IN THE HIGH COURT OF BOMBAY AT GOA

LD-VC-CW-43-2020

1 United Tribals Associations Alliance
Society registered under the provisions
of Societies Registration Act, 1960,
Having its office at C/o Prakash Velip,
Sarawati Niwas, Bharatkar Marg,
Quepem, Goa 403 705

Through its President
Mr. Namdev Fatarpekar
resident of F-5, Shiriji Apartment,
Opp. Kamat Estate Building,
Tonca, Caranzalem, Goa 403 002

2. Mr. Namdev Fatarpekar
son of Shri Ramnath S. Fatarpekar
64 years of age, Indian National,
Married, Businessman,
Resident of F-5, Shiriji Apartment,
Opp. Kamat Estate Building,
Tonca, Caranzalem, Goa 403 002
PAN No.AAOPF2270R,
Telephone 989098211 ... Petitioners

Versus

1. State of Goa
Through its Chief Secretary,
having its Office at
Secretariat, Porvorim,
Bardez-Goa

2. The Dean
Goa Medical College & Hospital
Bambolim Goa

3 The Director

Directorate of Technical Education
Government of Goa,
DTE Building, Alto Porvorim,
Bardez-Goa 403 521

4 Directorate of Health Services
Ministry of Health & Family Welfare
Government of India
Nirman Bhavan,
New Delhi-110 011 ... Respondents

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Mr. Abhijit Gosavi for the Petitioners.

Mr. D. Pangam, Advocate General of Goa a/w Ms. Ankita Kamat, Addl. Govt. Advocate for Respondent Nos.1 to 3.

Mr. Pravin Faldessai, Assistant Solicitor General of India.

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CORAM : S.C. GUPTE

DATE : 14 SEPTEMBER 2020

ORAL JUDGMENT :

. Heard learned Counsel for the parties.

2 This writ petition has been referred to me as a third Judge, since the Division Bench of this Court at Goa hearing the petition had a difference of opinion on one of the two issues relevant for deciding the case.

3 The writ petition is a public interest litigation at the instance of a registered society, whose objects include protection of rights of Scheduled Tribes in the State of Goa. The controversy concerns admission to under-graduate medical seats in the State of Goa. Across the country, for admission to under-graduate medical courses, 15 per cent of total available seats are to be allotted by the Central Government under what is known as an 'All India Quota'. These seats go by the uniform qualification/s applied in the country without reference to the laws of individual States concerning reservation. The remaining seats go under what is known as a 'State Quota'. For these latter seats, reservation policies of respective State Governments apply. It has been common knowledge that many times, seats under All India Quota are not filled in and remain vacant, and become available to individual States for allotment. It is an admitted position that under-graduate medical seats in Goa, with which we are concerned here, were originally part of All India Quota and have been reverted to the State since they were not filled and are to be allotted by the State. The State has made different provisions for allotment of original State Quota seats, particularly, the reservation of 12 per cent for Scheduled Tribes in the State under Notification dated 7 September 2007, and for allotment of reverted seats (reverted from All India Quota), namely, the rule specified in Clause 4.37 of the Common Prospectus for Admission to First Year of Professional Degree Courses, Session 2020-2021 *inter alia* for MBBS course. Clause 4.37

provides that seats reverted from All India Quota have to be offered to general category students without any reservation. Non-extension of the benefit of reservation (the rule contained in the Notification of 7 September 2007) available for the seats from original State Quota to the reverted seats, is the subject matter of challenge in the present petition. The learned Judges of the Division Bench hearing the writ petition have come to divergent views on this issue. My brother, Dama Seshadri Naidu J, has held that the original rule of reservation, which applies to State Quota seats, would also apply to seats reverted to the State from All India Quota; these reverted seats are deemed to be seats from State Quota and must go by the State's own stipulation of reservation, in particular, 12 per cent reservation for Scheduled Tribes contained in the Notification of 7 September 2007. On the other hand, my brother, M.S. Sonak J, has come to the conclusion that the reverted seats should go by the stipulation made in Clause 4.37 of the Prospectus; the clause is very much a law made by the State in exercise of its executive power under Article 162 of the Constitution of India, just as the original Notification dated 7 September 2007 was. In view of this difference, under directions of the learned Judges, the matter was placed before the Hon'ble the Chief Justice, who has referred it to me as a third Judge.

