

Ritesh R. Sah

Vs

Dr. Y.L. Yamul and others

Writ Petn. (Civil) No. 693 of 1995

(K. Ramaswamy, G. B. Pattanaik JJ)

15.02.1996

JUDGEMENT

PATTANAIAK J.

1. This writ petition under Article 32 of the Constitution of India raises the question whether a candidate belonging to the Scheduled Caste or any other reserved category even if is entitled to be selected for selection for admission in the open competition on the basis of his own merit yet can he be counted against the quota meant for reserved category or he will be treated as an open competition candidate? The aforesaid question arises because of the rules for selection to MBBS and BDS course for the year 1995-96 issued by the Government of Maharashtra in the Department of Medical Education and Drugs. The petitioner admittedly belongs to the reserved category. The petitioner's case in the nutshell is that respondent Nos. 5 to 36 belonging to the reserved category though could have been admitted on the basis of marks secured in open merit, yet they were admitted as against the reserved category and as a result the petitioner was excluded from getting admission into the MBBS course. There is no denial to the aforesaid assertion of fact. But the stand of the State Government as well as respondent Nos. 5 to 36 is that if the respondents are allowed to take admission in open merit then it will work out gross injustice and will be more harsh to them as they cannot get admitted to the colleges of their choice even though they have secured much higher marks than the other reserved category candidate and the candidates securing lower marks will get the premium of being admitted to the colleges of their choice. Before embarking upon any discussion on the point of controversy between the parties, it would be appropriate for us to notice some of the clauses of the Rules framed by the Government of Maharashtra for the purpose of selection of MBBS course and BDS course for the year 1995-96. The Preamble of the Rule indicates that it purports to give effect to the prescribed scheme of this Court given in the form of a directive in Unnikrishnan's case and the Rules are intended to be applicable for the year 1995-96. Under Clause 2.0.1. the Director of Medical Education and Research has been appointed as Competent Authority for Selection to 1st year M.B.B.S. Courses.

2. Under Rule 2.0.2. the Competent Authority is required to implement the Rules through the Designated Authorities and would also act as an Appellate Authority to dispose of representations submitted by the candidates.
3. Rules 2.0.3. provides that the Designated Authorities are those specified under Annexure "A"
4. Under Rule 2.0.4 the Designated Authorities are required to distribute application forms, receive filled in forms and scrutinise the same and publish Universities areawise (regional) merit list.

5. Under Rule 4.1.0. fifteen per cent of the seats are yearmarked for candidates of All India Entrance Examination and remaining 85% of seats will form the denominator for calculation of number of seats under various sub-categories at the colleges.
6. Under Rule 4.1.1. out of the remaining seats, all seats at Govt. colleges and 50% of seats at private colleges will be treated as free seats and 50% of seats in private colleges are treated as payment seats.
7. Clause 4.1.3.2. provides that out of the seats at the disposal of the Competent Authority, reserved seats as specified under Rule 4.1.3.3.2. will have to be excluded and the rest should be available for Open Merit category.
8. Under Rule 4.1.3.3.2 70% of the seats will be filled up by the Designated Authority from amongst the applicants who have passed the 12th standard (or equivalent) examination from the schools/colleges situated in the concerned Universities area as per rule. Balance 30% of the seats will be filled in from amongst the candidate from the State Merit List by the Competent Authority under Rule 4.1.3.3.1
9. The selection process has been indicated under Rule 8. Under Rule 8.0.3.0., the Competent Authority is required to fill up the 30% seats as provided under Rule 4.1.3.3.1 from the State Merit List in descending order of merit as well as taking into account the choices offered by each applicant subject to availability of seats and admissibility of his choice.
10. The procedure to be adopted by the Competent Authority to fill up the 30% quota from the State Merit list has been indicated from Rule 8.0.3.0 to 8.0.3.7
11. Rule 8.0.4.1. provides the procedure and method to be adopted for considering and admitting candidates against 70% quota. It is with this rule we are concerned in the present case and, therefore, the said rule is extracted hereinbelow in extensor :-

"8.0.4.1. FOR SEATS IN 70 PER CENT QUOTA :

After going through the procedure laid down in para 8.0.3. the applicants who are not selected for the selection process of seats of 30 per cent quota are required to remain present for counselling and interview to be held by the Designated Authority. The applicant will be called as per his merit position and he will be shown the Colleges where the seats are available. He will have to give his choices in writing for the allotments of seats. The applicants in the Regional Merit List which include both open and Backward Class applicants will be called for interview first. Those belonging to reserved categories of Backward Class will be called subsequently for selection against the seats reserved exclusively for the backward Class applicants. The Designated Authority will prepare the Regional Final Merit List showing the choices thus given at the time of interview and thus will display the said Regional Final Merit List. This list will be sent by the Designated Authority to the Competent Authority at Bombay. The Competent Authority will carry out selection to the 70 per cent seats of the recognized medical colleges by operating the Regional Final Merit List as per the merit and availability of a seat as per the choice order of the applicant. This selection list will be displayed on Notice Board by the respective Designated Authorities. The selected candidate will have to attend the office of the Designated

