Reportable

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Writ Petition (C) No. 961 of 2021

Neil Aurelio Nunes and Ors. … Petitioners

Versus

Union of India and Ors. … Respondents

With

Writ Petition (C) No 967 of 2021

With

Writ Petition (C) No 1002 of 2021

With

Writ Petition (C) No 1021 of 2021

And With

Writ Petition (C) No 1105 of 2021

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

This judgment has been divided into the following sections to facilitate analysis:

A. Factual Background

1 These writ petitions challenge the reservation for Other Backward Classes[1] and the Economically Weaker Section[2] in the All-India Quota[3] seats in the National Eligibility cum Entrance Test examination[4] for undergraduate[5] and postgraduate[6] medical courses. The Directorate General of Health Services in the Union Ministry of Health and Family Welfare[7] issued a notice on 29 July 2021 providing 27 percent reservation for OBC (non-creamy layer) and 10 percent reservation for EWS in the 15 percent UG and 50 percent PG seats in AIQ from the academic year 2021-2022. By an order dated 7 January 2022, a two-judge Bench of this Court upheld the constitutional validity of the OBC reservation in AIQ seats and posted the challenge to the validity of the EWS criteria for final hearing in the third week of March 2022. This judgement provides reasons for upholding the permissibility of reservations in the AIQ seats and constitutionality of OBC reservation in AIQ seats.

2 Some of the salient facts that have led to the implementation of OBC reservation in AIQ seats are being adverted for setting out the broad contours of the controversy. While we have discussed in detail the history of the AIQ and the evolution of an All-India common entrance examination in Section D.2, it is sufficient to highlight that the scheme of AIQ seats was devised by this Court in

[1] **"OBC"**
[2] **"EWS"**
[3] **"AIQ"**
[4] **"NEET-PG"**
[5] **"UG"**
[6] **"PG"**
[7] **"MH&FW"**

Dr Pradeep Jain v. **Union of India**[8] to provide domicile free seats in State run medical and dental institutions. The AIQ scheme was further developed by this Court in **Dinesh Kumar (I)** v. **Motilal Nehru Medical College**[9] and **Dinesh Kumar (II)** v. **Motilal Nehru Medical College**[10]. Presently, under the AIQ scheme, 15 percent UG seats and 50 percent PG seats in State–run institutions are surrendered by the states to the AIQ. The remaining seats in the State institutions are reserved for candidates domiciled in the respective States.

3 The Constitution (Ninety-Third Amendment) Act 2005 amended Article 15 of the Constitution by inserting clause (5) to Article 15 to empower the State to make special provisions (including reservation) for the advancement of socially and educationally backward classes (or the OBCs) relating to their admission in educational institutions. Article 15 (5) reads thus:

> "(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."

4 In **Abhay Nath** v. **University of Delhi**[11], this Court held that reservations for Scheduled Caste[12] and Scheduled Tribe[13] candidates are permissible in the AIQ seats. The Central Educational Institutions (Reservation in Admissions) Act

[8] (1984) 3 SCC 654
[9] (1985) 3 SCC 22
[10] (1986) 3 SCC 727
[11] (2009) 17 SCC 705
[12] **"SC"**
[13] **"ST"**

2006[14], which came into effect on 3 January 2007, was enacted to provide for reservation for students belonging to the SCs, STs and OBCs in Central educational institutions. The Act of 2006 provided that 15 percent seats shall be reserved for SCs, 7.5 percent seats for STs, and 27 percent seats for OBCs in Central educational institutions. However, reservation for OBCs was not extended to State contributed seats for AIQ in State-run institutions.

5 The State of Tamil Nadu granted 50 percent reservation to OBCs in State-run medical institutions under the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993[15]. Thus, the State quota seats were being filled according to the provisions of the Act of 1993. A writ petition[16] was instituted before this Court by Dravida Munnetra Kazhagam[17] seeking a mandamus to provide OBC reservation in AIQ. This Court by its order dated 11 June 2020 directed that the issue be agitated before the Madras High Court. This Court observed thus:

> "The learned senior counsel for the petitioners seek permission to withdraw these Writ Petitions with liberty to approach the High Court by filing Writ Petitions under Article 226 of the Constitution.
>
> Permission granted.
>
> The Writ Petitions are, accordingly, dismissed as withdrawn with the aforesaid liberty."

6 Pursuant to the above order, DMK instituted a writ petition[18] before the Madras High Court arguing that the AIQ seats available in State-run medical and

[14] "**Act of 2006**"
[15] "**Act of 1993**"
[16] WP No 507 of 2020
[17] "**DMK**"
[18] WP No 8326 of 2020

dental institutions in the State of Tamil Nadu must follow the reservation policy as applicable under the Act of 1993. However, the Madras High Court after issuing notice in the petition accepted the argument of the Union Government that the hearing in the matter be deferred in view of the pendency of a writ petition[19] before this Court on a similar issue. Aggrieved by the deferral of the hearing, special leave petitions were instituted before this Court. By its order dated 13 July 2020, this Court disposed of the petitions holding that the issue raised in the writ petition pending before it is different from the one raised by the DMK before the Madras High Court and directed the High Court to proceed with the hearing of the case. This Court made the following observations:

> "Permission to file Special Leave Petition without certified/plain copy of impugned order in Diary No. 13644/2020 is granted.
>
> These special leave petitions are directed against the order dated 22.6.2020 by which the High Court adjourned the matters in view of the pendency of Writ Petition No.596 of 2015 in this Court. This order was passed on the basis of the stand taken by the Union of India that the points arising in the writ petitions filed in the High Court are similar to those that arose in Saloni Kumari and Anr. Versus DGHS & Ors. (Writ Petition No.596 of 2015).
>
> We have perused the writ petition filed by Saloni Kumari which is pending consideration in this Court. The issue that arises in the writ petition pertains to the implementation of 27% seats for admission to Post Graduate courses in the All India Quota. The complaint of the petitioner is that the seats in the 27% quota of OBCs should not be restricted to Central Government institutions.
>
> Whereas, the writ petitions pending in the High Court involve a dispute pertaining to the percentage of reservation to be followed in State of Tamil Nadu in respect of the surrendered seats in the All India Quota for PG medical admissions.
>
> As the point raised in the writ petitions pending in the High Court is not similar to that in Saloni Kumari's case, the High Court can proceed to adjudicate the writ

[19] Saloni Kumari v Director General Health Services WP(C) No 596/2015.

> petitions on merits. We are informed that the writ petitions are listed before the High Court for final hearing on 17.7.2020. The High Court is requested to decide the writ petitions expeditiously.
>
> Special Leave Petitions are disposed of accordingly."

7 The Madras High Court by its judgement dated 27 July 2020 disposed of the writ petition holding that there are no legal or constitutional impediments in extending reservation to OBCs in the AIQ seats in the medical colleges in the State of Tamil Nadu. The High Court directed the Union Government to constitute an Expert Committee for implementing reservation for OBCs in the seats surrendered by the State of Tamil Nadu in AIQ. However, the High Court observed that the reservation should be implemented only from the academic year 2021-2022 since it would disturb the selection process that had been set into motion for the academic year of 2020-2021. The State of Tamil Nadu challenged the order of the Madras High Court dated 27 July 2020 before this Court in a special leave petition[20] on the limited ground that the High Court erred in denying implementation of the OBC reservation for the academic year 2020-2021. In its order dated 26 October 2020, this Court upheld the order of the High Court regarding the implementation of the OBC reservation from the subsequent academic year 2021-2022.

8 The MH&FW set up an Expert Committee to determine the modalities of granting reservation to OBC candidates in AIQ seats in UG and PG courses in state-run medical colleges within the State of Tamil Nadu from the academic year 2021-2022. The Committee recommended two options in its final report, i.e.,

[20] SLP (C) No 9286 of 2020

either State-specific reservation can be implemented for OBCs in AIQ seats or OBC reservation can be granted in terms of the provisions of the Act of 2006.

9 A Contempt petition[21] was instituted by DMK before the Madras High Court against the Union of India for non-implementation of OBC reservation in AIQ seats. In the meanwhile, a notice dated 29 July 2021 was issued by the Directorate General of Health Services, MoHFW to implement 27 percent OBC reservation (non-creamy Layer) and 10 percent EWS reservation in the 15 percent UG and 50 percent PG AIQ seats in the current academic session of 2021-22. The notice stated thus:

> **"NOTICE**
>
> **Urgent Attention Candidates of NEET-UG and NEET-PG:**
>
> It has been decided by the Government of India to implement 27% OBC reservation (Non-creamy later) and 10% EWS reservation in the 15% AIQ UG seats and the 50% All India Quota seats (MBBS/BDS and MD/MS/MDS) (contributed by the State/UTs). This reservation will take effect from the current Academic session 2021-22.
>
> Consequently, the overall reservation in 15% UG and 50% PG All India Quota seats would be as follows:
>
> SC-15%
>
> ST-7.5%
>
> OBC (Non-creamy layer) as per the Central OBC list-27%
>
> EWS- as per the Central Government Norms-10%
>
> PwD-5% Horizontal Reservation as per NMC Norms"

[21] Contempt Petition No 181 of 2021

10 By its order dated 25 August 2021, the Madras High Court dismissed the contempt petition since the Union Government had complied with the order dated 27 July 2020 of the Madras High Court by constituting a committee. The High Court observed thus:

> "Since the committee required to be constituted by the order dated July 27, 2020 was instituted and such committee gave its opinion and the Union, or its appropriate agencies, have acted on the basis thereof, albeit not exactly in terms of the recommendations, no case of willfull or deliberate violation of the said order can be said to have been made out."

Nonetheless, the High Court proceeded to scrutinize the validity of the notification dated 29 July 2021 providing reservation for OBC and EWS candidates in AIQ seats in medical and dental institutions. With respect to the reservation granted to EWS under the notification dated 29 July 2021, the High Court observed that such reservation can be permitted only with the approval of this Court. Special leave petitions were instituted before this Court challenging the order of the Madras High Court. This Court by its order dated 24 September 2021 disposed of the petitions observing that the Madras High Court in its contempt jurisdiction could not have entered into a discussion on the validity of the EWS reservation provided by the notice dated 29 July 2021 and set aside the direction that the approval of this Court should be received before implementing reservation for the EWS category in AIQ seats.

11 We have traced the trajectory of the introduction of OBC reservation in NEET AIQ seats, which is challenged before this Court in the present batch of writ petitions. By its order dated 7 January 2022, this Court upheld the constitutional validity of the OBC reservation in AIQ medical and dental UG and

PG seats. The constitutionality of the criteria used for the identification of the EWS category is yet to be decided. However, in the interim, this Court directed that the counselling in NEET-PG 2021 and NEET-UG 2021 be conducted by giving effect to the reservation provided by the notice dated 29 July 2021, including the 27 percent OBC reservation and 10 percent EWS reservation. The challenge to the validity of the OBC reservation in AIQ seats is dealt with in this judgement.

B. Pendency of the Writ Petition instituted by Saloni Kumari

12 We are aware that a writ petition was filed by Saloni Kumari seeking 27 percent OBC reservation in AIQ seats in State-run medical institutions on the ground that such reservation should not be restricted to Central education institutions in terms of the Act of 2006. The claim raised in that petition was of parity. The issue that has been raised before us is of the validity of the notification dated 29 July 2021 that provides for 27 percent OBC reservation in the AIQ seats in UG and PG seats from the academic year 2021-2022. On account of the difference in the nature of the issues raised before this Court, we will proceed to rule on the validity of the notification dated 29 July 2021.

C. Submissions of Counsel

13 Mr Shyam Divan, learned Senior Counsel appearing for the petitioners argued that there must be no reservation for the OBC community in the AIQ quota. In pursuance of this argument, he made the following submissions:

(i) In **Pradeep Jain** v. **Union of India**[22], this Court raised serious concerns about the reservation in PG seats. Once a person is qualified as a doctor, he cannot be treated as belonging to a backward class anymore. Therefore, admission in PG seats must be purely based on merit, without any reservation;

(ii) At the level of PG and super-speciality[23], doctors are required to possess high degree of skill and expert knowledge in specialised areas. This skill cannot be acquired by everyone. It would be detrimental to national interest to have reservations at this stage. Opportunities that are available for such training are minimal and therefore, it should only be available to the most meritorious;

(iii) This Court in **Pradeep Jain** (supra) created a right against reservation in the AIQ seats. The judgment of this Court in **Abhay Nath** v. **University of Delhi**[24] allowing reservations for SC and ST categories in the AIQ is *per incuriam* in light of the judgments in **Pradeep Jain** (supra), **Union of India** v. **R. Rajeshwaran**[25] and **Union of India** v. **Jayakumar**[26];

[22] (1984) 3 SCC 654
[23] **"SS"**
[24] (2009) 17 SCC 705
[25] (2003) 9 SCC 294
[26] (2008) 17 SCC 478

(iv) The AIQ scheme was conceived by this Court in **Pradeep Jain** (supra) and developed in **Dinesh Kumar (I)** (supra) and **Dinesh Kumar (II)** (supra). Therefore, only this Court can alter the reservation scheme in the AIQ seats. The Union Government ought to have made an application to this Court apprising it of its intention to provide reservation for OBC and EWS categories in AIQ, and this Court could decide to allow or deny permission;

(v) It has been held by this Court in **Dr Preeti Srivastava** v. **State of Madhya Pradesh**[27] and various other cases that reservation in PG courses must be minimum;

(vi) Even if reservation for the OBC category in the AIQ seats is constitutionally valid, it ought not to have been introduced for the academic year of 2021-22 since the notice on reservation for the OBC category was introduced after the registration window was closed. It is a settled principle that the rules of the game cannot be changed after the game has begun;

(vii) The candidates had registered for the exam against a certain seat matrix, having knowledge of the total number of seats for which they could compete. The impugned notification alters the seat matrix, changing the rules of the game after the game had begun;

(viii) The phrase 'as may be applicable' in clause 11.1 of the information bulletin must be read to mean the reservation applicable as on the date

[27] (1999) 7 SCC 120

of registration. The rules of the game were set when the registration closed; and

(ix) In specific branches of specialisation such as MD Radiology, MD Dermatology, MD Gynaecology, MS Psychiatry, MD (Chest), MD Preventive and Social Medicine, MD Forensic Medicine, MS Microbiology, MS Pathology, MD Biochemistry, MS Anatomy, MS Orthopedics, and MS ENT, no SS course is offered in India. Therefore, such courses are the end of the branch and there must be no reservation in such courses since they are equivalent to SS courses (**Dr. Preeti Srivastava** (supra)).

14 The Union of India addressed the following arguments contending that the 27 percent reservation for the OBC category in AIQ seats is constitutionally valid. Mr Tushar Mehta, Solicitor General and Mr KM Nataraj, Additional Solicitor General made the following submissions:

(i) The rules of the game were not changed after the process had begun since the reservation through the impugned notice issued on 29 July 2021 was introduced much prior to the date on which the exams were conducted and before the commencement of the counselling process. The NEET PG examination schedule is as follows:

(a) Release of Information Brochure: 23 February 2021

(b) Commencement of Registration Process: 23 February 2021

(c) Last date of Registration: 15 March 2021

(d) Scheduled examination date: 18 April 2021

(e) Postponement for four months on: 03 May 2021

(f) New date of examinations announced on: 13 July 2021

(g) New date for examination: 11 September 2021

Clause 11.1 of the information bulletin issued on 23 February 2021 states that reservation of PG seats shall be as per the norms of the Central Government and the respective State Governments. Clause 11.2 states that a separate handbook providing information on the counselling process and applicable reservation shall be released by the designated counselling authority for NEET-PG 2021. Therefore, the process begins only with the commencement of the counselling process and not when the registration closes;

(ii) Reservation in AIQ seats according to the impugned notice has been implemented for MDS admissions in the current academic year of 2021-22;

(iii) The AIQ scheme was introduced in 1986 to provide domicile free admission to students from across the country. Till 2007, there was no reservation in the AIQ. In 2007, this Court in the case of **Abhay Nath** (supra) permitted 15 percent reservation for the SCs and 7.5 percent reservation for the STs in the AIQ seats. The Act of 2006 providing 27 percent reservation to OBCs which came into force in 2007 was implemented in all Central educational institutions, including medical colleges run by the Central Government;

(iv) The AIQ scheme is a Central scheme. Therefore, the Central List of OBCs shall be used for implementing the reservation. Around 1500 OBC students in UG and 2500 in PG will be benefitted through reservation for OBC category in AIQ seats;

(v) In the last six years, MBBS seats in the country have been increased by 56 percent from 54,348 in 2014 to 84,649 seats in 2020. The number of PG medical seats has been increased by 80 percent from 30,191 seats in 2014 to 54,275 seats in 2020;

(vi) Providing reservation for the AIQ seats in medical/dental courses is a matter of policy;

(vii) Though observations have been made by this Court on the desirability or otherwise of reservation in PG courses, it has never been held to be unconstitutional; and

(viii) This Court in **Pradeep Jain** (supra) only held that there would be no domicile-based reservation in the AIQ seats. It was not held that no reservation otherwise would be impermissible in the AIQ seats. Subsequent decisions of this Court (**Saurabh Chaudri** v. **Union of India**[28]; **Gulshan Prakash** v. **State of Haryana**[29]) have clarified that this Court in **Pradeep Jain** (supra) had only observed that the AIQ seats shall be free from domicile reservation.

