

(2019) 10 CAL CK 0023

In the Calcutta High Court

Case No : Tender Of Mand Appl (MAT) No. 1222, 1223, 1224, 1239, 1245, 1267, 1333 Of 2019, Civil Application (CAN) No. 8410, 8411, 8412, 8489, 8548, 8664, 8981 Of 2019

Dr. Md. Babul Aktar And Others

APPELLANT

Vs

Dr. Md. Nazir Hossain And Others

RESPONDENT

Date of Decision : 01-10-2019

Acts Referred:

Specific Relief Act, 1963 — Section 34
Medical Council Of India Act, 1956 — Section 20, 33, 33(1)
Bengal, Agra And Assam Civil Courts (West Bengal Amendment) Act, 1957 — Section 4
Code Of Civil Procedure, 1908 — Section 2(9), Order 20 Rule 4(2)
West Bengal Health (Placement On Trainee Reserve) Rules, 2015 — Rule 3
Rajasthan Service Rules (Volume-I Part-A) — Rule 244
Constitution Of India, 1950 — Article 14, 16, 21, 41, 46, 47, 142, 226, 246, 254
Medical Council Of India Regulations, 2000 — Regulation 9, 9(1), 9(4), 9(7), 9(8), 9(10), 9(11)

Citation : (2019) 10 CAL CK 0023

Hon'ble Judges : Dr. Sambuddha Chakrabarti, J;Hiranmay Bhattacharyya, J

Bench : Division Bench

Advocate : Shakti Nath Mukherjee, Suman Banejee, Samik Sarkar, Soumendra Banerjee, Suman Banejee, Samik Sarkar, Pratik Dhar, Kartik Kumar Roy, Samir Halder, Kishore Dutta, Sirsanya Bandopadhyay, Sudeshna Das, Arka Das, Tapan Kumar Mukherjee, Susmita Chatterjee, Saibalendu Bhowmick, Biplab Guha, Subrata Bhattacharyay, Rajsekhar Basu, Indranil Roy, D. N. Maiti, Kishore Datta, Amitesh Banerjee, Sirsanya Bandopadhyay, S. Das Majumdar, Arka Kumar Nag, Tapan Kumar Mukherjee, Tuli Sinha, Sougata Mitra, Swapan Kumar Dutta, Jahar Lal De, Smita Das De, Bikash Ranjan Bhattacharyya, Siddhartha Banerjee, Firdous Samim, Gopa Biswas

Final Decision : Disposed Of

Judgement

Sambuddha Chakrabarti, J

These appeals are directed against the judgement and order, dated August 19, 2019 passed by a Learned single judge in WP No. 8990 (W) of 2019 inter alia

holding that the State has no authority to reserve 40% seats for the in-service doctors and 60% seats for open category doctors which has inter alia been held to be arbitrary, unconstitutional and unsustainable. The separate reservation list and the list of selected candidates prepared on April 3, 2019 and April 20, 2019 respectively have been set aside with consequential directions.

The writ petitioners, 22 in number, are all medical graduates who had appeared and succeeded in the entrance examination through the National Eligibility-cum-Entrance Test, Post Graduate, 2019 (NEET, for short) conducted by the National Board of Examination at all India level to get themselves admitted to the post-graduate degree classes. Half of the total number of seats have been reserved for all India quota and half has been reserved for the state quota in terms of the Rules and Regulations of the Medical Council of India (MCI, for short). The first round of counselling started on and from March 15, 2019 and the results were published on March 27, 2019. The second round of counselling started from April 5, 2019 and the result was published on April 11, 2019 for the all India quota states in open category. The remaining vacancies from the all India quota reverted back to the state which was to be filled up by the state quota seats in the open category following the MCI Rules and Regulations. It has been alleged that the State was trying to fill up these reverted back seats in the manner of 60% for the open category and 40% in-service doctors category.

The petitioners have alleged that the state respondents have filled up 60% from the open category and 40% for the in-service doctors category and in this manner the Government has conducted the first counselling. Subsequently, the result of the candidates for the respective faculties were published on April 3, 2019 as is reflected from the seat matrix available.

Out of the total available 699 seats, for open category candidates the number of seats was 414 whereas for the in-service doctors the number was 285 which roughly corresponded to about 40% of the available seats.

The West Bengal University of Health Services (the University, for short) after the first round of counselling filled up 60% seats from the open category and 40% from the in-service quota. The petitioners alleged that for the publication of two lists there is no provision in the Post Graduate Medical Education Regulations, 2000 (the Regulations, for short) as well as the entire Medical Council of India Act, 1956 (the Act, for short). There is no provision for reserving any seat for the in-service doctors. There is a provision for awarding 10% incentive marks per year which can be up to 30% for three years for the in-service candidates who have served remote or difficult areas and this would be added with the marks obtained in the NEET examination. It is the case of the petitioners that following the Rules and Regulations of the MCI a common list may be published instead of two separate lists for two categories of candidates.

The University has not published any list ascertaining remote and difficult areas which violates the Regulations, 2000. Further case of the petitioners is that the

common list to be prepared must contain the percentage of incentives awarded to the respective candidates and years of service rendered by the respective candidates along with the place of posting.

On April 18, 2019 the University issued the revised notice for the second round of counselling. They also published a list for the eligible candidates for this which included 1499 candidates in the open category and 410 in the in-service category.

The state respondents were trying to fill up the reverted back seats by in-service candidates along with the open category candidates which are against the relevant Regulations of the MCI. The petitioners have questioned the existence of quota for in-service candidates in terms of the Regulations, 2000.

The petitioners have inter alia prayed for a writ in the nature of mandamus commanding the respondents to quash and set-aside the list, dated April 3, 2019 of the selected candidates after the first round of counselling and for a direction to publish a fresh common list combining open and in-service category candidates mentioning the remote and difficult areas and years of rendering services and clubbing the incentives with the marks obtained in the NEET Examination by following Regulation 9 of the said Regulations, a writ in the nature of mandamus commanding the respondents to set aside or quash the notice dated April 18, 2019 and the list of eligible candidates published on April 20, 2019 and to publish a fresh merit list for the reverted back seats only for the open category candidates and for other ancillary reliefs.

On behalf of the State Respondents the Special Secretary, Medical Education, Department of Health and Family Welfare affirmed an affidavit-in-opposition. The respondents inter alia contended that the writ petition should be dismissed as the Medical Council of India was not made a party. They further alleged that the beneficiaries of the list dated April 3, 2019 who are the in-service candidates had not been made parties. For this ground also the writ petition was liable to be dismissed. The petitioners had participated in the counselling process on the basis of the same proportions in respect of the open category and in-service category candidates and are, therefore, esopped to question the validity of the same after completion of the first counselling and consequent admission of candidates. The schedule prescribed by the Medical Council of India is mandatory as declared by the Supreme Court. The examination being on an all India basis no special schedule is permissible nor can there be any alteration in it. After the petitioners had participated in the process of the first round of counselling on the basis of the same ratio of reservation they cannot be aggrieved that similar proportion in respect of two categories cannot be applied for the second or the mop-up counselling.

The last date for taking admission in MD/MS courses in respect of the state counselling was May 18, 2019. The Supreme Court had directed that the system of mop-up counselling has to be done before May 31, 2017 and this schedule must be strictly followed.

A further point taken by the respondents on the merits of the writ petition is that the writ petitioners have not challenged the memo, dated April 18, 2013. Regulation 9(4) of the Regulations mentions "as per applicable laws prevailing in States/Union Territories". The prevailing practice which was continuing since the year 2013 might not be interfered with as this might result in violating the mandatory schedule and consequently these seats of the state quota might remain vacant.

The petitioners could not, the answering respondents alleged, be affected by this reservation as there has not been any reduction of seats for them. The rules of the game could not be changed in the midst after the game had started. The total number of seats available in the State of West Bengal was 1398. Approximately 50% of them remain for the state quota seats which comes to 699 seats excluding 37 management quota seats in private colleges. The remaining seats are made for all India quota for which the in-service candidates cannot apply. Out of the state quota of 699 seats 40% i.e. 285 seats are reserved for in-service candidates whereas 60% is for open category. For 37 management quota seats in the private colleges candidates in the open category as well as in-service may apply.

The respondents have calculated that out of the total number of seats in West Bengal only 285 seats have been set apart for the in-service candidates which is about 21.4% of the total seats. The total number of eligible candidates on the basis of NEET examination for in-service category is 433. The 40% quota for the in-service candidates includes the quota made for the Schedule Caste, Schedule Tribes and Other Backward Classes candidates as per the state norms. The in-service candidates are restricted to only state quota whereas the open category candidates are free to compete against the entire all India pool seats.

It has been found that the in-service candidates who are serving in different hospitals of the state and in rural areas will help the state medical facilities across the state. Trainee Reservation facilities would be applicable to most of the doctors in the State service in accordance with various services under the state. The University by a notice dated March 12, 2019 mentioned that those candidates who opted for in-service candidates categories were not allowed to convert into open category/other service category and vice-versa.

The state respondents alleged suppression of fact against the writ petitioners as they had not mentioned that they had participated in the first counselling. Several writ petitioners have been allotted seats and three of them have already taken admission in the respective colleges. Their stand is that the writ petitioners having participated in the first counselling on the basis of a certain mechanism cannot seek a separate mechanism for second round of counselling in the same academic year. Only a small number of seats have been set apart for the in-service candidates compared to the large number of seats available for the open category. There has not been any reduction of seats for them. Once a particular mechanism has been adopted for the first round of counselling the same method

is required to be continued till the end to maintain uniformity in the process.

The list of eligible candidates was published on March 28, 2018 and the writ petition was filed on April 24, 2019. When the writ petition had been filed admission on the basis of the first counselling was over and the stage upto exercising choice for the second counselling had also been completed. Since the modalities for giving weightage to the in-service candidates could not be determined the prevailing practice has been validated. The state claimed that there has not been any violation of the provisions of the Regulations or the Act. If the prayers of the petitioners are allowed it would jeopardise the public health care system in the whole state and the in-service candidates shall neither get any weightage nor shall they be getting the benefit of the prevailing mechanism.

In view of the Supreme Court Judgment the mechanism which is to be adopted for rural, remote and district areas will be available not only to the post-graduate medical courses but also for all beneficial schemes of the state. But this is required to be done at the highest level of the state. Till such steps are taken by the state the admission process cannot be stalled which shall cause prejudice to the in-service candidates who have been already rendering their services to the State Government as well as those candidates who have been admitted at different institutions after the first counselling.

The respondents prayed for dismissal of the writ petition.

In course of hearing before the Learned single judge on two applications filed by some of the in-service candidates the applicants were added as parties to the writ petition. The Medical Council of India was also made a party.

The judgment and order passed by the learned Single Judge has been assailed in as many as seven appeals of which five have been filed by different sets of respondents to the writ petition. MAT 1222 of 2019 has been filed upon obtaining the leave of this court. The writ petitioners have also taken an independent appeal assailing the direction of the learned single judge to approach the Supreme Court for extension of time for admission, if advised. Again, a set of interested candidates have intervened with the leave of the court during the hearing of the appeals.

We took up all the appeals together and heard them analogously.

Mr. Mukherjee, the learned Senior Counsel appearing for the appellants in MAT 1222 of 2019, and MAT 1223 of 2019 submitted that on the day the writ petition was taken up admission to MD/MS post-graduate medical course was complete. The question of admission beyond May 31, as provided in Regulation 9(10) of the said Regulations did not arise. Relying on the judgement in Rounaq International Ltd. Vs. IVR construction Ltd. And others, reported in (1999) SCC 492. Mr. Mukherjee, argued that if the petitioners are not entitled to any relief the writ petition should not be entertained and the court also should not embark upon any adjudication. He has assailed the judgment and order impugned in the

appeals alleging that the learned single judge has almost entirely proceeded on the basis of the ratio decided in the case of State of Uttar Pradesh Vs. Dinesh Singh Chouhan, reported in (2016) 9 SCC 749 which has been delivered without considering the earlier constitution bench judgments, viz. R. Chitrallekha Vs. State of Mysore, AIR 1964 SC 1823, Kumari Chitra Ghosh Vs. Union of India, (1969) 2 SCC 228, Modern Dental College & Research Centre Vs. State of M.P., (2016) 7 SCC 353.

