

(2008) 09 DEL CK 0027

In the Delhi High Court

Case No : Writ Petition (C) No. 2763 of 2008 and 3313 of 2008

Krishna Adit Agarwal

APPELLANT

Vs

Guru Gobind Singh Indraprastha University and Others

 Indian Medical Association and Another Vs Union of
India (UOI) and Others

RESPONDENT

Date of Decision : 26-09-2008

Acts Referred:

Constitution of India, 1950 — Article 15, 15(5), 16, 19(6), 226
Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee Regulation of Admission Fixation of Non-Exploitative Fee and other Measures to Ensures Equity and Excellence) Act, 2007 — Section 12, 12(1), 13, 14, 18
Guru Gobind Singh Indraprastha University Act, 1998 — Section 39, 6, 6(1), 6(2)
Indian Medical Council Act, 1956 — Section 10A

Citation : (2008) 153 DLT 669

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Aman Hingorani, for the Appellant; G.D. Goel and Sanjiv Goel for respondent No. 1, Vikas Singh, ASG and R. Balasubramaniam and Najmi Waziri, in W.P. (C) 2763/2008, Chetan Chawla, for respondent No. 1, Maninder Singh and T. Singh for respondent No. 2, G.D. Goel and Sanjiv Goel for respondent No. 3, Vikas Singh, ASG and R. Balasubramaniam, for respondent Nos. 4 and 5 and Najmi Waziri, in W.P. (C) No. 3313/2008, G.D. Goel and Sanjiv Goel for respondent No. 1, Vikas Singh, ASG and R. Balasubramaniam, for respondent Nos. 2 and 3 and Najmi Waziri, in W.P. (C) No. 4454/2008 and G.D. Goel and Sanjiv Goel for respondent No. 1, Vikas Singh, ASG and R. Balasubramaniam, for respondent Nos. 2 and 3 and Najmi Waziri, in W.P. (C) 6484/2008, for the Respondent

Judgement

Vipin Sanghi, J.—This batch of writ petitions under Article 226 of the Constitution of India (except WP(C) No. 3313/2008 filed by Indian Medical Association and Anr.) primarily seeks to challenge the allocation of all the 100 seats for the wards of army personnel in the respondent No. 2 institute, viz. Army College of Medical Science, Delhi Cantonment, Delhi (hereinafter referred to as ACMS), which has

been set up for offering the MBBS degree course. WP(C) No. 3313/2008 has been filed to restrain the setting up of the Respondent ACMS without the approval of the Central Government u/s 10A of the Medical Council of India Act. It also seeks a mandamus to require the Respondent Nos. 1 & 2 i.e. the Union of India and the MCI to require the ACMS to first fulfill the qualifying criteria, before it is granted the aforesaid permission. A mandamus is also sought against the Respondent Guru Gobind Singh Indraprastha University to withdraw the affiliation granted to ACMS unless it complies with the conditions therefor. I shall be dealing with the facts as appearing in W.P.(C) No. 2763/2008 filed by Krishna Adit Agarwal. The petitioner Krishna Adit Agarwal filed the present writ petition being WP(C) No. 2763/2008 in March/ April, 2008 with the grievance that he was not being permitted to submit the application form for admission to the ACMS for MBBS-PGME 2008-09 and he was not being provided with the prospectus by ACMS on the ground that he is not eligible as he is not a ward of an army personnel.

2. During the pendency of the aforesaid writ petitions the Govt. of NCT of Delhi took a Cabinet decision bearing No. 1422 dated 14.7.2008 which was circulated vide file No. F.3/3/2004-GAD/CN-2868-2879, whereby the Cabinet of the Govt. of NCT of Delhi sought to approve 100% admission for the wards of army personnel in the ACMS. The Govt. of NCT of Delhi followed up the aforesaid Cabinet decision by a notification dated 14.8.2008 bearing No. DHE-4(33)/2008-09 purportedly issued in exercise of powers conferred by Clause(b) of Sub-section (1) of Section 12 of the "The Delhi Professional Colleges OR Institutions (Prohibition of Capitation Fee, Regulation Of Admission, Fixation Of Non Exploitative Fees And Other Measures To Ensure Equity And Excellence) Act, 2007" (referred as to "Delhi Act 80 of 2007" I may note that whereas in the Gazette Notification, the Act is numbered as "80 of 2007", in the Notification dated 29.05.2007 placed on record, the same is numbered as "8 of 2007"). By the said notification, the Lieutenant Governor of NCT of Delhi has permitted the ACMS to allocate 100% seats in the said college for admission to the wards of army personnel in accordance with the policy followed by the Indian Army.

3. To challenge the aforesaid Cabinet Decision and the notification dated 14.08.2008, the petitioner sought the amendment of the writ petition by moving the CM No. 12473/2008 in WP(C) No. 2763/2008. This application was allowed by the Court on 8.9.2008. Since the issue is purely legal, no further counter affidavit has been filed by the respondents to the amended writ petition. Counter affidavits had been filed to the unamended writ petition by respondent No. 1 Guru Gobind Singh Indraprastha University (hereinafter referred to as the GGSIPU) and by respondent No. 2 ACMS.

4. Learned Counsel for the petitioner submits that ACMS is an institution established entirely by the Central Government. The said institution has been leased land by the Government of India in Delhi Cantonment area, which is Government property. Moreover the hospital to which the ACMS is attached is the

base hospital run by the Army and is not owned or run by Army Welfare Education Society (AWES), which has set up ACMS. It is argued that it cannot be said that the ACMS is an unaided professional institution. It is a wholly Government funded enterprise. Therefore, it is a Central Educational Institution to which the Delhi Act 80 of 2007 is not applicable, since it cannot be said to be an unaided institution. The Delhi Act 80 of 2007, as per Section 2, applies to "unaided institutions" affiliated to a University imparting education in degree, diploma and certificate courses. "Institution" is defined to mean College or Institution aided or unaided, affiliated to a university imparting education, inter alia, in the discipline of medicine.