15 Mr P Wilson, learned Senior Counsel appearing for the DMK, submitted that the 27 percent reservation for the OBC seats in the AIQ is constitutionally valid. The Senior Counsel made the following submissions:

(i) Parliament by the Constitution (Ninety-Third Amendment) Act 2005 introduced Clause (5) in Article 15 providing reservation for the SCs, STs and socially and educationally backward classes (or the OBCs) in admission to educational institutions, including private educational

[28] (2003) 11 SCC 146
[29] (2010) 1 SCC 477

institutions, aided or unaided by the State and other minority educational institutions. Pursuant to the amendment, the Union Government enacted the Act of 2006 providing 27 percent reservation for the OBC category in Central educational institutions. The Supreme Court upheld the constitutional validity of the Ninety-Third Constitutional Amendment and the Act of 2006 in **Ashoka Kumar Thakur** v. **Union of India**[30]. The Tamil Nadu State legislature enacted the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act 1993 providing 69 percent reservation. The enactment permits 50 percent reservation for backward classes and the most backward classes. Therefore, both the State legislature and the Parliament allow reservation for the OBC category;

(ii) Regulation 9(IV) of the PG Medical Education Regulations 2000 and Regulation 5(5) of the UG Medical Education Regulations stipulate reservation for the categories based on the applicable laws prevailing in the States/Union Territories. Therefore, reservation must be applicable to all seats including the State contributed seats of AIQ;

(iii) Merit cannot be measured solely in terms of marks. Merit must be construed in terms of the social value of a member in the medical profession (**Pradeep Jain** (supra);

(iv) In UG courses, the States contribute 15 percent seats to the AIQ. Of the 6060 seats in the AIQ contributed by the States, 1636 seats (that is 27

[30] (2007) 4 SCC 361

percent) seats ought to have been reserved for the OBC category on the enactment of the Act of 2006. Similarly, 2569 of the 9515 seats contributed by the States to the AIQ in PG courses ought to have been reserved for the OBC category;

(v) The Madras High Court in a judgment dated 27 July 2020 (in WP No. 8626 of 2020) had observed that there was no legal or constitutional impediment in extending the benefit of reservation to the OBC category in the AIQ in PG courses. The petitioners have not challenged the judgment of the Madras High Court;

(vi) Clause 11 of the information bulletin for the NEET-PG examination states that reservation would be '*as per the norms of GOI and State prevailing at the time of counselling'*. Therefore, the argument of the petitioners that the rules of the game should not be changed in the middle of the game would be applicable only if the reservation was introduced after the counselling had begun;

(vii) The submission of the petitioners that no reservation was provided at the level of SS in view of the judgment of this Court in **Dr. Preeti Srivastava** (supra) is erroneous since the Act of 2006 only exempts reservations in institutions of excellence, research institutions, and institutions of national and strategic importance specified in the schedule of the Act, and Minority Educational Institutions as referred to under section 4 of the Act of 2006. Reservation is provided in SS courses in Central educational institutions such as AIIMS and JIPMER;

(viii) Central medical institutions such as AIIMS and PGI hold their own examination twice a year for PG courses. There is no demarcation of State Quota and AIQ in these Central institutions. Therefore, the AIQ PG seats are different from PG seats of Central institutions; and

(ix) Reservation can be provided either through a legislation or by an executive order such as a notification, order, and memorandum.

16 The arguments of the petitioners are three-fold: (i) Admissions to PG courses must solely be based on open competition; (ii) this Court in **Pradeep Jain** (supra) and subsequent cases has held that there shall be no reservation in the AIQ seats and that admission to the AIQ seats shall be strictly by open competition; and (iii) as this Court evolved the concept of AIQ seats, any reservation to be introduced in the AIQ seats must only be pursuant to the direction of this Court.

D. Analysis

D. 1 The Merit of Reservation

17 On behalf of the petitioners, it was urged that at the level of PG courses, a high degree of skill and expertise is required. Thus, such opportunities must be available to the most meritorious and providing any reservation for PG seats would be detrimental to national interest. In effect, a binary was sought to be created between merit and reservation, where reservation becomes antithetical to establishing meritocracy. This is not a novel argument. There has been a longstanding debate over whether reservation for any class impinges on the idea of merit. In the Constituent Assembly Debates on draft Article 10, which has been

incorporated as Article 16 of the Constitution, some members raised concerns on the inclusion of clause (3) to draft Article 10 (now Article 16 (4) of the Constitution) which provided that the State is empowered to make reservation in appointments or posts in favour of any backward class of citizens who, in the opinion of the State, is not adequately represented in the services under the State. Certain members of the Constituent Assembly argued for the deletion of clause (3). For instance, Shri Loknath Misra stated that such a provision puts, "a premium on backwardness and inefficiency" and no citizen had a fundamental right "to claim a portion of State employment, which ought to go by merit alone." Shri Damodar Swarup Seth argued that reservation results in the "very negation of efficiency and good Government" and appointments should be "made on merit and qualification". However, the Constituent Assembly rejected these claims and adopted clause (3) of draft Article 10. Although there was debate on the meaning of "backward classes", it was felt that there must be a provision that enables entry of those communities into administration since they were deprived of such access in the past and formal equality of opportunity would not suffice.[31] However, the view that merit or efficiency in service is distinct from concerns of advancement of backward classes persisted for some members. Shri KM Munshi (a member of the Drafting Committee) observed that:

> "What we want to secure by this clause [Article 10] are two things. In the fundamental right in the first clause we want to achieve the highest efficiency in the services of the State--highest efficiency which would enable the services to function effectively and promptly. At the same time, in view of the conditions in our country prevailing in several provinces, we want to see that backward classes, classes who are really backward, should be given scope in the State services; for it

[31] Volume 7, Constituent Assembly of India Debates, 30 November 1948, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30

> is realised that State services give a status and an opportunity to serve the country, and this opportunity should be extended to every community, even among the backward people."

However, many members also recognized that merit cannot be separated from the function of the existing inequalities in society. They envisaged that social justice must be read into the promise of equality of opportunity; otherwise the latter merely advances the interests of the privileged. During the debates on draft Article 286, which pertained to the functions of Public Service Commission with regard to appointments to public posts, Dr PS Deshmukh argued that:

> "…people's capacities cannot be measured by mere passing of examinations or obtaining the highest possible marks. But those communities who have had the advantage of English education, because they were prepared to be more servile than the rest, think it is a preserve of theirs, and whenever anybody gets up and speaks on behalf of the millions who have had no chances of education, they consider it as a threat to their monopoly on the part of the rest of the communities and accuse the advocates as communal and communally minded. There is no communalism in this. Neither I nor anybody who speaks on their behalf want any particular community to dominate, where as those who oppose this move are interested only in particular communities. They want to preserve communalism while accusing us of communalism because they have had the advantage of education which they fear will be taken away. They think and urge that merit is or can be tested only by examinations. But so far as the masses of the country are concerned, the millions of our populations who have not had even the chance to get primary school education, they have no place so far as the public services are concerned, so long as the present system lasts."[32]

Shri Phool Singh emphatically provided a conception of substantive equality when he stated that merit of candidates cannot be evaluated through an open competition without regard to their social positions. He further highlighted that the meaning of merit should also take into reference the task that is to be carried out. He stated thus:

[32] Volume 9, Constituent Assembly of India Debates, 23 August 1949, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-23

> "…Much has been made of merit in this case; but equal merit pre-supposes equal opportunity, and I think it goes without saying that the toiling masses are denied all those opportunities which a few literate people living in big cities enjoy. To ask the people from the villages to compete with those city people is asking a man on bicycle to compete with another on a motorcycle, which in itself is absurd. Then again, merit should also have some reference to the task to be discharged. Mr.Tyagi interrupted Dr. Deshmukh by saying that it is a fight for the illiterates. I think, however sarcastic that remark may be, he was probably right. Self-Government, means a government by the people, and if the people are illiterate, a few leaders have no right to usurp all the power to themselves. This cry, this bogey of merit and fair-play is being raised by those who are in a[n] advantageous position and who stand to suffer if others also come into the picture."[33]

While these observations were made in the context of employment to public posts, the debate on conceptualisation of reservation as an exception to the principle of merit has relevance in regard to admission to educational institutions as well. The debates in Constituent Assembly were limited to reservation in public posts because reservation in educational institutions was introduced through a subsequent constitutional amendment.

18 On its part, this Court initially subscribed to the binary of merit and reservation. Articles 14, 15(1) and 16(1) were thought to embody the general principle of formal equality. Articles 15 (4) and 16 (4) were understood to be exceptions to this general principle, advancing the cause of social justice. This Court sought to balance these competing imperatives. In such an understanding, merit is equated to formal equality of opportunity which has to be balanced against the concerns of social justice through reservation. In **MR Balaji** v. **State of Mysore**[34], a Constitution Bench of this Court observed that Article 15 (4) is an exception to Article 15 (1), which was introduced "because the interests of the

[33] Ibid
[34] 1963 Supp (1) SCR 439

society at large would be served by promoting advancements of the weaker elements in the society".[35] However, since Article 15 (4) (or reservation) was considered at odds with the notion of formal equality under Article 15 (1), which is broadly understood as complying with the principle of merit, this Court observed that there should be a cap on reservations, which it specified generally should be 50 percent.[36] This Court stated:

> "32. …Therefore, in considering the question about the propriety of the reservation made by the impugned order, we cannot lose sight of the fact that the reservation is made in respect of higher university education. The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by whole-sale reservation of seat in all technical, Medical or Engineering colleges or institutions of that kind. Therefore, considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Article 15(4) can be special provision which exclude the rest of the society altogether. In this connection, it would be relevant to mention that the University Education Commission which considered the problem of the assistance to backward communities, has observed that the percentage of reservation shall not exceed a third of the total number of seats, and it has added that the principle of reservation may be adopted for a period of ten years (p. 53)."

19 This view was followed by this Court in subsequent judgements where a special provision made for the benefit of a class was seen as a deviation from the principle of formal equality.[37] However, the dominant view of this Court was challenged by the Justice R Subba Rao in his dissent in **T. Devadasan** v. **Union of India**, where the learned judge stated that Article 16 (4) is not an exception but

[35] Ibid, paragraph 31.
[36] Ibid, paragraph 34.
[37] T. Devadasan v. Union of India (1964) 4 SCR 680; CA Rajendran v. Union of India (1968) 1 SCR 721

rather a facet of Article 16 (1), which seeks to redress the historical disadvantage suffered by certain communities. Justice Subba Rao observed thus:

> "26. Article 14 lays down the general rule of equality. Article 16 is an instance of the application of the general rule with special reference to opportunity of appointments under the State. It says that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. If it stood alone, all the backward communities would go to the wall in a society of uneven basic social structure; the said rule of equality would remain only an utopian conception unless a practical content was given to it. Its strict enforcement brings about the very situation it seeks to avoid. To make my point clear, take the illustration of a horse race. Two horses are set down to run a race —one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed, that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced clause (4) in Article 16. The expression "nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article."

20 The view expressed by Justice Subba Rao was adopted by this Court in **State of Kerala** v. **NM Thomas**[38], which transformed the equality jurisprudence in India from that of formal equality to substantive equality; thus, also changing our understanding of reservations. Chief Justice AN Ray writing the judgement of this Court held:

[38] (1976) 2 SCC 310

> "44. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. The claims of members of Backward Classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and tribes, who are said by this Court to be Backward Classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. Article 15(4) and 16(4) bring out the position of Backward Classes to merit equality. Special provisions are made for the advancement of Backward Classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). The basic concept equality is equality of opportunity for appointment. Preferential treatment for members of Backward Classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. Equality under Article 16 could not have a different content from equality under Article 14. Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. Preferential representation for the Backward Classes in services with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognised by our Constitution. Therefore, differential treatment in standards of selection are within the concept of equality."

The majority of the judges accepted that special provisions (including reservation) made for the benefit of any class are not an exception to the general principle of equality. Special provisions are a method to ameliorate the structural inequalities that exist in the society, without which, true or factual equality will remain illusory. Justice KK Mathew in his concurring opinion observed that while equality under Article 16 (1) is individual-centric[39](which was the view of the majority – Justice Mathew and Justice Beg's majority opinions, and Justice Khanna and Justice Gupta's dissents), the manner in which it is to be achieved is through the

[39] Ibid, paragraph 52.

identification of groups that do not enjoy equal access to certain rights and entitlements. The learned judge made the following observations:

> "73. There is no reason why this Court should not also require the State to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims.
>
> 74. The concept of equality of opportunity in matters of employment is wide enough to include within it compensatory measures to put the members of the Scheduled Castes and scheduled tribes on par with the members of other communities which would enable them to get their share of representation in public service. How can any member of the so-called forward communities complain of a compensatory measure made by the Government to ensure the members of Scheduled Castes and scheduled tribes their due share of representation in public services?
>
> 75. It is said that Article 16(4) specifically provides for reservation of posts in favour of Backward Classes which according to the decision of this Court would include the power of the State to make reservation at the stage of promotion also and therefore Article 16(1) cannot include within its compass the power to give any adventitious aids by legislation or otherwise to the Backward Classes which would derogate from strict numerical equality. If reservation is necessary either at the initial stage or at the stage of promotion or at both to ensure for the members of the Scheduled Castes and scheduled tribes equality of opportunity in the matter of employment, I see no reason why that is not permissible under Article 16(1) as that alone might put them on a parity with the forward communities in the matter of achieving the result which equality of opportunity would produce. Whether there is equality of opportunity can be gauged only by the equality attained in the result. Formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. Equality of result is the test of equality of opportunity."

Thus, the learned judge envisaged that equality of individuals is to be achieved by addressing the structural barriers faced by certain classes of citizens, which he called the "conditions and circumstances [that] stand in the way of their equal access to the enjoyment of basic rights or claims". Justice Krishna Iyer and Justice Fazal Ali in their concurring opinions went a step further to argue that the

content of Article 16 (1) is not individual-centric rather it aims to provide equality of opportunity to sections that face structural barriers to their advancement. Justice Krishna Iyer invoked Article 46 of the Constitution, which although unenforceable, was employed for giving effect to Article 16 (1). In his opinion both Articles 16 (1) and 16 (4) function to equalise group inequalities albeit in different contexts. The learned judge observed thus:

> "137. "reservation" based on classification of backward and forward classes, without detriment to administrative standards (as this Court has underscored) is but an application of the principle of equality within a class and grouping based on a rational differentia, the object being advancement of backward classes consistently with efficiency. Article 16(1) and (4) are concordant. This Court has viewed Article 16(4) as an exception to Article 16(1). Does classification based on desperate backwardness render Article 16(4) redundant? No. Reservation confers pro tanto monopoly, but classification grants under Article 16(1) ordinarily a lesser order of advantage. The former is more rigid, the latter more flexible, although they may overlap sometimes. Article 16(4) covers all backward classes; but to earn the benefit of grouping under Article 16(1) based on Articles 46 and 335 as I have explained, the twin considerations of terrible backwardness of the type harijans endure and maintenance of administrative efficiency must be satisfied."

21 Justice Fazal Ali in his concurring opinion noted that equality of opportunity under Article 16 (1) entails the removal of barriers faced by certain classes of society. They cannot be denied the right to equality and relegated to suffer backwardness only because they do not meet certain artificial standards set up by institutions. Justice Fazal Ali made the following observations:

> "158. It is no doubt true that Article 16(1) provides for equality of opportunity for all citizens in the services under the State. It is, however, well-settled that the doctrine contained in Article 16 is a hard and reeling reality, a concrete and constructive concept and not a rigid rule or an empty formula. It is also equally well-settled by several authorities of this Court that Article 16 is merely an incident of Article 14, Article 14 being the genus is of universal application whereas Article 16 is the species and seeks to obtain equality of opportunity in the services under the State. The theory of reasonable classification is implicit and inherent in the concept of equality

for there can hardly be any country where all the citizens would be equal in all respects. Equality of opportunity would naturally mean a fair opportunity not only to one section or the other but to all sections by removing the handicaps if a particular section of the society suffers from the same. It has never been disputed in judicial pronouncements by this Court as also of the various High Courts that Article 14 permits reasonable classification. But what Article 14 or Article 16 forbid is hostile discrimination and not reasonable classification. In other words, the idea of classification is implicit in the concept of equality because equality means equality to all and not merely to the advanced and educated sections of the society. It follows, therefore, that in order to provide equality of opportunity to all citizens of our country, every class of citizens must have a sense of equal participation in building up an egalitarian society, where there is peace and plenty, where there is complete economic freedom and there is no pestilence or poverty, no discrimination and oppression, where there is equal opportunity to education, to work, to earn their livelihood so that the goal of social justice is achieved. Could we, while conferring benefits on the stronger and the more/advanced sections of the society, ignore the more backward classes merely because they cannot come up to the fixed standards? Such a course, in my opinion, would lead to denial of opportunity to the backward classes resulting in complete annihilation of the concept of equality contained in Articles 14 and 16. The only manner in which the objective of equality as contemplated by the founding fathers of our Constitution and as enshrined in Articles 14 and 16 can be achieved is to boost up the backward classes by giving them concessions, relaxations, facilities, removing handicaps, and making suitable reservations so that the weaker sections of the people may compete with the more advanced and in due course of time all may become equals and backwardness is banished for ever. This can happen only when we achieve complete economic and social freedom. In our vast country where we have diverse races and classes of people, some of whom are drowned in the sea of ignorance and illiteracy, the concept of equality assumes very important proportions. There are a number of areas in some States like Kashmir, Sikkim, hilly areas of U.P., Bihar and the South, where due to lack of communications or transport, absence of proper educational facilities or because of old customs and conventions and other environmental reasons, the people are both socially and educationally backward. Could we say that the citizens hailing from these areas should continue to remain backward merely because they fall short of certain artificial standards fixed by various institutions? The answer must be in the negative. The directive principles enshrined in our Constitution contain a clear mandate to achieve equality and social justice. Without going into the vexed question as to whether or not the directive principles contained in Part IV override the fundamental rights in Part III there appears to be a complete unanimity of judicial opinion of this Court that the directive principles and the fundamental rights should be construed in harmony with each other and every attempt

> should be made by the Court, to resolve any apparent inconsistency. The directive principles contained in Part IV constitute the stairs to climb the high edifice of a socialistic State and the fundamental rights are the means through which one can reach the top of the edifice. I am fortified in my view by several decisions of this Court to which I will refer briefly."

22 Even if the judges differed on whether Article 16 (1) is individual-centric or group-centric, they nonetheless accepted that Article 16 (4) is crucial to achieve substantive equality that is envisaged under Article 16 (1). Articles 16 (4), 15 (4), and 15 (5) employ group identification as a method through which substantive equality can be achieved. This may lead to an incongruity where individual members of an identified group may not be backward or individuals belonging to the non-identified group may share certain characteristics of backwardness with members of an identified group. However, this does not change the underlying rationale of the reservation policy that seeks to remedy the structural barriers that disadvantaged groups face in advancing in society. Reservation is one of the measures that is employed to overcome these barriers. The individual difference may be a result of privilege, fortune, or circumstances but it cannot be used to negate the role of reservation in remedying the structural disadvantage that certain groups suffer.

23 The view that special provisions made for a backward class are not an exception to the principle of equality was re-affirmed by a nine-Judge Bench in **Indira Sawhney** v. **Union of India**[40]. These observations were made in the context of Articles 16 (1) and 16(4). In **Dr Jaishri Laxmanrao Patil** v. **Chief Minister**[41], this Court has observed that the principles applied for interpreting

[40] 1992 Supp (3) SCC 217
[41] (2021) 8 SCC 1

Article 16 are also to be used for the interpretation of Article 15. Thus, Articles 15 (4) and Article 15 (5) are nothing but a restatement of the guarantee of the right to equality stipulated in Article 15 (1).

