
(2018) 05 J&K CK 0018
In the Jammu And Kashmir High Court
Case No : OWP NO.927 OF 2018

DR. AKHIL KUMAR GUPTA

APPELLANT

Vs

STATE AND ORS

RESPONDENT

Date of Decision : 14-05-2018

Acts Referred:

Indian Medical Council Act, 1956 — Section 10(D)
J&K Reservation Act, 2004 — Section 9, 9(2)

Citation : (2018) 05 J&K CK 0018

Hon'ble Judges : ALOK ARADHE

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. In this petition, the petitioner, inter alia, seeks writ in the nature of certiorari for quashing the allotment of MD, Anaesthesia seat in favour of

respondent no.5 vide Notification No.31-BOPEE of 2018 dated 07.05.2018 on the ground that the same is in contravention of the Rule 15 of the J&K

Reservation Rules, 2005. The petitioner also seeks a writ of mandamus to allocate one seat of MD either in the discipline of Anaesthesia or any other

clinical discipline out of various seats/disciplines having become vacant due to any reason to the petitioner in view of his merit position as well as being

the member of the RBA category in the future round of counseling to be held on 10.05.2018, 11.05.2018 & 13/05/2018.

2. Facts giving rise to the filing of this writ petition briefly stated are that in the month of October, 2017, National Board of Examination, New Delhi

issued a notification for admission for MD/MS/graduate diploma courses, 2018. The National Eligibility Entrance Test/Post Graduation is the eligibility

cum rank examination which is prescribed as the single entrance examination for

admission to various post graduation courses as per Section 10(D) of the Indian Medical Council Act. The last date of submission of on-line application form from 31.10.2017 to 27.11.2017 and the date for examination was scheduled to be held on 07.01.2018. The results were declared on 31.01.2018. The petitioner admittedly belongs to RBA category and applied for admission to MD/MS and Post Graduate Diploma Courses under the aforesaid category by submitting her application on-line. The petitioner appeared in the entrance examination and the results were declared on 23.01.2018. As per the result card issued to the petitioner, he has been awarded 377 marks and as per the notification issued by Board of Professional Entrance Examination, in the State rank, the name of the petitioner appears at Serial No.748. The respondents 2 to 4 thereafter held that the first round of counseling online, the result thereof was declared vide notification No.28-BOPEE dated 01.05.2018. Since the preference given by the petitioner was not available. However, result of the first round of counseling was declared vide notification No.28-BOPEE of 2018 dated 01.05.2018. The respondents 2 to 4 thereafter issued another notification dated 05.05.2018 directing holding of 2nd round of counseling for allotment of discipline manually by interaction with the candidates, instead of on-line on the ground of internet disturbances. The 2nd round of counseling was held on 07.05.2018 and the result of the same was declared on 07.05.2018 itself. It is the case of the petitioner that in the 2nd round of counseling, a candidate, namely, respondent NO.5 who having the merit rank of 752 has been allotted the seat of MD Anaesthesia in Government Medical College, Srinagar, whereas the petitioner have merit rank of 748 was denied/deprived of allotment of the seat.

3. It is averred in the writ petition that the allotment has been made in contravention of Rule 15 of the J&K Reservation Rules, 2005 for the Post Graduate courses in MD/MS/M Tech., Engineering and Agricultural Sciences and similar other postgraduate courses. It has also been stated that the seat in MD Anesthesia has been allotted to respondent No.5 in contravention of Rule 15 of the J&K Reservation Rules. It is also averred that one seat in MD Anaesthesia is yet to be filled up for which counseling is scheduled to be held on 11.05.2018. In the circumstances aforesaid, the petitioner has approached this Court.

4. Learned Senior Counsel for the petitioner submitted that Rule 15 of the Rules, the reserved category candidate have to be treated as one class and, therefore, if a seat of reserved category falls vacant, the same has to go to the candidates of another reserved category only. It is further submitted that the brochure was published by the respondents after declaration of the result in the month of February, 2018 and Clause 26(VII) which provides that the seats falling vacant under the Scheduled Caste category shall only be allotted to Scheduled Caste category candidates is violative of the Rule 15 of the Rules and in case of conflict between the brochure and the Rules, the Rules have to prevail and brochure is in the nature of administrative instructions. It is also submitted that once the process of admission has commenced, the criteria for selection cannot be changed. In support of his submissions, reference has been made to the Division Bench decision of Srinagar Wing of this Court in LPASW No.22/2018 dated 01.05.2018 as well as Division Bench decision of Gauhati High Court in WPC No.4058 of 2017 dated 25.08.2017. It is also pointed out that Clause 26 (VII) has been challenged by way of separate application. It is further submitted that in case the effect is given to the clauses contained in the information brochure which has been issued subsequent to holding of the examination, the effect of Rule 15 would be diluted and the same would tantamount to negation of merit.Â

