

(1990) 05 GUJ CK 0001

In the Gujarat High Court

Case No : Spl. Civil Application No. 3670 of 1990

Sida Nitinkumar Laxmankumar Laxmanbhai and Another

APPELLANT

Vs

Gujarat University and Others

RESPONDENT

Date of Decision : 17-05-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Evidence Act, 1872 — Section 115

Gujarat University Act, 1949 — Section 32

Citation : AIR 1991 Guj 43 : (1990) 2 GLR 808

Hon'ble Judges : A.P. Ravani, J

Bench : Single Bench

Advocate : K.V. Shelat, for the Appellant; S.N. Shelat, for the Respondent

Judgement

1. Can something which has been conferred by way of substantial rights be taken away by adopting the procedure which has no roots in any of the provisions of law? This, in short, is the question at the centre of controversy raised in this petition by two students who belong to socially and educationally Backward Class and who wish to assert their fundamental rights as to equality before law.

2. The petitioners belong to socially and educationally backward class of communities. They are candidates for admission to post-graduate medical courses. Petitioner No. 1 is denied to assert his claim for a seat which may be available to him in unreserved category of seats, while petitioner No. 2 is denied to assert his claim for reserved category of seats. The respondent-University contends that both the students had at the commencement of the interviews exercised their choice and now they cannot be permitted to shift their stand. Specifically with regard to petitioner No. I it is contended that at his instance the petition cannot be entertained inasmuch as he has already secured admission in the subject of orthopedics on April 24, 1990 when the selection process started and petitioner No. I opted for reserved seat. It is inter alia contended that petitioners have no fundamental right under Art. 15(4) or Art. 16(4) of the

Constitution. Their right, if any, is to claim equality before law under Art. 14 of the Constitution. In support of their claim both sides have urged several other points.

3. THE FACTS FIRST:

The petitioners have completed their M.B.B.S. degree course from Gujarat University, and they wish to seek admission in post-graduate course in medicine. The petitioners belong to socially and educationally backward class of communities and, therefore, they are entitled to claim the benefits of reservation conferred upon the members belonging to such communities. As regards the entitlement of the petitioners to claim the benefit of reservation of seats there is no dispute.

4. After receipt of the application for admission to post-graduate course, the University prepared the merit lists. List No. 1 included names of eligible candidates for unreserved category of seats. This list included the names of the students belonging to SC/ST and SEBC communities also if they indicated their desire to compete in unreserved category of seats also in the application form submitted by them. This list does not include the names of those eligible candidates belonging to SC/ ST and SEBC candidates if they have not indicated their choice to compete for unreserved category seats. Facts regarding exclusion of names of eligible candidates have not been stated in the affidavit-in-reply, but have been stated to the Court, when Court, while scrutinizing the lists, put certain questions to the learned counsel for respondent-University. List No. 2 includes the names of candidates belonging to Scheduled Castes. List No. 3 included the names of candidates belonging to scheduled Tribe, Nomadic Tribes and denotified tribes, List No. 4 includes the names of candidates belonging to socially and educationally backward class of communities.

5. Name of petitioner No. 1 appears at serial No.21 in list No. 1 which is called common or unreserved category lists. His name appears at serial No. 3 in the reserved category list, i.e. list No. 4. Name of petitioner No. 2 appears at serial No. 73 in unreserved category list (i.e. list No. 1) and at serial No. 6 in reserved category list (i.e. list No. 4). The University has framed rules which govern the admission to the post-graduate degree and diploma medical courses under the provisions of Ordinance M.D. 14 and Ordinance M.S. 14 of the University. As per rules, the term would commence from January 1, 1990. But on account of litigation in Court there was delay in holding interviews. On April 12, 1990 the University issued notice informing the candidates the date and time of interview. In this notice the sequence in which the candidates were to be interviewed has been mentioned. First of all, the candidates belonging to SC/ ST and socially and educationally backward class and entitled to claim benefits of reservation were to be interviewed.

6. According to petitioners there was much confusion with regard to the procedure to be followed by the University in respect of selection, particularly for

the purposes of reserved category seats. As averred in the petition, petitioner No. 1 was treated with "neglected feelings" and was forced to express choice for reserved category seat and was required to give up choice for unreserved category seat. This allegation is denied by respondent No. 1 University. According to University, both the petitioners, along with other candidates -claiming benefits of reservation, were required to express their choice either for reserved category seat or for unreserved category seat at the initial stage only. This was according to the procedure and policy adopted by the University and no coercion as alleged was exercised. Petitioner No. 1 exercised choice for reserved category seat and was granted admission in subject of orthopedics, while petitioner No. 2 opted for unreserved seat and, therefore, his interview was deferred. Thereafter, on account of decision of Court in case of one Dr. Bharati Baxi, who was held to be eligible for postgraduate courses, the interviews were required to be taken again, as there was likelihood of reshuffling of choice. Hence all the selected candidates were called again on May 10, 1990. Consequences of this step be realised. As per the procedure and policy adopted by respondent-University, the candidates belonging to SC/ ST and socially, and educationally backward class are to be interviewed first. Hence these candidates are called again. This means that the entire process of interview is started afresh as per public notice dated May 4, 1990 issued and advertised in newspapers (Annexure "C" to the petition) informing the candidates that interview held on April 24, 1990 shall commence again on May 10, 1990.

7. On May 9, 1990 the petitioners have approached this Court and challenged the legality and validity of the stand taken by the respondent-University and have asserted that they cannot be denied special/ additional benefits conferred upon them and such benefits cannot be made a subject-matter of alternative claim. In their submission, the procedure adopted by the University takes away their fundamental rights. That which is substantially conferred upon them is taken away by adopting procedural devices. Hence the petition.

