

(1994) 06 CAL CK 0015
In the Calcutta High Court
Case No : Matter No. 4814 of 1993

Asis Maity and others

APPELLANT

Vs

State of West Bengal and others

RESPONDENT

Date of Decision : 08-06-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 162, 17
West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976 — Section 5

Citation : AIR 1995 Cal 38 : (1994) 2 CALLT 134

Hon'ble Judges : Bijitendra Mohan Mitra, J

Bench : Single Bench

Judgement

1. This writ petition is for issuance of writ of Mandamus against the respondents to recall, rescind and/or to withdraw the orders being dated May 30, 1992 and June 15, 1992, which are respectively appended as Annexures "D" and "E" to the writ petition. The writ petitioners applied to the West Bengal Board of Examination for admission to the Medical College in West Bengal scheduled to be held on 24th and 25th April, 1993. They duly appeared in the said examination but they were not supplied with adequate forms for admission to first year class of MBBS in Medical College on the ground that the Governor of the State was pleased to decide that 22% of the total seats would be reserved for schedule castes students and 6% of the seats would be reserved for schedule tribes in different teaching institutions where MBBS/BDS courses are being prosecuted in different Medical/ Dental Colleges of the State. The petitioners put up a challenge with regard to both the Memos dated May 30, 1992 and June 15, 1992 as aforesaid.

2. There are other applications for addition of parties, which have been allowed as a result of which certain more candidates came up before this Court with their grievances that they have also been affected by the impugned Memos and the policy of the State to fill up vacancies of the candidates with regard to MBBS/BDS courses. It is also necessary to point out that this writ petition was directed to be

heard afresh on merit as previously an order was passed by D.K. Basu, J. against which an appeal was preferred and the Appeal Court set aside the order and remitted the case back to this Trial Court for disposal of the writ petition in accordance with law.

3. Mr. Arun Prokash Chatterjee, the learned Counsel appearing on behalf of the petitioners in the writ petition, at the very outset has drawn the attention of this Court to an Act known as The West Bengal Medical & Dental College (Regulation of Admission) Act, 1973 vide West Bengal Act 36 of 1973. Mr. Chatterjee has also further referred to the West Bengal Medical & Dental Colleges (Regulation of Admission, Repealing) Act, 1977 vide West Bengal Act 27 of 1977, pursuant to which the earlier Act being the West Bengal Act 36 of 1973 as aforesaid was repealed. Thereafter, no such legislation was made by the concerned State Legislature touching on the subject and a vacuum was allowed to prevail. Mr. Chatterjee has further contended that the Repealing Act itself can be taken to be an action on the part of the State Legislature and it should be deemed to be considered as a step taken by the State by way of Legislative Activism and as a result of which if vacuum is created, that should be construed as a deliberate policy of the State Legislature.

4. In the wake of the said submission made by Mr. Chatterjee, he further drew the attention of this Court to Annexure "C" being appended to the writ petition, which is a Notification published in the Calcutta Gazette on March 27, 1990 from which it appears that in exercise of the powers conferred by the proviso to clause (a) of Section 4 and proviso to clause (a) of Section 5 of the West Bengal Schedule Caste & Schedule Tribe (Reservation of Vacancies in Service & Posts) Act, 1976 (West Bengal Act 27 of 1976), all appointments to service and posts in any establishment as defined are to be filled up by recruitment and/or by promotion and 22% of the vacancies shall be reserved for the candidates belonging to the Scheduled Caste and 6% of the candidates belonging to the Scheduled Tribe. The Government in conformity with the enhancement of the quota of reservation of jobs for scheduled casts and scheduled tribes, adopted similar policy for admission to MBBS/BDS courses in different Medical and Dental Colleges of the State. Mr. Chatterjee has further contended that no parity can be drawn with regard to the provisions of the Act for reservation of vacancies in services and posts and for filling up of seats on the same principles in different Medical and Dental Colleges of the State. Mr. Chatterjee further submitted that quantification of the reservation quota, as mentioned, and admission proposed to be given on that basis is unreasonable and arbitrary and the candidates affiliated to Scheduled Castes and Scheduled Tribes, who have secured admission in the general category, the number of such seats should be deducted from the reserved category. Mr. Chatterjee's submission is centred round the moot point that legislature of this State in its wisdom has repealed the West Bengal Medical & Dental Colleges (Regulation of Admission) Act, 1973. In view of the exigency of the situation, it should be deemed to be construed that the State Legislature does not warrant perpetuation and/or continuation of the said reservation.

According to Mr. Chatterjee, the Legislature, therefore, must be deemed to have decided that no special provision for reservation of Scheduled Castes and Scheduled Tribes are necessary in the State of West Bengal. Therefore, it cannot be said according to Mr. Chatterjee that there is a vacuum in the field and executive power under Art. 162 of the Constitution therefore does not extend to the filling up of such non-existent vacuum.

