

# RAJASTHAN HIGH COURT

Sushant Joshi

Vs.

State of Rajasthan

C. W. P. No.3523 of 2008

(H.R. Panwar, J.)

29.05.2008

## ORDER

**H. R. Panwar, J.**

1. By the instant writ petition under Article 226 of the Constitution of India, the petitioner herein seeks quashing of the impugned order Annex. 5 dated 21-5-2008 and also seeks staying of the counseling of in-service candidates scheduled to be held on 28-5-2008 and 29-5-2008 on the basis of the merit list prepared after dispensing with the negative marking.

2. The facts and circumstances giving rise to the instant writ petition by the petitioner, as has been averred in the writ petition are that the petitioner completed his MBBS from M.S. Ramaih Medical College, Bangalore, in the year 2006 and appeared in Pre-Post Graduation Medical Examination, 2008 conducted by the respondent No. 2, the Rajasthan University of Health Sciences, *Jaipur* (for short, "the university" hereinafter) on 20-1-2008 and stands in the non- service category. He has been placed in the merit at serial No. 100 and 101 vide Annex. P/2. The said examination of 2008 was conducted by the respondent No. 2 university as per the Instructions Booklet containing information relating to the seats and reservation, eligibility for admission; details of examination, declaration of result etc. vide Annex. P/3 and stated that as many as six medical colleges are in Rajasthan to give admission to M.D., M.S./Diploma courses, for which there are 360 seats for M.D. and M.S. and 68 seats for Diploma. 50% of the total seats available in various M.D./M.S./Diploma courses are to be filled up as per the allocations made by the Director-General of Health Services, Government of India, on the basis of the result of All India Competitive Entrance Examination for admission to P.G. Courses (M.D./M.S./ Diploma) on the

basis of merit and 50% of the total seats available in various M.D./ M.S./Diploma courses are to be filled up on the basis of merit of Pre-P.G. Medical Examination, 2008 at the State Level. Out of remaining 50% seats available at the State Level, 50% of which are to be filled up by in-service candidates and remaining 50% by non-service candidates as per the ordinance 278 E and G of the Rajasthan University Ordinance as modified and adopted by the Rajasthan University of Health Services, *Jaipur*. Further distribution of seats among general and reserved categories shall be made as per the rules and regulations of Medical Council of India and the directives of the State Government/Hon'ble Courts in this regard. Thus, according to the petitioner, 50% out of 368 seats are to be filled-up through Pre P.G. Medical Examination, 2008 on the basis of the result of All India Competitive Entrance Examination for admission to P.G. Course (M.D./M.S./Diploma). The remaining 50% seats are further bifurcated in two categories, viz. 50% in-service candidates and rest 50% thereof for non- service candidates. In-service candidates are those doctors, who are serving in the Government Hospitals and the non-service candidates would be other than those who are serving in the Government hospitals. According to the petitioner, by the impugned order Annex. P/5, negative marking in respect of in-service candidates, irrespective of their class whether from general class, Scheduled Castes, Scheduled Tribes or Other Backward Classes, has been dispensed with; whereas the non-service candidates are required to qualify with the examination with negative marking and on these premises, the petitioner has assailed the dispensing with the negative marking in respect of in-service candidates and contended that the dispensing with the negative marking in respect of in-service candidates is discriminatory; hence this writ petition.

3. A reply to the writ petition has been filed by the respondent-State raising certain preliminary objections that the petitioner cannot be said to be an "aggrieved person"; even if the dispensing with the negative marking in respect of in-service candidates had not been there, the petitioner would not be entitled for the admission to P.G. Courses. It is submitted that so far as in-service candidates are concerned, there are 109 seats allocated to them and as many as 37 persons have already been selected even on the basis of negative marking and the stand of the petitioner, even if accepted though denied the petitioner would not fall in the list of candidates eligible for admission to P.G. Course in M.D./M.S./Diploma. Taking 109 seats, out of which 37 in-service persons have been selected even on the basis of negative marking i.e. pre-Annx. 5 and there remains only 72 seats ( $109-37=72$ ) and if these 72 seats are transferred to the non-service category then the total seats available to the non-service category would be 112 seats i.e. 50% of the total seats available to the State Level +

72 seats sought to be transferred, which would come to 184 and as per the roster system, out of 184 total seats for non-service candidates, 94 seats will be for the general category and out of 94 seats, if 25% seats are to be reserved for girls (general) there would remain only 70 seats in general category for boys and even according to the admission of the petitioner himself, the petitioner stands at the merit No. 101, though according to the result available with the respondents, the petitioner stands at merit No. 102 and not merit No. 101 and, thus, in any case, even if the case set up by the petitioner is accepted then also the petitioner would not be eligible for allocation of the seat as a non-service candidate and, therefore, on this ground, the respondent-State emphatically contended that the petitioner cannot be said to be an "aggrieved person".

