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Court : Delhi

Decided On : Mar-03-2011

Judge : Sanjiv Khanna, J.

Acts : Constitution of India - Article 226

Appeal No. : LPA 599/2010

Appellant : Varun Kumar Agarwal

Respondent : Union of India and ors

Advocate for Def. : Mr.A.S. Chandhiok And Ors.

Advocate for Pet/Ap. : Mr.Arvind K. Nigam And Ors.

Judgement :

1. Whether reporters of the local papers be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

1. In this intra-court appeal, the assail is to the order dated 9th August, 2010 passed by the learned Single Judge in WP (C) No. 4272/2010 whereby he had declined to accede to the reliefs sought by the writ petitioner (hereinafter referred to as the appellant), principally the relief to give him admission in MS/MD course at All India Institute of Medical Sciences (AIIMS).

2. Sans unnecessary details, the facts which are necessary to be stated for disposal of the present appeal are that the appellant had appeared in the entrance examination held by the AIIMS for admission to the post graduate course commencing in the academic session in July, 2010. The appellant had secured 179 rank in the merit list and was called for counselling. As pleaded in the writ petition, the original counselling was scheduled for 11th June, 2010 but was postponed to 18th June, 2010 due to difference of opinion between the Respondent No.2 Director General of Medical Education (DGME) and the Respondent No.3 AIIMS. It was contended that the AIIMS had filled up the seats by students who were not eligible to be admitted. It was also averred that the AIIMS had expanded the zone of consideration of the students by changing the contents of the prospectus which was not permissible; that the students who had already taken admission in other colleges were called for counselling; that a maladroit attempt had been made to accommodate the AIIMS students by deviating the procedure which was impermissible; that some students had taken admission by misrepresentation inasmuch as while they had taken admission in other colleges, they had not clearly so stated.

3. The said assertions were opposed by the respondents contending, inter alia, that the prospectus uses the words "are pursuing" which is more than taking admission since the term pursue has a different meaning, namely, carry on further or continue a course of action; that there had been no ingenious effort to accommodate the students of AIIMS; that the seats have been filled as per the prescribed procedure; that the seats are not allowed to go waste; and that it is the principle of AIIMS to attract the best talent in the country.

4. The learned Single Judge dealt with all the aforesaid aspects and did not find any merit in any of the grounds and, accordingly, dismissed the writ petition.

5. This Court, in course of the appeal, on 6th December, 2010, had passed the following order:

" ..In course of hearing of this appeal, the issues that emerge for consideration fundamentally are whether the third respondent, namely, All India Institute of Medical Sciences (for short "AIIMS") in the name of institutional preference can

take recourse to reservation; to elaborate, AIIMS has an institutional preference in respect of Post Graduate seats at 50% of its MBBS seats but does not it necessarily mean that the 50% of seats are to be filled up from the students who have graduated from AIIMS ignoring the merit list in its entirety or some kind of rationale has to be conceded while determining the basic concept of institutional preference; whether there is any kind of institutional preference with regard to a particular stream or discipline; whether the third respondent was justified in changing the prospectus after the merit list was published by changing the ratio of the students to be called from 1:4 to 1:8; and whether the AIIMS should have gone for counseling for the vacant seats or carried forward such seats for the next year.

Be it noted, the submission of Mr. Arvind K. Nigam. learned senior counsel for appellant would be because of adopting such a recourse, the case of the appellant has been jeopardized as he has not been able to feature in appropriate stream in the merit list and, in any case, the AIIMS could not have adopted such a mode.

Per contra, Mr. Sunil Fernandes, learned counsel for AIIMS would submit that despite the enhancement of the ratio, the case of the appellant is not affected and as no prejudice is caused to the appellant, and hence, this Court would not advert to the same.

Quite apart from above, the issue that has further emanated for consideration is with regard to the possibility of holding a simultaneous examination for the AIIMS students as well as the students who undertake the All India Post Graduate Medical Entrance Examination, for which the AIIMS is the examining body.

Mr. Atul Nanda, learned standing counsel for Union of India, the first respondent herein and Mr. Sunil Fernandes, learned counsel for respondent no.3, AIIMS have agreed that both the parties shall hold a joint meeting and come with the feedback within a week hence ."

6. After the said order came to be passed, a meeting was convened and thereafter, on 11.1.2011, this Court directed the AIIMS to produce the relevant records relating to admission.