8. PROCEDURE ADOPTED AND THE RULES:

The rules governing admission to postgraduate medical courses do not provide for the procedure which has been adopted by the respondent-University. In this connection a specific question was put to the learned counsel for the respondents. At this time, Mr. H. L. Patel, Chairman of the Selection Committee was present in Court. After ascertaining the facts from him, it was stated that the rules do not prescribe the procedure adopted by the University. It was also stated that there is no decision taken by the Selection Committee either in the form of minutes of the meeting or in the form of resolution as regards the policy and procedure to be adopted at the time of holding the interviews. It was made clear that in this connection no decision has ever been taken by the University or by the Selection Committee. However, it was submitted that the procedure adopted is as per the longstanding practice of the University and that of the College Council which used to perform the function of granting post-graduate

admission before about four to five years. It needs to be noted that at no time the candidates have been made aware about the procedure to be adopted at the time of interview and selection of the candidates. Notice dated April 12, 1990 only indicates the sequence in which the interviews were to be held. Interviews for reserved category seats were to be held first and for the unreserved category seats, the interviews were to be held afterwards.

9. ADMITTED POSITION AS REGARDS THE PROCEDURE ADOPTED:

As regards the policy and procedure adopted by the University, in para 8 of the affidavit in-reply, it is stated as follows:

"Candidates are called at the interview according to the merit list. General merit list is utilized for open merit sets and reserved category 2, 3 and 4 merit list for SC, ST and Socially and Educationally Backward Class students respectively. I say that reservation is for subjects only. 4 say that reserved category students are called first. They have to state their option as to whether they are desirous of going in for open merit or for reserved category. Once they opt for reserved category, they are granted admission on the basis of their merit list. Then they are not to be considered on general open merit. The option exercised by them is final. If there are still registrations available, for which there are no reserved category students the said registrations are converted to be available on open merit."

In para 8 of the affidavit-in-reply further averments have been made in support of the aforesaid procedure. It is contended that the procedure is eminently just and fair. It is further submitted that "registration of postgraduate course is different from other posts in services inasmuch as each seat for registration is different and distinct from another. It is further stated in the affidavit-in-reply as follows:

"The student concerned knows his merit number in open merit list (list No. 1). Once he chooses his subject, he is not to be considered in open merit. If he withdraws his claim from reserved category, he is to be called on the basis of his general merit."

After the interviews for reserved category seats are over, if the seats reserved remain unfilled, they are converted into unreserved category and they are also offered to candidates listed in unreserved category list (i.e. list No. 1). Thereafter unreserved category list is operated till it is over. Usually some seats reserved for Scheduled Castes/ Scheduled Tribes and Socially and Educationally Backward Class candidates remain unfilled and they are required to be converted as unreserved. It appears that as the candidates listed in unreserved category can be offered these seats, interviews for reserved category seats are taken first at the initial stage.

10. SPECIAL AND PECULIAR FEATURES OF POST-GRADUATE MEDICAL COURSE SEATS/ POSTS.

At this stage special and peculiar features of the admission to post-graduate medical courses and the seats/posts may be noted:

(i) There are different subjects for post- degree/diploma courses. "The subjects are divided in three different groups (a) MEDICINE; (b) SURGERY; and (c) OBSTETRICS and GYNAECOLOGY. Each group consists of various subjects, and in some of the subjects post-graduation degree and diploma course both may be available. In some, post-graduate degree course alone may be available.. Again in each subject a student may be registered with different units under different post-graduate teachers.

(ii) Registration for post-graduation seat may be with residency, if it is with residency, it carries with it stipend and free quarters, and these posts are tenure posts (three years or four years). Each post will be under different units under different post-graduate teachers.

(iii) The choice of unit is very vital from the point of view of quality of education that may be imparted.

(iv) Registration may be without residency which may be called studentship only. To such candidates, benefits of stipend, quarter facility and similar other benefits available to candidates with residency would not be available. However, such registration also would be under different unit and different post-graduate teacher.

(v) As submitted by the University, each post is separate entity and therefore cannot be compared with another post, and with the posts in other services of the Government.

(vi) The selection of the seats/posts by each candidate is necessarily step by step. Selection process by a candidate higher in merit is completed before the seats are offered to the candidate next below in merit (see affidavit-in-reply para 8). The selection of any post by a student higher in merit necessarily affects the available choices of the candidates next below him and all other candidates lower in merits (see affidavit-in-reply para 11).

(vii) As per the rules, a candidate is required to be offered the subjects, units and the post-graduate teachers which may be available to him at his merit level. This offer is required to be made by the Selection Committee at the time of his interview and the candidate is required to make the choice of subject either with residency or without residency.

11. RULES GOVERNING THE ADMISSION AND SELECTION:

Admission and selection to the post-graduate medical course is governed by the rules framed by the University. Rule I provides for 25% All India Open seats with which we are not concerned. Rule 2 provides that remaining 75% or more of the total seats will be filled up by selection committee. The seats are to be distributed in the ratio of 3 : 1 for the first and second academic terms

commencing from January 1, and July I respectively. Selection of candidates for the seats is to be made on the basis of merit (Rule 3). The merit order is determined under the provisions of rules (Rule 5). Rule 3(2) provides that a candidate will be given choice of subject and postgraduate teacher according to his merit level, and he is required to choose either registration with residency or registration without residency out of available choices in different subjects under particular teacher. At the time of interview, a candidate is required to be offered the subject and teacher as per his merit level (Rule 5.4). Rule 4 provides for reservation of seats/posts as follows:

For candidates belonging to Scheduled Castes 7%

For candidates belonging to Scheduled Tribe, Nomadic Tribe and Denotified Tribes. 13%

For candidates belonging to Socially and Educationally Backward Class of Communities 5%

Rule 5 provides for determination of merit order and preparation of merit lists. Rule I I deals with eligibility criteria. Provisions of Rule 3.2 and Rule 5.4 are important which prescribe that the selection will be on the basis of merit and the candidate is required to be offered the subjects and teacher at the time of interview. Rule 4 also provides for conversion of reserved seats, in case the seats reserved remain vacant. Rule also provide for increase in unreserved seats in case the seats reserved for particular subject is utilized in reserved quota (It may be noted that the extent to which the seat may be increased, the percentage of reservation shall stand reduced. Hence the reservation or the special provision made in favour of SC/ ST and SEBC candidates stands diluted. But with this aspect we are not concerned in this petition). The rule also provides for allocation of reserved seats, a 100 point roster.

12. Thus the rules provide that the selection of candidates will be on the basis of merit and the candidate is required to be given choice of subject and post-graduate teacher according to his merit at the time of interview. Rules do not provide for compartmentalised interviews. There is no provision for two different interviews or two different selections, that is, one interview or selection for candidates belonging to SC/ ST and Socially and Educationally Backward Class confined to reserved category of seats, and another interview/ selection for unreserved category of seats. Rules do not contemplate division of interviews for different groups of posts. Interview and selection process as contemplated by rules is one indivisible. In this process of interview/ selection some candidates (i.e. candidates belonging to Scheduled Caste/Scheduled Tribes and Socially and Educationally Backward Class) are entitled to claim reserved seats also over and above the seats marked as unreserved category seats. Rules do indicate that category wise separate merit lists may be prepared by the University. However, rules do not provide that the candidates belonging to Scheduled Castes/ Scheduled Tribes and Socially and Educationally Backward Class are required to

express their choice either for the seats reserved or for unreserved seats at the initial stage of submitting application form or at the stage of commencement of interviews. No such division of seats for purposes of interview/ selection is permissible. As per rules it is the obligation of the interviewers/ selectors to offer to each candidate the subjects, the units and Post Graduate Teachers available to him at his merit level. There is no provision in the rule by which the selectors/ interviewers can get themselves relieved of this obligation on the ground that merit order is published and therefore the candidate can make out as to which subject, unit and the teacher would be available to him at particular merit level reflected in common list (i.e. list No. 1).

13. The Questions:

Now the questions which have emerged and which are required to be decided be seen:

- (1) Can a candidate belonging to SC/ ST and SEBC be called for interview at the initial stage and be asked to make up his mind as to whether he opts for reserved category seat or unreserved category seat?
- (2) At this stage, is it possible for the Selection Committee to offer to the candidate claiming benefits of reservation," the choice of subjects and the post graduate teacher available, as required under the provisions of the rules?
- (3) Can the University prepare merit list of unreserved category excluding the names of those SC/ ST and SEBC students who might not have expressed their choice in application form filled in by them for unreserved category seat?
- (4) Can such option be exercised by candidates concerned and can it be foisted on them at the stage when even different lists are not prepared? Or even at any stage of the interview, without offering them the subjects and units and teachers available to them at their merit level?

For determining these questions, several other point which have cropped up are also required to be decided. These are:

- (A) Is the procedure and the policy adopted by the respondent-University in conformity with the constitutional provisions and the provisions of the rules?
- (B) What is the object behind adopting such policy and procedure?
- (C) Is the procedure adopted by the University not violative of the fundamental rights of the petitioners and contrary to the provisions of the rules?
- (D) Can the rules be mutilated or bypassed and can any procedure be evolved without there being any decision to that effect by the respondent-University or for that matter even by the Selection Committee? Can the procedure be kept secret? Should it not have been published in advance?

14. Constitutional Background and the Position of Law as Regards Reservation and Special Provisions for SC/ST and Weaker Sections of the Society:

Before resolving the controversy as regards the question and the points urged, the constitutional background and the settled legal position in this behalf may be quickly looked at. The Constituent Assembly was aware of the unjust socio-economic order of the society. It was based on privileges of graded inequality which meant elevation for some and degradation for others. The goal to be achieved was establishment of a society based on egalitarian principles and to ensure justice-social, economic and political, to all the citizens of the country. Therefore, as stated by Dr. Ambedkar in his final address to the Assembly, on January 26, 1950, the day on which the Constitution came into force, "the nation entered into a life of contradictions". On paper equality was ensured, in reality, glaring inequality existed and much more so in social and economic field. Hence the call by Dr. Ambedkar, we must remove this contradiction at the earliest possible moment".

15. Recently the Supreme Court vividly narrated the plight of members belonging to SC/ ST and other weaker sections. They have been described as "children of Endless Night". Their position has been considered to be an affront to human rights. As against this, powerful and influential section of the society asserts in almost elitist and superior vein:

"We are the precious chosen few Let all the rest the damned.

There"s only room for one or two. We can"t have Heaven Crammed."

(See Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, .

16. The inherent contradictions in the socio-economic life of the country were visualized by the framers of the Constitution. They probably visualised that frictions may occur and the conflicts may even take ugly shape if not properly handled, Transformation of unjust socio-economic order into an egalitarian order based on socialist principles was aimed at. This was sought to be achieved by resorting to "Rule of Law" and that too within the framework of the Constitution itself. That is the reason why provisions have been made in the Constitution, and particularly Art. 15(4) and Art. 16(4) as part of the fundamental rights themselves so that the State can and should take measures for advancement of socially and educationally backward class of citizens and for the Scheduled Castes and Scheduled Tribes. Read with provisions of Arts. 38 and 46 occurring in Part IV of the Constitution relating to Directive Principles of State Policy, it is clear that the State has been enjoined with duty to secure social order and promotion of Welfare of the State in which justice-social, economic and political should inform all the institutions of national life. The State is ordained to minimize the inequalities, The State is also enjoined with duty to promote with special care educational and economic interests of weaker sections of the people, and particularly that of Scheduled Castes and Scheduled Tribes.

