

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Writ Petition (Civil) No. 9763/2009**

% **Date of Decision: 19 .11.2009**

Dr. Manish Patnecha Petitioner
Through Mr.Maninder Singh, Sr. Advocate with
Mr.Gaurav Duggal, Advocate

Versus

The Chairperson, Counselling Committee, AIIMS Respondents
Through Mr.Mukul Gupta, Advocate

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

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|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

ANIL KUMAR, J.

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1. The petitioner seeks a writ of mandamus seeking a direction to respondent to reschedule the second round of counselling for admission to the Post Graduate Courses and to give petitioner admission in the subject of Nuclear Medicine in the reserved category.

2. The petitioner appeared for admission to AIIMS-PG/Post Doctoral Courses. The petitioner was ranked 125th in overall merit list and was ranked 25 in OBC category. The petitioner was called for first round of counselling on 11th June, 2009. On that date the OBC list had been exhausted and the petitioner did not get any Post Graduate Course,

however, he was given option for the general category and petitioner opted for the General category and he was offered course in Anatomy which petitioner accepted provisionally.

3. The petitioner has contended that since OBC list had been exhausted on 11th June, 2009, he was erroneously called upon by the Counselling committee to opt for General Category and because he was orally assured that his case in OBC category will not be affected and he would be entitled to appear for OBC category in the second counselling also, he innocently opted for General Category.

4. The second counselling was held on 18th June, 2009. According to the petitioner, he was not allowed to appear in second counselling under reserved category though he was eligible for a Post Graduate course in Nuclear Medicine in reserved category on 18th June, 2009. In the circumstances, it is contended that another candidate with lower ranking who had not opted for any seat in the reserved category on 11th June, 2009 was given the seat in Nuclear Medicine.

5. The petitioner in the general category in second counselling, however, surrendered his provisional admission to the Post Graduate Course in Anatomy which was given to him in first counselling and opted for Post Graduate Course in Pharmacology.

6. The bulletin of information of All India Institute of Medical Sciences for admission to Post Graduate courses has laid down method of counselling in clause 3E which is as under:-

“E. Method of Counselling

1. In each category the number of candidates called for counselling will be 4 times the number of seats. The order of counselling will be ST/SC/OBC/General/50% AIIMS preferential candidates of total MBBS seats of AIIMS. The candidates in order of merit will exercise their choice of subject according to availability of seats in their respective category. In case of absentee the next candidate in merit will be considered. Counselling will be held as per schedule given under ‘AT A GLANCE’ on the inner side of front cover of the Prospectus.
2. In case during the second counselling, ST seat remains vacant, after calling all eligible candidates of ST category then seats will be transferred to the SC category. Similarly, in case the SC seat remains vacant after calling all eligible SC candidates then these seats, whether it pertains to ST category or SC category, shall be made available to the general category/AIIMS preferential graduates. **Similarly, in case the OBC seat remains vacant after calling all eligible OBC candidates then these seats shall be made available to the general category/AIIMS preferential graduates.**
3. Any candidate (Indian citizen) who have taken admission elsewhere in India & Abroad and have deposited all their original certificates with that concerned college/Institution, will be allowed to attend the first counselling at AIIMS subject to the condition that he/she provide the documentary evidence from the said college. A seat purely on **Provisional basis will be offered depending upon the availability of a seat at his/her rank and the choice exercised by the candidate.** They have to submit their original document on or before the date of second counselling for consideration of their admission during the second counselling along with other candidates called for second counselling on the following terms and conditions.

- i. The candidate must bring the original certificates i.e. “Date of Birth”, Proof of belonging to SC/ST/OBC. (If applicable), MBBS/BDS mark sheets (Including separate marksheet for each of the professional examinations), Degree, Internship Completion Certificate, Permanent Medical Registration Certificate etc.”
 - ii. The candidate who have joined elsewhere have to bring a No Objection Certificate from that concerned College/Institution for joining PG course at AIIMS along with all original certificates as mentioned in clause – I above.
4. No candidate/authorized person will be allowed to attend the counselling without original certificates, i.e., Date of Birth, Proof of belonging to SC/ST/OBC, MBBS, BDS Marksheets/Degree (including separate mark sheet for each of the professional examinations), Internship completion Certificate, Permanent Medical Registration Certificate etc.
5. The candidates will have the right to choose any one of the available seats in the discipline of his/her choice at his/her turn as per merit at the time of counselling and the same will be allotted to him/her and the selection letters will be issued by the next date. The selected candidates shall undergo a medical examination by the board appointed by the Institute and if found medically fit will join the course after paying the fees by the date stipulated in the selection letter. He/She is required to join immediately and no extension under any circumstances will be granted. The selected candidate should come well prepared to join the course immediately i.e. on 1st January Session and 1st July for July Session.
6. The very fact that a candidate or his/her authorized representative has appeared for counselling on the notified date(s), does not mean that the allotment of a seat will be made to him/her, as the same shall depend upon the availability of a seat at his/her rank and the choice exercised by the candidate or his/her authorized representative.
7. The candidates, who will not appear for counselling in person or through the authorized representative on notified dates(s) or who decline the available seats for allotment or

