

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

**CJ Court**

**Case: LPA No. 41/2024**

**CAV No. 307/2024**

**Reserved on :11.03.2024**

**Pronounced on : 27.03.2024**

Sara Banoo

.....Appellant

Through :- Mr. Abhinav Sharma, Sr. Advocate with  
Mr. Abhirash Sharma, Advocate

v/s

Ayeda Jehan and ors.

.....Respondent(s)

Through :- Mr. Jahangir Iqbal Ganaie, Sr. Advocate with  
Mr. Umar Farooq, Advocate  
Mr. Raman Sharma, AAG  
Mr. Sumeet Bhatia, GA

**CORAM:**

**HON'BLE THE CHIEF JUSTICE**

**HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE**

**ORDER**  
**27.03.2024**

**N. Kotiswar Singh, C.J.**

1. The present appeal has been preferred against the judgment and order dated 21.02.2024 (for short the '**impugned order**') rendered by the learned Single Judge in WP (C) No. 2755/2023, by which the learned Single Judge allowed the writ petition filed by the writ petitioner/Respondent No. 1 herein, seeking quashment of the allotment of the discipline/stream of "Paedodontics and Preventive Dentistry" to the Appellant and "Oral Pathology and Microbiology" in favour of the petitioner (Respondent No. 1 herein) and directing swapping of these disciplines allotted to them.
2. Before we deal with the issues raised in this appeal, it may be apposite to refer briefly to the background facts of the case.

- i.** The Jammu and Kashmir Board of Professional Entrance Examination- JKBOPEE (Respondent No. 3 herein) invited online applications from eligible candidates for appearing in the National Eligibility-cum-Entrance Test (NEET) MDS for admission to various MDS courses under the Dentists Act, 1948 where the present Appellant as well as the writ petitioner (Respondent No. 1 herein) along with other private respondents had participated. On the basis of the entrance test conducted by the Respondent No. 3, the Provisional Merit List of the NEET MD/MS/PG Diploma & MDS Courses-2023 candidates belonging to the UTs of J&K and Ladakh was published on 25.07.2023 in which the NEET ranking as well as the ranking in the UT were indicated.
- ii.** In the merit list so declared, the Respondent No. 1-Ayeda Jehan had secured 725<sup>th</sup> Rank in NEET and 19<sup>th</sup> Rank in the UT. On the other hand, the Appellant herein (Respondent No. 10 in the writ petition) - Sara Banoo had secured 13991<sup>st</sup> Rank in NEET and 65<sup>th</sup> Rank in the UT. Thus, the Respondent No. 1 was admittedly higher in ranking.
- iii.** As per the NEET-PG Schedule-2023, the whole process of admission of NEET-PG Session 2023-24 needed to be completed by 10.10.2023 and the Academic Session for PG Courses to be commenced by 05.09.2023.
- iv.** As far as the number of seats available for the Session 2023-24 is concerned, there were 21 seats available for the UTs of J&K and Ladakh which were distributed in terms of S.O 127 dated 20.04.2020 read with JK Reservation Rules, 2005. As per the aforesaid S.O 127 there is 10% reservation for RBA Category which means that out of 21 total MDS seats for Session 2023-24, 02 seats are reserved for RBA category.

|                           |   |    |
|---------------------------|---|----|
| Total Seats for MDS       | = | 21 |
| OM Category               | = | 10 |
| STK/STL (4% of 21)        | = | 01 |
| RBA Category (10%)        | = | 02 |
| Other reserved categories | = | 09 |

v. The authorities have also earmarked the PG courses for various as follows:

| OPERATIVE          |                                         | S.O 127 IMPLEMENTATION  |            |     |          |        |            |          | MDS 2023   |      |          |       |
|--------------------|-----------------------------------------|-------------------------|------------|-----|----------|--------|------------|----------|------------|------|----------|-------|
| NEET-PG (MDS)-2023 |                                         | Government Seats of MDS |            |     |          |        |            |          |            |      |          |       |
| S.No               | Discipline                              | GDC-SGR                 | Open Merit | EWS | Category | GDC-MU | Open Merit | Category | Open Merit | EW S | Category | Total |
| 1                  | Conservative Dentistry & Endodontics    | 3                       | 1          | 0   | 2        | 1      | 0          | 1        | 1          | 0    | 3        | 4     |
| 2                  | Oral & Maxillofacial Surgery            | 3                       | 1          | 1   | 1        | 1      | 1          | 0        | 2          | 1    | 1        | 4     |
| 3                  | Periodontics                            | 1                       | 1          | 0   | 0        | 1      | 0          | 1        | 1          | 0    | 1        | 2     |
| 4                  | Prosthodontics, Crown & Bridge          | 2                       | 1          | 0   | 1        | 1      | 1          | 0        | 2          | 0    | 1        | 32    |
| 5                  | Oral Medicine & Radiology               | 1                       | 1          | 0   | 0        | 0      | 0          | 0        | 1          | 0    | 0        | 1     |
| 6                  | Orthodontics & Dentofacial Orthopaedics | 2                       | 1          | 0   | 1        | 1      | 0          | 1        | 1          | 0    | 2        | 3     |
| 7                  | Paedondontics & Preventive Dentistry    | 1                       | 1          | 0   | 0        | 1      | 0          | 1        | 1          | 0    | 1        | 2     |
| 8                  | Oral Pathology & Microbiology           | 1                       | 0          | 0   | 1        | 1      | 1          | 0        | 1          | 0    | 1        | 2     |
| Total              |                                         | 14                      | 7          | 1   | 6        | 7      | 3          | 4        | 10         | 1    | 10       | 21    |

vi. Thus, from the above, it is evident that different courses are allotted to Open Merit Category and various reserved categories. An Open Merit Category or General Category candidate has to choose a discipline from the ones allotted to the Open Merit candidate. Similarly, a reserved category candidate has to choose from the disciplines earmarked for the

reserved category candidates. Every candidate has been given the choice in terms of preference to select from the respective categories.

**vii.** As per rules, this will be discussed hereinafter, though the candidates can choose the desired disciplines, it will be based on merit cum preference. Further, a candidate belonging to Open Merit Category cannot choose from the disciplines allotted to the Reserved Category and vice versa.

**viii.** As far as the present dispute is concerned, it will suffice to mention that the writ petitioner (Respondent No. 1 herein) i.e. Ayeda Jehan, who belongs to RBA category, had opted for “Paedodontics & Preventive Dentistry” as her second preferred course, and for the present Appellant (Respondent No. 10 in the writ petition), who belongs to ST category (Kargil)/STK, the said course was her fourth preference.

**ix.** Since as per the rules, allotment of discipline is to be based on merit cum preference, ordinarily and under normal circumstances, between the Respondent no. 1 and the Appellant, the Respondent No. 1 herein ought to have been allotted the course of her choice before considering the choice of the less meritorious candidate i.e. the Appellant. Since, the first choice of the Respondent No. 1 (writ petitioner) which was “Orthodontics & Dentofacial Orthopaedics”, was not available to her on account of the same being chosen by a more meritorious person, the Respondent No. 1 could have been allotted her second choice i.e. “Paedodontics and Preventive Dentistry” which however, was allotted

to the present Appellant who had lesser merit. Thus, this is the genesis of the dispute between the two parties.

