

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

+ **W.P.(C) 4230/2010**

% **Date of decision : 19th August, 2010.**

DR. JAGVEER SINGH & ORS. Petitioners
Through: Mr. Vivek Malik, Advocate.

Versus

**THE CHAIRPERSON, COUNSELLING COMMITTEE,
ACADEMIC SECTION, AIIMS & ANR.** Respondents
Through: Mr. Sunil Fernandes, Advocate
for R-1 AIIMS.
Mr. Jatan Singh & Mr. Ashok
Singh, Advocates for R-2 UOI.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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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 |

RAJIV SAHAI ENDLAW, J.

1. The four petitioners had applied for admission to the respondent no.1 All India Institute of Medical Sciences (AIIMS) for admission to Post Graduation/Post Doctoral Courses in the academic session commencing from July, 2010. All the petitioners belong to the OBC category. The prospectus issued by the respondent no.1 AIIMS, for admission to M.D./M.S. & MDS courses *inter alia* contains the following clauses:-

“2.(b) The candidate must have obtained a minimum of 55%

marks in aggregate in all the MBBS/BDS professional examinations for other category including OBC category and 50% for candidate belonging to SCs/STs.

12. B. Reservation of Seats

1. 22½ of the total Post-Graduate seats (15% for SC, 7.5% ST excluding OBC seats and 20 PG seats for OBC) excluding those for Sponsored/Foreign National candidates are reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and the Other Backward Classes (Non-Creamy Layer).

12. 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". 2. 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 SC seats 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."**

2. The grievance of the petitioners in the present writ petition is that the respondent no.1 AIIMS instead of drawing up an overall merit list has drawn up separate merit lists for the General, SC, ST & OBC categories. The petitioners were sent call letters for counselling, giving their rank in the OBC category only. The counselling also was done category wise only with the petitioners being called for counselling in the OBC category only. The petitioners impugn the said procedure adopted by the respondent no.1 AIIMS and contend that:-

(i) that the procedure adopted amounts to creating a reservation against the petitioners and results in the petitioners belonging to the OBC category becoming ineligible for admission in the general category

(ii) that the procedure adopted by the respondent no.1 AIIMS is not transparent.

(iii) Some of the courses offered do not have any seats in the OBC category; in the absence of an overall merit list, the OBC candidates are prevented from joining the said course/discipline

The petitioners seek a direction, directing respondent no.1 AIIMS to disclose overall ranking of the petitioners and to consider the petitioners for admission in the unreserved category also.

3. Notice of the writ petition was issued. The counsel for the respondent no.1 AIIMS on 23rd June, 2010 informed that counseling was already over and no vacancy in which the petitioners could be considered in any category was remaining. Though, Union of India was not originally impleaded as a party to the writ petition but was directed to be so impleaded as respondent no.2 on 7th July, 2010. Counter affidavit has been filed by the respondent no.1 AIIMS. No counter affidavit has been filed by the respondent no.2 Union of India.

4. The respondent no.1 AIIMS in its counter affidavit has *inter alia*

stated:-

- (a) that the writ petition has become infructuous owing to all seats having already been filled up.
- (b) that the procedure followed by the respondent no.1 AIIMS for admission is as per the prospectus; that the prospectus was published as far back as in May 2010; no objection to the procedure prescribed therein was taken at that time and the procedure prescribed therein cannot be challenged after the petitioners have been unsuccessful in getting admission as per the procedure prescribed in the prospectus.
- (c) that the petitioners having applied for admission on the terms prescribed in the prospectus are estopped from challenging the same.
- (d) that clause 12 E at page 8 of the prospectus while setting out the procedure for counselling expressly provides that “the counselling shall be done according to the Category Rank (UR/SC/ST/OBC/PH as filled in the application form) and not by the overall rank”

It is thus contended that the respondent no.1 AIIMS was not required under the prospectus to bring out the overall merit list and was required to only bring out a category wise merit list. It is also pleaded that the procedure adopted by respondent no.1 AIIMS is identical to the procedure adopted by the Ministry of Health and Family Welfare for filling up 5,225 seats in All India PG examination under the All India quota in Institutions other than

AIIMS.

5. The clause 12 E (supra) as quoted in the counter affidavit of the respondent no.1 AIIMS, is not found to exist in the copy of the prospectus annexed to the writ petition. The petitioners in their rejoinder affidavit also pleaded so. In spite of the same, the respondent no.1 AIIMS has not shown any prospectus for the current academic year containing the said clause. However, the letters calling the petitioners for counseling are found to be so providing.

6. The counsel for the petitioners has today fairly stated that the petitioners are now not claiming admission in the current academic year. It is however contended that unless the question raised in the writ petition is decided, the respondent no.1 AIIMS may in the next academic year also, when the petitioners may again apply, follow the same procedure. The counsel for the petitioners thus nevertheless seeks decision on the question raised in the writ petition. I find merit in the said contention and the counsels for the parties have been heard.

7. As aforesaid, there is a mismatch in the prospectus on the basis of which the respondent no.1 AIIMS in its counter affidavit claims to have proceeded and the prospectus as filed along with the writ petition. The prospectus for the current year as filed with the writ petition, does not provide that counselling shall be done according to category rank only and not by overall rank. The call letters issued to the petitioners cannot be at

variance with the prospectus. However, even if the respondent no.1 AIIMS has so interpreted the prospectus for the current year, the petitioners have in the writ petition sought declaration that the said interpretation/understanding of the respondent no.1 AIIMS as bad. I thus proceed to consider whether the respondent no.1 AIIMS can refuse to draw up the overall merit list and can insist upon drawing up category wise merit list. The direct consequence of the same is to exclude the SC/ST/OBC/PH candidates (reserved category candidates) from being considered for admission in the General (unreserved) Category.

