

(2014) 10 KL CK 0319
In the High Court Of Kerala
Case No : W.P. (C). No. 17721 of 2014 (M)

Gautam S. Raj

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 13-10-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 15(4), 16, 16(1), 16(4)

Citation : (2014) 10 KL CK 0319

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : S.P. Aravindakshan Pillay, N. Santha, K.A. Balan, Peter Jose Christo and S.A. Anand, Advocate for the Appellant; Biju Meenatoor, Senior Government Pleader and Millu Dandapani, Standing Counsel, Advocate for the Respondent

Judgement

K. Vinod Chandran, J.—The essential question to be decided in the above writ petition is, as to the quantum of seats on which the percentage of reservation has to be applied; whether such percentage has to be applied on the total number of seats available in the course or on the number of seats available for admission to the general category and reserved categories; after excluding those seats reserved for cadets of Indian Navy and Sports persons.

2. The specific issue raised here is, with respect to the admission to the B.Tech, Naval Architecture and Ship Building course, in which 40 [forty] seats are available in a selection year. Twelve of the said 40 seats are earmarked for cadets of the Indian Navy and one for the Sports Quota. The University, on the ground of maintaining a balance and also in the teeth of reservation beyond 50% being frowned upon; devised a system by which the 13 seats reserved for cadets of Indian Navy and the Sports Quota were excluded while applying the percentage of reservation. Hence, out of the 40, the percentage of reservation was applied on 27 seats alone. A resolution of the said question would redress the grievance of the petitioner.

3. On facts, it is to be noticed that the petitioner, undisputedly belonging to the

category of Scheduled Tribe, applied for Bachelor of Technology graduate course conducted by the respondent-University. Graduate courses are conducted in many disciplines and the petitioner had, by Exhibit P4, intimated five options, the first of which was Naval Architecture and Ship Building; which happens to be the most prestigious and sought after course in the graduate engineering stream of the University. The procedure for selection and the ranking is not relevant in the present case. Suffice it to say that, the petitioner, in general merit, had a rank of 3482, while among the category of Scheduled Tribe, he was placed at the 1st rank; in the rank list for graduate admissions made to the respondent-University, as is evident from Exhibit P5. The petitioner, as per the general merit, was allotted to B.Tech Mechanical Engineering (free seat), which was his 4th option. But, he did not join the same, since he was confident of being admitted to his first choice; he having secured 1st rank among the Scheduled Tribe candidates.

4. As per the reservation policy, at least one seat from the 40 seats available for the said course had to be reserved for Scheduled Tribe candidates, is the contention of the petitioner. The petitioner relies on Exhibit P8, wherein the Government's policy of communal reservation has been adopted by the University and in a professional course, the reservation prescribed for the Scheduled Tribe candidates is 2%. As per Exhibit P9 Government Order, a fraction of $\frac{1}{50}$ or more; while applying the aforesaid percentage, has to be rounded off to 1 [one]. Two percent of 40 being 0.80, it is the contention that one seat ought to be reserved in the graduate course in Naval Architecture and Ship Building, which the petitioner is entitled to, in the subject year.

5. The learned counsel for the respondent-University, however, relies on the roster of admissions devised by the University to implement the reservation policy. The first contention is that, out of the Forty, 12 seats are reserved for cadets of Indian Navy and 1 seat for Sports Quota. If reservation is applied to the total number of forty seats, 16 seats would have to be earmarked for communal reservation. The 16 set apart for communal reservation and the 13 reserved for Navy and Sports personnel, would result in the reservation exceeding 50%; which is proscribed by the Hon'ble Supreme Court. It is, hence, that the University has excluded the seats for Naval and Sports personnel and applied the percentage of reservation in the balance available seats. When adopting such a scheme of reservation, 0.54 is the percentage reserved for Scheduled Tribes and it is not possible for a Scheduled Tribe candidate to be taken in every year. Such reservation could be applied in the case of Scheduled Tribes only in alternate years and that would in fact ensure the proper implementation of the reservation scheme without at all sacrificing the merit, is the contention.

