

(1998) 07 KAR CK 0022

In the Karnataka High Court

Case No : Writ Petition No's. 17330 and 15502 of 1998

Miss Gopalam Mithula

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 18-07-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 15

Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 — Section 14

Karnataka Selection of Candidates for Admission to Engineering, Medical and Dental Courses Rules, 1997 — Rule 4, 7 (ii)

Citation : (1998) ILR (Kar) 3770

Hon'ble Judges : Tirath S. Thakur, J

Bench : Single Bench

Advocate : Sri R. Gururajan, for the Appellant; Sri N.K. Ramesh, A.G.A. and Sri K.L. Manjunath, for the Respondent

Judgement

1. An interesting question of considerable importance arises for consideration in these two writ petitions. The question precisely is whether a classification based on the place of birth of either the candidate or any one of his parents is permissible having regard to the provisions contained in Articles 14 and 15 of the Constitution. The petitioners who stand excluded from consideration for admission against a free or payment seat in the Karnataka quota only on account of the fact that none of their parents were born in Karnataka, have assailed the validity of Rule 7(ii) of the Karnataka Selection of Candidates for admission to Engineering, Medical and Dental Courses Rules, 1997 as amended by notification dated 8th of May, 1998. The challenge is mounted against the following backdrop.

2. Wing Commander K. Venkatachalam, father of petitioner in W.P. No. 15502 of 1998 is an Air Force Officer who hails from the adjoining State of Tamilnadu. He has served in Bangalore for different periods between 1977 and 1996 but having taken voluntary retirement from service is presently settled in Madras. The petitioner as also his parents were born at Madras, although the petitioner was

admitted to the Army School at Bangalore, wherefrom, he has appeared in the qualifying 10+2 Examination conducted by the Central Board of Secondary Education.

3. Dr. G. Hanumantha Rao, father of petitioner in W.P. No. 17330 of 1998 is a Doctor by profession having passed his M.B.B.S. Examination from Karnool, in the State of Andhra Pradesh. Having served as an Army Officer in different parts of the Country Dr. Rao has now retired from service and is settled in Bangalore. Except for the period when the petitioners' father was posted out of Bangalore, the petitioner has been a student of one or the other Institution in Bangalore. The parents of the petitioner have built a house at Bangalore and their names are duly entered in the electoral rolls at Bangalore. According to the averments made in the writ petition the mother of the petitioner who also is a Doctor by profession, has been continuously residing at Bangalore since the year 1968. In both the cases however, the petitioners have not admittedly studied for a period of 7 years in any Government Recognised Institution in the State of Karnataka so as to be eligible for consideration against a free or payment seat on that basis. Both the petitioners have appeared in the Entrance Test Cell and wish to be considered for admission against a free or a payment seat as a Karnataka student. Admission to professional colleges in the State is regulated by what are known as "Karnataka Selection of Candidates for Admission to Engineering, Medical and Dental Courses Rules, 1997", framed u/s 14 of Karnataka Educational Institutions (prohibiting of Capitation fees) Act, 1984. Rule 4 of the said Rules, inter alia provides that all the free Medical, Dental and Engineering seats in Government/Univer-sity/Aided/Unaided colleges, excluding Minority Institutions shall fall to the share of the State Government and shall be allotted in accordance with the procedure prescribed tinder the said Rules. Rule 7 of the rules prescribes the eligibility for Karnataka Quota seats and provides that all free and payment Karnataka quota seats shall be filled by candidates who satisfy one of the conditions prescribed therein. For purposes of these petitions conditions (i) and (ii) stipulated under Rule 7 alone are relevant out of which conditions (i) remains as it was originally engrafted though condition (ii) has undergone a change, by way of an Amendment, introduced by the State Government under notification dated 8th of May, 1998. Rule 7 and conditions (i) and (ii) stipulated therein as the same existed before the said amendment may at this stage be extracted:

Rule 7.--All free and payment Karnataka quota seats shall be filled by candidates who satisfy one of the following conditions: namely:

(i) a candidate should have studied and passed in one or more Government or Government recognised educational institutions located in the State of Karnataka for a minimum period of Seven academic years commencing from 1 Standard to II PUC/12th Standard as on 1st July of the year in which the Entrance Test is held and should have appeared and passed S.S.L.C./10th Standard or II PUC/12th Standard Examination from Karnataka State:

provided that candidate who takes more than one year to pass a class or standard, the years of academic study is counted as one year only.

