

(1999) 03 BOM CK 0114

Bombay High Court (Goa Bench)

Case No: Writ Petition No. 50 of 1999

Dr. Archan Marian D'Mello

APPELLANT

Vs

The Dean, Goa Central College,
Bambolim and others

RESPONDENT

Date of Decision: March 23, 1999

Acts Referred:

- Constitution of India, 1950 - Article 14, 15, 226
- Goa (Rules for Admission to the Post Graduate Degree Courses of the Goa University at Goa Dental College and Hospital) Rules, 1998 - Rule 3

Citation: AIR 2000 Bom 249 : (2000) 1 ALLMR 377 : (1999) 3 BomCR 669

Hon'ble Judges: R.M.S. Khandeparkar, J; N.P. Chapalgaonkar, J

Bench: Division Bench

Advocate: S.K. Kakodkar, S.A. and R.V. Kamat, for the Appellant; C.A. Ferreira, M.S. Sonak and Smt. A.A. Agni, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

N.P. Chapalgaonkar, J.

This is a petition by a student who seeks admission to Post-Graduate Course leading to M.D.S. Degree in the Dental College, Goa. The petitioner passed the Final B.D.S. Examination of the Goa University, held in June, 1997 and completed her internship on 1st August, 1998. In the month of December, 1998, the Dean, Goa Dental College invited applications for admission to M.D.S. Course. Goa University has Post-Graduation Course in only two subjects, Prosthodontics and Orthodontics. In all five seats, three in the first speciality and two for second speciality are available. Applicants who have B.D.S. Degree of the Goa University or other recognized University and have completed Paid Rotating Internship of one year and have registration updated with the State Dental Council and are resident of the State of Goa for a period of ten years preceding the last date of receipt of applications, are

eligible to apply. Candidates who have graduated from Goa Dental College are to be preferred. The order of merit is to be determined on the basis of the aggregate marks, meaning thereby the total arrived at by totalling marks obtained in all the subjects of First, Second, Third and Final B.D.S. Semester I and Semester II University Examination, subject to deduction 5% for every failure or drop from the marks of that subject. It is further laid down that a candidate who has more than two failures at the B.D.S. level of students from the General Category and three failures if he is from the Reserved Category would not be eligible for consideration to admission in Post-Graduate Course. It is also necessary that he should have obtained minimum number of marks prescribed, if he is from the General Category, then 55% in the aggregate marks and 60% in the speciality, if he is from O.B.C. Category then 50% and 55%, respectively and if he is from S.C./S.T. Category then 50% in respect of both the cases. None of the above eligibility or merit criteria are in dispute. The only challenge before us is in respect of sub-clause (v) of Clause (3) which reads as under:-

"A weightage of 1% of marks per year shall be given to a senior student who has passed from this Institution prior to starting of the M.D.S. Course, subject to a maximum of 5% marks in the Grand total."

It is contended by the petitioner that this addition of 1% to 5% marks is totally illegal and has no nexus with the object to be achieved. Classification on the basis of the year of passing has nothing to do with any valid object.

2. To justify the Clause (3)(v) under challenge Dr. Ajit D. Dinkar, Professor, Acting Dean of Goa Dental College and Hospital, has averred in the return as follows:-

"14. I respectfully submit that it may be seen from the above, that the purpose of introduction of this clause is only on account of the fortuitous circumstances when there was no Post Graduate Course available in this institution at the relevant time when these candidates had passed their B.D.S. Course.

15. I respectfully submit that generally there has been a gradual increase in the percentage of marks of the first three highest rank holders in each academic year except in certain years, as can be seen from the statement "Exhibit R-2" (hereto annexed) in as much as there have been candidates of the same College having passed through two different Universities and under these circumstances also considering that it is difficult to ascertain the correlation of the merit of candidates of different batches the classification which has been done clearly distinguishes those who have been included and those left out and the same bears reasonable nexus with the aims and objectives sought to be achieved by this classification to ensure a "level playing field."