With reference to Regulations, 2000 Mr. Mukherjee argued that by the impugned order of reservation the state was trying to upgrade the standard in their respective medical colleges. Since the candidates sponsored by the state were not qualified to be admitted in terms of their respective ranks in the merit list the state decided to secure their admission by reservation.

A very major thrust of Mr. Mukherjee's submission is that what the Medical Council has prescribed is nothing but a minimum qualification. Section 20 of the Act deals with the standard of post-graduate medical qualification the purpose of which is to prescribe a uniform standard for admission to the post-graduate medical courses. Regulations have been made under Section 33 of the Act. Section 33(l) also emphasizes the maintenance of standard and condition for admission to post-graduate courses. This will be very clear, Mr. Mukherjee submits, even from the statements and objects of the Act itself. The whole purpose behind the enactment was to secure a uniform standard in medical education. Therefore, the state has every right to secure the standard of education and take a measure to ensure its upliftment. The decision to reserve 40% of the seats of the state quota for the in-service candidates is a step towards achieving that object and that was the concern of Parliament also.

Article 246 of the Constitution of India does not deal with the Regulations to be made by the Council or any statutory body. It deals with "laws" to be made by Parliament and by the legislatures of the states. Emphasizing on the word "laws", Mr. Mukherjee submitted that the Article does not touch the Regulations made under Section 33 of the Act as these Regulations are not "laws" within the meaning of Article 246 of the Constitution. The Regulations are at best in the nature of bye-laws and do not have the force of statutory rules.

Therefore, the right of the state to make laws in respect of the areas of permissible legislation has not been abridged by the Regulations 2000. Mr. Mukherjee has referred to Entry 6 of List II of the 7th Schedule of the Constitution of India. List II is known as the State List and in respect of the matters appearing thereunder states have exclusive power to make laws. Entry 6 of List II of the 7th Schedule deals with public health and sanitation; hospitals and dispensaries. The West Bengal Health Services Act, 1990 is relatable to this entry in the State List and, therefore, the state has exclusive power to make legislations or provisions in respect of such matters falling in this entry.

In this connection, Mr. Mukherjee referred to entry 66 of the List I of the 7th

Schedule which deals with co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions. The Act has originated from this Entry in the 7th Schedule itself. Mr. Mukherjee relied on *Modern Dental College and Research Centre and Others Vs. The State of Madhya Pradesh and Others*, reported in (2016) 7 SCC 353. He particularly relied on the judgment delivered by Hon'ble Justice R. Bhanumati wherein a part of parliamentary debate has been reproduced. Taking us through the said portion Mr. Mukherjee stressed upon the importance of maintenance of standard in medical education. He particularly drew the attention of the Court to a part of the speech delivered by late Dr. B. R. Ambedkar while introducing the Act in parliament. Mr. Mukherjee submitted that the disparity in standards in different states in medical teaching was sought to be ironed out by introducing a uniform standard of medical education by enacting the Medical Council of India Act, 1956.

A major part of Mr. Mukherjee's submission is that beyond the areas of central enactment if any portion is left out the state has the exclusive authority to legislate. Even if co-ordination and determination of standards of medical education comes within Entry 66 of the Union List the State is not without powers to take further measures for uplifting the standards of medical education in the State. Entry 6 of the State List which deals with public health and hospitals confers a wide power on the state government to make laws on the subjects enumerated in that Entry. In exercise of the power conferred by inclusion of public health in Entry 6 of the State List the state government has every right to reserve certain seats for the in-service doctors which shall take care of upgrading the standards of the hospitals.

The concern of the state relating to the health of the public is public health, Mr. Mukherjee submitted. By way of an example he mentioned that an individual hospital is concerned with the health of the patients but the state is concerned with public health. Therefore, for improving the standard of public health and hospital administration it is very much within the authority of the state to make laws or provision of reservation for the in-service doctors.

Mr. Mukherjee relied on the Note after Rule 3 of West Bengal Medical Education Service, the West Bengal Health Service and the West Bengal Public Health-cum-Administrative Service (Placement of Trainee Reserve) Rules, 2015 and submitted that it confers a power on the State Government to specify the number of seats in different post-graduate courses which may be available to the in-service doctors. By a Regulation made under Section 33 of the Act the Rules of 2015 cannot be set aside nor can its power be abridged. The state made the law is in respect of a matter enumerated in the State List which has the supremacy over Regulations 2000.

Regulation 9 of the Regulations 2000 deals with the minimum marks to be obtained by a candidate for admission to a post-graduate degree course. A candidate in order to be considered for such admission has to obtain 50% of the

total marks and once such candidate satisfies the criteria he comes within the zone of consideration for admission. By the impugned action or the state order that standard has not been compromised and no candidate has been admitted to a post-graduate degree course who has not secured the basic minimum marks of 50% which is the cut off marks fixed by the Medical Council of India. Therefore, the state was very conscious of not admitting any candidate who has not secured the minimum marks fixed by the Regulations. No candidate who has not been included in the merit list has been sponsored by the state for admission to the post-graduate degree course.

In this connection, Mr. Mukherjee has interpreted the words "from the merit list" as distinct from and not carrying the same meaning of the expression "in accordance with the merit list" or "as per merit list". If the expression in Regulation 9 had been either any one of them the authority might not have any option to admit any candidate other than maintaining their respective ranks in the merit list. Then there would have been a requirement of admitting students according to the respective merits of candidates in the merit list. But since the Regulations permit the authority to admit students "from the list" it leaves a wide area of discretion to the state to admit any student who has been included in the list. Thus, the criteria for admission to a post-graduate degree course is inclusion of one's name in the list and not his respective rank in the list. Once a candidate's name is included in the list he can be chosen for the post-graduate class without flouting the Regulations.

Mr. Mukherjee submitted that since the whole purpose behind the exercise was to promote public health and to upgrade its standards there is a justification behind the impugned decision of reservation and there is nothing preventing the state from taking such a decision if a rational justification for the same exists which in the present case is ensuring the upliftment of the standard of medical education and public health. In this connection, Mr. Mukherjee relied on the theory of permissibility of reasonable classification which is available to the state and which in turn provides the legal basis for the reservation. He relied on the judgment in the case of Pre-PG Medical Sangharsh Committee and Another Vs. Dr. Bajrang Soni and Others, reported in (2001) 8 SCC 694, for a proposition that in-service candidates constitute a distinct class by themselves. The judgment further observed that mere theoretical excellence or merit alone is not sufficient indicia of the qualitative merit of the candidates in the field of actual practice and application. Relying on the said judgment he submitted that what the state has done is not a departure from the merit list but it made a separate list for the state-sponsored candidates. It is permissible for the state to fix such a source or classification of candidates from which selection for admission to the post-graduate colleges may be made for yet another genuine, relevant and reasonable cause which has sufficient nexus with the larger goal of equalization of educational opportunities to sufficiently prepare the doctors serving in various hospitals maintained out of public funds by the government in the absence of which there will be serious dearth of qualified post-graduate doctors and experts.

A very major part of argument of Mr. Mukherjee is that as per the Regulations all the process of admission must be completed by May 31 of the relevant year. Therefore, with the expiry of May 31, 2019 the hearing of the writ petition out of which this appeal arose, could not continue. Following the Regulations no student now can be admitted to the post-graduate course.

Relying on an observation made in the case of *Modern Dental College and Research Centre and Others* (Supra) Mr. Mukherjee submitted that the whole gamut of medical education is not covered by entry 66 of List I. A considerable portion has been left untouched in respect of which the state can make legislation. In spite of the Regulations 2000 the state is not without its power to make legislation or to pass necessary order reserving certain seats for in-service candidates.

ITC Ltd. Vs- Agricultural Produce Market Committee and Others, reported in (2002) 9 SCC 232 has been relied on to show how the dispute about the state legislation in respect of an entry in the Union List was resolved. The Supreme Court observed that a perusal of List-II shows that whenever a particular entry was intended to be made subject to an entry in List I and III, it has been so stated specifically. Therefore, an interpretation which tends to have the effect of making a particular entry subject to any other entry, though not stated in the entry, deserves to be avoided unless that be the only possible interpretation. The Supreme Court observed that although Parliament cannot legislate on any of the entries in the State List it may do so incidentally while essentially legislating within the entries under the Union List. Conversely, state legislatures may encroach on the Union List when such an encroachment is merely ancillary to an exercise of power intrinsically under the State List. The fact of encroachment does not affect the vires of the law even as regards the area of encroachment. This doctrine of pith and substance does not amount to an extension of the legislative fields. Such incidental encroachment does not deprive the state legislature in the first case or Parliament in the second, of their exclusive powers under the entry so encroached upon.

Mr. Mukherjee relied on *Association of Natural Gas and others -vs- Union of India and Ors.*, reported in (2004) 4 SCC 489 where it has been held that entries in the three lists are themselves not powers of legislation, but fields of legislation. However, an entry in one list cannot be so interpreted as to make it cancel or obliterate another entry or make another entry meaningless. The Supreme Court observed that in case of apparent conflict it is the duty of the court to iron out the crease and to avoid conflict by reconciling the conflict. The Privy Council in *Prafulla Kumar Mukherjee Vs. Bank of Commerce Limited* (AIR 1947 P.C. 60) referred to an observation of the Federal Court in another case that it must inevitably happen from time to time that legislation though purporting to deal with the subject in one list touches also on a subject in another list and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of

statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule of pith and substance has been evolved to determine whether it is legislation with respect to matters in this list or in not.

In Professor Yashpal and another Vs. State of Chattisgarah and others, reported in (2005) 5 SCC 420, a judgment relied on by Mr. Mukherjee, the Supreme Court observed that the consistent and the settled view of the Supreme Court was that in spite of incorporation of universities as a legislative head being in the State List the whole gamut of the University education which will include teaching, quality of education, curriculum, standard of examination, evaluation and research activity will not come within the purview of the state legislature on account of a specific entry on co-ordination and determination of standards in institutions for higher education or research and scientific and technical education being in the Union List for which Parliament alone is competent.

Mr. Dhar, the learned senior counsel for the appellants in MAT 1239 of 2019, submitted that they were added as respondents to the writ petition before the learned single judge on an application filed by them. They represented a large section of the sponsored in-service doctors who are aggrieved by the impugned judgment and order for which they have filed the appeal.

Mr. Dhar submitted that the writ petitioners were well aware of the separate channels of entry into the Post-Graduate medical courses and had participated in the counselling with a stipulation that it could not be changed subsequently. Many of them were even admitted to the Post-Graduate courses in different disciplines which they have not disclosed in their writ petition. He has also taken the point of delay in approaching the court which was done after the first counselling had been completed. He relied on Chandigarh Administration and Another vs.- Jasmine Kaur and others, reported in (2014) 10 SCC 521 where the requirement for a prompt challenge to an action has been emphasised by the Supreme Court. It has been observed that no relief can be granted in favour of a party who being aware of the criteria of the prospectus does not make any challenge promptly. Relying on this principle Mr. Dhar submitted that the conduct of the writ petitioners disentitles them to an equitable relief which is prejudicial to the interest of others.

On this point Mr. Dhar relied on three more judgments. In Om prakash Sukla Vs. Akhilesh Kumar Sukla and Others., reported in (1986) (Supp) SCC 285 the Supreme Court observed that where the petitioner appeared at the examination without protest and then he found that he would not succeed in the examination he filed a writ petition challenging the said examination the High Court should not have granted any relief to such a petitioner. In Madan Lal and Others. Vs. The State of Jammu and Kashmir and Others., reported in (1995) 3 SCC 486 it has been held by the Supreme Court that if a candidate takes a calculated chance and appears at the interview only because the result of the interview has not been palatable to him he cannot turn around and subsequently contend that

the process of interview was unfair or the selection committee was not properly constituted. To the same effect is the ratio in the case of *Ranjan Kumar and Others. Vs.-State of Bihar and Others.* , reported in (2014) 16 SCC 187. Mr. Dhar further relied on *Union of India and Others. Vs. C. Girija and Others*, reported in (2019) SCC Online 187 where also the Supreme Court observed that the applicant having participated in the selection for promotion after being aware of a certain quota it was not open for her to challenge the same after taking a chance to get selected.