(ii) a candidate should have studied and passed I and II year Pre-University Examination or equivalent examination within the State of Karnataka from an educational institution run or recognised by the State Government and that either of his parents should have born and studied or resided in Karnataka for a minimum period of Seven years".

4. It is evident from the above that while a candidate who has studied in one or more Government or Government recognised educational institutions, located in the State of Karnataka for a period of seven academic years, between 1st Standard to II PUC and who has appeared and passed the 10th or the 12th Standard Examination from Karnataka is eligible without satisfying any further requirement for consideration against a Karnataka quota seat, those who claim admission in terms of condition (ii) above were required not only to have studied and passed I and II year Pre-University Examination or Examination equivalent thereto from the State of Karnataka from an institution run or recognised by the State Government but also to satisfy the requirement of either of their parents having been born and studied or resided in Karnataka for a minimum period of seven years. The respondents it appears were interpreting the expression "born" and studied or resided" in Karnataka, to mean as though the parents of any such candidate must not only have resided in Karnataka for a period of seven years, but must also have been born in Karnataka so as to entitle their wards to claim admission in the Karnataka quota. Birth of at least one of the parents of the candidate was thus understood as an essential requirement to entitle the candidate to claim any such seat if the claim staked was in terms of condition (ii) of Rule 7, *supra*. The Constitutional validity of the said rule came under challenge in *Nita A. Salam v State of Karnataka and Others*, and which were disposed of by Raveendran, J. by his order dated 19th of August, 1997. The Court held that Clause (ii) of Rule 7 was intended to extend the benefit of reservation on the basis of residence to the children of persons who had resided in Karnataka for more than seven years and that Reservation on the basis of residence was well recognised while that on the basis of birth was not. The Court observed that birth was a requirement only in cases where one of the parents had studied in the State and not where the parents or one of them had resided in the State for the prescribed period. The following passage from the decision in this connection is instructive.

"Thus, the main reason for approving reservation on the ground of residence is not birth, but the fact that residents of a region, are more likely to remain in the region and serve the region. Hence, where reservation is on the ground of residence of the parent, the place of birth of the parent can have no relevance.

A plain reading of the provision also leaves no room for doubt that the requirement of "birth" is only added where the parent has resided in the State. The words "born and studied or resided" in the context of use of the said words,

cannot be read as "born and studied" and "born and resided". Therefore the requirements of Rule 7(ii) is met if either of the parents of the candidates has resided in Karnataka for a minimum period of seven years and the candidate has studied and passed the qualifying examination in the State of Karnataka from an educational institution run or recognised by the State Government".

5. Having accepted the interpretation suggested by the petitioners for Rule 7(ii), and declared that birth was irrelevant in cases where reservation was made on the ground of residence of the parents, the Court considered it unnecessary to go into the Constitutional validity of the Rule. The declaratory relief granted by the Court was in the following words:

"It is declared that having regard to the wording in Clause 7(ii) of the Rules, if a candidate has passed the first and second PUC or equivalent examination in the State of Karnataka from an educational institution run or recognised by the State of Karnataka, and if either of the parents of the candidate has resided in Karnataka for a minimum period of seven years, such candidate shall be considered for allotment of a free/payment seat under Karnataka quota seats. It is not necessary that such parent should have also been born in Karnataka".

6. The view taken by this Court was it appears accepted by the respondents, for no appeal against the same was preferred. All the same, what the State did was that in terms of notification dated 8th of May, 1998 it amended among other provisions, Rule 7 of the Rules and substituted the words "born and studied or resided in Karnataka" with the words "born and studied or born and resided in Karnataka". The net effect of the amendment is that for purposes of claiming benefit under Rule 7(ii) not only should the candidate have passed I and II year Pre-University Examination from any educational institution run or recognised by the State Government but it is necessary to further establish that either of his parents had been born and studied or born and resided in Karnataka for a period of seven years. In other words, birth of either one of the parents of a candidate, who has qualified from any institution within Karnataka is an essential requirement for any such candidate to fall within the purview of Rule 7(ii). The Constitutional validity of this provision has been called in question by the petitioners as already noticed earlier on the ground that a classification based only on the basis of birth whether of the candidates or his parents was impermissible in the light of the prohibition contained in Articles 14 and 15 of the Constitution. The petitioners have also assailed the validity of Rule 7(i) on the ground that the requirement of 7 years study in Karnataka was arbitrary and discriminatory in nature.