5. The alternative contention of the petitioner is that the allocation of 100% seats in the ACMS for wards of army personnel, ex-army personnel and war widows is in violation of Section 6 of the Guru Gobind Singh Indraprastha University Act (hereinafter referred to as the 1998 Act) and Article 15 of the Constitution of India. It is further submitted that Section 6(1) of the 1998 Act mandates that the University will be open to all persons. Section 6(2) permits the respondent University to make special provisions, inter alia, for admission of women, or of persons belonging to the weaker sections of the society and in particular of persons belonging to Scheduled Castes and Scheduled Tribes. Statute 24 of the respondent University deals with the aspect relating to the conditions under which colleges and institutions may be admitted to the privileges of the University and the conditions under which such privileges may be withdrawn. Clause 3 of the said Statute lays down the essential conditions of affiliation of colleges and institutions. It, inter alia, states that "No college or institution shall be admitted to the privileges of the University unless" inter alia, "it undertakes to adhere to the provisions of the Act, the Statutes, the ordinances and the regulations of the University and to comply with the standing orders, directions and instructions of the University." The petitioner submits that Ordinance-30 of the respondent University has been framed in keeping in view Article 15(5) of the Constitution of India read with Section 6(2) of the 1998 Act for making special provisions for advancement of weaker sections of the society, and in particular of persons belonging to the Scheduled Castes and the Scheduled Tribes by making special provision for their admission to self financing private institutions affiliated to respondent University. It, inter alia, states:

1. Reservation of seats and procedure of filing the same in all the self-financing private institutions affiliated with Guro Gobind Singh Indraprastha University in respect of Delhi as well as Outside Delhi Category candidates would be as follows:

(i) Scheduled Castes and Scheduled Tribes

(ii) Reservation for Defence Category:

Five percent of seats are reserved for Defence Category in the following order of priority:

a) Widows/Wards of Defence personnel killed in action.

- b) Wards of serving Defence personnel and ex-servicemen disabled in action.
- c) Widows/wards of Defence personnel who died in peace-time with death attributable to military service.
- d) Wards of Defence Personnel disabled in peace-time with disability attributable to military service.
- e) Wards of Defence ex-servicemen and serving personnel who are in receipt of Gallantry Award.

(iii) Physically Handicapped

(iv) Supernumerary Seats for Kashmiri Migrants

2. This procedure for filling up of the reserved category seats would be the same as notified by the University in the Admission Brochures from time to time.

3. This Ordinance would be applicable on the self-financing private institutions other than the minority institutions referred to in Clause (1) of Article 30 of Constitution of India.

4. For reservations in the Government Institutions, the policy of the Government of the NCT of Delhi already in vogue will continue to apply.

5. This issues with the approval of the Competent Authority.

6. This ordinance has come into force with effect from the date of approval by the Board of the Management.

6. It is, therefore, argued by learned Counsel for the petitioner that the respondent ACMS having sought affiliation with the respondent GGSIP University is bound to adhere to the provisions of 1998 Act, its Statutes and Ordinances which, inter alia, prescribed reservation for defence category only to the extent of 5% seats. The reservation of 100% seats of ACMS for the wards of serving and retired army personnel and war widows, and the resultant denial of admission to all other category of candidates is in the teeth of the 1998 Act, Statute 24 and Ordinance 30, as aforesaid. The petitions have relied upon various other decisions, reference where to is made later in the judgment.

7. The stand of Respondent No. 2 i.e. ACMS is that it has been established by the Army Welfare Education Society (AWES), a registered Society with the Registrar of Society, Delhi under the Societies Registration Act, 1860. The objective of AWES is to cater to the educational needs of the wards of serving army personnel, ex army personnel and war widows of the Army. There are about 11.3 lakhs serving army personnel and about 20 lakhs ex army personnel and war widows in the country. AWES is running approximately 123 army school and 12 professional colleges as a welfare measure for the wards of army personnel as tribute for the sacrifices and service being rendered by them for the nation. The stand of respondent No. 2 is that the terms and conditions of service of army personnel are very harsh. Consequently army service is not attracting adequate

talent for the protection of the country. The Indian Army is facing acute shortage of manpower which is adversely affecting its operational preparedness. It is stated that one of the core problems is that wards of army personnel suffer serious disadvantages in pursuing education for a number of reasons. Personnel serving in field/border areas cannot keep their families with them due to security reasons and lack of accommodation and education facilities, and at the places where the families are provided accommodation, educational facilities that are available may not be upto the desired standards. Consequently, service conditions of the parents-like deployment at the border; outposts in remote areas; having no or primitive educational facilities; tenure based postings affecting continuity; lack of married accommodation at military stations, and wherever available, lack of adequate facilities, results in frequent change of schools with different medium of instructions for such children, leading to adjustment and other related problems, and; lack of supervision and guidance from the fathers, lead to the children of the army personnel/ex army personnel to suffer from disadvantages compared to those coming from civil background. Additionally, some of the States have laid down conditions such as number of years of studying in the State and domicile requirements as a pre condition for appearing in entrance examination for professional courses in the States concerned. For the aforesaid reasons children of the army personnel cannot compete with civilian children for admission to professional courses since they do not enjoy a level playing field when it comes to competition with their civilian counter parts. Since the education of children of army personnel is vital in maintaining the morale of army personnel, AWES was set up to raise and administer its own educational institutions for wards of serving army personnel, ex servicemen and war widows.