6. The learned counsel for the respondent also would place reliance on the decisions in *Ku. Vrushali and Others Vs. The State of Maharashtra and Others*, , *Dr. B. Kaladhar and Others Vs. Government of A.P., Health, Medical and Family Welfare Department and Others*, and *Dr. Anusar Gupta Vs. All India Institute of*

Medical Sciences and Others . The learned counsel for the petitioner would place reliance on Exhibits P14 and P15, which are respectively an interim order passed in a writ petition and the judgment dismissing the appeal from such order.

7. The respondent-University has an alternate contention, insofar as the petitioner being disentitled to seek any upgradation for having not admitted himself in the course which was offered as per the general merit. This omission on the part of the petitioner, as per the general instructions to the candidates produced at Exhibit P10, disentitles him from claiming any admission in the year 2014-15. Specific reference is made to item Nos. 6, 7 and 8 in the Special Instructions in Exhibit P10, wherein, any allotment of candidates who does not confirm their admissions by remittance of fees in full on the scheduled date, would, on such omission, forfeit his/her claim to any of the higher options exercised in the application. According to the University, the petitioner ought to have paid the fees and admitted himself in the course he was allotted and then sought for upgradation. Having not done so, the petitioner forfeits his claim, is the argument.

8. The last contention, with respect to forfeiture, has to be considered first, because that would, if found against the petitioner, disentitle him altogether. The general instructions to students do specifically speak of forfeiture and that would have definitely applied in a regular claim for upgradation, without having got himself admitted in a course to which he was allotted. However, here is a case in which the allotment itself is made by Exhibit R2 (a), produced by the University itself, dated 08.07.2014. The very next day, on 09.07.2014, the petitioner's father addressed the University by Exhibit P7, claiming admission to the Naval Architecture and Ship Building course, since the petitioner had stood 1st among the Scheduled Tribe candidates. The writ petition itself was filed on 10.07.2014 and on 15.07.2014, there was an interim order that one seat in the B.Tech. Naval Architecture and Ship Building course should be kept vacant. That order has been continued till date. In such circumstance, the contention raised on behalf of the University regarding the forfeiture of the candidature would fail.

9. The University has placed before this Court the chart of reservation and distribution of seats when the percentage is applied to 27 seats and that applied to 40 seats.

Table 1 - Distribution of seats when total seats are 27

Table 2 - Distribution of seats when total seats are 40

10. The Hon'ble Supreme Court in *State of Kerala and Another Vs. N.M. Thomas and Others*, dispelled the till then, oft-quoted theory that Articles 15(4) and 16(4) are exceptions to the guarantee of equality as enshrined in Chapter III of the Constitution of India. It was held that reservation, on the other hand, is a device which brings about a semblance of equality by uplifting the weaker sections of the society to the equal status of the more favoured class.

"Article 16(1) is affirmative whereas Art. 14 is negative in language. Article 16(4) indicates one of the methods of achieving equality embodied in Art. 16(1)" [para 46].

The issue has to be looked at in that constitutional perspective.

11. The exclusion provided by the University is with respect to the reservation made for Naval cadets and for Sports personnel. Admittedly no communal reservation is applied in such selection and those are allotted on the basis of merit and on the satisfaction of specifications prescribed for applying for such special reservation; in which caste or community is not at all an aspect which is to be considered. Communal reservation, as enshrined in the Constitution and reflected in the policies of the Government, are implemented as per the specific guidelines on that aspect. Looking at the density of population of each category entitled to reservation as also other factors specific to a State or area, different percentages are applied for different categories. Such policy of the State and adopted by the University, is what is indicated in Exhibit P8. Among others, Scheduled Tribes have been granted 2% reservation and when this is applied on, the balance seats available to be filled up from the merit based candidates; such device adopted definitely tinkers with the policy of reservation.

