

OF JAMMU AND KASHMIR AT JAMMU

Case : LPA (OW) 24/ 2007

Date of decision: 31-5-2007.

Dr Mir G R Wali Vs State and others..

Coram:

HON'BLE MR. JUSTICE VIRENDER SINGH, JUDGE
HON'BLE MR. JUSTICE Y.P.NARGOTRA, JUDGE

Appearing counsel :

For Petitioner(s)/appellants : M/s Z A Shah, Sr Adv with
Mr. Vipin Gandotra, Advocate

For the respondents/Caveator. Mrs S. Hakim, Dy Adv General for
respondents No.1 & 5.

Mr. D.C. Raina, Sr Advocate with Mr. F A
Natnoo, Adv for respondents No.2 to 4,
Mr. Sunil Sethi, Advocate with Miss Veenu
Gupta, Adv for respondent No.9.

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| i) Whether to be reported in Press/Journal/Media: | YES |
| ii) Whether to be reported in Digest/Journal: | YES |

PER NARGOTRA, J

This letters Patent Appeal is directed against the order dated 25-5-2007 passed by the learned Single Judge of this Court in OWP No. 365/ 2007 filed by respondent No.9 Dr. Nishu whereby the selection of the appellant Dr. Mir G R Wali for PG Diploma Course in Dermatology, in Govt Medical College, Jammu in reserved category, has been quashed.

Brief narration of the relevant facts is that pursuant to the Notification issued by the J&K Board of Professional Entrance Examination (hereinafter called BPPEE) an entrance examination of the



cluded in which the merit obtained by the writ petitioner /respondent No.9, the appellant and private respondents No. 6 to 8 as per the select list was as follows:-

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| S.No.8- Writ Petitioner Dr. Nishu | 202 marks |
| S.No.10- Resp.No.6 Dr.Nuzha-tun-Nissa | 202 marks |
| S.No.23-Resp.No.7 Dr.Umar Yaseen | 193 marks |
| S.No.36-Resp.No.8 Dr.Sayed Shahab-Ud-Din | 189 marks |
| S.No.43-Appellant Dr. Mir G.R.Wali | 187 marks |

One Vikrant Gupta, RBA candidate also obtained 207 Marks.

The writ petitioner/ respondent No.9 and respondents No. 6 & 7 had applied in open Merit category while respondent no.8 and the appellant were the reserved category candidates. The selection was to be made in respect of 21 Disciplines/ streams for 237 seats available in Government Medical College, Srinagar, Government Medical College, Jammu and Sher-e-Kashmir Institute of Medical Sciences, Srinagar, out of which as per the rule of reservation envisaged by clause 7 of the Brochure of BPPEE, 154 seats were in Open category and 83 seats stood reserved for the benefit of candidates of reserved categories, in the ratio of 65% : 35% respectively.

In the discipline/stream of Dermatology there were only four seats available, two in Government Medical College, Srinagar and two in Government Medical College, Jammu.

It is not in dispute that for striking a balance in the distribution of seats out of 21 available disciplines to the open category and

out of the four available seats in the Dermatology stream, BPEE earmarked three seats for open category and one seat for Reserved Category.

Ordinarily going by the merit in between the above mentioned candidates that firstly three open merit seats should have gone to the writ petitioner, Respondent Nos. 6 & 7 namely Dr. Nishu, Dr. Nissa, Dr. Umar Yaseen respectively while the fourth Reserved seat to respondent Vikrant Gupta but it could not be so because Vikrant Gupta in (RBA) Reserved Category had obtained 207 marks in entrance examination and therefore, was to be considered in open merit category seat in terms of Rule 17 of the Jammu and Kashmir Reservation Rules, 2005 (hereinafter called the rules).

Under the Rule 17, the effect of high merit of Vikrant Gupta was that though he was a reserved category candidate yet was to be selected against an open merit category seat and as such was entitled to the allocation of such discipline/stream/college allocable to him on the basis of his merit in the open category or in the alternative to the discipline/stream/college for which he would have exercised the option while being in his respective category. Restriction of choice in open category alone to such reserved category candidate on getting selected in open category could not be legally insisted upon so as to avoid his merit being converted into demerit.

In Ritesh R.Sah V. Dr. Y.L.Yamul and others, reported as (1996) 3 SCC 253, the Hon^{ble} Supreme Court had held-

☞.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

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. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category should be considered and they be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate へへめ

When Vikrant Gupta got selected against open category seat as per his merit position in that category he could have opted for the discipline/stream/college available in the order of his preferences given by him in his application form. Undisputedly he would have got only the discipline/stream of Dermatology in Govt. Medical College Jammu. Whereas in terms of Rule 17 as per his merit in the Reserved Category he could have opted for any available discipline in reserve category out of his given preferences. Out of his preferences one was

stream Radio Diagnosis Govt. Medical College, Jammu. There were in all two seats in that stream available out of which one was for Reserved Category. Therefore, in view of his merit he could choose the same and accordingly it was allotted to him.

