

(1996) 07 KL CK 0078

High Court Of Kerala

Case No: W.A. No. 453/96

Sneha Sreenivasan

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision: July 22, 1996

Acts Referred:

- Constitution of India, 1950 - Article 16(4), 309, 73

Hon'ble Judges: K. Sreedharan, Acting C.J.; C.S. Rajan, J

Bench: Division Bench

Advocate: G.S. Raghunath, for the Appellant; Jose K. Kochupappu, Government Pleader, for the Respondent

Final Decision: Dismissed

Judgement

C.S. Rajan, J.

The Appellant appeared for the entrance examination conducted by the Respondents in 1995 for admission to the professional colleges in the State. She obtained rank No. 1157 in the general merit list for medical and allied courses. The Appellant belongs to Hindu fishermen community (Arayas) classified as Dheeveras. According to the Appellant, the second Respondent published a brochure prelude to the common entrance examination 1995 which contains three appendices. Appendix I consists of the Scheduled Castes and Scheduled Tribes (SC/ST). Appendix II consists of the list of Other Eligible Communities (OEC). Appendix III consists of the list of Socially and Educationally Backward Communities (SEBC). The list of OEC includes Dheevera/Dheeveran and other allied names by which the above community is known in different parts of the State. By Ext. P-6 dated 13th March 1984 the Government ordered to include the following sub castes of Hindu Fishing Community in Kerala and Kudumbi community in the list of OEC.

Arayan, Valan, Phallayan, Mukkuva, Aryavathi, Valinjar, Paniakkal, Kokaya, Bovia, Mogeyar and Megavirar.

2. It is also ordered that they would be eligible for all educational concessions (emphasis supplied) normally granted to Scheduled Castes. Reading Ext. P-6, the Government issued Ext. P-4 order dated 29th June 1995 by which it was ordered that those who belong to Dheevera/Dheeveran would be eligible for all educational concessions normally granted to the Scheduled Castes.

Ext. P-9 produced by the Petitioner along with CMP. No. 32224/95 is the prospectus for admission to M.B.B.S. and other allied courses for 1995-96. According to clause VIII of the prospectus the seats under each course as per mandatory reservation is given in Annexure II. The distribution of seats under Annexure II is as follows:

3. Socially and Educationally Backward Community 25 per cent

(a) Ezhava 9 per cent

(b) Muslim 8 per cent

(c) Other Backward Hindus 5 per cent

(d) Latin Catholic other than Anglo Indians 2 per cent

(e) Other Backward X'an 1 per cent

4. Scheduled Caste and Scheduled Tribe 10 per cent

(a) Scheduled Caste 8 per cent

(b) Scheduled Tribes 2 per cent in the ratio 8:5 between TC and Malabar (for MBBS only).

TC

Malabar

3. According to Clause 2 of Annexure II SEBC as per G.O.(P) 208/66/Edn., dated 2nd May 1966 whose annual family income is below Rs. 42,000 only are eligible for reservation as per item 3 mentioned above. They should produce community certificate and income certificate in the pro forma given in the application. According to Clause 3 candidates belonging to SC/ST will produce a certificate from a revenue officer not below the rank of Tahsildar regarding their caste/community and those belonging to OEC/OBC and SEBC will produce a certificate from the Village Officer regarding their caste/community and family income in the form provided for the purpose in the application form itself. Clause 6 states that the seats unavailed by the S.C. candidates will go to the S.T. and vice versa. If there are still vacant seats, they will be filled by candidates from Other Eligible Community.

4. The case of the Appellant as can be seen from paragraph 7 of the Original Petition is that the Appellant was not considered for admission to MBBS/BDS courses in the Medical Colleges on the sole ground that her family income exceeds Rs. 42,000 per annum and that ignoring her claims admissions are being given to candidates

belonging to SEBC who secured lower ranks than the Petitioner in the entrance examination for the reason that their family income is less than Rs. 42,000 per annum. The case of the Appellant is that denial of reservation to the Appellant on the basis of the annual income of the family is illegal and in violation of Ext. P-6 Government Order. The learned Single Judge dismissed the Original Petition on two grounds. The first ground is that Ext. P-6 by itself cannot enable the Appellant to claim reservation in the matter of admission to the professional colleges irrespective of the income limit prescribed. The second ground is that the Appellant would not be entitled to be considered for admission to the reserved seat now claimed by her in view of the fact that she has failed to furnish the necessary certificates along with the application.

