

(1958) 10 AP CK 0021

In the Andhra Pradesh High Court

Case No : Writ Petition No. 811 of 1958

A. Muralidhar and Others

APPELLANT

Vs

The State of Andhra Pradesh

RESPONDENT

Date of Decision : 16-10-1958

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 166, 226
States Reorganisation Act, 1956 — Section 113

Citation : AIR 1959 AP 437

Hon'ble Judges : P. Chandra Reddy, C.J.;Srinivasachari, J

Bench : Division Bench

Advocate : P.A. Choudhary and P. Venkayamma, for the Appellant; P. Ramachandra Reddy, 3rd Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

P. Chandra Reddy, C.J.—This petition is filed for the issue of a writ of certiorari to quash the proceedings relating to selection of candidates for admission into the First year M.B.B.S., course in Osmania Medical College and Gandhi Medical College, Hyderabad for the academic year 1958-59 by deleting the G.O. Ms. No 1071, (Health) dated 26-5-1958. The petitioners, four in number, are Graduates of the Osmania University who have passed B. Sc. Examination. In that examination, the 1st and 2nd petitioners have secured 61.2% marks in the Optionals, the 3rd petitioner 59% and the 4th 58.7% marks. In answer to a notification D/-1-6-1958 calling for applications for admission into the first year M.B.B.S. course in the aforesaid Medical Colleges commencing from July, 1958, the four petitioners sent in their applications to the Principal of the Osmania Medical College.

They were not called for the interview held by the Selection Committee for selecting candidates. This was obviously for the reason that they had not obtained the requisite number of marks in their Intermediate examination specified in the G.Os. issued on 26-5-58 and 14-6-1958. Having thus been

disappointed, they have come forward with these petitions after the final selections were made, challenging the validity of the Government Orders which formed the basis of the rejection of their applications.

2. By and under the G.O.Ms. 1071 (Health) dated 26-5-58, the Government of Andhra Pradesh divided the whole State into five groups of districts for purposes of admission of students to the Government Medical Colleges in the State three in the Andhra area and two in the Telangana area. We are here concerned only with the Telangana area which was divided into two regions. Region No. 1 consisted of the twin cities of Hyderabad and Secunderabad while Region No. 2 comprised the rest of the Telangana area. Out of a total of 430 seats available for admission of candidates to the 1st year in the M.B.B.S. course in the Medical Colleges, 150 are available in Osmania Medical College and Gandhi Medical College and these seats were allotted to candidates from Telangana area.

Out of them, certain seats were set apart for candidates from outside the State of Andhra Pradesh in addition to the reservations being made to schedule castes and scheduled tribes, socially and educationally backward classes and women candidates. The reservations pertinent in the present context are those made for Marathwada and Karnatak areas which formed part of the former Hyderabad State. That G.O. contained various other particulars all of which need not be detailed here. But, it is essential to note the educational qualifications prescribed for admission into the colleges. It is in these terms:

"(A) A pass in the Intermediate Examination with Physics, Chemistry and Natural Science (Biology) as Optionals; or

(B) A pass in the pre-professional (Pre-Medical) Examination with Physics, Chemistry and Natural Science (Biology) as Optionals; or

(C) A pass in an examination recognised by the State Government as equivalent thereto.

(c)and for purposes of selection to the M.B.B.S., Course, the total Marks obtained by the candidates in Part III (Optional) only in the Intermediate or the pre-professional (pre-medicine) examination shall be taken into account. In assessing the comparative merit of candidates, who have passed the Intermediate or the B.A./B.Sc. Degree Examination, the benefit of higher percentage of marks obtained by them at either of these examinations shall be given to the candidate. Those who passed the qualifying examinations in the first attempt shall be given priority in selection and higher ranking.

(d) Only candidates who have obtained not less than forty five per cent of the total marks in all the subjects in the qualifying examination in respect of pre-professional Course in Medicine and in Part II (Optionals) in respect of M.B.M.S., Course shall be considered."