Mr. Dhar also alleged deliberate suppression of the fact of admission of many of the writ petitioners to various post-graduate degree courses in the writ petition. The submission is that since they have not come in clean hands they cannot ask for an equitable relief.

The next point of attack is the non-joinder of the in-service sponsored candidates to the writ petition. Mr. Dhar has made a grievance that when an application for addition to a party was made the learned single judge did not allow it nor a copy of the writ petition was served upon them. Hearing continued and no opportunity to file an affidavit was granted to them. It was only when the judgment was delivered that these appellants came to know that they were made parties by an order, dated June 19, 2019. Mr. Dhar relied on the case of *Sadananda Halo and Ors. Vs. Mamta Ali Sk.*, reported in (2008) 4 SCC 619 where a few selected candidates approached the High court, but they were not even supplied with pleadings or the copies of the petitions in time. The Supreme Court observed that this amounted to denial of appropriate opportunity to the selected candidates. In the case of *Poonam Vs. State of Uttar Pradesh and Others.*, reported in (2016) 2 SCC 779 the Supreme court emphasised the requirement of impleading the successful candidates as parties to the proceeding.

Mr. Dhar criticised the observations of the learned Single Judge that the writ petitioners had approached the court immediately after participating in the first counselling as factually incorrect. He has submitted that from the course of events and from the conduct of the writ petitioners it can never be said that they had immediately after detection of reservation for the in-service candidates had approached the court. The writ petitioners knew that they were eligible to participate in the process of selection in 414 seats as against 699 open category seats which was in addition to the entire all India pool of 12,000 seats. The petitioners want to improve their disciplines than where they have been admitted. In case the order impugned is not interfered with, the appellants in MAT 1239 of 2019 would lose their entire admission which is an academic year.

The Regulations, 2000 contain specific stipulations in Regulation 9(10) and 9(11) fixing the cut off date for admission to the post-graduate courses on May 31 and provides for penal consequences for admitting students in contravention of the criteria or procedure of the Regulations or in violation of the judgements passed by the Supreme Court in respect of the admissions. Mr. Dhar submits that the time schedule so fixed must be strictly adhered to. In this connection he has

relied on Education Promotion Society for India and Another vs. Union of India and Others., reported in (2019) 7 SCC 38 where the Supreme Court observed that there are three rounds of counselling the last of which is to be completed by May 31, 2019 and if some seats remained vacant even after the mop-up round it could not be helped. Extension could not be granted just because some seats were lying vacant without there being any other justification.

Mr. Dhar justified the concept of reservation with reference to the judgment in the case of Union of India and Others. Vs. Satya Prakash and Others., reported in (2006) 4 SCC 550. According to him even if the word "reservation" has been used in this case, what the state has really done is to earmark certain seats or opening a separate channel for the in-service doctors at the cost of not being able to participate either in the all India pool or the open category seats of the state quota. In spite of there being two separate channels it is not a reservation in the sense the word is understood in case of reservation for SC, ST and OBC candidates.

The learned Advocate General appearing for the state appellants in MAT 1245 of 2019 has also assailed the impugned judgment and order on various grounds. He submitted that the schedule for admission to medical courses fixed by the Supreme Court cannot be extended by the High Court. The learned single Judge, therefore, has given liberty to the parties to seek extension of time for getting admission including counselling directly from the Supreme Court, if so advised. From this, the learned Advocate General submitted, it is clear that the learned single judge was conscious that she had no jurisdiction to entertain the writ petition. Relying on the case of Hiralal Patni Vs. Sri Kalinath, reported in AIR 1962 SC 199, he submitted that the competence of a court to try a case goes to the very root of the jurisdiction and where it is lacking it is a case of lack of inherent jurisdiction.

The learned Advocate General further relied on the case of Official Trustee, West Bengal and Others Vs. Sachindranath Chatterjee and Others, reported in AIR 1963 SC 883 for ascertaining the true meaning of the word 'jurisdiction'. The Supreme Court approvingly quoted a full-bench judgment of the Calcutta High Court where it has been observed that jurisdiction means: a) the power to hear, determine and pronounce judgment on the issues before the court, b) the authority which is conferred upon a court by the legislature to hear and determine causes between the parties and to carry the judgments into effect, and c) the power to enquire into the facts to apply the law to pronounce the judgment and to carry it into execution. The judgment further recorded that a judgment pronounced by a court without jurisdiction is void, subject to the well-known exception that when the jurisdiction of a court is challenged the court is competent to determine the question of jurisdiction though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it.

Based on these two judgments, the learned Advocate General submitted that

unless the court has power to execute its order it lacks jurisdiction in entertaining and deciding a lis and in the absence of jurisdiction, judgments passed are rendered void.

As taken in the affidavit-in-opposition filed by the state respondents to the writ petition, the learned Advocate General also submitted that the case of the petitioners is based on a Memo, dated April 18, 2013 which has not been challenged in the writ petition. Relying on the judgment in the case of Uma Sankar Das Vs. State of West Bengal, reported in 1974 Lab.I.C. 514, he submitted that a document, even if a nullity, has to be challenged in a proceeding.

The action taken by the state in preparing two merit lists is the consequence of the memo, dated April 18, 2013. The writ petitioners have challenged the consequential orders but not the basic order from which the consequences follow. This is not permissible as this is a corollary to Section 34 of the Specific Relief Act. The judgment in the case of Amarjeet Singh and Others Vs. Debi Ratan and Others, reported in (2010) 1 SCC 417 was relied on before the learned single Judge for a proposition that challenging the consequential order without challenging the basic order is not permissible. The learned Advocate General made a grievance the learned single Judge did not decide the issue while allowing the writ petition.

The learned Advocate General has emphasized that the Memo, dated April 18, 2013 has recorded that reservation has remained in place. Regulation 9(4) categorically provides for reservation for respective categories which shall be as per the applicable laws prevailing in the state or union territories. Therefore, it recognizes and saves reservations which were in force on the date of coming into effect of the Regulations. Reservation for the in-service candidates falls in the category of horizontal reservation which has been recognized by Regulation 9(4). According to the learned Advocate General the contention that reservation for in-service candidates would result in compromising on the merits is negated by Regulation 9(7) itself. That apart, the select list of the candidates sponsored by the state is based on the merits of the reserved category candidates also.

The learned Advocate General has also criticized the impugned judgment as not one within the meaning of Section 2(9) read with Order 20 Rule 4(2) of the Code of Civil Procedure. He alleges that the judgment does not contain any reason in support of the conclusions reached by the learned single Judge.

The learned Advocate General also relied on the case of Education Promotion Society for India and Another Vs. Union of India and Others, reported in (2019) 7 SCC 38, to which reference has already been made while recording the submissions of Mr. Dhar. In that case the Supreme Court observed that if extension is granted the same would lead to opening a Pandora's Box and the whole purpose for fixing a time schedule would be defeated.

The learned Advocate General also relied on the case of Prof. Yashpal Vs.

Chhattisgarh, reported in (2005) 5 SCC 420, where the words "subject to" as occurring in entry 25 of List III has been interpreted to mean the excluded matters. The persistent stand of the state is that neither the Act nor the Regulations debar it from making any reservation for the in-service candidates.

Mr. Roy, the learned Advocate appearing for the Medical Council of India, submitted that Regulation 9 of the Regulations is a complete code by itself and has to be read as a whole. Relying on *Sudhir N. Vs. State of Kerala*, reported in (2015) 6 SCC 685, he submitted that the admission process must strictly adhere to the norms stipulated therein. The state has no authority in the matter of determining the method of admission where the central legislation and Regulations must prevail. Reservation mentioned in Regulation 9(4) should be as per the Constitutional scheme for the SC/ST and OBC candidates and not for the in-service candidates. Responding to the submission of Mr. Mukherjee he has submitted that the word "from the merit list" occurring in Regulation 9(4) should be interpreted as "as per the merit list". However, his specific stand is that all admissions must be completed by May 31 of the concerned year and, therefore, no admission may be made beyond that date.

A further limb of Mr. Roy's submission is that except the writ petitioners no other open category candidates are before the court.

Interference with the state action may have the effect of setting aside admission of the open category candidates also. Mr. Roy was willing to admit that the hospitals run by the state are covered by Entry 6 of List II of the 7th Schedule, but medical education is not. There is no provision in the Act regarding reservation of seats for the members of the State Health Service to post-graduate medical courses. He has gone that far to submit that the Trainee Reserve Rules in so far as they relate to reservation is ultra vires the Act.

Regulation 9 does not put any embargo upon the service doctors to compete for all India quota. The restriction has been put by the state government in the service condition of the in-service doctors. However, Mr. Roy submits that in case any fresh admission is to be ordered by the court, the students may not be able to maintain their requirement of mandatory attendance as classes have long started.

The University has also filed an appeal being MAT No. 1267 of 2019. The stand and submission of Mr. Roy, the learned Advocate for the University, is almost the same as that of the state appellants. He has also mentioned that the reservation policy which has been continuing since the inception of the University, has not been challenged by the writ petitioners. However, he submits that about 140 seats are still lying vacant which the University could not fill up within the cut-off date i.e. May 31, 2019. He, however, would like to absolve the University of any fault as the state's specific reservation policy for the in-service doctors has been followed by it for allotment of state quota seats.

With reference to the impugned judgment and order, Mr. Roy has disclosed the

real reasons for filing the appeal by the University. He submits that it is impossible for them to prepare and publish a common merit list without the assistance of the state authorities as the University does not have any access to the service record of the in-service candidates nor does it have the list of rural and difficult areas. The Registrar-in-Charge of the University by a communication, dated August 27, 2019 requested the Director of Health Service to supply the incentive marks to be provided to the in-service candidates, but it has not been replied to. In the absence of the particulars of the incentive marks to be provided, it became practically impossible for the University to carry out or comply with the court's order. He relied on a judgment in the case of Rajan Purohit and Others Vs. Rajasthan University of Health Science and Others, reported in (2012) 10 SCC 770 and submitted that the students cannot be blamed for the irregular admissions made by the colleges. In that case, the Supreme Court allowed the admitted students to continue the MBBS course in exercise of the power under Article 142 of the Constitution of India.

Mr. Roy's further submission is that in case the impugned judgment is not set aside, the candidates who have already taken admission during counselling, should not be disturbed or affected. Since the classes have already started, the requisite attendance in terms of the MCI norms cannot be maintained. Any direction for fresh counselling would amount to travelling beyond the schedule provided for counselling in the Regulations since the schedule for the next year's examination has already been issued. If the counselling is conducted afresh and the classes commence, it would be very difficult for the colleges to conduct the classes for two parallel sessions.

Being aggrieved by the direction of the learned single Judge upon the parties to seek extension of time from the Supreme Court, if so advised, the writ petitioners have also filed an appeal being MAT 1333 of 2019. But for this direction, they have defended the judgment of the learned single Judge in all the appeals filed by various authorities and persons.

We have extensively heard the learned Advocates for the respective parties in all these appeals. The bone of contention in all of them appears to be whether the state can pass an order reserving seats for the in-service doctors in derogation of the Regulations. The writ petitioners claimed that the procedure for selection of candidates for the post-graduate courses have been contained in Regulation 9 of the Regulations. A very detailed procedure step by step and stage by stage has been provided in Regulation 9. According to them, an order of reservation flouts Regulation 9(4) which inter alia provides for reservation of seats in medical colleges/institutions for respective categories as per the applicable laws prevailing in states/union territories. An all India merit list as well as a state-wise merit list of the eligible candidates shall have to be prepared on the basis of the marks obtained in the NEET and the candidates shall be admitted to the post-graduate courses from the said merit lists only.

Regulation 9(4) has a proviso which says that in determining the merit of the

candidates who are in service of government/public authority weightage in the marks will 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 the NEET. The remote and/or difficult areas or rural areas shall be as notified by the state government/competent authority from time to time.

