

S. No.
Suppl. Cause List

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH**  
**AT SRINAGAR**

LPA No. 140/2022  
CM No. 4269/2022

Reserved on: 24.08.2022  
Pronounced on: 13.09.2022

UT of J&K through Chairman J&K Board of Professional Entrance Examination Srinagar/Jammu and Another ...Appellant(s)

Through: Mr. D. C. Raina, Advocate General with  
Mr. Hilal Ahmad Wani, AAG

**Vs.**

Dr. Bhat Ab. Ubran Bin Aftab and Others ...Respondent(s)

Through: Mr. Syed Faisal Qadiri, Sr. Advocate with  
Mr. Huzaif Ashraf Khanpuri, &  
Mr. Mansab Wadoo, Advocates

**CORAM:**

**HON'BLE THE CHIEF JUSTICE**

**HON'BLE MR JUSTICE WASIM SADIQ NARGAL, JUDGE**

**JUDGMENT**

**Per Wasim Nargal-J:**

1. This intra Court Appeal, (for short "Appeal") is directed against the judgment/final order dated 27.06.2022, (for short "*Impugned Order*"), passed by the Writ Court in writ petition bearing WP(C) No. 2020/2021, whereby, the writ petition filed by the petitioners has been allowed in the following manner:-

- (i) That the petitioner no. 1 is held entitled to admission in the MDS Course in the discipline that was last leftover after the Open Merit Category candidates 20 in number were allotted the seats in various disciplines as per their merit and preference. It would be discipline which, in the instant selection, has been offered to the candidate figuring at serial No.21 of the Open Merit Category.
- (ii) That since the cutoff date for admission to the PG Courses is a long back over, it would, therefore, be not in the fitness of

things to grant admission to the petitioner no.1 at this point of time. More so, when all the seats notified for admission stand filled up and there is no seat left vacant.

- (iii) That with a view to undo the wrong done to the petitioner no.1 and give effect to his right to admission, as upheld by this Court, respondents are directed to keep one seat of MDS reserved in the next session in the discipline to which the petitioner no.1 was entitled to in the instant admission but was not granted because of fault attributable exclusively to the respondent-BOPEE.
- (iv) The respondent-BOPEE shall do well to set aforesaid discipline apart and not to make it part of selection or admission of MDS Course-2022.
- (v) The petitioner is also held entitled to a compensation of Rs. Five Lakhs to be paid by the respondent-BOPEE to compensate the petitioner no.1 for the loss of one year of his career.

2. To understand the controversy in proper perspective, the brief resume of the facts in question that led to the filing of the aforesaid appeal are enumerated as under:-

**FACTS OF THE CASE:**

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

Court made a categorical statement that since the aforementioned petitioners were allocated the disciplines and have got the admission or have otherwise lost interest to pursue the petition before the Writ Court and, accordingly, arguments were raised on behalf of petitioner no.1 only.

4. It was the specific stand of the petitioner no.1 before the Writ Court that as per the provisional merit list of NEET-MDS-2021, he figured at S. No.52 in the overall merit and would be at S. No. 2 in the category of CDP/JKPM, next only to Dr. Rasiq Mansoor. It was the specific stand of the petitioner no.1, before the Writ Court that so far as Dr. Rasiq Mansoor, is concerned, he figured at S. No. 5 of the merit list and, therefore, was in the selection zone in the general category. The grievance which was projected by the petitioner no.1 before the Writ Court was that in terms of the impugned selection list, the BOPEE has filled up only 41 seats by selection of equal number of candidates for different specialities of MDS Courses, but in doing so, the official respondents have not given 2% reservation earmarked for CDP/JKPM Category. It was further pleaded that out of 42 seats notified for admission, 1 seat was allocable to the category of CDP/JKPM. However, no candidate from CDP/JKPM Category was selected, therefore, the mandate of reservation provided under the J&K Reservation Act, 2004 and Rules framed thereunder, was violated.
5. The aforesaid petition was vehemently opposed by the BOPEE (appellants herein). It was pleaded by the respondents (appellants

