

(2009) 05 MAD CK 0008

In the Madras High Court

Case No : Writ Appeal No's. 763 and 764 of 2007 and Writ Petition No. 7067 of 2009

Dr. Bharath N., Dr. S. Deebalakshmi and K.G. Arun Raj

APPELLANT

Vs

The Secretary, Selection Committee, The Dental Council of
India and State of Tamilnadu

RESPONDENT

Date of Decision : 12-05-2009

Acts Referred:

Constitution of India, 1950 — Article 15, 162

Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services Under the State) Act, 1993 — Section 4, 4(1), 5, 8

Citation : AIR 2009 Mad 189 : (2010) WritLR 165

Hon'ble Judges : P. Jyothimani, J; Aruna Jagadeesan, J

Bench : Division Bench

Advocate : K.M. Vijayan for La Law, for the Appellant; S. Rajasekar, Addl. Govt. Pleader for R.3 in WA and R1 and R2 in WP, for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—The writ appeals are directed against the common order passed by the learned single Judge in W.P. Nos. 12762 of 2007

and 13336 of 2007 etc., dated 02.05.2007. Under the said order the learned Judge, while dismissing the writ petitions has held that there is no

unreasonableness in the roster system sought to be introduced by the impugned Government Order.

2. W.P. No. 7067 of 2009 has been filed for declaration that Clause 54(b) and Annexure II relating to Super specialty Five Year course in M.Ch.

(Neuro Surgery) under the prospectus for admission to Post Graduate degree for the academic year 2009-2010 is invalid in so far as it provides

reservation in the category of Super specialty Post Graduate Medical course and

reservation by roster is contrary to Article 15 and against the judgment of the Supreme Court and the provisions of the Tamil Nadu Act 45 of 1994 relating to reservation in admission and also for direction against the respondents to fill up M.Ch.(Neuro Surgery) from and out of service candidates as per the merit list and grant admission to the petitioner.

3. Since the writ petition is connected with the point that is involved in the writ appeals, the writ petition is directed to be posted along with the appeals for a decision.

4. The interesting points involved in these cases are, whether the roster system is admissible in respect of admission to Postgraduate course as well as Super specialty course in Medical Education; whether the concept of reservation can be applied in respect of Super specialty course and whether the Five year integrated M.Ch. course in Neuro Surgery introduced from the academic year 2009-2010 by the respondents is a super-specialty course or a Post Graduate Medical course.

5. It is not in much dispute that the respondents have introduced the Five Year M.Ch. (Neuro Surgery) course for the first time in the State. The prospectus issued by the respondents for the year 2009-2010 shows that the Five Year M.Ch. (Neuro Surgery) course is a Postgraduate Degree course. The eligibility criteria for Five Year M.Ch.(Neuro Surgery) course are that the candidate should be a citizen of India and should have undergone MBBS course in the State of Tamil Nadu and passed the said MBBS degree and completed CRR period on or before 31.03.2009 in the Tamil Nadu Dr.MGR Medical university or any other university recognised as equivalent. The entrance examination for M.Ch.(Neuro Surgery) and Postgraduate degree courses was held on 22.02.2009 among the undergraduate candidates. The maximum mark 100 is divided into two; 90 marks for entrance examination and 10 marks for experience, including the marks for hilly areas and rural areas. The admission would be effected by counselling process on the basis of merit by applying the Rule of reservation wherever applicable.

6. For the year 2009-2010, number of candidates to be admitted in the five year M.Ch.(Neuro Surgery) are four, out of whom two are to be admitted in Madras Medical College, Chennai; one in Stanley Medical College,

Chennai and one in Madurai Medical College, Madurai. Out of the sanctioned seats, 50% are offered to All India quota allotted by the Director General of Health Services, New Delhi and the remaining are allotted to State quota, however, vacant seats under the All India quota will be surrendered for being filled up under the State quota among merit list candidates following the Rule of reservation.

