
(2016) 04 GUJ CK 0038

In the Gujarat High Court

Case No : Special Civil Application No. 3378 of 2016

Jayantkumar Lakshmanbhai Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 06-04-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 15, Article 15(1), Article 15(4), Article 21, Article 226

Gujarat University Act, 1949 — Section 32

Citation : (2016) AIR(Gujarat) 91 : (2016) 2 GCD 1730 : (2016) 3 GLR 2467

Hon'ble Judges : R. Subhash Reddy, C.J. and V.M. Pancholi, J.

Bench : Division Bench

Advocate : S.P. Majmudar and Nishit P. Gandhi, Advocates, for the Appellant;
Dhawan Jayswal, Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

R. Subhash Reddy, C.J.

1. RULE. Service of rule is waived by Mr. Dhawan Jayswal, learned Assistant Government Pleader for respondent No. 1-State of Gujarat; Mrs. V.D. Nanavati, learned advocate for respondent No. 2-Gujarat University; and Ms. Avni H. Pandya, learned advocate for respondents No. 3 and 4.

2. This writ petition is filed under Article 226 of the Constitution of India seeking directions by way of mandamus to the respondent No. 2-Gujarat University, to give admission to the petitioner as Scheduled Tribe candidate in Post Graduation Medical Course by quashing Rule 5.5 of the Rules governing the admission to Postgraduate Degree and Diploma Medical Courses other than M.Ch. & D.M. at the affiliated Medical Colleges/Institutions ("Rules" for brevity), framed by respondent No. 2-Gujarat University by Office Memorandum No. D 14/O.M.S.14, as illegal, arbitrary and ultra vires to the constitutional provisions.

3. The petitioner has completed his MBBS Course from M.P. Shah Medical

College, Jamnagar in the year 2013. The petitioner is belonging to Scheduled Tribe and is desirous of getting admission in Post-graduate Degree and/or Diploma Course for the academic year 2016-17, from respondent No. 2-University and had appeared in entrance examination held by the University for the purpose of admission, with Seat No. 1620 and Registration No. 3013. The petitioner has secured 235 marks, whereas qualifying mark is 160. When respondent No. 2-University was not considering to grant admission to the petitioner based on impugned Rule 5.5 of the Rules of 2016, the petitioner has approached this Court.

4. Respondent No. 2-University is constituted under Gujarat University Act, 1949. Under section 32 of the Act, the University is empowered to frame rules on various subjects. For the purpose of admission to Post-graduate Degree and Diploma course, rules are framed vide proceedings No. O.M. D 14/O.M.S.14. As per rules of admission, 50% of the total available seats in academic year in various Post-graduate Degree and Diploma Course in each subject in Government institutions/colleges will be filled up on the basis of All India Competent Examination for admission to PG Medical Courses and the remaining seats will be available for candidates passing from Gujarat University. So far as self-financed colleges/institutions are concerned, 75% of the, total seats shall be filled by Admission Committee of the Gujarat University and the remaining 25% by management quota seats will be filled by Colleges/Institutes; 50% of the seats, other than seats covered by All India Competitive Examination, will be filled by the Admission Committee of the University. As per rules of admission, 7% of the seats are reserved for candidates belonging to scheduled caste, 15% of the seats, are reserved for scheduled tribe candidates and 27% of seats similarly are reserved for candidates belonging to Socially and Educationally Backward Class (SEBC), including widows and orphan children. There is specific rule providing preference to candidates graduated from Gujarat University for filling up of seats, to be made by Admission Committee of the University. In case, the seats which are reserved for Scheduled Castes, Scheduled Tribes, Socially and Educationally Backward Class are lying vacant due to non availability of candidates of the specified category, from the candidates of respondent No. 2-University, those seats shall be treated as unreserved seats and will be filled up by the candidates eligible for open market on the basis of merit. Though the petitioner, who is qualified in Entrance Examination belonging to Scheduled Tribe category and has passed MBBS not from respondent No. 2-University, but he has passed from other medical college within the State of Gujarat. Primarily, it is the case of the petitioner in the writ petition that there is no basis or any intelligent differentia for restructuring reserved category seats only for the candidates of respondent No. 2-University. Precisely, it is his grievance that under the guise of preference to University candidates, they are denying reservation which is notified as per the Rules to Scheduled Tribe candidates, to which category the petitioner belongs to.

