
(2010) 09 DEL CK 0298

In the Delhi High Court

Case No : LPA No. 379 of 2010 and WP (C) No. 3703 of 2010

Dr. Saurabh Gaur and Another

APPELLANT

Vs

Vice Chancellor, Guru Gobind Singh Indraprastha University
and Others
 Dr. Saurabh Mittal and Another Vs Union
of India (UOI) and Others

RESPONDENT

Date of Decision : 06-09-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 15(4), 29(2)
Guru Gobind Singh Indraprastha University Act, 1998 — Section 16, 17, 19, 19A, 20
Postgraduate Medical Education Regulations, 2000 — Regulation 9, 9(2)

Citation : (2010) 09 DEL CK 0298

Hon'ble Judges : Dipak Misra, C.J.; Manmohan, J

Bench : Division Bench

Advocate : Sunil Kumar, Awanish Sinha and Chandrashekhar Yadav, for the Appellant; Mukul Talwar, for R1 in LPA Nos. 379 and 380/2010 and for R3 in WP (C) No. 3703/2010, A.S. Chandhiok, ASG, Lalit Kumar, Jayender and Pratap Singh Parmar for Union of India, Amarendra Saran Amit Kumar and Sanchit Kumar for MCI, G.D. Gupta and S.K. Sinha, for R-4 to 59 in LPA Nos. 379 and 380/2010, Rajat Katyal, for AIIMS in LPA No. 379/2010 and WP (C) No. 3703/2010 and Sushil Dutt Salwan and Aditya Garg for R-62 to 68 in LPA No. 379/2010, for the Respondent

Judgement

Dipak Misra, C.J.—Regard being had to the identic of controversy raised in this batch of matters, it was heard analogously and is disposed of by a singular order. For the sake of convenience and clarity, we shall first refer to the facts in LPA No. 379/2010 and thereafter, wherever necessitous, we shall advert to the factual matrix in the other appeal and the writ petition.

2. Questioning the legal substantiality and the sustainability of the order dated 28th April, 2010 passed by the learned Single Judge in CWP No. 2517/2010, the present intra-Court appeal has been preferred under Clause 10 of the Letters Patent.

3. The facts which are imperative to be exposted for adjudication of the controversy at hand are that the Guru Gobind Singh Indraprastha University (for short "the University"), the first respondent herein, held a Common Entrance Test (for short "CET") on 2nd April, 2010 for admission to 120 seats of the Post Graduate Medical Course for Delhi State quota in which 130 candidates appeared for its two affiliated institutions, namely, Vardhman Mahavir College, Safdarjung Hospital, New Delhi and Post Graduate Institute of Medical Education and Research, Dr. Ram Manohar Lohia Hospital, New Delhi, the respondent Nos. 2 and 3 respectively. The said respondents were allotted 51 and 72 seats respectively. The result of the CET was declared on 2nd April, 2010 itself in which 24 candidates were declared successful to take admission in respect of the allotted seats. After the declaration of the result, some of the candidates made a representation to the Vice Chancellor of the respondent No. 1 for cancellation of the said test and for holding a fresh CET. That apart, many other grievances were raised before the said respondent. When their grievances were not paid heed to, they preferred CWP No. 2517/2010 seeking a direction to cancel the result of CET on account of many a lapse and to conduct a fresh examination. Be it noted, in the first examination, 24 candidates had qualified.

4. In the writ petition, the learned Single Judge, by order dated 23.4.2010, had issued certain directions. In pursuance of the aforesaid order, the Vice Chancellor of the University had convened a meeting with certain experts and the said Committee had taken a decision which reads as follows:

(i) Since no clarification has been received from the Medical Council of India till date, the decision has been taken to fill up all the remaining seats in the larger interest of the students in the light of the Hon"ble Court direction dt. 23 April 2010.

(ii) Considering the matter, the Committee decided that the University should propose to carry out a second test for filling the remaining vacant seats by providing sufficient preparation time for the students.

(iii) The University while carrying out this second tests should adhere to all the standards of the examination and should not allow any dilution in the standards and quality of questions.

(iv) In the event of any vacant seats remaining after the second test and counseling, the University would surrender the State Quota Seats to the Central Government for further necessary action so that the same are filled up.

(v) The committee felt that this decision being taken as a one time measure under special circumstances and would not be treated as a precedence.

5. When the matter was listed before the learned Single Judge on 28.4.2010, the learned Single Judge referred to the said decision and came to hold as follows:

During the course of the arguments the petitioners did not press prayer (a) and insisted for prayer (b) to direct the respondents to conduct a fresh entrance test

to fill the remaining 96 seats. Contention of counsel for the petitioners is that in all there were 120 seats meant for the State quota under Clause 7.2 of the admission brochure and out of that test conducted on 2nd April, 2010 only 24 candidates qualified. Out of these 24, 19 are from the general category and 5 are from the reserved category. Contention of the counsel for the petitioners is that still 96 seats remain to be filled up by the University. The University had earlier taken up the matter with the MCI so as to allow them to adopt percentile system but no response was received by the respondent from the MCI. In the meanwhile, the petitioners had approached this Court by way of the present writ petition and pursuant to the directions given by this Court the respondent convened a meeting and has taken the decisions as reproduced above.

Taking into consideration the said decision taken by the University, let the University hold a re-test for filling the remaining 96 vacant seats and allow all the candidates who are eligible to appear in the said retest under the State quota. The University shall adhere to the said decision taken by the experts in the meeting held on 26.4.2010 and the other standards of examination as prescribed in the bulletin.

