HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

WP (C) No. 2020/2021
CM Nos. 6681 & 7878/2021

Reserved on : 24.05.2022
Pronounced on : .06.2022

Bhat Ab. Urban Bin I Aftaf & Ors. ...Petitioner(s)

Through:- Mr. Mudasir Bin Hassan, Advocate.

V/s

UT of Jammu and Kashmir and others... Respondent(s)

Through:- Mr. M. A. Chashoo, AAG.

Coram:HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. The petitioners are aggrieved of and have challenged the selection list of NEET- MDS-2021 candidates belonging to UTs of J&K and Ladakh, issued by the Board of Professional Entrance Examination (BOPEE) vide notification No. 100-BOPEE of 2021 dated 03.10.2021 ["the impugned select list"] to the extent it denies the reservation quota in the MDS Course provided for the reserved category of Children of Defence Personal/ Military Forces and State Police Personal ['CDP/JKPM' for short]. The petitioner No.1 claims to be a candidate belonging to CDP/JKPM category being next in order of merit to Dr.Rasiq Mansoor, who, by the dint of his merit, is placed in the general category. The petitioner nos. 2, 3 and 4 are candidates belonging to RBA category. As is stated by learned counsel for the petitioners, petitioner nos. 2, 3 and 4 are allocated the disciplines and have got admission or have otherwise

lost interest to pursue this petition. The petition was, thus, argued for and on behalf of petitioner No.1 only.

2. As per the Provisional merit list of NEET-MDS -2021 of candidates belonging to UTs of J&K and Ladakh, the petitioner No.1 figures at serial No. 52 in the overall merit and would be at serial No.2 in the category of CDP/JKPM, next only to Dr.Rasiq Mansoor. So far as Dr.Rasiq Mansoor is concerned, he figures at serial No.5 of the merit list and, therefore, is in the selection zone in the general category. The grievance of the petitioner is that in terms of the impugned select list, the BOPEE has filled up 41 seats by selection of equal number of candidates for different specialities of MDS Courses but in doing so, the respondents have not given 2% reservation earmarked for CDP/JKPM category. It is submitted that out of 42 seats notified for admission, one seat was allocable to the category of CDP/JKPM. However, no candidate from CDP/JKPM category is selected, therefore, the mandate of reservation provided under the Jammu and Kashmir Reservation Act, 2004 and Rules framed there under, has been violated.

3. The petition is vehemently contested by the BOPEE. It is submitted that after the conduct of entrance examination by the National Board of Examination (NBE) and receipt of result, the BOPEE proceeds further in accordance with Rules for conducting counselling of the candidates and allotment of streams in various disciplines/Colleges. It is submitted that NBE declared the result of NEET PG -MDS-2021 on 30.08.2021 and after receipot of result by the Union Territory of Jammu and Kashmir, online registration of candidates was done and provisional UT List was notified vide notification No.94-BOPEE of 2021 dated 25.09.2021. By a subsequent notification bearing No. 100-BOPEE of 2021 dated 03.10.2021 the provisional select list on the

basis of merit-cum-preferences exercised by the eligible participating candidates in physical round of counselling and by operation of relevant reservation rules for admission to MDS courses in Government Dental College Srinagar (GDC Srinagar) and Indira Gandhi Government Dental College, Jammu (IGDC Jammu) was issued. 14 candidates were recommended for admission in IGDC Jammu whereas 27 candidates were recommended for GDC Srinagar. It is thus submitted that the selected candidates have joined their courses and there is no short fall in any of the aforesaid institutions. The respondent-Board has further pleaded that out of 28 seats available in GDC Srinagar, 14 were filled up from Open Merit, 2 from EWS category and 12 from the reserved categories. Similarly in IGDC Jammu, out of 14 seats available in the College, 7 have been filled up from Open Merit and 7 from the reserved categories. The petitioner No.1 was having UT rank of 52 under JKPM Category which is clubbed with CDP category as as per SO 127 dated 20.04.2020 and the said category has 2% reservation, meaning thereby that out of 42 seats, one seat is allocable to the category of CDP/JKPM. It is submitted that the lone seat earmarked for the said category has been utilized/filled up by selecting/admitting the candidate having UT rank 5. It is thus urged that only seat earmarked for the category of CDP/JKPM has been exhausted and, therefore, petitioner should have no grievance on this account.

