

(2019) 08 CAL CK 0329

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 8990 (W) Of 2019

Dr. Md. Nazir Hossian & Others

APPELLANT

Vs

State Of West Bengal & Others

RESPONDENT

Date of Decision : 19-08-2019

Acts Referred:

Indian Medical Council Act, 1956 — Section 3, 19A, 20, 30, 33
West Bengal State Health Service Act, 1990 — Section 21
Land Acquisition Act, 1894 — Section 6
Code Of Civil Procedure, 1908 — Order 6 Rule 17
Post Graduate Medical Education Regulations, 2000 — Rule 9
Constitution Of India, 1950 — Article 13, 14, 16, 142, 162, 226, 245, 246, 254, 335
Indian Medical Council Regulations, 2002 — Regulation 9(4), 9(4)(7)
Medical Council Of India Post Graduate Medical Education Regulations, 2000 — Regulation 9, 9 (10), 9(11)

Citation : (2019) 08 CAL CK 0329

Hon'ble Judges : Samapti Chatterjee, J

Bench : Single Bench

Advocate : Jayanta Kumar Mitra, Amit Kumar, Prasun Kumar Dutta, Amiya Kumar Dutta, A.M. Tripathi, Swadesh Priya Ghosh,, Suddhasatva Banerjee, Supratic Roy, D.N. Maiti, Chaitali Bhattacharya, Subhendu Roy Choudhury, Saibalendu Bhowmick, Biplab Guha, Saktinath Mukherjee, Kallol Basu, Suman Banerjee, Pratik Dhar, Kartik Kumar Roy, Samir Halder

Final Decision : Disposed Of

Judgement

Samapti Chatterjee, J

1. The petitioners filed the present writ petition for the following reliefs :-

a). A Writ of or in the nature of Mandamus do issue commanding the respondent authorities to quash and/or set aside the list of selected candidates

prepared on 03/04/2019, Annexure P-1, after the 1st round of state counselling and to publish a fresh common merit list combining the open category

and in service category providing incentives, mentioning name of remote and

difficult working places and years of rendering services and clubbing the incentives with the marks obtained in the NEET-PG examination by following the Rule 9 Post Graduate Medical Education Regulations, 2000, amended up to date and according to the Indian Medical Council Act, 1956 forthwith;

b). A Writ of or in the nature of Mandamus do issue commanding the respondent authorities to quash and/or set aside the impugned notice dated

18/04/2019. Annexure P-2, and the list of eligible candidates published on 20/04/2019, Annexure P-3 and to publish a fresh merit list, for the open

category candidates as those seats are reverted back from the open category of the all India quota forthwith;

c). A Writ of or in the nature of Mandamus do issue commanding the respondent authorities to publish a list mentioning the incentives that is, the

percentages of incentives as marks awarded to the respective candidate categorically and the years of service rendered by the respective incentive

awardee along with their place of posting and years of service.

d) A Writ in nature of certiorari do issue directing the respondent authorities to produce before this Honâ??ble Court the entire records and

proceedings including all the relevant Government orders, Memorandums, notices etc at the time of hearing so the conscionable justice may be

rendered by passing appropriate direction.

e) Rule NISI in terms of above prayers (a), (b) and (c) , (d) above.

f) An interim order of injunction should be given directing the respondent authorities upon the list of the allotted candidates published on 03.04.2019;

Annexure P-1 after 1st round of state counselling and impugned notice no. OG/WBUHS/2019-20/0149, dated 18/04/2019, Annexure P-2 and the list

published on 20/04/2019, Annexure P-3 of the eligible candidates till to the disposal of the eligible candidates till to the disposal of the instant writ

petition and all subsequent steps taken by the respondent authorities, until and unless a fresh merit list be published forthwith;

g) And to pass such other order/orders. Direction/directions as Your Lordships may deem fit and proper.

2. The petitionersâ?? case in a nutshell is as follows :-

That all the petitioners have passed the Bachelor of Medicines and Bachelor of Surgery (M.B.B.S). The petitioners along with in-service Doctors

appeared for M.D and M.S examination through National Eligibility-cum-Entrance Test Post Graduate (NEET-PG), 2019 conducted by National

Board of Examination (NBE) at all India level. Since the petitioners have been duly qualified in the written examination, therefore, the petitioners were

called for State counselling which starts from 29th March, 2019. Accordingly, the petitioners appeared in the State counselling. The petitioners on 5th

March, 2019 made a representation before the State Authorities to follow guideline of the Medical Council of India Post Graduate Medical Education

Regulations, 2000 as amended up to May, 2018 for preparing common eligibility test. But without considering the same on 29th March, 2019 the

authority issued notice thereby reserving 40% seats for the in-service doctors and 60% seats for open category doctors. Assailing the same, the

petitioners filed the present writ petition.

3. Being prima facie satisfied with the argument of Dr. Md. Hossain appeared in person this Court on 24th April, 2019 restrained the West Bengal

University of Health Sciences (WBUHS) from holding second round of counselling which was scheduled to be held on and from 25th April, 2019 till

1st May, 2019 and the matter was directed to appear on 30th April, 2019.

4. Pursuant to the directions the respondent authorities filed their affidavit-in-opposition and the petitioners also filed their affidavit-in-reply.

5. During the course of the argument the respondent authority was directed to submit the list of in-service candidates who have served as per Clause

9 (4) at the remote, rare and difficult areas to get 10 per cent additional marks.

6. Unfortunately the list submitted by the respondent authority did not notified the remote, rural and difficult areas where the in-service candidates

served for three years in terms of Sub Rule 4 of Regulation 9 of the Medical Council's Regulations (hereinafter referred to as the said

Regulations).

7. Being dissatisfied with that order the respondent authority preferred appeal before the Hon'ble Appeal Court being MAT No.693 of 2019.

Relevant portion of the Hon'ble Appeal Court order is quoted below :

"In the writ petition the petitioners have prayed for a writ in the nature of certiorari directing the respondents to produce the entire records including

the Government orders, memorandum etc. In a writ petition where certiorari has been prayed for it is within the competence of the Court to direct the

respondents to produce the relevant records for being satisfied about the merits of the respective cases. Even otherwise also it is always competent

for a Court to direct the parties to produce the records for a complete and effective adjudication of the issues before it. That apart, the impugned

direction is very innocuous. The respondents should produce the records of the in-service doctors which the learned single judge can satisfy herself

about merits of the case. It is not understood why such an innocuous direction has left the present appellants aggrieved so as to challenge the same in

the form of an appeal.

The reason submitted by the appellants that after the setting aside of the notification dated November 23, 2011 no fresh notification has been issued

and therefore, the distinction between the rural, urban and remote or difficult areas have not been very clearly delineated is difficult to accept as a

justification for non-production of records. If the appellants have not issued any notification subsequently it is for them to say why it has not been, but

that cannot be any justification for not producing the records of the in-service doctors. If for any reason whatsoever the remote or difficult areas have

not been specifically earmarked the records can still be produced and relevant submissions may be made.

We find absolutely no justification on the part of the present appellants to take any exception to an otherwise inoffensive direction for production of

records.

The appellants lastly submitted that the interim order should be vacated and the admission process should be completed which shall abide by the result

of the writ petition.

For reasons far too obvious such a prayer cannot be entertained in the present appeal assailing the order, dated May 15, 2019. If a party is aggrieved

by the grant of an interim order he must have to challenge the initial grant of it and not its subsequent extension. After the initial interim order was

granted the appellants had appeared before the learned Single Judge on several occasions and in their presence the interim order was subsequently

extended. The initial grant of the interim order not having been challenged the appellants cannot assail the extension of the same which has been

passed in furtherance of the order passed on April 26, 2019.

Coming to the issue of urgency of the case we do not find this to be a valid

ground to interfere with the order impugned. We have been informed that affidavits in connection with the writ petition have already been filed. The learned single judge was in the midst of hearing of the writ petition. She has recorded that she has heard different parties in person. She has, on the submission of the present appellants, modified the interim order on May 1, 2019. Even that was not challenged. About fifteen days thereafter when the learned single judge has directed the records to be produced the impropriety of passing of the interim order became a subject matter of challenge by the appellants.

It cannot be glossed over that the learned single judge, in course of hearing of the writ petition expressed her dissatisfaction about the submission of the respondents and wanted to be satisfied upon perusal of the service records. That is why the Court had directed the records of the in-service

doctors who had served the remote areas as per the Regulations, 2000 of the MCI to be produced before the Court. It is not clear how the appellants

want to save time by initiating a fresh proceeding in the form of an appeal and the connected application when the learned single judge is already in

seisin of the matter and is in the midst of hearing the writ petition. If the appellants want the interim order to be vacated it has to be done on affidavits

which will certainly take more time. The process is bound to be further delayed and not expedited. The learned single judge has fixed the matter on

May 22, 2019 which is only tomorrow and had extended the interim order till May 24, 2019. There cannot be any earthly reason for the present

appellants to file an appeal on the ground of urgency when the case is fixed for hearing tomorrow. This urgency does not appear to be a convincing

reason for filing the present appeal.

We have indicated that the order impugned is a very innocuous one merely directing the respondents to produce the records. We repeat, where writ of

certiorari has been prayed for every writ court has power to direct the respondents to produce the records. If they face any difficulty about it or if

they consider that the petitioners are not entitled to the interim order or to any other relief they have all the opportunity to agitate the same before the

learned single judge. Nothing of what the appellants have submitted before us can be said to be any ground for not producing the records before the

learned single judge.

The last submission of the appellants that the admission should be allowed to be completed, subject to the result of the writ petition, cannot be

entertained in the present appeal as the appellants have not come against the grant of the interim order. To accede to the prayer of the appellants

would amount to vacating the interim order the grant of which is not under challenge.

For the reasons aforesaid there is nothing to interfere in the present appeal. The order impugned calls for no interference. We find no understandable

or reasonable justification for the appellants to feel aggrieved by the order impugned. The order impugned has not touched their rights in any manner

nor has it prejudicially affected their case.

The appeal merits no consideration and the same is dismissed.

With the dismissal of the appeal the connected application being C.A.N. 4850 of 2019 has become infructuous and the same is also dismissed.

The learned single judge is requested to dispose of the writ petition as expeditiously as possible.

There will be no order as to costs.â??

8. Thereafter Learned Single Bench after hearing the parties passed an order on 22nd May, 2019 thereby directing the Medical Council of India to

extend the date of admission in respect of students for MD and MS examination of this State till 29th June, 2019 or until further order whichever is

earlier. The operative portion of the order is quoted below :

â??Pursuant to the earlier order, today Mr. Anup Das, appearing in person on behalf of WBUHS, produces a list of in-service doctors who served in

the remote, difficult, distant and rural areas. Unfortunately, after perusing the list, Court did not find any indication pertaining to the effect that these in-

service doctors served in therefore, difficult, distant and rural areas.

That being the scenario, it is submitted by Mr. Anup Das that the identification regarding serving at remote, distant and rural areas is in process. It is

also submitted by Mr. Das that the last date of admission for Post Graduate Medical Courses by the Medical Council of India is 31st May, 2019.

In this backdrop, since it is not at all clear whether those in-service doctors serve in remote, rare area, therefore, I direct the Medical Council of India

to extend the date of admission in respect of the students for M.D. and M.S. Examination of this State till 29th June, 2019 or until further order

whichever is earlier.

Interim order, already passed, is extended till 28th June, 2019.

Let the matter appear on 11th June, 2019 at 2 p.m. under the same heading.

Let photostat plain copy of this order, duly countersigned by the Assistant Registrar (Court), be given to the parties on usual undertakings.â??

9. After withdrawal of ceasework of the learned Advocates and during vacation of this Court some in-service candidates filed application for leave to

file appeals accompanied by memorandum of appeal. The Honâ??ble Division Bench on 30th May, 2019 disposed of the appeal and the connected

applications. Relevant portion of the order is quoted below :-

â?? The moot question which arises before us and in fact involved in the writ petition is that whether the State Government can put a reservation on

percentage basis for the candidates who offered their candidature as in-service candidate without any authority and/or power conferred under the said

Regulations. It is manifested from the impugned order that the Single Judge noticed the list of in-service doctors claimed to have served in a remote,

difficult, rural and distant area and held that such list does not indicate that the medical practitioners enlisted therein have actually served in remote,

difficult, rural and distant area. Being swayed by such facts, the Single Bench found that the prima facie case has been made out and extended the

date of admission in respect of students for MD and MS examination till 29th June, 2019 or until further order, whichever is earlier.

