
(2005) 09 KL CK 0043

In the High Court Of Kerala

Case No : Writ Petition No. 23200 of 2005

Sharon Susa Kurian

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 22-09-2005

Acts Referred:

Kerala Self Financing Professional Colleges Prohibition of Capitation Fees and
Procedure for Admission and Fixation of Fees Act, 2004 — Section 2, 3(4), 3(5)

Citation : (2005) 4 KLT 235

Hon'ble Judges : K. Balakrishnan Nair, J

Bench : Single Bench

Advocate : Bechu Kurian Thomas, Paul Jacob P, Roshan D. Alexander, Naveen Cherian, Babu Varghese and C. Valsan, for the Appellant; Rajan Joseph, A.A.G. and K.P. Dandapani, V. Giri, Mohan Pulikkel, T.R. Ramachandran Nair, Babu Joseph Kuruvathaza, N. Nandakumara Menon, C.P. Sivadasan Nair, K.V. Pavithran, Kurian George Kannanthanam and Jayanandan Madayi Puthiyaveetil, for the Respondent

Judgement

K. Balakrishnan Nair, J.—These Writ Petitions are filed, challenging the method of selection of candidates, for filling up the Management quota seats for M.B.B.S. course, in the Academy of Medical Sciences, Pariyaram and the Co-operative Medical College, Kochi. So, they are heard and disposed of by a common Judgment.

2. The facts of the above three cases, necessary for their disposal, are summarised below:

WP(C) No. 23200/05

3. The petitioner was a candidate, who applied for admission to the MBBS course, pursuant to the prospectus issued by the Commissioner for Entrance Examinations, Kerala. In the rank list published by the Commissioner, the petitioner was Rank No. 1366, in the medical stream. But, he could not get admission in any of the Government Medical Colleges or in any of the merit

quota seats in the self-financing colleges. He was desirous of getting admission in the Management quota seats, in the Colleges of respondents 1 and 2, namely, Academy of Medical Sciences, Pariyaram and Co-operative Medical College, Kochi. The petitioner thought that admissions to the management quota seats in the above said two Colleges will be made from the merit list published by the Commissioner for Entrance Examinations, in the light of Section 3(4) of the Kerala Self Financing Professional Colleges (Prohibition of Capitation Fees and Procedure for Admission and Fixation of Fees) Act 2004, in view of the interpretation given to the said sub-section by this Court in Academy of Medical Sciences v. Regina (2004 (3) KLT 628). While so, without giving proper publicity, respondents 1 and 2 invited applications for admission to the management quota seats, by Exts.P4 and P4(a) notifications published in Mathrubhoomi and New Indian Express dailies. The said respondents joined together and conducted an entrance test of their own, on 24.07.2005. Since applications were invited without giving proper publicity, the petitioner did not notice Ext.P4 or P4(a) and therefore, he could not submit his application. The petitioner submits, in view of the provisions of Act 17 of 2004, the decisions of the Apex Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , Islamic Academy of Education and Another Vs. State of Karnataka and Others, , and this Court's decision in Regina's case mentioned above, respondents 1 and 2 should have made the admissions from the list, published by the Commissioner for Entrance Examinations. The petitioner submits, the 5th respondent Consortium was formed illegally. The said Consortium does not include 50% of the self-financing Medical Colleges in the State and therefore, it cannot be treated as a valid Consortium. The Colleges of respondents 1 and 2, being run on "no loss, no profit" basis, they should have followed the merit list published by the Commissioner for Entrance Examinations, which was used for filling up the merit quota seats in them. Since those Colleges are Public Institutions, the management quota seats should also have been filled up from the ranklist published by the Commissioner for Entrance Examinations. So, the petitioner prays for quashing Exts.P4 and P4(a) and for a direction to fill up the management quota seats also from the list published by the Commissioner for Entrance Examinations.

4. The 1st respondent has filed a counter affidavit. The petitioner's rank in the medical stream is only 1366. So, even if all the 70 seats available in the management quota in the Colleges of respondents 1 and 2 were filled up on the basis of the merit list published by the Commissioner for Entrance Examinations, the petitioner would not have got admission. The challenge against Exts.P4 and P4(a) is unsustainable. Respondents 1 and 2 were permitted to hold an entrance test by the State Government, by Ext.R1(a) order dated 11.07.2005. There is no violation of the provisions of Act 17 of 2004, as the Colleges of respondents 1 and 2 come under a particular type of self-financing Medical Colleges. The formation of the Consortium is in tune with the law laid down by the Apex Court in T.M.A. Pai Foundation's and Islamic Academy's cases mentioned above.

