

(2003) 01 KL CK 0030

In the High Court Of Kerala

Case No : W.A. No's. 3660 and 3661 of 2001 and O.P. No. 18683 of 2001

Benny

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 30-01-2003

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 33, 39

Citation : AIR 2003 Ker 208 : (2003) 2 ILR (Ker) 169 : (2003) 1 KLT 850

Hon'ble Judges : Jawahar Lal Gupta, C.J.; M. Ramachandran, J.; J.B. Koshy, J

Bench : Full Bench

Advocate : Abraham Vakkanal and A. Dinesh Rao, for the Appellant; C.K. Abdul Rahim, Govt. Pleader and P.S. Sreedharan Pillai, S.C.G.S.C., for the Respondent

Judgement

Jawahar Lal Gupta, C.J.—Is the action of the State Government in not making any reservation for the handicapped persons for admission to the Post Graduate Courses in Medicine, Surgery etc. violative of Section 39 of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995? This is the short question that arises for consideration in this set of three cases. Learned counsel for the parties have referred to the facts in W.A.No.3660 of 2001. These may be briefly noticed.

2. The appellant is physically handicapped. He was afflicted with Polio. It had left him with a handicap of 60% in the legs. Despite the handicap, the appellant had graduated in Medicine from the Calicut University in 1994. He had completed the requisite internship in November 1995. On December 5, 1995 he was registered as a Medical Practitioner with the Medical Council.

3. In April 2001, the State Government published a prospectus for admission to the Post Graduate Degree/Diploma Courses in Medical Sciences. While issuing this prospectus, reservations were made for various categories like Scheduled Castes, Scheduled Tribes, Ex-servicemen and Service candidates. However, no reservation was made for the physically handicapped persons. The appellant

submitted his application form. He did not claim the benefit of any reservation. However, in June 2001, he filed a petition under Article 226 of the Constitution complaining that the State Government had failed to carry out its statutory obligation under the provisions of the 1995 Act. This action was arbitrary and violative of Article 14 of the Constitution. Thus, he prayed that a writ of mandamus be issued directing the respondents to modify the prospectus and to make a provision of "3% reservation for physically handicapped in the Medical P.G. Degree/Diploma Courses 2001..." He further prayed that the respondents be directed to consider his application in the quota for the physically handicapped.

4. The matter was posted for hearing before a learned Single Judge. His Lordship, relying on the decision of a Division Bench in *State of Kerala v. Mary Joseph* (2001 (3) KLT 26) dismissed the writ petition. In *Mary Joseph's* case, the Bench had ruled that Section 39 appeared in Chapter 6 of the Act. This Chapter primarily deals with employment. Thus, the reservation for the physically handicapped had to be made only at the time of recruitment. No provision for reservation was required to be made u/s 39 for the purpose of admission to Government or aided educational institutions. The fact, which deserves mention here is that, this view was taken despite the fact that Section 39 specifically provided for reservation in "all Government educational institutions and other educational institutions receiving aid from the Government..." However, the learned single Judge was bound by the decision of the Division Bench. Resultantly, the Writ Petition was dismissed.

5. Aggrieved by the order of the learned single Judge, the writ petitioner filed the appeal. When the matter was posted before a Division Bench, reference was made to the decision in *Mary Joseph's* case. The correctness of the view was challenged. The Division Bench, after hearing the learned counsel, felt that if the interpretation as placed in *Mary Joseph's* case was upheld, Section 39 "would be rendered otiose and nugatory." Thus, the Bench ordered that the matter be placed before the Chief Justice for constitution of a larger Bench. This is how the matter has been placed before this Bench.

6. Mr. Abraham Vakkanal, learned counsel for the appellant has pointed out that the Division Bench of this Court, while dealing with the issue of Section 39, had decided a number of cases together. One of these was *State of Kerala v. Mary Joseph* (supra). The judgment of the Division Bench was challenged before the Supreme Court by one of the parties. The matter was considered by their Lordships of the Supreme Court in *All Kerala Parents Association v. State of Kerala* (2002 (3) KLT 423 (SC)). The Apex Court had reversed the decision of the Division Bench. Resultantly, the benefit of reservation under the Act is available for the purpose of admission to educational institutions. On this basis, the counsel submits that the relief as prayed for by the appellants and the writ petitioner in this set of three cases deserves to be granted.

7. The claim as made on behalf of the appellants/petitioner has been controverted by the counsel for the respondents. It has been submitted that in

the circumstances of these cases, the action of the authority in refusing to make any reservation u/s 39 is legal and valid.

8. In view of the clear language of the provision and the decision of the Supreme Court, it is not necessary to examine the matter at length. The short question that arises for consideration is - Has the State Government acted in violation of Section 39 in refusing to make reservation for the handicapped persons for admission to the Post Graduate Degree/Diploma Courses in different specialties of Medicine and Surgery?