7. It is also stated in the prospectus that 50% seats in each Branch are reserved for service candidates and the remaining seats should go to open category. The relevant Clauses in the prospectus issued for the year 2009-2010 are 54(a) and 54(b), which read thus:

54(a). The selection will be made by counselling based on merit and by applying the Rule of reservation followed by the Government of Tamil Nadu wherever applicable.

(b). 50% of seats in each branch are reserved for service candidates, in addition to those service candidates selected in the open category. In case of an odd number of vacancy that vacant seat shall be filled up by consideration of merit among Service candidates only.

Roster method of Rule of reservation will be followed if the seats are more than 1 and less than 8 in each branch as per G.O.Ms. No.

241/dt.29.10.2007 of P & AR (K) Dept. of Government of Tamil Nadu. If the seats are 8 and more, the Rule of reservation shall be as follows:

Open competition ... 31%

Backward class ... 30%

Most Backward/Denotified ... 20%

Scheduled caste ... 18%

Scheduled Tribe ... 1%

Within the 30% reservation for Backward Classes 3.5% reservation will be provided for Muslims.

8. On the factual matrix, out of four sanctioned seats for Five Year M.Ch. (Neuro Surgery) course, two are to be admitted from State quota of which one should be from service candidate and the other from the open category and the remaining two are from the All India quota.

9. The case of the petitioner in W.P.No.7067 of 2009 is that he belongs to service category and appeared for the entrance examination conducted

by the respondents and obtained total marks of 69.04 and secured overall rank 63 and service rank 31. In the counselling that took place on

03.04.2009, he was offered only M.D. General Medicine though he is interested in M.Ch. (Neuro Surgery) and the petitioner was denied

admission by applying the roster system under Clause 54(b) of the prospectus under which M.Ch. (Neuro Surgery) seat under service category is

stated to have been reserved exclusively for MBC candidates alone in the academic year 2009-2010.

10. In respect of the appellants in two appeals before us, they sought for admission in M.D.S. Course for the academic year 2007-2008. Out of

the total seats available in the State of Tamil Nadu in M.D.S. Post Graduate Dental course, 50% seats were allotted to All India quota and the

remaining seats were earmarked for State quota to be allotted by the Selection Committee, the Director of Medical Education, Chennai. There are

seven faculties in MDS Course conducted by Madras Dental College and in no faculty there were more than 8 candidates and in fact, it was not

more than four candidates representing non-service candidates. As per Clause 8 of the General Instructions issued for the year 2007-2008,

Rule of reservation is applicable when there are eight seats and more in each discipline.

However, the State Government issued G.O.Ms.No.95 (Health and Family Welfare Department) dated 22.3.2007 providing for roster system to

be followed, if there are less than eight seats in each discipline. According to the appellants, if, as per the prospectus, the reservation was not

applied, they would have got admitted on merits and hence, they have filed the respective writ petitions for direction to admit them to MDS Course

in the academic year 2007-08.

11. The contention raised by Mr. K.M. Vijayan, learned senior Counsel appearing for the appellants and the writ petitioner is that the prospectus

issued by the respondents for the year 2007-08 stating that the Rule of reservation is applicable when there are eight seats or more in each

discipline is binding upon the parties and in the absence of any Rule made by the Government in accordance with the powers conferred u/s 8 of the

Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of seats in educational institutions and of Appointments of

posts in the Services under the State) Act, 1993 (Act 45/1994), the Government Order issued in G.O.Ms. No. 95 (Health and Family Welfare

Department) dated 22.3.2007 applying the Rule of reservation even if the number of seats are less than eight has no statutory force.

11(a). It is also his submission that the roster system which has been referred to in the said G.O. for admission in Postgraduate Medical Education

is not acceptable because, Section 4 of the said Act (Act 45/94) speaks about the admission on annual basis applying the Rule of reservation and

what is applicable is Section 5 which says that the appointment is a continuous process and according to him, the roster system will have no

application in respect of admission on annual basis and it is applicable where the appointment is a continuous process.