3. Before we proceed to examine the validity of this allocation of streams/courses, which the Respondent No. 1 as the writ petitioner had questioned in the writ petition, we may further refer to the relevant rules which govern the reservation of seats and allocation of disciplines/courses.

(i) As noted above, a total 21 seats were available for being filled up by various categories of candidates in the UTs of J&K and Ladakh. Out of the 21 seats, 10 were allotted to Open Merit Category and the remaining 11 seats to the reserved categories. As far as ST (Kargil) ST (Ladakh) is concerned, there was one seat earmarked for them (being 4% of 21), and for the reserved category of RBA, 02 seats were allotted (being 10% of 21).

(ii) How the seats for the Post Graduate Courses in Dentistry are to be distributed is governed by Rule 15 of J&K Reservation Rules, 2005 which reads as follows:

Rule 15

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

- |      |                                                |   |     |
|------|------------------------------------------------|---|-----|
| (i)  | Open Merit Category                            | = | 75% |
| (ii) | Reserved Categories:                           |   |     |
|      | (a) Scheduled Caste                            | = | 4%  |
|      | (b) Scheduled Tribe                            | = | 5%  |
|      | (c) Socially and Educationally backed Classes: |   |     |

- |                                                                                      |   |     |
|--------------------------------------------------------------------------------------|---|-----|
| (i) Residents of Backward Areas                                                      | = | 10% |
| (ii) Residents of Areas Adjoining<br>Actual Line of Control                          | = | 2%  |
| (iii) Weak and Under Privileged Classes<br>(Social Castes)                           | = | 1%  |
| (d) Children of Defence Personnel/Para<br>Military forces and State Police Personnel | = | 2%  |
| (e) Candidates possession outstanding<br>Proficiency in Sports                       | = | 1%  |

(iii) The above Rule 15 specifically provides that selection from the reserved category for different streams has to be made strictly on the basis of their *inter se* merit by treating them as a single class for the purpose of allotment of seats. Thus, it is very clear that though different percentages of reservation have been provided for various reserved categories, at the time of allotment of discipline, the same is to be made purely on the basis of merit by treating all these reserved categories as one unit.

4. The application of the aforesaid Rule 15 has been further explained in Rule 17 of J&K Reservation Rules, 2005 specially to deal with a situation when a preference is made by a reserved category candidate who is included in the Open Merit Category by virtue of merit. The said Rule 17 permits a reserved category candidate who finds a place in the Open Merit list, to choose from a discipline earmarked for Reserved categories. Otherwise, an Open merit candidate cannot chose a discipline which is allotted to the reserved category. The aforesaid Rule 17 reads as follows:

**Rule 17**

"17. Allotment of Discipline etc.

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

Explanation:

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

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 of 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 of 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 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 Counseling 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".

5. The aforesaid Rule 17, therefore, makes it clear that if a reserved category candidate, selected in the open merit category by virtue of his merit, who is referred to as a Meritorious Reserved Candidate (for short 'MRC') seeks allotment of a discipline which is reserved for the reserved category, by not choosing from any of the disciplines earmarked for the Open Merit Category, the same may be allowed. Thus, a discipline earmarked for the reserved category can be allotted to such MRC candidate who finds place in the Open Merit Category by virtue of his merit.
6. Thus, it may so happen that a candidate who originally belongs to a reserved category and is included in the open merit category by virtue of his merit, does not get the preferred discipline of his choice from amongst the disciplines earmarked for the open merit category, yet, he may find that his preferred choice is earmarked for the reserved category. In that event, such a reserved category candidate though included in the open merit category, is given the benefit of choosing such preferred subject which may be available under reserved category. This benefit has been extended for the reason that a reserved candidate even if he finds place in open merit is not put to a disadvantageous position vis a vis other candidates in the reserved category. However, the aforesaid arrangement has certain consequences which has caused controversies in the past.

7. If the said reserved category candidate who secures his place amongst the open merit category by virtue of his merit finds the preferred discipline from amongst the disciplines earmarked for the open merit category, and hence does not take advantage or benefit of choosing any of the disciplines earmarked for the reserved categories as enabled under Rule 17 aforesaid, then, such reserved candidate has to be treated as an open merit candidate, pure and simple. In such an event, there is no impact on the courses or disciplines earmarked for the reserved categories which have to be allocated amongst the reserved category candidates based on merit cum preference. In such an eventuality, there is no scope for any controversy.
8. However, the situation changes when a candidate (MRC) who belongs to Reserved Category does not opt for any of the disciplines/streams earmarked for the open category, and instead chooses or opts for another discipline which is earmarked only for the reserved category, as enabled under Rule 17 (supra). Thus, one discipline earmarked for the reserved category gets consumed by the MRC to the loss of the reserved category candidates, but resultantly one stream from the Open Merit Category becomes available after being unutilized by the MRC. The methodology of allotment of discipline amongst the reserved candidates thereby gets effected which is dealt under Rule 17 referred to above.
9. An important attending question which will arise is, if such candidate belonging to a reserved category who finds himself in the open merit category by virtue of merit opts for a discipline earmarked for the reserved category, then how such a candidate (MRC) is to be classified? *Whether he will continue to be treated as an open merit category candidate or a*

*reserved category candidate?* As the percentage of reservation of seats for different categories i.e. reserved category *viz-a-viz* open merit category cannot be changed, if such an MRC candidate chooses a discipline earmarked for the reserved category, if he is still considered to be a candidate belonging to the open merit category, then, it will create a room for another reserved category to take his place in the reserved category.

10. On the other hand, if such a candidate is treated to be a reserved category candidate and not an open merit candidate, since he has opted to choose a particular discipline earmarked for reserved category, thus, enjoyed a benefit meant for a reserved category, then another candidate in the open merit category by virtue of merit will take the place of the MRC in the open merit category as the number of seats/quota for the Open Merit Category cannot be decreased.
11. Further, another co-related issue which will arise is how the extra discipline which is earmarked for open merit category, which will become available because of the option made by the reserved category candidate to choose a discipline earmarked from reserved category, is to be filled up.
12. The Rule making authorities had visualized the aforesaid situation and sought to deal with it by framing Rule 17 as quoted above. Yet, in spite of the endeavour of the Rule making authorities to deal with such a situation, certain ambiguities had arisen in the past which led to amendment of the said Rule 17 as it stands today. In the present case, we would be required to examine whether the said amended Rule 17 has been properly implemented.

13. In the instant case, what has happened is that there is one candidate namely, Younis Bashir who belongs to RBA Category, who by his merit came to occupy 5<sup>th</sup> Rank in the overall merit list of the UT level. He, thus, finds a place in the Open Merit Category and is treated as an MRC. There is another candidate namely Zubair Bin Hayat who belongs to RBA category who by his merit came to occupy 13<sup>th</sup> Rank in the overall merit list of the UT level. As mentioned above, there are only two seats reserved for RBA category.