those who will not join the allotted seat by the last date of joining mentioned in the selection letter, shall forfeit the claim for a seat.

8. The P.G. seats shall lapse if the selected candidates does not join by 31st January for January Session and 31st July for July Session. No candidate shall be allowed to join after 31st January for January session and 31st July for July session.
9. Candidates, who have been admitted must join the concerned department on the date mentioned in the selection letter, if they do not join, they shall forfeit all their claims for a seat and fees deposited will not be refunded.
10. Those candidates who fail to report for 1st Counselling will not be considered for Second Counselling.
11. While reporting for admission, candidates must bring all the relevant certificates/documents, in original. These original documents will be kept with the institute till his/her completion of the course.
12. Candidates or their authorized representatives participating in the counselling process are required to maintain proper decorum/discipline at the time of counselling.
13. In case of any dispute arising out of the allocation of a seat at the time of the counselling, the decision of the Chairperson of the Counselling Committee will be final.
14. All disputes pertaining to the conduct of the examination by the AIIMS, and the allocation of seats in various subjects by counselling will be subject to the jurisdiction in the High Court of Delhi.”

7. The petitioner contended that since he was denied a seat in OBC category in second counselling, therefore, he wrote a letter on 20th June, 2009 to the Dean raising his grievance. Since the grievance of the petitioner was not redressed, the writ petition was filed by the petitioner on 30th June, 2009 which came up for hearing on 2nd July,

2009. The petitioner had not disclosed on that date that he has already joined the course of Pharmacology and got the matter adjourned. On 7th July, 2009 it was contended by the petitioner that he has joined post graduate course of Pharmacology without prejudice to his rights and contentions which was disputed by the counsel for the respondent. Show cause notice was, however, issued to the respondent on 7th July, 2009 which was accepted by the counsel for the respondent and he had sought time to file reply to show cause notice.

8. The petitioner asserted that there is a difference in allotment of seats adopted by respondent in comparison to other institutions and the universities. According to him under All India Post Graduate counselling, “3200 Point Reservation Roster” is followed under which the person belonging to a reserved category can chose to opt for a seat in the unreserved category. The plea of the petitioner is that in counselling adopted by the respondent, there is distinct segregation between various categories and the migration from one category to another category is impermissible and it is only when certain reserved seats remain vacant, they are shifted to general category. It was categorically asserted that there is no provision of OBC category candidates shifting to general category seats during the first round itself. The petitioner also quoted some instances where a candidate in the OBC category whose request for a particular subject in the general

category was rejected and he was asked to confine himself to reserved category seats only. Para 6 of the petition is as under:

"6. In the " 3200 Point Reservation Roaster" as followed in All India Post Graduate Counselling, the person belonging to even the OBC rank can choose to opt a seat which is even in the unreserved category. However in counselling as stated in the Prospectus of the AIIMS and followed in practice by the AIIMS, there is distinct segregation between the various categories and the migration from one category to another category is impermissible. It is only when certain reserved seats remain vacant, they are shifted to general category. There is no provision of OBC category candidate shifting over to general category seats during the first round of Counselling itself.

9. According to the petitioner he was allowed participation in the first counselling for general seats perhaps on account of inadvertence coupled with nervousness and innocence on the part of the petitioner that he accepted a seat in the general category provisionally though, according to the petitioner he was not entitled for it. The petitioner contended that his admission is provisional and not confirmed and the error which had crept in should have been rectified. In the circumstances, the petitioner further contended that his consent as a novice student shall not matter because the offer itself was invalid and the respondent ought to have corrected the mistake and allowed the petitioner to avail of OBC category seats in accordance with duly published guidelines.