Notifications inviting applications were published in leading newspapers, like Indian Express, Mathrubhoomi and Chandrika. The Controller of Examinations was a retired Judge of this Court. 35 seats in the management quota have been filled up and the classes have already commenced on 17.08.2005. No writ will lie against respondents 1 and 2 and therefore, the 1st respondent prayed for dismissal of the Writ Petition.

5. The 2nd respondent has also filed a counter affidavit on similar lines. The said respondent made all efforts to join the Consortium formed by other self-financing colleges. An amount of Rs. 50,000/- was also paid by way of admission fee. Finally, the 2nd respondent was informed that his College cannot be given membership. In the above circumstances, the Government was addressed for sanction to form a Consortium of two Co-operative Medical Colleges. The Government, by Ext.R2(7) order dated 11.7.2005, allowed respondents 1 and 2 to form a Consortium. A retired Judge of this Court was appointed as the Controller of Examinations and under his supervision, the entrance test was conducted properly. Applications were invited by issuing Exts.P4 and P4(a) notifications in Mathrubhoomi and Indian Express dailies. The petitioner, who appeared confident of getting a medical seat in the merit quota, did not respond to those notifications. It is further pointed out that even if all the management quota seats were filled up on the basis of the merit list published by the Commissioner for Entrance Examinations, the petitioner would not have got admission, as his rank was only 1366. The 2nd respondent's College is a self-financing College and therefore, it is free to conduct an entrance test by forming a Consortium with the 1st respondent. The College is being run without any financial assistance from the State Government. So, it is a self-financing College. It is submitted that, the entrance test was conducted properly and strictly on the basis of merit, the admissions were made. The allegations of the petitioner to the contrary are denied. On the above pleadings, the 2nd respondent also prayed for dismissal of the Writ Petition.

6. The petitioner has filed a reply affidavit to the counter affidavits filed by respondents 1 and 2. The 1st respondent has filed an additional counter affidavit, placing certain additional documents. The main contention raised by the petitioner in this Writ Petition is that, the Consortium formed by respondents 1 and 2 is no Consortium in the eye of Law. So, the admissions made, based on the test conducted by the said Consortium, may be set aside and fresh admissions may be made, on the basis of the merit of the candidates, as per the list published by the Commissioner for Entrance Examinations. When the Writ Petition was admitted on 05.08.2005, this Court passed an interim order, stating that admissions, if any, made to the management quota seats, will be subject to the final orders in the Writ Petition and the candidates shall be informed accordingly.

WP (C) No. 24705/05

7. The petitioner was a candidate, who took the entrance test held by the

Commissioner for Entrance Examinations for admission to the MBBS course and secured Rank No. 7315, in the list published by the Commissioner, for the medical stream. When respondents 4 and 5, who were respectively, the Principals of the Cooperative Medical College, Kochi and the Academy of Medical Sciences, Pariyaram invited applications for admission to the MBBS course in management quota seats in their Colleges, they added a stipulation to the effect that the candidates should have 70% aggregate marks for Physics, Chemistry and Biology in the qualifying examination, namely, the Higher Secondary Examination. But, as per Ext.P1 prospectus, published by the Government of Kerala the candidates need have only 50% marks in aggregate for Physics, Chemistry and Biology. The said fixation of higher marks is illegal, submits the petitioner. Ext.P3 is the notification issued by the Consortium of respondents 4 and 5, inviting applications for admission to the management quota seats. This Writ Petition is filed, challenging Ext.P3 notification.

8. Respondents 4 and 5 have filed a statement, supporting the fixation of a minimum of 70% marks in aggregate for Physics, Chemistry and Biology for admission to management quota seats. According to them, the Statute has only fixed the minimum qualification. The same does not prevent the Management from fixing a higher percentage of marks for admission. So, they pray for dismissal of the Writ Petition.

WP(G) No. 25169/05

9. The petitioner was a candidate, who secured Rank No. 1318 in the merit list, published by the Commissioner for Entrance Examinations, for the medical stream. She applied for the entrance test held by the 3rd respondent for admission to the MBBS course in the management quota seats in the 4th and 5th respondents' Colleges. Exts.P2 and P3 are respectively, the prospectuses issued by respondents 4 and 5. Exts.P4 and P5 are the hall tickets issued for entrance test by the said respondents. The petitioner submits, though she took the entrance test, the 3rd respondent never published any ranklist. She made all efforts to know whether she could get admission, on the basis of her performance in the entrance test. Finally, she was intimated on 17.08.2005 that she could not be given admission. According to her, the entire conduct of the test was illegal and irregular. It was never transparent. Everything was shrouded in mystery. The conduct of the test from top to bottom was manipulated and persons were included in the top of the merit list for extraneous reasons. She challenges Section 3(4) of Act 17 of 2004, on the ground that it gives unbridled arbitrary power to the Managements, to hold the entrance test. She prays for quashing the entrance test held, pursuant to Exts.P2 and P3 and prays for filling up the management quota seats in respondents 4 and 5 Colleges, in the light of the rank list published by the Commissioner for Entrance Examinations.

