

(2019) 04 J&K CK 0038

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2470 Of 2018, IA No. 01, 02, 03 Of 2019, Others Writ Petition (OWP) No. 351 Of 2019

Mehdi Ali And Ors

APPELLANT

Vs

State And Ors

RESPONDENT

Date of Decision : 02-04-2019

Acts Referred:

Indian Medical Council Act, 1956 — Section 10(D)
Jammu and Kashmir Reservation Act, 2004 — Section 3, 9, 9(2), 10, 23
Jammu And Kashmir Reservation Rules 2005 — Rule 15, 17
Constitution Of India, 1950 — Article 14, 15, 15(1), 15(4), 16(4), 16(4)(A), 29, 29(2)

Citation : (2019) 04 J&K CK 0038

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Sunil Sethi, Veenu Gupta, Pawan Kundal, C.M.Koul, Vishal Bharti, F.A.Natnoo, Z.A.Shah, Jagpaul Singh, Abhinav Sharma

Final Decision : Dismissed

Judgement

1 The petitioners in both the aforesaid writ petitions are aspirants for admission to MD/MS/PG Diploma Courses 2019-Academic Sessions. They belong to different reserved categories and are entitled to the benefit of reservation provided under the J&K Reservation Act, 2004 (for short "Act of 2004") and J&K Reservation Rules 2005 (for short "Rules of 2005"). They are aggrieved and challenge the SRO 49 of 2018 dated 30.01.2018 whereby Rule 17 of the Rules of 2005 has been amended. In OWP No.351/2019, apart from assailing the constitutional validity of aforesaid SRO, the petitioners has sought declaration of Rule 15 of the Rules of 2005 to the extent it provides for clubbing/amalgamation of seats allocable to various reserved categories in one pool as ultra vires the Constitution and Act of 2004. The petitioners in OWP No. 351/2019 also seek direction to the respondents to distribute the seats earmarked for different categories proportionate to their population in the State.

2. The relevant facts which have given rise to the instant writ petitions need to

be noticed before proceeding to determine the core issue pertaining to the constitutional validity of SRO 49 of 2018.

In the month of October, 2018 respondent No.4-National Board of Examinations, New Delhi issued a Notification for the admission to MD/MS/Post- Graduate Diploma Courses 2019-Academic Session. The National Eligibility-cum-Entrance Test-PG is an eligibility cum ranking examination to various MD/MS/Postgraduate Diploma Courses in terms of Section 10(D) of the Indian Medical Council Act, 1956. Other than the aforesaid examination to be conducted by respondent No.4, no other entrance examination either at State or Institutional level is valid for admission to the aforesaid medical courses.

As per the aforesaid Notification issued by respondent No.4, the candidates possessing MBBS Degree/provisional MBBS Pass certificate from a Medical college/Institute duly recognized by the Medical Council of India as per the provisions of Medical Council Act and having completed one year of internship or are likely to complete the same on or before 31.3.2019 are eligible to apply for NEET-PG 2019 through online application system. The petitioners claim that they being fully eligible and qualified in terms of the aforesaid Notification issued by respondent No.4, applied to participate in NEET- PG 2019. When the instant writ petitions were filed, the aforesaid examination was yet to take place and was scheduled to be held on 6th January, 2019. The petitioners, anticipating that they would come higher up in merit in the examination and would secure admission in the PG Courses in the State Medical Colleges/Institutions, filed the aforesaid writ petitions even without waiting for the result of the NEET-PG-2019 examination. The provocation to file these writ petitions even prior to sitting in the NEET-PG 2019 examination was the amendment that had been carried to Rule 17 of the Rules of 2005 by promulgating SRO 49 of 2018. The petitioners, who belong to different reserved categories and are entitled to preferential treatment in the matter of admission to various PG Medical Courses, were of the view that the impugned amendment carried to Rule 17 would seriously impact their right to get admission in the PG Medical Courses of their choice commensurate to their merit as a reserved category candidate.