10. The petitioner had filed the petition on 30th June, 2009 and he had joined the post graduate course in Pharmacology which fact was

not disclosed in the petition and, therefore, the petitioner filed an affidavit dated 2nd July, 2009 detailing the circumstances under which he joined the Post Graduate Course of Pharmacology. In the additional affidavit, the petitioner also prayed that he may be permitted to submit the form without prejudice to his rights and contentions and that his rights cannot be defeated on account of filling the form for the Post Graduate Course of Pharmacology.

11. The petition is contested by the respondent and an affidavit of Professor A.B. Dey, Chairman, Counselling Committee, was filed stating that in the reserved category petitioners rank was 27 and there were only 20 seats reserved for OBC and, therefore, when the turn of the petitioner came there was no seat in the reserved OBC category. The counselling of the OBC category was held prior to the counselling of the general category. The petitioner instead of not opting for any seat in the general category and waiting for seats to fall vacant in OBC category, he opted for the seat of general category in the course of Anatomy. According to the respondent, another OBC category candidate though was entitled for a seat in the general category, opted not to fill any Post Graduate seat in the general category and wait for seats falling vacant in the OBC category whose overall rank was 136. In the second counselling, since he had not opted for any seats in the general category, he was allowed Nuclear Medicine under the category of OBC and since the petitioner had already opted for seat in general category,

he was not allowed to opt for seat under OBC category in the second counselling . The other OBC candidate with the overall rank of 136 who had not opted for any general seat in first counselling and who waited for the seat to fall vacant in OBC category, thus was granted the Post Graduate Course in Nuclear Medicine. It is categorically contended by the respondent that the candidate with lower merit ranking who had opted for post graduate course in Nuclear Medicine has not been impleaded as a party, though he is a necessary party. Not permitting a candidate who had opted a seat in general category was for the reason that if a candidate from reserved category opts for a seat in the general category then he blocks one seat and in such a case he cannot be allowed to opt again for the reserved category, as it would deprive a general seat to another candidate in the general category. The respondent contended that the practice is in vogue ever since the process of counselling was started and, therefore, the petitioner was not permitted to participate in second counselling for the reserved category. The categorical assertion of the respondent is that the petitioner could not be permitted to block two seats one in general category and the other in OBC category. The respondent filed an additional affidavit dated 12th August, 2009 contending inter alia that respondent does not permit candidates to switch/shift over for a different category once the candidate opts for any seat in a particular category. It was asserted that the policy is also prevalent in other universities/institution and is also followed by Director General of Health Services.

12. It was asserted that left over seats from reserved category quota are liable to be transferred to the general category pool at the end/third counselling. The rationale for this has been stated as that a candidate should not be allowed to block more than one seat and seek claim in more than one category so as to provide equal opportunity to opt to candidates of various categories.

13. To the plea of the respondent that no seat in Nuclear Medicine was available and second counselling could not be redone, the petitioner contended that two seats in Nuclear Medicine are still vacant. Regarding the two seats of Nuclear Medicine lying vacant under the sponsored/foreign category, it was stated by the respondent that those seats are earmarked and are meant for special category of seats as given in prospectus in column VIII.

14. The petitioner had also filed a rejoinder contending *inter alia* that he was given a seat in general category by mistake and, therefore, he could not be debarred from participating in the second round of counselling under the reserved OBC category. It is contended that the petitioner ought not to have been offered a general category seat and the respondent is liable to correct its own mistake and the petitioner must be given a seat in the OBC category.

15 This Court has heard the learned counsel for the parties in detail. The petitioner in the first counselling held on 11th June, 2009 opted for a provisional seat in Anatomy and thereafter on 18th June, 2009 he opted for the confirmed seat in Pharmacology. The petitioner not only accepted the confirmed seat in Pharmacology but also reported for the said course on 1st July, 2009 and while joining the course of Pharmacology, the petitioner did not join the course subject to his rights, if any, on the ground that he has already filed a writ petition on 30th June, 2009 and he was entitled to participate in second counselling in the reserved category. The writ petition was taken up for hearing on 2nd July, 2009. It was not revealed on that day by the petitioner that he has joined the course of Pharmacology without prejudice to his rights and contentions on 1st July, 2009. This was pointed out by the counsel for the respondent who had appeared on advance notice and therefore, the petitioner sought an adjournment and filed an additional affidavit dated 2nd July, 2009. The matter came up for hearing on 7th July, 2009 on which date it was contended on behalf of the petitioner that he joined the course Pharmacology without prejudice to his rights and contention which is contrary to the joining report of the petitioner which is as under:-

“All India Institute of Medical Sciences

The Dean

A.I.I.M.S., Ansari Nagar,

New Delhi-110029.

