

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: December 01, 2016

Judgment delivered on: December 15, 2016

+ W.P.(C) 10166/2016, CM Nos. 40202/2016 & 42889/2016
GOVIND KR VERMA AND ANR

..... Petitioners

Through: Mr. Pankaj Sinha, Adv. with Ms. Ritu
Singh & Mr. Vishal Kalra, Adv.

versus

JOINT REGISTRAR (MEDICAL) FACULTY OF AYURVEDIC AND UNANI
MEDICINES AND ANR

..... Respondent

Through: Mr. Mohinder J.S. Rupal, Adv. with
Ms. Simran Jeet, Adv.

CORAM:
HON'BLE MR JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

CM No. 42889/2016

This is an application filed by the petitioner for bringing on record, additional documents. The application is allowed and disposed of.

Writ Petition (Civil) 10166/2016

1. The challenge in this petition, by two petitioners who are physically challenged is, to the inaction of the respondents in not inviting them for counseling and admission to the

MD/MS Ayurvedic and Unani Medicines Course for the academic year 2016-2019 (for short 'the said course').

2. The prayers made in the petition are as under: -

- a) *Issue a writ of certiorari or any other Writ, order or direction in the nature of certiorari calling for the records of process adopted while inviting the candidates for counseling and the records of the candidates who have applied under the disability quota;*
- b) *Issue a writ of mandamus or any other Writ, order or direction in the nature of mandamus issuing direction to the Respondent;*
 - 1) *To call the petitioners for the counseling forthwith*
- c) *Issue a writ of mandamus or any other writ, order or direction in the nature of mandamus directing the Respondents 1 and 2 to consider the case of the Petitioners and provide them admission for course of MD/MS (Ayurved);*
- d) *Any other order/direction as the Hon'ble Court may be deem fit."*

3. It is averred in the petition that on July 20, 2016 a brochure was issued by the respondents for admission to the said course. It is the case of the petitioners that 66 seats were advertised and as per sub-clause (B) of Clause 7, 3% seats were compartmentally reserved on horizontal basis for candidates belonging to PWD category. On September 11, 2016, entrance exam for the said course was held. On September 23, 2016, result was announced. However, due to issues raised by students, the same was withdrawn from the website of the respondent No.2. According to the petitioner, final result was published on the website on October 17, 2016 without any list of candidates under the physically disabled

category. The petitioners made representation before the Chief Commissioner of Persons with Disabilities and the Vice-Chancellor of the University of Delhi on October 20, 2016. On October 21, 2016, the Chief Commissioner of Persons with Disabilities passed the order advising the respondents to give comments within 20 days and asking them to keep two seats for persons with disability in abeyance.

4. The respondent no.2 has filed a short counter-affidavit, wherein it is the stand that 62 seats were sanctioned by the Department of Ayush, Government of India for the said course. As per the norms 50% seats, i.e., 31 seats are meant for Delhi University quota. The matter pertains to admission under 50% All India quota. The counter-affidavit gives, the distribution of seats under All India Quota. According to the respondents, under All India quota, against OBC there were eight seats. It is the stand, that in the current academic year 3% seats in any of the categories, i.e., General, SC, ST and OBC cannot be carved out compartmentally and on horizontal basis out of the respective seats available under the said categories. Even if 100 point roster is applied even then this year no reservation under PWD category can be granted as demanded by the petitioners, since the seats are less this year to carve out reservation within each category. It is also stated that both the petitioners belong to OBC category for which there are only eight seats available. Hence, no seat can be reserved under PWD category.

5. Mr. Pankaj Sinha, learned counsel for the petitioners would at the outset submit, even though the University has called for applications against 66 seats, assuming 62 seats

were sanctioned, 3% thereof being 1.86, two seats need to have been reserved for persons with disability. He would urge that under Section 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'Act of 1995'), all government educational institutions and other educational institutions received aid from the government, shall reserve not less than three percent seats for persons with disability. He would also state, for the implementation of the mandate under Section 39 of the Act of 1995 there is no specific mechanism stipulated but the petitioners have drawn analogy from the DoPT OM dated December 29, 2005 which in clause 15 stipulates the mechanism or modality by which the seats have to be distributed amongst all the three categories enlisted under the Act of 1995. He states, the Medical Council of India has already recognized the course of MDs suitable for the persons with locomotor disabilities therefore in no circumstances, the respondents could have deprived the petitioners the benefit of Section 39 of the Act. He states, educational institutions are bound to reserve 3% seats every time, when they advertise the seats for fresh admissions. He states, since the seats are fixed in number, they are advertised every year and the courses have fixed duration, therefore the DoPT OM will not be applicable to implement Section 39 of the Act.

6. It is his case that the petitioners will be entitled to seats and are entitled to be called for counseling and admission to the said course for the session 2016-19. He would rely upon the judgments of the Supreme Court in the cases of *Mahesh Gupta and ors v. Yashwant Kumar Ahriwar and ors Civil Appeal No. 3984/2007 decided on August 30,*

2007; Union of India vs. National Federation of the Blind & Ors (2013) 2 SCC 772 and All Kerala Parents Association v. State of Kerala 2003 (2) WLN 692 in support of his contentions.