Based on this provision the writ petitioners have argued that admission to post-graduate courses shall be only from the all India merit list or the state-wise merit list. There is no scope for admitting any candidate to the post-graduate degree course through any method or any channel other than that mentioned in Regulation 9(4) and the state government by reserving 40% of the seats of the state quota from the in-service candidates has not only violated the mandatory requirement of Regulation 9(4) but also acted arbitrarily and in violation of Article 14 of the Constitution of India.

We have already noted how Mr. Mukherjee sought to justify the impugned state decision of reservation for the in-service candidates. He finds a laudable purpose behind the decision, i.e.

uplifting the standard of the post-graduate medical qualification.

Such submission in all fitness of things could have been made by the state appellants who were in the best situation to apprise the court why the order for reservation had been issued by them. A group of sponsored candidates who have been admitted to the post graduate courses availing themselves of the reservation, were not supposed to be in the know of the reasons and purpose behind the policy of reservation.

We had directed the state to produce the records in connection with the Memo, dated April 18, 2013 reserving 40% of the state quota seats for the in-service doctors. It appears from the records, as produced before us, that the Controller of the Examinations of the University had asked the Joint Secretary, Ministry of Health and Family Welfare to pass an order of reservation so that the booklet for the ensuing examination for that year could contain the relevant provision for reservation. In response to the same, some officials of the state in a note expressed the requirement of a reservation for the in-service candidates for admission to the post-graduate courses. The reason mentioned in the said note was the dearth of qualified post-graduate doctors in the state hospitals. Thus, upliftment of standards as the *raison d'etre* for issuing an order of reservation does neither appear from the order itself nor from the records leading to the order providing for reservation.

That apart, Mr. Mukherjee himself having admitted that but for this reservation most of the in-service doctors might not have found a berth in the post-graduate courses as they had secured lower ranks in the merit list, it cannot be argued that by making provisions for admission for those candidates the state was really trying to upgrade the standard of post-graduate medical education. It is not

understood how by taking candidates securing lower marks the standard of education could either be maintained or uplifted. If merit is the first criteria for judging the suitability of a candidate for a higher medical degree, by admitting students of lower ranks standard could not be expected to ungraded. In fact, it is bound to lead to just the reserve end.

Mr. Mukherjee tried to justify the authority of the state to make provision for the in-service doctors with reference to Entry 25 of List III and Entry 6 of List II of the 7th Schedule of the Constitution of India. Entry 25 of List III deals with the subjects of education, including technical education, medical education and universities subject to the provisions of Entries 63, 64, 65 and 66 of List I, vocational and technical training of labour. What is to be noted is that Entry 25 does not mention "co-ordination and determination of standards" which have been specifically mentioned in Entry 66 of List I and the laws to be made under Entry 25 are subject to the provisions of Entry 66 of that List. It is a settled principle of law, as mentioned in *Osmania University Teachers' Association Vs. State of Andhra Pradesh and Another*, reported in AIR 1987 SC 2034 that any Act made by the state legislature under Entry 25 of List III shall be invalid if parliament has passed a law on the same subject in exercise of the powers conferred by the Entry 63 to 66 of List I.

There cannot be any doubt that the MCI Act was passed in exercise of the powers conferred under Entry 66 of List I. For laying down the standard of education in institutions mentioned in Entry 66 of List I parliament has the exclusive authority to make laws. State does not have any authority to decide or determine the standard of education in such institutions, particularly, once parliament has made a legislation in the specific field. In *Gujarat University and Another Vs. Shri Krishna Ranganath Mudholkar and Others*, reported in AIR 1963 SC 703, the Supreme Court observed that items 63 to 66 of List I are carved out of the subject of education and in respect of these items the powers to legislate is vested exclusively in parliament. Use of the expression "subject to" clearly indicates that legislation in respect of excluded matters cannot be undertaken by the state legislatures. If a subject of legislation is covered by items 63 to 66 even if it falls within the larger field of education including Universities, power to legislate on that subject must lie with parliament. In *Ajay Kumar Vs. State of Bihar*, reported in (1994) 4 SCC 401, it has been reiterated by Supreme Court that by virtue of entry 66 of the List I which overrides entry 25 of List III the states are denuded of all and every power to determine and co-ordinate the standards of higher education which must necessarily take in regulating admission to these courses.

Thus, the repeated emphasis that the state action of reservation is aimed at improving the standard of medical education, apart from being not borne by the records, is clearly beyond the competence of the state legislature. Again in *Preeti Srivastava Vs. State of M.P.*, reported in (1999) 7 SCC 120, the Supreme Court observed that the state cannot make rules of regulations under this entry in

conflict with the rules and regulations made under entry 66 of List I.

Since entry 6 of List II inter alia mentions hospitals and public health, Mr. Mukherjee made elaborate submission that that entry confers right upon the state to take appropriate measures for uplifting the standard of medical education. One thing, however, cannot but be noted that Entry 6 of List II does not deal with the medical education, far less standard of such education. The fields of making laws covered by this entry are public health and sanitation; hospitals and dispensaries.

The field of legislation covered under Entry 6 of List II has nothing to do with and is completely different from medical education. Hospitals and public health are very different conceptually and factually from medical education or maintenance of its standards. By the exercise of the power to make laws for hospitals or public health or sanitation or dispensaries a state is plainly not competent to make laws for "co-ordination and determination of standards" of medical education. Running hospitals and setting standard for medical education are two different exercises. Equally it is difficult to accept that public health is equal to the health of the public. Public health has a very definite connotation signifying something very different from what the word 'health' conjures up. In any case, none of the items mentioned in Entry 6 of List II covers medical education in any way.

It appears and such is the grievance of all appellants, except the writ petitioners, that the learned single Judge has passed the order impugned largely relying on the judgment in the case of State of Uttar Pradesh and Others Vs. Dinesh Singh Chouhan (Supra). In that case a three-judge bench of the Supreme Court has inter alia held that Regulation 9 recognizes the principle of giving weightage to in-service candidates while determining their merits. That is a rational legitimate basis to encourage the medical graduates/doctors to offer their service and expertise in remote or difficult areas of the state for some time. However, the Supreme Court specifically observed that Regulation 9 of the Regulations does not permit preparation of two merit lists. It prescribes the basis for determining the eligibilities of the candidates including the method to be adopted for determining the inter se merit on the basis of one merit list of the candidate appearing in the same NEET including by giving commensurate weightage of marks to the in-service candidates. Proviso to Regulation 9(4) prescribes the measure for giving incentive marks to in-service candidates who have worked in notified remote and difficult areas in that state. The Supreme Court described this as a qualitative factor for determining their merits.

The Supreme Court observed that it is well-settled that Regulation 9 is a self-contained code regarding the procedure to be followed for admission to the 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 Entry 66 of List 1 of the 7th Schedule of the Constitution of India. The

procedure for selection of candidates for the post graduate degree courses is one such area on which the Central Legislation and Regulation must prevail. It has been observed that Regulation 9 is a composite provision prescribing procedure for selection of candidates for both the post-graduate degree and diploma courses. Interpreting Regulation 9(4) the Supreme Court observed that 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. The proviso to Regulation 9(4) provides for an incentive at the rate of 10% of marks for each year of service in specified remote or difficult area of the state upto the maximum of 30% of the marks obtained in NEET. It is amply clear that it does not envisage reservation for in-service candidates in respect of the post-graduate degree courses.

It has been specifically held in the abovementioned case that the central enactment and the Regulations framed thereunder do not provide for reservation for in-service candidates in respect of post-graduate degree courses. Negating the contention that as there was no express provision prohibiting reservation to in-service candidates in respect of admission to post-graduate degree courses such reservation by the state government is not impermissible in law the Supreme Court held that the argument did not commend to Their Lordships. There is nothing in these Regulations to even remotely indicate that a separate channel for admission to in-service candidates must be provided at least in respect of post graduate degree courses. The Supreme Court draws the distinction between the degree and diploma courses. For diploma courses 50% of the seats are earmarked for in-service candidates. If the Regulation intended a similar separate channel for in-service candidates even for the post-graduate degree courses that position would have been made clear in Regulation 9 itself. In the absence thereof it must be presumed that a separate channel for in-service candidates is not permissible for admission to post-graduate degree courses. The state government has no authority to issue a government order to the contrary.

There has been a persistent effort by the learned advocates for all the appellants, except Mr. Mitra, the learned Senior counsel for the writ petitioners/appellants, to establish that the observations and findings in State of Uttar Pradesh and Others (supra) cannot be said to have reached any finality as this judgment has been referred to the larger bench for not considering the earlier larger bench judgments. Since this reference is pending, it has been submitted, this court may not treat the observations made in the said judgment as binding.

Mr. Mukherjee heavily relied on the judgment in the case of Kumari Chitra Ghosh and Anr. -vs.- Union of India and Ors., reported in (1969) 2 SCC 228. The Supreme Court observed that in order to pass the test of permissible classification two conditions must be fulfilled; viz. classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and that the differentia must have a

rational relation to the object sought to be achieved. The Supreme Court further observed that the government cannot be denied the right to decide from what sources the admission will be made. That essentially is a question of policy and depends inter alia on and overall assessment and survey of the requirements of residence of particular territories and other category of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified it is not for the courts to interfere with the matter and the method of making the classification. The main purpose of admission to a medical collage is to impart education in the theory and practice of medicine. The sources from which students have to be drawn are primarily determined by the authorities who maintain and run the institution. Since the whole object of the selection for admission is to secure the best possible material it can be achieved by making proper rules relating to the matter of selection. With reference to the facts of that particular case, the Supreme Court has further held that the appellants did not have any right to challenge the nominations made by the central government. They did not compete for the reserved seats and had no locus standi in the matter of nomination of such seats.

Mr. Mukherjee further relied on the judgment in the case of Modern Dental college and Research centre and Ors. -vs.- State of Madhya Pradesh and Ors., reported in (2016) 7 SCC 353. The Supreme Court has held that Entry 66 in List I is a specific Entry having a very specific and limited scope. It deals with the co-ordination and determination of standards in institutions of higher education or research as well as scientific and technical Institutions. Thus, when it comes to prescribing the standards for such institutions for higher learning exclusive domain is given to the Union. However, that did not include the conduct of examination, or prescribing fee etc. In fact, such co-ordination and determination of standards, so far as the medical education is concerned, is achieved by Parliament by legislating in the form of Medical Council of India Act and by creating the statutory body like Medical Council of India. The functions that are assigned to Council include within its sweep determination of standard in a medical institution as well as co-ordination of standards and that of the educational institutions. When it comes to regulating "education" which includes even medical education as well as universities that is prescribed in List-III Entry 25 which gives concurrent powers to both Union of India as well as the states. When two entries relating to education co-exist they have to be read harmoniously. It would become manifest that when it comes to co-ordination and laying down of standards of higher education or research and scientific and technical Institution power rests with the Union of India to the exclusion of the state legislatures. In respect of other facets of education the state legislatures are given power by virtue of entry 25 of List III. The field covered by List-III, entry 25 is wide enough and is circumscribed to the limited extent of its being subject to entries 63,64,65 and 66 of List-I.

The Supreme Court in that judgment specifically mentioned why adoption and setting up of minimum standard of education was left to Parliament. The

objective of prescribing minimum standards is to provide a bench mark of the calibre and quality of education as being imparted by various educational institutions in the whole country. Relating the vast diversity of the nation where levels of education fluctuated from lack of even basic primary education to institutions of high excellence it was thought desirable to determine and prescribe the basic minimum standard of education at various levels particularly at the level of research institutions, higher education and technical education institutions. As such while balancing the needs of the state to impart education as per the needs and requirements of local and regional levels it was essential to lay down a uniform minimum standard for the nation. That is why the Constitution-makers provided for List-I entry 66 with the objective of maintaining uniform standards of education in fields of research, higher education and technical education.

Relying on this judgment Mr. Mukherjee argued that no doubt List-III Entry 25 is subject to List I Entry 66 but it is not possible to exclude the entire gamut of admissions from List III entry 25 which, however, is subject to the central law referable to Entry 25.