3. A week later, this G.O. was amended in one respect by G.O No. 1155 dated 4-6-1958 The effect of it was that the marks obtained by the candidates in the

Intermediate examination or other equivalent examination would be taken into account for the purpose of admission to the M.B.B.S., Course. This came into force much earlier than the last date fixed for making applications for admission, namely 25-6-1958. According to the petitioners, it is the amended G.O. that had adversely affected them and had excluded them even from an interview. The legality of these G.Os. is attacked on several grounds.

4. It is urged in the forefront of the arguments that these G.Os. are unconstitutional for the reasons that they constitute laws which cannot be made by the Executive of a State. The contention is formulated thus:

The G.Os. in substance are in legislative form and therefore require legislative sanction. It is within the exclusive sphere of a legislature to make laws and the executive would be usurping the functions of the legislature if it issues G.Os. laying down policies. Article 246 of the Constitution distributes legislative power amongst the various legislative bodies in the country and the subjects allotted to the Union as well as the State legislatures are set out in lists 1, 2 and 3. No part of the legislative function is assigned to the executive under the Constitution. The executive has only ordinance making powers and not legislative function under the Constitution. Article 213 of the Constitution has conferred powers on the Governor to promulgate only ordinances.

To the extent that the G.O. gives instructions with regard to reservation of seats and qualifications etc., it amounts to laying down the policy which can only be done by the Legislature. If in these premises these G.Os. are struck down as being beyond the pale of authority of the executive, all restrictions imposed on the admissions into the colleges are removed with the result that every student will become eligible for admission into them as it is common law right of every citizen of India to get admission into any college provided the legislature does not for valid reasons preclude them from competing. Since there is no legislative measure in this behalf in the State, no citizen could be deprived of the right of being admitted into any college. The executive functions of a State are confined to subjects in regard to which there is already legislation and anything done outside any legislative act is without jurisdiction.

5. As substantiating these propositions, reliance is placed on certain decided cases.

6. We are unable to assent to the views propounded above. It cannot be predicated that every order issued by the Government constitutes law, simply because it affects a number of people and its operation extends into the future, as suggested by the counsel for the petitioners. The essential characteristic of "a law" is that it lays down a policy either affecting rights or creating rights or liabilities and making it a binding rule of conduct. It should also be enforceable in a Court of law. In "Salmond on Jurisprudence", page 41 (11th edition), law is defined as the body of principles recognised and applied by the State in the administration of justice. In other words the law consists of the rules recognised

and acted on by the courts of justice. Again at page 139, the following passage occurs:

"Legislation is that source of law which consists in the declaration of legal rules by a competent authority. It is such an enunciation or promulgation of principles as confers upon them the force of law. It is such a declaration of principles as constitutes a legal ground for their recognition as law for the future by the tribunals of the State,"

7. The impugned G.Os. lack the postulates of statute. They cannot be said to be issued in exercise of any legislative authority and in fact the State does not purport to do so and its purpose was not to prescribe any law. They are only executive instructions for the guidance of committees charged with the selection of candidates. These G.Os. do not confer any right or create any liability or any individual or groups of individuals nor could an action be founded on them in a Court of law.

8. The proposition that the powers of the State Government are contained within the laws enacted by the legislature is unsubstantial. Though it may not be possible or desirable to define the scope and ambit of the executive functions of a Government, it may be safely asserted that the functions and duties of the executive extend to subjects not only in regard to which there have been enacted legislations but to all topics in regard to which the State Legislature is competent to legislate. It is competent for a Government in discharge of its executive functions to do an act in regard to any sphere of activity if there is no legislation in regard to that matter. If there is legislation in regard to any matter, the executive has to perform its duties conformably to that. The extent of the executive power of a State is set out in Article 162 of the Constitution which extends it to matters with respect to which the legislature of the State has power to make laws. This is subject to a proviso that

"in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

It is thus seen that the power of the executive is not confined to merely executing the laws. As pointed out by Malik, C.J., in *Moti Lal and Others Vs. The Government of the State of Uttar Pradesh and Others*, , "in a written constitution" like ours,

"the executive power must be such power as is given to the Executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution."

