
(2015) 04 KL CK 0099

In the High Court Of Kerala

Case No : Writ Petition (C). No. 27209 of 2014 (A)

R.N.K. Sankar and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 08-04-2015

Acts Referred:

Indian Medical Council Act, 1956 — Section 20, 33

Citation : (2015) 04 KL CK 0099

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : C.S. Manu, for the Appellant; Roshan D. Alexander, Senior Govt. Pleader and Joseph George, Govt. Pleader, Advocates for the Respondent

Final Decision : Dismissed

Judgement

P.R. Ramachandra Menon, J—Challenge raised by the petitioners is against the stipulation in Ext. P2 prospectus, vide Clause 4.4, as to the necessity to qualify in the Post Graduate Medical Entrance Examination, 2015 to be considered for selection in the "Service Quota" for the various Post graduate Degree/Diploma courses under the Kerala Medical Officers admission to Post Graduate Medical courses under Service Quota Act 2008 (in short "Service Quota Act"). The case is that, by virtue of the mandate under Section 5(4) of the Act, the selection has to be based on seniority of the service quota candidates and that alone.

2. The petitioners herein after successful completion of MBBS from different institutions, came to be selected and appointed as Doctors/Lecturers in the T.D. Medical College at Alappuzha. They are having Government service of about 15 to 20 years and are dedicated in their duties. By virtue of the Service Quota Act, 40% of the seats available are earmarked to be filled up by Doctors serving the Government. As a matter of fact, the petitioners being Medical Officers having 15 to 20 years of service are virtually detached from the theoretical studies, who cannot compete with fresh Medical Graduates who take up the Entrance Test, to qualify for the entry into the Post Graduate courses. It is stated that, the

experience gathered by the persons like the petitioners is much above the theoretical knowledge and as such, selection of persons like the petitioners for the post of graduate degree/diploma courses will be in the best interest of the ultimate beneficiaries, who are the patients, who mostly belong to the poor section of the society. It was considering the above vital aspect, among other relevant factors, that the Government found it fit and proper to earmark a quota exclusively for service candidates; thus bringing in the legislation as "Service Quota Act", prescribing the "eligibility criteria" and "mode of selection". As per the Act, by virtue of the non-obstante Clause under Section 3, the selection of candidates under the Service Quota is to be made, notwithstanding anything contained in the Medical Council of India Act/Regulations and it has to be strictly on the basis of seniority, as provided under Section 5, Sub Section 4 of the Act. Weightage for rural service has to be given, as specified under Section 6 of the Service Quota Act. The Act does not contemplate any Entrance Test and as such, the course sought to be pursued by the respondents to select candidates on the basis of performance in the common Entrance Test is contrary to the scheme of the statute and hence the challenge.

3. The case of the petitioners is that, the Act and the process of selection were sought to be challenged by filing a writ petition before this Court, placing reliance on the judgment rendered by the Apex Court in *Dr Preeti Srivastava and Another Vs. State of M.P. and Others*, AIR 1999 SC 2894 : (1999) 5 JT 498 : (1999) 4 SCALE 579 : (1999) 7 SCC 120 : (1999) AIRSCW 2795 : (1999) 7 Supreme 81 . It was held by a Division Bench of this Court, as per the decision reported in *Mohammed Riaz Vs. State of Kerala*, (2011) 2 ILR (Ker) 279 : (2011) 2 KLT 294 that, in so far as the field of legislation is not occupied by a Central Legislation enacted with reference to entry No. 66 of the 1st list under the 7th Schedule of the Constitution of India, the State is at liberty to enact the law on the subject, drawing power with reference to entry 25 in list III (concurrent list) of the 7th schedule. In view of the relevant Regulations formulated by the Medical Council of India, invoking the power under Section 20 and 33 of the Medical Council of India Act, the Court observed that, the selection has to be made on the basis of "merit" as stipulated by the Medical Council and as such, it was not proper for the State to have invaded or encroached into the said extent/area/field which is occupied by the Central Legislation. In the above circumstances, the Division Bench read Section 5(4) of the State Act and observed that, the candidate had to take part and qualify in the Entrance Test, and once they qualify in the Entrance Test, obtaining the prescribed minimum extent of marks, then their Rank List and eligibility shall be decided with reference to their seniority in service.