4. With regard to petitioner nos. 2, 3 and 4 the respondents have explained as to how the seats earmarked for BRA category have been filled up by selecting and admitting candidates on the basis of their *inter se* UT rank. The petitioner no. 2 was allotted the stream of Oral Pathalogy and Micro Biology under Open Merit category as per merit/preference given by him. The petitioner no. 3 was at UT rank 33 whereas RBA category was exhausted at

rank 25. Similar is the position with regard to petitioner no. 4 who is having UT rank 27 and has been given the discipline of Oral Pathology & Microbiology in GDC Srinagar as per his merit/preference in Open Merit Category.

5. In a nut shell, the stand of the Board with regard to denial of seat under CDP/JKPM category to the petitioner no.1 is that as per the reservation provided vide SO No. 127 dated 20.04.2020, 2% reservation is available to the said category which, in view of availability of total 42 seats, comes to one. It is submitted that the only seat that was allocable to the category of CDP/JKPM was filled up by admitting Dr.Rasiq Mansoor in the Post Graduate Course of Orthodontics & Dentofacial Orthopaedics, and, therefore, the petitioner no.1 could not be considered. It is the emphatic case of the BOPEE that Rule 17 of the Reservation Rules was not applied. It is submitted that since Dr.Rasiq Mansoor, a JKPM category candidate, who had made it to the select list in the general category, had made only one choice in the order of preference and, therefore, was allotted the discipline and college as per his merit and preference. He did not leave any discipline to be put in the pool of reserved categories which could have been offered to the petitioner no.1.

6. Having heard the learned counsel for the parties and perused the material on record, it is necessary to set out Sections 9 and 10 of the Jammu and Kashmir Reservation Act, 2004 ('the Act of 2004' hereafter), which reads thus:-

> 9. **Reservation in professional institutions**. — (1) The Government shall reserve seats in the Professional Institutions for candidates belonging to:-
> (a) reserved categories and such other classes and categories as may be notified from time to time; and
> (b) economically weaker sections.

> Provided that the total percentage of reservation provided in clause (a) shall in no case exceed 50%.
>
> Provided further that the reservation in the Professional Institutions in favour of the persons belonging to economically weaker sections shall be in addition to the existing reservation as provided in this sub-section and shall be subject to a maximum of ten percent of the seats in each category.
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> (2) The Government shall prescribe the percentage for each category in admission in the Professional Institutions:
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> Provided that different percentage may be prescribed 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.
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> 10.**Reservation not to bar admission in open merit**. —Nothing contained in section 9 shall bar admission of members of the reserved categories against seats other than, or in addition to, those reserved for them under the said section, if such members are found qualified for admission on merit as compared with candidates not belonging to any reserved category."

7. From reading of Section 9 and 10 of the Act of 2004 it is evident that these provisions have been enacted to give effect to law on the subject settled by Hon'ble the Supreme Court in various judgments rendered from time to time. The principle underlying the provisions of Section 10 is that the benefit of reservation must reach the deserving candidate in the category and is not eaten away or affected by a candidate of reserved category, who, on the strength of his merit, has equal or better merit than the merit of the candidate last admitted in the professional course in the general category. Section 10 of the Act is abundantly clear and unambiguous. It clearly lays down that there shall be no bar for admission of a member of reserved category against the seat other than or in addition to one reserved for him under Section 9, if such candidate is found qualified for admission on merit as compared with

candidates of the Open merit/General Category. By plain reading of Section 9 and 10, it is crystal clear that selection of Dr. Rasiq Mansoor, who had applied for admission under the category of CDP/JKPM, was in the general category because of his position at serial No.5 in the UT merit List. The next candidate in order of merit in the category of CDP/JKPM was thus entitled to be selected against one seat earmarked for the category of CDP/JKPM. Admittedly, the Board has not carried out the mandate of Section 9 and 10 of the Act. There were in as many as 21 seats of MDS in the Open Merit category in the two Dental Colleges and Dr. Rasiq Mansoor being at serial No.5 was entitled to be considered in the Open Merit, though he had the option of taking the benefit of his reserved category status for the purpose of making the choice of the discipline/College. However, this could not be construed to give a right to the Board not to select any candidate in the category of CDP/JKPM, for which one, out of 42 notified seats, was reserved.

