

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **LPA 622/2009**

Dr. MANISH PATNECHA Appellant
Through Mr.Maninder Singh, Sr.Advocate with
Mr. Gaurav Duggal and Mr. T.Singh Dev, Advocates

versus

CHAIRPERSON COUNSELING COMMITTEE A.I.I.M.S. Respondent
Through Mr. Sunil Fernandes with Mr.Rajat Jariwala,
Advocates

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE S.MURALIDHAR

% **ORDER**
10.12.2009

1. This appeal is directed against the judgment dated 19th November, 2009 passed by the learned single Judge disposing the appellant's Writ Petition (C) No.9763/2009.

2. The appellant sought a writ of mandamus to the respondent, the Chairperson, Counselling Committee, Academic Section, All India Institute of Medical Sciences (AIIMS), New Delhi to re-schedule the second round of counselling for admission to the post graduate course and give the appellant admission in the subject of Nuclear Medicine in the reserved category.

3. The appellant appeared for admission to the post graduate courses in AIIMS. He was ranked 125th in overall merit and 25th in the Other Backward Classes (OBC) category. He was called for the first round of counselling on 11th June, 2009. According to the appellant, and this is not denied by the respondent, he gave an option for the general category course in Anatomy during the first round of counselling since as on the date of the first counseling the OBC list was already exhausted. His option for Anatomy was admittedly provisional. In terms of the bulletin of information supplied by the

respondent to the candidates the procedure to be followed in the first two rounds of counseling was 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.”

4. In the second round of counselling which took place on 18th June, 2009, the appellant opted for Nuclear Medicine under the OBC category. However, the respondent objected to it on the ground that the appellant had already exercised his choice for Anatomy in the general category in the first round and, therefore, could not switch to the OBC category in the second counselling. The appellant was permitted only to exercise an option in the general category. He accordingly opted for MD course in Pharmacology.

5. According to the appellant he was not happy with this turn of events as his preference had always been MD in Nuclear Medicine. Therefore, even while he began attending the MD Pharmacology course, on 30th June, 2009 he filed aforementioned writ petition seeking the reliefs as mentioned hereinbefore. According to the appellant the case came up for hearing first on 2nd July, 2009. At the next adjourned date of 7th July, 2009 the appellant informed the court that he had joined the MD Pharmacology course without prejudice to his rights and contentions. On 27th July, 2009 the learned single Judge passed the following order:

“Considering the facts and circumstances and after hearing the arguments for some time, the petitioner is permitted to join the course of MD (Pharmacology) opted by him provisionally without prejudice to pleas and contentions of the parties in the writ petition.”

6. Thereafter the writ petition was heard finally on 9th October, 2009 and the impugned judgment was delivered on 19th November, 2009. The principal findings of the learned single Judge were as under:

(a) “The method and procedure for allocation of seats as detailed in prospectus does not stipulate that a candidate who opts for a general seat in the first counselling provisionally is not to be allowed to or a reserved category seat in the second counselling. Therefore, 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. “

(b) “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.”

(c) “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.”

7. Having come to the above conclusion, the learned single Judge considered next the question of granting the consequential relief to the appellant. It was held that since the appellant had not impleaded the person belonging to the reserved category who was lesser in the order of merit and was granted the seat of Nuclear Medicine as a party to the writ petition, a direction could not be issued to the respondent to conduct a second counseling again and allot the seat in Nuclear Medicine to the appellant by cancelling the allocation made to the other reserved category candidate. Further, since the government of India was not a party, no direction could be issued to create an additional seat. The appellant could not also be allocated a sponsored seat or in the category of foreign national. In the circumstance, it was held that the respondent could not be directed to admit the appellant in the course of Nuclear Medicine.

8. We have heard Mr. Maninder Singh, learned senior counsel appearing for the appellant and Mr. Sunil Fernandes, learned counsel appearing for the respondent.

