

SUPREME COURT OF INDIA

Satyaprata Sahoo

Vs.

State of Orissa

C.A.No.5705-5706 of 2012

(K.S. Radhakrishnan and Dipak Misra, JJ.)

03.08.2012

JUDGMENT

K.S. Radhakrishnan, J.

1. Leave granted.

2. The appellants, who have appeared in the Entrance Examination for Post-Graduate (Medical) Selection 2012, Odisha are challenging the validity of Clause 11.2 of the Prospectus for selection of candidates for Post- Graduate (Medical) Courses in the Government Medical Colleges of Odisha for the Academic Year, 2012, as violative of Article 14 of the Constitution of India.

3. The appellants appeared in the entrance examination as 'direct candidates' (Open Category) and have qualified purely on merit for admission to Post Graduate (Medical) Courses 2012 in the Government Medical Colleges in Odisha. The Prospectus issued for Post-Graduate (Medical) Selection, 2012, Odisha deals with the availability of the seats both in the category of direct as well as in-service. Clause 4 of the Prospectus gives the category-wise details of the seats for P.G. (Medical) Courses in three Government Medical Colleges in Odisha for the Academic Year 2012. For the category MD/MS Course, in-service category, 87 seats are available and for direct category, 86 seats are available, totaling 173 seats. Appellants, who fall under the category of direct candidates, as already indicated, are aggrieved by Clause 11.2 of the Prospectus which stipulates an additional weightage for candidates who are in employment of Government of Odisha/Government of Odisha undertaking / Government of India Public Undertaking located in Odisha and had worked in Rural/Tribal/Backward areas while applying through the category of direct candidates. Additional weightage of 10% of marks secured in the P.G. Entrance Examination per year of completion of service in -Rural/Tribal/Backward areas, subject to the maximum of 30% of

marks secured in the entrance examination, in service to be given to those candidates who apply through direct category.

4. Appellants submit that the above clause is wholly arbitrary, discriminatory and goes contrary to the ratio laid down by this Court in *State of M.P. & Ors. V. Gopal D. Tirthani & Ors*¹ and *Dr. Snehelata Patnaik & Ors. V. State of Orissa & Ors*². Appellants have also prayed for quashing the Medical Council of India (in short 'MCI') Notification No. 51210 of 17.11.2009 providing weightage marks to in-service candidates applying through the direct category, which according to the appellants, is a clear encroachment and appropriation of seats earmarked for the direct category candidates which has to be filled up purely on merit, subject to rule of reservation. Appellants' challenge was repelled by the learned single Judge of the Orissa High Court as well as the Division Bench. Hence, these appeals.

5. Shri Shyam Diwan, learned senior counsel appearing for the appellants submits that providing additional weightage marks to in-service candidates who had rendered service in-Rural/Tribal/Backward areas while considering their applications for admission through the direct candidate category amounts to making an artificial differentiation between a homogenous class i.e. direct candidates and in-service candidates. Learned senior counsel pointed out that on account of additional weightage benefit given to the doctors who have rendered less than five years of service in Rural/Tribal/Backward areas both in Government of Odisha or Public Sector Undertakings owned by the State Government, will be an advantageous position and that would amount to drawing an artificial differentiation between a homogeneous class i.e. direct candidates and in-service candidates and also within the in-service candidates, which action would be hit by Article 14 of the Constitution of India.

6. Learned senior counsel also pointed out that the same further amounts to providing horizontal reservation within the seats meant for in-service candidates. Learned senior counsel pointed out that the admission through direct candidates route be made purely on merit on the basis of the common entrance examination and not on the basis of the additional weightage granted to a few doctors who -had the advantage of serving in Rural/Tribal/Backward areas while in employment in Government of Orissa, Public Sector Undertakings owned by the State Government.