8. Respondent No. 2 further submits that the Supreme Court has upheld the reservation in favour of wards of ex defence personnel in D.N. Chanchala Ors. Vs. The State of Mysore and Others, . The submission of respondent No. 2 is that there is no medical college for the wards of army personnel in the country and seats reserved in some of the medical colleges are woefully inadequate to meet the requirements of approximately 60 lakh army children. So as to attract adequate talent to join the army, AWES has opened 12 professional colleges for the wards of army personnel. In line with the aforesaid decision, it was decided to establish Army College of Medical Sciences at New Delhi. It is submitted that respondent ACMS has been set up through the Army Welfare Funds which are regimental funds and are not public funds. No public or Government fund or grants are used in running these educational institutions. The revenue expenditure in establishing and running the army professional colleges are made through regimental welfare funds in addition to tuition fee payable by the students. The management body of AWES comprises of senior serving army officers in ex officio and honorary basis. It is submitted that AWES and its educational institutions do not receive any financial aid or grant from the Central or State Governments and that AWES is a purely unaided educational society.

There is no management quota in army professional colleges and admissions are made solely on the basis of merit, drawn on the basis of the written admission test. Fee structure is not aimed at commercial exploitation and there is total transparency in admission of eligible wards.

9. It is also argued that the purpose of establishing the respondent Institution would be wholly defeated if the seats are thrown open to the civilian candidates who are equipped to avail of all other opportunities as compared to wards of army personnel.

10. It is further submitted that the ACMS being an unaided professional college is entitled to maintain complete autonomy in its administration, which would include admission of students. It claims an unfettered fundamental right to choose students to be granted admission, provided the admission procedure is fair, transparent and non-exploitative. It is further argued that the restrictions on the source of selection to the wards of army personnel, ex army personnel and war widows does not amount to reservation. It does not amount to discrimination against any citizen on the ground of religion, race or caste or sex or place of birth. Wards of all army personnel, ex-servicemen and war widows constitute a special class who, because of the extraordinary difficulties that they face, unlike their civilian counter parts, are in a disadvantaged position so far as their education is concerned and they are, therefore, entitled to be treated differently from the wards of civilians.

11. The respondent GGSIPU in its counter affidavit submits that for establishment of a medical college in NCT of Delhi, the institution requires permission u/s 10A of the Medical Council of India Act. It also requires an approval from the Medical Council of India and a No Objection Certificate from the Government of NCT of Delhi. The respondent GGSIPU further states that admission and fee etc in the unaided professional institutions in NCT of Delhi is regulated by the Delhi Act No. 80 of 2007. The said Act was passed by Govt. of NCT of Delhi after amendment in Article 15 of the Constitution of India vide Constitution (93rd Amendment) Act, 2005 dated 28.1.2006. In the counter affidavit of the said University dated 17.5.2008, the respondent University stated that ACMS had not been granted affiliation by it till the filing of such affidavit. However, during the pendency of the writ petitions the respondent University has granted provisional affiliation to the ACMS of Medical Sciences vide communication dated 6.8.2008, which has been placed on record by the respondent University upon the Court requiring its production, after the judgment was reserved.

12. Therefore, it needs to be firstly ascertained whether ACMS can be said to be an "aided institution" or whether it is an "unaided institution". The expression "Unaided Institution" has been defined in Delhi Act 80 of 2007. It reads "'unaided institution" means an institution other than an aided institution." "Aided Institution" is defined to mean "an institution receiving recurring financial aid or grant-in-aid from any State, Union Territory, Central Government or the

University Grants Commission, and includes a minority institution as may be specified by the Government." In support of his submissions that ACMS is an aided, and not an unaided institution, the petitioner submits that the land for setting up the ACMS has been leased by the Ministry of Defence, Government of India. The Base Hospital is also not a hospital of the AWES. It is the Base Hospital of the Army. On the other hand, the learned ASG Mr. Vikas Singh has urged that AWES has been held as not being "a State" and that it has been held that the funds of the Army Welfare Fund are not government/public funds. He relies on *Asha Vij and Others Vs. The Chief of the Army Staff and Others, and Union of India and Another Vs. Chotelal and Others*, . A similar body, namely, Army Welfare Housing Organisation (AWHO) has also been held not to be an instrumentality of the State in *N.C. Rastogi Vs. Union of India and Others*, . He submits that the Base hospital of the army is being utilised by the ACMS only till such time as the hospital of the said institution is set up.

13. In my view, considering the definitions aforesaid of the expressions "aided institution" and "unaided institution" and the aforesaid decisions of the various courts including this Court, whereby it has been held that AWES is not an instrumentality of the State and that the regimental funds, which have been used for the purpose of setting up, and for the purpose of meeting the recurring expenses of ACMS, do not constitute government/public funds, it cannot be said that ACMS is an aided institution. To be classified as an aided institution, I would assume that an overwhelming percentage of the day to day recurring running and maintenance expenses would have to be borne by the Government on a regular basis. That is how even an "aided school" is understood under the Delhi School Education Act. The petitioner has not produced any material on record to show that there is any commitment made by the Government to support the ACMS on a regular and recurring basis to meet a large percentage of its day to day running and maintenance expenses. Merely because, for the present, the ACMS is using the base hospital of the army for the purposes of clinical experience and education of the medical students, it does not mean that it is receiving any "aid". So far as the land on which the ACMS has been set up is concerned, the same belongs to the Government. The same has been leased out to AWES initially for a period of 30 years, which could be raised to 99 years. Even other private unaided educational institutions have been allotted/leased land for setting up the institutions in the past by the Government (L&DO) and the DDA in Delhi. Merely because the same is paid for by such institution, does not make a difference. I, therefore, reject the submission of learned Counsel for the petitioner that ACMS can be said to be an "aided institution" and not an "unaided institution".

14. The fall out of the aforesaid finding is that the respondent institute is governed by the Delhi Act No. 80 of 2007. Section 12 of the Said Act is relevant and the same reads as follows:

12. Allocation and reservation of seats-

(1) In every institution, except the minority institution-

(a) subject to the provisions of this Act, ten per cent of the total seats in an unaided institution shall be allocated as management seats;

(b) eighty five per cent of the total seats, except the management seats, shall be allocated for Delhi students and the remaining fifteen per cent seats for the outside Delhi students or such other allocation as the Government may by notification in the Official Gazette, direct;

(c) supernumerary seats for non-resident Indians and any other category shall be as may be prescribed.

