

(2000) 02 KL CK 0067
In the High Court Of Kerala
Case No : W.A. No's. 2609/99

Sonny P. Jacob and Others

APPELLANT

Vs

Dr. Jilse George and Others

RESPONDENT

Date of Decision : 25-02-2000

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2000) 1 KLJ 738

Hon'ble Judges : R. Rajendra Babu, J;K.K. Usha, J

Bench : Division Bench

Advocate : T.P.K. Nambiar and K.R. Reghunath, for the Appellant; Nandakumara Menon, S.V.S. Ayyar, Murali Purushothaman, P.K. Suresh Kumar and K.P. Sudheer, for the Respondent

Judgement

Usha, J.—The writ appeals are filed challenging the judgment in O.P.24800/99 by persons who were not parties to the original petition. The 1st respondent in these writ appeals is the petitioner in the original petition. The original petition was filed by an Assistant Surgeon who is a member of the Health Services seeking the following reliefs in the matter of admission to the course D.M. Cardiology:-

i) issue a writ of mandamus or other appropriate writ, order or direction directing the first respondent to reallocate the reserved seat for D.M. Cardiology coming under the Staff Quota to be filled up by a candidate who has applied for admission for D.M. Cardiology for the Health Service Department;

ii) to issue a writ of mandamus or other appropriate writ, order or direction declaring that the clause contained in Ext.PI directing filling up of the vacant seats in the reserved category by candidates coming under the General Merit Quota as illegal and void.

iii) to issue a writ of mandamus or other appropriate writ, order or direction directing the first respondent to introduce a reservation quota in Ext.PI

prospectus for the candidates who applied for the course from the Kerala Health Services.

The learned single Judge after taking note of the contention put forward by the petitioner that at least one seat may be reserved for Health Services candidates in D.M. Cardiology observed that the general merit candidates' quota cannot be curtailed. The learned Judge then proceeded to give the following direction:-

It is submitted that in this year one post allotted to staff quota, that is for the persons working in Medical Colleges, is vacant. If that be so, in the absence of applications in the staff quota that seat may be given to the petitioner, if petitioner is otherwise-qualified and eligible.

The learned Judge then observed that the above direction was being given taking into account, the contentions in the statement filed by the Government and the special circumstances stated in the original petition. The contention in the statement filed by the Government was to the effect that the department was finding it difficult to meet the needs of cardiac patients for want of qualified hands, that the Director of Health Services has already requested the Government for creation of two posts of Cardiologist, but no qualified cardiologist with super specialty qualification is there in the Government services to be posted.

2. Appellants in W.A.2609/99 are qualified postgraduate degree holders in medicine and applicants for super specialty courses notified in their concerned subjects. Appellants 1 to 3 have specified D.M. Cardiology as their first preference. They wrote the entrance examination conducted on 9-10-1999 and 10-10-1999 as provided under the prospectus and are awaiting for the results to be published. They are aggrieved by the direction given by the learned single Judge to allot the petitioner the one seat which is set apart in the quota for teachers in the Medical Colleges. They pointed out that the selection to the staff quota is not yet over and that even if the seat set apart for the teachers in the Medical Colleges falls vacant, in view of the provisions contained under the prospectus it should go to the merit quota candidates. Therefore, the direction given by the learned single Judge is against the terms of the prospectus.

3. W.A.2609/99 is filed by a lecturer in Cardiology in Medical College, Trivandrum. According to him, the contention put forward by the petitioner that there is no applicant for D.M. Cardiology for staff quota is incorrect. The appellant is an applicant for admission to the above course from staff quota.

4. W.A.350/2000 is filed by a civil surgeon in the department of Health Services under Government of Kerala. She is much senior to the petitioner in the original petition and even if a vacant seat in the quota of the Medical College teachers has to be filled up by giving admission to a candidate from among Health Services, the appellant has better claim than the petitioner. Therefore, the direction given by the learned single Judge to admit the petitioner in the vacancy in the seat set apart for Medical College Teachers on its falling vacant is

erroneous.