7. Mrs. Indu Malhotra, learned senior counsel, also submitted that such candidates can always come through the in-service category, a normal route for admission to PG (Medical) Course. Learned senior counsel pointed out that additional weightage is always available to them when they come through the in-service category route, however, the same cannot be extended to them while applying for admission as direct category candidates, lest they may

make an inroad into the direct category, which is arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

8. Shri Krishnan Venugopal, learned senior counsel contesting on behalf of the respondents, on the other hand, submitted that there is no illegality in Clause 11.2 of the Prospectus which gives additional weightage to in-service candidates who fall under the direct candidates route, as well as third proviso added after clause 9(2)(d) of the Post Graduate Medical Education (Amendment) -Regulations 2000 as amended by Post Graduate Medical Education (Amendment) Regulation 2009 (Part II) vide Notification dated 17.11.2009. Learned senior counsel pointed out that classification of candidates as per Clause 6 and sub-clauses providing weightage marks to such in-service candidates as per Clause 11.2 of the Prospectus, cannot be termed as discrimination between direct and in-service candidates and amongst the in-service candidates. Learned senior counsel also pointed out that the weightage marks given to in-service candidates who have rendered service in Rural/Tribal/Backward areas and qualified in the entrance examination, cannot be termed as “horizontal reservation” as it is only the weightage of marks given for rendering service to the people in Rural/Tribal/Backward areas, in view of the law laid down by this Court in Gopal D. Tirthani (supra).

9. Shri Kirti R. Mishra, learned senior counsel appearing on behalf of the 4th respondent, submitted that the prospectus has been issued strictly in accordance with the Notification No. 51210 dated 17.11.2009 issued by the Medical Council of India, whereby additional weightage marks given as an incentive for determining -the merit in the entrance examination passed for P.G. admission. Learned senior counsel submitted that the weightage in marks is given as an incentive at the rate of 10% of the marks obtained up to maximum of 30% of the marks obtained for each year of service rendered in remote or difficult areas. It was also pointed out that the additional benefit is an incentive only and by awarding such an incentive, there is no violation of Article 14 of the Constitution of India.

10. Learned counsel appearing for the MCI referred to the counter affidavit filed on its behalf and submitted that the third proviso to Regulation 9(2)(d) of the Post Graduation Regulation, 2000 (as amended) does not provide for or contemplate any separate channel of entry for in service candidates in admission to P.G. Degree Courses like that provided for P.G. Diploma Courses. The proviso only provides that a weightage may be given at the rate of 10% of the marks obtained for each year in service in remote or difficult areas upto the maximum of 30% of the marks obtained in the entrance examination and has secured minimum required -percentage of marks for government service rendered in remote/difficult areas. We heard counsels on either side at length.

11. Medical Council of India, in exercise of its powers conferred by Section 33 read with Section 20 of the Indian Medical Council Act, 1956, framed the Postgraduate Medical Education Regulations, 2000. Clause 9 of the Regulations 2000 deals with the selection of the postgraduate students. Clause 9(1) was substituted in terms of Notification published in the Gazette of India on 20.10.2008 and the same now reads as follows:

“9(1)(a) Students for Post Graduate medical courses shall be selected strictly on the basis of their Inter-se Academic Merit.

(b) 50% of the seats in Post Graduate Diploma Courses shall be reserved for Medical Officers in the Government service, who has served at least three years in remote and difficult areas. After acquiring the PG Diploma, the Medical Officers shall serve for two more years in remote and/or difficult areas.”

12. Clauses 9(1)(a) and 9(1)(b) when read together would indicate that 50% seats are earmarked for direct category candidates and -50% seats are earmarked for in service category. Clause 9(1)(a) clearly states that students for post graduate medical courses shall be selected strictly on the basis of their inter-se academic merit and Rule 9(1)(b) states that 50% of the seats stand reserved for in service candidates who have at least three years service in remote and difficult areas.

13. The methodology to be adopted for determining academic merit is provided in Clause 9(2), which is relevant for our purpose and hence extracted hereunder:

“9(2) For determining the ‘Academic Merit’, the University/Institution may adopt the following methodology:-

a. On the basis of merit as determined by a ‘competitive test’ conducted by the state government or by the competent authority appointed by the state government or by the university/group of universities in the same state; or

b. On the basis of merit as determined by a centralized competitive test held at the national level; or

c. On the basis of the individual cumulative performance at the first, second and third MBBS examinations provided admissions are University wise. Or

d. Combination of (a) and (c) Provided that wherever ‘Entrance Test’ for postgraduates admission is held by a state government or a university or any other authorized examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical course shall be 50 percent for general category candidates and 40 percent for the candidates belonging to Scheduled Castes,

Scheduled Tribes and Other Backward Classes. Provided further that in Non-Governmental institutions fifty percent of the total seats shall be filled by the competent authority notified by the State Government and the remaining fifty percent by the management(s) of the institution on the basis of Inter-se Academic Merit.”

