
(2013) 03 CAL CK 0016
In the Calcutta High Court
Case No : Writ Petition No. 24431 (W) of 2012

Dr. Samar Kumar Barai and Others

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 07-03-2013

Acts Referred:

Constitution of India, 1950 — Article 141
Indian Medical Council Act, 1956 — Section 33

Citation : (2013) 3 WBLR 242

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Saptangsu Basu, Satyajit Mondal, Supradip Roy, Siddhartha Roy, Amarnath Sen, Suranjan Mondal, Sukumar Bhuniya, Ayan Banerjee, Prolay Kar, Saurabh Banerjee, Saiful Islam Mallick and Rajarshi Halder, Saugata Bhattacharyya, Sunit Kr. Roy and Deboparma Mukhopadhyaya for the Medical Council of India, for the Appellant; Tapan Kumar Mukherjee (AGP), P. Deb Roy, Subrata Talukdar, Abdul Momen, Tulshidas Ray, Supratim Dhar, Subrata Guha Biswas, Tapati Samanta, Paramita Pal and Hasanuzzaman for the State, Indranil Ray and Ayan Bhattacharjee for the West Bengal University Health Sciences, for the Respondent

Judgement

Aniruddha Bose, J.—This batch of writ petitions are being taken up for hearing together as similar questions of law as well as factual issues are involved in all these proceedings. The petitioners are all medical officers under the service of the Government of West Bengal (the State Government). They were permitted to appear in the entrance examination for the post graduate medical degree and diploma courses as Government sponsored candidates from in-service category for the 2012 session, All the petitioners are guided by the West Bengal Medical Education Service, the West Bengal Health Service and the West Bengal Public Health-cum-Administrative Service (placement on Trainee reserves) Rules, 2008 (the 2008 Rules) for the purpose of participating in the said courses. For admission in post-graduate medical degree and diploma courses, I have been apprised by the learned Counsel appearing for the petitioners that 50 per cent of

the total seats are offered to candidates who participate in All India Entrance Examination, and 50 per cent of the candidates are admitted at the State level, through the West Bengal Post-Graduate Medical Admission Test (WBPGMAT). In respect of these 50 per cent seats which are filled up through the WBPGMAT, for degree course 40 per cent of the seats are reserved for in-service candidates, whereas 50 per cent are reserved for the same category of candidates in respect of diploma courses. In these writ petitions admission of candidates from this category which is the subject-matter of dispute. The Medical Council of India, (the "Council" in short) who are respondents in these proceedings have framed the Regulation for admission to the post-graduate courses being the Post-Graduate Medical Education Regulation 2000 (the 2000 Regulation), in exercise of power conferred by Section 33 of the Indian Medical Council Act, 1956.

2. There has been dispute in the past about the last date of admission in the medical courses over maintaining the time schedule. In the case of Medical Council of India Vs. Madhu Singh and Others, , the Hon'ble Supreme Court directed adherence to the examination schedule to be ensured by the Council. Thereafter, on 14th May, 2003, a directive was issued by the Ministry of Health and Family Welfare to the State authorities and Universities awarding medical and dental degrees laying down the policy guideline on admission of students and other allied matters. The said directive specified the last date by which students could be admitted against various quotas in the MBBS/BDS course as also postgraduate courses. In the case of Mridul Dhar (Minor) and Another Vs. Union of India (UOI) and Others, , it was held by the Hon'ble Supreme Court:--

Having regard to the professional courses, it deserves to be emphasized that all concerned including Governments, State and Central both MCI/DCI college-new or old, students, Boards universities examining authorities etc. are required to strictly adhere to the time schedule wherever provided for; there should not be midstream, admissions; admissions should not be in excess of sanctioned intake capacity or in excess of quota of anyone, whether State or management. The carrying forward of any unfilled seats of one academic year to next academic year is also not permissible.

3. The Council further amended the 2000 Regulation as per Postgraduate Medical Education (Amendment) Regulations, 2006, introducing Appendix III to the main Regulation specifying a fresh time schedule for post-graduate and super specialty courses. This schedule provides:--

4. Clause 9 of the 2000 Regulation was also amended by introducing sub-Regulation (2) which stipulates:--

3(i) The Universities and other authorities concerned shall organize admission in process in such away that teaching in postgraduate courses starts by 2nd May and by 1st August for super specialty courses each year. For this purpose, they shall follow the time schedule indicated in Appendix-III.

(ii) There shall be no admission of students in respect of any academic session

beyond 31st May for postgraduate courses and 30th September for super specialty courses under any circumstances. The Universities shall not register any student admitted beyond the said date.

(iii) The Medical Council of India may direct, that any student identified as having obtained admission after the last date for closure of admission be discharged from the course of study, or any medical qualification granted to such a student shall not be a recognized qualification for the purpose of the Indian Medical Council Act, 1956.

The institution which grants admission to any student after the last date specified for the same shall not be liable to face such action as may be prescribed by MCI including surrender of seats equivalent to the extent of such admission made from its sanctioned intake capacity for the succeeding academic year.

5. From the year 2009, in 2000 Regulations there has been provisions for reserving certain percentage of seats in postgraduate courses for medical officers in the State Government service, who had served for at least three years or more in remote and difficult areas. Clause 9 of the said Regulation was amended on 27th February, 2012 in the following terms:--

5. Clause 9 under the heading "Selection of Postgraduate student", as amended vide notification No. MCI. 18(1)/2010 Med/49070 dated December 21, 2010, following shall be added after Sub-Clause IV, which is as under:

Provided that in determining the merit of candidates who are in service of Government/public authority, weightage in the marks may be given by the Government/competent authority as an incentive at the rate of 10% (ten per cent) of the marks obtained for each year of service in remote and/or difficult areas up to the maximum of 30% (thirty per cent) of the marks obtained in National Eligibility-cum-Entrance Test, the remote and difficult areas shall be as defined by State Government/competent authority from time to time."