17. Following the observations made by the Supreme Court in the case of K.C. Vasanth Kumar and Another Vs. State of Karnataka, , Division Bench of this High

Court has indicated that while dealing with the question of reservation the approach of the Court should not be traditional which has generally been superior and elitist and therefore ambivalent. (Special Civil Application No. 6691 of 1987 decided on August 29, 1989). Hence the need to discard this superior and elitist approach.

18. Provisions of Arts. 14, 15(I) and 16(I) have to be carried forward with a view to providing socio-economic justice to weaker sections of the society. Viewed from this angle, reservation of posts and other measures designed to promote the participation of Scheduled Castes and Scheduled Tribes in the public services at all levels are necessary consequences flowing from the fundamental rights guaranteed by Art. 16(I). This very idea is emphasized by Art. 16(4). It is not in the nature of exception to Art. 16(I). Art. 16(4) is a facet of Art. 16(I) which fosters and furthers the idea of equality of opportunity with a special reference to under-privileged and deprived class of citizens. To this class of citizens, legal equality is not equivalent to practical or factual equality. Provisions of Art. 16(I) recognize that the right of equality of opportunity includes the right of the underprivileged to claim conditions comparable to or compensatory of those enjoyed by the privileged. *Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others*, . This very principle is reiterated in different opinions expressed by the learned Judges of the Supreme Court in the case of *K. C. Vasantkumar (supra)*. These benefits conferred by way of special provisions and/or by reservation under the provisions of Arts. 15(4) and 16(4) of the Constitution can be claimed by members belonging to Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Class as fundamental right and can be enforced as such.

19. What then is the Nature of Right flowing from Reservation and Special Provisions?

Once an individual belongs to a class or community to which benefits of reservation are extended, or some special provision is made for the members of such class or community, as a member of that class or community such an individual would be entitled to claim the benefits conferred on such class/ community. The individual belonging to such class/ community and claiming such benefits does not cease to be citizens of the country. Even while claiming benefits conferred by way of reservation or special provisions, he would be entitled to claim protection of fundamental rights enshrined in Arts. 14, 15 and 16 of the Constitution. These fundamental rights are unalienable. They are not capable of being waived by any individual. No individual can waive these rights, nor the State can accept such waiver and get itself relieved of its duty to enforce the fundamental rights conferred upon citizens. Fundamental rights of equality are in the nature of command issued by the Constitution to the State as a matter of public policy, the object being to ensure equality of status and opportunity to all the citizens. No person, by any act or conduct, relieve the State of the solemn

obligation imposed on it by the Constitution. Fundamental rights cannot be made a subject matter of barter by and between the individual citizens and the State *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, ; and Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, .*

20. The special provisions conferring certain benefits on members belonging to Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Class and the reservation made in their favour

under the provisions of Arts, 15(4) and 16(4) of the Constitution are not in substitution of any other right which may otherwise be available to all the citizens of the country. Benefits of reservation and special provisions do not and in fact cannot substitute or supplant any other right of an individual belonging to Scheduled Caste/Scheduled Tribe or any other weaker sections of the society. These benefits would be in addition to the already existing fundamental rights and other rights. If any scheme of reservation or special provision is conditional or dependent upon truncating the fundamental or any other right of an individual, such scheme of reservation or special provision would be contrary to constitutional provisions and law to the extent that it curtails the fundamental right or any other right.

21. What then is Reservation?

The Supreme Court in the case of *Shri V.V. Giri Vs. Dippala Suri Dora and Others, ,* has explained the principles of reservation. In that case, in a double-member Parliamentary constituency there were four candidates, two belonging to Scheduled Tribe and two belonging to un-reserved category. The Scheduled Tribe candidates took the benefit of concessions available to them and campaigned in the election as if they were contesting for un-reserved seats. One of them secured highest votes and he was declared elected on un-reserved seat. Another one was declared elected on reserved seat for Scheduled Tribes. Thus both the seats went to members belonging to Scheduled Tribes. Shri V. V. Giri challenged the declaration of result of election contending that Scheduled Tribe candidates could not have been declared elected on un-reserved seat. The Supreme Court negated the contention and held that Scheduled Tribe candidate is entitled "to contest for the reserved seat and for that purpose he can and must make the prescribed declaration. But from that it does not follow that he is precluded from contesting the election, if necessary, for the general seat. The Supreme Court observed that election recognizes no compartment at all it is one Federal election with reservation of seats; that is all. The Supreme Court further held that a Scheduled Caste or Scheduled Tribe candidate does not forego his right to seek election to the general seat merely because he avails himself of the additional concession of reserved seat by making the prescribed declaration for that purpose. The Supreme Court stated: "the claim of eligibility for reserved seat does not exclude the claim for general seat; it is an additional claim and both the claims have to be decided on the basis of one election from the double-member

constituency",

22. The concept of reservation is further explained by the Supreme Court by giving an analogy. In some educational institutions and universities, in addition to the prizes "and scholarships awarded in general competition amongst all the candidates, some prizes and scholarships are reserved for candidates belonging to backward communities. In such cases, though the backward class candidates may try for the reserved prizes and scholarships, they are not precluded from claiming their general prize and scholarship by competition, with rest of the candidates.