14. However, the following proviso was added after clause 9(2)(d) in terms of Gazette Notification published on 17.11.2009 and the same reads as follows:

“Further provided that in determining the merit and the entrance test for postgraduate admission weightage in the marks may be given as an incentive at the rate of 10% of the marks obtained for each year in service in remote or difficult areas upto the maximum of 30% of the marks obtained.”

15. Above Clause 9, therefore, stipulates the methodology to be adopted for determining the inter-se academic merit of candidates who fall under direct category and of those candidates who ultimately fall under 50% seats reserved for in-service candidates. Clause 9(1)(a) clearly stipulates that students for postgraduate medical courses shall be selected strictly on the basis of “inter-se academic merit”. The main controversy in this case is whether the candidates from direct admission category has to be selected strictly on the basis of their inter-se academic merit or whether it is legal to dilute the merit to the extent as indicated in the third Proviso to Clause 9(2)(d). Candidates who fall in the direct candidates category, whether they are fresh from the college or serving elsewhere, either on Government service or under public-sector undertakings, working in rural/Tribal area or otherwise or doctors who are serving in private hospitals or nursing homes etc. situate in remote or difficult area, all fall in that direct category and all of them have to take a common entrance examination and admission criteria is only comparative merit. When the comparative merit is the only criteria in the open category, the question is whether a weightage can be given exclusively to those candidates who are in - service of State of Odisha/Government of Odisha undertaking, whether contractual/temporary/ad-hoc/regular on the ground that they had worked in rural/tribal/backward areas. It may be noted that 50% seats have already been earmarked for such category of candidates which they can always claim depending upon the inter-se merit after complying with other eligibility criteria. Question is whether those in-service candidates can appropriate seats from the open category where seats are only few.

16. Clause 11.2 in the Prospectus issued by the P.G. (Medical) Selection Committee 2012, giving additional weightage to those in-service candidates, reads as follows:

“11.2 Those in-service candidates who have qualified in the Entrance Examination and worked in Rural/Tribal/Backward areas shall be awarded an additional weightage of 10% of the marks secured in the P.G. Entrance Examination per year of completion

service (in Rural/Tribal/Backward areas), subject to maximum of 30% of marks secured in entrance examination, vide MCI Notification No.51210/ dt.17.11.2009 (In Form No.Appendix-III(A)).”

Candidates fall under the Direct Category is provided under Clause 6 of the Prospectus, which reads as follows:

“6. Category of Candidates:

6.1. A Direct Candidate is one who at the time of application:

6.1.1 Is son/daughter/spouse of a person who has served in Defence Service for minimum of 5 years by 31st December, 2011.

6.1.2 Is either unemployed or in the employment of Government of Odisha, but not completed five years of service which includes all categories of employment like contractual/temporary/ad- hoc/regular by 31st December, 2011

6.1.3 in the employment of Govt. of Orissa Public Sector Undertaking/Govt. of India Public Sector Undertaking located in Odisha. The employer has to sponsor the candidates for entire period & must submit the sponsorship certificate as in Appendix III.” Clause

6.2 deals with In-service candidate which reads as follows:

“6.2 An In-service candidate is one who at the time of application:

6.2.1 Is in the employment of Government of Odisha and has completed a length of 5 years of service which includes all categories of employment like contractual/temporary/ ad-hoc/ regular by 31st December, 2011, excluding at-a-stretch leave of any kind, of 30 days or more. However, the maternity leave is exempted from this exclusion and shall be counted towards the length of five years of service.

Note: In-service and Direct candidates in employment under Government of Odisha at the time of application - are advised to submit their applications along with the required documents directly to the Convenor, P.G. (Medical) Selection Committee - 2012, under intimation to their Employer. Copy of such intimation is to be attached.”