3. The challenge to the Rules is based on the following grounds:

- (a) that the Rules were not published in advance and were implemented in an abrupt manner last year;
- (b) the Rules are bad inasmuch as there is no prior consultation with the Goa University and Dental Council of India and the Rules have not been effected pursuant to the Cabinet decision of the Government of Goa;
- (c) addition of 1% to 5% marks on the ground of year of passing is arbitrary; and
- (d) Rules are in the form of executive instructions and the executive instructions cannot be given a retrospective effect so as to make them applicable to the students who have passed their M.B.B.S.

Examination and qualified themselves for Post Graduation. They also violate the principles of promissory estoppel and legitimate expectations.

4. Eligibility criteria and method of preparation of the Merit List contained and notified in the Prospectus are also part of the Goa (Rules for Admission to the Post Graduate Degree Courses of the Goa University at Goa Dental College and Hospital) Rules, 1998, published in Official Gazette on 19th November, 1998. No dispute is raised before us about the proposition that the State who maintains the College for Medical Education from the State fund has a right to frame Rules in the form of executive instructions, governing the admissions to the said Colleges. It is only contended that in the instant case the Rules in the Prospectus are made retrospectively applicable. The admitted position is that the very same Rules were applied last year also and one batch has already been admitted to the Post-Graduate Courses and the petitioner is challenging their merit and eligibility on the basis of these Rules last year. Submission that a Rule governing admission to Post-Graduate Courses should be notified prior to the date of examination of the students at the graduation is not acceptable. Similarly, the principle of promissory estoppel is not applicable in cases of admission to such courses. There is no promise held out by the State prior to the publication of the Rules of admission that students will be admitted in a particular manner and it is not that on the basis of that promise held out the students have moulded their manner of the statute. As was held by the Full Bench of this Court in Ashwin Prafulla Pimpalwar and etc. Vs. State of Maharashtra and Others, the doctrine of promissory estoppel will not have any relation in Post-Graduate Courses for higher specialized studies in Medical Colleges run by or under the control of the State Government. Every student will strive for coming out in the best colours in the ensuing examination irrespective of the availability or otherwise of further educational prospects. It was also observed by the Full Bench in the same judgment that the principle of legitimate expectation is not attracted in such cases.

5. As was observed by the Supreme Court in the case of Dr. Pradeep Jain & others v. Union of India & others, 1983 (3) S.C.C. 654 the only valid reason which permits the departure from the principle of selection based on merit could be to bring about the

real equality of opportunity between those who are unequal. It is on this ground that the Supreme Court justified the reservation in favour of backward classes and also reservation in favour of underdeveloped areas, if they are so well-defined. As was observed by the Supreme Court in Dr. Pradeep Jain's case, cited above:

"...the scheme of admission to medical college may depart from the principle of selection based on merit where it is necessary to do so for the purpose of bringing about real equality of opportunity between those who are unequal. Equality under the Constitution is a dynamic concept which must cover every process of equalisation. Equality must become a living reality for the large masses of the people. Those who are unequal, in fact cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality. Existence of equality of opportunity depends not merely on the absence of disabilities but on presence of abilities. It is not simply a matter of legal equality. De jure equality must ultimately find its *raison d'être* in *de facto* equality. The State must, therefore, resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas."

6. The above observations of the Supreme Court would serve as a touchstone for examining whether the departure from the rule of merit is permissible under a particular scheme. The Rule impugned directs weightage of 1% marks per year to a senior student who has passed from Goa Medical College prior to the starting of the M.D.S. Course, subject to a maximum of 5% marks in the grand total. Therefore, the addition of marks is based on the year of passing and the senior is the person having passed earlier who would get more marks by way of this weightage. It was tried to be argued by the respondents that since there was no facility for Post-Graduate Education in Goa the students who have passed earlier to the introduction of the M.D.S. Course in Goa could not pursue their studies and therefore, they will have to be given preference. The Rule does not say that the students who have passed from the Goa Medical College and could not apply to any other College because of non-availability of the facility in Goa, are to be preferred. There is neither a preference nor a reservation of seats in favour of such candidates. What has been prescribed is a novel mode of addition of marks on the basis of the year of passing. Therefore, if somebody has passed five years before the introduction of the M.D.S. Course in Goa and has just kept quiet without making any attempts to get admission for Post-Graduation in any other College outside Goa, he would get an advantage of 5% more marks which matters very much as compared to the cut-throat competition experienced in cases of such admissions and the students of the very College of Goa fulfilling the same eligibility test will be handicapped merely because they have passed in the later years. Secondly, we do not see any rationale for this graded weightage. Even the students who have passed the graduation from Goa College prior to the availability of Post-Graduation facility have not been treated alike as one class. The differentiation between them also has been made by the Rule which is totally unjustifiable. A student who has passed five