11(b). It is his further submission that applying the roster system for admission, as per G.O.Ms.No.95, dated 22.3.2007 is ultra vires. It is his

submission that by applying the roster system, a particular group of communities would be completely denied their right of participating in the

admission process in each year. It is his further submission that M.Ch Course in Neuro Surgery is conducted as an integrated five year degree

course and as a super specialty course, it cannot be treated as a mere postgraduate course. According to him, postgraduate M.D. is awarded after

completion of two years of the course and it is, thereafter admission is made to M.Ch. Course for another three years, and in the present case, by

integrating both the courses, the period of course is increased to five years and, it would not take away the super specialty character of M.Ch.

Course. He therefore submitted that in respect of super specialty course, the Rule of reservation is not applicable and admission is to be made only

on the basis of merit. It is his submission that for admission to M.Ch. (Neuro Surgery), M.B.B.S. can not be the basic requirement.

12. On the other hand, it is the contention of the learned Counsel for the respondents in the appeals as well as in the writ petition that the roster is

only a continuation of existing reservation Rule and as far as applicability of the Rule of reservation it is for the authorities to decide from time to

time as permitted by the Supreme Court. It is the further contention of the learned Additional Government Pleader that G.O.Ms.No.95, dated

22.3.2007 was issued in furtherance of the executive functions of the Government and therefore, it should be treated as an executive instruction. It

is his submission that it is not as if when Rules are not made, the purport of the Act should not be implemented by executive instructions and

according to him, the G.O.Ms. No. 95 dated 22.3.2007 is not running contrary to the provisions of the Act. It is his further submission that simply

because M.Ch. (Neuro Surgery) is an integrated five year course, it cannot be treated as a super specialty course since the basic qualification

required is only M.B.B.S. Degree and not a postgraduate degree and M.Ch. degree being a second degree should be treated as a postgraduate

degree.

13. The learned Judge, while considering the said arguments, has held that by applying the roster system, the admission right of persons belonging

to any community to be considered in the open category is not affected. It was further held that by applying the roster system, a particular

community may not get a chance for admission in a particular year, but that community will get the chance in the next year and therefore it will be a

carry forward Rule that perpetuates. The learned Judge further held that merely because Section 4 of Act 45 of 1994 does not provide for roster it

does not mean that the Government cannot formulate the policy of roster. It is on that basis, the learned Judge held that the G.O.Ms.No.95, dated

22.3.2007 cannot be held to be invalid or against the provisions of Section 4 of the Act 45 of 1994.

14. As far as the principle of reservation is concerned, Section 4 of Act 45 of 1994 provides for reservation of seats in educational institutions and

Section 5 provides for reservation in appointments of posts in the services under the State. For the purpose of understanding the issues involved in

this case, it is relevant to extract Sections 4 and 5 of the Act 45 of 1994 which are as follows:

4. Reservation of seats in Educational Institutions:

(1) Notwithstanding anything contained in any judgment, decree, or order of any court or authority, having regard to the social and educational

backwardness of the Backward Classes of citizens and the persons belonging to the Scheduled Castes and the Scheduled Tribes who constitute

the majority of the total population of the State of Tamil Nadu, the reservation in respect of the annual permitted strength in each branch or faculty

for admission into educational institutions in the State, for the Backward Classes

of citizens and for the persons belonging to the Scheduled Castes and the Scheduled Tribes, shall be sixty-nine per cent.

(2) The reservation referred to in Sub-section (1) shall, in respect of the persons belonging to the Backward Classes, the Most Backward Classes and Denotified Communities, the Scheduled Castes and the Scheduled Tribes, be as hereunder:

- (a) Backward Classes - Thirty per cent
- (b) Most Backward Classes and Denotified Communities - Twenty Per cent
- (c) Scheduled Castes - Eighteen Per Cent
- (d) Scheduled Tribes - One per cent.

5. Reservation in appointments or posts in the service under the State.-(1) Notwithstanding anything contained in any judgment, decree or order of

any court or other authority, having regard to the inadequate representation in the services under the State, of the Backward Classes of citizens and

the persons belonging to the Scheduled Castes and the Scheduled Tribes, who constitute the majority of the total population of the State of Tamil

Nadu, the reservation for appointments or posts in the services under the State, for the Backward Classes of citizens and for the persons belonging

to the Schedules Castes and the Scheduled Tribes, shall be sixty-nine per cent.