24 The crux of the above discussion is that the binary of merit and reservation has now become superfluous once this Court has recognized the principle of substantive equality as the mandate of Article 14 and as a facet of Articles 15 (1) and 16(1). An open competitive exam may ensure formal equality where everyone has an equal opportunity to participate. However, widespread inequalities in the availability of and access to educational facilities will result in the deprivation of certain classes of people who would be unable to effectively compete in such a system. Special provisions (like reservation) enable such disadvantaged classes to overcome the barriers they face in effectively competing with forward classes and thus ensuring substantive equality. The privileges that accrue to forward classes are not limited to having access to quality schooling and access to tutorials and coaching centres to prepare for a competitive examination but also includes their social networks and cultural capital (communication skills, accent, books or academic accomplishments) that they inherit from their family.[42] The cultural capital ensures that a child is trained unconsciously by the familial environment to take up higher education or high posts commensurate with their family's standing. This works to the disadvantage of individuals who are first-generation learners and come from communities whose traditional occupations do not result in the transmission of necessary skills required to perform well in open examination. They have to put in surplus effort to

[42] K.V Syamprasad, Merit and caste as cultural capital: Justifying affirmative action for the underprivileged in Kerala, India, Journal for Critical Education Policy Studies, Vol 17, p.50-81 (2019).

compete with their peers from the forward communities.[43] On the other hand, social networks (based on community linkages) become useful when individuals seek guidance and advise on how to prepare for examination and advance in their career even if their immediate family does not have the necessary exposure. Thus, a combination of family habitus, community linkages and inherited skills work to the advantage of individuals belonging to certain classes, which is then classified as "merit" reproducing and reaffirming social hierarchies. In **BK Pavithra v. Union of India**[44], a two-judge Bench of this Court, of which one of us was a part (Justice DY Chandrachud) had observed how apparently neutral systems of examination perpetuate social inequalities. This Court observed:

> "134. It is well settled that existing inequalities in society can lead to a seemingly "neutral" system discriminating in favour of privileged candidates. As Marc Galanter notes, three broad kinds of resources are necessary to produce the results in competitive exams that qualify as indicators of "merit". These are:
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> "… (a) economic resources (for prior education, training, materials, freedom from work, etc.); (b) social and cultural resources (networks of contacts, confidence, guidance and advice, information, etc.); and (c) intrinsic ability and hard work…" [Galanter M., Competing Equalities : Law and the Backward Classes in India, (Oxford University Press, New Delhi 1984), cited by Deshpande S., Inclusion versus excellence : Caste and the framing of fair access in Indian higher education, 40 : 1 South African Review of Sociology 127-147.]
>
> 135. The first two criteria are evidently not the products of a candidate's own efforts but rather the structural conditions into which they are borne. By the addition of upliftment of SCs and STs in the moral compass of merit in government appointments and promotions, the Constitution mitigates the risk that the lack of the first two criteria will perpetuate the structural inequalities existing in society."

[43] Ibid
[44] (2019) 16 SCC 129

25 This is not to say that performance in competitive examination or admission in higher educational institutions does not require a great degree of hard work and dedication but it is necessary to understand that "merit" is not solely of one's own making. The rhetoric surrounding merit obscures the way in which family, schooling, fortune and a gift of talents that the society currently values aids in one's advancement.[45] Thus, the exclusionary standard of merit serves to denigrate the dignity of those who face barriers in their advancement which are not of their own making. But the idea of merit based on "scores in an exam" requires a deeper scrutiny. While examinations are a necessary and convenient method of distributing educational opportunities, marks may not always be the best gauge of individual merit. Even then marks are often used as a proxy for merit. Individual calibre transcends performance in an examination. Standardized measures such as examination results are not the most accurate assessment of the qualitative difference between candidates.[46] Ashwini Deshpande highlights that there is always a degree of separation between what examinations claim to measure and what they actually measure. He states:

> "…most examinations and tests have an inevitably indexical character – they claim to measure something more than (or other than) what is established by the actual tasks they set. Thus, for example, a candidate aspiring to join civil service may take an entrance exam where she appears in papers in, say geology, philosophy and general knowledge. On the basis of her performance in these papers, the entrance exam claims to predict her potential ability to be a good civil servant. There is at best a rather indirect link between good at writing exam answers in geology, philosophy and general knowledge and being a good civil servant. This is the sense in which the exam and the candidate's performance in it serves as an index – an indicator – of something else namely her potential to be a good civil servant.

[45] Michael Sandel, Tyranny of Merit: What's become of the Common Good (Penguin Boks)
[46] Ashwini Deshpande, Social Justice Through Affirmative Action in India: An Assessment, in Jeannette Wicks-Lim and Robert Pollin (editors) Capitalism on Trial: Explorations in the Tradition of Thomas Weisskopf, Publisher: Edward Elgar Publishing Inc. (Northampton, MA), 2013

> All examinations are more of less indexical, even those that have a lot of 'practical' components involving activities that appear to be very close to what successful candidates will eventually be doing professionally. All other things being equal, indexicality tends to weaken diagnostic claims of the examination. Because of this, the higher the stakes, the greater the ideological energy that is spent on building up the prestige and popular deference accorded to the exam. That is why exams guarding the gateway to a prized profession or status are steeped in hyperbole and are socially required (so to speak) to be traumatic bloodbaths. Anything less would not only undermine the status of the status that they are guarding, it would also endanger the main social function that such exams perform, which is to persuade the vast majority of aspirants to consent to their exclusion."[47]

At the best, an examination can only reflect the current competence of an individual but not the gamut of their potential, capabilities or excellence,[48] which are also shaped by lived experiences, subsequent training and individual character. The meaning of "merit" itself cannot be reduced to marks even if it is a convenient way of distributing educational resources. When examinations claim to be more than systems of resource allocation, they produce a warped system of ascertaining the worth of individuals as students or professionals. Additionally, since success in examinations results in the ascription of high social status as a "meritorious individual", they often perpetuate and reinforce the existing ascriptive identities of certain communities as "intellectual" and "competent" by rendering invisible the social, cultural and economic advantages that increase the probabilities of success. Thus, we need to reconceptualize the meaning of "merit". For instance, if a high-scoring candidate does not use their talents to perform good actions, it would be difficult to call them "meritorious" merely because they scored high marks. The propriety of actions and dedication to public service should also be seen as markers of merit, which cannot be

[47] Satish Deshpande, Pass, Fail, Distinction: The Examination as a Social Institution. Marjorie Sykes Memorial Lecture, Regional Institute of Education, Ajmer, 3rd March, 2010. Published by the National Council for Educational Research and Training, New Delhi.
[48] Ibid

assessed in a competitive examination. Equally, fortitude and resilience required to uplift oneself from conditions of deprivation is reflective of individual calibre.

Such a formulation of merit was emphasised by this Court in **Pradeep Jain** (supra), where it observed:

> "12. But let us understand what we mean when we say that selection for admission to medical colleges must be based on merit. What is merit which must govern the process of selection? It undoubtedly consists of a high degree of intelligence coupled with a keen and incisive mind, sound knowledge of the basic subjects and infinite capacity for hard work, but that is not enough; it also calls for a sense of social commitment and dedication to the cause of the poor. We agree with Krishna Iyer, J., when he says in Jagdish Saran case [(1980) 2 SCC 768 : AIR 1980 SC 820 : (1980) 2 SCR 831] : (SCC p. 778, para 21)
>
> "If potential for rural service or aptitude for rendering medical attention among backward people is a criterion of merit — and it, undoubtedly, is in a land of sickness and misery, neglect and penury, wails and tears — then, surely, belonging to a university catering to a deprived region is a plus point of merit. Excellence is composite and the heart and its sensitivity are as precious in the scale of educational values as the head and its creativity and social medicine for the common people is more relevant than peak performance in freak cases."
>
> Merit cannot be measured in terms of marks alone, but human sympathies are equally important. The heart is as much a factor as the head in assessing the social value of a member of the medical profession. This is also an aspect which may, to the limited extent possible, be borne in mind while determining merit for selection of candidates for admission to medical colleges though concededly it would not be easy to do so, since it is a factor which is extremely difficult to judge and not easily susceptible to evaluation."

26 However, after contextualising the meaning of merit, in the next paragraph this Court reverted to equating the selection process adopted for admission to merit. However, irrespective of the true purport of merit, this Court notes that the selection process for admission must satisfy the test of equality. This Court observed thus:

"13. We may now proceed to consider what are the circumstances in which departure may justifiably be made from the principle of selection based on merit. Obviously, such departure can be justified only on equality-oriented grounds, for whatever be the principle of selection followed for making admissions to medical colleges, it must satisfy the test of equality. Now the concept of equality under the Constitution is a dynamic concept. It takes within its sweep every process of equalisation and protective discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest that progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground that every individual is entitled to equality of opportunity based purely on merit judged by the marks obtained by him. We cannot countenance such a suggestion, for to do so would make the equality clause sterile and perpetuate existing inequalities. Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities. Where, therefore, there is inequality, in fact, legal equality always tends to accentuate it. What the famous poet William Blake said graphically is very true, namely, "One law for the Lion and the Ox is oppression". Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality. It is, therefore, necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons or, inflicting handicaps on those more advantageously placed, in order to bring about real equality. Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful sections so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence. We may in this connection usefully quote what Mathew, J., said in Ahmedabad St. Xavier's College Society v. State of Gujarat [(1974) 1 SCC 717, 799 : AIR 1974 SC 1389 : (1975) 1 SCR 173] : (SCC p. 799, para 132)

"… it is obvious that 'equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations' [The Advisory opinion on Minority Schools in Albania, April 6, 1935 publications of the Court, series A/B No 64, p 19] ."

We cannot, therefore, have arid equality which does not take into account the social and economic disabilities and inequalities from which large masses of people suffer in the country. Equality in law must produce real equality; de jure

> equality must ultimately find its raison d'etre in de facto equality. The State must, therefore, resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. The State must, to use again the words of Krishna Iyer, J., in Jagdish Saran case [(1980) 2 SCC 768 : AIR 1980 SC 820 : (1980) 2 SCR 831] (SCC p. 782, para 29) "weave those special facilities into the web of equality which, in an equitable setting, provide for the weak and promote their levelling up so that, in the long run, the community at large may enjoy a general measure of real equal opportunity. . . . equality is not negated or neglected where special provisions are geared to the larger goal of the disabled getting over their disablement consistently with the general good and individual merit". The scheme of admission to medical colleges may, therefore, depart from the principle of selection based on merit, where it is necessary to do so for the purpose of bringing about real equality of opportunity between those who are unequals."

27 It is important to clarify here that after the decision in **NM Thomas** (supra) there is no constitutional basis to subscribe to the binary of merit and reservation. If open examinations present equality of opportunity to candidates to compete, reservations ensure that the opportunities are distributed in such a way that backward classes are equally able to benefit from such opportunities which typically evade them because of structural barriers. This is the only manner in which merit can be a democratizing force that equalises inherited disadvantages and privileges. Otherwise claims of individual merit are nothing but tools of obscuring inheritances that underlie achievements.

28 If merit is a social good that must be protected, we must first critically examine the content of merit. As noted above, scores in an exam are not the sole determinant of excellence or capability. Even if for the sake of argument, it is assumed that scores do reflect excellence, it is not the only value that is considered as a social good. We must look at the distributive consequences of

merit. Accordingly, how we assess merit should also encapsulate if it mitigates or entrenches inequalities. As Amartya Sen argues:

> "If, for example, the conceptualization of a good society includes the absence of serious economic inequalities, then in the characterization of instrumental goodness, including the assessment of what counts as merit, note would have to be taken of the propensity of putative merit to lessen—or generate—economic inequality. In this case, the rewarding of merit cannot be done independent of its distributive consequences.
>
> …..
>
> In most versions of modern meritocracy, however, the selected objectives tend to be almost exclusively oriented towards aggregate achievements (without any preference against inequality), and sometimes the objectives chosen are even biased (often implicitly) towards the interests of more fortunate groups (favouring the outcomes that are more preferred by "talented" and "successful" sections of the population. This can reinforce and augment the tendency towards inequality that might be present even with an objective function that inter alia, attaches some weight to lower inequality levels"[49]

A similar understanding of merit was advanced by this Court in **BK Pavithra** (supra), where this Court held:

> "131. Once we understand —merit as instrumental in achieving goods that we as a society value, we see that the equation of —meritǁ with performance at a few narrowly defined criteria is incomplete. A meritocratic system is one that rewards actions that result in the outcomes that we as a society value."

An oppositional paradigm of merit and reservation serves to entrench inequalities by relegating reserved candidates to the sphere of incompetence, and diminishing their capabilities. We have already stated that while examinations are a necessary and convenient method to allocate educational resources, they are not effective markers of merit. The way we understand merit should not be limited to individual agency or ability (which in any event is not *solely* of our own doing)

[49] Amartya Sen, 'Merit and Justice' in Arrow KJ, et al (eds), Meritocracy and Economic Inequality (Princeton University Press 2000).

but it should be envisioned as a social good that advances equality because that is the value that our Constitution espouses. It is important to note that equality here does not merely have a redistributive dimension but also includes recognizing the worth and dignity of every individual. The content of merit cannot be devoid of what we value in society. Based on the above discussion, we find it difficult to accept the narrow definition of merit (that is, decontextualised individual achievement). We believe such a definition hinders the realisation of substantive equality.

29 Coming to the issue of whether reservation can be permitted in PG courses, it is evident Article 15 (5) does not make a distinction between UG and PG courses. Article 15 (5) reads thus:

> "(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."

The Constitution enables the State to make special provisions for the advancement of socially and educationally backward classes for admission to educational institutions at both the UG and PG levels. While on certain occasions, this Court has remarked that there cannot be any reservation in SS courses, this Court has never held that reservations in medical PG courses are impermissible. In **Pradeep Jain** (supra), this Court did not hold that reservation in PG courses is altogether impermissible. In **Dr Preeti Srivastava** (supra), this Court was not concerned with the issue of reservation in PG courses; rather it

was concerned with the question whether it is permissible to prescribe a lower minimum percentage of qualifying marks for reserved category candidates in comparison to the general category candidates. In **AIIMS Student Union** v. **AIIMS**[50], this Court was concerned with the question of reservation based on institutional preference in PG courses and held that limited preference to students of the same institution can be given at the PG level. In **Saurabh Chaudhri** v. **Union of India**[51], a Constitution Bench of this Court observed that reservation in PG courses to a reasonable extent did not violate the equality clause.[52] Mr Divan had urged on behalf of the petitioners that for many individuals PG is the end of the road and therefore, the PG courses should be equated with SS courses and no reservation should be allowed in PG. We find it difficult to accept this argument when this Court has time and again permitted reservation in PG courses. This argument merely seeks to create an artificial distinction between the courses offered at the PG level. Further, only certain medical fields do not have SS courses and on the basis of that we cannot deem that reservation is impermissible in PG as a whole. Crucially, the issue here is whether after graduation, an individual is entitled to reservation on the ground that they belong to a class that suffers from social and educational backwardness. In our opinion, it cannot be said that the impact of backwardness simply disappears because a candidate has a graduate qualification. Indeed, a graduate qualification may provide certain social and economic mobility, but that by itself does not create parity between forward classes and backward classes. In any event, there cannot be an assertion of over-inclusion where undeserving candidates are said to be

[50] 2002 (1) SCC 428
[51] 2003 (11) SCC 146
[52] Ibid, paragraph 67.

benefitting from reservation because OBC candidates who fall in the creamy layer are excluded from taking the benefit of reservation. Thus, we find that there is no prohibition in introducing reservation for socially and educationally backward classes (or the OBCs) in PG courses.

D.2 The Court and the AIQ seats

30 In order to address the argument of the petitioners that this Court in **Pradeep Jain** (supra) and the subsequent cases has held that there shall be no reservation in the AIQ seats, it is necessary that we chronologically refer to the development of the concept of AIQ seats by various cases.

31 In **Pradeep Jain** (supra), a three-Judge Bench of this Court was deciding on the constitutional validity of reservation based on domicile and institutional preference in medical colleges or institutions of higher learning. Referring to **State of U.P** v. **Pradip Tandon**[53] and **Nookavarapu Kanakadurga Devi** v. **Kakatiya Medical College**[54], where reservation for the people of the hills in Uttarakhand and Telangana was held to be permissible since they were backward regions which would fall within the ambit of socially and educationally backward classes in Article 15(4), it was held that reservation or any other affirmative action programme based on residence or domicile is not arbitrary and violative of Article 14. However, it was also observed that it is desirable to admit students to the MBBS course on an all-India basis, in furtherance of 'merit', without any classification based on residence. It was observed that however, in view of the inequality in the society where a few areas within a State, and a few

[53] (1975) 2 SCR 761
[54] AIR 1972 AP 83

States on comparison to others are backward, admission based on an all-India examination will lead to inequality:

> "19. […]Theoretically, of course, if admissions are given on the basis of all-India national entrance examination, each individual would have equal opportunity of securing admission, but that would not take into account diverse considerations, such as, differing level of social, economic and educational development of different regions, disparity in the number of seats available for admission to the MBBS course in different States, difficulties which may be experienced by students from one region who might in the competition on all-India basis get admission to the MBBS course in another region far remote from their own and other allied factors. There can be no doubt that the policy of ensuring admissions to the MBBS course on all-India basis is a highly desirable policy, based as it is on the postulate that India is one nation and every citizen of India is entitled to have equal opportunity for education and advancement, but it is an ideal to be aimed at and it may not be realistically possible, in the present circumstances, to adopt it, for it cannot produce real equality of opportunity unless there is complete absence of disparities and inequalities — a situation which simply does not exist in the country today."

32 In order to balance between the claims of legal and factual equality, it was observed that even if the Union Government decides to conduct an all-India entrance examination for admission to medical courses, a certain percentage of seats may be reserved for candidates based on residence. Further, it was held that wholesale reservation of 100 percent based on domicile for admission in educational institutions is unconstitutional:

> "20 […] We agree wholly with these observations made by the learned Judge and we unreservedly condemn wholesale reservation made by some of the State Governments on the basis of 'domicile' or residence requirement within the State or on the basis of institutional preference for students who have passed the qualifying examination held by the university or the State excluding all students not satisfying this requirement, regardless of merit. We declare such wholesale reservation to be unconstitutional and void as being in violation of Article 14 of the Constitution."