8. Next comes the question as to whether Rule 17 of the Rules of 2005, as in vogue, could have been applied when the meritorious reserved category candidate (MRC) like Dr. Rasiq Mansoor makes only one choice available in the reserved category.It is the contention of the Board that since Dr. Rasiq Mansoor had given only one choice i.e. in the discipline of Orthodontics & Dentofacial Orthopaedics, which choice was available in the pool of reserved category candidates in terms of Rule 15 and, therefore, by making said choice on the basis of his merit, he did not leave behind any discipline/stream/College which could have been offered or added to the pool of the reserved category candidates in terms of Rule 15 and allotted on the basis of merit/preference.

9. *Per contra*, the plea of the learned counsel for the petitioner No.1 is that in terms of Rule 15, a certain number of disciplines were allocable to the General category candidates and with Dr. Rasiq Mansoor, not making any choice/preference as a general category candidate, one discipline was left out and the same could have been added to the pool of reserved category candidates in terms of Rule 15 and allotted on the basis of merit/preference. The respondents have arbitrarily derogated from the said Rule and in the process have deprived the petitioner No.1 of his selection/admission against such left over seat.

10. I have given my thoughtful consideration to the rival contentions and with a view to determine the question and resolve the controversy, I deem it proper to advert to Rule 15 which speaks of distribution of seats in various PG Courses in MD/MS/M.Tech Engineering and Agricultural Sciences and similar other PG Courses. As per the breakup of seats given in Rule 15, admittedly 2% reservation is provided in favour of CDP/JKPM candidates. Rule 15 further provides 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 the purposes of allotment of seats. To put it in a simple manner, there would be a pool of seats allotted to different reserved categories and the members of such reserved categories shall be treated as a single class for the purposes of allotment of seats which would be done strictly as per their *inter se* merit.

11. As already taken note of, Section 10 of the Act clearly provides that if a reserved category candidate, by strength of his merit, gets placed in the Open merit, the resultant seat in the reserved category has to be given to

the candidate next in the order of merit in the said category. Undisputedly, the petitioner No.1 was the candidate next in order of merit in CDP/JKPM category as the most meritorious candidate in the category had made it to the select list under the Open Merit category. The petitioner No.1 was thus required to be selected against the one seat reserved for CDP/JKPM category, which was allocable to his category under Rule 15 of the Rules.

12. Rule 17, which is at the core of controversy in this petition, has been interpreted by this Court on more than one occasion. This Court had an occasion to deal with and interpret Rule 17, as was amended vide SRO 49 of 2018. The essential part of Rule 17 which was interpreted by this Court in **Medhi Ali and ors v. State and Ors, AIR 2019 J&K 91**, remains the same even after its substitution vide SRO 165 of 2019 dated 08.03.2019. While interpreting Rule 17, as it stood after the amendment of 2018 in the judgment in Medhi Ali (supra), this Court in paragraph nos. 34, 36, 37 and 38 held thus:-

> "**34**. Rule 17, which is subject matter of controversy in these petitions, deals with a situation where some candidates belonging to reserved category/categories qualifying for higher ranking on the basis of their own merit and depending on their performance in the Common Entrance Test, are placed in the general merit list. Such candidate when go to occupy the general category seat is not counted against the quota reserved for reserved category. He is treated as a general category candidate and the seat fallen vacant goes to a candidate belonging to its category who is next in the order of merit to the candidate last selected in such category. This way the aggregate reservation provided for reserved category does not exceed. Rule 17 provides that a meritorious reserved candidate („MRC" for brevity) who chooses to avail of the option of admission in a particular stream kept for reserved category is deemed to have been admitted as an open merit category candidate. He continues to be an open merit

category candidate for the purpose of counting the quota for reserved category. For example, if 10 MRCs on the strength of their merit shift to the general merit category, they will create space for 10 more candidates who are next in the order of merit to the last candidate selected under such category. This way, the percentage is maintained. If the MRC, who shifts to the general merit category, does not accept the stream/discipline that would be allotted to him by treating him as a general category candidate then, by operation of Rule 17, he would have option for admission to the stream of his choice kept reserved for the reserved category. The provision, in essence, is intended to achieve the objective that the MRC is not put to any disadvantageous position vis-à-vis candidate of his category with the lesser merit. In other words, the reserved category candidate is held entitled to admission on the basis of his merit and he will have the option of taking admission to the stream kept reserved for the reserved category. For the purpose of computing the percentage of reservation, such MRC would be deemed to have been admitted to a general merit category and would not eat away the quota earmarked for reserved category. This is how, Rule 17 operates. So far so good, there is no difficulty with regard to the procedure prescribed in Rule 17 as the same only gives effect to the law laid down by the Supreme Court in the cases of Ritesh R. Shah vs Dr. Y.L. Yamul, 1996 (3) SCC 253 and Anurag Patel vs UP Public Service Commission, 2005 (9) SCC 742. However, in terms of Rule 17 as it stood prior to amendment which was followed by the respondents for several years, the resultant disciplines/streams/colleges in the open merit category which would become available on MRC making his choice of discipline allocable to him in the reserved category as per his merit, would go to the reserved category candidate getting selected consequent upon MRC shifting to the open merit category. This Rule was being operated by the State without there being any challenge from any aggrieved candidate.