The aforesaid Younis Bashir, however, did not get his preferred discipline from the disciplines earmarked for the Open Merit Category. On the other hand, the discipline of “Orthodontics and Dentofacial Orthopedics” was earmarked for the reserved category which Younis Bashir opted by invoking Rule 17 (supra). Thus, Younis Bashir who belongs to the reserved category of the RBA who finds himself in the list of Open Merit Category (MRC) by virtue of his merit, instead of choosing a discipline earmarked for open merit category, chooses a discipline earmarked for the reserved category. Thus, there will be a shortfall of discipline for the reserved category and a corresponding extra seat in the open category.

It appears that the authorities under the circumstances continued to treat Younis Bashir as a candidate under the open category rather than as a reserved category candidate under RBA category. Consequently, in his place, and since there were two seats reserved for RBA category, the Respondent No. 1-Ayeda Jehan who was the third in the merit list under the RBA category was inducted as the second candidate in the RBA

category, by filling the slot which was earlier occupied by Younis Bashir as an RBA category candidate. The authorities, however, while making allocation of disciplines amongst the reserved categories allocated the stream of “Oral Pathology and Microbiology” in GDC Jammu to Ayeda Jehan which was her last and 16<sup>th</sup> choice in order of preference, and the Appellant herein namely, Sara Banoo, who was lesser in merit to Ayeda Jehan was allotted “Paedodontics & Preventive Dentistry” in GDC Jammu which was the second choice of Ayeda Jehan.

- 14.** As noted above, since Ayeda Jehan was more meritorious than the Appellant herein-Sara Bano, the aforesaid discipline of “Paedodontics & Preventive Dentistry” which was the second preferred choice of Ayeda Jehan, ought to have been offered to Ayda Jehan in terms of Rule 15, which, however, was not done, because of which Ayeda Jehan raised the grievance and filed the writ petition which was allowed by the learned Single Judge as mentioned above.

The authorities defended the said allocation and claimed that the aforesaid allotment was done by proper application of Rule 17 and it does not suffer from any illegality.

- 15.** The learned Single Judge allowed the writ petition, set aside the allotments made to the writ petitioner (respondent no.1 herein) and the Appellant and directed swapping of the disciplines vide impugned judgment/order dated 21.02.2024 which is the subject matter of challenge before us.
- 16.** The findings of the learned Single Judge have been assailed by Mr. Abhinav Sharma, learned Senior counsel appearing for the Appellant primarily on the following two grounds:

a) Firstly, it has been submitted that in the first place, the Respondent No. 1-Ayeda Jehan could not have been included in the select list under RBA category as Younis Bashir after having chosen a discipline allotted to the reserved category has to be treated as a reserved category candidate and not an Open Merit Category candidate and since there are only two seats reserved for the RBA category, inclusion of Ayeda Jehan in the list was illegal and, hence, the question of giving preference of her choice over the claim of the Appellant herein by virtue of a better merit position does not arise.

b) Secondly, it has been submitted that even if the inclusion of Respondent No. 1-Ayeda Jehan in a merit list under the RBA category is assumed to be correct, though not admitted, yet, there could not have any direction for swapping the seats for discipline between her and the Appellant herein at this belated stage, after a delay of about 04 months from the date of admission since it amounts to re-admission to a new course. Since the timeline for admission as prescribed by the competent authority has to be strictly adhered to, any direction issued at this stage for swapping of seats would amount to directing re-admission in the respective courses and would be a deviation from the admission schedule and contrary to the mandate of law.

**17.** On the other hand, it is a plea of the private Respondent No. 1, (Ayeda Jehan) that since there was gross violation of Rule 17 by denying her the choice/stream by virtue of a better meritorious position than the Appellant, in order to do complete justice, swapping of the seats between the two seats can be directed as has been done by the learned Single Judge.

18. It has been submitted that this swapping does not involve any new admission in the PG Course as both the contesting parties are already admitted to PG courses and the swapping will not entail setting aside of any admission and also new admission.
19. Thus, the issues which arise for consideration is as to the true scope of Rule 17 referred as above and the effect it will have on the categorization of the reserved candidate and how the discipline left over in the Open Merit Category is to be allotted. Whether a reserved category candidate, though comes under the open merit category by virtue of the meritorious position he has earned, can be still treated to be a reserved category candidate for the purpose of determining the number of reserved seats or will he be treated as a candidate under the open category which will trigger the entry of another reserved candidate in the slot earlier occupied by the MRC candidate?
20. Mr. Abhinav Sharma, learned Senior counsel appearing on behalf of the Appellant by drawing attention of this Court to the decision rendered in **Union of India vs. Ramesh Ram and Others, (2010) 7 SCC 234** wherein it was held that for the purpose of computation of reservation quota, if a reserved candidate by virtue of merit and finds place in the open merit category, opts for a benefit which is made for the reserved category, he then has to be treated as a reserved category candidate and not as an open merit candidate. It has been submitted that in the present case, since Younus Bashir though could have been included in the open merit category by virtue of his merit had chosen a discipline earmarked for reserved candidate, he has to be treated as a reserved candidate under RBA category,

but the authorities continued to treat him as an open merit candidate and brought in Ayeda Jehan who was a third meritorious candidate amongst the RBA category in place of Younis Bashir. Thus, Ayeda Jehan has been wrongly included in the RBA category. As Younis Bashir belongs to RBA category and there was already another RBA category candidate namely Zubair Bin Hayat, and since there were only two seats earmarked for RBA category, no third RBA category candidate could have been included in the RBA category and considered for admission under the RBA category. Since, Ayeda Jehan has been wrongly included, the question of giving admission to her under RBA category does not arise, much less allotting a discipline of her choice.

- 21.** Further, it has been submitted by Mr. Abhinav Sharma, learned Senior Counsel that assuming that her inclusion is not disturbed, yet, the fact remains that she approached this Court belatedly i.e. two months and eleven days after the declaration of allotment of the seats and by the time the writ petition before the learned Single Judge disposed of, about four months of academic study had been already undertaken by the students and in view of a catena of decisions rendered by the Apex Court, no effective order can be passed at this belated stage to swap the disciplines as directed by the learned Single Judge.
- 22.** According to Mr. Abhinav Sharma, direction of the learned Single Judge for swapping of disciplines, literally amounts to giving direction for new admissions in the swapped disciplines and as such, any such direction for new admission, even if it is called swapping cannot be permitted at this stage. In support of his contention, learned Senior Counsel has relied on the

decisions rendered in **Priya Gupta vs. State of Chhattisgarh & Ors., (2012) 7 SCC 433**, **Asha vs. Pt. B.D. Sharma, University of Health Sciences & Ors., (2012) 7 SCC 389** and **National Medical Commission vs. Mothukuru Sriyah Koumudi & Ors., (2021) 14 SCC 805**.