33 This Court then determined the quantum of reservation based on residence and institutional preference. This Court observed that reservation based on residence in MBBS shall not exceed 70 percent of the total seats available, *after taking into account other reservations validly made*. It was also observed that the Indian Medical Council must consider revising the percentage of reservation based on the residence criteria every three years. The remaining 30 percent seats were available for admission on an all-India basis irrespective of the residence of the candidate:

> "21. But, then to what extent can reservation based on residence requirement within the State or on institutional preference for students passing the qualifying examination held by the university or the State be regarded as constitutionally permissible? It is not possible to provide a categorical answer to this question for, as pointed out by the policy statement of the Government of India, the extent of such reservation "would depend on several factors including opportunities for professional education in that particular area, the extent of competition, level of educational development of the area and other relevant factors". It may be that in a State where the level of educational development is woefully low, there are comparatively inadequate opportunities for training in the medical speciality and there is large scale social and economic backwardness, there may be justification for reservation of a higher percentage of seats in the medical colleges in the State and such higher percentage may not militate against "the equality mandate viewed in the perspective of social justice". So many variables depending on social and economic facts in the context of educational opportunities would enter into the determination of the question as to what in the case of any particular State, should be the limit of reservation based on residence requirement within the State or on institutional preference. But, **in our opinion, such reservation should in no event exceed the outer limit of 70 per cent of the total number of open seats after taking into account other kinds of reservations validly made.** The Medical Education Review Committee has suggested that the outer limit should not exceed 75 per cent but we are of the view that it would be fair and just to fix the outer limit at 70 per cent. We are laying down this outer limit of reservation in an attempt to reconcile the apparently conflicting claims of equality and excellence. We may make it clear that this outer limit fixed by us will be subject to any reduction or attenuation which may be made by the Indian Medical Council which

> is the statutory body of medical practitioners whose functional obligations include setting standards for medical education and providing for its regulation and coordination. We are of the opinion that this outer limit fixed by us must gradually over the years be progressively reduced but that is a task which would have to be performed by the Indian Medical Council. We would direct the Indian Medical Council to consider within a period of nine months from today whether the outer limit of 70 per cent fixed by us needs to be reduced and if the Indian Medical Council determines a shorter outer limit, it will be binding on the States and the Union Territories. We would also direct the Indian Medical Council to subject the outer limit so fixed to reconsideration at the end of every three years but in no event should the outer limit exceed 70 per cent fixed by us. **The result is that in any event at least 30 per cent of the open seats shall be available for admission of students on all-India basis irrespective of the State or university from which they come and such admissions shall be granted purely on merit on the basis of either all-India entrance examination or entrance examination to be held by the State.** Of course, we need not add that even where reservation on the basis of residence requirement or institutional preference is made in accordance with the directions given in this judgment, admissions from the source or sources indicated by such reservation shall be based only on merit, because the object must be to select the best and most meritorious students from within such source or sources."
>
> **(emphasis supplied)**

34 This Court then distinguished admission to the MBBS course (at the UG level) and the MD course (at the PG level). It observed that at the PG level, merit cannot be compromised since compromising the standard of medical facilities would be detrimental to national interest. The Court referred to the submissions of the Medical Education Review Committee according to which:

> "22. […] all admissions to the post-graduate courses in any institution should be open to candidates on an all-India basis and there should be no restriction regarding domicile in the State/Union territory in which the institution is located".

The policy statement filed by the Government of India was as follows:

> "22. […] So far as admission to the institutions of post-graduate colleges and special professional colleges is concerned, it should be entirely on the basis of all-India merit subject to constitutional reservations in favour of Scheduled Castes and Scheduled Tribes."

35 Consequently, it was held that it would be desirable to not provide reservation based on residence in PG medical courses, though there shall be a maximum of 50 percent reservation based on institutional preference. Therefore, a doctor who has passed the MBBS course from a certain college may be given preference in the same college for admission to PG course. It was observed:

> "22. [..] We are therefore of the view that so far as admissions to post-graduate courses, such as MS, MD and the like are concerned, **it would be eminently desirable not to provide for any reservation based on residence requirement within the State** or on institutional preference. But, having regard to broader considerations of equality of opportunity and institutional continuity in education which has its own importance and value, we would direct that though residence requirement within the State shall not be a ground for reservation in admissions to post-graduate courses, a certain percentage of seats **may in the present circumstances, be reserved on the basis of institutional preference** in the sense that a student who has passed MBBS course from a medical college or university, may be given preference for admission to the post-graduate course in the same medical college or university but such reservation on the basis of institutional preference should not in any event exceed 50 per cent of the total number of open seats available for admission to the post-graduate course."
>
> **(emphasis supplied)**

The observations were to guide both medical and dental courses in State-run institutions.

36 The Bench in **Pradeep Jain** (supra) clarified its decision in **Dinesh Kumar (I)** (supra). It was observed by the Bench that the admission to the AIQ quota seats (30 percent in UG and 50 percent in PG) shall only be through a uniform all-India examination. The suggestion of the Union Government that the admission to the AIQ seats in UG and PG medical courses could be made through marks received in the individual qualifying examinations was rejected observing:

> "It would be wholly unjust to grant admissions to students assessing their relative merits with reference to the marks obtained by them, not at the same qualifying examination where standard of judging would be reasonably uniform but at different qualifying examinations held by different State Government or Universities where the standard of judging would necessarily vary and not be the same. That would be blatantly violative of the concept of equality enshrined in Article 14 of the Constitution."

Further, the Bench also clarified the demarcation of seats for the AIQ. It was observed that 30 percent of the total number of seats were not demarcated for AIQ. Rather, after deducting the seats filled by reservation, 30 percent of the remaining seats are reserved for AIQ. As an example, if there are 100 seats available, of which 30 percent of the seats are reserved for SC and ST (that is 30 seats), 30 percent of the remaining seats (that is 21 of the remaining 70 seats) must be filled by the AIQ. It was observed:

> "5. We would also like to clear up one misunderstanding which seems to prevail with some State Governments and universities in regard to the true import of our Judgment dated June 22, 1984. They have misinterpreted our Judgment to mean that 30% of the *total number* of *seats* available for admission to MBBS course in a medical college should be kept free from reservation on the basis of residence requirement or institutional preference. That is a total misreading of our Judgment. What we have said in our Judgment is that after providing for reservation *validly made*, whatever seats remain available for non-reserved categories, 30% of such seats at the least, should be left free for open competition and admission to such 30% open seats should not be based on residence requirement or institutional preference but students from all over the country should be able to compete for admissions to such 30% open seats. To take an example, suppose there are 100 seats in a radical college or university and 30% of the seats are validly reserved for candidates belonging to Scheduled Castes and Scheduled Tribes. That would leave 70 seats available for others belonging to non-reserved categories. According to our Judgment, 30% of 70 seats, that is, 21 seats out of 70 and not 30% of the total number of 100 seats, namely, 30 seats, must be filled up by open competition regardless of residence requirement or institutional preference."

37 Pursuant to the directions given by the Bench in **Dinesh Kumar (I)** (supra), the Medical Council of India formulated a scheme for holding an all- India medical entrance examination for admission to the AIQ seats in UG and PG. However, difficulties arose in the implementation of the scheme. This Court thought it necessary to iron out the creases and by an order dated 16 September 1985, directed the Government of India, in the Ministry of Health to convene a meeting of the Deans of Medical colleges, representatives of the Medical Council of India and Dental Council of India. A revised scheme was formulated and submitted to this Court for approval. Various State Governments raised objections to the revised scheme before a two-Judge Bench in **Dinesh Kumar (II)** v. **Motilal Nehru Medical College**[55]. The State of Tamil Nadu submitted that since the total percentage of reservation varies in different States, if the AIQ seats are calculated after deducting the seats in which reservations are validly made, the total AIQ seats in a medical college in the State would be inversely proportional to the percentage of reservation in the State. This Court addressed this submission and observed that it would then be open to the State Governments to reduce the number of seats available in the AIQ by increasing the percentage of reservation in the State. Therefore, this Court altered the formula for seat matrix adopted in **Pradeep Jain** (supra) and clarified in **Dinesh Kumar (I)** (supra). This Court held that for UG, 15 percent of the total seats in each medical college or institution shall be demarcated for AIQ (as per the revised scheme of the Central Government), without taking into account any reservation validly made. For PG, it

[55] 1986 (3) SCC 727

was held that 25 percent of the total seats would be reserved for the AIQ, without taking into account reservation validly made. It was observed:

> "5. […] There can be no doubt that if in each State, 30 per cent of the seats were to be made available for admission on the basis of All-India Entrance Examination after taking into account reservations validly made, the number of seats which would be available for admission on the basis of All-India Entrance Examination would vary inversely with the percentage of reservations validly made in that State. If the percentage of reservations is high as in the State of Tamil Nadu or the State of Karnataka, the number of seats available for admission on the basis of All-India Entrance Examination would be relatively less than what would be in a State where the percentage of reservations is low. There would thus be total inequality in the matter of making available seats for admission on the basis of All-India Entrance Examination. It would be open to a State Government to reduce the number of seats available for admission on the basis of All-India Entrance Examination by increasing the number of reserved categories or by increasing the percentage of reservations. We therefore agree with the Government of India that the formula adopted by us in our main judgment dated June 22, 1984 [*Dr Pradeep Jain* v. *Union of India*, (1984) 3 SCC 654] for determining the number of seats which should be made available for admission on the basis of All-India Entrance Examination should be changed. We would direct, in accordance with the suggestion made in the Scheme by the Government of India, that not less than 15 per cent of the total number of seats in each medical college or institution, **without taking into account any reservations validly made, shall be filled on the basis of All-India Entrance Examination.** This new formula is in our opinion fair and just and brings about real equality of opportunity in admissions to the MBBS/BDS course without placing the students in one State in an advantageous or disadvantageous position as compared to the students in another State. The same formula must apply also in regard to admissions to the postgraduate courses and instead of making available for admission on all-India basis 50 per cent of the open seats after taking into account reservations validly made, we would direct that not less than 25 per cent of the total number of seats without taking into account any reservations, shall be made available for being filled on the basis of All-India Entrance Examination. This suggestion of the Government of India deserves to be accepted and the objection to it must be overruled."
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> **(emphasis supplied)**

As opposed to the clarification issued in **Dinesh Kumar (I)** (supra), where reservation based on residence was against the total seats available after

reservation made for backward classes under Article 15, **Dinesh Kumar (II)** applies reservation based on residence against the total number of seats available without excluding the reserved seats.

38 In **Rajeshwaran** (supra), the respondent filed a writ petition before the Madras High Court seeking a direction to the Union of India to provide reservation for the SC and ST categories in the AIQ seats set aside for MBBS and BDS courses. The Madras High Court prima facie observed that there was no specific order by this Court not to apply reservation as under Article 15 in the AIQ seats. It was further observed that the AIQ seats were demarcated only to overcome reservation based on residence. The Madras High Court allowed the writ petition directing the Central Government to provide 15 percent reservation for SC and ST in the AIQ seats. The Union of India filed an appeal against the order of the Madras High Court. This Court in appeal referring to the judgment in **Dinesh Kumar (II)** (supra) observed that since this Court has settled the scheme, it would not be appropriate to determine if the candidates of SC and ST categories are entitled to reservation in the AIQ seats since: (i) each State will have different categories of SC and ST, and the Central list would also vary making it difficult to adjust seats; and (ii) States anyway provide reservation for SC and ST categories in the 85 percent seats demarcated for them. It was observed:

> "7. In respect of undergraduate course, the scheme works out like this. If a State has a total of 100 seats and in that State 15% of the seats are reserved for Scheduled Castes and 10% for Scheduled Tribes, the State will fill up 15% seats for Scheduled Caste candidates and 10% for Scheduled Tribe candidates, of the remaining 75 seats 60 seats will be filled by the State Government as unreserved and 15 seats will be earmarked for the all-India quota.

> 8. Inasmuch as 15% all-India quota has been earmarked under the scheme framed by this Court and that scheme itself provides the manner in which the same should be worked out, we do not think, it would be appropriate to travel outside the said provisions to find out whether a person in the position of the petitioner would be entitled to plead in the manner sought for because each of the States could also provide for reservation for the Scheduled Caste and Scheduled Tribe category in respect of 85% of the seats available with them. If we meddle with this quota fixed, we are likely to land in innumerable and insurmountable difficulties. Each State will have different categories of Scheduled Castes and Scheduled Tribes and the Central Government may have a different category and hence adjustment of seats would become difficult. The direction fixing 15% quota for all-India basis takes note of reservations and hence the High Court need not have made any further directions."

39 A Constitution Bench of this Court in **Saurabh Chaudri** (supra), decided on the constitutional validity of reservation based on domicile and institutional preference in admission to PG courses in Government-run medical colleges. This Court held that there was no reason to depart from the ratio laid down in **Pradeep Jain** (supra) that reservation based on institutional preference and residence in PG courses is constitutionally valid. The ratio of **Pradeep Jain** (supra) was referred to and the Court observed:

> " 70. We, therefore, do not find any reason to depart from the ratio laid down by this Court in Dr Pradeep Jain. The logical corollary of our finding is that reservation by way of institutional preference must be held to be not offending Article 14 of the Constitution of India."

The Constitution Bench also increased the total percent of AIQ seats from 25 percent (as held in **Dinesh (II)** (supra)) to 50 percent of the seats reasoning that the situation has improved to a great extent and that the country has produced numerous PG doctors with the passage of time.

40 In **Buddhi Prakash Sharma** v. **Union of India**[56], the writ petitioners challenged the communication issued by the Directorate General of Health Services[57] on 7 December 2004 directing the States to provide information on the total number of PG medical seats under the 50 percent AIQ seats *after* excluding the seats reserved for SC and ST categories. By an order dated 21 February 2005, this Court directed the States to provide the total number of seats in PG medical courses, without any exclusion. This Court observed that the DGHS was not permitted to change the basis of the seat distribution by identifying the AIQ seats after applying reservation for the SC and ST categories. This Court observed that the total seats in AIQ would be 50 percent of the total number of available seats, without any exclusion. It was observed:

> "3. […] It is not in dispute that till 2004-2005 when all-India quota of seats was 25%, the number of postgraduate seats was worked out on the basis of total seats without any exclusion. It is because of the letter dated 7-12-2004 requiring the information about 50% of all-India quota after excluding the reserved seats that this mess has been created. **None permitted DGHS to change the basis this year.** The result of communication is that in many States the total number of postgraduate seats has gone down than what it was when the all-India percentage was 25% instead of it being almost double since the direction of this Court was that from this academic year it would be 50%.
> 4. From the material placed before us, it is evident that some of the States have not furnished the requisite information to DGHS. **We direct that the total number of postgraduate seats on all-India basis would be 50% of the total number of seats without any exclusion and the calculation of seats would be done on the same basis which was adopted when all-India quota was 25%.** The Chief Secretaries of States/Union Territories, who have not supplied the requisite information to DGHS on this basis, are directed to supply the same latest by 5.00 p.m. on 1-3-2005 and file a compliance affidavit in this Court. Failure to supply the information would be seriously viewed as a violation of this Court's direction by the Chief Secretaries concerned. The counselling will commence on the dates already

[56] (2005) 13 SCC 61
[57] "**DGHS**"

> announced as we have no doubt that entire information about availability of the seats would be furnished by all concerned to DGHS."
>
> **(emphasis supplied)**

41 In **Jayakumar** (supra), an appeal was filed before this Court against the judgment of the Madras High Court in a Public Interest Litigation[58] seeking reservation for SC and ST candidates in the 15 percent AIQ seats in the UG medical course. The Madras HC disposed of the PIL observing that reservation was a constitutional mandate and that the Government could implement reservation in the AIQ seats in the future. This Court allowed the appeal in terms of the decision in **Rajeshwaran** (supra) where it was held that there shall be no reservation for the AIQ seats. It observed:

> "6. In our considered opinion, the question has been directly considered in the decision of this Court in R. Rajeshwaran, referred to supra, and it has been indicated as to how incongruous it would be, if the provisions of reservation be made applicable to the seats meant for being filled up on the basis of all-India entrance examination. Following the judgment of this Court in R. Rajeshwaran as well as in Dr. Dinesh Kumar we hold that the High Court was wholly in error in observing that the requirement of reservation should also apply to the seats to be filled up on the basis of all-India entrance examination."

42 In **Abhay Nath** (supra) the Union of India sought clarification of the order passed in **Buddhi Prakash Sharma** (supra) wherein it was held that the 50 percent seats for AIQ seats shall exclude reservation. A three-judge Bench reviewed the order and held that there may be reservation for the SC and ST students in the AIQ. The order of this Court was as follows:

> "1. This Court in *Pradeep Jain (Dr.)* v. *Union of India* [(1984) 3 SCC 654] directed that out of the postgraduate seats to be filled up by the various colleges in India, 50% of the seats shall be admitted on the basis

[58] **"PIL"**

of All-India Entrance Examination. It was directed that out of the total number of seats, 50% of the open seats shall be filled up by All-India Entrance Examination.

2. Thereafter in *Dinesh Kumar (Dr.)* v. *Motilal Nehru Medical College* [(1985) 3 SCC 22] , it was explained: (SCC p. 28, para 5)

"*5*. … That is a total misreading of our judgment. What we have said in our judgment is that after providing for reservation *validly made*, whatever seats remain available for non-reserved categories, 30% of such seats at the least, should be left free for open competition and admission to such 30% open seats should not be based on residence requirement or institutional preference but students from all over the country should be able to compete for admissions to such 30% open seats. To take an example, suppose there are 100 seats in a medical college or university and 30% of the seats are validly reserved for candidates belonging to Scheduled Castes and Scheduled Tribes. That would leave 70 seats available for others belonging to non-reserved categories. According to our judgment, 30% of 70% seats, that is, 21 seats out of 70 and not 30% of the total number of 100 seats, namely, 30 seats, must be filled up by open competition regardless of residence requirement or institutional preference."

3. And in *Dinesh Kumar (Dr.) (II)* v. *Motilal Nehru Medical College* [(1986) 3 SCC 727] , it was clarified: (SCC p. 733, para 5)

"*5*. … that not less than 25 per cent of the total number of seats without taking into account any reservations, shall be made available for being filled on the basis of All-India Entrance Examination. This suggestion of the Government of India deserves to be accepted and the objection to it must be overruled."

4. In *Saurabh Chaudri* v. *Union of India* [(2003) 11 SCC 146] the percentage of seats to All-India Entrance Examination was increased to 50%.

5. Another writ petition was filed in this Court in *Buddhi Prakash Sharma* v. *Union of India* [(2005) 13 SCC 61] . In this writ petition an order was passed by this Court on 28-2-2005 [(2005) 13 SCC 61] wherein it was stated that the total number of postgraduate seats on all-India basis would be worked out on the basis of 50% of the total number of seats without any exclusion. The order indicated that out of 50% that are allocated are to be admitted by All-India Entrance Examination and it was made clear that there shall not be any seats excluded on reservation.

