

(2020) 07 RAJ CK 0009

In the Rajasthan High Court

Case No : Special Appeal Writ No. 396, 397, 398, 399, 401, 408, 442 Of 2020

State Of Rajasthan and Ors

APPELLANT

Vs

Yogesh Kumar Saini and Ors

RESPONDENT

Date of Decision : 17-07-2020

Acts Referred:

Medical Council Of India Act, 1956 — Section 10D
Central Educational Institutions (Reservation in Admission) Act, 2006 — Section 2(c)
Code Of Civil Procedure, 1908 — Order 1 Rule 8
Admissions Rules, 2008 — Rule 4(2), 7, 15
Madhya Pradesh Private Medical and Dental Post Graduate Courses Entrance
Examination Rules, 2009 — Rule 7
Constitution Of India, 1950 — Article 14, 15, 15(4), 15(5), 15(6), 16, 226
Graduate Medical Education Regulations, 2000 — Regulation 9, 9A
Post Graduate Medical Education (Amendment) Regulations, 2018 — Regulation 9(4)

Citation : (2020) 07 RAJ CK 0009

Hon'ble Judges : Prakash Gupta, J

Bench : Single Bench

Advocate : M.S. Singhvi, Darsh Pareek, Virendra Lodha, Atishay Jain, R.B. Mathur, Nikhil Simlote, Sameer Jain, Daksh Pareek, R.N. Mathur, Prateek Mathur, Angad Mirdha, Shobit Tiwari

Final Decision : Allowed

Judgement

Prakash Gupta, J

Under challenge is the judgment dated 15.6.2020 passed by the learned Single Judge, whereby the learned single judge allowed the writ petitions filed

by the writ petitioners with the following directions:

(a) The State Government shall conduct a fresh round of counselling for admission to PG seats by including the additional seats allotted for

implementation of EWS quota as per the MCI letter dated 27/02/2020.

(b) As it is noticed that during pendency of the writ petitions, the first round of

All India Counselling and second round of All India Counselling has already commenced, therefore, in the counselling, which is to be done now by the State, all the seats, which have come back to the State Government after the All India Counselling, shall also be included keeping in view the peculiar circumstances which have arisen and with the view that there is no delay in giving admissions.

(c) The State Government shall be free to fill EWS 10% quota by applying plain roster of 10%. The roster of direct recruitment shall not be applicable for the said purpose. The EWS reservation shall apply as per roster to the only seats which are made available by MCI for implementation of EWS quota vide letter dated 27/02/2020.

(d) The admissions given in the first round of counselling would be treated as cancelled. However, if in the second round of counselling, the students are allotted the same College, their admission shall be accordingly made. In other cases, where a student has not been able to get a particular seat, his fees already deposited, shall be returned. The exercise shall be immediately conducted on completion of the All India Counselling.

(e) It is directed that henceforth, the admission process for PG Courses, which is to be conducted, shall be transparent and information shall be provided to all students beforehand about roster which is being applied and the Colleges where the vacant seats are there etc. in order to avoid further litigation in future.

(f) The observations made by this Court with regard to the EWS reservation in each category as per the provisions of the Constitution shall be considered for future admissions.

FACTS IN A NUTSHELL

1. The brief facts necessary for a fair adjudication of these Appeals are that: Admission to Post Graduate Courses in Medical Education are done on the basis of merit secured by the participating candidates in a uniform entrance test known as the National Eligibility-cum-Entrance Test (hereinafter NEET"). The said examination has to be conducted by the National Board of Examination under the supervision and guidance of the Medical Council of India (Now the Board of Governors in supersession of the MCI). For this purpose, an amendment was made to Section 10-D of the Medical

Council of India Act, 1956. The admission process for various post-graduate courses in medical education are governed by Post Graduate Medical

Education Regulations, 2000 (hereinafter "the Regulation of 2000"). Regulation 9 of the Regulations of 2000 deals with reservations of seats in medical

colleges/institutions for the respective categories and states that reservations would be made as per the extant laws in the concerned State/Union

Territory. The procedure for counselling is provided by Regulation 9A of the Regulations of 2000 and the designated authorities responsible for

counselling of 50% All India Quota seats as also the 50% state seats as are specified therein.

2. For the academic session 2020-2021, the National Board of Examination invited application for NEET PG 2020 on 01.11.2019 and the Petitioners

filled the forms and participated in NEET PG 2020 under the General/UR category and participated in the entrance examination held on 06.01.2020.

The results and cut-off were declared on 21.01.2020.

3. Before the commencement of the counselling process, the Board of Governors in supersession of the MCI, recommended 92 additional seats for

the State of Rajasthan in six government medical colleges. The same was done so that reservations to Economically Weaker Sections (EWS) as

introduced by the Constitutional 103rd Amendment Act and now envisaged under Article 15(6) could be given effect to, without affecting the number

of seats available to candidates belonging to other categories. A letter had also been written by the Ministry of Health and Family Welfare,

Government of India on 13.03.2020 to the state government for implementation of the 10% quota for EWS. Meanwhile, the number of additional seats

recommended to the State of Rajasthan was decreased from 92 to 89 as only 15 seats (As opposed to 18 earlier) could be converted from Diploma to

Degree.