**23.** It has been further submitted on behalf of the Appellant that the aforesaid judicial dictum has been followed very recently by a Single Bench of this Court in **Nadeem-Ur-Rehman & Ors. Vs. Union Territory of J&K & Ors., JKJ ONLINE 83504** [WP (C) No. 2233/2023] decided on 08.11.2023. It has been submitted that keeping in mind the directions of the Supreme Court, the learned Single Judge in the aforesaid case of **Nadeem-Ur-Rehman** (supra) did not grant admission at the belated stage in spite of categorical finding that certain candidates had been wrongly denied admissions. Instead of directing granting admission in the present academic session, the learned Single Judge had directed admission in the next academic session.

**24.** As opposed to these contentions of Mr. Abhinav Sharma, learned Senior Counsel, Mr. Jahangir Iqbal Ganaie, learned Senior Counsel appearing on behalf of Respondent No. 1 has argued that it cannot be said that the writ petitioner/Respondent No. 1 herein had belatedly approached this Court. In fact, it is on record that soon after the provisional list of admission was announced on 25.07.2023, she had filed a representation before Respondent No. 3 herein-BOPEE on 22.08.2023 and then on 23.08.2023 before the Grievance Redressal Cell in the office of the Lt. Governor, J&K for redressal of her grievance, but after not having received any positive response from the concerned authorities, she filed the writ petition on

31.10.2023 and as such, it cannot be said that there was delay in filing the writ petition.

25. It has been further argued by Mr. Ganaie, Ld. Sr. Counsel that the final selection list was not published at the time of filing of writ petition and what was published was merely a provisional selection list of candidates and as such, it cannot be said that there was any delay.
26. It has been further submitted by Mr. Ganaie, Ld. Sr. Counsel on behalf of Respondent No. 1 that the decisions cited by Mr. Sharma, Ld. Sr. Counsel in **Priya Gupta** (supra), **Asha** (supra) refer to admission to MBBS Course and are not applicable to admission in Post Graduation Courses. It also cannot be said that Respondent No. 1 was not entitled to be included as RBA category and the decision relied upon by Mr. Sharma, Ld. Sr. Counsel in **Ramesh Ram** (supra) is not applicable in the present case. It has been submitted that facts obtaining in the said case of **Ramesh Ram** (supra) is different from the one in the present case.
27. It has been submitted that since there is a clear provision under Rule 15 that the allocation of seats has to be based on merit-cum-preference, and since Respondent No. 1-Ayeda Jehan was more meritorious than the Appellant-Sara Banoo, and the said discipline of “Paedodontics & Preventive Dentistry” was the second preference of Ayeda Jehan, the Respondent No. 1, and fourth preference of the Appellant which is undisputed, the aforesaid allocation of disciplines is contrary to Rule 15 and as such, the learned Single Judge has rightly directed swapping of the disciplines/courses by rectifying the mistake.

28. It has been further submitted by Mr. Ganaie, Ld. Sr. Counsel that the learned Single Judge has not directed for new admissions. In fact, both the candidates had already been admitted. Therefore, the question of directing fresh admissions in the present case does not arise in the present case and swapping of seats does not involve any cancellation of admission or creation of new admissions. Hence, these directions issued by the learned Single Judge are not contrary to any directions of the Apex Court.
29. We will first deal with the rules governing admissions of PG courses, i.e. Rule 15 and Rule 17 of the Jammu and Kashmir Reservation Rules, 2005 framed in terms of Section 23 of the J & K Reservation Act 2004 and Section 22 of the J & K Persons with Disability Act, 1998.
30. Rule 15 specifies the percentage of the seats to be distributed for the post-graduate courses in MD/MS/M.Tech, engineering and agricultural associations and similar other post-graduate courses for the different category candidates. The relevant portions of Rule 15 read as follows:

Rule 15

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

|      |                                                            |   |     |
|------|------------------------------------------------------------|---|-----|
| (i)  | Open Merit Category                                        | = | 75% |
| (ii) | Reserved Categories:                                       |   |     |
|      | a. Scheduled Caste                                         | = | 4%  |
|      | b. Scheduled Tribe                                         | = | 5%  |
|      | c. Socially and Educationally backed Classes:              |   |     |
|      | i. Residents of Backward Areas                             | = | 10% |
|      | ii. Residents of Areas Adjoining<br>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 possession outstanding       |   |    |
| Proficiency in Sports                      | = | 1% |

31. The prescription of percentage under the aforesaid Rule 15 is in terms of Section 9 (2) of the J & K Reservation Act, 2004 which provides for reservation in professional institutions. As far as the Session 2023-24 is concerned, there were total 21 seats available in the UTs of J&K and Ladakh which were distributed in terms of S.O 127 dated 20.04.2020 read with JK Reservation Rules, 2005 where under 2 (two) seats are reserved for the RBA category.

32. It may be noted that Section 9 of the J & K Reservation Act 2004 provides for reservation of seats for various categories of candidates.

It has been also provided under Section 10 of the Reservation Act 2004 that 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.

The aforesaid Sections 9 and 10 of the Reservation Act 2004 are reproduced herein for convenience:

**RESERVATION IN PROFESSIONAL INSTITUTIONS**

**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 or categories as may be notified from time to time; and

(b) economically weaker sections :]

Provided that 2 [the total percentage of reservation provided in clause (a)] shall in no case exceed 50%:

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

**(2)The Government shall prescribe the percentage for each category in admission in the Professional Institutions:**

Provided that different percentage may be prescribed for different courses:

Provided further that 50% of the seats in each category including open category for admission to MBBS and BBS, shall be selected from amongst female candidates belonging to such category:

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

**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.

33. It appears that there were certain controversies/ambiguities in the past regarding allotment of seats which led to amendment of both Rule 15 and Rule 17. The unamended Rule 15 as well as Rule 17 read as follows:

“Rule 15 (Unamended)

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

(i) Open Merit Category 65% (ii) Reserved Categories:

(a) Scheduled Caste 4%

(b) Scheduled Tribe 5%

(c) Socially and Educationally Backward Classes:-

(i) Residents of Backward Areas 10%

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

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

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

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

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

Rule 17 (Unamended)

“Allotment of discipline etc. -A reserved category candidate, if selected against the Open Merit seat, may be considered for allotment of discipline/stream/college allocable to him in his respective category on the basis of his merit and preference. The resultant discipline/stream/college in the Open Merit category shall be allotted to the reserved category candidate who gets selected consequent upon the reserved category candidate getting selected in the Open Merit Category”

34. The aforesaid Rules 15 & 17 as amended vide SRO 165 of 2019 dated 08.03.2019 have been already reproduced earlier.

As far as Rule 17 in its unamended form is concerned, it provided that a reserved category candidate selected against open merit category may be considered for allotment of stream/discipline allocable to him in the respective categories on the basis of his merit and preference, and the resultant stream/discipline in the open merit category shall thereafter be allotted to the reserved category candidate who gets selected consequent upon the reserved category candidate getting selected in the open merit category.