herein) before the Writ Court that after the conduct of entrance examination by the National Board of Examination (NBE) and receipt of result, the BOPEE proceeded further in accordance with the Rules for conducting counselling of the candidates and allotment of streams in various disciplines/Colleges. It was further pleaded that NBE declared the result of NEET PG-MDS-2021 on 30.08.2021 and after receipt of result by the Union Territory of Jammu and Kashmir, online registration of candidates was done and provisional UT List was notified vide notification No.94-BOPEE of 2021 of 2021 dated 25.09.2021. It was the further stand of the appellants before the Writ Court that by a subsequent notification bearing No.100-BOPEE of 2021 dated 03.10.2021, the provisional select list on the basis of merit-cum-preference exercised by the eligible participating candidates in physical round of counselling and by operation of relevant reservation rules for admission to MDS Courses in Government Dental College, Srinagar (GDC, Srinagar) and Indira Gandhi Government Dental College, Jammu (IGDC, Jammu), was issued. It was further stand of the respondents (appellants herein) that 14 candidates were recommended for admission in IGDC, Jammu, whereas 27 candidates were recommended for GDC, Srinagar. It was further pleaded that the selected candidates have joined their courses and there was no short fall in any of the aforesaid institutions. The respondent-Board, has further pleaded that out of 28 seats available in GDC, Srinagar, 14 were filled up from open merit category, 2 from EWS Category and 12 from the reserved category. Similarly, in

IGDC, Jammu, out of 14 seats available in the College, 7 have been filled up from open merit category and 7 from the Reserved Category. The petitioner no.1 before the Writ Court was having UT rank of 52 under JKPM Category, which was clubbed with CDP Category as per S.O 127 dated 20.04.2020 and the said category has 2% reservation, meaning thereby that out of 42 seats, 1 seat is allocable to the category of CDP/JKPM. It was further pleaded that the lone seat earmarked for the said category has been utilized/filled up by selection/admitting the candidate having UT rank 5. It was, thus, urged that only seat earmarked for the category of CDP/JKPM has been exhausted and, therefore, the petitioner no.1, should have no grievance on this account.

6. The stand with regard to petitioner nos. 2, 3 and 4, have explained by the respondents as to how the seats earmarked for RBA Category, have been filled up by selecting and admitting candidates on the basis of their *inter se* UT rank. The petitioner no.2 was allotted the stream of Oral Pathology and Microbiology under open merit category as per merit/preference given by him. The petitioner no.3, was UT rank 33, whereas RBA Category was exhausted at rank 25. Similar was the position with regard to petitioner no.4, who, was having UT rank 27 and has been given the discipline of Oral Pathology & Microbiology in GDC, Srinagar, as per his merit/preference in open merit category.
7. It was the specific stand of the Board that with regard to denial of seat under CDP/JKPM Category to the petitioner no.1, was that, as per the reservation provided vide S.O. No.127 dated 20.04.2020, 2%

reservation is available to the said category which in view of availability of total 42 seats, comes to one. It was pleaded before the Writ Court that the only seat that was allocable to the category of CDP/JKPM was filled up by admitting Dr. Rasiq Mansoor in the Post Graduate Course of Orthodontics & Dentofacial Orthopaedics, and, therefore, the petitioner no.1, could not be considered. It was the emphatic case of the BOPEE that Rule 17 of the Reservation Rules was not applied. It was further pleaded that since Dr. Rasiq Mansoor, a JKPM Category candidate, who had made it to the select list in the general category, had made only one choice in the order of preference and, therefore, was allotted the discipline and college as per his merit and preference. He did not leave any discipline to be put in the pool of reserved category, which could have been offered to the petitioner no.1.

**GROUND OF CHALLENGE:**

8. Feeling aggrieved of the aforesaid judgment/final order, the present appeal has been preferred by the appellants on the ground that the learned Writ Court has interpreted Rule 17 in a different way than implemented by the appellants since inception of the J&K Reservation Rules 2005 read with SRO 49 dated 30.01.2018 followed by SRO 165 dated 08.03.2019. It has been further pleaded in the memo of appeal by the appellants that the candidate namely, Dr. Rasiq Mansoor, having UT rank 5 belonging to JKPM/CDP, otherwise falling in open merit category, had given only one choice while appearing for the counselling for the said course, got selected for the said

discipline/course on the basis of merit-cum-choice, as the seat which he opted for, was available only in his respective category, i.e., JKPM/CDP and was not available in open merit, as a result of which, Rule 17 could not be applied in his case as he has not leftover any discipline/stream, which would have been shifted, after exhausting the open merit quota and adding to the pool of the reserved category. The appellants have specifically pleaded that the leftover discipline/stream as per SRO 165 dated 08.03.2019, is created by the choices given by the meritorious reserved category candidate, so preferences/choices given by the meritorious reserved category candidates, has very important role to play in deciding the allocation of the seat/stream to the subsequent merit holder in the concerned category. Accordingly, as per the appellants, Rule 17 was not applied as he has not leftover any discipline/stream which would have been shifted to the reserved category pool and, accordingly, as per the appellants, the impugned judgment deserves to be quashed.