23. This idea may be explained by an illustration. In a public passenger vehicles, certain seats may be reserved for handicapped persons. The handicapped persons can very well occupy these seats as a concession offered to them. Other able bodied persons cannot occupy these seats, since they are reserved for handicapped persons. However, the converse is not true, A handicapped person, say, whose legs are amputated, but on account of the skill developed by him for the use of crutches, he finds no difficulty in securing or occupying any other un-reserved seat in the vehicle. He cannot be asked, "you shall occupy the seat reserved for you". In case such a handicapped person exhibits his skill and physical capabilities comparable with other able bodied persons, it should be a matter of pride and prestige both for him and for the society. In such a situation, the other more handicapped and disabled persons or the less fortunate who have not been able to develop their physical capabilities would occupy the seat reserved for handicapped persons. This, in short, is the idea of reservation and also the concept of making special provisions and conferring certain benefits on members belonging to Scheduled Castes and Scheduled Tribes and other weaker sections of the society.

24. What is not Reservation?

Reservation is not compartmentalization of different groups of the society. Reservation is not aimed at dividing the society in different distinct compartments. Nor does it aim reserving members belonging to certain communities as reserved persons for the, benefits conferred or the seats reserved for them. Reserving certain benefits or posts for the different groups of the community in the first instance means that these benefits and/ or posts are meant for members belonging to specified group. This is an additional benefit conferred on them. On account of the additional benefit having been conferred on them, they are not precluded from claiming ordinary benefits available to all other citizens of the country. Reservation of seats for a specified group does not" mean that there are two compartments of seats, one reserved for the specified group of people and another unreserved for the members of the society who do not belong to the specified group. Recognizing the disabilities of the Scheduled Castes and Scheduled Tribes and other weaker sections of the society, with a view to bring them on par with other privileged and advance sections of the society, the benefits of reservation are conferred on them. On that count they

cannot be considered to be members of certain groups reserved for additional benefits alone. The idea of reservation is to provide them a launching, an opening which otherwise would not have been available to them had they been left to their own fate due to which they have been denied certain privileges by the society for number of years. By no stretch of reasoning or by any device, the concept of reservation can be converted into compartmentalization of seats or posts, for different groups. If such a meaning is given to the concept of reservation and the special provisions which the State is duty-bound to make, under the provisions of Art. 15(4) and Art. 16(4) of the Constitution, the society would be divided into several ethnic groups, castes and communities.

25. In early fifties, the Government of Madras issued a communal G. O. in which reservation of posts for Harijans and backward Hindus was made. In the same G.O. posts were reserved for Muslims, Christians, Non-Brahmins Hindus and Brahmins. The Supreme Court has held the G.O. as illegal and void *B. Venkataramana Vs. The State of Madras and Another*, . If the reservation of seats for certain specified groups of the society is interpreted to mean that the seats can be claimed only by the members belonging to reserved category, one may not have any objection up to this extent. But if the reservation provides that the rest of the un-reserved seats can be claimed by members belonging to un-specified groups only on whom the benefits of reservation are not conferred, these seats cannot be claimed by any one belonging to specified groups (i.e. Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Class) then in that case it would lead to compartmentalisation of seats without mentioning in the provision that only the reserved seats are for the members belonging to the specified groups and that the members belonging to these groups are also reserved for these seats; and also without mentioning that the members belonging to un-specified group are reserved for un-reserved seats and that the un-reserved seats are reserved for members belonging to un-specified groups. Thus that which cannot be done directly maybe sought to be done indirectly without mentioning the compartmentalisation of seats for different groups. The aforesaid decision of the Supreme Court has been referred to by the Division Bench of this High Court while deciding special C.A. No. 6691 of 1987, and the same has been followed while explaining the principles of reservation.

26. From the aforesaid settled legal position it is evident that the posts or seats are reserved for individuals belonging to particular caste, community or class. But reverse is not true. Members belonging to Schedule Caste, Scheduled Tribes and Socially and Educationally Backward Class for whom reservation of posts is made are not reserved for these seats or posts. They cannot be asked to occupy only reserved seats/posts. They would be and should be free to occupy any seat or post including un-reserved posts. However, while claiming un-reserved posts, they should prove their merit like any other citizen who is not entitled to benefits of reservation. To deny them the right to occupy any seat other than the seat reserved would amount to denying them the right of equality enshrined under Art. 14 of the Constitution. Moreover, such course would result into

compartmentalization of the society. The Constitution aims at cohesion of the society and not at disintegration of the society into different groups of castes and communities. Therefore, no provision of law or scheme of reservation or special provisions conferring benefits on members belonging to Scheduled Castes and Scheduled Tribes and other weaker sections of the society can be interpreted so as to lead to disintegration of the society into different divisions. The Constitution abhors disintegration of the society into different groups. Therefore, no provision of law, either substantive or procedural can be interpreted so as to run counter to these basic tenets of the Constitution.