Before fixing the schedule for the re-test of the said examination, the respondent will keep in mind that on 9th and 23rd May, 2010 entrance exam for post graduate medical course of All India Institute of Medical Sciences and PGI Chandigarh respectively are fixed.

6. Being dissatisfied with the aforesaid order, the present appellants have preferred this appeal with a prayer for grant of leave as they were not parties to the writ petition and their rights have been affected. The prayer for leave was granted and the Letters Patent Appeal was entertained.

7. Initially, when the LPA was taken up, this Court had issued notices and directed that counseling shall be conducted but the same shall not be given effect to till 28th May, 2010. On 28th May, 2010, this Court passed the following order:

We have heard learned Counsel for the parties at length. This Court on 26th May, 2010 while dealing with interlocutory application had directed that the counseling shall be conducted but the same shall not be given effect to till today.

We have been apprised that the counseling has been deferred till 30th May, 2010.

In course of hearing, two aspects emerged for consideration, namely, whether the State quota has been properly determined or the State had acted solely on the basis of communication made by the Union of India fixing the number of seats as well as the percentage; and secondly, whether the University concerned could have held a second entrance examination. We have been apprised by Mr. Talwar, learned Counsel for Guru Gobind Singh Indraprastha University that the number of seats were increased after due correspondence and consultation with the Central Government. The second entrance test, learned Counsel for the

University would submit, was conducted keeping in view the leave granted by this Court to the Vice-Chancellor to consider the matter and thereafter a test was conducted in respect of 96 seats. We have been further apprised that 105 students have undertaken the second entrance test.

In view of the aforesaid, keeping the issue open, we modify the interim order that was passed on earlier occasion to the extent that the counseling shall be held, as re-scheduled, on 30th May, 2010 and be given effect to, subject to final result of this writ petition.

The matter be listed on 31st May, 2010.

8. The aforesaid order was assailed before the Apex Court in SLP(C) No. 16634/2010 and their Lordships, vide order dated 02.06.2010, passed the following order:

Heard learned Counsel for the parties and perused the record.

In the facts and circumstances of the case, we do not find any valid ground or justification to entertain the petitioners' prayer for stalling the admission to the post-graduate courses on the basis of retest conducted by the University pursuant to the order passed by the learned Single Judge of the High Court.

With the above observation, the SLP is dismissed.

While dismissing the special leave petition, we make it clear that the admissions made hereinafter shall remain subject to final adjudication of the matters pending before the High Court.

9. When the matter was taken up on 4th June, 2010, this Court passed the following order:

Learned Counsel for the parties fairly stated that though the application for review has been filed in this case, the main order was passed in LPA No. 380/2010. It is conceded to that in the second line of paragraph 3 at page 3 it has been mentioned that 17 seats are lying vacant, though, thereafter, as communicated by the university, 27 seats are lying vacant. Thus, instead of 17 it should be read as 27.

Needless to emphasize, that the seats are available, subject to the directions in our earlier order, shall be kept for the All India quota in ongoing counseling.

Thereafter, the matter was finally heard.

10. As the present appeal has been preferred after obtaining leave from this Court, it is necessary to refer to certain facts and the attack to the grounds of assail.

11. The appellants had appeared in the examination conducted by the All India Institute of Medical Sciences (for short "AIIMS") for Post Graduate Medical Courses of MD/MS/PG Diploma/MDS for the 50% seats for all Government/

Municipal Colleges in India except for the Government Medical Colleges in the States of Andhra Pradesh and Jammu & Kashmir and had become successful in the said entrance examination. The seats in the Post Graduate Medical Courses in all the Government and Municipal Medical Colleges of all States are divided into two categories, one, the All India Quota seats and the second, the State Quota seats in equal proportion. The All India quota seats are unreserved seats which are allotted only on the basis of merit in the All India Entrance Examination conducted by the respondent No. 3, the Principal, Post Graduate Institute of Medical Education and Research at Dr. Ram Manohar Lohia Hospital and the State quota seats are allotted on the basis of the CET conducted by the individual States in which only those students who are domicile in that State can appear. The All India quota seats are filled up by way of two rounds of counseling which are conducted by the Guru Gobind Singh Indraprastha University and Vardhman Mahavir College. The second round of All India counseling is conducted only after the first round of counseling for all the States is over and this is done to ensure that full effect is given to the All India quota inasmuch as all the students appearing in the All India quota examination also appear in the CET of the States of which they have a domicile and vacate their All India seats if they get a better institution or course in their State quota. After the first round of counseling by the States, several seats fall vacant and are reverted to the All India quota and accordingly, several students are benefited. It is urged that in no event, reservation based on residence/institutional preference should exceed 50% of the total number of seats in such courses and to ensure that 50% of the All India quota is given full effect to and is not diluted by reason of any malpractice followed by any State, directions have been issued by the Apex Court for holding an extended second round of counseling after all the States have completed their first round of counseling. It is contended that the order passed by the learned Single Judge which is a consent order is in total disregard of the principle laid down by the Apex Court as a result of which the students who had failed in the first CET have been allowed to undertake the examination under the Delhi State quota. It is put forth that some students who had appeared in the All India examination conducted by the AIIMS in January, 2010 filed a writ appeal before this Court against non completion of the first round of counseling by the different States and for not reporting in time the correct number of seats for the All India quota to be added in the second round of All India counseling. The said writ appeal was withdrawn as number of seats were involved and the appellants therein could approach the Apex Court. The Writ Petition (Civil) No. 189/2010 was preferred before the Apex Court and the Apex Court by order dated 13th May, 2010 had passed an interim direction in regard to the schedule for the extended second round of the Post Graduate counseling for the All India quota. As per the said direction, the second round of counseling is to be conducted between 2nd June, 2010 to 12th June, 2010 and all the States were directed to report the number of vacancies resulting from non joining, resigning and surrendering of seats from the All India quota to the Director General of Health Services on 27th May, 2010. The Apex Court further directed that not more than

50% institutional quota be permitted and the need was to consider the merit on All India basis.