17. Clauses 6.1, 6.2 and 11.2, quoted above, clearly recognize two categories of candidates i.e. “direct” and “in-service”. “Direct” is a very wide category (open category) where students for P.G. Medical Courses shall be selected strictly on the basis of inter-se academic merit, as

determined by a competitive test and in-service is a restricted category of candidates who are in service of the State Government/State owned undertakings. The details of the availability of seats are provided in Clause 4 of the prospectus which is as follows:

18. Seats in the direct category are also reserved for members of SC/ST communities and also to those SC/ST candidates migrated from their state of origin subject to certain conditions. Clause 6.4 reserves seats for children or spouse of service/Ex-service personnel (Defence). Clause 6.5 states that seats are reserved for physically handicapped candidates also subject to rules governing them. In other words, several reserved candidates have also to be accommodated in the 50% Open Category. 50% seats ear marked for the in-service candidates is kept intact, for which in- service candidates can always aspire and if they satisfy the condition of rural/Tribal service, they will definitely get weightage.

19. Now by virtue of third proviso to Clause 9(2)(d) and clause 11.2 of the Prospectus candidates who fall under the in-service category are given a weightage through which they can make an in-road into the direct candidates category while retaining their rights to get admission for P.G. Course through in-service category. Appellants lament that already 66% reservation is there in the State for P.G. Admissions, including all reservations and only 34% seats are available for direct unreserved category on merit and if third -proviso to Clause 9(2)(d) of the M.C.I. Regulation and Clause 11.2 of the Prospectus are given effect to then those seats would be occupied by the in-service candidates large in number and candidates who comes strictly on the basis of merit through the competitive examination will have to stand out.

20. This Court in Gopal D. Tirthani (supra) upheld the allocation of 20% seats for in-service candidates and held that weightage can be given to in- service candidates for their having rendered specified number of years of service in rural/tribal areas which is not hit by Article 14 of the Constitution of India. This Court held that allocation of 20% of seats in Post Graduation in the University of Madhya Pradesh for in-service candidate is not a reservation, it is a separate and exclusive channel of entry or source of admission, validity thereof cannot be determined on the constitutional principles applicable to communal reservations. Having so said, the Court held as follows:

“33Firstly, it is a case of post-graduation within the State and not an All-India quota. Secondly, it is not a case of reservation, but one of only assigning weightage for service rendered in rural/tribal areas. Thirdly, on the view of the law we have taken hereinabove, the assigning of weightage for service - rendered in rural/tribal area does not at all affect in any manner the candidates in open category ”

21. Therefore, in Tirthani case, it has been categorically held that it is permissible to assign a reasonable weightage to services rendered in rural/tribal areas by the in-service candidates for the purpose of determining inter se merit within the class of in-service candidates who have qualified in the pre-PG test by securing the minimum qualifying marks as prescribed by the Medical Council of India. Regulation 9 framed by the Medical Council of India was also noticed by this Court so also the existence of two categories: (1) direct category (open category) candidates and (2) in-service category candidates. Weightage given for rendering service in rural/tribal areas, so far as in-service candidates, was upheld noticing that the assigning of weightage for service rendered in rural/tribal areas would not affect in any manner the candidates in open category.

22. We may, in this connection, refer to few earlier judgments in the matter of giving weightage to in-service candidates although those decisions were also considered in Tirthani case. In *State of -U.P. and Others. v. Pradip Tandon and Others*³ reservation in favour of people in “hill areas” and Uttarakhand was held to be constitutionally valid as they were socially and educationally backward classes of citizens. Reservation in favour of “rural areas” was found difficult to accept as it was sought to be justified on the test of poverty as the determining factor of social backwardness. This Court held that rural element did not make a class by itself because it could not be accepted that the rural people were necessarily poor or socially and educationally backward just as the urban people were not necessarily rich. What was being dealt with in Pradip Tandon case was a reservation and not a weightage. Later in *Dinesh Kumar (Dr.) (II) v. Motilal Nehru Medical College*⁴ the two-Judges Bench examined a scheme of examination for admission to postgraduate courses suggested by the Government of India stipulating a weightage equivalent to 15 per cent of the total marks obtained by a student at the All-India Entrance Examination, being given if he had put in a minimum of 3 years of rural service. In that case, of course, this Court observed that it was eminently desirable that some incentive should be given to the doctors to go to the rural -areas because there was concentration of doctors in the urban areas and the rural areas appeared to be neglected. The observation made in Dinesh Kumar case was considered by three-Judges Bench of this Court in *Dr. Snehelata Patnaik (supra)* and this Court opined that the authorities might well consider giving weightage upto maximum of 5 per cent of marks in favour of in-service candidates who had done rural service for five years or more, the determination of which have to be made by the authorities.

