

(1996) 07 KL CK 0077

In the High Court Of Kerala

Case No : W.A. No. 644, 645 and 645 of 1996

Nazer, M.

APPELLANT

Vs

Dr. Srinivas Shenoy and Others

RESPONDENT

Date of Decision : 05-07-1996

Acts Referred:

General Clauses Act, 1897 — Section 21

Citation : (1996) 07 KL CK 0077

Hon'ble Judges : T. Ramachandran, J;K.G. Balakrishnan, J

Bench : Division Bench

Advocate : P. Sukumaran Nair and Thottathil B. Radhakrishnan and C.P. Sudhakara Prasad, for the Appellant; K.R.B. Kaimal and T.A. Ajayakumar for Respondents 4 and 1 and Lal George, Government Pleader for Respondents 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

Balakrishnan, J.—These writ appeals have been filed against the common judgment of the learned Single Judge in O.P. Nos. 4584, 4532 and 1430 of 1996. The matter relates to the admission to super speciality courses in Medical Colleges in the State. The learned Single Judge held that ear-marking of seats for Tutors/Assistant Professors in the various super speciality courses is violative of law laid down in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, and other similar cases. The order passed by the Government reserving seats for Tutors/Assistant Professors for super speciality courses was struck down by the impugned judgment, and hence these Writ Appeals.

2. The Directorate of Medical Education issued prospectus for admission to nine super speciality courses in February 1994. In this prospectus, it was specified that applicants who had undergone M.B.B.S. and appropriate Postgraduate degree of the University of Kerala or any other University recognised by University of Kerala were eligible to apply for admission to the courses. Admission to these courses was regulated by an entrance examination. In

previous years one seat each was reserved for Lecturer/Assistant Professors except for D.M. Gastroenterology, D.M. Neurology and D.M. Nephrology but in 1995 prospectus for admission to these courses, no reservation of seats was provided for Lecturers/Assistant Professors.

2(a) Appellant-association in W.A. No. 646/96 challenged the discontinuance of reservation given to Lecturers/Assistant Professors for super speciality courses in 1995 prospectus by filing O.P. No. 1430/96. Petitioner had also submitted a representation before the Government to extent the benefit of reservation. The learned Single Judge before whom O.P. No. 1430/96 came up for consideration directed the Government to consider the representation and pass appropriate orders. Government passed an order amending the prospectus issued in 1995. That is produced as Ext. P-2 in O.P. No. 4532/96. By that order Government directed to continue the reservation of one seat in each speciality of super-speciality courses, 1995 in favour of the Tutor's/Assistant Professors under the Medical Education Services. Thus for the ten super speciality courses one seat each was reserved for Tutors/Assistant Professors. Petitioners in that O.P. challenged Ext. P-2 order passed by the Government mainly on the ground that it was against the dicta laid down in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, . There was an earlier decision by a learned Single Judge of this Court in O.P. No. 4465/91 to the effect that reservation in favour of Tutors/Assistant Professors was perfectly legal and was not against the mandate laid down by the Supreme Court in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, .

3. Learned Single Judge quashed Ext. P-2 Government Order (in O.P. No. 4532/96) and held that Government had no authority to amend the prospectus and that the decision to reserve seats in favour of Tutors/Assistant Professors was opposed to the directions contained in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, . Incidentally the learned Single Judge also observed that decision rendered in O.P. No. 4465/91 is "per incurium". The correctness of the finding of the learned Single Judge is sought to be challenged in W.A. Nos. 644 and 645 of 1996.

4. W.A. No. 546/96 is against the judgment in O.P. No. 1430/96. It was in this O.P., there was an interim direction to consider the representation submitted by the Petitioners. This O.P. when came up for hearing, the Petitioner's counsel submitted that O.P. had become infructuous. Then the learned Single Judge quashed the interim order passed earlier and directed that original petition would stand dismissed. That finding is challenged in W.A. No. 646/96.

5. We heard the senior counsel for the Appellant Sri P. Sukumaran Nair in W.A. No. 646/96, Sri C.P. Sudhakara Prasad-counsel for the Appellant in W.A. Nos. 644 and 645/96, Respondents' counsel Sri K.R. B. Kaimal, and Sri Ajaya Kumar and the Government Pleader Sri Lal George.

