

(1983) 04 AHC CK 0001

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 946 of 1983

Young Doctors" Association

APPELLANT

Vs

State of Uttar Pradesh and Another

RESPONDENT

Date of Decision : 22-04-1983

Acts Referred:

Constitution of India, 1950 — Article 226
Indian Medical Council Act, 1956 — Section 33
Uttar Pradesh State Universities Act, 1973 — Section 28(5)

Citation : (1983) 04 AHC CK 0001

Hon'ble Judges : Satish Chandra, C.J;B.D. Agarwal, J

Bench : Division Bench

Advocate : Markandey Katju, for the Appellant;

Judgement

B.D. Agarwal, J.—This petition under Article 226 of the Constitution is directed against the notification of the State Government dated 15th December, 1982, issued u/s 28(5) of the U.P. State Universities Act, 1973.

2. According to Section 33 of the Indian Medical Council Act, 1956, the Medical Council may with the previous sanction of the Central Government make regulations providing, inter alia, for standards of proficiency to be obtained and the practical training etc to be undertaken in medical institutions for grant of recognised medical qualifications. The Regulations drawn under this Section and approved by the Central Government lay down the criteria for selection of candidates for post graduate training as under:

(a) Students of post-graduate training should be selected strictly on merit judged on the basis of academic record in the under graduate course. All selection for postgraduate studies should be conducted by the Universities.

(b) The candidates should have obtained full registration i.e. they must have completed satisfactorily one year of compulsory rotating internship after passing the final MBBS examination and must have full registration with State Medical

Council.

(c) They must subsequently have done one year's housemanship prior to admission to the post graduate degree or diploma course. Housemanship should preferably be for one year in the same subject or atleast six months in the same department and the remaining six months in an allied department provided that in departments like Radiology/Anaesthesiology/Physical Medicine & Rehabilitation where suitable candidates who have done housemanship in the respective subject for the respective speciality are not available then the housemanship in Medicine and/or in the surgery may be considered as sufficient.

Alternatively

(i) Must have worked as a full time postgraduate student in a manner equivalent to housemanship requirements, in the department concerned before taking up the postgraduate courses.

It is further stated:

The Postgraduate Committee was of the opinion that in order to determine the merit of a candidate for admission to postgraduate medical courses, (i) his performance at the MBBS examinations, (ii) his performance during the course of internship and housemanship for which a daily assessment chart be maintained and (iii) the report of the teachers which is to be submitted periodically may be considered.

Alternatively the authorities concerned may conduct competitive entrance examination to determine the merit of a candidate for admission to postgraduate medical courses.

3. The period of training for M.D., M.S. shall be three years after full registration including one year of house job or equivalent thereof.

4. u/s 28(5) of the U.P. State Universities Act, 1973, the State Government is empowered to regulate admission to Medical Colleges by such orders as it may, by notification, make in that behalf.

5. On December 3, 1980 the State Government issued a notification u/s 28(5) keeping in view the recommendations of the Medical Council of India formulated as the Regulations above mentioned. As per this notification, the admission to post-graduate courses is to be made only on the basis of merit. It was also specified that in every speciality, 75% seats in a particular Medical College shall be reserved for the candidates who have passed the MBBS Examination from the college and against the remaining 25% seats, candidates who have passed MBBS Examination from other Medical Colleges and are bona fide residents of U.P. shall be eligible for admission on the basis of merit along with the candidates who have passed the MBBS examination from that very College. The Principal, Moti Lai Nehru Medical College issued notice dated 15th October, 1982 inviting applications for admission to the post graduate course as per the notification

dated 3-12-1980.

6. The impugned notified order dated December 15, 1982 was issued later by the State Government which to an extent modifies the earlier notification. This reiterates that admission to post graduate course shall be made only on the basis of merit. It also affirms the position earlier existing with regard to admission of external candidates. Clause 6 of this subsequent order, however, specifies:

No candidate shall be eligible for admission to post graduate degree or diploma courses who has obtained less than 55% and 52% respectively, for the courses (degree and Diploma in merit....

7. Aggrieved against this provision made for having secured a minimum percentage of marks in the MBBS as a condition precedent to eligibility for admission to post graduate course, the Petitioner approached this Court.

8. Learned Counsel for the Petitioner Association has raised three fold contentions in support of the petition, namely:

(1) the notified order dated 15th December, 1982 is inapplicable to candidates who had applied earlier for admission to post-graduate course in pursuance of notice issued on October 15, 1982.