3. During the pendency of the aforesaid writ petitions, the NEET-PG 2019 has been held. How have the petitioners fared in the examination is not known, for, neither the petitioners nor the respondents have brought anything on record to indicate whether the petitioners have succeeded in coming higher up in the merit to secure admission in the PG Medical Courses in the different medical colleges/institutions in the State of Jammu and Kashmir. Be that as it may, this Court in these writ petitions is called upon to adjudicate the constitutional validity of the amendment carried to Rule 17 of the Rules of 2005 and also the Rule 15 whereby the percentage of reservation for different categories too has been re-fixed.

4 In the backdrop of the aforesaid factual position, learned counsel appearing for the parties have raised variety of arguments for and against the constitutional

sustainability of the impugned SRO. On behalf of the petitioners, Mr. Sunil Sethi learned Senior Counsel led the charge. He would vehemently submit that SRO 49 of 2018 in so far as it amends Rule 17 of Rules of 2005 is not constitutionally sustainable. Dwelling on the concept of reservation as envisaged in the Constitution, learned Senior Counsel submits that the reservation is not a bounty or concession given to the deprived and marginalized section of the society, but is provided to ensure that these have nots are empowered to compete with haves. It is submitted that 'equality' which is at the core of illusory and forms the bedrock of the 'rule of law' envisaged under Article 14 of the Constitution of India cannot be achieved in its true sense, if the equals are treated unequally and un-equals, equally. He, therefore, urges that the respondents by affecting amendment to Rule 17 of Rules of 2005 have breached this mandate of Constitution and have rendered the benefit of reservation envisaged under the un-amended Rule meaningless and illusory and, thus, the impugned SRO is clearly hit by Article 14 and 15 of the Constitution of India. Learned Senior Counsel painstakingly took this Court through the un-amended and amended provisions of Rule 17 of Rules of 2005 to indicate the impact the amendment had made on the rights of the reserved category candidates in the matter of admission to Postgraduate Medical Courses.

5. Backing the attack led by Mr Sethi, learned Senior Counsel, Mr. Kundal learned counsel in OWP No.351/2019 also assails the amendment carried to Rule 15 of the Rules of 2005 as well by SRO 49 of 2018. He would urge that variation of percentage of reservation has taken away the vital rights of the candidates belonging to reserved categories, particularly the Scheduled Castes category who, after the amendment, has been given the quota of 4% in the different PG Medical Courses etc. Learned counsel would state that the percentage is not commensurate to the population of the Schedule Castes in the State and, therefore, the amendment to the aforesaid Act is contrary to the mandate of Section 3 of the Act of 2004. Learned counsel would assail the constitutional validity of amendment affected to Rule 17 on the similar grounds as urged by Mr. Sethi, learned Senior Counsel.

6. Per contra, Mr. Z.A.Shah, learned Senior Counsel, who led the arguments on behalf of the respondents, would urge that as per Rule 17 of Rules of 2005 as it stood prior to amendment affected by SRO 49 of 2018, the candidates belonging to reserved categories were being conferred double benefit at the cost of meritorious general category candidates. He would argue that the reservation in favour of different categories in the matter of admission to professional courses is governed by Article 15(4) of the Constitution of India. Article 15(4) being an enabling provision does not cast any mandatory duty on the State to necessarily provide reservation. It is left to the State to make provision for such reservation by way of affirmative action and no mandamus would lie to direct the State to provide reservation in a particular manner to a particular extent. It is, thus, urged that since the petitioners do not have any fundamental right to claim reservation, as such, the amendment to Rule 17 in terms of SRO 49 of 2018

cannot be assailed on the ground that the same has taken away some vested rights of the petitioners/reservation category candidates. It is vehemently argued that in view of the law laid down in the case of *Indra Sawhney vs Union Of India And Others*, AIR 1993 SC 477, the reservation in specialty and super-specialty Medical Courses is not permissible at all and yet the Government, in terms of the Act of 2004 and the rules framed there-under, has made adequate provision for the benefit of reserved category candidates. Rules 17 even after its amendment does not take away or even affect the right of the petitioners to seek admission to the various Postgraduate Medical Courses on the strength of reservation provided under the Act of 2004 and the Rules framed there-under, but only regulates it in the manner that the reserved category candidates are not put to an additional advantage over and above the one envisaged, that too, to the prejudice of the meritorious general category candidates.