4. The State of Rajasthan started counselling for allotting NEET PG 2020 on 17.03.2020 and invited applications for counseling on 17.03.2020 and

published the schedule for counseling on 16.04.2020. Thereafter, on 21.04.2020, a combined provisional merit list was published by the appellants and

all the candidates whose names appeared in the said provisional list were required to submit their preferences, the last date for which was 21.04.2020.

5. On 30.04.2020 and 05.05.2020, the state government intimated its decision

to implement 10% reservation for EWS to the Board and sent a revised seat matrix to the Board.

6. In the meantime, these batch of Writ Petitions had been filed by the Petitioners, challenging the first round of counselling done by the Appellants, which came to be numbered as 5468/2020, 5486/2020 and 5495/2020. These Writ Petitions were allowed by the learned single judge vide his order dated 15.06.2020 with the directions as quoted above, against which the instant intra-court appeals have been filed.

SUBMISSIONS BY THE LEARNED ADVOCATE GENERAL

7. Learned Advocate General appearing for the State submits that the direction (f) given by the learned Single Judge in his judgment dated 15.6.2020

is contrary to Article 15(6) of the Constitution of India. He further submits that vide Gazette Notification dated 12th January, 2019, reservation to

Economically Weaker Section was introduced and vide 103rd constitutional amendment, Article 15(6) was inserted. Clause (6) of Article 15 of the

Constitution of India reads as thus:

(6) Notwithstanding in this article or sub-clause (g) of clause (1) of Article 19 or clause (2) of article 29 shall prevent the State from making.-

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5);

and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5)

in so far as such special provision relate to their admission to educational institutions including private educational institutions, whether aided or unaided

by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition

to the existing reservation and subject to a maximum of ten per cent of the total seats in each category.

Explanation:- For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to

time on the basis of family income and other indicators of economic disadvantage.

8. Learned Advocate General further submits that based on the aforesaid amendment made to Article 15 of the Constitution of India, Office

Memorandum dated 17th January, 2019 came to be issued by the Department of Higher Education, Govt., of India. Sub-clause (c) of Clause 2 of the aforesaid O.M. dated 17th January, 2019 states that every Central Educational Institution shall, with the prior approval of the appropriate authority (as defined in clause (c) of Section 2 of the Central Educational Institutions (Reservation in Admission) Act, 2006), increase the number of seats over and above its annual permitted strength in each branch of study or faculty so that the number of seats available, excluding those reserved for the persons belonging to the EWSs, is not less than the number of such seats available, in each category, for the academic session immediately preceding the date of the coming into force of this O.M. On the basis of the aforesaid OM dated 17.1.2019, two communications dated 29th January, 2019 were issued by the Ministry of Health and Family Welfare, Government of India providing reservation to Economically Weaker Sections for admission of students to Central Educational Institutions and Medical Educational Institutions and in sub-clause (e) of clause 1, all the State Governments/UTs were requested to give effect to the provisions of the said Constitution Amendment Act with respect to all higher education institutions/funded/aided, directly or indirectly by the State Government starting from the academic year 2019-2020.

9. So far as the State Government is concerned, Mr. M.S. Singhvi, learned Advocate General submits that a UO Note dated 22.2.2019 was issued by Department of Personnel, Government of Rajasthan directing all the appointing authorities and Head of the Departments to provide 10% reservation to EWSs in appointments and admission in educational institutions. He submits that for the year 2019-2020, benefit of reservation to EWS category candidates could not be given as the selection process had already begun. However, so far as the academic year 2020-2021 is concerned, National Board of Examination conducted National Eligibility cum Entrance Test (Post Graduate) {hereinafter referred to as "NEET-PG"} for admission to MD/MS/Post Graduate Diploma Courses. An information bulletin/brochure was issued, wherein it was provided that there would be 50% quota of seats on All India basis (all States & UTs). Head Note 13 of the Brochure related to Reservations and clause 13.2 of the Brochure provided for reservation on 50% State Quota Seats.

10. Mr. M.S. Singhvi, Advocate General further submits that on 8.4.2019, MCI invited proposals from the State Government for increase of PG seats

to provide EWS reservation. Subsequently, NEET PG Medical and Dental Admission/Counselling Board, 2020 (hereinafter referred to as "the Board

of 2020") issued the Instruction Booklet, wherein it was mentioned that all admissions to MD/MS/PG - Diploma/MDS courses would be given as per

reservation roster. It was further mentioned that at roster point of UR, all candidates would be considered as per their merit but at roster point of SC,

ST, STA, OBC-NCL, MBC-NCL, EWS, the concerned category candidate would be considered as per their merit. In the Note appended thereto, it

was provided that the EWS reservation would be applicable on all educational institutions.

11. Mr. Singhvi further submits that out of the total 1255 seats for admission to PG Medical course, 50% seats had gone into All India quota and 50%

seats i.e. 627 remained for State quota. Initially MCI had granted 92 seats but the number of additional seats recommended to the State of Rajasthan

was decreased from 92 to 89 as only 15 seats (As opposed to 18 earlier) could be converted from Diploma to Degree. The appellants applied 10%

reservation for EWS candidates accordingly allotted to candidates belonging to EWS. For this reason, the first round of counselling conducted by

Counselling Board was in accordance with the seats allotted by MCI.

12. Learned Advocate General further submits that on 1.11.2019 National Board of Examinations invited applications for NEET PG 2020 examination.

