

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6975 of 2005

For Approval and Signature:

HON'BLE MS.JUSTICE H.N.DEVANI

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

PRITI AGARWAL

Versus

GOVERNMENT COLLEGE BHAVNAGAR

Appearance:

1. Special Civil Application No. 6975 of 2005
MR CL SONI for Petitioner No. 1-2
MR DIPEN DESAI, AGP for Respondent No. 1,8
DS AFF.NOT FILED (N) for Respondent No. 2
NOTICE SERVED BY DS for Respondent No. 3-4,7,9
MR GM JOSHI for Respondent No. 5-6
MR MITUL K SHELAT for Respondent No. 10
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CORAM : HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 25/05/2005

C.A.V. ORAL JUDGEMENT

1. By this petition, the petitioners seek the following principal reliefs :

- (A) be pleased to admit and allow this petition ;
- (B) be pleased to quash and set aside the action of the respondent of deciding to fill in the seats of P.G.Medical Course of All India quota reverted to the state in the respondent college by applying roster by issuing suitable writ, direction and/or order under Article 226 of the Constitution of India;
- (C) be pleased to direct the respondent to fill in the seats of P.G.Medical Course of All India quota reverted to the state in the respondent college only from the open category/general category on merit by reshuffling the entire allotment of seats of the said quota and further direct the respondent to allot the seats to the petitioners on such reshufflement on the basis of their merit by issuing suitable writ, direction and/or order under Article 226 of the constitution of India ;
- (F) be pleased to quash and set aside the action of the respondent in applying roster for reservation to all the seats in P.G.Medical Course without first deducting 50% seats for All India Quota and further quash and set aside the action of the respondent No.1 in earmarking seat in Paediatric subject for SEBC while sending to all India Quota.
- (G) be pleased to hold and declare that the respondent no.1 is required to send one seat in each subject to All India quota if there are more than one seat in such subject by issuing suitable writ, direction and/or order under Article 226 of the Constitution of India.
- (H) be pleased to hold and declare that 50% of total P.G.Seats without any exclusion are required to be sent for All India Quota before applying roster for reservation, by issuing suitable writ, direction and/or order Under Article 226 of the Constitution of India.

(I) be pleased to direct the respondent no.1 to allot the seat in Paediatric subject shown to be reserved for SEBC and sent to All India quota and now reverted to State to the candidate belonging to General Category by issuing suitable writ, order or direction under Article 226 of the Constitution of India.

(J) be pleased to direct the respondent to cancel the admission given on seats in Ophthalmology and Anatomy to SEBC ST Category candidates respectively by issuing suitable writ, direction and/or order under Article 226 of the Constitution of India.

2. The petitioners who have passed their M.B.B.S. Examination in August 2003, have applied for admission to the Post Graduate Medical course in the respondent No.1 Medical College ("respondent College") in March, 2005. In all there are 12 seats to the said course in the said College, out of which 50%, i.e. 6 seats are reserved for the All India quota.

2.1 As per the program of allotment, once a candidate is allotted a seat in the interview, he is required to report and join for admission within 15 days from the date of interview, but not later than 6th April, 2005. It appears that out of the 6 seats reserved for the All India quota, 2 students namely Anju Sarupria and Munish Kumar whose dates of interview were 12th March 2005 and 18th March 2005, respectively, did not join till 6th April 2005, hence, the said two seats (Paediatrics-MD and Anaesthesiology-MD) have reverted back to the State to be filled by local students.

2.2 It is the case of the petitioners that the seats which remain vacant in the All India quota, upon their reverting back to the State are required to be filled by allotting the same to students belonging to the open category. That, three other seats from the All India quota are likely to be available, as the candidates who have been allotted those seats have been accommodated elsewhere.

2.3 It is also the case of the petitioners that the petitioner No.1 and 2, rank 4th and 2nd respectively, in the merit list. That by a communication dated 8th April, 2005, the petitioners had requested the said college to transfer the unfilled All India category seats to the

open category and to place the same on the notice board. That, the petitioners were informed that by virtue of a stay order granted by the Supreme Court, the said seats were not to be filled up. However, on 15th April the petitioners came to know that the State was permitted to fill up the seats. That, the petitioners, therefore, approached the Dean of the respondent College and requested him to fill the said seats from the open category, but were informed that the same would be filled by applying the roster, and that therefore, out of the two seats, one seat would go to the reserved category and will not be available to the general category.

2.4 It is in the aforesaid circumstances, that the petitioners have approached this Court by way of the present petition, challenging the action of the respondent college of filling the seats that have reverted back from the All India Quota to the State as per the roster, and seeking a direction against the respondent college to fill in the said seats from amongst the candidates belonging to the open category, strictly in accordance with merit by reshuffling the entire allotment of seats from number one onwards.