7. Appearing for the petitioners, Mr. Gururajan confined his submissions to the validity of Rule 7(ii) of the Selection and Regulation Rules. He contended that the amendment to the Rule brought about a hostile discrimination vis-a-vis candidates whose parents or any one of them was not born in the State of Karnataka. A classification, it was argued, based entirely on the place of birth of a citizen for the grant of admission to any professional college or for any other

benefit, was offensive to Article 14 and forbidden by Article 15(1) of the Constitution. He urged that the decision in Nita A Salam's case, supra, was a clear authority for that proposition and that the State had by introducing the amendment and making "Birth" a determinative factor for those falling under Rule 7(ii) not only disregarded the pronouncement of this Court but enacted a provision which could not stand the test of reasonableness on the touchstone of Articles 14 and 15. Reliance was also placed by Mr. Gururajan on the decisions of the Supreme Court in State of Uttar Pradesh and Others Vs. Pradip Tandon and Others, , Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, , Nidamarti Maheshkumar Vs. State of Maharashtra and Others, .

8. Articles 14 and 15 of the Constitution, contain an inviolable pledge of equality and strike against arbitrariness in State action, and hostile discrimination, whether the same be administrative or legislative in character. They read as under:

"Article 14.--The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

"Article 15.--(1) The State shall not discriminate against any citizen on grounds only to religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to --

(a) access to shops, public restaurants, hotels and place of public entertainment, or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this Article shall prevent the State from making any special provision for women and children.

(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".

9. The guarantee against discrimination on the grounds of religion, race, caste, sex, place of birth or any one of them is writ large in Article 15(1) and needs no more than a bare reading to dispel misgivings if any in that regard. The provision does not in fact conceive of any situation where a classification may be sustainable only on the ground of place of birth of the citizens. Classification based on residence requirements is however permissible especially in matters relating to admissions to educational institutions on the principle that those who belong to or reside in any given area are more likely to settle down to serve the inhabitants of such area. Classification resulting in a preference or reservation made on the ground of residence have been judicially recognised on the twin

grounds of "State Interest" and the regions claim for backwardness".

10. In *D.P. Joshi v State of Madhya Bharat and Another*, the Supreme Court was considering the validity of a Rule which prescribed capitation fee for admission to Medical Colleges in the State of Madhya Bharat. The Rule inter alia prescribed that such of the students as were domiciled in Madhya Bharat would not be liable to pay the Capitation Fees while others were required to do so. Interpreting the rule the Court held that the ground for exemption from payment of Capitation fee was "bona fide residence in the State of Madhya Bharat". Residence and place of birth, declared the Court were two distinct concepts with different connotations both in law and on facts and when Article 15(1) prohibited discrimination based on the place of birth, it did not mean that discrimination based on residence was also forbidden. The Court repelled the argument that though the rules purported to grant exemption on the basis of residence, yet definition of the expression "bona fide residence" showed that the exemption was really based on the place of birth. The Court held that the rule making authorities had while referring to domicile, really referred to residence of the candidates and therefore the classification based on any such consideration was not repugnant to Article 185. The Court accepted the theory that the object underlying the classification based on residence was to help students from Madhya Bharat so that the State could benefit from such students since some of them after passing out of the college were bound to settle down and serve the needs of the State. This view was reiterated in *Nidamarti Maheshkumar Vs. State of Maharashtra and Others*, . In that case the Supreme Court was examining the validity of Rule 3 of the Rules for selection of candidates for admission to the M.B.B.S. Course in the Government Medical Colleges in the then State of Mysore. The rule provides that no person who is not a citizen of India and is not a resident of the State of Mysore for no less than 10 years at any time prior to the date of application for a seat shall be eligible to apply. The petitioner's application for admission was rejected on the ground that she had not resided in the State for the prescribed period of 10 years. The rule was challenged on the plea that the same violated the right to equality guaranteed under Article 14 of the Constitution. The challenge was however negated by the Court, holding that a classification based on residence did not impinge upon the principles of equality enshrined under Article 14. The object of framing the impugned rule, declared the Court seemed to be to impart medical education to the best talent available out of the class of persons who are likely, so far as it can reasonably be foreseen, to serve as doctors, the inhabitants of the State of Mysore.