Mr. Mukherjee particularly relied on the portion of the judgment delivered by Hon'ble Justice R. Bhanumati. It has been observed by the Hon'ble Judge that entries 65 and 66 of List-I, giving the Union of India the power to ensure that standards of research etc. are not lowered at the hands of the particular state or states to the extent of national progress, the power of the state legislature must be so exercised as not to directly encroach upon the power of the Union of India under entry 66 of List-I.

The Hon'ble Judge has further given the legislative history of entry 66 of List I. A part of the constituent assembly debate in this connection has been referred to in the judgment. The Hon'ble Judge observed that while introducing List-I entry 66 Dr. B.R. Ambedkar proposed nothing more than empowering the Union of India to set mere standard for higher education and to co-ordinate between the institutions. He clarified the limited scope of entry 66 of List-I (as in the present form) with reference to the disparities in standard in certain classes of institutions in the matter of imparting higher education. Since various universities fixed different yardsticks for passing an examination it would be quite a chaotic condition and in such circumstances prescribing mere qualification with varied standards would be meaningless.

After recording the concern of the constitution-makers while introducing entry 66 of List-I, the Hon'ble Judge observed that in the federal structure of India it is for the Union to co-ordinate between the states to cause them to work in the field of higher education in their respective states. Entry 25 of List III is available both to the centre and states. But the power of the state is subject to the provisions of entries 63, 64, 65 and 66 of List-I. While the state is competent to legislate on the education including medical education it would be as per the standards set by the Union of India.

The Hon'ble Judge specifically observed that the scope of Entry 66 of List I must be construed as limited to the actual sense of "determining the standards of higher education" and not laying down the admission process. The state is not denuded of its power to legislate in respect of a matter pertaining to the admission process in universities imparting higher education.

Reliance by the learned single Judge in the impugned judgment on State of Uttar Pradesh and Others (Supra) has been criticized by the learned Advocate General, Mr. Mukherjee and Mr. Dhar. According to the learned Advocate General, the said judgment is inapplicable to the facts of the present case as in the said decision there has been no adjudication as to the rights of the open category candidates vis-à-vis in-service candidates arising out of reservation for in-service candidates. He also wants to distinguish that decision from the facts of the present one with reference to the date of the government order. In the case of the reported decision, the government orders under challenge were issued after the Regulation came into effect whereas reservation in the present case was before the Regulations had been promulgated. That apart, the specific government orders were challenged in the reported decision but here the writ petitioners have not thrown any challenge to the order, dated April 18, 2013.

The learned Advocate General further submitted that in State of Uttar Pradesh and Others, (Supra) an interim order was passed on May 12, 2016 directing the State Government to revise and redraw the merit list and grant admission to the suitable candidates. At the final hearing the State of Uttar Pradesh wanted to come out of the concession which the Supreme Court did not approve and in view of that factual position the Supreme Court rendered its decision.

Mr. Dutta wants to distinguish the case of State of Uttar Pradesh and Others (Supra) on the ground that the question before the Supreme Court was very different from the one involved in the present one. The question to be decided by the Supreme Court was whether the in-service candidates without rural service could be equated with in-service candidates having rendered rural service. But in the present case, there is no issue of comparison of the two categories of in-service candidates.

It is true that the decision in the case of State of Uttar Pradesh and Others (Supra) has been referred to a larger bench. This, however, does not mean that the judgment has lost all its force or the ratio decided therein is no longer binding by reason of its being referred to larger bench. It has not lost its force as a precedent. A judgment remains valid and binding till it is reversed or superseded by a larger bench judgment. Mr. Mukherjee submitted that the judgment now binds the parties only and not others. Reference to a larger bench does not rob a judgment of its precedential value.

That apart, while considering the interlocutory application after the reference a five-judge bench of the Supreme Court in Tamil Nadu Medical Officers' Association and Others Vs. Union of India and Others, reported in 2018 SCC

OnLine SC 432, after considering the various judgments including Modern Dental College and Research Centre (Supra) observed that State of Uttar Pradesh and Others (Supra) has construed the amended provisions of Regulation 9 which has been held to be a self-contained code regarding the procedure to be followed for admissions to medical courses. The full-bench of the Supreme Court recorded the finding in the case of State of Uttar Pradesh and Others (Supra) that the state has no authority to enact any law, much less any executive instruction, 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 7, List I Entry 66 of the Constitution of India.

Their Lordships of the Supreme Court observed that the view taken in State of Uttar Pradesh and Others (Supra) is consistent with the principles reaffirmed by the Constitution Bench in Modern Dental College and Research Centre (Supra). The fundamental basis of the decision is in accord with the principles laid down by the Constitution Bench.

About the interpretation put upon Regulation 9(4) the State of Uttar Pradesh and Others (Supra) held that the reservations referred to in the opening sentence are obviously constitutional reservations for the Scheduled Casts and Scheduled Tribes and the socially and educationally backward classes of citizens and not those for in-service candidates. Proviso to Regulation 9(4) does not contemplate a reservation for them in post-graduate courses; but provides for grant of incentive marks. After elaborately quoting from the judgment in the case of State of Uttar Pradesh and Others (Supra) and after noting that in arriving at the conclusion the court had taken due note of the decisions of the Constitution Bench in various cases, the full bench of the Supreme Court observed:

".....the decision in Denish Singh Chouhan 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..... The grant of any interim relief at this 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 statutes."

Mr. Dhar tried to avoid the effect of that order by reason of its being an interim in nature and not a final decision. He relied on a judgment in the case of State of Assam Vs. Barak Upatyaka DU Karmachari Sanstha, reported in (2009) 5 SCC 694, for a proposition that an interim order which does not finally and conclusively decide an issue cannot be a precedent. Any reasons assigned in support of such non-final interim order containing prima facie findings are only tentative. The judgment further observes that any interim directions issued on the basis of such prima facie findings are temporary arrangements to preserve

the status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing.

This judgment hardly applies to the order of the full bench in Tamil Nadu Medical Officers' Association and Others (Supra). While considering the nature of interim order the Supreme Court in the State of Assam (Supra) observed that the interim directions involved an extraordinary situation of human rights violation resulting in starvation deaths and suicide by reason of non-payment of salaries to the employees of a large number of public sector undertakings for special years.

The interim orders were passed in State of Assam (Supra) to make an interim arrangement to save the matter from being infructuous. In the present case it cannot be said that the purpose of the order passed by the full bench on interlocutory application was to make a temporary arrangement. It is not a case that the court had allowed in-service doctors to be admitted to post graduate medical courses purely on a temporary basis by way of an interim arrangement. On the contrary, a separate source of entry or reservation for the in-service candidates had been specifically denied by the Supreme Court even by way of an interim relief or an interim arrangement. After such elaborate observations, even though passed in connection with an interlocutory application, the reasoning given by the full bench of the Supreme Court for not granting any interim relief cannot only be not ignored but has to be taken to be the view expressed by the full bench of the Supreme Court till the reference is a finally disposed of.

A persistent point has been taken by the appellants, except the writ petitioners/appellants in MAT 1333 of 2019, that the writ petition should not have been entertained by the learned single Judge on the ground of delay, acquiescence and suppression of material facts. The first counselling had taken place at end-March 2019 and the petitioners had filed the writ petition on April 23, 2019. Thus, there has been some delay in seeking the relief after the first counselling had taken place.

We have considered the submission and do not find much merit in it. Mr. Mitra has drawn our attention to the representation made by the writ petitioners to the Director of Medical Education as early as on March 5, 2019 raising their protest to the policy of reservation for the in-service candidates. The petitioners drew his attention to Regulation 9(4) which specifically mentions that reservation of seats in medical colleges/institutions for respective categories shall be as per the applicable laws prevailing in the states and the union territories. Requirement of complying with the Regulation 9(4) was variously emphasized in the representation.

The petitioners categorically mentioned that apart from awarding incentive marks to eligible in-service candidates no other source of entry by way of an en bloc reservation was permissible which had the effect of violating the Regulations 2000. Even the judgment in the case of State of Uttar Pradesh and Others

(Supra) and Tamil Nadu Medical Officers' Association and Others (Supra) were referred to. The writ petitioners requested the Director of Medical Education to conduct the counselling process strictly in compliance with the legal standards set forth in the Regulations and interpreted by the Supreme Court so as to benefit all sections of candidates in an objective and impartial way.

Since this letter was not replied, the writ petitioners addressed another letter to the Director of Medical Education on April 16, 2019 ventilating their grievances and requested him to take appropriate action.

Thus, when the petitioners approached the authorities long before the first counselling it was only expected that the Director of Medical Education being the highest authority in medical education in the state would look into the matter or at least inform the petitioners of the stand of the government. Despite being made aware of the various judgments of the Supreme Court laying down impermissibility of introducing a separate source of entry into the post graduate degree courses the state respondents remained unmoved and proceeded steadfast. If they had taken any positive action perhaps the entire exercise might not be necessary. The letter, dated March 5, 2019 was specific and unambiguous about what the petitioners were asking the respondents to do. After this, the respondents cannot really come and allege of any delayed action on the part of the writ petitioners in espousing their right.

It is true that the petitioners had appeared at the first round of counselling. That, however, does not operate as an estoppel against them or disentitles them from challenging the reservation for the in-service candidates and its consequences.

As a matter of fact, the petitioners had hardly any option left than to participate in the first counselling as the first letter, written sufficiently ahead of the first counselling, went un-responded. If they had not participated in the first counselling their entire career might have been jeopardized. Silence from the Director of Medical Education or the state respondents left them without any alternative and compelled them to participate in the counseling process. But the participation was not a meek acceptance of the reservation made by the state respondents. Their participation was definitely with and under protest. The stand of the writ petitioners was made loud and clear to the respondents as early as on March 5, 2019. If a candidate in an examination process appears either without prejudice or under protest relief to him cannot be denied either on the ground of acquiescence or estoppel. That apart, we are of the considered view that when the constitutionality of a provision or an order is under challenge the respondents should not raise the issue of delay unless it affects the merits of the case.

Mr. Mitra made a grievance that far from sleeping over their rights the writ petitioners observed that the state had suddenly started expediting the process. On the very next date after the second counselling two separate lists were published and such publication was the immediate cause of action for approaching the Court.

Mr. Mitra submitted, and we find sufficient substance in it, that Regulation 9(4) does not permit a separate channel of entry into post graduate medical degree courses. A plain reading of it makes it clear that candidates to post graduate degree courses are to be admitted from either of the two merit lists viz. an all India merit list or the state-wise merit list. There is no provision for publishing a third merit list based on reservation for the in-service candidates. That being so, the order making provision for reservation of 40% of the seats for in-service candidates is contrary to the Regulation. This has been amply clarified by the Supreme Court in *State of Uttar Pradesh and Others (Supra)* that the state has no authority to enact any law that may undermine the procedure for admission enunciated by the central legislation and the Regulations framed thereunder. Analyzing various sub-Regulations of Regulation 9, the Supreme Court observed that the reservation referred to in the opening part of Regulation 9(4) is obviously with reference to reservation as per the Constitutional scheme for the SC/ST and OBC candidates and not for the in-service candidates or medical officers in service.

This completely answers the issue sought to be raised by the learned Advocate General that the first sentence of Regulation 9(4) enables the state to provide for reservation for the in-service doctors. The effort to distinguish *State of Uttar Pradesh and Others (Supra)* from the facts of the present one on the ground that the reservation in that case was post-Regulations 2000 and in the present case it has been continuing from before has hardly any material bearing. It is practically a distinction without a difference. Even if any reservation has been continuing from before the same had no force of law to continue after promulgation of Regulation 9. Any reservation or devising a method of admission or channel of entry contrary to Regulation 9, irrespective of whether it was continuing from before or introduced after the Regulations, is bad in law to the extent it violates the mandatory and non-relaxable provision of Regulation 9. The fact that the reservation was first introduced in the year 1999, as submitted both by Mr. Mukherjee and learned Advocate General, did not confer on it either any elevated status or made it outside the purview of the Regulations 2000. As a matter of fact, if the stands of the respondents to the writ petition are correct that the practice of reservation has been continuing from before the promulgation of the Regulations, the same was required to be considered to have been impliedly set aside by the Regulations 2000.