5. In the petition which is supported by affidavit, it is stated by the petitioner

that similar such rule framed by the University of Bhavnagar is struck down. The learned counsel for the petitioner placed reliance on the judgment in the case of Vinodkumar Rasiklal Vahoniya Vs. University of Bhavnagar and others, reported in , 2007 (1) GLH 696. The learned counsel for the petitioner has also relied on another Division Bench judgment of this Court in the case of Ketankumar Gabubhai Patel Vs. Secretary, Department of Health and Family Welfare, rendered in Letters Patent Appeal No. 1098 of 2006 dated 13.10.2006 [, 2006(O) GLHEL-HC 217113]. In the aforesaid judgment when benefit of reservation was not granted to a student for outside University area, this Court has held that the University has committed legal error by filling up such reserved seat through open category candidates and issued directions.

6. Affidavit in reply is filed on behalf of respondent No. 2-Gujarat University. In the reply while denying various allegations made by the petitioner, it is stated that while framing rules, the faculty has taken into consideration the provisions for institutional preference. Thus, 50% of the seats are therefore, offered to students of Gujarat University, who are eligible for consideration under the Rules. While stating that Rule 5 provides for reservation for Scheduled Caste, Scheduled Tribe and Socially and Educationally Backward Class category, it is stated that if reserved category candidates are not available, it is open for the University to treat such seats as unreserved seats and grant admission on the basis of merit. Thus, the same is not in breach of rights guaranteed under Article 15 of the Constitution of India. While reiterating that all 50% of seats available to Gujarat University students are required to be offered to Gujarat University students subject to reservation, it is pleaded that the petitioner cannot claim any right for grant of admission, as he is not a candidate of respondent No. 2-University. In reply while pleading that all the statutory universities have policy of reservation consistent with the institutional preference prayed for dismissal of the petition.

7. Respondents No. 3 and 4, viz. Students graduated from Gujarat University are impleaded as party- respondents by supporting the case of the University. It is also their case that 50% of available seats are reserved for students of the Gujarat University, as such, the petitioner has no legitimate grievance, not being a student of the Gujarat University, seeking admission into PG Medical Course.

8. Heard Mr. S.P. Majmudar, learned advocate for the petitioner; Mr. Dhawan Jayswal, learned Assistant Government Pleader for respondent No. 1-State of Gujarat; Mr. Suresh N. Shelat, learned senior counsel assisted by Mrs. V.D. Nanavati, learned advocate for respondent No. 2-Gujarat University; and Mr. Mihir J. Thakore, learned senior counsel assisted by Ms. Avni H. Pandya, learned advocate for respondents No. 3 and 4. It is contended by the learned counsel for the petitioner that the impugned Rule 5.5 of the Rules framed by the University by Office Memorandum No. D 14/O.M.S.14, is arbitrary and ultra vires of the provisions under Articles 15(4) and 21 of the Constitution of India. It is contended that having provided reservation to the extent of 15% of available seats to Scheduled Tribe candidates, it is not open for the University to restrict

such benefit of reservation only to the candidates belonging to respondent No. 2-University and to de-reserve the seat on the ground that such category candidates are not available from respondent No. 2-University. It is contended that when seats are reserved, they are to be thrown open to all the candidates in the State, but there is no reason to restrict such benefit of reservation only to students of respondent No. 2-University, denying admission to the petitioner, who has secured more than the qualifying marks for PG Medical Course. It is the say of the petitioner that similar identical rule which is framed by the University of Bhavnagar came to be examined by this Court by holding that such an action breaches rights guaranteed under Articles 14 and 15 of the Constitution of India. It is contended by the learned counsel that source of 50% which is given for the purpose of regulatory mechanism of admission by the University in strict sense does not constitute reservation, but a preference. As such under the guise of preference, the University cannot deny reservation which is already provided under the rules which is in conformity with the Constitutional Mandate under Article 15(4) of the Constitution of India.