9. Learned counsel for the appellants has given to us a copy of the prospectus issued by the Directorate of Medical Education for admission to the Courses for the year 2001. The number of seats etc. available in different specialties have been given in Annexures I and II. Annexure I gives the details of the seats available at the five Medical Colleges in the State for Post Graduate Degree Courses. Annexure II deals with the number of seats available for the Diploma Courses at the said colleges. A perusal of the prospectus shows that the total number of seats available in all the five colleges for admission to Degree Courses is 186. Total number of seats available for Diploma Courses is 143. On this basis, it is claimed that 3% of the 329 seats viz. at least 10 seats should be allotted to the physically handicapped persons like the appellants in the specialties for which they have applied.

10. The 1995 Act was promulgated "to give effect to the Proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific Region." India is a signatory to this Proclamation. In the Statement of Objects and Reasons, it was inter alia pointed out that the State had responsibility "towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities." Another objective of the Act was to create "barrier free environment for persons with disabilities" and to "remove any discrimination against persons with disabilities in the sharing of development benefits vis-a-vis non-disabled persons." To achieve the declared objects of the legislation, it was inter alia provided that the Central and State Governments would constitute coordination committees. Definite functions have been assigned to these committees. In Chapter IV, provision for prevention and early detection of disability was made. In Chapter V, provision for providing opportunities for education have been made.

11. Chapter VI of the Act primarily deals with providing opportunities for employment u/s 32, the State Government has to identify posts, which can be reserved for persons with disability. Section 33 provides as under:

"Section 33 Reservation of posts - Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three percent for persons or class of persons with disability of which one percent each shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work earned on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

12. A perusal of the provisions in this Chapter clearly indicates that the posts in different services have to be identified. The object is to determine the categories of posts against which persons with different kinds of disability may be considered for appointment. Still further, on a perusal of Section 33 it is clear that reservation at the rate of 1% each has to be made for persons suffering from blindness or low vision, hearing impairment and locomotor disability or cerebral palsy. Such persons have to be appointed against the posts identified for each disability. In the proviso, a provision for the grant of exemption has been made. An establishment can be excluded from the provisions of the Section. In other words, the Government is under a duty to identify the categories of posts against which persons with different disabilities can be appointed. In the case of departments where appointment of disabled persons is difficult, the Government has the power to grant an exemption. To illustrate: the Government can reserve posts of teachers in music for persons who are blind. Similarly, clerical jobs may be reserved for persons suffering from impairment of hearing or locomotor disability. Equally, it is open to the Government to say that engineering and certain parts of medical establishments shall be exempt from the operation of the provision regarding reservation. The reason for this appears to be that a person who is physically handicapped may not be able to stand and supervise the construction of buildings, installation of machinery or the working of plants. Equally, a doctor who is handicapped may not be in a position to physically stand and perform surgery for long hours.

13. Counsel for the parties have not pointed out anything from the records as to whether or not the Government has identified posts and services against which the physically handicapped persons can be appointed. This exercise is essential. If the needful has not be done, the matter should be considered without delay. However, as at present, the short question that arises is - Can the Government be compelled to make reservation of not less than 3% seats in postgraduate degree and diploma medical courses?

14. In Section 39 a provision for reservation of seats in educational institutions for the handicapped has been made. The provision reads as under:

"Section 39. All educational institutions to reserve seats for persons with disabilities:- All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three per cent seats for persons with disabilities."

15. A perusal of the above provision shows that reservation of "not less than 3%" has to be made in "all educational institutions." However, the provision does not stipulate that the seats in all the educational institutions located at different places in the State have to be pooled together. Why? It appears that the reservation was intended to be institution-wise. The Parliament was aware of the fact that persons with physical handicaps may not be able to stay away from the normal places of their residence. Some of them may not be able to look after themselves fully. Thus, no provision for combining the seats together was made.

16. The question that arises is - Does Section 39 lay down an inflexible rule that a minimum of 3% of the seats in all educational institutions shall be reserved for the physically handicapped persons? Why did the Parliament include Section 39 in Chapter VI, which primarily relates to employment?

17. It is true that the provision requires the Government to reserve not less than 3% seats in all educational institutions except those, which are not receiving any aid from it. We are clearly of the view that despite the language of the provision the Government has a discretion in the matter. To illustrate: The Government may be running an institute for training drivers. The disabled persons like those who have the handicap of eyesight shall not be able to work as drivers. Similarly, the Government may be running an institute for providing training in sports. The persons with physical disabilities shall not be in a position to serve as Coaches at the end of the training. Such instances can be multiplied. In all these cases, it may not be useful or even desirable to make reservation. In other words, the Government should have the same discretion in making reservations in educational institutions as it has in the matter of identifying jobs. This would avoid wastage of effort and expense. Thus, despite the language of the provision, we are of the view that the Government has a discretion in the matter of reserving seats in the educational institutions, in the same manner as it has in case of identification of services and posts.