35.....

36. The short point raised by the petitioners, which calls for determination in these writ petitions is, as to whether this amendment has affected any right of the petitioners and, therefore, unsustainable in law. The right of a category candidate to seek reservation has been dealt with in detail hereinabove. The argument of Mr. Sethi, learned

Senior Counsel appearing for the petitioners that operation of Rule 17 in the manner now provided after the amendment acts to the serious prejudice of the petitioners and confers undue advantage on the general category candidates is without any basis and, therefore, cannot be accepted. The Rule recognizes the right of meritorious reserved category candidate, who on the strength of his merit comes in the open merit, still makes an option of discipline/stream/college of his choice as per his status as reserved category candidate. He would not count a seat of the reserved category, but would occupy one seat in the open merit. This would not disturb the percentage of reservation provided for the general category and the reserved categories in any manner. However, the seats in post graduate medical courses cannot be separated from the streams. The seat and stream are, therefore, integrated and completely inseparable. However, for the purpose of giving effect to the law laid down by the Supreme Court in the cases of Ritesh R. Shah and Anurag Patel (supra) and other judgments and to ensure that reservation does not act to the disadvantage of MRC, there is notional separation of the seats from the streams. The MRC, who finds place in the general category list on the strength of his own merit, occupies the seat in the general category, but for the purpose of choice of discipline, he may fall back upon his reserved category status and claim the discipline which is allocable to him being a member of the reserved category. Although, in terms of Rule 15, there is a distribution of the streams amongst the general category and the different reserved categories, yet, for the purpose of effectuating the object of Rule 17, the reserved categories are treated as a single class for the allotment of streams. This is so provided unequivocally in Rule 15.

37. Now the question arises as to how to utilize the stream which becomes available in the general category on account of MRC not opting for it. As per un- amended Rule 17, it would go to a candidate in the reserved category who would come up in the select list on account of shifting of MRC to the general category. This would go to the candidate with the inferior merit even in reserved category. This was not only acting disadvantageous to the general category candidates, but was equally disadvantageous to the candidates of his category being better merit. For example, the discipline of General Surgery in the open merit becomes available on account of MRC not opting for it, but opting for a discipline available in his category. The

> discipline of General Surgery under the un- amended Rule 17 would straightway go to the last selected candidate in the reserved category who would come consequent upon moving of the MRC to the open category. The better meritorious candidate in the reserved categories who might have got the non clinical discipline or PG Diploma course did not have the option to claim the aforesaid resultant discipline/stream. This was clearly an anomalous situation created by Rule 17 as it stood prior to amendment. As stated by the respondents in the reply and is otherwise apparent that the Government, with a view to remove that anomaly and to ensure that the merit of a candidate whether it is a general category candidate or reserved category candidate does not operate to his prejudice, a need was felt to suitably amend Rule 17. This is how SRO 49 of 2018 impugned in these petitions came to be issued.
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> **38**. As per the amended provision, the stream/discipline which becomes available consequent upon the MRC not opting for these disciplines are being now put in a pool of general category candidates as well as the reserved category candidates and are allocated on the principle of merit cum choice. Now these disciplines which so become available have the "trickle down effect" and in the process, the principle of merit cum choice is honored irrespective of status of the candidate. I do not see any illegality or unconstitutionality in the said provision."