5. The prospectus for admission to postgraduate super specialty courses 1998 in the Medical Colleges in Kerala was issued by the Directorate of Medical Education. A copy of the prospectus is produced as Ext.P1 along with the original petition. The details of the courses and the seats available in different colleges thereof were shown in clause 1 of the prospectus. For the course D.M. Cardiology the specialty with which we are concerned in this case, has a total of five seats distributed between the Medical Colleges, Trivandrum, Kozhikode and Ottawa as 2:1:2. The qualification necessary for admission is prescribed under clause II. It is then provided that any seat falling vacant in the reserved category will be filled up by candidates under general merit quota. Clause 111(a) gives the number of seats available and the distribution of seats to different categories. In D.M. Cardiology 4 seats are set apart to general merit and 1 seat to staff quota. Therefore, going by the provisions of the prospectus if there is no applicant in the staff quota, the one seat set apart for them should go to the general merit quota.

6. In the original petition the petitioner has detailed, elaborately the requirement of doctors with super specialty qualification in Government Hospital especially in areas where facility of a Medical College is not available. The petitioner then points out that no seat is reserved in any of the super specialties for the staff working in Health Services under the Health Department unlike in the case of staff working in the Kerala Medical Education Service. He has referred to a representation submitted by the Government Medical Officers Association to the Honorable Minister for Health, copy of which is produced as Ext.P2. In the above representation request was to reserve few seats in all super specialty courses for doctors working in the, Health Services Department. Thus after referring to the facilities available in the General Hospital, Ernakulum the requirement of the cardiac patients and the absence of doctors with super specialty qualification, the petitioner contended that in public interest it is only just and proper that unfilled seat coming under the staff quota is allotted to candidates who have applied for admission to super specialty course wording in Health Services. Pointing out the emergent need to have services of a cardiologist in General Hospital, Ernakulum, the petitioner prays that the one seat reserved coming under the staff quota in the year 1998 in D.M. Cardiology which has fallen vacant may be filled up by candidate from Health Services Department.

7. A reading of the entire pleadings in the original petition would show that the petitioner's claim for relating the seat set apart to Medical College teachers in his favor is not supported by any legal right or fundamental right. The petitioner does not challenge the allotment of seats to different categories under the prospectus. There is no challenge against the provision under the prospectus by which unfilled seats of reserved categories should go to the general merit quota. In the light of the provisions contained in the prospectus which is not under challenge in the original petition the petitioner is not justified in seeking

allotment of the vacant seat from staff quota to the petitioner.

8. A provision in the prospectus for admission to postgraduate course in Medical Colleges that unfilled seats available in one reserved category was directed to be allotted to another reserved category was under challenge before this court in Dr. P.M. Manor and another v. State of Kerala and another, 1986 KLJ 637. In the above prospectus relating to admission to M.D. and M.S. Courses 10% was reserved for Asst. Surgeons/Civil Surgeons etc. of the Health Services Department and 30% reserved for Tutors in Medical Colleges under the Government. It was then provided that if any of these seats reserved for Tutors remained unfilled, those seats will be filled up by the Health Service Staff and if any of these seats reserved for Health Services staff remained unfilled, those seats will be filled by the Tutors. This court struck down the provision as opposed to Art. 14. The reasoning, was that when quota has been reserved for a particular class, which itself is a fair dilution of the quality of standards expected at the postgraduate level, there is no reason why that percentage should be increased in any contingency. There cannot be a direct or indirect increase of the percentage of reservation when the same is already fixed for any class. This court held that when merit is the test to select the best, any seat that is not available to a reserved class should in the normal course naturally go to the "merit" candidate. The classification in the above mentioned clause was found plainly destructive of the object sought to be achieved regarding admission to the postgraduate level.

9. In the present case prospectus does not provide for any reservation of seats for Health Services candidates in super specialty courses. In the counter affidavit filed on behalf of respondents 2 and 3 in W.A.2608/99 it has been specifically contended that in the light of the provision in clause II of the prospectus any seat falling vacant in the reserved category will be filled up by candidates under general merit quota. The vacancy which may arise for D.M. Cardiology under staff quota has to be filled up by a genial merit candidate. The above would clearly show that the writ petitioner has no legal right at all to claim the vacant seat from the staff quota.