12. This Court would concede to the proposition advanced by the learned counsel for the respondent-University that neither Exhibit P14 nor Exhibit P15 can be treated as binding on this Court. Exhibit P14 is an interim order in a writ petition which is said to be still pending. In Exhibit P15, the Division Bench specifically noted this aspect and refused to go into the details and no interference was caused on the well accepted principle that an appellate Court would not interfere merely on the ground that there is another reasonable view possible. The Division Bench was cautious to notice that, the interim order passed in the writ petition was only a tentative conclusion and would have to be decided in the writ petition itself.

13. However, this Court is fully in agreement with the reasoning of the learned Single Judge in Exhibit P14 interim order. That was a case in which the Government brought about a reservation for in-service candidates in Post-graduate Medical Courses conducted in the Medical Colleges. When applying communal reservation as per the policy of the Government, those seats which were reserved for in-service candidates, meaning those in the service of the Government, was excluded. The learned Single Judge, in Exhibit P14 order, held that such a change made by the Government itself would constitute a major policy decision concerning Scheduled Castes and Scheduled Tribes and would require consultation as provided in Articles 338(9) and 338A(9). True, the said observation was made since the Government had, all along, applied the percentage for communal reservation on the total number of seats and had only in that particular academic year, changed its policy on the basis of reservation brought in for in-service candidates and there was a change in policy.

14. Herein, it is contended that the University has been following this method for long. The petitioner's counsel per contra, vociferously argued that such a contention would be begging the question as to the illegality visited on the reserved categories for long. The petitioner's counsel asserts that the writ petition has urged reliefs to a broad extent. This Court is not convinced that any general directions are to be issued in this case; nor an enquiry is to be directed on the question of reservation in the University, in the present writ petition. Despite the prayers made to that end, this Court is of the opinion that no such exercise can be made in the aforesaid writ petition acting within the contours of jurisdiction conferred on this Court under Article 226 of the Constitution, since this Court is not dealing with a public interest litigation. Nor would the same be permissible since public interest litigations are to be posted before a Division Bench, as per the roster. The petitioner does not seek for a posting before the Division Bench, hence the question is only with respect to the petitioner's admission.

15. It has to be noticed that the University has implemented the policy of the Government and as the policy stands, the University cannot tinker with the spirit and essence of such policy by excluding certain seats as being specially reserved for other categories; when such reservation is not in accordance with the principles enshrined in the Constitution of India as to communal reservation. The decisions placed by the learned Standing Counsel for the respondent-University, unfortunately, are not applicable to the present facts, especially since admittedly reservation is made on the number of seats in the particular course in which admissions are made by the respondent-University. The Common Entrance Examination is conducted for admission to the graduate course leading to a B.Tech Degree, in various disciplines. In the present case, to various disciplines of Engineering. The reservation percentage, as is evident from Exhibit P8 policy and the statement filed by the respondent-University, is applied to the seats available to this particular course.

16. Dr. B. Kaladhar (supra) was a case in which reservation was applied to the entire gamut of courses in three different Universities in the State of Andhra Pradesh. Reservations were made on a 100 point roster and besides communal reservations, which are horizontal in nature, vertical reservations for the disabled and, as was noticed by the Full Bench, even diagonal reservations, meaning 85% of the seats being reserved for the local candidates, was the subject dealt with. The specific question considered therein was as to a reserved category candidate, fairly higher up in merit, for reason only of his being placed higher up, losing an opportunity for being allotted to a better course in a better college for reason only of the reservation point being lower to the rank of such candidate. Then, a person having lesser merit in the reserved category would be admitted to the more preferred course. A Full Bench of the Andhra Pradesh High Court found that the Government orders challenged in the said batch of cases, took note of such anomalies and attempted at dispelling the same.