9. The learned counsel for the petitioner placed reliance on the judgment in the case of *Vinodkumar Rasiklal Vahoniya Vs. University of Bhavnagar and others* (supra), and *Ketankumar Gabubhai Patel Vs. Secretary, Department of Health and Family Welfare* (supra). On the other hand, Shri Suresh N. Shelat, learned senior counsel appearing for the respondent-University submits that it is open for the University to fill up 50% of seats other than the seats which are covered on the basis of All India Competitive Entrance Examination to be held by the University by effecting reservation by giving preference to the students of respondent No. 2-University. It is submitted by the learned counsel that as such it cannot be said that Rule 5.5 of the Rules is ultra vires of the provisions of the Constitutional scheme.

10. Shri Mihir Thakore, learned senior counsel appearing for the impleaded respondents submits that though similar rules in the case relied upon by the learned counsel for the petitioner were struck down by this Court, he made effort to draw distinction from the said case on the ground that reservations are to be provided within quota 50% source as per the mandate of the Hon'ble Supreme Court, as such it is always open for the University to de-reserve seats and to fill the same with open category candidates of 2nd respondent, University, in case candidates belonging to communally reserved category are not available for grant of admission. It is submitted by the learned counsel that institutional preference is also permissible. The learned counsel placed reliance on the following judgments:

- (i) *Dr. Pradeep Jain and others Vs. Union of India and others*, reported in , (1984) 3 SCC 654;
- (ii) *Saurabh Chaudri and others Vs. Union of India and others*, reported in , (2003) 11 SCC 146;

(iii) Karamsad Medical Association Vs. State of Gujarat, reported in 2000 (2) GLR 1648; and

(iv) Judgment of the Judge of Punjab & Haryana High Court in the case of Dr. Amanpreet Kaur Vs. State of Punjab and others, reported in Civil Writ Petition No. 6696 of 2005, dated 01.09.2005.

Precisely it is the case of the learned counsel that Article 15(4) of the Constitution is enabling provision, making special provision for advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes; that by itself does not confer any right on the petitioner to claim reservation. Institutional preference is also provided in the rules. It is submitted that 50% of source for which Admission Committee of the University is empowered to fill up seats is to be treated as separate unit for the purpose of effecting reservation for Scheduled Caste/Scheduled Tribe candidates. It is contended by the learned counsel that in case candidates belonging to communally reserved categories are not available from respondent No. 2-University candidates, it is always open for the University to de-reserve such seats by filling up with the open category candidates by giving preference to University students of 2nd respondent.

11. Before we deal with the rival contentions advanced by the learned counsel appearing for the parties, we deem appropriate to refer to the relevant rules for the purpose of disposal of this writ petition as under.

12. For the purpose of effecting admissions to PG Degree and Diploma Courses other than MCH & D.M., separate rules were framed by respondent No. 2-Gujarat University in Office Memorandum No. D 14/O.M.S.14. Such rules are framed by invoking rule making power under the provisions of Gujarat University Act. Relevant Rules are reproduced hereunder:

"2.0 As per directive of Hon"ble Supreme Court of India, New Delhi 50% of total available seats in Academic year in various Post-graduate Degree and Diploma courses in each subject in Govt. Institutions/Colleges will be filled up on the basis of "All India Competitive Entrance Examination for admission to Post-graduate Medical Courses (M.D./M.S. Diploma)". The remaining seats will be available for the candidates passing from Gujarat University in accordance Rule 4.1. The student passing from other statutory Universities within Gujarat State will be considered as per their merits in accordance within Rule 4.3.

