

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 15523 of 2018

1. Dr. Ravi Ranjan Kumar, Son of Ramchandra Prasad, Resident of Village 12, Bahari Bigha, Lalbigha, P.S. Kaschichak, District-Nawada.

2. Dr. Chandan Kumar Tiwari, Son of Brajnandan Tiwari, Resident of Lichi Bagan, Near Doon Public School, Bhikhanpur, Gumti No.2, P.S. Jagdishpur, District-Bhagalpur

... .. Petitioners

Versus

1. The State Of Bihar through the Chief Secretary, Government of Bihar, Patna
2. The Principal Secretary, Department of Health, Medical Education and Family Welfare, Government of Bihar, Patna
3. The Secretary, Department of Health, Medical Education and Family Welfare Government of Bihar, Patna
4. The Additional Secretary, Department of Health, Medical Education and Family Welfare, Govt. of Bihar, Patna
5. The Director, Department of Health, Medical Education and Family Welfare, Government of Bihar, Patna
6. The Chairman, Bihar Combined Entrance Competitive Examination Board, Government of Bihar, I.A.S. Association Building, Near Patna Airport, Patna-14.

... .. Opposite Party

Appearance :

For the Petitioner/s : Mr.Ashish Giri
Ms. Deepika Sharma
For the State : Mr.Kinkar Kumar, SC 9

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA)

Date : 27-04-2020

This writ application has been listed before me for hearing through video conferencing under the orders of



the Hon'ble the Chief Justice in view of the prevailing lockdown due to COVID-19 pandemic.

2. The present writ application has been filed by the petitioners, who are MBBS doctors and have been working as General Medical Officers in the State of Bihar, initially for issuance of a writ in the nature of mandamus for a direction to the State respondents to prepare the State merit list for admission to State quota seats in Post Graduate Medical Courses (Degree/Diploma) in the session 2019, conducted by respondent no. 6, the Bihar Combined Entrance Competitive Examination Board (hereinafter referred to as 'BCECEB'), by granting incentive marks to in-service Government/public authority, to the extent of 10 per cent of the marks obtained for each year of service rendered in remote and/or difficult areas and up to the maximum of 30 per cent of the marks obtained in the National Eligibility -cum- Entrance Test (hereinafter referred to as 'NEET') as per Regulation 9 (IV) of the Post Graduate Medical Education Regulation, 2000, as amended and lastly notified vide Notification No. MCI-18(1)/2010-Mad/62052, dated 15th February, 2012, and made applicable for the academic year 2013-14 (hereinafter referred to as 'Regulation, 2000').



3. During the pendency of this writ application, the admission process for the session 2019 got completed and the petitioners have filed I.A. No. 2 of 2020, for amendment of the prayer for a direction to the State respondents to prepare the State merit list for admission in various medical colleges for MD/MS/Post Graduate Diploma Courses for the session 2020, conducted by respondent no. 6, BCECEB, by granting them incentive marks as per Regulation 9 (IV) of the Regulation, 2000, and also in terms of the direction of the Supreme Court, in the case of **State of Uttar Pradesh and Others v. Dr. Dinesh Singh Chauhan**, reported in (2016) 9 SCC 749. The amendment application filed by the petitioners has been allowed by this Court by order, dated 23.04.2020.

4. The brief facts, giving rise to the present writ application, is that the petitioner no. 1 has successfully completed his MBBS examination from Aryabhatt Knowledge University, Patna in December, 2014, and was registered in the Bihar Council of Medical Registration vide Certificate No. 44229, dated 14.03.2016. The petitioner no. 2 has completed his MBBS examination from Aryabhatt Knowledge University, Patna in July, 2014, and he also got himself registered in the Bihar Council of Medical Registration vide Certificate No. 43680, dated



13.10.2015. It has further been stated that the Health Department, Government of Bihar issued a notification, vide memo no. 2/Court-59/13-695 (2), dated 17.06.2014, stating therein that except the State Headquarter and the District Headquarter Health Centres/Hospitals, all other health centres have been marked to be remote or difficult areas and in support of the same, the petitioners have annexed the copy of the notification, dated 17.06.2014, as Annexure-3 to the writ application. The petitioner no. 1 has joined as General Medical Officer in the Primary Health Centre, Ekangarsarai, in the district of Nalanda, on 20.02.2017 and has been working in the said Primary Health Centre to the satisfaction of the respondent authorities, and the petitioner no. 1 claims that the said Primary Health Centre falls under the remote area, as per notification, dated 17.06.2014.

5. Likewise, the petitioner no. 2 joined as General Medical Officer in the Primary Health Centre, Jaipur, Kaler, in the district of Arwal on 19.12.2016 and since then, he has been working to the satisfaction of his superiors, and claims that the Primary Health Centre, Jaipur, Kaler, falls under the remote area, as per the notification, dated 17.06.2014.

6. Mr. Ashish Giri, learned Counsel for the petitioners, submits that he has brought on record the certificates of the



two petitioners issued by the concerned District Magistrates, on 24.02.2020 and 26.02.2020, respectively, in his second supplementary affidavit filed through email on 26.04.2020 as Annexures 21 and 21/A, declaring therein that the areas, in which the petitioners have been working, are classified as remote and difficult areas, as per notification, dated 17.06.2014.

