

(2002) 09 AP CK 0019

In the Andhra Pradesh High Court

Case No : WA No's. 1169, 1180 and 1495 of 2002

Dr. B.G.V. Giridhar

APPELLANT

Vs

Dr. Ch. Ramakrishna Rao and Others

RESPONDENT

Date of Decision : 19-09-2002

Acts Referred:

Andhra Pradesh Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee) Act, 1983 — Section 15(1), 3
Andhra Pradesh Regulation of Admission to Super Specialities in the Medical Colleges Rules, 1983 — Rule 7(3)

Citation : (2002) 6 ALD 331

Hon'ble Judges : S.R. Nayak, J;Dubagunta Subrahmanyam, J

Bench : Division Bench

Advocate : D.V. Sitharam Murthy, in WA No. 1169 of 2000, Government Pleader for Medical and Health in WA No. 1495 of 2002 and K.G.K. Prasad, in WA No. 1180 of 2002, for the Appellant; D.V. Sitharam Murthy, in WA Nos. 1180 and 1495 of 2002, Pratap Narayan Sanghi, in all WAs, Government Pleader for Medical and Health for Respondent No. 2 in WA Nos. 1169 and 1180 of 2002 and K.G.K. Prasad, in WA No. 1169 of 2002 and for Respondent No. 2 in WA No. 1495 of 2002, for the Respondent

Final Decision : Allowed

Judgement

S.R. Nayak, J

1. All these writ appeals are directed against the same order of the learned single Judge dated 10.7.2002 in WP No. 9085 of 2002. WA No. 1169 of 2002 is by one Dr. B.G.V. Giridhar, the 3rd respondent in the writ petition; WA No. 1180 of 2002 is by N.T.R. University of Health Sciences, the 2nd respondent in the writ petition; and WA No. 1495 of 2002 is by State Government of Andhra Pradesh, the 1st respondent in the writ petition. The 1st respondent in these appeals, namely. Dr. Ch. Ramakrishna Rao filed the above writ petition praying for the following relief:

"Petition under Article 226 of the Constitution of India praying that in the

circumstances stated in the affidavit filed herein the High Court will be pleased to issue a writ, order or direction more particularly one in the nature of Writ of mandamus (i) by declaring the action of the respondents in not considering the MD qualification for selection to the post of DM (Neurology) as wholly illegal, arbitrary, unconstitutional and violation of Article 14 of Constitution of India; (ii) declare that Regulation 7(f) of 2nd respondent university is contrary to Section 3 of Act 5 of 1983 and rules made thereunder and set aside the same by declaring the same as illegal, arbitrary, unconstitutional and violative of Article 14 of the Constitution of India; (iii) direct the 2nd respondent university to consider the case of the petitioner for admission in MD. Neurology course in Osmania Medical College, Hyderabad, for the academic year 2002-2003 by giving preference to the rank secured in M.D. General Medicine in the interest of justice; (iv) declare 7(3) of the A.P. Regulation of Admission to Super Specialities in the Medical Colleges Rules, 1983, issued in G.O.Ms.No. 740, Medical and Health (E-II), dated 22.11.1983 as ultra vires, illegal, arbitrary, unconstitutional and declare the same contrary to Section 3 of the Act of 1983"

2. It is contended in the writ affidavit that Rule 7(3) of the Andhra Pradesh Regulation of Admission to Super Specialities in the Medical Colleges Rules, 1983 (for short "the Rules") is arbitrary, unreasonable and it offends the provisions of Section 3 of the Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 (for short "the Act"). The writ petition was opposed by the appellants herein by filing counter affidavits. On behalf of the respondents, it was contended that the impugned Rule is intra vires the Act and is very much within the power conferred u/s 15 of the Act.

3. The learned single Judge on consideration of the rival contentions found the impugned Rule to be contrary to the provisions of Section 3 of the Act. The learned Judge has also opined that in framing the impugned Rule, the State Government acted ultra vires the Act. In the premise of these findings, the learned Judge allowed the writ petition and directed the N.T.R. University to consider and admit the petitioner into DM Course, if he satisfies the other requirements.

4. The writ petitioner challenged the validity of the Rule 7(3) in the context of the denial of admission to him to the course leading to the degree, DM (Neurology) and granting admission to Dr. B.G.V. Giridhar (the 3rd respondent in the writ petition) to that course. In the entrance test conducted by the N.T.R. University -2nd respondent, the petitioner as well as the third respondent secured 74 marks. At that stage itself the University by applying the provisions of Sub-rule (3) of Rule 7 of the Rules, placed the third respondent above the writ petitioner in the merit list because the third respondent had secured 60.81% in the subject of Medicine whereas the writ petitioner had secured 54.64% in the MBBS degree course. At that juncture, the writ petition was filed praying for the relief already noted above.