We do not find any reason assigned by the Single Judge extending the period simply because the list empanelling the medical practitioners in-service

does not indicate whether they served in remote and difficult areas. However, our attention is drawn to Regulation 9 (4) where the weightage is

required to be given to in-service medical practitioners intending to pursue the Post graduate Courses and it is sought to be contended that power to

give weightage does not empower the State Government to channelise another way of admission or restricting the number of seats.

We do not want to delve deep into such aspect as the writ petition is still pending. We are confining our consideration to a solitary issue as to whether

it was proper for the Single Bench to extend the period beyond 31st May, 2019. Our attention is further drawn to Regulation 9 (10) of Regulations,

2000 which mandates that admission of the students in respect of any academic

sessions beyond 31st May for Postgraduate Courses and 31st August

for Super Speciality Courses shall not be made. The language put therein apparently makes the provision mandatory and it can further be corroborated

from the other steps and/or actions of the statutory authorities putting a cut off date as 31st May, 2019. It is not in dispute that Regulations, 2000 has a

statutory force and in fact the rival parties relied upon the provisions made herein and sought to interpret in their own way. It would be injustice

enrichment upon the domain of the statutory authorities by extending the time when the statutory provisions mandate the entire exercise to be

completed within the time frame. We are also not unmindful of the fact that the action of the State or its instrumentality is the subject matter of

challenge in the writ petition which is still pending and the outcome may or may not affect the candidates if they are already admitted in such Courses.

The education is one of the primary concern of the good governance and have a larger impact on the candidates who are in pursuit of excelling their

knowledge, intelligence and therefore time limit is necessary to eradicate any sense of insecurity and to bring a uniformity in it. Equally we cannot

overshadow the other legal rights of the aspiring candidates who may otherwise be found eligible.

To strike the balance and in order to bring equilibrium in the rights of the rival parties, we, therefore, feel that the extension of time for admission as

directed in the impugned order would not sub-serve the justice but if the candidates who have succeeded in two tier of counselling and succeeded

therein should be admitted in the courses subject to outcome of the writ petition pending before this Court.

The order impugned is modified to the extent that the competent authority is directed to complete the process of admission strictly in conformity with

the Regulations, 2000 and the candidates who are offered admission and if admitted in the respective colleges shall be made aware that such

admission is subject to the result of the writ petition pending as of this date. Such candidates shall give an undertaking that they would not claim any

equity in the event they are put out of the zone of consideration for being appointed in such courses or in the said colleges and the respective

authorities shall ensure the strict compliance thereof.

With this observations, both the appeals are disposed of. Since the main appeals

have been disposed of by this order, the connected applications have become infructuous and are accordingly disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.â??

10. Assailing this order, the petitioners preferred special leave petition before the Honâ??ble Apex Court. The Honâ??ble Apex Court on 10th June,

2019 dismissed the special leave petition made some observations 17 and passed certain direction. The order dated 10th June, 2019 is quoted below :-

â??Petition (s) for Special Leave to Appeal (C) No. (s). 13584/2019 (Arising out of impugned final judgment and order dated 30.05.2019 in MAT

No.716/2019 passed by the High Court at Calcutta).

MD. NAZIR HOSSAIN & ORS.

Petitioner (s)

VERSUS

MADHUMITA BASU & ORS.

Respondent (s).

We are informed that the writ petition is fixed for hearing before the High Court tomorrow at 2 p.m. We are, therefore, not inclined to interfere in the

matter at this stage. Counsel appearing on behalf of the petitioners and also counsel appearing for the Medical Council of India (MCI) argued that

admissions to medical courses are required to be made as per the rules of MCI which do not permit reservation for in-service conditions for the post-

graduate courses. It will be open to all the parties to urge all questions before the High Court including the question of whether the State has made

reservation for in-service candidates and if so, the sustainability in law of such reservation. It will be open to the in-service candidates to intervene and

make submissions in the High Court. However, no adjournment shall be granted at their instance. Since there is no stay of counselling, we do not

deem it necessary to fix a time schedule for the High Court to decide the matter. We only request the High Court to hear the matter from day to day

without granting adjournments and to decide the case as expeditiously as possible.

The special leave petition is dismissed accordingly.

Pending application (s), if any, stands disposed of.â??

It is to be noted that by the above quoted order the Honâ??ble Supreme Court permitted the in-service candidates to intervene and make submissions before the High Court.

11. In the back drop of the above noted facts and circumstances of this case the following issues are to be determined :-

(i) Whether the Stateâ??s action in publishing two separate set of lists thereby reserving 40 per cent seats for the in-service doctors and 60 per cent

seats for the open category doctors is in violation of the Clause 9 (4) of the Medical Council of India Post Graduate Medical Education Regulations,

2000 as amended up to May, 2018 and also contrary to the Indian Medical Council Act, 1956?

(ii) Whether the impugned action is discriminatory creating division among the doctors; in service doctors with 40 per cent reserved seats and open

category doctors with 60 per cent reserved seats and is therefore unconstitutional, void, contrary to statute and violative of the Article 13 and 14 of the

Constitution of India ?

(iii) Whether impugned action of reservation is contrary to Entry 66 of the list 1 of schedule 7 and Entry 25 of list 3 of schedule 7 ?

(iv) Whether the Courts have power to direct the competent authority to prepare one common merit list of both categories of doctors viz. in-service

doctors as well as open category doctors strictly in terms of the Regulations 2000 and allow the candidates to take admission on the basis of such

combined list within the date of admission fixed by the Court ?

Submissions of the Learned Advocates

12. Mr. Jayanta Kumar Mitra, learned senior counsel appearing for the petitioners submitted that the petitioners on 5th March, 2019 made

representation before the state authority to prepare a common eligibility list strictly in terms of the Medical Council of India Postgraduate Medical

Education Regulations, 2000 as amended up to May, 2018 (hereinafter referred to as the â??said Regulationsâ?). Unfortunately without disposing of

the petitionersâ?? representation as canvassed by the petitioners the respondent authority by the impugned order dated 29th March, 2019 illegally and

arbitrarily prepared two separate lists thereby reserving 40 per cent seats for the in-service doctors and 60 per cent seats for the open category

doctors.

13. Mr. Mitra further strongly urged that the said Regulation is a complete code and governs the field maintaining standard of education as well as

admission. The State has no authority to prepare two separate lists thereby reserving 40 per cent seats for the in-service doctors and 60 per cent seats

for the open category doctors. This action clearly violates the existing Regulations. It is submitted by Mr. Mitra that Clause 9 (4) clearly provides that

at the time of determining the merit of the candidates who are in-service of the government/public authority weightage to the marks may be given by

the government/competent authority as an incentive @ 10 per cent of the marks obtained for each year of service in remote and/or difficult areas up

to the maximum of 30 per cent of the marks obtained in National Eligibility cum Entrance Test (NEET). The remote and difficult areas shall be as

defined by the State Government/Competent authority from time to time.

In support of his contention Mr. Mitra drew Court's attention to the Clause 9 (4) of the said Regulation which is quoted above.

â??Regulation-9(4)-The reservation of seats in Medical Colleges/institutions for respective categories shall be as per applicable laws prevailing in

States/Union Territories. An all India merit list as well as State-wise merit list of the eligible candidates shall be prepared on the basis of the marks

obtained in National Eligibility-cum-Entrance Test and candidates shall be admitted to Postgraduate Courses from the said merit lists only.

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

Government/Competent Authority as an incentive upto 10% of the marks obtained for each year of service in remote and/or difficult areas or Rural

areas upto maximum of 30% of the marks obtained in National Eligibility-cum-Entrance Test. The remote and/or difficult areas or Rural areas shall be

as notified by State Government/Competent authority from time to time.â??

In support of this point Mr. Mitra also relied on a Hon'ble Apex Court decision reported in 2016 (9) SCC Page-749 (State of Uttar Pradesh And

Others vs Dinesh Singh Chauhan) Paragraphs 24, 25, 25.4, 26, 27 and 29 which are quoted below :-

â??Para-24-By now, it is well established that Regulation 9 is a self-contained code regarding the procedure to be followed for admissions to medical

courses. It is also well established that the State has no authority to enact any law much less by executive instructions that may undermine the

procedure for admission to postgraduate medical courses enunciated by the Central legislation and regulations framed thereunder, being a subject

falling within Schedule VII List I Entry 66 of the Constitution procedure for selection of candidates for the postgraduate degree courses is one such

area on which the Central legislation and regulations must prevail.

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

officers generally for admission to postgraduate â??degreeâ? courses. Regulation 9 is a composite provision prescribing procedure for selection of

candidates-both for postgraduate â??degreeâ?? as well as postgraduate â??diplomaâ?? courses :

Para-25.4-Clause (IV) is the relevant provision. It provides for reservation of seats in medical colleges/institutions for reserved categories as per

applicable laws prevailing in States/Union Territories. The reservation referred to in the opening part of this clause is, obviously, with reference to

reservation as per the constitutional scheme (for the Scheduled Caste, the Scheduled Tribe or the Other Backward Class candidates); and not for the

in-service candidates or medical officers in service. It further stipulates that all-India merit list as well as State-wise merit list of the eligible candidates

shall be prepared on the basis of the marks obtained in NEET and the admission to postgraduate courses in the State concerned shall be as per the

merit list only. Thus, it is a provision mandating admission of candidates strictly as per the merit list of eligible candidates who are in service of the

Government or a public authority, weightage in the marks may be given by the Government/competent authority as an incentive @ 10% of the marks

obtained for each year of service in specified remote or difficult areas of the State up to the maximum of 30% of the marks obtained in NEET. This

provision even if read liberally does not provide for reservation for in service candidates, but only of giving a weightage in the form of incentive marks

as specified to the class of in-service candidates (who have served in notified remote and difficult areas in the State).

Para-26- From the plain language of this proviso, it is amply clear that it does not envisage reservation for in-service candidates in respect of

postgraduate â??degreeâ? courses with which we are presently concerned. This proviso postulates giving weightage of marks to â??specified in-

service candidatesâ? who have worked in notified remote and/or difficult areas in the State-both for postgraduate â??degreeâ? courses and also for

postgraduate â??diplomaâ? courses. Further, the weightage of marks as allotted is required to be reckoned while preparing the merit list of candidates.

Para-27-Thus understood, the Central enactment and the regulations framed thereunder do not provide for reservation for in-service candidates in

postgraduate â??degreeâ? courses. As there is no express provision prohibiting reservation to in-service candidates in respect of admission to

postgraduate â??degreeâ? courses, it was contended that providing for such reservation by the State Government is not impermissible in law. Further,

there are precedents of this Court to suggest that such arrangement is permissible as a separate channel of admission for in-service candidates. This

argument does not commend to us. In the first place, the decisions pressed into service have considered the provisions regarding admission process

governed by the regulations in force at the relevant time. The admission process in the present case is governed by the regulations which have come

into force from the academic year 2013-2014. This Regulation is a self-contained code. There is nothing in this Regulation to even remotely indicate

that a separate channel for admission to in-service candidates must be provided, at least in respect of postgraduate â??degreeâ? courses. In

contradistinction, however, 50% seats are earmarked for the postgraduate â??diplomaâ? courses for in-service candidates, as is discernible from

clause (VII). If the regulation intended a similar separate channel for in-service candidates even in respect of postgraduate â??degreeâ? courses, that

position would have been made clear in Regulation 9 itself. In absence thereof, it must be presumed that a separate channel for in-service candidates

is not permissible for admission of postgraduate â??degreeâ? courses. Thus, the State Government, in law, had no authority to issue a Government

Order such as dated 28-2-2014, to provide to the contrary. Hence, the High Court was fully justified in setting aside the said government order being

contrary to the mandate of Regulation 9 of the 2000 Regulations, as applicable from the academic year 2013-2014.

Para-29-In the present case, we have held that providing 30% reservation to in-service candidates in postgraduate "degree" courses is not permissible. It does not, however, follow that giving weightage or incentive marks to in-service candidates for postgraduate "degree" courses entails in excessive or substantial departure from the rule of merit and equality. For, Regulation 9 recognises the principle of giving weightage to in-service candidates while determining their merit. In that sense, incentive marks given to in-service candidates is in recognition of their service reckoned in remote and difficult areas of the State, which marks are to be added to the marks obtained by them in NEET. Weightage or incentive marks specified in Regulation 9 are thus linked to the marks obtained by the in-service candidate in NEET and reckon the commensurate experience and services rendered by them in notified remote/difficult areas of the State. That is a legitimate and rational basis to encourage the medical graduates/doctors to offer their services and expertise in remote or difficult areas of the State for some time. Indisputably, there is a wide gap between the demand for basic health care and commensurate medical facilities, because of the inertia amongst the young doctors to go to such areas. Thus, giving specified incentive marks (to eligible in-service candidates) is permissible differentiation whilst determining their merit. It is an objective method of determining their merit."