4 The facts of the case are extensively set out in the judgment of my brother Dama Seshadri Naidu J, and need not to be repeated here. Noting of the controversy, in its essential particulars, as above,

should suffice. Just to recapitulate, it is common ground for all concerned here that seats from All India Quota, which remain unfilled, are available to the State for allotment according to its own laws; whether these should be termed as deemed State Quota seats and, what is more, reservation policy of the State in respect of State seats, contained in the Notification of 7 September 2007, should be applied to these on that basis or whether these should go by the stipulation made in the prospectus issued by the State, particuarly, Clause 4.37 thereof, is the real controversy. Both sides rely on Article 15 of the Constitution of India in support of their respective cases.

5 It is important to note at the very outset that Article 15 does two things. Firstly, it provides for a broad rule against any discrimination by the State on grounds only of religion, race, caste, sex, place of birth or any of them. Secondly, and in the same breath, it provides for permissible discrimination on a few stated grounds by way of an exception. The main part of Article 15, namely, Clause (1) thereof, is a rule against discrimination, whereas the clauses which follow, namely, Clauses (3), (4) and (5), enact exceptions to this rule against discrimination. Clause (3) protects special provisions made by the State for women and children; whereas Clause (4) countenances special provisions for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes; Clause (5), for its part, not only forms an exception to what is contained in Article 15, but also in sub-clause (g) of clause

(1) of Article 19, in protecting special provisions by the State, by law, for advancement of any socially and educationally backward class of citizens or a Scheduled Caste or a Scheduled Tribe in so far as such special provisions relate to admission to educational institutions including private educational institutions, aided or non-aided by the State, other than minority educational institutions referred to in Clause (1) of Article 30. Any reservation made for Scheduled Tribes in the matter of admission to medical colleges, such as the one we are concerned with in the present petition, would thus be protected notwithstanding the rule against discrimination contained in Article 15(1). That is, however, not to say that Article 15 mandates the State to make the particular reservation or, for that matter, any of the special provisions referred to in Clauses (3), (4) or (5) thereof. If the State were to choose not to make any reservation under these Clauses, its action cannot be faulted under Article 15. Simply put, this means that Article 15 countenances certain designated reservations or discriminations; it enables such reservations or discriminations on the part of the State; it does not mandate any such reservation or discrimination as a matter of compulsion. The Supreme Court, in the case of **Gulshan Prakash (Dr.) Vs. State of Haryana**[1], has affirmed this position in unequivocal terms.

6 A corollary to what is discussed above is that the rule of permissible reservation under Clauses (3), (4) or (5) of Article 15 and

1 AIR 2010 SC 288

its percentage are matters strictly within the discretion of the State. Such discretion encompasses not only making of a particular permissible reservation and providing for its percentage (subject of course to the provisions the Constitution), but even not making of any such reservation. No mandamus would lie against the State for making of a provision for such reservation or its percentage, at least under Article 15 of the Constitution of India. (Article 15 is the only provision of the Constitution, which is invoked in the present case by both parties; it is nobody's case that the State's action can be faulted on any other ground available under the Constitution of India.)

7 Having, thus, noticed that the State has a discretion to make a rule of reservation and provide for its percentage, let's see whether the State of Goa, in our case, has made any such reservation or provided for its percentage. Two provisions made by the State are referred to in this behalf. The first is the Notification made on 7 September 2007 and the second is the prospectus issued *inter alia* for governing admissions to under-graduate medical courses in the State, in particular, Clause 4.37 thereof. By the Notification of 7 September 2007, the Government of Goa has reserved 12 per cent of total seats in all medical institutions in the State for Scheduled Tribes. The prospectus issued by the State, particularly, Clause 4.37 thereof, on the other hand, provides for the manner of filling seats becoming available to the State upon reversion from All India Quota quota (i.e. from 15 per cent of total seats in the State of Goa). In case any of

these seats remain vacant, Clause 4.37 provides that such vacant seats (which then become available to be allotted by the State) shall be offered to applicants from the merit list of general category in a special round of admission to be notified separately, subject to the provisions of MCI Regulations and Supreme Court guidelines.

8 Before we consider the combined effect of these two stipulations, it is necessary to deal with one more aspect. Both provisions, it is important to note, are made by the State in exercise of its executive power under Article 162 of the Constitution of India and are as much a law as any other provision made by the State in exercise of its legislative power. Subject to the provisions of the Constitution, the executive power of a State extends to all matters, over which it has power to make laws. The expression "law" used in Article 13 for voidness due to inconsistency with, or derogation of, fundamental rights, covers not only laws made by the competent legislature of a State, but also includes any ordinance, order, bye-law, rule, regulation or notification, by whatever name called. Rules of admission by the State, both by Notification of 7 September 2007 and Clause 4.37 of the prospectus, are laws made accordingly by the State in exercise of its executive power under Article 162. They are mandatory and uniformly enforceable. Even otherwise, that is to say, even if they or any of them were to be treated as simple executive orders, they are nevertheless legally binding and cannot be derogated from.