The petitioners filled the forms for NEET PG 2020 in General/UR category and appeared in the examination held on 6.1.2020, result whereof was

declared on 20.1.2020. Thereafter admission process was started as per schedule. On 17.3.2020, the State Counselling Board began the process of

allotting PG Medical Degree colleges for academic year 2020-21 by inviting applications for counselling, but due to outbreak of COVID-19, the dates

were extended and fresh notice was issued on 10.4.2020. The last date for online choice filling and locking of the seats for the candidates was

18.4.2020. Learned Advocate General submits that seat matrix were submitted by two Government Medical Colleges namely S.P. Medical College,

Bikaner and Jhalawar Medical College, Jhalawar, according to which they added the increased seats in the seat matrix furnished before the first round

of counselling. On 21.4.2020, a combined provisional merit list of 142 candidates was published belonging to EWS reservation. Thereafter, on the basis of ranking in combined merit list, the candidates were given a chance for online choice filling and locking of preferred PG medical stream available in Government Medical Colleges. Accordingly, the candidates in the merit, submitted their preferences for colleges. On 26.4.2020, a provisional online allotment list was published. Subsequently on 30.4.2020, the State Government communicated its decision to implement 10% EWS reservation in PG courses in Government Medical Colleges and immediately thereafter the revised seat matrix was sent to the Counselling Board. Soon thereafter the revised seat matrix was submitted by the remaining four Government Medical Colleges for adding the newly sanctioned seats. Learned Advocate General further submits that the petitioners submitted their applications and nobody raised the objection at that point of time and thus, the petitioners are now estopped from challenging the counselling process.

13. Learned Advocate General further submits that so far as the writ petitioners are concerned, they are not going to be prejudiced in any manner because in the second round of counselling, there is a provision for free exit and the candidates can apply in the second round of counselling afresh. In other words, a candidate who has already been admitted in the first round of counselling is free to exit and he/she can again opt for a seat which may be available in the second round of counselling. In this way, on account of non-inclusion of enhanced seats in the first round of counselling, no prejudice was caused to the petitioners. In this connection, he has placed reliance on the judgment of the Hon'ble Apex Court in the case of Kumari Chitra Ghosh v. Union of India reported in 1969 (2) SCC 228.

14 . He further submits that the learned Single Judge has directed that EWS reservation in each category shall be considered for future admissions. In other words, the learned single judge directed that EWS reservation would have to be given to SC, ST, OBC category candidates (which includes both creamy and non-creamy layer candidates). He further submits that amongst the petitioners, 9 candidates did not get any seat as per their choice and it is only 1 petitioner i.e. Dr. Vikas Bhardwaj, who would get SN Medical College instead of SP Medical College, allotted to him as per the choice given by him. Thus, the directions given by the learned Single Judge go contrary to the

plain language of Article 15(6) and since no prejudice was caused to any of the petitioners, the petitioners had not reason to challenge the counselling process.

15. Learned Advocate General further submits that the learned Single Judge while allowing the writ petition observed that the State Government is not expected to take umbrage under a specious plea that all the students have not approached the Court. By issuing general directions, the learned single judge erred in treating the writ petitions as filed in a representative capacity even when there was no pleading in this regard and the mandatory procedure prescribed under Order 1, Rule 8 CPC was not followed. In support of his contentions, he has placed reliance on the judgment of the Hon'ble Apex Court in the case of *Km. Rashmi Mishra v. M.P. Public Service Commission and others* (2006) 12 Supreme Court Cases 724.

16. Learned Advocate General also relied upon the judgment of the Hon'ble Apex Court in the case of *Ashish Ranjan and others v. Union of India & Ors.* (2016) 11 Supreme Court Cases 225 to contend that a calendar has been prescribed by the Apex Court to complete the admission process for courses in medical education. As per the calendar, 31st May was the last date upto which the students could be admitted or could have joined, but the time was extended by the Apex Court for this academic session considering the problems due to the outbreak of the COVID-19 pandemic. Reliance was also placed by the learned Advocate General on the judgment rendered by the Honourable Supreme Court in *DAR-US-Slam Educational Trust and Others v. Medical Council of India* -(Writ Petition (Civil) No. 267/2017: dated 9.5.2017).

17. Learned Advocate General further submits that EWS reservation would be as per communications dated 22.2.2019 and 17.03.2020, but none of these communications have been challenged by the Petitioners. Unless challenge is made to the impugned communications, subsequent action cannot be challenged. In support of his contentions he has placed reliance on the judgment of the Hon'ble Apex Court in the case of *Government of Maharashtra and Others v. Deokar's Distillery* reported in (2003) 5 Supreme Court Cases 669.

18. Learned Advocate General also placed reliance on the judgment passed by the Hon'ble Apex Court in the case of *Amarjeet Singh and Others v.*

Devi Ratan and Others reported in (2010) 1 Supreme Court Cases 417 to contend that challenging consequential orders without challenging the basic order is not permissible. Learned Advocate General thus contended that the learned single judge granted relief beyond the prayer made in the writ petition.

19. Learned Advocate General further submits that the petitioners unconditionally applied for their admission into NEET PG, 2020 and also participated in the counselling and thus, they could not challenge the counselling process now, having once participated in it without any demur or objection.