3. Initially, the respondent No.1 college had been impleaded as the sole respondent to the petition. By an order dated 21st April, 2005 notice was issued and by way of ad-interim relief it was directed that admission in PG Medical courses of Paediatrics (MD), Anaesthesiology (MD), General Medicine, MS General Surgery, MS Ophthalmology will be subject to further orders that may be passed by this Court in the present petition. That if any admission is given, the respondent must inform the candidate/student with regard to the same.

3.1 Subsequently by different orders, several other parties were permitted to be impleaded as respondents. In all there are 10 respondents to the present petition.

4. In response to the notice issued by this Court, on behalf of the respondent No.1, the Dean Medical College, Bhavnagar has filed an affidavit in reply dated 27th April, 2005 opposing the petition.

4.1 It has been stated in the said reply affidavit that the petitioners have already been granted admission to the post graduate medical course. That, the petitioner No.1 Dr. Priti Agarwal has been granted admission to the Preventive and Social Medicine (PSM) course and the petitioner No.2 Dr. Deepmala Budhrani has

been granted admission to the Anaesthesia general category seat, out of the seats which had reverted back from the All India quota. That the petitioners having already been granted admission may not be permitted to raise any grievance before this Court.

4.2 It is further stated that by way of a resolution of the Health and Family Welfare department of the Government of Gujarat, a policy has been adopted of implementing the running roster and accordingly, candidates belonging to the reserved category are given admission in accordance with the running roster points. It is stated that roster points are decided as per the said Resolution and accordingly seats are reserved for candidates belonging to the Scheduled Castes/Scheduled Tribes and Socially and Educationally Backward Classes. That the notification dated 17.03.2005, inviting applications for admission to the Post Graduate Medical Courses in the respondent No.1 College, itself provided for the manner in which the roster was to be operated and specified the seats which were reserved for the aforesaid categories.

4.3 It is also stated that as per the decision of the Hon'ble Supreme Court in the case of Saurabh Chaudri and others v. Union of India, 50% of the approved seats for P.G. Course are required to be allocated to the All India quota candidates. That pursuant to the said decision the Directorate General of Health Services (D.G.H.S.) had by a letter dated 7th December, 2004 instructed the Principals/Deans of all the Medical colleges to furnish information about 50% All India quota after excluding the seats validly reserved for the SC/ST etc., to the Directorate.

4.4 That in compliance with the aforesaid instructions the respondent college had allocated 6 seats (50% of the total seats) to the DGHS which are as shown below:

Anatomy Anaes- Medi Ophthal- Padea- Surgery
thetia cine mology trics

General Gen. Gen. Gen. SEBC Gen.

It is further stated that the said exercise was undertaken under the mistaken belief and wrong understanding of the decision of the Hon'ble Supreme Court as well as the instructions received from the

D.G.H.S. That as per the instructions contained in the letter dated 7.2.2005, 50% seats excluding the seats that were reserved for the candidates belonging to the reserved categories were to be allocated to the All India quota candidates. However, by mistake, 50% of the total seats were allocated to the All India quota by the college authorities.

4.5 It is also stated that out of the six seats allocated to the All India quota, admission had been granted to 5 seats; and that the remaining seat i.e. in the subject of Anatomy was not filled up and that the same would be filled in on 3rd May 2005, on reshuffling by the D.G.H.S., and that the said seat had not reverted back to the State quota.

4.6 It is further stated that out of the aforesaid five seats for which admission had been granted by the D.G.H.S., two students namely Anju Sarupria (Paediatrics) and Munish Kumar (Anaesthesiology) did not report for admission, and accordingly the said seats had fallen vacant. That by a letter dated 18th April 2005, the D.G.H.S. had informed that the States are permitted to fill up the seats reverted to them on account of seats of the All India quota having fallen vacant on the selected candidates not having joined the courses.

4.7 It is the case of the respondent college as stated in the reply, that the seats that had fallen vacant on account of non-joining of All India quota candidates had reverted back to the State quota and were required to be filled in by the State. That since the seats which belonged to the reserved category had also been allocated to the All India quota, and the seat in the subject of Paediatrics which originally belonged to the reserved category and was wrongly allocated to the All India quota, upon reverting to the State quota was filled in by applying the roster and accordingly one Mr. Gajjar Jayesh who belongs to the SEBC category, had been given admission against the said seat.

4.8 It is also submitted that if the reliefs as prayed for in the petition are granted, the same would tantamount to reducing the reservation for the SEBC category, as 27% seats are reserved for the said category and that any action changing the percentage of reservation would result in breach of the provisions of the Constitution of India.

5. Mr. Amit M. Panchal, learned Advocate appearing

on behalf of the petitioners, contended that the two seats that have reverted to the State are required to be filled in from the open category of students. It was submitted that as per the law settled by the Hon'ble Supreme Court, 50% of the Post Graduate seats, without any exclusion were to be made available for the All India quota. It was urged that the roster for reservation can be applied to the remaining 50% seats within the State quota only, after deducting 50% seats for the All India quota.