18. It is in this background that the issue as arising in this case has to be answered.

19. A brief reference to the facts is necessary. A perusal of the prospectus shows that the Postgraduate Degree Courses are provided in 22 different Specialties. Similarly, even the Diploma Courses are in different disciplines. Thus, the number of seats available for each Specialty is different. It varies from 2 to 32 for the Degree Courses. However, the maximum number of seats are available in General Surgery. Out of these 32, 15 are available at the Trivandrum Medical College, 7 at Kottayam Medical College, 9 at Kozhikode Medical College and 1 at Alleppey Medical College. The question that arises is - Can the Government be still compelled to make reservation of at least 3% seats?

20. The difficulties are - (i) the number of seats in each Specialty at each of the Colleges is small; (ii) on account of the physical handicap the appellants/petitioner are not in a position to seek admission to the Specialties like General

Surgery etc. To illustrate, it may be mentioned that the appellant in the appeal in hand has a handicap of 60% on account of Polio. Both his legs are badly affected. As a result, it is not possible for him to stand and perform surgery. For this reason, he has not even applied for this Specialty. Still further, it is also clear that it would be very difficult for a person who is totally blind or deaf to study the courses and perform the duties expected of a Physician with a postgraduate Degree in Medicine or Surgery. Above all this, there have to be a minimum of 33.33 seats in a particular subject at an institute. This is because the provision in Section 39 requires "not less than 3%" reservation for admission to educational institutions. It is true that the State has the obligation to make reservation of not less than 3%. It can certainly provide for more. However, as at present, it is apparent that the State has not even provided for 3% seats in postgraduate Medical Courses. Why? Has the State identified the posts and then taken a decision to exempt even postgraduate courses from the Act? The counsel has pointed out nothing. In any event, the State cannot be compelled by the issue of a writ or direction to make a reservation of more than 3%. Whatever be our sympathies, in law such a direction would not be in conformity with law.

21. There is another aspect of the matter. Each Specialty constitutes a separate category. The number of seats in each Specialty is low. Reservation of even one seat would exceed the prescribed percentage. It would lead to reservation of more than 3% to 100%. To illustrate: There is only one seat at Medical College at Alapuzha. If it is reserved, it would amount to 100% reservation. This would not be in conformity with the provisions of Section 39. Still further, even if it is assumed that the pooling of seats is permissible, the reservation of 3% shall not be workable. Still further, the stipulation in Section 33 has also to be kept in view. Both the provisions have to be harmonised. Otherwise, the reservation of seats in Schools and Colleges would not lead to the fulfillment of the object of helping the handicapped persons to get settled in life. However, these are matters, which have to be considered by the competent authority. The Counsel have not pointed out anything to show that there is a violation of law so as to call for an intervention by the Court.

22. Learned counsel for the appellants has contended that a seat can be given in the field of General Medicine. The total number of seats for this subject in all the five colleges is 26. Even if We proceed on the assumption that the seats can be put together, reservation of one seat out of 26 would be in excess of the percentage prescribed under the provisions of Section 39. Since such reservation would not be in strict conformity with the provisions of the statute, no mandamus forcing the Government to do so can be issued. This is especially so because it would mean cancellation of the admission of some one who was admitted on merit in the year 2001. It would not be just and fair to do so.

23. It has been contended by learned counsel for the appellants/petitioner that the total number of seats in Post Graduate Courses being more than 300, seats at the rate of 3% should be reserved. The claim has been controverted by the

counsel for the respondents. It has been inter alia pointed out that in view of the decision of their Lordships of the Supreme Court in Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, the claim for reservation cannot be sustained. Learned counsel has also referred to the decision in Dr. Preeti Srivastava v. State of Madhya Pradesh (AIR 1999 SC 2895). The counsel appears to be right. It is undoubtedly true that provision for reservation u/s 39 has been made with the object of helping the less fortunate members of the society. However, keeping in view the fact that each Specialty constitutes a separate unit and there is no provision for amalgamating all the disciplines together, the authority could have taken the view that no reservation should be made. It has also been pointed out that considerations of efficiency and merit have to be kept in view. Each medical student at the Post Graduate level costs a substantial amount of money. Admission is given to the meritorious so that public funds are spent on the deserving. Persons with handicaps even if imparted the training may not be in a position to fully carry out all the onerous duties expected of medical officers with postgraduate qualifications. The plea taken on behalf of the respondents does not appear to be unfair or arbitrary. In any case, in matters of policy, the courts are normally reluctant to interfere. The decision has to be taken by the competent authority after examining the factual position.

24. In this context, it deserves mention that we live in a world of specialisation. After graduation, the effort is to concentrate on special subjects so as to impart expertise in different fields and provide better medical care. Thus, the State may not have considered it appropriate to pool all the seats together. We think, the State has not acted unfairly.

25. No other point was raised.

26. In view of the above, we find that even though the appellants are right in contending that the decision in Mary Joseph's case (supra) is not good law in view of the judgment of the Supreme Court, the claim as made in these cases cannot be sustained. Resultantly, the appeals as well as the Writ Petition are dismissed though for different reasons. In the circumstances, the parties are left to bear their own costs.