5. On the other hand, Mr. Asheesh Singh Kotwal, learned Deputy Advocate General for the respondents 2 to 4 submitted that Rule 15 nowhere prescribes that where the seat under the Scheduled Caste category falls vacant, the same should be allotted to a candidate belonging to another reserved category. Learned Deputy Advocate General while inviting the attention of this Court to third proviso to Section 9 of the J&K Reservation Act, 2004 has submitted that in case the seats in any reserved category which cannot be filled up for want of candidates belonging to that category, shall be filled up from amongst the candidates belonging to the Open Merit category candidates and if as per Section 9 of the Act, the seat in question which belongs to the Scheduled Caste category is kept for Open Merit category candidate, the petitioner would not be selected as the petitioner as secured lower merit than the last selected candidate belonging to the Open Merit category candidate. It is further submitted that Rule 17Â of the

J&K Reservation Rules, 2005 has no application to the fact situation of the case. It is also submitted that the respondents are bound by the selection

procedure stipulated in the advertisement. Lastly, it is urged that since the seat in the Scheduled Caste has fallen vacant, the same shall be allotted to

the next meritorious candidate on the basis of preference under the Scheduled Caste Category and the same cannot be filled up by the RBA Category

candidate. In support of aforesaid submissions, reference has been made to the decision of the Supreme Court in the case of *Bedanga Talukkar v.*

Saifudallah Khan & Ors, AIR 2012 SC 1803.

6. I have considered the submissions made by learned counsel for the parties and have perused the record. Admittedly, the petitioner belongs to RBA

category whereas the respondent No.5 belongs to Scheduled Caste category. It is not in dispute that two posts under the Scheduled Caste category

had fallen vacant. Third proviso to Sub-section(2) of Section 9 of the Act reads as under:

9. Reservation in professional institutions.- (1) The Government shall reserve seats in the Professional Institutions for candidates belonging to

reserved categories and such other classes and categories as may be notified from time to time:

Provided that the total percentage of reservation shall in no case exceed 50%.

(2) The Government shall prescribe the percentage for different courses:

Provided further that 50% of the seats in each category including open category for admission to MBBS and BDS, shall be selected from amongst

female candidates belonging to such category:

Provided also that the seats in any reserved category, which cannot be filled for want of candidates belonging to that category, shall be filled from

amongst the candidates belonging to open merit category.

Relevant extract of Section 15 of the J&K Reservation Rules, 2005 reads as under:

15. 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.

Rule 17 of the J&K Reservation Rules, 2005 reads as under:

17. 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.

7. From perusal of Section 9 of the Act, it is evident that in case any seat in any reserved category which cannot be filled up for want of candidates

belonging to that category shall be filled from amongst the candidates belonging to the Open Merit category. Thus, the reserved category post in case

it is not filled up from that category has to be filled up from Open Merit category. In view of express mandate contained in Section 9 of the Act, which

shall prevail over the provisions of the Rules, it is evident that a post which falls vacant under the Scheduled Caste category cannot be filled up from

the candidate belonging to RBA category, and the petitioner, admittedly, belongs to RBA Category and has secured less marks than the last selected

candidate under the General Category. It is pertinent to mention here that Rule 15 of the Rules provides that candidates from reserved categories

from different streams shall be made strictly on the basis of inter-se merit treating them as a single class for the purpose of allotment of streams. The

candidates belonging to different reserved categories have to be treated as single class for purposes of allotment of stream and no further

subclassification is permissible. The aforesaid Rule does not provide that a seat falling vacant under a particular category can be filled up from a

candidate belonging to another reserved category. The Rule 15 of the Rules is silent with regard to situation whether a seat falling in a particular

category can be filled up from the candidate belonging to the another category. Had the intention of the Legislature being so, it would have said so in

express terms in Rule 15 of the Rules.Â In the absence of any enabling provision in this regard, the claim of the petitioner is not tenable in the eye of

law. For the aforementioned reasons, it is not necessary for this Court to deal with various contentions raised by the learned Senior Counsel for the

petitioner.Â

8. In view of preceding analysis, I do not find any merit in the writ petition.
The same fails and is hereby dismissed along with connected MP.