6. Clause 9 under the heading "Selection of Postgraduate students", as amended vide notification No. MCI. 18(1)/2010 Med/49070 dated December 21, 2010, following shall be added after Sub-Clause VI which is as under:

50% (Fifty per cent) of the seats in Postgraduate diploma courses shall be reserved for Medical officers in the Government service, who have served for at least three years in remote and/or difficult areas. After acquiring the Postgraduate diploma, the medical officers shall serve for two more years in remote and/or difficult areas as defined by State Government/competent authority from time to time.

6. The State Government had issued a notification on 23rd November, 2011 declaring the remote and difficult areas in this State. As a consequence of issue of such notification, the medical officers who satisfied the provisions relating to qualifying service in such remote and difficult areas became entitled to weightage as stipulated in Clause 9 of the 2000 Regulation, as amended in the

year 2012. Several medical officers who did not have requisite period of service in such areas had filed writ petitions before this Court questioning the legality and rationale of specifying the remote and difficult areas. An interim order was passed by an Hon''ble Single Judge of this Court on 19th January, 2012 staying the operation of the said notification dated 23rd November, 2011. In the meantime the written test of WBPGMAT of 2012 was held on 22nd January, 2012 and on 9th February, 2012 the result of the said entrance examination was published. On 23rd November, 2012 however the aforesaid writ petitions were dismissed by an Hon''ble Single Judge of this Court. The writ petitioners had appealed against the said order of dismissal of the writ petitions before an Appellate Bench of this Court and on 2nd May, 2012 there an interim order of stay on operation of the notification was dated 23rd November, 2011. On 17th May, 2012 the interim order was modified and counselling was permitted by Hon''ble Division Bench. A set of petitioners filed a petition for special leave to appeal-before the Supreme Court (Civil) No(s). 17684-17688/2012, (Prosenjit Das and Other v. State of West Bengal & Ors.) against the said order. This SLP was disposed of by the Hon''ble Supreme Court on 28th May, 2012, in the following terms:--

Heard learned Counsel for the parties and perused the records.

In view of the fact that the admission are going to be closed on 31.5.2012 as has been pointed out by Mr. Amit Kumar, learned Counsel appearing for Medical Council of India, We can quite see the urgency in the matter, it is therefore, requested to the Writ Appeal Court to hear the matter as early as possible immediately after re-opening.

For that purpose, we request Hon''ble the Chief Justice of the High Court to place the matter before a Bench for expeditious hearing and the concerned Bench is requested to decide the appeal within three weeks.

In the meanwhile, as the Counseling is in continuance, eligible candidates of both categories shall be allowed to participate in the Counselling. The incentive marks may be awarded to the carved out category as if the notification to the in-service candidates which shall be placed in a sealed cover before the Division Bench hearing the matter. After the matter is decided on merits, the High Court may implement its order giving effect to the admission.

The admissions shall take place only after the order of the Division Bench of the High Court hearing the writ appeal. The time for giving admission is extended regard being had to special features of the case.

With these observations, the special leave petitions stand disposed of.

7. A further order passed by the Hon''ble Supreme Court on 21st August, 2012 in certain connected applications to that Special Leave Petition, in which it was held:--

IA. Nos. 1-5 of 2012, filed in the disposed of special leave petitions, have been

taken up for consideration, on account of the relief which has now been practiced for on behalf of the petitioners.

As will appear from the order passed on 28th May, 2012, this Court had recorded the fact that there was a certain urgency in the matter, since admission to the post graduate courses were going to be closed on 31st May, 2012. On that basis, a request was made to the Chief Justice of the Calcutta High Court to list the matter before a Bench for expeditious hearing and the concerned Bench was requested to decide the appeals within three weeks. Three weeks from the date of the order takes us to the middle of June, 2012. Unfortunately, even at the end of August, 2012, the appeals have not been decided and, in fact, for whatever reason, the Hon"ble Judges hearing the appeals decided to release the matter. We are not going into the question as to why the Bench released the appeals, but as has been submitted on behalf of the other respondents, certain conditions were created in the Court, which compelled the Court to release the matter. This allegation has, of course, been denied on behalf of the petitioners.

Be that as it may, the sole reason for the order being passed on 28th May, 2012, was keeping in mind the fact that admissions were going to close on 31st May, 2012. As has been pointed out by Mr. Amit Kumar, learned Counsel appearing for the Medical Council of India, already two months have passed since the course has begun and it is difficult for the Medical Council of India to deviate from the period prescribed for each particular course. Even then, since an order has been passed by this Court on 28th May, 2012, it must be given effect to in the spirit in which it was passed. We are informed by learned Counsel appearing for the parties that the appeals have already been assigned to another Bench and that the matters are being heard on day to day basis and even listed for hearing today, In that context, we request the Bench concerned to ensure that the appeals are disposed of within two weeks from date, so that if any benefit, is to be derived by the petitioners from the order of the Division Bench, the same be made available to them during the current academic year itself.

We make it clear that we have not considered any other aspect of the matter while disposing of the interlocutory applications and the Division Bench will be at liberty to decide the matter in such a manner as it deems fit and proper.

Let a copy of this order be communicated to the Registry of the Calcutta High Court forthwith and let copies also be made available to the learned Advocate for the respective parties, for communication.

8. The appeal against the judgment of the learned Single Judge of this Court by which the said notification of 23rd November, 2011 issued by the State Government was held to be valid was allowed by an Hon"ble Division Bench on 18th October, 2012. It was held by the Division Bench:--

(a) "Clause 9(2)(d) of the said Regulation is intra vires.