7. An affidavit has been filed by the respondent No.1 - Union of India. The said affidavit refers to the meeting held with the representatives of the AIIMS and the agreements that have been arrived at. The said affidavit refers to the solution for curbing wastage of seats, the difficulties in holding common AIIMS Post Graduate Entrance Examination and All India Post Graduate Entrance Examination and the structural differences in the examination schemes followed by the AIIMS for PG Entrance Examination and All India PG Quota. We think it appropriate to reproduce the structural differences in the examination schemes which also refer to the institutional preference. The said paragraph reads as under:

"Further, there are structural differences in the examination schemes followed by the AIIMS for PG entrance examination & All India PG Quota, which are as under:

i) The eligibility criteria for UR/OBC candidates at AIIMS is that he/she must obtain a minimum of 55% marks in aggregate in all the MBBS/BDS professional examinations and 50% marks for SC/ST while for All India PG Examination, the eligibility criteria is that he/she should have qualified MBBS/BDS examination.

ii) As per Supreme Court judgment dated 24.08.2001 in Civil Appeal No. 7366 of 1996, there shall be a uniform minimum cut-off 50% marks in the competitive entrance test as a condition of eligibility for all candidates at AIIMS. While in All India PG Exam, the same is 50% for UR and 40% for SC/ST etc.

iii) By way of institutional preference, the institutional candidates, i.e. those who have graduated from All India Institute of Medical Sciences shall be preferred for admission against 50% of total MBBS seats of AIIMS out of the open general seats without any discipline wise preference, in accordance with the above mentioned judgment of the Honble Supreme Court and subsequent judgment dated 07.05.2004 of the Supreme Court in Saurabh Chaudhary v. Union of India W.P.(C) No.29 of 2003 and connected matters.

iv) All India PG entrance exam is done once in a year i.e. January each year while AIIMS PG entrance exam is done twice in a year i.e. January Session and July Session."

8. A reply has been filed by the appellant that the stand taken by the Union of India before the learned Single Judge is totally different from the affidavit filed in the present appeal and does not really deal with the issue that has emerged in this case. At this juncture, we may note with profit that an additional affidavit has been filed by the appellant giving the names of students who had taken admission in other colleges and paid fees but had also been permitted to appear in the counselling for the seats in AIIMS contrary to the stipulates in the prospectus.

9. Questioning the defensibility of the order passed by the learned Single Judge, Mr. Arvind Nigam, learned senior counsel, has raised the following contentions:

(a) The AIIMS authorities could not have changed the prospectus in the midway after publication of the results on the date of counselling as that affects the norms prescribed in the prospectus and further creates an atmosphere of impropriety by which the meritorious students are deprived of admission and students much below in the rank are given admission.

(b) The interpretation placed by the learned Single Judge on "are pursuing" is totally erroneous inasmuch as the students who had taken admission in other colleges should be regarded to be pursuing the studies and an artificial interpretation cannot be placed on the ground that courses had not commenced and, therefore, it cannot be construed that they are pursuing their studies.

(c) Results ought not to be declared beyond 336 candidates but unfortunately, the AIIMS did not adhere to the same and called the candidates for counselling by increasing the ratio of the candidates.

(d) The total seats available in MS/MD courses were 125 in number, 43 in the reserved category and 82 in the unreserved category and had the same been strictly followed, the appellant would have been entitled for a seat in the stream he sought the admission.

(e) The learned Single Judge, despite the averments made in the writ petition to the said effect, has fallen into error by not dealing with the same.

(f) The AIIMS in the name of getting best talent based on merit throughout the country has really destroyed the said concept of merit by extending the ratio only to accommodate the AIIMS students which is impermissible.

10. Mr. Mehmood Pracha, learned standing counsel for AIIMS, per contra, contended that the interpretation placed by the learned Single Judge on the words "are pursuing" is absolutely infallible since mere admission into a course could not tantamount to pursuing a course. The AIIMS has not committed any illegality by calling more number of candidates for counselling as it was to meet the institutional preference for AIIMS and to attract the best talent of the country. It is also urged that the appellant could not have got admission in the post graduate surgery course on the basis of his placement in the merit list.

