
(2004) 08 KL CK 0055

In the High Court Of Kerala

Case No : Writ Petition (C) 24161 and 23656 of 2004

Hailin Jacob K.

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 18-08-2004

Acts Referred:

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

Citation : (2004) 2 KLJ 922 : (2004) 3 KLT 934

Hon'ble Judges : K. Balakrishnan Nair, J

Bench : Single Bench

Advocate : Bechu Kurian Thomas, Prakash Puthiadam, Roshin Ipe Joseph, Paul Jacob and Roshen D. Alexander, for the Appellant; George Mecheril (G.P.), for the Respondent

Judgement

K. Balakrishnan Nair, J.

W.P.(C) No. 24161 of 2004

1. The petitioner is a physically challenged person. She took the Entrance Examination for the Professional Degree Courses for the year 2004. Her rank in the Entrance Examination was 21352. She is a person suffering from 52% physical disability. So, she claimed reservation as a physically challenged person, in the light of the relevant clauses contained in Exhibit PI prospectus. The total number of seats available for MBBS course in Government/Aided Colleges in the State is 700. According to the petitioner, she has been ranked as 33 among the physically handicapped persons. But, several persons ranked above her were found not suitable for admission to the MBBS course by the Committee of Medical Experts constituted for evaluating the disability. Therefore, her rank has come to 17. Section 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the Act") provides that all Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less

than three per cent seats for physically handicapped persons. Therefore, for the MBBS course, twenty one seats should be reserved for physically handicapped persons and if that be so, the petitioner, being the seventeenth person among the physically handicapped persons, is eligible to get admission to the MBBS course. But, she has been offered admission only for the BDS course. According to the respondents, only sixteen seats are available to the physically handicapped persons for the MBBS Course, and the petitioner, being the seventeenth candidate, is eligible to get admission only to the BDS course. So, this writ petition is filed seeking a direction to the respondents to allot a seat for MBBS course in one of the Medical Colleges to the petitioner under the quota set apart for physically handicapped candidates. Other incidental reliefs are also sought. The learned Government Pleader appearing for the respondents produced before the Court the instructions received by him from the second respondent. According to the said instructions, the Government have to set apart 105 seats for All India Quota, 29 seats for the special nominees of Union of India and 32 seats for special reservation, which include the quota for Ex-service man, NCC, Kalathilakam, etc. The total of the above seats will come to 166. Only 534 seats are remaining for allotment by the State Government. Three percent of 534 will come to 16.2, which is rounded as 16. Therefore, the petitioner is not eligible to be admitted for the MBBS course. In view of the above position, it is submitted that the petitioner is eligible to get admission to the BDS course only.

2. Heard the learned counsel on both sides. The point to be decided is, how many seats are available for the physically challenged candidates for admission to the MBBS course. According to the petitioner, it must be 21. But, according to the respondents, it can only be 16. The petitioner's case is that the total number of seats, with reference to which the three per cent should be calculated, is 700, whereas according to the respondents, the total number of seats available with the State Government for admission is only 534. Therefore, three per cent of the same alone can be reckoned, submits the learned Government Pleader.

4. Section 39 of the Act reads as follows: "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.

The Act in question, is a plenary legislation. The above quoted provision is mandatory and all Government educational institutions and aided institutions are absolutely bound by the said provision. Going by the above said provision, the percentage should be reckoned, with reference to the total number of seats available in the educational institutions. The contention of the respondent is that the three per cent can be reckoned, only after excluding the seats to be set apart for the allotment from other quotas. The said approach appears to be perverse. I feel that the seats to be set apart for the physically handicapped persons should be fixed first, in the light of the statutory mandate. Having regard to the statutory provisions, the Scheme of the Act is to eliminate discrimination against

the physically handicapped persons. The objects and reasons of the Act reads as follows:

The meeting to launch the Asian and Pacific Decade of the Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region, held at Beijing on 1st to 5th December, 1992 adopted the Proclamation on the full participation and Equality of People with Disabilities in the Asia and the Pacific Region. India is a signatory to the said Proclamation and it is necessary to enact a suitable legislation to provide for the following:

- (i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training employment and rehabilitations of persons with disabilities;
- (ii) to create barrier free environment for persons with disabilities;
- (iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis, non-disabled persons;
- (iv) to counteract any situation of the abuse and the exploitation of persons with disabilities;
- (v) to lay down strategies for comprehensive development of programmes and services and equalisation of opportunities for persons with disabilities; and
- (vi) to make special provision for the integration of persons with disabilities into the social mainstream.

2. Accordingly, it is proposed to provide inter alia for the constitution of Co-ordination Committee and Executive Committees at the Central and State levels to carry out the various functions assigned to them. Within the limits of their economic capacity and development the appropriate Governments and the local authorities will have to undertake various measures for the prevention and early detection of disabilities, creation of barrier free environment, provision for rehabilitation services, etc. The Bill also provides for education, employment and vocational training reservation in identified posts, research and manpower development, establishment of homes for persons with severe disabilities, etc. For effective implementation of the provisions of the Bill, appointment of the Chief Commissioner for persons with disabilities at the Central level and Commissioner for persons with disabilities at the State level clothed with powers to monitor the funds disbursed by the Central and State Governments and also to take steps to safeguard the rights of the persons with disabilities is also envisaged.

3. The Bill seeks to achieve the above objects.

Section 39 has to be interpreted keeping in mind, the above objects of the Act. The stand of the respondents that the percentage of quota available to them can be fixed only after excluding the seats available to other reserved quotas, is ex facie unsustainable and runs counter to the scheme of the Act. In fact, no

discretion is conferred on the Government, in the matter of choice of the basis for calculating the three per cent. Rather, they are under a duty to reserve three per cent of the total number of seats available in Government and aided colleges. But, the said power has been exercised in an arbitrary and irrational manner by deciding to reserve 3% seats after setting apart the seats for the privileged categories. So, the said approach is plainly unauthorised and ultra vires.

4. Apart from that, the scheme of the prospectus itself does not warrant such an approach. Clause 4.1 of the prospectus deals with types of reservation, which reads as follows:

Types of Reservation: Out of the total seats available for the various courses, seats will be reserved for different categories under the following main items:

- (a) Reservation for All India Quota for MBBS/BDS courses.
- (b) Reservation for Nominees.
- (c) Special reservation.
- (d) Reservation for Persons with disabilities.
- (e) Mandatory reservation.

Clause 4.1(d) deals with reservation for persons with disabilities. It has been put on the same pedestal for MBBS course along with All India Quota under Clause 4.1(a). There is nothing in the said clause to indicate that the persons coming under Clause 4.1(d) should be allotted three percent seats only after allotting the seats for those who are coming under other Clauses of 4.1.

5. Clause 4.1.4. deals with the reservation for persons with disabilities, which reads as follows:

Reservation for Persons with Disabilities: three percent seats for all the courses in all the Government and Aided colleges are reserved for the candidates with disabilities. For details, refer clause 5.3. The details regarding the seats will be made known before the commencement of CAP.

This clause is made in strict conformity with Section 39 of the Act.

6. Clause 4.1.5 deals with mandatory reservations. The opening paragraph of that clause reads as follows:

Mandatory Reservation: Leaving the seats set apart for All India Quota, Government of India Nominees, special reservation, persons with disabilities, Management and NRIs, the remaining seats for each course will be distributed as per the mandatory reservations principle as contemplated in G.O.(P) 208/66/Edn. dated 2-5-1966, as modified from time to time. The percentage break-up of seats as per mandatory reservation is as follows.....