7. It has further been stated by the petitioners that they had applied for National Board of Examinations, NEET-PG, 2018, having Roll Nos. 1805102998 and 1805104133 and the petitioners had scored 64.6703 percentile and 72.9547 percentile respectively in the said examination. The petitioners next contended that despite the fact that the amended Regulation, 2000, was made applicable from the academic year 2013-14, the State Government failed to comply the mandate of Regulation 9 (IV) of Regulation, 2000, while preparing the State merit list in the year 2018 and had not granted any incentive marks to in-service Government or public authority working in remote or difficult areas.

8. During the pendency of this writ application, the petitioners have filed I. A. No. 01 of 2019, stating therein that the examination of NEET-PG, 2019, was conducted by the National Board of Examination for admission in the session 2019 in Post Graduate Degree/Diploma Courses and the respondent no. 6,



BCECEB, after counselling, published the State merit list of the candidates without taking into consideration the provisions of Regulation 9 (IV) of Regulation, 2000, and without granting incentive marks to in-service Government or public authority at the rate of 10 per cent of the marks up to maximum of 30 per cent marks. The petitioners have stated that from perusal of their results, it is evident that incentive marks have not been awarded to them and in support of their submission, they have annexed the relevant part of the merit list as Annexure-16.

9. It is not in dispute that the admission process for the session 2019 has also been completed. Regulation 9 of the Regulation, 2000, which has been framed by the Medical Council of India in exercise of power conferred by Section 33 read with Section 20 of the Indian Medical Council of India Act, 1956, and it has gone under amendment from time to time. Regulation 9, as amended and notified and made applicable from the Academic Year 2013-14 vide Notification No.MCI-18(1)/2010-Mad/62052 dated 15thFebruary 2012, reads thus:

"9. Procedure for selection of candidate for Post-graduate courses shall be as follows:

I. There shall be a single eligibility cum entrance examination namely "National Eligibility -cum- Entrance Test for admission to Post-graduate Medical Courses" in each academic year. The



superintendence, direction and control of National Eligibility -cum- Entrance Test shall vest with National Board of Examinations under overall supervision of the Ministry of Health & Family Welfare, Government of India.

II. 3% seats of the annual sanctioned intake capacity shall be filled up by candidates with locomotory disability of lower limbs between 50% to 70%:

Provided that in case any seat in this 3% quota remains unfilled on account of unavailability of candidates with locomotory disability of lower limbs between 50% to 70% then any such unfilled seat in this 3% quota shall be filled up by persons with locomotory disability of lower limbs between 40% to 50% - before they are included in the annual sanctioned seats for General Category candidates.

Provide further that this entire exercise shall be completed by each medical college/ institution as per the statutory time schedule for admissions.

III. In order to be eligible for admission to any post-graduate course in a particular academic year, it shall be necessary for a candidate to obtain minimum of marks at 50th percentile in "National Eligibility -cum- Entrance Test for Post-graduate courses" held for the said academic year. However, in respect of candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes, the minimum marks shall be at 40th percentile. In respect



of candidates as provided in clause 9 (II) above with locomotory disability of lower limbs, the minimum marks shall be at 45th percentile. The percentile shall be determined on the basis of highest marks secured in the All-India common merit list in "National Eligibility -cum- Entrance Test" for Post-graduate courses:

Provided when sufficient number of candidates in the respective categories fail to secure minimum marks as prescribed in National Eligibility -cum- Entrance Test held for any academic year for admission to Post Graduate Courses, the Central Government in consultation with Medical Council of India may at its discretion lower the minimum marks required for admission to Post Graduate Course for candidates belonging to respective categories and marks so lowered by the Central Government shall be applicable for the said academic year only.

IV. The reservation of seats in medical colleges/institutions for respective categories shall be as per applicable laws prevailing in States/Union Territories. An all India merit list as well as State-wise merit list of the eligible candidate shall be prepared on the basis of the marks obtained in National Eligibility -cum- Entrance Test and candidates shall be admitted to Post Graduate courses from the said merit lists only:

Provided that in determining the merit of candidates who are in service of Government/ public authority, weightage in the marks may be



given by the Government/Competent Authority as an incentive at the rate of 10% of the marks obtained for each year of service in remote and/or difficult areas up to the maximum of 30% of the marks obtained in National Eligibility –cum- Entrance Test. The remote and difficult areas shall be as defined by State Government/Competent authority from time to time.

V. No candidate who has failed to obtained the minimum eligibility marks as prescribed in sub-clause (II) above shall be admitted to any Post-graduate courses in the said academic year.

VI. In non-Governmental medical colleges/institutions, 50% (Fifty Per cent) of the total seats shall be filled by State Government or the Authority appointed by them, and the remaining 50% (Fifty Per Cent) of the seats shall be filled by the concerned medical colleges/institutions on the basis of the merit list prepared as per the marks obtained in National Eligibility –cum- Entrance Test.

VII. 50% of the seats in Post Graduate Diploma Courses shall be reserved for Medical Officers in the Government service, who have served for at least three years in remote and/or difficult areas. After acquiring the PG Diploma, the Medical Officers shall serve for two more years in remote and/or difficult areas as defined by State Government/Competent authority from time to time.