20. He further submits that the MCI filed its reply to the writ petition and appended Post Graduate Medical Education (Amendment) Regulations, 2018

(hereinafter to be referred to as "the Regulations of 2018") as Annexure-R/2/1. Regulation 9 of the aforesaid Regulation deals with the procedure for

selection of candidate for Postgraduate courses. Sub-clause (4) of Regulation 9 of the Regulations of 2018 states that the reservation of seats in

Medical Colleges/Institutions for respective categories would be as per applicable laws prevailing in States/Union Territories. It further states that an

all India merit list as well as State-wise merit list of the eligible candidates shall be prepared on the basis of the marks obtained in National Eligibility-

cum-Entrance Test and candidates shall be admitted to Post Graduate Course from the said merit lists only. He submits that there is no Regulation

framed by the Medical Council of India that EWS reservation will be conditional upon the increased seats.

21. The learned Advocate General further submits that providing reservation is within the exclusive domain of the State Government and the power to

make special provisions for EWS flows directly from Article 15(6) and Entry 25 of List-III. The provision of reservation being within the domain of

the State, the Medical Council of India cannot curtail the powers of the State Government. In support of his contentions, he has relied upon the

judgment of the Hon'ble Apex Court in the case of Gulshan Prakash (Dr.) v. State of Haryana reported in 2010 (1) SCC 471. He also placed reliance

on the judgment of the Hon'ble Supreme Court in the case of Modern Dental College v. State of M.P. reported in 2016 (7) SCC 353.

SUBMISSIONS BY THE LEARNED COUNSELS FOR THE PETITIONERS

22. Learned Sr. Counsel Mr. R.N. Mathur assisted by Mr. Prateek Mathur submits that EWS seats granted by MCI under PGMER, 2000 were 51.

Similarly, 23 seats were given under 10A and 15 seats were converted from Diploma Course to Degree course. He submits that total 89 seats were

given by MCI on the understanding that the State would utilize its roster point and would implement its EWS reservation. Learned senior counsel

further submits that it was incumbent upon the State Government to notify all the Medical Colleges for the purpose of giving reservation to EWS. He

further submits that seats cannot be increased without checking the availability of resources i.e. faculty and infrastructure etc. in colleges. He further

submits that roster applicable for the appointment and promotion cannot be applied for admission. He further submits that only State quota is

challenged in the writ petition and not All India Quota, for the reason that the EWS reservation is given only in the State quota seats. Contending that

the roster applicable for appointments and promotions could not be applied, Mr. Mathur contended that the learned Single Judge was fully justified in

quashing and setting aside the first round of counselling. Mr. Mathur further submitted that unless seats are identified and colleges are identified, roster

automatically cannot be applied. He further submits that it was incumbent upon the State Government to notify all the Medical Colleges for the

purpose of giving EWS reservation, but they did not inform the colleges, yet conducted the first round of counselling. Mr. Mathur also vehemently

contended that first round of counselling is illegal as seats have been allotted without any seat matrix. In this way, a serious prejudice has been caused

to the students. Mr. Mathur submits that the MCI directions are mandatory for the State and they cannot deviate from the same. When 89 seats were

allotted, the State Government was required to fill in the same strictly. According to Mr. Mathur, Sr. Counsel 4 Medical Colleges were given 51 seats.

Even if it is assumed that the number of additional seats is 89, then also, 50% of the 89 would go to the State quota, whereas in the first round of

counselling, for the State quota in respect of 50% of 89, the appellants have allotted 55 seats. In this view of the matter, first round of counselling is

vitiated. Mr. R.N. Mathur further submits that the option of free exit would not make any difference for the reason that if a candidate is admitted and

a seat is occupied by him, who is not entitled to occupy that seat, he would never vacate that seat. He further submits that while considering the

standard of education in any College or Institution, calibre of the students of that Institution or College cannot be ignored. He further submits that the

State Government did not frame rules for providing reservation for admission to Medical Colleges and passed a general order, a copy whereof was not

even endorsed to Medical Colleges and Rajasthan University of Health Sciences. In this view of the matter, learned Single Judge rightly held that the

roster is a general roster.

The learned counsel has relied on the following judgments:

1. (1983) 2 SCC 235 Col. D.D. Joshi & Ors. v. Union of India & Ors.
2. (1985) Suppl. SCC 432 B. Prabhakar Rao and Others v. State of Andhra Pradesh & Ors.
3. (1998) 6 SCC 131 Medical Council of India v. State of Karnataka and others
4. (1999) 7 SCC 120 Dr. Preeti Srivastava and Anr. v. State of M.P. & Ors.
5. (2012) 8 SCC 203 Satyabrata Sahoo and others v. State of Orissa & Ors.
6. (2016) 9 SCC 749 State of Uttar Pradesh and others v. Dinesh Singh Chauhan
7. (2018) 17 SCC 426 : (2018) 17 SCC 478 Tamil Nadu Medical Officers Association and others v. Union of India & Ors.
8. (2006) 8 SCC 212 M. Nagaraj and others v. Union of India & Ors.