2.0-A For Self-financed Colleges/Institutions, 75% of total seats shall be filled by Admission Committee of Gujarat University and the remaining 25% of Management quota seats will be filled up by College/Institute. "Management seats" means twenty-five per cent seats of the professional courses of the total approved seats in the unaided colleges or institutions including fifteen per cent Non-Resident Indian seats; "Non-Resident Indian seats means fifteen per cent seats reserved for children or wards or the dependents for the education purpose, of the Non-Resident Indian, to whom admission is to be given in the

professional educational colleges or institutions.

(a) Admission on the 15% NRI seats shall be given by the Management of the respective college/institution on the basis of Inter se merit list of the candidates who have applied for admission against the NRI seats in the following manner, namely:-

(i) The Candidate who is non-resident Indians as also the candidate whose parents and in the absence of his/her parents, his/her legal guardian who is Non-Resident Indian, shall be offered the non resident Indian seats in the first instance,

(ii) and thereafter, the Non-Resident Indian seats, if remain vacant, shall be offered to the dependent NRI candidates and preference should be given to the Candidates who graduating from Gujarat State."

"5.0 The affiliated P.G institutes/colleges will prepare separately the category wise seat list in each degree and diploma subject. The 7% of seats available for P.G Degree and Diploma under Rule 3 will be reserved for candidates belonging to scheduled Caste, 15% of seats will be similarly reserved for ST candidates and 27% of seats will be similarly reserved for candidates belonging to Socially and Educationally Backward Class (SEBC) students including widows and orphan children. The student desiring admission under SEBC category will have to submit a non - creamy layer certificate of financial year pertaining to the period of application, that they are not included in the creamy layer from the competent authority as prescribed by the Govt. of Gujarat from time to time along with the application."

"5.5 As per rules 4.1, Preference should be given to the students who passed M.B.B.S. From Gujarat University only. In case, the seats reserved under the rule 5.0 remain vacant due to non-availability of the Candidate of the specified category after the operation of Merit list (i.e. of Specified category SC/ST/SEBC/ In-service/PH) prepared under rule 4.1, they shall be treated as unreserved seats and will be filled up by the Candidate eligible for Open Merit on the basis of Merit as per rules 4.1 (Merit list 1.1.).

After completion of Merit list Prepared under the rule 4.1, any seats remain vacant then filled up from the Merit list prepared under rule 4.3. Roster Point for Vacant seats will be prepared and maintained by Admission Committee."

13. From the perusal of the aforesaid rules it makes clear that 50% of total available seats are to be filled on the basis of All India Competitive Examination for admission to PG Medical Courses and remaining 50% of seats are to be filled by Admission Committee of the University. As per Rule 4.1 of the Rules, preference is provided to the candidates who have graduated from Gujarat University. Under Rule 5.0 of the Rules, in the affiliated PG institutions/colleges, 7% of seats available for PG Degree and Diploma are reserved for Scheduled Caste candidates, 15% of seats will be similarly reserved for Scheduled Tribe

candidates, 27% of seats are similarly reserved for candidates belonging to Socially and Educationally Backward Class category. Thus, it is clear that Rules provide communal reservations which is in conformity with the Constitutional mandate under Article 15(4) of the Constitution of India. Further Rule 5.5 of the Rules provide that if seats reserved under Rule 5.0 of the Rules remain vacant due to non availability of candidates of the specified category after operation of merit list (i.e. of Specified category SC/ST/SEBC/In-service/PH) prepared under rule 4.1, they shall be treated as unreserved seats and will be filled up by the Candidate eligible for Open Merit on the basis of merit.