12. It is set forth in the Memorandum of Appeal that the respondent University has extended 100% seats under the State quota and left no seats for the All India quota which is in direct conflict with the decisions of the Apex Court. It is also urged that in the action taken by the respondent No. 1, not only illegality has crept in but merit has also been compromised. It is contended that had such a step not been taken by the respondent No. 1, number of seats would have been available in the All India quota to benefit a number of doctors coming from all over the country and the meritorious doctors would have got admission in the Post Graduate course. It is averred that the learned Single Judge had fallen into grave error by issuing a writ of mandamus commanding the respondent No. 1 to do such a thing which in law is impermissible. It is set forth that by virtue of the order of the learned Single Judge, PG seats in the institutes located in Delhi earmarked for institutional preference which remained vacant could not have been brought under the All India quota as a consequence of which the eligible candidates of the All India quota have lost the opportunity. It is the case of the appellants that by virtue of the direction to hold a second examination, the concept of institutional preference has been given an indecent burial and there has been 100% reservation for the students of Guru Gobind Singh Indraprastha University. Various averments have been made that the direction of the learned Single Judge is absolutely fallacious. It is highlighted that the learned Single Judge has completely erred in holding that there are no undergraduate seats in Ram Manohar Lohia Hospital and, hence, 57 seats allotted in the State quota should go to the All India quota as there is no question of institutional preference in the case of Ram Manohar Lohia Hospital.

13. At this juncture, we think it appropriate to refer to the counter affidavits filed in this appeal as the learned Counsel for the respondents thought it appropriate to bring certain facts on record which were not brought on record before the learned Single Judge and further there were certain subsequent events which are required to be taken note of.

14. In the counter affidavit filed by the respondent No. 1, it has been stated that the University had published the admission brochure with respect to the PG Medical Degree/Diploma Course of the University on 15.2.2010 in which 60 seats were shown to be reserved for the State quota out of the total number of 118 seats. Thereafter, the total number of seats was increased to 245 out of which 123 Degree/Diploma seats were allocated to the State quota. The said decision was uploaded on the website of the University on 19.4.2010. Despite the same, the appellants came to assail the same before this Court on 25.5.2010 and, hence, the doctrine of delay and laches comes into play. It is contended that the University functions within the framework of the Guru Gobind Singh Indraprastha University Act, 1998 and the Statutes, Rules & Regulations, Ordinances made thereunder and two medical colleges are affiliated to the said University. The

Common Entrance Test which was to be conducted by the University on 2.4.2010 was only in respect of 60 seats to be filled up under the State quota. The term "State quota" actually refers to the quota of seats that are to be filled up from the graduates of the university concerned. This quota is determined at the level of the University and all MBBS graduates of the University are eligible to apply irrespective of the college in which they may have pursued their MBBS course. In total, 130 candidates applied for the said test but only 24 obtained the qualifying marks out of which 19 belonged to the General Category and 5 to the Scheduled Castes and Scheduled Tribes category. Under these circumstances, the respondent-University entered into correspondence with the Medical Council of India on 6.4.2010 requesting the MCI to relax the qualifying percentage. While the request of the University was pending with the MCI, WP(C) No. 2517/2010 was filed by the students. During the pendency of the writ petition, the Post Graduate Medical Degree/Diploma seats in the University were increased from 118 to 245 seats out of which the State quota consisted of 123 seats (120 degree seats and 3 diploma seats). The learned Single Judge on 23.4.2010 recorded the submission of the learned Counsel for the parties and noted that 96 seats were likely to go waste and, accordingly, directed the University to take measures for filling up the remaining vacancies in the current academic session itself. Pursuant to the aforesaid direction, the University took a decision to hold a second CET which was approved by the learned Single Judge. It is urged that the two reasons which weighed with the Committee of the University while recommending a re-test to be held for the remaining vacancies are that the percentage of candidates who had passed the test was abnormally low as compared to the past years and secondly, the University was of the bona fide opinion that if the second test was not held, the 96 degree seats and 3 diploma seats would go waste. It is also put forth that in the year 2009-2010, 19 seats could not be filled up out of the State quota and remained vacant. After referring to the process of examination, it is set forth that 105 candidates appeared in the re-test held on 26.5.2010 and 79 candidates obtained qualifying marks. The counseling was conducted on 29.5.2010 and admissions were given on 31.5.2010. It is put forth that 71 candidates took admission and the said position was communicated to the Director General of Health Services (DGHS) by communication dated 1.6.2010.

15. It is urged by the University that it is the stand of the appellants that the State quota should be limited to 50% of the MBBS seats in the University but when there are only 100 MBBS seats in the University, the limitation of the State quota to 50% is not correct inasmuch as the University has three medical colleges attached to it and the total number of MBBS seats offered by the University at present is 240 seats. It is also the stand of the University that the matter relating to affiliation of other medical colleges (including the medical college attached to the ESI Hospital, Delhi) is also under consideration and the number of seats were likely to increase for the academic year 2011-2012. It is further put forth that the seats were allocated in the State quota by the Union of

India after the increase of seats and the same is evident from the correspondences made between the Union of India and the University.