(2) the impugned notification is invalid being ultra vires the powers of the State Government.

(3) the provision requiring minimum percentage of marks is arbitrary and unreasonable.

9. Learned Counsel submitted in regard to contention No. 1 that the notified order impugned in this case cannot be invoked in relation to those who had applied earlier for admission in response to notice published on 15th October, 1982 which was in compliance to notification dated 3rd December, 1980. The argument is that to hold the contrary would mean giving retrospective effect to the notification and this is incompetent. This seems to overlook that subsequent to the issue of the impugned notification dated 15th December, 1982, there was another notice published on 19th February, 1983 inviting applications for admission to post graduate course within 5th March, 1983 (Annexure CAI to the Counter affidavit). This enabled candidates eligible in terms of the notification dated 15-12-1982 to apply for admission. The selection made is from among those who applied in pursuance of this later notice.

10. Indeed there is no occasion to apply the notification dated 15-12-1982 retrospectively. Although Section 28(5) of the U.P. State Universities Act makes enabling provision to the effect that, if considered necessary, the State Government may issue order hereunder with retrospective effect, it has not been found necessary to avail of this in respect of this notification. The notification is prospective in express terms. It applies to all those who sought admission on or after 15th December, 1982. Housemanship for one year is a precursor to seeking

admission to post graduate degree, this must have been completed prior to admission to the degree. Admission to post graduation is not open to one who has not done housemanship for one year or its equivalent; but completion of housemanship or its equivalent is not in itself a guarantee for admission to post graduation course. Therefore, neither by completion of one year's housemanship nor by the mere fact that some of members of the Petitioner Association may have applied for admission in pursuance of notification dated 3-12-1980 read with notice dated 15-10-1982 can they claim to have acquired a legal right to secure admission (See I.J. Divakar and Others Vs. Government of Andhra Pradesh and Another, .

11. With regard to contention No. 2, the argument of the Petitioner's learned Counsel is that co-ordination and determination of standards in scientific institutions is a Union subject and, therefore, the State Legislature has no constitutional competency to make a law for maintaining the standards of these institutions. As the executive power of the State Government extends to matters with respect to which the Legislature of the State has power to make laws, the argument proceeds, the Government of the State cannot make an order or issue direction for maintaining the standards. The further argument is that prescribing higher marks for admission to a Medical College for post graduate degree is for the purpose of maintaining the standards of medical education and therefore, the State Government is not empowered to do so.

Entry 25 of the concurrent list reads:

Education, Including technical education, medical education and universities subject to the provisions of Entries 63, 64, 65 and 66 of List I, Vocational and technical training of labour.

Entry 66 of List I reads:

Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

12. From Entry 25 of List III it is apparent that with respect to Education (including medical education) the power to legislate is concurrent vesting both in the Parliament and the State Legislature. This Entry in its present form was substituted by the Constitution (42nd Amendment) Act, 1976. Formerly, this was confined to vocational and technical training of labour. Entry 11 of the State List related to "Education including Universities subject to the provisions of items 63, 64, 65 and 66 of List I and 25 of List III". Now Entry 11 stands deleted from the Statute BOOK.

13. The expression "subject to" in the relevant context appears in various other entries also. See, for instance, entries 2, 23, 24, 26, 27, 33, 37 of the State List. This came up for interpretation before the Supreme Court on different occasions. In *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, the question related to cess levied under the Orissa Mining Areas

Development Fund Act, 1952. Entry 23 of the State List provides with respect to "Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the Control of the Union". Entry 54 of the Union List reads thus, "Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the Public interest." Considering the effect of reading these two entries together, it was held:

The jurisdiction of the State Legislature under Entry 23 is subject to the limitation imposed by the latter part of the said Entry. If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded. In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 54 and if the said declaration covers the field occupied by the impugned Act the impugned Act would be ultra vires, not because of any repugnance between the two statutes but because the State Legislature had no jurisdiction to pass the law. The limitation imposed by the latter part of Entry 23 is a limitation on the legislative competence of the State Legislature itself. This position is not in dispute.