Now the stream/discipline/college which Vikrant Gupta could have got in open merit category which was Dermatology in Government Medical College, Jammu because of his opting for the discipline of Radio Diagnosis, Government Medical College, Jammu from the reserved category, got shifted to and became available in Reserved Category. And as Vikram Gupta was out of the Reserved Category so the seat becoming available on his moving to open category was to be utilized for the next reserved category candidate as per his merit.

So far so good.

As already said there were three seats available for open category and one seat for reserve category in the stream of Dermatology. Against the sole reserve seat one candidate next in merit in the category after Vikrant Gupta was to be adjusted. Such candidate being Sayed Shahab-ud-Din was entitled to get that seat and accordingly was adjusted against that reserved seat by BPEE. However, BPEE considering one more seat to have become available due to the shifting of the stream/discipline/college which Vikrant Gupta would have got in open category if he had opted for the same, was given to the appellant who was next in queue in reserved category and thereby the number of open seats in the said stream has come to be reduced to two from three. In this way the appellant and respondent

reserved category candidate have consumed two seats of Dermatology stream in Government Medical College, Jammu.

Being aggrieved of the allocation of the seat in the discipline of Dermatology to the appellant, the writ petitioner/respondent No.9 a candidate of open category filed the writ petition claiming that out of four seats in Dermatology, the number of seats in open category could not validly be reduced to two from three and number of seats in reserved category be increased to two from one. If the number of available seats in open category would have remained three out of four available seats then the writ petitioner would have got the same as per her merit and the appellant would have been ousted.

Learned Writ Court has allowed the writ petition observing:-

Respondents 2 to 4 in their reply have admitted that in the discipline of Dermatology, four seats were available and in terms of Rule 15 of the Rules, three seats were required to be filled up from open merit category and one from the reserved category. Two candidates have been admitted in the discipline of Dermatology from Open merit category in Government Medical College, Srinagar. One candidate namely Nuzhatun Nisa was having 202 marks and the other candidate namely Ummer Yaseen was having 193 marks whereas two candidates namely Syed Shahbu Din and Mir GR Wali have been admitted in Government Medical College, Jammu in the discipline of Dermatology securing 189 and 187 marks respectively in the reserved category. As per the admitted position by the respondents, only three seats in the open category are to be allocated in the discipline of Dermatology and one seat is to be allocated to the reserved category,

Vikrant Gupta originally gave his preference in the discipline of Dermatology but subsequently when he came in open merit category, he opted for Radio Diagnosis as his first choice, therefore, as per Rule 17 of the rules, the same seat vacated by Vikrant Gupta is to be occupied only by a reserved category candidate. In the reserved category, respondent No.8 Syed Shahbu Din Dukukhari is to occupy the said seat in the discipline of Dermatology. Respondent Nos.2 to 4 erroneously and illegally have allocated the seat to respondent No.9 and this has been done in violation of mandate of Rule 17 of the rules. Respondent authorities have to strike a balance for maintaining the ratio of 65: 35 between the Open and Reserved category candidates. When there are only three seats in the Open Category, then out of that one cannot be allocated to reserved category. ॐ

The principle question arising for consideration before us is;

Whether by shifting of the discipline/ stream/ college i.e. Dermatology in Government Medical College, Jammu which Vikrant Gupta would have got if he had opted for the same while being in open category, to the reserved category, a fresh seat in other sense the second seat became available for allocation to a reserved category candidate or not.”

The contention of Mr. Z.A.Shah, Learned Counsel for the appellant is that: -

(a) first situation could be out of four seats available three in open could be filled as per merit by the candidates writ petitioner, Nuzhatun Nisa Respondent No.6 and Umar

Yaseen Respondent No.7 whereas the reserved seat would have gone to Vikrant Gupta.

(b) 2nd situation; Vikrant Gupta as per his merit going to open category and opting for Dermatology Government Medical College, Jammu, then Umar Yaseen Respondent No.7 would be out so far as Dermatology is concerned. And reserved seat vacated by Vikrant Gupta would have gone to Shahab-Ud-Din, Respondent No.8.

(c) third situation; Vikrant Gupta not opting for Dermatology Government Medical College, Jammu and choosing Radio Diagnosis from Reserved bouquet and in its place Dermatology Government Medical College, Jammu gets shifted in Reserved bouquet and thus two seats in Dermatology become available in Reserved bouquet. So the number of seats available in reserved category gets increased to two and therefore reserved category candidate the appellant being next in merit to respondent No.8 would get the same.

