HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP No. 572/2014
c/w
OWP No. 575 /2014
CMA No. 764/2014

Date of Decision: 16.09.2014

Omer Bashir Itoo **vs.** **State and ors.**

Coram:
Hon'ble Mr. Justice Janak Raj Kotwal, Judge

Appearing counsel:

For petitioner (s): Mr. S. K. Shukla, Adv.
For respondent(s): Mr. Sunil Sethi, Sr. Adv. with
Ms. Veenu Gupta, Adv.
Mr. M. A. Goni, Sr. Adv. with
Mr. Ajay Singh Kotwal, Adv.
Mr. Pranav Kohli, Adv.
Mr. P. N. Raina, Sr. Adv. with
Mr. J. A. Hamal, Adv.
Ms. Sindhu Sharma, Adv.

(i) Whether to be reported in Press, Journal/Media: Yes/No
(ii) Whether to be reported in Journal/Digest: Yes/No

1. Respondent No. 2, 'Acharya Shri Chandra College of Medical Science and Hospital', (for short the College) is a ***Minority unaided Professional Education Institution*** in the State of Jammu and Kashmir. It imparts Medical Education at Graduate and Post Graduate level. The College is competent to grant admission under Non Resident Indians Quota (for short the NRI quota) up to

15 per cent of its total sanctioned intake both at Graduate and Post Graduate level.

2. The College vide its No. Assoc/CET/M&D/205 dated 11.02.2014 issued Admission Notice calling applications from eligible candidates for admission to two seats under the NRI quota in MS/MD courses, one each in General Surgery and Anaesthesia, for Academic Session, 2014-2015. The College uploaded the application form alongwith brochure laying down the conditions for the 'NRI/NRI Wards seats'. Last date of receipt of applications was fixed as 07.03.2014. Clause 4 of the brochure laid down the eligibility for admission under the NRI quota.

3. The Advertisement Notice/brochure also provided that selection under the NRI quota will be based on merit obtained in a Common Entrance Test to be conducted by Association of Private Unaided Medical and Dental Colleges of Jammu and Kashmir and that applicants will have to appear in and qualify the test with aggregate 50 per cent marks to be eligible for selection in order of merit.

4. Petitioner submitted his application form claiming to be the son of NRI father, Dr. Bashir Ahmad Itoo, working at the Royal Hospital/Muscat/Sultanate of

Oman. Besides the petitioner, seven other candidates, including Shagun Mahajan and Jeevitesh Khoda (respondent Nos. 3 and 4 of OWP No. 572/2014) and Misbah Tabassum (respondent No. 4 of OWP No. 575/2014), submitted their application forms.

5. After the Common Entrance Test, the College published its result notifying the four candidates who succeeded in securing more than 50 per cent marks. Respondent, Shagun Mahajan, with 116 merit points, ranked 1st Jeevitesh Khoda, with 107 merit points, ranked 2nd and respondent, Misbah Tabassum, with 105 merit points, ranked 3rd . Petitioner, having obtained 102 merit points, ranked 4th. The College in the first instance vide Admission Notification No. ASCOMS/FS/NRI/501 dated 18.04.2014, while notifying the names of the four candidates having secured the qualifying marks, granted admission to respondents, Shagun Mahajan and Jeevitesh Khoda figuring at serial Nos. 1 and 2 and called them for joining the course. Shagun Mahajan was allotted MS, Surgery and Jeevitesh Khoda MD, Anaesthesia.

6. Feeling aggrieved by the grant of admission to respondents, Shagun Mahajan and Jeevitesh Khoda, petitioner filed OWP No. 572/2014 alleging mainly and *inter alia* that neither of them was eligible to seek consideration under NRI/NRI Wards quota. He alleged

that the father of respondent, Shagun Mahajan, is a Doctor in Medicines, presently posted as Professor and Head, Department of Medicines, Government Medical College, Jammu. He also contended that she has not annexed with her application form any order of a competent court appointing an NRI as her guardian. As regards respondent, Jeevitesh Khoda, petitioner alleged that he is son of the Ex Director General of Police, presently the Chief Vigilance Commissioner of Jammu and Kashmir State and was neither an NRI nor a ward of an NRI. Petitioner also alleged that even Misbah Tabassum, figuring at rank position 3rd is neither daughter of any NRI nor any NRI is appointed her guardian. Petitioner thus contended that he was the only eligible candidate having qualified under the NRI quota but has been denied admission to illegally accommodate the private respondents.

7. When OWP No. 572/2014 came up before the Court on 25.04.2014, respondent, Jeevitesh Khoda, voluntarily appeared before the Court and stated that he was not interested in taking admission in the College and has moved application to the Director, Principal of the College that seat may be given to some other candidate. Moreover, the College in its reply also informed that respondent, Jeevitesh Khoda,

did not join and the College has selected the candidate falling next in order of merit, namely, Misbah Tabassum, against the seat for MD Anaesthesia. The College stated further in its reply that the eligibility criteria indicated in the brochure was reconsidered and amended criteria adopted in a meeting held on 04.03.2014, which was notified by displaying on notice board of the College. The College alongwith its reply also produced minutes of the meeting held on 04.03.2014, whereby the eligibility criteria were changed by adding clause 4.2. to the brochure. In this changed scenario, petitioner filed OWP No. 575/2014 alleging mainly and *inter alia* that respondent, Misbah Tabassum, too was not eligible under NRI quota. He alleged that Misbah Tabassum is daughter of Dr. A. Q. Salaria, who is working as Consultant Orthopedics in the respondent College and none of her blood relatives is an NRI.