16. Be it noted, a counter affidavit has been filed by the Union of India in the writ petition contending, inter alia, that the respondent No. 1, vide letter dated 26.11.2007, had requested the University of Delhi for not including the seats of Ram Manohar Lohia Hospital and Safdarjung Hospital while finalizing the prospectus for the Post Graduate Entrance Examination as it has become necessary to change the affiliation of the existing MD/MS seats in the said two institutions from the University of Delhi to the Indraprastha University. The third respondent, vide letter dated 7.1.2008, had granted professional affiliation for the Post Graduate course in Safdarjung hospital for the academic year 2008-09 subject to certain conditions.

17. It is urged that pursuant to the direction issued by the Apex Court, the AIIMS has conducted the CET for Post Graduate Degree and Diploma Course on All India basis for the All India quota. For the academic year 2010-2011, total 56,826 candidates had appeared in the test conducted by the AIIMS and 11,942 students have qualified the CET as per the norms fixed by the Medical Council of India. Out of the said students, the result of 4974 students was not declared despite being qualified and the remaining students were put in the first wait list, second wait list and the third wait list. A chart has been brought in that regard as per Annexure-R1/4. It is the stand of the respondent that only 21% students had qualified in the test conducted by AIIMS for the All India quota and the remaining students had failed to qualify in the test. It is urged that it is nothing unusual that only 24 students out of 130 qualified in the test conducted by the respondent No. 3 for the Post Graduate seats as the same is within the national average for passing in the post graduate seats. The respondent No. 3 could not have conducted the second test on the ground of alleged high failure rate of the students in the entrance test as there are more meritorious students available in the All India quota who had qualified the admission test and have not failed as is the case with respect to the students of the respondent No. 3 University. It is the stand of the respondent No. 1 that since 96 seats remained vacant in the Central Government Institution after the test of 2.4.2010, the said vacant seats should have been filled up from the All India quota. It is also urged that the candidates who had qualified and are from Delhi should have been given preference in place of the failed candidates by accommodating them to the second test. The respondent No. 3 should have asked for permission before proceeding for conducting the test of failed candidates and should not have done so without approval. It is set forth that there were only 100 MBBS seats in the academic year 2004. In the first counseling of the All India quota, 118 seats were included. In terms of the norms of the MCI, the seats in the Government Educational Institution including Ram Manohar Lohia Hospital, etc. were enhanced pursuant to the inspection carried out by the respondent and thereafter, the notification for increase in the seats was issued by the respondent No. 1 only on 29.3.2010. The test for the Post Graduate seats of the respondent No. 3 University was carried

out based on the information bulletin published in February, 2010 and the test was held on 2.4.2010 and, therefore, the claim of the students for the enhanced seats pursuant to the notification dated 29.3.2010 could not be sustained as they had not appeared in the test on the strength of the said seats and besides that, the MBBS seats in the academic year 2004 were only 100 and as per the norms, only 50 seats could be allocated to the students of the Post Graduate programme. It is the stand of the respondent No. 1 that there is no MBBS college attached with Ram Manohar Lohia Hospital and, therefore, no reservation could be made for the Post Graduate seats for Ram Manohar Lohia Hospital under the State quota. It is contended that the students who had appeared in the second test could not have appeared and the same has resulted in not giving admission to meritorious students who are available in the All India quota and the students in Delhi would be deprived of admission in the Post Graduate programmes.

18. It is worth noting that the respondent No. 3, the Guru Gobind Singh Indraprastha University, has also filed a counter affidavit in the writ petition reiterating the stand in the return which has been filed in the LPA. Apart from highlighting that 123 seats are to be filled up from amongst the MBBS graduates who have passed out from the University, it is further stated that the Union of India has always accepted that the State quota/institutional quota of the PG degree/diploma seats of the University comprised of 50% of the total number of seats. Reference has been made to various correspondences between the Union of India and the University with regard to the increase in seats and collectively brought on record as Annexure R1/5 series. Relying on the said correspondence, it is highlighted that the seats have been increased in respect of the affiliated colleges of the University and, therefore, the Union of India cannot take a somersault by projecting a different picture.

19. In LPA No. 379/2010, a counter affidavit has been filed by the respondent Nos. 4 to 59 justifying the holding of the second entrance test on many a ground. It is also their stand that the appellants are not aggrieved persons because they cannot claim to enter into the State quota as they had qualified in the All India quota inasmuch as there is no such policy decision in existence or any judicial precedent. In fact, the practice has been that the seats belong to the States out of which 50% is given to the All India quota under the present scheme and in case the seats are not consumed in the All India quota, the same fall back to the State quota. There is no direction at any point of time that if the State quota remains unfilled, the same shall go to the All India quota. It is urged that the decision rendered in Saurabh Chaudri and Others Vs. Union of India (UOI) and Others, makes it quite clear that the reservation for institutional preference is not ultra vires Article 14 of the Constitution of India and further in the Saurabh Chaudhri-II case, the Apex Court was pleased to dismiss the application moved by the candidates of the All India quota for increase in their quota. A reference has been made to the letter dated 26.11.2007 issued by the Union of India to highlight that when the hospitals have been affiliated with the Indraprastha University, the said University is competent to hold examination for MBBS/MS

admission for Vardhman Mahavir College, Safdarjung Hospital as well as Ram Manohar Lohia Hospital against the 50% State quota and, hence, there is no illegality in the action of the University. It is urged that the Central Government has always taken a policy decision on the basis of affiliation but, for the first time, is taking a contrary stand which has no base in law. The stance of the Union of India that unfilled seats in the State quota would go to the All India quota is unacceptable inasmuch as the All India quota has to be restricted to 50% and, accordingly, the same had been restricted. Commenting on the enhanced quota, it is put forth that the said enhancement is totally flawless and the respondent University was justified in holding the examination in respect of the enhanced quota and the Vice Chancellor was justified in holding a second entrance test so that the seats of the State quota would not lapse.