In the same decision *Mootham and Wanchoo, JJ*, who delivered common judgment expressed the opinion that there was no need for a specific enactment enabling the bus-owners to run bus service, thereby implying that a legislative

sanction is not a necessary ingredient of every executive function to be discharged by a Government.

9. In *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, it is remarked by Mukherjee, C. J. :

"The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial function in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws."

Therefore, the existence of a legislation is not a prerequisite to the exercise of executive functions in regard to any subject,

10. We cannot also agree with the theory that, whenever a policy is laid down it amounts to legislation. In regard to matters which pertain to the normal functions of a Government, it has not only power but a duty to enunciate policy and to carry it into effect. It is of the essence of an executive function of a State that it should enunciate policies" in regard to subjects within its sphere and give effect to them. In this context, the observations of Mukherjee, C.J., in the cited case are apposite:

"Our Constitution though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of Governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution."

11. Indisputably, it is the primary duty of the Executive to take stock of the educational needs of the people in the State, organise educational activities and lay down a policy in regard thereto in furtherance of the educational advancement of its people. Therefore, if the field is not occupied by a statute, the State Government functions in its executive capacity in that regard. It follows that those G.Os. cannot be regarded to be laws in any sense of the term, nor could they be disregarded on the ground that they lack legislative sanction.

12. We will now turn to the citation made by the counsel for the petitioners in support of his proposition. In *Prentis v. Atlantic Coast Line Co.*, (1908) 53 Law 150, the State of Virginia created Corporation Commission which was entrusted with the duty of establishing railway passenger rates after recording evidence and completing investigation. That body was clothed with executive, judicial and legislative powers. The State Constitution provided that the Commission in the

performance of its duty had to prescribe and enforce such rates, charges, classification of traffic and rules and regulations for transporting and transmission companies doing business in the State etc. Before fixing the rates, notice had to be given in the manner indicated therein of the substance of the contemplated action and time and place to hear objections and evidence against it. If an order was passed that order had to be published as above before it shall go into effect. It was in such a situation that Justice Holmes said that those proceedings were legislative in their nature. The learned Judge added:

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind....."

The opinion embodied in this passage seems to have been reached having regard to the dominant aspect of the matter. It cannot be said that the learned Judge intended to lay down that every act of an organ of a state which extends its operation into the future is legislative in nature.

13. It cannot be posited as an absolute rule that every determination binding the subjects not only in present but in future has the attribute of law. In judging the character of the act, regard must be had to the nature of the function called in question as laid down by Bhagwati, J., in *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, The learned Judge, remarked it would not be possible to lay down any universal rule which would help a court in the determination of this question.

14. Nor does *Ross v. Oregon*, (1913) 57 Law 458 carry the petitioners very far. There the construction placed on the depository act was challenged by a person who was prosecuted by information conformably to a law of the State in force at that time as being violative of the prohibition in the Constitution of U.S.A. against ex post facto State laws. Following the judgment of conviction and while the case was pending in appeal an amendment was introduced in the Constitution to the effect that it was only on an indictment found by a grand jury that any person could be charged in any circuit court with the commission of any crime etc.

Thereupon, the contention was advanced that the amendment had the effect of repealing the enactment under which the information was filed and made it impossible to enforce the judgment against him without depriving him of his liberty without due process of law, contrary to the 14th amendment to the Constitution of the United States. The State Courts overruled this on the ground that the amendment was only prospective and did not affect pending cases. It is in regard to this controversy and in reviewing the case-law that Mr. Justice Van Devanter remarked that the legislation looks to the future and changes the existing conditions by making a new rule.