5.1 It was pointed out that the respondent college had first applied the roster point to all the seats and then decided to send 50% seats to the All India quota. That, by applying the roster to all the seats, the seat in respect of the subject of Paediatrics was shown as reserved for ST and SEBC. That, the seat in the subject of Paediatrics, that was shown to be reserved for SEBC as per the roster, was sent to the All India quota. That, once the said seat formed part of the 50% seats meant for the All India quota, the same could not have been shown to be reserved for SEBC. It was, therefore, contended that the respondent college had committed grave error in treating the seat for the subject of Paediatrics as reserved for SEBC though the same was earmarked for the All India quota.

5.2 It was further submitted that the reservation is always applicable to the seats available with the State and cannot be applied to the All India quota. That, 50% clear seats without any reservation from 12 seats were meant for the All India quota, meaning thereby that out of 12 seats, 6 seats were meant for the All India quota, therefore, the roster could not be made applicable to any of the seats of the All India quota.

5.3 It was also submitted that if more than one subject is available in a particular subject, then, 50% of those seats are to be taken into consideration while sending seats to the All India quota. That, if the roster is applied first to all the seats without first deducting 50% seats for the All India quota, then in a given case out of the total subjects, half of the subjects would not be available to the students of All India quota to make a choice out of those subjects. That, therefore, the students would be left with having to make a choice from the remaining subjects only. That the respondents could not have applied the roster to all the seats and could not have reserved both the seats for the subject of paediatrics.

5.4 It was strenuously urged that after allotment of 50% of the total available seats to the All India quota, without any exclusion, only six seats would remain for being filled up by the Bhavnagar University, which ought to have been filled up by moving a single roster point. It was submitted that accordingly, the seats of Anatomy and Ophthalmology belong to the General category but the said seats had been allotted to SEBC and ST category respectively, in the interview held on 20.4.2005.

5.5 The attention of the Court was drawn to the Notice/Circular dated 17th March, 2005 issued by the Dean, inviting applications for admission to the PG Medical Course, and it was submitted that the said notice clearly stipulates that in case the post (seat) reserved for the respective category remains vacant due to non-availability of candidate, it will be filled from the open merit. That, therefore, the respondent could not have acted contrary to the said rule. Attention was also drawn to the admission rules of Gujarat University and South Gujarat University, and it was submitted that the said universities also have similar rules that are being followed by them. That, therefore, the action of the respondent college in deciding to fill the vacant seats of P.G. Medical Course of the All India quota by applying the roster was not in accordance with the rules, and accordingly the respondents may be directed to fill the seats from the open category by reshuffling the entire allotment of seats from merit number one onwards.

5.6 Strong reliance was placed upon the decision of this Court in the case of *Shajul George v. State of Gujarat* reported in 1997(2) GLR 1250 with particular reference to the contents of paragraph 20 thereof, for the proposition that reservation can be made from the seats available for the State quota only after earmarking the seats for the All India quota.

5.7 Learned Counsel, Mr. Panchal also relied upon the order dated 28th February, 2005 passed by the Supreme Court in the case of *Buddhi Prakash Sharma v. Union of India* in Writ Petition (Civil) No.18/2005, wherein it has been observed that the letter dated 7th December 2004, issued by the DGHS shows total non-application of mind. That, it was not in dispute that till 2004-2005, when All India quota of seats was 25%, the number of post graduate seats were worked out on the basis of the total seats without any exclusion, and that the aforesaid letter dated 7.12.2005 requiring the information about the All India quota after excluding the reserved seats had created a mess. The Court directed, that the total

number of Post Graduate seats on All India basis would be 50% of the total seats without any exclusion and the calculation would be done on the same basis which was adopted when All India quota was 25%.

5.8 Learned Counsel submitted that the respondent No.1 had sent the information regarding seats available for the All India quota in pursuance of the instructions contained in the aforesaid letter dated 7.12.2005, hence, the All India quota was required to be earmarked in accordance with the aforesaid directions of the Supreme Court. That, accordingly after earmarking the All India quota as per the aforesaid directions, the seats that have reverted to the State are required to be treated as open seats and filled in by general category students.

6. Mr. Dipen Desai, Learned Assistant Government Pleader reiterated the averments made in the affidavit in reply and submitted that the action taken by the respondent college was in accordance with the rules and was also in consonance with the aforesaid directions of the Hon'ble Supreme Court. The learned Assistant Government Pleader referred to the letter dated 7th December, 2004 issued by the Directorate General of Health Services, whereby the Principal/Dean of the all Government Medical Colleges were requested to furnish information about 50% All India quota seats in various M.C.I. recognized/approved PG courses after excluding the seats validly reserved for SC/ST etc. to the Directorate. It was submitted that at the relevant time, on a wrong understanding of the said instructions, instead of sending 50% seats to the All India quota after excluding the seats reserved for reserved candidates, 50% of the total available seats had been allocated to the All India quota.