20. A reply has been filed by the respondent Nos. 62 to 68 justifying the second examination; allocation of seats; surrender of seats of the All India quota, if unfilled, to the State quota; justifiability of the enhancement of seats; the conducting of the second entrance examination and the factum that the petitioners have no locus standi to prefer the appeals as they cannot get admission in respect of the seats which belong to the State quota. Reference has been made to the decisions rendered in *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, , *Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others*, *Magan Mehrotra and Others Vs. Union of India (UOI) and Others*, and *Saurabh Chaudri case (supra)* to justify the institutional preference in allocation. It is also the stand of the respondent Nos. 62 to 68 that after the second round of counseling of the All India quota is completed, the institute had to inform regarding the number of seats that remained vacant in the All India quota and surrender the same back to the State quota. The same can be filled in the second round of counseling of the State quota. It is set forth that no third counseling is permitted at the All India level and the seats come to the State quota. Be it noted, in LPA No. 380/2010, the same order passed by the learned Single Judge is under assail and the pleadings from all aspects are same.

21. We have heard Mr. Sunil Kumar, learned senior counsel with Mr. Awanish Sinha, Mr. Chandrashekhar Yadav for the appellants and the writ petitioners, Mr. A.S. Chandhiok, learned Additional Solicitor General with Mr. Lalit Kumar, Mr. Jayender, Mr. Pratap Singh Parmar for the Union of India, Mr. Mukul Talwar, learned Counsel for the Guru Gobind Singh Indraprastha University, Mr. Amarendra Saran, learned senior Counsel with Mr. Amit Kumar, Mr. Sanchit Kumar for the Medical Council of India, Mr. G.D. Gupta, learned senior Counsel with Mr. S.K. Sinha for the private respondents, Mr. Rajat Katyal, learned Counsel for AIIMS and Mr. Sushil Dutt Salwan, learned Counsel for the private respondents.

22. From the pleadings that have been set forth in the appeals as well as in the writ petition, the following questions emerge for consideration:

- a) Whether the learned Single Judge could have directed for holding a second entrance test and whether the University could have taken a decision in law to hold such a test after the first entrance test was over and the result was published?
- b) Whether the University could have included the seats that were assigned to it by the Central Government after the prospectus was published?
- c) Whether the stand and stance put forth by the appellants that when the seats in the State quota fall vacant, they are bound to be surrendered to the All India quota, is acceptable?
- d) Whether the number of seats as allocated to the affiliated colleges of the University is justified as a stand has been taken by the Union of India as well as by the appellants that the same goes beyond the institutional preference or reservation?
- e) Whether the appellants/writ petitioners are entitled to get any relief on the basis/foundation that had the seats been surrendered to the All India quota, they would have called for counseling for the said vacant seats in All India quota and in that case, they had a choice of subject as well as institution?
- f) In case a finding is reached that the University could not have conducted the second entrance test, whether at this juncture, it would be appropriate and apposite to cancel the admissions given to the respondent students?

23. Firstly, we shall advert to the first issue. On a perusal of the order passed by the learned Single Judge, it is perceivable that he had, on 23.04.2010, issued certain directions and thereafter the Vice Chancellor convened a meeting of certain experts and took a decision that as no clarification has been received from the Medical Council of India, a decision has been taken to fill up the remaining seats in the larger interest of the students. The learned Single Judge thereafter directed to hold a re-test, that is, second entrance test for filling up the remaining 96 vacant seats and allowed all the eligible candidates to appear in the said test under the State quota. In the course of hearing, we put it to the learned Counsel for the parties to show whether there is any provision for holding any second entrance test and the only answer that was given by the learned Counsel for the University was that there is no prohibition and further the Guru Gobind Singh Indraprastha University Act, 1998 enables the University u/s 5(25) to determine the standards for admission to the University which may include examination, evaluation or any other method of selection. The learned senior Counsel for the Medical Council of India stated that the University cannot rely on its own enactment to hold a second entrance examination but is to be totally guided by the provisions of The Indian Medical Council Act, 1956 and the Regulations framed thereunder. Regulation 9 of the Post Graduate Medical Education Regulations, 2000 (for short "the Regulations") reads as follows:

9. SELECTION OF POSTGRADUATE STUDENTS

(1) Students for postgraduate medical courses shall be selected strictly on the basis of their academic merit.

(2) For determining the academic merit, the university/institution may adopt any one of the following procedures both for degree and diploma courses:

(i) On the basis of merit as determined by a competitive test conducted by the state government or by the competent authority appointed by the state government or by the university/group of universities in the same state; or

(ii) On the basis of merit as determined by a centralized competitive test held at the national level; or

(iii) On the basis of the individual cumulative performance at the first, second and third MBBS examinations, if such examinations have been passed from the same university; or

(iv) Combination of (i) and (iii):

Provided that wherever entrance test for postgraduate admission is held by a state government or a university or any other authorized examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical course shall be 50 percent for general category candidates and 40 percent for the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes;

Provided further that in non-governmental institutions fifty percent of the total seats shall be filled by the competent authority and the remaining fifty percent by the management of the institution on the basis of merit.