23. Mr. Shobit Tiwari, learned counsel appearing for the writ petitioners submits that the object for implementation of 10% EWS seats in the base year

of 2019 was that the unreserved category seats should not get reduced. He further submits that the reservation for EWS category candidates had

been provided in terms of Article 15(6) of the Constitution of India in the Medical institutions and for the purpose of implementing the same, the letter

dated 27.2.2020 was issued, which starts with the words ""for the purpose of implementation"" and thus, the implementation of EWS quota for PG seats

would be governed solely by the letter dated 27.2.2020. He further submits that as 89 seats were available before the first round of counselling, there

was no reason for not including the said seats. He submits that if 89 seats are further bifurcated, then 50% of it i.e. 44 seats would go in All India

quota and 45 seats would go in State quota. Thus, the first round of counselling was not as per the letter dated 27.02.2020.

24 . Mr. Angad Mirdia, learned counsel appearing for the MCI submits that total number of PG seats in Government Medical Colleges of Rajasthan

for academic year 2019-20 were 1053. Out of these 1053 seats, 50% seats i.e. 526 were earmarked for All India Quota (AIQ) and remaining 50%

seats i.e. 527 were earmarked for State Quota. The Government of Rajasthan followed 54% reservation prior to implementation of the EWS quota.

Thus, Open/Unreserved seats available with the State of Rajasthan for General Category were 46%. In view of the reservation policy followed by the

State of Rajasthan, the number of General Category seats available for PG admissions for the year 2020-21 were 542, according to the following

formula:

$$0.46 \times 527 = 242$$

25. After implementing 10% EWS reservation, the percentage of Unreserved/Open Category seats has been reduced to 36% from the existing 46%

available with the State of Rajasthan. Therefore, number of seats required for implementation of EWS quota while keeping absolute number of

unreserved seats intact were thus:-

$$242/0.36 = 672$$

26. He further submits that to implement 10% EWS quota, 145 NEET PG seats were required to be enhanced in the State of Rajasthan for the A.Y.

2020-21, however only 92 seats were enhanced. The bifurcation of which are as under:

27. However, subsequently the total number of seats i.e. 92 were reduced to 89 for the academic year 2020-21. He further submits that once the

seats had been allocated to the State Government for implementation of EWS quota, it was incumbent upon the State Government to have included

the State seats in the first round of counselling and the State cannot absolve from its responsibility of providing EWS reservation only after including

the additional seats. He further submits that reservation policy i.e. to be followed, is within the absolute domain of the State Government, but it should

be applied in one shot and 89 seats ought to have been included in the first round of counselling.

ISSUES WHICH NEED TO BE ADJUDICATED BY THIS COURT

28. After having heard the arguments made by the learned counsel for the parties and having perused the material available on record, the issues

which need to be adjudicated are as follows:

(I) Whether the direction (f) as given by the learned single judge is bad in the eyes of law and violates the provisions of the Constitution?

(II) Whether the learned single judge was right in holding that the EWS reservation is to be applied in each category?

(III) Whether the writ petitioners were estopped from challenging the counselling process?

(IV) Was any prejudice caused to the petitioners by the impugned action of the Appellants?

(V) Whether there was any violation of the reservation policy or the MCI regulations while allocating seats in favour of the candidates belonging to EWS?

(VI) Was the learned single judge justified in issuing general directions by treating the petitions as filed in representative capacity?

29. In re: Question No. (I) and (II)

It has been observed by the learned single judge in paragraph 37 of the impugned order dated 15.06.2020 that the words used in Article 15(6) of the

Constitution are ""each category"". Relying on the aforesaid expression, the learned single judge held that EWS reservation was to be given in each

category to maintain the cap of 50% as reservations cannot exceed 50%. In other words, the learned single judge held that in each category 10% of

seats would be reserved for EWS and thus, reservation would cut across each category. It was further observed by the learned single judge that the

state government misinterpreted Article 15(6) of the Constitution to mean that EWS reservation was to be granted only from the general/open

category and not from the SCs, STs and OBCs. It was also observed by the learned single judge that if Article 15(6) were to be interpreted in the

manner as done by state, it would exceed the cap of 50%.

After having perused the observations made by the learned single judge carefully, we are of the opinion that the learned single judge failed to interpret

the plain language of Article 15(6) of the Constitution. Article 15(6) of the Constitution reads as thus:

(6) Notwithstanding in this article or sub-clause (g) of clause (1) of Article 19 or clause (2) of article 29 shall prevent the State from making.-

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5);

and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5)

in so far as such special provision relate to their admission to educational institutions including private educational institutions, whether aided or unaided

by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition

to the existing reservation and subject to a maximum of ten per cent of the total seats in each category.

Explanation:- For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to

time on the basis of family income and other indicators of economic disadvantage.

A bare perusal of Article 15(6) makes it clear that the reservations for EWS are in addition to the existing reservations, subject to a cap of 10%.

Further, 15(6)(b) makes it clear that provisions for advancement of economically weaker sections can be made by the State other than the classes

mentioned in Clause (4) and (5). When the language of the Article is clear, it has to be interpreted literally and the interpretation as taken by the

learned single judge goes against the plain language of Article 15(6). In our considered view, the learned single judge also failed to read Article 15(6)

as a whole and merely relied on the expression "each category". Moreover, the vires of Article 15(6) has already been challenged before the Apex

Court and all the issues including the issue regarding exceeding the 50% cap is sub-judice before the Honourable Apex Court in a number of Writ

Petitions including Writ Petition (C) No. 55/2019 titled Janhit Abhiyan v. Union of India. No interim stay order has been granted by the Apex Court in

these bunch of petitions pending before it and thus, the State is free to proceed as per the plain language of Article 15(6). Moreover, when the issues

are pending before the Honourable Apex Court, it was not proper on part of the learned single judge to give finding on any of those issues including

the issue regarding the 103rd constitutional amendment having the effect of permitting reservations over 50%. Thus, the learned single judge erred in

issuing direction (f). Question No. I is answered accordingly.