4. Apart from the preliminary objections, it has been stated that the petitioner himself averred in the writ petition that there is a "strong apprehension" of the petitioner that he will get the seat of his choice subject because there will be availability of more seats if the negative marking is not dispensed with in respect of the in-service candidates. Supporting dispensing with the negative marking, in the reply, the respondent-State contended that the matter was examined and considered taking into consideration every aspect of the matter like difficult nature of the paper, general level of doctors who are posted at the rural area, the fact that the doctors who are appointed freshly, are required to render their services in rural for two to three years for becoming eligible as in-service candidate and after completion of M.D./M.S., such doctors are required to serve in the rural areas for five years and in this respect, the in-service doctors, who are given admission in P.G. Courses like M.D./M.S., are required to submit the bond that on completion of such P.G. Course, they would serve the State at least for five years in the rural areas and for the purpose, the State is to make them expert to serve in rural areas in Government service and, therefore, it was in the larger interest to dispense with the condition of negative marking in respect of in-service candidates irrespective of their category, whether General, Other Backward Classes, Scheduled Castes or Scheduled Tribes. It was further submitted that there are two sources of admission to P.G. Courses, i.e. P.G. in M.D./M.S./M.D.S. namely in-service candidates and non-service candidates and allocation of 50% seats is exclusive to either of the said categories and, therefore, there are two separate and distinct classes and even if the seats of in-service candidates remain unfilled then the same can be filled-up from non-service category but the position would remain that even from the non-service category, the seats have to be filled-up from the various categories, i.e. General, Women, Scheduled Castes, Scheduled Tribes and Other Backward Classes etc.

5. I have heard learned counsel for the parties. Carefully gone through the record.

6. It is contended by the learned counsel for the petitioner that para 4(m) of the Booklet, 2008 (Annex. P/3) deals with the negative marking, which provides that "each answer with correct response shall be awarded four marks. Negative marking will be, adopted for incorrect responses. One mark will be deducted for each incorrect response. Zero mark will be given for the question not answered. More than one answer indicated against a question will be deemed as incorrect and one mark will be deducted accordingly," Para 7 of the Booklet, 2008 (Annex. P/3) provides that "for SC/ ST candidates, two results will be prepared one with negative marking and other without negative marking. In case, sufficient number of SC/ST candidates do not pass the examination with negative marking then the other result without negative marking will be declared and will be considered in the counselling. This is to be done simply to give adequate representation to the reserved category. Therefore, no candidate would be allowed to compare the first result with second result. This provision came to be challenged in the writ petition filed by in-service candidates *Dr. Gautam Morarka v. State of Rajasthan, S.B.* <sup>1</sup> with six other writ petitions by the Jaipur Bench of this Court, which quashed the same on the ground that it is violative of Article 14 of the Constitution of India and, therefore, by the impugned order Annex. P/5, negative marking have been dispensed with in respect of in-service candidates is discriminatory and violative of the Article 14 of the Constitution of India and on the same premises, learned counsel for the petitioner submits that the in-service candidates and non-service candidates form one class for admission to Pre-P.G. Examination, 2008 conducted by the respondent No. 2 university. There are two sources, one "in-service candidates" and another "non-service candidates" having allocation of 50% seats for either and, therefore, cannot be differentiated. It was further contended that dispensing with the negative marking in respect of in-service candidates is against the spirit of the order dated 13-5-2008 passed by a single Bench of this Court (*Jaipur Bench*) in the writ petitions filed by Dr. Gautam, Morarka etc. (*supra*). Learned counsel for the petitioner further submitted that for the Pre-P.G. Entrance Examination, in-service candidates and non-service candidates appeared knowing it well that the candidates of both these categories have to face the situation of negative marking and thereafter, by the impugned order Annex. P/5 dated 21-5-2008, the negative marking have been dispensed with in respect of in-service candidates putting them to an advantageous position and discriminating the petitioner. Lastly, it was contended that the admissions to the P.G. Courses are governed by the provisions of Ordinance 278(R) and (G) and the respondent-State has no power to overrule the said Ordinance by providing