11. In *Dr. Pradeep Jain's case*, supra, the Court was examining the true import of expression "domicile" in the context of certain States prescribing "domiciliary" requirements as a condition of eligibility for admission. The Court held that "domicile" was meant to identify the personal law by which an individual is governed in respect of various matters such as the validity of a marriage, the effect of marriage on the proprietary rights of husband and wife, jurisdiction in divorce and nullity of marriage, illegitimacy, adoption and testamentary and

intestate succession etc., It was a relationship between an individual and the territory with a distinctive legal system. It was observed that the Constitution of India recognised only one domicile, namely domicile in India and that the legal system which prevailed throughout the territory of India is one single indivisible system with a single unified justice delivery system with the Supreme Court of India at the Apex of the hierarchy. All the same, the Court noticed the emergence of an unfortunate trend with narrow parochial loyalties fostered by interested parties with a view to gaining advantage to themselves which was perceived by the Court as a serious threat to the unity and integrity of the nation. The Court felt that this was a dangerous trend which if allowed to go on, may one day break up the Country into fragments. The following passage from the decision is in this regard apposite.

"Today unfortunately, a citizen who has his permanent, residence in a State entertains the feeling that he must have preferential claim to be appointed to an office or post in the State or to be admitted to an educational institution within the State vis-a-vis a citizen who has his permanent residence in another State, because the latter is an outsider and must yield place to a citizen who is a permanent resident of the State, irrespective of merit. This, in our opinion, is a dangerous feeling which, if allowed to grow, indiscriminately, might one day break up the country into fragments, though as we shall presently point out, the principle of equality of opportunity for education and advancement itself may justify, within reasonable limits, a preferential policy based on residence".

12. Having said so the Court declared that equality of opportunity was not simply a matter of legal equality. Its existence depended not merely on the absence of disabilities but on the presence of abilities. The State could therefore resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. In the matter of admission to Medical Colleges, the State could depart from the principle of selection based on merit where it was necessary to do so for the purpose of bringing about real equality of opportunity between those who are un-equals. A certain percentage of reservations on the basis of residence requirement was therefore held to be legitimate in order to equalise opportunities for medical admission on a broader basis and to bring about real and not formal, actual and not merely legal, equality. The percentage of reservations made on this count could also include institutional reservation for students passing the P.U.C. or Pre-Medical Examination of the same University or clearing the qualifying examination from the School system of the educational hinterland of the medical colleges in the State and for this purpose, there could be no distinction between schools affiliated to State Board and Schools affiliated to the Central Board of Secondary Education. The Court however felt that the reservations on account of residence requirements and institutions preference should in no event exceed the outer limit of the 70 percent of the total number of open seats after taking into account other kinds of reservations validly made.

13. The legitimacy of a classification based on residence requirement in a State or institutional preference has thus been judicially recognised insofar as admissions to professional colleges are concerned. It follows that any residence requirement for admission cannot be condemned as unconstitutional on the ground of violation of Article 15(1). The provisions of Article 16(2) also cannot be invoked in support of any such challenge since that provision has no application insofar as the admission to educational institutions are concerned. The challenge to any such residence requirement can however be examined on the touch stone of Article 14 as was the position in Pradip Jain's case, *supra*, also, where the Supreme Court, reiterated the view taken in D.P. Joshi's case, *supra*, and Vasundara's case, *supra*, by holding that a classification based on residence requirement, was permissible. The Court declared that any wholesale reservation on the basis of residence requirement or institutional preference was liable to be declared unconstitutional and offensive to Article 14 of the Constitution,

14. The subsequent decisions of the Apex Court in Nidamarti Ma-heshkumar's case, *supra*, Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others, and Anant Madaan and others Vs. State of Haryana and others, , have reiterated and re- affirmed the above position in law. Suffice it to say that reservations for purposes of admission to professional colleges based on residence and institutional preferences, alone have been accepted as exceptions to the general rule of such admissions being made only on the basis of the merit.