11. Though we have referred to the pleadings and the submissions raised at the bar, yet we are of the considered opinion that the whole controversy can be addressed on the determination of a singular issue, i.e., whether the AIIMS could have changed the prospectus for the purpose of counselling after results are published and what would have been the sequitur had there been strict adherence to the stipulations in the prospectus. To appreciate the said aspect in proper perspective, we have carefully gone through the prospectus. Clause 12(E)(1) of Section VI prescribes the method of counselling. It reads as follows:

"E. Method of Counselling:

1. In each category the number of candidates called for counselling will be 4 times the number of seats. The order of counselling will be ST/SC/OBC/General/50% AIIMS preferential candidates of total MBBS seats of AIIMS. The candidates in order of merit will exercise their choice of subject according to availability of seats in their respective category. In case of absence the next candidate in merit will be considered. Counselling will be held as per schedule given under AT A GLANCE".

12. It is not in dispute that the appellant was placed at 179 position in the merit list in the General category. It is also not in dispute that there were 125 seats, 43 in the reserved category and 82 in the unreserved category. It is also not disputed by the parties in the course of arguments that initially, the result of 326 candidates in

the unreserved category was published.

13. On 11th June,2010, AIIMS issued a corrigendum mentioning that for the purpose of counselling, instead of calling four candidates per seat, eight candidates would be called and published the result of 658 candidates. Had the original conditions furnished in the prospectus been followed, 326 candidates would have been allowed to participate in the counselling and the appellant being at 179 rank would have got a seat of his choice in general surgery as the persons who have been placed at the ranks of 446 and 605 have been allotted seats in general surgery and a candidate at 472 rank was allotted ophthalmology.

14. Presently we shall refer to certain authorities in the field that have dealt with sanctity of a prospectus or brochure and the legal impact when it is changed in the midstream. In Dr. M. Vannila v. Tamil Nadu Public Services Commission, 2007 (3) CTC 69, a Division Bench of the High Court of Madras has opined thus:

"19. The principle that the prospectus is binding on all persons concerned has been laid by the Supreme Court in Punjab Engineering College, Chandigarh vs. Sanjay Gulati (AIR 1983 SC 580 = 1983 (96) LW 172 S.N.). Following the same, a Division Bench of this Court has also observed in Rathnaswamy, Dr. A. v. Director of Medical Education (1986 WLR 207) that the rules and norms of the prospectus are to be strictly and solemnly adhered to. The same view is also taken by another Division Bench of this Court in Nithiyan P. and S.P. Prasanna vs. State of Tamil Nadu (1994 WLR 624). The same principle is reiterated in the case of Dr. M. Ashiq Nihmathullah vs. The Government of Tamil Nadu and Ors. reported in 2005 WLR 697. It is clear that the prospectus is a piece of information and it is binding on the candidates as well as on the State including the machinery appointed by it for identifying the candidates for selection and admission."

[Underlining is ours]

15. In Indu Gupta v. Director Sports, Punjab and Anr., AIR 1999 P&H; 319 (FB), the Full Bench in paragraphs 9, 10 and 11 has expressed thus:

"9. A Full Bench of this Court in the case of Raj Singh v. Maharshi Dayanand University, (1994) 4 Recent Services Judgments, 289 disapproved the liberal construction of the terms and conditions of the brochure and specified the need for their strict adherence to avoid unnecessary prejudice to the candidate or the authority during the course of admission. The bench approved that the eligibility for admission to a course has to be seen according to the prospectus issued before the entrance test examination and that the admission has to be made on the basis of the instructions given in the prospectus having the force of law. While disapproving the law laid down by a Division Bench of this Court in the case of Madhvika Khurana (minor) v. M. D. University Civil Writ Petition No. 15367 of 1991, where contrary view had been taken, the Full Bench observed that the students seeking admission to the professional colleges are even otherwise matured enough and supposed to understand the full implication of filling the admission form and compliance with the instructions contained in the brochure.

10. Subsequently, another Full Bench of this Court in the case of Rahul Prabhakar v. Punjab Technical University, Jalandhar, 1997 (3) RSJ 475: (AIR 1998 Punj. & Har. 18) recapitulated the entire law on the subject. The Full Bench was considering the same brochure for the previous year of the Punjab Technical University. The Court held as under:-