7. Rule 17, it is urged, embodies the principles of law enunciated by the Supreme Court in the case of *Ritesh R. Shah vs Dr. Y.L. Yamul*, 1996 (3) SCC 253 and that it has not been affected in any manner by the amendment impugned in these writ petition.

8. Mr. F.A.Natnoo, learned counsel for BOPEE has adopted the arguments raised by Mr. Z.A.Shah, learned Senior Counsel. So is the position of Mr. C.M.Koul, who appears for the Department of ARI and Training. Mr. Abhinav Sharma, appearing for the private respondents, too has echoed the arguments made by Mr. Shah.

9. In nutshell, learned counsel appearing for the respondents led by Mr. Z.A.Shah, learned Senior Counsel vehemently defend the amendment carried to Rule 17 as also Rule 15 of Rules 2005.

10. Learned counsel appearing for both the sides have relied upon several judgments of the Supreme Court in support of their arguments urged elaborately at the Bar.

11 Having heard learned counsel for the parties and perused the record, it would be necessary to first set out the provisions of Rule 15 and Rule 17 of Rules of 2005 as these stood prior to amendment. Rule 15 and Rule 17 read thus::

"Rule 15 (Unamended)

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

(i) Open Merit Category 65%

(ii) Reserved Categories:

(a) Scheduled Caste 4%

(b) Scheduled Tribe 5%

(c) Socially and Educationally Backward Classes:-

(i) Residents of Backward Areas 10%

(ii) Residents of Area Adjoining Actual Line of Control- 2%

(iii) Weak and Under Privileged Classes (Social Castes)- 1%

(d) Children of Defence Personnel/Para-military Forces and State Police Personnel- 2%

(e) Candidates possessing Outstanding Proficiency in Sports - 1%

(f) Open merit category candidates other than those selected under item (i) above who have served for a minimum period of 5 years in Rural areas 10%

Rule 17 (Unamended).

"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"

12. The Rules reproduced above are part of J&K Reservation Rules 2005 framed by the Government under Section 23 of the Act of 2004. Section 23 of the Act reads thus:

"Section 23:

Framing of rules.-The Government may make rules to give effect to the provisions of the Act"

13. It is, thus, pertinent to note that the reservation in appointment and admission in professional institutions for the members of Schedule Castes, Scheduled Tribes and other socially and educationally backward classes is governed by the Act of 2004 and with a view to give effect to the different provisions of the Act, the Government is empowered to frame the rules which it has done by promulgating the Rules of 2005. Chapter- IV of the Act of 2004 pertains to reservation in professional institutions. Section 9 of the Act of 2004 which is relevant in the context of controversy involved may be quickly noticed and the same reads thus:

"Section 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 each category in admission in the Professional Institutions:

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 BBS, 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".

14. As is evident from bare reading of Section 9(2), the Government has been empowered to prescribe the percentage for each reserved categories for admission in the professional institutions. It also gives unfettered discretion to the Government to provide different percentage for different courses. There is only a note of caution added in Section 9(2) which provides that total percentage of reservation for admission in the professional institutions shall not, in any case, exceed 50%. Section 10 contained in Chapter IV of the Act of 2004 lays down that if a member of reserved category is found qualified for admission on merit as compared with the general category candidate, he would be admitted in the quota earmarked for the general category and would not be migrated to the category to which he belongs for the purpose of computing the prescribed percentage of reservation provided for the category. We may also notice the provisions of Section 10 which, for expediency, are also reproduced hereunder:

"Section 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"

15. Reading of Sections 9 and 10 of Act of 2004 would make it clear that these provisions have been enacted to give effect to the law on the subject settled by the Supreme Court in different judgments rendered from time to time. The principle underlining the provisions of Section 10 is that the benefit of reservation should reach the deserving candidate in the category and is not eaten away or affected by a candidate of the 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.