24. A Constitution Bench in *Preeti Srivastava (Dr.) and Anr. v. State of Madhya Pradesh and Ors.* AIR 1999 SC 2984 has held thus:

55. ...The first part of Sub-section (1) empowers the Council to prescribe standards of post-graduate medical education for the guidance of Universities. Therefore, the Universities have to be guided by the standards prescribed by the Medical Council and must shape their programmes accordingly. The scheme of the Indian Medical Council Act, 1956 does not give an option to the Universities to follow or not to follow the standards laid down by the Indian Medical Council. For example, the medical qualifications granted by a University or a medical institution have to be recognised under the Indian Medical Council Act, 1956. Unless the qualifications are so recognised, the students who qualify will not be able to practice. Before granting such recognition, a power is given to the Medical Council u/s 16 to ask for information as to the courses of study and examinations. The Universities are bound to furnish the information so required by the Council. The post-graduate medical committee is also u/s 17, entitled to appoint medical inspectors to inspect any medical institution, college, hospital or other institution where medical education is given or to attend any examination held by any University or medical institution before recommending the medical

qualification granted by that University or medical institution. u/s 19, if a report of the Committee is unsatisfactory the Medical Council may withdraw recognition granted to a medical qualification of any medical institution or University concerned in the manner provided in Section 19. Section 19A enables the Council to prescribe minimum standards of medical education required for granting recognised medical qualifications other than post-graduate medical qualifications by the Universities or medical institutions, while Section 20 gives a power to the Council to prescribe minimum standards of post-graduate medical education. The Universities must necessarily be guided by the standards prescribed u/s 20(1) if their degrees or diplomas are to be recognised under the Medical Council of India Act. We, therefore, disagree with and overrule the finding given in *Ajay Kumar Singh v. State of Bihar* AIR 1994 SCW 2515 (supra), to the effect that the standards of post-graduate medical education prescribed by the Medical Council of India are merely directory and the Universities are not bound to comply with the standards so prescribed.

In the said decision, in paragraph 62, their Lordships have ruled thus:

62. In the premises, we agree with the reasoning and conclusion in *Dr. Sadhna Devi and others Vs. State of U.P. and others*, and we overrule the reasoning and conclusions in *Ajay Kumar Singh v. State of Bihar* AIR 1994 SCW 2515 (supra) and *Post-Graduate Institute of Medical Education and Research etc. Vs. K.L. Narasimhan and another etc.*, To conclude:

1. We have not examined the question whether reservations are permissible at the post-graduate level of medical education.

2. A common entrance examination envisaged under the Regulations framed by the Medical Council of India for post graduate medical education requires fixing of minimum qualifying marks for passing the examination since it is not a mere screening test.

3. Whether lower minimum qualifying marks for the reserved category candidates can be prescribed at the post graduate level of medical education is a question which must be decided by the Medical Council of India since it affects standards of post-graduate medical education. Even if minimum qualifying marks can be lowered for the reserved category candidates, there cannot be a wide disparity between the minimum qualifying marks for the reserved category candidates and the minimum qualifying marks for the general category candidates at this level. The percentage of 20% for the reserved category and 45% for the general category is not permissible under Article 15(4), the same being unreasonable at the post-graduate level and contrary to public interest.

4. At the level of admission to the super-speciality courses, no special provisions are permissible, they being contrary to national interest. Merit alone can be the basis of selection.

25. In *The State of Madhya Pradesh and Others Vs. Gopal D. Tirthani and Others*,

the Apex Court has held thus:

36. We sum up our conclusions as under:

1. In the State of Madhya Pradesh allocation of 20% seats in post-graduation in the Universities of Madhya Pradesh for in-service candidates is not a reservation; it is a separate and exclusive channel of entry or source of admission, the validity whereof cannot be determined on the constitutional principles applicable to communal reservations. Such two channels of entry or two sources of admission is a valid provision.

2. There can be only one common entrance test for determining eligibility for post-graduation for in-service candidates and those not in service. The requirement of minimum qualifying marks cannot be lowered or relaxed contrary to Medical Council of India Regulations framed in this behalf.

3. In the State of Madhya Pradesh there are five Universities, i.e., there are Universities more than one. Regulation 9(2)(iii) cannot be made use of in the State of Madhya Pradesh either singly or in combination with Clause (i) for determining the eligibility for entrance into PG courses.

4. It is permissible to assign a reasonable weightage for service rendered in rural/tribal areas by in-service candidates for the purpose of determining inter se merit within the class of in-service candidates who have qualified in the Pre-PG test by securing the minimum qualifying marks as prescribed by the Medical Council of India.

5. Women candidates constitute a class by themselves and the provision of relaxed or reduced eligibility criteria by reference to continuous service rendered in rural areas for the purpose of sponsorship by the State Government in specified disciplines which have utility for serving women folk in villages does not suffer from the vice of invidious discrimination.

26. In view of the aforesaid enunciation of law, there can be no scintilla of doubt that there has to be only one entrance test as merit is the criterion and the Regulations of the Medical Council of India in a way command for a common entrance test. If a common entrance test is permitted to be held on more than one occasion, it will defeat the purpose of The Indian Medical Council Act as well as the Regulations and further, we are disposed to think, continue to run counter to the decision rendered in Preeti Srivastava (Dr.) case (supra) and Gopal D. Tirthani case (supra). Thus, we conclude and hold that the learned Single Judge has fallen into error by directing the University to first consider whether a second test can be held and thereafter directing them to hold a second test on the basis of a meeting held by the experts at the instance of the Vice Chancellor. When a particular thing is not permissible in law, a mandamus cannot be issued to consider the same as that would tantamount to violation of the statute or law. Thus, the order passed by the learned Single Judge on that score has to be set aside and we do so.

