
(2011) 03 KL CK 0274

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 1014 of 2009 and 2610 of 2010

Mohammed Riaz

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 30-03-2011

Acts Referred:

Constitution of India, 1950 — Article 246, 254, 254(2)
Indian Medical Council Act, 1956 — Section 20(1), 33
Kerala Medical Officers Admission to Post Graduate Courses under Service Quota Act, 2008 — Section 5(4)

Citation : (2011) 2 ILR (Ker) 279 : (2011) 2 KLT 294

Hon'ble Judges : Thottathil B. Radhakrishnan, J; S.S. Satheesachandran, J

Bench : Division Bench

Advocate : Kurian George Kannanthanam, Tony George Kannanthanam and Jiji Thomas, for the Appellant; C.P. Sudhakara Prasad, General, T.B. Hood, Government Pleader, Alexander Thomas, Sajeev Kumar K. Gopal, Babu Joseph Kuruvathazha, P. Leelakrishnan, Shyam Krishnan, Kodoth Sreedharan, V.N. Ramesan Nambisan, E.K. Nandakumar, A.K. Jayasankar Nambiar, K. John Mathai, P. Benny Thomas, P. Gopinath, V.J. Anand, Ambika Radhakrishnan, K.U. Vijayan and K.N. Sreekumaran, for the Respondent

Final Decision : Allowed

Judgement

Thottathil B. Radhakrishnan, J.—These Writ Petitions are filed seeking a declaration that Section 5(4) of the Kerala Medical Officers' Admission to Postgraduate Courses under Service Quota Act, 2008 (Kerala Act 29 of 2008), hereinafter referred to as "the State Act", in so far as it lays down that admission to Postgraduate Medical Education in service quota shall be on the basis of the seniority, is arbitrary and illegal. Some of the provisions of the Prospectus for the relevant year for admission to postgraduate medical education in the service quota are also sought to be quashed. When these matters came up for final hearing, the Petitioners, having regard to the passage of time, pressed only for the relief of declaration as to the invalidity of the statutory provision under challenge.

2. The pleadings on behalf of the Petitioners are that Section 5(4) of the State Act in so far as it relates to prescription that selection for admission to Postgraduate Courses shall be solely on the basis of seniority, without even prescribing a minimum eligibility, is in violation of the Regulations issued by the Medical Council of India, the competent authority under the Indian Medical Council of India Act, 1956, for short, "the IMC Act". The argument advanced is that the Postgraduate Medical Education Regulations, 2000, "MCI Regulations", for brevity, provide the prescriptions as to the minimum requirement that all candidates have to be selected only on the basis of inter se academic merit and that the M.C.I. Regulations also provide for weightage etc. and the State cannot legislate in relation to matters which are provided for specifically in the IMC Act and in the MCI Regulations, not only because such provisions are in place, but also because the making of those provisions is referable only to Entry 66 of List I of Seventh Schedule and the impugned State legislation cannot be pushed off as one having been made with reference to Entry 25 in List III. It is accordingly argued that the fact that the State Act was reserved for consideration of the President and has received his assent in terms of Article 254(2) of the Constitution, does not save the State legislation, to the extent impugned, from being impeached as one made without legislative competence. This is the crux of the contentions and submissions.

3. Per contra, the State of Kerala, through the learned Advocate General, and the Association of Medical Officers impleaded as additional Respondent, as also those who have obtained the benefit of the impugned provision, contended that applying the doctrine of pith and substance, the impugned State Act is wholly different from the substance of the I.M.C. Act and the M.C.I. Regulations. It is argued that the substance of the State Act is referable to Entry 25 of List III and it does not conflict with Entry 66 of List I. On such basis, it is contended that the examination of rival contentions ought to be on the basis of the principle of dominant purpose of the legislation under attack. The in-service officers also attempt to show that on ground reality, allotment of quota, as is provided for by the State Act, is necessary to render justice to that category of aspirants for higher education in medicine.

4. The Medical Council of India, through pleadings and arguments, supports the stand taken by the Petitioners and points out that the MCI Regulations categorically provide as follows in clause 9:

Selection of Postgraduate Students

(1)(a) Students for Postgraduate medical courses shall be selected strictly on the basis of their Inter-se Academic Merit.

(b) 50% of the seats in Post Graduate Diploma Course shall be reserved for Medical Officers in the Government service, who have served for at least three years in remote and difficult areas. After acquiring the PG Diploma, the Medical Officers shall serve for two more years in remote and/or difficult areas.

(2) For determining the "Academic Merit", the University/Institution may adopt the following methodologies:

(a) On the basis of merit as determined by a "Competitive Test" conducted by the State Government or by the competent authority appointed by the State Government or by the university/group of universities in the same State; or

(b) On the basis of merit as determined by a centralised competitive test held at the national level; or

(c) On the basis of the individual cumulative performance at the first, second and third M.B.B.S. examinations provided admissions are University wise; or

(d) Combination of (a) and (c):

Provided that wherever "Entrance Test" for postgraduates admission is held by a State Government or a university or any other authorized examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical course shall be 50 percent for general category candidates and 40 percent for the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes:

Provided further that in Non-Governmental institutions fifty percent of the total seats shall be filled by the competent authority notified by the State Government and the remaining fifty percent by the managements) of the institution on the basis of inter-se Academic Merit:

Further provided that in determining the merit and the entrance test for postgraduate admission weightage in the marks may be given as an incentive at the rate of 10% of the marks obtained for each year in service in remote or difficult areas upto the maximum of 30% of the marks obtained.