Explanation.- For the purposes of this Act, ""services under the State"" includes the services under-

- (i) the Government;
- (ii) he Legislature of the State;
- (iii) any local authority;
- (iv) any corporation or company owned or controlled by the Government; or
- (v) any other authority in respect of which the State Legislature has power to make laws.

(2) The reservation referred to in Sub-section (1) shall, in respect of the persons belonging to the Backward Classes, the Most Backward Classes

and Denotified Communities, the Scheduled Castes and the Scheduled Tribes, be as hereunder:-

- (a) Backward Classes - Thirty per cent
- (b)Most Backward Classes and Denotified Communities - Twenty Per cent

(c) Scheduled Castes - Eighteen Per Cent

(d) Scheduled Tribes - One per cent.

15. A reading of the above provisions make it clear that the reservation in educational institutions is different from the reservation in appointment of posts in services under the State. It is clear from Section 4 that the only reservation is applicable for the obvious reason that the admissions are made every year. Such a Clause is not available u/s 5 of the Act as the appointment to the Government service is a continuous process. In fact, the Government has prescribed the concept of roster system which was originally 50 point roster and subsequently 100 point roster and presently 200 point roster with an idea of providing employment opportunity to all classes of persons like, Backward Classes, Most Backward Classes, Scheduled Classes and Scheduled Tribes and therefore, the appointment which is a continuous process is made following the roster system.

However, in respect of admission to educational institutions, it is an annual process and whether 100 points or 200 points of roster system are followed or not, the percentage prescribed for each classes of persons should be maintained.

16. A comparative reading of Sections 4 and 5 makes it very clear that while in the case of educational institutions reservation has to be followed every year, in the case of appointments in services the reservation has to be followed as a continuous process by roster not pertaining to a particular year but, as and when vacancies arise in each of the departments.

17. There is one other difficulty in the roster system for being followed in admission to educational institutions. When admission is on yearly basis, every qualified student is entitled to participate in the admission process, of course, based on the percentage of reservation. As the roster points are to go to a particular community in a particular year, the applicability of roster system in admission to educational institutions is not desirable, especially in the circumstance where very limited number of seats are available, because students belonging to other communities may not get chance in a particular year and they have to wait for next year, and that would not amount to equal distribution of existing seats every year among the qualified students based on the Rule of reservation. Further, it is not acceptable that if in any particular year persons belonging to a particular

community may not be able to participate in the admission process they can wait for next year. It would not only be an abuse of the admission

process, but would take away the valid rights of students in participating in the admission process every year. That is not the purport of Section 4

of the Act. We are of the considered view that the finding of the learned Judge that a particular class of persons who are denied admission in a

particular year can wait for next year is not the correct position of law.

18. The mere postponing the right of qualified students to participate in the admission process for next year in effect would cause enormous

injustice which can never be the purport of any law including the policy of reservation. On the other hand, in the matter of appointment in service, it

is, only as and when vacancy arises in a department, the post is filled up and therefore, the roster system is being followed as a continuing process

with the intention to give the benefit of reservation policy to all communities turnwise. The concept of reservation being the basis for Section 4 and

5 of the Act, the roster can be applicable only to service matters and that cannot be applied to the admission process in the educational institutions.

In such view of the matter, the action of the respondents in not allowing the petitioner in W.P. No. 7067 of 2009 to participate in the selection

process for the year 2009-10 on the ground that in this year as per roster system, the opportunity would only go to candidates belonging to Most

Backward Classes is illegal and not permissible in law and also opposed to the Rule of reservation.

19. Moreover, on the facts of the case in the writ petition, out of four seats, two seats have been handed over to All India quota. The only

remaining two seats to be filled up among service candidates. By applying roster system it would cause disaster to the Rule of reservation.