6. The Additional Solicitor General pointed out that in the all-India quota of 50% seats, if 22.5% are reserved for SC/ST students, it would be difficult for the State to give the entire percentage to reservation out of the 50% seats left for them to be filled up. It is equally difficult for DGHS to have the entire 22.5% reservation out of the 50% of the seats allotted to be admitted in the All-India Entrance Examination. Therefore, it is suggested that the Union of

> India has decided to provide 22.5% reservation for SC/ST candidates in all-India quota from the academic year 2007-2008 onwards.
>
> 7. The Union of India seeks clarification of the order passed in *Buddhi Prakash Sharma* v. *Union of India* [(2005) 13 SCC 61] passed on 28-2-2005, to the effect that 50% seats for all-India quota shall exclude the reservation. **We review that order and make it clear that the 50% of the seats to be filled up by All-India Entrance Examination shall include the reservation to be provided for SC/ST students. To that extent the order passed on 28-2-2005 [(2005) 13 SCC 61] is clarified.**
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> **(emphasis supplied)**

43 In **Gulshan Prakash** v. **State of Haryana**[59], a writ petition was filed seeking to quash the prospectus issued by Maharishi Dayanand University, Rohtak, Haryana for the academic session 2007-2008 to the extent that it did not provide any reservation of seats for SC and ST candidates. One of the contentions raised by the petitioners was that this Court in **Abhay Nath** (supra) had directed that reservation for SC and ST candidates be provided in PG medical courses. However, the three-Judge Bench in **Gulshan Prakash** (supra) clarified that the directions in **Abhay Nath** (supra) would be applicable only to AIQ seats and would have no bearing on admissions in the State quota for the PG course. It was further clarified that if the State of Haryana has decided to not provide reservation in PG medical courses for seats in the State Quota, this Court cannot direct the State to provide such reservation. It was observed:

> "29. Inasmuch as the Government of Haryana has not prescribed any reservation for the postgraduate courses, neither the University nor any other authority can be blamed for approving and publishing the prospectus which does not contain reservation for postgraduate courses. The clarificatory order of this Court in *Abhay Nath* [(2009) 17 SCC 705] is applicable for the institutes managed/run by the Central Government and unless the State Government takes any decision for granting reservation in MD/MS/PG diploma and MDS courses, it cannot be made applicable.

[59] (2010) 1 SCC 477

> As the State Government is competent to make the reservation to a particular class or category, until it is decided by the State, as being a policy matter, there cannot be any direction to provide reservation at the PG level. The State of Haryana has explained that reservation in undergraduate medical courses is being provided strictly as per their policy. The postgraduate degree/diploma in medical education is governed by the Medical Council. Even the Medical Council of India has not followed strict adherence to the rule of reservation policy in admission for SC/ST category at the postgraduate level."

44 Having traced the evolution of the AIQ in UG and PG medical and dental courses, we answer the following questions: (i) whether this Court in **Pradeep Jain** (supra) held that the AIQ seats that were to be filled by an open all- India examination should be free of reservation for the socially and educationally backward classes, and SC and ST as enabled by Article 15(4); and (ii) whether reservation in the AIQ can be provided only pursuant to a direction of this Court.

45 This Court in **Pradeep Jain** (supra) was deciding on the constitutional validity of reservation based on domicile/residence. Having held that residence-based reservation is constitutionally valid, the next question that this Court was tasked with was adjudicating the quantum of residence-based reservation that could be permitted. Referring to the decision of this Court in **Jagdish Saran** v. **Union of India**[60], it was held that there cannot be wholesale reservation (that is, 100 percent reservation). It was observed that a certain percentage of seats must be filled by open merit by an all-India examination without reservation based on residence. The Medical Education Review Committee had suggested that 75 percent of the seats in a medical college shall be reserved for residents of the State. This Court decided that it would be fair to reserve 70 percent of the seats

[60] 1980 AIR 820

for residents of the State. Therefore, 30 percent of the seats were to be filled through an all-India Examination. This would mean that candidates from all across the country could compete against the 30 percent seats available in State-run medical colleges. In this context, this Court had observed, "such reservation should in no event exceed the outer limit of 70 per cent of the total number of open seats after taking into account other kinds of reservations validly made" (paragraph 21). The Bench further observed that "at least 30 percent of the open seats shall be available for admission of students on all-India basis irrespective of the State or University from which they come and such admissions shall be granted purely on merit on the basis of either all-India entrance examination or entrance examination to be held by the State" (paragraph 21). The observation of this Court that AIQ seats must be filled purely on the basis of merit, cannot be interpreted to mean that there shall be no reservations in the AIQ seats. As noted in Section D.1 of this judgement, merit must be socially contextualised and reconceptualized according to its distributive consequences where it furthers substantive equality in terms of Articles 15 (4) and 15 (5) of the Constitution. The reference to merit in paragraph 21 of the judgment must be read with the previous observations made in the judgment. Identifying the issue before this Court, Justice PN Bhagwati writing for a three-judge Bench formulated the following question:

> "1. […] The question is, whether, consistently with the constitutional values, admissions to a medical college or any other institution of higher learning situate in a State can be confined to those who have their "domicile" within the State or who are resident within the State for a specified number of years or can any reservation in admissions be made for them so as to give them precedence over those who do not possess "domicile" or

> residential qualification within the State, **irrespective of merit."**
>
> **(emphasis supplied)**

46 While discussing the constitutional validity of domicile-reservation, it was observed that selection of candidates for admission based on the all-India open examination would further merit since it would permit the selection of the 'best minds in the country'. In this context, it was observed that claims that would weigh with this Court in justifying the departure from the principle of merit-based selection are: (i) claim of State interest, where the students by view of their residence are expected to settle down and serve their State; and (ii) the regions' claim of backwardness (paragraph 16). Further, it was observed that though theoretically, admissions in medical colleges should be based on an all-India examination since it would further merit and would provide equality of opportunity to candidates across the country, keeping in view the differing levels of social, economic, and educational development in different areas, factual equality would not be attained. Therefore, the observation in paragraph 21 of the judgment that the AIQ seats shall be filed through an all-India examination purely on merit, must be interpreted only with reference to the discussion made on residence-based reservation and the necessity of an all-India examination for admission to medical and dental courses. References to 'merit' must therefore be read in the context of merit vis-à-vis residence reservation. This is further evident from the observation in paragraph 21 of the judgment where it was observed that "*atleast 30 per cent of the open seats shall be available for admission of students on all-India basis irrespective of the State or university from which they come and such admissions shall be granted purely on merit on the basis of either all-India entrance*

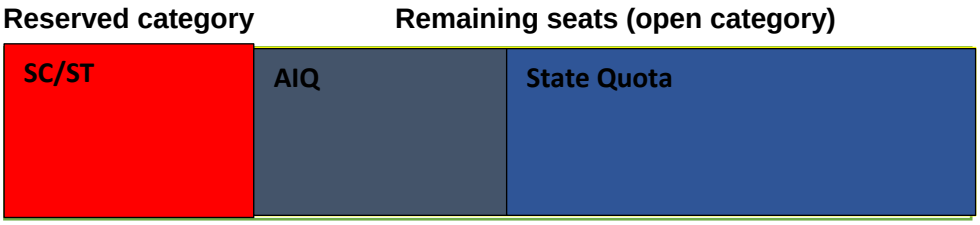
examination or entrance examination to be held by the State'. The Bench thought it fit that admission through an all-India entrance examination would further merit, enabling the best minds all over the country to study medicine. The observations of the Bench extracted below also aid the interpretation that we have arrived at:

> "10. The philosophy and pragmatism of universal excellence through equality of opportunity for education and advancement across the nation is part of our founding faith and constitutional creed. The effort must, therefore, always be to select the best and most meritorious students for admission to technical institutions and medical colleges by providing equal opportunity to all citizens in the country and no citizen can legitimately, without serious detriment to the unity and integrity of the nation, be regarded as an outsider in our constitutional set-up. Moreover, it would be against national interest to admit in medical colleges or other institutions giving instruction in specialities, less meritorious students when more meritorious students are available, simply because the former are permanent residents or residents for a certain number of years in the State while the latter are not, though both categories are citizens of India. Exclusion of more meritorious students on the ground that they are not resident within the State would be likely to promote substandard candidates and bring about fall in medical competence, injurious in the long run to the very region. "It is no blessing to inflict quacks and medical midgets on people by wholesale sacrifice of talent at the threshold. Nor can the very best be rejected from admission because that will be a national loss and the interests of no region can be higher than those of the nation." The primary consideration in selection of candidates for admission to the medical colleges must, therefore, be merit. The object of any rules which may be made for regulating admissions to the medical colleges must be to secure the best and most meritorious students."

47 This aspect was further clarified by the Bench in **Dinesh Kumar (I)** where this Court observed that the Union Government and the Medical Council for India had not taken any initiative to conduct an all-India entrance examination for admissions to the AIQ seats. The suggestion that admission to the AIQ could be made based on the marks obtained in the qualifying examination held by different States or/and Universities was rejected on the ground that the standard of assessment would not be uniform. It is thus evident that the intention of this

Court in **Pradeep Jain** (supra) in creating an AIQ was solely to provide candidates from across the country the opportunity to study medicine in colleges in other parts of the country as well, owing to the unequal number of medical colleges (and opportunities) in different States.

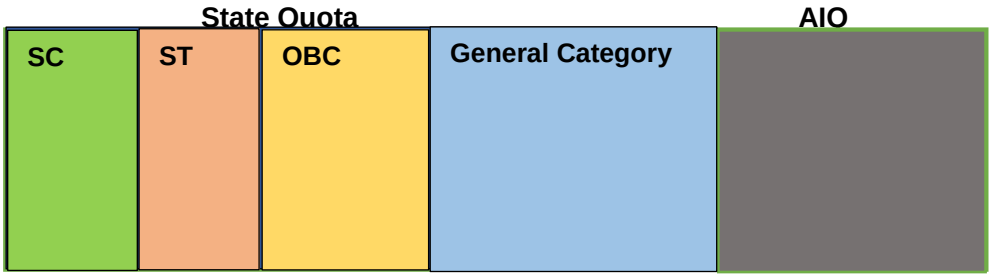
48 Reference was made to reservation of backward classes only for the limited purpose of determining the seat matrix. The observation in paragraph 21 in **Pradeep Jain** (supra) on the calculation of seat matrix was clarified in **Dinesh Kumar (I)** (supra). The Bench had clarified that after reservations (for the SC, ST and OBC provided by the States) validly made, 30 percent of the remaining seats would be reserved for AIQ. The graphical representation of the demarcation is as under:



(Figure 1)

49 Therefore, according to the clarification in **Dinesh Kumar(I)** (supra) on the demarcation of seats, the first bifurcation should be between reserved and non-reserved seats, and the seats remaining in the open category must be bifurcated into State Quota and AIQ. It was thus, a three-fold vertical reservation, with the reserved category not being considered within either the AIQ or the State Quota. The logical fallacy of this method of demarcation of seats is that different States provide varying percentages of reservation. Therefore, the total percentage of unreserved seats would inversely depend on the percentage of reservation provided by the State. The State of Tamil Nadu raised this objection in **Dinesh**

Kumar (II) (supra). Pursuant to this, it was held that the AIQ seats shall be determined without excluding any reservation validly made. The seats were first bifurcated to State quota and AIQ, and the vertical and horizontal reservations (for example, for persons with disabilities) were accommodated within the State quota. The revised seat matrix is graphically represented below:



(Figure 2)

50 When the judgment in **Dinesh Kumar (II)** (supra) was pronounced, the Union Government had not yet made any decision on providing reservation in AIQ seats. It was subsequently in 2009 that the Union Government had taken a policy decision to provide reservation for the SC and ST categories in the AIQ. It is important to note that in **Jayakumar** (supra) and **Rajeshwaran** (supra), the petitioners had sought a direction from this Court for providing reservation in the AIQ seats. In **Rajeshwaran** (supra), this Court declined to ascertain if a person would be entitled to reservation in the AIQ seats. It was observed that if reservations for SC and ST categories is to be provided in the AIQ seats, it would cause difficulty in adjusting seats since the State and the Central lists would differ. However, when the Union Government submitted before this Court in **Abhay Nath** (supra) that it had taken the decision to reserve seats in the AIQ, it was clarified that there was no impediment against the implementation of such reservation.

51 In **Buddhi Prakash Sharma** (supra), there was a slight deviation from the settled jurisprudence. This Court had held that the total number of PG seats in AIQ would be 50 percent of the total seats without any exclusion for reservation. The Bench had interpreted the observation in **Dinesh Kumar(II)** (supra) that the AIQ seats would be determined without excluding reservations (as depicted by figure 1) to mean that there would be no reservation in the AIQ. Therefore, since, **Pradeep Jain** (supra) did not preclude the AIQ seats from reservation, a three-Judge Bench in **Abhay Nath** (supra) clarified that the 50 percent AIQ seats in PG medical and dental seats would be inclusive of reservation for SC and ST categories.

D.3 The Executive's power to introduce reservation in AIQ seats

52 We next address the argument of the petitioners that the Union Government should have filed an application before this Court before notifying reservations in the AIQ since the AIQ scheme is a creation of this Court. We are unable to agree to this argument. The Union Government in **Abhay Nath** (supra) had made a submission to this Court of its intention to provide reservations in the AIQ for the SC and ST candidates since until then in view of the confusion on demarcation of the seat matrix, there was no clarity on whether reservations could be provided in the AIQ. This Court in **Abhay Nath** (supra) clarified that reservations are permissible in the AIQ seats. Therefore, the order in **Abhay Nath** (supra) was only clarificatory in view of the earlier observations in **Buddhi Prakash Sharma** (supra). Interpreting the order to mean that the Union of India sought the permission of this Court before providing reservation would amount to aiding an interpretation that would foster judicial overreach. Therefore, the

argument that the Union Government should have approached this Court before notifying the reservations for the OBC and EWS categories in the AIQ seats is erroneous.

53 In **Abhay Nath** (supra), the Union Government had apprised this Court of its decision to provide reservation for the SC and ST categories in the AIQ. It had then, as a policy decision decided to only provide reservation for the SC and ST categories. The Parliament enacted the Central Educational Institutions (Reservation in Admission) Act 2006 in view of the enabling provision in Article 15(5). Section 3 stipulates that there shall be 15 percent reservation for the SC, 7.5 percent reservation for the ST, and 27 percent reservation for the OBC category in Central Educational Institutions. A Constitution Bench in **Ashoka Kumar Thakur** v. **Union of India**[61] upheld the Constitutional validity of 27 percent reservation for the OBC category provided under the Act of 2006. Though the Act of 2006 would not be applicable to the seats earmarked for AIQ in State-run institutions since it would not fall within the definition of a Central educational institution under the Act, the Union of India in view of Article 15(5) has the power to provide reservations for OBCs in the AIQ seats. It is not tenable for the States to provide reservation in the AIQ seats since these seats have been 'surrendered' to the Centre. It would also lead to the anomaly highlighted in **Dinesh Kumar (II)** (supra) since the percentage of reservation provided by different States differ, which would lead to an unequal percentage of seats available in the AIQ in different States. This is also coupled with the fact that the

[61] (2008) 6 SCC 1

SC, ST and OBC lists are not uniform across States. Thus, it is the Union Government's prerogative to introduce reservation in AIQ seats.

D.4 Changing the Rules of the Game

54 The impugned notice providing reservation for OBC and EWS categories in the AIQ was issued on 29 July 2021, after the registration for the examination had closed on 18 April 2021. It is the contention of the petitioners that the rules of the examination could have only been changed before the last date for registration. The petitioners argue that the candidates registered for the exam having a particular seat matrix in mind and that the change in the seat matrix after registration would be arbitrary. However, the Union Government has argued that Clause 11 in the Information Bulletin released by the National Board of Examinations during the registration process provided that information regarding seat matrix would be separately released by the counselling authority. Clause 11 reads as follows:

> "11.1. Reservation of PG seats shall be as per the norms of the Government of India and respective State Governments as may be applicable.
> 11.2. A separate handbook informing details of the counselling process and applicable reservation shall be released by the designated counselling authority for NEET-PG 2021."

It is evident from a reading of clause 11.2 that applicants are informed of the seat matrix (that is, the applicable reservation) only when a separate handbook is released by the counselling authority. The candidates would possess no knowledge of the seat matrix at the time of registration.

55 In **Manjusree** v. **State of AP**[62], the selection of candidates to ten vacant posts of District and Session Judges (Grade II) in the Andhra Pradesh State Higher Judicial Service was the subject-matter of the appeal. The selection and appointments to the post of District & Session Judges (Grade II) are governed by the Andhra Pradesh State Higher Judicial Service Rules 1958. The rules prescribe that one-third of the posts are to be filled by direct recruitment. However, the method of recruitment is not prescribed in the Rules. Therefore, the High Court determines the method of selection when the vacancies are notified. An advertisement was issued on 28 May 2004 calling for applications. The Administrative Committee by its resolution dated 30 November 2004 decided to conduct a written examination for seventy-five marks and an interview for twenty-five marks, and prescribed minimum category marks for the written examination. The exam was held on 30 January 2005. The results were declared on 24 February 2005. The merit list was prepared by aggregating the marks obtained in the written examination out of 100 and the interview for 25 marks. However, the Full Court did not agree with the selection list and another committee of judges was constituted to prepare the list. The committee was of the view that the select list changed the proportion of marks of the written exam to the interview from 3:1 to 4:1 since the written exam marks (out of 100) were not converted to 75 marks. The sub-committee also directed that there must be minimum marks for the interview component, in the same cut-off percentage as applied to the written test component. Another selection list was prepared based on the revised selection criteria. Candidates whose names were featured in the first select list but were

[62] (2008) 3 SCC 512

absent in the second list, challenged the second selection list. A three-judge Bench of this Court held that the scaling down of marks in the written exam in proportion to the maximum of 75 marks was valid since it was in consonance with the resolution dated 30 November 2004. However, it was observed that introducing minimum marks in the interview component '*after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible.'* The facts of the case in **Manjusree** (supra) differ from the factual matrix before us since the impugned notice notifying reservation in the AIQ was introduced even before the examination was held. Further, unlike the case before us, there was in that case, a change in the selection criteria.

