

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

WPPIL No. 25/2013
MP Nos. 77/2014, 724/2013

Date of decision: 03.09.2015

Ashok Sharma	vs.	State and others
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Coram:

Hon’ble Mr. Justice Muzaffar Hussain Attar, Judge
Hon’ble Mr. Justice Janak Raj Kotwal, Judge

Appearing counsel:

For appellant (s) : Mr. Kuldeep Singh Parihar, Adv.
For respondent(s) : Mr. Ranjit Singh, Dy. AG for Nos. 1, 2, 6 and 7
Mr. Anil Sethi, Adv. for No. 9
Mr. Pawan Kumar Kundal, Adv. for No. 10
None for others.

(i)	Whether to be reported in Press, Journal/Media:	Yes/No
(ii)	Whether to be reported in Journal/Digest:	Yes/No

Per Kotwal-J

1. This is a Writ Petition in Public Interest (PIL) whereby the petitioner seeks quashing of Rule 17 of the Jammu and Kashmir Reservation Rules, 2005 (for short the Rules) declaring it as *ultra vires* the Constitution of India and the Constitution of the State of Jammu and Kashmir. Issue mooted for discussion is:

Whether Rule 17 of the Rules tends to give seats to the candidates of reserved categories more than their quota under the Rules and is, therefore, illegal?

2. The aforementioned issue has its base in the various averments made in the writ petition, which we are reproducing below for easy reference:

“i).....the impugned rule is so framed that in the circumstances when a reserved candidate selected

against the open merit opts for reserved category benefit then **the open merit seat** secured by him instead of going to the candidate next in merit again goes to a reserved category candidate, thus causing immense loss of meritorious open merit category candidates” (Ref. part 2 of para 2).

“ii).... the impugned rule of keeping **an open merit seat** reserved for a reserved category candidate on sole ground of its having been vacated by a reserved category candidate is increasing the anger of open merit candidates. (Ref part 2 of para 2).”

“iii).... A reserved category candidates instead of being selected for his preferential choice in case he qualifies for the same on the basis of his merit and category, instead, is shown selected according to his merit to his less preferential discipline as open merit candidate and another reserved category candidate is accommodated against the reservation quota. Later on reservation benefit is also extended to open merit reserved category selectee **and this way against one vacancy in reservation quota two are being selected.**” (part 2 of para 5)”

“iv)..... if a reserved category candidate can reach to choice of his higher preference on account of his being reserved category candidate he will opt for extension of benefit of reservation and upon his doing so the **seat of open merit left vacant by him shall instead of going to next in merit from open category goes to the reserved category candidate who has been selected on account of his being selected in open merit.**” (part 2 of para 5)”

“v..... If a reserve category candidate on account of his open merit is selected for a particular discipline or college and he finds himself selected on ground of his additional qualification of belonging to reserve category he is selected for the discipline of his choice **but reserving the seat vacated by him for his fellow reserve category candidate thus leaving only diploma courses and lesser important MD/MS seats for open merit category candidates.**”

(Emphasis supplied by us)

3. Heard. We have perused the record.
4. Section 9 of the J&K Reservation Act, 2004 (for short the Act) in conformity with Article 16(4) of the Constitution makes provision for reservation in admission to professional institutions by empowering the Government to reserve seats for the candidates belonging to reserved categories with maximum outer limit of 50 per cent of the total seats.
5. Section 10 of the Act, nonetheless, keeps it open for the candidates belonging to reserved categories to be granted admission against the seats other than and in addition to the seats reserved for the reserved categories on merit as compared with candidates not belonging to any reserved category, that is, open merit seats.
6. Rule 15 of the Rules framed under the Act gives in tabulated form the break up of the seats reserved for candidates of different reserved categories and those available to the candidates in open merit for admission to post-graduate course in MD/MS/M.Tech, Engineering and Agricultural Sciences and similar other postgraduate courses. Rule 15 unambiguously manifests that 65 per cent of the total seats are kept available for admission in open merit and 35 per cent seats are reserved for the candidates of reserved

categories to be distributed among the different reserved categories as per the table provided therein.

