
(2003) 12 KL CK 0006
In the High Court Of Kerala
Case No : W.A. No. 1959 of 2003

Varghese Philip

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:

Citation : (2004) 2 ILR (Ker) 172 : (2004) 1 KLT 581

Hon'ble Judges : K. Padmanabhan Nair, J; Cyriac Joseph, J

Bench : Division Bench

Advocate : V.N. Achuta Kurup and K. Harilal, for the Appellant; C.P. Sudhakara Prasad and D.P. Renu, Government Pleader, for the Respondent

Judgement

Cyriac Joseph, J.—This appeal is filed against the judgment dated 30.10.20003 in Writ Petition (C) No. 29639/2003 which was dismissed by the learned Single Judge. The appellant is the petitioner in the Writ Petition and the respondents are the respondents in the Writ Petition.

2. The dispute in this case relates to selection of candidates for admission to Post Graduate Medical Courses. As per Clause X of the Prospectus for Post Graduate Degree/Diploma Courses 2003 issued by the Directorate of Medical Education, Kerala, seats are reserved for Service candidates in four quotas, viz., (1) Lecturers (2) Assistant Surgeons, (3) Medical Officers in Municipal service (4) Medical Officers in Insurance Medical Service. There are 3 categories under the quota for Assistant Surgeons. They are (a) Health Services Quota (b) Leprosy Service Quota, and (c) Tuberculosis Service quota. As per Clause X(j)(v) of the Prospectus a seat each in M.D., TBRD and DTCD will be reserved for doctors working in District Tuberculosis Centres/Tuberculosis Treatment units of Health Services. A minimum of two years of service may be fixed as eligibility to apply under this quota. As per clause X(B)(ii) of the prospectus, for candidates under Service quota total service will be reckoned as on the last date of submission of application. Unauthorised absence or absence due to Leave without Allowance will not be counted for the purpose of calculating the seniority. As per Ext. P7

notification dated 10.9.2002 issued by the Director of Medical Education, the last date for submission of applications for selection to the Service quota was fixed as 15.10.2002. However by Ext. P6 Government Order dated 29.10.2002 Clause X(j) (v) of the prospectus was modified as follows:

"A seat each in MD, TBRD and DTCD will be reserved for doctors working in State TB Cell Unit/District Tuberculosis Centres/Tuberculosis treatment Unit of Health Services".

Thus as per the unamended prospectus only the service in the District Tuberculosis Centres/Tuberculosis treatment Unit of Health Services was taken into account for the purpose of selection to Tuberculosis quota. But as per Ext. P6 amendment, service in the State TB Cell Unit also could be taken into account.

3. The appellant Dr. K.Varghese Philip and the fourth respondent Dr. Lalitha Geena Dalus had submitted applications for admission to the P.G. Courses 2003 in the Tuberculosis quota. In Ext. P3 final seniority list of candidates who applied for P.G. Course under Tuberculosis Quota - 2003, the fourth respondent was given rank No. 1 and the appellant was given rank No. 2. The qualifying service of the fourth respondent was shown as 5 years, one month and 13 days. The qualifying service of the appellant was shown as four years, 8 months and 14 days. It is admitted that the qualifying service of the 4th respondent was determined as 5 years, one month and thirteen days by taking into account the service rendered by her in State T.B. Cell Unit. It is not disputed that if the service rendered by the fourth respondent in the State T.B. Cell Unit is not taken into account, she will have only less qualifying service than the appellant and that the appellant will be entitled to be ranked above the fourth respondent in the final seniority list.

4. Aggrieved by the amendment of the prospectus as per Ext. P6 Government Order and the rank given to the appellant and the fourth respondent in Ext. P3 final seniority list of candidates who applied for P.O. course under the Tuberculosis Quota, the appellant filed the Writ Petition praying for quashing Exts. P3 and P6 and for a direction to the second respondent to select the petitioner/appellant for P.O. Course 2003 in preference to the fourth respondent. The learned Single Judge after considering the rival contentions of the parties dismissed the Writ Petition holding that the Government was competent to amend the prospectus and that Ext. P3 final seniority list was not vitiated by any illegality. Aggrieved by the dismissal of the Writ Petition, the Writ Petitioner has filed the present appeal.

5. We have heard Mr. V.N. Achutha Kurup, learned counsel for the appellant, Mr. C.P. Sudhakara Prasad, learned Counsel for the 4th respondent and Smt. D.P. Renu, learned Government Pleader for respondents 1 to 3.

6. Learned Counsel for the appellant pointed out that in Ext. P4 provisional seniority list of candidates who applied for P.G. Course under Tuberculosis Quota 2001, the appellant had been given rank No. 3 whereas the fourth respondent

had been given rank No. 8 only. However in Ext. P3 final seniority list of candidates who applied for P.G. course under Tuberculosis Quota 2003, the fourth respondent is ranked above the appellant, showing that she has got longer qualifying service than the appellant. This change is only due to Ext. P6 Government Order according to which doctors working in State TB Cell Unit also will be considered for admission to the seat reserved in MD, TBRD and DTCD. It is only because of Ext. P6 that the service rendered by the fourth respondent in the State TB Cell Unit is taken into account for calculating her qualifying service. The contention of the appellant is that the Prospectus could not have been amended changing the eligibility criteria after the last date fixed for submission of applications. Admittedly Ext. P6 order dated 29.10.2002 was issued only after the last date fixed in Ext. P7 for submission of applications. Hence the basic question is whether Ext. P6 order is illegal or not.