14. Mr. Mitra further contended that as per Clause 9 Sub Clause (7) 50 per cent of the seats in Postgraduate Diploma courses could be reserved for the medical officers in the government service but not in respect of Postgraduate Degree Course. In respect of Postgraduate Degree Course the competent authority prepared a combined merit list both in respect of in-service doctors as well as open category doctors.

Mr. Mitra also referred to Sub Clause VII & Sub Clause VIII of Clause 9 of the Regulations, 2000 which are quoted below :-

"Sub-Clause VII-In non-Governmental medical colleges/institutions, 50% (Fifty Percent) of the total seats shall be filled by the concerned medical colleges/institutions on the basis of the merit list prepared as per the marks obtained in National Eligibility-cum-Entrance Test. Sub-Clause VIII-50% of the seats in Postgraduate Diploma Courses shall be reserved for Medical Officer in the Government service, who have served for at least three

years in remote and/or difficult areas and/or Rural areas. After acquiring the Postgraduate Diploma, the Medical Officers shall serve for two more

years in remote and/or difficult areas and/or Rural areas as defined by State Government/Competent authority from time to time.â??

It is also contended by Mr. Mitra that only in the affidavit-in-opposition the State for first time has disclosed that pursuant to the government order

dated 18th April, 2013 forty per cent reservation for in-service candidates has been made.

15. Mr. Mitra vehemently argued that a government order cannot overrule the Constitution of India, the Medical Council Act of 1956 as well as the

Regulations, 2000. He emphasized that this act on the part of the Government is per se un-constitutional, clearly against the statute as well as violative

of the Regulations 2000 which has been declared by the Honâ??ble Apex Court time and again as a complete Code and the same holds the field till

date. Mr. Mitra further contended that Regulation of MCI shall prevail over any law made by the State Government, Universities and any other

concerned parties. State is not empowered to reserve 40 per cent seats for in-service doctors. Therefore, the impugned order for keeping 40 per cent

reservation for the in-service doctors is nothing but a nullity and should be quashed at sight.

16. Mr. Mitra further emphasized that executive order cannot override the MCI Regulation. The State can keep reservation only in accordance with

constitutional reservation i.e. SC/ST/OBC and not for in-service doctors. In support of his contention he relied on Apex Court decisions reported in

1998 (6) SCC Page-134 Para-24 (Medical Council of India vs State of Karnataka & Others) and 1999 (7) SCC Page-120 Paras-52-53 (Dr. Preeti

Srivastava And Others vs State Of M.P And Others) Relevant extracts are quoted below :-

â??Para-52-Mr. Salve, learned counsel appearing for the Medical Council of India has, therefore, rightly submitted that under the Indian Medical

Council Act of 1956 the Indian Medical Council is empowered to prescribe, inter alia, standards of postgraduate medical education. In the exercise of

its powers under Section 20 read with Section 33 the Indian Medical Council has framed regulations which govern postgraduate medical education.

These regulations, therefore, are binding and the States cannot, in the 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 postgraduate medical education. Since the standards laid down are in the 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. The power of the States under Entry 25 of List III is subject to Entry 66 of List-I.

Para-53- Secondly, it is not the exclusive power of the State to frame rules and regulations pertaining to education since the subject is in the Concurrent List. Therefore, any power exercised by the State in the area of education under Entry 25 of List III will also be subject to any existing relevant provisions made in that connection by the Union Government subject, of course, to Article-254.

17. It is also strongly urged that procedure to be followed to notify the remote and difficult area for giving weightage to the in-service candidates

though on earlier occasion Hon'ble Division Bench directed the State authority to notify the remote and difficult areas. In support of this

contention reliance is placed on a decision reported in 2017 (14) SCC Page-642 Paragraphs-8 to 12 (State Of Haryana And Another vs Narendra

Soni And Others).

18. Mr. Mitra also contended that Court has the power to extend the time for counselling and admission when it is detected that illegality has been

committed by the authority at the time of admission. On this point reliance have been placed in the Hon'ble Supreme Court order dated 4th June,

2019 in writ petition (Civil) No.55 of 2019 (Sagar Damodar Sarda & Ors v. The State of Maharashtra & Ors, order dated 31st May, 2019 in Writ

Petition (Civil) No.55 of 2019 (Janhit Abhuyan v. Union of India), and also the decisions reported in 2014 (11) SCC Page-456 (Dr. Vishal Goyal &

Ors vs State of Karnataka & Ors), 2012 (7) SCC Page-389 (Asha v. Pt. B.D. Sharma University of Health Sciences, 2013 (10) SCC Page-237

(Nikhil Mimthani vs State of Uttarakhand).

It is also contended on behalf of the petitioners that in the matter of preparing the State list as per Regulations only merit would be considered.

Unfortunately however in the present case the respondent authority without preparing a common merit list arbitrarily, illegally and with ulterior motive

has reserved 40 per cent seats for the in-service candidates and 60 per cent

seats for the open category candidates/doctors which is patently illegal, arbitrary, unconstitutional and contrary to the Regulation 9 (4) and is further violative of the Article 14 of the Constitution of India. In this connections reliance is placed on paragraphs 15-18 of the Dr. Preeti Srivastava case (supra) and also paragraphs 10 and 22 of the Honâ??ble Apex Court decision reported in 1984 (3) SCC Page-654 (Dr. Pradeep Jain vs Union of India). Mr. Mitra further vehemently argued that order dated 18th April, 2013 which has been disclosed by the affidavit-in-opposition filed by the State not only contrary to the Constitution but at the same time contrary to the statute. Therefore, the order dated 18th April, 2013 is a nullity, un-constitutional and void.

Mr. Mitra referred to paragraphs 1, 2, 3 and 4B, 5, 6, 7 and 8 of the affidavit-in-opposition filed by the State.

19. Before parting with his argument Mr. Mitra submitted that the impugned list of selected candidates prepared on 3rd April, 2019 should be quashed and set aside and the respondent authority should be directed to prepare a combined single list of both categories of doctors only on the basis of the merit and to allow the doctors from such combine merit list to participate in the counselling and then complete the admission.

20. Mr. Indranil Roy, learned Advocate appearing for the Medical Council of India (hereinafter referred to as â??MCIâ?) submitted that any

Government order passed in contravention of and contrary to the Regulation 9 is void, nullity, un-constitutional and therefore cannot be sustained in the

eye of law. Mr. Roy further contended that the Regulation is a complete Code therefore State has no authority to pass any order contrary to the

Regulation. Mr. Roy also submitted that Regulation 9 of the Postgraduate Medical Education 2000 has been held to be a self-contained code in

relation to the procedure to be followed in admission to medical courses in consistent with the merit list and this proposition has been re-affirmed by

the Constitutional Bench of Honâ??ble Supreme Court reported in 2016 (7) SCC Page-359 (Modern Day & College Research Centre vs The State

of Madhya Pradesh & Others) . Therefore, it is emphasized by Mr. Roy that State Government and the University have no right to introduce

reservation of seats in favour of in-service candidates. The reservation for in-service doctors is wholly unconstitutional and patently illegal and

contrary to statute.

21. Mr. Roy further contended that by the Notification dated 20th May, 2019 last date was extended till 31st May, 2019 within which time the admission part was to be completed.

Mr. Roy also drew the Court's attention to the Notification dated 2nd June, 2015 issued by the Government of West Bengal, Department of Health and Family Welfare and also referred the 'Note' under Rule 3 (b) (iii) & (iv) as well as the 'Note' appearing at Page-50-53 of the affidavit-in-opposition.

Those Notes read as under :-

'(iii)-for officers of the West Bengal Public Health cum Administrative Service : MD (Community Medicine/Social and Preventive Medicine), Master in Public Health, Master in Applied Epidemiology, Diploma in Maternity and Child Health and Other post graduate courses in public health, Epidemiology, health management, health and hospital administration, and related courses conducted by institutions of repute and affiliated by recognized Universities, both within and outside the State of West Bengal as Government sponsored candidate, as enumerated in the Schedule of these rules :

Provided that the officers up to the rank of Public Health-cum-Administrative Officer : Group B shall also be eligible for trainee reserve facilities for

prosecution all courses enumerated in sub-clause (ii) of clause (b) as Government Sponsored candidates :

(iv) Course recognized by the Medical Council of India or courses approved by the National Board of Examinations (DIPLOMATE OF NATIONAL

BOARD) will only be allowed to be prosecuted outside this State subject to the condition that for postgraduate courses in public health, Epidemiology,

health management, health and hospital administration and related courses, recognition by Medical Council of India may not be mandatory, provided

that the course is conducted by Institutions of repute and affiliated by recognized Universities and included in the Schedule of these rules.

Note:-The number of seats available for the different courses run by the West Bengal University of Health sciences and other Universities within this

State, for the officers of the West Bengal health Service, the 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.â??

22. Mr. Roy contended that Honâ??ble High Court has no power to extend the date of admission. It is only the Honâ??ble Supreme Court under

Article 142 can extend the time. In support of his contention Mr. Roy relied on honâ??ble Supreme Court decisions reported in 2016 (9) SCC Page-

749 (State of Uttar Pradesh vs Dr. Dinesh Singh Chauhan), 2002 (7) SCC Page-258, Paras-22, 23 & 24 (Medical Council of India vs Madhu Singh

And Others), 2005 (2) SCC Page-65 paras-11, 32 and 35 (Mridul Dhar (Minor) And Another vs Union of India And Others), AIR 2013 Supreme

Court Page-1115 Paras-12 & 13 (Faiza Choudhary vs State of Jammu And Kashmir and Anr and AIR 1994 Supreme Court Page-595 Para-8 (State

of Punjab and Others vs Renuka Singla and Others).

In conclusion Mr. Roy submitted that although 40 per cent seats as reserved for the in-service candidates by the Government totally being illegal, bad,

arbitrary, un-constitutional and against the statute, and is therefore liable to be quashed but at the same time High Court cannot extend the time for

admission and it is only the Honâ??ble Supreme Court under Article 142 can extend the time for admission.

23. Mr. Kishore Dutta learned Advocate General appearing for the State submitted that the list of 40 per cent reservation for the in-service doctors

and 60 per cent reservation for the open category doctors was prepared on the basis of the Notification dated 18th April, 2013. Therefore, without

challenging that notification the petitioners cannot contend that the notification is un-constitutional, nullity, void and very much against the statute and

therefore, not required to be challenged in any legal forum for quashing the same. In support of this reliance has been placed in a decision reported in

1973 (2) SLR Page-848 Paras-2, 3, 4, 9, 10, 12 (Umashankar Das vs State of West Bengal) and also 2010 (1) SCC Page-417 paras-28-31 (Amarjeet

Singh And Others vs Devi Ratan And Others).

24. It is also submitted by learned Advocate General that all in-service candidates should be made party in the writ petition. Unfortunately the

petitioners failed to implead all in-service candidates as party respondent. This writ petition as such should be dismissed on the sole ground of non-

joinder of necessary parties. In support of his contention learned Advocate

General relied on an Honâ??ble Apex Court decision reported in 2016 (2)

SCC Page-779 Paragraphs-18 & 21 (Poonam vs State of Uttar Pradesh And Others). Learned Advocate General also vehemently urged that reliefs

which are not been sought for in the writ petition cannot be granted by the Court. On this proposition reliance has been placed in one Honâ??ble

Apex Court decision reported in 2010 (11) SCC Page-557 Paragraphs-30-34 (Manohar Lal (dead) By LRS vs Ugrasen (dead) By LRS And Others).

In this connection learned Advocate General also placed reliance on Order VI Rule 17 of the Civil Procedure Code which is quoted below :-

â??Amendment of pleadings.-The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on

such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in

controversy between the parties:

Provided that no application or amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of

due diligence, the party could not have raised the matter before the commencement of trial.â??