30. In Re: Question No. (III)

It has been vehemently contended by Mr. M.S. Singhvi, the learned Advocate General that the petitioners participated in the entrance examination as also the first round of counselling without any demur or objection. No grievance was raised by any of the petitioners at the time of submitting their preferences. Having participated in the examination and the counselling process without any demur or objection, it was not open for the petitioners to challenge the entire counselling. We find substance in the argument made by the learned Advocate General. It is not disputed that the petitioners participated in the first round of counselling. Having participated in the first round of counselling without raising any objection, it was not open for the petitioners to challenge the rules of the game at a belated stage, more so when the appellants need to strictly follow the schedule prescribed by the Honourable Apex Court for completion of admission process. In this regard, we rely on the observations made by the Supreme Court in D.

Sarojakumari v. R. Helen Thilakom and Others reported in (2017) 9 Supreme Court Cases 478 wherein the Supreme Court observed as thus:

10. The Kerala High Court did not note the above mentioned judgments and ignored the well settled position of law in rejecting the specific plea raised by the appellant herein that the appellant could not raise the issue that no direct recruitment should have been conducted once she had applied for and taken part in the selection process by direct recruitment.

11. As far as the present case is concerned an advertisement was issued by Respondent No. 6 inviting applications for the post of Music Teacher in

Samuel LMS High School. Respondent No. 1 did not raise any objection at that stage that the post could not be filled in by direct recruitment and she

should be considered for promotion. Not only that, she in fact, applied for the post and took part in the selection process. After having taken part in the

selection process and being found lower in merit to the appellant, she cannot at this stage be permitted to turn around and claim that the post could not

be filled in by direct recruitment. The reasoning of the learned Single Judge in rejecting the objection is not in consonance with the law laid down by

this Court. In view of this we need not go into the other issues raised.

Further, it is also not the case of the petitioners that they were not aware that 10% of the seats would be allotted to candidates belonging to the EWS.

The Department of Personnel, Government of Rajasthan had issued a UO Note as

early as 22.02.2019 to the effect that 10% of the total seats would be reserved for candidates belonging to EWS in educational institutions across the state. Further, another letter dated 17.03.2020 had been issued by the Directorate of Medical Education, Government of Rajasthan to ensure the implementation of 10% EWS in NEET PG 2020. In the absence of any challenge made to these orders, it was not open for the petitioners to challenge the consequential orders as rightly contended by the learned Advocate General. In *Amarjeet Singh and Others v. Devi Ratan and Others* reported in (2010) 1 Supreme Court Cases 417, the Supreme Court observed as follows:

Challenging the consequential order without challenging the basic order is not permissible, (vide *Chithranja Menon & Ors. vs. A. Balakrishnan & Ors.*, AIR 1977 SC 1720).

26. In *Roshan Lal & Ors. Vs. International Airport Authority of India & Ors.*, AIR 1981 SC 597, the petitions were primarily confined to the seniority list and this Court held that challenge to appointment orders could not be entertained because of inordinate delay and in absence of the same, validity of consequential, seniority could not be examined. In such a case, a party is under a legal obligation to challenge the basic order and if and only if the same is found to be wrong, consequential orders may be examined.

In our considered opinion, the learned single judge erred in over-looking that the petitioners could not challenge the counselling as they participated in it without any demur or objection. Question No. (III) is answered accordingly.

31. In Re: Question No. (IV) and (V)

It has been contended by Mr. Singhvi, the learned Advocate General that the petitioners were not in any way prejudiced or affected by the impugned action of the appellants and the results of the first counselling. It was submitted by the learned Advocate General that reservation policy is within the exclusive domain of the state and the MCI does not have any role in this regard and as such, cannot curtail the power or the discretion of the appellants in applying the reservation of 10% for the EWS category. Moreover, there is an option of "free exit" and candidates who have filled their preferences in the first round of counselling can exit and submit their options again in the second round of counselling. Thus, there was no prejudice

caused to the petitioners by the non-inclusion of additional seats in the first round of counselling and as such they did not have any cause of action to even file the writ petitions.

On the other hand, Mr. R.N. Mathur, Mr. Shobhit Tiwari and Mr. Angad Mirdha have vehemently argued that the reservation was wrongly applied by

the appellants, because of which excess seats had been allotted to the candidates belonging to the EWS category, which adversely affected the right

of the petitioners. Moreover, there was a failure on part of the appellants to include the additional seats in the first round of counselling. Mr. Mathur

relied on the judgment rendered by the Honourable Supreme Court in Dr. Preeti Srivastava (Supra). It was also vehemently contended by all the

learned counsels appearing for the Respondents that instead of giving EWS reservation on the additional seats i.e. 45 (as out of 89 additional seats,

only 45 would go to the state quota), EWS reservation in the first round of counselling was given to 55 candidates which adversely affected the right

of the petitioners and similarly situated unreserved/open category candidates.