56 In **Maharashtra State Road Transport Corporation** v. **Rajendra Bhimrao Mandve**[63], the selection to the post of drivers and conductors was in question. The writ petitioners satisfied the qualifications and possessed the requisite experience. A total of 12.5 percent marks was initially allotted to the personal interview component. However, a change in the criteria for selection was introduced after the driving test was conducted. This Court then held the new criteria was invalid since it proposed to change the rules of the game after the game had begun. In **Umrao Singh** v. **Punjabi University**[64], this Court held that the selection norms for selection to the posts of lecturers could not have been relaxed after the last date for making the application and after the process for selection had started. In **Tej Prakash Pathak** v. **Rajasthan High Court**[65], the

[63] (2011) 10 SCC 51
[64] (2005) 13 SCC 365
[65] (2013) 4 SCC 540

Rajasthan High Court had called applications for the post of 'translators'. According to the Rajasthan High Court Staff Service Rules 2002, 100 marks was prescribed for the written exam and 50 marks for the personal interview. After the exam was conducted, 75 percent marks was prescribed as the qualifying marks in the written examination. Justice Chelameshwar, writing for a three-judge Bench observed that changing the 'rules of the game' midstream or after the game has been played is an "aspect of retrospective law-making power". This Court held that the principle applied in **Manjusree** (supra), without further scrutiny would not further public justice and efficient administration. This Court referred the question to a larger Bench in the following terms[66]:

> "15. No doubt it is a salutary principle not to permit the State or its instrumentalities to tinker with the "rules of the game" insofar as the prescription of eligibility criteria is concerned as was done in *C. Channabasavaih* v. *State of Mysore* [AIR 1965 SC 1293], etc. in order to avoid manipulation of the recruitment process and its results. Whether such a principle should be applied in the context of the "rules of the game" stipulating the procedure for selection more particularly when the change sought is to impose a more rigorous scrutiny for selection requires an authoritative pronouncement of a larger Bench of this Court. We, therefore, order that the matter be placed before the Hon'ble Chief Justice of India for appropriate orders in this regard."

57 In **Dr Prerit Sharma** v. **Dr Bilu**[67], the information bulletin for NEET-SS 2020 was issued on 3 August 2020. The examination was held on 15 September 2020, and the results were declared on 25 September 2020. Clause 5.16 of the information bulletin that was released when the registration process had begun stipulated that there would be no reservation in the SS courses. The medical

[66] The Bench noticed the judgment in **State of Haryana** v, **Subash Chander Marwaha**, (1974) 3 SCC 220 where the Supreme Court upheld the decision of the State to not appoint all candidates who had secured the minimum percentage of marks.
[67] Civil Appeal No. 3840 of 2020

counselling committee issued the counselling scheme for AIQ for NEET-SS course 2020-21 in which it was mentioned that there would be no reservation for the SS courses by referring to the judgments of this Court in **Dr Preeti Srivastava** (supra) and **Dr Sandeep Sadashivrao** v. **Union of India**[68]. The counselling for the SS course was postponed. The State of Tamil Nadu issued GOMS No. 462 dated 7 November 2020 stipulating that 50 percent of the SS seats in Government medical colleges in the State of Tamil Nadu would be reserved for in-service candidates. This Court observed that when the process for admissions to the SS courses had began, it was notified through the information bulletin that there would be no reservation in the SS courses. Therefore, it was held that reservation for in-service doctors shall not be permitted for the current academic year.

58 The impugned notice providing reservation for the OBC and EWS categories in the AIQ seats was issued after the registration had closed but before the exam was conducted. Thus, it would not amount to altering the rules of the game for the following reasons:

(i) The judgments cited by the counsel for the petitioner on 'changing the rules of the game midway' referred to changes in the selection criteria or the procedure for selection. Those cases are distinguishable from the case before us since the impugned notice did not alter the selection criteria;

[68] (2016) 2 SCC 328

(ii) The judgments referred to applied the principle of not changing the rules of the game mid-way *after* the selection process (of exams and interviews) was completed; and

(iii) Clause 11 of the information bulletin specifies that the reservation applicable would be notified by the counselling authority before the beginning of the counselling process, unlike the facts in **Dr Prerit Sharma** (supra). The candidates while applying for NEET-PG are not provided any information on the distribution of the seat matrix. Such information is provided by the counselling authority only before the counselling session is to begin.

E. Conclusion

59 In view of the discussion above we hold that the reservation for OBC candidates in the AIQ seats for UG and PG medical and dental courses is constitutionally valid for the following reasons:

(i) Articles 15(4) and 15 (5) are not an exception to Article 15 (1), which itself sets out the principle of substantive equality (including the recognition of existing inequalities). Thus, Articles 15 (4) and 15 (5) become a restatement of a particular facet of the rule of substantive equality that has been set out in Article 15 (1);

(ii) Merit cannot be reduced to narrow definitions of performance in an open competitive examination which only provides formal equality of opportunity. Competitive examinations assess basic current competency to allocate educational resources but are not reflective of excellence, capabilities and

potential of an individual which are also shaped by lived experiences, subsequent training and individual character. Crucially, open competitive examinations do not reflect the social, economic and cultural advantage that accrues to certain classes and contributes to their success in such examinations;

(iii) High scores in an examination are not a proxy for merit. Merit should be socially contextualized and reconceptualized as an instrument that advances social goods like equality that we as a society value. In such a context, reservation is not at odds with merit but furthers its distributive consequences;

(iv) Articles 15 (4) and 15 (5) employ group identification as a method through which substantive equality can be achieved. This may lead to an incongruity where certain individual members of an identified group that is being given reservation may not be backward or individuals belonging to the non-identified group may share certain characteristics of backwardness with members of an identified group. The individual difference may be a result of privilege, fortune, or circumstances but it cannot be used to negate the role of reservation in remedying the structural disadvantage that certain groups suffer;

(v) The scheme of AIQ was devised to allot seats in State-run medical and dental institutions in which students from across the country could compete. The observations in **Pradeep Jain**(supra) that the AIQ seats must be filled by merit, must be read limited to merit vis-à-vis residence

reservation. This Court in **Pradeep Jain** (supra) did not hold that reservation in AIQ seats is impermissible;

(vi) The Union of India filed an application before this Court in **Abhay Nath** (supra) placing the policy decision of the Government to provide reservation for the SC and ST categories in the AIQ seats since until then in view of the confusion on demarcation of seat matrix, there was no clarity on whether reservations could be provided in the AIQ seats. The Union Government was not required to seek the permission of this Court before providing reservation in AIQ seats. Therefore, providing reservation in the AIQ seats is a policy decision of the Government, which will be subject to the contours of judicial review similar to every reservation policy;

(vii) It was clarified in **Dinesh Kumar (II)** (supra) that the total seats demarcated for AIQ shall be determined without excluding reservation as was earlier directed by **Pradeep Jain** (supra) and clarified in **Dinesh Kumar (I)**. However, this Court in **Buddhi Prakash Sharma** (supra) had erroneously construed the clarification in **Dinesh Kumar (II)** to mean that there should be no reservation in AIQ seats. Therefore, the order in **Abhay Nath** (supra) was only clarificatory in view of the observations in **Buddhi Prakash Sharma** (supra); and

(viii) Clause 11 of the information bulletin specifies that the reservation applicable to NEET-PG would be notified by the counselling authority before the beginning of the counselling process. Therefore, the candidates while applying for NEET-PG are not provided any information on the distribution of seat matrix. Such information is provided by the counselling

authority only before the counselling session is to begin. It thus cannot be argued that the rules of the game were set when the registration for the examination closed.

60 The challenge to the constitutional validity of OBC reservation in AIQ seats introduced through the notice dated 29 July 2021 is rejected in view of the above discussion.

61 Pending application(s), if any, relating to the issue of OBC reservation implemented through the notice dated 29 July 2021 stand disposed of.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[A S Bopanna]

New Delhi;
January 20, 2022

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Writ Petition (C) No. 961 of 2021

Neil Aurelio Nunes and Ors. **… Petitioners**

Versus

Union of India and Ors. **… Respondents**

With

Writ Petition (C) No 967 of 2021

With

Writ Petition (C) No 1002 of 2021

With

Writ Petition (C) No 1021 of 2021

And With

Writ Petition (C) No 1105 of 2021

O R D E R

This order has been divided into the following sections to facilitate analysis:

A. Genesis of the Controversy

1 These writ petitions challenge the reservation for Other Backward Classes[1] and Economically Weaker Section[2] in the All India Quota[3] seats in the National Eligibility cum Entrance Test (Post Graduate) examination[4]. The criteria for the determination of the EWS for the ten percent reservation in pursuance of The Constitution (One Hundred and Third Amendment) Act 2019 has come under challenge. The permissibility of reservations in the AIQ seats has been addressed in the judgment dated 20 January 2022. This order will only deal with the challenge to the criteria for determination of the EWS category.

2 An information brochure was released on 23 February 2021 scheduling the NEET-PG 2021 examination on 18 April 2021. The registration process commenced on 23 February 2021 and the last date for registration was 15 April 2021. However, in view of the second wave of the COVID -19 pandemic, the Ministry of Health and Family Welfare[5] issued a notice dated 15 April 2021 postponing the examination until further notice. By an official statement issued on 3 May 2021, the NEET-PG 2021 examination was postponed by another four months. The National Board of Examinations in Medical Sciences, New Delhi issued a notice on 13 April 2021 rescheduling the NEET-PG 2021 examination to 11 September 2021. The Directorate General of Health Services, MoHFW issued a notice on 29 July 2021 to implement 27 percent OBC reservation (non-creamy

[1] **"OBC"**
[2] **"EWS"**
[3] **"AIQ"**
[4] **"NEET-PG"**
[5] **"MoHFW"**

Layer) and 10 percent EWS reservation in the 15 percent undergraduate[6] and 50 percent PG AIQ seats in the current academic session of 2021-22. The notice stated thus:

> **"NOTICE**
>
> **Urgent Attention Candidates of NEET-UG and NEET-PG:**
>
> It has been decided by the Government of India to implement 27% OBC reservation (Non-creamy later) and 10% EWS reservation in the 15% AIQ UG seats and the 50% All India Quota seats (MBBS/BDS and MD/MS/MDS) (contributed by the State/UTs). This reservation will take effect from the current Academic session 2021-22.
>
> Consequently, the overall reservation in 15% UG and 50% PG All India Quota seats would be as follows:
>
> SC-15%
>
> ST-7.5%
>
> OBC (Non-creamy layer) as per the Central OBC list-27%
>
> EWS- as per the Central Government Norms-10%
>
> PwD-5% Horizontal Reservation as per NMC Norms"

3 The Constitution was amended by the Constitution (One Hundred and Third Amendment) Act 2019, including Articles 15(6) and 16(6). Article 15(6) states that special provisions (including reservation) shall be made for the advancement of the EWS category in classes "other than the classes mentioned in clauses (4) and (5)". An explanation to Article 15 was also included by the constitutional amendment which reads as follows:

> "Explanation- For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage"

[6] **"UG"**

4 The Department of Personnel, Public Grievances & Pensions, Department of Personnel & Training, Government of India on 17 January 2019[7] in pursuance of the explanation to Article 15(6) issued an executive order (O.M No. 36039/1/2019) defining the criteria for identification of EWS. The relevant extract of the OM is as under:

> **"3. EXEMPTION FROM RESERVATION**
> 3.1 "Scientific and Technical" posts which satisfy all the following conditions can be exempted from the purview of the reservation orders by the Ministries/Departments:
> (i) The posts should be in grades above the lowest grade in Group A of the service concerned.
> (ii) They should be classified as 'scientific or technical" in terms of Cabinet Secretariat (OM No. 85/11/CF-61(1) dated 28.12.1961), according to which scientific and technical posts for which qualifications in the natural sciences or exact sciences or applied sciences or in technology are prescribed and the incumbents of which have to use that knowledge in the discharge of their duties.
> (iii) The posts should be 'for conducting research' or 'for organising, guiding and directing research'.
> 3.2 Orders of the Minister concerned should be obtained before exempting any posts satisfying the above condition from the purview of the scheme of reservation.
> **4.CRITERIA FOR INCOME & ASSETS**
> 4.1 Persons who are not covered under the scheme of reservation for SCs, STs and OBCs and **whose family has gross annual income below Rs 8 lakh (Rupees eight lakh only) are to be identified as EWSs** for benefit of reservation. Income shall also include income from all sources i.e. salary, agriculture, business, profession, etc. for the financial year prior to the year of application. Also persons whose family owns or possesses any of the following assets shall be excluded from being identified as EWS, irrespective of the family income:-
> i. 5 acres of agricultural land and above;
> ii. Residential at of 1000 sq ft. and above;
> iii. Residential plot of 100 sq. yards and above in notified municipalities;
> iv. Residential, plot of 200 sq. yards and above in areas other than the notified municipalities.
> 4.2. The property held by a "Family" in different locations or different places/cities would be clubbed while applying the land or property holding test to determine EWS status.
> 4.3 The term "Family" for this purpose will include the person who seeks benefit of reservation, his/her parents and siblings below the age of 18 years as also his/her spouse and children below the age of 18 years."

[7] "**OM**"

5 The petitioners are doctors who appeared for the NEET-PG 2021 examination. The petitioners filed a writ petition on 24 August 2021 challenging the validity of the notice issued on 29 July 2021 providing reservation for the OBC category and EWS category in NEET-PG examination and sought quashing of the notice. One of the arguments raised by the petitioners was that the criteria under the OM for the determination of the EWS category is arbitrary.

B. Issues raised by this Court

6 Notice was issued on 6 September 2021. The NEET-PG results were declared on 28 September 2021. The arguments were heard in part by the Bench on 7 October 2021. The Bench questioned the basis of using Rs 8 lakhs as the income limit for identifying EWS. Two weeks were granted to the Union Government to file an affidavit clarifying the basis for adopting the Rs 8 lakhs income criteria.

7 When the petitions were called for hearing on 21 October 2021, the Union Government had not filed an affidavit clarifying the basis of the Rs 8 lakhs income limit for determining the EWS. Mr KM Nataraj, learned Additional Solicitor General informed the Bench that he would be in a position to file an affidavit in two days. The Bench formulated specific questions on the Rs 8 lakhs income limit and required disclosure from the Union Government. The order dated 21 October 2021 stated thus:

> "2. Mr K M Nataraj, the learned Additional Solicitor General states that he has received oral instructions and would be in a position to file the affidavit within a period of two days. At the same time, during the course of the hearing, we have formulated certain issues in regard to the criteria adopted for identification of the EWS category. We propose to formulate

them in this order so that the Union government can bring clarity to the issues by filing its affidavit. The specific issues on which a disclosure shall be made in the affidavit are as follows:

(i) Whether the Union government undertook an exercise before arriving at the criteria for the determination of the EWS category;

(ii) If the answer to (i) above is in the affirmative, whether the criteria are based on the report submitted by Major General Sinho (2010). If the criteria are based on Major General Sinho's report, a copy of the report should be placed on the record of these proceedings;

(iii) Whether the EWS category is over inclusive;

(iv) The income limit in the criteria for the determination of the creamy layer of the OBC category and the EWS category is the same, namely, Rs 8 lakhs. While the creamy layer in the OBC category is identified for excluding a section of the community that has 'economically progressed' to such an extent that the social backwardness of the community diminishes, the EWS category is identified to include the segment which is 'poorer' when compared to the rest of the community. Therefore (a) the income criterion in respect of the OBC category is aimed at exclusion from a class while in the case of the EWS category, it is aimed at inclusion; and (b) the OBC category is socially and educationally backward and, therefore, has additional impediments to overcome as compared to those belonging to the general category. In these circumstances, would it be arbitrary to provide the same income limit both for the OBC and EWS categories;

(v) Whether the differences in the GDP/per capita income of different States have been accounted for while arriving at Rs 8 lakhs income limit;

(vi) Whether the differences in the purchasing power between rural and urban areas have been accounted for while fixing the income limit; and

(vii) According to the notification of Union government (OM No. 36039/1/2019), families which have an income lower than Rs 8 lakhs would be excluded from the EWS category if the family holds assets of (a) five acres of agricultural land and above; (b) a residential plot of 100 square yards and above in notified municipalities and 200 square yards and above in areas other than notified municipalities; and (c) a residential flat of 1000 square feet and above. In this context, a disclosure may be made on the following aspects:

(i) On what basis has the asset exception been arrived at and was any exercise undertaken for that purpose; WP(C) 961/2021;

(ii) (ii) Whether municipalities as required under the exception have been notified;

(iii) The reason why the residential flat criterion does not differentiate between metropolitan and nonmetropolitan areas.

3. We grant liberty to the Union government to place its affidavit on record making a full disclosure on the record on the issues raised above since the Court must be apprised of the nature of the exercise undertaken while fixing the income criterion for the EWS category. In this context, it would be significant to note that the explanation to Article 15(6) which was introduced as a result of the 103rd Constitutional Amendment in 2019, specifically enunciates that for the purposes of Article 15(6) and for Article 16(6), economically weaker sections shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage. It is in this context that it would be necessary for the Union government to disclose before the Court the nature of the exercise which was undertaken to categorize the economically weaker section as mandated by the provisions of the explanation to Article 15. We may clarify at this stage that the Court is not embarking upon any issue of policy while requiring such a disclosure to be made before it, but will determine as to whether the constitutional requirements have been duly complied with. 4 Counter affidavit, if any, be filed on or before 26 October 2021. 5 List the Writ Petitions on 28 October 2021 as the first item on the Board."