(b) The State Government was competent to issue the notification dated

November 23, 2011.

(c)(i) The identification of the State Government of the remote and difficult areas is arbitrary.

(ii) The notification dated November 23, 2011 is, therefore, set aside.

(iii) This order, however, shall not prevent the State Government to issue a notification after identifying the remote and difficult areas.

The order impugned, in these appeals, stands modified.

The appeal and all connected applications are, therefore, disposed of.

9. After delivery of the said judgment, candidates from the State quota who were ranked in the merit list in regular course, that is without being giving the weightage for serving in the remote and difficult areas, were admitted in the respective medical colleges. So far as admission on the basis of All India selection is concerned, I have been apprised by the learned Counsel for the MCI, the procedure is that if all the seats in a particular State from the All India quota are not filled up, these seats revert back to the State quota and such vacant seats are filled up in the same proportion in relation to general category and in-service category. For the State of West Bengal, in respect of the State quota, it has been submitted on instruction by the learned Counsel for the university that sixty two seats are still vacant, 30 of them being for the degree course and 32 in diploma course. This has been brought on record in an affidavit filed on behalf of the University, to which I shall refer to in the later part of this judgment. Such vacancies have occurred mostly on account of reversion from the national quota, as well as some from withdrawal or refusal on the part selected candidates from joining the respective courses.

10. The petitioners before me in these proceedings are in-service candidates who were originally ranked in the merit list from that category. In fact, the petitioners form three categories of candidates. Some have declined admission in the courses they were offered as they should not be admitted in the courses of their choice. Some of them were admitted in the courses which were not their main preference whereas some were in the waiting list. All the petitioners have prayed for holding of second round of Counselling, which appears to be the usual practise for admission in postgraduate degree and diploma courses. In W.P. No. 24431(W) of 2012 there are seven petitioners, and six of them have been admitted in courses not of their preferred choice, whereas one has declined admission in the course he was offered. In W.P. No. 25117(W) of 2012 all the three petitioners did not get chance of admission in the first round of Counselling. Out of the eleven writ petitioners in W.P. 24781(W) of 2012, two were admitted in the degree course but the course was not of their preferred choice, whereas two of them declined admission in the course they were being offered. The rest of the petitioners, after first round of Counselling did not get any seat. There are nine writ petitioners in W.P. No. 25145(W) of 2012. Out of

them, five have taken admission, again not in their desired course and four of them did not opt for the seats they were offered. The nine petitioners in W.P. No. 25781(W) of 2012, have taken different postgraduate degree and diploma courses, but such courses were not as per their preference. In W.P. 25838(W) of 2012, the two writ petitioners declined to get admitted as the courses offered to them were not as per their choice. In W.P. No. 24959(W) of 2012, there are ten writ petitioners and seven of them have taken admission in courses which were not as per their preference, while three of them did not get admission after the first round of Counselling. Three petitioners have jointly filed the W.P. No. 25204(W) of 2012. Two of them got admitted in diploma courses whereas the third one could not get admission. The sole petitioner W.P. No. 28047(W) of 2012 has been admitted, but again not in his desired course. In W.P. No. 25815 of 2012 none of the eleven petitioners has been admitted. In W.P. No. 27711(W) of 2012, all the three petitioners were in waiting. The petitioners in all these proceedings have prayed for direction upon the university to conduct second round of Counselling, whereas in W.P. No. 25815(W) of 2012 and W.P. No. 27711(W) of 2012, the petitioners have made alternative prayer for admission in the next session on the basis of their position in the entrance test of 2012.

11. The University after finding the vacancies at the end of first round of Counselling in respect of in-service candidates had sought opinion of the Council as regards the steps to be taken by them. The Council, however, expressed their inability to give approval for any admission beyond the schedule as per Annexure-III to the 2000 Regulation. A copy of the letter of the Secretary of the Medical Council of India addressed to the Controller of Examination, the West Bengal University of Health Sciences bearing Memo No. MCI-7(10)/2012-Legal/(7314)/45964 dated 24.11.2012 has been produced before me. In this letter, it was recorded:--

Kindly refer to your letter No. COE/UHS/1 157/2012, dated 31.10.2012 whereby you sought our decision as to whether the date of admission can be extended so that the second Counseling can be conducted to fill up vacant seats in In-service quota.

The Competent authority considered your requests and after deliberation came to a conclusion that MCI has no power to extend the date for admission or Counseling in any eventuality as it would amount to violation of Rules and Regulation framed by the MCI which has statutory force.

It has already been settled by the Hon''ble Supreme Court that no one can extend the last date or cutoff date of various stages for admission into any medical course fixed by the MCI in its regulation. Recently the Hon''ble Supreme Court has in its judgment in Priya Gupta Vs. State of Chhatisgarh and Others, has held that the time scheduled provided by the Apex Court and Regulation of MCI are mandatory in nature and in violation by any authority would be punished for contempt.

In view of aforesaid the Competent Authority has come to a conclusion that MCI has no power to extend the date for admission or Counseling. However, you are requested to follow the Orders and Judgment passed by the Hon''ble High Court and the Hon''ble Supreme Court from time to time in this matter.