VIII. The Universities and other authorities concerned shall organize admission process in such a way that teaching in postgraduate courses starts by



2nd May and by 1st August for super specialty courses each year. For this purpose, they shall follow the time schedule indicated in Appendix-III.

IX. There shall be no admission of students in respect of any academic session beyond 31st May for post-graduate courses and 30th September for super speciality courses under any circumstances. The Universities shall not register any student admitted beyond the said date.

X. The Medical Council of India may direct, that any student identified as having obtained admission after the last date for closure of admission be discharged from the course of study, or any medical qualification granted to such a student shall not be a recognized qualification for the purpose of the Indian Medical Council Act, 1956. The institution which grants admission to any student after the last date specified for the same shall also be liable to face such action as may be prescribed by MCI including surrender of seats equivalent to the extent of such admission made from its sanctioned intake capacity for the succeeding academic year."

10. None of the parties have brought on record the further amendment made in Regulation 9 (IV) of the Regulation, 2000, but it appears that Regulation 9(IV) of the Regulation, 2000, has further been amended vide Notification No. MCI-18(1)/2018-Med./100818, effective from 05.04.2018, which reads as under:-



"The reservation of seats in Medical Colleges/institutions for respective categories shall be as per applicable laws prevailing in States/Union Territories. An all India merit list as well as State-wise merit list of the eligible candidates shall be prepared on the basis of the marks obtained in National Eligibility -cum- Entrance Test and candidates shall be admitted to Postgraduate Courses from the said merit lists only.

Provided that in determining the merit of candidates who are in service of government/public authority, weightage in the marks may be given by the Government/Competent Authority as an incentive upto 10% of the marks obtained for each year of service in remote and/or difficult areas or Rural areas upto maximum of 30% of the marks obtained in National Eligibility-cum Entrance Test. The remote and/or difficult areas or Rural areas shall be as notified by State Government/Competent authority from time to time."

(Emphasis is added)

11. Thus, by amendment, the words 'Rural areas" and 'notified' have been included and there is no substantial change from the amendment of 2012.

12. The petitioners have filed their representation before the Principal Secretary, Health Department, Government of Bihar and the Health Minister, Bihar, on 04.04.2018 (Annexure



11 series) for grant of benefit of incentive marks to them, who are in-service Government/public authority working in remote or difficult areas, as per Regulation 9 (IV) of the Regulation, 2000.

13. A supplementary counter affidavit has been filed by respondent nos. 2 to 5, in which the fact that the petitioners have been working in remote or difficult area has not been denied. The stand of the State Government is that giving an incentive/weightage to the doctors posted in remote/difficult areas up to the maximum of 30 per cent of the marks obtained in NEET is not mandatory for the State Government; rather, it is at the discretion of the State Government either to give effect or not in their respective States. It has further been stated that the State Government has already reserved 50 per cent seats of the State quota for admission in the Post Graduate Diploma Courses for the in-service doctors posted at remote or difficult areas in terms of Regulation, 2000. The further stand of the State Government in the supplementary counter affidavit is that the matter of posting of the doctors in Government service is the decision/discretion of the State Government and is not based upon the option of the doctors and if the incentive/weightage is given to the in-service doctors posted at rural or difficult area in admission to the Post Graduate Degree/Diploma Courses, the merit will be compromised



and would adversely affect the in-service doctors posted at urban areas and, therefore, it is not appropriate and justified to give any weightage to the in-service doctors posted at rural/remote areas over and above to those posted at urban areas.

14. Thus, in nutshell, the supplementary affidavit filed on behalf of the State is that the State Government, after having considered all the aspects, has not found it appropriate to give incentive/weightage to the doctors posted at rural, remote or difficult areas in admission to the Post Graduate Degree/Diploma Courses.

15. Though, no one appears on behalf of the respondent no. 6 (BCECEB) today, but a separate counter affidavit has already been filed on its behalf, stating therein that BCECEB is not a competent authority to take any decision in this regard and the Department of health is the competent authority to take a decision on the issues raised by the petitioners.

16. Heard Mr. Ashish Giri, learned Counsel for the petitioners and Mr. Kinkar Kumar, learned Standing Counsel No.9 for the State.

17. Learned Counsel for the petitioners submits that the petitioners are entitled to be given incentive marks in terms of Regulation 9 (IV) of the Regulation, 2000, which has been enacted



by the Medical Council of India in exercise of power conferred by Section 33 read with Section 20 of the Indian Medical Council of India Act, 1956. He further submits that Regulation 9(IV) clearly stipulates in its proviso that in determining the merit of candidates, who are in- service of Government/public authority, weightage in the marks may be given by the Government/ Competent Authority as an incentive at the rate of 10 per cent of the marks obtained for each year of service in remote and/or difficult areas up to the maximum of 30 per cent of the marks obtained in NEET, the remote and difficult areas shall be as defined by State Government/Competent authority from time to time. He, with reference to Annexures 3, 21 and 21/A, submits that the petitioners are working as General Medical Officers in difficult and remote areas, as notified by the State Government, and as such, they are entitled to be given incentive marks while preparing the State merit list by the respondents in terms of regulation prevailing on the point of admission in Post Graduate Degree/Diploma Courses.