9. Mr. Maninder Singh points out that the findings of the learned single Judge that the appellant could not have been denied, at the stage of the second counseling, an opportunity of opting for a reserved seat in the OBC category in the post graduate course

in Nuclear Medicine was consistent with the judgment of Supreme Court in **Ritesh R. Sah** v. **Dr. Y.L. Yamul and Others** (1996) 3 SCC 253 and a Full Bench decision of the Andhra Pradesh High Court in **Dr. B. Kaladhar & Ors** v. **Government of A.P., Health, Medical & Family Welfare Department** 2005 (6) ALT 273. It is submitted that once it was held that the appellant was wrongfully denied a seat in Nuclear Medicine by the respondent, he could not be denied the consequential relief. He pointed out that the admission to the post graduate courses in AIIMS are made twice in a year with around 25% seats being filled up in the session that commence in January, 2010 for which the counseling will take place tomorrow i.e. 11th December, 2009. Referring to the prospectus issued by the respondent he points out that in Nuclear Medicine there are a total of five seats, two of which are in the sponsored/foreign category. Of the three remaining seats, two are in the unreserved (UR) category and one in the Scheduled Caste (SC) category. He prays that the respondent should be directed to allocate one seat in Nuclear Medicine in UR category for the appellant and that such direction would be consistent with the directions issued in the decisions of the Supreme Court in **Vijay Jaimini** v. **Medical Council of India** (2005) 13 SCC 461 and **Harshali** v. **State of Maharashtra** (2005) 13 SCC 464.

10. On the other hand, Mr.Sunil Fernandes submits that the judgment in **Ritesh R. Shah** is distinguishable on facts. It is submitted that the appellant cannot be given admission in the subsequent session beginning in January, 2010 since he did not take the exam for admission to that session. It is pointed out that having already opted for Pharmacology in the general category, the appellant has been in fact blocked that seat and it would not be equitable now to permit him to switch over to an OBC category seat.

11. The submission of counsel for the parties have been considered. We are in full agreement with the findings of the learned single Judge as regards the appellant having been unjustifiably denied participation in the second round of counselling. Merely

because he did not opt for the OBC category seat in the first round of counselling and opted provisionally for a seat in Anatomy in the general category he could not be denied the choice of opting for Nuclear Medicine in the OBC category in the second round of counselling. This is plain from the following observations of the Supreme Court in

Ritesh R Shah:

“In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates.”

We may note here that in the instant case an OBC category candidate with a much lower merit (No.136 in the list) was granted a seat in Nuclear Medicine whereas the appellant has a rank of 25 in the OBC merit list and No.125 in the overall merit list.

12. We find that the Full Bench of the Andhra Pradesh High Court in **Dr. B. Kaladhar's** case after analyzing the law explained in several judgments of the Supreme Court, held as under:

“If we examine the judgments of the Supreme Court rendered in the cases of Ritesh R. Sah, Neethi Chandra and Anurag Patel's, referred to above, it emerges that the Supreme Court laid down a principle to the effect that the merit obtained by a candidate belonging to a reserved category, cannot be treated, or permitted to become, a factor, to deprive or minimize the options to him, when compared to a candidate belonging to the same category, and accommodated in the reserved seats or posts. This principle, in turn, came to be applied in different manners, in different cases, depending on the procedure adopted for selection of candidates. It is the principle, that becomes a guiding factor, than the application part of it. The principle – the ratio decidendi, as we understand is that a higher ranked/merited candidate belonging to a reserved category, should not suffer a deprivation in the choices of either a seat or an institution of his choice vis-à-vis a lesser ranked/merited candidate of the same social class, by the operation of a reservation principle. Any admissions programme that accords with such principle is valid.”

13. We accordingly concur with the findings of learned single Judge on the above issue. We also note that the respondent has itself not challenged the said findings.

14. On the question of consequential relief that can be granted to the appellant we find that there is no denial by the respondent that the second session is to commence in January 2010 and that admissions are to be made to the post graduate courses in that session. The appellant, having succeeded in showing that the denial of admission to him in Nuclear Medicine in the OBC category is unjustified, is in our view entitled to a direction to the respondent to admit him to the said course in the next session. This is held to be permissible by the Supreme Court in both *Vijay Jaimni* and *Harshali*.

15. Accordingly we issue a direction to the respondent that the appellant will be granted admission to the post graduate course in Nuclear Medicine in one of the UR seats in the next session commencing in the year January 2010. He will be permitted to participate in the counselling that is to take place tomorrow i.e. 11th December, 2009.

16. The appeal is accordingly disposed of in the above terms.

17. Copy of the order be issued dasti to the counsel for the parties.

CHIEF JUSTICE

S.MURALIDHAR, J

DECEMBER 10, 2009

“V”