C. The Initial Stand of the Union Government

8 On 25 October 2021, the Union Government deferred counselling due to the pendency of the petitions. The Union Government filed an affidavit justifying the EWS criteria on 26 October 2021, making the following submissions:

(i) Exercise was undertaken by the Union Government to determine the EWS category: The criteria for the determination of the EWS category was arrived at after due deliberation within the Ministry of Social Justice and Empowerment and all the concerned stakeholders. Even before the OM dated 17 January 2019 was issued, the Union Government had set up the Major Sinho Commission in 2005 for

identification of the EWS and determining the constitutional permissibility of reservation for the class;

(ii) The criteria for the determination of the EWS category does not suffer from over-inclusiveness: Any cut-off criteria is likely to have some degree of assumption. The fixation of Rs 8 Lakhs is based on criteria for the determination of the creamy layer of the OBCs. The Major General Sinho Commission had recognised that the income limit for the determination of the creamy layer of the OBCs could be used for the identification of the EWS category. The OM dated 17 January 2019 provides further checks in the form of the assets exemption so that only the needy receive the benefit of reservation under Articles 15(5) and 16(6);

(iii) The same income limit criteria used for determining both the EWS and the creamy layer of OBCs is not arbitrary: The exercise conducted to determine the creamy layer for the purpose of the OBC reservation would be equally applicable for the determination of the EWS category since the premise is that persons having substantial economic standing may not receive the benefits of the reservation. The courts can only determine if there is 'some material' for arriving at the income criteria. The courts cannot review the criteria;

(iv) Urban- rural and State divide: Though there will be differences in the purchasing power and GDP of different areas (Urban/Rural; amongst States, amongst different districts in a State), it is sufficient if the criteria is based on 'some material'. There is no need to prescribe

different income limits for rural and urban families since EWS is intended mostly for students in higher education and employment. Since there is constant migration from rural to urban areas for education and employment, a separate criteria will not be needed. It is sufficient if the criteria is based on broad probabilities since it is impossible to achieve mathematical precision;

(v) Asset Exception: The assets exception is provided to ensure that the reservation is provided only to the needy. 'Notified municipalities' refers to all municipalities legally constituted; and

(vi) Other Arguments: The total seats have been increased by 56 percent in MBBS and by 80 percent in PG in the last six years. Therefore, the total number of seats available for the general category has increased. The issue of whether reservation for the EWS would violate the law laid down in **Indra Sawhney** v. **Union of India**[8] since it exceeds the 50 percent reservation cap is the subject matter of reference to a five-judge Bench in **Janhit Abhiyan** v. **Union of India**[9], which is adjudicating upon the constitutional validity of the Constitution (One Hundred and Third Constitution Amendment) Act 2019.

[8] AIR 1993 SC 477
[9] WP (C) 55/2019

D. Major Sinho Commission Report

9 At this stage, a reference must be made to the Major Sinho Commission report since the Union Government has strongly relied on the observations in the report on using the income limit for identifying the creamy layer of the OBC for determining the EWS. The Major Sinho Commission was constituted for determining the EWS among the unreserved categories. Chapter III of the Commission's report noted that the welfare measures (excluding reservation which would require other considerations) may be extended to the EWS category.[10] Chapter IV of the report discusses the parameters to determine the EWS category. The relevant parameters for the identification of EWS were enumerated as follows:

(a) Monthly Per Capita Expenditure;

(b) Below Poverty Line[11] Category;

(c) Occupational Pattern and Backwardness;

(d) Educational Backwardness;

(e) Status of Health and Nutrition; and

(f) Housing Conditions

10 Analysing the above parameters across categories, the Commission arrived at the following conclusions:

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[10] Internal page 20 of the Report. The Report noted, "On the basis of the above, this Commission gathers the Constitutional and legal understanding that 'Backward Classes' cannot be identified for providing reservation in employment and admission in educational institutions on the basis of economic criteria and hence 'Economically Backward Classes' (EBCs) can be identified by the State for extending welfare measures only and in order to provide any quantum of reservation to them (EBCs) two essential aspects need to be considered:

(i) Social, educational and economic backwardness, and

(ii) Until a different direction is given by the Supreme Court or a Constitutional Amendment is made, the 50 per cent limit for reservation makes a binding on the State for any further increase in the quantum of reservation to any class."

[11] "**BPL**"

(i) A part of the general category formed a class of poor along with poor of other social groups. Poor households resulted from landlessness, high women illiteracy, marginal farm holdings and part-time/temporary work in the unrecognized sector. Such people have to cope with kutcha housing, poor hygiene and inability to spend on basics;

(ii) Socio-economic condition of the general category is better than other social groups but segments within the general category are equivalent to or worse off than the OBCs; and

(iii) The general category has a deeper creamy layer than OBCs. The lower end of the spectrum of the general category and the OBCs are comparable.

The Major Sinho Commission made the following recommendations for the identification of the EWS:

(i) Socio-economic backwardness prevails at a community level. However, economic backwardness prevails at a family level. Thus, the family should be the unit for identification of EWS; and

(ii) The BPL families must be identified as EWS. This view was also expressed by various States. While the creamy layer criteria could be used for the identification of EWS, the creamy layer was a concept exclusive to a class that suffers both social and educational backwardness. The economic needs of EWS differs and hence just one criterion of BPL or setting creamy layer of OBC as the upper limit would not be effective to ensure intended benefits to EWS. The percentage of BPL among the general category was less compared to the backward

class, however the poor of the general category (though above BPL) still suffered from malnutrition, poor health, and low standard of living. Therefore, families with income less than the current non-taxable limit of Rs. 1,60,000 (as may be revised from time to time) and the BPL families should be identified as EWS.

E. Union Government's Decision to Revisit the EWS Criteria

11 On 28 October 2021, the learned Solicitor General sought an adjournment, requesting that the petitions be heard after the Diwali vacation. Thereafter, on 25 November 2021, the learned Solicitor General stated that the Union Government had taken a considered decision to revisit the criteria for determining EWS in accordance with the provisions of the explanation to Article 15 of the Constitution inserted by the Constitution (One Hundred and Third Constitution Amendment) Act 2019. The Solicitor General submitted that a period of four weeks would be required to conduct this exercise and the counselling would remain suspended during such period. Acceding to the Union Government's request to revisit the criteria, this Court posted the petitions for hearing on 6 January 2022.

12 The Union Government by its order dated 30 November 2021 constituted a Committee[12] to review the criteria for determination of the EWS category. The terms of reference of the committee stated thus:

> "a) To re-visit the criterion given in OM dated 17.01.2019 in determining EWS category keeping in view the observations of the Hon'ble Supreme Court in their order dated 21.10.2021,
>
> b) To examine various approaches so far followed in the country for determining economically weaker sections, and

[12] **"Pandey Committee"**

> c) Recommend criteria that may be adopted for identifying EWS category in future."

The Pandey Committee submitted its report to the Government on 31 December 2021.

13 Thereafter, the Union Government filed an affidavit before this Court submitting that it has accepted the recommendations of the Pandey Committee including its recommendation that the new criteria for identifying EWS must be applied prospectively and not in the current admission year of 2021-2022.

F. The Findings of the Pandey Committee

14 It is important to advert to the findings of the Pandey Committee on the issues raised by this Court by its order dated 21 October 2021. The Pandey Committee's short responses to the issues raised by this Court are given in the table below[13]:

Q. Based on prevailing conditions and economic disparity in the country, what should be the principles for determining criteria that may be used for identifying EWS?
A feasible criterion for defining EWS can be based on income (family income).
Q. If income criteria is to be used then what would be the threshold for income for identifying EWS
A threshold of Rs 8 lakhs of annual family income, in the current situation, seems reasonable for determining EWS.
Q. Is there any justification for adopting a uniform income-based threshold across the country for the identification of EWS - especially in light of the disparity in purchasing power across the country?
The desirability of a uniform income-based threshold has been upheld by the Supreme Court, and it can be adopted across the country as a matter of economic and social policy, drawing authority from Article 254 and Article 73, read with Entry 20 of the Concurrent List.

[13] Internal page number 29 of the Report

Q. Is the current limit of annual family income of Rs 8 lakhs over-inclusive?
The current limit of annual family income of Rs 8 lakhs does not seem to be over-inclusive as the available data on actual outcomes does not indicate overinclusion. It should be noted that income includes salary and agriculture as well.
Q. Should there be other criteria to determine economic weakness, in addition to income? Should residential or other assets be considered for EWS? ***Q. In case, inclusion of asset in the criteria for EWS is justified, is the current asset limit adequate or does it require a review based on factors including differences in valuation due to location of the assets***?
It will be prudent to have only income criteria for EWS. Residential asset criteria may be omitted altogether. However, the families holding more than 5 acres of land or more may be excluded from EWS.

15 The Pandey Committee observed that income limit is the most appropriate criteria to identify EWS as opposed to a multiple-criteria approach because the latter requires complex and large-scale surveys. The periodic surveys may not be able to capture the evolving nature of the EWS category. Further, over-reliance on consumption patterns would result in beneficiaries hiding or avoiding the consumption of goods and services. The report stated thus:

> "3.3.1.24. The problem with a multiple-criteria approach is that it requires complex, large-scale surveys. While it may be possible to periodically do such detailed socio-economic surveys, it should be noted that our idea of EWS keeps evolving. For example, using the refrigerator or a phone connection as one of the parameters may have been valid for exclusion in 2011 but may not be true today. Moreover, if we start to rely too heavily on certain consumption patterns to identify beneficiaries, we will end up with people gaming the system by hiding or avoiding certain goods and services."

16 The Pandey Committee sought to justify the use of Rs 8 lakhs income-cut off for determining the EWS category by placing reliance on the Major Sinho Commission report, which it submitted, proposed using the concept of "creamy layer" in OBCs to determine the criteria for identifying EWS among the general

category. Further, it noted that despite having a similar threshold of Rs 8 lakhs, the criteria applied for the determination of creamy layer in OBCs and EWS is different. The report contains the following table enumerating the differences between the two criteria[14]:

Table III: Creamy Lawyer among OBCs vs EWS criteria

Parameters	Creamy Layer among OBCs	EWS
Annual Family Income and Eligibility in years	Annual Income above Rs 8 lakh for 3 consecutive years will be excluded	Annual income should be less than Rs 8 lakhs in the preceding financial year will be included
Income from salaries or agricultural land	Excluded	Included
Persons working as artists or engaged in hereditary occupations	Excluded	Included
Definition of Family	Candidate, parents, minor children	Candidate, parents, minor siblings, spouse, minor children

The Pandey Committee also submitted that if adequate investments are made and deductions are taken advantage of, the effective income tax exemption limit is Rs 7 to 8 lakhs. The relevant portion of the report is reproduced below:

> "3.3.1.39 The current annual income tax exemption limit is Rs 2,50,000. However, in February 2019 the Government through Finance Act amended the Income Tax Act to provide relief to the low-income individuals wherein anyone having taxable income up to five lakhs of rupees per annum was exempt from paying income tax. Whatever tax that was calculated for the income exceeding Rs.2,50,000 was given back to the taxpayer by way of rebate which effectively meant that individuals having taxable income up to 5 lakhs of rupees had their entire income tax free. As a result, even persons having gross income up to Rs. 6.50 lakhs are not be required to pay any income tax if they make investments in provident funds, specified savings, insurance etc. In fact, with additional deductions such as interest on a home loan up to Rs 2 lakh, interest on education loans, National Pension Scheme contributions, medical insurance, medical expenditure on

[14] Internal page number 44 of the Report

> senior citizens etc, persons having even higher income do not have to pay any tax. In addition, salaried persons get an additional standard deduction of Rs 50,000. Income from capital gain on listed shares/units up to Rs 100,000 too is exempt from tax. Effectively, a person earning up to around Rs 8 lakhs are not be required to pay any income tax from the financial year 2019-2020 onwards, provided he makes some specified savings etc. Further, Income from agriculture too is not included for the purpose of income tax in this case.
>
> ….
>
> 3.3.1.42 It should be noted that the Rs 8 lakh annual gross annual income limit for inclusion into EWS is
>
> -is for the entire family as against the individual income tax exemption limit of Rs 5 lakh
>
> -is without any deduction's available various provisions of income tax such as 80C, standard deductions etc.
>
> -includes agricultural income. The individual income tax exemption limit does not include agricultural income.
>
> 3.3.1.43 As per current income tax norms, the effective income tax on individuals is zero for those with incomes up to INR 5 lakhs. As discussed in the foregoing paras after taking advantage of the various provisions for savings, insurance etc., the tax-payer may not need to pay any tax up to an annual income of INR 7-8 lakhs. Thus, the EWS cut-off, if applied to just an individual, is in the ballpark of income tax requirements for zero tax liability. Once applied to include family income and farm income, however, it becomes much more demanding."

In the Pandey Committee's opinion, a lower-income limit would increase the risk of excluding deserving candidates. However, to avoid undeserving candidates from taking the benefit of reservation, a set of simple asset criteria should be introduced to weed out such candidates instead of lowering the income limit.[15]

17 The Pandey Committee submitted that uniform criteria should be imposed for identifying EWS because prescribing different income limits based on the differences in purchasing power in urban and rural areas would create complications, especially on account of migration. It will also lead to

[15] Para 3.3.1.34 at internal page 44 of the Report.

administrative difficulty in implementation. The Pandey Committee concluded thus:

> "3.3.2.5 In the present context of establishing a uniform income criterion across the country for determining EWS, this judgment draws focus on the need to have a uniform criterion for determining EWS across the country, as it relates to the practical implementation of such criterion. It was argued before the Supreme Court in Jaishree Laxman Rao Patil (Supra) that the establishment of such standards by the states may lead to vote-bank politics and that a national body that would be charged with establishing such uniform criteria would be able to objectively, "without being pressurised by the dust and din of electoral politics" be able to provide benefits.
>
> 3.3.2.6 Therefore, the Committee is of the view having different income limits for different geographies or areas is neither feasible nor desirable."

18 The Pandey Committee submitted that the Rs 8 lakhs cut-off is not over-inclusive because data shows that the majority of the candidates fall within the lower income brackets of below Rs 5 lakhs. The Pandey Committee relied on the data on household income distribution for qualified EWS candidates in UPSC, NEET-UG 2020 and JEE (2021) examinations. The Pandey Committee's conclusion is reproduced below:

> "3.3.3.6 After analysing the data of the three different entrance examinations. The committee is of the view that there is no evidence that the current cut-off of Rs 8 lakhs is leading to a major problem of the inclusion of undeserving candidates. Nonetheless, the committee observed that the distribution of the deserving candidates will have a long "tail" for various factors such as income volatility, size of family, the inclusion of agricultural income, high cost of living in certain locations and so on. Therefore, despite the fact that the bulk of the qualifying candidates is below Rs 5 lakhs, a somewhat higher threshold is needed which ensures that deserving beneficiaries in the tail of the distribution are not excluded.
>
> 3.3.3.7 Thus, the committee is of opinion that the income criteria of INR 8 lakh per annum performs well based on evidence and should be kept unchanged for identifying EWS."

19 The Pandey Committee was of the view that there should be no interference with the existing criteria relating to exclusion of families having agricultural land of 5 acres or more from the category of EWS even if their gross income is less than Rs 8 lakhs. The Pandey Committee observed that it is the marginal and small farmers who have farm holdings up to 5 acres whose monthly income is in the range of Rs 10,000. The Pandey Committee observed thus:

> "3.3.4.17 The situation is quite vulnerable for the marginal (less <1 hectare) and small farmers (1-2 hectares of land) as their income is way behind that of the medium and large farmers. A finer categorisation of farmers as per the size of land holdings reveals that the marginal and small farmers' average monthly earning are barely Rs 9,099, and Rs 11,000 respectively.
>
> 3.3.4.18 Therefore, considering that the marginal and small farmers (having landholding up to 5 acres of land) are able to have monthly income only in the range of around Rs 10,000, the committee is of the view, there is no need to interfere in the criterion of 5 acres of agricultural land."

20 The Pandey Committee opined that the residential asset criteria for identifying EWS must be removed. The Pandey Committee noted that there are practical difficulties in identifying a common denominator that can be used in rural and urban areas for determining EWS. The Pandey Committee submitted that it could be difficult to apportion the share of the nuclear family in the residential house of a joint family. Further, in rural and semi-rural areas, house plots are also used for storing grains, agricultural equipment and sheltering cattle. It will be difficult to demarcate the criteria of the residential house. In urban areas, various measurements are used like carpet area, built-up area and super-built-up area. It will place an onerous burden on a candidate to get these areas measured and calculated for obtaining certificates from the designated authority. The Pandey

Committee also observed that criteria of residential house or plot area does not encapsulate the value of the land which may differ according to geographic location. The Pandey Committee concluded thus:

> "3.3.4.31…. The Committee is therefore of the view that a similar approach could be adopted for EWS wherein residential asset exclusion criterion may be omitted for simplicity, ease, and convenience. In short, an asset criterion on residential plot size or flat floor area should not be imposed unless there is clear evidence that the system is being widely gamed in practice. Even if there was evidence of misuse, the Committee is of the opinion that it may be easier to mine the wealth of digital information to establish real income rather than get caught in a complex debate about ownership and valuation."

21 Thus, effectively the only revision that the Pandey Committee has recommended is the exclusion of the residential asset criteria in determining the category of EWS. The Pandey Committee in its report observed that applying the new criteria would disturb the ongoing admissions and lead to delay. It was further stated that since the present EWS criteria was being applied since 2019, no serious prejudice would be caused if it is implemented in the present year as well. The relevant observations of the Pandey Committee are reproduced below:

> "4.19….
>
> …..
>
> (iv) The Committee deliberated upon the vexed question as to from which year the criteria suggested in his Report should be used, adopted and made applicable. The Committee found that the existing criteria [the criteria applicable prior to this Report] is in use since 2019. The question of desirability of the existing criteria arose and a possibility of its being revisited arose only recently in Neil Aurelio Nunes and ors. versus Union of India and ors. and a batch of petitions towards the later part of 2021. By the time this Hon'ble Court started examining the said question and the Central Government decided to revisit the criteria by appointing this Committee, the process with respect to some appointments / admissions have taken place ormust have been at an irreversible and advanced stage. The existing system which is going on since 2019, if disturbed at the end or fag-end of the

> process would create more complications than expected both for the beneficiaries as well as for the authorities.
>
> In case of admissions to educational institutions, sudden adoption of a new criteria inevitably and necessarily would delay the process by several months which would have an inevitable cascading effect on all future admissions and educational activities / teaching / examination which are time bound under various statutory / judicial time prescriptions.
>
> Under these circumstances, it is completely unadvisable and impractical to apply the new criteria (which are being recommended in this report) and change the goal post in the midst of the on-going processes resulting in inevitable delay and avoidable complications. When the existing system is ongoing since 2019, no serious prejudice would be caused if it continues for this year as well. Changing the criteria midway is also bound to result in spate of litigations in various courts across the country by the people/persons whose eligibility would change suddenly.
>
> The Committee, therefore, after analysing the pros and cons on this issue and after giving serious consideration, recommends that the existing and ongoing criteria in every on-going process where EWS reservation is available, be continued and the criteria recommended in this Report may be made applicable from next advertisement / admission cycle."

22 The petitions were listed on 5 January 2022 after a request for urgent listing was made by the Solicitor General. It was urged on behalf of the Union Government that the OBC and EWS reservation (following the old criteria) must be allowed to be implemented in the present admission year. This has been contested by the petitioners.