5. Arguing for the appellant in WA No. 1169 of 2002, Sri Sitharam Murthy

contended that the very considerations which have gone into the decision-making at the hands of the learned single Judge are not germane in deciding the constitutionality of the impugned Rule and that the High Court while undertaking judicial review of the validity of the impugned Rule under Article 226 should not question the wisdom of the rule-making authority in prescribing a particular rule in the event of a tie between two students or more in the matter of admission to super specialty courses and that that is the exclusive domain of the University and the Government and the only thing to be seen by the Court is whether the impugned Rule could be condemned as unconstitutional either for the reasons that it is ultra vires the provisions of Section 3 of the Act as contended by the petitioner and whether the prescription made by the impugned Rule to resolve the tie between two or more candidates of equal merit could be regarded as whimsical or fanciful so as to attract the wrath of Article 14 postulates. If the validity of the impugned rule were to be decided in the premise of these principles governing judicial review of delegated legislation, we should state, the petitioner has utterly failed to make out any ground to invalidate the impugned rule. The learned Counsel for the appellant also contended that the impugned rule which provides for taking into account the marks secured by a candidate in the subject of Medicine or in the subject of Surgery, as the case may be, to resolve a tie between two or more candidates of " equal merit in terms of the marks in the qualifying entrance test, cannot be said to be irrational because such a consideration is a relevant consideration to grant admission to a super specialty course.

6. The learned Counsel for the writ petitioner, on the other hand, strenuously contended that the impugned rule is ultra vires the Act inasmuch as it offends the content and spirit of the provisions of Section 3 of the Act. The learned Counsel also contended that if the impugned rule is allowed to stand, it would tantamount to this Court putting its stamp of authority on an invidious discrimination incorporated in the impugned rule. Elaborating this particular contention, the learned Counsel would draw our attention to the modes prescribed by the other Universities as well as Nizam's Institute of Medical Sciences in the field of selection of candidates to super specialty courses conducted by them. The learned Counsel by reading out certain passages from the judgment of the Supreme Court in *Dinesh Kumar and Others Vs. Motilal Nehru Medical College, Allahabad and Others*, would maintain that the rule-making authority ought to have enacted Sub-rule (3) of Rule 7 on par with the similar provisions contained in the rules framed by the other Universities and Organisations like NIMS. The learned Counsel also contended that since the petitioner had passed the qualifying MD degree in the first attempt and admittedly the third respondent passed the qualifying MD degree in third attempt, by any standards, the petitioner should have been treated as superior in merit to the third respondent and that the action of the University in placing the third respondent above the petitioner in the merit list is, therefore, arbitrary and unreasonable.

7. The threshold question, having regard to the rival contentions raised by the learned Counsel for the parties, is whether any ground is made out by the writ petitioner to invalidate the impugned Rule 7(3). If the impugned rule is held to be valid, no exception can be taken to the action of the N.T.R. University in placing the third respondent above the writ petitioner in the merit list because, admittedly, the third respondent has secured more marks than the petitioner in the subject of Medicine in MBBS course. Therefore, it is appropriate to proceed to consider, in the first instance, the validity of the impugned rule. Before we proceed to consider the above question, it is appropriate to note the principles governing the judicial review of subordinate legislation and scope of such judicial review. A Division Bench of this Court, dealing with the principles governing the judicial review of subordinate legislation and scope of such judicial review, speaking through one of us (S.R. Nayak, J.,) on consideration of the binding authoritative pronouncements of the Supreme Court, in *Suvarna Cements Ltd. v. Union of India* 2001 (6) ALT 28 (DB), held thus:

"Before proceeding to consider the contentions of the learned Counsel for the parties, it is appropriate to note the principles governing judicial review of subordinate legislation and scope of such judicial review. It is true that mandamus lies to quash a notification, order, rule, scheme or other form of subordinate legislation where it is ultra vires or unconstitutional, that is to say, where it violates any of the fundamental rights guaranteed under Part III of the Constitution of India or any other limitations imposed by the Constitution. A statutory instrument may be ultra vires if it exceeds the power by acting in bad faith or exercising it for an unauthorised purpose or acting on irrelevant considerations or by keeping out of relevant considerations or where it is perverse, in the sense that no fair minded person could have ever made, where it is manifestly erroneous having been made on the basis of facts which do not exist or where it is totally arbitrary or where statutory power is used for extraneous purposes which shocks the conscience of the Court. This position in law is well settled by the binding authoritative pronouncements of the Supreme Court in *Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others*, , *E.P. Royappa Vs. State of Tamil Nadu and Another*, , *Saraswati Industrial Syndicate Ltd. and Others Vs. Union of India (UOI)*, , *D.L. Breweries v. D.B. Trading Co.* (1986) UJSC 506, *Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another*, , *Indian Express Newspaper's case* AIR 1956 SC 515. On the other hand, a statutory rule or regulation unlike a bye-law cannot be held invalid on the ground of unreasonableness as distinguished from arbitrariness nor can they question the wisdom of the policy behind the subordinate legislation.

