

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8431 OF 2016

Dr. Neeraj Desai

.... Petitioner

V/s.

Union of India,
Through the Secretary,
Ministry of Health & Family Welfare,
New Delhi & Ors.

.... Respondents

Mr. V.M. Thorat, a/w. Ms. Pooja V. Thorat, for the Petitioner.

Mr. Rui Rodrigues, a/w. Mr. Anand Singh, for Respondent No.1-UOI.

Mr. L.S. Shetty, a/w. Mr. U.R. Naik and Mr. M.M. Nairo, i/by M/s. L.S. Shetty & Associates, for Respondent No.2.

CORAM : S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 10TH AUGUST, 2016.

P.C. :

1. We have heard Mr. Thorat, learned counsel appearing for the petitioner and Mr. Shetty, learned counsel for respondent No.2.

2. This Writ Petition, under Article 226 of the Constitution of India, seeks a direction to respondent No.2-National Board of Examination to forthwith hold additional round of admission for filling up vacant super speciality seats, at-least, in the discipline of DNB Cardiology.

3. This and the relief in terms of prayer clause (b) is sought in the following facts and circumstances :-

4. Dr. Neeraj Desai, petitioner before us, appeared for the qualifying examination and thereafter completed his Post-Graduate Degree. At page No.9 of the Writ Petition, it is stated that the petitioner was desirous of appearing for the National Board of Examination's qualifying test for Super Speciality Course. That is how he filled up his form and appeared for this Common Entrance Test held on 27th November 2015. The result of this test was declared on 25th January 2016. The petitioner's name appears at serial No. 1002 in the overall merit list. He was much higher in the merit list for "DNB Cardiology". According to the petitioner, there is a brochure issued, copy of which is at Annexure-A in the paper-book, which indicates that, approximately 135 Cardiology seats are available in various hospitals and teaching institutions throughout India. The petitioner had chosen the subject of "Cardiology" and he decided preferably to do it in Mumbai. After appearing for the examination and being in the merit list, the petitioner attended the counselling session at New Delhi on 18th February 2016 and followed by two subsequent rounds on 6th April 2016 and 20th May 2016. The petitioner concedes and rather does not dispute that 18 seats in various hospitals in "DNB Cardiology", according to him, are vacant,

because at the end of the second round, 4 seats in various hospitals in Mumbai were shown available. Out of these 4 seats, 2 seats were available at Jaslok Hospital, 1 seat was available at Lilavati Hospital and 1 seat was available at Holy Family Hospital, Bandra. The third round of counselling indicated that these seats are available. Some students were selected to join these colleges on the said seats. The petitioner cannot and does not dispute that he was not one of them. The petitioner was, according to respondent No.2-Board, allotted a seat in a college / teaching hospital in the State of Kerala. The petitioner did not opt for it. The petitioner did not join there and some other place as well, but was interested in “Cardiology” and that when he realized that one Dr. Satish Sawant, who was the selected candidate for “DNB Cardiology Course” at Holy Family Hospital, Bandra did not join, he has taken up the issue of such seats which are styled as *“being vacant - about to lapse or remaining unclaimed”*.

5. It is this part of the issue, which is highlighted by him and he states that apart from the Holy Family Hospital, Bandra, even the petitioner realized that the situation of this nature ought to have been brought to the notice of respondent No.2-Board.

6. Since respondent No.2-Board did not address the issue, the petitioner approached this Court in its writ jurisdiction claiming the above relief.

7. Upon notice, affidavit has been filed by respondent No.2-Board in reply. In that affidavit, which is styled as the “first affidavit”, apart from raising the technical challenge to the maintainability, the Board states that, as far as the petitioner Dr. Desai is concerned, he appeared in the Centralized Counselling for DNB-CET SS for January Admission Session and appeared also at the three rounds. In the first round of counselling, the confirmed seats available were 38, but the petitioner did not opt for them. In the second round also, 19 seats were confirmed as available, but the petitioner opted for none and the same continued even in the third round. The petitioner, during each of these rounds, expressed his unwillingness to opt for and accept any DNB Super Speciality seat for January 2016 Admission Session, despite available and offered to him, as stated.

8. The petitioner having not opted for seats, though offered by respondent No.2-Board, such a candidate or a student or a Doctor cannot raise this issue, is the essential argument.

9. As far as the unfilled seats, even after three rounds of counselling, being wasted, the argument in the first affidavit is that they are carried forward to the next academic session.

10. The petitioner has placed a rejoinder-affidavit on record, in which, while not disputing and denying the factual position, contends that he had given his first preference to “DNB Cardiology” at Mumbai. At no point of time a Cardiology seat was made available to him in any of the rounds. Had any DNB Cardiology seat been made available to him in Maharashtra, he would have opted for the same. He has raised the issue of language barrier and that is why not taking up any seat in Kerala and South India, is justified by him. He has placed in the forefront this right by which he would be able to project his grievance successfully and prays for the reliefs.

11. Since the core issue remained unanswered and that was our concern throughout, we passed a brief order on the earlier occasion i.e. on 3rd August 2016. We were not concerned as much for Holy Family Hospital, but one super speciality seat in Maharashtra being wasted. For the current exercise, such candidates, who have been successful and yet not joining any course of study and particularly in super speciality in a city

like Mumbai, which is very thickly populated and having a large population spread not only in the in the island city but suburbs, that we impressed upon respondent No.2-Board to find out a solution so that the existing seat is not wasted.