35. Let us try to understand the application of the aforesaid rules with the following illustration.

As per the reservation norms, two seats are reserved for RBA category. Thus, candidates "A" and "B" who are selected in order of merit under the RBA category are entitled to admission under RBA category. However, it may so happen that candidate "A" obtained more marks from one or more candidates in the open merit category. Thus, by virtue of his merit, candidate "A" is entitled to be included in the Open Merit Category by operation of Section 9 and 10 of the Reservation Act, 2004 as mentioned above. Accordingly, because of inclusion of candidate "A" in the open merit category, one seat becomes vacant in the RBA category and consequently, another candidate under RBA category who was the third candidate in order of merit i.e. candidate "C" will be inducted in the slot vacated by candidate "A". Though, apparently there are three candidates

belonging to RBA, candidate “A” though belongs to reserved category will be treated as an open merit candidate.

36. However, after induction of candidate “A” in the open merit category list, it may so happen that he does not get the discipline/stream of his choice from the disciplines which are available and allotted to the Open Merit Category, though, the said candidate “A” may find that there is a discipline/stream “X” which he would like to choose but is available and allotted to the reserved category. The aforesaid provisions of Sections 9 and 10 however, make it possible for the candidate “A” to avail the stream/discipline of his choice “X” even if it is earmarked for the reserved category. Though, the said discipline “X” is earmarked for the reserved candidates, rules enable the candidate “A” to make his choice from the steam/discipline allotted for the reserved candidate. The result will be that while there will be a shortfall of discipline under the reserved category, as discipline “X” will no more be available for the rest of the reserved candidates, there will be one extra discipline “Y” in the Open Merit category. Since, the total number of disciplines has to remain constant, and one discipline “X” allotted to reserved category has been consumed by the candidate “A” in a manner aforesaid, there will be one extra seat say “Y” available in the pool of disciplines allotted to the open merit candidate. How this extra discipline/stream “Y” which became available from the Open Merit Category, is to be allocated, has been dealt with under Rule 17.
37. As per the unamended Rule 17, the discipline/stream “Y” which becomes available in the open merit category would be made available to candidate “C” who comes to occupy slot in the reserved category of RBA category.

This arrangement resulted in a situation where candidates who were more meritorious than the candidate “C” were deprived of the opportunity to choose that subject “Y”. To overcome this inequitable situation arising and undue advantage, which may accrue to a reserved candidate “C” who comes into the list by default as mentioned above, Rule 17 was amended by making the extra seat “Y” from the pool for open merit candidates to be placed in the pool for the reserved category candidates by adding “Explanation” to Rule 17. Thus, by virtue of the amendment, the said left over discipline from the Open Merit Category “Y”, was made available not only to candidate “C”, who came to be included in the reserved category by default, but to all other candidates to be allotted on the basis of merit cum preference as provided under Rule 15.

- 38.** The *vires* of the amendments made to Rules 15 and 17 came to be challenged before this Court in SWP 2740/2018 and OWP 351/2019, which challenge was rejected by the learned Single Judge, vide order dated 02.04.2019. The Writ Court while dealing with the issues, made the following pertinent observations as to how Rule 17 has to be applied, as reproduced hereunder:

37..... Now the question arises as to how to utilize the stream which becomes available in the general category on account of MRC not opting for it. As per unamended Rule 17, it would go to a candidate in the reserved category who would come up in the select list on account of shifting of MRC to the general category. This would go to the candidate with the inferior merit even in reserved category. This was not only acting disadvantageous to the general category candidates, but was equally disadvantageous to the candidates of his category being better merit. For example, the discipline of General Surgery in the open merit becomes available on account of MRC not opting for it, but opting for a discipline available in his category. The discipline of General Surgery under the unamended Rule 17 would straightway go to the last selected candidate in the reserved category who would come consequent upon moving of the MRC to the open category. The better meritorious candidate in the reserved categories who might have got the non clinical discipline or PG Diploma course did not have the option to claim the aforesaid resultant discipline/stream. This was clearly an

anomalous situation created by Rule 17 as it stood prior to amendment. As stated by the respondents in the reply and is otherwise apparent that the Government, with a view to remove that anomaly and to ensure that the merit of a candidate whether it is a general category candidate or reserved category candidate does not operate to his prejudice, a need was felt to suitably amend Rule 17. This is how SRO 49 of 2018 impugned in these petitions came to be issued.

38. As per the amended provision, the stream/discipline which becomes available consequent upon the MRC not opting for these disciplines are being now put in a pool of general category candidates as well as the reserved category candidates and are allocated on the principle of merit cum choice. Now these disciplines which so become available have the “trickle down effect” and in the process, the principle of merit cum choice is honored irrespective of status of the candidate. I do not see any illegality or unconstitutionality in the said provision.

39. Before I close, I would like to give an example to elucidate the mechanism on which Rule 17 operates. Let us assume that there are five seats of MD Radiotherapy in the GMC Jammu. As per distribution provided under Rule 15, the effective reservation would be four in the open merit and one for the pool of categories. If a candidate belonging to reserved category obtains merit equal to or higher than the last in the open category, by operation of law, he shifts to the open merit. As per his merit, he gets the MS Anatomy from the pool of open merit which is not a stream of his liking and, therefore, in terms of Rule 17, he falls back upon his merit in his reserved category and on the basis of his inter se merit in the pool of reserved categories, he gets the discipline of MD Radiotherapy. He utilizes the only available discipline of Radiotherapy which was meant for pool of the reserved category, but does not eat away the seat fallen to the share of reserved category. In this process, there is neither any change in the percentage of reservation provided for the reserved categories nor there is decrease of any discipline or stream earmarked for reserved categories. The discipline of MD Radiotherapy which was meant for the reserved category candidates continues to remain with the reserved category candidate and shifting of such candidate to the general category on the strength of his merit notwithstanding. This is how the process needs to be appreciated. This is so far as the streams available in the pool of reserved category is concerned, but what would happen to the stream in the general category. The MRC who shifts to the open merit category would, as a matter of right, be entitled to make option for the stream available in the general category as well. He does not make such option for the reason that it is not a discipline of his choice. Consequently, this discipline becomes available. As per the amended Rule 17, this discipline and like this, if more seats in available disciplines also become available, it constitutes a pool of left over seats/streams. Un-amended Rule provided that these seats becoming available should go to those candidates of the reserved categories who will come up in the select list consequent upon shifting of the MRCs to the open merit, whereas after the amendment, this would be available to all the selected candidates on the basis of their merit irrespective of whether they are general category or reserved category candidates. This is what I have termed as “Trickle down effect”. This promotes merit and brings certainty and un-ambiguity in Rule 17. The State, as a matter of policy decision, has decided to deviate from the earlier procedure which was not only ambiguous but anomalous. The principle underlining Rule 17 has been well explained in the cases of Ritesh R. Shah, Anurag Patel and recently, in the case of “Tripurari Sharan and another Vs. Ranjit Kumar Yadav and others” (2018)2 SCC 656. In the case of Tripurari Sharan’s case, the Supreme Court was considering the legality of the Full Bench decision of the Patna High Court rendered in the case of “The Controller Of Exam., Bihar vs Nidhi Sinha & Anr”, AIR 2017 Pat 1”. The High Court of Patna in the said case had answered the reference which is

noted by the Supreme Court in para No.3 and for facility of reference, is reproduced hereunder:

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

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

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

(ii) This distinction arises because all candidates receive, in a case of common entrance test held for securing admission in medical institutions, the same benefits of securing admission in one of the medical institutions, in a particular course, whereas in the case common selection process adopted for filling up vacancies in various services, there are variations, which accrue to the successful candidates, because the services may differ in terms of status and conditions of service including pay scale, promotional avenues, etc. Consequence of migration of an MRC to the concerned reserved category shall be, therefore, different in case of the admission to various medical institutions vis-avis selection to various posts.