18. In support of his submission, learned Counsel for the petitioners relied upon a decision of the Supreme Court, in the case of **Dr. Dinesh Singh Chauhan** (supra). He submits that the provisions of Regulation 9 (IV) of the Regulation, 2000, was considered by the Supreme Court, in the case of **Dr. Dinesh**



Singh Chauhan (supra), in the light of the fact that the State of Uttar Pradesh had come out with a Government order, dated 28.02.2014, providing reservation for Post Graduate Degree Courses and after considering the relevant provisions of the Regulation, 2000, and previous judgments of the Supreme Court on the issue, the Supreme Court held that any State has no authority to enact any law much less by executive instructions to undermine the Central Regulation framed under Entry 66 of List I to the Seventh Schedule of the Constitution of India and upheld the decision of the Allahabad High Court, which, in the context of Regulation 9, noticed that there was no provision in The Indian Medical Council Act, 1956 (hereinafter referred to as the Central Enactment or Act of 1956); and the Regulations framed thereunder known as Medical Council of India Post Graduate Medical Education Regulations, 2000, stipulating reservation for in-service candidates against the 30 per cent seats in Post Graduate Degree Courses. He further submits that the Supreme Court has also taken note of the amended provisions of Regulation 9, in paragraph 24, in the case of **Dr. Dinesh Singh Chauhan** (supra), which reads as under:-

"24. By now, it is well established that Regulation 9 is a self-contained Code regarding the procedure to be followed for admissions to medical



courses. It is also well established that the State has no authority to enact any law much less by executive instructions that may undermine the procedure for admission to Post Graduate Medical Courses enunciated by the Central Legislation and Regulations framed thereunder, being a subject falling within Schedule VII List I Entry 66 of the Constitution [See, Preeti Srivastava (Dr.) V. State of M.P., reported in (1999) 7 SCC 120]. The procedure for selection of candidates for the Post Graduate Degree Courses is one such area on which the Central Legislation and Regulations must prevail."

19. Learned Counsel for the petitioners has also relied on paragraphs 29, 35, 40 and 42, in the case of **Dr. Dinesh Singh Chauhan** (supra), which read as follows:-

"29. In the present case, we have held that providing 30% reservation to in-service candidates in Post Graduate "Degree" Courses is not permissible. It does not, however, follow that giving weightage or incentive marks to in-service candidates for Post Graduate "Degree" Courses entails in excessive or substantial departure from the rule of merit and equality. For, Regulation 9 recognizes the principle of giving weightage to in-service candidates while determining their merit. In that sense, incentive marks given to in-service candidates is in recognition of their service reckoned in remote and difficult areas



of the State, which marks are to be added to the marks obtained by them in NEET. Weightage or incentive marks specified in Regulation 9 are thus linked to the marks obtained by the in-service candidate in NEET and reckon the commensurate experience and services rendered by them in notified remote/difficult areas of the State. That is a legitimate and rational basis to encourage the Medical Graduates/Doctors to offer their services and expertise in remote or difficult areas of the State for some time. Indisputably, there is a wide gap between the demand for basic health care and commensurate medical facilities, because of the inertia amongst the young doctors to go to such areas. Thus, giving specified incentive marks (to eligible in-service candidates) is permissible differentiation whilst determining their merit. It is an objective method of determining their merit.

35. As aforesaid, the Regulations have been framed by an Expert Body based on past experience and including the necessity to reckon the services and experience gained by the in-service candidates in notified remote and difficult areas in the State. The proviso prescribes the measure for giving incentive marks to in-service candidates who have worked in notified remote and difficult areas in the State. That can be termed as a qualitative factor for determining their merit. Even the quantitative factor to reckon merit of the eligible in-service candidates is spelt out in the proviso. It envisages



giving of incentive marks at the rate 10% of the marks obtained for each year of service in remote and/or difficult areas up to 30% of the marks obtained in NEET. It is an objective method of linking the incentive marks to the marks obtained in NEET by the candidate. To illustrate, if an in-service candidate who has worked in a notified remote and/or difficult area in the State for at least one year and has obtained 150 marks out of 200 marks in NEET, he or she would get 15 additional marks; and if the candidate has worked for two years, the candidate would get another 15 marks. Similarly, if the candidate has worked for three years and more, the candidate would get a further 15 marks in addition to the marks secured in NEET. 15 marks out of 200 marks in that sense would work out to a weightage of 7.5% only, for having served in notified remote and/or difficult areas in the State for one year. Had it been a case of giving 10% marks en bloc of the total marks irrespective of the marks obtained by the eligible in-service candidates in NEET, it would have been a different matter. Accordingly, some weightage marks given to eligible in-service candidate linked to performance in NEET and also the length of service in remote and/or difficult areas in the State by no standard can be said to be excessive, unreasonable or irrational. This provision has been brought into force in larger public interest and not merely to provide institutional preference or for that matter to create separate channel for the in-service candidate, much



less reservation. It is unfathomable as to how such a provision can be said to be unreasonable or irrational.