9 I am fortified in this view by a judgment of a Full Bench of our court in the case of **Ashwin Prafulla Pimpalwar Vs. State of Maharashtra**[2]. The Full Bench was dealing with the legal character of certain G.Rs issued by the State dealing with admissions to post graduate courses in Government Medical Colleges in the State. These G.Rs. could not be traced to any statute, but were said to have been issued in exercise of the State's power under Article 166. Neither the form nor the formalities attached thereto gave the slightest indication about their being statutory rules. In that context, whilst considering administrative instructions on the one hand and statutory rules on the other, this Court, after referring to various Supreme Court rulings on the issue, held that rules governing admissions to Government Medical Colleges run at public expense can, by no stretch of imagination, be held to be mere guidelines or executive instructions having no statutory force. The court observed that it had been well established that administrative instructions also confer rights or impose duties; the Government was bound to faithfully follow the norms prescribed in these instructions, even if they were administrative instructions or executive orders.

10 In fact, as the Supreme Court explained in the case of **Dean, Goa Medical College, Bambolim, Goa Vs. Dr. Sudhir Kumar Solanki**[3], eligibility criteria statutorily stipulated can, by no means, be held to

2 AIR 1992 Bom 233
3 (2001) 7 Supreme Court Cases 645

be merely directory, thereby resulting in a nebulous state of affairs in the matter of selection of candidates for admission. There could be only two alternative courses, namely, either the rule was unconstitutional or illegal for any reason and, therefore, deserving to be struck down, or on the other hand, valid, and invariably and uniformly enforceable without any restriction whatsoever, as binding and mandatory in character.

11 Clause 4.37 of the prospectus, thus, is clearly a State rule for admission, as much as the original rule of reservation contained in the notification of 7 September 2007, and unless the same is declared invalid or illegal, is bound to be scrupulously followed.

12 Mr. Gosavi, learned Counsel appearing for the Petitioners, submits that the rule is contrary to the State's own policy of reservation as well as MCI Regulations framed in that behalf. So far as the State policy is concerned, learned Counsel relies merely on the Notification of 7 September 2007, which, as we have noted above, provides for reservation of 12 per cent seats of medical colleges for Scheduled Tribes. This State policy, reflected in the Notification of 7 September 2007, is very much in pursuance of Entry 25 of List III of Schedule VII to the Constitution of India, though made in exercise of its executive power, which, as we have noted above, extends over the entire legislative domain available to the State. The other provision made by the State, namely, Clause 4.37 of the prospectus, has also

been made in exercise of the same executive power. There is nothing to suggest that both provisions cannot stand together. So long as both can hold the field, consistent with each other, there is no reason why the latter provision (clause 4.37 of the prospectus) should make way for the earlier (Notification of 7 September 2007).

13 There is nothing to be gained by terming these reverted seats, which have become available to the State for allotment, as "deemed State Quota seats". First of all, there is nothing in law to indicate that these seats (i.e. reverted seats) are to be treated as deemed State Quota seats in the sense that they have to go by the rule of reservation made for State Quota seats originally available for allotment. Mr. Gosavi refers to Appendix 'E' to MCI Regulations, introduced by way of amendment, in this behalf. The amended Appendix provides (in a note written below it) that All-India quota seats remaining vacant after the last date for admission shall be deemed to be converted into State quota. There is nothing in this note, or the expression "deemed to be converted into State Quota", used in the Appendix 'E', to suggest that these reverted seats are bound to be treated as seats from the original State Quota available for being filled. The relevant regulations of Medical Council of India, namely, Regulations of Graduate Medical Education, 1997, provide for selection of students to medical colleges based on merits and criteria to be adopted for determination of such merits (Clause 5 of the Regulations). Sub-clause (5) of Clause 5 provides for the procedure