8. Petitioner, thus:

I. By the medium of OWP No. 572/2014 seeks issue of writ order or direction in the nature of certiorari to quash Admission Notification No. ASCOMS/FS/NRI/501 dated 18.10.2014, whereby respondents, Shagun Mahajan and Misbah Tabassum have been selected for admission to MD/MS courses in General Surgery and Anaesthesia under NRI category ,

II. Writ order or direction in the nature of mandamus declaring respondents Shagun Mahajan and Misbah Tabassum as ineligible for seeking admission under NRI quota and

III. Writ order or direction in the nature of mandamus directing respondent No. 2 (the College) to admit the petitioner to MD Anaesthesia course under NRI quota.

Besides, in OWP No. 575/2014 petitioner seeks:

I. Writ order or direction in the nature of Certiorari quashing communication issued by the respondent College vide No. ASCOMS/FS/504/PG/4699 dated 04.03.2014, whereby eligibility criteria was changed and

II. Mandamus directing the respondent Nos. 2 and 3 to pay exemplary compensation of ten lac rupees to the petitioner for putting him to unnecessary and uncalled for litigation.

9. Before taking up the respective pleas of the parties, contentions raised at bar and the legal issues raised in these writ petitions, I may refer to para 131 of the seven-Judge Bench decision in P. A. Inamdar v State of Maharashtra, (2005) 6 SCC 537, where the Supreme Court have accorded formal recognition to admission under NRI quota in private educational institutions and have laid down the broader norms for admission under this quota. Issues for consideration of this Court in this case have been raised and discussed on the touchstone of the norms laid down by the Supreme Court in P. A. Inamdar. As the observations made by the Supreme Court in para 131 would guide in resolving the issues raised in these petitions, the same is reproduced verbatim:

"***NRI seats***

131. Here itself we are inclined to deal with the question as to seats allocated for Non-Resident Indians ('NRI', for short) or NRI seats. It is common knowledge that some of the institutions grant admissions to a certain number of students under such quota by charging a higher amount of fee. In fact, the term 'NRI' in relation to admissions is a misnomer. By and large, we have noticed in cases after cases coming to this Court, neither the students who get admissions under this category nor their parents are NRIs. In effect and reality, under this category, less meritorious students, but who can afford to bring more money, get admission. During the course of hearing, it was pointed out that a limited number of such seats should be made available as the money brought by such students admitted against NRI quota enables the educational institutions to strengthen their level of education and also to enlarge its educational activities. It was also pointed out that people of Indian origin, who have migrated to other countries, have a desire to bring back their children to their own country as they not only get education but also get reunited with Indian cultural ethos by virtue of being here. They also wish the money which they would be spending elsewhere on education of their children should rather reach their own motherland. A limited reservation of such seats, not exceeding 15%, in our opinion, may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seats should be utilized *bona fide* by NRIs only and for their children or wards. Secondly, within this quota, merit should not be given a complete go-by. The amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well-defined criteria, the educational institution may admit on subsidized payment of their fee. To prevent misutilization of such quota or any malpractice referable to NRI quota seats, suitable legislation or regulation needs

> to be framed. So long as the State does not do it, it will be for the Committees constituted pursuant to the direction in Islamic Academy to regulate."
>
> (Emphasis provided)

10. The three categories of candidates, who can be granted admission under the NRI quota, recognized by the Supreme Court in P. A. Inamdar are:

i) NRI himself/herself,

ii) Children of the NRIs and

iii) 'Wards' of the NRIs

These three categories were similarity reflected in clause 4.1 under the heading 'ELIGIBILITY' in the brochure issued by the College though the College also imposed a condition that the person claiming as a 'ward', must fall within the definition of 'ward' and must have a 'Guardian' appointed by the court. I hereby reproduce clause 4 given in the brochure:

"4. **ELIGIBILITY**

4.1 Any candidate who himself/herself is NRI or whose parents are NRI is eligible to apply for admission to MD/MS Courses under NRI category.

Any candidate who claims to be a **ward** of the NRI is also eligible to apply provided that he/she falls within the definition of **"WARD"**.

> **"WARD MEANS"** Only that person who has a guardian appointed by the Court to take care for and take responsibility of that person."

The brochure, however, did not make it clear as to which definition of 'Ward' a candidate should satisfy.

11. It is stated by the College in its reply that the eligibility criteria given in the brochure was reconsidered and amended criteria was adopted in a meeting held on 04.03.2014, which was notified by displaying on notice board of the College. The College alongwith its reply has produced minutes of the meeting held on 04.03.2014, whereby Clause 4.2 was added to the "ELIGIBILITY" clause of the brochure, which stands reproduced above. Clause 4.2, which, as per the College, came to be added to the brochure, pursuant to a decision taken by College in a meeting held on 04.03.2014 reads:

> "NRI financially supporting the candidate must be a blood relative such as Father, Mother, Brother, Sister, Uncle, Aunt only."

12. Contextually, I now refer to and take note of the stand of the College and the private respondents, Shagun Mahajan and Misbah Tabassum, as under which category of NRI quota the private respondents have

been granted the admission. This should be looked into primarily in the reply filed by the College and in addition in the reply filed by the two private respondents. Respondent, Shagun Mahajan, hereafter shall be referred to as respondent No. 3 and Misbah Tabassum shall be referred to as respondent No. 4.

13. It is seen that College in its reply to both the petitions has not stated it clearly as to which category of the NRI quota respondents 3 and 4 had satisfied. The wide and disjointed stand taken by the College is that respondents 3 and 4 have been granted admission in accordance with the criteria indicated in the brochure including the amended criteria adopted in the meeting held on 04.03.2014.