With reference to your Memorandum No.F.4-7/2009-Acad-1 dated 18-06-2009, I beg to report myself for duty as MD/MS/MDS/M.Biotech/Ph.D/D.M./M.Ch./M.Sc./House Job on the forenoon of 1-7-2009 in the Department of Pharmacology.

- (1) I am not in receipt of any other award/fellowship emoluments/salary etc. I shall immediately inform you if any award/if fellowship or emoluments salary is received by me from any other sources.

Yours faithfully,

Sd/-

Name: Manish Patnecha

Permanent Address: 2, Chazo,

Choupasni Housing Board,

Jodly (P.C.)

Local Address: 66, Gautam Nagar,

New Delhi 49.

Telephone No.9999361297”

16. From the above, it is apparent that the plea taken on behalf of the petitioner that he had joined the course of Pharmacology on 1st July, 2009 without prejudice to his rights and contentions is not correct. In fact, the counsel for the respondent had categorically contended on that date that the course of Pharmacology had been joined by the petitioner in general category without any reservation. It also emerges from undertaking signed by the petitioner on 18th July, 2009 opting for a confirmed seat of Pharmacology that he had not opted for the confirmed seat in the general category without prejudice to his right to participate

in the second counselling in the reserved category after a provisional seat in Anatomy was opted by the petitioner on 11th June, 2009.

17. The plea of the petitioner that he had innocently participated in the first counselling for the general category and had opted for course in Anatomy as he was erroneously called by Counselling Committee to opt for general category, cannot be accepted, in the facts and circumstances. The merit ranking of the petitioner was low and all the seats in OBC category had been opted by the higher ranking merit candidates and no seats in OBC were left for the petitioner and it is for this reason that the petitioner opted for general category and opted for course of anatomy. Since the procedure for allocation of seats contemplated provisional allocation, therefore, the petitioner was allocated seat in subject anatomy.

18. It is apparent that the petitioner has taken contradictory pleas in the petition and affidavits filed before this Court. In the writ petition which is dated 26th June, 2009, it has been contended that he was not aware of the exact modalities and he was erroneously called and he opted for general category which plea is not correct. Since the petitioner did not get any seat in reserved category, he did not want to take chance and wait for second counselling, perhaps thinking that he may

not get even those choices which would be available to him in first counselling in general category. The petitioner, therefore, opted for general category and accepted the course of anatomy. In the affidavit dated 2nd July, 2009, it was contended by the petitioner that he was not allowed to join on the ground that his case is pending before the Court. The respondent categorically asserted in an affidavit filed on 16th July, 2009 that the counselling for the OBC category on 18th June, 2009 was held prior to counselling of general category. Another candidate having overall ranking of 136 instead of opting for seat under the general category in the first counselling waited for the second counselling under OBC category and was allotted a seat of Nuclear Medicine under the said category. The said candidate joined the course of Nuclear Medicine who has not been impleaded as a party to the present petition. In the rejoinder affidavit filed by the petitioner on 21st July, 2009, the petitioner contended that he was given general category seat by mistake and thereafter, the petitioner was debarred from availing second round of counselling under the OBC category. In another reply dated 13th August, 2009, the stand taken by the petitioner is that on the first round of counselling the petitioner was left with no option but to opt for provisional seat in the subject Anatomy in the general category. For the second round of counselling which took place on 18th June, 2009, his participating in the reserved category was objected to by the Registrar and therefore he was forced to opt for general category seat in Pharmacology. The petitioner is a Graduate in Medicine and it will be

difficult to infer, in the facts and circumstances, that he was forced to opt for a general seat in Pharmacology on 18th June, 2009. The petitioner also participated in the general category without reserving his right for consideration in the reserved category.

19. From different pleas it is clear that the petitioner has changed his stand from time to time to suit his convenience. The petitioner did not want to take chances in the first counselling, as he was not getting admission to any course in reserved category, therefore, he opted for a seat in anatomy in general category. For second counselling for reserved category though the stand of the respondent is that the petitioner could not be allowed to block seats in two subjects and it appears that the petitioner was not allowed to participate in the second counselling for the reserved category, however, in view of the contradicting stands taken by the petitioner, the entire blame cannot be placed on the respondent solely. The petitioner not only opted for the confirmed seat, however, joined the same also on 1st July, 2009 without disclosing this fact to the Court that he has joined the course without reserving his rights but also made an incorrect contention that he joined the course in general category of Pharmacology without prejudice to his rights and contentions.