"A Full Bench of this Court in Amardeep Singh Sahota v. State of Punjab (1993) 4 Serv LR 673 had to consider the scope and binding force of the provisions contained in the prospectus. The Bench took the view that the prospectus issued for admission to a course, has the force of law and it was not open to alteration. In Raj Singh v. Maharshi Dayanand University, 1994 (4) R.S.J. 289 another Full Bench of this Court took the view that a candidate will have to be taken to be bound by the information supplied in the admission form and cannot be allowed to take a stand that suits him at a given time. The Full Bench approved the view expressed in earlier Full Bench that eligibility for admission to a course has to be seen according to the prospectus issued before the Entrance Examination and that the admission has to be made on the basis of instructions given in the prospectus, having the force of law. Again Full Bench of this Court in Sachin Gaur v. Punjab University, 1996 (1) RSJ 1: (AIR 1996 Punj. & Har. 109) took the view

that there has to be a cut off date provided for admission and the same cannot be changed afterwards. These views expressed by earlier Full Benches have been followed in CWP No. 6756 of 1996 by the three of us constituting another Full Bench. Thus, it is settled law that the provisions contained in the information brochure for the Common Entrance Test 1997 have the force of law and have to be strictly complied with. No modification can be made by the court in exercise of powers under Article 226 of the Constitution of India. Whenever a notification calling for applications, fixes date and time within which applications are to be received whether sent through post or by any other mode that time schedule has to be complied with in letter and spirit. If the application has not reached the co-ordinator or the competent authority as the case may be the same cannot be considered as having been filed in terms of the provisions contained in the prospectus or Information Brochure. Applications filed in violation of the terms of the brochure have only to be rejected."

11. The cumulative effect of the above well enunciated principles of law, is that the terms and conditions of the brochure where they used preemptory language cannot be held to be merely declaratory. They have to be and must necessarily to be treated as mandatory. Their compliance would be essential otherwise the basic principle of fairness in such highly competitive entrance examinations would stand frustrated. Vesting of discretion in an individual in such matters, to waive or dilute the stipulated conditions of the brochure would per se introduce the element of discrimination, arbitrariness and unfairness. Such unrestricted discretion in contravention to the terms of the brochure would decimate the very intent behind the terms and conditions of the brochure, more particularly, where the cut off date itself has been provided in the brochure. The brochure has the force of law. Submission of applications complete in all respects is a sine qua non to the valid acceptance and consideration of an application for allotment of seats in accordance with the terms prescribed in the brochure.

[Emphasis added]

16. We have referred to the aforesaid decisions only to highlight that the conditions stipulated in the prospectus are guidelines for all concerned and

everyone is required to follow the same in letter and spirit and not act in transgression. The hopes and aspirations of the students, who came within the zone of merit, cannot be scuttled by changing the prospectus by way of introducing a corrigendum. A change in the conditions of the prospectus can be conceived of and allowed if such power is specifically reserved while making the prospectus public as in that case, no one can think of having a right. In that event, the same could be capable of change. In the case at hand, in the absence of a power reserved in the prospectus, in our considered opinion, the same could not have been altered by way of corrigendum. It is interesting to note that by issuing a corrigendum, the scenario of results changed because further results were published and more candidates were called. This, according to us, is nothing but an accommodation. The AIIMS may have been conferred the privilege of institutional preference, but that would not enable AIIMS to change the prospectus in the manner it has been done. Thus, the action of the AIIMS on this score is vitiated and despite the laboured attempt by the learned counsel for the AIIMS, we cannot give the stamp of approval to the action of the institution.

17. The next issue that arises for consideration is what relief could be granted to the appellant. In the course of hearing, Mr. Nigam, learned senior counsel, after obtaining instructions, submitted that the appellant has no objection to be admitted in surgery, gynaecology or orthopaedics. Had the appellant been treated in his rank, he could have got his choice. The same was denied to him by extension of the ratio in the prospectus. In this context, we may profitably refer to the decision rendered in LPA No. 726/2010 titled Dr. Mundhe Kailas Maharudra v. AIIMS & Ors., decided on 29th November, 2010, wherein this Court opined thus:

7. This Court in LPA No.611/2010 (Tej Pal Yadav v. Union of India & Ors. decided on 29.11.2010) while dealing with a similar situation wherein a meritorious candidate was not given admission due to the fault of the authorities has held as follows:

"21. In Punjab Engineering College, Chandigarh v. Sanjay Gulati, AIR 1983 SC 580, the Apex Court has categorically held that the authority which makes admission by ignoring the rules of admission must pay for its own lapse and wrong

caused and injustice meted to the deserving candidates. In the said case, their Lordships directed for increase of strength as a course of solution. It is worth noting that in the said case, a contention was propounded that the Medical Council of India would not sanction additional seats but the said proponement was repelled. We think it apt to reproduce the relevant paragraph from the said decision:

"It is strange that in all such cases, the authorities who make admissions by ignoring the rules of admission contend that the seats cannot correspondingly be increased, since the State Government cannot meet the additional expenditure which will be caused by increasing the number of seats or that the institution will not be able to cope up with the additional influx of students. An additional plea available in regard to medical colleges is that the Indian Medical Council will not sanction additional seats. We cannot entertain this submission.