That takes us to the consideration of why at all the state continued with the reservation for in-service candidates even after the Regulation 9 was promulgated. A far more pertinent query in this connection is why at all the state did not strike down on its own the provision for reservation after the pronouncement of *State of Uttar Pradesh and Others (Supra)*. The answer given by the learned Advocate General that the state continued with it as Regulation 9(4) contained provision for making reservation is hardly a satisfactory reply, particularly, after the specific clarification made by the Supreme Court in *State of Uttar Pradesh and Others (Supra)* that the reservation stipulated in Regulation

9(4) is restricted only two constitutional reservations and is not meant for the in-service doctors.

Mr. Mukherjee relied on the Note after Rule 3 of the Rules of 2015 referred to earlier. The Note says that the number of seats available for the different courses run by the University and other Universities within the state for the officers of the West Bengal Health Service, West Bengal Medical Education Service and the West Bengal Public Health-cum-Administrative Service shall be specified from time to time by the Department of Health and Family Welfare, Government of West Bengal. Based on this Mr. Mukherjee submitted that there is a legislative recognition in favour of making reservation for the in-service candidates for post graduate courses. Mr. Mukherjee further argued that such legislation by the state cannot be nullified by a Regulation made under the Act. In other words, the Regulations notwithstanding the state still continues to have the power to reserve seats for the in-service candidates.

Mr. Mukherjee relied on *Tara Singh and Ors. Vs.- State of Rajasthan and Ors.*, reported in (1975) 4 SCC 86 for a proposition that a 'Note' is provided in the Rules in exercise of legislative power of the rule making authority. The real purpose of the note is that when rules are silent the Note will fill up the gaps. With the reference to the facts of that case the Supreme Court observed that the Note to Rule 244 of the Rajasthan State service Rules is a part of the Rules because they are for guidance of the authorities. They are not inconsistent with the Rules but are intended to fill up the gaps where the Rules are silent.

Relying on this judgment Mr. Mukherjee sought to build up his submissions that therefore the notes under Rule 3 of the Trainee Reserve Rules should be treated as the part of the Rules and consequently have a statutory effect. In this connection Mr. Mukherjee further relied on a judgment and order dated September 29, 2011 in *Medical Council of India -vs.- The State of West Bengal and Ors.* reported in (MAT 613 of 2010) where a Division Bench of this Court relied on *Government of AP and Ors. Vs.- P. Lakxmi Devi (Smt.)*, reported in (2008) 4 SCC 720. Where the Supreme Court referred to Kelsen's theory of hierarchy of legal norms. In every country there is a hierarchy of legal norms, headed by what he called as "grundnorm", i.e. basic norm. If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in the lower layer the former will prevail. The Supreme Court observed that the Constitution of India is the "grundnorm" for our country. Below it are the statutory laws made by Parliament or the legislatures of the state and still below them are delegated legislations which may be in the form of rules made under the statute, regulations made under the statute etc. Based on that the Division bench of this court observed that Regulation belongs to the lowest layer of the central field of legislation and, therefore, the jurisdiction of the state government under the Bengal Medical Act, 1914 cannot be declared to have been overridden by the MCI Regulations. Therefore, the plea of repugnancy does not arise.

This argument of the appellants does not appear to be entirely in conformity with

the principle of law laid down by Supreme Court. In *Medical Council of India vs. State of Karnataka and Ors.*, reported in (1998) 6 SCC 131 the legal validity of the Medical Council Regulations came up for consideration. The Supreme Court observed that the Act is relatable to Entry 66 of List I. It prevails over any State enactment to the extent the state enactment is repugnant to the provision of the Act even though the state Act may be relatable to Entries 25 or 26 of the List-III. The Regulations framed under Section 33 of the Medical Council of India Act, with the previous sanction of the Central Government are statutory in nature. These Regulations are framed to carry out the various purposes mentioned in Section 33. If a Regulation follows the purposes referred to under Section 33 of the Act it will have a mandatory force.

Again in the case of *Dr. Preeti Srivastava and Anr. Vs. State of M.P and Ors.*, reported in (1999) 7 SCC 120, the Supreme Court observed that under the Indian Medical Council Act the Medical Council of India is empowered to prescribe standards of post-graduate medical education. In exercise of its powers under Section 20 read with Section 33 of the Act the Medical Council has framed Regulations which govern post-graduate Medical education. These Regulations, therefore, are binding and states cannot in exercise of power under Entry 25 of List III make rules and regulations which are in conflict with or adversely impinge upon the regulations framed by the Medical Council of India for Post-graduate medical Education. Since, the standard laid down in exercise of the power conferred under Entry 66 of List-I the exercise of that power is exclusively within the domain of the Union government any power exercised by the State in the area of education under Entry 25, of List-III will be subject to any existing relevant provisions made in that connection by the Union government, subject to Article 254 of the Constitution of India.

In view of the very specific observations of the Supreme Court the view of the High Court with regard to the nature and status of the Regulations framed under the Act court be treated to be binding. There is hardly any scope for entertaining any reasonable doubt that the regulations not being statutory rules do not have any force of law. From this it also cannot be argued that the Regulations, 2000 cannot take away the state's power to make reservation for the in-service doctors.

Moreover, in its proper connotation and in view for the purpose for which they are framed there is no scope to consider the Regulations framed under Act as occupying an inferior position than that of a statutory rule. Even in the case of *Government of Andhra Pradesh and Ors. Vs. P. Laxmi Devi (Smt.)* (supra) the High Court placed both the statutory rules and statutory regulations in the same category in the hierarchy of the laws applicable to India. The importance of Regulations framed under an Act cannot be overstated. In the case of *Chief Inspector of Mines vs. K.C.Thapper*, reported in AIR 1961 SC 838, the Supreme Court observed that without proper regulation is statute may often be worse than useless. The importance attached to Regulations can be appreciated from an

observation made in *Wicks vs. Director of Public Instructions*, reported in [1947] 1 All. ER 205 where the Court of Appeal observed that when an Act confers an authority to make regulations a regulation which is validly made under the Act and which is intra vires the regulation making power, should be regarded as though it were itself an enactment.

Any misgiving about the relative status of a regulation has been set at rest more than a century ago by the King's Bench division in the case of *Willingale vs. Norris*, reported in [1909] 1 KB 57 where it was observed that to break the regulations made under the authority of a statute is to break the statute itself.

Mr. Mukherjee also tried to justify the act of reservation from a social stand point and in terms of the urgent need of the society. It has been repeatedly emphasised by Mr. Mukherjee that the state is in urgent need of doctors and unless there are qualified doctors in the state-run-hospitals the purpose of reaching medical service to the public in general will never be achieved. The State has an obligation and the citizen has a corresponding right to make sure that the benefits of health service reaches to the largest section of the population which is the basic purpose behind running a state hospital. In this connection he relied on *Association of Medical Super Speciality Aspirants and Residence & ors. Vs. Union of India & Ors.* (Writ petition (Civil) No. 376 of 2018). The Supreme Court observed that Article 21 of the Constitution of India emphasises an obligation on the state to safeguard the right to life of every person. The government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. In a welfare state it is the obligation of the state to ensure the creation and sustaining of condition congenial to good health. The Supreme Court referred to Article 47 of the Constitution of India which imposes on the State an obligation to improve public health.

In the said judgment the Supreme Court further observed that it is for the state to secure health to its citizen as its primary duty. The government is discharging this obligation by opening government hospitals, but in order to make it meaningful it has to be within the reach of its people. Government has a constitutional obligation to provide health facilities to the people. The right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest with sanction and validity which may endure for years to come. In that judgment the Supreme Court reiterated the well known principle that right to life includes the right to live with human dignity and all that goes along with it. With reference to the subject matter of dispute in that case, i.e., the validity of the compulsory bonds to be executed for admission to post-graduate medical courses and super specialist courses, the Supreme Court approved the stand of the state of West Bengal in view of the positive obligation of the state to uphold the dignity of the larger section of the society to protect the rights conferred on them by Article 21 of the Constitution of India. The immediate need of the deprived

sections of the society to have proper health care was the reason behind the policy decision of the Government.

This judgment has hardly any application to the facts of the present case or even to the case of the appellants that reservation for in-service candidates would ameliorate the dearth of doctors in the health service. The judgment in the case of Association of Medical Super Speciality Aspirants and Residence & ors. Vs. Union of India & Ors. (supra) was delivered in the context of a notification issued by the government of West Bengal by which every post-graduate trainee was directed to execute an indemnity bond to serve the state government for a period of three years after successful completion of their respective degree courses and for a period of two years after their successful completion of diploma courses. This was done obviously to ensure that the successful specialists after completion of their courses serve the state for a certain length of period during which their service may be utilised by the state in further fulfilment of state's primary obligation of taking meaningful steps in the health care system.

But, by making provisions for reservation for the in-service doctors in the state quota the same social objective is not likely to be achieved. In the reported judgment the government tried to devise the method so that the qualified doctors are compelled to serve the state-run-hospitals for a certain number of years. But in the making of reservation the state is trying to ensure admission of such doctors in their employment. But for the reservation most of these doctors might not have come within the zone of consideration for admission to a post-graduate degree course.

The issue has to be examined from a far more cardinal point of view about the permissibility or validity of the system of reservation. We have already noted that the Supreme Court has held the reservation in favour of in-service doctors to be unconstitutional and the said judgment, the large Bench of the Supreme Court has observed, still holds the field.

Even that apart the constitutional validity of making a reservation for admission to a course of a higher medical degree has repeatedly come under the judicial scanner. Reference may be made to AIIMS Students' Union v. AIIMS & Ors., (2002) 1 SCC 428 where the Supreme Court, apart from laying down the impermissibility of reservation in general, except where it is mandated by the Constitution of India, drew a distinction between the reservation at primary or lowest level and at the higher level. The Supreme Court observed that reservation is guided by Constitution for ensuring allotment of a privilege or quota to or conferral of state largesse on, a defined class or category of limited persons dispensing with the need of competition with another defined class of persons or remaining persons. Beneficiary of reservation is necessarily a minor or similar group of persons which deservedly stands in need of protection because of various factors. Persons consisting in reserved category are found to be an underprivileged class who cannot be treated on a par with a large and more preiviladged class of persons and shall be denied social justice equality unless

protected and encouraged. Reservation is protective discrimination, observed the Supreme Court.

In the above judgment it has been further held that when protective discrimination for promotion of equalisation is pleaded the burden is on the party who seeks to justify the ex facie deviation of equality. The basic rule is equality of opportunity for every person in the country. Candidates who get more marks than others are entitled to preference for admission. Merit must be the test when choosing the best. The Supreme Court further observed that this proposition has greater importance for the higher levels of education like post-graduate courses. Reservation, as an exception, may be justified subject to discharging the requirement of proving justification in favour of the class which must be educationally handicapped.

The Supreme Court while striking down the reservation of seats for their own candidates for the post-graduate courses came down very heavily upon the concept of such reservation It observed:

"reservation unless protected by the Constitution itself, as given to us by the founding fathers and as adopted by the people of India, is sub-version of fraternity, unity and integrity and the dignity of the individual secured by the Preamble to the Constitution. While dealing with the directive principles of state policy, Article 46 is taken note of often by overlooking Articles 41 and 47. Article 41 obliges the State inter alia to make effective provision for securing the right to work and right to education. Any reservation in favour of one, to the extent of reservation is an inroad on the right of others to work and to learn....."

Public health can be ensured by having the best doctors, specialists and super specialists. Under graduate level is a primary or basic level of education in medical sciences wherein reservation can be understood as the fulfilment of societal obligation of the state towards the work segments of the society. Beyond this, a reservation is a refrain or diversion from the performance of primary duty of the state. Pushing the protection of reservation beyond the primary level betrays the big wigs' desire to keep the crippled dripped forever.

Mr. Mukherjee laid great emphasis on the judgment in Kumari Chitra Ghosh (supra) where the appellant challenged the power of the central government to make nominations in respect of the seats which has been reserved for certain categories of persons belonged to different classes and territories. The Supreme Court found that the classification had been based on intelligible differentia which distinguished them from the group to which the appellants belonging and consequently the appeal was dismissed.