The above quoted portion would show that for allotment of the mandatory

reservation under this clause, the seats are reckoned, after excluding the seats for all other quotas, including All India Quota and the Quota for the persons with physical disabilities. Clause 4.3.1 would show that the seats under the All India Quota are to be allotted by the Director General of Health Services and the State has no role in it. Clause 4.3.2 also deals with the allotment of seats from outside the State. Clause 5.3 deals with the method of admission for persons with physical disability. Such persons should be cleared by the Committee of Medical Experts before they are actually admitted.

7. Going by the above provisions in the prospectus, there is no scope for thinking that the percentage of seats for the physically handicapped persons should be or could be fixed, after excluding the seats allotted to various other reserved categories. But, the learned Government Pleader would rely on Annexure 111(2) of the prospectus, which allots the seats to special categories like All India Quota, Government of India nominees, etc. It is submitted that the Entrance Commissioner cannot deviate from that. But, the rigid fixation of seats for those categories will not, in any way, affect the claim of the physically handicapped persons because they are entitled to get three per cent reservation of the total number of seats. So, the contention made by the learned Government Pleader relying on Annexure III(2) of the prospectus, will not affect the entitlement of the physically handicapped persons. It may be noticed that the prospectus does not provide for any particular number of seats reserved for physically handicapped persons in Annexure III(2). So, the above contention of the learned Government Pleader has no relevance.

8. The learned Government Pleader further points out that since the admissions are already over, there may not be any vacancies. But, the petitioner has approached this Court on 13.8.2004. This Court, on 16.8.2004, passed an interim order, directing the second respondent to keep one seat vacant for MBBS course for a period of two weeks. The said order was passed in the presence of the learned Government Pleader. If any candidate is allotted the seat eligible to the petitioner, it will be to a general merit candidate. Any allotment made, ignoring the statutory protection in favour of the physically handicapped persons, cannot be upheld on such technical grounds. The learned Government Pleader further submitted that if the writ petition is allowed, the Scheduled Caste/Scheduled Tribe candidates may also come forward, raising similar contentions. The same is not a ground to reject the genuine case put forward by the petitioner. Even if heavens fall, justice has to be done. Further, the said contention appears to be in conflict with Clause 4.1.5 of the prospectus also. The said clause quoted in paragraph 7 above, expressly provides that the mandatory reservation to various categories including Scheduled Caste/Scheduled Tribe is made to the seats available, after allotting the seats to All India Quota, persons with disabilities, etc.

9. If there is any mistake made in the allotment, it can be rectified now, by issuing notice to the affected candidate and hearing him. It is too early to contend

that the illegal allotment has created indefeasible right in the allottee. Further, as far as the petitioner is concerned, it is impossible to find out the allottee in her seat and implead him. It is unfortunate that the State and its Officers, who are bound to protect the interest of our less fortunate brothers and sisters, have evolved an interpretation to Section 39 of the Act to defeat their interest and to favour the general candidates. The fate has been cruel to them. Many of us, who are fortunate, not to have any physically handicapped children, may not realise their sufferings. Here, the State has turned a Brutus and inflicted the most unkindest cut, by removing a portion of their statutorily fixed quota to the general candidates. This Court cannot approve it, accepting the technical contentions of the respondents. In view of the above position, the writ petition is allowed. It is declared that twenty one persons from among the physically handicapped persons, who are cleared by the Committee of Medical Experts, are eligible to be admitted to the MBBS course. If the petitioner's rank is 17, as claimed by her, from among the persons cleared by the Medical Expert Committee of the Entrance Examination Commissioner, or her rank is 21 or above among them, the petitioner shall be admitted to the MBBS course. This, the respondents, shall do within two weeks from the date of receipt of a copy of this judgment.

W.P.(C) No. 23656 of 2004

The case of the petitioner is identical to the case of the petitioner in W.P.(C) No. 24161/2004. So, the directions issued in that case will govern this case also. The petitioner's claim for admission to the MBBS course shall be considered if her rank, among the physically handicapped persons, who are cleared by the Committee of Medical Experts, is 21 or above.

The writ petition is allowed.