These remarks do not bear on the present inquiry. The other rulings cited by the learned-counsel for the petitioners are not in point and need not be adverted to as they all related to the subject of delegated legislation. A passage in Clement's. Canadian Constitution (3rd Edn, page 435) to which our attention was drawn is not also quite material. That only recites that all laws falling within the-class "sea-coast and inland fisheries" could be passed only by the Dominion Parliament. That proposition does not admit of any doubt and need not be dilated upon.

15. Coming next to the point relating to common law right, it is equally fallacious. We are not aware of any authority or general principles which confer such a right on any citizen. It is within the discretion of the college authorities to allot seats to candidates subject to such rules as govern the admissions. A right of admission into any institution should be derived either from a statute or rules having the force of law. If the contention of the petitioner was sound, every citizen of India should as of right be admitted into any college he chooses irrespective of qualifications or suitability, but the petitioners' counsel is not prepared to go to that length. We need not pursue this further. Suffice it to say that it cannot stand any scrutiny. This argument is therefore inadmissible and cannot prevail.

16. Another argument pressed upon us is that as these G.Os. were not published they cannot have any efficacy. To bear this proposition out, the counsel called in aid a passage in "Cases in Constitutional Law" by Keir and Lewson occurring at page 79 (4th edition).

"To which I answered, that true it is that every precedent hath a commencement; but when authority and precedent is wanting, there is need of great consideration, before that anything of novelty shall be established and to provide that this be not against the law of the land; for I said, that the king cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament."

This is an extract from "The Case of Proclamations (1611), 12 Co. H. 74" by James I. The opinion, is said to have been offered by the then Chief Justice when King James I, wanted to issue a proclamation prohibiting new buildings in and about London. We are unable to see how it touches the question that falls for decision here. Blackpool Corporation v. Locker (1948) 1 All 85, also does not come to his rescue in any way. That concerned the problem of Sub-delegated legislation. It is in dealing with that point Scott, L. J., said:

"The Act, when passed may contain delegated powers to a Minister of the Crown to legislate, and the Minister may within his powers make rules or orders which constitute binding legislation. Again the aggrieved citizen has no legal remedy against the legislative act of the Minister. He is bound by the terms of the delegated legislation, but in both types of legislation. Parliamentary and delegated, the aggrieved citizen at least knows or his lawyers can tell him just

what his rights and duties and restrictions are under the new law because each kind of statutory law is at once published by the King's printer, whether as Acts of Parliament or as statutory instruments. On the other hand, if the power delegated to the minister is to make sub-delegated legislation and he exercises it, there is no duty on him, either by statute or at common law, to publish his sub-delegated legislation, and John Citizen may remain in complete ignorance of what rights over him and his property have been secretly conferred by the Minister on some authority or other and what residual rights have been left to himself.

For practical purposes the rule of law, of which the nation is so justly proud, breaks down because the aggrieved subject's legal remedy is gravely impaired. When executive or administrative directions falling short of legislation accompany the sub-delegated legislation, as they may often do, the omission to publish Such directions raises no legal issues, or, at any rate, none relevant to the present appeal, but such cases as the present do appear to me *ex debito justitiae* to demonstrate the crying need of immediate publication of all matter that is truly legislative."

17. We fail to see how the position envisaged in this passage lends any support to the theory of the petitioners. On the other hand, it denotes that executive or administrative directions which do not constitute legislation need not be published.

18. It is only matters which are legislative in nature that have to be published. It is axiomatic that every statute or rules having the statutory force ought to be brought to the notice of the people by publication as they are expected to obey the laws. The people who ought to obey laws should be cognisant of them; otherwise, the maxim "Ignorance of law is no excuse" is unmeaning. But the same cannot be posited with regard to executive or administrative directions unless there is any obligation cast on the authorities concerned by any statute or the rules made thereunder. The rules framed by the Governor under Article 166 of the Constitution do not contemplate publication of the G.Os. Rule 11 which bears on the Government Orders only require that they shall be "expressed to be made or executed in the name of the Governor". Rule 12 provides that

"every order or instrument of the Government of the State shall be signed either by a Secretary, an Additional Secretary, a Joint Secretary, a Draftman, a Deputy Secretary, an Under Secretary or an Assistant Secretary to the Government of the State or such other officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument."