40. The matter does not end here. In the present proceedings, however, large number of candidates who earlier found place in the merit list have been affected by the fresh merit list prepared in terms of Order of this Court dated 12.05.2016. As a result of giving effect to Regulation 9, the fresh list has thrown up a different argument for consideration. The in- service candidates who had secured relatively less marks in NEET have been placed high up in the order of merit consequent to addition of incentive marks @ 10% of the marks for each year of service in the remote and/or difficult areas up to the maximum of 30% of marks obtained in NEET (CET). We find merit in the submission of Mr. Dwivedi, learned senior counsel, that the rights of such candidates to be considered for admission, is not affected. What is affected is the opportunity to get admission in a college or subject of their choice. There can, however, be no right to get the subject or college of ones choice. The provision in the shape of Regulation 9 is to determine the merit of the competing candidates. The provision for giving incentive marks to in-service candidates is permissible in law; and thus the proviso to Clause IV in Regulation 9 must be upheld in larger public interest. That provision has been introduced, inter alia, also to address the deficiency and lack of



response of graduate doctors to serve in remote or difficult areas in the State. The scarcity of doctors in villages has been felt for quite some time for which the provision in the form of proviso to Clause IV of Regulation 9 was necessitated. This concern was even echoed in the Rajya Sabha.

42. It was then contended that hitherto reservation for in-service candidates was applicable only in respect of Government colleges but on account of interim directions given by this Court, dispensation of giving weightage or incentive marks as per Regulation 9 to the in-service candidates has been made applicable across the board even to non-Government medical colleges where the seats allocated to the State Government are to be filled up. In our opinion, Regulation 9 per se makes no distinction between Government and non-Government colleges for allocation of weightage of marks to in-service candidates. Instead, it mandates preparation of one merit list for the State on the basis of results in NEET. Further, regarding in-service candidates, all it provides is that the candidate must have been in-service of a Government/public Authority and served in remote and difficult areas notified by the State Government and the Competent Authority from time to time. The Authorities are, therefore, obliged to continue with the admission process strictly in conformity with Regulation 9. The fact that most of the direct candidates who have secured higher marks in NEET than the in-service



candidates, may not be in a position to get a subject or college of their choice, and are likely to secure a subject or college not acceptable to them, cannot be the basis to question the validity of proviso to Clause IV of Regulation 9. The purpose behind the proviso is to encourage graduates to join as medical officers and serve in notified remote and difficult areas of the State. The fact that for quite some time no such appointments have been made by the State Government also cannot be a basis to disregard the mandate of proviso to Clause IV of giving weightage of marks to the in-service candidates who have served for a specified period in notified remote and difficult areas of the State."

20. Learned Counsel for the petitioners submits that in paragraph 46, in the case of **Dr. Dinesh Singh Chauhan** (supra), the Supreme Court has directed all concerned to follow the admission process for Academic Year 2016-17 and onwards strictly in conformity with the Regulations in force, governing the procedure for selection of candidates for Post Graduate Medical Degree Courses and including determination of relative merit of the candidates who had appeared in NEET by giving weightage of incentive marks to eligible in- service candidates.

21. Learned Counsel for the State has vehemently contended that the act of the State Government in not following



the provisions of Regulation 9 of the Regulation, 2000, which is a self-contained code, is based on the discretionary power given to the States by the Supreme Court, in the case of **Dr. Dinesh Singh Chauhan** (supra).

22. On the other hand, learned Counsel for the petitioners has placed reliance on a judgment delivered by the 5-judges Bench, in the case of **Tamil Nadu Medical Officers Association and Others v. Union of India and Others**, reported in (2018) 17 SCC 426, and submitted that the judgment in the case of **Dr. Dinesh Singh Chauhan** (supra), construed the provisions of Regulations 9 (IV) and 9 (VII) of the Regulation, 2000, as amended on 15 February 2012, has been referred by a Three-Judges Bench of the Supreme Court, by order, dated 13.04.2018, for consideration by a larger bench. The terms of the reference to the larger bench has been mentioned in paragraph 2 of the judgment. Learned Counsel for the petitioners, referring to paragraphs 6 and 7 of the judgment, in the case of **Tamil Nadu Medical Officers Association** (supra), submits that the interim prayer of the State of Tamil Nadu was to the extent that this Court should stay the operation of Regulation 9 of the Regulation, 2000, has been rejected by the Supreme Court in paragraphs 15 and 16 of



the judgment, in the case of **Tamil Nadu Medical Officers Association** (supra), Which read as under:-

"15. The decision in Dinesh Singh Chauhan holds the field. It is based on a construction of Regulation 9(IV) which, at least at the present stage, cannot be brushed aside. The principle which has been adopted in that decision is consistent with the primacy which is attributed by the Constitution to Entry 66 of List I. This is the clear intendment of the words "subject to" in Entry 25 of List III. The grant of any interim relief at the present stage would amount to a mandatory final order which cannot be countenanced. MCI has, as an expert body, proceeded on a principled basis. Any attempt at this stage to read into Regulation 9(IV), a separate source of entry or a reservation for in-service candidates in degree courses would impinge upon Entry 66 of List I and the exercise of regulatory powers under the central statute.

16. For these reasons, we are unable to accede to the prayer for interim relief which has been urged on behalf of the petitioners. Interim relief is accordingly refused. We, however, clarify that the counselling which takes place shall ultimately abide by the result of the reference. I.A. No 33686 of 2018 is disposed of accordingly."