After having heard the arguments made by the learned counsels for both the sides, we do not find any substance in the submissions made by the

learned counsel for the writ petitioners that the reservation was wrongly applied by the appellants. Pursuant to the 103rd amendment made to the

constitution, reservations can be provided to candidates belonging to EWS candidates for admissions to educational institutions under Article 15(6) as

noted above. Acting in pursuance of the same, the State of Rajasthan vide its order dated 22.02.2019 provided for EWS reservation to the extent of

10%. Further, another letter dated 17.03.2020 had been written by the Directorate of Medical Education to the Counselling Board to ensure that 10%

EWS reservation is implemented for NEET PG 2020. Acting in compliance of the directions of the Central Government and State Government, the

Board of Governors (in supersession of the MCI), recommended 89 additional PG seats to the State of Rajasthan, to be filled through NEET PG 2020.

A letter dated 13.03.2020 had also been issued by the Government of India to all States to give the benefits of EWS reservation from the Academic

Session 2020-21 as per State policy. The appellants provided reservations to candidates belonging to the EWS category to the extent of 10% and thus,

the first round of counselling was done for a total of 597 seats, out of which EWS

reservation was given subject to the cap of 10% as provided by Article 15(6) and the order dated 22.02.2019 passed by the Department of Personnel, Government of Rajasthan. It is also important to mention here that the order dated 22.02.2019 and the letter dated 17.03.2020 issued by the appellants have not been challenged by the writ petitioners and thus, when the main orders on the basis of which the reservation of 10% was provided under EWS was not challenged, consequential orders and the first round of counselling could not have been quashed by the learned single judge. We also do not find any substance in the arguments made by Mr. Mirdha, learned counsel appearing for the MCI. The policy of reservation is within the exclusive domain of the State and the MCI cannot curtail the power or discretion of the State in this regard. The role of the MCI is limited to allocating additional seats after taking into consideration the infrastructure in medical colleges across the State, the availability of faculty etc. Once the MCI allocated additional seats, it was not open for the MCI to direct the State-appellants to apply the policy of reservation in a particular way. The policy regarding reservations is framed by the State and the role of MCI is limited to maintaining the standards of education across the country. In this regard, reference must be made to some judicial precedents. In *Gulshan Prakash and Others v. State of Haryana*, (2010) 1 SCC 477, the issue for consideration before the Supreme Court was whether the State of Haryana was bound to give reservations in favour of candidates belonging to the Schedules Castes and Schedule Tribes. Dismissing the petitions, the Honourable Supreme Court observed that Article 15(4) is merely an enabling provision and matters relating to reservations are to be decided by the respective States. The relevant observations are reproduced below:

29. Inasmuch as the Government of Haryana has not prescribed any reservation for the Post-Graduate Courses, neither the University nor any other authority be blamed for approving and publishing the prospectus which does not contain reservation for Post-Graduate Courses. The clarificatory order of this Court in *Abhay Nath (supra)*, is applicable for the Institutes managed/run by the Central Government and unless the State Government takes any decision for granting reservation in MD/MS/PG Diploma and MDS Courses, it cannot be made applicable. As the State Government is competent to make the reservation to a particular class or category, until it is

decided by the State, as being a Policy matter, there cannot be any direction to provide reservation at the PG level. The State of Haryana has explained that reservation in under-Graduate Medical Courses is being provided strictly as per their policy. The Post-Graduate Degree/Diploma in medical education is governed by Medical Council. Even, the Medical Council of India has not followed strict adherence to the rule of reservation policy in admission for SC/ST category at the Post-Graduate level.

30. As stated earlier, Article 15(4) is an enabling provision and the State Government is the best judge to grant reservation for SC/ST/Backward Class categories at Post-Graduate level in admission and the decision of the State of Haryana not to make any provision for reservation at the Post-Graduate level suffers no infirmity. In our view, every State can take its own decision with regard to reservation depending on various factors. Since the Government of Haryana has decided to grant reservation for SC/ST categories/Backward Class candidates in admission at MBBS level i.e. under graduate level, then it does not mean that it is bound to grant reservation at the Post-Graduate level also.

Similarly, in *Modern Dental College and Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353 a Constitution Bench of the Apex Court observed as thus:

95. In any case, since this Court in *P.A. Inamdar* has held that there cannot be any fixation of Quota or appropriation of seats by the State, reservation which inheres setting aside Quotas, would not be permissible. It is, thus, argued that the provisions seek to bring back the *Unni Krishnan* system of setting up State Quotas which has been expressly held by this Court to be impermissible. This argument is to be noted to be rejected. In fact, as can be seen from the impugned judgment having regard to the provisions of Clause (5) of Article 15 of the Constitution, there was no serious challenge laid to Section 8 read with Rules 4(2), 7 and 15 of the Rules, 2008. In fact, counsel for the appellants conceded that they had not challenged 93rd Constitutional Amendment vide which Article 15(5) was inserted into the Constitution. In any case, there is hardly any ground to challenge the said constitutional amendment, which has already been upheld by a Constitution Bench judgment in the case of *Pramati Educational and Cultural Trust*. The only other argument raised was that a reading of the reservation

provisions in Rule 7 of Rules, 2009 would show that it would be difficult to work out said percentage having regard to the fact that number of seats in the post-graduate dental and medical courses in different specialized disciplines are few. The High Court has successfully dealt with this argument by appropriately demonstrating, by means of charges, that not only it was possible to work out extent of reservation provided for different categories, sufficient number of seats were available for general categories as well. We, thus, do not find any merit in the challenge to the reservation of seats for SC/ST and OBC etc. which is in consonance with Article 15(5) of the Constitution.