6.1 It was submitted that except that one of the seats reserved for the SEBC had been allocated to the All India quota, the remaining seats allocated to the All India quota were in consonance with the directions contained in the aforesaid order dated 28th February 2005, of the Supreme Court, upon which reliance has been placed on behalf of the petitioner.

6.2 Ld. Assistant Government Pleader submitted that upon reversion of a vacant seat to the State, the same would form part of the State quota and was required to be filled in by applying the roster. It was also submitted that the reference to post reserved for the respective category in admission notice dated 17th March 2005, would mean only the posts reserved for candidates belonging to

the SC, ST and SEBC categories, and that the same did not include the All India quota. Hence, in case a post reserved for the respective category, namely, SC, ST or SEBC remained vacant due to non-availability of the candidate, the same was required to be filled from the open merit list. However, the same would not be applicable to seats remaining vacant due to non-availability of candidate in the All India quota as the said seats could in no manner be termed as reserved posts. It was submitted that the term "post reserved" was required to be read in conjunction with the earlier part of the notice wherein the term reserved has been used in the context SC, ST and SEBC categories alone.

6.3 It was submitted that by mistake a seat reserved for the SEBC as per the roster had been allocated to the All India quota, however, upon the same reverting to the State, the same had rightly been filled in by a candidate belonging to the SEBC category. It was submitted that if the said seat is filled up by a general category student as prayed for by the petitioners, the same would tantamount to decreasing the percentage of reservation, which was not permissible in law. It was accordingly submitted that there was no illegality in the action of the respondent college and the petition deserved to be rejected.

7. Learned Counsel Mr. G.M. Joshi appearing on behalf of the respondent No.5, submitted that the roster was declared by the admission notice dated 17th March 2005. That, the petitioners had participated in the admission process, without raising any grievance against the application of the roster, hence, at this stage after admissions to the said seats are concluded, the petitioners cannot be permitted to challenge the same. It was submitted that the term commences on 2nd May, 2005 whereas the petition was filed on 4th May, 2005.

7.1 It was further submitted that the roster points have been made applicable to the Post graduate medical courses by virtue of the government resolution dated 2nd June, 2003. Referring to the Rules governing the appointment of residents at the Government Medical Colleges, it was submitted that admission to PG courses were governed by the said rules and that Rule 23 of the said Rules specifically provides that for giving proper effect to the reservations for the Scheduled caste/scheduled tribes, socially and educationally backward classes etc. prescribed under the said rules, every appointing authority that is Deans of the respective Government Medical colleges in the State of

Gujarat were required to treat the vacancies required to be filled up as reserved or unreserved according to a model roster constituting of 100 points. That, the manner in which the Roster points were to be implemented for the purpose of admission to PG Medical course was provided by the government resolution dated 2nd June, 2003.

7.2 It was further submitted that both the seats meant for M.D. (Paediatrics) were to be filled in by candidates belonging to the ST and SEBC categories respectively. However, the respondent-Dean wrongly sent one seat meant for SEBC to the All India quota. That fortunately, the All India quota candidate who had been admitted to the said seat, had not reported for admission and accordingly the said seat had reverted back to the State and the respondent No.5 had been admitted to the said seat. That, the respondent No.5 had been admitted to the said seat taking into consideration the original position, which was just, legal and proper and did not call for any intervention on the part of this Court.

7.3 Learned Counsel submitted that there were two sources of admission (i) the All India students and (ii) the State or local students. That, insofar as the State quota is concerned, once there is a policy governing admissions in respect of the same; the said policy has to be applied.

7.4 Learned Counsel placed reliance upon the decision rendered by the Supreme Court in the case of Union of India v. R. Rajeshwaran and another, reported in (2003)9 SCC 294. The Supreme Court referred to the decision in the case of Dinesh Kumar (Dr.)(II) v. Motilal Nehru Medical College wherein it was directed that in accordance with the suggestion made in the Scheme by the Government of India, not less than 15% of the total seats in each medical college or institution, without taking into account any reservations validly made, shall be filled on the basis of All India Entrance Examination and held that the same formula must apply also in regard to admissions to the postgraduate courses. It was directed that not less than 25% of the total number of seats without taking into account any reservations, shall be made available for being filled on the basis of All India Entrance Examination.