6. In our opinion, two questions arise for consideration: (i) Whether the

Government had authority to amend the prospectus after having issued the same and Whether the amendment was just and proper, (ii) whether the grant of reservation in favour of Tutors/Asst. Professors for admission to super speciality courses is permissible under law or whether it is opposed to the dicta laid down by the Supreme Court in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, ; C. Surekha Vs. Union of India (UOI) and Others, and Fazal Ghafoor Vs. Union of India (UOI) and Others,

7. As regards the power of the Government to amend the prospectus, counsel for the Respondent contended that Clause 12 of the prospectus has no relevance and it does not give the Government any authority to modify or amend the prospectus. Clause XII of the prospectus reads thus:

Notwithstanding anything contained in the Prospectus, the Government may at any time on their own accord or otherwise, revise or amend any order passed by the subordinate authority.

It is contended by the Respondent's counsel that power to amend the prospectus would apply only to correct the mistake if any done by the subordinate authority, and the prospectus though issued by the Directorate of Medical Education, it was under the authority of the Government and the amendment now effected was not by way of correcting any mistake in the order passed by the subordinate authority. A strict interpretation of Clause XII will lead to such an inference, but the intention is to correct or amend any of the mistakes that had crept in the prospectus. If the Government itself committed any mistake while issuing the prospectus, Clause XII gives a residuary power to amend or modify it. More so, in view of Clause 21 of General Clauses Act, which reads as follows:

21. Power to issue to include power to add to, amend, vary or rescind, orders, rules or bye-laws.-Where, by any Central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws, so issued.

Section 21 of the General Clauses Act gives power to the Government to amend, vary or rescind any notification issued by the Government. Counsel for the Respondent contended that there can not be any retrospective effect to the rescission or modification. Here, the notification was not amended retrospectively. Admission to the courses was not over and it was during the course of admission to these courses the amendment was made by the authorities.

8. The counsel for the Respondents relied on decisions reported in Dinesh Kumar v. Motilal Nehru Medical College, Allahabad AIR 1986 S.C. 1877 and Gurdeep Singh Vs. State of Jammu and Kashmir and others, . Gurdeep Singh Vs. State of Jammu and Kashmir and others, was a case where in the State of Jammu and Kashmir a certain percentage of seats in Medical Courses was reserved for the

candidates excelling in certain categories of sports specifically notified as approved sports. At the relevant time, "mountaineering" was not one of the items of sports approved. Entrance examination was held in September 1991 and in November 1991 the council took steps to recognise mountaineering as an additional sports activity. Sixth Respondent was the only candidate in this category. The selection of the 6th Respondent was challenged in that case. It was in this background the selection of the 6th Respondent was held to be thoroughly unjustified and the attribution of eligibility long after the selection process was over, was held to be misuse of power. The facts in that case have no comparison to the facts of the present case. Here the Petitioners have no case that the prospectus was amended to help any particular candidate. Counsel for the Respondent also contended that amendment of the prospectus was long after the selection process was over. Appellant-association of medical teachers submitted a representation even at the time of publication of prospectus. But the Government did not consider the same in time and the delay was due to failure on the part of the Government to take timely action for which Appellant association cannot be found fault with.

9. The other main question that arise for consideration is whether the reservation of seats in favour of Lecturers/Assistant professors in the super speciality courses is against the directions of the Supreme Court contained in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, . The learned Single Judge held that in view of this decision, reservation of any kind in favour of any category in super speciality course is illegal. We do not think that the decision of Supreme Court in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, , laid down such a proposition. It is important to note for what reliefs and purpose that case was filed before the Supreme Court. In paragraph 1, it was observed that,

The question is, whether, consistently with the constitutional values, admissions to a medical college or any other institution of higher learning situate in a State can be confined to those who have their "domicil" within the State or who are resident within the State for a specified number of years or can any reservation in admissions be made for them so as to give them precedence over those who do not possess "domicil" or residential qualification within the State, irrespective of merit.

The above question was considered in detail and it was held that,

Wholesale reservation made by some of the State Governments on the basis of "domicile" or residence requirement within the State or on the basis of institutional preference for students who have passed the qualifying examination held by the university or the State excluding all students not satisfying this requirement, regardless of merit, is unconstitutional and void being violation of Article 14. But certain percentage of reservation based on residence or institution in a State for admission to M.B.B.S. course can not be said to be irrational or irrelevant and can be introduced as a condition for admission without violating Article 14.

The main thrust of the decision in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, is about the reservation of seats on the ground of domicile and "institutional preference". We are unable to hold that the ratio dissidenti of the case is against any sort of reservation. It is true that in paragraph 27, towards end, it has been observed that,

But, even in regard to admissions to the postgraduate course, we would direct that so far as super specialities such as neuro-surgery and cardiology are concerned, there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on merit on all India basis.