12. An additional affidavit has been filed by respondent No.2-Board to address this issue.

13. Mr. Thorat, learned counsel appearing for the petitioner, submits that the petitioner has highlighted as to how he can claim a right to join a seat of his choice and equally educational course and as to how the Board has not taken care of, nor bothered to answer the issue or concern that has been raised by the Court. He would submit that the Board's additional affidavit maintains complete silence in that regard.

14. On the other hand, Mr. Shetty, appearing for respondent No.2-Board, would submit that the petitioner has no legal right to claim a seat beyond his rank in the order of merit. He cannot rely only on a chance and that too resulting because of some candidate not joining the chosen or allotted seat. Mr. Shetty submits that, based on such a choice, which is now sought to be exercised, respondent No.2-Board cannot be called

upon to fill up a seat, particularly when its whole selection process is over.

15. Mr. Shetty would submit that this affidavit has admitted and did answer the issue raised by this Court. He would submit that respondent No.2-Board conducts these examinations, but once the counseling process comes to an end, then, merely because some seats are or fall vacant, that by itself cannot mean that they must be offered to other candidates and by a fresh round of counseling. That is not what the Board's rules presently indicate, but the Board includes such seats in the further round or process of selection. Apart therefrom, it is not as if the teaching faculty at such colleges, where students did not join Super Speciality Course, sits idle. There are other academic duties and equally hospital and clinical duties, which these senior consultants or the teaching faculties perform. In such circumstances, it is submitted that respondent No.2-Board cannot be directed to frame a particular rule or to adopt a particular line of action, merely because it is in the opinion of the Court desirable. He would submit that in academic matters, unless the decision is palpably arbitrary or vitiated by malafides, this Court should not interfere in its writ jurisdiction.

16. While we agree with Mr. Shetty that in purely academic exercise

and decisions, this Court should not interfere with the decision of experts, unless they lack bonafides, what we have noted is that the petitioner may not possess any legal right and at this belated stage to insist on he being offered a seat at Mumbai or the particular seat at Holy Family Hospital, Bandra yet, there could be other candidates and students higher-up in the order of merit, who would suffer. Equally, we do not find that it is an answer, when respondent No.2-Board says that the teaching faculty is not rendered idle at such hospitals. Eventually, Super Speciality Courses are allowed at some teaching institutions and hospitals to meet the need of the hour. The need of the hour is quality health care. In a State, which is as thickly populated as approximately 12.50 crores, we have very few Doctors, much less, experts in the field of Medicine and Surgery. If Super Speciality Courses are set up in some cities, at-least, in the State of Maharashtra, all Academic Bodies and Institutions must ensure that seats therein are duly filled up. We can understand some circumstances beyond a candidate's or Doctor's individual control, which compel them not to join but, as a matter of routine, if seats are remaining vacant, then, that is not a happy scenario as far as the State of Maharashtra is concerned. The State of Maharashtra may not take up this issue, but, surely, respondent No.2-National Board of Examinations and the Secretary in the Department of Health and Family Welfare, Government of India. Respondent No.1 can

take notice of this situation. We can impress upon the Secretary, who is impleaded as Respondent No.1 to this Writ Petition, and, at-least, some remedial measures can be thought of by him, including a change or amendment to the existing rules.

17. Every time it is no answer that further rounds of selection would be held, in which far more meritorious candidates may appear and together with students like the petitioner and thereafter the vacant seats, which are included in that process, would be duly filled in. That is also an expectation. If after years of experience we do not wish to learn anything and every time the seats are or fall vacant, are to be carried forward in the absence of any rules or regulations specifically empowering the Board to fill them by continuing the existing round/s, then, these are not satisfactory state of affairs at all. It is for the Academicians and the Administrators to address this issue. We do not think that a State like Maharashtra can afford lapsing of seats or the seats remaining vacant for months together. Doctors with very high qualifications, including Super Speciality Degrees, are required for health care; that means identification of diseases and ailments which are complex but far too common. They are prevailing in all sections and stratas of the society. State hospitals are unable to cater to the needs of the patients and if Super Speciality Doctors qualifying from

other or private Teaching Institutions do not set up their own hospitals or nursing homes or health care facilities, then, it is impossible to cater to the increasing demand or pressure of the population. It is that concern which has moved us in making the earlier observations.

18. We are aware that in the absence of specific rules and regulations empowering respondent No.2-Board to fill up a vacant seat after completion of the selection process, the petitioner cannot insist on a mandamus being issued. No Court can issue a writ contrary to law or to subvert the law. No Court can issue a writ directing an authority like National Board of Examinations to adopt a particular course even if its rules and regulations do not permit it to do so. The Court cannot, in the garb of exercising power to issue prerogative writs, direct respondent No.2-Board to fill up seats after a given selection process is completed when the only way is to include the vacant seats in the coming selection process or fresh round of admission. If that is the only way open for respondent No.2-Board, then, we cannot, in the absence of any rules or regulations, direct respondent No.2-Board to accept the claim of the petitioner. Even otherwise, in the light of the admitted facts, the petitioner cannot claim a fundamental or legal right to the seat at the Holy Family Hospital, Bandra.

19. While we dismiss this Writ Petition, we hope that Respondent Nos.1 and 2 find a solution and take care of the vacancies, so that the vacant seats to be filled-up, would not have to wait a fresh selection process necessarily. That would not be in public interest as shortage of Doctors is faced by a State like Maharashtra repeatedly. The problems of malnutrition and lack of health care can be addressed, if more Doctors become available to the State.

20. As a result of the above discussion, the Writ Petition is rejected.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [S.C. DHARMADHIKARI, J.]