4. The cause of action now projected in the writ petition is with reference to the subsequent event, whereby the Apex Court, as per the decision reported in *Christian Medical College Vellore and Others Vs. Union of India and Others*, (2013) 12 AD 311 : (2013) 9 SCALE 226 : (2014) 2 SCC 305 : (2014) 1 SCT 390 set aside the Regulations formulated by the Medical Council. No Regulation prescribing a "common entrance test" with regard to selection to the Post

Graduate courses is in existence as on date. As such, there is no Central Legislation on the point and hence, selection of Service Quota candidates had to be strictly in terms of the seniority as mentioned under Section 5(4) of the Act. It is pointed out that the petitioners had approached the concerned respondent by filing Ext. P1 representation even much prior to issuance of the prospectus, to look into the aspect and to make appropriate stipulations, simultaneously approaching this Court by filing the writ petition, seeking for a declaration in this regard and also to direct the 1st respondent to consider the representation.

5. Meanwhile, the "prospectus committee" finalised all the relevant proposals and a draft was forwarded to the Government, who considered the same and approved it as per the G.O. No. GO (Rt) No. 3986/2014/H&FWD dated 15.12.2014 prescribing the eligibility criteria and the mode of selection, a copy of which has been produced as Ext. P2. Clause 4.4 of Ext. P2 prospectus clearly stipulates that, all the candidates including "service quota candidates" have necessarily to appear and qualify in the "common entrance test", for being selected for the post graduate degree/diploma courses, which made the petitioners to amend the writ petition seeking to challenge the said clause as well.

6. A counter affidavit has been filed on behalf of the respondents 1 and 2 contending that the version of the petitioners to conduct the selection for the post graduate diploma/degree courses merely on the basis of seniority is not at all liable to be entertained. It is also pointed out that the verdict passed by the Division Bench of this Court in Dr. Mohammed Riyaz's case (cited supra) has been intercepted by the Apex Court as per the judgment dated 12.01.2015 in Civil Appeal Nos. 297-298/2015, a copy which has been produced as Ext. R1(a). It has been held in the said judgment, that the field is pre-occupied by the Central Legislation and the Regulations formulated by the Medical Council of India and as such, the State Government could not have touched the field with reference to entry 25 of list III of the 7th schedule of the Constitution of India. It was also observed in paragraph 9 of the said judgment that, in principle, the High Court had agreed that admission to post graduate courses could be made only on the basis of inter se seniority, provided the candidates appeared in the common entrance examination and got qualified. But referring to Regulation 9 of the Regulations framed by the MCI, it was held that, admission to the post graduate medical courses shall be made strictly on the basis of inter se academic merit of the candidates and as such the High Court was not correct in reading down seniority simplicitor in to the norms, once they qualified in the common entrance test. The Apex Court also observed that, the grievance of the service quota candidates with regard to the long service and the difficulty in competing with the others/fresh hands, stands already compensated by virtue of the stipulation in the Regulations, providing for "weightage" of marks to be given as an incentive at the rate of 10% of the marks obtained for each year in the service in the "remote" or "difficult areas", upto the maximum of 30% of the marks obtained. Observing that Regulation No. 9 is a complete code by itself, the Apex Court observed that, for determining the eligibility of candidates including

the method to be adopted for determining the inter se merit, which remains the only basis for such admissions, it was held that, weightage on account of the "rural service" can be added to the extent as indicated in the third proviso to Regulation 9, to the performance in the Entrance test. The Apex Court observed that a meritorious in-service candidate cannot be denied admission only because he has an eligible senior above him, though lower in merit and that it is now fairly well settled that merit alone can be the basis for admission among candidate belonging to any given category. According to the Supreme Court, the inter se merit cannot be overlooked only to promote seniority, which has no place in the scheme of MCA Regulations and that, interest of the in-service candidates can be protected by giving weightage to the sufficient/prescribed extent as given in the "third proviso" to Regulation No. 9.

7. A statement has been filed on behalf of the additional 4th respondent/MCI to the effect that, the field is occupied by the Central Legislation, adding that, Clause 9 of the Post Graduate Medical Education Regulation 2000 is only supplemental to the 1971 Regulations. It is stated that, even if the subsequent Regulation is set aside, the 1971 Regulations held that, the selection shall be strictly on academic merit. It is further pointed out that, the said Regulation has now been supplemented by detailed instructions through prospectus for All India Post Graduate Medical Entrance Examination 2015, by the National Board of Examinations - an Instrumentality of the Union Government. Para 14.1 of the said prospectus prescribes minimum qualifying score in each category. Placing reliance on the decision rendered by the Apex Court in *The Joint Action Committee of Airlines Pilots Associations of India and Others Vs. The Director General of Civil Aviation and Others*, AIR 2011 SC 2220 : (2011) 6 JT 24 : (2011) 5 SCALE 284 : (2011) 5 SCC 435 : (2011) 5 SCR 1019 : (2011) 4 UJ 2267 : (2011) AIRSCW 3068 : (2011) 3 Supreme 621 , it is stated that, if the Rules are silent on any particular point, Government can fill up the gaps and supplement the Rules and issue instructions in so far as it is not inconsistent with the Rules already framed. The subsequent developments as to the modification/ amendment to Ext. P2 prospectus brought about by the Government pursuant to Ext. R1 (a) verdict passed by the Apex Court, by issuing G.O.(Rt) No. 517/2015/H&FWD dated 03.02.2015 and doing away with the negative marks" for the Entrance Test as per the G.O.(Rt) No. 529/2015/H&FWD dated 04.02.2015, have also been brought on record, as per memo dated 23.02.2015 filed by the learned Government Pleader.