(2) In the seats mentioned in Sub-section (1), an institution shall reserve-

(a) seventeen per cent seats for the candidates belonging to the Scheduled Castes category, one percent seats for the candidates belonging to the Scheduled Tribes category and such percentage of seats, for any other category including Other Backward Classes as may be prescribed;

(b) for seats not mentioned as allocated for Delhi students in Sub-section (1), fifteen per cent seats for candidates belonging to the Scheduled Castes category, seven and a half per cent seats for the candidates belonging to the Scheduled Tribes category and such percentage of seats, for any other category as may be prescribed.

(c) subject to Clause (a) and Clause (b), three per cent seats for person with disabilities as provided in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) and, such percentage of seats for the wards of defence personnel and any other category, as may be prescribed.

15. The Govt. of NCT of Delhi in exercise of powers conferred by Section 23 of the Delhi Act 80 of 2007 framed "The Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to Ensure Equity and Excellence) Rule, 2007 (hereinafter referred to as the said Rules). Rule 8 of the said Rules deals with the allotment of seats. In so far as it is relevant states as follows:

8. Allotment of seats - (1) Allotment of seats in an un-aided professional college or institution shall be made college or institution-wise for each course.

(2) Every institution other than a minority institution, shall provide for seats in respect of management quota, wards of defence personnel, persons with disability and others in the manner as described below:

(a) ...

(b) Wards of Defence Personnel - Five percent of the seats under each programme of study shall be reserved for widows/wards of personnel of Armed Forces in the order prescribed by the Rajya Sainik Board from time to time.

16. The submission of Dr. Hingorani, learned Counsel for the petitioner is that even if one were to proceed on the basis that the Delhi Act No. 80 of 2007 is applicable to ACMS, even so the said institution can provide only 5% of the seats as reserved seats for wards of army/ex-army personnel and war widows in the order of preference prescribed by the Rajya Sainik Board from time to time. On the other hand the submission of Mr. Vikas Singh, learned ASG is that Section 12 of the Delhi Act No. 80 of 2007 and, in particular, Clause (b) of Section 12(1) empowers the Government of NCT of Delhi to make such "allocation" as it may deem fit, and in exercise of the powers so conferred the Government can allocate 100% seats for being filled by the wards of army/ex-army personnel and war widows. He, therefore, sought to justify the aforesaid cabinet decision contained in Cabinet decision No. 1422 dated 14.7.2008 as well as the notification issued purportedly u/s 12(1)(b) of the Delhi Act 80 of 2007.

17. It, therefore, now needs to be determined whether the Cabinet decision No. 1422 dated 14.7.2008 and the Notification dated 14.8.2008 purportedly issued u/s 12(1)(b) of the Delhi Act No. 80 of 2007 are valid and competent or not, by reference to the provisions of the Delhi Act No. 80 of 2007 and the Rules.

18. The object of the Delhi Act No. 80 of 2007, as evident from the Preamble of the said Act is, inter alia, "to ensure equity and excellence in professional education in the NCT of Delhi." From a reading of Section 12, what emerges is that it talks of both- "allocation" and "reservation". Section 12(1)(a) states that 10% of the total seats in "every" unaided institution (except minority institution) shall be "allocated" as management seats. u/s 12(1)(b), 85% seats, of the remaining 90% seats (i.e. $85/100 \times 90/100 \times \text{total seats}$) "shall be allocated for Delhi students" and "the remaining fifteen percent seats" (i.e. $15/100 \times 90/100 \times \text{total seats}$) "for the outside Delhi students or such other allocation as the Government may by notification in the Official Gazette, direct". The words "or such other allocation as the Government may by notification direct" in my view, do not relate to "eighty five percent of the total seats, except the management seats" which are to be "allocated for the Delhi Students" and only relate to "the remaining fifteen per cent seats for the outside Delhi students." This is the plain grammatical meaning of Clauses (a) and (b) of Section 12(1). It is, even otherwise, reasonable to conclude that an unaided institution set up in Delhi would largely cater to the students of Delhi. That is the pattern for allocation of seats followed in unaided institutions in Delhi.

19. While Sub-section(1) of Section 12 deals with the aspect of "allocation" of seats, Sub-section (2) thereof deals with "reservations", Clauses (a) & (b) of Section 12(2) deal with "reservations" of the specified percentage of seats for the Scheduled Castes, Scheduled Tribes, and Other Backward Classes category of candidates. Clause (c) is very pertinent and provides that, subject to Clause (a) and (b) [of Section 12(2)], three percent seats are reserved for persons with disabilities, and, "such percentage of seats for the wards of defence personnel or any other category, as may be prescribed."

20. Therefore, the Delhi Act No. 80 of 2007 provides for "reservation" and not "allocation" of seats for the wards of defence personnel. It does not provide for earmarking any percentage of the total seats for the words of defence personnel, and thereafter, the further division thereof by providing for reservations for the eligible categories. Had the seats for the wards of defence personnel been covered by Sub-section (1) of Section 12 dealing with "allocation", there was no question of the same being covered by Clause (c) of Section 12(2). The fact that the Delhi Act No. 80 of 2007 provides for "reservation" and not "allocation" for the wards of the defence personnel is also clear from the rule making power conferred by Section 23, and particularly by Clause (g) of Section 23(2). The said clause empowers the Government to make Rules for fixing the "percentage of seats to be "reserved" for the ward of defence personnel under Clause (c) of Sub-section (2) of Section 12". Pertinently, as aforesaid, the Government has also framed Rules as extracted above, which prescribe the percentage of reservations for the wards of the defence personnel at 5%. This shows that the Government also understood the provision of seats for the wards of defence personnel as an act of "reservation" and not "allocation". I am, therefore, of the view that under the Scheme of the Delhi Act No. 80 of 2007, the Government is not empowered, in exercise of powers conferred by Clause (b) of Section 12(1), to allocate 100% seats in ACMS for wards of Army/ex-Army personnel or War Widows. The power to "allocate" seats u/s 12(1) (b) as vested in the Government is in respect of 15% of the 90% of the total number of seats in ACMS. The said notification would, therefore, have to be read down to save it from invalidity, by interpreting it to mean as providing reservation upto the permissible extent. Section 14 of the Delhi Act No. 80 of 2007 states that "any admission made in contravention of the provisions of the Act or the Rules made thereunder, shall be void." Section 18 makes the contravention of the provisions of the Act or the Rules made thereunder an offence, and the offender is liable to be punished with imprisonment for a term which may extend to three years or with fine which may extend to Rs. 1 Crore, or with both. Thus, the legislature has evinced its intention in a clear and firm manner to punish the offenders with severe punishments.