10. The petitioner has impleaded one of the affected students in a representative capacity and has taken out notice to the affected persons, by publication in Mathrubhoomi daily. This Court, on 2.9.2005, ordered that admissions, if any, to

the extent they are challenged in this Writ Petition, will be subject to the result of the Writ Petition.

11. Respondents 4 and 5 have filed a detailed counter affidavit, resisting the prayers in the Writ Petition. It is submitted that the petitioner appeared for the entrance examination with Ext.P5 hall ticket and she was included in the ranklist of the 5th respondent's College. The allegations against the conduct of the test are emphatically denied. It is asserted that everything concerned with the written test was conducted under the supervision of a retired Judge of this Court, in a fair and transparent manner. Admissions were made strictly on the basis of merit. The rank-lists were published in both the Colleges. The averments to the contrary are denied. It is also pointed out that even if the 70 management quota seats were filled up on the basis of the merit list published by the Commissioner for Entrance Examinations, the petitioner would not have got admission. She was not admitted because of her inferior merit in the rank list published by the Consortium, it is asserted. The Consortium was formed and the test was conducted, as permitted by the State Government, by Ext.R5(7) order dated 11.07.2005. The petitioner has chosen, not to challenge that order. Therefore, the respondents pray for dismissing the Writ Petition.

12. The 3rd respondent has filed a detailed counter affidavit, explaining how the written test was conducted and also denying the allegations against the conduct of the test. Some of the students, who were already admitted, have got themselves impleaded and have filed counter affidavits, resisting the prayers in the Writ Petition.

13. I heard the learned Counsel on both sides in all these Writ Petitions. The learned Counsel for the petitioner in WP(C) No. 25169/05 fairly submitted, at the time of final hearing that he is not pressing the challenge against the constitutionality of Section 3(4) of Act 17 of 2004. He prayed for allowing him to withdraw the challenge to the said Section, without prejudice to his contentions. The said prayer was allowed. Though, regarding the conduct of the test by the Consortium, several allegations were made, they were countered by the concerned respondents. So, I decided, not to go into the said realm of disputed facts and the counsel were alerted about this view. Therefore, the arguments were mainly confined to two points. They were (1) Whether, the formation of a Consortium of the two Co-operative Medical Colleges for the purpose of conduct of the entrance test, is legally sustainable and (2) Whether the fixation of minimum marks of 70% in aggregate for Physics, Chemistry and Biology as the eligibility criterion, is valid or not. Section 2(c) of the Kerala Self Financing Professional Colleges (Prohibition of Capitation Fees and Procedure for Admission and Fixation of Fees) Act, 2004, defines consortium as follows:

" "Consortium" means an association of self financing professional colleges, consisting of more than fifty percent of the total number of institutions of that particular type such as engineering technology, medical/dental/pharmacy/ayurveda/homoeopathy/siddha and nursing."

(Emphasis supplied)

Section 3(4) of the Act reads as follows:

"Seats in the Management Quota shall be filled up either from the list prepared on the basis of the Common Entrance Examination conducted by the Commissioner for Entrance Examinations or from the list prepared on the basis of the common entrance test conducted by a Consortium of a particular type in the State:"

(Emphasis supplied)

Section 3(5), dealing with the educational qualification, reads as follows:

"Educational qualification for admission in the self financing professional college shall be the same as are applicable to the corresponding courses in the Government Colleges as may be notified by the Government from time to time."

The petitioners in these Writ Petitions point out that a Consortium can have existence by virtue of Section 2(c), if only more than 50% of the Medical Colleges are members of it. In this case, only two Medical Colleges are its members. So, the Consortium formed by the Pariyaram and Kochi Medical Colleges, is no Consortium, in the eye of law. They should have joined the Consortium, formed by the other Colleges. If they were not admitted to that Consortium or they were expelled, the only course open to them, was to follow the mandate of Section 3(4) and fill the management quota seats from the list prepared by the Commissioner for Entrance Examinations. Two Colleges cannot form a Consortium by themselves and conduct a test. It is also pointed out that the qualification prescribed, as per the prospectus published by the State Government, is 50% aggregate marks in Physics, Chemistry and Biology. The fixation of 70% marks, is ultra vires of Section 3(5) of the Act. On the above grounds, the petitioners seek to quash notifications published by the two co-operative Medical Colleges and also the selection and the admissions made, based on them. They pray for re-doing the admissions made, on the basis of the merit list, published by the Commissioner for Entrance Examinations.