years before and the student who has passed two years before the introduction of Post-Graduate facility in Goa have both suffered the same lack of facilities and they cannot be treated differently. It is also not the case that these students are preferred against the students from outside Goa. There is a specific provision in the preference criterion in Clause (2) of Part II of the Prospectus that the candidates who have graduated from the Goa Dental College and Hospital and have completed satisfactorily the internship will be first preferred. It is only if such candidates are not available then candidates who have graduated from Goa but have done internship outside Goa and those candidates who have graduated from Colleges other than Goa Dental College are considered. Therefore, the differentiation between students who have passed last year and the students who have passed few years before merely on the basis that in that year there were no Post-Graduation facilities in Goa, is not justified. In fact, even the justification of the Rule on this ground has not been pleaded before us. What has been pleaded is the difficulty in ascertaining the co-relation of the candidates in the different batches and to ensure level play in the field. If the students in the recent years have shown greater merit and have acquired more marks they cannot be discriminated on that ground by giving advantage to the students who have secured lesser merit merely on the ground that they are seniors. The contention does not appear to be fully true. The merit list of the first to third rank of students in the First to Final B.D.S. Class has come at Exh. R. 2 annexed to the return filed by the State and goes to say that even in the year 1985-1986 first three students had secured between 63% to 64.5% marks. Approximately the same percentage is maintained up to the year 1996-97. It is in the years 1996-1997 and 1997-1998 students have secured marks between 67% to 70%. Such a differentiation by itself will not justify a conclusion that the marking system has in any way interfered with the merit adjudged on the basis of the marks obtained in the examination. It is possible that in a particular year more meritorious students might have appeared for the examination and might have secured more marks as compared to students who have passed in some previous year. That can hardly be a ground for differentiation. When a Division Bench of this Court took a view that Rule 3.3.O of the Government Resolution dated 10th June, 1994, issued by the Government of Maharashtra must be read down so as to restrict admissions for the M.B.B.S. and B.D.S. Examinations to the students Who have passed qualifying examinations during that year i.e. 1994-1995 only, excluding all those who had passed qualifying examinations during the earlier years, the Full Bench in the case of Komal Kamlakar Chitnis and Others etc. Vs. Director, Medical Education and Research Bombay and Others etc., ruled:

"If a rule for admission to the medical courses prescribes that the candidate must pass the qualifying examination at one attempt, in that event irrespective of the fact as to in which year the applicant has passed the qualifying examination, if he does not satisfy this condition, he would be ineligible. It is extremely difficult to appreciate how this fact would be relevant for coming to the conclusion that the

students passing qualifying examination in different years constitute different classes. Whatever may be the year in which the candidate has passed the qualifying examination, his eligibility will have to be determined on the basis of the rules applicable for the particular academic year in which he makes for admission to the medical courses."

As was observed by the Full Bench, the year of passing in such cases has absolutely no relevance. It can hardly assist the judging of the *inter se* merit of the applicants and that too giving weightage on the basis of the seniority on the basis of the year in which the candidates have passed and the number of years for which the candidate had to wait for admission. His merit will have to be judged on the marks obtained by him in the qualifying examination to be considered as per the Rules applicable for the purpose.