27. Have the petitioners no Fundamental Right under Arts. 15(4) and 16(4) of the Constitution?

It is contended that the petitioners cannot claim any right, much less fundamental right under Art. 15(4) and Art. 16(4) and they are not entitled to claim enforcement of such rights. The law is settled by the Supreme Court in the case of *State of Kerala and Another Vs. N.M. Thomas and Others*, , and in the case of *Akhil Bharatiya Soshit Karmachari Sangh (supra)*. Reservation of posts and special provisions are necessary consequences flowing from the fundamental rights guaranteed under Article 16(I). The very idea of equality of opportunity is enshrined in Art. 16(I) and Articles 15(4) and 16(4). The provisions of Art. 16(4) is a facet of Art. 16(I). It fosters and furthers the idea of equality of opportunity with special reference to under-privileged and deprived class of citizens. For this class of citizens, formal or legal equality is not similar to practical or factual equality. This is the law laid down by the Supreme Court in the aforesaid decisions and in the decision of the Division Bench of this High Court in Special Civil Application No. 6691 of 1987 decided on August 30, 1989. As against this, it is contended that another Division Bench of this High Court in Special Civil Applications Nos. 3376 and 3347 of 1990 has held that Arts. 15(4) and 16(4) and Art. 29 do not confer any fundamental right on the citizens. In that case the question agitated was with regard to eligibility criteria prescribed in Post Graduate Medical Rules framed by the University. In the context of the Government policy prescribing the extent of reservation and the eligibility criteria, the Court held that provisions of Arts. 15(4) and 16(4) and Art. 29 enable the executive to make reservation and special provisions. The Articles themselves do not contain any definite reservation policy. In this view of the matter the aforesaid decision cannot be read to mean that the benefits conferred under the provisions of Articles 15(4) and 16(4) of the Constitution on members belonging to Scheduled Castes, Scheduled Tribes and other weaker sections of the society cannot be claimed as a matter of right and cannot be enforced as fundamental rights. If this decision is read in that fashion, it would run counter to the principles laid down by the Supreme Court in the case of *N. M. Thomas (supra)*, and *AkhiI Bharatiya Soshit Karmachari Sangh (supra)* which have been followed by the Division Bench (Coram: R. C. Mankad & R. A. Mehta, JJ.) of this High Court while deciding special civil application No. 6691 of 1987. Since no such question arose in special civil applications Nos. 3376 and 3347 of 1990, and

no such principle is laid down by the Division Bench of this High Court, the decision does not help the respondent. In view of the fact that the principles have been clearly laid down by the Supreme Court, the contention has got to be rejected.

28. Are Petitioners, And Particularly Petitioner No. I Stopped From Filing Petition And Asserting Their Claims:

The plea of estopped can be availed of only if there is representation of existing fact with intent to cause some belief or induce the other side to form the belief that the representation made is true. On such representation the other side must have been led to believe the representation and must have also been induced to act on the basis of the representation. Moreover, the other side must have so acted to its detriment. All these ingredients which may entitle a party to raise the plea of estopped are absent in the instant case. The petitioners have not made any representation with an intent to cause certain belief in the mind of the University. On the basis of such representation the University has not changed its position to its detriment. On the contrary, the petitioners have been misled to conduct themselves against their own interest. As per the case of the University, the University has taken action according to its own policy and procedure and not on account of the representation made by the petitioners. Again, the plea of estopped is not available in matters of waiver of rights. It has got to be realized that estopped deals with questions of facts and not of rights. No one can be estopped from asserting his right, which he might have stated that he will not assert. There cannot be estopped against statute. *Chhaganlal Keshavlal Mehta Vs. Patel Narandas Haribhai*, . If the plea of estopped is permitted to be raised and accepted, it would amount to permitting the petitioners to waive their fundamental rights and thereby relieving the University of its obligation to protect and enforce the fundamental rights of the citizens. This also cannot be permitted, in view of the law laid down by the Supreme Court in the case of *Basheshar Nath v. I.-T. Commissioner*, (supra) and *Olga Tellis v. Bombay Municipal Corporation*, (supra). Whether petitioner No. I had secured admission by asserting his claim of reserved seat in the subject orthopaedics on April 24, 1990 and as to whether petitioner No. 2 had already expressed his choice for unreserved category seats on April 24, 1990 pales into insignificance in view of the aforesaid principles laid down by the Supreme Court. For these reasons, there is no substance in the plea of estopped raised by the learned counsel for the respondents.

29. Answers To The Questions Referred To In Para 13.

As indicated hereinabove, principle of reservation and conferment of benefits by way of special provisions cannot deprive the beneficiary of such conferment of his ordinary rights and fundamental rights otherwise available to him. He cannot be treated as a different citizen belonging to a separate group deprived of any of his fundamental rights or other ordinary rights. He is not reserved for the reserved category seats. He does not belong to any reserved category. "Reserved

category citizen" is a misnomer. There would be citizens for whom the seats and posts may be reserved, but these citizens are not reserved category citizens. Probably for the sake of convenience this expression appears to have been used even in some judicial pronouncements, but wherever it has been so used, it has got to be understood to mean the citizens belonging to certain castes and communities on whom benefits of reservation have been conferred. These people do not become reserved or tied down only to those reserved seats or posts. That which would be ordinarily available to him cannot be taken away by resorting to any procedural device or niceties.

30. The rules do provide for preparation of different lists of different categories. But rules do not provide for exclusion of any candidate belonging to SC/ ST or SEBC from the common list to be prepared for unreserved category seats. Rules also do not provide for expressing the choice by candidates belonging to SC, ST and SEBC for whom the benefits of reservation are conferred at the stage of filling in the form. In fact the rules do not prescribe any form. If there be any such provision in the form", which casts obligation on the candidate to express his choice in alternative, i.e. either for reserved category or for unreserved category seats, to that extent the requirement of that form would be contrary to the rules. In that case the question may be raised as to why the rules provide for preparation of separate list. The only object can be to have an idea at a glance as to how many candidates are there who are entitled to claim benefits of reservation in different groups. Beyond this, preparation of separate lists for different categories cannot have any practical purpose. Precisely, for these reasons, the rules do not provide that the names of students who do not claim to compete for un-reserved category seats are excluded from list No.1 or common list.