It is also submitted by the learned Advocate General that petitioners having participated in the first counselling cannot approach this Honâ??ble Court

in the midst of 2nd counselling by filing the present writ petition for preparation of a common merit list with the in-service doctors as well as open

category doctors. When they were fully aware that a separate list has been prepared thereby reserving 40 per cent seats for in-service doctors and 60

per cent seats for open category doctors and accordingly participated in the counselling. Therefore petitioners are debarred from subsequently

challenging the list in the present writ proceedings. In support of his submission learned Advocate General relied on Honâ??ble Apex Court decisions

reported in 2000 (2) SCC Page-48 Para-14 (Municipal Council, Ahmednagar And Another vs Shah Hyder Beig And Others), 2011 (5) SCC Page-607

paras-67 and 68 (Shankara Cooperative Housing Society Limited vs M. Prabhakar And Others) and 1995 (4) SCC Page-683 Para-14 (State of

Maharashtra vs Digambar).

25. It is further contended by the learned Advocate General that being unsuccessful the petitioners filed the present writ petition which is not

permissible in law. Unsuccessful candidates have no right to challenge the proceedings. On this point learned Advocate General relied on Honâ??ble

Apex Court decision reported in 2018 (7) SCC Page-207 Para-15 (Gurmeet Pal Singh vs State of Punjab And Another).

It is also contended that since the petitioners failed to challenge the order dated 18th April, 2013 it should be held that the petitioners have relinquished

their right. On that issue reliance is placed by him on one Honâ??ble Apex Court decision reported in AIR 1987 (SC) Page-425 Paras-8 and 9 (The

Comptroller and Auditor General of India, Gian Prakash, New Delhi and Another vs K.S. Jagannathan and Another) and also 2006 (14) SCC Page-

161 Paras-15 to 18. Learned Advocate General distinguished Dr. Chauhanâ??s case (supra) thereby submitting that Dr. Chauhanâ??s case has no

manner of application in the present case. He pointed out that even in the Dr. Chauhanâ??s case (supra) the Court considered that since seats have

been already filled up the settled posts should not be unsettled. It is also submitted by the learned Advocate General that after the Regulation came

into force since 2013 the system of in-service doctors reservation is carried on by the Government.

It is also emphasized that Regulation 9 (4) (7) supports the theory of reservation carried on by the Government in respect of admission to the

postgraduate courses.

Learned Advocate General further argued that right to make law is a State subject. Therefore, issuance of Government order dated 18th April, 2013 is

an executive action validity of which cannot be challenged by the petitioners.

Learned Advocate General also relied on Article 162 (extent of executive power of State), Articles 245 and 246 and also Entry 66 of List I of the 7th

Schedule and Entry 25 of the List III of 7th schedule. It is emphatically submitted that Entry 25 of List-III of 7th Schedule has empowered the State to

create law. In support of his contention learned Advocate General relied on a Honâ??ble Apex Court decision reported in 2005 (5) SCC Page-420

Para-28 (Prof. Yashpal And Another vs State of Chhattisgarh And Others).

26. In conclusion learned Advocate General submitted that there is no merit in the present writ petition since seats have already been filled up by the

in-service doctors as well as by the open category doctors according to the first counselling on the basis of the 40 per cent as well as 60 per cent

reservation of seats, therefore, the writ petition should be dismissed.

27. Mr. Suddhasatva Banerjee appearing for the University submitted that Dr. Chauhan's case (supra) is not a good law as it did not consider the

earlier Supreme Court decision reported in 2001 (8) SCC Page-694 (P.G. Medical Sangarsh Committee & Anr. vs Dr. Bajrang Soni & Ors) and also

Hon'ble Apex Court's decision reported in 2001 (8) SCC Page-700, Para-6.

Mr. Banerjee submitted that if the earlier judgment is not considered in the latter judgment then the latter judgment should be declared as per incuriam

and the earlier judgment would prevail. In support of his contention reliance is placed on Hon'ble Supreme Court decisions reported in 2003 (5)

SCC Page-448 (State of Bihar vs Kalika Kuer @ Kalika Singh & Ors). He also relied upon a decision reported in 1996 (3) SCC Page-253 Para-17 (

Ritesh R. Sah vs Dr. Y.L. Yamul & Ors).

Accordingly, Mr. Banerjee submitted that the writ petition should be dismissed.

28. Mr. Shaktinath Mukherjee, learned Senior Counsel appearing for the in-service doctors started his argument by referring to Article 246 of the

Constitution which is quoted below :-

Article-246-Subject-matter of laws made by Parliament and by the Legislatures of States.- (1) Notwithstanding anything in clauses (2) and (3),

Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (In this Constitution

referred to as the Union List).

(2) Notwithstanding anything in clauses (2) and (3) Parliament and, subject to clause 01) the Legislature of any state also, have power to make laws

with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List).

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to

any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the State List).

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included [in a state] notwithstanding that

such matter is a matter enumerated in the State List.

Mr. Mukherjee also referred Entry 66 of List I of Schedule 7 and Entry 6 of List II

of Schedule 7 and emphasized that State has exclusive jurisdiction under Entry 6 of List II of Schedule 7 for making laws.

It is further contended by Mr. Mukherjee that under Entry 66 of List I Schedule 7 provided that Parliament has exclusive power to create law but

under List III of Entry 25 of the Schedule 7 provided that both State and the Centre has concurrent power to create laws.

29. Mr. Mukherjee also referred Rule 3 of the Clause (b) of the notification dated 2nd June 2015 issued in exercise of power conferred by Section 21

of the West Bengal State Health Service Act, 1990.

Mr. Mukherjee also referred the "Proviso" and the "Note" which is quoted below :-

"Provided that the Officers of the West Bengal Health Service who desire to prosecute postgraduate courses in any subjects specified for the

West Bengal Medical Education Services and the West Bengal Public Health cum Administrative Service as mentioned in sub clauses (I) and (iii) of

Clause (b), shall only be allowed to do so if they execute a bond or an undertaking to serve in the West Bengal Medical Education Service or the West

Bengal Public Health cum Administrative Service as the case may be, afterwards, if they are so directed by the State Government and selected by the

competent authority.

(iii) for officers of the West Bengal Public Health cum Administrative Service :

MD (Community Medicine/Social) and Preventive Medicine), Master in Public Health, Master in Applied Epidemiology, Diploma in Maternity and

Child Health and other post graduate courses in public health, Epidemiology, health management, health and hospital administration and related courses

conducted by institutions of repute and affiliated by recognized Universities, both within and outside the State of West Bengal as Government

sponsored candidate, as enumerated in the Schedule of these rules :

Provided that the Officers up to the rank of Public-Health-cum-Administrative Officer : Group B shall also be eligible for trainee reserve facilities for

prosecuting all courses enumerated in sub clause (ii) of clause (b) as Government Sponsored candidates;

(iv) Course recognized by the Medical Council of India or courses approved by the National Board of Examinations (DIPLOMATE OF NATIONAL

BOARD) will only be allowed to be prosecuted outside this State subject to the condition that for postgraduate courses in public health, Epidemiology, health management, health and hospital administration, and related courses, recognition by Medical Council of India may not be mandatory, provided that the course is conducted by Institutions of repute and affiliated by recognized Universities and included in the Schedule of these rules.

Note : The number of seats available for the different courses run by the West Bengal University of Health sciences and their Universities, within this

State, for the officers of the West Bengal Health Service, the 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.â??

It is further submitted by Mr. Mukherjee that the Note (supra) has empowered the State Government to reserve seats for in-service candidates. He

referred Sections 19A and 20 of the Indian Medical Council Act, 1956. It is submitted that the said Act does not deal with admission in the institution.

The Act contemplates only in respect of standard not the admission. Those Sections are quoted below :-

â??Section 19A-Minimum standards of medical education.-(1) The Council may prescribe the minimum standards of medical education required for

granting recognised medical qualifications (other than post-graduate medical qualifications) by Universities or medical institutions of India.

(2) Copies of the draft regulations and of all subsequent amendments thereof shall be furnished by the Council to all State Governments and the

Council shall, before submitting the regulations or any amendment thereof, as the case may be, to the Central Government for sanction, take into

consideration the comments of any State Government received within three months from the furnishing of the copies as aforesaid.

(3) The Committee shall from time to time report to the Council on the efficacy on the regulations and may recommend to the Council such

amendments thereof as it may think fit.

Section 20-Post-graduate Medical Education Committee for assisting Council in matters relating to post-graduate medical education-(1) The Council

may prescribe standards of post-graduate medical education for the guidance of Universities, and may advise Universities in the matter of securing

uniform standards for post-graduate medical education throughout India, and for this purpose the Central Government may constitute from among the

members of the Council a Post-graduate Medical Education Committee (hereinafter referred to as the Post-graduate Committee).

(2) The Post-graduate Committee shall consist of nine members all of whom shall be persons possessing post-graduate medical qualifications and experience of teaching or examining post-graduate students of medicine.

(3) Six of the members of the Post-graduate Committee shall be nominated by the Central Government and the remaining three members shall be elected by the Council from amongst its members.

(4) For the purpose of considering post-graduate studies in a subject, the Post-graduate Committee may co-opt, as and when necessary, one or more members qualified to assist it in that subject.

(5) The views and recommendations of the Post-graduate Committee on all matters shall be placed before the Council; and if the Council does not agree with the views expressed or the recommendations made by the Post-graduate Committee on any matter, the Council shall forward them together with its observations to the Central Government for decision.â??

It is further contended by Mr. Mukherjee that in view of exclusive power of the State under Entry 66 of List II and the concurrent power under Entry

25 of List III of Schedule 7 State has got not only the power but it has the public duty to train up State doctors in medical hospitals and public health

centres. The Parliament has not made any law under Entry 25 of List III of the concurrent list in respect of education.

Parliament has only provided the condition for determination of standard of education and not of admission.

30. It is also submitted that Section 3 of the Act states above State Health Service. Section 21 provides for the power to make rules. On the point of

weightage and implication of note Mr. Mukherjee relied on a Honâ??ble Apex Court decision reported in (1975) 4 Supreme Court Cases Page-86

(Tara Singh And Others Vs State Of Rajasthan And Others) . Mr. Mukherjee also urged that since the order dated 18th April, 2013 has not yet been

quashed and set aside by any Court of law it is still in force. On the issue that until an order is challenged it remains effective Mr. Mukherjee relied

on an Apex Court decision reported in 1996 (1) Supreme Court Cases Page-435

Paragraph-8 (State of Kerala Vs M.K. Kunhikannan Nambiar

Manjeri Manikoth, Naduvil (Dead) and Others). It is also submitted by Mr. Mukherjee that MCI has travelled beyond its jurisdiction and made

Regulation 2000 thus prevented the exercise of power conferred upon the state under Entry 6 of List II and Entry 25 of List III of Schedule 7. Mr.

Mukherjee also submitted that the State is empowered to classify and/or reserve seats for the in-service doctors. In support of his contention Mr.

Mukherjee relied on one Honâ??ble Apex Court decisions reported in 1969 (2) Supreme Court Cases Page-228 Paragraphs- 8-12 (Kumari Chitra

Ghosh And Another vs Union Of India And Others) and 2016 (7) Supreme Court Cases Page-353 Paragraphs- 116, 117, 121, 129, 131, 139, 140, 141,

147 and 149 (Modern Dental College And Research Centre And Others vs State of Madhya Pradesh And Others) . Paras 8-12 of Kumari Chitra

Ghoshâ??s case are quoted below :-

â??Para-8-As laid down in Shri Ram Krishna Dalmia vs. Shri Justice S.R. Tendolkar & Others Article 14 forbids class legislation; it does not forbid

reasonable classification. In order to pass the test of permissible classification two conditions must be fulfilled-(i) that the classification is founded on

intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must

have a rational relation to the object sought to be achieved. The first group of persons for whom seats have been reserved are the sons and daughters

of residents of Union Territories other than Delhi. These areas are well known to be comparatively backward and with the exception of Himachal

Pradesh they do not have any Medical College of their own. It was necessary that persons desirous of receiving medical education from these areas

should be provided some facility for doing so. As regards the sons and daughters of Central Government servants posted in Indian Missions abroad it

is equally well known that due to exigencies of their service these persons are faced with lot of difficulties in the matter of education. Apart from the

problems of language, it is not easy or always possible to get admission into institutions imparting medical education in foreign countries. The Cultural,

Colombo Plan and Thailand scholars are given admission in medical institutions in this country by reason of reciprocal arrangements of educational and

cultural nature. Regarding Jammu and Kashmir Scholars it must be remembered

that the problems relating to them are of a peculiar nature and there do not exist adequate arrangements for medical education in the State itself for its residents. The classification in all these cases is based on intelligible differentia which distinguishes them from the group to which the appellants belong.