14. The respondents attack the very maintainability of the Writ Petitions. According to them, the petitioners came late before this Court. They point out that if the petitioner in WP(C) No. 24705/05 was aggrieved by the prescription of qualification in the notification issued on 03.07.2005, he should have sought reliefs before the conduct of the written test on 24.07.2005. Even without submitting any application, he has approached this Court only on 18.08.2005. Therefore, the respondents pray, at his instance, this Court may not examine the validity of the fixation of minimum 70% marks in aggregate for the three subjects. This point, regarding the fixation of higher marks, is the main ground raised in this Writ Petition. So, they pray that the Writ Petition may be dismissed.

15. I find considerable force in the submission of the respondents. It is true, there is some technical violation of Section 3(5) of the Act, in fixing a higher

qualification than that was notified by the State Government. Since the petitioner in W.P.(C) No. 24705/05 has chosen to approach this Court, long after the publication of the notification and after the holding of the written test, no relief can be granted to him. He is guilty of delay and laches. The ground of delay urged against the petitioners in the other two Writ Petitions cannot be accepted, as the petitioner in W.P.(C) No. 23200/05 has approached this Court well in time and the petitioner in W.P.(C) No. 25169/05 has approached this Court on realising that admissions were completed without granting admission to her.

16. The next point raised is concerning the validity of the formation of the Consortium. Going by the plain meaning of the words contained in Section 2(c), read with Section 3(4), the formation of Consortium by the two Co-operative Medical Colleges at Pariyaram and Kochi, is illegal. But, the learned Counsel for the respondents strenuously contended that the words "institutions of that particular type" used in Section 2(c) will also take in the Consortium of two Co-operative Colleges. It is also pointed out that while using the words "Consortium of a particular type", in Sub-section 4 of Section 3, it is not specifically mentioned as to what is meant by particular type. But of feel that what is "a particular type" has been explained in Section 2(c). So, going by Section 2(c), Medical Colleges, consisting of more than 50% of the self financing Medical Colleges in the State, may form a Consortium. In Kerala, when the admission process was going on there were altogether eight self financing Medical Colleges, six of them in the private sector and two, in the co-operative sector. So, the membership of at least five Colleges, was necessary for forming a Consortium. So, I am inclined to accept the contention of the petitioners, regarding the illegality of the Consortium formed by Kochi and Pariyaram Co-operative Medical Colleges. The formation of a Consortium of two colleges and holding of a test were plainly unauthorised by the provisions of Act 17 of 2004. The Government Order dated 11.07.2005, (G.O.(MS) No. 158/2005/Co-op.) does not have the legal efficacy to override the provisions of Section 2(c) or Section 3(4) of the Act. If that be so, the above said Colleges are bound to make admissions on the basis of the ranking in the rank list published by the Commissioner for Entrance Examinations.

17. Now, coming to the grant of reliefs, I feel that the admissions already made, need be disturbed only for the purpose of granting reliefs to the petitioners. The petitioner in WP(C) No. 23200/05 did not apply for admission, either to the Kochi College or to the Pariyaram College. His contention that there was no proper publication, cannot be accepted. The petitioner himself has produced two notifications issued in Mathrubhoomi and Indian Express dailies. So, a person, who has chosen, even not to apply for admission, cannot be granted admission by the orders of this Court. Now, what remains to be considered is, whether the petitioner in WP(C) No. 25169/05 should be granted admission or not. The main point raised against her by the respondents is that she did not specifically raise the ground of invalidity of the formation of the Consortium, by the two Co-operative Colleges. But, whether the Consortium was formed in accordance with