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

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

40. The Supreme Court in the aforesaid case upheld the judgment of the Full Bench of the Patna High Court on all the issues answered by it. The Supreme

Court in the aforesaid case too had formulated two questions for determination. The questions those were formulated are contained in para 10 and read as under:

“i. Whether X – MRC can opt for a seat earmarked for reserved category?”

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

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

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

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

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

42. The questions were formulated and decided in the context of circular of Patna Government which was materially different from the provisions of Rule 17(amended). Besides, in the example cited, the Supreme Court referred to 50<sup>th</sup> (last) general seat and, therefore, rightly concluded that this seat if not opted by MRC would go to the reserved category candidate who stands to lose out by the choice of MRC. It is, thus, not the last candidate in the category, but all others also stand to lose out by the choice of MRC. The position, however, would be different if discipline becoming available is not one allocable to last candidate in open but higher up. In such situation, Rule 17 takes the driver's seat and discipline/stream in general category becoming available due to MRC not opting for it, will be treated as left over and would be offered on the basis of merit first to the general category and then the reserved categories.

**39.** The findings of the learned Single Judge in the aforesaid writ petitions were challenged before the Division Bench of this Court in LPA No. 89/2019 and LPA No. 97/2019 which were dismissed by the Division Bench of this Court vide order dated 30.04.2019. While upholding the *vires* of the amended rules and explaining the operation of Rule 17, the Division Bench made the following observations in Paras 14 to 18 which are reproduced as under:

14..... Then comes the second stage where rule 17 operates. According to the old rule, when a reserved category candidate finds a place in the open merit category then in an eventuality where such a candidate is not satisfied with the stream/discipline or college which might be allocable to him could opt the stream/discipline or college which he would otherwise get in the reserved category. This was done to give an additional benefit to such a candidate lest his merit placed him in a more disadvantageous position as regards the options available. The following example would explain the scenario:

15. 'A' applies in the reserved category of SC for the post of M.D. in gynecology. He however, secures very high marks and thus finds a place in the open merit category where keeping in view the merit –cum-choice principle he would get an MD seat in the discipline of E.N.T., which he does not prefer. Then as per Rule 17 whether before or after amendment, he has the choice to opt for the discipline of gynecology which he would otherwise have been entitled to had he not secured the high percentage of marks.

16. As per the unamended Rule 17 when such a candidate 'A' moved from the reserved category to the open merit category, the candidate from the reserved category would find a place in the select list under the SC category and would be entitled to the discipline of E.N.T.

17. By this principle, a more meritorious candidate in the open merit category was placed at a more disadvantageous position as against such a reserved category candidate who would secure the ENT discipline.

18. With the amendment of Rule 17 the scenario changes. Now the discipline of ENT would be offered first to the open merit candidates according to their merit and choice and in case it remains unfilled, it would then be added to the pool of reserved category candidates and then allotted on the basis of merit-cum-preference. By amending Rule 17 the No. of reserved seats remains unaffected. The amendment seeks only to curtail the benefit to a reserved category candidate of a stream or discipline which a more meritorious candidate in the open merit would be entitled to opt for. In fact, a candidate who is pushed up to figure in the select list has to sacrifice his discipline to a more meritorious reserved category candidate figuring in the open merit category if such a candidate so chose. The amendment thus, cannot be said to be irrational or ultra vires the Act or the constitution.

- 40.** We see no reason to depart from the aforesaid position obtaining as regards operation of Rule 17.
- 41.** In the present case, the present Appellant has sought to raise an issue which was not specifically dealt with in the earlier writ proceedings. What Mr. Abhinav Sharma, learned Senior counsel appearing on behalf of the Appellant seeks to harp upon is that, in the present case, Younis Bashir though belonging to RBA category by virtue of his merit, found a place in the open merit category but since he did not get the stream/discipline of his

choice, he chose a discipline which was earmarked for the reserved category. The submission of Mr. Abhinav Sharma, Ld. Sr. Counsel is that once Younis Bashir had opted a discipline which was specifically earmarked for the reserved category and not available to any of the open merit category, the said Younis Bashir cannot be treated as an Open Merit candidate any longer. He has to be treated as a reserved category belonging to RBA in which event, the present Respondent No. 1-Ayeda Jehan could not have been included in the list of RBA category candidates as the number of seats reserved for RBA Category cannot be increased from two.

In support of his claim, learned Senior counsel for the Appellant has relied on the decision rendered by the Apex Court in **Ramesh Ram** (supra) wherein it was held that:

42. Therefore, we are of the firm opinion that MRC candidates who avail the benefit of Rule 16 (2) and are eventually adjusted in the Reserved Category should be counted as part of the reserved pool for the purpose of computing the aggregate reservation quotas. The seats vacated by MRC candidates in the general pool will therefore be offered to General Category candidates. This is the only viable solution since allotting these General Category seats (vacated by MRC candidates) to relatively lower ranked Reserved Category candidates would result in aggregate reservations exceeding 50% of the total number of available seats. Hence, we see no hurdle to the migration of MRC candidates to the Reserved Category.

42. It has been further submitted by Mr. Sharma, learned Senior counsel appearing on behalf of the Appellant that Rule 16 (2) referred in the **Ramesh Ram** (supra) and Rule 17 in the present case are *pari materia* and as such, since it was held by the Hon'ble Apex Court that such meritorious candidate has to be included in the reserved category for RBA, Respondent No. 1 could not have been included in the RBA category at all, in which event, she could not have been allotted any seat much less allotted her

choice subject. The Hon'ble Apex Court in the aforesaid case, made the following observations which are reproduced as under:

27. We must also take note of the fact that when MRC candidates get adjusted against the Reserved Category, the same creates corresponding vacancies in the General Merit List (since MRC candidates are on both lists). These vacancies are of course filled up by general candidates. Likewise, when MRC candidates are subsequently adjusted against the General Category [i.e. without availing the benefit of Rule 16 (2)], the same will result in vacancies in the Reserved Category which must in turn be filled up by Wait Listed Reserved Candidates. Moreover, the operation of Rule 16 does not result in the ouster of any of the candidates recommended in the first list. Many of the wait-listed candidates are accommodated in the second stage, and the relatively lower ranked wait-listed candidates are excluded. It is pertinent to note that these excluded candidates never had any absolute right to recruitment or even any expectation that they would be recruited. Their chances depend on how the MRC candidates are adjusted.