9. Furthermore, it has been pleaded in the memo of appeal that the respondent herein without bringing on record the selected candidates, cannot obtain any order/judgment nor the relief in the nature of certiorari can be claimed under Article 226 of the Constitution without impleading them as party respondent.
10. It is the specific stand of the appellants in the memo of appeal that Dr. Rasiq Mansoor, who participated in the counselling held on 03.10.2021, having UT rank 5 under JKPM Category, had given only one choice in his preference form, i.e., Orthodontics & Dentofacial

Orthopaedics at GDC, Srinagar and at the time of his counselling, the said choice was not available in the open merit category and the same was available in the reserved category, therefore, the same was allotted to him from the reserved category quota considering him as JKPM candidate and as he had given only one choice in his preferences form and has not leftover any seat which would have eventually been shifted to the reserved category pool. Thus, as per the stand of the appellants, one seat which was to be allotted to JKPM category was allotted to Dr. Rasiq Mansoor having UT rank 5. So, the JKPM category was exhausted at UT rank 5.

11. Besides that, it has been pleaded by the appellants that the respondent no.1 herein participated in the physical round of counselling held on 03.10.2021, whereby, in his preference form, he had not given any choice and furthermore, at the time of his counselling, no seat was available under JKPM category as the same was already exhausted at UT rank 5.
12. It has been further pleaded that the judgments on which the learned Writ Court relied relates to the case, where the meritorious candidates had approached the Court in time without any delay and there is a fault only on part of the authorities and or there is apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right of equality, whereas in the present case, the appellants have reserved two seats in the said course in compliance to the Court judgment and not conducted the second round of counselling and mop up round of the counselling for



allotment of the seats which had remained unfilled/leftover after conducting the first round of counselling. As per the stand of the appellants, one seat which has remained unfilled because of non-availability of candidate in ST category and the second seat became vacant because of the petitioner no.3, (resigned after allotment of the seat in the first round of the counseling) had been kept reserved. It is the specific stand of the appellants that because of pendency of the case before the Writ Court, two seats got wasted as the last date of allotting the seats was 10.11.2021, as given in the admission schedule of academic year 2021-22 for MDS Courses 2021 by Dental Council of India, therefore, the order/judgment is liable to be set aside.

13. Lastly, it has been pleaded by the appellants that, since, the writ petitioner no.1 (respondent no.1) had prayed for quashment of selection of the selected candidates, and none of the candidate has been arrayed as a party respondent in the writ petition, as per the law laid down by Hon'ble Supreme the Court, the appeal, as such, deserves to be dismissal in the light of the fact that none the candidates arrayed as party respondent by the writ petitioners.

**POINTS IN ISSUE:**

14. The core issues which arise out of the instant appeal preferred by the appellants is as under:-

- (i) *Whether in the facts of the present case, Section 9 and 10 of the Reservation Act and Rules as amended till date are required to be applied?*

- (ii) *If yes, then how Rule 15 and 17 of the Reservation Rules is required to be interpreted and applied. Secondly, whether the ground taken by the appellants about Rule 17 being not applicable in the present case is correct?*
- (iii) *Whether after coming to the conclusion by the learned Writ Court about applicability of the Rules and Act and its incorrect interpretation on part of the Board before the Writ Court, the relief granted in favour of the respondent is in tune with the settled legal position?*
- (iv) *Whether the directions issued by the learned Single Judge, vide judgment impugned to the extent of reserving one seat of MDS in the next session in the discipline to which respondent no.1 (petitioner no.1) was entitled to, but was not granted because of the fault attributable to the appellants (BOPEE) is correct, in absence of arraying the affected persons as party respondents?*

**ARGUMENTS/SUBMISSIONS OF THE PARTIES:**

15. Shri D. C. Raina, learned Advocate General assisted by Shri Hilal Ahmad Wani, learned AAG, appearing on behalf of appellants has argued that in case open merit candidate belonging to any reserved category opts for only one discipline and does not leave any other choice there, in that eventuality, Rule 17 of the reservation rules cannot be applied in his case and he shall be considered first in open

merit and subsequently, allotted a discipline/stream/college of his choice, if available. However, in case discipline/stream/college of his choice is not available in open merit, he is required to be considered for allotment of discipline stream/college in his respective category on the basis of merit-cum-preference as per the rules.