law is a pure question of law. The invalidity of the formation of the Consortium was raised as a ground in WP(C) No. 23200/05, which was heard along with this Writ Petition. Further, at the time of hearing, I asked the respondents to answer only two grounds of attack, namely, concerning the validity of formation of the Consortium and the fixation of higher percentage of marks for admission, than that was fixed by the State Government. The respondents addressed arguments, extensively on both the points. Therefore even if the ground relating to invalidity of the formation of the Consortium, was not specifically raised in the Writ Petition, the respondents got ample opportunity to answer this pure legal contention. The petitioner has, in Ground D, stated that the conduct of the entrance test on 24.07.2005, was illegal. At the time of argument, he amplified the illegality, by referring to Section 2(c) and Section 3(5). So, I feel that the technical ground raised by the respondents cannot stand in the way of granting relief to the petitioner. From the list of persons admitted in the 5th respondent's College, it is seen that there are several persons, lower in rank than the petitioner, who were admitted there. Once the list prepared by the Consortium goes, by virtue of Section 3(4), admissions can be made only in accordance with the ranklist published by the Commissioner for Entrance Examinations. The 5th respondent has produced a list of persons admitted, on 7.9.2005. The same would show that persons from Rank No. 1148 in the Commissioners list, upto persons with Rank No. 27606, have been admitted. The last candidate admitted is a person who does not even have a rank in the ranklist published by the Commissioner for Entrance Examinations. Even according to the 5th respondent, he is the person with the lowest merit. So, it is ordered that the said person shall be removed to accommodate the writ petitioner in WP(C) No. 25169/05 and she shall be given admission to the M.B.B.S. course, in his place.

18. Last year, when this Court unsettled the admissions in the two Co-operative Medical Colleges and ordered to admit students, according to their merit in the ranklist published by the Commissioner for Entrance Examinations, the Principals of the Colleges tried to defeat the writ of this Court by staying away from their Colleges and declining to make arrangements to accept the fees from the students. The Medical Council of India has fixed the last date for admission of students to the M.B.B.S. course as 30th September of the concerned year. The Apex Court has ordered that no High Court shall tinker with the said date. So, under the fond hope that if the admissions are delayed beyond 30th September, the writ of this Court may become futile, the aforementioned action was taken by them. The unbecoming conduct of them led to dramatic incidents. This Court ordered the RDO, Kannur to receive fees from the students of Pariyaram Medical College. An Officer of this Court was deputed to Kochi Medical College to receive the fees. The efforts made by the Managements in this regard to get over the writ of a Court of Record to save the illegal admissions made, were thoroughly ill-conceived. "Even the King is subject to Law and God". "Be you ever so high, the Law will be above you". If this Court's writ is disobeyed, the consequence is more than clear. The wages of sin can be incarceration in jail upto six months. If

anybody is aggrieved by the direction issued by this Court, his remedy is to move the Appellate Court and get it stayed or reversed and not to ignore the order of this Court, in the light of the past experience, it is ordered that the certified copy of this Judgment shall be served by a special messenger of this Court at the expense of the petitioner in WP(C) No. 25169/05 on the Principal of the Co-operative Medical College, Kochi or on his office within one week from today. The petitioner shall tender the fee fixed by the Justice K.T. Thomas Commission, for management quota seats and other additional amounts if any if demanded, by way of special fee etc. in cash or by demand draft. If such a tender is made to the Principal or his office, in the presence of the messenger of this Court, even if the amount tendered/demand draft is not accepted, it shall be deemed that the petitioner has been admitted to the MBBS course in the Co-operative Medical College, Kochi for this academic year, in obedience to the directions contained in this Judgment.

19. In this context, I think, it is only appropriate to mention one mysterious fact, that has arisen in this case. It is not known, why the two Medical Colleges involved in this case, ventured to hold a special test. It appears to be a riddle, wrapped in an enigma. The merit seats in the Colleges are filled from the list published by the Commissioner for Entrance Examinations. Both the Colleges are bound to fill the management quota seats also on the basis of merit. If that be so, what was the necessity for conducting an entrance examination? Why public money was wasted for doing that and the students were directed to undergo this ordeal? None of the respondents explained this riddle. Though a specific question was put to the learned Additional Advocate General, who appeared in this case for the State, on the reasons for holding a test and the purported sanction given by the State for holding a separate test, the same was not explained by him. In the light of Sections 2(c) and 3(4), the formation of a Consortium and its approval by the State Government have no validity at all.

20. In this context, it is necessary to mention one more aspect regarding the running of the two Co-operative Medical Colleges involved in this case. Financially, both of them are already in the red. They, being self-financing colleges, must be able to collect the fees necessary for running the Colleges. So, if the Government, in implementation of its policies, direct them to collect fees at a lower rate than that, which could be legally collected, the Government have a duty to compensate them for the resultant loss suffered by them.

21. In the result, WP(C) Nos. 23200 & 24705 of 2005 are dismissed and WP(C) No. 25169/05 is allowed as ordered above. No costs.