8. The Supreme Court in (i) *Indra Sawhney Vs. Union of India* 1992 Supp. (3) SCC 217 (ii) *Ritesh R. Sah Vs. Dr. Y.L. Yamul* 1996 (3) SCC 253 (iii) *R.K. Sabharwal Vs. State of Punjab* AIR 1995 SC 1371 and (iv) *Union of India Vs. Satya Prakash* (2006) 4 SCC 550 has held that the candidates selected in General (unreserved) Category on their own merit, even if belonging to the reserved category, cannot be counted in the reserved category so as to reduce the number of seats prescribed for the reserved category. In *R.K. Sabharwal* (supra) it was expressly held that “reserved category candidates can compete for non-reserved posts.”

9. An unreserved seat is available to all the candidates who are in the zone of consideration but a reserved seat is confined for candidates of that particular category. In an open competition, General Category candidates are entitled to compete only against unreserved seats but a reserved category candidate in addition to his right to be considered against the reserved seat is

also entitled to be considered against unreserved seats. His option in the application, for consideration of his candidature for a reserved seat is only a declaration of his intention to be considered against reserved seat without depriving himself of the right to be considered against an unreserved seat. Articles 15 and 16 of the Constitution of India confer certain benefits on the persons belonging to these categories but which benefits are not in substitution of any other right which may be otherwise available to them as citizens of the country.

10. Benefit of reservation does not substitute or supplant any other right of a person belonging to SC/ST and OBC Category. Such benefit would be in addition to an already existing right including the fundamental right of equality. If any scheme of reservation or the procedure evolved with a view to give effect to such scheme is made to depend upon the condition of truncating the fundamental or any other right of an individual, such scheme of reservation would be contrary to the constitutional provisions and the law and to the extent it curtails fundamental right or any other right of a person belonging to such category, would be liable to be declared illegal. Reserving certain seats for different groups of the community in the first instance means that these seats are meant for members belonging to such specified groups. This is an additional benefit conferred on them. On account of such additional benefit however they are not precluded from claiming ordinary benefits otherwise available to them.

11. Members belonging to SC, ST and OBC Category for whom

reservation of seats is made are not confined for selection for those seats only, although its converse is true. They cannot be asked to occupy only reserved seats. They would be free to occupy any seats including unreserved seats. However, the requirement of law is that while claiming selection against unreserved seats, they should prove their merit like any other citizen, who is not entitled to the benefit of reservation. No provision of law whether substantive or procedural, can be so interpreted as to run contrary to this basic tenet of the Constitution of India.

12. The respondent no.1 AIIMS in drawing up separate merit list for the UR/SC/ST/OBC/PH categories has misapplied the law of reservation; in doing so, it has completely excluded consideration of candidates belonging to OBC category for the seats meant for General Category. Just because the petitioners in their application forms, being required to fill up their categories in the relevant column described themselves as belonging to OBC category, they cannot be deprived of consideration in the General Category. The petitioners and others eligible for selection in reserved categories, cannot be deprived of an opportunity of selection in unreserved category, of course on the basis of merit.

13. Recently in judgment dated 16th August, 2010 in W.P.(C) No.5536/2010 titled *Ms. Jyoti Yadav Vs. Govt. of NCT of Delhi*, I had an occasion to deal with the procedure for admission to Diploma Course in Elementary Teacher Training. In that case liberty was granted to the candidates belonging to the reserved category to apply in the General

Category also by filling up a separate form. The petitioners therein however failed to apply in the General Category and being not successful in gaining admission in the reserved category then wanted to be considered in the General Category. However, they were held not entitled to do so, having failed to apply in the General Category. However, the procedure allowing the candidates in the reserved category to apply in the General Category also was upheld.

14. Though, in the prospectus of the respondent no.1 AIIMS for the current academic year, I do not find any limitation for considering the candidates belonging to the reserved category, in the unreserved category also, but the call letters issued and the counter affidavit of the respondent no.1 AIIMS shows that it has wrongly refused to so consider them.

15. The Supreme Court recently in *Jitendra Kumar Singh Vs. State of U.P.* (2010) 3 SCC 119 also held that a reserved candidate cannot be deprived of his right to be considered against general vacancy on the basis of merit. The practice of preparing categorywise list was also deprecated in para 43 of *A.P. Public Service Commission Vs. Balaji Badhavath* (2009) 5 SCC 1 as being detrimental to the interest of meritorious candidates belonging to the reserved categories.

16. I therefore declare the stand taken by the respondent no.1 AIIMS in its counter affidavit of being entitled to prepare and declare a separate merit list for each of the categories and of thus depriving candidates belonging to

the reserved category from admission in the General (unreserved) Category to be bad in law.

17. The writ petition succeeds to the aforesaid extent. The respondent no.1 AIIMS is directed to w.e.f. next admission, allow the candidates belonging to the reserved category to compete in the General (unreserved) Category also and the candidates belonging to reserved category, if entitled to admission on their own merit in General (unreserved) Category to be so given admission without counting them against seats in the reserved category.

The writ petition is disposed of. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

19th August, 2010
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