In *State of Kerala Vs. K.M. Charia Abdullah and Co.*, , the Supreme Court held --

If in making a rule, the State transcends its authority, the rule will be invalid, for statutory rules made in exercise of delegated authority are valid and binding only if made within the limits of authority conferred. Validity of a rule whether it is

declared to have effect as if enacted in the Act or otherwise is always open to challenge on the ground that it is unauthorised".

Dealing with the grounds on which a subordinate legislation could be invalidated, the Supreme Court in *I.E. Newspapers (Bombay) Private Ltd. v. Union of India* (1), (1986) 159 ITR 856 (SC) , observed --

"A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock, L.J. in *Mixnam's Properties Ltd. v. Chestey Urban District Council* thus:

The various special grounds on which subordinate legislation has sometimes been said to be void..... can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation- to be valid, must be shown to be within the powers conferred by the statute. Thus, the kind of unreasonableness which invalidates a bye-law is not the antonym of "reasonableness" in the sense in which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a Court would say: "Parliament never intended to give authority to make such rules, they are unreasonable and ultra vires" if the Courts can declare subordinate legislation to be invalid for "uncertainty" as distinct from unenforceable .. this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain".

The summary made by Prof. Alan Wharam in his article entitled "Judicial Control of Delegated Legislation: The Test of Reasonableness" in 36 *Modern Law Review* 611 at pages 622-23 and referred to by the Apex Court in the above Judgment in paragraph 74 is as follows:

(I) It is possible that the Courts might invalidate a statutory instrument on the grounds of unreasonableness or uncertainty, vagueness or arbitrariness; but the writer's view is that for all practical purposes such instrument must be read as forming part of the parent statute, subject only to the ultra vires test.

(II) The Courts are prepared to invalidate bye-laws, or any other form of legislation emanating from an elected, representative authority, on "the grounds of unreasonableness, uncertainty or repugnance" to the ordinary law; but they

are reluctant to do so and will exercise their power only in clear cases.

(III) The Courts may be readier to invalidate bye-laws passed by commercial undertakings under statutory power, although cases reported during the present century suggest that the distinction between elected authorities and commercial undertakings, as explained in *Krn.ie. v. Johnson*, might not now be applied so stringently.

(IV) As far as subordinate legislation of non-statutory origin is concerned, this is virtually obsolete, but it is clear from *In re French Pmlesimi HP. ipifal* that it would be subject to strict control. (See also H.W.R. Wade *Administrative Law* (Fifth Ed.) pp. 747-748).

A Division Bench of this Court in *Rajasthan Trading Co. Vs. The Registrar of Firms and Another*, while holding that Rule 4(2) of A.P. Partnership (Registration of Firms) Rules, 1957 which prescribed a time limit of 15 days for notice or intimation, as ultra vires the power of the State Government u/s 71(2) of the Partnership Act, 1932, held --

"... The section itself does not prescribe any limitation as to the period within which notice should be filed. Notice should, however, be given within a reasonable time. The section, which is designed to give relief to the partners of the firm as well as the public, should be construed more benevolently.

... In our opinion. Section 71(2) of the Act does not empower the State Government to prescribe the minimum period of limitation for the submission of the intimations or notices under the Act. But Rule 4(2) framed in exercise of the power u/s 71(2) specifically stated that every statement, intimation or notice relating to a firm under Sections 60, 61, 62, 63(1) or 63(2) of the Act shall be sent or given to the Registrar together with the prescribed fee within 15 days from the date of such occurrence referred to in such statement, intimation or notice. As already noticed, Section 63(1) of the Act prescribes no such period of limitation nor does it authorise the rule making authority to prescribe. That apart, in Section 63(1) itself permissive words are employed by the Legislature that a person may send intimation to the Registrar about the change in the constitution of the firm. The consequence of non-compliance with the provisions of section are not found in the section itself or in the rules. Further, if the notice sent after the prescribed period of 15 days about the change is rejected, that would result in defeating the manifest purpose of the legislation, namely, to have the names of the persons entered in the Register of Firms. We are, therefore, of the opinion that Rule 4(2) of the Andhra Pradesh Partnership Rules is beyond the rule-making power of the State Government".