14. It is not disputed that neither respondent No. 3 nor respondent No. 4 is herself an NRI or daughter of NRI. They, therefore, could have been granted admission either in capacity as wards of NRIs as provided in para 131 of P. A. Inamdar or in capacity as a candidates financially supported by an NRIs as provided under Clause 4.2 incorporated in the brochure by way of the amendment. The College would have done better by being clear than obscure on this point.

15. In backdrop of the obscurity shown by the College, clarity, however, is available in the reply filed by

respondents 3 and 4. The explicit stand taken by respondent No. 3 (Shagun Mahajan) in her reply filed in OWP No. 572/2014 (as she is a party respondent in OWP No. 572/2014 only) is that her admission falls in the category of candidates financially supported by an NRI in blood relation and is covered under clause 4.2 of the brochure. I may reproduce the relevant portion of her reply contained in para 5 (a):

> "…. That it is further submitted that eligibility criteria i.e. S. 4. 2 clearly states that NRI financially supporting the candidate must be a blood relative such as father, mother, brother, sister, uncle and aunt only. Since the answering respondent's uncle who is a NRI has given an undertaking that he hereby undertakes the responsibility of his niece and further undertake to pay the fee as would be determined by the competent authority under NRI quota and further he would be fully responsible for providing total financial support including all expenses of the answering respondent and will bear the same. Therefore the answering respondent having fulfilled the eligibility criteria has been rightly selected on the basis of her high merit in the common entrance test."

16. The respondent No. 4 (Misbah Tabassum), however, seems claiming benefit both under Clause 4.1 and 4.2 of the brochure claiming both as a ward of and being financially supported by her NRI father-in-law. She states in her para wise reply that she 'has married to Sh. Nawaf Khurshid Sheikh son of Sh. Khurshid Ahmad Sheikh, a resident of Sabia, Sector Al-Manha Jazan, Saudi Arabia. Here marriage took place on 07.12.2013,

much prior to issuance of the admission notice by the College. She has produced copies of the 'Nikhanama' and marriage certificate issued by Auqaf Islamic, Forum. Factum of marriage has not been disputed by the petitioner. Ever since her marriage, she is being maintained and is under the guardianship of her husband and father-in-law and the answering respondent's father-in-law has sponsored the answering respondent's candidature'. Again, in para 4 (a) she states that 'the answering respondent has fully complied with eligibility criteria i.e. Clause-iv. The answering respondent is under the guardianship of her father-in-law ever since her marriage. It is submitted that the father in law of the answering respondent is competent to sponsor/undertake in accordance with the eligibility criteria and there is no legal impediment in the same. Even the constructive interpretation of the eligibility criteria it is evident that there is no prohibition for a father-in-law to sponsor his daughter-in-law in accordance with the eligibility criteria. It needs to be stated that the petitioner has not contradicted the factual stand taken by the private respondents.

17. The issues, thus, arising for consideration are:

i **whether respondent No. 3 (Shagun Mahajan), having been assured financial support by her real**

uncle for undergoing the post graduate course, is and was eligible for admission under NRI quota as per the norms laid down in P. A. Inamdar?

ii whether respondent No. 4 (Misbah Tabassum), being sponsored/financially supported by her father-in-law, is and was eligible for admission under NRI quota as per the norms laid down in P. A. Inamdar?

iii whether Clause 4.2 subsequently added to the brochure by respondent College is in conformity with the norms laid down in P. A. Inamdar?

18. Following points would emerge and may be noticed on reading and rereading of para 131 of the Supreme Court judgment in P. A. Inamdar:

a) Supreme Court recognized that some private educational institutions grant admission to a certain number of students under NRI quota by charging higher amount of fee.

b) Supreme Court was of the view that the term 'NRI' in relation to admissions is a misnomer and that in the experience of the Supreme Court neither the students who get admission under this Category nor their parents are NRIs.

c) Supreme Court was of the view that under NRI category, less meritorious students, who can afford to bring more money, get admission.

d) Supreme Court seems to have entertained the contention raised at bar that a limited number of seats under NRI quota should be made available to the management for the reason that money brought by such students enables the educational institutions to strengthen their level of education and to enlarge their educational activities.

e) **Supreme Court seems to have entertained also the contention that the NRIs, have a desire to bring back their children to their own country, not only to get education but also to get reunited with the Indian cultural ethos by virtue of being here and that the NRIs also wish the money, which they would be spending elsewhere on education of their children, should rather reach their own mother land.**

f) **Having pointed out the reality behind the misnamed NRI quota and found substance in the purpose behind allowing such quota, the Supreme Court favoured a limited reservation, not exceeding 15% of sanctioned seats, to be made available for the NRIs, however, depending on the discretion of the management.**

g) **Supreme Court, however, imposed two conditions on grant of admission under the NRI quota, firstly, that such seats should be utilized bona fide by NRIs only and for their children or wards and secondly, that within this quota, merit should not be given complete go by.**

h) **Supreme Court also directed that the money collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution may admit on subsidized payment of their fee.**

19. As pointed out above, respondents 3 and 4 are not NRIs themselves. They are not even the children of the NRIs. Respondent No. 3 (Shagun Mahajan) undisputedly is daughter of a person, who is working as a Doctor at a high level in Government Medical College, Jammu. Respondent No. 3 has not denied the petitioner's contention that her father is a doctor and posted as Professor and Head, Department of

Medicines in Government Medical College, Jammu. It may be pointed out that this contention of the petitioner averred in para 4 of the petition has not been specifically denied by the respondent in her objections to the petition in OWP No. 572. It is a settled principle of the law of pleadings that an averment made by a party is expected to be specifically denied by the replying party. If there is no specific denial, then such averment is deemed to have been admitted by the respondent. Likewise, respondent No. 4(Misbah Tabassum) undisputedly is daughter of a Consultant Orthopedics working in the respondent College.