14. Under the Constitutional scheme, particularly, Under Article 15 of the Constitution of India, the State shall not discriminate against any citizen on grounds of religion, race, caste, sex or place of birth or any of them, but under Clause (4) of the very Article 15, the State is empowered to make special provision for advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes. The very fact that rules provide reservation of 7% of available PG Degree and Diploma seats to Scheduled Caste and 15% of seats for Scheduled Tribe and 27% of seats for Socially and Educationally Backward Class students, that itself makes clear that certain category of students are entitled for reservations. It is well known that such policies in educational institutions and public employment are made for betterment of those, who come from grass root level, and have no facilities and are striving to achieve excellence. Having recognized their backwardness and reason for reservation that they cannot compete with general category candidates reservations are provided. Such backwardness or requirement of reservation cannot be on the basis of University area. Once based on such backwardness, reservation is provided, it has to be inferred that such backwardness in scheduled castes and scheduled tribes is in the region or in the State, but certainly cannot be restricted to any local area of the university. The judgment relied on by the learned counsel for the petitioner in the case of Vinodkumar Rasiklal Vahoniya Vs. University of Bhavnagar and others (supra), similar such rule of the University of Bhavnagar was examined by the Division Bench of this Court, by drawing distinction between reservation and preference. In the aforesaid judgment, while examining identical question, this Court has held that:

"28. Dereservation of a seat or non-reservation would put a reserved category candidate in competition with general category students. We can take a judicial note of the fact that the reservation policy is for the betterment of those who come from the grass-root level, have no facilities and are still striving to achieve the excellence. If the have's and have not's are treated equal, then, it may offend equality clause. Reservation is for those who cannot compete in the general category. Preference is in the class or category itself, because, it is something beyond reservation. Reserved seats inform the general category that you are outsiders to this category, while preference says to the person belonging to the very same category that he would be out if in-institutional resident

candidate is available. Reservation is for a class or community while preference is for the selected few. In the present matter, Rules 4.1, 4.2 and 4.3, if are applied to the general category only, then, there is nothing wrong in the said Rules, but when Rule 4.1 is allowed to operate in the field of seats reserved under Rule 5, then, it perilously borders unconstitutionality.

29. Rule 5.3, in fact, runs contrary to policy of reservation, because the Rule says that only resident seats will be considered for calculating reserved seats. Rule 5.4[a] would virtually violate the provisions of Articles 14 and 15 of the Constitution and judgment of the Supreme Court so also the Regulations issued by the Medical Council of India. Rule 5.4[a] provides that if a reserved seat remains vacant due to non-availability of the candidates of the specified category up to rule 4.1, the same should be deemed to be unreserved or the said seat would stand de-reserved. In our humble opinion, non-availability of reserved class candidate, who could be given preference would not make seat unreserved. The seat will have to be offered to a person who belongs to the same category if no person is available against him to have preference.

30. Preference, as we have already observed would be available to in-institution candidate, if he has more than cut off marks and even lesser marks than an outsider reserved category candidate. If reserved seats cannot be filled by in-institutional candidate, it cannot be declared to be dereserved. If this policy is allowed, then, an outsider would have no chance of an admission in the respondent University.

31. The manner in which Rule 5, specially Rule 5.4[a] has been framed would violate Articles 14 and 15 of the Constitution of India. It is also to be noted that Medical Council of India has nowhere said that policy of reservation is to be sacrificed in the name of excellence or merits. Comparative merits are to be examined in a class or community and not otherwise.

32. In our humble opinion, Rule 4.3, if it is allowed to be read that any person who graduated from any other university located in Gujarat State will be considered after selection of the candidates in the merit list as per Rule 4.1 and 4.2, and is applied to reserved category, then, such application would be ultra vires the Constitution, but if Rule 4.3 is read for general category candidates, then, Rule is not ultra vires.

33. So far as Rule 5.4[a] is concerned, it is apparently ultra vires the Constitution, it runs contrary to the Rules framed by the State, it runs contrary to the Regulations made by the Medical Council of India and the mandate of the Constitution."

15. Following the aforesaid judgment, further Division Bench of this Court in the case of Ketankumar Gabubhai Patel Vs. Secretary, Department of Health and Family Welfare (supra), Division Bench of this Court has held that if candidates belonging reserved category eligible in that very class of that University are not available, such seats are to be filled up from the candidates graduating from any

other University located in Gujarat State. Having perused the aforesaid judgment and reasons which we have recorded above, we are in full agreement with the view taken by the earlier Division Bench of this Court.