23 By an order dated 7 January 2022, this Court upheld the constitutional validity of the OBC reservation in AIQ medical and dental UG and PG seats. The constitutionality of the criteria used for the identification of the EWS category is yet to be decided. However, in the interim, this Court directed that the counselling in NEET-PG 2021 and NEET-UG 2021 be conducted by giving effect to the reservation provided by the notice dated 29 July 2021, including the 27 percent

OBC reservation and 10 percent EWS reservation. The reasons for allowing EWS reservation for the current academic year 2021-2022 are provided in this order.

G. Submissions of Counsel

24 Mr. Arvind Datar, learned Senior Counsel appearing for the petitioners argued that the criteria fixed for determining the EWS category in the OM is *prima facie* arbitrary. In support of this argument, he made the following submissions:

(i) The Constitution was amended by the Constitution (One Hundred and Third Amendment) Act 2019 on 14 January 2019 to provide 10 percent reservation for the EWS of the unreserved category. The OM laid down the criteria for determining the EWS category within three days of introducing the amendment. The Union Government did not undertake any study before notifying the criteria on 17 January 2019. It evident from the report submitted by the Pandey committee that no exercise was undertaken before notifying the criteria in 2019;

(ii) The report of the Pandey committee only justifies the criteria but does not submit the exercise that was undertaken for arriving at the criteria;

(iii) The Rs 8 lakhs income limit prescribed for determining the EWS category is arbitrary because:

(a) The income limit used to determine the creamy layer category of OBC/BC/MBC is used to identify EWS. The OBC category suffer from both social and economic backwardness unlike the unreserved category. The criteria for exclusion cannot be used as the criteria for inclusion;

(b) The prescription of the Rs 8 lakhs income limit would amount to treating unequal's equally. For example, the per capita income of States differs. Goa has a per capita income of Rs 4 lakhs, while Bihar has a per capita income of Rs 40,000. The Minister of State of the Ministry of Statistics and Programme implementation, while answering a Parliamentary question acknowledged the disparity in per capita income among States and the rural and urban populations. The 8 lakhs income criteria is higher than the per capital income of any of the States;

(c) The Rs 8 lakhs cap is on the higher end and does not cover the section of those who are economically weaker. The affluent of the general category would take away all the reserved seats available. Thus, the Rs 8 lakhs limit is over-inclusive;

(d) The Major Sinho Commission was constituted for the purpose of determining the feasibility of providing reservation for the EWS and the criteria for determining EWS category. The Commission submitted its report in 2010 after extensive study and consultation with all States. After undertaking such an extensive study, it recommended that the criteria for the determination of EWS shall be families that fall under the BPL category and the families exempted from payment of income tax (that is Rs. 1.6 lakhs at the relevant time);

(e) The common income limit of Rs 8 lakhs does not include factors such as income volatility, size of family, and high cost of living in certain locations;

(f) The current non-taxable limit is Rs. 2.5 lakhs. A person who saves Rs. 2-3 lakh a year to avail benefits under Section 80C of the Income Tax Act 1961 cannot be termed as 'economically weak';

(g) According to the Seventh Pay Commission, a class IV employee receives a salary between Rs 18,000 to Rs, 30,0000. Therefore, the Rs 8 lakh limit is over-inclusive; and

(h) The Rs 8 lakhs limit is a top down approach and not a bottom up approach. The Pandey Committee has erroneously interpreted the recommendations of the Major Sinho Commission.

(iv) The Pandey Committee report does not have any reasons to reject the recommendation of the Major Sinho commission. The report does not sufficiently address the issues raised by this Court by the order dated 21 October 2021 because:

(a) The report acknowledges the absence of reliable data;

(b) The report was submitted within three weeks without undertaking any study, unlike the Major Sinho Commission report which was submitted after four years of extensive research by placing reliance on data, survey reports, and feedbacks;

(c) The Pandey Committee did not consult with the State Governments/Union Territories while framing the report. Without any consultation, it is recommended that there should not be different income limits for different States or areas based on purchasing power;

(d) The report stated that the family income of Rs 8 lakh does not seem to be over-inclusive as the 'available data' on actual outcomes does not

indicate over-inclusion. However, no data was submitted on 'actual outcomes' to prove the claim;

(e) The justification in the report for not considering the varying costs of living in metropolitan and non-metropolitan cities, rural and urban areas for determining the EWS criteria was that it would create complications. Such a justification is not reasonable;

(f) The 5 acres agricultural land asset exemption is arbitrary since no exemption is made between wet and dry lands; and

(g) The Pandey committee has determined the criteria by ignoring the relevant factors and taking into account irrelevant factors.

(v) The explanation to Article 15 states that for the purposes of Article 15 and Article 16, 'economically weaker sections' shall be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage. Both the Union and the State Governments have the power to determine the EWS. However, the Pandey committee did not even consult the States before arriving at the criteria. The Kerala Government constituted a commission for determining the criteria for identifying the EWS. The Commission chaired by Mr. K Sasidharan Nair submitted its report on 29 November 2019 recommending that Rs 4 lakhs gross family income must be used to identify the EWS category in Kerala;

(vi) The open category seats are filled by the members of the general category and the reserved categories. According to the Rajan committee report submitted in Tamil Nadu, only 2.3 percent of the open

category seats are occupied by the forward community. By improperly identifying the EWS, the injustice suffered by the forward community is being compounded;

(vii) This Court in **Indra Sawhney** (supra) held that a class identified for the purposes of reservation under Articles 15 and 16 must have common traits. The EWS class identified by the impugned criteria does not possess common traits; and

(viii) In the case of **Shantistar Builders** v. **Narayan K. Totame**[16], a three-judge Bench of this Court held that the 'economic basis' or the 'means test' maybe adopted as a working guideline for determining 'weaker sections of the society'. In this case, a family having an annual income not exceeding Rs 18,000 was considered to be belonging to the weaker sections of the society.

25 Mr. Anand Grover, senior counsel appearing for the intervenors made the following submissions challenging the criteria for the determination of EWS:

(i) The explanation to Article 15 states that EWS must be determined on the basis of 'family income and other indicators of economic disadvantage'. Therefore, the criteria used for the identification of the class must encompass both the income and other indicators. However, the criteria devised does not use any other indicator for economic disadvantage;

(ii) The EWS category is identified by the income limit, and other indicators are used only to exempt a class falling within the income

[16] (1990) 1 SCC 520

criteria. Indicators such as housing, literacy, education, and health have been ignored while identifying the EWS category;

(iii) The daily minimum wage in India is Rs 176 per day, which is not even half of what is recommended by the Parliamentary Committee. Around 76 percent of India's population does not receive a minimum wage. Therefore, the criteria only identifies the creamy layer and not the 'poorest of the poor';

(iv) The income criteria must be the based on the income tax exemption slab that is Rs. 2.5 lakhs. Considering that the cut off of Rs. 2.5 lakhs was fixed in 2004, the amount may be increased by 10-12 percent; and

(v) The Pandey committee report states that 'despite the fact that the bulk of the qualifying candidates are below Rs 5 lakhs, a somewhat higher threshold is needed which ensures that deserving beneficiaries affected by various factors such as income volatility, size of family, high cost of living in certain locations are not excluded.' No other justification is given to not prescribe Rs. 5 lakhs as the income limit.

26 On behalf of the Union of India, the Solicitor General, Mr Tushar Mehta, and the Additional Solicitor General, Mr KM Natraj, made the following submissions:

(i) The rules of the game were not changed after the game had begun since the reservation through the impugned notice issued on 29 July 2021 was introduced much prior to the date on which the exams were conducted and before the commencement of the counselling process. The NEET PG examination schedule is as under:

(a) Release of Information Brochure: 23 February 2021

(b) Commencement of Registration Process: 23 February 2021

(c) Last date of Registration: 15 March 2021

(d) Scheduled examination date: 18 April 2021

(e) Postponement for four months on: 03 May 2021

(f) New date of examinations announced on: 13 July 2021

(g) New date for examination: 11 September 2021

Clause 11.1 of the information bulletin issued on 23 February 2021 states that reservation of PG seats shall be as per the norms of the Central Government and the respective State Governments. Clause 11.2 states that a separate handbook providing information on the counselling process and applicable reservation shall be released by the designated counselling authority for NEET-PG 2021. Therefore, the process begins only with the commencement of the counselling process and not when the registration closes;

(ii) The reservation in AIQ seats in terms of the notice dated 29 July 2021 has been already implemented in MDS admissions for the current academic year 2021-2022 to comply with the order of this court dated 11 August 2021 in **Debraj Samanta & Ors**. v. **Medical Counselling Committee**[17];

(iii) The EWS reservation is already in place and is now being extended to AIQ seats for UG/PG admission in medical and dental courses. The EWS reservation has already been implemented for IITs and Central educational institutions, amongst others. The reservation is in compliance with The

[17] WP (C) No. 680 of 2021

Constitution (One Hundred and Third Amendment) Act 2019 and is in terms of the prescribed parameters of eligibility criteria, which, *inter alia*, includes gross income;

(iv) The reservation for EWS was introduced on broader considerations of equality of opportunity and concerns of social justice. Around 550 EWS students for MBBS and 1000 EWS students for PG medical courses would benefit each year; from this reservation

(v) In the last six years, MBBS seats has been increased by 56 percent from 54, 348 seats in 2014 to 84, 649 seats in 2020 and the number of PG seats has been increased by 80 percent from 30,191 seats in 2014 to 54, 275 seats in 2020. In the same duration, 179 medical colleges have been established and now there are 558 medical colleges in the country. Thus, the reservation for the EWS category will not be at the expense of other categories;

(vi) The challenge to the constitutional validity of the Constitution (One Hundred and Third Amendment) Act 2019 has been referred to a Constitution Bench by the order dated 5 August 2020 in **Janhit Abhiyan** v. **Union of India & Ors**.[18]. While referring the challenge to the Constitution Bench, this Court did not stay the operation of the constitutional amendment. Thus, the implementation of the constitutional amendment through the notice dated 29 July 2021 cannot be questioned in the present writ petitions;

[18] WP (C) No. 55 of 2019

(vii) The criteria for reservation for admission in the AIQ seats is a question of policy and is within the powers of Union Government. The criteria depends on an overall assessment and survey of requirements of various categories of persons to whom it is essential to provide facilities of higher education. The contours of judicial review have been defined by this Court in **BK Pavithra** v. **Union of India**[19], which is the "Barium Chemicals Test". Thus, unless the criteria for EWS is so grossly unfair that no person with common sense would arrive at it, there is no reason for judicial interference;

(viii) It is always possible to come up with an alternative criteria. However, the judiciary is only required to assess whether the Government took into account only relevant considerations, showed application of mind and did not adopt an absurd view that no person with common sense would arrive at;

(ix) The Union Government had undertaken an exercise for the determination of the EWS criteria as stipulated in the OM, which was arrived at after due deliberation within the Ministry of Social Justice and Empowerment and all concerned stakeholders. Even before the OM came into existence, the Government had set up the Major General Sinho Commission in 2005. The Major Sinho Commission in its report dated July 2010 arrived at various conclusions including that the creamy layer threshold among the OBCs can serve as the basis to decide the upper limit for identifying the economically backward category among the unreserved category. Even then the criteria that applies to the OBC creamy layer is significantly

[19] (2019) 16 SCC 129.

different from the criteria applicable for identifying the EWS. The criteria for the latter is more stringent;

(x) The Pandey Committee has merely tweaked the Major Sinho Commission report. It has also considered relevant material including the Socio Economic and Caste Census 2011. Based on the material, it opined that economic weakness is a complex issue and no single indicator can be used to capture the level of poverty. The Pandey Committee observed that a multi-pronged criteria requires complex and large-scale surveys. Since EWS is a dynamic concept and keeps evolving, it is suitable to have an income criteria. A criteria based on consumption patterns would lead to people avoiding certain goods and services for the purpose of securing the reservation benefit;

(xi) The Major Sinho Commission report recommended using the income tax exemption limit. While the current income tax exemption limit is Rs 2.5 lakhs, the income of Rs 8 lakhs effectively falls within the income tax exemption limit since a tax rebate is provided for income upto Rs 5 lakhs and with sufficient savings and investments, such a tax rebate can be obtained. Further, income tax exemption limit applies to individuals but the 8 lakhs income limit applies to families. If three members of a family annually earn Rs 3 lakhs, they could fall outside the bracket of EWS;

(xii) If a lower income limit for identifying EWS is adopted, it will be underinclusive. For being eligible for EWS reservation, the beneficiary household income has to be less than Rs 8 lakhs in the preceding financial

year. Merely one year of windfall income earned by a household can push them out of the EWS category;

(xiii) It is important to note that the state is not identifying the poor but rather those belonging to the economically weaker category. Such people may be above the poverty line;

(xiv) It will be difficult to adopt different income limits for urban and rural areas because of internal migration and it would lead to implementation issues. A uniform criteria can be used to provide reservation;

(xv) It will be discriminatory if EWS reservation is not implemented in medical and dental colleges, when it is being implemented in other educational institutions; and

(xvi) While the Pandey Committee has highlighted that the certification process for determining the size of the residential plot is a cumbersome process and has recommended doing away with the residential criteria for exemption from the EWS category, it has also recommended that the new criteria should apply prospectively. The EWS candidates would have prepared their respective certificates to satisfy the EWS criteria which are to be submitted once the counselling process begins for this admission cycle. Thus, no hardship would be caused to them for applying this year. On the other hand, if the new criteria is implemented from this year, it would disturb the entire admission process since candidates who qualify under the new criteria would have to be given additional time to satisfy it and participate in the counselling process.

H. Analysis

27 It has been brought to our notice that the counselling for the MDS courses has already begun, where the reservation for EWS in AIQ has been provided. On behalf of the petitioners, Mr Shyam Divan has urged that a completely separate exercise is conducted for MDS courses. He has submitted that a separate notification is issued for admission to MDS courses and a different schedule for examination and counselling is followed. Be that as it may, the medical and dental courses have been treated on the same footing with respect to the creation of the AIQ seats. The decision of this Court in **Pradeep Jain** v. **Union of India**[20] which led to the inception of AIQ seats in State-run medical and dental colleges specifically clarified that the observations and directions made with regard to MBBS and MD/MS courses would equally apply to BDS and MDS courses.[21] The notification dated 29 July 2021 introduced reservation for the OBC and EWS categories for AIQ seats in both medical and dental courses. Thus, there has been parity between medical and dental courses with regard to the implementation of the AIQ and the reservation policy governing seat distribution. Mr Divan has also submitted that a separate challenge[22] has been mounted to the notification dated 29 July 2021 by doctors possessing a Bachelor's degree in Dental Surgery, which is being heard with the current batch of petitions. This argument, in fact, supports the conclusion that while the reservation in both the medical and dental courses has been challenged, any interim stay on the implementation of reservation for the former in view of the pending counselling

[20] 1984 AIR 1420
[21] Paragraph 23.
[22] WP (C) No. 1105 of 2021

process, would creat a position of disparity between the two streams which have always been treated alike. Therefore, a stay on reservation for this academic year for medical courses would lead to differential treatment being meted out to dental candidates who are similarly placed.

28 On behalf of the petitioners, it has been urged that the rules of the game cannot be changed midway and hence, the notification dated 29 July 2021 is liable to be set aside because it was issued after the registration for the examination was closed. We have dealt with this argument in detail in the judgement delivered on 20 January 2022 in the current batch of petitions on the validity of OBC reservation in AIQ seats. The information bulletin dated 23 February 2021 issued for the purpose of conducting NEET examination specifically mentioned that the counselling authority would issue a separate handbook relating to details of counselling process and applicable reservation. Thus, during the registration process which commenced on 23 February 2021 and ended on 15 March 2021, the candidates knew that the details relating to the seat matrix would only be available during the counselling process. The notification dated 29 July 2021 was issued much before the exams were conducted and the counselling process was to begin. It cannot be said that the rules for the game were set when the registrations closed on 15 March 2021 as has been urged on behalf of the petitioners.

29 In the judgement pronounced on 20 January 2022 on the validity of OBC reservation in AIQ seats, we have dealt with the challenge to the power of the Union Government to implement reservation in AIQ seats. The Union of India in view of Article 15 (5) and Article 15(6) of the Constitution has the power to provide reservation in AIQ seats since these seats have been surrendered to the Centre.

30 The argument of the petitioners on the validity of EWS reservation was not limited to the permissibility of reservation in the AIQ seats. Rather, the petitioners challenged the very criteria for the determination of the EWS, which would not only require us to hear the matter at length but would also entail us to hear all interested parties. However, in view of the delay in the counselling process due to the pendency of this petition, we deem it necessary to allow the counselling session tobegin with the existing criteria for theidentification of the EWS category. Judicial propriety would not permit us to pass an interim order staying the criteria for determination of the EWS category. It is a settled principle of law that in matters involving challenge to the constitutionality of a legislation or a rule, the Court must be wary to pass an interim order, unless the Court is convinced that the rules are prima facie arbitrary.[23] However, at this stage, without hearing all the interested parties at length on arguments such as (i) extent of judicial review of materials relied on for providing reservation under Article 15; (ii) the power of the States to determine EWS in view of the explanation to Article 15 and in view of an alternative criteria proposed by the committee formed by the Government of Kerala; and (iii) the meaning of EWS - the identification of the poor or the poorest,

[23] Heart of Millions v. Union of India, 2014 (14) SCC 496

it would be impermissible for us to form a prima facie opinion on the alleged arbitrariness of the criteria. These arguments are only indicative of the wide range of arguments that have been raised before us, which would require proper consideration as it has wide ranging constitutional and societal implications on equality and the law.

31 Additionally, any judicial intervention which would have changed the stated reservation policy for this academic year 2021-2022 would have delayed the admission process. The notification introducing reservation for OBC and EWS was issued on 29 July 2021. Thereafter, a notice dated 6 August 2021 was issued to allow candidates to change their category and EWS status. The window for editing one's status was between 16 August 2021 and 20 August 2021. The exam was conducted on 11 September 2021. The candidates who qualify for the EWS category would have prepared the necessary documentation to satisfy the eligibility criteria for applying for reservation. Any change in the eligibility status for reservation at this stage would have caused confusion and led to possible litigation challenging such a change. This would have only caused further delay. We are still in the midst of the pandemic and any delay in the recruitment of doctors would impact the ability to manage the pandemic. Hence, it is necessary to avoid any further delays in the admission process and allow counselling to begin immediately. As a result, we allow the implementation of EWS reservation in AIQ seats in NEET UG and PG seats for the academic year of 2021-2022. The EWS category shall be identified in view of the criteria in O.M No. 36039/1/2019. The challenge to the validity of the criteria determined by the Pandey committee

for the identification of the EWS category shall be listed for final hearing in the third week of March 2022.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[AS Bopanna]

New Delhi;
January 20, 2022