20. Main plank of the submissions made by Mr. S. K. Shukla, learned counsel for the petitioner, is that, respondents 3 and 4 being neither NRIs nor children of NRIs, their admission under NRI quota would justify only if they satisfy the category of 'wards' of NRIs, which however, they do not. Mr. Shukla would say that the entity of a 'ward' is synonymous with existence of a guardian appointed by a court. A 'ward' will not come into being until and unless there is an appointed guardian of the person claiming to be the 'ward'. Mr. Shukla would thus say that the College initially had correctly given the meaning of the 'ward' eligible for admission under NRI quota in the

brochure. However, in order to deliberately accommodate respondents 3 and 4 and to deprive the petitioner of his legitimate right, the College added clause 4.2 to expand the relationship between 'ward' and guardian to the relationship of a candidate and his NRI sponsor. Mr. Shukla urged to say that clause 4.2 was added in papers only and by so doing the College created a 4th category of eligibility under NRI quota in addition though contrary to the three categories provided by the Supreme Court in P. A. Inamdar.

21. In relation to the admission of respondent No. 3, Shugan Mahajan, Mr. Shukla submitted that her admission under NRI quota is illegal because she does not satisfy any of the three categories provided in P. A. Inamdar and that the addition of clause 4.2 in the brochure is contrary to the mandate in P. A. Inamdar. Likewise, as regards respondent No. 4 (Misbah Tabassum), Mr. Shukla submitted that her admission is covered neither under Clause 4.1 nor Clause 4.2 because her father-in-law is not her legally appointed Guardian nor does he fall in the class of blood relatives named in clause 4.2. Mr. Shukla concluded that the College illegally deprived the petitioner of the admission in spite of his being the only eligible candidate, who had qualified under the NRI quota.

22. Per contra, Mr. Sunil Sethi, learned senior advocate, appearing for the College submitted that, the State Government so far has not enacted suitable legislation or framed regulations for regulating admissions under NRI quota so the College was within its right to regulate and lay down the criteria for such admissions. Mr. Sethi would say that, given the purpose for which private institutions have been permitted limited NRI quota, the Supreme Court cannot be said to have limited the scope of the word 'ward' as used in P. A. Inamdar only to the cases where a guardian has been appointed by order of a court. Dilating his point, Mr. Sethi would say that purpose behind admission under NRI quota is to enable the private unaided institutions to generate additional money, which can be utilized for better health of an institution and granting subsidized admission to the students belonging to weaker sections of the society. The concept of a legal guardian, submitted Mr. Sethi, in no case can apply to admission at post graduate level and may not apply even at graduate level because at that stage a student has already attained age of majority and a legal guardian for him would not exist. If the concept of appointment of legal guardian is strictly applied to the admission under NRI quota, the private institutions would practically be deprived of their legally recognized right to grant admission under this quota

to generate funds for betterment of the institutions and students of weaker sections as no student having a legally appointed guardian may be available. For harmonious application of all the points referred to and noticed by the Supreme Court in P. A. Inamdar, Mr. Sethi submitted, benefit under NRI 'wards' category should be extended to all those candidates whose education expenses are borne by their NRI blood relatives. It was in this backdrop, Mr. Sethi submitted, that the management of the College redefined the meaning of word 'ward' by extending its scope to the persons financially supported by a blood relative like Father, Mother, Sister, Brother, Uncle, Aunt only.

23. Mr. Sethi, thus, sought to justify the admission of respondent No. 3 under Clause 4.2 because of having been financially supported by her NRI paternal uncle. Mr. Sethi also justified admission of respondent No. 4 both under Clause 4.1 and 4.2 being a ward of her father-in-law. In this context, Mr. Sethi referred to undisputed factual position that the husband of respondent No. 4, Nawab Khurshid Sheikh, had also applied to the respondent College under the NRI quota but he could not make it having failed to secure minimum 50% qualifying marks in the written examination. Mr. Sethi thus submitted that

respondent No. 4 and her husband are both financially dependent on the NRI father-in-law of respondent No. 4 so respondent No. 4 was eligible for the benefit as 'ward' of her NRI father-in-law as his dependant. As regards refusal of admission to the petitioner, who figured at rank position 4th in the qualifying test, Mr. Sethi submitted that emphasis in P. A. Inamdar is also on the merit and the selected respondents, having secured higher rank in the common entrance test than the petitioner, the latter could not have been preferred over the former.

24. Mr. P. N. Raina, learned senior advocate appearing for respondent No. 3(Shagun Mahajan) supported by Ms. Sindhu Sharma, advocate first of all pointed out and emphasized that change in eligibility criteria incorporated vide Clause 4.2 of the brochure is not under challenge in OWP No. 572/2014 in which alone the admission of respondent No. 3 has been assailed so she cannot be deprived of the benefit accruing under Clause 4.2. Mr. Raina too countered the contention that a 'ward' as provided under P. A. Inamdar must have a Guardian appointed by the court making submissions similar to those made by Mr. Sethi. Mr. Raina, while tracing the history of, what he called, the absolute right of private institutions in running and laying down criteria for admission to the

private educational institutions, starting from the judgment in famous T.M. A. Pai Foundation, submitted that the private unaided institutions have absolute right to regulate admissions to these institutions, common thread, however, being the merit. Mr. Raina thus concluded that respondent College was within its right to lay down and redefine the meaning of word 'ward' as provided in P. A. Inamdar by adding clause 4.2 to eligibility criteria in the brochure. Admission of respondent No. 3, submitted Mr. Raina, is squarely covered under Clause 4.2 as her NRI uncle shall be providing the finances for undergoing the course.