The Court after referring to the aforesaid observations in Dinesh Kumar's case, went on to say as to how the said scheme would work out in respect of undergraduate course. At the relevant time 15% seats had

been earmarked for the All India quota, and the Court stated that if the State has a total of 100 seats and in that State 15% of the seats are reserved for Schedule Castes and 10% for Scheduled Tribes, the State will fill up 15% seats for Scheduled Caste candidates and 10% for Schedule Tribe candidates, of the remaining 75 seats 60 seats will be filled by the State government as unreserved and 15 seats will be earmarked for the All India quota.

7.5 Learned Counsel, submitted that accordingly first the roster had to be applied and the seats reserved for the SC, ST and SEBC were required to be filled from the State quota and that the remaining seats if any, were to be treated as unreserved category for the State and 50% of the total seats namely 6 seats were required to be allocated to the All India quota. That accordingly if the roster had been operated as contemplated by the aforesaid decision of the Hon'ble Supreme Court, then in the current academic year, namely 20-05-2006 all the six seats in the State quota were required to be filled by candidates belonging to the reserved categories, and the remaining 50% seats were to be allocated to the All India quota. That, the respondent Dean had wrongly allotted a seat belonging to the SEBC category to the All India quota, which fortunately had reverted back to the State and had rightly been filled by a candidate belonging to the SEBC category. Learned Counsel further submitted that in view of the aforesaid decision of the Supreme Court the observation made by this Court in the case of Sharjul George (supra) was no longer good law.

8. Learned Counsel, Mr. Mitul Shelat submitted that the respondent No.6, whom he represents, had been given admission as per the original roster. Learned Counsel referred to the order dated 28th February, 2005 of the Supreme Court in the case of Buddhi Prakash Sharma (supra), and pointed out that the Supreme Court had directed that the total number of Post Graduate seats on All India basis would be 50% of the total seats without any exclusion and the calculation of seats would be done on the same basis as was adopted when All India quota was 25%. It was submitted that as to how the calculation was done for the said 25%, the same was as laid down in the case of Union of India v. R. Rajeshwaran (supra).

8.1 Learned Counsel submitted that if today the roster is changed, the same would cause irreparable injury and destroy the scheme.

8.2 It was further submitted that as the petitioner

had participated in the admission process and been admitted to the PG Course, it was not open to the petitioner to challenge the same.

8.3 It was submitted that rights has already crystallized in favour of the respondent No.6 and any contrary decision would cause irreparable injury to the respondent No.6. The decision in the case of Ashok Chand Singhvi v. Jodhpur University, reported in AIR 1989 SC 823, was relied upon for the proposition that assuming that the respondent No.6 was admitted by mistake, there was no fault on his part, hence, he should not be made to suffer for the mistake committed by the Dean.

8.4 Finally it was urged that no relief should be granted which would upset the admission granted to the respondents.

9. Learned Counsel, Mr. Panchal, in rejoinder, again referred to the aforesaid order dated 28th February, 2005 of the Supreme Court and submitted that the under the said order the total number of Post Graduate seats on All India basis was 50% of the total seats without any exclusion, hence, insofar as the respondent college is concerned reservation could be applied to only 50% of the total 12 seats, i.e. to 6 seats. That, therefore, the respondent college had gravely erred in applying reservation to all the 12 seats and thereafter earmarking the All India seats, which affected the rights of the general category students like the petitioners.

9.1 It was further submitted that the reference to "respective category" in the admission notice dated 17th March, 2005 would include the All India category, and that, therefore, even as per the Rules applicable to the respondent college, the seats remaining vacant due to non-availability of candidates, were required to be filled from the open merit list. It was further submitted that the intent to include the All India quota seats within the meaning of the term "respective category" was also borne out upon reading the admission rules of the respondent college along with the rules of the Gujarat University as well as the South Gujarat University which clearly provided that in case the seats earmarked for All India quota remain unfilled because of non-availability of candidates, the same would be treated as open seats.

9.2 Lastly learned Counsel placed reliance upon the decision of the Supreme Court in the case of Medical

Council of India v. Madhu Singh reported in (2002) 7 SCC 258, with special reference to paragraph 23 thereof, wherein it has been held that there is a necessity for specifically providing the time schedule for the course and fixing the period during which admissions can take place, making it clear that no admission can be granted after the scheduled date, which essentially should be the date for the commencement of the course. Referring to clause (iv) of paragraph 23 of the said decision, wherein the MCI has been directed to ensure that the examining bodies fix a time schedule specifying the duration of the course, the date of commencement of the course and the last date of admission, it was urged that the last date of admission is 31st May, 2005 after which no reshuffling is permissible, hence, the petitioners could still be given their choice of seats after calculating the seats for All India quota in accordance with the directions of the Supreme Court in the aforesaid order dated 28th February, 2005.