16. Rule 15 of Rules of 2005 was enacted to give effect, in particular, to Section

9(2). The Government, in its wisdom, while framing Rule 15 as it stood prior to the impugned amendment, distributed the available seats in post graduate medical courses by providing different percentage in each stream of the course providing only 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 purpose of allotment of streams.

17. From the provisions aforesaid, it is seen that even in the un-amended Rule, for the purpose of selecting the candidates from the reserved categories for different streams on the basis of their inter se merit, they were envisaged to be treated as a single class for the purpose of allotment of streams. The amendment to Rule 15 has not made any change except enhancing the percentage of open merit category from 65% to 75% and this 10% has come from deletion of category (f) which was earlier earmarked the quota of 10%. Before we proceed to appreciate the change brought about by the impugned amendment in better perspective, it would be appropriate to notice the amended Rule 15 and Rule 17.

"Rule 15 (amended)

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

(i) Open Merit Category 75%

(ii) Reserved Categories:

(a) Scheduled Caste 4%

(b) Scheduled Tribe 5%

(c) Socially and Educationally Backward Classes:-

(i) Residents of Backward Areas 10%

(ii) Residents of Area Adjoining Actual Line of Control- 2%

(iii) Weak and Under Privileged Classes (Social Castes)- 1%

(d) Children of Defence Personnel/Para-military Forces and State Police Personnel- 2%

(e) Candidates possessing Outstanding Proficiency in Sports- 1%

Rule 17(amended)

"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 left over disciplines/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

Explanation:

The left over discipline shall mean such number of disciplines/stream College becoming available after allotment of seat to the last open merit candidate as allocable under rules. Such seats shall be added to the pool of reserved category candidates in terms of Rule-15 and allotted on the basis of merit cum preference"

18. From the reading of amended Rule 15 in juxta position with un-amended Rule, it would be evident that so far as the percentage prescribed for the reserved categories is concerned, the same has not been varied in any manner.

19. Grievance of Mr. Kundal, learned counsel for the petitioners in OWP No. 351/2019 in this regard is, therefore, unfounded. The contention of Mr. Kundal that the percentage of reservation provided is not commensurate to the population of Scheduled Castes and, therefore, de hors the provisions of Section 3 of the Act of 2004 is clearly misconceived. Section 3 deals with reservation in appointment and not the reservation in admission in the professional institutions. Section 9 of the Act of 2004, which, in any case, is not challenged by the petitioners gives discretion to the Government to prescribe the percentage for each category in admission in the professional institutions. It can even prescribe different percentage for different courses. This power of the Government cannot be called in question on the ground that the reservation in admission in the professional courses including the Postgraduate Medical Courses should be in proportion to the population of a particular category in the State. There is inherent fallacy in the argument raised by Mr. Kundal and this has emanated from the misconception that the members of the reserved categories have a fundamental right to reservation in professional institutions.

20. There has been a consistent view of the Supreme Court in a series of judgments rendered right from the year 1963 onwards that the source of reservations i.e, Article 15(4) is only an enabling provision and an exception to Article 15(1). The Government has discretion in the matter and may or may not choose to provide reservation in favour of the identified reserved categories including SC/STs. Reading of Article 15(4) also makes the aforesaid position abundantly clear. At this juncture, I would like to reproduce Article 15(4) as well for quick reference.

"Article 15(4):

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1)

(2).....

(a).....

(b).....

(3).....

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes"

21. This provision i.e Article 15(4) has been a matter of debate in several cases which went to the Supreme Court from time to time and the Supreme Court in one voice and with unanimity has held Article 15(4) to be an enabling provision which does not cast any duty on the State to necessarily make the provision for reservation. Such being the right of the candidates claiming to be the members of different reserved categories including SCs and STs, it cannot be contended that the State, by not providing adequate representation to the SC candidates in admission to various post graduate medical courses and other professional institutions, has violated the constitutional mandate. The issue though settled was hotly debated by the learned counsel appearing for the parties and, therefore, it would be just and fair to deal with the same in some detail.