23. Learned Counsel for the petitioners submits that the decision, judgment in the case of **Dr. Dinesh Singh Chauhan** (supra), which is based on Regulation 9(IV) of the Regulation, 2000, is the only law which holds the field in the matter of admission in the Post Graduate Degree/Diploma Courses.

24. On the other hand, learned Standing Counsel No. 9 submits that Regulation 9(IV) of the Regulation, 2000, is not mandatory and the State Government has got discretion to follow the said principle or not inasmuch as from bare reading of proviso to Regulation 9(IV) of the Regulation, 2000, it would be evident that the "weightage in the marks may be given by the Government/Competent Authority as an incentive at the rate of 10% of the marks obtained for each year of service in remote and/or difficult areas up to the maximum of 30% of the marks obtained in National Eligibility –cum- Entrance Test. Learned Counsel for the State, thus, submits that use of the word "may" in the proviso to Regulation 9(IV) makes it amply clear that it was not mandatory and was only a directory in nature and depending upon the discretion of the State Government to follow this procedure or not, the same is directory in nature. Learned Counsel, referring to a decision of the Supreme Court, in the case of **T. R. Sharma v. Prithvi Singh and Others**, reported in (1976) 1 SCC



226, submits that when a Statute uses the words 'may' and 'shall' both, then in that case, the word 'may' may be considered as discretionary. Learned Counsel further submits that the word 'shall' has been used in Regulation 9 (VII), as such, the State Government has treated it to be mandatory and accordingly decided to grant 50 per cent reservation in the matter to admission to Post Graduate Diploma Courses to in-service candidates.

25. Learned Counsel for the petitioners submits that the decision of the Supreme Court, in the case of **T. R. Sharma** (supra) is not applicable in the facts of the present case.

26. I have heard learned Counsel for the parties and have also gone through different judgments cited by learned Counsel for the parties.

27. The Supreme Court, in the case of **Dr. Dinesh Singh Chauhan** (supra), had the occasion to consider and interpret the amended provisions of Regulation 9(IV) of the Regulation, 2000, in the light of the order passed by the Allahabad High Court, by which the High Court has quashed the Government order, dated 28.02.2014, providing 30 per cent reservation for Post Graduate Degree Courses, holding the same as illegal. The Supreme Court has also occasioned to test the validity of Regulation 9 and held



that giving incentive marks to eligible in service candidate is permissible while determining their merit. The Supreme Court, in the case of **Dr. Dinesh Singh Chauhan** (supra), in paragraph 24, held that Regulation 9 is a self-contained Code regarding the procedure to be followed for admissions to medical courses and the State has no authority to enact any law much less by executive instructions that may undermine the procedure for admission to Post Graduate Medical Courses enunciated by the Central Legislation and Regulations framed thereunder, being a subject falling within the Entry 66 of List I to the Seventh Schedule of the Constitution of India and the procedure for selection of candidates for the Post Graduate Degree Courses is one such area on which the Central Legislation and Regulations must prevail. The Supreme Court further held, in the case of **Dr. Dinesh Singh Chauhan** (supra), in paragraph 25, that Regulation 9 is a composite provision prescribing procedure for selection of candidates- both for Post Graduate Degree as well as Post Graduate Diploma Courses. Paragraphs 25 and 26 of **Dr. Dinesh Singh Chauhan** (supra) are quoted herein below:

25. Thus, we must first ascertain whether Regulation 9, as applicable to the case on hand, envisages reservation of seats for in-service medical officers generally for admission to postgraduate



“degree” courses. Regulation 9 is a composite provision prescribing procedure for selection of candidates—both for postgraduate “degree” as well as postgraduate “diploma” courses:

25.1. Clause (I) of Regulation 9 mandates that there shall be a single National Eligibility-cum-Entrance Test (hereinafter referred to as “NEET”) to be conducted by the designated authority.

25.2. Clause (II) provides for three per cent seats of the annual sanctioned intake capacity to be earmarked for candidates with locomotory disability of lower limbs. We are not concerned with this provision.

25.3. Clause (III) provides for eligibility for admission to any postgraduate course in a particular academic year.

25.4. Clause (IV) is the relevant provision. It provides for reservation of seats in medical colleges/institutions for reserved categories as per applicable laws prevailing in States/Union Territories. The reservation referred to in the opening part of this clause is, obviously, with reference to reservation as per the constitutional scheme (for the Scheduled Caste, the Scheduled Tribe or the Other Backward Class candidates); and not for the in-service candidates or medical officers in service. It further stipulates that all-India merit list as well as State-wise merit list of the eligible candidates shall be prepared on the basis of the marks obtained in NEET and the admission to postgraduate courses in



the State concerned shall be as per the merit list only. Thus, it is a provision mandating admission of candidates strictly as per the merit list of eligible candidates for the respective medical courses in the State. This provision, however, contains a proviso. It predicates that in determining the merit of candidates who are in service of the Government or a public authority, weightage in the marks may be given by the Government/competent authority as an incentive @ 10% of the marks obtained for each year of service in specified remote or difficult areas of the State up to the maximum of 30% of the marks obtained in NEET. This provision even if read liberally does not provide for reservation for in-service candidates, but only of giving a weightage in the form of incentive marks as specified to the class of in-service candidates (who have served in notified remote and difficult areas in the State).