At this juncture, it would be appropriate for us to discuss the few case-laws relied on by the counsel for the petitioners. Mr. Mathur first replied on the judgment rendered in *Satyabrata Sahoo* (Supra). The issue which required consideration in that case was whether the prospectus for admission for postgraduate courses in medical education issued by the State of Odisha in so far as it provided additional weightage of marks for in-service candidates was violative of Article 14 of the Constitution of India since in-service candidates could appropriate seats even from open category where seats were already few. The Supreme Court had in that case quashed proviso to Clause 9(2) of the relevant Regulations and the prospectus issued by the State of Odisha in so far as it permitted appropriation of open/unreserved seats by in-service candidates since 50% seats had already been allocated for in-service candidates by virtue of Clause 9(1) and permitting in-service candidates to appropriate the seats of open category would have violated Clause 9(1)(a). It is clear that the said judgment is not applicable to the facts of the instant case. In the instant case, reservations to EWS have been provided by virtue of Article 15(6) which has not been challenged by the petitioners and also on the basis of the order dated 22.2.2019 and letter dated 17.03.2020 issued by the State Government.

The next judgment relied on by the counsels for the petitioners is *Medical Council of India v. State of Karnataka*, (1998) 6 SCC 131. The question which fell for consideration before the Apex Court in that case was whether the Medical Council of India or the Central Government could fix admission capacity in the medical colleges in the state of Karnataka before the insertion of Sections 10A, 10B and 10C in the Medical Council Act,

1956. Allowing the petition filed by the Medical Council of India, the Honourable Court noted that seats could be increased in medical colleges only by

the Central Government on the basis of the recommendations of the MCI. This judgment also does not advance the case of the writ petitioners in any

way. The power of the MCI to approve and allocate additional seats is not in question here. In the instant case, the appellants applied 10% EWS

reservation as per State policy. Though MCI had allocated 89 additional seats to the State, the policy of the state to apply 10% EWS reservation on

the total number of seats cannot be said to be wrong as it was in consonance with the plain language of Article 15(6) of the Constitution.

The next judgment relied on by Mr. Mathur, learned senior counsel for the petitioners is Preeti Srivastava (Supra). The main question before the

Supreme Court in the aforesaid case was whether or not, the States had the power to prescribe lower minimum qualifying marks for candidates

belonging to the reserved categories. Answering in the negative, it was held by the Honourable Court that since minimum qualifying marks had a

direct relation with the standards of education, it was for the MCI to prescribe the same and not for the States. The ratio of the judgment in Dr. Preeti

Srivastava (supra) is also not applicable to the facts of the instant case since in the instant case, 10% reservations have been given by the State-

appellants after the 103rd constitutional amendment and as per the mandate of the Central Government.

There is yet another reason as to why the reasoning given by the learned single judge does not seem to be cogent. Admittedly, there is an option of

free exit"" in the first round of counselling and any candidate (including those belonging to the UR/open category) are free to exit and submit his/her

preference afresh. Thus, by the alleged action of the appellants in not including additional seats in the first round of counselling, no prejudice has been

caused to any of the petitioners as the same would be added in the second round of counselling and all open category candidates including the

petitioners can submit their options afresh.

For the reasons aforementioned, questions (IV) and (V) are decided in favour of the appellants and against the writ petitioners. We accordingly hold

that there was no infirmity or illegality in the first round of counselling and also in the action of the State-appellants to provide/allot 55 seats to

candidates belonging to the EWS.

32. In Re: Question No. (VI)

The learned single judge has observed in paragraph 34 of the impugned judgment dated 15.06.2020 that the observations made in the judgment would apply to all the students (whether they have approached the court or not) and the petitions were treated as being filed in representative capacity by the

learned single judge. After reading the impugned judgment, we do not agree with the findings of the learned single judge. For filing a representative

suit or petition even under Article 226, the provisions contained in Order 1, Rule 8 of the CPC have to be followed as held in *Km. Rashmi Mishra v.*

M.P. Public Service Commission and others (2006) 12 Supreme Court cases 724.

In view of the aforesaid discussions, SAW Nos. 396/2020, 397/2020 and 398/2020 filed by the appellants-State deserve to be allowed, which stand

allowed. Accordingly, we quash and set aside the impugned judgment dated 15.06.2020 passed by the learned single judge and hold that the first round

of counselling was proper and there was no illegality or infirmity in the same. The Appellants-State are free to proceed with the second round of

counselling.

So far as SAW Nos. 399/2020, 442/2020, 401/2020 are concerned, the appellants therein are not going to be affected in any way by the directions

issued by the learned Single Judge and the counsel appearing for the appellant(s) therein as also the counsel for the intervener supports the argument

of learned Advocate General appearing for the State. Thus, those appeals are disposed of accordingly.

However, SAW No. 408/2020 filed by Dr. Vishal Mittal stands dismissed for the reasons aforementioned. EWS reservation would apply to all the

institutions and not on particular seats.

A copy of this judgment be placed in each connected file.