19. Section 21 of the Madras General Clauses Act also gives indications as to what should be published. It runs as follows:

"Where in an Act, or in any rule passed under any Act, it is directed that any order, notification or other matter shall be notified or published, such notification

or publication shall, unless the Act otherwise provides, be deemed to be duly made if it is published in the Fort St. George Gazette."

Our attention was not invited to any provision which renders it obligatory on the Government to publish these G.Os.

20. In *In Re: Muniyandi*, *Dixit, J.*, while considering whether an order has statutory force or not observed:

"While it is true that in the absence of constitution or statutory requirement, publication is not necessary to the validity of a statute or to put it in operation, the fact that the order dated 27-7-1946 was not published in the manner in which statutes and Ordinances used to be published in the former Gwalior State in 1946, is an indication that the order was not intended to operate as a law and that it was merely an administrative decision".

These remarks also reinforce our view that there is no duty cast on the Government to publish the G.Os. before they come into operation.

21. We will now proceed to examine the contentions founded on Chapter III of the Constitution. The first attack is directed against the reservation of seats to candidates belonging to Marathwada and Karnatak areas. It is argued that this has deprived the students belonging to Telangana of an equal protection in regard to the selections to the concerned colleges. We are unable to appreciate how this in any way contravenes equal protection of rights. It is not a case where the students or a particular region are denied the opportunity of competing for admission into the colleges. This, does not involve any discrimination. Further, u/s 113 of the States Reorganisation Act, it is competent to the Government or India to make such reservations.

It is not disputed that the Government of India have made such reservations for a particular period and issued directions to the State Government which is its imperative duty to carry out under the express terms of that section. The petitioners are unable to question the validity of this Act. These reservations, as alleged in the affidavit in opposition, are intended to afford facilities to students of the adjoining areas included in the newly formed states in the wake of reorganisation because sudden distribution of territory required time for making necessary adjustment in regard to special, economic and educational needs affected by the said reorganisation.

The policy underlying Section 113 of the Act find the various notifications" issued thereunder by the concerned Governments is to extend equal facilities and opportunities to students belonging to areas which once formed part of the Hyderabad State but were removed from the state and included in other states. This does not constitute discrimination against students of the Telangana area. It may also be here mentioned that the reservation made for the Marathwada area has since been discontinued and the reservation for Karnatak area, alone is continuing. It follows that this reservation does not amount to an infraction of

guarantees contained in Article 14 of the Constitution.

22. The argument that a special favour is bestowed by that G.O. on the sons of officers arriving from Andhra area to Hyderabad and Secunderabad by making a reservation is equally devoid of substance. The effect of that G.O. is only to make candidates whose parents have been shifted from the Andhra area to Hyderabad consequent upon the formation of the new State eligible for admission and there has been no reservation in that behalf. Further, this is not confined to the children of the officers but to all persons who had to remove into the capital consequent upon the formation of the Andhra Pradesh. That besides, there is a provision in that G.O. which also seems to be the basis of complaint by the petitioners that seats equal to those which might be given to students coming from Andhra area should be assigned to students of Telangana area like the petitioners in colleges in the Andhra area. Consequently, this does not in any way impair any right which has been acquired by the petitioners or persons similarly situated.

23. We are not also impressed with the argument that the allocation of 30 per cent of the seats to the students of Secunderabad and Hyderabad as against 70 per cent of seats reserved for the rest of the Telangana area infringes Article 14 of the Constitution. It is true that the proportion of seats allotted to the twin cities of Hyderabad and Secunderabad is in excess of the ratio of the population subsisting between the two regions, but that cannot be a ground for challenging the constitutionality of the G.O. In making this distribution, the Government must have taken into consideration the number of candidates from each of the respective areas and their educational needs.