25. Mr. Aslam Goni, learned senior advocate, appearing for respondent No. 4(Misbah Tabassum) supported by Mr. Pranav Kohli, advocate submitted that respondent No. 4 is financially dependent on her NRI father-in-law as her husband too is a student and financially dependent on her NRI father. Respondent No. 4 therefore, cannot be deprived of the status of being a dependant and 'ward' of her father-in-law and question of appointment of her father-in-law as her guardian does not arise as she has entered his family only by way of her marriage to his son at a time when she had already attained the age of majority. Mr. Pranav Kohli, painstakingly sought to demonstrate the concept of a person being dependent for education

purpose on a member of his family, other than his/her father or mother and being treated as a 'ward' of that person for the purpose of admission under NRI quota. In support of his argument, Mr. Kohli referred to and relied upon a judgment dated 27.09.2010 rendered by a Division Bench of the Gujarat High Court in Bhavi Vipulkumar Shah v. State of Gujarat, Special Civil Application No. 9079 of 2010.

26. The common thread in the submissions made at bar by the learned counsel appearing for the respondents is that in relation to NRI quota the 'ward' as provided in P. A. Inamdar cannot in all cases mean a person who has a guardian appointed by a court and I, having accorded anxious consideration to the rival contentions, feel persuaded to take the same view.

27. Idea of having a guardian, in relation to seeking admission as 'ward' of an NRI under NRI quota will be imaginary only, when it comes to admission in Professional Education Institutions at post graduate level because by that time a candidate has since attained the age of majority. Even at graduation level, the idea of having appointed guardian may not apply in majority of the cases. Under the Guardians and Wards Act, a guardian is appointed in relation to a minor. A minor under that Act read with the Majority Act, is a person not having attained the age of

majority, that is, 18 years. Experience would show that in the present era of cutthroat competition, majority of the candidates cross the age of 18 even by the time of their seeking admission in professional colleges at graduation level (like MBBS/BDS BE/B Tech etc.) and in any case age of majority is attained by the time of seeking admission at post graduate level (like MS/MD/M. Tech.). To say that 'ward' in relation to admission under NRI quota to professional colleges should be a person who has a guardian appointed by a court would render superfluous the category of 'wards' of NRIs as envisaged in P. A. Inamdar.

28. Contextually, it would not be wholly correct to suggest that in law entity of a 'ward' is wholly synonymous with existence of a guardian appointed by a court or that a 'ward' will not come into being until and unless there is a guardian appointed for the person claiming to be the 'ward'. In law the concept of a guardian of a person does exist even independent of his having been appointed as guardian by a court. For example, father or mother is the natural guardian of a minor and husband is natural guardian of his minor wife. There may be a testamentary guardian appointed by a natural guardian. It, therefore, would not be correct to say that the Supreme Court in P. A. Inamdar has envisaged that 'Ward' for the purpose of admission

under NRI quota would be one for whom an NRI has been appointed as a guardian by the court.

29. The important question, however, would be, who, other than the NRIs themselves or their children, would be entitled to admission under NRI quota in unaided private Professional Education Institutions. To deal with this question, para 131 of P. A. Inamdar needs to be interpreted harmoniously, reading conjointly the negative as well as the positive aspects of and the purpose behind providing NRI quota as noticed by the Supreme Court. The basic purpose, which can be taken as the purpose from the institutions' point of view, is to enable the institutions to improve their financial position by charging higher fee from the candidates admitted under NRI quota and to strengthen their level of education and enlarge their educational activities and above all to use the funds so generated for the benefit of economically poor candidates by giving them admission on subsidized rates. This purpose can be achieved by the NRIs' money coming in any way. May it be admission to NRI himself, his children, wards or any person who can secure sponsorship and payment of fee by an NRI. Such wideness, however, is not permissible and has rather been disapproved by the Supreme Court.

30. From NRIs' point of view, the purpose of NRI quota is to enable an NRI settled abroad to fulfill his desire of bringing back his children to his own country to get education and to get them reunited with Indian cultural ethos by virtue of being here and also to fulfill his desire that the money which he would be spending elsewhere on education of his child(ren) should rather reach his motherland. Achieving such a purpose, however, would be a farce if the child in question is already residing and getting education in India itself. In that case the situation of the child having been brought back to get him reunited with Indian culture would not arise as the child is already in India. Such a purpose would have relevance only where either the NRI himself is a candidate seeking admission in India or the child studying abroad is intended to be brought back to India for professional education. Such situation, however, may never arise or arise very rarely.

31. The situation that may put together all the aspects and fulfill and reflect the purpose and object of NRI quota envisaged in P. A. Inamdar can be achieved by giving slightly spacious and practical meaning to the word 'ward', though within the parameters laid down by the Supreme Court and not by restricting its meaning to only a person having an NRI guardian appointed by a

court. At the same time the meaning to be given to the word 'ward' cannot be such so as to add a new category of aspirants under NRI quota not envisaged by the Supreme Court. The NRI quota should not and cannot be allowed to be relegated to a source of earning NRI money only. To make the NRI quota workable and meaningful and to harmonize the purpose and requirements envisaged in P. A. Inamdar, the word 'ward' in relation to the NRI quota used therein is required to be interpreted in such a way so that the concept and the underlying purpose are supplemented and not supplanted.