17. The 100 point roster provided for a particular seat in a particular college/course at each point. As is illustrated therein, a candidate included in a category entitled to reservation provided at the 7th point, if placed at a higher rank would be denied of a chance to get his first option only for the reason of his higher rank. Then the rules provided that he would be capable of being admitted to the point of reservation, at the 7th point, which is his first option. Otherwise, a candidate 'A', placed at the 2nd rank would loose out to the next available candidate in the reserved category, at the 20th rank. The 7th position, which is desired by the 2nd rank holder, will then go to the 20th rank holder, thus disentitling the 2nd rank holder from getting a much desired allotment only by reason of his merit. Granting such seat to the meritorious candidate would also result in the reserved category losing a seat, since the candidate appointed to the reserved vacancy would have been allotted on merit itself. In such circumstance, the Court found that the Government Order contemplated reverse reservation insofar as allotting the 2nd rank holder to the 7th position, as per his option, and the chance lost to the reserved category being adjusted from the last points available under the 100 point roster, dislodging a merit based candidate, to ensure that no reserved candidate is denied a chance of reservation by reason of the adjustments made. We do not have such a position in the present case, since admittedly the reservation is not based on a 100 point roster applied to the entire courses as a whole. The roster system adopted by the University is said to be the balancing device provided, ensuring reservation of a category in the alternate or subsequent sessions (meaning "admission years") as possible and permissible.

18. Dr. Anusar Gupta (supra) also does not help the respondent-University, since the seats available there, were, minimal and specifically 5 in number, in which event a rotational exercise spreading over the various academic years would be expedient. To apply communal reservation without violating the 50% reservation is well nigh impossible when seats are minimal, unless reservation is confined to certain categories in each of the sessions or academic years.

19. Heavy reliance has been placed on Vrushali (supra) which, according to the learned counsel for the University, is identical on facts and the law laid down is squarely applicable. The issue therein was also with respect to the restriction of reservation to the permissible limit of 50%; or more aptly, as to how and on what criteria it was to be applied. The State of Maharashtra had framed rules governing admissions to the Dental and Medical Colleges in the State, whereby the criteria laid down for distribution of seats primarily set apart 15% of the seats available in Government Colleges to be filled up from All India Entrance Examinations and the reservation was applied to the balance 85%. As for, private colleges 50% were "free seats" and 50% "payment seats", out of the latter of which 5% was set apart for NRI students; which was later increased to 15% as permitted by the Hon'ble Supreme Court. Whether the reservation has to be applied on the total seats available or on the seats after excluding the 15% set apart for the NRI students, was the issue dealt with. The Division Bench of the

Bombay High Court found that the reservation has to be applied only on the balance available for disposal of the Competent Authority, designated under the Rules to carry out admissions.

"... It is a common ground that as per the order of the Court as well as under the rule, NRI quota is only from amongst the category of payment seats from private Medical Colleges. Rule 5.1.0 clearly states that out of the seats at the disposal of the Competent Authority, seats are reserved for Backward Classes and Other Backward Classes as mentioned in Rule 5.1.1. We are clear in our opinion that on proper reading of the rules, the seats allotted to NRI quota are excepted from the seats at the disposal of the Competent Authority and thus, out of total fifty payment seats in the private Medical or Dental College, fifteen seats allotted to NRI quota must necessarily go out of the seats available at the disposal of the Competent Authority. In the result, under the rules, the constitutional reservation being expressly out of the seats at the disposal of the Competent Authority, it must be out of thirty-five seats, which are at the disposal of the Competent Authority. So far as seats allotted to NRI quota are concerned, it is an agreed position that the Competent Authority has nothing to do and all those seats are filled in directly by the Colleges concerned and the Competent Authority does not figure in the picture at all. If that is so, as far as private Medical and Dental Colleges are concerned, the constitutional reservation under Rule 5.1.0 has to be out of thirty-five seats and not out of fifty seats as done by the Competent Authority. This is also logical and rational. We have already indicated that so far as Government Medical and Government Dental Colleges are concerned, fifteen per cent seats, which are to be filled in on the basis of all India entrance examination and by candidates nominated by the Director General, Health Services, Government of India are excluded while determining the constitutional reservation and in fact, the constitutional reservation is fifty per cent of the remaining eighty-five per cent. This is because the source from which candidates are admitted for fifteen per cent reservation for candidates of all India entrance examination is totally different. In fact, so far as fifteen per cent NRI quota in private Medical Colleges in payment seats is concerned, there is no difference in principle because fifteen per cent of the quota for NRIs is to be filled in totally from different source. Those seats are not available to anyone through the general admission process conducted and controlled by the Competent Authority. Apart from that, the express wording of Rule 5.1.0 makes it clear that fifty per cent reservation shall be out of the seats at the disposal of the Competent Authority and by no stretch of imagination, one can hold that fifteen per cent NRI quota is at the disposal of the Competent Authority. We find it difficult to accept the contention of Shri Aney and Shri Chandurkar that for the purposes of Rule 5.1.0, the seats at the disposal of the Competent Authority must be taken as total intake capacity of the College. On the express language of the rules mentioned hereinabove, it is impossible to accept the contention. Thus, the reservation of twenty-five seats out of fifty payment seats in the private Medical and Dental Colleges appears to us to be clearly against the express provision of