10. In Shania v. State of Kerala, 1988 (2) KLT 701, question arose regarding the diversion of seats in Engineering College from one category to another. Though 10 seats were allotted under the broad heading "sports quota" (Sports Council nominees); they have been distributed as 5 seats for athletics and 5 seats for those proficient in games in different specialties. There was no provision to the effect that in the absence of required number of candidates belonging to athletic category, the unfilled seats can be filled up by those belonging to games category and vice versa. On the other hand, it was provided that unreserved seats should be added to the seats under the merit on Statewide basis. The contention taken on behalf of the petitioner that since the entire 10 seats are allotted under a broad heading "sports quota", they should be distributed between athletics and games. This contention was not accepted by this court. It

was observed as follows:-

Though the generic category is sports quota, there is specific subdivision of five seats for athletics and five seats for games. Hence it follows that if there are not requisite number of athletics candidates or requisite number of games candidates, to fill up the five seats reserved for each category, those seats shall stand added to the merit quota on State-wide basis. As the topic is expressly covered by the specific provisions in the prospectus there is no scope for building up an argument that in the absence of adequate number of candidates in the athletics category, those seats should be made available to those falling under the games category.

11. This court had occasion to consider a provision in the prospectus relating to admission to postgraduate courses in Medical Colleges wherein provision was made for transferring vacant seat from one reserved quota to another recently. After the judgment of this court in 1986 KLJ 637 there was no provision in the prospectus for postgraduate admission shifting the vacant seat from one reserved quota to other till 1996. But, in the 1997 prospectus the following provision was incorporated:-

Seats which become vacant in the Lecturer quota will be transferred to Health Service quota and vice versa. If there are no candidates from either quota the seats will be transferred to General Merit Quota.

This provision was challenged before this court by general merit candidates contending that the vacancies in Lecturer quota should not be transferred to Health Service quota, but it should go to general merit quota. The learned single Judge who heard the writ petitions took the view that if seats in any reserved quota become vacant, it should go to the general merit candidates. When the matter was taken in appeal by those in Health Service Department in Writ Appeal No. 234/98 and connected cases, a Division Bench of this court in its common judgment dated 6th August, 1998 reiterated the view taken by a Bench of this court in 1986 KLJ 637. The Bench affirmed the decision of the learned single Judge. It was noted that the special leave petitions filed from the judgment in 1986 KLJ 637 were dismissed by the Supreme Court. In 1995 service candidates made an attempt to reintroduce the provision by filing O.P.3070/95. They sought a direction to the Government to allot the unfilled teachers' seat to the Assistant Surgeons. The original petition was dismissed on merits by a learned single Judge after detailed consideration and the judgment was affirmed in W.A. No. 1369/96. The Bench, therefore, observed that it is at a loss to understand that such a clause was again introduced in 1997 ignoring observations in the decision of this court in Manor's case.

12. In the light of these decisions, it is futile to contend that the seats set apart to the staff quota in D.M. Cardiology when falls vacant in the absence of qualified candidates, it should be allotted to Health Service candidates. As mentioned earlier, a specific contention raised by the Health Service candidates for such a

relief was rejected by this court in O.P. No. 13020/98 and affirmed in W.A. No. 1369/96.,

13. The principle laid down in the above mentioned decision is directly applicable in the present case also. The prospectus has made clear provisions as to allotment of one seat in D.M. CarclioIogy to the staff quota. It is also provided that in the absence of qualified candidates in a reserved category the seat should go to the general merit quota.