7. Rule 15 provides also 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 single class for purpose of allotment of streams. For easy reference, we reproduce Rule 15:

“15. 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%
(i i)	Reserved Categories:	
	(a) Scheduled Caste	4%
	(b) Scheduled Tribe	5%
	(c) Socially and Educationally Backward Classes:-	5%
	(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%

8. It is apt to point out here that neither any selection process nor selection of any candidate is under assail in this petition and we do not have any material available in the pleadings or record of the case as regards the number of the disciplines/streams or colleges for which admission at post-graduate level is made. Nonetheless, it emerged as admitted ground of both the sides that there are around twenty disciplines/streams available at post-graduation level in different Medical Colleges of the State and the disciplines/streams as also the colleges for undergoing the MD/MS course are allotted to the candidates admitted in the open merit and those belonging to reserved categories on the basis of their respective *inter se* merit having regard to the options given by them in their application forms. Same is the position in similar other postgraduate courses.
9. Rule 17, which calls for interpretation in order to decide the issue raised by the petitioner, reads:

“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 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.”

10. Mr. Kuldeep Singh Parihar, learned counsel for the petitioner, urged on the strength of the averments in the writ petition briefly but strongly that application of Rule 17 of the Rules leads to increase in seats reserved for the reserved categories beyond 35 per cent of the total seats and quite often beyond 50 per cent which violates fundamental right of the candidates belonging to open merit category guaranteed under Articles 15 and 16 of the Constitution of India and also defeats the reservation policy enshrined under Article 16 and the outer limit of reservation provided under section 9 of the Act read with the break up given in Rule 15 of the Rules. Dilating his point, Mr. Parihar submitted that by allotting the seat vacated by a reserved category candidate due to his selection in the open merit to a candidate of reserved category and not to a candidate in the open merit increases number of reserved category candidates beyond permissible 35 per cent of the total seats and corresponding reduction in number of seats available for open merit candidates.
11. Stand of the State on the other hand briefly and categorically is that Rule 17 has nothing to do with the number of the seats allotted to open merit category candidates or to the reserved categories. It is contended that Rule 17 advances the real object of the reservation so that any candidate belonging to a reserved category, who is selected in open merit

category does not usurp the quota meant for reserved category. It is contended further that a reserved category candidate if selected in the open merit is treated as open merit category candidate and Rule 17 enables him only to opt for the discipline or college which he would have secured had he been selected as a reserved category candidate. Dilating the stand of the State, Mr. Ranjit Singh, Dy. AG submitted that Rule 17 deals only with allocation of disciplines/streams and college and has nothing to do with admission against seats available in open merit or reserved for reserve categories.

12. Stand of respondent No. 10, the J&K Scheduled Caste Welfare Association, is in tune with the stand taken by the State. Mr. Pawan Kumar Kundal, learned counsel for respondent No. 10 in addition submitted that the issue raised by the petitioner has already been settled by a Coordinate Bench of this Court in **Mir G. R. Wali v State and others, 2007 (2) JKJ 534 (HC)** and the contentions raised by the petitioner are contrary to the view taken by this Court.
13. A question in regard to the application of Rule 17 of the Rules has earlier been considered in the Division Bench Judgement of this Court in Mir G. R. Wali's case (supra). Learned Division Bench in that case has observed in para 19 of the reporting:

“19. From the rule it is significant to note that it does not speak of allocation of seats in open category or reserved category, but refers only to shifting of discipline/stream/college. Thus, in the event of a reserved category candidate who has moved to open category and opted for a stream/discipline/college available in reserved category, what is shifted to reserved category is not the seat but the stream/discipline/college which he would have got in the open category. The number of seats available in the open category and reserved category remaining the same fixed as per the ratio of 65%:35%.”