12. At the initial stage when these writ petitions were taken up for hearing, prayer of the petitioners for second round of Counselling was opposed by both the council and the university. The State Government is also a party to these processing and at that stage of hearing, they did not take any definite stand. Hearing of these writ petitions was concluded on 8th January, 2013. Thereafter, these matters were mentioned on behalf of the State Government by their learned Counsel and I was informed that the State would have no objection if the vacancies were filled up by conducting second round of Counselling for degree and diploma courses for the State Government sponsored candidates. In view of such submission made on behalf of the State Government, I had directed these matters to be listed again, and on 17th January, 2013, the cases were heard again. In course of hearing, on that day the learned Counsel for the University also supported the stand of the State. In these circumstances, I had directed the matters to be listed on 22nd January, 2013. These petitions were subsequently taken up for hearing on 24th January, 2013. In course of hearing on that day, Mr. Roy, learned Counsel for the university submitted that his client would have no objection in the vacant seats, which were subject of dispute in these proceedings were filled up, but his clients were also required to follow directions of the Supreme Court on that point. On that date I had directed the State Government as also the university to file affidavits explaining their specific stand. An affidavit was filed by the university in W.P. No. 24431(W) of 2012 affirmed by their Deputy Registrar on 29th January, 2013, which was adopted by the University in other matters also. In this affidavit it has been, inter alia, stated:--

I submit that the said University is agreeable to admit the in service candidates in the vacant seats through 2nd Counseling if a direction to that effect is issued by this Hon''ble Court. I further submit that the said University would follow the training programme as stimulated In the Post Graduate Medical Education Regulations, 2000 framed by the Medical Council of India and is doing so, the candidates would have to attend training for 2 years/3 years, as the case may be, from the date of admission.

It is pertinent to mention here that as on date, 30 Degree seats and 32 Diploma seats are lying vacant

13. A composite affidavit has also been filed on behalf of the State-respondents in the same proceeding, i.e. W.P. No. 25117(W) of 2012 affirmed by one Arup Kumar Mitra, Joint Director of Medical Education, Govt. of West Bengal, on 29th January, 2013. In this affidavit it has been stated:--

I state that at present more than 80 Post graduate medical seats are lying vacant. I also state that the State Government has an acute need for Post-

graduate doctors for manning its hospitals at all levels throughout the territory of the State of West Bengal.

In view of the above situation the State Respondents have no objection and/or are willing to fill up the aforementioned vacant Post-Graduate seats through counselling pursuant to appropriate orders passed by this Hon'ble Court. The State Respondents also undertake to take necessary steps with the co-operation of the West Bengal University of Health Sciences (in short WBUHS) to provide necessary additional infrastructural inputs/services as may be required from time to time to enable fresh entrants to the aforementioned vacant Post-graduate seats to successfully complete their respective courses of studies, subject to appropriate orders of this Hon'ble Court.

By way of confirmation of the aforementioned stand of the State Respondents a letter dated 14th January, 2013 bearing Memo No. ME/CC-02/13/M/75 issued for the Director of Medical Education and Ex-officio Secretary, Government of West Bengal is annexed hereto and marked with annexure "A-1".

14. The matter heard again on 31st January, 2013 and on that date learned Counsel for the Council opposed any prayer for second round of Counselling relying on the judgments of the Hon'ble Supreme Court on his issue. The matter was directed to be listed on 5th February, 2013 and I had directed presence of responsible officers of the Medical Council as well as the University on that date before this Court to clarify their stand on any query on the subject dispute so that these proceedings could be concluded finally without further delay. On that date, senior officers of the University were present but no responsible officer of the Council appeared. A question was raised in course of hearing on that date that there was already delayed admission for in-service candidates for the current Session, and in what manner their admission was going to be regularized by the Council if this Court was to allow the prayer of the petitioners, I also wanted the University to explain in what manner they were going to comply with the applicable regulations if admission was directed after second round of Counselling. The stand of these two statutory bodies were directed to be brought on record by way of affidavits by me. Such affidavits were filed on 13th February, 2013 by the University and on 18th February 2013 by the Council. In the second affidavit of the University, which was affirmed by one Dr. Amit Ghosh on 11th February 2013, it was stated:--

I submit that the stand of the said University in these proceedings is as follows, subject to kind Constitution of this Hon'ble Court:

(a) All candidates pursuing Post Graduate Courses in Modern Medicine are required to attend the curriculum (both theory and practical classes) for a period of 2 years in case of Post Graduate Diploma Course and Post Graduate Degree Course (Exempted Category) and 3 years in case of Post Graduate Degree Course in terms of the Post Graduate Medical Education Regulations, 2000 framed by the Medical Council of India.

(b) The final examinations for the session 2012 for candidates pursuing Post Graduate Diploma Course and Post Graduate Degree Course (Exempted Category) is scheduled to be held in April-May, 2014 and the final examinations for the session 2012 for candidates pursuing Post Graduate Degree Course is scheduled to be held in April-May 2015. The supplementary examinations for the session 2012 are scheduled to be held in September 2014 and September 2015, as the case may be.

(c) Under such circumstances, the said University purposes that the in-service candidate's who has been admitted in October 2012 pursuant to orders of the Hon''ble Division Bench of this Hon''ble. Court read with orders passed by the Hon''ble Supreme Court of India, would appear in their respective final examinations in September 2014 and September 2015, as the case may be, as regular candidates.

It is submitted that in the event this Hon''ble Court is pleased to direct the said University to conduct 2nd Counseling and admit the in service candidates in the vacant seats such candidates would appear in their respective final examinations in April-May, 2015 and April-May, 2016, as the case may be, as regular candidates.

(d) It is further submitted that in the event this Hon''ble Court is pleased to direct the said University to conduct 2nd Counseling and admit the in service candidates in vacant seats, the said University would require at least 4 weeks time to complete such process and such counseling cannot be restricted to the petitioners only and as such the said university may be permitted to conduct such Counseling in compliance with the relevant rules and Regulations of the said University

15. On behalf of the Council, however, the prayer of the petitioners as also the stand of the State and the University were opposed. The affidavit of the Council has been filed in connection W.P. No. 25117(W) of 2012 affirmed by one Shikhar Ranjan on 12th February, 2013. It has been stated in this affidavit, inter alia, that any admission at this stage would be contrary to be 2000 Regulation as well as in violation of the directions contained in the aforesaid judgments of the Hon''ble Supreme Court.