16. He has argued that since Dr. Rasiq Mansoor ( who has not been arrayed as party respondent before the Writ Court), participated in the counselling held on 03.10.2021, having UT rank 5 under JKPM category, had given only one choice in his preference form, i.e., Orthodontics and Dentofacial Orthopaedics, GDC Srinagar, and at the time of his counselling, the said choice was not available in the open merit category and the same was available in the reserved category, therefore, the same was allotted to him from the reserved category quota, considering him as JKPM. He further argued that since he had given only one choice in his preference form and has not left any seat vacant which would have eventually been shifted to the reserved category pool. Therefore, in such a peculiar situation, the appellants have not applied Rule 17 of J&K Reservation Rules 2005 read with SRO 165 dated 08.03.2019. He further argued that as per the S.O 127 dated 20.04.2020, 2% reservation was to be given to the JKPM category, so out 42 seats, 1 seat was to be allotted to the JKPM category and same was allotted to Dr. Rasiq Mansoor having UT rank 5, so the JKPM category was exhausted at UT rank 5.
17. He has further argued that since the petitioner no.1 (respondent no.1 herein) had participated in the physical round of counselling held on

03.10.2021, whereby, in his preference form, he had not given any choice and furthermore, at the time of his counselling, no seat was available under JKPM category as the same was already exhausted at UT rank 5.

18. He pointed out that in open merit category having 21 seats, stood exhausted at UT rank 28, by the candidate namely, Samer Ahmad Kambay, who was petitioner no.2 in writ petition bearing WP(C) No. 2020/2021, and reserved category having 19 seats got exhausted at UT rank 78 namely, Asgar Ali, therefore, the only seat available under JKPM category stood exhausted and no other reserved category seat for a candidate under the aforesaid category could be allotted because merit and choice are correlated with each other, as the merit of the course is the relevant factor, but allocation of discipline is a determinative factor.
19. With a view to substantiate his argument, learned Advocate General, has heavily relied upon the judgment of the Hon'ble Supreme Court in case titled *National Medical Commission v. Mothukuru Sriyah Koumudi & Others*, passed in Civil Appeal No. 3940 of 2020, wherein it has been held that the directions cannot be issued for increasing annual intake capacity and to create seats. He argued that the annual intake capacity fixed by the MCI has to be strictly adhered to as per the law laid down by the Hon'ble Supreme Court. With a view to put forth his point, he relied upon para 11 of the aforesaid judgment, wherein the principle has to be made applicable to the Post

Graduate Courses also. For facility of reference, para 9 and 11 of the aforesaid judgment is reproduced as under:-

“9. The question that arises for our consideration is whether the High Court was right in directing creation of a seat for this academic year for granting admission to Respondent no.1. It has been repeatedly held by this Court that directions cannot be issued for increasing annual intake capacity and to create seats. The annual intake capacity is fixed by the Medical Council of India (now National Medical Commission) which has to be strictly adhered. Admissions to Medical Colleges cannot be permitted to be made beyond the sanctioned annual intake capacity of a medical college as has been repeatedly held by this Court.

11, As the dispute in *S. Krishna Sradha* case (supra) pertained to admission to the undergraduate MBBS Course, this Court held that they have not dealt with the Post Graduate Medical Courses. Mr. Parameshwar argued that there is no reason why the logic behind the judgment in *S. Krishna Sradha* case (supra) should not be made applicable to Post Graduate Courses. We find force in the said argument of Mr. Parameshwar. This Court was only dealing with the admission to the MBBS Course for which reason directions given in the said judgment were restricted to the MBBS Course. Directions issued in *S. Krishna Sradha* case (supra) can be made applicable to admission to Post Graduate Courses as well”.

20. Besides learned Advocate General has specifically relied upon the operative portion of para 9 of another Supreme Court judgment in case titled *S. Krishna Sradha v. The State of Andhra Pradesh and Others*, reported in *AIR 2020 SC 47*. With a view to justify that since the petitioner no.1 has not impleaded any of the selected candidate in the array of respondents and, as such, the writ petition could not have been allowed and the writ petition, accordingly, was required to be dismissed on this ground alone. The operative portion of para 9 of the aforesaid judgment is reproduced as under:

“The Court may also pass an order cancelling the admission given to a candidate who is at the bottom of the merit list of the category who, if the admission would have been given to a more meritorious candidate who has been denied admission illegally, would not have got the admission, if the Court deems it fit and proper, however, after giving an opportunity of hearing to a student whose admission is sought to be cancelled”.