14. At the appellate stage the petitioner in the original petition endeavored to make an entirely different argument from what has been pleaded in the original petition. The learned counsel appearing on behalf of the 1st respondent in these writ appeals namely, the petitioner in the original petition, made an attempt to contend before us that the word "staff* under clause III (a) of the prospectus would take in both the staff of the Medical Colleges in the Medical Education service and Assistant Surgeon/Civil Surgeon in Government Hospitals under the Health Services and therefore in the absence of candidate from Medical College service, the vacancy has to be filled up by ah Asst. Surgeon/Civil Surgeon. In the original petition the petitioner had no such case. He had admitted the fact that the seat is reserved in favor of the staff of the Medical College and that there is no seats set apart for the Health Service candidates. His very complaint was that certain seats should be set apart for the Health Service candidates in order to equip them to man Government hospitals. Apart from the above, as mentioned earlier, State in its counter affidavit has taken the definite stand that the seat is reserved only for the staff in the Medical Colleges. Even though a contention had been taken by the State in Writ Appeal 574/98 that the staff in the Medical Colleges are only a sub category of the service candidates and therefore there is nothing wrong in giving the unfilled seats to other service candidates from the Health Services, this court rejected the contention and held that if any seat in the quota reserved for the staff is left unfilled the same will have to be filled up by the candidates from the general merit. A similar contention was sought to be raised in,1986 KLJ 637 also on behalf of the State. On behalf of the State it was contended that Asst. Surgeons and Tutors both belonged to the same category of in-service candidates and thus there is nothing wrong in the seats allotted to one group in the same category being given to another group also of the same category. The above contention was rejected by this court by observing that we are unable to appreciate this stand for the simple reason that the Government themselves have made a classification of in-service candidates. The reservation was made for two categories and they did not belong to the same class as contended by the Government -Pleader. One category comprises the staff engaged mainly in rendering aid to the poor sections of the community while the other is comprised of staff engaged in the medical colleges imparting education to medical students. One category belongs to the Health Services Department and the other to a different department under the Government.

15. If we examine the terms of the prospectus the fallacy of the argument put

forward on behalf of the writ petitioner at this appellate stage-will be very clear. In clause 111(b) it is mentioned that certain seats specified in clause 111(a) will be reserved for staff in concerned specialties in the Medical Education Service shown in clause II (a). It is men provided that selection under this category will be made by a committee. The category mentioned therein is the staff in the concerned specialties in the Medical Education Service. There is no reference for selection from health service. It is also to be noted that while Director of Medical Education is the Convener of the Committee and the Joint Director of Medical Education (M) and Principals of Medical Colleges as members, the Director of Health Services is not a member of the Committee at all. Clause III(c) provides the conditions to be satisfied for the candidate from Medical Education Service to be considered for selection. There is no provision made in the prospectus regarding the manner of selection of candidates from health services to a super specialty courses. Therefore going by the provisions of the prospectus also we find no merit in the desperate Endeavour made on behalf of the writ petitioner at the appellate stage.

16. Learned counsel for the writ petitioner made an attempt to contend that the failure to grant a quota to the candidates from Health Service in the prospectus while such quota is provided for staff from the Medical College is arbitrary and volatile of Article 14 of the Constitution. The learned counsel appearing on behalf of the appellants points out that in the light of the recent decision of the Supreme Court in Dr Preeti Srivastava and Another Vs. State of M.P. and Others, , no reservation could be granted for super speciality courses. We do not proposes to go into this issue at all since there is total lack of pleadings on this aspect in the original petition. The Apex Court has time and again pointed out that when a plea is raised regarding violation of Art. 14 it must be supported by necessary pleadings in the original petition. In the State of Uttar Pradesh Vs. Kartar Singh, , the burden of a petitioner challenging a rule as violative of Art.14 has been explained as follows:-

That where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the rules offend Art.14 the burden is on him to plead and prove the infirmity is too well established to need elaboration.

16. Where the necessary facts have been pleaded and established, the court would have materials before it on which it could base findings, as regards the reasonableness or otherwise or of the discriminatory nature of the rules. In the absence of a pleading and proof of unreasonableness or arbitrariness the court cannot accept the statement of a party as to the unreasonableness or unconstitutionality of a rule and refuse to enforce the rule as it stands merely because in its view the standards are too high and for this reason the rule is unreasonable.

This principle has been reiterated in subsequent decisions also. In the absence of such pleadings in this case it will not be proper for us to speak on this issue at all. In the result, we set aside the judgment of the learned single Judge in

O.P.24800/99 and allow W.A. no. 2609/99. If the seat in DM. Cardiology reserved for staff in the Medical Colleges falls vacant it has to be filled by a General merit candidate. We are not called upon to decide the issue raised in W.A. no. 2608/99 as no decision taken by the appropriate authorities as to whether there is any qualified candidate from the staff of medical colleges to fill up the seat in D.M. Cardiology, was under challenge in the original petition. Therefore W.A. No. 2608/99 is dismissed. In the light of the view which we had taken in W.A.2609/99 the terse dispute between the appellant in W.A. No. 350/2000 and the writ petitioner is irrelevant. We, therefore, dismiss W.A. No. 350/2000.