16. I shall first examine the question as to whether the writ petitioners at all have any legal right to demand second round of Counselling or not. Though no specific provision for holding second round of Counselling in any Regulation has been shown to me by any of the parties to these proceedings, in Appendix III of the 2000 Regulation, in which time schedule for completion of admission process for postgraduate Medical courses is specified, there is reference to second round of Counselling. The table recording the time schedule has been reproduced in the earlier part of this judgment. In the information booklet produced by the university continuing Regulations for admission to post-graduate degree and diploma courses in modern medicine for the year 2012, there is also provision for

second round of Counselling in Clause 5.9 and its various sub-clauses, where it has been referred to as allotment:--

5.9. "There may be more than one round of allotment by personal appearance. The government order and or the Court/MCI directives (at that point of time) will be strictly adhered to for this purpose.

5.9.1. In the second round of allotment, if any, the candidate who had been allotted a seat in the first round and had joined the allotted Institution will be permitted change of course/discipline/Institution on the basis of her/his merit position. On such reallocation, the allotment made during first round shall stand automatically cancelled with immediate effect and the candidate shall have no claim whatsoever on the earlier allotment. In case he/she does not opt for reallocation due to any reason, her/his original seat shall remain undisturbed.

5.9.2. Candidates, attending Counseling for allotment will have to deposit the stipulated fees. However, in case any candidate is not allotted a seat due to non-availability, her/his fees will be carried for the second counseling. If he/she is not allotted seat, fees shall be refunded from the University on subsequent dates.

5.9.3. In case any candidate attended the first round of counseling and declines to accept any PG seat offered during the counseling, he/she may appear in the next round of allotment, if permitted. No further "Counseling Fees" is required.

A copy of this booklet has been made Annexure "P-1" to the W.P. No. 24781(W) of 2012.

17. Thus, though there might not be any specific provision for second round of counselling, this appears to be an accepted norm for conducting admission through the process of Counselling. I have been apprised by the learned Counsel for the petitioners that for general category candidates, counselling in second round was held for the same academic session. Second round of counselling, or allotment, as this expression has been interchangeably employed in the booklet of the university, appeals to me to be an integral part of the admission process for a particular session.

18. On behalf of the Council, the petitions were also resisted on the plea that mere empanelment in the merit list by itself does not give rise to right of selection. In my opinion, though mere empanelment in the merit list would not confer any vested legal right on a candidate seeking admission in a particular course, when there are vacant seats after one round of counselling, and those in waiting in the list are not permitted to take admission in such vacant seats through another round of counselling which has become an accepted practice, such waiting candidates under ordinary circumstances would be entitled to seek mandatory direction of the Court requiring the authorities to fill up such vacancies or permit change of course in respect of candidates who have not been admitted as per their choice, to the extent the counselling process allows such change.

19. But that would have been under ordinary circumstances. Here the circumstances are not ordinary as it is almost seven months past the initial date of admission as per the stipulations of Appendix III of the 2000 Regulations. Learned Counsel for the MCI has strongly resisted any further admission by way of second round of counselling for the 2012 session. Their objection is on twofold grounds. First, it is submitted on their behalf that holding of second round counselling would not be permissible as that would cause breach of the time schedule. Secondly, it is submitted that under the applicable Regulations, there is requirement of attending not less than 80 per cent of training during each calendar year by a candidate. In the event the petitioners are permitted to participate in the second round of counselling and admitted thereafter, it is submitted that they would not be able to complete the attendance requirement of 80 per cent at this stage. It has been argued on behalf of the MCI that so far as the in-service candidates are concerned who were admitted after the first round of counselling in the month of October 2012, their admission was accepted in terms of the order of the Supreme Court passed on 28th May, 2012, in the case of Prosenjit Das (supra). But, the petitioners in these proceedings did not have any judicial sanction in favour of second round of counselling.

20. Learned Counsel for the MCI has referred to the judgments of the Supreme Court in the cases of Medical Council of India Vs. State of Karnataka and Others, and Dr Preeti Srivastava and Another Vs. State of M.P. and Others,] in support of this submission. For the 2012 session, it was argued that classes have commenced from 2nd May, 2012 for open category candidates and the last date for admission was on 31st May, 2012. Thus, it would be unworkable at this stage to start a parallel session for another set of candidates. The other authority which was relied upon was by the learned Counsel for the MCI the judgment of the Supreme Court in the case of Medical Council of India v. Naina Verma and Others, [(2005)12 SCC 626]. This judgment has been cited in support of their argument that the medical course starts from the very first day the classes start and there would be gross violation of law if the candidates are admitted now after second round of counselling. Referring to the decision of Supreme Court in the case of Mridul Dhar (supra) it was submitted mid stream admission in postgraduate medical course would be impermissible.

21. On behalf of Council, it was also submitted that vacancies cannot be carried forward to the next academic year, which course was also prayed for by some of the petitioners. The two authorities relied upon by the MCI on this point are the judgments of the Supreme Court in the cases of Ajay Pradhan Vs. State of Madhya Pradesh and Others, and Shafali Nandwani Vs. State of Haryana and Others, The prayer for carrying forward the vacancy to the next academic year was also resisted on the ground that the same would lead to enhancement of the intake capacity fixed by Council and that would violate the provisions of the Indian Medical Council Act, 1956.