21. He has also placed reliance upon judgment in case titled *Tripurari Sharan and Another v. Ranjit Kumar Yadav and Others*, reported in *2018(2) SCC 656* and, judgment passed by Division Bench of this Court in LPA No. 08/2021 in case titled *Mehak Javid v. JKBOPEE* decided on *31.03.2021* and, accordingly, prayed for that the judgment impugned passed by the learned Single judge be set aside.
22. *Per contra*, Shri Syed Faisal Qadiri, learned Senior Counsel for the respondent no.1, along with ShriHuzaif Ashraf Khanpuri, & Shri Mansab Wadoo, Advocates, appearing on behalf of respondent no.1, has vehemently argued that the denial of MDS seat to the respondent no. 1, by the appellants on the ground of non-applicability of the reservation rules and the Act is incorrect. With a view to substantiate his claim, he argued that the Meritorious Reserved Category Candidate (MRC, Dr. Rasiq Mansoor) and the respondent no.1, both had applied under CDP category, which as per the reservation rules has 2% reservation in professional PG Course. He pleaded that the Board upon allocating a seat to the MRC in open merit category was under a legal obligation qua the respondent to allot the seat to his client being next in the order of merit in CDP category. Since the appellants have failed to act in conformity with the Reservation Rules, the action of the appellants is not sustainable in the eyes of law with particular reference to Rule 15 of the aforementioned Rules. He further argued that Rule 17 of the Reservation Rules has to be applied in the present case for allotment of discipline, more particularly, in the light of explanation and proviso 2 to the aforesaid rules, which has not

been done by the Board and consequently, the action of the Board is liable to be set aside. He further argued that admittedly, the UT rank of the respondent no.1 and the MRC, Dr. Rasiq Mansoor, was 52 and 05, respectively. Once rank 5, i.e., MRC, Dr. Rasiq Mansoor, finds a place in the open merit because of his higher merit, then Rank 52 was required to be incorporated in the reserved category and one seat was required to be given to CDP category as per the Rules in vogue, which has not been done in the present case. He pleaded that this was precisely the reason that the learned Single Judge, has allowed the writ petition against the appellants.

23. He further argued that the Board has fallen in error in interpreting Rule 15 and 17 of the Reservation Rules and he heavily relied upon the judgments passed by Hon'ble the Supreme Court, which have been reproduced by the learned Single Judge that, once MRC, had opted for a preference out of the pool of disciplines reserved for categories, leaves the discipline which he would ordinarily get in the open merit because of his shifting being higher in the merit. The learned Senior counsel appearing for the respondent no.1, has placed reliance upon Rule 17 of the Reservation Rules, which makes it abundantly clear that once, the MRC candidate chooses a discipline from the pool of reserved category, he leaves the discipline being offered to him as an open merit candidate because of his shifting from reserved category candidate to open merit candidate. As per the learned senior counsel for the respondent no.1, the explanation to Rule 17, prescribes the method for such a situation and, accordingly, he

argued that the respondent no.1, was required to be granted a seat and a choice of his discipline in accordance with the rule read with explanation and second proviso of Rule 17. With a view to clarify the factual position, learned Senior counsel for respondent no.1, argued that the select list was issued on 03.10.2021 and the respondent no.1 (writ petitioner no.1) objected to his non-inclusion immediately on 04.10.2021, without wasting any time and the writ petition came to be preferred on 04.10.2021. He further pleaded that the learned Writ Court vide interim order dated 05.10.2021, protected the writ petitioners by passing an interim order in their favour by reserving the seats, thus, no fault can be attributed to the respondent no.1, for not approaching the Court well in time. The learned senior counsel for respondent no.1 further argued that the judgment of the Writ Court is comprehensive, well-reasoned and justified and the findings arrived by the learned Single Judge are based on the law laid down by Hon'ble the Supreme Court in identical cases for PG Courses.

24. With a view to substantiate his argument, the learned senior counsel for the respondent no.1 has heavily relied upon the judgment passed by Hon'ble the Supreme Court in case titled *S. Krishna Sradha v. The State of Andra Pradesh*, reported in *AIR 2020 SC 47*, and also, the judgment passed by the Hon'ble the Supreme Court in case titled *National Medical Commission v. Mothkuru Sriyah Koumudi and Others*, reported in *2020 SCC Online SC 992*.

**LEGAL ANALYSIS:**

25. We have heard learned counsel for the parties at length and also perused the material on record.



26. From a plain reading of Section 9 and 10 of the J&K Reservation Act, 2004, it is abundantly clear that these provisions have been enacted to give effect to the law on the subject settled by Hon'ble the Supreme Court and this Court in various authoritative pronouncements rendered from time to time. The principle underlying the provision of Section 10 is manifestly clear that the benefit of reservation must reach to the deserving candidate in the category and is not eaten away or affected by a candidate of reserved category, who on the strength of his merit, has equal or better merit than the merit of the candidate last admitted in the professional course in the general category. Section 10 in clear and unambiguous terms, provide that there shall be no bar for admission of a member of reserved category against the seat other than or in addition to one reserved for him under Section 9, if such candidate is found qualified for admission on merit as compared with the candidates of the open merit/general category. Admittedly, in the present case, the Board has not acted in conformity with the mandate and spirit of Section 9 and 10 of the aforesaid Act, as Dr. Rasiq Mansoor, who was figuring at S. No. 5, was entitled to be considered in the open merit, though, he had the option for taking the benefit of his reserved category status for the purpose of making the choice of the discipline/college.