7. In our view it is not permissible to change the eligibility criteria for admission to a course by modifying or amending the Prospectus after the last date fixed for submission of applications. Such amendment or modification of the Prospectus will have the effect of changing the eligibility criteria for admissions retrospectively. Admissions should be made based on eligibility criteria contained in the prospectus as it stood on the last date fixed for submission of applications. Changing the eligibility criteria after the last date fixed for submission of application, is unjust, unfair and arbitrary. Though, as per Clause XVII of the Prospectus, the Government is competent to issue an executive order modifying the Prospectus, the said power cannot be exercised to change the eligibility criteria after the last date fixed for submission of applications. The power to change the eligibility criteria after the last date fixed for submission of applications is capable of being misused in favour of an applicant or against an applicant, because, on the last date fixed for submission of applications the identity and details of all applicants are known. With the knowledge of identity and details of the applicants, the eligibility criteria may be changed to make an ineligible person eligible or to make an eligible person ineligible or to improve the chances of selection of a person to the disadvantage of another as happened in the present case. Such an arbitrary and unbridled power cannot be conceded to Government in the matter of admission of educational courses. In taking this view, we are supported by judgments of this Court in Writ Appeal Nos. 864/2002, 985/2002 and 3058/2002.

8. In *Ashok Kumar Sharma and Others Vs. Chander Shekhar and Another*, , the Hon"ble Supreme Court has held that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. In our view, the above principle is applicable in the case of

change of eligibility criteria for admission to educational courses also. Having issued a Prospectus calling for applications representing that the eligibility will be determined based on certain criteria, the Government is bound by such representation and the said eligibility criteria cannot be changed after the last date fixed for submission of applications.

9. Though learned counsel for the fourth respondent sought to place reliance on the decision of a Division Bench of this Court in *Relly Susan Mathew v. The Controller of Entrance Examinations and Ors.* ILR 1997 Ker 489 the question whether the eligibility criteria can be changed by amending or modifying the Prospectus after the last date fixed for submission of applications, was not raised or considered in that case and hence the said decision has no relevance in deciding the present case. Learned Counsel for the fourth respondent also sought to place reliance on the decision of a Division Bench of this Court in *Nazar v. State*, 1996 (2) KLT 519. In our view the said decision has no application to the facts of this case. In *Nazar v. State* (supra) the challenge was against a Government order amending the Prospectus to provide for reservation of one seat in each speciality of Super Speciality Courses in favour of Tutors/Assistant Professors under the Medical Education Services. It was not a case where the Prospectus was amended to change the eligibility criteria.

10. Learned Counsel for the fourth respondent then contended that even assuming that Ext. P6 order amending the Prospectus was, illegal, the Writ Petition was not maintainable since the petitioner/appellant had earlier filed O.P. No. 14954/2003 on 9.5.2003 and when he failed to get a stay order he got the Original Petition dismissed as not pressed on 17.10.2003 and thereafter he filed the present Writ Petition. Relying on the judgment of the Hon"ble Supreme Court in *Avinash Nagra v. Navodaya Vidyalaya Samiti etc.* 1997 (1) SLR 270 the learned counsel contended that the second Writ Petition was not maintainable as the principle of constructive resjudicata would apply. We are not impressed by this contention also. In *Avinash Nagra's* case (supra), the first Writ Petition was withdrawn without permission of the Court to file another Writ Petition. In this case, the situation is different. In O.P. No. 14954/2003 the petitioner had filed a withdrawal Memo stating as follows:

"Since the petitioner was not in possession of certain relevant records at the time of filing this O.P. and now those records are available with the petitioner and he has taken steps to file fresh Writ Petition before this Hon"ble Court. So kindly permit the petitioner to withdraw the above said O.P. as not pressed, without prejudice to the right of the petitioner to file fresh Writ Petition."

Pursuant to the said withdrawal memo dated 18.9.2003 the Court passed the following order:

"Memo filed for withdrawing the O.P. accepted. Accordingly O.P. is dismissed as withdrawn".

From the above it is clear that the petitioner was allowed to withdraw the

Original Petition without prejudice to his right to file fresh Writ Petition. Hence the principle of constructive resjudicata would not apply in this case.

11. The learned counsel for the fourth respondent further submitted that the fourth respondent was admitted to the course on 1.10.2003 and hence her admission may not be cancelled. However, in view of the fact that the appellant was entitled to admission in preference to the fourth respondent and that the appellant may not get another chance for admission in future due to restrictions of age and that the fourth respondent, being much longer in age, will get further chances for admission in future also, we are not inclined to accept the above mentioned request of the learned counsel for the fourth respondent. If there is only one seat and if only one person can be admitted, the appellant is entitled to be admitted and he cannot be denied admission only on the ground that the fourth respondent was admitted to the course during the pendency of the Writ Petition.

12. For the foregoing reasons the appellant is entitled to succeed. Hence the Writ Appeal is disposed of in the following terms:

(a) The judgment in W.P.(C) No. 29693/2003 is set aside.

(b) Ext.P6 Government Order, G.O.(Rt)No.2607/2002/H&FWD dated 29.10.2002 is quashed.

(c) Ext. P3 final seniority list of candidates who applied for Post Graduate Course under Tuberculosis Quota 2003 is quashed to the extent the fourth respondent is ranked above the appellant.

(d) Respondents 1 to 3 are directed to cancel the admission given to the fourth respondent and to admit the appellant to the Post Graduate Course immediately.

(e) The parties are left to bear their own costs.