Therefore, it is clear that the challenge to the impugned rule should succeed only if the petitioner has made out any of the grounds noted above. Should it be noticed at the threshold that this Court while reviewing the validity of the impugned rule, a piece of delegated legislation/subordinate legislation, is not expected to go into the question whether an alternative, more reasonable, more

prudent, more efficacious rule could have been enacted in substitution of the impugned rule or not. That is not the scope of judicial review. When the constitutional validity of a subordinate legislation is assailed on the ground that the impugned rule is arbitrary, unreasonable, whimsical and violative of Article 14 postulates, the only thing to be seen by the reviewing Court is whether the prescription contained in the impugned rule can withstand the scrutiny of Article 14 or not. It is true that even a rule-making power, if exercised in violation of mandates of Article 14, could be condemned as invalid.

8. In this case, the proviso to Section 3 makes an exception to the main provision of Section 3. It is nobody's case that the proviso as such is violated by enacting Sub-rule (3) of Rule 7. The proviso to Section 3 having made an exception, prescribes that in the case of admission to the Medical and Engineering courses, the admission should be effected only on the basis of relative performance in the entrance test conducted by the concerned authorities. In the instant case, admittedly, entrance test was conducted in conformity with the proviso and the petitioner and the third respondent have secured equal marks. Neither Section 3 nor any provisions of the Act do not enact any provision to resolve a tie between two or more students of equal merits who seek admission to super specialty courses. Therefore, there is a lacuna in the Act to deal with or resolve such contingency. Therefore, the rule-making authority has enacted Sub-rule (3) of Rule 7 to fill in the gap to deal with a possible contingency and such a power is undoubtedly available to the rule-making authority by virtue of power conferred u/s 3 and Sub-section (1) of Section 15 of the Act. If such a power is not conceded to the rule-making authority, the method of selection and admission envisaged u/s 3 of the Act could not be given effect in the event of two or more students securing same marks in the entrance test. Such an interpretation would result in avoidable impracticafities. We are at a loss to understand how a provision, which is intended to fill in gap in the statutory provisions to meet a possible exigency, could be regarded as a provision which supplants the statutory provision contained in Section 3 of the Act.

9. The next question is whether the prescription made in Sub-rule (3) of Rule 7 that in case of tie between two or more students of equal merit, the marks obtained in the respective subjects, Medicine or Surgery, as the case may be, should be taken into account, could be regarded as arbitrary or unreasonable. By no stretch of imagination, it can be said that the subject of Medicine or subject of Surgery could be regarded as something extraneous or irrelevant consideration to pursue super specialty course in the fields of Medicine or Surgery. The performance of the applicant in the subject of Medicine in MBBS course is undoubtedly a relevant consideration to assess his relative merit for the purpose of admitting him to the Super-speciality leading to DM (Neurology). Therefore, Rule 7(3) cannot be condemned as arbitrary or unreasonable.

10. The validity of the impugned rule has to be decided in the premise of

constitutional limitations and doctrine of ultra vires. Therefore, simply because, Nizam's Institute of Medical Sciences, which is said to be an autonomous body, has adopted a different method to resolve a tie between two or more candidates of equal merit who seek admission to super specialty courses in that organization, it cannot be said that the same method should have been provided by the Government in exercise of its rule-making power under the Act. There is no such legal obligation on the part of the Rule-making authority under the Act.

11. Before concluding, another submission made by the learned Counsel for the petitioner placing reliance on the decision of the Supreme Court in *Nedurimilli Janardhana Reddy Vs. Progressive Democratic Students' Union and Others*, , has to be noticed. According to the learned Counsel, since the proviso to Section 3 does not provide a method to resolve a tie in the event of two or more applicants securing equal marks, the rule-making authority in consonance with the method suggested in the main provision of Section 3 should have provided that in case of tie, one who has performed well in relative terms in the qualifying M.D. Examination should be given admission and such a provision would have been in consonance with the law declared by the Supreme Court in the above judgment. The method suggested by the learned Counsel falls within the domain of legislative choices and that it is not permissible for the Court to question the wisdom of the Rule-making authority in adopting a particular method unless that method is shown to be irrational or arbitrary or ultra vires the parent Statute. No such grounds are made out by the writ petitioner.

12. In the result, we allow the writ appeals, set aside the order of the learned single Judge dated 10.7.2002 in WP No. 9805 of 2002 and dismiss the writ petition with no orders as to costs. We declare that the impugned rule is valid and infra vires the Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983.