14. As per its plain language and observation of the learned Division Bench in *Mir G. R. Wali's case*, Rule 17 of the Rules has no relation with the number of seats reserved for the reserved categories and those available for admission in open merit or percentage of reservation. Rule 17 rather relates to and confirms the Constitutional right of a candidate belonging to a reserved category to be selected in open merit on the basis of the merit provided for the candidates seeking admission in open merit category, which has been protected under section 10 of the Act.

15. Right of a candidate belonging to a reserved category to be selected in open merit is well recognized under the Constitution and has been specifically protected under section 10 of the Act which reads:

“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.”

16. In *Ritish R. Shaw v Dr. Y. L. Yamul*, AIR 1996 SC 1378,

Supreme Court after surveying earlier case law starting from *Indira Sawhney's* case (1992) 6 Suppl (3) SCC 2010 has held:

“17.....In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible 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. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they will be allotted seats in whichever colleges the seats should be available. In other words, 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 a open category candidate and not as a reserved category candidate.....”

17. Petitioner's contention, or say his anxiety, that Rule 17 of the Rules tends to increase the number of seats

reserved for a reserved category beyond permissible limit, we may say, arises from his wrong notion about application of the rule. The benefit made available under Rule 17 has no relation with the seats available in open merit or those reserved for reserved category candidates. What the Rule provides is that if a candidate belonging to a reserved category and entitled to reservation succeeds in securing seat in open merit, he shall be entitled and shall have an option to retain the benefit of discipline/stream or college which would have been available to him had he been selected against a seat reserved for that category. To say otherwise, such a candidate has an option to choose between the discipline/stream or the college available to him as an open merit candidate and the discipline/stream or the college that would have been available to him had he been selected as a reserved category candidate. In case such a candidate opts for the discipline/stream or the college that would have been available to him had he been selected against a reserved seat, the discipline/stream or the college available to him as the open merit candidate will have to be allotted to the candidate who came to be selected under the reserved category against the seat having become available in that category due to selection of that particular candidate in the open merit category.

18. We may explain the operation of Rule 17 of the Rules like this: Supposing 'A' is a candidate entitled to admission to MD course against a seat reserved for S.C. category. 'A' on the basis of merit, however, is selected against a seat in open merit category and consequent upon his admission in the open merit category another candidate 'B' of S.C. category secures admission against the seat reserved for the S.C. category. As an open merit category candidate, the discipline/stream available to 'A' is Gastroenterology, whereas had he been selected as a reserved category candidate, stream available to him would have been Nephrology. Here 'A' will have an option to choose between Gastroenterology and Nephrology and in case he opts for Nephrology, Gastroenterology will go to 'B'. Same would be the case in allocation of a colleges to 'A' and 'B'.
19. It cannot be said that Rule 17 increases number of seats reserved for reserved categories beyond the prescribed limit of 35 per cent. It may be that in a given selection process the number of the selected candidates entitled to admission under one or the other reserved category exceeds the number of seats reserved for that category when some of them are selected in the open merit but that would not be illegal because right of selection of a reserved category

candidate in open merit is guaranteed under the Constitution and specifically protected under section 10 of the Act. In **Ritish R. Shaw's** case (supra) the Supreme Court has clearly held that a candidate entitled to reservation when selected against a seat in open merit shall be deemed to have been selected as an open merit candidate and will no longer be treated as candidate selected against seats reserved for reserved categories. Question of imbalancing the percentage of quota therefore, does not arise. Whenever pursuant to a selection process the number of candidates belonging to a reserved category is more than the seats reserved for that category the reason should be that the extra candidates have secured admission against seats in open merit and therefore, cease to be taken as reserved category candidates. This needs to be understood.

20. For all that said and discussed above, the contentions of the petitioner raised in this writ petition (PIL) are not well-founded and the petition has no merit and is, therefore, dismissed.

21. Disposed of.

(Janak Raj Kotwal)
Judge

(Muzaffar Hussain Attar)
Judge

Jammu:

03.09.2015
Rakesh