22. If it was only the question of regulatory prohibition against delayed

admission, then Court's power or jurisdiction to hold certain imperative provisions of a statute to be directory could have been invoked. In exceptional cases, such construction is permitted, as postulated in *The Construction of Statutes* (at page 539) by Earl T. Crawford:--

Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the Court will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their justification in considerations of justice. It is a well known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane considerations, and other considerations of a closely related nature, would seem to be of a sufficient calibre to excuse or justify a technical violation of the law.

23. But in this case, it is not mere a question of adhering to or relaxing the statutory provisions. In a series of judgments, the Hon'ble Supreme Court has prescribed deviation from this time-schedule. I have referred to the said judgments in the preceding paragraphs. The requirement to adhere to the time schedule has been laid down in the strictest term in the case of *Priya Gupta Vs. State of Chhatisgarh and Others*, In this judgment it has been held:--

24. In the case of *State of Bihar and others Vs. Dr. Sanjay Kumar Sinha and others*, a Bench of this Court took exception to the non-adherence to the time schedule and reiterated that the admissions to medical colleges and postgraduate courses, were governed by the orders of this Court and the regulations issued by the Medical Council of India, which must be strictly followed. This Court issued a warning, that if there was any violation in future, the same shall be treated as default and viewed very seriously. Further, in the case of *Medical Council of India Vs. Madhu Singh and Others*, , this Court declared two very important principles. Firstly, it declared that mid-stream admissions should not be permitted and secondly, noticing the practice of compassion in review of such admissions, this Court also held that late or mid-stream admission, even just four months after beginning of the classes, cannot be permitted.

25. A consistent and clear view held by the Court is that the regulations framed by the MCI are binding and these standards cannot be deviated from. Reference can be made to *The State of Madhya Pradesh and Others Vs. Gopal D. Tirthani and Others*, - paras 24 and 26: AIR 2003 SC 2952: 2003 AIR SCW 3636; *Bharati Vidyapeeth [Deemed University] and Others Vs. State of Maharashtra and Another*, *Chowdhury Navin Hemabhai and Others Vs. The State of Gujarat and Others*, and *Harish Verma and Others Vs. Ajay Srivastava and Another*,

26. What is of greater significance is that this Court has not so far considered or stated as a principle, what consequences should follow where the Central Government, or the State Government or Medical Council of India or the College itself with impunity, violate the time schedule, regulations and order of merit to

give admission to students in an arbitrary and nepotistic manner. Also, we must consider what preventive steps can be taken to avoid such repetitive and intentional defaults, as well as undue exploitation of the class of students. Admissions based on favouritism necessarily breach the rule of merit on the one hand, while on the other, they create frustration in the minds of the students who have attained higher rank in the competitive entrance examinations, but have not been admitted. We propose to specifically address this concern in this judgment. From the above discussion and reference to various judgments of this Court, it is clear that adherence to the principle of merit, compliance with the prescribed schedule, refraining from midstream admission and adoption of an admission process that is transparent, non-exploitative and fair are mandatory requirements of the entire scheme.

27. Now, let us examine the adverse consequences of non-adherence to the prescribed schedules. The schedules prescribed have the force of law, in as much as they form part of the judgments of this Court, which are the declared law of the land in terms of Article 141 of the Constitution of India and form part of the regulations of the Medical Council of India, which also have the force of law and are binding on all concerned. It is difficult to comprehend that any authority can have the discretion to alter these schedules to suit a given situation, whether such authority is the Medical Council of India, the Government of India, State Government, University or the selection bodies constituted at the college level for allotment of seats by way of counseling. We have no hesitation in clearly declaring that none of these authorities are vested with the power of relaxing, varying or disturbing the time schedule, or the procedures of admission, as provided in the judgments of this Court and the Medical Council of India Regulations. Inter alia, the disadvantages are:--

(1) Delay and unauthorized extension of schedules defeat the principle of admission on merit, especially in relation to preferential choice of colleges and courses. Magnanimity in this respect, by condoning delayed admission, need not be shown by the Courts as it would clearly be at the cost of more meritorious students. The principle of merit cannot be so blatantly compromised. This was also affirmed by this Court in the case of *Muskan Dogra & Ors. v. State of Punjab & Ors.*, (2005)9 SCC 186.

(2) Mid-stream admissions are being permitted under the grab of extended counseling or by extension of periods for admission which, again, is impermissible.

(3). The delay in adherence to the schedule, delay in the commencement of courses etc., encourage lowering of the standards of education in the Medical/Dental Colleges by shortening the duration of the academic courses and promoting the chances of arbitrary and less meritorious admission.

(4) Inequities are created which are prejudicial to the interests of the students and the colleges and more importantly, affect the maintenance of prescribed

Standard of education. These inequities arise because the candidates secure admission, with or without active connivance, by the manipulation and arbitrary handling of the prescribed schedules, at the cost of more meritorious candidates. When admission are challenged these students would run the risk of losing their seats though they may have completed their course while litigation was pending in the Court of competent jurisdiction.

(5) The highly competitive standards for admission to such colleges stand frustrated because of non-adherence to the prescribed time schedules. The admissions are stretched to the last date and then admissions are stretched to the last date and then admissions are arbitrarily given by adopting impermissible practices.

(6) Timely non-inclusion of the recognize/approved colleges and seats deprives the students of their right of fair choice of college/course, on the strength of their merit.

(7) Preference should be to fill up all vacant seats, but under the grab that seats should not go waste, it would be permissible to give admissions in an arbitrary manner and without recourse to the prescribed rule of merit.