20. Mr. Maninder Singh, Senior Advocate appearing for the petitioner, has very strongly contended that the merit obtained by a candidate belonging to a reserved category, cannot be treated, or permitted to become a factor to deprive or minimise the options to him when compared to a candidate belonging to the same category and accommodated in the reserved category seats or the post. According to the learned counsel, the rank of the petitioner in the reserved category (OBC) is 25 and though he opted for the admission to the Post Graduate Course of Nuclear Medicines, however, on account of his opting for a seat in general category he had been denied participation in the reserved category in second counselling and the admission has been given to another candidate in the reserved category with a lower merit ranking. Relying on various precedents, it is contended that a higher ranked/merited candidate belonging to reserved category, should not suffer a deprivation in the choices of either a seat or an institution of his choice vis-a-vis a lesser ranked/merited candidate of the same social class, by operation of reservation principle. Learned counsel has relied on a full Bench order of Andhra Pradesh High Court in Dr.B. Kaladhar and others v. Government of A.P., Health, Medical and Family Welfare Department and others, MANU/AP/0727/2005. The said precedent relied on by the petitioner pertains to admission on the basis of 100 point roster for admission where points were identified to comply with reservation in favour of SC, ST and OBC candidates. In Dr. B.Kaladhar (supra), also took into consideration horizontal reservation

earmarking the vacancies for women, physically handicapped and service candidates. This is different and distinguishable from the method of admission in respondent. Even the petitioner is pleaded that that there is a difference in allotment of seats adopted by respondent in comparison to other institutions and the universities. According to him under All India Post Graduate counselling, 3200 Point Reservation Roster is followed under which the person belonging to a reserved category can chose to opt for a seat in the unreserved category whereas in counselling adopted by the respondent, there is distinct segregation between various categories and the migration from one category to another category is impermissible and it is only when certain reserved seats remain vacant, they are shifted to general category. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it

21. Learned counsel for the petitioner has relied on (2002) 8 SCC 152, Shafali Nandwani v. State of Haryana and others; (2005) 13

Supreme Court Cases 677, M.A. Salam (II) v. Principal Secretary, Govt. Of A.P. and others, (1996) 3 SCC 253, Ritesh R. Sah v. Dr. Y.L. Yamul and others, (1996) 6 SCC 36, State of Bihar and Others v. M. Neethi Chandra and Others; 2006 (12) ALD 1, Dr. B. Kaladhar and Others v. Government of A.P., Health, Medical and Family Welfare Department and Others; AIR 2008 J&K 11, Mir G.R. Wali v. State and others and Writ Petition No.16998 of 2007, Dr.Surekha Dabas v. The Union Territory of Pondicherry in the High Court of Judicature of Madras; (2005) 13 SCC 461, Vijay Jaimni v. Medical Council of India and Others and (2005) 13 SCC 464, Harshali v. State of Maharashtra and Others.

22. In Harshali (*supra*), the candidate was denied admission in first years MBBS course by the College for Academic year 2004-2005 despite securing higher marks in the entrance test. The plea of the college that the candidate had not approached the college, was disbelieved and it was held that since the candidate had already taken admission in dental course in the same college maintained by the same Trust, it is not believable that she had not approached the college for admission to MBBS course and in the circumstances the college was directed to admit the petitioner to the MBBS Course for academic years 2005-2006 from the sanctioned intake of the college and the fees already paid by her was directed to be adjusted. In Vijay Jaimni (*supra*), a candidate securing 134 marks in the common entrance test was not given admission on the ground that her application was received on 24th

September, 2004 and by the time her application was received, the candidate securing lesser marks for granting admission by 23rd September, 2004 at 4.00 PM. The plea of the college was negated on the basis of the list given by the Medical Council of India reflecting that except for some stray admissions most of the students were granted admission on 29/30th September, 2004 and not by 23rd September, 2004 as was alleged by the college. Since for the year 2005-2006, year next in which the candidate had applied, and the college was ready to grant admission to the petitioner and was also ready to charge only such fees as would have been charged if the admission had been granted in the academic year 2004-2005, the candidate was permitted to get admission in 2005-2006.