31. The object behind the policy and procedure adopted by the University by which the candidates on whom the benefits of reservation are conferred are called first is to ascertain as to how many seats can be converted as unreserved seats. According to the University, if this is done at the initial stage, the seats which are not utilized as reserved category seats can be converted as unreserved category and can be thrown open for claiming the same by all the candidates. This is no ground for denying the candidate belonging to SC/ ST and SEBC to exercise the choice of the subject, unit and teacher only after he knows and only after he is offered the different choices.

32. The object set forth, itself is not justified. Even if it is assumed to be justified, the procedure adopted is unjust, unfair and arbitrary. It is discriminatory. At this stage, the candidates entitled to claim benefits of reservation are offered (i) reserved seats and the subject, unit and teacher available as per the reserved seat already notified; and also (ii) guess work, i.e. seat, from unreserved pool, which may be available to them at their merit level. Since no one knows what will be the subjects, units and the teachers available, it is a matter of guess work by the candidate. On the other hand students claiming

seats from unreserved pool only are never subjected to such guess work in respect of their available choices of subjects, units and teachers. Moreover, in respect -of the candidates claiming seats only from unreserved pool, the selectors/ interviewers perform their duty of offering different choices of subjects etc., to each candidate while in respect of candidates claiming benefits of reservation the selectors/ interviewers do not perform their duty of offering all the choices of subjects, units and teachers available to them. It is left to their guess work. There is no rational basis for such different treatment to candidates belonging to SC/ ST and SEBC. Therefore also the procedure cannot be sustained.

33. The rules do not provide for seeking declaration from the candidates belonging to SC/ ST and SEBC. However, this much may be read in the rules by necessary implication. But, then there is nothing in the rule requiring them to express their choice as to whether they claim reserved category seats only or unreserved category seats also. The rules also do not contemplate that the names of the candidates not asserting their claim for unreserved category seats should be excluded from list No. 1. Thus no eligible candidate could be excluded from list No. I even if he himself renounces his right to claim seat from unreserved pool.

34. The policy and procedure adopted by the University is likely to result into compartmentalization of seats for different groups of citizens, such compartmentalization is not permissible. It is held to be illegal by the Supreme Court in the case of Venkataramana (supra) way back in the year 1951. This will be the consequence as the University insists that a candidate who claims benefits of reservation will forfeit his claim to compete for unreserved category seats. As per the policy and procedure adopted by the University, this is sought to be done at the stage of filling in the form by the candidate concerned. Again, this is done at the stage of commencement of the interviews. At both the stages, steps taken by the University are neither in accordance with the provisions of the rules nor in accordance with the Constitutional provisions.

35. The policy and procedure adopted by the University permits a citizen to waive his fundamental right of being treated equally and claim seat from unreserved pool of seats on his own merits. In turn the University relieves itself of its obligation to enforce the fundamental rights of the citizens. The aforesaid pernicious result flows from the "generous steps" of granting choice at the stage of filling in the form and again at the stage of commencement of the interviews. When a candidate is asked to make up his mind, at the initial stage of interview, as to whether he opts for reserved category or unreserved category seats, he is in essence asked to waive his fundamental right of equality enshrined in Article 14 and Article 16(I) of the Constitution. To claim the benefits of reservation or special provision he is not required to waive his fundamental right or his fundamental right cannot in any way be truncated. At this stage he can very well say, "let me know the choices available to me at my merit level in the common list, i.e. list No. I". At the initial stage of the interview it will not be possible even

for the Selection Committee to comply with the provisions of Rules 3(2) and 5 (4) and offer the candidate the subjects, units and P.G. teachers available to him at his merit level in common list No. 1. Thus, without there being offer of all the subjects and of all available choices to him as contemplated under the Rules, he is asked to waive the fundamental right of being treated equally along with others, and in turn the University gets itself believed of the duty of enforcing the fundamental rights of citizens.

36. The rules do not contemplate interviews in separate divisions. Rules contemplate one indivisible process of interview and one indivisible process of selection. Merit level of the candidate is the criterion on the basis of which the candidate is to be offered the subject, unit and P. G. teacher available to him at a particular merit level. It is an admitted position that the selection process has got to be done step by step. Unless a candidate, even a step above in merit list exercises his choice, it is impossible to offer him the subject, unit and P.G. teacher available to him. It has got to be realized that in the same subject there may be different units and different P.G. teachers. The unit and the teacher are likely to determine the quality of education that would be imparted to a student. Taking these factors into consideration a student is likely to be induced to change his subject also. In this view of the matter, at the initial stage of interview when Scheduled Castes, Scheduled Tribe and Socially and Educationally Backward Class students are called for to express their choice it is impossible for him to know the choice of subject unit and teacher available to him. Similarly, it is impossible for the Selection Committee to offer the different choices to him. Such compartmentalized or fractured process of interview/ selection is not permissible under the rules.

37. The pernicious effect of the procedure adopted by the University is that it is likely to lead to compartmentalization of the candidates in different groups as if they are reserved for certain seats. Such procedure is likely to accelerate the process of disintegration of the society into different groups rather than helping the forces, fostering and furthering the process of cohesion of the society.

38. Moreover, a student belonging to Scheduled Castes, Scheduled Tribe or Socially and Educationally Backward Class would be tempted to opt for reserved category seat only, since he would not know what will be in store for him if he waits till his turn reaches in the common list. Thus a meritorious student, even though he may be one of the first ten, topping the merit list, would be tempted to secure a seat reserved for SC/ ST or SEBC as the case may be. Thereby he would reduce the possibility of securing such reserved seat by a student lower in merit and belonging to SC/ ST or SEBC. Such procedure would, defeat the very idea and object of reservation and of conferring certain benefits by making special provisions.