24. The question I shall address now is as to whether directing a second round of counselling at this stage would be permissible or not at all, in the given facts, considering the ratio of the judgments relied upon by the learned Counsel for the MCI. Case of the petitioners on this point is that it was not due to any fault or negligence on their part they were being deprived of admission in the post-graduate course itself, and in some cases admission in the course their choice at the postgraduate level. On the other hand, stand of the MCI is that the mandate of the Hon'ble Supreme Court in the aforesaid decisions is for strict adherence to the schedule. It has also been argued on behalf of the petitioners that it is permissible for the Court to relax the rigours of the time schedule in appropriate cases. The authorities relied upon in support of this contention are *Parmender Kumar and Others Vs. State of Haryana and Others*, , *Asha Vs. Pt. B.D. Sharma University of Health Sciences and Others*, , an unreported judgment of the Supreme Court in Civil Appeal No. 6304-6304 of 2012 *Bhawana Garg & Anr. v. University of Delhi & Ors.* decided on 5th September, 2012 and a Bench decision, also unreported, of the Delhi High Court in the case of (LPA No. 763 of 2012) (*Manoj Kumar Dhaka v. Union of India & Ors.*) delivered on 26th November, 2012.

25. In the case of *Asha* (supra), a student had wrongly been denied admission in the MBBS Course. She filed a writ petition before the Punjab and Haryana-High Court but was unsuccessful. The Supreme Court had specifically framed the question relating to the cut-off date in Paragraph 4 of the report:--

The questions are:

(a) Is there any expectation to the principle of strict adherence to the rule of merit for preference of courses and colleges regarding admission to such courses?

(b) Whether the cut off date of 30th September of the relevant academic year is a date which admits any exception?

(c) What relief the Courts can grant and to what extent they can mould it while ensuring adherence to the rule of merit, fairness and transparency in admission in terms of rules and regulations?

(d) What issues need to be dealt with and finding returned by the Court before passing orders which may be more equitable, but still in strict compliance with the framework of regulations and judgments of this Court governing the subject?

26. In paragraph 38.2 of the report, the question framed as paragraph 4(b) was answered as:--

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 therefore are recorded by the Court of competent jurisdiction."

27. In this judgment (*Asha*) the Hon'ble Supreme Court had considered the decisions of *Mridul Dhar* (supra), *Naina Verma* (supra), *Madhu Singh* (supra), *Priti Srivastava* (supra) as well as the judgment in the case of *Priya Gupta* (supra). In the case of *Monoj Kumar Dhaka* (supra), similar question arose where a candidate remained unadmitted on account of misconstruction of certain Regulation in determining the number vacant seats. Citing the judgment of the Supreme Court in the case of *Asha* (supra), it was held by a Division Bench of the Hon'ble Delhi High Court:--

The present is an equally hard case. The Super Course of DM (Cardiology) in PGIMER is not only prestigious but highly competitive. To secure admission therein is no mean task. The need of the country and the public at large for the doctors with said Super Speciality cannot be over emphasized. The course, we are informed is of three years duration out of which three months are admittedly over.

What falls for constitution is as to whether the aforesaid can fall in the category of rarest of rare cases as spelled out by the Supreme Court. The appellant, for the delay, cannot be faulted with in any manner whatsoever. Thought the learned

Single Judge has observed that the appellant made out a wrong case than what emerged before the Court but the appellant could not be expected to have knowledge thereof. Though on the basis of the infrastructure available in the Department of Cardiology in PGIMER, four seats ought to have been allocated by GGSIPU, but GGSIPU on a wrong interpretation of Regulation 1294 (supra) which was supported by MCI also before this Bench till 23rd November, 2012, allocated only three seats. We are unable to digest that such valuable seat should be allowed to go waste for the next three years merely for the reason of three months hairy elapsed.

28. Now the question arises as to whether the petitioners in these proceedings have made out an extraordinary case of such degree, which would be necessary for permitting deviation from the specified time schedule or not. In these proceedings, the petitioners are seeking admission on the basis of merit. It is not in dispute that it is because of adoption of a faulty weightage policy by the State Government, they could not get admitted or get the course of their choice within the prescribed time schedule. Cause for such delay cannot be attributed to them. Moreover, in respect of admission of this category of candidates, the regular admission process cannot be said to have been concluded as the second round of counselling was never conducted. I have already held that the second round of counselling is an integral part of the overall admission process. Two factors, however, I have taken into consideration while adjudicating these proceedings. First, there are a large number of students who are on the queue and in the event second counselling is permitted, that would require choice to be given to all the selected candidates from the in-service category as it is submitted by Mr. Roy learned Counsel for the University. Secondly, there is delay. Seven months have passed since the scheduled date of admission is over and it is required to be examined as to whether it would be feasible to permit admission at this stage or not.

29. On the last point, that is delay and passage of long time, learned Counsel appearing for the University has submitted that the course actually starts from day one and a candidate is required to attend 80 per cent classes every year to qualify for postgraduate examination. In the 2012 session, however, the admission of the in-service candidates took place on 19th and 20th October, 2012, which was five months beyond the last scheduled date. That was by way of first round of counselling. On behalf of MCI, it was submitted that these candidates were permitted to participate in the course because of direction of the Supreme Court in the order passed on 28th May, 2012. On being asked how the University proposed to plan their schedule to accommodate the entry of these candidates mid-stream if permitted, it was submitted on behalf of the University that they had decided to arrange the schedule in respect of the in-service candidates for the 2012 session who have already been admitted, in such manner that they would sit for regular examination along with the candidates for supplementary examination.