8. Heard both the sides in detail.

9. The scope of selection of the service quota candidates under the said Act was explained by the Division Bench of this Court as per the decision reported in *Dr. Mohammed Riyaz's case*, with reference to the Central Legislation, particularly, Regulations framed by Medical Council of India and the necessity to pass a "common entrance test"; which stands declared and settled. By virtue of the said judgment, it is obligatory for all the candidates, including the service quota

candidate, to qualify in the written test and their inter se seniority is ordered to be reckoned, once they get qualified in the test as aforesaid. The first part stands intact, as made clear by the Apex Court in Ext. R1 (a) judgment dated 12.01.2015. Interference was made with regard to the inter se merit ordered to be followed, once the service candidates get qualified in the Entrance Test holding that by virtue of the Regulation, particularly, Regulation No. 9 inter se merit alone shall be considered for the purpose of selection and can be given to the requisite extent as given in the 3rd proviso to Regulation No. 9 for safeguarding the interest of the service candidates. The cause of action for the petitioners is stated as arisen only by virtue of the decision rendered by the Apex Court in Christian Medical College, Vellore's case, whereby the Regulation framed by the Medical council has been set aside. Since the Regulation is gone, there is no Central Legislation on the point and hence the inter se seniority shall automatically be applied in terms of Section 5(4) of the "Service Quota Act" appears to be the contention of the petitioners.

10. It is true that, the decision rendered by the Division Bench as per the decision reported in Dr. Mohammed Riyaz's case, and the verdict passed by the Apex Court vide Ext. R1(a) were with reference to the factual situation when the field was covered by the Central Legislation/Regulation. It is also true to say that, by virtue of the verdict passed by the Apex Court in Christian Medical College, Vellore's case, the Regulation is no more in existence and as such, it is open for the Government to follow appropriate procedure, in so far as there is no conflict with the Central Legislation or biding precedent, if any, in any manner. The eligibility criteria and the mode of selection are prescribed by the "prospectus committee" after detailed deliberation considering various aspects, also finding the need, necessity and interest to protect and maintain the quality of higher education in the medical field. It was accordingly, that a stipulation was provided under Clause 4(4) of Ext. P2 prospectus, making it obligatory for all candidates to qualify the Entrance Examination, also providing the seniority considering the "rural service" or the "difficult rural service", as the case may be, as provided under Section 6 of the Act read with the relevant Rules. The said prospectus has been approved by the Government as per G.O. No. GO(Rt) No. 3986/2014/H&FWD dated 15.12.2014. Since there is no other stipulation as to the manner of selection and as to the reckoning of seniority, the prospectus approved and issued by the Government, which is an "Executive Order", is enough to plug the gap. If the Government was to maintain a particular standard in identifying persons to be selected for the Post Graduate degree/diploma, there is a specific purpose behind the same which cannot be found fault with. The picture becomes more clear when the Apex Court intercepted a portion of the judgment rendered by this Division Bench of this Court in Dr. Mohammed Riyaz, as to the necessity to reckon merit as of primary consideration thus leading to necessary changes in the prospectus brought about as per G.O. bearing No. G.O. (Rt) No. 517/2015/H&FWD dated 03.02.2015 ie; before commencement of the Entrance Test scheduled on 08.02.2015. As per the said G.O. deletions and

additions have been made at the appropriate places also making clear that a minimum of 50% marks was necessary for qualifying in Entrance Examination in the case of the service quota candidates as well. Subsequently, taking note of the undesirable consequences resulted, because of negative marking for incorrect responses/answers to the questions in the Entrance Examination as per G.O. bearing No. G.O.(Rt) No. 529/2015/H&FWD dated 04.02.2015 was also issued, which was more to protect the interest of the in-service candidates as mentioned in the second paragraph of the said order.

In the above facts and circumstances, this Court finds that no tenable ground is raised to call for any interference. The writ petition fails and the same is dismissed accordingly.