10. By the notice dated 17th March 2005, issued by the Dean, Medical College, Bhavnagar, applications were invited from Registered Medical Graduates for full term first year residencies at the Medical College, Bhavnagar & Sir T. Hospital for the term commencing from 1st May 2005. The notice itself specifies the subjects in respect of the residencies as follows:

Ana- Anaes- Medi- Ophthal. Paedia. Surg. PSM
thesia cine

Gen. SEBC Gen. Gen. ST SEBC Gen.
Gen. Gen. Gen. ST SEBC Gen Gen

The said notice specifies that (50% seats are for local students and 50% for All India students excluding the seats validly reserved for SC/ST/SEBC) are subject to change as per the direction of the Govt./MCI/DGHS.

11.1 The said notice further provides that the Candidates applying for reserved posts should super scribe "FOR RESERVED POST" on the top of their application. That, if reserved category candidates also want to be considered for appointment on open merit he/she should also submit separate application in the open merit category. It is also stated that "In case the post reserved for the respective category remain vacant due to non-availability of the candidate, it will be filled from open merit list."

11.2 It appears that prior to the issuance of the aforesaid notice, the Directorate General of Health Services, (Medical Examination Cell), had by a circular dated 7th December, 2004 informed that as per the 'Scheme' approved and devised by Hon'ble Supreme Court of India the allotment of seats by personal appearance of the candidates for admission against PG (Medical) courses in different specialities under 50% All India Quota 2005 will start from 3.3.2005. That allotment of PG seats in MD/MS & Diploma courses will be based on the information provided by participating Colleges in All India Quota Scheme. After referring to the decision of the Supreme Court in the case of Saurabh Choudhri and Ors. V. Union of India it was stated as follows:

"Therefore, to comply with the directions of the Hon'ble Supreme Court, it has been decided by the Ministry of Health and FW/Dte.GHS to allocate All India Quota candidates against 50% instead of 25% of the total MD/MS & Diploma seats of each Govt. Medical/Dental College on the basis of All India PG Entrance Examination from the session 2005.

You are, therefore now requested to furnish the information about 50% All India Quota seats in various M.C.I. recognized/approved PG courses after excluding the seats validly reserved for SC/ST etc. to this Directorate."

11.3 It appears that the Dean of the respondent No.1 college, misunderstood the aforesaid directions, and instead of calculating the 50% All India quota seats after excluding the seats validly reserved for the SC/ST etc. allocated 50% of the total seats to the All India quota.

11.4 It appears that the Supreme Court by an order dated 21st February, 2005 passed in Writ Petition (Civil) No.18 of 2005 in the case of Buddhi Prakash Sharma v. Union of India (supra), directed the D.G.H.S. to send a communication to the Chief Secretaries of all the States and Union Territories to furnish information to the D.G.H.S. as to total number of seats in Postgraduate courses if worked out on the basis of fifty per cent of the total number of seats without any exclusion. The Secretaries were directed to furnish the requisite information to the D.G.H.S. by 24th February 2005. It was directed that the matter be listed on 28th February 2005.

11.5 The Supreme Court by its order dated 28th February 2005, in the aforesaid proceedings found that the resultant effect of the letter dated 17th December 2004 issued by the D.G.H.S. was to reduce the seats of All India quota further from 25% downwards instead of 25% being increased to 50%. That the letter dated 17th December 2004, requiring information about 50% of All India quota after excluding the reserved seats had created a mess. Finally it was directed that the total number of Post Graduate seats on All India basis would be 50% of the total number of seats without any exclusion and the calculation of seats would be done on the same basis which was adopted when All India quota was 25%.

11.6 It is an undisputed fact that in pursuance to the said admission notice, the petitioners has submitted applications for admission to the Post Graduate medical course to the respondent college. That, the petitioner No.1 has been admitted to the Preventive and Social Medicine course and the petitioner No.2 has been admitted to the Anaesthesia course against the general category seat which had reverted back from the All India quota. Thus, initially neither of the petitioners has made any grievance against the reservation of seats for the SC/ST/SEBC candidates as per the roster from the total available seats and had participated in the admission process.

11.7 Initially when the petition was filed, the relief prayed for was to direct the respondent to fill in the seats of P.G. Medical Course of All India quota reverted to the state in the respondent college only from the open category/general category on merit by reshuffling the entire allotment of seats of the said quota and to allot seats to the petitioners on such reshufflement on the basis of their merit. However, later on by moving an amendment to the petition, the scope of the petition was expanded and the application of the roster to all the seats without first deducting 50% seats for All India quota was challenged. A declaration to the effect that if there is more than one seat in each subject, the respondent No.1 was required to send one seat in each subject to the All India quota was also sought. A further declaration was sought to the effect that the seat in Paediatrics subject shown to be reserved for SEBC and sent to the All India quota and now reverted to the State be declared to be a general category seat. Last but not least, a direction was sought against the respondent No.1 to cancel admission given on the seats in ophthalmology and Anatomy to SEBC and ST category candidates respectively.