22 A Constitution Bench of the Supreme Court way back in the year 1963 in the case of M. R. Balaji And Others vs State Of Mysore, AIR 1963 649 elaborately discussed the concept of reservation and the scope of Article 15(4) of the Constitution. Para 17 of the said judgment, which is relevant, is reproduced hereunder:

"Article 15(4) provides that nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward Classes of citizens or for the Scheduled Castes and the Scheduled Tribes. This Article was added by the Constitution (First Amendment) Act '1951. The object of this amendment was to bring Articles 15 and 29 in line with Art. 16(4). It will be recalled that in the case of The State of Madras v. Srimathi Champakam Dorairajan, 1951 SCR 525 (AIR 951 SC 226)) .The validity of the Government order issued by the Madras Government fixing certain proportions in which students seeking for admissions to the Engineering and Medical Colleges in the State should be admitted, was challenged. The said Government Order was on the face of it a communal order fixing the admissions in the Stated proportion by reference to the communities of. the candidates. This order was struck down by the Madras High Court and the decision of the Madras High Court was confirmed by this Court in appeal, on the ground that the fundamental rights guaranteed by Articles 15(1) and 29(2) were not controlled by any exception, and that since there was no provision under Art. 15 corresponding to Art. 16(4), the impugned order could not be sustained. It

was directly as a result of this decision that Art. 15 was amended and Art. 15(4) was added. Thus, there is no doubt that Art. 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2). In other words, if the impugned order is justified by the provisions of Art. 15(4), its validity cannot be impeached on the ground that it violates Art. 15(1) or Art. 29(2). The fundamental rights guaranteed by the said two provisions do not affect the validity of the special provision which it is permissible to 'make under Art. 15(4). This position is not and cannot be in dispute. The petitioners contend that the impugned order is invalid because it is not justified by Article 15(4)"

23. After noticing that Article 15(4) was not originally part of Article 15, but was added by the Constitution (First Amendment) Act 1951 and hearing the arguments of learned Advocates, appearing in the aforesaid case, the Constitution Bench in, para No.37, concluded as under:

"37. Whilst we are dealing with this question, it would be relevant to add that the provisions of Art. 15(4) are similar to those of Art. 16(4) which fell to be considered in the case of *The General Manager, Southern Railway v. Rangachari*, AIR 1962 SC 36. In that case, the majority decision of this Court held that the power of reservation which is conferred on the State under Art. 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments, but also by providing for reservation of selection posts. This conclusion was reached on the basis of that it served to give effect to the intention of the Constitution-makers to make adequate safeguards for the advancement of Backward Classes and to secure their adequate representation in the Services. The judgment shows that the only point which was raised for the decision of this Court in that case was whether the reservation made was outside Art. 16(4) and that posed the bare question about the construction of Art. 16(4). The propriety, the reasonableness or the wisdom of the impugned order was not questioned because it was not the respondents' case that if the order was justified under Art. 16(4), it was a fraud on the Constitution. Even so, it was pointed out in the judgment that the efficiency of administration is of such a paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration; that, it was stated, was undoubtedly the effect of Art. 335. Therefore, what is true in regard to Art. 15(4) is equally true in regard to Art. 16(4). There can be no doubt that the Constitution-makers assumed, as they were entitled to, that while adequate reservation under Art. 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Art. 15(4), reservation made under Art. 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. In this connection it is necessary to emphasise that Art. 15(4) like Article 16(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate

government to take suitable action, if necessary".