27. The second issue that arises for consideration is whether the University could have held the examination in respect of the seats though the same were sanctioned after the issuance of the prospectus. On a perusal of the prospectus, it transpires that the prospectus was published on 15.2.2010. In the said prospectus/brochure, 60 seats were shown to be reserved for the State quota out of the total number of 118 seats. Thereafter, the number of seats was increased to 245, out of which 123 degree/diploma seats were allocated to the State quota. The said decision was uploaded on the website of the University on 19.4.2010. The learned Additional Solicitor General for the Union of India submitted with immense vehemence that all the seats could not have been put in the second entrance examination as the first test was over. As we have already held that the second entrance test was not permissible in law, we do not think it necessary to advert to the said issue.

28. The next aspect which requires to be considered is whether the seats falling vacant in the State quota are required to be surrendered to the All India quota. We may state here that the learned senior Counsel for the Medical Council of India as well as the learned Additional Solicitor General for the Union of India strenuously argued that they are to be surrendered to the All India quota, but could not show us any provision even remotely suggesting the same. Per contra, the learned Counsel appearing for the University and the private respondents placed reliance on an interim order passed by the Apex Court on 13.5.2010 in Writ Petition (Civil) No. 189/2010. In the said case, their Lordships have directed as follows:

We are informed that several States (as many as 14) have not completed the first round of counseling. We are also informed the second round of counselling for the All India quota, comes to an end today. After hearing learned Counsel and having examined the facts and having considered the similar order passed during the previous years, we issue the following interim directions in regard to the schedule for extended second round of Post Graduate Counselling 2010 for All India quota:

Date Detail 20.5.2010 Time-scheduled to be hosted on the website by Directorate General of Health Services.

27.5.2010 All States must report updated number of vacancies resulting from non- joining, resigning and surrendering of seats in "All India Quota" to the Directorate General of Health Services by 5 PM

1.6.2010 Total number of vacancies to be notified by Directorate General of Health Services

From 2.6.2010 Extended 2nd round of Counselling to to 12.6.2010 be conducted by Directorate General of Health Services at Delhi Counselling Venue only

20.6.2010 The last date for the students to join allotted College.

21.6.2010 Vacant "All India Quota" seats may be deemed to be surrendered to

the States.

30.6.2010 Final deadline for the students to join allotted course

We direct that the unfilled seats of All India quota which would be deemed to have lapsed in favour of the State Governments as at the end of the second counselling today, will not so lapse in favour of the State Government in view of the extended second round of counselling. To ensure that the entire extended second counselling is completed within the time schedule, the extended second counselling for the All India quota shall be held at Delhi. The State Government shall adhere to the above schedule particularly to the second item in regard to reporting of vacancies.

29. On a perusal of the aforesaid order, it is noticeable that their Lordships had directed that the All India seats may be deemed to be surrendered to the State quota and a direction has been issued for extending the second counseling for the All India quota. The learned Counsel for the private respondents and the University were desirous to inferentially deduce that the All India quota seats are surrendered to the State quota and not vice versa. At this juncture, as the matter is pending before the Apex Court, we do not intend to express any opinion on this score except stating that there is no provision stating that in case the State quota seats are not filled up, they are to be surrendered or transferred to the All India quota.

30. In this regard, we may refer with profit to the decision in *Mridul Dhar (Minor) and Another Vs. Union of India (UOI) and Others*, wherein in paragraph 11, their Lordships have referred to the time schedule for completion of the admission process for medical and dental courses. There is a reference to the conduct of entrance examination for the All India quota and the State quota. Thereafter, their Lordships have, in paragraph 15, dealt with the allocation of seats and eventually, in paragraph 16 and 17, have held thus:

16. ...By maintaining the dates already fixed, if not the result of all students, at least the results of those who participate in the All India Entrance Examination and are in high merit ranking can be declared and marksheets made available to them by 15th June so as to enable them to participate in the first counseling in All India Quota. Going by the past figures, the candidates requiring such facility may be only about 100. Only the candidates in the merit list up to 2500 may need such a facility and cooperation from the State authorities. From the year 2006, the State Government/West Bengal Council of Higher Secondary Education shall arrange its affairs in such a manner that the examinations are held timely, results are declared by 10th June and marksheets made available to the students by 15th June. The other States/Union Territories would ensure declaration of result by 10th June and availability of marksheet to the students by 15th June from the academic year 2005.

17. Another connected aspect is declaration of result of qualifying examination/entrance examination for State quota seats. The State Governments, as per the

time schedule are required to declare the said results by 15th June of every year. The timely declaration of result will enable the students to take a decision about participation in all-India counseling or State counseling. The Central Government has rightly pointed out that due to late declaration of result of State-level entrance examinations, candidates and their parents travel from all over the country to participate in all- India quota counseling which is conducted in Delhi and then travel to allotted medical/dental colleges. Later on, if the candidates get admission in the colleges of their choice in their respective States through State counseling, they have to travel back to the college allotted through all-India quota to get their college-leaving certificate and other documents which are deposited with allotted college before joining the State college. By timely declaration of the results of the State-level entrance examination i.e. by 15th June, which is before the start of all-India quota counseling, candidates and their parents can be saved from facing undesirable hardships.