12. In the backdrop of the aforesaid facts, the first and foremost issue that arises is as to how the 50% seats for the All India quota are to be allocated. The Supreme Court by its aforesaid order dated 28th February 2005 has directed that the total number of Post Graduate seats on All India basis would be 50% of the total number of seats without any exclusion and the calculation of seats would be done on the same basis which was adopted when All India quota was 25%. Therefore, the basis that was adopted when the All India quota was 25% would be required to be looked into.

12.1 In this regard it would be appropriate to refer to certain observations made by the Supreme Court in the case of Dinesh Kumar (Supra) which are as follows:

"We would direct, in accordance with the suggestion made in the Scheme by the Government of India, that not less than 15 per cent of the total number of seats in each medical college or institution, without taking into account any reservations validly made, shall be filled on the basis of All India Entrance Examination. This new formula is in our opinion fair and just and brings about real equality of opportunity in admissions to the MBBS/BDS course without placing the students in one State in an advantageous or disadvantageous position as compared to the students in another State. The same formula must apply also in regard to admissions to the postgraduate courses and instead of making available for admission on all-India 50 per cent of the open seats after taking into account any reservations validly made, we would direct that not less than 25 per cent of the total number of seats without taking into account any reservations, shall be made available for being filled on the basis of All India Entrance Examination. This suggestion of the Government of India deserves to be accepted and the objection to it must be overruled."

12.2 The Supreme Court in the case of Union of India v. R. Rajeshwaran (supra) observed that the question of 15% of the total seats being made available for admission to MBBS or BDS course without taking into account any reservation made by the State Government was considered in Dinesh Kumar's case. After referring to paragraph 5

of the said decision, the Court observed as follows:

"7. In respect of undergraduate course, the scheme works out like this. If a State has a total of 100 seats and in that State 15% of the seats are reserved for Scheduled Castes and 10% for Scheduled Tribes, the State will fill up 15% seats for Scheduled Caste candidates and 10% for Scheduled Tribe candidates, of the remaining 75 seats 60 seats will be filled by the State Government as unreserved and 15 seats will be earmarked for the all-India quota."

12.3 Applying the aforesaid decision, to the facts of the present case, in order to allocate 50% seats for All India quota, firstly the State would be required to fill up the seats reserved for the Scheduled Castes, the Scheduled Tribes and the Socially and Educationally Backward Classes in accordance with the specified percentage. Admissions to the Post Graduate Medical courses are to be given as per the roster prescribed by the State Government in its Health and Family Welfare Department Resolution dated 2nd June 2003. Under the said government resolution, the Government of Gujarat has prescribed a 100 point roster of all the seats to be filled in by candidates belonging to the reserved category for the purpose of admission to PG Medical Course. Thus, seats are arranged in accordance with the roster points prescribed by the aforesaid government resolution. Hence, as per the aforesaid scheme as worked out by the Supreme Court, firstly the roster would be required to be operated and the seats reserved for the aforesaid reserved categories would be required to be filled in. Since the percentage of reservation in respect of the various categories are 7% for SC, 15% for ST and 27% for SEBC, the question of the same being in excess of 50% would not arise. Therefore, after operating the roster, if any seats covering the 50% reserved for the State quota remain, the same would be required to be filled by the State Government as unreserved and the remaining 50% would be earmarked for the All India quota.

12.4 Thus, out of the 12 PG Medical seats available at the relevant time, if the roster had been applied, six seats, one seat each for the subjects of Anatomy, Anaesthesia, Ophthalmology and Surgery and both the seats in the subject of Paediatrics were required to be filled by candidates belonging to the reserved categories and

the remaining six seats comprising 50% of the total available seats were required to be earmarked for the All India quota. However, it appears that by mistake the seat in the subject of Paediatrics, reserved for SEBC had been earmarked for the All India quota, accordingly, the number of seats reserved for the aforesaid reserved categories had been reduced by one seat.

12.5 As can be seen from the record of the case, the Dean of the respondent NO.1 college, had misconstrued the directions contained in the letter dated 17th December 2004 issued by the D.G.H.S., hence, the mess which was created in case of other colleges was not created in the case of the respondent college, and except for the aforesaid error in earmarking a seat meant for SEBC category for the All India quota, the remaining seats allocated to the All India quota were in order. Therefore, the reliance placed on behalf of the petitioners upon the order dated 28th February, 2005 passed by the Supreme Court, is misconceived and does not take the case of the petitioners any further.

12.6 Moreover, in view of the specific observations of the Supreme Court in the case of Union of India v. R. Rajeshwaran (supra) as regards how the scheme for determining the number of seats which should be made available for admission on the basis of All India Entrance Examination is to be worked out, the reliance placed by the learned Counsel for the petitioners upon the earlier decision of this Court in the case of Sharjul George (supra), which takes a contrary view, also does not take the case of the petitioner any further.