24. The aforesaid Constitutional Bench Judgment has been followed in several later judgments of the Supreme Court. It may be interesting to note that in two judgments, one rendered in the case of Ashok Kumar Gupta v. State of U.P and Ors., (1997) 5 SCC 201 and other in the case of Jagdish Lal & Ors vs State Of Haryana & Ors, 1997 (6) SCC 538, the Supreme Court, while considering the provisions of Article 16(4) and 16 (4A) of the Constitution struck discordant note and held that the rights covered by these Articles were fundamental rights. These judgments were also followed in some cases that came before the Supreme Court after the aforesaid judgments. Both these judgments and also the judgments which followed the aforesaid cases were examined in detailed by the Constitution Bench in the case of Ajeet Singh and others (II) vs State of Punjab and ors, 1999 (7) SCC 209. The Constitution Bench, after taking note of the rulings of the larger Benches on the issue, held that the cases of Ashok Kumar Gupta and Jagdish Lal and ors (supra) and the cases which followed these cases did not lay down the law correctly insofar as these held that the rights covered by Article 16(4) and 16(4A) were fundamental rights. The observations of the Supreme Court made in para No. 31 of the judgment are noteworthy and are set out hereunder:

" 31. Unfortunately, all these rulings of larger Benches were not brought to the notice of the Bench which decided Ashok Kumar Gupta and Jagdish Lal and to the Benches which followed these two cases. In view of the overwhelming authority right from 1963, we hold that both Articles 16(4) and 16(4A) do not confer any fundamental rights nor do they impose any constitutional duties but are only in the nature of enabling provision vesting a discretion in the State to consider providing reservation if the circumstances mentioned in those Articles so warranted. We accordingly hold that on this aspect Ashok Kumar Gupta, Jagdish Lal and the cases which followed these cases do not lay down the law correctly".

25. Though the aforesaid Constitution Bench Judgment was on Article 16(4), but the same would hold good for Article 15(4) of the Constitution as well, as these two provisions are *pari materia*. One makes the general provision for advancement of socially and educationally backward classes of citizens or for SCs and STs, whereas other makes a similar provision in the matters relating to employment or appointment to an office under the State.

26. In a latter judgment rendered in the case of NTR University of Health Sciences, Vijaywada vs G Babu Rajendra Prasad and another, (2003) 5 SCC 350, the Supreme Court while interpreting the provisions of Article 15 and 16 of the Constitution went on to hold that providing of reservation is a matter of policy of the State and such policy decision normally would not be open to challenge. Para No.13 of the judgment deals with this aspect and the same is reproduced hereunder:

"13. Articles 15 and 16 of the Constitution of India provide for enabling

provisions. By reason thereof the State would be entitled to either adopt a policy decision or make laws providing for reservations. How and in what manner the reservations should be made is a matter of policy decision of the State. Such a policy decision normally would not be open to challenge subject to its passing the test of reasonableness as also the requirements of the Presidential Order made in terms of Article 371-D of the Constitution of India".

27. Thereafter, there is a line of judicial pronouncements on the issue to cite few: (2005) 1 SCC 394, E.V.Chinnaiah vs. State of A.P. and ors: (2010) 1 SCC 477, Gulshan Prakash and ors vs. State of Haryana and ors and (2010) 7 SCC 234, Union of India vs. Ramesh Ram and ors.

28. From the conspectus of the judicial opinion, it is now firmly established that Article 15(4), which is a source of reservation in favour of socially and educationally backward classes of citizens or for SCs and STs, is only an enabling provision giving discretion to the Government in the matter. The decision of the Government in this regard is a policy matter and cannot be interfered with by the Constitutional Courts except on the laid down parameters. The unreasonableness and arbitrariness of the policy decision may be a ground to struck it down by the Constitutional Courts, but, the wisdom of the Government in taking such policy decision cannot be questioned in the Court of law. The Government as a matter of policy and driving its powers under Articles 15(4) has provided reservation in appointment and admission in professional institutions, inter alia, for the members of the SCs and STs and enacted the J&K Reservation Act 2004. With a view to give effect to different provisions of the Act, the Government has also framed the rules i.e J&K Reservation Rules, 2005.