Even in the above passage, the honourable Judges of the Supreme Court had in mind the reservation on the ground of domicile and institutional preference. It is difficult to read into the judgment that the decision in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, completely ruled out any sort of reservation for admission to medical colleges. The observations made in the later decision of the Supreme Court in relevant. In the decision reported in Ajay Kumar Singh v. State of Bihar 1994 (4) S.C.C. 403 where State of Bihar issued a prospectus relating to Postgraduate Medical Admission Test, 1992 providing inter alia reservation in favour of socially and educationally backward classes, Scheduled Castes, Scheduled Tribes and women. The percentages reserved were Scheduled Castes- 14 per cent, Scheduled Tribes 10 per cent, extremely Backward Classes 14 per cent, Backward Classes 9 per cent and ladies 3 per cent. The Appellants questioned the aforesaid provision for reservation by way of writ petitions in the Patna High Court. The writ petitions were dismissed. In appeal before the Supreme Court it was contended that The Indian Medical Council Act, 1956 is an Act of Parliament and Indian Medical Council had determined the standard of higher education in various institutions and therefore the admission could be in accordance with the directions of the Indian Medical Council. It was also contended that the reservation of seats in favour of socially and educationally Backward Classes is opposed to the decision in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, . As regards the first contention, it was held that the directions of the Indian Medical Council is only advisory in nature and the recommendations on Postgraduate Medical Education adopted by the Medical Council of India were not approved by the Central Government and that the field is thus left free to be regulated by the State and the education being in Entry 25 of list III, the State Government had authority to reserve seats in favour of socially and educationally backward candidates.

10. As regards the objections raised on the basis of Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, it was held that,

In Pradeep Jain, the Court was concerned with wholesale reservation made by some of the State Governments on the basis of domicile or residence requirement within the State and admitting only those students to their medical colleges who satisfied the said requirement. With a view to extend the rule of equality, the Court directed that certain percentage of seats both in M.B.B.S. and

postgraduate medical courses should be filled on the basis of All India entrance test and that students to this reserved quota should not be called upon to satisfy the rule of residence or domicile, as the case may be. This was again not a case arising under Article 15(4). The observations made cannot be torn from their context and read as applicable to the situation obtaining under Article 15(4). For the above reasons, the second contention of Shri Vikas Singh is also rejected.

11. We do not find any observation in the decisions of the Supreme Court reported in *Ajai Kumar Singh v. State of Bihar* 1994 (4) S.C.C. 403, *C. Surekha Vs. Union of India (UOI) and Others*, and *Fazal Ghafoor Vs. Union of India (UOI) and Others*, prohibiting reservation of any kind in super speciality courses. Moreover, the term "Merit" has been extensively explained in *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, in paragraphs 12 and 13 of the judgment.

12. The learned Single Judge was not justified in holding the view that the decision in *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, was to the effect that any sort of reservation was illegal. The observation of the learned Single Judge that earlier decision in O.P. No. 4465/91 is "per incurium" also is not correct.

13. Coming to the facts of the case, it may be noted that the reservation is made in favour of medical college teachers and the stand taken by the Government is that if these teachers have special skill and knowledge in their branch of studies, that would enure to the betterment of the medical education in the State. If the admissions to super speciality courses is only on the basis of a pass in the entrance test, it is not likely that these teachers may get admission to these courses. If teachers acquire more skill in their profession that would certainly benefit the students and also the patients who are undergoing treatment in the hospitals attached to medical colleges. The State is incurring heavy expense for medical education. There is nothing wrong or irrational in enabling the medical college teachers to acquire more skill and knowledge in their work. The reservation is only an enabling provision and in every branch of science continuing education is now accepted as a permanent necessity. Medical science is a fast developing branch of science. The teachers are bound to know and keep abreast with the latest technology and know-how in their respective branch of studies. Any effort made by the State in this regard to impart knowledge and training to the medical college teachers can only be welcomed as a progressive step. We are told that super speciality courses in various other States give a larger percentage of reservation to medical college teachers. In postgraduate courses and super speciality courses, reservation in favour of teachers was in force till 1994 but the Government took away these rights and that has been set a right by the impugned order. We do not think that the Government Order is illegal or against the mandate of the Supreme Court in *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, . We allow the Writ Appeals Nos. 644 and 645 of 1996.

14. W.A. No. 646/96 is filed against the dismissal of O.P. No. 1430/96. In fact, O.P. No. 1430/96 was reported by the counsel as in fructuous. We accept that and we direct O.P. No. 1430/96 shall stand dismissed and the interim direction shall hold good for the purpose for which it was issued. So the direction of the learned Single Judge that interim order in C.M.P. No. 2488/96 would stand vacated is held to be without any consequence. W.A. No. 646/96 is also allowed to the extent indicated above.