21. In my view, merely because the Rules provide for reservation of 5% for the wards of defence personnel, it does not mean that the Government can not in respect of ACMS, provide for a higher percentage of reservation for the said category of candidates. The prescription of 5% reservation is for general application to all the unaided institutions. It does not preclude the Government from to take into account the background of each institution, the purpose for which it is set up, the organization/people who who have set up the institution etc. and to permit a percentage of seats to be reserved for a defined class of candidates. At the same time, it is clear that the impugned Cabinet decision and the notification, by seeking to reserve 100% seats in ACMS for the wards of the Army/ex-Army personnel and war widows, undisputedly compromises the relative merit of the candidates which is protected by Section 13 of the Delhi Act

No. 80 of 2007. The same reads as follows:

13. Manner of admission - An institution shall, subject to the provisions of this Act, make admission through a common entrance test to be conducted by the designated agency, in such manner, as may be prescribed:

Provided that the management seats may be advertised and filled up, from the candidates who have qualified the common entrance test, by the institution in a transparent manner based on the merit at the qualifying examination.

22. Section 3(d) defines "common entrance test" to mean "the entrance test conducted for determination of merit of the candidates followed by centralized counseling for the purpose of merit based admission to an institution through a single window procedure by the designated agency". Pertinently, the petitioner Krishna Adit Agarwal has secured the 314 rank in the Common Entrance Test (CET). According to the petitioner there are only 70 defence candidates who have cleared the CET, and secured ranks that go upto 1688. Only 7 out of the 70 successful defence candidates have a rank better than the petitioner Krishna Adit Agarwal. Similar is the position with regard to few other petitioners in this batch of petitions. However, it is not necessary to go into the ranking of each of them for the present purpose.

23. Learned Counsel for the petitioner submits that the question is not about the grant of reservation to the wards of army/ex army personnel and war widows in aided or unaided institutions. He does not deny that they constitute a special class and could be provided reservation within the Constitutional framework. He submits that the issue raised by the petitioners is about the extent of such reservation, and he submits that 100% reservation is even otherwise, not permissible under the Constitutional Scheme as is sought to be done in respect of the ACMS. By placing reliance upon *Indira Sawhney v. UOI* 1993 SC 477, he submits that the Supreme Court has held in relation to Article 16 of the Constitution of India (which provides for equality of opportunity in matters of public employment, and at the same time entitles the State to make provision for reservation in the matter of grant of employment or appointment to office under the Government, local authority or other authority, in favour of the Scheduled Castes, Scheduled Tribes and backward classes etc.), that only in very exceptional situations, and not for all and sundry reasons any further reservation of whatever kind should be provided under Clause (1) of Article 16. In such cases the State has to justify, if called upon, that the making such a provision is necessary in public interest to redress a specific situation. If reservations are made both under Clause (4) as well as Clause (1) of Article 16, the vacancies available for free competition as well as reserved categories would be categorically whittled down and that is not a reasonable thing to do.

24. On the other hand, the submission of Mr. Vikas Singh, the learned Additional Solicitor General is that Article 15 enjoins the State not to discriminate against any citizen on the grounds of religion, race, castes, sex, place of birth or any of

them. He submits that the allocation of all the 100 seats in ACMS for the wards of army/ex army personnel and war widows does not in any way violate the mandate of Article 15. He submits that within the allocated source, i.e., the wards of army/ex army personnel and war widows, there is no discrimination in the matter of grant of admission on the basis of religion, race, caste, sex, place of birth or any of them and admissions are being made to the ACMS entirely on the basis of merit of the candidates being judged on the basis of their ranking in the CET conducted by the respondent University.

25. In my view this submission of the petitioner, in so far as it pertains to grant of reservation in favour of the wards of army/ex-army personnel and war widows in educational institutions, does not hold good for two reasons. Firstly, the provision of reservation for wards of army/ex-army personnel and war widows is not even under challenge in this petition. Moreover, from the counter affidavit of ACMS it is clear that the wards of the army/ex-army personnel and war widows constitute a separate class for which reservations can legitimately be provided, and there is disclosure of sufficient justification for its being provided.

26. After the decision of the Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , the Supreme Court in Islamic Academy of Education and Another Vs. State of Karnataka and Others, clarified various aspects of T.M.A. Pai Foundation (supra). In para 6 of this decision (at page 720) the Supreme Court formulated the questions which arose for consideration before it. Question 3 framed by the Supreme Court reads as follows:

3. Whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100%, and if not, to what extent....

27. While dealing with the aforesaid question, the Supreme Court referred to para 68 of its decision in T.M.A. Pai (supra) which reads as follows:

68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the university or the government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the Management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the Management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the state agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the government according to the local needs and different percentage can be fixed for minority

unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz., graduation and post- graduation non-professional colleges or institutes.