29. Rule 15 provides for distribution of seats of Postgraduate Courses in MD/MS/ M.Tech, Engineering and Agricultural Sciences and similar other post graduate courses by earmarking different percentage of seats to different categories. In Rule 15 as it stood prior to impugned amendment, the Scheduled Castes were given the share to the extent of 4%, whereas it was 65% in the case of open merit category. As noted above, 10% of seats were earmarked to open merit category candidates who had served for a minimum period of five years in Rural areas. It is pointed out that the aforesaid categorization was later on held to be bad by this Court and, therefore, 10% which was earmarked for such open merit category candidates was added to 65% quota which was already earmarked for the open merit category. This is the total change brought about by amendment so far as Rule 15 is concerned. There is no variation in so far as the SC category is concerned.

30. For the discussions made hereinabove and in view of the settled legal position adumbrated hereinabove, the petitioners have no right to seek a mandamus to the State to provide reservation necessarily and that too, to a particular extent. The petitioners cannot, therefore, claim that the State is under an obligation to provide reservation to the petitioners proportion to their population in the state. Similarly for the purpose of allocation of different

streams to the members of reserved categories, the rule providing for treating all the members of different categories as a single class also cannot be questioned. The Government has wide discretion in the matter in terms of Section 9 of the Act.

31. For the aforesaid reasons, the challenge to the amendment affected to Rule 15 by SRO 49 on the grounds urged by the petitioners in OWP No. 351/2019 is without any substance and, therefore, fails.

32. The next point for determination which is common in both the petitions is with regard to the constitutional sustainability of amendment affected to Rule 17. It may be noted that the arguments of learned counsel appearing for the petitioners, attacking the constitutional validity of amendment affected to Rule 17, are required to be appreciated in the light of law laid down by the Supreme Court and explicated in the celebrated judgments, some of which are Constitution Bench Judgments reference to which has been made hereinabove. Once it is conceded that a member of reserved category has no fundamental right to claim reservation, it is to be understood that such member has no right to dictate the State to operate reservation in a particular way.

33. Article 15(4) which is referred to as a source of enactment of J&K Reservation Act, 2004 and the rules framed there-under is only an enabling provision giving discretion to the Government to provide reservation and such decision of the Government is nothing, but a policy matter. It is true that the Government by enacting the Act and the Rules has made provision for reservation for admission in professional institutions for the reserved categories. So far as the professional courses like MBBS, BDS or BSC Agriculture/ BVSc etc, are concerned, there is no difficulty in effectuating the reservation provided under the Act and the Rules. But the difficulty arises in the matter of admission in various PG Medical courses. The seats of different streams are available in different medical college/medical institutions of the State. The candidates may have preference for one stream over the other and for one college over the other. Respondent No.3 while allocating seats to the meritorious candidates in different streams and colleges follows the principle of merit cum choice/merit cum preference. Clause 14 of the Information Brochure 2019 issued by respondent No.3 spells out the procedure that is followed by it in the matter of distribution of PG Medical seats from Government/Private Medical Colleges. Para 14 of the Brochure needs reproduction to better appreciate the controversy. It reads thus:

"14. Distribution of MD/MS/PG Diploma and MDS seats:

Distribution of PG Medical seats from

Government/Private Medical Colleges:

The seats available for admission to medical postgraduate courses through NEET-PG 2019 will be from Institutions located in J&K State i.e Government/Private medical colleges. The State of J&K is not contributing to All India quota,

therefore, all seats available in government medical colleges shall be filled through the NEET 2019. All seats in private college shall also be filled by the BOPEE. Tentative seat matrix available in State of Jammu and Kashmir given in Annexure E to this Brochure shall be notified separately. Seats available will be filled on the basis of State Merit List in NEET PG 2019 with due regard to the preferences submitted by the candidates. Reservation rules and other orders of State, MCI/DCI Regulations.

Selection of candidates from Reserved Categories for different streams in MD/MS/PG Diploma Courses shall be made strictly on the basis of their inter se merit treating them as a single class for the purposes of allotment of streams in terms of Rule 15 of Reservation Rules, 2005 as amended vide SRO 49 of 2018 dated 30.01.2018. In addition, in MDS course, selection of candidates for reserved categories will be done as per roster issued vide SRO 154 dated 27th May, 2009 (Annexure D). However, since there is no reservation for inservice candidates serving in rural areas, the roster point, if any, allocable to rural service under SRO 154 shall be allocable to the OM Candidates".