Those who infringe the rules must pay for their lapse and the wrong done to the deserving students who ought to have been admitted has to be rectified. The best solution under the circumstances is to ensure that the strength of seats is increased in proportion to the wrong admission made."

22. In Anil Kumar Gupta v. State of UP, (1995) 5 SCC 173, the Apex Court, after coming to hold that there were errors in the rule of reservation and its implementation, dwelled upon the relief to be granted when the admissions had already been finalized. In that context, their Lordships held thus:

"At the same time, we have to rectify the injustice done to the open competition candidates in the admissions in question, to the extent feasible. Accordingly, we direct that in the matter of admissions made pursuant to C.P.M.T. 1994, while the admissions already finalised shall not be disturbed, the Uttar Pradesh Government shall create thirty-four additional seats in the M.B.B.S. course and admit thirty-four students from the O.C. category against those seats. If any seats are vacant as on today, they shall also be filled from the O.C. category alone."

23. In Dolly Chhanda v. Chairman, JEE & Ors., (2005) 9 SCC 779, while finding that the appellant was unjustly denied admission to an educational course, their

Lordships ruled thus:

9. The appellant undoubtedly belonged to reserved MI category. She comes from a very humble background, her father was only a Naik in the armed forces. He may not have noticed the mistake which had been committed by the Zilla Sainik Board while issuing the first certificate dated 29.6.2003. But it does not mean that the appellant should be denied her due when she produced a correct certificate at the stage of second counselling. Those who secured rank lower than the appellant have already been admitted. The view taken by the authorities in denying admission to the appellant is wholly unjust and illegal.

10. The appellant had qualified in JEE-2003 but the said academic year is already over. But for this situation the fault lies with the respondents, who adopted a highly technical and rigid attitude, and not with the appellant. We are, therefore, of the opinion that the appellant should be given admission in MBBS course in any of the State medical colleges in the current academic year.

24. In Vijay Jaimni v. Medical Council of India & Ors., (2005) 13 SCC 461, while noticing the mistake in the determination of category, the Apex Court directed as follows:

"5. Under these circumstances, we direct Respondent 5 college to give admission to the petitioner out of the said intake and under the category to which the petitioner was entitled as per the position in the last Academic Year 2004-2005. The said college is further directed to charge from the petitioner the fee which would have been charged if admission had been granted in Academic Year 2004-2005. The admission shall be granted before 30.9.2005. The petitioner shall comply with all the requirements."

8. At this stage, it is pertinent to refer to the case of Dr.Manish Patnecha (supra), wherein the Division Bench had directed as follows: -

"On the question of consequential relief that can be granted to the appellant we find that there is no denial by the respondent that the second session is to commence in January, 2010 and that admissions are to be made to the post

graduate courses in that session. The appellant, having succeeded in showing that the denial of admission to him in Nuclear Medicine in OBC category is unjustified is in our view entitled to a direction to the respondent to admit him to the said course in the next session. This is held to be permissible by the Supreme Court in both Vijay Jaimni and Harshali. Accordingly we issue a direction to the respondent that the appellant will be granted admission to the post graduate course in Nuclear Medicine in one of the UR seats in the next session commencing in the year January, 2010. He will be permitted to participate in the counselling that is to take place tomorrow i.e. 11th December, 2009."

9. In view of the aforesaid decision, we are disposed to think that the appellant cannot be denied his right which was lawfully due to him and, therefore, we direct that he should be permitted to participate in the counselling for the purpose of subsequent examination i.e. the examination held after May 2010 and be allotted a seat in the Post-Graduate course in AIIMS in the general category."

18. In view of the aforesaid position of law, we are inclined to direct the AIIMS authorities to allot the seat in Post Graduate in AIIMS in the general category either in Surgery or Gynaecology or Orthopaedics in the next academic session, that is, the academic session beginning from July, 2011, to the appellant and it is so ordered.

19. As we have accepted the submission of the learned counsel for the appellant on this issue, the other issues that have been raised are kept open.

20. Resultantly, the appeal is allowed and the order passed by the learned Single Judge is set aside. There shall be no order as to costs.

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