28. In para 13 of *Islamic Academy* (supra) the Supreme Court observed:

However, a proper reading of paragraph 68, indicates that a further distinction has been made between minority and non minority professional colleges. It is provided that in cases of non minority professional colleges "a certain percentage of seats" can be reserved for admission by the management. The rest have to be filled up on basis of counseling by State agencies. The prescription of percentage has to be done by the Government according to local needs. Keeping this in mind provisions have to be made for the poorer and backward sections of the society. It must be remembered that, so far as, medical colleges are concerned, an essentiality certificate has to be obtained before the college can be set up. It cannot be denied that whilst issuing the essentiality certificate the respective State Governments take into consideration the local needs. These aspects have been highlighted in a recent decision of this Court in *State of Maharashtra v. Indian Medical Assn.* Whilst granting the essentiality certificate the State Government undertakes to take over the obligations of the private educational institution in the event of that institution becoming incapable of setting of the institution or imparting education therein. A reading of paragraphs 59 and 68 shows that in non minority professional colleges admission of students, other than the percentage given to the management, can only be on the basis of merit as per the common entrance tests conducted by government agencies. The manner in which the percentage given to the management can be filled in is set out hereinafter.

29. In paragraph 175 of the judgment rendered by S.B. Sinha, J. in *Islamic Academy* (supra) the Supreme court observed as under:

175. If it is to be held that in a case of minority institution all the seats could be filled in by members of their community/language, if available, the same would run counter to para 68 of the Judgment which says about certain percentage which can never be 100%. The expression "different percentages" occurring in para 68 would clearly mean there cannot be any fixed percentage. In a given case it may be more than 90% but in another it may be less than 50%. Different percentages must be worked out in terms of the need of the institution. It has nothing to do with minority or non-minority; aided or unaided.

30. If, in the case of even minority institutions, 100% of the seats could not be filled by the management of the minority institutions, certainly ACMS, which is not even a minority institution (who enjoy special protection under Article 30 of the Constitution), cannot seek to fill 100% of its seats from only a single source i.e. from amongst the wards of the army/ex-army personnel and war widows.

31. The Supreme Court has held in *A.I.I.M.S. Students Union Vs. A.I.I.M.S. and Others*, that a mechanism evolved, which ensures admission in the post graduate

courses in AIIMS to all students graduating from AIIMS, amounts to super reservation. The Supreme Court rejected the argument that reservation of 33% of post-graduate seats in favour of AIIMS students is not a reservation as it provides two sources of entry to PG courses of study in AIIMS, namely, in-house candidates of AIIMS and open category of candidates i.e. students other than from AIIMS. The Supreme Court rejected the argument advanced by the appellants that the use of the expression "reservation" in the context is misplaced. The Supreme Court observed:

We are dealing with a case where the division of seats between two classes coupled with two level reservation and unique percentile method has been so carved out, as if tailor-made, as is resulting into a reservation which ensures allotment to the extent of 100% of PG seats followed by guaranteed placement in the choicest of creamy disciplines to the candidates belonging to one category (i.e. Institute's in-house candidates) without regard to their competitive merit. This is not a reservation but a super-reservation and certainly not a source of entry.

In para 53, the conclusion recorded by the Supreme Court is in the following words:

53. The upshot of the above discussion is that institutional reservation is not supported by the Constitution or constitutional principles. A certain degree of preference for students of the same institution intending to prosecute further studies therein is permissible on grounds of convenience, suitability and familiarity with an educational environment. Such preference has to be reasonable and not excessive. The preference has to be prescribed without making an excessive or substantial departure from the rule of merit and equality. It has to be kept within limits.

32. In *Pai Foundation (supra)* as well as in *P.A. Inamdar and Others Vs. State of Maharashtra and Others*, , the Supreme Court has held that "education up to undergraduate level on one hand and education at graduate and post-graduate levels and in professional and technical institutions on the other are to be treated on different levels inviting not identical considerations". At the graduation level professional courses such as the one in question, there cannot be 100% reservation, or the limiting the sources of selection to only one source/class by giving a go by to merit. The respondent ACMS is bound to comply with the terms of affiliation on which affiliation can be granted and, in fact, has been granted to ACMS by the respondent University. In *Pavai Ammal Vaiyapuri Education Trust Vs. Government of Tamil Nadu and others*, the aforesaid position is clearly stated. From para 107 at page 593 (as reported in SCC) of *P.A. Inamdar (supra)*, it appears that once an educational institution is granted aid or aspires for recognition, the state may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of such aid or recognition.

33. Reliance placed by the learned ASG on Sameer Anand v. Amity Institute of Law decided by the High Court of Punjab & Haryana in Civil Writ Petition No. 1098/2000, on 30.01.2001, does not appear to be of much help to determine the controversy raised in these petitions. That was a case where 80% of the seats in the Army Institute of Law, also set up by AWES, were reserved for wards of army personnel. The remaining 20% seats were meant for either Punjab residents or fell in the All India category. The petition was dismissed, inter alia, by holding that it was not a case of reservation in favour of the wards of army personnel, but a case of fixing the source from which the candidates were being drawn. This decision is not of much assistance, since it is rendered before the decisions of the Supreme Court in T.M.A. Pai Foundation (supra), Islamic Academy of Education (supra) and P.A. Inamdar (supra). Moreover, unlike in the said decision, the present case is governed by the Delhi Act No. 80 of 2007, which specifically deals with the aspect of allocation and reservation, as discussed hereinabove. It appears the learned Judge was not apprised with the judgment of the Supreme Court in AIIMS Students Union (supra).

34. Learned ASG also submits that a Division Bench of the Punjab & Haryana High Court in Army Institute of Higher Education v. State of Punjab and Ors. Civil Writ No. 8961/2007, decided on 04.10.2007, while dealing with a case pertaining to an institution running the B.Ed. Course took a contrary view by holding that the Army Institute of Higher Education could not be allowed to fill up all the seats exclusively from the wards/dependants of army personnel ignoring other meritorious eligible candidates. This decision was appealed against before the Supreme Court. He submits that the Supreme Court has granted leave and virtually stayed the operation of the said judgment in SLP (Civil) No. 887/2008.