23. We have referred to the above mentioned judgments only to indicate the fact that this Court in various judgments has acknowledged the fact that weightage could be given for doctors who have rendered service in rural/tribal areas but that weightage is available only in in-service category, to which 50% seats for PG admission has already been earmarked. The question is whether, on the strength of that weightage, can they encroach upon the open

category, i.e direct admission category. We are of the view that such encroachment or inroad or appropriation of seats earmarked for open category candidates (direct admission category) would -definitely affect the candidates who compete strictly on the basis of the merit.

24. The purpose and object for giving weightage to in-service candidates who have rendered rural/tribal service is laudable and their interest has been taken care of by the Medical Council of India as well as the prospectus issued for admission to the various medical colleges in State of Odisha but they have to come through the proper channel i.e. the channel exclusively earmarked for in-service candidates and not through the channel earmarked for candidates in the open category. The in-service candidates are also free to compete through the open category just like any other who fall under that category. Further, it is also relevant to note those who get admission in post graduate courses through the open category have to execute a bond stating that they would serve rural/tribal areas after completion of their post-graduation. In fact, weightage is given to those candidates who have rendered service in rural/tribal areas when they compete for admission to PG (Medical) Courses in in-service category for whom 50% seats are earmarked.

25. We also find another fallacy in Clause 11.2 read with Clause 6.2.1 of the prospectus. Clause 6.2.1 of the prospectus says in-service candidate is one who at the time of application is in the employment in Government of Odisha and has completed a length of 5 years of service which include all categories of employment like contractual/temporary/ad-hoc/regular by 31st December 2011. Therefore, a doctor who is doing rural service on contract or on temporary basis or on ad hoc basis by 31st December 2011 will also get the benefit. At the same time, the candidates who pass out MBBS either in regular service or in contractual / temporary/ ad hoc in a private hospital even though serving in a remote/tribal areas would not get that benefit even though those doctors are also rendering the same service. Every doctor who goes out of medical college after MBBS would not get an opportunity to serve in a rural/tribal area by way of contractual/temporary/ad-hoc or regular service offered by the State of Odisha or a public sector. Few may fall in that category for various reasons and they get an advantage and those who get that advantage of course can, claim weightage when they are being considered in the in- service category.

26. We notice that the seats earmarked for the open category by way of merit are few in number and encroachment by the in-service candidates into that open category would violate clause 9(1)(a) of the MCI regulations, which says students for PG medical courses shall be selected strictly on the basis of the inter se academic merit i.e. on the basis of the merit determined by the competent test. Direct category or open category is a homogeneous class which consists of all categories of candidates who are fresh from college, who have rendered service after MBBS in Government or private hospitals in remote and difficult areas like hilly

areas, tribal and rural areas and so on. All of them have to complete on merit being in the direct candidate category, subject to rules of reservation and eligibility. But there can be no encroachment from one category to another. Candidates of in-service category cannot encroach upon the open category, so also vice-versa.

27. We find, except State of Odisha and, to some extent, State of Tamil Nadu, none of the other States in India, has incorporated such a clause in any of their prospectus for admission to the graduate medical courses and students who fall under the open -category in those States are, therefore, not affected by such weightage.

28. Medical Council of India in the counter affidavit raised some objections for giving admissions beyond the sanctioned admission capacity. Reference was made to Section 10A of the MCI Act which provides that admissions can be made by Medical Colleges only within sanctioned capacity for which permission under Section 10A/recognition under Section 11(2) has been granted. This Court in *State of Punjab and Others v. Renuka Singla and Others*⁵ held that the High Court or the Supreme Court cannot be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory rules and regulations, in respect of admissions of students. Technical education, including medical education, requires infrastructure to cope with the requirement of giving proper education to the students, who are admitted. Taking into consideration, the infrastructure, equipment, staff, the limit of the number of admissions is fixed either by the Medical council of India.