13. It is, thus, trite that when 'MRC' (Meritorious Reserved Category Candidate) goes to occupy General Category seat, he is not counted against the quota reserved for his category. He is treated as General Category candidate and seat fallen vacant goes to candidate next in order of merit in his category. This way aggregate reservation provided to the category does not exceed. As per Rule 17, MRC who chooses to avail of option of admission in a particular stream from the pool of reserved categories is deed to have been admitted as a General Category Candidate. MCR will continue to be a General Category Candidate for the purpose of counting the quota for reserved category. How Rule 17 operates is explained by this Court in Medhi Ali (supra) in paragraph

39 of the judgment, which, for facility of reference, is also reproduced hereunder:-

> "39. Before I close, I would like to give an example to elucidate the mechanism on which Rule 17 operates. Let us assume that there are five seats of MD Radiotherapy in the GMC Jammu. As per distribution provided under Rule 15, the effective reservation would be four in the open merit and one for the pool of categories. If a candidate belonging to reserved category obtains merit equal to or higher than the last in the open category, by operation of law, he shifts to the open merit. As per his merit, he gets the MS Anatomy from the pool of open merit which is not a stream of his liking and, therefore, in terms of Rule 17, he falls back upon his merit in his reserved category and on the basis of his inter see merit in the pool of reserved categories, he gets the discipline of MD Radiotherapy. He utilizes the only available discipline of Radiotherapy which was meant for pool of the reserved category, but does not eat away the seat fallen to the share of reserved category. In this process, there is neither any change in the percentage of reservation provided for the reserved categories nor there is decrease of any discipline or stream earmarked for reserved categories. The discipline of MD Radiotherapy which was meant for the reserved category candidates continues to remain with the reserved category candidate and shifting of such candidate to the general category on the strength of his merit notwithstanding. This is how the process needs to be appreciated. This is so far as the streams available in the pool of reserved category is concerned, but what would happen to the stream in the general category. The MRC who shifts to the open merit category would, as a matter of right, be entitled to make option for the stream available in the general category as well. He does not make such option for the reason that it is not a discipline of his choice. Consequently, this discipline becomes available. As per the amended Rule 17, this discipline and like this, if more seats in available disciplines also become available, it constitutes a pool of left over seats/streams. Un-amended Rule provided that these seats becoming available should go to those candidates of the reserved categories who will come up in the select list consequent upon shifting of the MRCs to the open merit, whereas after the amendment, this would be available to all the selected candidates on the basis of their merit irrespective of whether

they are general category or reserved category candidates. This is what I have termed as "Trickle down effect". This promotes merit and brings certainty and un-ambiguity in Rule 17. The State, as a matter of policy decision, has decided to deviate from the earlier procedure which was not only ambiguous but anomalous. The principle underlining Rule 17 has been well explained in the cases of Ritesh R. Shah, Anurag Patel (supra) and recently, in the case of "Tripurari Sharan and another Vs. Ranjit Kumar Yadav and others" (2018)2 SCC 656. In the case of TripurariSharan‟s case, the Supreme Court was considering the legality of the Full Bench decision of the Patna High Court rendered in the case of "The Controller Of Exam.,Bihar vs Nidhi Sinha &Anr", AIR 2017 Pat 1". The High Court of Patna in the said case had answered the reference which is noted by the Supreme Court in para No.3 and for facility of reference, is reproduced hereunder:

―It was contended before the Patna High Court by the appellants that the seat which remained unfilled because of migration/shifting of a MRC to the reserved category should be filled up by the candidates from the general category list inasmuch as the MRC virtually shifts himself to the reserved category. Per contra it was contended by the contesting respondents that such seat should continue to be filled up by the ousted candidates at the bottom of the reserved category list, in view of the fact that the MRC continues to be a general category candidate. By the impugned judgment, the Patna High Court answered the reference in favour of the respondents as under:

17. In view of the discussions above and what has been held by Supreme Court in cases of Ramesh Ram (supra) and Ritesh R. Sah (supra) we arrive at the following conclusion(s) :-

(i) There is an obvious distinction between qualifying through a common entrance test for securing admission to medical courses in various institutions vis-a-vis a common competitive examination held for filling up vacancies in various services.

(ii) This distinction arises because all candidates receive, in a case of common entrance test held for securing admission in medical institutions, the same benefits of securing admission in one of the medical institutions, in a particular course, whereas in the case common selection process adopted for filling up vacancies in various services, there are variations, which accrue to the successful

candidates, because the services may differ in terms of status and conditions of service including pay scale, promotional avenues, etc. Consequence of migration of an MRC to the concerned reserved category shall be, therefore, different in case of the admission to various medical institutions vis-a- vis selection to various posts.

(iii) In case of admission to medical institutions, an MRC can have in, for the purpose of allotment of institutions, of his choice, the option of taking admission in a college, where a seat in his category is reserved. Though admitted against a reserved seat, for the purpose of computation of percentage of reservation, he will be deemed to have admitted as an open category candidate, rather he remains an MRC. He cannot be treated to have occupied a seat reserved for the category of reservation he belongs to. Resultantly, this movement will not lead to ouster of the reserved candidate at the bottom on the list of that reserved category. While his/her selection as reserved category candidate shall remain intact, he/she will have to adjusted against remaining seats, because of movement of an MRC against reserved seats, only for the purpose of allotment of seats.