9. It is the Central Government which bears the financial burden of running the medical college. It is for it to lay down the criteria for eligibility. From the very nature of things it is not possible to throw the admission open to students from all over the country. 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 an overall assessment and survey of the requirements of residents of particular territories and other categories of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis it is not for the courts to interfere with the manner and method of making the classification.

10. The next question that has to be determined is whether the differentia on which classification has been made has rational relation with the object to be achieved. The main purpose of admission to a medical college is to impart education in the theory and practice of medicine. As noticed before the sources from which students have to be drawn are primarily determined by the authorities who maintain and run the institution the Central

Government in the present case. In *Minor P. Rajendran v. State of Madras* it has been stated that the object of selection for admission is to secure the best possible material. This can surely be achieved by making proper rules in the matter of selection but there can be no doubt that such selection has to be confined to the sources that are intended to supply the material. If the sources have been classified in the manner done in the present case it is difficult to see how that classification has no rational nexus with the object of imparting medical education and also of selection for the purpose.

11. The case of *Minor P. Rajendran* is clearly distinguishable because there the classification had been made district-wise which was considered to have no reasonable relation with the object sought to be achieved. Nor can the decision of a full bench of the Patna High Court in *Umesh Ch. Sinha v.*

V.N. Singh, Principal P.M.C. and Hospital and Ors be of any avail to the

appellants. In that case preferential treatment had been given to the children of the employees of the Patna University in the matter of admission to the Patna Medical College. It was held that there was no reasonable nexus between the principle governing admission to the college on the one hand and the pecuniary difficulties or the meritorious services rendered by the employees of the University on the other and that preferential treatment to the children of these employees would amount to favouritism and patronage. There is no question of any preferential treatment being accorded to any particular category or class of persons desirous of receiving medical education in the present case. The mere fact that the Central Government has to make the nominations with regard to the reserved seats cannot be considered to be preferential treatment of any kind. As the candidates for the reserved seats have to be drawn from different sources it would be difficult to have uniformity in the matter of selection from amongst them. The High Court was right in saying that the standards of the examination passed by them, the subjects studied by them and the educational background of each of them would be different and divergent and therefore the Central Government was the appropriate authority which could make a proper selection out of those categories. Moreover this is being done with the tacit approval and consent of the Medical Courses Admission Committee. It appears that the Central Government has been acting in a very reasonable way inasmuch as when nominations were made only to nine seats the rest were thrown open to the general pool.

12. The other question which was canvassed before the High Court and which has been pressed before us relates to the merits of the nominations

made to the reserved seats. It seems to us that the appellants do not have any right to challenge the nominations made by the Central Government.

They do not compete for the reserved seats and have no locus standi in the matter of nomination to such seats. The assumption that if nominations to

reserved seats are not in accordance with the rules all such seats as have not been properly filled up would be thrown open to the general pool is

wholly unfounded. The Central Government is under no obligation to release those seats to the general pool. It may in the larger interest of giving

maximum benefit to candidates belonging to the non-reserved seats release them but it cannot be compelled to do so at the instance of students who

have applied for admission from out of the categories for whom seats have not been reserved. In our opinion the High Court was in error in going into the question and holding that out of the nine seats filled by nomination two had been filled contrary to the admission rules and these would be converted into the general pool. Since no appeal has been filed against that part of the order we refrain from making any further observations in the matter.â??

31. In conclusion Mr. Mukherjee submitted that already the in-service doctors as well as some of the open category doctors have taken admission therefore Court should not entertain this writ petition but should dismiss the same with costs.

Mr. Pratik Dhar, learned Senior Counsel appearing for another group of in-service doctors submitted that knowing fully well that 40 per cent seats has been reserved for the in-service doctors and 60 per cent seats has been reserved for open category doctors the petitioners appeared in the first

counselling. Only in the midst of the second counselling petitioners approached before this Honâ??ble Court filing this present writ petition. Mr. Dhar

submitted that since the petitioners have already participated in the first counselling the petitioners are estopped from challenging the same in the

present proceedings. In support of his contention Mr. Dhar relied on Honâ??ble Apex Court decision reported in 2014 (10) Supreme Court Cases

Page-521 Paragraphs-33 and 44 (Chandigarh Administration And Another Vs Jasmine Kaur And Others) and also another Honâ??ble Apex Court

decisions reported in 2019 SCC Online SC Page-187 para-18 (Union of India And Others vs C. Girija And Others), 2008 (4) Supreme Court Cases

Page-171 Paragraph-9 (Dhananjay Malik And Others vs State Of Uttaranchal And Others). Mr. Dhar also contended that after participating in the

first counselling now by the present writ petition petitioners are virtually asking for change of rules in the midst of game which is not permissible in

law. On this point Mr. Dhar relied on a decision reported in 2008 (7) Supreme Court Cases Page-11 Paragraphs-11 & 14 (Hemani Malhotra vs High

Court of Delhi) which are quoted below :-

â??Para-11-On service of notice, Mr. Ramesh Chand, Deputy Registrar, Delhi High Court has filed reply-affidavit controverting the averments made

in the petition. In the reply it is stated that the writ petitions filed against

prescription of minimum percentage of marks for qualifying at the viva voce test, is not maintainable and therefore should be dismissed. It is mentioned in the reply that as far as selection made in the year 2000 was concerned, a candidate was required to get minimum of 55% marks if he belonged to the General Category and 50 % marks if he belonged to the Scheduled Castes and Scheduled Tribes category for passing the viva voce test and as the petitioners who belong to the General Category did not secure the minimum marks stipulated for the viva voce, but failed, their names were not recommended for appointment. It is mentioned in the reply that another advertisement dated 19.05.2007 was issued for recruitment to the vacant posts in the Delhi Higher Judicial Service wherein the petitioners had appeared but failed and therefore also they are not entitled to the reliefs claimed in the petitions. What is pointed out in the reply is that a candidate is required to secure the stipulated minimum marks in the written examination in order to qualify for the next stage i.e. viva voce test and therefore the respondent was justified in prescribing cut-off marks at the viva voce test. By filing the reply the respondent has demanded dismissal of the petitions.

Para-14-It is an admitted position that at the beginning of the selection process, no minimum cut-off marks for viva voce were prescribed for Delhi Higher Judicial Service Examination, 2006. The question, therefore, which arises for consideration of the Court is whether introduction of the requirement of minimum marks for interview, after the entire selection process was completed would amount to changing the rules of the game after the game was played. This Court notices in K. Manjusree v. State of A.P. the question posed for consideration of this Court in the instant petitions was considered and answered in the following terms :

â??33. The Resolution dated 30.11.2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks prescribed for written examination, to interviews, in the selection process is impermissible. We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do

not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interviewâ??.

From the proposition of law laid down by this Court in the abovementioned case it is evident that previous procedure was not to have any minimum marks for viva voce. Therefore, prescribing minimum marks for viva voce was not permissible at all after the written test was conducted.â??

32. Mr. Dhar also contended that there is no whisper in the writ petition that some of the open category doctors including some of the petitioners have taken admission. Mr. Dhar emphasized that the writ petition should be dismissed only on the sole ground of suppression of material facts. In support of his contention Mr. Dhar referred on an Honâ??ble Apex Court decision reported in 2008 (12) Supreme Court Cases Page-481 Paragraphs-38 & 39 (K.D. Sharma vs Steel Authority of India Limited And Others) .

33. In conclusion Mr. Dhar submitted that he is not against the Dinesh Singh Chauhanâ??s case but points out that even in D.S. Chauhanâ??s case Supreme Court directed that effect would be given from 2016-17 Academic Year though the challenge was for the year 2015-2016 . Therefore, Mr. Dhar in his usual fairness prayed before this Court to show some mercy or concession and be compassionate to the in-service doctors who have already taken admission for this session, allowing them to continue this academic session instead of setting aside the admission.

Decision with Reasons

34. After considering the rival submissions advanced by the learned Advocates appearing for the respective parties and after perusing the records I find that only after appearing in first counselling and in the midst of second counselling the petitioners approached before this Honâ??ble Court

thereby assailing the illegality committed by the respondent authority by reserving 40 per cent seats for in-service doctors and 60 per cent seats for the open category doctors though there is no provision in the Medical Council of Postgraduate Medical Education Regulation 2000. Under Clause 9(4)

(supra) the State authority is bound to prepare one combined merit list by taking in-service doctors as well as open category doctors as per their

position in the list of NEET. To get some idea regarding share of seats the chart is depicted below :-

In my opinion the State has no authority to divide or discriminate. It is revealed from Section 19A , Section 20 and Section 33 of the Medical Council

of India Act, 1956 that under Section 30 the Medical Council of India has the power to make laws. The State only can add weightage to the in service

doctors who served in the remote, rural and difficult area thereby giving 10 per cent extra marks to them. Unfortunately in the present case State

failed in its duty to notify any remote or rural area.

35. In my opinion illegality cannot be allowed to be perpetuated by the Court of law. Thus the Act of Government keeping 40 per cent reservation for

in service doctors and 60 per cent reservation for open category doctors is patently illegal. arbitrary and colourable exercise of power which is clearly

violative of Article 14 and Article 245 of the Constitution as well as Regulation 2000 at the same time. In this context Article 245 is required to be

noted as quoted below :-

Article 245-Extent of laws made by Parliament and by the Legislatures of States.-(1) Subject to the provisions of this Constitution, Parliament

may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the

State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Under sub Clause 2 of Article 245 no law made by Government shall be deemed to be invalid. Not only that it would be an extra territorial operation.

In this context in my opinion Article 13 should be referred and the same is quoted below :-

Article-13-Laws inconsistent with or in derogation of the fundamental rights-(1) All laws in force in the territory of India immediately before the

commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause

shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement

of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in

particular areas."

It therefore follows that if State makes any law in contravention of existing law that shall be void. Even if state make any law under Entry 6 of List II

of Schedule 7 the same is also subject to Entry 66 of List I of Schedule 7 of the Constitution.

36. The Hon'ble Supreme Court repeatedly warned in a catena of decisions that merit cannot be compromised in any event. A lesser-merited

doctor cannot be allowed admission in postgraduate medical education only on the basis of reservation. Unfortunately in the present case merit has

been compromised by creating two separate lists (1) 40 per cent reservation for in service doctors and (2) 60 per cent reservation for open category

doctors.

In this context I consider that it would be apposite to refer to a few paragraphs of *Asha v Pt. B.D. Sharma University of Health* case (supra) which

are quoted below :-

"Para-20-It is not necessary for the appellant to plead and prove mala fides, misconduct or favouritism and nepotism on the part of the parties

concerned. Failure to do the same could be an error, internal or otherwise, but in either event, we see no reason why the appellant should be made to

suffer despite being a candidate of higher merit.

21. At this stage, we may refer to certain judgments of the Court where it has clearly spelt out that the criteria for selection has to be merit alone. In

fact, merit, fairness and transparency are the ethos of the process for admission to such courses. It will be a travesty of the scheme formulated by this

Court and duly notified by the States, if the Rule of Merit is defeated by in efficiency, inaccuracy or improper methods of admission. There cannot be

any circumstance where the rule of merit can be compromised. From the facts of the present case, it is evident that merit has been a casualty. It will

be useful to refer to the view consistently taken by this Court that merit alone is the criteria for such admissions and circumvention of merit is not only

impermissible but is also abuse of the process of law.

23. Adherence to the schedule is the obligation of the authorities and the students both. The prescribed schedule is to be maintained *stricto sensu* by all

the stakeholders because if one party adheres to the schedule and others do not or there is some kind of lack of communication or omission to make

proper announcements and maintain proper records for such counselling, disastrous results can follow, of which the present case is an apt example.

24. The Court cannot ignore the fact that these admissions relates to professional courses and the entire life of a student depends upon his admission

to a particular course. Every candidate of higher merit would always aspire admission to the course which is more promising. Undoubtedly, any

candidate would prefer course of MBBS over BDS given the high competitiveness in the present times, where on a fraction of a mark, admission to

the course could vary. Higher the competition, greater is the duty on the part of the authorities concerned to act with utmost caution to ensure

transparency and fairness. It is one of their primary obligations to see that a candidate of higher merit is not denied seat to the appropriate course and

college, as per his preference. This Court is not oblivious of the fact that the process of admissions is a cumbersome task for the authorities but that

could never be a ground for compromising merit. The authorities concerned are expected to perform certain functions, which must be performed in a

fair and proper manner i.e. strictly in consonance with the relevant rules and regulations.â??