**RULE POSITON:**

For facility of reference Rule 9 and 10 of the Reservation Act is reproduced as under:-

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

(a) reserved categories and such other classes and categories as may be notified from time to time; and

(b) economically weaker sections.

Provided that the total percentage of reservation provided in clause (a) shall in no case exceed 50%.

Provided further that the reservation in the Professional Institutions in favour of the persons belonging to economically weaker sections shall be in addition to the existing reservation as provided in this sub-section and shall be subject to a maximum of ten percent of the seats in each category.

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 BDS, shall be selected from amongst female candidates belonging to such category:

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

**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.

27. Accordingly, we are of the view that the next candidate in the order of merit in the category of CDP/JKPM (respondent no.1 herein), was entitled to be selected against one seat earmarked for the category of CDP/JKPM. Admittedly, the appellant-Board, has not carried out the mandate of Sections 9 and 10 of the aforesaid Act in its letter and spirit as they have not selected any candidate in the category of CDP/JKPM for which 1 out of the 42 notified seats, was reserved.

*Thus, we answer the issue no. (i), in affirmative by holding that Sections 9 and 10 of the Reservation Act and Reservation Rules as amended till date was applicable to the case in hand.*

28. From the perusal of the Rule 17, it is abundantly clear that the reserved category candidate, if selected against open merit seat (known as MRC), is entitled to be considered for allotment of discipline/stream/college allocable to him in his respective category on the basis of his merit-cum-preference. The leftover discipline/stream/college in the open merit category shall be allotted to the reserved category candidate, who gets selected consequent upon MRC getting selected in open merit. We have gone through the explanation appended to Rule 17, which explicitly provides that the term leftover discipline/stream/college means such number of discipline/stream/college that would become available after allotment of seat to the last open merit candidate as allocable under Rules.

**Rule Position:**

It would be apt to reproduce Rule 15 and Rule 17 of the Reservation Rules as it now stands and which are applicable to the instant selection reads as under:-

**“15. Distribution of seats:-** For the post-graduate courses in MD/MS/M.Tech. Engineering and Agricultural Sciences and similar other postgraduate course, 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	10%

	Areas	
	(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%

### “17. Allotment of Discipline etc.

A reserved category candidates, if selected against the open merit set may be considered for allotment of discipline/stream/college allocable to him in his respective category on the basis of his merit and preference. The left over discipline/stream/college in the open merit category shall be allotted to the reserved category candidates who get selected consequent upon the reserved category candidate getting selected in the open merit category.

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

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

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

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

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

**Note:1:** In case the last OM candidate belongs to any reserved category, but Rule 17 cannot be applied in his case, he shall be considered first in OM and allotted a discipline/stream/college of his choice/preference, if available. However, in case discipline/stream/college of his choice/preference is not available in the OM, he may be considered for allotment of 16 WPC No. 2020/2021 discipline/stream/college in his respective category on the basis of merit cum preference in accordance with Rule 13 or 15 as may be applicable in his case.

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

From the bare perusal of Rule 15 coupled with 2<sup>nd</sup> proviso to Rule 17, it is abundantly clear that in respect of PG Courses, the leftover disciplines/streams/college, shall be added to the pool of reserved category candidates in terms of Rule 15 and allotted on the basis of merit-cum-preference. Note (1) of Rule 17, makes position further clear by providing that in case the last open merit candidate belongs to any reserved category, i.e., if the last candidate in the open merit is MRC, in that eventuality, Rule 17 will have no application. In such case, the said candidate shall be considered first in the open merit category and subsequently, allotted the discipline/stream/college of his choice/preference, if available. It is only in case discipline/stream/college of his choice/preference is not available in the open merit category, in such eventuality, he may be considered for allotment of discipline/stream/college in his respective category on the basis of merit/preference in accordance with Rule 15 of the Rules.