7. The learned Counsel for the respondents invited our attention to the judgment of the Supreme Court in [Sanjay Ahlawat Vs. M.D. University and Others](#), wherein a weightage of ten marks to the graduates of the only existing medical college in the State of Haryana was given so as to make their services available in the State in view of dearth of medical facilities. Weightage was held to be not violative of Article 14 of the Constitution of India. Relying on this judgment the learned" Counsel contends that the weightage of the marks in the case at hand is also justifiable for the same reasons. The submission is without any basis. Even the students who are discriminated are from Goa, they have passed from the same Institution and it is not that the weightage is to see that the students from Goa are given preference. From the students from Goa who have passed from same Institution, a sub-class who have passed the examination few years before is carved out. This is not permissible.

8. Though there is no foundation in the pleadings, it was sought to be contended on behalf of the petitioner that the Rules are bad in as much as there is no prior consultation with the Dental Council of India and the Goa University. We do not see such a requirement either in the statutory provision or in any of the guidelines. The Rules have been framed in exercise of the executive powers of the State and there is no requirement that such Rules should be framed only after the prior consultation of the Dental Council of India, or the Goa University. As was held by the Supreme Court in [State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others](#), matters relating to selection of candidates for admission are covered by Entry 25 of the Concurrent List and in the absence of any legislation in this sphere, the State is competent to make rules under Article 162 of the Constitution of India in that regard. Medical Council Regulations in this respect are only recommended and do not affect the State's order. In view of this position, it is not mandatory for a State Government to consult the Dental Council of India before framing Rules for admission. The learned Counsel for the petitioner did not point out any specific provision which requires that the Rules should have been framed after the prior consultation with the University of Goa. However, we find that the University did

express an opinion about the Rule impugned before us. Communication dated 22nd December, 1998 by the Registrar of the Goa University to the Dean, Goa Dental College and Hospital, informed about the Rule impugned before us the following opinion:-

"This provision is discriminatory and may be challenged successfully in a writ petition. Therefore, I am directed to inform you to delete this provision and determine the order of merit without any such weightage."

The opinion expressed by the Goa University and communicated in writing to the Dean was just by-passed in his reply dated 13th January, 1999. The reply is as under:-

The Government of Goa after due consideration at all level of its functioning agreed to this proposal and the whole provision was notified under Official Gazette Series I No. 34 dated 19-11-98 and is not discriminatory in nature.

However the Government is being informed of this matter."

We are sorry that the opinion expressed by the academic institution like the Goa University was not properly considered by the authorities. Such a consideration would have saved much of the embarrassment which the respondent students are required to face. Had the advice of the Goa University been properly considered, this would have avoided the unfortunate situation.

9. We therefore allow the writ petition, quash the Rule (3)(v) of the Goa (Rules for Admission to the Post Graduate Degree Courses of the Goa University at the Goa Dental College and Hospital) Rules, 1998 and its identical version published in the Prospectus. We direct that the Merit List be prepared de novo ignoring this Rule of addition of marks, considering only the applicants who have already filed their applications for admission to the Post Graduate Course. The revised list be prepared and notified within a period of seven days from today. It shall also be notified in the newspapers having wide circulation in Goa that the admissions to the Post-Graduate Courses in this Academic year have been cancelled and are being revised as per the directions of the High Court and the revised Merit List would be notified on the Notice Board of the College. The newly selected candidates should be allowed to take admission within seven days from the date on which the revised Merit List is notified on the Notice Board.

10. The respondent students who were admitted by the application of the impugned Rule have argued before us that they be allowed to continue their studies since they were admitted on 3rd March, 1999. We do not think that continuation in the Post Graduate Course for a period of three weeks on a Rule of such nature will entitle the respondent students to any equitable relief.

11. Rule is made absolute in the above terms. There will be no order as to costs.

12. At this stage Shri M.S. Sonak, learned Counsel for the respondents No. 3 and 6, prays for stay of the operation of this order for a period of four weeks. By our directions finalization of the admissions would take about two weeks. In the circumstances, we do not think that there is any necessity of granting stay of the operation of our order. Prayer refused.

13. Petition allowed.