negative marking "only" in respect of the non-service candidates. Learned counsel for the petitioner has relied on a Full Bench decision of this Court in *Virendra Kapur v. University of Jodhpur*,<sup>2</sup> wherein the Full Bench of this Court held as under :-

"Having regard to the analysis of the effect of the two regulations we have made, it seems to us rather difficult to hold that the two of them can satisfactorily operate on an identical field simultaneously without producing an almost irreconcilable conflict.

This, however, does not conclude the matter. For, the question still remains and will have to be answered whether the new regulation can be lawfully and reasonably held to be applicable to the case of a student like the one before us who was entitled to the benefit of the old regulation which had been brought into force as early as September 1962 and who had taken the annual examination while that regulation was in force in April 1963 or with the benefit of that regulation in prospect though it is correct that the new regulation had also come to be enacted by the Vice Chancellor a day before his result was announced on the 13th June, 1963.

We have given this matter our most careful and anxious consideration and have, on the whole, felt disposed to come to the conclusion that should not be so.

To dissuade us from coming to this conclusion, we may point out at the very outset that it was strongly pressed upon us that the petitioner can have no right at all in a matter like this and that he should be bound by the rules and regulations of the University as may be framed from time to time and as they may be in operation at a given time when the controversy arises. We regret that we have not found it possible for us to accept this submission in the sweeping form in which it has been formulated before us. We shall illustrate what we mean by giving one or two examples."

7. On the strength of the Full Bench decision relied on, learned counsel for the petitioner submits that the ordinance 278 (E) and (G) cannot be overruled by the State, but it can be done only under the provisions of the Rajasthan University of Health Sciences Act, 2005.

8. Mr. N.M. Lodha, learned Additional Advocate General, appearing for the respondent-State firstly contended that the petitioner is not an "aggrieved person" and, therefore, the writ petition filed by the petitioner is not maintainable. It is contended that even if the contention of the petitioner is accepted, though denied, then too, out of 109 seats for in-service candidates, 37 persons have been declared selected even on

the basis of negative marking and if out of 109 seats, 37 persons have been selected even after negative marking, the remaining seats comes to 72 and 109 seats for non-service candidates, which subsequently added with three seats, comes to 112 seats and out of 112 seats, if remaining 70 seats are transferred to the non-service category from in-service category then the figure would come to 184 seats and out of 184 seats, for general category there would be 94 seats and out of 94 seats, 25% seats are reserved for girls (general) and, therefore, for boys (general) there would be only 70 seats and even according to the admission of the petitioner himself, he stands at merit No. 101 whereas according to the result available with the respondent-State, he stood at merit No. 102. Learned Additional Advocate General has shown me the result sheet, according to which the petitioner is placed at serial No. 102 in the general category (boys) and, therefore, the petitioner is not at all nearby to the seats available for general category (boys) of non-service category. Learned Additional Advocate General has relied on a decision of the Hon'ble Supreme Court in *Gopabandhu Biswal v. Krishna Chandra Mohanty*<sup>3</sup> wherein the Hon'ble Apex Court, while examining the phrase "party aggrieved" or "person aggrieved", held that the test for determination is that the person claiming to be "party aggrieved" or "aggrieved person" has to show strongly and immediately affected and not a person remotely affected. However, leniently one may construe to the term "party aggrieved", a person not directly affected cannot be so considered. Otherwise, for years to come, every person who becomes eligible for promotion will be considered a "party aggrieved" when the Tribunal interprets any service rule such as in the present case. Only persons who are directly and immediately affected by the impugned order can be considered as "parties aggrieved". According to learned Additional Advocate General, the petitioner is neither directly nor immediately affected person on account of dispensing with the negative marking in respect of in-service candidates by the impugned order Annex. P/5, as the petitioner himself averred in the writ petition that there is strong apprehension of the petitioner that he will get the seat of his choice subject on account of more availability of the seats if the negative marks are not dispensed with in respect of in-service candidates. Even the seats, as per the calculations given above with negative marks are made available for in-service category to non-service category then too the petitioner would not be eligible for admission to P.G. Course. Mr. N. M. Lodha, learned Additional Advocate General further contended that the aims and object sought to be achieved for dispensing with the negative marking in respect of in-service candidates are that if the negative marking is dispensed with then 60 additional specialists will be available to the Government Hospitals after three years,