13. From the facts of the case, it is apparent that there was a bonafide mistake in earmarking a seat meant for SEBC candidate against the All India quota. Hence, upon the said seat reverting back to the State quota, the same had rightly been allotted to the respondent No.6, he being an SEBC candidate.

13.1 The assertion made on behalf of the petitioners that as per the notice dated 17th March 2005, in case the post reserved for the respective category remain vacant due to non-availability of the candidate, it will be filled from open merit list, the post remaining vacant because of non availability of All India quota candidate is also required to be filled in from the open category, also appears to be misconceived. On a plain reading of the provision, in conjunction with the other provisions of the notice, it is apparent that the term respective category is used with reference to the reserved category

candidates alone.

13.2 From the Scheme of allotment of seats, it is evident that there are two sources for admission, one from the State Quota and the other from the All India quota. In case any seat remains vacant from the All India quota, the same would revert back to the State Quota and would form part of the common pool, which would be required to be filled in like any other seat earmarked for State students. Accordingly the roster would be required to be applied qua the said reverted seats also. In so far as the application of the roster is concerned the same would be to the extent of the 50% seats reserved in favour of the State students and the balance 50% seats would be earmarked for the All India quota.

13.3 The Supreme Court in the case of NTR University of Health Sciences v. G. Babu Rajendra Prasad reported in (2003) 5 SCC 350 has held that Articles 15 and 16 of the Constitution of India provide for enabling provisions. By reason thereof the State would be entitled to either adopt a policy decision or make laws providing for reservations. How and in what manner the reservations are made is a matter of policy decision of the State. Such policy decision normally would not be open to challenge subject to its passing the test of reasonableness.

By virtue of the Government Resolution dated 2nd June, 2003 the Government of Gujarat has prescribed a 100 point roster for admission to the post graduate medical course, and accordingly, the same has been implemented by the respondent-college.

13.4 In the case of R.K. Sabharwal v. State of Punjab, the Supreme Court had observed that when the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed. It was further observed that no general category candidate can be appointed against a slot in the roster reserved for the Backward caste.

Applying the aforesaid decision to the facts of the present case, as the seat for the subject of Paediatrics has been reserved for the SEBC candidate in the roster, the same cannot be filled in by a general category candidate.

13.5 Moreover, if anyone can be said to be aggrieved

by the manner in which the seats have been earmarked for the All India quota, it would be the students who have passed the All India Entrance Examination. The petitioners, who belong to the State category, cannot be heard to make any grievance as regards the allocation of seats to the All India quota, merely because some of the seats have reverted to the State and are to be filled by local students. Moreover, the petitioners having participated in the admission process without demur, are now estopped from challenging the same. Accordingly, the petitioners are not entitled to claim the reliefs prayed for vide paragraph 10 (F), (G) (H)(I) and (J) of the petition.

14. The petitioners have also placed reliance upon the rules of the Gujarat University and the Veer Narmad South Gujarat University in support of their contention that the seats that remain vacant because of non-availability of the All India quota candidates are to be treated as open seats. However, while doing so the petitioners appear to have lost sight of the fact that Rule 2.0 of the said rules provide that as per the directive of the Hon'ble Supreme Court of India, 50% of the total available open merit seats in any academic year in various post graduate degree and diploma courses in each subject will be filled up on the basis of "All India competitive entrance examination for admission to postgraduate medical courses (M.D./M.S. Diploma)"

Thus, it appears that the said Universities have provided for earmarking 50% of the total available open merit seats for the All India quota, which presupposes that the said seats would be earmarked after excluding the seats validly reserved for the SC/ST and SEBC candidates. Hence, the said Rules do not take the case of the petitioners any further.

14.1 It is true that as per the directives issued by the Hon'ble Apex Court from time to time, the seats reserved for the reserved categories have to be covered by the seats from the State quota, and all the seats earmarked for the All India quota would be of the open/general category. However, on the facts of the present case, it is evident that due to an error on the part of the respondent No.1 Dean, a seat earmarked for the SEBC category had been allocated to the All India quota. However, upon reverting of the said seat to the State quota, the same was filled by a SEBC candidate. It is nobody's case that by filling up the said seat by an SEBC candidate, the percentage of reservation has exceeded the prescribed limit or that there is a breach

of the roster point. Hence, if a bonafide error on the part of the authorities has been corrected in the present set of facts, no fault can be found on the part of the authorities in doing so.

14.2 In the aforesaid facts and circumstances, the contention of the petitioners that the roster cannot be applied to seats of the All India quota of the PG Medical Course, that have reverted to the State due to non-availability of candidate, and that, the same are required to be filled only from the open/general category is not tenable and is liable to be rejected.

15. In the result the petition fails and the same is accordingly rejected. Rule is discharged with no order as to costs.

[Ms. H.N.Devani, J.]
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