(iv) In the case of filling up of posts based on common competitive selection process in different services, situation will be entirely different, when an MRC opts to move to the reserved category, which he belongs to, for getting a service/post of his choice. In such a situation, the candidate, at the bottom of list of the concerned category, will have to move out and the slot, in the general merit list, will stand vacated, because of migration of the MRC will have to be filled up from general merit list. Otherwise, if the open seats are allowed to be filled up by candidates of reserved categories, it will result into extending the benefit of reservation beyond fifty percent, which is constitutionally impermissible."

14. It is thus not available to the respondent-Board to contend that since Dr. Rasiq Mansoor had made only one choice, which choice was available in the reserved category, and, therefore, Rule 17 had no application. Rule 17, as it now stands and which was applicable to the instant selection reads thus:-

"**17. Allotment of Discipline etc**.

A reserved category candidates, if selected against the open merit set 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 left over discipline/stream/college in the open merit category shall be allotted to the reserved category candidates who get selected consequent upon the reserved category candidate getting selected in the open merit category.

Explanation: The left over discipline/stream/college shall mean such number of disciplines/streams/colleges becoming available after allotment of seat to the last OM candidate as allocable under rules;

Provided that in respect of under graduate courses the left over seats/colleges shall be added to such categories where shortfall has taken place due to application of Rule 17 and allotment shall be made in terms of Rule 13 on the basis merit cum preference from the respective categories.

Provided further that in respect of PG Course the leftover discipline/stream/colleges shall be added to the pool of reserved category candidates in terms of Rule-15 and allotted on the basis merit cum preference.

Provided also thatRule-17 shall be applicable only during the first round of counselling both in respect of UG and PG courses, Unfilled seats due to non-joining, resignation etc. during the first round of counselling shall be filled up from amongst the eligible candidates from the respective categories where a seat has become available i.e. seat left by the SC candidate in the first round shall be allotted to the candidates from the SC category during the second round of counselling only etc. so that the quota allocable to different categories is maintained.

The unfilled category seats, if any, shall be filled up from OM candidates in accordance with Section 9 of the Jammu and Kashmir Reservation Act, 2004.

Note:1: In case the last OM candidate belongs to any reserved category, but Rule 17 cannot be applied in his case, he shall be considered first in OM and allotted a discipline/stream/college of his choice/preference, if available. However, in case discipline/stream/college of his choice/preference is not available in the OM, he may be considered for allotment of

discipline/stream/college in his respective category on the basis of merit cum preference in accordance with Rule 13 or 15 as may be applicable in his case.

Note 2: The prescribed Counselling Authority may, for the reasons to be recorded, address any other unforeseen situation arising during application of Rule 17 in such a manner that it does not put any meritorious category candidate to hardship viz-a-viz preference for allotment of discipline/stream/college as the case may be."

15. As stated above, there is no substantial change insofar as essential part of Rule 17 is concerned. From reading of Rule 17, it is abundantly clear that a reserved category candidate, if selected against Open Merit seat (also known as MRC), is entitled to be considered for allotment of discipline/stream/College allocable to him in his respective category on the basis of his merit cum preference. The left over discipline/stream/College in the Open Merit category shall be allotted to the reserved category candidate, who gets selected consequent upon MRC getting selected in Open Merit. The explanation appended to Rule 17 explains the term 'leftover discipline/stream/College' and it means such number of discipline/stream/Colleges that would become available after allotment of seat to the last Open Merit candidate as allocable under Rules. By having reference to Rule 15, the 2nd proviso to Rule 17 further provides that in respect of PG Courses, the leftover disciplines/streams/Colleges shall be added to the pool of reserved category candidates in terms of Rule 15 and allotted on the basis of merit-cum-preference. Note (1) of Rule 17 makes the position further clear by providing that in case the last open candidate belongs to any reserved category, i.e. if the last candidate in the Open Merit is MRC, Rule 17 will have no application. He shall be considered first in the Open Category and allotted the discipline/stream/College of his choice/preference if available. It is only in

case Discipline/Stream/College of his choice/preference is not available in the Open Merit category, he may be considered for allotment of Discipline/Stream/College in his respective category on the basis of merit/preference in accordance with Rule 15 of the Rules.