32. Key to the meaning to be given to word 'ward' used by the Supreme Court in P. A. Inamdar can be had from the expression 'such seats should be utilized *bona fide* by NRIs only and for their children or wards' used by the Supreme Court. Besides the purpose envisaged in providing the NRI quota, what is important is that there should be *bona fide* utilization of the quota and within the quota merit must prevail. The use would be *bona fide* if an NRI, besides bearing expenses on education of his own child(ren) or a candidate for whom he has been appointed a guardian, is permitted to sponsor and finance the education of a candidate, providing education to whom is his obligation or who for the purpose of education is dependent upon him.

Cases would not be rare where a person, other than a parent or legally appointed guardian, has social obligation and responsibility for providing education to a candidate or where a candidate is dependent on a person other than his parents. For example, one having lost his father or both the parents, the responsibility of bringing him up and providing him education may be discharged by one of his blood relation or a distant relation. Husband has the responsibility for providing education to his wife. One may be dependent upon his grandparents. Case of a father-in-law having responsibility of providing education to the wife of his son, in particular, unemployed son will also fall in the same category. In all such cases requirement of appointment as guardian cannot be allowed to come in the way of a person in bearing educational expenses of the candidate. It should, therefore, be permissible for an NRI, other than a parent or legally appointed guardian, to sponsor and finance education of a candidate, who is dependent upon him for education purpose or providing education to whom is his social obligation and responsibility. Responsibility or the dependence should be the criteria.

33. In taking the view as above, I can draw support from the 2-Judge Bench Judgment of Gujarat High Court in

Special Civil Application No. 9079 of 2010 (supra) relied upon by Mr. Kohli, learned counsel for the respondent No. 4. In that case petitioner had applied for NRI seat for admission in MBBS/BDS/BPT, having been sponsored by an NRI. It was admitted by petitioner's counsel before the High Court that the sponsor was a cousin brother of petitioner's father. It was stated by petitioner's counsel that there was nothing to suggest that in the past the petitioner was dependent on the sponsor in any manner but the sponsor had undertaken to pay fees for the petitioner for higher education in MBBS course. Petitioner therefore, claimed benefit within the category of NRI dependent candidates.

34. In that case the expression 'dependent of Non-resident Indian for education purpose' as used in the Gujarat Professional Medical Educational Colleges or Institutions (Regulation of admission and fixation of Fees) Act, 2007 came up for interpretation by the Gujarat High Court. This Act seems to have been enacted pursuant to the judgment in P. A. Inamdar. The High Court has referred to the definition of NRI seats given in section 2(i) of this Act which reads:

> "2(i) Non-Resident Indian Seats means fifteen per cent seats reserved for children or wards or the *dependents for the education purpose*, of

> the Non-Resident Indian, to whom admission is to be given in the professional educational colleges or institutions".
>
> (Emphasis supplied)

35. The Division Bench in that case, while referring to P. A. Inamdar, observed that 'prescribing separate quota reserved for Non-Resident Indian students has been recognized by the Apex Court. However, the entire purpose was to make such benefit available to genuine NRI students and not to enlarge the scope to such an extent that even non-genuine students could claim such benefit.'

36. The Division Bench after referring to the meaning of the word 'dependent' in some other Acts and its definition in Black's Law Dictionary, concluded in context of the petitioner of that case, which I reproduce:

> "14. In the present case, petitioner admittedly prior to filling up the form for admission in NRI quota seats never claimed any dependency on her NRI sponsor. It is also not case of the petitioner that the petitioner's parents are not able to pay fees for her higher education. Admittedly, petitioner studied upto 12th Standard without any dependence on the sponsor. Her education and all other expenses have so far been borne by her parents. It is not case of the petitioner that her parents are not able to bear costs for her further education. In short, till she filled up her admission form, the sponsor had provided no

> economic support to the petitioner for her education or for any other purpose."

37. What can be unmistakably inferred is that the Gujarat High Court has endorsed the expansion and application of NRI quota to the dependents for the education purpose of the NRIs.

38. Reference may also be made to the 2- Judge Bench decision of Kerala High Court in Wp(C). No. 14708/2012, Dr. Gowri Raj v. State of Kerala and others dated 18.12.2012 referred to by Mr. Shukla, learned counsel for petitioner. In that case, High Court of Kerala, while dealing with a question in relation to NRI quota arising in a different context, has referred to the Kerala Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Explorative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006 (Act 19 of 2006). This Act too undisputedly has been enacted after the judgment in P. A. Inamdar. High Court of Kerala has referred to the definition of Non-Resident Indian seats given in section 2(o) of that Act as 'a seats reserved for children or wards or dependents of non-resident Indians to whom admission is given by a management in a fair, transparent and a non exploitative manner on the basis of fees as may be

prescribed.' The High Court while observing that 'the State Legislature has widened the scope of NRI seats by including the dependents of NRIs also', apart from providing for children or wards as contemplated in P. A. Inamdar, however, did not deliberate upon the validity of the expansion so made as that question was not raised before the High Court.

39. I would, thus, hold that within the parameters for NRI quota laid down by the Supreme Court in P. A. Inamdar, it would be permissible for a private unaided Professional Education Institution to grant admission under the NRI quota to a candidate who is dependent upon an NRI for the purpose of his education or for whose education, an NRI is responsible, besides the NRI himself or his children. What, however, would be important is that there should be none other more responsible for education of the candidate in question than the NRI sponsoring and financing his case for admission under NRI quota. NRI quota cannot be made available to a candidate simply for the reason that some of his NRI/her relative or blood relative has agreed to provide NRI money only for the purpose of undergoing the course for which the admission is sought.