Authorities on the date indicated to collect his selection order and to take provisional admission. No separate intimation will be sent to the selected candidates. The applicants whose name appear in the selection list will not be considered for subsequent procedure of selection and his name shall automatically stand deleted from the Regional Final Merit List. In other words the names of applicants who are selected against 70 percent quota as per the Regional Merit List will be taken out from the Regional Merit List. It is clarified that these applicants will be eligible for the admission to the payment seats. The selected candidates will have to pay immediately the prescribed fees to the representatives of the colleges who will be present at the office of the Designated Authority on the date prescribed and published by the Designated Authority. This will confirm that the candidate has taken admission against the available and allotted seat. Those candidates who do not join or remain absent and fail to pay the fees or refuse admission, such seats will be treated dropout/casual vacancies. The waiting list will be operated for making selection against such dropout/casual vacancies. The applicant who remain absent for any reason whatsoever will not be considered for allotment of seats for that particular process. However, such an applicant can remain present for subsequent process of selection.

12. The aforesaid provision indicates that candidates who could not secure admission against 30% State level seats will then be called as per his merit position, and he will be told the colleges where the seats are available. He will then be called upon to give choice in writing for his allotment. The candidates in the Regional Merit List, which include both open and backward class will be called for interview and those belonging to reserved categories of backward class will be called subsequently for selection against the seats reserved exclusively for the backward class applicants. It is this provision which is being objected to by the petitioner belonging to a reserved category on the ground that it affects, and frustrates the very purpose of the Constitutional mandate enshrined in Article 15(4) of the Constitution of India. A candidate who is otherwise entitled to be admitted to the MBBS course on the basis of his open merit though belonging to a reserved category it is adjusted against a seat meant for reserved category then the purpose of reservation will not be achieved. We find sufficient force in the aforesaid contention raised by Dr. Dhawan, the learned senior counsel for the petitioner. But Mr. Nageshwar Rao, learned counsel appearing for respondent Nos. 3 to 36, who also belong to the reserved category and have given their choice for being considered against the seats meant for reserved category argued that if these persons who otherwise have qualified to be admitted under the open category would not be allowed to exercise their option for being admitted against the reserved seats then will be forced to take admission in either private colleges or some colleges of the State even though they are found to be more meritorious than others, like the petitioner who even could not qualify to be admitted to any of the colleges. In order to appreciate this contention it would be necessary for us to find out as to how the selection is made. In a college where there are 100 seats, 15 seats remained reserved for the candidates who come through All India Competitive Test to be allotted by the Govt. of India, out of remaining 85 seats 50% are kept reserved for different reserved categories and 50% remained for open market in accordance with merit. From out of open market seats, say, in the aforesaid illustration 30% are distributed from the State level candidates and 70% in the Regional level. It is while considering the candidates at Regional level, option is asked for from the candidates individually of their choice and then allotment is made. Therefore, at that stage if a candidate belonging to the reserved category is considered by virtue of his merit and is admitted, then it is just possible he may not be admitted to any Government colleges and would be admitted into a private college whereas as against the 50%

seats reserved for reserved category, persons down below the list belonging to the reserved category, will be admitted and undoubtedly this will cause undue hardship to the meritorious candidates amongst the reserved category and will be a premium for the less meritorious candidates amongst the reserved category.

13. There cannot be any dispute with the proposition that if a candidate is entitled to be admitted on the basis of his own merit then such admission should not be counted against the quota reserved for Scheduled Caste or Scheduled Tribe or any other reserved category since that will be against the Constitutional mandate enshrined in Article 16(4).

14. In a case *Indra Sawhney v. Union of India* (1992) 6 Suppl (3) SCC 210 (217) : (1992 AIR SCW 3682), commonly known as Mandal's case, this Court in paragraph 811 held thus:-

"In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say Scheduled Castes get selected in the open competition filed on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.

15. In *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745: (1995 AIR SCW 1371), the Constitution Bench of this Court considered the question of appointment and promotion and roster points vis a vis reservation and held thus(at p. 1376 of AIR):

"When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserved categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State if not adequately represented in the Services under State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise make the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing

reservation for the said class but so long as the instructions/rules providing certain percentage of reservation for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition."

16. In *Union of India v. Viral Singh Chauhan*, (1995) 6 SCC 684 at 705 : (1995 AIR SCW 4309), it has been held that while determining the number of posts reserved for Scheduled Castes and Scheduled Tribes, the candidates belonging to reserved category but selected/promoted on the rule of merit and not by virtue of rule of reservation shall not be counted as reserved category candidates.