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. Mr. Sethi, learned Senior Counsel, however, states that these resultant disciplines/streams becoming available in the open merit category used to be put in the pool of reserved category candidates and then distributed on the basis of their inter se merit cum choice. This has been disputed by the learned counsel for the respondents. On being asked, Mr. F.A.Natnoo, representing respondent No.3, states that there had been no consistency in the matter. At some point of time, these resultant streams/disciplines etc, were put in the common pool of the reserved category candidates and at the other, these resultant vacancies were offered to the candidates, who made it to the merit list of selected category candidates consequent upon the MRC shifting to the open merit category. Be that as it may, a bare look at Rule 17, as it stood prior to amendment, makes it crystal clear that the resultant disciplines/streams/colleges that would become available upon the MRC opting for the stream as per his merit in the reserved category were envisaged to be offered to the candidates who would get selected consequent upon the MRC shifting to the open merit category. Any way, this is not the bone of contention in these writ petitions. The bone of contention, however, is with regard to the manner in which these disciplines/streams/colleges which become available in terms of Rule 17 (amended) are being allocated. Going by the provisions of Rule 17, as amended vide SRO 49 of 2018, the left over disciplines/streams/colleges in the open merit category becoming available after allotment of seats to the last open merit candidate as allocable under the Rules shall go to the pool of reserved category candidates in terms of Rule 15 and allocated on the basis of merit cum preference. This is what comes out clearly from reading of the Rule along with the explanation appended thereto. It is here, the petitioners feel pinched.

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.

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.

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 se 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 Tripurari

Sharan'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".

40. The Supreme Court in the aforesaid case upheld the judgment of the Full Bench of the Patna High Court on all the issues answered by it. The Supreme Court in the aforesaid case too had formulated two questions for determination. The questions those were formulated are contained in para 10 and read as under:

"i. Whether X - MRC can opt for a seat earmarked for reserved category?

ii. If answer is yes; what happens to the 50th seat which was to be allotted to X - MRC (i.e. 50th general merit candidate) had he opted for a seat meant for the reserved category to which he belongs?"

41. The answer to the aforesaid questions is given by the Supreme Court in Para No.26 which, for expediency, is also reproduced hereunder:

"26. In light of the cases discussed hereinabove, both questions are answered as follows:

i) An MRC can opt for a seat earmarked for the reserved category, so as to not disadvantage him against less meritorious reserved category candidates. Such MRC shall be treated as part of the general category only.

ii) Due to the MRC's choice, one reserved category seat is occupied, and one seat among the choices available to general category candidates remains unoccupied. Consequently, one lesser-ranked reserved category candidate who had choices among the reserved category is affected as he does not get any choice anymore. To remedy the situation i.e. to provide the affected candidate a remedy, the 50th seat which would have been allotted to X - MRC, had he not opted for a seat meant for the reserved category to which he belongs, shall now be filled up by that candidate in the reserved category list who stands to lose out by the choice of the MRC. This leaves the percentage of reservation at 50% undisturbed".

42. The questions were formulated and decided in the context of circular of Patna Government which was materially different from the provisions of Rule 17(amended). Besides, in the example cited, the Supreme Court referred to 50th (last) general seat and, therefore, rightly concluded that this seat if not opted by MRC would go to the reserved category candidate who stands to lose out by the choice of MRC. It is, thus, not the last candidate in the category, but all others

also stand to lose out by the choice of MRC. The position, however, would be different if discipline becoming available is not one allocable to last candidate in open but higher up. In such situation, Rule 17 takes the driver's seat and discipline/stream in general category becoming available due to MRC not opting for it, will be treated as left over and would be offered on the basis of merit first to the general category and then the reserved categories.

43. For the foregoing reasons, I find no merit in either of the petitions and the same are, accordingly, dismissed.