26. From the plain language of this proviso, it is amply clear that it does not envisage reservation for in-service candidates in respect of postgraduate “degree” courses with which we are presently concerned. This proviso postulates giving weightage of marks to “specified in-service candidates” who have worked in notified remote and/or difficult areas in the State—both for postgraduate “degree” courses as also for postgraduate “diploma” courses. Further, the weightage of marks so allotted is required to be



reckoned while preparing the merit list of candidates."

28. The Supreme Court next held, in the case of **Dr. Dinesh Singh Chauhan** (supra), in paragraph 29, that *it does not, however, follow that giving weightage or incentive marks to in-service candidates for Post Graduate "Degree" Courses entails in excessive or substantial departure from the rule of merit and equality. For, Regulation 9 recognizes the principle of giving weightage to in-service candidates while determining their merit. In that sense, incentive marks given to in-service candidates is in recognition of their service reckoned in remote and difficult areas of the State, which marks are to be added to the marks obtained by them in NEET. Weightage or incentive marks specified in Regulation 9 are thus linked to the marks obtained by the in-service candidate in NEET and reckon the commensurate experience and services rendered by them in notified remote/difficult areas of the State. That is a legitimate and rational basis to encourage the Medical Graduates/Doctors to offer their services and expertise in remote or difficult areas of the State for some time. Indisputably, there is a wide gap between the demand for basic health care and commensurate medical facilities, because of the inertia amongst the young doctors to go to such*



areas. Thus, giving specified incentive marks (to eligible in-service candidates) is permissible differentiation whilst determining their merit. It is an objective method of determining their merit.

29. In the case of **Dr. Dinesh Singh Chauhan** (supra), in paragraph 35, the Supreme Court held that some weightage marks given to eligible in-service candidate linked to performance in NEET and also the length of service in remote and/or difficult areas in the State by no standard can be said to be excessive, unreasonable or irrational and this provision has been brought into force in larger public interest and not merely to provide institutional preference or for that matter to create separate channel for the in-service candidate, much less reservation and it is unfathomable as to how such a provision can be said to be unreasonable or irrational.

30. In paragraph 44, the Supreme Court, after considering all the facts, has held that the inescapable conclusion is that the procedure evolved in Regulation 9 in general and the proviso to Clause (IV) in particular is just, proper and reasonable and also fulfill the test of Article 14 of the Constitution, being in larger public interest.



31. Further, the contention of learned Counsel for the respondents is that the proviso to Regulation 9(IV) of the Regulation, 2000 is not mandatory and is discretionary in nature. The proviso to Regulation 9(IV) of the Regulation, 2000, uses the words "weightage in the marks may be given by the Government/Competent Authority.....".

32. I have considered the said submission made by Learned Counsel for the respondents. The word 'may' is an auxiliary verb qualifying the meaning of another verb by expressing ability, contingency, possibility or probability, (Webster Dictionary), to have permission- be allowed (Anderson L. Dictionary); to be possible. As used in Statute, in its ordinary sense, the word is permissive and not mandatory, merely importing permission, ability, possibility or contingency; but it has been properly construed as employed in an imperative or mandatory sense when the legislature imposes a positive duty not a discretion or where a public duty is involved, where a right is given or a duty is imposed, or where a matter of public policy and not merely a private right is involved, where the Statute directs the doing of a thing for the sake of justice or the public good or where the statute imposes a duty or confers power on a public officer for public purposes, or for the purpose of enforcing a right but not to



create one; it should be construed as meaning "must" or "shall" only where public interests and rights are concerned. (See, Page-2947 of Advanced Law Lexicon).

33. The Supreme Court, in the case of **N. Nagendra Rao and Co. v. State of A.P.**, reported in **(1994) 6 SCC 205**, in paragraph 6, has held that even though the section uses the word 'may', but keeping in view the objective of the Act and the context in which it has been used, it should be read as 'shall', otherwise it would frustrate the objective of the sub-Section. Paragraph 6 of **N. Nagendra Rao** (supra) is quoted herein below:-

"6. However, this appeal is primarily concerned with nature of Power exercised by the Collector under sub-section (2) of Section 6-A of the Act the purpose and objective of which is to make interim arrangement of the goods which are seized. The sub-section is extracted below :

"(2) Where the Collector, on receiving a report of seizure or on inspection of any essential commodity under sub-section (1), is of the opinion that the essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do, he may-

(i) order the same to be sold at the controlled price, if any, fixed for such essential commodity under this Act or under any other law for the time being in force; or



(ii) where no such price is fixed, order the same to be sold by public auction: Provided that in the case of any such essential commodity the retail sale price whereof has been fixed by the Central Government or a State Government under this Act or under any other law for the time being in force, the Collector may, for its equitable distribution and availability at fair prices, order the same to be sold through fair price shops at the price so fixed."