For appreciating the contention of Mr. Shah, it is necessary to examine the scope of reservation and rule of shifting of a reserved category candidate to open category.

with the distribution of seats. It reads: -

Distribution of seats-

For the post-graduate courses in MD/MS/M.Tech, Engineering and Agricultural Sciences and similar other postgraduate courses, the seats shall be distributed as follows with the condition that the selection of candidates from the reserved categories for different streams shall be made strictly on the basis of their inter-se merit, treating them as a single class for purpose of allotment of streams: -

| | | |
|------|--|-----|
| (i) | Open Merit Category | 65% |
| (ii) | Reserved Categories: | |
| | (a) Scheduled Caste | 4% |
| | (b) Scheduled Tribe | 5% |
| | (c) Socially and Educationally Backward Classes:- | |
| | (i) Residents of Backward Areas | 10% |
| | (ii) Residents of Area Adjoining Actual Line of Control | 2% |
| | (iii) Weak and Under Privileged Classes (Social Castes) | 1% |
| | (d) Children of Defence Personnel/Para-military Forces and State Police Personnel | 2% |
| | (e) Candidates possessing Outstanding Proficiency in Sports | 1% |
| | (f) Open merit category candidates other than those selected under item (i) above who have served for a minimum period of 5 years in Rural Areas | 10% |

From the bare reading of the above rule, it is manifest that out of the total seats available 65% are to go to open merit category and 35% to reserved category.

There are in all 21 disciplines/streams available. So in one selection 21 disciplines/streams have to be distributed to the open

and category Seats which are in the ratio of 65% and 35 respectively. Keeping in view the ratio BPEE allocated three seats to open category and one seat to reserved category in the stream of Dermatology out of the four seats in all available; two in Government Medical College Jammu and two in Government Medical College, Srinagar.

Rule 17 deals with the allotment of discipline. It reads:-

7. Allotment of discipline etc.:

A reserved category candidate, if selected against the Open Merit seat, may be considered for allotment of discipline/stream/college allocable to him in his respective category on the basis of his merit and preference. The resultant discipline/stream/college in the Open Merit category shall be allotted to the reserved category candidate who gets selected consequent upon the reserved category candidate getting selected in the Open Merit Category.

From the rule it is significant to note that it does not speak of allocation of seats in open category or reserved category, but refers only to shifting of discipline/stream/college. Thus, in the event of a reserved category candidate who has moved to open category and opted for a stream/discipline/college available in reserved category, what is shifted to reserved category is not the seat but the stream/discipline/college which he would have got in the open category. The number of seats available in the open category and reserved category remaining the same fixed as per the ratio of 65% : 35%.

Therefore, for a candidate in reserved category the choice of discipline/stream/college would be reduced by one stream for having been consumed by the candidate shifted to open merit from reserved

category would get added up to the streams available and thereby total number of streams/ discipline available in the categories remains the same. Therefore, the candidate who comes next in merit to such candidate would have respective availability of choice substituted. It would therefore be incorrect to assume that there would be an additional seat in reserved category in the stream added up..

On the moving of Vikrant Gupta from the reserved category to open merit category and on his choosing Radio diagnosis available as a choice stream in reserved category for the candidates in reserved category who comes to be selected in his place on merit, a substituted left over choice made available by Vikram Gupta would also become available to him. This in our view cannot be an addition to the seats available for reserved category.

Suppose instead of Dermatology in Government Medical College, Jammu Vikrant Gupta as per his merit position in open merit would have got Anesthesia stream in Government Medical College, Srinagar available in open category choices what would have been available to the candidate next in the merit in reserved category, in our considered view, for making a choice, it would be the same which was available to Vikrant Gupta in that category and there would not be any shifting of the stream.

Therefore, Respondent No.7 being next in merit to Vikrant Gupta was to fill the vacancy in reserved category caused by the shifting of Vikrant Gupta to open category. For him he would have the choice of discipline/ stream of Dermatology in Govt Medical College, Jammu in place of already existing choice in the stream of

other available choices in that stream, when he opted for discipline/ stream/ College i.e Dermatology, Govt Medical College, Jammu the one seat reserved for reserved category in the stream of Dermatology, Govt Medical College, Jammu got consumed, leaving three seats in Dermatology, one in GMC Jammu and two in GMC, Srinagar open for open category, which as per merit position could go to the writ petitioner and respondent Nos 6 & 7. The appellant in any case, shall not be entitled to any of the four seats in Dermatology. He would get only that seat to which he otherwise would have been entitled to as per his merit and preference.

As a sequel to the afore-said discussion, the net result now surfaces is that view already taken by the learned Single Judge does not suffer from any illegality calling for our interference.

Thus, the instant appeal fails being devoid of merit and therefore dismissed alongwith connected CMPs.

Copy of the judgment be furnished to the learned counsel for the parties by the Private Secretary of this Court forthwith.

Sd/-

Sd/-

(Y.P. NARGOTRA) (VIRENDER SINGH)
JUDGE JUDGE

JAMMU

31-5-2007

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