for such selection. Sub-clause (6) of Clause 7 of these regulations provides for Universities and other authorities concerned to organize admission process in such a way that teaching in the first semester starts by 1st of August each year and for this purpose, to follow the time schedule indicated in Appendix 'E'. The time schedule for completion of admission process in Appendix 'E' provides separately for seats to be filled up by the Central Government from All India Entrance Examination (All India Quota) and Seats to be filled up by the State Govt./Institution (State Quota). After the last date for joining seats allotted from All India Quota, if any of these seats are left out, they are to be taken up by the concerned State for allotment. What this indicates is merely that by a particular date, by which All India seats have to be filled up, if they are not so filled up, they are to be filled up by the State in accordance with the time schedule given in Appendix 'E'. This is also clear from the two types of seats described in the time schedule, namely, (i) Seats to be filled up by the Central Government through the All-India Entrance Examination, and (ii) Seats to be filled up by the State Government/Institution. What this implies is that upon their lying vacant, the seats to be filled up by the Central Government are to be filled up by the State Government. There is no indication in the Appendix as to the manner in which these are to be filled up by the State Government. The note, in fact, does not in any way reflect on whether the seats so becoming available to the State are to be treated as part of the original State Quota so as to make the rule of reservation made in their connection

applicable to those seats.

14 Be that as it may, even if one were to treat these as seats of State Quota, there is nothing in law, which requires the State to make any particular reservation as far as these seats are concerned. The State is free to make a particular reservation for seats originally available to it under its quota for allotment; it is equally free to not make any reservation for seats which later become available to it as a result of their falling vacant after allotment of All India Quota. Just as the reservation made for its original Quota forms part of its policy, allotment of reverted seats (from All India Quota) without any reservation and their availability to candidates of general merit are also matters of policy of the State. There is no question of one policy overriding the other; both are consistent with each other and are be equally enforced. As I have noted above, it was fully within the discretion of the State to reserve any seats available to it for allotment, and, whilst doing so, it was perfectly legitimate for the State to make a distinction between (i) seats originally available to it under its Quota for allotment, and (ii) seats which later become available to it on being reverted from All India Quota. The State may choose to make a particular reservation in so far as the first category of seats is concerned and it may equally choose not to make any reservation for the second category. Either way, it is a matter of its own policy and discretion. In case it chooses not to make any reservation in the second category of seats, there is no way to find a

fault with it, at any rate, by resorting to Article 15 of the Constitution of India.

15 Mr Gosavi submits that the original Notification of 7 September 2020 reflects the policy of reservation of the State, whilst the prospectus issued by the State only reflects the manner of its implementation. One fails to understand why this should be so. By means of this prospectus, as I have noted above, what the State meant to do was to make a rule for admission to its medical colleges. If it chooses to allot any particular medical seats available to it upon reversion from All India Quota in a particular way, it is making nothing but a policy of admission and as we have seen above, there is no question of one policy yielding to the other, since both may well stand together.

16 Mr. Gosavi, alternatively, submits that the State Government rule contained in clause 4.37 of the prospectus is contrary to MCI Regulations. The argument has no substance for more than one reasons. In the first place, MCI, in prescribing regulations for admission, has made no provision of any particular reservation. Indeed, it is no remit of MCI to make any such reservation. As the Supreme Court has held in the case of **Tamil Nadu Medical Officers Association Vs. Union of India**[4], the provision of medical council and its regulations are based on Entry 66 of List I of Schedule VII, which

4 Writ Petition No.196 of 2018, decided on 31 August 2020.

is a specific entry dealing with coordination and determination of standards in institutions of higher education or research as well as scientific and technical institutions. The expression "coordination and determination of standards" implies laying down of such standards. That would not include reserving of admission of students to such institutions. Thus, in exercise of its legislative power under Entry 66, the Union cannot provide for any reservation or prescribe any percentage for it or even, for that matter, the mode of admission within the State Quota; these powers are conferred specifically upon the States under Entry 25 of List III. It is the States who have to make provisions for these matters, having regard peculiar conditions obtaining in individual States.

17 In any event, it is quite apparent that MCI has made no such policy or provision in its regulations covering medical admissions, i.e. Medical Council of India Regulations on Graduate Medical Education, 1997. The Regulations simply provide for the standard of education and to maintain such standard, a time line for admissions to medical colleges, having regard to both All India Quota and State Quota. As we have noted above, what MCI has done is to prescribe a timeline for guidance of medical institutions and when it refers to "deemed state seats" in Appendix 'E', again as we have noted above, all that is meant is that these seats, which become available to the States for allotment, upon their remaining unfilled, are to be allotted in accordance with the timeline given by it in Appendix 'E' in a round

of selection following the allotment and acceptance of All India Quota seats.