40. It may be stated, as it is well settled, that the private unaided Professional Education Institutions are entitled to autonomy in administrations of their institutions and in the field of laying down the norms for admission of students but at the same time, they are required to maintain the principle of merit and have no right to maladministration. In P. A. Inamdar, the Supreme Court, while dealing with and laying down the parameters for admission under NRI quota, has suggested that 'to prevent misutilization of such quota or any malpractice referable to NRI quota seats, suitable legislation or regulations needs to be framed' by the States. Supreme Court has further suggested that so long as the State does not do it, it will be for the Committees constituted pursuant to the direction in Islamic Academy, (2003) 6 SCC 481 to regulate.

41. In this case, it is undisputed that the State of Jammu and Kashmir has neither enacted any law nor issued regulations to regulate the admissions under NRI quota. Not even the Committee constituted pursuant to Islamic University, namely, 'Fee Structure Committee' seems to have come forward to regulate the admission, inasmuch as the Committee, when approached by the College in relation to this case, instead of being responsive and stepping forward, showed lack of interest by directing the College to

seek legal opinion from its standing counsel. I may here reproduce the contents of communication No. PS/FSC/282/2014 dated 11.04.2014 written on behalf of the Chairman, Fee Structure Committee to the respondent-College:

> "I am desired to convey that petition of Misbah Tabassum requires legal interpretation of preferential relationship of the candidate seeking admission to the NRI wards. Since Fee Structure Committee constituted by Hon'ble Supreme Court has to maintain a transparent and impartial image and as such cannot act as advisor to any professional institution, I am directed to request you to seek legal opinion from your standing counsel to settle the present request of the petitioner."

42. As neither the State Government has laid down norms to regulate admissions under NRI quota nor the Committee constituted pursuant to Islamic University's case has stepped in, the College was within its right to lay down conditions including the eligibility for admission under NRI quota in the brochure issued alongwith the admission notice. College was also within its right to amend the eligibility clause but the College neither is nor can be permitted to expand the scope of NRI quota beyond the parameters laid down by the Supreme Court in P. A. Inamdar and lay down a category contrary to and far beyond the scope of categories laid down by the Supreme Court. Supreme Court in P. A. Inamdar

clearly did not envisage or indicate a category of NRI sponsored or financially supported candidates to be granted admission under NRI quota. Had the Supreme Court intended to extend the benefit under NRI quota to the persons financially supported by their NRI blood relatives other than the parents, the same could have been clearly mentioned in the judgment. The Supreme Court as a matter of fact in para 131 of P. A. Inamdar had started with observing that under NRI quota generally students who can afford more money get admission and has emphasized the *bona fide* use of the quota. The College, therefore, cannot be said to have acted legally by incorporating clause 4.2 and creating a category of candidates financially supported by their blood relatives, other than father and mother. This tantamount expanding the parameters laid down by the Supreme Court in P. A. Inamdar which is not permissible and cannot be allowed to sustain. As said above, such expansion is permissible only to the extent of an NRI relative on whom a candidate is dependent for education purpose or, having regard to facts of a case, the NRI is responsible for education of the candidate.

43. Having viewed as above, the benefit of NRI quota in the case on hand could not have been made available to respondent No. 3(Shagun Mahajan), even if her

uncle, who is an NRI, has agreed to bear the expenses of her education from NRI money. This is for the reason that respondent No. 3 is daughter of a highly placed Doctor working in a Medical College of the State and neither it is said nor it can be said, either that her father was not able to pay fee for her higher education or that she is dependent on her uncle for the purpose of her education or that the uncle has the responsibility of imparting education to her. This rather is clearly a case of sponsorship/financial support by NRI uncle only to secure a seat under NRI quota, which is not permissible within the parameters of P. A. Inamdar.

44. In relation to respondent No. 3, a contention raised by Mr. P. N. Raina, learned senior advocate, was that Clause 4.2 of the brochure has not been challenged in OWP No. 572/2014 in which alone respondent No. 3 is a party respondent and therefore, benefit accruing under Clause 4.2 would be available to her. Contention of Mr. Raina, however, does not have any substance because it is not Clause 4.1 or Clause 4.2 that matters. What matters is the requirement of the parameters laid down by the Supreme Court in P. A. Inamdar which, however, have been flouted in case of respondent No. 3 as she is not eligible under NRI quota.

45. Benefit under NRI quota, nonetheless, is available to respondent No. 4(Misbah Tabassum) because after her marriage with the son of an NRI, who himself was a student, the respondent has become dependent upon her NRI father-in-law for her education purpose. If respondent No. 4 wants to pursue higher studies, none other than her father-in-law has the first duty to support her financially. To support and finance the higher education of respondent No. 4 is the duty of her father-in-law and admitting her under NRI quota would be *bona fide* utilization of the quota. Such admission can be justified under the category of the NRI wards and question of his appointment as guardian by a court would not arise.

46. In relation to the petitioner, it is seen that he is son of an NRI, which is not disputed. He therefore, was and is eligible for admission under NRI quota. In granting admission to him, there would be no compromise with the merit. This is because he has qualified the written test and was placed at rank position 4th having secured 102 merit points. By denying the admission to the petitioner, the College has acted arbitrarily and seemingly with the intention of accommodating candidate(s) who were not better placed that the

petitioner. The College has thus, infringed the fundamental right of equality of the petitioner.