It is pointed out in the counter-affidavit that this allotment was adopted this year having regard to the fact that there are more colleges in the cities Which have produced comparatively many more students than in the remaining Telangana area. Article 14 of the Constitution does not inhibit territorial classification. All that is required is that the classification should be based on an intelligible differential and a nexus between the classification and the object of the enactment of a rule should exist. In this case, such a nexus subsists as the idea is to get the best candidates for the purpose of qualifying themselves to the medical profession.

24. The further question is whether the later G.O. has in any way contravened Article 14. The argument in this behalf is that it operates as a hostile and invidious discrimination in favour of the students of Intermediate and against B.Sc. candidates. As already noticed above, as a result of this G.O. the selection of candidates to the colleges is to be made on the basis of the marks obtained by them in Intermediate or other equivalent examination. First of all, we cannot agree that the B.Sc. candidates are denied an opportunity of competing in this regard by this G.O. Its only purpose is that all the students applying for admission should be judged by a common standard and does not seek to give any weightage to students of Intermediate class.

In order to evaluate the merit of each of the candidates there should be a common standard. The previous rule which gave the benefit of higher percentage of marks obtained by them at either of the examinations to the candidates does not furnish a common yard stick with which the merit of each of the candidates should be measured. On the other hand, that loads the dice very heavily in favour of the B.Sc. candidates. It is reasonable that the marks obtained by a candidate in an examination which is prescribed as a minimum qualification should be regarded as the basis for testing the talents of the persons seeking admission to the colleges.

The intention of the later G.O. is to secure the best talent for the profession. This is not in any way designed to deprive the B.Sc. students of an equal opportunity in regard to admission to the colleges. They have as much chance as the persons who have passed Intermediate examination. The only effect of this is that the marks secured in the Intermediate examination constitute the measuring rod. Moreover, they are not in any way disqualified to apply for selection by reason of this. Thus we are unable to see how this, in any way offends against Article 14 of the Constitution.

25. We are also not satisfied that Article 15 is in any way contravened. Admission is not denied to any of the petitioners either on the ground of religion, race, caste, sex, place of birth or any of them. There is therefore no ground for invoking Article 15 of the Constitution in this behalf.

26. Another argument presented is that the G.Os. offend Articles 19 and 21 of the Constitution also. It is complained that they have the effect of taking away the right of the petitioners to practise the profession of medicine. We are unable to accede to this contention. These G.Os. were only conceived in the best interests of the profession, i.e., to select boys who, in the opinion of the Government will make most efficient doctors. In this case, there is no question of the petitioners being denied the right to carry on their profession.

It cannot be predicated that the Government is not competent to make rules governing the entry of certain classes of persons into the profession. The power of Government or other competent authority to prescribe qualifications for medical men cannot be disputed. It is not as if every person in the country is entitled to set up profession in medicine. It is therefore futile to contend that the impugned G.Os. in any way deprive the petitioners of the rights conferred by Article 19. We are not shown how Article 21 has been contravened by the concerned G.Os.

27. The last argument to be noticed is that the Government is not empowered to make rules with regard to admissions into colleges and it is for Osmania University to make rules in that behalf. This contention overlooks the fact that these colleges are maintained by the Government and not by the University.

28. Even otherwise the rule in question was framed by the Government by virtue of a resolution under which the Osmania University has agreed to the

Government framing their own rules of admission into the Medical Colleges in Telangana area which are maintained by the Government, as appears from the counter-affidavit. An extract of the communication received from the University in that behalf is contained in the counter-affidavit.

29. For all these reasons, we hold that the various contentions advanced on behalf of the petitioners are unsubstantial and cannot be given effect to. In the result the writ petition is dismissed with costs. Advocate's fee is fixed at Rs. 200/-.