5. Mr. Dutt, the learned Advocate appearing on behalf of the respondents, has strongly contended that by the impugned Memo dated March, 27, 1992 the Governor, being the mouthpiece of the executive, has adopted a policy in conformity with the provisions of another Act where the reservation is made for Scheduled Castes and Scheduled Tribes. According to Mr. Dutt after the West Bengal Medical and Dental Colleges (Regulation of Admission) Repealing Act, 1977 saw the light of the day the earlier Act being the West Bengal Medical and Dental Colleges (Regulation of Admission) Act, 1973 stood repealed. As such, there is no legislation covering the field of admission to fill up the vacancies in the Medical and Dental Colleges in the State. Mr. Dutt laid stress before this court by drawing a distinction between "existing legislation" and "legislative intent". According to Mr. Dutt in terms of the provisions envisaged under Art. 15(4) of the Constitution of India, the State can adopt a policy in and Ch. III of the Constitution is required to be read in harmonious unison with the provisions enumerated in Art. 46 of the Constitution being included in Ch. IV. This Court is also reminded of the fact that the provisions envisaged under Ch. IV of the Constitution are recommendatory in nature. The Directive Principles of State Policy, forming themselves as a part of the Constitution, should not be overlooked and on the contrary spirit should be derived from them provided harmonisation is possible between a particular provision included in Ch. III and another provision included in Ch. IV. The Directive Principles of State Policy, according to the contention, as understood by this Court, cannot be read as a parade of high sounding words couched in vainglorious verbiage.

6. Reference may be made, in this context, to a decision reported in the case of *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, wherein the Supreme Court has laid down that Arts. 14 to 18 of the Constitution must be understood not merely with reference to what they say but also in the light of several Articles of Part IV of the Constitution. This Court also feels that some efforts should be made in order to effectuate the provisions incorporated in Ch. IV of the Constitution so that the dreams of the founding fathers of our Constitution can be fulfilled.

7. Thereafter, Mr. Dutt has referred to a decision reported in *State of Andhra Pradesh and Another Vs. Lavu Narendranath and Others etc.*, in the case of *State of Andhra Pradesh v. Lavu Narendranath*, where the Supreme Court has been pleased to hold that under Art. 162 of the Constitution executive power of the State extends to the matter with respect to which the legislature of State has power to make laws but this is subject to the provisions of the Constitution.

8. In the said context a further reference was made with regard to the decision of the State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others, wherein the Supreme Court has further held that under Art. 162 of the Constitution the executive power of a State extends to the matters with respect to which the legislature of a State has power to make laws. If there is no legislation covering the field and the selection of the candidates for admission to Medical Colleges is proposed to be made, then the State Government will undoubtedly be competent to pass executive orders in this regard. Accordingly, in the light of the said judgment as referred to above, this Court is of the view that the impugned orders, which are the subject-matter of challenge in the present writ petition, are not liable to be struck down and they are clearly to be supported under Art. 15(4) of the Constitution.

9. The executive power of the State functioning under the federal structure of Indian polity can make rules and adopt suitable policy to promote the cause and welfare of the under-privileged section of the Community at large.

10. Mr. Chatterjee's submission about unreasonableness of the quota as mentioned with regard to reservation of Scheduled Castes and Scheduled Tribes candidates on the ground that if the candidates affiliated to such section came up on the general category on the merit list, their number should be deducted from the totality of the number of the quota as mentioned in the Memo, but such submission of Mr. Chatterjee does not find support from the decision of Apex Court as referred to and reported in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., of the said judgment the Supreme Court has further held that speaking generally and in a broad way a special provision enacted which is an exemption clause under Art. 15(4) of the Constitution any provision made for reservation should be less than 50% but how much less than 50% would depend upon the relevant prevailing circumstances. According to the considered opinion of the Apex Court there are two types of reservation, viz., (1) Vertical reservation and 2) Horizontal reservation. The reservation of the Scheduled Caste and Scheduled Tribe groups may be called vertical reservation and the reservation in favour of physical handicapped persons may be called horizontal reservation. When horizontal reservation cuts across vertical reservation, the same is known as interlocking reservation. Scheduled Caste candidates when selected in open competition on the basis of their merits, they will not be counted nor any adjustment can be claimed against the quota reserved for Scheduled Castes.

11. In the background of the said decision a reference may be made with regard to an earlier decision in the case of The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, . Indeed, according to the considered opinion of this Court in the matter of adequacy of representation, the Court in deference to the policy adopted by the State should not look upon the same with some amount of discount just because it is emanating from the executive organ of the State. It does not, of course, however, mean that the opinion formed by the executive is beyond judicial scrutiny altogether. The scope and reach of

judicial scrutiny in matters which are within the ambit of the subject of decision of the executive can be tested and the extent of scrutiny and the mode thereof has been also explicitly stated in the reported decision of *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*,

12. It has been stated by Mr. Dutt before this Court that admission in Medical and Dental Colleges was completed for the currency of the years 1993-94 and the classes were started from the month of Sept. 1993 as a result thereof the rights of candidates who have been allowed to participate in class for a considerable period of time have been crystallised and they should be impleaded as parties to the pending writ petition as otherwise there cannot be any affectation of the rights of those candidates without affording them an opportunity of being heard. The number of seats in the Medical and Dental Colleges is fixed and the said number of seats is determined by the Prerogative to be exercised by the Medical Council of India. It appears that in this case neither the Medical Council of India nor the candidates who may be required to be displaced, have been impleaded as parties in the present writ petition. Accordingly, the writ petition appears to suffer from material defect of non-joinder of necessary parties.

13. In view of the observations made hereinbefore and after giving my anxious consideration to all the pros and cons and after taking note of the catena of decisions pronounced by the Apex Court from time to time, this Court is of the view that this writ petition is liable to be dismissed. Accordingly, the same stands dismissed on contest. There shall, however, be no order as to costs.

14. All parties to act on a signed xerox copy of this Judgement on the usual undertaking.

15. Petition dismissed.