5. Learned Counsel Sri G.S. Reghunath appearing for the Appellant contended that Ext. P-6 order is an order issued under Article 16(4) of the Constitution and therefore has to be applied in the case of the Appellant in order to give her the benefit of admission. For the above purpose, the learned Counsel relied on the ruling of the Supreme Court reported in [Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.](#), popularly known as the "Mandal Case". The following passage of the above ruling was cited for our consideration:

A question is raised whether an executive order made in terms of Article 16(4) is effective and enforceable by itself or whether it is necessary that the said "provision" is enacted into a law made by the appropriate legislature under Article 309 or is incorporated into and issued as a Rule by the President/Governor under the proviso to Article 309 for it to become enforceable? Mr. Ram Jethmalani submits that Article 16(4) is merely declaratory in nature, that it is an enabling provision and that it is not a source of power by itself. He submits that unless made into a law by the appropriate legislature or issued as a rule in terms of the proviso to Article 309, the "provision" so made by the Executive does not become enforceable. At the same time, he submits that the impugned memorandums must be deemed to be and must be treated as Rules made and issued under the proviso to Article 309 of the Constitution....

* * *

It would, therefore, follow that until a law is made or rules are issued under Article 309 with respect to reservation in favour of backward classes, it would always be open to the Executive (Government) to provide for reservation of appointments/posts in favour of Backward Classes by an executive order. We cannot also agree with Sri Jethmalani that the impugned Memorandums should be treated as Rules made under the proviso to Article 309. There is nothing in them suggesting even distantly that they were issued under the proviso to Article 309. They were never intended to be so, nor is that the stand of the Union Government before us. They are executive orders issued under Article 73 of the Constitution read with

Clause (4) of Article 16. The mere omission of a recital "in the name and by order of the President of India" does not affect the validity or enforceability of the orders, as held by this Court repeatedly.

6. We do not think that anybody disputes the above well accepted principle that until a law is made under Article 309 with respect to reservation in favour of backward classes, it would always be open to the executive to provide for reservation by an executive order. But the question in this case is whether Ext. P-6 is an order which provides reservation in favour of the community to which the Appellant belongs. As we had noticed earlier, both Exts. P-6 and P-4 only state about the extension of all educational concessions to the community to which the Appellant belongs as in the case of the member's of Scheduled Caste. Those orders do not go further to provide any kind of reservation in favour of Dheevera community.

6A. In this connection it is pertinent to look into Ext. P-9 prospectus to find out whether the educational concessions include the reservation also. Clause XVI of Ext. P-9 reads like this:

XVI. Scheduled Caste/Scheduled Tribe and Backward Class students eligible for education concessions are exempted from the payment of fee as per orders of the Government issued from time to time.

Therefore it is obvious that what is meant by educational concession are matters like payment of fees etc., and not the mandatory reservation. The provision for mandatory reservation is provided in Annexure II. In Annexure II there is no reference to O.B.C. But there is only Other Backward Hindus. To a pointed question asked by us, the learned Counsel appearing for the Appellant answered that the Appellant can come only under the heading "Other Backward Hindus". But Other Backward Hindus are only part of S.E.B.C. If that is the case, then the Appellant is bound to produce the community certificate and income certificate as required in Clause 2 to Annexure II. The argument of the Appellant that Clause 5 stands independently of other clauses in Annexure II cannot be accepted since there is no separate reservation for O.B.C. in the prospectus.

7. Admittedly the annual income of the family of the Appellant is Rs. 70,000. Therefore the Appellant has been taken out of family income limit prescribed in Clause 3 of Annexure II which is based on G.O.(P) 208/66/Edn., dated 2nd May 1966. We may also state that the backwardness of the community cannot be ascertained on the basis that it is similarly situated like the Scheduled Caste and Scheduled Tribes. The concept of Other Backward Classes does not depend upon the comparison to that of S.C. or S.T., or to that of the standard backwardness of Other Backward Classes as held by the Supreme Court in the Mandal Case. The expression "Backward Classes of citizens" in Article 16(4) does not comprise all the weaker sections of the people, but only those which are socially and therefore educationally and economically backward and which are inadequately represented in the services.

When the State has prescribed an income limit of Rs. 42,000 to make members of the S.E.B.C. to be eligible for reservation, the Appellant cannot wriggle out of the situation by claiming the benefit of reservation on the ground that she belongs to O.B.C. Such an argument cannot be spelt out either from Ext. P-4 or Ext. P-6 or from Ext. P-9 prospectus. Therefore the learned Single Judge rightly rejected the above contention of the Appellant.

8. The Appellant is bound to produce the community certificate and the family income certificate along with the application. The above prospectus binds all the candidates who seek admission. Failure to furnish the certificate along with the application renders the application defective. The above position has been held to be the correct one in the judgment of the Division Bench of this Court in *Sainulabdin v. State of Kerala* 1995 (2) KLT 429. We are in respectful agreement with the above view.

9. We are also referring to the judgment in O.P. No. 13718/95 rendered by our learned Brother T.V. Ramakrishnan (J), in which the claim of a person belonging to Dheevera community to get the benefit of reservation without taking into consideration the family income limit of Rs. 42,000 was negatived. In the above judgment this Court took the view that a person like the Petitioner therein or the present Appellant cannot be considered to be entitled to the benefits of mandatory reservation for professional courses treating him on a par with SC/ST community candidate. We are in respectful agreement with the views expressed in the above judgment.

Under these circumstances there is absolutely no merit in the writ appeal and the same is dismissed.