the rules in that behalf".

20. The similarity on facts is unmistakable but what is glaringly absent in the present case is the absence of a specific prescription in the Rules; which would permit such exclusion. The Maharashtra Rules brought out by the Government specifically applied reservation on the seats available for disposal by/with the Competent Authority. Neither in the reservation policy of the State of Kerala nor in the prospectus of the University is there such an exclusion; which exclusion definitely will have to be brought about by the State and not by the University.

21. In fact, a roster system, adopted to the entire seats in various disciplines, as has been done in Dr. B. Kaladhar (supra), would have effaced instances of certain categories being altogether denied admissions, in all the years. As is evident from both the tables above, Other Backward Christians, Kudumbis and Pot Making Castes though entitled to reservation as per the policy of the Government, is denied that and none are given the benefit in any of the years for at least the subject graduate courses in which the total intake is 40 seats. There could also be adjustments made by accommodating either of these categories once in five years when another category exceeds the quota. By illustration, Scheduled Tribes who have 0.80 seats reserved would exceed the quota, by 1 seat, when consistently the category has been given reservation of one seat in four consecutive years. In the fifth year that seat could be conceded to any of the categories who have 0.20 reservation, who could stake a legitimate claim for a seat once in five years. The University would do well to look into such implementation and as guidance, look at the scheme that comes to fore in Dr. Anusar Gupta (supra) too. It is submitted by the learned counsel that a separate reservation is provided only to B.Tech Naval Architecture and Ship Building, which is the most sought after course, to accommodate the most meritorious candidates there. Definitely a roster applied could set apart the first available seats in the open category to that course.

22. With respect to the contention of violation of 50%, it is to be specifically noticed that in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., it was held by the Constitution Bench of the Supreme Court that the ceiling of 50% reservation applies only to caste reservation under Article 16(4).

"95. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture : all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as "vertical reservations" and "horizontal reservations". The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes (under Article 16(4)) may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of article 16) can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped

persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

It is, however, made clear that the rule of 50% shall be applicable only to reservations proper; they shall not be - indeed cannot be - applicable to exemptions, concessions or relaxations, if any provided to "Backward Class of Citizens" under Article 14".

23. The principle of such restriction, as has been made to reservations under Article 16(4), equally applies to Article 15(4). Article 15(4), with specific reference to Article 201 sustains reservation on communal considerations in admissions to educational institutions; which provision was introduced after such reservations were held to be violative of the principles of equality in *The State of Madras Vs. Srimathi Champakam Dorairajan*, . Hence, there can be no violation of the 50% rule, since the 13 seats set apart for cadets of Indian Navy and Sports personnel would be included in the seats allotted to the open category candidates. For all the above reasons, the writ petition stands allowed. The petitioner shall be admitted to the seat kept vacant as per the interim order of this Court. The University shall also look at the observations made herein and re-vamp the implementation of the reservation policy to avoid certain categories being altogether denied their entitlement to reservation. Petitioner shall be admitted, at any rate within one week from the date of receipt of a copy of this judgment. Parties are left to suffer their respective costs.