16. In the instant case, the MRC i.e. Dr. Rasiq Mansoor had given only one choice insofar as the discipline of MDS is concerned. He was allotted the aforesaid discipline as per his merit/preference. He got the discipline of Orthodontics & Dentofacial Orthopaedics by making his choice as a CDP/JKPM category candidate, though selected in Open Merit. The movement of Dr. Rasiq Mansoor from Open Merit to the category of CDP/JKPM for the purposes of making the choice of discipline resulted in one discipline of MDS available in the Open Merit. The leftover discipline in the instant case, therefore, would be the discipline that would remain available after all the candidates selected in Open Merit are admitted on the basis of their merit/preference. This leftover discipline would shift and has to be added to the pool of reserved categories in terms of Rule 15 and allotted on the basis of *inter-se* merit-cum-preference amongst the reserved categories. Admittedly, the BOPEE has not conducted such exercise. It committed an illegality in not pushing the petitioner No.1 up to be selected under the category of CDP/JKPM when the only more meritorious candidate in the category than the petitioner i.e. Dr. Rasiq Mansoor had succeeded in making a place in the Open Merit on the strength of his merit. Undeniably, Dr. Rasiq Mansoor took the advantage of his category status and invoked Rule 17 for the purposes of his choice of his discipline. He was accommodated and was admitted to MDS Course in the discipline of Orthodontics & Dentofacial Orthopedics, which discipline was available in the pool of reserved categories. For the purpose of making choice

of discipline, the Open Merit category became less by one candidate which resulted in leaving over one discipline. It is this discipline which the BOPEE ought to have added to the pool of reserved category in terms of Rule 15 and allotted on the basis of merit-cum-preference. This is where the BOPEE has fallen in error in understanding the true import of Rule 17.

17. As is evident from the record, there were total number of 21 seats allocable to the Open Merit in both the Dental Colleges of the UT of J&K and the 21 candidates selected in the order of merit included Dr. Rasiq Mansoor who was figuring at serial No. 5 of the merit list. He, as explained above, was entitled to make the choice of discipline asserting his status as reserved category candidate. He did so and got admitted to MDS Orthodontics & Dentofacial Orthopedics. Undoubtedly, he consumed one discipline from the pool of reserved categories but consequently he made one discipline meant for Open Merit category available to be filled up. It is this discipline that would be leftover discipline which was required to be added to the pool of reserved categories and allotted on the basis of merit/preference.

18. For the foregoing reasons, I am of the considered view that the petitioner No.1 has made out a case for his admission to the PG Course i.e. MDS against the leftover discipline in the Open Merit category. However, having regard to the fact the admissions to the current session of MDS Course are about six months old, I am of the opinion that it would not be in the fitness of things to grant admission to the petitioner No.1 in the MDS course in the current session. The petitioner No.1 has made out a case that he was entitled to admission to MD course but was denied the same due to sheer negligence if not on account of *malafide* inaction on the part of the respondent-BOPEE But that does not mean that this Court is powerless to grant appropriate relief to the

petitioner No.1. What should the Court do in the circumstances where a candidate has made out a case that he/she, despite being a meritorious candidate, was not selected for admission to a medical course but the cut off date for admission has long back over. There were conflicting judgments on the issue from Hon'ble the Supreme Court. Hon'ble the Supreme Court, noticing the conflict of opinion in the judgment of **Asha v. Pt B. D. Sharma UHSI,(2012) 7 SCC 389**and **Chandigarh Admn v. Jasmine Kaur, (2014) 10 SCC 521**, referred the issue to a larger Bench for consideration in the case of **S. Krishna Sradha v. State of A.P and ors, (2020) 17 SCC 465**. A Three Judge Bench of Hon'ble the Supreme Court, after considering the entire gamut of the case law on the issue, in Paragraph No. 13 has held thus:-