31. We have referred to the aforesaid paragraphs only to highlight that one has to undertake the examination in All India quota and the State quota. Though the learned Counsel for the appellants referred to the said decision, yet he has not really read or assessed them as their Lordships have not stated with regard to the conversion or surrender of seats.

32. The next limb that is required to be addressed is whether the institutional preference or reservation in respect of the affiliated colleges of the University is correct or not.

33. The learned senior Counsel for the appellant has placed heavy reliance on the decisions in *A.I.I.M.S. Students Union Vs. A.I.I.M.S. and Others*, and *Saurabh Chaudri case* (supra).

34. In *Saurabh Chaudri case* (supra), the Constitution Bench has held thus:

108. As regards the constitutional validity of institutional/regional/university wise reservation/preference, in view of this Court's emphasis on the need to strive for excellence which alone is in the national interest, it may not be possible to sustain its constitutional validity. However, the presently available decisional law is in support of institutional preference to the extent of 50% of the total available seats in the educational institutions concerned.

Conclusions:

1) In the case of Central educational institutions and other institutions of excellence in the country the judicial thinking has veered around the dominant idea of national interest with its limiting effect on the constitutional prescription of reservations. The result is that in the case of these institutions the scope for reservations is minimal.

2) As regards the feasibility of constitutional reservations at the level of superspecialities, the position is that the judiciary has adopted the dominant norm, i.e., "the higher the level of the speciality the lesser the role of

reservation". At the level of superspecialties the rule of "equal chance for equal marks" dominates. This view equally applies to all superspeciality institutions.

3) As regards the scope of reservation of seats in educational institutions affiliated and recognised by State universities, the constitutional prescription of reservation of 50% of the available seats has to be respected and enforced.

4) The institutional preference should be limited to 50% and the rest being left for open competition based purely on merits on an all-India basis.

5) As regards private non-minority educational institutions distinction between government-aided and unaided institutions. While government/State can prescribe guidelines as to the process of selection and admission of students, the government/State while issuing guidelines has to take into consideration the constitutional mandate of the requirement of protective discrimination in matters of reservation of seats as ordained by the decisional law in the country. Accordingly, the extent of reservation in no case can exceed 50% of the seats. The inter se merit may be assessed on the basis of a common all-India entrance test or on the basis of marks at the level of qualifying examination.

6) The position with respect to minority-aided institutions is that they are bound by the requirement of constitutional reservation along with other regulatory controls. However, the right to admit students of their choice being part of the right of religious and linguistic minorities, to establish and administer educational institutions of their choice, the managements of these educational institutions can reserve seats to a reasonable extent, not necessarily 50% as laid down in Stephens College case. Out of the seats left after the deduction of management quota, the State can require the observance of the requirement of constitutional reservation.

7) As regards the unaided institutions, they have a large measure of autonomy even in matters of admission of students as they are not bound by the constraints of the demands of Article 29(2). Nor are they bound by the constraints of the obligatory requirements of constitutional reservation.

35. The learned senior Counsel for the appellants submitted that 50% of the seats are to be based on the strength of colleges which impart education for the MBBS course. He has drawn inspiration from some of the observations in Saurabh Chaudri case (*supra*). In our considered opinion, the seats have been fixed by the Union of India. Whether the basis is correct or incorrect does not deserve to be debated at the instance of the appellants at this juncture. The same has to be sorted out by the Union of India in consultation with the Medical Council of India and the Government of NCT of Delhi for the purpose of fixation in respect of the next year. We express no opinion on the said score.

36. The next aspect that requires to be adverted to is whether the appellants/writ petitioners are entitled to any relief. Their basic claim is that had the seats been surrendered to the All India quota, they would have been entitled to be

called for counseling. We have already held that there is no provision that the seats meant for the State quota would be surrendered to the All India quota and the picture on that score is absolutely unclear. On the contrary, by an interim order, their Lordships have directed that the All India quota seats shall be surrendered to the State quota. In this factual backdrop, we are disposed to think that the appellants/writ petitioners are not entitled to any relief.

37. The next issue that requires determination is whether the respondents-students who have taken admission on the basis of the second entrance test should face the wrath of cancellation of their admission. True it is, there could not have been a direction to hold a second entrance test. The same is in the realm of illegality. However, in pursuance of the order of this Court, the students had undertaken the examination. Some of them got qualified. That apart, we have also been apprised that in the second entrance test, they have obtained the requisite percentage as fixed by the Medical Council of India. Regard being had to the special features of the case, we are not inclined to cancel their admission and permit them to prosecute their studies in the respective courses.

38. Before parting with the case, we must state that the present case projects and frescoes a picture of utter confusion, an utter maze. The University should have been well advised to enter into proper and responsible correspondence with the Medical Council of India and not take a decision to hold a second entrance test and justify the same. Henceforth, we require the University to be well guided and remain within the framework of The Indian Medical Council Act, 1956 and the Regulations framed thereunder. We also expect the Medical Council of India to make the position clear so that this kind of anarchy does not occur. Quite apart from the above, the Union of India should not create puzzlement by enhancing the seats and allotting the same to the State quota and thereafter projecting a different picture before the Court. A sanguine homogeneity is expected from the Government of NCT of Delhi, Union of India, The Medical Council of India and the University while they are dealing with the career of the students.

39. Ex consequenti, the appeals as well as the writ petition stand disposed of without any order as to costs.