i.e. on completion of P.G. Course, on which the State Government incurs huge expenses in running the P.G. Courses. The State is obliged to admit 50% candidates on the basis of All India Examinations, all these candidates are non-service candidates, however, 50% quota seats i.e. half of the seats, would go to the non-service category, remaining = of the State quota which are available to in-service category. If the system of negative marking is adopted then the very less number of specialized doctors would be available to the Government Hospitals. If the negative marking is dispensed with, more number of doctors would be available having expertise in the subject of Post Graduate Course in different branches to deploy them to work in rural areas under the bonds which the in-service candidates are required to submit and, therefore, they are bound to work in rural areas at least for five years after having expertized on completion of P.G. Course and the respondent-State, after examining the matter from every stand-point of view and taking into consideration every aspect of the matter, decided to dispense with the negative marking in respect of in-service candidates, irrespective of their category, whether General, P.B.C., S.C., or S.T. According to Mr. Lodha, the in-service category and non-service category are two separate and distinct classes for admission to P.G. Courses. Mr. Lodha has relied on a Three Judge Bench decision of the Hon'ble Supreme Court in *K. Duraisamy v. State of T.N.*,<sup>4</sup> wherein the Hon'ble Apex Court held that it is well stated that the Government possess the right and authority to decide from what sources the admissions in educational institutions or to particular disciplines and courses therein have to be made and that too in what proportion. It is also settled that at the super-speciality level, in particular, and even at the postgraduate level reservations of the kind known as "protective discrimination" in favor of those considered to be backward should be avoided as being not permissible. Reservation, even if it be claimed to be so in this case, for and in favor of the in-service candidates, cannot be equated or treated on a par with communal reservations envisaged under Article 15(4) or 16(4) of the Constitution of India. On these premises, the Hon'ble Supreme Court further held that in-service candidates could not, on the basis of merit, be considered for the seats earmarked for the non-service candidates.

9. In *State of M.P. v. Gopal D. Tirthani*,<sup>5</sup> while considering admission to the Medical Colleges for P.G. Courses, allocation of 20% seats by in-service candidates, it was held by the Hon'ble Apex Court that the allocation of 20% seats for in-service candidates is not violative of Article 14 of the Constitution of India. The Hon'ble Supreme Court held as under (para 21 of AIR):-

"There is nothing wrong in the State Government setting apart a definite

percentage of educational seats at post graduation level consisting of degree and diploma courses exclusively for the in-service candidates. In the State of Madhya Pradesh allocation of 20% seats in post graduation in the universities of Madhya Pradesh for in-service candidates is not a reservation; it is a separate and exclusive channel of entry or source of admission, the validity whereof cannot be determined on the constitutional principles applicable to communal reservations. Such two channels of entry or two sources of admission is a valid provision. In-service candidates, and the candidates not in the service of the State Government, are two classes based on an intelligible differentia. There is a laudable purpose sought to be achieved. In-service candidates, on attaining higher academic achievements, would be available to be posted in rural areas by the State Government. It is not that an in-service candidate would leave the service merely on account of having secured a postgraduate degree or diploma though secured by virtue of being in the service of the State Government. If there is any misapprehension, the same is allayed by the State Government obtaining a bond from such candidates as a condition precedent to their taking admission that after completing PG degree/diploma courses they would serve the State Government for another five years. Additionally, a bank guarantee of rupees three lakhs is required to be submitted along with the bond. There is, thus, clearly a perceptible reasonable nexus between the classification and the object sought to be achieved."

10. The Hon'ble Supreme Court further observed as under (para 21 of AIR) :

"To withstand the test of reasonable classification within the meaning of Article 14 of the Constitution, it is well settled that the classification must satisfy the twin tests : (i) It must be founded on an intelligible differentia which distinguishes persons or things placed in a group from those left out or; placed not in the group, and (ii) the differentia must have a rational relation with the object sought to be achieved. It is permissible to use territories or the nature of the objects or occupations or the like as the basis for classification. So long as there is a nexus between the basis of classification and the object sought to be achieved, the classification is valid."