47. Contextually, it is and it needs to be noticed that as per the notice calling applications, two seats in MS/MD courses, one each in General Surgery and Anaesthesia, were to be filled up under the NRI quota. The application forms received by the College, which are available on the record produced on behalf of the College, would show that respondent No. 3(Shagun Mahajan) had given MS Surgery as her first choice and MD Anaesthesia as second choice. Respondent No. 4(Misbah Tabassum) likewise had given MS Surgery as her first choice and MD Anaesthesia as second choice. Petitioner, however, had given MD Anaesthesia as his first choice and MS Surgery as second choice. As the order of preference given by respondents 3 and 4, who were given the admission, was the same, the College allotted MS Surgery to respondent No. 3(Shagun Mahajan) and MD Anaesthesia to respondent No. 3(Shagun Mahajan). This seems to have been done on the basis of rank position secured in the common entrance test. Had the respondent No. 3 not been granted admission in that case in order of merit MS Surgery would have gone to respondent No. 4 and Anaesthesia to the petitioner.

48. While hearing this case, it was pointed out by the learned counsel for the College/respondent that it any case no relief may be available to the petitioner because it would not be possible to grant admission to the petitioner after the deadline set by the Supreme, that is, after 30th September 2014.The point raised by the learned counsel, however, does not sustain in this case as it is covered under the latest view taken by the Supreme Court in ***Asha v. Pt. B.D. Sharma University of Health Sciences, (2012) 7 SCC 389*** **and I quote the relevant at page 403.**

> "29. However, the question that immediately follows is whether any mid-term admission can be granted after 30th September of the academic year concerned, that being the last date for admissions. The respondents before us have argued with some vehemence that it will amount to a mid-term admission which is impermissible, will result in indiscipline and will cause prejudice to other candidates. Reliance has been placed upon the judgments of this Court in *Medical Council of India* v. *Madhu Singh*11, *Neelu Arora* v. *Union of India*19, *Aman Deep Jaswal* v. *State of Punjab*20, *Medical Council of India* v. *Naina Verma*21 and *Mridul Dhar* v. *Union of India* 22.
>
> 30. There is no doubt that 30th September is the cut-off date. The authorities cannot grant admission beyond the cut-off date which is specifically postulated. But where no fault is attributable to a candidate and she is denied admission for arbitrary reasons, should the cut-off date be permitted to operate as a bar to admission to such students particularly when it would result in complete ruining of the

professional career of a meritorious candidate, is the question we have to answer.

31. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible, we are of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to meritorious students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course. The appellant had attained 832 marks while the students who had attained 821, 792, 752, 740 and 731 marks have already been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission.

32. Though there can be the rarest of rare cases or exceptional circumstances where the courts may have to mould the relief and make exception to the cut-off date of 30th September, but in those cases, the Court must first return a finding that no fault is attributable to the candidate, the candidate has pursued her rights and legal remedies expeditiously without any delay and that there is fault on the part of the authorities and apparent breach of some rules, regulations and principles in the process of selection and grant of admission. Where denial of admission violates the right to equality and equal treatment of the candidate, it would be completely unjust and unfair to deny such exceptional relief to the candidate. (Refer *Arti Sapru* v. *State of J&K*23, *Chhavi Mehrotra* v. *DG, Health Services*24 and *Arvind Kumar Kankane* v. *State of U.P.*25)

33. We must hasten to add at this stage that even if these conditions are satisfied, still, the court would be called upon to decide whether the relief should or should not be granted and, if granted, should it be with or without compensation.

49. As said above, petitioner has been deprived admission arbitrarily and without any fault on his part. Out of the four candidates, who qualified the common entrance test for admission to two seats under NRI quota, petitioner alone was the son of an NRI and therefore, the most *bona fide* claimant. While as the College should have preferred him over the remaining three, unfortunately he alone came to be deprived of the admission. Not only that, petitioner lost no time in pointing out to the College by serving notice through his counsel that the other three candidates were not eligible under NRI quota and was quick in filing the first writ petition immediately after the College granted admission to respondents, Shagun Mahajan and Jeevitesh Khoda in the first instance. Inspite of all that the College seems not to have accorded consideration to his grievance and instead proceeded ahead in granting admission to respondent No. 4 (Misbah Tabassam). Going by ordinary prudence, the College should not have ignored the petitioner. Depriving him relief in these petitions for any reason, whatsoever, would mean nothing less than endorsing and compounding the illegality committed by the College and tilting the scale of justice towards injustice, which cannot be done. The petitioner's case, therefore, falls in that rare category where the cut-off

date, cannot be permitted to operate as a bar to admission to him as that would result in depriving him of the one time opportunity that may ruin his professional career.

50. For the reasons set out and discussed above, these writ petitions deserve to be allowed and are therefore, allowed as:

1. By issue of a **writ of certiorari** selection and admission of respondent No. 3(Shagun Mahajan) vide No. ASCOMS/FS/NRI/501 dated 18.04.2014 pursuant to Admission Notice No. Assoc/CET/M&D/205 dated 11.02.2014 is and stands quashed.

2. By issue of a **writ of mandamus** respondent No. 2, Acharya Shri Chander College of Medical Sciences and Hospital, Jammu, is directed to grant admission to the petitioner under NRI quota pursuant to Admission Notice dated 11.02.2014 (supra). It shall be open to the respondent No. 2 to make readjustment of the streams (General Surgery or Anaesthesia) among the petitioner and respondent No. 4(Misbah Tabassum).

3. Since the admission of the petitioner has been delayed due to act on the part of the respondent College, **by writ of mandamus** the College is further directed to

make arrangement for making up the deficiency accrued to the petitioner due to his late admission.

4. By issue of a **writ of certiorari** eligibility Clause 4.2 of the brochure is quashed.

5. No case for imposing costs as prayed for, however, has been found in the facts and circumstance of the case.

6. Writ petition OWP No. 575/2014 in relation to admission of respondent No. 4(Misbah Tabassum) is dismissed.

Disposed of.

(Janak Raj Kotwal)
Judge

Jammu:
16.09.2014
Rakesh