In the instant case, the MRC candidate, i.e., Dr. Rasiq Mansoor had given only one choice insofar as the discipline of MDS is

concerned and, accordingly, he was allotted the aforesaid discipline as per his merit/preference, which was Orthodontics and Dentofacial Orthopaedics, by making his choice as a CDP/JKPM category candidate. The movement of Dr. Rasiq Mansoor from open merit category to CDP/JKPM category for the purpose of making the choice of the discipline resulted in one discipline of MDS available in open merit. The Board, as such, upon allotting a seat to MRC in open merit was under a legal obligation to allot the seat to respondent no.1, being next meritorious candidate in CDP category, which in the present case has not happened and action of appellants, as such, is violative of Rule 15 of the Reservation Rules. The leftover discipline in the present case would shift and has to be added to the pool of the reserved category candidates as envisaged under Rule 15 and was required to be allotted on the basis of *inter se* merit/preference amongst the reserved category candidates. We are in agreement with the learned Single Judge that the Board has committed an illegality in not pushing the petitioner no.1, upto the selected under the category of CDP/JKPM, when, the only more meritorious candidate in the category than the petitioner, i.e., Dr. Rasiq Mansoor, has succeeded in making a place in the open merit on the strength of his merit. Thus, the Board has fallen in error in interpreting Rule 15 and 17 to the disadvantage of the petitioner No.1 (respondent no.1 herein) and, thus, we are of the view that it is the discipline which the BOPEE ought to have added to the pool of reserved category in tune with Rule 15. Since Dr. Rasiq Mansoor has taken the advantage of his category status and invoked

Rule 17 for the purpose of his choice of his discipline and was admitted to MDS Course in the discipline of Orthodontics & Dentofacial Orthopaedics, which discipline was available in the pool of reserved category and by doing so, he consumed one discipline from the pool of reserved category, but consequently, he made one discipline meant for open merit category available to be filled up. We are of the view that the said discipline that would be leftover discipline, was required to be added to the pool of reserved category and allotted on the basis of merit-cum-preference, which has not happened in the present case.

*Accordingly, we hold that the appellants have fallen in error in interpreting the true spirit and mandate of Rule 17, which was applicable to the case in hand. Thus, the ground taken by the appellant-Board that Rule 17 was not applicable to the present case, is rejected and we hold that the Rule 17 is applicable to the case in hand, and the Board has fallen in error in understanding the true import of Rule 17. Thus, the issue no. (ii), is answered, accordingly.*

29. Since, there was no delay on part of the respondent no.1, in filing the representation/writ petition, thus, we hold that the law laid down by the Hon'ble Supreme Court in case *titled S. Krishna Sradha v. The State of Andhra Pradesh and Others and National Medical Commission v. Mothukuru Sriyah Koumudi and Others*, as has been reproduced by the learned Single Judge, was fully applicable to the case in hand. Since, the merit list was declared by the appellant-Board on 03.10.2021 and representation was immediately filed by the

respondent no.1, on 04.10.2021, as per record followed by writ petition, which was filed on 05.10.2021. Thus, the judgment passed by Hon'ble the Supreme Court mentioned supra, was applicable to the case in hand, wherein the Hon'ble the Supreme Court had held as under:-

**“13.** In light of the discussion/observations made hereinabove, a meritorious candidate/student who has been denied an admission in MBBS Course illegally or irrationally by the authorities for no fault of his/her and who has approached the Court in time and so as to see that such a meritorious candidate may not have to suffer for no fault of his/her, we answer the reference as under:

**13.1.** That in a case where candidate/student has approached the court at the earliest and without any delay and that the question is with respect to the admission in medical course all the efforts shall be made by the concerned court to dispose of the proceedings by giving priority and at the earliest.

**13.2.** Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate and the candidate has pursued his/her legal right expeditiously without any delay and there is fault only on the part of the authorities and/or there is apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right of equality and equal treatment to the competing candidates and if the time schedule prescribed – 30th September, is over, to do the complete justice, the Court under exceptional circumstances and in rarest of rare cases direct the admission in the same year by directing to increase the seats, however, it should not be more than one or two seats and such admissions can be ordered within reasonable time, i.e., within one month from 30th September, i.e., cutoff date and under no circumstances, the Court shall order any Admission in the same year beyond 30th October. However, it is observed that such relief can be granted only in exceptional circumstances and in the rarest of rare cases. In case of such an eventuality, the Court may also pass an order cancelling the admission given to a candidate who is at the bottom of the merit list of the category who, if the admission would have been given to a more meritorious candidate who has been denied admission illegally, would not have got the admission, if the Court deems it fit and proper, however, after giving an opportunity of hearing to a student whose admission is sought to be cancelled.