35. In my view, the mere fact that the Supreme Court has granted a leave to appeal from the decision of the Division Bench in Army Institute of Higher Education (supra) cannot be taken to mean that the Supreme Court has set aside the decision of the Division Bench. In fact, a perusal of the order dated 25.01.2008 passed in the aforesaid SLP shows that the Supreme Court did not in terms stay the operation of the judgment of the Division Bench. However, it appears that the operation of various notifications by which the Army Institute of Higher Education was aggrieved was stayed. On 15.09.2008, when the Supreme Court granted leave the aforesaid interim order dated 25.01.2008 was continued. It cannot, therefore, be said that the decision of the Division Bench of the Punjab and Haryana High Court, in the aforesaid matter, has either been disapproved or even stayed by Supreme Court. The Supreme Court in P.A. Inamdar (supra) in para 134 observed that different considerations would apply for graduate and post graduate level of education as also for technical and professional educational institutions. Such education cannot be imparted by any institution unless recognized by or affiliated with any competent authority created by law, such as the University, Board, Central or State Government or the like. Excellence in education and maintenance of high standards at this level are a must. To fulfil these objectives, the State can and rather must, in national

interest, step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth.

36. What was meant when the Supreme Court observed that "different considerations would apply" for graduate/post graduate level education and for technical/professional educational institutions, which are unaided? The answer lies in para 125 of the Judgment in P.A. Inamdar (supra). The Supreme Court had observed as under:

125. As per our understanding, neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala Education Bill, which was approved by Pai Foundation, is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalization of seats which has been specifically disapproved in Pai Foundation. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts Constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

37. Therefore, in respect of the unaided non minority educational institutions, the emphasis (even in respect of institutions other than those imparting graduate/post graduate and technical/professional education) was that the admissions to such educational institutions should be based on merit and merit should not to be compromised by thrusting the reservation policy of the State upon such educational institutions. In respect of graduate/post graduate level of education, as also in respect of technical/provisional education the emphasis on maintenance of higher standards and excellence is even greater. Para 107 of the judgment in P.A. Inamdar (supra) is instructive, and relevant extract thereof reads as follows:

107. Educational institutions imparting higher education i.e. graduate level and above and in particular specialized education such as technical or professional, constitutes a separate class. While embarking upon resolving issues of constitutional significance, where the letter of the Constitution is not clear, we have to keep in view the spirit of the Constitution, as spelt out by its entire scheme. Education aimed at imparting professional or technical qualifications

stands on a different footing from other educational instruction. Apart from other provisions, Article 19(6) is a clear indicator and so are Clauses (h) and (j) of Article 51A. Education upto undergraduate level aims at imparting knowledge just to enrich mind and shape the personality of a student. Graduate level study is a doorway to admissions in educational institutions imparting professional or technical or other higher education and, therefore, at that level, the considerations akin to those relevant for professional or technical educational institutions step in and become relevant. This is in national interest and strengthening the national wealth, education included. Education up to undergraduate level on the one hand and education at graduate and post-graduate levels and in professional and technical institutions on the other are to be treated on different levels inviting not identical considerations, is a proposition not open to any more debate after *Pai Foundation*. A number of legislations occupying the field of education whose constitutional validity has been tested and accepted suggest that while recognition or affiliation may not be a must for education up to undergraduate level or, even if required, may be granted as a matter of routine, recognition or affiliation is a must and subject to rigorous scrutiny when it comes to educational institutions awarding degrees, graduate or post-graduate, post-graduate diplomas and degrees in technical or professional disciplines.

38. In *T.M.A. Pai Foundation* (supra) the Supreme Court in para 58 of the judgment delivered by Kirpal, C.J., observed that for admission into any provisional institution merit must play an important role. It is necessary that meritorious candidates are not unfairly treated or put to a disadvantage by preferences shown to less meritorious but more influential candidates. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission.

39. This batch of cases present a somewhat reversed situation, inasmuch as, ACMS, which is an unaided institution imparting professional education, with the backing of the Government, is seeking to disregard the merit of the candidates by screening them on the basis whether they are or they are not wards of army/ex-army personnel and war widows. Since the thrust of the decisions of the Supreme Court in *T.M.A. Pai Foundation* (supra) as well as in *P.A. Inamdar* (supra) is to lay emphasis on maintenance of excellence and higher standards, inter alia, in professional courses, the action of the respondents" in seeking to preserve 100% seats in ACMS for the wards of army/ex-army personnel and war widows even otherwise does not appear to be constitutionally valid. As I have observed above, the impugned notification would, therefor, have to be read down to sustain it.

40. The issue that now arises for consideration is, as to what percentage of seats can validly be claimed to be reserved in ACMS for wards of army/ex-army personnel and war widows. One cannot lose sight of the fact that ACMS has been set up by AWES primarily from the regimental fund of the army and primarily for

the purpose of providing better educational avenues to the wards of army/ex-army personnel and war widows. The circumstances which put such candidates to some amount of disadvantage when compared to the general category candidates has been elaborately set out by the respondent institute in its counter affidavit and has also been extracted in the earlier part in this judgment. It is also not disputed that the wards of army/ex-army personnel and war widows do constitute a definite class which is entitled to grant of reservation in educational institutions.

41. Section 6 of the Guru Gobind Singh Indraprastha University Act 1998 permits the University to make such provisions for the appointment or admission of, inter alia, persons belonging to the weaker sections of the society. Under the 1998 Act, "Government" means the Lieutenant Governor of Delhi. The Lieutenant Governor of Delhi is also the Chancellor of the Respondent University. The Chancellor has to right to cause an enquiry "in respect of any matter connected with the administration or finances of the University, college or institution" and, eventually to issue directions, which the Board of Management of the Respondent University is bound to comply with. Section 39 of the 1998 Act enables the Government to remove difficulties in giving effect to the provisions of the said Act by issuing orders, published in the Official Gazette, making provisions not consistent with the provisions of the said Act. The impugned notification, also issued by the Lieutenant Governor of NCT of Delhi, in my view can be read as one such order made in respect of ACMS a College affiliated to the Respondent University.