11. Mr. Lodha further submits that this controversy came to be raised before the Jaipur Bench of this Court in *Dr. Vikas Pareek v. State of Rajasthan* <sup>6</sup> along with bunch of writ petitions, i.e. in *Dr. Gautam Morarka v. State of Rajasthan* (supra) wherein the Additional Advocate General stated that the Government is not going to implement its decision dated 7-2-2008 of dispensing with the negative marking for in-service

general candidates but it was felt that the issue of not dispensing with negative marking is required to be dealt with in an independent manner and answered in other connected cases. It was further contended that so far as the decision rendered in Dr. Gautam Morarka (AIR 2008 (NOC) 2026) (supra) and bunch of other writ petitions are concerned, it was the controversy decided between the same class i.e. in-service candidate and for in-service candidates, negative marks were dispensed with in respect of candidates belonging to Scheduled Castes and Scheduled Tribes categories, wherein in respect of general and O.B.C. Categories, no such dispensing with of negative marking was there and, therefore, between the same class, there being disparity, this Court quashed that disparity, but in the instant case, it is not between the same class as the in-service and non-service candidates form two different and distinct classes. Lastly, learned Additional Advocate General submits that in view of the directions of the Hon'ble Supreme Court in IA 17/2008 in writ petition (Civil) No. 157 of 2005, the Hon'ble Supreme Court directed that the State of Rajasthan is to complete the first counseling for admission to State quota to the D.G.H.S., Government of India, before 10th May, 2008 and the admissions to All India quota D.G.H.S. in respect of the remainder of the second round of counseling is permitted to be held between 24th May to 30th May, 2008 and correspondingly, the second round of State Counseling would stand extended for a period of ten days and they may complete the second round of counseling and admissions by 10th June, 2008. Therefore, the State Government, in compliance of the order of the Hon'ble Supreme Court, has to complete the admissions as per the directions of the Hon'ble Supreme Court.

12. So far as contention raised by learned counsel for the petitioner regarding competency of respondent-State dispensing with negative marking in respect of in-service candidates is concerned, there is no such foundation in the writ petition. From the perusal of averment made in the writ petition, it is clear that there is no such pleading and, therefore, in absence of such pleading, this question cannot be gone into.

13. From the facts noticed above, I am of the view that the petitioner cannot be said to be an "aggrieved person; and firstly, as per the pleadings of the parties and even according to the admission of the petitioner himself as averred in the writ petition, the petitioner is having an apprehension that he will get the seat of the subject of his choice if there is more availability of the seats. Even according to the case set up by the petitioner, at any rate, he would not come in the merit list even if the negative marking is adopted. Secondly, the in-service candidates and non-service candidates

form two different and distinct classes and the object sought to be achieved by dispensing with the negative marking in respect of in-service candidates, which form a separate class from that of non-service class is for the largest interest of the State and is not opposed to public policy so that the State will have a good number of doctors specialized in a particular specialization and after having completion of their P. G. Course and on filling up the bonds, they are required to serve with the State Government in the rural areas at least for five years vis-a-vis the non-service class would be under no obligation either to serve with the State or in the rural areas. Therefore, dispensing with the negative marking in respect of the in-service category is based on intelligible differentia, as has been held by the Hon'ble Supreme Court in *State of M. P. v. Gopal D. Tirthani (AIR 2003 SC 2952)* (supra).

14. Consequently, in view of the aforesaid discussion, I do not find any merit in the writ petition and it is dismissed accordingly. There shall be no order as to costs.

Petition dismissed.

Cases Referred.

1. Civil Writ Petition No. 795/ 2008 decided on 13-5-2009 (reported in AIR 2008 (NOC) 2026)
2. AIR 1964 Raj 161
3. (1998) 4 SCC 447: (AIR 1998 SC 1872),
4. (2001) 2 SCC 538: (AIR 2001 SC 717)
5. (2003) 7 SCC 83: (AIR 2003 SC 2952)
6. SBCWP No. 2059/2008, decided on 13-5-2008