20. It is also relevant to point out that Section 8 of the Act enables the Government to make Rules for the purpose of implementation of various

provisions of the Act, but the Government has not framed Rules either regarding admission or appointment. Nevertheless, the intent of Section 4 of

the Act which contemplates reservation to Backward Classes, Most Backward Classes, Scheduled Castes and Scheduled Tribes at 30%, 20%,

18% and 1% respectively, remains to be enforced. When such legislative mandate prevails, the question remains to be seen is whether it is possible

for the Government to issue an order contrary to Section 4 of the Act in the absence of any Rule made as per the Act.

21. When Section 4 makes it clear that the percentage of reservation has to be given effect to based on the annually permitted strength in each

branch or faculty, the Government Order in G.O.Ms. No. 95, dated 22.3.2007 restricting the application of reservation only in case the seats are

more than eight and introducing the roster system if the seats are less than eight, certainly runs contrary to Section 4 of the Act. Apart from that, the

contention that the said G.O.Ms. No. 95, dated 22.3.2007 could be treated as executive instruction permissible under Article 162 of the

Constitution of India cannot be countenanced, particularly when the Government Order runs contrary to the Act 45/1994. Further, the comparison

of the power of Pollution Controlling Authority in declaring an area as pollution control area which is a distinct act of the Board being a competent

authority for the said purpose with that of the present respondents in issuing the Government Order taking away the right of reservation in the

matter of admission when the seats available are less than the prescribed norm is not acceptable. The law laid down by the Hon"ble Apex Court in

Orissa State (Prevention and Control of Pollution) Board Vs. Orient Paper Mills and Another, upholding the right of the Board to declare an area

as air pollution control area even in the absence of framing of Rules by the State Government is certainly distinct from the present case which

relates to reservation and when the Act contemplates reservation process to be adopted annually, it is certainly not for the Government to issue the

G.O.Ms. No. 95, dated 22.3.2007 taking away the right of reservation where the number of seats to be filled up in a faculty are less than eight. In

such view of the matter, we are of the considered view that the finding of the learned Judge in this regard is not correct.

22. However, in the writ petitions filed by the appellants, the prayer was to admit them in MDS Course for the academic year 2007-08 as per the

conditions of the prospectus issued without following the Rule of reservation when the number of seats sought to be filled up is less than eight in

each faculty. It is true that the contents of the prospectus are binding on the parties and in the prospectus and general instructions issued for the

year 2007-08, in clause-8 it was specifically stated that "rule of reservation is applicable when there are eight seats and more in each discipline"

thereby meaning that in case where the seats are less than eight, the Rule of reservation has no application for admission for the year 2007-08. This

is equally not in accordance with Section 4 of the Act. The analogy that is applicable against the roster system which is opposed to Section 4 of the

Act would equally apply against Clause 8 of the general instructions given for the year 2007-08 also.

23. The contention of the learned Additional Government Pleader that application of roster system if the seats are less than eight is a policy

decision is not acceptable, in the light of Section 4 of the Act which mandates that the reservation has to be followed in all cases of admission. In

such view of the matter, the prayer of the writ petitioners who are the appellants in the above appeals runs contrary to the provision of Section 4 of

the Act which does not distinguish the number of seats for the purpose of application of the Rule of reservation. Therefore, we have no hesitation

to hold that the appellants' case in the writ petitions cannot be accepted, for the reason that the Rule of reservation should not be given a go-by

even if the number of seats to be filled up were less than eight and that Clause 8 of the general instructions given for the year 2007-08 is opposed

to Section 4 of Act 45/1994. In this view of the matter, the dismissal of the writ petitions by the learned Judge need not be interfered with.

Accordingly, the writ appeals stand dismissed. However, if roster system was followed in admission for the year 2007-2008, the same is not

permissible in law.