> "**13**. In light of the discussion/observations made hereinabove, a meritorious candidate/student who has been denied an admission in MBBS Course illegally or irrationally by the authorities for no fault of his/her and who has approached the Court in time and so as to see that such a meritorious candidate may not have to suffer for no fault of his/her, we answer the reference as under:
>
> **13.1**. That in a case where candidate/student has approached the court at the earliest and without any delay and that the question is with respect to the admission in medical course all the efforts shall be made by the concerned court to dispose of the proceedings by giving priority and at the earliest.
>
> **13.2**. Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate and the candidate has pursued his/her legal right expeditiously without any delay and there is fault only on the part of the authorities and/or there is apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right of equality and equal treatment to the competing candidates and if the time schedule prescribed – 30th September, is over, to do the complete justice, the Court under exceptional circumstances and in rarest of rare cases direct the admission in the same year by directing to increase the

seats, however, it should not be more than one or two seats and such admissions can be ordered within reasonable time, i.e., within one month from 30th September, i.e., cutoff date and under no circumstances, the Court shall order any Admission in the same year beyond 30th October. However, it is observed that such relief can be granted only in exceptional circumstances and in the rarest of rare cases. In case of such an eventuality, the Court may also pass an order cancelling the admission given to a candidate who is at the bottom of the merit list of the category who, if the admission would have been given to a more meritorious candidate who has been denied admission illegally, would not have got the admission, if the Court deems it fit and proper, however, after giving an opportunity of hearing to a student whose admission is sought to be cancelled.

13.3. In case the Court is of the opinion that no relief of admission can be granted to such a candidate in the very academic year and wherever it finds that the action of the authorities has been arbitrary and in breach of the rules and regulations or the prospectus affecting the rights of the students and that a candidate is found to be meritorious and such candidate/student has approached the court at the earliest and without any delay, the court can mould the relief and direct the admission to be granted to such a candidate in the next academic year by issuing appropriate directions by directing to increase in the number of seats as may be considered appropriate in the case and in case of such an eventuality and if it is found that the management was at fault and wrongly denied the admission to the meritorious candidate, in that case, the Court may direct to reduce the number of seats in the management quota of that year, meaning thereby the student/students who was/were denied admission illegally to be accommodated in the next academic year out of the seats allotted in the management quota.

13.4. Grant of the compensation could be an additional remedy but not a substitute for restitutional remedies. Therefore, in an appropriate case the Court may award the compensation to such a meritorious candidate who for no fault of his/her has to lose one full academic year and who could not be granted any relief of admission in the same academic year.

> **13.5**. It is clarified that the aforesaid directions pertain for Admission in MBBS Course only and we have not dealt with Post Graduate Medical Course."

19. It is true that the aforesaid judgment was rendered in the context of MBBS Course, but I see no reason not to extend the benefit of the said judgment to the PG Courses as well, though the exercise to find out discipline/stream/college to be offered to successful petitioner in the case of PG admission would be at times cumbersome and bit difficult. In the instant case the petitioner No.1 was left out not because of any of his act or omission but due to the fault attributable exclusively to the respondent- BOPEE, which failed to carry out the mandate of Rule 17 of the Rules in its right perspective and deprived a meritorious candidate i.e. Petitioner No.1 of his right to seek admission in the PG Course of MDS.

20. Taking guidance from the judgment of Hon'ble the Supreme Court in **S. Krishna Sradha** (supra), I am inclined to allow this petition and provide as under:-

(i) That the petitioner No.1 is held entitled to admission in the MDS Course in the discipline that was last leftover after the Open Merit category candidates 20 in number were allotted the seats in various disciplines as per their merit and preference. It would be discipline which, in the instant selection, has been offered to the candidate figuring at serial No.21 of the Open Merit category.

(ii) That since the cutoff date for admission to the PG Courses is a long back over, it would, therefore, be not in the fitness of things to grant admission to the petitioner No.1 at this point of time. More so,

when all the seats notified for admission stand filed up and there is no seat left vacant.

(iii) That, with a view to undo the wrong done to the petitioner No.1 and give effect to his right to admission, as upheld by this Court, respondents are directed to keep one seat of MDS in the next session in the discipline to which the petitioner No.1 was entitled to in the instant admissions but was not granted because of fault attributable exclusively to the respondent-BOPEE.

(iv) The respondent-BOPEE shall do well to set aforesaid discipline apart and not to make it part of selection or admission of MDS Course 2022.

(v) The petitioner is also held entitled to a compensation of Rs. five Lakhs to be paid by the respondent-BOPEE to compensate the Petitioner No.1 for the loss of one year of his career.

21. Ordered accordingly.

22. The writ petition is, accordingly, disposed of.

23. The record submitted by the respondent-BOPEE be returned.

(Sanjeev Kumar)
Judge

SRINAGAR:
June ___, 2022.
Anil Raina, Addl. Reg/Secy

Whether the order is speaking: Yes
Whether the order is reportable: Yes