**13.3.** In case the Court is of the opinion that no relief of admission can be granted to such a candidate in the very academic year and wherever it finds that the action of the authorities has been arbitrary and in breach of the rules and regulations or the prospectus affecting the rights of the students and that a candidate is found to be meritorious and such candidate/student has approached the court at the earliest and without any delay, the court can mould the relief and direct the admission to be granted to such a candidate in the next academic year by issuing appropriate directions by directing to increase in the number of seats as may be considered appropriate in



the case and in case of such an eventuality and if it is found that the management was at fault and wrongly denied the admission to the meritorious candidate, in that case, the Court may direct to reduce the number of seats in the management quota of that year, meaning thereby the student/students who was/were denied admission illegally to be accommodated in the next academic year out of the seats allotted in the management quota.

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

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

Rule 17, which is the core issue in the present case, has been interpreted by this Court on more than one occasion. The essential part of the Rule 17, which was interpreted by the Single Bench of this Court in case titled *Mehdi Ali and Others v. State and Others*, reported in *AIR 2019 J&K 91*, remains the same even after its substitution vide SRO 165 of 2019 dated 08.03.2019. The law laid down by the Court in aforesaid judgment is fully applicable to the case in hand and, accordingly, we reject the contention of the Board that since Dr. Rasiq Mansoor, had made only one choice, which was available in the reserved category, therefore, Rule 17 had no application.

Since, the petitioner no.1 was left out not because of his Act or omission, but due to the fault attributable, exclusively to the Board which failed to act strictly in conformity with the Rule 17 of the aforesaid Rules in its right perspective and deprived a meritorious candidate of his right to seek admission in the PG Course in MDS.

*We are in total agreement with the findings/observations made by the learned Writ Court after careful consideration of the*

*matter and do not find any infirmity or illegality in the judgment/final order. Thus, the issue no. (iii), is answered, accordingly.*

30. The learned Single Judge, while parting with the judgment has observed that since the petitioner no.1 has made out a strong case for his admission to PG Course, i.e., MDS Course against the leftover discipline in open merit category and with a view to undo the wrong, the petitioner no.1 was given effect to his right of admission by keeping one seat of MDS reserved in the next session in the discipline to which the petitioner no.1 was entitled to in the instant admission, but was not granted because of fault attributable exclusively to the BOPEE, by directing the BOPEE to set aforesaid discipline apart and not to make it part of selection or admission of MDS Course 2022, besides holding him entitled to compensation of Rs. 5.00 lakhs. We do not find any fault with the observations of learned Single Judge and, thus, the ground of the appellants that the petitioner no.1 has failed to array the affected persons as a party respondent does not hold ***good as no prejudice has been caused to any contesting candidate for the current session.***

Thus, the argument of the learned Advocate General, does not hold good that no directions can be issued for increasing the annual intake capacity, which if be done, will be against the mandate of Medical Council of India Guidelines as provided in para 11 of the law laid down by Hon'ble the Supreme Court in case titled ***National Medical Commission v .Mothukuru Sriyah Koumudi and Others,***

with particular reference to para 9 of the aforesaid judgment. We are of the view that the directions passed by the learned Single Judge to reserve 1 seat of MDS in the next session in the discipline to which the petitioner no.1 was entitled to, in no way increases the intake capacity rather a direction has been issued to BOPEE to set the aforesaid discipline apart and not to make it part of the selection or admission of MDS Course 2022.

*The 2<sup>nd</sup> contention of learned Advocate General that the Court cannot pass any order cancelling the admission given to a candidate, who is at the bottom of the merit without arraying the said person as a party respondent, is also not tenable in the eyes of law as there is no such direction which has been issued by the learned Single Judge, which will be violative of the law laid down by Hon'ble The Supreme in case titled S. Krishna Sradha v, State of Andhra Pradesh and Others, as projected by the learned Advocate General. Thus, the issue no. (iv), is answered, accordingly.*

31. The judgment relied upon by Shri D. C. Raina, learned Advocate General, in case titled *Mehak Javid v. JKBOPEE*, passed by the Division Bench of this Court in LPA No. 08/2021, decided on 31.03.2021, is not applicable to the present case.

**CONCLUSION:**

32. Viewed in the context what has been discussed herein above, we are in agreement with the findings/observations made by the learned Writ Court and on the careful consideration of the matter, we do not find

any infirmity or illegality in the judgment/final order dated 27.06.2022 and, accordingly, we uphold the same.

33. In the above background, while affirming the judgment impugned dated 27.06.2022, we *dismiss* the instant appeal filed by the appellants along with connected CM(s), being without any merit.

(WASIM SADIQ NARGAL) (PANKAJ MITHAL)  
JUDGE CHIEF JUSTICE

**SRINAGAR**

13.09.2022

Manzoor