The above dicta of the Honâ??ble Apex Court is still holding the field.

37. I am tempted to refer some portions of the decision in Dr. Preeti Srivastava case (*supra*) (Paragraphs-35 & 36) and also paragraphs-62, 67, 74

and 84 of decision reported in AIR 1952 SC Page-252 -as has been rightly relied

on by Mr. Mitra. Even in the case of Modern Dental College and

Research (supra) the Honâ??ble Apex Court in Paragraph-143 observed that norms for admission have a nexus with the standard of education or

rules of admission which are governed under Entry 25 of the concurrent list III.

In this context Paragraphs-3, 4, 6 and 24, 25 & 40 of Dinesh Chauhanâ??s case (supra) are also quoted below :-

â??Para-3. The said writ petitioners claimed to be members of the Provincial Medical Health Services in the State of Uttar Pradesh. According to

them, they were also entitled to be considered for admission in postgraduate degree courses against 30% quota for in-service candidates. The plea

was opposed on the ground that 30% quota was reserved only for the in-service candidates who had worked in remote and difficult areas; and not for

the in-service medical officers generally. In these petitions, the High Court was primarily required to consider the question as to whether the in-service

medical officers in the State of Uttar Pradesh who had working experience (in areas other than remote and difficult areas), could also be treated as

eligible for admission against the reserved 30% quota for in-service candidates in postgraduate degree courses.

4.-While considering this issue, the High Court, in the context of Regulation 9, noticed that there was no provision in the Indian Medical Council Act,

1956 (hereinafter referred to as â??the Central Enactmentâ? or â??the 1956 Actâ?); and the Regulations framed thereunder known as the Medical

Council of India Postgraduate Medical Education Regulations, 2000 (hereinafter referred to as â??the said Regulationsâ?), stipulating reservation for

in-service candidates against the 30% seats in â??postgraduate degree coursesâ?. The provision, however, was only to give weightage of marks to

in-service candidates who had worked for specified period in CHC and PHC Hospitals in notified remote, difficult or backward areas of the State. On

the other hand, reservation has been limited to postgraduate â??diplomaâ?? courses by the said Regulations. The High Court, therefore, called upon the

Medical Council of India to clarify its stand in this behalf.

6. The High Court whilst advertent to the decisions of this Court including the recent judgment in Sudhir N. v. State of Kerala held that Regulation 9 is

a complete code and the admission process must strictly adhere to the norms stipulated therein. It, thus, proceeded to quash the Government

Notification-cum-Government order dated 28.2.2014 and directed that admissions to postgraduate "degree" courses be proceeded strictly on

merits amongst the candidates who have obtained requisite minimum marks in the common entrance examination in question. It also noted that as per

Regulation 9, at best, the in-service candidates who have worked in remote and difficult areas in the State, as notified by the State

Government/competent authority from time to time, alone would be eligible for weightage of marks as incentive @ 10% of the marks obtained for

each year of service in such areas up to the maximum of 30% marks obtained in National Eligibility-cum-Entrance Test.

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

It is also well established that the State has no authority to enact any law much less by executive instructions that may undermine the procedure for

admission to postgraduate medical courses enunciated by the Central legislation and regulations framed thereunder, being a subject falling within

Schedule VII List I Entry 66 of the Constitution. The procedure for selection of candidates for the postgraduate degree courses is one such area on

which the Central legislation and regulations must prevail.

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

officers generally for admission to postgraduate "degree" courses. Regulation 9 is a composite provision prescribing procedure for selection of

candidates-both for postgraduate "degree" as well as postgraduate "diploma" courses.

40. The matter does not end here. In the present proceedings,, however, large number of candidates who earlier found place in the merit list have

been affected by the fresh merit list prepared in terms of order of this Court dated 12-5-2016. As a result of giving effect to Regulation 9, the fresh list

has thrown up a different argument for consideration. The in-service candidates who had secured relatively less marks in NEET have been placed

high up in the order of merit consequent to addition of incentive marks @ 10% of the marks for each year of service in the remote and/or difficult areas

up to the maximum of 30% of marks obtained in NEET (CET). We find merit in the submission of Mr. Dwivedi, learned Senior Counsel, that the

rights of such candidates to be considered for admission, is not affected.

What is affected is the opportunity to get admission in a college or subject of their choice. The provision in the shape of Regulation 9 is to determine

the merit of the competing candidates. The provision for giving incentive marks to in-service candidates is permissible in law; and thus the proviso to

clause (IV) in Regulation 9 must be upheld in larger public interest. That provision has been introduced, inter alia, also to address the deficiency and

lack of response of graduate doctors to serve in remote or difficult areas in the State. The scarcity of doctors in villages has been felt for quite some

time for which the provision in the form of proviso to clause (IV) of Regulation 9 was necessitated. This concern was even echoed in the Rajya

Sabha.â??

38. On the issue of extension of date of admission under Regulation 9 (10) cannot be done by the High Court as has been canvassed by learned

Advocate Mr. Roy on that issue in my considered view Regulation 9 should be taken as a whole and not in a piecemeal manner. If Regulation 9 (4) is

not followed by the State then nobody can dictate that Regulation 9 (10) and 9 (11) would be followed in toto. In this context I refer paragraphs-7 & 8

of â??Sagar Damodar Sardar caseâ? (supra) as well as Paras- 38.2 and 38.3 of Asha v Pt. B.D. Sharma case (supra) relied on by Mr. Mitra. Paras-

38.2 and 38.3 are quoted below :-

â??Para-38.2-Question (b) : 30th September is undoubtedly the last date by which the admitted students should report to their respective colleges

without fail. In the normal course, the admissions must close by holding of second counselling by 15th September of the relevant academic year (in

terms of the decision of this Court in Priya Gupta). Thereafter, only in very rare and exceptional cases of unequivocal discrimination or arbitrariness or

pressing emergency, admission may be permissible but such power may preferably be exercised by the courts. Further, it will be in the rarest of rare

cases and where the ends of justice would be subverted or the process of law would stand frustrated that the courts would exercise their

extraordinary jurisdiction of admitting candidates to the courses after the deadline of 30th September of the current academic year. This, however, can

only be done if the conditions stated by this Court in Priya Gupta and this judgment are found to be unexceptionally satisfied and the reasons therefor

are recorded by the court of competent jurisdiction.

38.3- Questions (c) & (d) : Wherever the court finds that action of the authorities has been arbitrary, contrary to the judgments of this Court and

violative of the rules, regulations and conditions of the prospectus, causing prejudice to the rights of the students, the court shall award compensation to

such students as well as direct initiation of disciplinary action against the erring officers/officials. The court shall also ensure that the proceedings

under the Contempt of Courts Act, 1971 are initiated against the erring authorities irrespective of their stature and empowerment. Where the

admissions given by the authorities concerned are found by the courts to be legally unsustainable and where there is no reason to permit the students

to continue with the course, the mere fact that such students have put in a year or so into the academic course is not by itself a ground to permit them

to continue with the course.â??

If the State action is contrary to Regulation 9 (4) then any further consequential steps taken contrary to Regulation 9 (4) shall automatically given go

bye.

39. Court cannot shut its eyes and sit idle when it is detected that wrong action has been committed and pursued violating the statute as well as the

constitutional mandate then it is the duty of the Court to rectify the wrong rather than allowed to perpetuate the same. On this issue Paras 18, 19, 20

of the Honâ??ble Apex Court decision reported in AIR 1987 SC Page-537 (The Comptroller and Auditor General of India Gian Prakash New Delhi

and Another vs K.S. Jagannathan and Another) may be profitably employed herein which are quoted hereunder :

â?? Para-18-The first contention urged by learned Counsel for the Appellants was that the Division Bench of the High Court could not issue a writ of

mandamus to direct a public authority to exercise its discretion in a particular manner. There is a basic fallacy underlying this submission both with

respect to the order of the Division Bench and the purpose and scope of the writ of mandamus. The High Court had not issued a writ of mandamus.

A writ of mandamus. was the relief prayed for by the Respondents in their writ petition. What the Division Bench did was to issue directions to the

Appellants in the exercise of its jurisdiction under Article 226 of the Constitution. Under Article 226 of the Constitution, every High Court has the

power to issue to any person or authority, including in appropriate cases, any Government, throughout the territories in relation to which it exercises jurisdiction, directions, orders, or writs including writs in the nature of habeas corpus, mandamus, quo warranto and certiorari, or any of them, for the enforcement of the Fundamental Rights conferred by Part III of the Constitution or for any other purpose. In *Dwarkanath, Hindu Undivided Family v. Income-Tax Officer, Special Circle, Kanpur, and another*, [1965] 3 S.C.R. 536, 540 this Court pointed out that Article 226 is designedly couched in a wide language in order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts "to reach injustice wherever it is found" and "to mould the reliefs to meet the peculiar and complicated requirements of this country." In *Hochtief Gammon v. State of Orissa & Ors.*, [1976] 1 S.C.R. 667, 676 this Court held that the powers of the courts in England as regards the control which the Judiciary has over the Executive indicate the minimum limit to which the courts in this country would be prepared to go in considering the validity of orders passed by the Government or its officers.

Even had the Division Bench issued a writ of mandamus giving the directions which it did, if circumstances of the case justified such directions, the High Court would have been entitled in law to do so for even the courts in England could have issued a writ of mandamus giving such directions.

Almost a hundred and thirty years ago Martin, B., in *Mayor of Rochester v. Regina*, [1858] E.B. & E. 1024,1032,1034 said :

But, were there no authority upon the subject, we should be prepared upon principle to affirm the judgment of the Court of Queen's Bench. That Court has power, by the prerogative writ of mandamus, to amend all errors which tend to the oppression of the subject or other misgovernment, and ought to be used when the law has provided no specific remedy, and justice and good government require that there ought to be one for the execution of the common law or the provisions of a statute : Comyn's Digest, Mandamus (A) Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable.

The principle enunciated in the above case was approved and followed in *The King v. The Revising Barrister for the Borough of Hanley*, [1912] 3

K.B. 518, 528-9, 531. In *Hochtief Gammon's Case* this Court pointed out (at page 675) that the powers of the Courts in relation to the orders of the

Government or an officer of the Government who has been conferred any power under any statute, which apparently confer on them absolute

discretionary powers, are not confined to cases where such power is exercised or refused to be exercised on irrelevant considerations or on erroneous

ground or mala fide, and in such a case a party would be entitled to move the High Court for a writ of mandamus. In *Padfield and Others v. Minister*

of Agriculture, Fisheries and Food and Others, [1968] A.C. 997 the House of Lords held that where Parliament had conferred a discretion on the

Minister of Agriculture, Fisheries and Food, to appoint a committee of investigation so that it could be used to promote the policy and objects of the

Agricultural Marketing Act, 1958, which were to be determined by the construction of the Act which was a matter of law for the court and though

there might be reasons which would justify the Minister in refusing to refer a complaint to a committee of investigation, the Minister's discretion was not

unlimited and if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was

entitled to interfere by an order of mandamus. In *Halsbury's Laws of England*, Fourth Edition, Volume I, Paragraph 89, it is stated that the purpose of

an order of mandamus "is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a

specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy,

yet that mode of redress is less convenient, beneficial and effectual.

Para-20-There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of

mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed

to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised

such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the

object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and

proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or

pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public

authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions

which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.â??

(Emphasized supplied)

40. I would now deal with the decisions cited by the learned Counsels.

The decision in Amarjeet Singh And Others case (supra) relied on by learned Advocate General was rendered in service matter holding that

promotion with retrospective effect could be permitted in exceptional circumstances and that act of Court shall not prejudice any one; the maxim being

actus curiae neminem gravabit. The decision has no manner of application in the case in hand.

The next decision cited is â??Poonamsâ??s caseâ? (supra) to say about the necessity of impleadment of necessary parties on the principles of

natural justice and paragraphs 17 and 18 dealt with the issue. This case also has no manner of application in the case in hand inasmuch as in this writ

petition the Stateâ??s action in publishing two separate set of list thereby reserving 40% seats for the in-service doctors and 60% seats for the open

category doctors is under challenged and all necessary parties are before this Court.

The decision reported in â??Mohan Lalâ??s Caseâ? (supra) relied on by the learned Advocate General for the proposition that relief not specifically

prayed for cannot be granted by the Court. While the proposition is undisputed, it is also trite law that if the petitioners have made out a proper case

for relief the Court has ample power to modify or mould the prayers and grant appropriate relief although not prayed for.