14. In *State of Orissa Vs. M.A. Tulloch and Co.*, likewise, the issue related to Entry 23 List II and Entry 54 List I. Reading these together, the Supreme Court observed that "subject to" provisions of List I the power of the State to enact Legislation on the topic of "mines and mineral development" is plenary. At page 1287 it is stated by their Lordships:

It does not need much argument to realise that to the extent to which the Union Government had taken under its control "the regulation and development of minerals" so much was withdrawn from the ambit of the power of the State Legislature under Entry 23 and the legislature of the State which had rested on the existence of power under that entry would to the extent of that "control" be superseded or be rendered ineffective, for here we have a case not of mere repugnancy between the provisions of the two enactments but of a denudation or deprivation of State legislative power by the declaration which Parliament is empowered to make and has made.

(The underlining-herein in italics is ours).

15. Entry 24 of List II is with respect to Industries subject to the provisions of Entries 7 and 52 of the List 1 Entry 52 of List 1 reads "Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war". Though unlike Entry 54 of List I Entry 52 does not make use of the expression "to the extent to which". Hon^{ble} Desai, J. speaking for the majority in *Ishwari Khetan Sugar Mills (P) Ltd. and Others Vs. State of Uttar Pradesh and Others*, held at page 153:

It can, therefore, be "said with a measure of confidence that legislative power of the States under Entry 24 List II is eroded only to the extent control is assumed by the Union pursuant to a declaration made by the Parliament in respect of declared industry as spelt out by legislative enactment at the field occupied by such enactment is the measure of erosion. Subject to such erosion, on the remainder the State Legislature will have power to legislate in respect of declared industry without in any way touching upon the occupied field. Such legislature which is otherwise competent to deal with industry under entry 24, List II can deal with that industry in exercise of other powers enabling it to legislate under different heads set out in List II and III and this power cannot be denied to the State.

16. In the case of *The Gujarat University, Ahmedabad Vs. Krishna Ranganath Mudholkar and Others*, the question raised was whether medium of instruction in Universities was comprehended by entry 66 of the Union List or Entry 11 of the State List (as it then was) or whether it fell under both. In that context it was observed at page 715-16:

The State has the power to prescribe the syllabi and courses of study in the institutions named in Entry 66 (but not falling within entries 63 to 65) and as an incident thereof it has the power to indicate the medium in which instruction should be imparted. But the Union Parliament has an overriding legislative power to ensure that the syllabi and courses of study prescribed and the medium selected do not impair standard of education or render the coordination of such standards either on an All India or other basis impossible or even difficult.

17. In *R. Chitrallekha v. State of Mysore* AIR 1964 SC 1923 which is more directly in point selections for admission to Engineering and Medical colleges were made on the basis of marks obtained by the candidates in the examination and those obtained in the interview, as per directions of the State Government. Dispute was raised with regard to the competence of the State Government to issue those orders in face of entry 66 of the Union List. Referring to the passage extracted above from the *Gujrat University* case, Subba Rao, J. speaking for the majority of the Constitution Bench held at page 1830:

This and similar other passages indicate that if the law made by the State by virtue of entry 11 of List II of the Seventh Schedule to the Constitution makes impossible or difficult the exercise of the legislative power of the Parliament under the entry "co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions" reserved to the Union, the State law may be bad. This cannot obviously be decided on speculative and hypothetical reasoning. If the impact of the State law providing for such standards on entry 66 of List I is so heavy or devastating as to wipe out or appreciable abridge the central field, it may be struck down. But that is a question of fact to be ascertained in each case. It is not possible to hold that if a State Legislature made a law prescribing a higher percentage of marks for extra curricular activities in the matter of admission to colleges, it would be directly

encroaching on the field covered by entry 66 of List I of the Seventh Schedule to the Constitution. If so, it is not disputed that the State Government would be within its rights to prescribe qualifications for admission to colleges so long as its action does not contravene any other law.

18. This decision was affirmed by another Constitution Bench in *D.A.V. College, Bhatinda, etc. Vs. The State of Punjab and Others*, , it was observed that entries 65 and 66 of List I give the Union power to secure that the standard of research etc. is not lowered at the hands of any State or States to the detriment of national progress and the power of the State Legislature must be so exercised as not to directly encroach upon the power of the Union under that entry.