43. We have given our anxious consideration on this aspect. In this regard, it cannot be said that the aforesaid Rule 16(2) of the Civil Services Examination Rules dealt in the case of **Ramesh Ram** (supra) is *pari materia* with Rule 17 of the J&K Reservation rules, 20025 quoted above. Rule 16 (2) of the Civil Services Examination Rules which was the subject matter of consideration in the case (supra) does not specifically deal with how the resultant vacancy is to be filled up.

Rule 16 (2) of the Civil Services Examination Rules reads as follows:

"16 (1). After interview, the candidates will be arranged by the Commission in the order of merit as disclosed by the aggregate marks finally awarded to each candidate in the main examination. Thereafter, the Commission shall, for the purpose of recommending candidates against unreserved vacancies, fix a qualifying mark (hereinafter referred to as "general qualifying standard") with reference to the number of unreserved vacancies to be filled up on the basis of the main examination. For the purpose of recommending reserved category candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes against reserved vacancies, the Commission may relax the general qualifying standard with reference to number of reserved vacancies to be filled up in each of these categories on the basis of the main examination:

Provided that the candidates belonging to the Scheduled Castes, Scheduled Tribes and the Other Backward Classes who have not availed themselves of any of the concessions or relaxations in the eligibility or the selection criteria, at any stage of the examination and who after taking into account the general qualifying standards are found fit for recommendation by the Commission shall not be recommended against the vacancies reserved for Scheduled Castes, Scheduled Tribes and the Other Backward Classes.

- (2) *While making service allocation, the candidates belonging to the Scheduled Castes, the Scheduled Tribes or Other Backward Classes recommended against unreserved vacancies may be adjusted against reserved vacancies by the Government if by this process they get a service of higher choice in the order of their preference. (emphasis added).*
- (3) .....
- (4) .....
- (5) .....

The aforesaid Rule 16 (2) of the Civil Services Examination Rules specifically provides that while making service allocation, the candidates belonging to the Scheduled Castes, the Scheduled Tribes or Other Backward Classes recommended against unreserved vacancies *may be adjusted against reserved vacancies* by the Government if by this process they get a service of higher choice in the order of their preference. On the other hand, there is no such provision under the J & K Reservation Rules, 2005 for adjusting against the reserved vacancies when such a candidate is allotted a discipline/stream allocated to the reserved candidates.

44. In our opinion, the aforesaid observations were made in context of the Rule 16 (2) of the Civil Services Examination Rules, but in our case, Rule 17 specifically provides that the resultant vacancy has to be added to the pool of reserved category, and in terms of Rule 15 the same is to be allotted on the basis of merit cum preference. Thus, the provisions of these Rules being different, in our opinion, the aforesaid decision in **Ramesh Ram** (supra) may not be applicable in the present case.
45. In this regard, one may note what the Hon’ble Supreme Court had observed in **Ritesh R. Shah vs. Dr. Y L Yamul & Ors. (1996) 3 SCC 253**. Though the case is related to admission in MBBS course, it was observed by the Hon’ble Supreme Court that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be

considered to be admitted against seats reserved for reserved category. It was further observed that while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as an open merit category candidate and not as a reserved category candidate.

46. Thus, it appears from the above decision in **Ritesh R. Shah** (supra) that Younis Bashir, a reserved candidate who finds a place in the Open Merit list, though opted for a subject which is allotted to the reserved category has to be treated as an open merit category by virtue of his merit.
47. It appears that the practice being followed in Jammu & Kashmir is that the reserved category candidate who gets selected against the open merit candidate is treated as an open merit candidate, even if he chooses a discipline earmarked for the reserved candidates, in whose place, another reserved category candidate gets a slot by virtue of migration of the meritorious candidate from reserved category to open merit category which appears to be in tune to the decision in **Ritesh R. Shah** (supra).
48. The analysis of the decisions of this Court in SWP 2740/2018 and OWP 351/2019 as well as in LPA No. 89/2019 and LPA No. 97/2019 would suggest that this Court had been proceeding on the premise that the MRC candidate on having found a place in the open merit list by virtue of his merit creates a vacant slot in the reserved category which is filled up by another candidate from the same reserved category on the basis of merit. It thus appears that this Court had been proceeding on the premise that such

MRC is to be treated as an open merit category candidate in which event, there will be a result in vacancy in the reserved category to which the next reserved category candidate with the most merit can be accommodated in the merit list for that particular reserved category. Thus, in view of the position obtaining in the light of the decisions of this Court in SWP 2740/2018 and OWP 351/2019 as well as in LPA No. 89/2019 and LPA No. 97/2019 which has remained undisturbed, we are not inclined to take a different view.

49. Accordingly, Younis Bashir though had opted for a stream earmarked for reserved category candidate has to be treated as an open merit candidate in which event, inclusion of Ayeda Jehan as an RBA candidate does not appear to be illegal.
50. We are also mindful of the fact that in the impugned judgment, the learned Single Judge has not discussed about this issue as to whether Younis Bashir has to be counted as reserved category or open merit candidate and as to whether inclusion of Ayeda Jehan in the list of RBA was valid or not. Accordingly, we leave this issue open to be raised at an appropriate proceeding. However, in the present case, we do not wish to deviate from the aforesaid decisions of this Court as it also appears that Rule 17 contemplates a situation where the reserved candidate who gets a position in the open merit category is entitled to opt for a stream/discipline for reserved category and upon his migration to open merit list, another candidate in the reserved category gets the position in the reserved category to which the MRC belonged. As otherwise, Rule 17 would not have used the expression in the “*Explanation*”, “*The left-over*

*disciplines/stream/college in the open merit category shall be allotted to the reserved category candidates who get selected consequent upon the reserved category candidates getting selected in the open merit category”.*

There is a presumption underlying the aforesaid *Explanation* that a reserved candidate who finds a place in the open merit category in spite of choosing a discipline earmarked for the reserved candidates continues to be in the open merit category. Thus, the “*Explanation*” talks of allotting the discipline available in the open merit category to such reserved candidate who gets selected to the slot vacated by the MRC.

51. We have also noted that while dealing with the vires of Rule 17 by this Court in the aforesaid decisions, this particular issue, as to whether a reserved candidate who opts to avail a discipline allotted to reserved category would continue to be an open merit candidate or deemed to be reserved category, was not specifically discussed or not considered.
52. Under the circumstances, having held that there is no illegality in the inclusion of Ayeda Jehan in the RBA category, we have to examine as to whether the allocation of streams/disciplines in favour of the Appellant and the Respondent no.1 was in terms of Rule 17.
53. As the position stands today, in terms of “*Explanation*” to Rule 17, any such discipline which becomes available in the open merit category after the MRC had opted a discipline from those allotted to the reserved candidates, has to be added to the pool of disciplines meant for the reserved candidates.
54. From the illustration as mentioned above, after selection of a stream/discipline “X” (from the pool of disciplines allotted to the reserved

candidates) by the candidate “A”, the stream “Y” which remained unfilled and remains available under the open merit category shall be added to the pool earmarked for reserved category and this discipline “Y” along with the remaining disciplines (after candidate “A” has utilized one of them) shall be allotted to the reserved candidates in terms of merit cum preference.