23. In *Shafali Nandwani (supra)*, the dispute was between two candidates both of whom had given first choice for MD Medicines at the first counselling, however, both of them had accepted different subjects (speciality) and were allowed but also got waitlisted for second counselling. During the second counselling, a seat in MD Medicine became available on account of the same being vacated by a candidate who was also lower than the respondent No.4 but above the appellant. In such circumstances, the MD Medicine seat was allowed to the appellant and not to respondent no.4 and it was held that it was on account of fortuitous circumstance which did not negate reasonableness of the rule. The plea of the respondent no.4 to permit

her to take admission in MD Medicine for subsequent academic year was also declined by the Supreme Court on the ground that that would violate the relevant regulations of Medical Council of India. Another factor was taken into consideration by the Supreme Court was that appellant and respondent had already completed 2½ years of their respective course and it was held that it would be improper to allow the change as it would amount to colossal waste of efforts and expenditure. In *Arvind Kumar Kankane v. State of U.P.*, (2001) 8 SCC 355, it was held by the court that if a vacant seat was not included in the initial counselling and on the basis of first counselling several candidates had accepted the seats offered to them for different courses and when the vacant seat was offered in the second counselling then the plea of candidates who had already accepted the allotment of seats at the first counselling that they should be given a chance in order of merit to opt for that seat was rejected by the Supreme Court. The Supreme Court had held that the fact that the subject of choice of a person higher in merit list was given to a candidate who was lower in rank in the merit list but which was on account of fortuitous circumstance, will not negate the reasonableness of the rule which provides that the vacant seats should be provided to the candidate next in the merit list. In *M.A. Salam (II)* (*supra*), a candidate was given admission by extending the benefit of a notification and he joined the medical college in 2000 and pursued the course during January 2003 and thereafter on a objection that he was not covered by the said notification his admission was cancelled.

Against the seat of that candidate another candidate had been granted admission on account of disqualification of the candidate. Since the candidate whose admission was cancelled and whose seat was allotted to some other candidate, was found not guilty of making any misrepresentation, therefore, for an equitable and fair solution, the college was directed to admit the candidate whose admission was cancelled for the academic session 2005-2006 within the permissible intake limit without insisting on counselling.

24. A candidate belonging to a reserved category if he is permitted and he gets admission on open merit, then he is to be treated as an open category candidate for the purpose of computation of percentage of reservation. It was so held by the Supreme Court in Ritesh R. Shah (*supra*). In this case, a number of candidates could have been admitted on the basis of marks secured in open merit, yet they were admitted against reserved category, as a result, the petitioner in that case belonging to the reserved category was excluded from getting admission into the MBBS course. Since the petitioner was a single applicant before the court, it was directed that the petitioner to be admitted to any one of the colleges where the seat was available in the MBBS course and in case no seat was available even then the respondents were directed to admit him to wherever the seat could be made available in any college.

25. Learned counsel for the petitioner has also relied on Dr. Javed Iqbal and others v. State & ors, MANU/JK/0089/2004 where the candidate had challenged the allocation of discipline on the ground that there were 31 seats advertised in MD Medicine and out of the category quota of 35%, the category candidates were entitled to 11 seats with 10.85%. However, only 10 seats had been allocated to the reserved category candidate for the discipline of medicine, whereas 11 seats had been allocated to the candidates in the open merit category. The petitioner in this case had been selected in the open merit category and had been adjusted against the reserved category resulting in reduction of one seat of reserved category candidates. The last candidate who was selected in the reserved category had obtained 153 marks, whereas in the open category last candidate had obtained 170 marks. It was held that it is a settled position of law that a candidate belonging to any reserved category, if he is selected in the open category, the reserved vacancy is to be allotted to the next candidate of the reserved category and such a seat will not be deemed to be filled by the candidate who has got in general merit as a reserved category. It was held that merit cannot be permitted to become demerit as otherwise this will frustrate the very purpose and object.