18 There is one more reason why MCI cannot be said to have made any stipulation of reservation by including the note referred to by Mr. Gosavi. All that the note implies, even at the highest as suggested by Mr. Gosavi, is that unfilled seats from All India Quota become available to the State for allotment in accordance with its own law. MCI has not prescribed any rule in this behalf, particularly, whether reverted seats should go by the same rule which applies to seats originally available to the State for allotment. That would be a matter for the State to decide. MCI itself recognizes all admissions as having to be made in accordance with the laws of the States and, as we have noted above, it is very much the law of the State of Goa that reverted seats should go to general merit candidates and not in accordance with the reservation affecting the allotment of original State Quota seats.

19 Mr. Gosavi is unable to point out how or in what manner Clause 4.37 of the prospectus issued by State can be said to be *ultra vires*. As we have noted above, the State had the requisite power to make that provision. In its legislative power under Entry 25 of List of VII Schedule of the Constitution of India, it was very much within the domain of the State to make a provision for admission to the medical colleges. It made such provision by exercise of its

executive power under Article 162 of the Constitution of India, which is co-extensive with its legislative power. The provision itself does not breach any constitutional mandate; and there is indeed no Central law occupying the field, which Clause 4.37 can be said to have fallen foul of.

20 If anything, Clause 4.37 is consistent with the broad policy of the State of Goa. Seats reserved in a particular category, if not filled, are to be filled on the basis of merit under general category. The prospectus, in Clause 4.29 thereof, provides for filling up of unclaimed/vacant seats from any reserved category through general category on merit at the end of the admission process for the particular reserved category. In keeping with this idea, even unclaimed/vacant seats from All India Quota are offered to applicants on the merit list from general category in a special ground of admission to be notified separately. This stipulation is subject to MCI regulations and Supreme Court guidelines. We have already seen that there is no MCI regulation requiring the State to follow any different course and there is no contrary guideline of the Supreme Court pointed out to this court either. In **Ashish Ranjan Vs. Union of India**[5] as well as **Raghuvir Saini Vs. Union of India**[6], the Supreme Court has merely accorded its stamp of approval to the time schedule provided by MCI in its Regulations (in Appendix 'E'), which *inter alia* requires the vacant All India Quota seats to be filled by the State; they do not

5 (2016) 11 SCC 225

6 Writ Petition Civil No.742/2020 decided on 14.08.2020

lapse. But there is no gainsaying that the allotment itself of these seats by the State can only be according to the State's own policy.

21 Learned Advocate General has cited four cases of this court bearing on the treatment to be accorded to reverted seats from All India Quota to the State. These are **Dhondiba Munde Vs. State of Maharashtra**[7], **Jigna Priyavadan Desai Vs. State of Maharashtra**[8], **Dr. Shilpa Suresh Shinde Vs. State of Maharashtra**[9] and **Dr. Sameer Anant Deshpande Vs. State of Maharashtra**[10]. These do imply that absent any contrary provision by the State, the reverted seats available to it for allotment have to be allotted on merit; they cannot be treated as State seats subject to reservation of the State. No doubt, as pointed by Mr. Gosavi, these judgments pre-date amended Appendix 'E' and the cases of **Ashish Ranjan Vs. Union of India** and **Raghuvir Saini Vs Union of India** (*Supra*). But, as we have seen above, what amended Appendix 'E' and cases of **Ashish Ranjan Vs. Union of India** and **Raghuvir Saini Vs Union of India** imply is that these seats (i.e. reverted seats) have the colour of State seats and would have to go in accordance with laws made by the State. The State has ample discretion to make an appropriate law or rule in their behalf; the State, in our case, has indeed made such law in the form of Clause 4.37 of the prospectus; and this law cannot be shown to be in any way *ultra vires*.

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7 Bombay High Court, Aurangabad Bench Jt. In WP/3909/1989 and 3910/1989 dated 20 August 1990
8 Bombay High Court, Writ Petition No.370 of 1999 dated 23 February 1999
9 2000(4) Bom CR 242
10 2002(1) ALL MR 510

22 There is, accordingly, no merit in the contention of the Petitioners in so far as their challenge to Clause 4.37 of the prospectus is concerned. Rule of reservation prescribed for State Quota seats originally available to the State for allotment, does not apply to the seats reverted from All India Quota, though such seats are available to the State for allotment; it has made a particular law in their behalf, namely, Clause 4.37 of the prospectus; and it is that law, valid as it is, which applies to them. I would answer the issue accordingly and dismiss the petition. Let the record be accordingly returned to the Division Bench with this opinion.

(S.C. GUPTE, J.)