In the case of *Medical Council of India v. Naina Verma & Ors.*, (2005)12 SCC 626 it was held that mid-stream admission in the MBBS course would not be permissible following the judgment of Supreme Court in the case of *Madhu Singh* (supra). In the case of *Dr. Ajay Pradhan* (supra) question arose as to whether it was permissible to admit to a seat in the post-graduate course in MD/MS falling vacant in a medical college in the midst of or towards the end of an academic year. It was held in this case:--

It follows that if a seat falls vacant for any reason, namely, that the candidate selected in under of merit does not join the PG course in MD/MS in a medical college or by reason of his death or otherwise, and due to inaction on the part of the authorities the seat is not filled up in the academic year to which it pertains, there is no question of the vacancy being carried forward to the next academic year.

30. In the case of *Shafali Nandwani Vs. State of Haryana and Others*, again mid-stream change of course was deprecated but in that case the contesting candidates had completed two and half years of the course. Factual situation of the present case, however, is altogether different. Here there are several vacant seats and large number of candidates have been deprived the chance of second counselling, which is a normal practice and followed by the authorities in regular course. The State Government has submitted before this Court that they are seeking filling up of these vacancies as there is dearth of medical practitioners with post-graduate degree in the State. In course of hearing Mr. Tapan Kumar Mukherjee, learned Additional Government Pleader also submitted that the State was willing to give infrastructural support so that the vacancies could be filled up. The University also agreed to admit the students at this stage but it was submitted by Mr. Roy that in the event any of the candidates were admitted through second round of counseling, examination for them would be held the following year along with the candidates entering the course in the next academic session so that they could clear the attendance requirement as also requirement of course participation. The University has also agreed to complete the full training cycle to enable them to meet the requirement of the applicable MCI Regulations.

31. As regards the factor of delay which has to be considered while dealing with the prayer of the petitioners, reference has been made to the case of *Permender Kumar* (supra). The Hon'ble Supreme Court, while dealing with a similar issue, held in that case:--

We, accordingly, have no hesitation in allowing the appeals and setting aside the judgement and order of the Division Bench of the Punjab and Haryana High Court. However, we appear to be facing the same problem, as was faced by this Court in *Vinay Rampal* case. The counselling process in these appeals was to be conducted on 6.4.2011 and the academic session was to commence on 10.5.2011. In other words, the appellants have already lost about six months of the courses in question. As was observed in *Vinay Rampal* case, the sands of

time had run out which is inheritable in judicial process. Following the same reasoning, as was adopted in the aforesaid case, We direct that the applicants shall be admitted in the postgraduate or diploma courses, for which they have been selected, for the new academic year without any further test or selection.

32. In W.P. No. 25815(W) of 2012 and W.P. No. 27711(W) of 2012, the alternative prayer of the petitioners is for such direction to carry forward vacancy. I will have to examine now as to whether I shall direct the eligible candidates to be admitted in the next session, as has been done in the cases of Asha (supra) and Permender Kumar (supra), or I shall direct delayed admission in the current session only, where final examination shall be held alongwith the batch of the next academic session. This is a middle way suggested by the University, where the candidates would be admitted for the current session but would appear in the examination in the following session. This course, if adopted, would ensure compliance of the attendance requirement as also mandated programme participation without unusually enlarging the intake capacity for any particular session. I do not think it would be equitable to issue direction for their admission in the next academic session as the petitioners here are seeking second round of counselling and to bring the delayed initiation of the admission process into its logical and legitimate conclusion, all the candidates from the in-service category are required to be given the choice of changing their course as well. There is also the factor of numbers. There are altogether about 62 vacancies which are required to be filled up. Carrying forward that many vacancies for the next session would seriously jeopardize the chance of in-service candidates who may be inclined to compete for the respective courses in the next academic session. I have also considered the stand of the University, who have been tested with the power and duty to conduct the course. Learned Counsel for the University has assured this Court that the basic parameters of the MCI Regulations shall be complied with and there would be no short circuiting of attendance requirement or programme participation by the individual candidates if they enter the course now through second round of counselling. As the duty to conduct the course is vested with the University, I am inclined to give greater weightage to their scheme for handling the admission process, rather than the views of the MCI, who have primarily founded their case on imperative nature of the applicable Regulations.

33. The Hon"ble Supreme Court has cautioned against such midstream admission in the judgments to which I have referred already. But in the cases of Asha (supra), Permender Kumar (supra), as well as in the case of Monaj Kumar Dhaka (supra), in deviation from the MCI schedule has been found to be permissible under extraordinary circumstances. In my opinion, the very fact that a large number of candidates are having to forego their admission for not conducting the second round of Counselling in spite of there being vacancy gives rise to such an extraordinary situation. Their right to participate in the process of second round of counselling I have found to have been established in this batch of cases. The State wants to fill up the vacancies on the ground of public interest

as they do not want so many seats to go vacant.

34. In these circumstances, I allow these writ petitions and direct the University to hold second round of counselling so that the vacant seats in the post graduate medical degree and diploma courses for the 2012 session in respect of medical officers covered by the 2008 Rules can be filled up through second round of counselling. The candidates who would be called for the said counselling process would cover the admitted medical officers who may decide to change the course, and they shall be informed in writing that in such a case, they would have to sit in the examination which are normally scheduled to be held at the end of the course, to be held for them along with the examination of the candidates who enter such course in the 2013 session. The University shall create a special schedule for such students so that the minimum attendance requirement and programme participation as laid down by the MCI Regulations are complied with. Such rescheduling shall be done in consultation with the MCI, and the MCI shall recognize the validity of the qualification of the candidates obtained as per the directions contained in this judgment. The second round of counselling shall take place within four weeks so that no further time is lost.

35. There shall be, however, no order as to costs.

Urgent certified photocopy of this order be made available to the parties, if applied for, subject to compliance with all necessary requisite formalities.

LATER:

Prayer is made on behalf of the Medical Council of India for stay of operation of this order. Such prayer is considered and refused.