39. The idea of making reservation is to help weaker section of the society including SC/ ST. But the object is not to induce and tempt the able and efficient persons even amongst SC/ ST and weaker section of the society to crave for

reserved seats and cling to that atmosphere of permanent deprivation and degradation. If and when he is able to secure his place on his own merit without the help of launching or padding provided for by reservation or special provision, he is to be encouraged to do so and feel confident about his capabilities and tell the world that despite several deprivations and depraved situation, he is able to secure higher rank and secure place above many others claiming unreserved category of seats. The procedure adopted by the University is likely to smother the confidence and spirit of initiative of the members belonging to SC/ ST and SEBC. It cuts at the very root of the objects and ideals for which the reservation is to be provided and for which the special provisions are to be made.

40. There cannot be any scheme of reservation or of conferment of benefits by making special provisions which can be conditional or dependent upon truncating of fundamental rights or deprivation or cancellation of any other right of an individual. such deprivation itself would be an eye-wash. It is both self elusive because University avoids its obligation to comply with the reservation policy and also to respect and enforce the fundamental rights of the citizens. It is illusory because to a large extent it is "MAYA" which induces one to believe in existence of something while in reality there may not be anything at all or what may be there would not be what it appears to be. The mask or the veil of procedural details, robs off much of the substantial benefits conferred and/or sought to be conferred on the members belonging to SC/ST and SEBC. Whatever the thin and diluted benefits of reservation remain are further damaged and destroyed by procedural "MAYA".

41. The University ought to have declared the procedure well in advance. The norms fixing the eligibility criteria and other norms of selection are required to be published in advance as laid down by this Court in the case of B. M. Rana v. Ahmedabad Municipal Corporation, reported in 16 GLR 1939. Similarly, the University is also required to make it known to the candidates concerned about the procedure to be adopted by it, much more so because the procedure sought to be adopted by the University affects their substantial rights. The procedure which is sought to be adopted is not capable of being spelt out from the provisions of the rules. Therefore, it was much more necessary for the University to publish the same well in advance and make it known to all concerned. As conceded, the policy and procedure adopted is not the outcome of due deliberation made by either the selection committee or by any other authority of the University. Without there being any decision, either in the form of resolution or minutes of the meeting, how this policy and procedure has come into existence and how it is being implemented is itself a wonder - amystery, difficult to be understood and explained. In short the procedure adopted is without authority of law and is not backed by any resolution or decision of the Selection Committee or that of any other appropriate authority of the University. On this ground also the procedure adopted by the University cannot be sustained.

42. Some difficulties and problems are envisaged by the University. It is

suggested that if the policy and procedure adopted by the University are not followed it will create several problems. The short answer is that whatever difficulties the administration may, encounter, it cannot be permitted to encroach upon the fundamental rights of the citizens and it cannot ask the citizens to waive their fundamental rights and thereby get itself relieved of its duty to enforce the fundamental rights. Moreover, the pernicious effects and the disastrous consequences which are likely to follow and which have been indicated herein-before, if the policy and procedure adopted by the University are permitted, cannot be ignored and or connived at. Therefore, for the sake of administrative convenience such policy and procedure cannot be omitted to be adopted. As laid down by this High Court (Coram: R. C. Mankad, J.) in the case of S.K. Awatramani and Another Vs. State of Gujarat and Another, , even if the authorities have to encounter practical difficulties and face some inconvenience, they cannot be permitted to take away the rights of the citizens and act against the interests of the candidates.

43. However, in my opinion, the difficulties sought to -be projected are more imaginary than real. In fact the University has never implemented the rules and has never tried to evolve a procedure and policy in inconformity with the constitutional provisions and the provisions of the rules. As indicated hereinabove the procedural MAYA is invoked with an object to see that the seats which may be converted from reserved quota to unreserved category can be offered with defined choices to all the candidates claiming the same from unreserved category pool while doing so rights and interests of other candidates have been totally ignored. Assuming for a moment that there are some genuine difficulties, then the difficulties have got to be resolved by adopting the procedure which should be in conformity with the constitutional provisions and the provisions of the rules. Rules cannot be mutilated and or by-passed and similarly the constitutional provisions cannot be ignored. Even if the procedure is in vogue for quite some time and even if the same is being adopted by the Government while determining the admission to different branches of professional education, the same cannot be sustained on that count also. It only indicates that the tentacles of procedural MAYA which takes away substantial benefits conferred on candidates belonging to Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Class are widespread and are not confined only to post graduate medical course. Sooner this procedural MAYA is folded, and renounced from all the spheres, it would be better. That alone will ensure that the executive is sincere and honest in implementing the reservation policy enunciated in the constitution so that the goal of securing justice - social, economic and political, for all the citizens can be achieved at the earliest. Therefore the contention based on assumed difficulties has no merits and the same is rejected.

44. In the result the petition is allowed. The respondent-University is directed to hold the interviews and proceed further with the selection process in the light of the observations made and the principles elucidated hereinabove. The respondent-University is directed to hold the interviews of the petitioner-students

as and when their turn reaches in the common merit list in accordance with their merit level reflected in this list, i.e. list No. 1, and offer them the different choices of seats, teachers and units available to them at that merit level both for reserved category seats as well as for unreserved category seats. The decision of the University denying petitioner No. 1 to claim the seats in common merit list is held to be illegal and void and the same is hereby quashed and set aside. Similarly, the decision of the respondent-University to deny petitioner No. 2 to assert his claim for reserved seat also as and when his turn reaches in common merit list is also held to be illegal and void. Rule made absolute accordingly with costs.

45. Petition allowed.