But this judgment in Kumari Chitra Ghosh (supra) has been distinguished by the Supreme Court in the case of AIIMS students' Union (supra). The Supreme Court observed that in Kumari Chitra Ghosh (supra) the test laid down for determining the validity of sources of admission is that the sources were properly classified where on territorial, geographical or other reasonable basis and must have

rational nexus with the object of imparting a particular education and effective selection for the purpose. In laying down the sources of entry there is no question of any preferential treatment being accorded to any particular category or class of persons desirous of receiving medical education over the other.

But in this case the basis of reservation is very different. It has not been done on geographical or territorial basis, but just to confer benefits to the in-service doctors. Again, the reservation made by the state government cannot also be said to be constitutionally protected as the in-service doctors as a class do not belong to the weaker section of the society, though some of them may belong to reserved categories who are otherwise entitled to reservation in terms of the Constitutional scheme.

Even otherwise a bare reading of Regulation 9 as a whole makes it clear that it was never the intention of the framers of the Regulation to reserve any seat for the in-service doctors. This will be clear from a comparative reading of Regulation 9(4) and Regulation 9(8). Regulation 9(8) says that 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 and/or rural areas. Regulation 9(4) on the other hand entitles an in-service candidate of government/public authorities to weightage in the marks 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 NEET.

Thus, for those in-service doctors intending to prosecute post graduate diploma courses the Regulation has kept a provision for reservation of 50% seats. A well-settled principle of law has been expressed in a legal maxim, i.e. *Expressio Unius Est Exclusio Alterius* which means that express mentions of one thing implies the exclusion of another. This maxim is based on absolute logic which has been recognized as one of the fundamental principle for construction of an Act of the legislature. To the facts of the present case the maxim may be profitably applied as Regulation 9(8) makes an express provision for reservation of seats for the in-service doctors for post graduate diploma courses without making any similar provision for those intending to pursue a post graduate degree course. It clearly suggest that the framers of the Regulations did not want the reservation for in-service doctors to be extended to the post graduate degree courses for whom only incentive marks have been provided.

There cannot be any doubt that while admitting students to post graduate degree courses the primary criteria is merit, subject to constitutionally permissible reservations. Many years ago the inherent problems of making complete reservation to the post graduate medical courses was pointed out by the Supreme Court in the case of *Jagadish Saran (Dr.) Vs. Union of India*, reported in (1980) 2 SCC 768. The Supreme Court observed that entirely excluding meritorious candidates will promote sub-standard candidates and bring about a fall in a medical competence, injurious in the long run to the very region. The

Supreme Court has already recognized in *Indra Sawhney Vs. Union of India*, reported in 1992 Supp (3) SCC 217 that the very idea of reservation implies selection of a less meritorious person. But even then, reservation has been recognized to achieve the constitutional promise of social justice. An alarm was sounded in *Mohan Bir Singh Chawla Vs. Punjab University*, reported in (1997) 2 SCC 171, where the Supreme Court observed that at higher levels of education, it would be dangerous to depreciate merit and excellence.

In the case of *Dr. Pradeep Jain and Others Vs. Union of India and Others*, reported in (1984) 3 SCC 654, the Supreme Court was considering the issue relating to reservation of seats for admission to medical colleges. The Supreme Court specifically observed that the primary consideration in selection of candidates for admission to the medical colleges must be merit. The object of any valid scheme of admission must be to select the best candidate for being admitted to the medical colleges and if any departure is to be made from the principle of selection on the basis of merit it must be justified on the touchstone of Article 14 of the Constitution of India. The Supreme Court further observed that merit 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. It also calls for a sense of social commitment and dedication to the cause of the poor. The Supreme Court quoted the observation made in the case of *Jagadish Saran (Dr.) (Supra)* that if equality of opportunity for every person is the constitutional guarantee, a candidate who gets more marks than another is entitled to preference for admission. The Supreme Court observed, "Merit must be the test when choosing the best, according to this rule of equal chance for equal works. This proposition has greater importance when we reach the higher level of education like post graduate courses. After all, top technological expertise in any vital field like medicine is a nation's human assets without which its advance and development will be stunted".

We have already seen that in the case of *AIMS Student's Union (Supra)* the Supreme Court has frowned upon the system of reservation to a higher course of study which is bound to compromise with the comparative merits between the candidates.

If that be so, we cannot really attach any special meaning to the expression 'from the list' appearing in Regulation 9 as distinct from 'as per list'. If the authorities have the power to admit students irrespective of their ranks and if the sole criteria is to get the bare minimum marks of 50% there might not have been any necessity for publishing a merit list. The task could have been far easier for an examining body to declare the names of the candidates who have secured 50% and above in the NEET.

Mr. Mukherjee argued that an amendment was brought into the Regulation 9(1) in the year 2009 which provided that students for post graduate medical courses shall be selected strictly on the basis of their inter se academic merit. This provision has been substituted by a notification which has come into effect on

April 5, 2018. Regulation 9(1) now says that there shall be a uniform entrance examination to the all medical educational institutions at the post graduate level viz., NEET, for admission to post graduate courses in each year and shall be conducted under the overall supervision of the Ministry of Health and Family Welfare, Government of India. From this, he submits that inter se merit is no longer the criteria for admission to a post graduate medical course. In this connection, Mr. Mukherjee has relied on *Renuka Pachal Vs. Chapa Guha Neogi and Others*, reported in AIR 1978 Cal 457. There this Court had held with reference to the amendment in Bengal, Agra and Assam Civil Courts Act, 1887 that when the state legislature amended the said Act raising the District Judge's jurisdiction, it must be presumed to have known how Section 4 of West Bengal Act XVI of 1957 was interpreted by the Division Bench of this Court in two cases. In spite of it, savings clause was introduced which was interpreted as a conscious adoption or approval by the legislature of the court's decisions. Relying on this, Mr. Mukherjee sought to argue that in view of several judgments like *Kumari Chitra Ghosh (Supra)* the framers of the Regulation consciously decided to do away with the provision of inter se merit of the candidates for the purpose of admission to post graduate medical courses.

This argument, if accepted, would mean defeating the purpose of the Regulation 9 itself. As a matter of fact, there is practically not much difference between the two forms of Regulation 9(1) and between the expression "inter se academic merit" and "from the list". The difference is more academic than real. In whichever language it may be expressed when the provision of law says that candidate should be selected from the merit list or according to their academic merit or on the basis of inter se academic merit it practically means the same thing. If any rule says that candidates will be selected from the merit list it for all practical purposes must be taken to mean that the respective ranks and relative positions of the candidates should be maintained. Any interpretation other than this is bound to lead to arbitrariness and conferring disproportionate power on the authority to pick up any student from the list without maintaining the respective ranks of the selected candidates. That will be a clear case of violation of Article 14 of the Constitution of India. A candidate occupying lower position in the list should not be preferred to more meritorious candidates above him taking advantage of the use of expression "from the list". We have already found that it has been judicially interpreted that a facet of equality of opportunity in matters of admission to an educational institution is preference according to the merit of an individual candidate.

Mr. Mukherjee tried to justify the state action for reservation with reference to Section 33(I) of the Act which provides for conduct of professional examinations, qualifications of examiners and conditions of admission to such examinations. It has been sought to be argued that since the condition of admission to such examination has been provided in Section 33(I) of the Act, the state action cannot be said to have been vitiated.

This is hardly any justification for a reservation de hors Regulation 9. Section 33 of the Act empowers the Medical Council to make Regulations on certain subjects which includes Clause (I). In other words, it means that 33(I) empowers the Medical Council to make Regulation in respect of the matters provided in Clause (I) of Section 33 of the Act. And the Medical Council has done exactly the same by framing the Regulations, 2000.

Mr. Dhar and the learned Advocate General have alleged that the petitioners are guilty of suppression of fact inasmuch as they never disclosed in the writ petition that they had appeared at the counselling. It is true that the petitioners should have disclosed this fact in their writ petition, but every omission to mention a fact does not amount to suppression. Suppression in order to invite a fatal consequence for the petitioners either must be of a material fact of such a nature which, but for the disclosure, would not have been known to the respondents. That the writ petitioners had appeared at the examination is a matter of record and is very much known to the state respondents. Therefore, omission to disclose participation in the counselling process cannot be said to be a fatal lapse on their part entitling the respondents to have the writ petition dismissed.

The further objection taken by Mr. Dhar as well as the learned Advocate General about the maintainability of the writ petition for not challenging the memo, dated April 18, 2013, does not appear to be a valid one. In other words, the objection is not weighty enough disentitling the petitioners to any relief in an otherwise meritorious writ petition. The petitioners have challenged the policy of reservation for the in-service doctors. When the policy itself is under challenge, a further challenge to the specific document creating the policy should not be absolutely insisted upon as a non-relaxable pre-condition for the grant of an appropriate relief. The writ petitioners have challenged the constitutionality of the policy of reservation. It is possible that they had no knowledge about the document in which the policy of reservation was enunciated. But that makes no difference. If the policy is found to be constitutionally invalid or cannot be justified on the touchstone of the Constitutional provisions, the memo, dated April 18, 2013 does not survive.

The issue relating to non-joinder of necessary parties might have had some relevance before us had not the appellants in MAT 1239 of 2019, been added as parties on their applications. Court should not insist on at whose instance a party has been impleaded once he is present in the court. Mr. Dhar's submission was heard and considered by the learned single Judge. His further grievance that no opportunity to file an affidavit-in-opposition was given to the added respondents must have to be considered in the backdrop of the order of the Supreme Court dated June 10, 2019. The Supreme Court had specifically directed the learned single Judge to hear out the matter on a day to day basis without granting any adjournment to the interveners. In such view of it, the learned single Judge could not adjourn the hearing of the matter by giving an opportunity to the added parties to file their affidavit-in-opposition and the writ petitioners to file their

affidavit-in-reply. That would have caused a breach of the directive of the Supreme Court.

The submission of the learned Advocate General that the learned single Judge had no jurisdiction to adjudicate the matter as no admission to the post-graduate course can be allowed beyond May 31, 2019, does not appear to be a convincing one. The question of carrying a judgment into effect arises only after the judgment is delivered. Whether in a given case the petitioners will get the relief as prayed for is a consideration very different from the one which weighs with the court at the stage of entertaining the writ petition. It is nobody's case the court had no jurisdiction to entertain the writ petition or to adjudicate the dispute raised in it. The allegation that the writ petition was not maintainable after expiry of May 31, 2019, is a very different consideration. Entitlement to the relief, as prayed for and admission of the writ petition are two different exercises. In a given case, it may so happen that after the declaration of the law a court may hold that for any reason whatsoever the petitioners are not entitled to the relief. The ultimate finding is with reference to the facts of that case but it does not really fetter the hands of the court in declaring the legal position or answering a challenge posed by the petitioners.

The state also cannot justify reservation of seats for the in-service doctors with reference to the use of the word 'reservation' in Regulation 9(4). The Supreme Court in the case of State of Uttar Pradesh and Others (Supra), had already held that the word 'reservation' appearing in Regulation 9(4) is with reference to the reservation as per the constitutional scheme for the Scheduled Casts, Scheduled Tribes or Other Backward Classes candidates and not for the in-service candidates or medical officers in service. The judgment has unequivocally observed that Proviso to Regulation 9(4) does not envisage reservation for in-service candidates in respect of the post graduate degree courses.

We have also heard the submission of Mr. Roy for the University and Mr. Roy for the MCI. The difficulties expressed by Mr. Roy appearing for the University in making a fresh merit list does not appear to be a very convincing one. The University got sufficient time to prepare a fresh merit list in terms of judgment and order of the learned single Judge but they did not do it. There was no stay of operation of the impugned judgment and order. The University also did not press their application for stay. In such view of it, the University should have prepared the merit list as per the direction of the learned single Judge long before. They having not done so cannot project paucity of time as an excuse for not preparing the fresh merit list.

One of the reasons for not preparing the merit list in terms of the direction of the learned single Judge is that the University had approached the Department of Health, Government of West Bengal requesting them to furnish the details of the candidates who have been awarded incentive marks. Mr. Roy submitted that since they had not received any reply from the state government they could not comply with the directive.