29. Further, in *Medical Council of India v. State of Karnataka*⁶ this Court held the number of students admitted cannot be over and above that fixed by the Medical Council as per the Regulations and that seats in medical colleges cannot be increased indiscriminately without regard to proper infrastructure as per the Regulations of the Medical Council.

30. In *Mriduldhar (Minor) and another v. Union of India and Others*⁷ this Court held as follows:

“Having regard to the professional courses into consideration, it deserves to be emphasized that all concerned including Governments, State and Central both, MCI/DCI, colleges, new or old, students, Boards, universities, examining authorities etc. are required to strictly adhere to time schedule wherever provided for; there should not be mid-stream admission; admission should not be in excess of sanctioned intake capacity or in excess of quota of any one, whether State or Management. The carrying forward of any unfilled seats of one academic year to next academic year is also not permissible.”

31. It is unnecessary to multiply the judgment rendered by this Court, on this point, the question is how to mould the reliefs, especially when we cannot, in the facts and circumstance of the -case, direct the State of Odisha and the Medical Council of India to increase the seats so as to accommodate the appellants. Seats which are legitimately due to the appellants are being occupied by the candidates from in-service category.

32. Contention was raised by learned counsel, appearing for some of the in-service candidates who got admission that they shall not be displaced since they have already left their jobs from the State Government service or the State owned undertakings after having got admission for P.G. (Medical) Course. But, going by the stand taken by MCI and on the basis of the decided cases of this Court, it would not be possible to increase the seats, however, candidates who are meritorious should get admission.

33. Contention was raised that all the affected candidates were not made parties to the writ petition and, therefore, without hearing them, no orders shall be passed against them thereby depriving them of their seats. Learned counsel for the appellants has stated that they had approached the High Court of Orissa on 13.01.2012 i.e soon after the prospectus was issued and the declaration of the provisional merit list took place on 10.04.2012 subsequent to the -filing of the writ petition. Learned Single Judge rendered the judgment before the results were declared on 23.03.2012 and the Division Bench dismissed the appeal on 09.04.2012. The first counseling was conducted between 21.04.2012 to 23.04.2012. Since the appellants had approached the court on 13.01.2012 and the matter was sub judice before a court of law and this proceeding is only a continuation of the writ petition filed by them on 13.01.2012, we are, of the view, that the admissions given to the in-service candidates necessarily would be subject to the outcome of the petitions pending before the court of law. Therefore, in our view, non-impleadment of few of those candidates in these proceedings would not affect the legitimate claim raised by the appellants.

34. Learned counsel appearing for the contesting respondents submitted that they are undergoing studies from May 2012 onwards and, at this distance of time, if they are displaced, that will cause serious injustice to them since they have already left the government service/public sector undertakings for joining the post graduate course. In view of the stand aken by the Medical Council -of India that seats for post-graduate courses cannot be increased, we are inclined to give a direction to the State of Odisha or their undertakings to take back the in-service candidates into their service and permit them to serve in the rural/tribal areas so that they can compete through the category of in-service candidates in the 50% seats earmarked for them for admission to the post-graduate course.

35. We are, therefore, inclined to allow this appeal and set aside the judgment of the Division Bench as well as learned Single Judge by quashing the proviso to clause 9(2)(d) of the MCI regulations to the extent indicated above as well as clause 11.2 of the prospectus issued for admission to the Post Graduate Medical Examination 2012 in the State of Odisha. The State of Odisha, the Medical Council of India and respondents 1 to 4 are directed to take urgent steps to re-arrange the merit list and to fill up the seats of the direct category, excluding in-service candidates who got admission in the open category on the strength of weight age, within a period of one week from today and give admission to the open category candidates strictly on the basis of merit.

36. Appeals are allowed and the judgments of the High Court are set aside accordingly.

Judgment Referred

1(2003) 7 SCC 0083

2(1992) 2 SCC 0026

3(1975) 1 SCC 0267

4(1986) 3 SCC 0727

5(1994) 1 SCC 0175

6(1998) 6 SCC 0131

7(2005) 2 SCC 0065