When a statute gives a power and requires the authority to exercise it in public interest then the person exercising the power must be vigilant and should take it as a duty to discharge the obligation in such a manner that the object of the enactment is carried into effect. The purpose of sub- section (2) is for protecting the goods seized by the Collector whether they are eatables or they are foodstuffs or they are iron and steel, as, if they are spoilt or they deteriorate then it is a loss not only to the owner but to the society. Loss in value of goods or its deterioration in quality and quantity would be in violation of the purpose and spirit of the Act. Even though the section uses the word 'may' but keeping in view the objective of the Act and the context in which it has been used it should be read as 'shall'; otherwise it would frustrate the objective of the sub-section. Once goods are seized, they are held by the State through the Collector and his agents as custodia society, unless it is found that the detention was illegal in which case it shall be deemed to have been



held for the benefit of the person from whom it was seized. In either case, its proper maintenance and early disposal is statutory duty. It is more so as the proceedings do not come to an end quickly. The rationale of the provision appears to be that penalise the person who acts in contravention of the order but protect the goods as they are essential for the society. Loss in value of the goods in quality or quantity is neither in public nor in society's interest. Therefore, the Collector has to form an opinion if the goods seized are of one or the other category and once he comes to conclusion that they fall in one of the categories mentioned in the sub-section then he has no option but to direct their disposal or selling of in the manner provided. The expression "speedy and natural decay" does not need any elucidation. It is not an expression of art and must be understood in a common sense manner. The other expression, "it is otherwise expedient in the public interest" has also to be understood so as to advance the legislative objective of ensuring that the goods do not suffer either in quality or quantity. For instance, fertiliser may not be susceptible to speedy and natural decay but it is expedient in public interest to ensure that it is either sold to the agriculturist or disposed of at least before the next season. This interim arrangement comes to an end once an order of confiscation is passed."



34. The Supreme Court, in a judgment passed in the case of **Chandrika Prasad Yadav v. The State of Bihar and Others**, reported in **(2004) 6 SCC 331**, in paragraph 31, has held as follows:-

"The question as to whether a statute is directory or mandatory would not depend upon the phraseology used therein. The principle as regards the nature of the statute must be determined having regard to the purpose and object the statute seeks to achieve. [See, P.T. Rajan Vs. T.P.M. Sahir and Others, reported in 2003 (8) SCALE 165]."

35. The Supreme Court has been stressing time and again that the question whether Statute is mandatory or directory is not capable of generalization and that in each case, the Court should try and get at the real intention of the legislature by analyzing the entire provisions of the enactment and the scheme underlying it. A provision in a Statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void. The Supreme Court has pointed out on many occasions that the question as to whether a Statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislation must govern and these are to be ascertained not



only from the phraseology of the provision, but also by considering the nature, its design and the consequences which would follow from construing it the one way or the other.

36. Considering the submissions advanced by the parties and law laid down by the Supreme Court, as discussed herein above, I am of the considered view that the contention raised by the respondents State that proviso to Regulation 9(IV) of the Regulation, 2000 is discretionary in nature is specious and not tenable in law and facts. The Supreme Court, in the case of **Dr. Dinesh Singh Chauhan** (supra), has construed that the purpose behind the proviso is to encourage graduates to join as medical officers and serve in notified remote and difficult areas of the State. This provision has been brought into force in larger public interest and not merely to provide institutional preference. The Apex Court further held that procedure evolved in Regulation 9 in general and the proviso to Clause (IV), in particular, is just, proper and reasonable and also fulfils the test of Article 14 of the Constitution of India, being in larger public interest. The submission made by learned Counsel for the State that the merit of the candidates will be affected is also not tenable in view of the findings given by the Supreme Court in paragraphs 29 and 35 of **Dr. Dinesh Singh Chauhan** (supra).



37. It is well settled that a proviso is in the nature of exception to a main provision and has to be strictly construed. The only discretion, which the State Government is posited with, is the discretion to notify the areas within the territory of the State as remote, rural or difficult areas.

38. Accordingly, in my considered opinion, the State respondents have no option, but to mandatorily follow the proviso to Regulation 9(IV) of the Regulation, 2000, as amended, and non-adherence to the provisions of Regulation 9(IV) and its proviso of the Regulation, 2000, by the State respondents will defeat the very purpose and object of the amendment which has been brought in to force in larger public interest.

39. In view of the discussions made and law laid down by the Supreme Court, in the case of **Dr. Dinesh Singh Chauhan** (supra), the contention of the State respondents taken in its supplementary counter affidavit is rejected and the concerned respondents are directed to consider the claim of the petitioners for grant of incentive marks strictly in conformity with and in terms of Regulation 9 (IV) of the Post Graduate Medical Education Regulation, 2000, as amended vide Notification No. MCI-18(1)/2018-Med./100818, effective from 05.04.2018 and, thereafter, prepare the State merit list for admission in Post



Graduate Degree/Diploma Courses of the eligible candidates for the present session 2020 accordingly.

40. This writ application is allowed.

41. However, there shall be no order as to costs.

42. Later, at the time of finalization of this judgment, this Court came across the further amendment made in the proviso to Regulation 9 (IV) of the Regulation, 2000, vide Notification No. MCI-18(1)/2018-Med./100818, effective from 05.04.2018, and the same has been mentioned in paragraph 10 of the judgment. Accordingly, in the operative part of the order, dated 27.04.2020, after "as amended and lastly notified vide Notification No. MCI-18(1)/2010-Mad/62052, dated 15thFebruary, 2012" shall be read as "as further amended vide Notification No. MCI-18(1)/2018-Med./100818, effective from 05.04.2018".

(Anil Kumar Sinha, J.)

Prabhakar Anand/-

AFR/NAFR	AFR
CAV DATE	N/A
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