24. Now, in respect of admission to M.Ch. Integrated Five Year Course, for the reasons explained above, the roster system cannot be made

applicable to the admission by virtue of Section 4 of Act 45/1994 and we are of the view that the denial of participation of the petitioner in the

counselling for Five Year Integrated M.Ch. Neuro Surgery Course for the year 2009-10 on the above said ground is not permissible in law. That

apart, the contention of the learned Counsel for the respondents is that separate prospectus has been issued for super specialty course as well as

postgraduate course in medicine and in respect of the super specialty course, viz., M.Ch. Neuro Surgery, out of four seats, two seats are to be

admitted in Madras Medical College, one seat is to be admitted in Stanley Medical College and the remaining one seat is to be admitted in

Madurai Medical College. Further, in the prospectus for Post Graduate Degree/ Diploma/MDS 5 Year M.Ch (Neuro Surgery) Courses for the

year 2009-10, of course, in Annexure-II under M.S. Course category, M.Ch. (Neuro Surgery) is added. The question is, by merely adding

M.Ch. Neuro Surgery with M.S. Courses, whether M.Ch. Course ceases to be a super specialty course. In the absence of any material to show

that the syllabus for M.Ch. Neuro Surgery as stated in the prospectus of super specialty course and the syllabus for Five Year M.Ch. Neuro

Surgery Course included as one of the postgraduate courses in the prospectus issued by the respondents are distinct, it is not possible to accept

the contention of the learned Counsel for the respondents that both the courses are different. It is relevant to point out that including D.M. Course,

all other super specialty courses are M.Ch. only. Therefore, it is clear that admission to such super specialty course as that of M.Ch. Neuro

Surgery can be made only from among the persons who are the Postgraduate holders and merely a person who has completed graduation in

medicine, viz., M.B.B.S. is not entitled for admission to M.Ch. Course. Accordingly, in our considered view, in the absence of any special

circumstance showing that the syllabi for both the courses are entirely different, it is not possible to accept the contention that Five Year Integrated

M.Ch. Neuro Surgery Course is a postgraduate course and not a super specialty course.

25. Law is well settled that in respect of super specialty course, the selection shall be only based on merits. The Supreme Court in *Dr. Sanjay*

Mehrotra and Another Vs. GSVM Medical College, Kanpur and Others, , while dealing with the reservation of 75% of seats for institutional

candidates, held as follows:

4. According to the High Court, in view of the decision of this Court in *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, ,

admission to super speciality courses should be made strictly on the basis of present merit and as no examination was held by the college to assess

the merits of the candidates, the High Court set aside the admission of the appellants and respondent No. 9.

26. Therefore, the super specialty course being a specialised course in medicine, merit alone shall be the criterion and not any other consideration

including the communal reservation. In any event, on the facts of the case, it is seen that for the service candidates only one seat is available and the

law is well settled that reservation cannot be applied if the seat to be filled up is only one. Therefore, the petitioner in W.P. No. 7067 of 2009,

having only M.B.B.S. degree is not entitled to be considered for M.Ch. Neuro Surgery Course for the year 2009-10. In these circumstances, the

writ appeals and writ petitions are disposed of in the following terms:

(1) W.A. Nos. 763 and 764 are dismissed holding that the policy of reservation is applicable for admission even if the number of seats are less

than eight;

(2) Roaster system is not applicable for admission in educational institutions since Section 4 of the Act 45 of 1994 contemplates admission on

annual basis;

(3) Clause 8 of the prospectus/General Instructions to candidates issued by the respondents for the year 2007-08 denying reservation in case the

seats are less than 8 is set aside;

(4) Clause 54(b) of the prospectus for postgraduate degree/diploma/MDS 5 year M.Ch.(Neuro Surgery) courses, 2009-10 is set aside in so far

as it relates to roster system of Rule of reservation in cases where the seats are more than one and less than eight in each branch;

(5) Five Year Integrated M.Ch. Neuro Surgery Course is to be treated as a super specialty course and admission shall be made only based on

merit without following the Rule of reservation. Further, it is made clear that for admission to M.Ch. Neuro Surgery course, the qualification shall

not be under graduation in Medicine and any admission made for the year 2009-2010, contrary to the above said ruling stands set aside.

(6) W.P. No. 7067 of 2009 is ordered accordingly.

No costs. Connected miscellaneous petitions are closed.