This, on the face of it, appears to be a redundant exercise. It is an admitted position that for want of proper notification no incentive mark has been awarded to any in-service candidate. This is an information which should have been with the University also. If not, it seems a little surprising that a body conducting the examination would not be aware that no additional marks has been awarded by the state government.

Here we make an observation. We have already mentioned that the Controller of Examinations of the University by a letter, dated April 2, 2013 requested the Joint Secretary, Health and Family Welfare Department to issue government order effecting reservation of seats for in-service doctors in the post graduate degree, diploma and post-doctoral courses. If the state had made a policy to that effect, the University was required to follow it. But it remains unexplained why the University on its own asked for a government order for effecting reservation of seats for the in-service doctors. The University as a statutory autonomous body undoubtedly overstepped its area of operation.

The submission of the Medical Council of India is partly in favour of the writ petitioners and partly in favour of the other appellants. Mr. Roy agreed that Regulation 9(4) or any other provision in the Act or Regulation does not permit or provide for any reservation for the in-service doctors for admission to post-graduate degree courses. He has also supported the writ petitioners that the word 'reservation' mentioned in Regulation 9(4) cannot be interpreted as available for the in-service doctors. He also is not in one with the submission of Mr. Mukherjee that the expression 'from the merit list' empowers the authority to select candidates from the merit list not according to the respective merits of the candidates.

From the foregoing discussions, we are of the considered view that the reservation of seats for the in-service doctors is against the provisions of Regulations, 2000. There is not only no provision for the same in the Regulation, in view of the judgments of the Hon'ble Supreme Court such an exercise must be held to be unconstitutional and violative of Articles 14, 16 and 21 of the Constitution of India. The reservation of seats for the in-service doctors also suffers from the vice of arbitrariness and has the potential of sacrificing merit in the matter of admission.

We, therefore, set aside the memo, dated April 18, 2013 by moulding the relief in the writ petition. It is a settled position of law that a writ court has sufficient powers in appropriate cases to mould the relief in order to do complete justice in between the parties in the given factual situation. We further declare the order of reservation as de hors the Regulations, 2000 and beyond the power of the state to issue. The order of reservation is declared as null and void. To that extent, the impugned judgment and order of the learned single Judge is affirmed.

That, however, takes us to the consideration of the reliefs the writ petitioners are entitled to after declaring the order of reservation as null and void.

Mr. Roy, the learned Advocate for the MCI, however, submitted that the admissions of the in-service candidates in this year may not be disturbed which may have the effect of setting aside the admission of the open category candidates also. His specific stand is that since all admissions are to be completed by May 31 is no scope for admission of any candidate at this stage.

This is also the persistent stand of all the appellants except the writ petitioners. For Mr. Mukherjee, the writ petition could not be heard beyond May 31, 2019 as that was the cut-off date within which all admissions should be completed. Mr. Dhar and the learned Advocate General also submitted that the time schedule fixed by the Regulations must be strictly adhered to. The High Court exercising of its powers under Article 226 of the Constitution of India cannot extend the time beyond that fixed by the Regulation. He, however, submitted that instead of disturbing the admission which has already taken place this year, the Regulations may be operationalised from the next year.

We have heard the learned Advocates for the parties and have given our very anxious consideration to the issue of extending the time of admission to post graduate degree.

We are of the view that the direction of the learned single Judge with regard to the relief granted requires some modification. The consequence of declaring reservation to be constitutionally invalid will be that after such declaration we cannot direct the seats to continue to be occupied by the reserved category doctors any more. The admission by way of reservation must have to fall through. The argument that the classes have already started and these admitted candidates are not at fault is no justification for continuing with the admission through a channel found to be unconstitutional. If the method of admission is bad, the consequence must have to follow. Following the principle laid down in *Ashok Kumar Sonkar Vs. Union of India and Others*, reported in (2007) 4 SCC 54, we hold that this is a case where the principle of natural justice need not be invoked, even if there be some in-service sponsored doctors not before us. Misplaced sympathy has no place in law.

The consequence would be that the seats to which the in-service candidates had been admitted will become vacant. These seats are to be filled up by the candidates from the state quota irrespective of whether they are in service or not. There are a large number of open category candidates who have secured better marks and ranks in the NEET than those of the in-service candidates by whom the reserved seats were filled up.

Should we allow a fresh counselling in respect of those 285 seats only? Or set aside the admission of all the students admitted to various disciplines? In an idyllic situation perhaps the second alternative would have been a better course of action. After all, the choice of discipline of many meritorious candidates was restricted to and conditioned by the reservation of 40% of the state quota seats. But in many cases the ideal course of action may not be the most realistic

solution. The effect of directing the respondents to prepare and publish one common merit list so far as the state quota is concerned will have the effect of unsettling a settled position so far as the students admitted against the 60% of the state quota seats are concerned. Again, to ask the respondents to prepare a once common merit list will be directing them to achieve a Sisyphean task which may lead to unnecessary complications, a time-consuming exercise and ultimately the prosecution of studies for the majority of the candidates not before us may be disturbed. We have, therefore, decided to restrict ourselves to 285 seats representing 40% of the state quota who have been admitted pursuant to the order of reservation.

We, however, agree with Mr. Mitra that the appellants, except the writ petitioners, are very particular in adhering to the time schedule mentioned in Regulation 9(10) when Regulation 9(4) has been flouted in the teeth of the Supreme Court judgment and as well as the Regulations. Between the requirement of adhering to the standard of merit and the time schedule, maintenance of merit was far more important.

We are not in the least unmindful of the requirement of adhering to the timeframe fixed by Regulation 9(10). But this is a very different and extraordinary situation when consequent upon our declaring the act of reservation for in-service candidates as null and void an unusual situation has emerged. Mr. Mitra has given us a list of cases where the court had directed admission to post graduate classes beyond the cut-off dates in presence of the Medical Council of India which did not file any appeal against them. For circumstances arising out of an extraordinary situation no straightjacket formula or precedent may be available.

It has been sought to be argued before us that extension of time for admission to post graduate classes may be made only by the Supreme Court in exercise of its powers under Article 142 of the Constitution of India.

Mr. Mitra referred to several cases where time for admission had been extended by the Supreme Court beyond the stipulated date. He refers to the order dated June 4, 2019 passed in Sagar Damodar Sarda and Others Vs. State of Maharashtra and Others, [writ petition (civil) no. 733 of 2019] and the order, dated May 31, 2019 passed in Janhit Abhiyan Vs. Union of India, [writ petition (civil) No. 55 of 2019]. In Dr. Vishal Goyal and Others Vs. State of Karnataka and Others, reported in (2014) 11 SCC 456, the Supreme Court after declaring a certain clauses in the Information Bulletins for post-graduate medical and dental courses as ultra vires Article 14 of the Constitution of India directed the respondents to publish fresh Information Bulletins and make admissions to the post graduate medical and dental courses in the government colleges as well as the state quota of private colleges by June 2014.

In Asha Vs. Pt. B. D. Sharma University of Health Sciences and Others, reported in (2012) 7 SCC 389, the Supreme Court observed that as September 30 was

the cut-off date the authorities could not grant admission beyond date which is specifically postulated. But the appellant pursued her rights and remedies as expeditiously as possible. The cut-off date cannot be used as a technical instrument or tool to deny admission to meritorious students. The Supreme Court observed that it is not only unfortunate but apparently unfair that the appellant having much higher merit was denied admission to MBBS.

It has been submitted that the directions such as the one mentioned above can be passed only by the Supreme. The High Court while exercising jurisdiction under Article 226 of the Constitution of India does not have the power similar to the one which the Supreme Court has under Article 142 of the Constitution of India.

The learned Advocates for the appellants, except the writ petitioners have relied on Education Promotion Society for India and Another (Supra) in order to establish that the Supreme Court in recent times also did not extend the time for filling up the vacant seats in post graduate medical courses. But the order of the Supreme Court has to be read in the facts in which it was passed. Every case has a factual context. Before the Supreme Court the petitioner no. 1 Society claiming to represent a large number of educational institutions prayed for extension of time to carry out counselling as a large number of seats in the medical colleges were lying vacant. Their contention was that colleges had spent huge amount of money. The Supreme Court observed that the petitioners wanted a general extension of time and not on account of any particular difficulty faced by any individual college or University but on the ground that large number of seats were going vacant. It is in this context that the Supreme Court declined to interfere with an observation that extension cannot be granted just because some seats are lying vacant without there being any other justification. We consider that there is sufficient justification in the present case for passing a necessary order to do justice between the parties.

It is true that a High Court does not have powers under Article 142 of the Constitution of India. But in a given extraordinary situation, the hands of the court may not be fettered. Asha (Supra) also mentions that not only the Supreme Court but the High Courts also may have to face this problem or problems of this nature. The Supreme Court observed that the question involved in Asha (Supra) were bound to arise repeatedly not before the Supreme Court but the High Courts as well. In that case the Supreme Court observed that where no fault is attributable to a candidate and she is denied admission for arbitrary reasons the cut-off date should not to be permitted as a bar to admission of such students when it would result in complete ruining of the professional career of a meritorious candidate.

In the present case the number of such candidates who may have a similar fate because of the reservation policy of the state are far more numerous and much larger than those who had filed the writ petition. The Supreme Court further observed that there can be rarest of the rare cases or exceptional circumstances

where the courts may have to mould the relief and make exception to the cut-off date. But in those cases the court must first return a finding that no fault is attributable to the candidate and he has pursued his rights and remedies expeditiously without any delay and there is fault on the part of the authorities and apparent breach of some Rules, the Regulations and principles in the process of selection and grant of admission.

We are of the view that the criteria mentioned in that case for treating a situation as an exceptional one are all present in the case in hand. The Regulations have been flouted. The petitioners are not at fault. They raised a protest long before the first counselling. Still their grievances have not been redressed and they filed the writ petition long before the expiry of the cut-off date. Since the judgment in *Asha* (Supra) permits the courts to make exception to the cut-off date, we take it that the right of a High Court exercising writ jurisdiction is not necessarily ousted to meet the exigencies of the situation. The word 'court' has been used in the plural.

If such power is restricted to Supreme Court alone there was no necessity to use the plural form of the word 'court'. We take the order of the Supreme Court, dated June 10, 1999, into consideration when there was a direction upon the learned single Judge to hear the writ petition on a day to day basis. When the Supreme Court had passed the direction after the expiry of the cut-off date it must be taken that the order had a purpose behind it. It cannot be that Their Lordships were not aware of the scope of the writ petition when the said order was passed. The submission that the issue before the Supreme Court was different is not very material as the Supreme Court had directed the High Court to hear the writ petition.

Admissions of the in-service doctors the post-graduate degree courses pursuant to the reservation of 40% of the state quota seats stand cancelled. Consequently a fresh merit list for 285 seats is required to be prepared. We, therefore, direct the University to publish a fresh merit list in terms of this order for those seats only, within a week after the reopening of the office of the University after the Puja vacation. In such view of it and treating the situation arising out of the present case as the rarest of the rare one, we direct the respondents to undertake all steps for reorientation of the hitherto reserved seats in the state quota by way of a fresh counselling within 10 days from the date of publication of the merit list. The University is directed to start classes as early as possible. The students will be required to attend extra classes to make up the delayed admission and to cover the syllabus as well as to maintain their attendance. The state is directed to take all necessary steps to ensure the compliance of the direction of the court and if necessary to arrange for extra classes for the candidates to be admitted after fresh counselling.

Mr. Bhattacharya, the learned Senior Counsel appearing for interveners in CAN 8548 of 2019 prayed for awarding incentive marks to the in-service doctors in terms of Regulation 9(4). Since, the state government has not issued any

notification about the rural and difficult areas which is a pre-condition for incentive marks in terms of the Regulations, the prayer cannot be acceded to.

Thus, all the appeals filed by all sets of appellants, except the one filed by the writ petitioners, fail and are dismissed. However, the directions given by the learned single judge are modified to the extent indicated above. The appeal of the writ petitioners is disposed of.

With this all the connected applications are disposed of.

There shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.

I agree