42. The Supreme Court in *M.R. Balaji v. State of Mysore* 1963 SC 649 has held that reservations upto 50% are permissible. The Supreme Court in *Islamic Academy of Education* (supra) in para 175 while dealing with para 68 of the decision in *T.M.A. Pai Foundation* (supra) held that the expression "a certain percentage of seats" used in relation to the management quota in a non-minority unaided professional institution could be more than 90% in a given case, but may be less than 50% in another case. Different percentages must be worked out in terms of the need of the institution. The need of the respondent ACMS to reserve a high percentage of the seats for the wards of army/ex-army personnel and war widows has been sufficiently explained. Under the scheme evolved by the Delhi Act No. 80 of 2007, the management is entitled to 10% seats. Another 15% seats of the remaining 90% seats, can be allocated by the Government u/s 12(1)(b). This translates to 13.5 out of 100 seats and would be rounded off to 14 seats out of 100 seats. An additional 5% seats are, in any event, reserved for the wards of armed forces in exercise of powers conferred u/s 12(2)(c) under the Rules. All this put together translates to $50+10+14+5 = 79$ seats out of 100 seats. In my view reservation of 79 out of 100 seats for wards of army/ex-army personnel and war widows would serve the purpose for which ACMS has been set up by AWES. The remaining 21 seats in my view ought to be thrown upon to all other candidates to be filled up strictly on the basis of merit determined by reference to the ranking in the CET conducted by respondent University. These

21 seats being open general category seats, would be available to all candidates, including the wards of Army/Ex-Army personnel and war widows. If, on account of their higher merit in the CET, they are able to bag some of these seats, it would not affect the number of reserved seats for the wards of Army/Ex-Army personnel and war widows.

43. I am also of the view that it would be in the larger interest of ACMS as well as the candidates who are admitted to the institute from amongst the wards of army/ex-army personnel and war widows, if a fraction of the students are admitted on the basis of merit alone. It is well known that meritorious students in any institution lend credibility to the institution. When they pass out, they act as the ambassadors of their Alma Mater. They lead to enhancement of the reputation of the institution. While studying at the institution, they also inspire their classmates/batchmates to perform better. Other students often derive personal guidance and help from the more meritorious students which, sometimes, they are not able to receive even from their instructors. The more meritorious students expose the others to better techniques of learning and infuse a sense of comfort and confidence in their other classmates. They also generate healthy competition, which also invariably leads to achievement of higher efficiency, knowledge and expertise amongst other co-students. It is well known that leading Universities and Institutes the World over invite students with proven merit to study at their faculties and even offer scholarships and other benefits to them as incentives. This is primarily done to get the cream of students precisely for the reasons indicated above.

44. The submission of learned Counsel for the ACMS is that the AWES is investing its regimental funds and the army is providing the facility of its Base Hospital. These contributions have been made by the AWES, the Government and the Army for the wards of defence personnel, and not for subsidizing medical education for the general category students. It being a welfare measure, the respondent institute is not charging fee like other private institutes from its students. In my view, the general category candidates, who may be granted admission to ACMS, are not entitled to any concessional fee that ACMS may recover from other candidates, who are wards of army/ex-army personnel and war widows. Such students should be required to pay the fee that may be fixed by ACMS/AWES in accordance with the provisions of the Delhi Act No. 80 of 2007.

45. It is not disputed by the respondents that a very large number of seats in the respondent college have remained unfilled since very few candidates who are wards of defence personnel have qualified for admission to the respondent college in the current academic session. It is also not disputed that several of the petitioners in this batch of writ petitions have, in fact, secured higher merit in the CET conducted by the respondent University than those who have been granted admission being wards of army/ex-army personnel and war widows. Since a large number of seats are still available to be filled in the respondent college, the respondent college may, without conceding a higher percentage of seats for

general category candidates than 21 out of 100, consider filling up the remaining seats in this particular academic session 2008-09 from amongst general category candidates on the basis of merit. However, on this aspect, I leave the decision entirely in the hands of the respondent institute. The aforesaid suggestion has been made by me considering the fact that every such seat is highly precious since a large number of meritorious candidates are desirous of, and waiting to get admission. Each such seat is a national asset and it would be desirable not to let the same go to waste. A seat left unfilled in any academic session remains vacant till the end of the course and the period of the MBBS Course is nearly 5 years.

46. I, accordingly, allow this batch of writ petitions and hold that the reservation/ allocation of seats for the wards of army/ex-army personnel and war widows in ACMS could be to the extent of 79 out of 100 seats and the remaining 21 seats should be filled by the general category candidates on the basis of merit in the CET 2008. I, therefore, direct the respondents to insert prominent public notices in national dailies published from Delhi on 27.9.2008 and 28.9.2008, inviting candidates who have successfully cleared the CET 2008 to report for a special counseling to be held on 29.09.2008 from 10:00 a.m. onwards at the ACMS, Delhi Cantonment. The candidates should be required to report for counseling with the necessary documents. The list of all those candidates who report upto 4 p.m. be compiled in the order of merit and displayed by the respondents at ACMS and on the notice board of the respondent University on 30.9.2008 at 09:00 a.m. On 30.9.2008, the respondent ACMS should accept the fee and grant admissions to the candidates as per merit. Since the time is extremely short, in view of the decision of the Supreme Court in *Mridul Dhar (Minor) and Another Vs. Union of India (UOI) and Others*, , the respondents may provisionally accept attested copies of the mark sheets and other documents and grant provisional admissions to the candidates, subject to their producing the original documents by 30.10.2008.

47. With these directions the petitions stand disposed off. A copy of this judgment be given to the parties Dasti today itself.