26. From the procedure stipulated for allocation of seats in the prospectus for July 2009 Session, it is apparent that for the first

counselling the order was ST/SC/OBC/GENERAL/50% AIIMS preferential Candidates. However, during first counselling a candidate could join the course provisionally and the provisional seat was to be confirmed in the second counselling. The method of counselling also contemplates that a candidate who does not opt for a seat in first counselling is entitled to participate in second counselling. The order of second counselling was ST/SC/OBC/GENERAL/50% AIIMS preferential Candidates. The method of allocation of seats does not show that a candidate opting for a provisional seat in first counselling can not be allowed to participate in the second counselling in the same category or in the category in which the seat was opted by the candidate provisionally in the first counselling. Since the petitioner had opted a general seat provisionally during the first counselling, according to the method of second counselling, the petitioner ought to have been allowed to participate in OBC category in the second counselling as the seat of Anatomy in general category allocated to the petitioner in the first counselling was provisional. It is also apparent that in the first counselling the allocation of seat could be provisional for a candidate not getting the course of his choice, so that he could get the course of his choice in second counselling if available, if the choice of candidate is not available in the second counselling, the option of the candidate in the first counselling be confirmed. The Bulletin of Information is categorical about it which is as under:

F. Allocation of Seats

First Counselling (to be held on 11.6.2009)

- a) The order of counselling will be ST/SC/OBC/General/50% AIIMS preferential candidates of total MBBS seats of AIIMS
- b) **Group 1-** Confirmed seats: A candidate who has got a confirmed seat in the subject of his/her choice, will not be allowed to change the subject and will not be eligible for the second counselling.
- c) **Group 2-** If a candidate wants subject 'A' and it is not available at his/her rank/turn he/she can choose subject 'B' provisionally. His/Her provisional seat will be confirmed only in the second counselling.
- d) **Group 3-** A candidate, who does not take any seat provisionally but wants to come for the second counselling will be eligible for second counselling.
- e) All candidates in group 1 (confirmed seat) shall deposit fees as per the date stipulated in the selection letter. If they fail to deposit fees, and/or do not join after depositing the fees then they would lose the seat allotted to them and such candidates will not be eligible for second counselling.

Second Counselling (to be held on 18.6.2009)

- a) The order of the second counselling will be ST/SC/OBC/General/50% AIIMS preferential candidates of total MBBS seats of AIIMS.
- b) In case during the second counselling ST seats remains vacant after calling all eligible candidates of ST category then these seats will be transferred to the SC category. Similarly, in case the ST seat remains vacant after calling all eligible SC candidates then these seats, whether they pertain to ST category or SC category, shall be made available to the General Category/AIIMS

preferential graduates. Similarly, in case the OBC seat remains vacant after calling all eligible OBC candidates then these seats, shall be made available to the General category/AIIMS preferential graduates.

- c) During first counselling, candidates who had provisionally, opted for seats under group 2 (provisionally) will be allocated only those seats which they had provisionally opted in the first counselling and/or the seats which were not available at his/her turn as per merit in the first counselling.
- d) Group 2 and 3 from first counselling will be eligible to attend the second counselling as specified in clauses F(c), (d) and (e)
- e) A candidate belonging to Group 2 would lose the seat allotted provisionally in the first counselling, if he/she does not attend the second counselling.
- f) In the second counselling, all the seats will be confirmed seats.

‘3rd Counselling/open selection’ (to be held on 28.7.2009)

There will be 3rd counselling/open selection if any of the seats remain vacant after the 2nd counselling. These seats will be notified/advertised in the leading newspapers i.e Hindustan Times and Hindu in all Editions.

Besides the above, if any regular seats have fallen vacant after 2nd counselling till afternoon of 23rd July, 2009 (July session 2009) due to resignation/or leaving of the course, by any candidate these seats also will be filled up during the 3rd counselling/open selection against the concerned category candidates. The status of these vacant seats will be available only on 24th July, 2009 onwards and will be put up on the Notice Board at AIIMS, Academic Section as well as AIIMS website i.e www.aiims.ac.in and www.aiims.edu.

A candidate who has opted for a confirmed seat either in 1st or 2nd counselling but desires another subject in the 3rd counselling/open selection may also attend this session. A candidate may resign the confirmed seat during the counselling without penalty to obtain another of his/her choice. The seats will be offered only to those candidates who are physically present during the 3rd counselling session/open selection strictly according to merit obtained in the concerned categories. No separate communication will be sent to candidates in this regard. Any seats falling vacant during the 3rd counselling/open selection or seats available after 23rd July 2009 will be transferred to the next session.