16. The argument of Shri Mihir Thakore, learned counsel that 50% of the seats which are to be filled by the University is separate source, as such, even social reservation can be worked out by giving preference to students of respondent No. 2-University, cannot be accepted. As distinction drawn rightly between reservation and preference in the cases which we have referred to above, we are of the view that 50% of the seats which are allowed to be filled up by the University and its colleges is source to fill up on preferential basis, but at the same time the very same rules framed by the University provided reservation to the candidates belonging to Scheduled Caste, Scheduled Tribe and Socially and Educationally Backward Class only on the ground that such category candidates are not available within the University, such seats cannot be allowed to be filled up by de-reserving the same from open category candidates of the University. As we have already discussed above social and other backwardness cannot be on the basis of university area, and submissions of the learned counsel, cannot be accepted. The judgment relied upon by the learned senior counsel would not render any assistance in support of his argument having regard to the issue which falls for consideration in this case. In the case of Dr. Pradeep Jain and others Vs. Union of India and others (supra), the Hon"ble Supreme Court has opined that so far as admission to PG course, such as, MS and MD are concerned, it would be eminently desirable not to provide for any reservation based on residence requirement within the State or institutional preference. However, having regard to broader considerations, equality of opportunity and institutional continuity in education, the Hon"ble Supreme Court has directed that maximum limit of 50% of the seats can be made basis of institutional preference. In the case of Saurabh Chaudri and others Vs. Union of India and others (supra), the Hon"ble Supreme Court has examined the scope of reservation in Government medical colleges based on domicile and held that the same is not prohibited by virtue of provisions of Article 15(1) of the Constitution. In the aforesaid judgment the Hon"ble Supreme Court has held that in educational institutions affiliated and recognized by State Universities, constitutional prescription of reservation of 50% seats should be maintained and the rest should be left for open competition based on merits on All India basis. In the said case validity of institutional preference is examined by the Hon"ble Supreme Court. In the case of Karamsad Medical Association Vs. State of Gujarat (supra), institutional preference is upheld by the Division Bench of this Court. In the judgment rendered in Civil Writ Petition No. 6696 of 2005, in the case of Dr. Amanpreet Kaur Vs. State of Punjab & others, by the Punjab & Haryana High Court, the same was the case with reference to reservation policy within the service and providing separate quota for in-service candidates and for open category candidates, as was examined by the Punjab & Haryana High Court. Having perused the aforesaid judgments, we are of the view that the said

judgments do not render any assistance in support of the respondent-University in this case. Thus, we are of the view that Rule 5.5 of the Rules, which permits the respondent-University to treat reserved seats as unreserved seats only on the ground that such reserved candidates are not available from respondent No. 2-University, is arbitrary and illegal and in violation of Constitutional Mandate of Articles 14 and 15(4) of the Constitution of India. Under the guise of source/preference to the University candidates, the respondent-University cannot deny quota percentage reserved for Scheduled Caste, Scheduled Tribe, Socially and Educationally Backward Class, In-service and PH candidates. When required specified category candidates are not available from the candidates of respondent No. 2-University, such category of seats are to be filled from specified categories of other universities in the State of Gujarat. Thus, Rule 5.5 of the Rules is fit to be quashed as the same is arbitrary, by declaring the same as arbitrary and in violation of constitutional scheme of Articles 14 and 15(4) of the Constitution of India.

17. For the aforesaid reasons and in view of the judgments relied on by the learned counsel for the petitioner, as we are of the view that earlier judgments relied on by the learned counsel for the petitioner fully supports the case of the petitioner, we allow this petition by quashing Rule 5.5 of the Gujarat University Admission Rules, 2016 for Medical Post Graduation Course, framed by respondent No. 2-University by Office Memorandum No. D 14/O.M.S.14, which governs admission to PG Degree and Diploma Medical Course other than MCH and DM in affiliated colleges/institutions. Consequently, we direct respondent No. 2-University to consider the case of the petitioner for admission, having regard to his merit in the specified category.

18. The petition is allowed with directions as indicated above. Rule is made absolute. No order as to cost.