15. Coming then to the present case the rule as it now stands makes birth of the parents of the candidates a determinative factor as between two candidates one of whom satisfies the requirements of birth and residence while the other satisfies the requirement of only residence of 7 years. Similarly, birth is the determining factor as between two candidates both of whom satisfy the requirement of Rule 7(2) insofar as their parents or any one of them having studied in Karnataka for a period of 7 years is concerned. In both the situations any candidate one of whose parents had not been born in Karnataka bound to lose to the other falling in the same category but whose parents or one of them were born in the State. Birth thus assumes critical significance as between suit candidates and a benefit which may otherwise have been due and admissible is denied only because the candidate parents or one of them had not been born in Karnataka. It is therefore a situation where an impermissible requirement is prescribed alongside a permissible one. The very fact however that the impermissible requirement is in the company of a permissible requirement would neither render the impermissible part ineffective nor bring legitimacy to the provision which contains the same. So long as birth is made an essential requirement for claiming benefit under Rule 7(ii), the presence of some further or additional requirement like residence within the State or studies for the prescribed length of time would not rescue the provision from the vice of unconstitutionality. An otherwise perfect classification may at once become impermissible if it is based on an amalgam of what is constitutionally permissible and what is not.

16. The next question then is whether the provision should be struck down in its entirety or only to the extent it engrafts the offending requirement. It was contended by Mr. Gururajan that it was neither necessary nor desirable to strike down the provision in toto, for the offending part which was introduced by an amendment to the rules was distinct and severable from the rule as it stood originally and as interpreted by this Court in Nita Salam's case, *supra*. There is considerable merit in that submission. The principles governing the doctrine of severability were summarised by the Supreme Court in *R.M.D. Chamarbaugwalla Vs. The Union of India (UOI)*, , thus:

"1. In determining whether the valid parts of a statute are separable from the invalid parts thereof it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid vide *Corpus Juris Secundum*, Vol. 82, page 156 and *Sutherland on Statutory Construction*, Vol. 2, pages 176 and 177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable vide *Cooley's Constitutional Limitations*, Vol. 1, at pages 217 and 218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole vide *Crawford on Statutory Construction*, pages 218 and 219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so then and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections vide *Cooley's Constitutional Limitations*, Vol. 1, pages 361 and 362; it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation vide *Sutherland on Statutory Construction*, Vol. 2, page 194.

7. In determining the legislative intent on the question of separability, it will be

legitimate to take into account the history of the legislation, its object, the title and the preamble to it -- vide Sutherland on Statutory Construction, Vol. 2, pages 177 and 178".

It is evident from the above that the doctrine can be invoked not only in respect of a statute as a whole but even in respect of a section appearing in the same. It is also manifest that the crucial question to be examined is whether after removal of the offending part the statute what remains behind is still reasonably workable as an independent scheme without making any alterations and modifications therein. Applying these tests to Rule 7(ii), as it stands after amendment, it cannot be said that the offending part of the provision is so integrated with the other requirement that its removal will have the effect of making the remnant otiose or unworkable. What is of prime importance is that the vice of unconstitutionality is introduced by reason of an amendment to the rule which rule was held by this Court to be valid and workable subject to the interpretation placed on the expressions used therein. The fact that severance would enlarge the scope of the provision would be inconsequential having regard to the settled legal position that there is no juristic principle which inhibits the Court from striking down an unconstitutional portion of a legislative enactment only because the same will have the effect of enlarging the width and the scope of the measure. The following passage from the decision of the Supreme Court in *D.S. Nakara and Others Vs. Union of India (UOI)*, is in this regard apposite:

"Said the learned Attorney General that principle of severability cannot be applied to argument the class and to adopt his words "severance always cuts down the scope, never enlarges it". We are not sure whether there is any principle which inhibits the Court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class. In such a situation, the Court can strike down the words of limitation in an enactment".

17. In the result, these petitions succeed and are hereby allowed. Notification dated 8-5-1998 issued by the State Government to the extent the same amends Rule 7(ii) to prescribe birth of either of the parents of the candidate in the State of Karnataka as an essential requirement for grant of benefit under the said rule, shall stand quashed as unconstitutional, with a direction to the respondents to consider the petitioners and all others claiming benefit of the said rule without insisting upon the fulfilment of the said requirement.

18. No costs.