19. In *State of Andhra Pradesh and Another Vs. Lavu Narendranath and Others etc.*, , the question raised was whether the Entrance Test prescribed under notification of the State Government dated 23-7-70 for selection of candidates in the four Medical Colleges run by the State in the Andhra area was justified in law. Repelling the contention for the Appellants, Mitter, J. speaking for the Constitution Bench held:

Obtaining 50% of the marks at the qualifying examinations was the first hurdle to be crossed by any candidate before he could submit an application for admission into a medical college. The Government which ran the colleges had the right to make a selection out of a large number of candidates and for this purpose they could prescribe a test of their own which was not against any law. Merely because they tried to supplement the eligibility rule by a written test in subjects with which the candidates were already familiar, their action cannot be impeached nor was there anything unfair in the test prescribed. The test prescribed by the Government must be considered in the light of a second hurdle for the purpose of screening to find out who of all the candidates applying should be admitted and who should be rejected.

20. Referring to Entry 66 of List I it was observed at page 2564:

The above entry gives Parliament power to make laws for laying down how standards in an institution for higher education are to be determined and how they can be co-ordinated. It has no relation to a test prescribed by a Government or by a University for selection of a number of students from out of a large number applying for admission to a particular course of study even if it be for higher education in any particular subject.

21. The consistent view taken thus is that the expression "subject to" does not exclude the competence of the State Legislature for all purposes and in all contexts. The exclusion is only to the extent the State legislation might seem "to wipe out or appreciably abridge" the Central field. Despite the power in the Parliament to coordinate or determine the standards, the State Legislature may supplement the eligibility rule. The criteria prescribed by the State Government for admission to a course is not necessarily in conflict with the standards set by the Government of India.

22. Viewed in the light of the test thus propounded, it will be noticed that in the instant case the Regulations do not erode the authority of the State Government to prescribe the minimum percentage of marks for securing admission to higher studies. The Regulations emphasise that selection for post graduate course be made "strictly on merit judged on the basis of academic record in the undergraduate course". Under the heading "Evaluation of Merit" the Regulations state:

The postgraduate committee was of the opinion that in order to determine the merit of a candidate for admission to postgraduate medical course,

- (i) his performance at the MBBS examinations,
- (ii) his performance during the course of internship and housemanship for which a daily assessment chart be maintained and
- (iii) the report of the teachers which is to be submitted periodically may be considered.

Alternatively the authorities concerned may conduct competitive entrance examination to determine the merit of a candidate for admission to postgraduate medical courses.

23. Far from abridging the Central field in any manner, the impugned notified order acts in further implementation of the Regulations. The direction lays a guideline for evaluating merit of performance in the under-graduate course. Merit remains the criteria as under the Regulations the directions of the State Government do not even require an examination to be conducted as an admissibility test, the assessment is made on the performance in the undergraduate course itself. The screening envisaged on the basis of minimum percentage of marks is, in our opinion, in the true spirit of and not in departure from or, conflict with, the Regulations. In relation to methodology for evaluating merit prior to admission the field is unoccupied and, therefore, the State Government cannot be said to have encroached upon the provisions of the Central Government, or to have made an order repugnant to the Regulations.

24. In our opinion the impugned notified order is within the ambit of executive powers of the State Government.

25. Lastly, the learned Counsel for the Petitioner contended that the minimum percentage of marks prescribed by the State Government is arbitrary and unreasonable. The submission is that the Respondents have not placed on record the recommendations of the high power committee referred in para 6 of the counter affidavit and that due to this criteria being enforced some of the seats in certain specialities in the Medical College, Allahabad are lying unfilled. We do not find force in this contention.

26. Indisputedly, the seats for admission to various post graduate courses in State Medical Colleges are limited. The State may legitimately seek to ensure

that, as best as possible, the admission granted for pursuit of higher studies especially, in medical education is to the most deserving on merit. The public expenditure incurred in the process is enormous. The assessment of merit being to an extent, subjective and objective criteria is more likely to serve as a safeguard against arbitrariness. The petition does not disclose the impact of the impugned notified order in the matter of admission to other State Medical Colleges in U.P. Admission is open to candidates from outside the particular Medical College as well. The measure is experimental in character. We have no basis to doubt that in the light of relevant data collected from different Medical Colleges, the State Government would undertake periodical review of the position with the object to ensure excellence of medical education and the service of larger public interest. The impugned order, in our opinion, for these reasons, is not hit by the rule of *Mrs. Maneka Gandhi Vs. Union of India* (UOI) and *Another*, relied by the learned Counsel.

27. In the result the petition fails and is dismissed with costs.