27. The method and procedure for allocation of seats as detailed in the prospectus does not stipulate that a candidate who opts for a general seat in the first counselling provisionally is not to be allowed to opt for a reserved category seat in the second counselling. Therefore, the petitioner could not be denied to participate in the second counselling for the reserved seat on the ground that he had already opted for a Post Graduate Course in Anatomy provisionally in the first counselling. The plea of the respondent that a candidate who once opt for consideration in general category, cannot be permitted to change the category, as the same would result in blocking more than one seat, cannot be justifiable ground in the facts and circumstances. On the allegation that such a practice is in vogue ever since the process of counselling was started, will not be a ground to act contrary to procedure for allocation of seat as detailed in the prospectus nor on such a ground denying the petitioner's participation in the second counselling under reserved category can be justified. How the petitioner,

who had opted for the Post Graduate Course in Anatomy provisionally in the first counselling, would have blocked two seats, had he been allowed to participate in the second counselling for the reserved seats, has not been explained satisfactorily by the respondent. Allocation of Post Graduate Course in Anatomy provisionally could be confirmed only in the second counselling, whether it was in the reserved category or in the general category. Had the petitioner been allowed to participate in the reserved category in the second counselling, he would have either opted for a Post Graduate Course of his choice available under the reserved category, in that case he would have released the provisional seat given to him in Anatomy which would have become available to a general category in the second counselling. Had the petitioner not got any course of his choice in the second counselling in the reserved category, he could participate for counselling in the general category, which he did and he released his seat in Anatomy which was given to him provisionally and opted for a seat in Post Graduate Course of 'Pharmacology'. The plea of respondent in the facts and circumstances that the petitioner would have blocked two seats is not acceptable

28. As a reserved candidate on the basis of his merit in the general category, the petitioner was entitled for a seat, however, his option for a seat in general category could not be worked out to his disadvantage so as to be placed on a more disadvantageous position than the other less

meritorious reserved category candidates. Even after opting for a Post Graduate Course in Anatomy provisionally, the petitioner could not be denied to participate in the reserved category as this non-participation at the instance of the respondent has resulted into a less meritorious candidate than the petitioner getting the seat of Nuclear Medicines which the petitioner has been deprived of. In the circumstances, the respondent ought to have allowed the petitioner to participate in the second counselling under the OBC category.

29. In the circumstances, the petitioner has contended that he be given a seat of Nuclear Medicine lying vacant under the sponsored/foreign category as no other seat in Nuclear Medicine is available now. The petitioner has not claimed the seat of Nuclear Medicine given to another candidate in the reserved category, who had not opted for the general seat in the first counselling and who had waited for second counselling, as he has not been impleaded as a party to the present petition. In the circumstances, the respondent cannot be directed to have second counselling again and allot the seat of the Nuclear Medicine to the petitioner and cancel the allocation of the seat of said course to another candidate. The petitioner has not impleaded the Government of India, Ministry of Health or the concerned authority which can create seat in a particular subject in certain circumstances.

Therefore, the direction cannot be given to the respondent to admit the petitioner in the course of Nuclear Medicine now on the general seat.

30. The next alternative is to direct the respondent to admit the petitioner in the course of Nuclear Medicine in the sponsored seats. Perusal of the prospectus, however, reveals that sponsored seats can be allocated to the sponsored candidates only. The said sponsored seats can only be filled by the candidates who are permanent employees of any Central/State Government or Armed Forces. The State Government can, however, sponsor a candidate for the sponsored seat for the super-specialty course, only for those courses which are not available in that State. In absence of any sponsoring state, the sponsored seat therefore, should not be directed to be allocated to the petitioner. The petitioner also cannot be allocated the sponsored seat as the emoluments of the sponsored seat are not paid by the respondent, rather the emoluments are borne by the Central/State Government. In absence of Central/State Government, directions cannot be given to the concerned Government to bear the emoluments of the petitioners. Consequently the respondent cannot be directed to admit the petitioner in the course of Nuclear Medicine at this stage in the sponsored seats.

31. The seat under the category of foreign national also cannot be allotted to the petitioner as the same is to be allotted in accordance with

the bilateral agreement between the Government of India and other countries. The petitioner not being a foreign national is, therefore, also not eligible for a seat in Nuclear Medicine in the category of foreign National, in the facts and circumstances. The respondent, therefore, cannot be directed to admit the petitioner in the course of Nuclear medicine.

32. In the circumstances, the writ petition is disposed of with the above noted observations. The respondent shall, however, be liable to pay a cost of Rs.20,000/- to the petitioner. Cost to be paid within four weeks.

November 19, 2009.
'Dev'

ANIL KUMAR, J.