55. As per the rules, the allotment of discipline/stream of subjects is not done category wise i.e. SC/ST/RBA etc. in terms of separate quotas of reservation, but all the reserved categories are taken altogether as one unit/single class for the purpose of allotment of streams to the different categories of reserved candidates.
56. In the present case, as per Rule 15, allotment of disciplines/streams amongst the reserved candidates, has to be done on the basis of merit cum preference. There is no dispute to the fact that the Respondent No. 1 (Ayeda Jehan) though a default candidate finds a place in the list of RBA category is placed above the Appellant-Sara Banoo in order of merit and as such, under normal circumstances, the Respondent No. 1 ought to have been given preference over the choice made by the Appellant. In view of the above, we are of the opinion that in respect of the subject of “Paedodontics and Preventive Dentistry” available in the pool of disciplines/streams for the reserved candidates, the Respondent No. 1 had a better claim over the Appellant being more meritorious than the Appellant and it was also the Respondent No.1’s second choice. On the other hand, it was the fourth preference of the Appellant. To that extent, we agree with the submission of Mr. Ganaie, Id. Senior counsel appearing on behalf of Respondent No.

1 who was deprived of this choice, that the said discipline of “Paedodontics and Preventive Dentistry” ought to have been allotted to the Respondent No. 1.

57. Having held so, the next question which arises for our consideration is whether we should, at this stage, disturb the allocation of seats already made vide Provisional Merit List dated 25.07.2023 by which “Paedodontics and Preventive Dentistry” was allotted to the Appellant. We are mindful of the fact that the Writ Court while passing the order dated 30.12.2023 in the interim application had directed the Respondent No. 2-BOPEE to carry out the requisite exercise by according the discipline of “Paedodontics and Preventive Dentistry” in Govt. Dental College to the Respondent No. 1 by simultaneously accord the discipline of “Oral Pathology and Microbiology” in the Govt. Dental College, Jammu to the Appellant herein. Though, the said direction appears to be sound in hindsight, the said direction being passed at the interim stage without fully deciding the matter on merit was required to heard on merit, stayed by this Court. Even at that stage, more than two months of study had been already undertaken by the students.
58. It is to be also noted that by the time, the impugned final order was passed on 21.02.2024, the last date of admission was already long over and the academic session had already started. Further, as also noted above, the writ petitioner approached the Writ Court after about two months of the impugned allotment order. Filing of the writ petition was after the commencement of the academic session. To that extent, we are also in agreement with Mr. Abhinav Sharma, Ld. Senior Counsel appearing for the

Appellant that the Respondent No. 1 had not approached the Court in time to earn any such favourable order. The explanation proffered by the Ld. Senior Counsel appearing for the Respondent No. 1 that the candidate was awaiting response from the authorities to her representations submitted to the respondent authorities does not impress us inasmuch as once the respondents did not respond to her representations with promptitude, she should have immediately approached the Writ Court, since the authorities did not change the discipline in time, only the Court could have directed the authorities to do so, which is also under the rarest circumstances as observed by the Hon'ble Supreme Court in **Asha (supra)** as it would not be proper for the Court to intervene and disturb the admissions already made.

59. We are also of the view that though aforesaid decisions in **Priya Gupta (supra)** and **Asha (supra)** were rendered in the context of admissions in MBBS courses, in view of the subsequent decision in **Mothukuru Sriyah Koumudi (supra)**, the same principle would be equally applicable in the admission to PG courses.
60. The submission of the learned senior counsel for Respondent No. 1 that the direction issued by the learned Single Judge for swapping of discipline does not amount to new admission and hence, the direction can be carried out, also does not impress us since by change or swapping of disciplines at this stage, it would amount to directing new admissions as far as these two candidates are concerned. By this time, even by swapping of discipline, the candidates would have missed certain period of academic exercise already undertaken in these disciplines for which there is no provision to make

up/provide additional classes for the classes missed by the candidates and as such, both the candidates would stand to lose the academic exercise already undertaken during the aforesaid period. In fact, this is one of the reasons why the Hon'ble Apex Court had been disinclined to direct admission at a later stage, in spite of having found merit in the claim by the candidate concerned.

**61.** Similar is the case here. Though we have found that Respondent No. 1 had a better claim over the discipline of "Paedodontics and Preventive Dentistry", since, there is inordinate delay as noted above, we are not inclined to grant the relief sought by the Respondent no.1 though the same was granted by the learned Single Judge by the impugned judgement. At the same time, the explanation offered by official respondents for not allocating Paedodontics and Preventive Dentistry to respondent No.1 and allocating the same to appellant does not appear to be based on law and reasons as discussed above.

**62.** Under the circumstance, we are of the view that since there was violation of Rule 17 of the J & K Reservation Rules 2005, in the matter of allocation of disciplines/streams on the basis of merit cum preference which led to the denial of allocation of the stream of "Paedodontics and Preventive Dentistry" to the Respondent no.1 and since the Respondent no.1 has been denied admission to her preferred discipline by virtue of merit during the current academic session, she deserves compensation. Further, we are also of the view that the Respondent No. 1 may be allotted the discipline/stream

of “Paedodontics and Preventive Dentistry” in the next academic session provided, she wishes to undertake the said course.

**63.** Accordingly, for the reasons discussed above, the present appeal is partly allowed and disposed of by modifying the impugned order dated 21.02.2024 passed in W.P. (C) No. 2755 of 2023 with the following observations and directions:

- (i) *Respondent No. 1-Ayeda Jehan was entitled to admission in “Paedodontics and Preventive Dentistry” course which was wrongly denied to her, and hence, the Respondent no.1 shall be entitled to be admitted to the said discipline/stream in the next academic session of 2024, if so desired by the Respondent no.1, by clarifying that the same shall be done irrespective of whether such a discipline/course falls under the Open Merit category or under the Reserved category.*
- (ii) *It is further directed that in the event the aforesaid discipline/stream of “Paedodontics and Preventive Dentistry” is not available in the next academic session, the same shall be made available by creating an additional seat in the next academic session.*
- (iii) *It is further clarified that if it is not possible to create the additional seat for the discipline of “Paedodontics and Preventive Dentistry” in the next academic session, it shall be created by adjusting a seat in the discipline which is the least preferred discipline in the next academic session of 2024.*
- (iv) *Respondent No. 1 is entitled to amount of Rs. 3 Lacs as compensation to be paid by the official Respondents for the wrongful denial of her preferred discipline of*

*“Paedodontics and Preventive Dentistry” in the current academic session.*

- (v) *Allotment of discipline of “Paedodontics and Preventive Dentistry” already granted to Appellant Sara Bano shall not be disturbed.*

**(RAJESH SEKHRI)**  
**JUDGE**

**(N.KOTISWAR SINGH)**  
**CHIEF JUSTICE**

JAMMU  
27.03.2024  
Manan

*Whether the order is reportable?*

*Yes*