7. Mr. Mohinder J.S. Rupal would submit that 62 seats need to be divided 50% each under the All India quota and the Delhi University quota. Hence, 31 seats were earmarked for All India quota. He states, that the bulletin of information also clarified that reservation both vertical, horizontal and compartmental shall be done as per the roster maintained. He states, that the first seat shall be earmarked for PWD if there are 33 seats but since there were only 31 seats available this year, hence the admission committee could not reserve any seat for PWD. All the seats have been filled and the last cut off date for admission was November 30, 2016. The petitioners have also resorted to parallel remedy. He would rely upon the judgment of the Supreme Court in the case of *Saurabh Choudhary vs. Union of India (2003) 11 SCC 146* to contend that in higher degree courses the merit has to be given preference. He states that the petitioners cannot challenge the applicability of the roster when they themselves had relied upon the office memorandum dated December 29, 2005. He relies upon the judgment of the Supreme Court in the case of *Rajesh Kumar Daria vs. Rajasthan Public Service Commission, Civil Appeal No. 3132/2007 decided on July 18, 2007 [2007 (8) SCC 785]*.

8. Having heard the learned counsel for the parties, the question needs to be decided whether the petitioners were entitled to be called for counseling and need to be admitted in

the said course.

9. Insofar as the issue whether there exist 66 or 62 seats is concerned, it is the case of the respondents that the Department of Ayush had sanctioned only 62 seats. If that be so, the said figure need to be taken as the final figure against which the admissions could be made. There is also no dispute that 50% of the seats were meant to be filled through All India quota and the other 50% through Delhi quota. It is also not in dispute that the petitioners had sought admission against All India quota and they belong to the OBC category.

10. Mr. Rupal may be right in stating that the bulletin of information has clarified that both vertical and horizontal reservation shall be effected as per the roster maintained. This stand of the respondents frustrate the very intent of Sections 33 / 39 of the Act of 1995 and is contrary to the judgment of the Supreme Court in ***Union of India v. National Federation of the Blind and ors. (supra)***, wherein, in para 48, the Supreme Court in unequivocal terms has held that the reservation policy stipulated in the Act of 1995 is a vacancy based reservation.

11. That apart, the University's own communication dated July 6, 2015, para 3 thereof inter-alia stipulates 3% reservation may be calculated on the total number of seats available for admission in a particular College/Institution/Department and in a particular year. However, the implementation of this reservation will be course wise. Regrettably, the short counter-affidavit of the respondents does not make a reference to this communication. Be

that as it may, the OM dated December 29, 2005, wherein the Ministry of Personal, Public Grievance and Pensions referred to maintenance of roster cannot be invoked to frustrate the very mandate of Sections 33 / 39. If the number of vacancies in a particular year enables the horizontal reservation of 3% for PWD candidates can be computed/granted, the same must be given effect to. It is an obligation on the part of the University of Delhi being a creature of statute to give effect to the mandate of Sections 33 / 39 and not to defeat the same. As I have already stated that the figure of 31 need to be taken as the final figure, against which admissions need to be made against All India quota, and 3% thereof being 0.93% and by adopting the principle of rounding off, one vacancy should have been reserved for person with disability. In this regard reference be made to the Judgment of the Supreme Court in the case of ***State of UP and Anr. v. Pawan Kumar Tiwari and Ors., Civil Appeal No. 4079/2005*** decided by the Supreme Court on 4th January, 2005 wherein the Supreme Court has held *“the Rule of rounding off based on logic and common sense is if part is one and a half or more, its value shall increase to one and if part is less than half then its value shall be ignored”*.

12. Insofar as the plea of Mr. Rupal that the petitioners belong to OBC category for which there are only 8 seats available, hence, no seat can be reserved under PWD category is also unsustainable. The eighth seat (against the eight seats meant for OBC candidates) should have been filled by a person belonging PWD category. It is not the case of the respondents that out of the 8 reserved for OBC category candidates, one seat has already

been filled on merit by a candidate, belonging to PWD category.

13. This I say so, in view of the judgment of the Supreme Court in the case of **Rajesh Kumar Daria** (*supra*), on which reliance was placed by Mr. Rupal. The relevant paras (from SCC), I reproduce as under:-

“8. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be : "For SC : 30 posts, of which 9 posts are for women". We find that many a time this is wrongly described thus : "For SC : 21 posts for men and 9 posts for women, in all 30 posts". Obviously, there is, and there can be, no reservation category of 'male' or 'men'.

9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indira Sawhney (Supra), R. K. Sabharwal

vs. State of Punjab (1995 (2) SCC 745), Union of India vs. Virpal Singh Chauhan (1995 (6) SCC 684 and Ritesh R. Sah vs. Dr. Y. L. Yamul (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example :

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SCwoman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC

candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.] (emphasis supplied by this Court)''.

14. Translating the above position of law to the facts of this case, 7 candidates who are above the petitioners in merit and belonging to OBC category shall be adjusted against 7 seats and the eighth seat, if no OBC candidate belonging to PWD category has been selected within the seven seats, one of the petitioners, who is high in merit, should have been given the eighth seat. This has not been done.

15. Now the question would arise, what relief can be granted to the petitioners, in view of the stand of the respondents that the last cut off date for admission was November 30, 2016 and the petitioners have not impleaded the last selectee as a party respondent in the present petition.

16. In view of my discussion above, the only relief that can be granted at this stage is the respondents, shall, reserve one extra seat for OBC candidate belonging to PWD category over and above, to be reserved against the vacancies to be sanctioned in the next academic year and shall grant admission to one of the petitioners who is high in merit.

17. The petition is disposed of as allowed to the extent stated above with cost quantified at Rs.25,000/- to be paid by the respondents equally (Rs.12,500/- each) to the petitioners.

CM No. 40202/2016

Dismissed as infructuous.

V. KAMESWAR RAO, J

DECEMBER 15, 2016

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