5. The impugned State Act stands with assent of the President in terms of Article 254(2) of the Constitution. When a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by the Parliament or an existing law with reference to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. This provision deals only with possible repugnancy between provisions of laws made by the Parliament and the laws made by the State with reference to any particular entry in the Concurrent List, i.e., List III. Recourse to Presidential assent under Article 254(2) is not curative of the absence of legislative competence in terms of the provisions of Article 246 and Seventh Schedule of the Constitution. Therefore, the support of Presidential assent in terms of Article 254(2) would not save the impugned provisions of the State legislation if the subject dealt with therein falls within the Union List.

6. Hence, the crucial question would be whether the subject of the State Act, to

the extent impugned, is one that falls within Entry 66 of the Union List. If it is so, the State Act to the extent impugned, would fail on ground of lack of legislative competence. If that subject falls within Entry 25 of the Concurrent List, it stands.

7. In *Dr Preeti Srivastava and Another Vs. State of M.P. and Others*, , it was held that the State cannot, while controlling education in the State, impinge on the standards in the institutions for higher education, because this is exclusively within the purview of the Union. Having regard to Entry 25 of List III and Entry 66 of List I, it was laid down that a State has the right to control education, including medical education so long as the field is not occupied by any Union legislation. While prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union under Entry 66 of List I. From 1977, education including, inter alia, medical and university education; is in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in that field, except as provided in Article 254. The Apex Court noted that it would not be correct to say that the norms for admission have no connection with the standards of education, or that the rules for admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on standards of education. Though State can make rules for admission, they have to be consistent with and without adversely affecting the standards of education, as are prescribed by the Union in exercise of powers under Entry 66 of List I. It was further held that standards of postgraduate medical education in terms of Section 20(1) of the IMC Act would include guidance regarding the minimum qualification or eligibility criteria for admission. It was also held that Section 20(1) empowers the Medical Council to prescribe standards of postgraduate medical education and the scheme of the IMC Act does not give an option to the universities to follow or not to follow the standards laid down by the Indian Medical Council. It was found that prescription of eligibility conditions was within the domain of the M.C.I. In *The State of Madhya Pradesh and Others Vs. Gopal D. Tirthani and Others*, , the Apex Court upheld the allocation of a percentage of seats for in-service candidates holding that such classification only constitutes a separate source or channel of admission and is not by way of reservation. It was contended by the in-service candidates before the Apex Court in that case, that having done graduation and having then entered into Government service, they were detached from theoretical studies and therefore, it would be too much to expect from them such theoretical knowledge of medical science as would enable them to compete with fresh medical graduates taking up pre-PG test and to qualify for entry into postgraduate courses. It was also suggested by them that there should be two separate examinations for the two groups and that would not prejudice the open category candidates.

This contention was repelled by the Apex Court holding as follows:

25. The eligibility test, called the entrance test or the pre-PG test, is conducted

with dual purposes. Firstly, it is held with the object of assessing the knowledge and intelligence quotient of a candidate whether he would be able to prosecute postgraduate studies if allowed an opportunity of doing so; secondly, it is for the purpose of assessing the merit inter se of the candidates which is of vital significance at the counselling when it comes to allotting the successful candidates to different disciplines wherein the seats are limited and some disciplines are considered to be more creamy and are more coveted than the others. The concept of a minimum qualifying percentage cannot, therefore, be given a complete go-by. If at all there can be departure, that has to be minimal and that too only by approval of experts in the field of medical education, which for the present are available as a body in the Medical Council of India.

26. The Medical Council of India, for the present, insists, through its Regulations, on a common entrance test being conducted whereat the minimum qualifying marks would be 50%. The State of Madhya Pradesh must comply with the requirements of the Regulations framed by the Medical Council of India and hold a common entrance test even if there are two separate channels of entry and allow clearance only to such candidates who secure the minimum qualifying marks as prescribed by the M.C.I. Regulations. If the State has a case for making a departure from such rule or for carving out an exception in favour of any classification then it is for the State to represent to the Central Government and/or the Medical Council of India and make out a case of justification consistently with the afore-quoted observation of this Court in *State of Punjab Vs. Dayanand Medical College and Hospital and Others*, .

27. The in-service candidates may have been away from academics and theories because of being in service. Still they need to be assessed as eligible for entrance in P.G. For taking up such examination, they must either keep updating themselves regularly or concentrate on preparatory studies to entrance examinations but without sacrificing or compromising with their obligations to the people whom they are meant to serve on account of being in State services.

8. Among the conclusions in *Gopal D. Tirthani (supra)*, it has been specifically laid down that the requirement of minimum qualifying marks cannot be lowered or relaxed contrary to the M.C.I. Regulations and though there could be a separate and exclusive channel of entry or source of admission for in-service candidates, there has to be only one common entrance test for determining the eligibility for post graduation for in service candidates and those not in service. In a State where there are more universities than one, the appropriate provision of Regulation 9(2) would apply. The principles of law emanating from the above include that the prescription as to the requirement of an entrance examination with a minimum eligibility bench mark to be acquired in that entrance test for postgraduate medical education is within the field covered by Entry 66 in List I and the competence of the State Legislature to make a law with reference to Entry 25 in List III would not enable it to make any such law encroaching on the field occupied by Entry 66 in List I. The M.C.I. Regulations framed u/s 33 of the

IMC Act is insulated from any contradiction by any State legislation. Therefore, the State cannot make a law doing away with the requirement, for in-service candidates, to participate in the common entrance test for admission to postgraduate medical courses and obtaining the minimum eligibility requirement prescribed by the M.C.I., in the Regulations.

The conclusion is that the provision in Section 5(4) of the State Act that the select list of in-service medical officers for postgraduate medical education shall be strictly on the basis of seniority is subject to the requirement that such selection can be made only from among those in-service medical officers who have undergone the common entrance test for postgraduate medical education and have obtained the minimum eligibility bench mark in that test in terms of the M.C.I. Regulations. It is so declared. These Writ Petitions are allowed to that extent. No costs.