17. In *Ajay Kumar Singh v. State of Bihar*, (1994) 4 SCC 401 : (1994 AIR SCW 2515), a three Judge Bench considered the same question for admission in post-graduate medical course. It was contended that once the candidates seeking admission to post-graduate medical course have already enjoyed the benefit of reservation at the stage of their admission to M.B.B.S. course, they are not eligible for admission to post-graduate medical course, as reserved candidates. The contention that provision for reservation at the stage of admission to post graduate medical course is uncalled for and contrary to public interest, cannot be accepted. Firstly, the assumption on the basis of which this argument is addressed is untenable. A candidate who is seeking reservation at the stage of admission to post-graduate medical course may not have availed of the benefit of reservation at the stage of admission to M.B.B.S. course as he would have been admitted on his own merit in the general quota (open competition quota) but because the competition at the level of post-graduate medical course is extremely acute, he may have to seek the benefit of reservation. Therefore, the assumption that a student seeking benefit of reservation at the stage of admission to post graduate medical course has already enjoyed the benefit of reservation once previously is not necessarily true. Secondly, there is no rule under Article 15(4) that a student cannot be given the benefit of reservation at more than one stage during the course of his education career. Where to draw the line is not a matter of law but a matter of policy for the State to be evolved keeping in view the larger interests of the society and various other relevant factors. Unless the line drawn by the State is found to be unsustainable under the relevant article, the Court cannot interfere. With regard to the observations in *Indra Sawhney* case in para 834 and 839 (of 1992 Supp (3) SCC 210 : 1992 AIR SCW 3682), relied upon to contend that the reservation for admission at the post-graduate level is unconstitutional, it was clarified in para 8 that "the Court not speaking of admission to specialities and super-specialities. Moreover, MS or MD are not super-specialities. In any event, this Court did not say that they were not permissible". The argument that reservation at post-graduate level is detrimental to the interests of the society was not countenanced holding that "no one will be passed unless he acquires the requisite level of proficiency. Secondly, the academic performance is not guarantee of efficiency in practice. We have seen both in law and medicine that persons with brilliant academic record do not succeed in practice while students who were supposed to be less intelligent come out successful in profession/practice. It is, therefore, wrong to presume that a doctor with good academic record is bound to prove a better doctor in practice. It may happen or may not". In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking

their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they will be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as a open category candidate and not as a reserved category candidate. The Full Bench of the Bombay High Court in *Ashwin Prafulla Pimpalwar v. State of Maharashtra* (W.P. No. 2469/90) decided on 16th September, 1991 (reported in AIR 1992 Bom 233) held that selection of candidates for admission to post-graduate medical course in colleges run by or under the control of the State Government shall be regulated in accordance with the prescription in that behalf contained in the rule for selection of the candidates for admission to the post-graduate medical course notified by the Government. The contention that the candidates belonging to the backward classes admitted to M.B.B.S. course selected as general candidates are not eligible for admission as reserved candidates or for scholarship etc. and also for admission to post-graduate medical course as reserved candidates, is illegal for and in negation of Article 15(4). The memorandum issued by the Government on the basis of the statement made by the Minister of Health, Government of Maharashtra was placed before us showing that such candidates are entitled to all the benefits though admitted on merit basis. The said statement is consistent with Article 15(4). Therefore, the candidate belonging to backward classes but selected as general candidates for admission to graduate or post-graduate medical course are entitled to the concession or scholarships and other benefits according to the rules or instructions of the State Government or the Central Government as the case may be. The admission to the Medical Colleges for the year 1995-96 in the State of Maharashtra is already over and we are not inclined to interfere with the admission already made but we do commend that while deciding and publishing the Rules for admission in the next academic session, directions given in this judgment should be borne in mind and the rules should be made accordingly. In view of our conclusion, and admittedly the Authorities having admitted the candidates belonging to the reserved category only against seats meant for reserved category even though they were entitled to be admitted on the basis of their merit, the petitioner who could have been otherwise admitted, has to be debarred from taking admission. Since the petitioner is a single applicant before us, we direct that the petitioner be admitted to anyone of the colleges where he can be so admitted to the MBBS course where seat is still available and if no seat is available then he may be admitted by increasing one seat in anyone of the colleges. It may be made clear that if the petitioner is desirous of being admitted to any of the Medical colleges in pursuance of this Court's order then he should approach the Designated Authority within two weeks from today and the Designated Authority will then take appropriate action within two weeks thereafter. The designated authority will decide the college to which the petitioner will be admitted.

18. Needless to mention that if there is any prohibition under any University Regulation for such admission since the course has already started such prohibition should be condoned and admission should be given.

19. We make it clear that it is not open for others belonging to reserved category, who might have applied for admission to the MBBS course for this year to make any application either in this Court or in Bombay High Court and any such application should not be entertained. But we are inclined to issue directions in favour of the petitioner since in course of hearing in another case in Writ Petition No. 3694 of 1995 the State itself gave admission to the petitioner therein.

20. The writ petition is accordingly allowed with the aforesaid observation. There will be no order

as to costs. Petition allowed.