The decision reported in â??Municipal Council, Ahmednagar and Anr.â? (supra), relied on by learned Advocate General was rendered on a writ

petition filed long after 21 years challenging the notification issued under

Maharashtra Region and Town Planning Act, 1906 read with Section 6 of the Land Acquisition Act, 1894 by way of amendment, the initial challenge being the Award published subsequent to the said notification and the plea of

limitation was considered therein on the doctrine of "delay defeats equity". This decision also has no manner of application in the case in hand.

The decision in "Shankara Cooperative Housing Society Ltd case (supra) relied on by the learned Advocate General was rendered on the question

of maintainability of writ petition on the issue of inordinate delay of nearly 15 years and laches of the petitioner and also the issue of constructive res

judicata also fell for consideration by the Apex Court. This decision has also no manner of application in the case in hand.

The same issue of laches and delay was also considered in the case of "State of Maharashtra" (supra) relied on by the learned Advocate

General which again is not applicable in the case in hand.

The decision reported in "Gurmeet Pal Singh" (supra) relied on by the learned Advocate General is clearly distinguishable on facts. In the said

case, recruitment process under Punjab Superior Judicial Services Rules, 2007 was considered by the Apex Court in the backdrop of elevation made

on a date subsequent to the advertisement issued earlier to such elevation and that a candidate appearing in the examination without objection and

subsequently unsuccessful is precluded to challenge the process of recruitment. In the case in hand the petitioners are not unsuccessful candidates.

The decision in 2005 (5) SCC 420 (Para-28) (Prof. Yaspal vs State of Chattisgarh) relied on by the learned Advocate General does not support the

action of the State at all in view of the statements of the Hon'ble Supreme Court made, inter alia, in paragraphs-32, 33, 45, 46 and 48 of the

report.

The decision reported in AIR 1987 SC 425 (Para-8 & 9) (Ashok Gulati vs V.S. Jain) relied on by the learned Advocate General was rendered in

relation to the State Government Notification making ad hoc promotion of the appellants and the respondents therein, which was quashed by the High

Court but restored in Appeal by the Hon'ble Apex Court. Therefore, the issue involved in the said case is totally different to the issue involved in

the case in hand.

41. The decision relied on by Mr. Banerjee in P.G Medical Sangarsh case (supra) I

find has no manner of application in the present case as in that case Regulation 2000 was not even a subject matter of challenge. It is noticed from the cited case that the initial writ petition was filed much before 2000 as evident from Civil Case No.7264 of 1999 when admittedly the Regulation has not seen the light of the day. There this decision is pre-Regulation 2000.

The decision in State of Bihar case (supra) cited by Mr. Banerjee I find the said case says as to when a decision could be said to be per-incuriam. In my considered view the citation is misplaced. In the case the reference is still pending before the Honâ??ble Constitutional Bench.

The other decision cited by him being Ritesh R. Shahâ??s case (supra) I find that in the said case although admission for the session being already over still the court directed to admit the candidate even by increasing one seat even when no seat is available. This decision, to my mind, has no manner of application in the present case.

42. Now I would deal with the citations relied on by Mr. Mukherjee.

In the decision relied on by Mr. Mukherjee in Modern Dental College (supra) in (Para-143) the Honâ??ble Supreme Court held that it is not correct to say that norms for admission have no connection with the standard of education or that rules for admission are covered only by the List III under Entry 25. Norms for admission have a direct impact on the standard of education. Paragraph-143 is quoted below :-

â??Para-143-In Preeti Srivastava case, this Court considered the question whether it was open to the State to prescribe different admission criteria, in the sense of prescribing different minimum qualifying marks, for special category candidates seeking admission to the postgraduate medical courses under the reserved seats category as compared to the general category candidates. While considering the question whether norms for admission have any connection with the standards of education, observing that norms for admission have a nexus with standards of education of rules of admission which are covered under Entry 25 of the Concurrent List, it was held that the minimum standards as laid down by the Central statute have to be complied with by the States. In paras 35 and 36 it was held as under :

â??35-â?|.Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to List I Entry

66 which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also coordination

of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any union

legislation. Secondly, the state cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is

exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education

including higher medical education the state cannot adversely affect the standards laid down by the Union of India under List I Entry 66. Secondly,

while considering the cases on the subject it is also necessary to remember that from 1977, education, including, inter alia, medical and university

education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in

this field, except as provided in Article 254.

36. It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are

covered only by List III Entry 25. Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for

admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under List I

Entry 66. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those prescribed under

List I Entry 66. This would be consistent with promoting higher standards for admission to the higher educational courses. But any lowering of the

norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education. Standards of education in an

institution or college depend on various factors. Some of these are :

(i) the calibre of the teaching staff;

(ii) a proper syllabus designed to achieve a high level of education in the given span of time;

(iii) the student-teacher ratio;

(iv) the ratio between the students and the hospital beds available to each student;

(v) the calibre of the students admitted to the institution;

(vi) equipment and laboratory facilities, or hospital facilities for training in the case of medical colleges;

(vii) adequate accommodation for the college and the attached hospital; and

(viii) the standard of examinations held including the manner in which the papers are set and examined and the clinical performance is judged.â??

The decision in Tara Singhâ??s case (supra) relied on by Mr. Mukherjee is rendered on the issue of implementation of â??Noteâ? in my opinion an

explanatory note cannot supplement the provisions of the substantive clause. It has to be read in the context of the substantive provision and not in

derogation or in isolation thereof. In a judgement delivered on 10th April, 2007 in Civil Appeal No.1870 of 2007 (V.B Prasad vs Manager, PMDUP

Schools and Others) reported in AIR 2007 SC Page 2053, the Honâ??ble Supreme Court has stated as under :

Note : The language/specialist teachers, according to their seniority in the combined seniority list of teachers shall also be appointed as Headmaster of

U.P. School or Schools under an Educational Agency provided the teacher possesses the prescribed qualifications for promotion as Headmaster of

U.P. School on the date of occurrence of vacancy.

The said rule, thus, provides for essential qualification. Rule 45 is in three parts. The first part provides for the qualification of a teacher who can be

appointed in the post of Headmaster. He must be graduate with B.Ed. or other equivalent qualification and must have at least five years' experience in

teaching after acquisition of B.Ed. degree. The second part of the rule provides for consideration of such teachers only in the event a graduate

teacher is not available. Indisputably, Respondent No. 6 fulfils the educational qualification as also five years' experience in teaching after acquisition

of B.Ed. degree. Ignoring her claim, Respondent No. 2 was appointed whose case comes within the purview of the second part of Rule 45, as she did

not have the qualification specified in the first part thereof . Appellant was a Drawing teacher. He, therefore, was a specialist teacher. According to

him his case comes within the purview of the 'note' appended to Rule 45.

For the time being, we may assume that in view of fact that he had also acquired the qualification of B.Ed. in April 1989, his case also could be

considered in terms of Rule 45; although it is well-settled principles of law that the note appended to a statutory provision or the subordinate legislation

must be read in the context of the substantive provision and not in derogation thereof. Five years' teaching experience for appointment to the post of

Headmaster was a sine qua non. Such teaching experience was to be 'teaching experience' and not a deemed teaching experience.

In Punjab State Electricity Board Ltd. v. Zora Singh and Others [(2005) 6 SCC 776], this Court noticing a decision of a Full Bench of the Andhra

Pradesh in A.P. SRTC v. STAT [ILR 2001 AP 1], observed :

23. In A.P. SRTC v. STAT a Full Bench of the Andhra Pradesh High Court has noticed thus: (An LT p. 544, para 31) 31[24]. The meaning of note

as per P. Ramanatha Aiyars Law Lexicon, 1997 Edn. is a brief statement of particulars of some fact, a passage or explanation.

24. The note, therefore, was merely explanatory in nature and thereby the rigour of the main provision was not diluted.

(Emphasis supplied)

The Honâ??ble Court dealing with â??Note appended to Rule 244 (2)â? observed that the function of the Notes is to provide procedures and to

control discretion and that notes are not inconsistent with the Rules but are intended to fill up gaps where the Rules are silent and that the Notes to the

Rules make explicit what is implicit in the Rules.

The issue is no more res integra the that a NOTE appended to any proviso or policy decision cannot override the Medical Council Act as well as the

Regulation 2000 and also cannot supercede Entry 25 of List III as well as Entry 66 of List I of Schedule 7. Entry 25 of List III is the Parliament list

and Entry 66 of List I is the concurrent list. This Court does not find any force in the argument of Mr. Mukherjee on the point that MCI cannot make

Regulation 9 (4) thereby travelling beyond the Act. Neither the private respondent nor the State has challenged the MCI Act or the Regulation 2000.

Unless it is challenged none can question its authority; it is appropriate to mention here that Honâ??ble Supreme Court has consistently held that

Regulation 2000 is a self-contained code as well as a complete code.

It can not be disputed that any law made by the State is subject to Entry 66 of the List I of Schedule 7 which is the Parliament List.

In the context of reference of Modern Dental College case (supra) the decision of Constitutional Bench of Honâ??ble Supreme Court reported in

1999 (7) SCC Page-120 (Dr. Preeti Srivastava And Another vs State Of M.P. And

Others) has been considered with approval; paragraphs 36, 37, 39

and 46 of Dr Preeti Srivastava case are quoted below :-

â??Para-36-It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for

admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of education. Of course, there can

be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers

under Entry 66 of List I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those

prescribed under Entry 66 of List I. This would be consistent with promoting higher standards for admission to the higher educational courses. But any

lowering of the norms laid down can and does have an adverse effect on the standards of education in an institution or college depend on various

factors. Some of these are :

(1) the calibre of the teaching staff;

(2) a proper syllabus designed to achieve a high level of education in the given span of time;

(3) the student-teacher ratio;

(4) the ratio between the students and the hospital beds available to each student ;

(5) the calibre of the students admitted to the institution;

(6) equipment and laboratory facilities, or hospital facilities for training in the case of medical colleges;

(7) adequate accommodation for the college and the attached hospital; and

(8) the standard of examinations held including the manner in which the papers are set and examined and the clinical performance is judged.

Para-37- While considering the standards of education in any college or institution, the calibre of students who are admitted to that institution or college

cannot be ignored. If the students are of a high calibre, training programmes can be suitably moulded so that they can receive the maximum benefit out

of a high level of teaching. If the calibre of the students is poor or they are unable to follow the instructions being imparted, the standard of necessarily

has to be lowered to make them understand the course which they have

undertaken; and it may not be possible to reach the levels of education and training which can be attained with a bright group. Education involves a continuous interaction between the teachers and the students. The pace of teaching, the level to which teaching can rise and the benefit which the students ultimately receive, depend as much on the calibre of the students as on the calibre of the teachers and the availability of adequate infrastructural facilities. That is why a lower student-teacher ratio has been considered essential at the levels of higher university education, particularly when the training to be imparted is a highly professional training requiring individual attention and on-hand training to the pupils who are already doctors and who are expected to treat patients in the course of doing their postgraduate courses.

Para-39-The respondents have emphasised the observation that admission has to be made by those who are in control of the colleges. But, the question is, on what basis ? Admissions must be made on a basis which is consistent with the standards laid down by a statute or regulation framed by the Central Government in the exercise of its powers under Entry 66 List I. At times, in some of the judgments, the words “eligibility” and “qualification” have been used interchangeably, and in some cases a distinction has been made between the two words—“eligibility” connoting the minimum criteria for selection that may be laid down by the University Act or any Central statute, while “qualifications” connoting the additional norms laid down by the colleges or by the State. In every case the minimum standards as laid down by the Central statute or under it, have to be complied with by the State while making admissions. It may, in addition, lay down other additional norms for admission or regulate admissions in the exercise of its powers under Entry 25 List III in a manner not inconsistent with or in a manner which does not dilute the criteria so laid down.

Para-46-There are, however, two cases where there are observations to the contrary. On is the case of State of M.P. v Nivedita Jain, a judgment of a Bench of three Judges. In this case the Court dealt with admission to the MBBS course in the medical colleges of the State of Madhya Pradesh. The rules framed by the State provided for a minimum of 50% as qualifying marks for the general category students for admission to the medical colleges of the State. But for the Scheduled Castes and the Scheduled Tribes the

minimum qualifying marks were prescribed as 40%. Later on, the minimum qualifying marks for the Scheduled Castes and the Scheduled Tribes were reduced to 0. The Court observed :

That it was not in dispute and it could not be disputed that the order in question was in conflict with the provisions contained in Regulation II of the regulations framed by the Indian Medical Council.

But it held that Entry 66 of List I would not apply to the selection of candidates for admission to the medical colleges because standards would come

in after the students were admitted. The Court also held that Regulation II of the regulations for admission to MBBS courses framed by the Indian

Medical Council, was only recommendatory. Hence any relaxation in the rules of selection made by the State Government was permissible. We will

examine the character of the regulations framed by the Medical Council of India a little later. But we cannot agree with the observations made in that

judgment to the effect that the process of selection of candidates for admission to a medical college has no real impact on the standard of medical

education; or that the standard of medical education really comes into the picture only in the course of studies in the medical colleges or institutions

after the selection and admission of candidates. For reasons which we have explained earlier, the criteria for the selection of candidates have an

important bearing on the standard of education which can be effectively imparted in the medical colleges. We cannot agree with the proposition that

prescribing no minimum qualifying marks for admission for the Scheduled Castes and the Scheduled Tribes would not have an impact on the standard

of education in the medical colleges. Of course, once the minimum standards are laid down by the authority having the power to do so, any further

qualification laid down by the authority concerned. But the action of the State is valid because it does not adversely impinge on the standards

prescribed by the appropriate authority. Although this judgment is referred to in the Constitution Bench judgment of *Indira Sawhney v Union of India*

the question of standards being lowered at the stage of postgraduate medical admissions was not before the Court for consideration. The Court merely

said that since Article 16 was not applicable to the facts in *Nivedita Jain case* Article 335 was not considered there. For postgraduate medical

education, where the students are required to discharge duties as doctors

in hospitals, some of the considerations underlying Articles 16 and 335

would be relevant as hereinafter set out. But that apart, it cannot be said that the judgment in Nivedita Jain is approved in all its aspects by Indra

Sawhney v Union of India.

In 1966 (1) SCC 435 (State of Kerala vs N.K. Kunhikannan Nambier), cited by Mr. Mukherjee the Hon'ble Court held that the void order or

decision is effective inter partes unless it is successfully avoided or challenged in a higher forum.

The ratio in the decision reported in 2016 (7) SCC 353 (Modern Dental College case) cited by Mr. Mukherjee is dealt with hereinafter.

On the point of Mr. Mukherjee as well as learned Advocate General that unless any Government order or notification is challenged and declared as

nullity by any Court of law that cannot be automatically considered as nullity. On that score my considered view is that High Court exercising the

jurisdiction under Article 226 have the power to issue a writ of mandamus or writ in the nature of mandamus or pass an order and give direction

where it is noticed that the government or a public authority has failed to exercise or has wrongly exercised the rule or policy decisions of the

Government or has exercised such discretion mala fide or on irrelevant consideration and also have the power to mould the reliefs to render justice to

the sufferers of the wrong. In this context AIR 1987 SC Page-537 Paras-18, 19 and 20 (The Comptroller and Auditor General of India, Gian Prakash,

New Delhi and Another vs K.S. Jagannathan and Another) (supra) referred above.

44. I now deal with the decisions relied on by Mr. Indranil Roy, learned Advocate pleading for Medical Council of India (MCI).

In the decision reported in AIR 1994 SC 595 (State of Punjab & Ors vs Renuka Singla & Ors), the Hon'ble Supreme Court held that the High

Court cannot disturb balance between capacity of institution and number of admissions on Compassionate ground and thus set aside the

admission of student of B.D.S course on Compassionate ground.

The next decision cited by Mr. Roy, reported in AIR 2013 SC 115 (Faiza Choudhury vs State of J & K & Anr) wherein the Hon'ble Supreme

Court held that an unfilled seat of one academic year cannot be filled up after the cutoff date or in the next academic year and that carry forward

principle is unknown to the professional course like Medical, Engineering etc.

In the decision reported in 2016 (7) SCC 359 (Modern Dental College & Research Centre vs State of U.P) cited by Mr. Roy, the Honâ??ble

Supreme Court dealt with issue of fundamental rights of private unaided professional colleges and held that they should yield to the public interest and

rights of the students at large and this was pronounced by the Honâ??ble Court where the Writ Petitioners challenged the validity/vires of the

provisions of the statute passed by the state legislature known as â??Niji Vyavasayik Shikshan Sanstha Adhiniyam, 2007, Admission Rules, 2008 and

also M.P. Private Medical and Dental Post Graduate Course Entrance Examination Rules, 2009 and while upholding the decision of the High Court

constituted an Oversight Committee, exercising Article 142 of the Constitution, consisting of 3 Members which would oversee all statutory functions

under the MCI Act and this Committee was constituted when the Expert Committee Report observing that MCI as the regulator of the Medical

education in the country has reportedly failed in all its mandates over the decades and such Expert Committee Report was yet to be acted upon by the

Government and in Her Lordshipâ??s supplementary judgement, Justice Banumathi held in para-88 of the Report, inter alia, that to check capitation

fees and profiteering, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not

exploited and that in exercise of their â??Right to Occupationâ?? private institutions cannot transgress the rights of the students.

In a decision reported in 2006 (9) SCC 749 (State of U. P vs Dinesh Singh Chouhan) cited by Mr. Roy, the Honâ??ble Court held that High Court

was justified in quashing the State Government order providing for reservation to in-service candidates being violative of Regulation 9 as in force and

modifying the operative direction by the High Court, directed that admission process for academic year 2016-17 onwards to the Post Graduate Degree

Course in the State should proceed as per Regulation-9 including by giving incentive marks to eligible in-service candidates in terms of proviso to

clause (iv) of Regulation-9 and accordingly the Honâ??ble Court moulded the operative order of the High Court in conformity with the direction

contained in the Honâ??ble Courtâ??s interim order dated 12.05.2016.

The Honâ??ble Court further stated â??we are conscious of the fact that this arrangement is likely to affect some of the direct candidates, if not a

large number of candidates whose applications were already processed by the competent authority for Post Graduate Degree Course concerned for

academic year 2016-17, however, their admissions cannot be validated in breach of or disregarding the mandate of Regulation-9 as in force.â??

In the decision reported in 2002 (7) SCC 258 (MCI vs Madhu Singh), cited by Mr. Roy, the Honâ??ble Supreme Court held that there is no scope for

admitting students mid-stream as that would be against the very spirit of statutes governing Medical education and even if seats are unfilled that

cannot be a ground for making mid-sessions admissions and that there cannot be telescoping of unfilled seats of one year with permitted seats of the

subsequent year.

In the decision reported in 2005 (2) SCC 65 (Mridul Dhar & Anr vs UOI & Ors) cited by Mr. Roy, the Honâ??ble Court issued various directions,

inter alia, relating to availability of the mark-sheets to the students, completion of the admission process of first round of State-level Medical Dental

College within the stipulated time and also counseling etc.

45. The judgment cited by Mr. Dhar in â??Chandigarh Administrationâ?s case (supra) the facts of the cited case and facts of the present case are

not same. To that effect Para-2 of this judgement is quoted below :-

â??2. The present impugned orders of the Division Bench came to be passed at the instance of the contesting respondent in both the civil appeals

who was really aggrieved of a clause in the prospectus issued by the appellants in SLPs (C) Nos.18137-38 of 2014 (hereinafter called â??the

Chandigarh Administration and the Government Medical College, Chandigarhâ?), which according to her was not valid. According to the contesting

respondent, she being a Canadian citizen is an NRI, that, therefore, she was entitled to seek admission to the MBBS course in the NRI category quota

but yet the definition of â??NRIâ? as specified in the prospectus issued by the Chandigarh Administration and the Government Medical College,

Chandigarh for the academic year 2014-15 would denude her of such status and, therefore, it was liable to be struck down. The said definition, which

was contained in Para 2 of the prospectus of 2013-2014, was as under :

â??2. Eligibility and merit for NRI seats (03 seats) for MBBS course : In addition to the general conditions above, under the NRI category 03 seats

shall be filled up as per preference order of Categories 1 and 2, given as under :

First preference will be given to those NRI candidates who have ancestral background of Chandigarh (Category 1) :

For ancestral background of Chandigarh, the grandparents/parents of the candidates should be resident of Chandigarh for a minimum period of 5 years

at any time since the origin of Chandigarh and should have immovable property in his/her name in Chandigarh for the last at least 5 years. A

certificate to his effect is required from DC-cum-Estate Officer or Municipal Corporation of Chandigarh.

Second preference will be given to those NRI candidates who have ancestral background of States/UTs other than UT Chandigarh (Category 2). A

certificate regarding ancestral background of the other State/UT from the competent authority is to be submitted in case of students with ancestral

background of other States/UTs.

There will be no separate test/entrance test for the candidates applying for NRI/foreign Indian student. These candidates will have to obtain the

eligibility and equivalence certificate for their qualifying examination from the Punjab University, Chandigarh (as mentioned in general condition Point f

)â??.

As regards the contention that relief cannot be granted to the petitioners as the petitioners knowing fully well participated in the process and are thus

estopped from filing the writ petition in my considered view the cited case has no manner of application in the present case as the moment it was

detected that the respondent authority has published separate list thereby reserving 40 per cent seats for the in-service doctors and 60 per cent seats

for the open category doctors then and then just after participating in first counselling the petitioners approached Honâ??ble Court thereby ventilating

their grievance to the separate reservation list for the in-service doctors and open category doctors thus violating the statute published by the authority.

In 2008 (4) SCC 171 (Dhananjay Malik & Ors vs State of Uttaranchal), cited by Mr. Dhar, the Honâ??ble Court held that â??Unsuccessful

candidates participated in the process of selection without any demur are estopped from challenging the selection processâ? . In the case in hand the

petitioners are not unsuccessful candidates.

In 2008 (7) SCC 11 (Himani Malhotra vs High Court of Delhi) cited by Mr. Dhar, the Honâ??ble Court held that â??Change of Rules of the game

during election process or when it is over not permissible??.

There is no dispute to the above proposition. In the case in hand the selection process is not over and hence the decision is inapplicable herein.

Furthermore petitioners are not successful candidates.

In 2008 (12) SCC 481 (K.D. Sharma vs SAIL) cited by Mr. Dhar, the Honâ??ble Court held that â??The Writ Court has power to dismiss the

petition at the threshold without considering the merits of the claim where the petitioner makes false statement or conceals material facts or misleads

the Courtâ??.

While the above proposition is not in dispute but in the case in hand, the ratio of the case is not applicable.

In 2014 (10) SCC 521 (Chandigarh Administration & Anr. Vs Jammie Kaur & Ors), cited by Mr. Dhar the Honâ??ble Court inter alia held that

â??Under exceptional circumstances, Court can give a direction to admit a candidate if there has been a violation of right to equality, the candidate

was not at fault in pursuing legal remedies expeditiously and the time schedule for admission has not expired, the Honâ??ble Court further reiterated

that Court cannot direct telescoping of unfilled seats of one year with permitted seats of the subsequent year, i.e. carry forward of seats cannot be

permitted.

Although the above pronouncement of the Honâ??ble Court is settled law but the said case has no manner of application in the case in hand.

In my opinion the State has no authority to divide or discriminate doctors in two separate categories like open category doctors and in-service doctors.

Consequently, 40 per cent reservation for in-service doctors and 60 per cent reservation for open category doctors by the State is un-constitutional,

contrary to law and demonstratively violative of Article 14 & 16 of Constitution of India. Therefore, it is nothing but a nullity and the framers of law

have said that anything which is a nullity should be shot at sight.

46. I got some substance in the argument of Mr. Roy appearing for the MCI that the High Court has no power to extend the time for taking admission

only that could be considered by the Hon'â??le Supreme Court.

47. In view of the above discussions in my considered view the State has no authority to reserve 40 per cent seats for in-service doctors and 60 per

cent seats for open category doctors which I hold to be patently illegal, arbitrary, un-constitutional, as well as contrary to statute and thus cannot be

sustained in the eye of law. I also hold that the State has no authority to divide or discriminate the doctors in two separate categories like open

category doctors and in service doctors.

48. Accordingly I quash this separate reservation list as well as the list of selected candidates prepared on 3rd April, 2019 & 20th April, 2019.

49. I further direct the authority to prepare a common merit list on the basis of the marks obtained in NEET-PG of the examination by following the

Rule 9 of the Postgraduate Medical Examination Rule 2000 within a period of fortnight from the date of this judgement and thereafter parties may

seek extension for granting admission including counselling directly from the Honâ??ble Apex Court if they are so advised.

50. With these directions this writ petition is disposed of without any order as to costs.

51. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis.