

(1999) 11 AHC CK 0022
In the Allahabad High Court
Case No : Writ Petition No. 3801 (M/B) of 1998

Manoj Kumar Upadhyaya (Dr.) and Others	APPELLANT
Vs	
State of U.P. and Others	RESPONDENT

Date of Decision : 30-11-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 15(4)
Uttar Pradesh Post Graduate Medical Education (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1997 — Section 5, 6

Citation : (2000) 3 UPLBEC 2589

Hon'ble Judges : R.D. Mathur, J; Pradeep Kant, J

Bench : Division Bench

Advocate : S.K. Kalia and D.P. Singh, for the Appellant; CSC and Sandeep Dixit, for the Respondent

Judgement

Pradeep Kant, J.—Despite series of Government Orders, Notifications, Ordinances and Acts, and admissions in Post Graduate Classes in the State Medical Colleges in Uttar Pradesh has been a constant source of litigation for the candidates who seek admission and find themselves discontented with the policy and standard adopted by the authorities in selecting the most talented students for pursuing higher studies in the field of Medical Sciences. The law laid down by the Apex Court, the guidelines provided by various judgments have not yet been able to put the controversy at rest and it becomes necessary after every examination of the Courts to deal with such situation and judicially scrutinise the norms and criteria laid down for the admission and if the norms are reasonable and correct, also to judge as to whether the same have been followed or not.

2. Needless to mention that the higher studies in the specialised field like Medical Sciences, if it is not an absolute right of most talented students, is certainly their preferential right which should not be jeopardised by any other consideration either by making a policy which does not further the very object of giving a chance to more talented students or otherwise by not following the enunciated policy, or by adopting a long decision process which results into prejudice to

more meritorious students. The policy of reservation in admission to M.B.B.S. Course which is the first step towards the professional medical course is already, protected under the legal seal and that is being extended even to the higher courses like Post Graduate Courses and other courses in spite of the verdict of the Hon'ble Supreme Court in Mohan Veer Singh Chawla v. Punjab University, Chandigarh, 1997 (Volume 7) SCC 171 and Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., , wherein their Lordship opined that there should not be any reservation in specialised field requiring expert technical and scientific knowledge including the medical courses.

3. So far the law of reservation for admission to Post Graduate Classes, is in existence, there cannot be any quarrel in granting reservation to the deserving candidates but the equal concern of protecting the interest of those candidates who are not privileged enough to take an advantage of reservation policy, and/or otherwise more meritorious cannot be brushed aside only for the purpose of accommodating the reserved category candidates by adopting such norms and standard which are not only discriminatory but also are against the constitutional mandate regarding reservation and in violation of law laid down by the Hon'ble Supreme Court. It is also to be checked as to whether, the existing legal and accepted policy, has been followed while giving admission, or not.

4. In this bunch of writ petitions, the petitioners being aggrieved by the method adopted in the Counselling for admission to the Post Graduate Classes held in pursuance, of Post Graduate Medical Examination, 1998, have knocked the doors of this Court once again pleading and urging that the manner in which the Counselling has been done is not in accordance with law laid down by the Hon'ble Supreme Court and the same is discriminatory and violative of settled principle procedure and norms.

5. The King George's Medical College, Lucknow was directed to conduct U.P. Post Graduate Medical Entrance Examination, 1998 (hereinafter referred to as PGME Examination, 1998 for short) which was held on 11.1.1998 and the petitioner alongwith other candidates appeared in the same. The result of the said examination was declared, sometimes in February, 1998. After the result was declared the process of Counselling was to start and since Counselling was sought to be done on the basis of provisions of UP., Act No. 14 of 1997, the provisions of which according to the petitioners were not applicable to PGME Examination, 1998 as such writ petition bearing number as W.P. No. 868 (M.S.) of 1998 was filed before this Court. This Court passed an interim order on 15th April, 1998 providing therein that the candidates belonging to reserve category who have secured less than 35% marks shall not be permitted to appear in the Counselling and if they have already been permitted to appear, they shall not be granted admissions until further orders.

6. Before dealing with the various writ petitions which were filed from time to time, it is essential to enumerate the following relevant facts regarding policy of the State Government wherein the eligibility criteria for general category

candidates and the reserve category candidates has been fixed at various intervals.

7. Information Brochure was issued by K.G. Medical College, Lucknow and as per clause D (iv) and (v) of the Brochure the criteria for general category candidates was fixed as 45% and it further provided that minimum eligibility for reserve category shall be in accordance with the U.P. Government Rules prevailing at the time of admission. On 11.10.1994 the Government issued an order fixing minimum marks for general category candidates to be 45% and for reserve category candidates to be 35%. On 31st August, 1995 the State Government withdrew the requirement of obtaining minimum marks for admission to the candidates to reserved category, thus, the reserve category candidates were not required to have even minimum marks for being, within the field of eligibility, for getting admission in the Post Graduate classes. This order of the State Government became the subject-matter of challenge before the Hon'ble Supreme Court in the case of Dr. Sadhana Devi and Ors. v. State of U.P. and Ors., wherein the Hon'ble Supreme Court vide its pronouncement dated 19th February, 1997, reported in Dr. Sadhna Devi and others Vs. State of U.P. and others, , quashed the Government order dated 31st August, 1995. While quashing the said Government order it was directed that a minimum eligibility criteria has to be fixed for the reserve category candidates also and that if the seats still remain vacant because of non-availability of reserve category candidates, the same be diverted and be made available to general category candidates.

8. In compliance of the judgment of Dr. Sadhana Devi (supra) the State Government issued an order on 2nd April, 1997 prescribing 45% marks to be the eligibility criteria for general category and 35% marks for the eligibility of reserve category candidates. This order which was in consonance with the directions issued by the Hon'ble Supreme Court, further provided that in case reserve seats and not filled up because of non-availability of reserve category candidates the same will be filled up from amongst the candidates belonging to general category candidates. Yet another ordinance was promulgated by the State known as U.P. Ordinance No. 6 of 1997 on 15th June, 1997 providing therein that minimum eligibility criteria for reserve category would be 25% and for general category it would be 45%. Thus the State Government within a period of two months when it fixed 35% marks as minimum eligibility criteria for reserve category candidates vide order dated 2nd April, 1997 by means of U.P Ordinance No. 6 of 1997 promulgated on 15th June, 1997 further reduced the same to 25% for the reserve category and maintained the criteria 45% with respect to general category candidates. On 16th August, 1997, U.P. Ordinance No. 6 of 1997 was repealed and the same was converted into an Act, i.e. U.P. Act No. 14 of 1997. This time while converting the U.P. Ordinance No. 6 of 1997 into Act No. 14 of 1997 against he eligibility criteria with respect to reserve category was further reduced to 20% and the criteria for general category candidates was maintained to 45%.

9. As already stated, being aggrieved by the action of the opposite parties of fixing 20% eligibility criteria for reserve category candidates, which was not to be found in any of the Government Orders prevalent at the time of Counselling and U.P. Act No. 14 of 1997 being limited only to PGMEET 1997 certain students approached this Court by means of W.P. No. 868 (MB) of 1998 in which an interim order dated 15.4.1998 was passed, a reference of which has already been made in the earlier part of this judgment.

10. The first Counselling was held on 15th, 16th and 17th April, 1998.

11. The minimum eligibility criteria for, 35% marks to the reserve category candidates was adopted in obedience to the interim order passed by this Court on 15.4.1998. The grievance of the petitioners of this set of writ petitions is that though the first Counselling was held on 35% minimum eligibility marks for reserve category students but remaining seats which could not be filled in because of non-availability of reserve category candidates were not made open to general category candidates. In all 101 seats of M.D./M.S. and other Diploma courses could not be filled in because of non-availability of reserve category candidates and as per directions issued by the Apex Court in Dr. Sadhana Devi (supra) and also as per Government order dated 2nd April, 1997 these seats should have been diverted to the general category candidates. Since this was not done the general category candidates could not opt for these seats resulting into deprivation of their choice of seats according to their merits. Similarly five seats of M.D. Course cannot be filled because of non-availability of the eligible reserve candidates but these seats were not made available of general category candidates.

12. On 5th May, 1998 the applications were moved by some reserve category candidates for vacation of interim order dated 15th April, 1998 passed in writ petition No. 868 (MS) of 1998 but the same was rejected by the Court.

13. The submission of the learned Counsel for the petitioner is that at the time of first Counselling the Government order dated 11th October, 1994 and 2nd April, 1997 provided 45% and 35% minimum eligibility marks criteria for general category and reserve category candidates, respectively and as per the terms of the brochure and the information given to the students the said criteria should have been followed in the Counselling in PGMEET 1998.

14. A few general category candidates filed a writ petition being numbered, as W.P. No. 1915 (MS) of 1998 and 1916 (MS) of 1998 seeking a direction from the Court to divert the seats which could not be filled up in the first Counselling because of non-availability of reserve category candidate to the general category candidates. The petitioners of Writ Petition No. 1916 (MS) of 1998 have opted for some course but the petitioners of W.P. No. 1915 (MS) of 1998 had not opted for any seat and they opted to remain in waiting list, with the hope to get a seat of their choice at later point of time.

15. Without deciding the fate of the remaining seats of the first Counselling and

ignoring the grievance of the general category candidates that the unfilled seats of the reserve category should have been diverted to the general category candidates, the State Government promulgated the ordinance viz. U.P. Ordinance No. 15 of 1998 on 20th October, 1998. By means of this ordinance the provisions of U.P. Act No. 14 of 1997 were made applicable to PGMEET 1998 also meaning thereby that the minimum eligibility criteria as laid down in U.P. Act No. 14 of 1997 was also to be applied for PGMEET 1998 i.e. 45% for general category and 20% for reserve category candidates.

16. After issuance of the aforesaid ordinance the interim order dated 15th April, 1998 passed in W.P. No. 868 (MS) of 1998 was modified vide order dated 23.11.1998, providing therein that Counselling will be made as per the provision of U.P. Ordinance No. 15 of 1998. Against this order dated 23.11.1998 passed by the learned Single Judge, special appeal No. 384 of 1998 was filed. The Special Appeal is also connected with the Bunch.

17. It was at this juncture that the petitioners challenged the U.P. Ordinance No. 15 of 1998 by means of Writ Petition No. 3801 (MB) of 1998 wherein again this Court passed the interim order directing that the Counselling the complete but actual admission be not given to the students.

18. The second Counselling was done on 30.11.1998 and 1.12.1998 on the basis of 20% minimum eligibility marks criteria for reserve category candidates and 45% for general category candidates. On 28th April, 1999 the interim order dated 30th November, 1998 was modified on the request of the parties in writ petition to the extent that in case the Counselling has been completed the admission on that basis be given, but the same shall be subject to the result of the writ petition No. 3801 (MB) of 1998. It was also provided by this Court that this fact will be indicated in admission letters to be given to the candidates. The office order was issued by the Director, Medical Education and Training on 6th May, 1999 providing therein that admission on the basis of second Counselling will be made subject to final decision of the writ petition No. 3801 (M.B.) of 1998. This fact of the order was also mentioned in the admission letter also, which was a compliance of the Courts directions.

19. On 20th March, 1999 U.P. Ordinance No. 15 of 1998 was converted into the Act by means of U.P. Act No. 9 of 1999 by which the minimum eligibility criteria for reserve category was provided 20% and for general category was as 45% . As a matter of fact the provisions of U.P. Act No. 14 of 1997 were made applicable to the PGMEET 1998 and PGMEET 1999.

20. The admissions could not be completed even after second Counselling and there were number of seats which remained unfilled and fluidity continued in the meantime the Hon'ble Supreme Court pronounced a judgment on 10th August, 1999 in the case of Dr. Preeti Srivastava v. State of M.P., AIR 1999 Supreme Court 2894, declaring the U.P. Act No. 14 of 1997 as ultra vires on the ground that there exist, wide discrepancies between the minimum eligibility marks for

general category candidates and reserved category candidates and the same are hit by Article 15(4) of the Constitution of India. The Hon'ble Supreme Court also provided that the matter regarding fixation of minimum eligibility criteria for admission to the PGMEET course lies within the circular issued by the Medical Council of India, could not be made applicable in the third Counselling as the vacancies are of the year 1998 which should be governed by the criteria which was fixed in the year 1998, before the pronouncement of the judgment of the Supreme Court.

21. Further grievance of these petitioners is that even after third Counselling there are 42 vacancies which still remain unfilled, therefore in absence of reserved category candidates with the aforesaid minimum eligibility criteria the seats should be filled as per earlier minimum eligibility criteria i.e., 20%. The question therefore, raised is as to what should be minimum qualifying marks for drop out unfilled, vacancies after the third Counselling and whether these vacancies are to use filled or not.

22. Sri S.K. Kalia representing the petitioners of general category in Writ Petition No. 3801 (M.B.) of 1998 and other connected matters after setting up the sequence of events while challenging the fixing of minimum eligibility criteria for reserved category candidates from time to time, vehemently urged that the action of the opposite parties for holding first Counselling has been arbitrary, without any basis and also without any authority. The attempt to hold Counselling for reserved category candidate obtaining 20% marks or more was not in existence at the relevant time. The argument is that the opposite parties were bound by the relevant information given in the brochure that for general category candidates the minimum eligibility criteria would be 45% and for reserve category candidates, the criteria would be the same as would be prevailing at the time of admission. Since U.P. Act No. 14 of 1997 was limited only for the PGMEET 1997 the said criteria could not be made the basis for the examination of PGMEET 1998. Obviously the learned Counsel relied upon the Government order dated 11th October, 1994 and 2nd April, 1997 which provided 45% marks for general category candidates and 35% marks for reserve category candidates. It was because of intervention of the Court that in the first Counselling the 20% criteria was not permitted to be adopted for reserve category candidates and therefore, the first Counselling had taken place keeping the minimum eligibility criteria as 35% for reserve category and not 20% for the reserve category candidates. The learned Counsel further urged that it was obligatory upon the authority to divert the unfilled seats namely 101 in number which could not be filled in, from amongst the reserve category candidates but they having deliberately not done so the petitioners and other like candidates have been deprived of their right to exercise for their option as per their choice. This according to the learned Counsel vitiates the first Counselling itself.

23. Our attention has been drawn to the provisions of the Act No. 14 of 1997 particularly Sections 5 and 6 which restricted its applicability only to the PGMEET

1997. Later on by means of U.P. Ordinance No. 15 of 1998 the same was extended to the PGMEET 1998 also. The ordinance was promulgated on 20th October, 1998. The learned Counsel urged that this provision was not given retrospective effect and the same was prospective. According to learned Counsel the 20% criteria could not be adopted for reserve category students in any of the Counselling.

24. We need not enter into this controversy in detail but for the limited purpose for finding out the effect of such amendment in the Act, in view of the fact that U.P. Act No. 14 of 1997 has already been declared ultra vires by the Hon'ble Supreme Court in the case of Dr. Preeti Srivastava (supra).

25. The controversy which needs consideration is that:-

(i) Whether laying down of minimum eligibility criteria for reserved category of 20th marks by means of amendment brought by virtue of Ordinance No. 15 of 1998 which was later on converted into U.P. Act No. 9 of 1998 on 20th March, 1999 can be upheld.

(ii) What is the effect of not diverting the seats which could not be filled by the reserve category of candidates or students on the minimum eligibility criteria of 35% as per the orders of this Court and not making them open and known to the general category candidates or students and consequently not diverting the benefit of the same to the general category students which according to the petitioners were 101 in members.

(iii) The second Counselling which has been held on 30th November, 1998 and 1st December, 1998 on the criteria of 20% marks for reserve category students could be upheld in view of declaration made by the Hon'ble Supreme Court in the case of Preeti Srivastava v. State of M.P., and Dr. Ashutosh Kumar and Ors. v. State of U.P. and Ors., on 10th August, 1999 and what is the effect of the admission given to such students in view of the interim order passed in writ petition No. 3801 (MB) of 1998 dated 6th May, 1999 which provided that their admission would be subject to decision of the writ petition.

(iv) Whether the third Counselling which was held on 23rd August, 1999 ought to have been held with the earlier criteria as provided under U.P. Ordinance No. 15 of 1998 i.e. U.P. Act No. 9 of 1998 or on the basis of circular of the Medical Council of India issued on 17th August, 1999 or on the same criteria, which was adopted in the first Counselling.

(v) What should be the fate of 42 drop out vacancies, even after 3rd Counselling i.e. they are to be filled up at all or not and in case they are to be filled up then on what criteria and lastly.

(vi) Whether the protection given by the Hon'ble Supreme Court to all the admissions which had taken place under U.P. Act No. 14 of 1997 would also be available to the admission given by PGMEET 1998 also.

26. Sri S.K. Kalia representing the general category students/candidates submitted that on the face of it once the very Act has even declared unconstitutional, discriminatory and the criteria fixed under the said Act has been held to be bad by the Hon''ble Supreme Court the said criteria could not be followed and could not have been followed.

27. Since the second Counselling has been done on the basis of criteria which has been quashed by the Hon''ble Supreme Court the second Counselling with 20% marks minimum eligibility criteria for reserve category candidates cannot be upheld. Therefore, he further argued that general category candidates have been discriminated right from the beginning as despite clear law on the subject and their own Government orders, the opposite parties did not either disclose the number of seats which could not be filled up because of minimum eligibility criteria of 35% nor the general category candidates were given opportunity against those seats which has resulted in gross injustice of them. These very seats were 101 in number have illegally been brought in the second Counselling on 30th November, 1998 and 1st December, 1998 and were made available and left open to the reserve category candidates on the criteria of 20% basing their strength on the provisions of unconditional and ultra vires Act. According to the learned Counsel for the petitioner there should be resuming of these seats which should be firstly offered to the general category candidates in accordance with their merit treating to be the seats of the first Counselling and thereafter remaining seats should be brought within the ambit of the second Counselling, if certain seats still remain unfilled.

28. In alternative, the learned Counsel urged that those petitioners who have been permitted to participate into third Counselling and those who have already opted under compelling circumstances in the first and second Counselling and have secured more than 50% marks, the criteria which have been laid down by the Medical Council of India in pursuance of the judgment of the Hon''ble Supreme Court and to whom the seats have been allocated should be permitted to join on their seats despite they having opted for one or the other discipline earlier. The embargo that once a candidate opts for a discipline in any Counselling would not be permitted to opt for any other discipline in subsequent Counselling cannot be applied, in the instant case, as it was the deliberate concealment on the part of the opposite parties in not disclosing the seats and not making them available to general category candidates to which the petitioners are otherwise entitled.

29. The action of the opposite parties has also been challenged on the ground that the same is in violation of the law and the specific Government Orders issued in this regard, a mention of which has already been made earlier in this judgment.

30. According to the learned Counsel for the petitioner the protection could have been given to such admission of reserved category candidates, only in case the action was bona fide and had been taken in pursuance of existing law of rule at

the time when the Counselling was done and not otherwise. The emphasis is that in the instant case the authorities fully knew that the criteria of 35% has been fixed of reserve category candidates by the Court, and 20% minimum eligibility was not provided anywhere at the relevant time even then despite clear orders of the Hon''ble Supreme Court in the case of Dr. Sadhana and the Government order dated 2nd April, 1997, remaining seats which could not be filled up by the reserved category candidate for want of requisite marks, the said seats deliberately were concealed and were not thrown open for general candidates, rather they were kept reserve for those very reserve category candidates who obtained only 20% marks. This fact is fortified by the criteria of second Counselling, which was of 20% marks. Such an action cannot be protected under law.

31. In the case before the Hon''ble Supreme Court in Preeti Srivastava the admissions were made in pursuance of law and rule when the U.P. Act No. 15 of 1997 existed validly at the time of admission and the same was declared bad or unconstitutional only after admissions were made. It was in this background that the admissions were protected by the Hon''ble Supreme Court.

32. Sri D.P. Singh who appeared for the reserve category candidates, laid emphasis upon paragraphs 63 and 115 of the Judgment of Hon''ble Supreme Court and urged that the seats having been made available for admission in pursuance of the PGMEET 1998 were also protected by the dictum of the Hon''ble Supreme Court. In this regard Sri D.P. Singh drew our attention to the fact that Hon''ble Supreme Court in paragraph 6 has taken note of 1998 examination also.

33. The learned Counsel further urged that the criteria of 20% marks for reserve category candidates was followed in pursuance of the Ordinance No. 15 of 1998 and U.P. Act No. 9 of 1998 in the second Counselling which has admittedly taken place after enforcement of these provisions.

34. Besides this he further argued that the third Counselling also relates to the year 1998 and for filling up only unfilled seats or drop out seats or second Counselling, two different criteria could not be adopted in the admission to the same course in one particular year. The circular issued by the Medical Council of India raising minimum criteria to 40% for the reserve category and 50% to the general category candidates was not at all applicable, according to the Counsel, either in the third Counselling or for the remaining 42 drop out seats which still remain to be filled in. Thus, the submission is that the third Counselling of reserved category candidates should have been done with 20% minimum eligibility criteria, which should also be followed for remaining 42 unfilled seats.

35. Sri D.P. Singh submitted that since the course have started, therefore, if the admissions are set aside or fresh Counselling is done the students may suffer.

36. We in principle agree with the arguments raised by Sri D.P. Singh that in Counselling for a particular year of examination the standard cannot be changed in the subsequent stages of Counselling. However, the arguments of the learned

Counsel for the petitioner is to be tested in the light of the fact that original Counselling was done with 35% minimum eligibility criteria for reserved category candidates and therefore, whether the change of criteria to 20% in the second Counselling would be in consonance with the arguments raised by Sri D.P. Singh. So far the third Counselling is concerned i.e. being challenged by all class of petitioners.

37. We have given thoughtful consideration to this submission and we find that the second Counselling had taken place on 30th November, 1998 and on 1st December, 1998 the orders for giving admission in pursuance of the above Counselling were issued on 6th May, 1999 and therefore, the admission letters have been issued some times in the month of May, 1999. So far the third Counselling is concerned the admission letters have not been issued yet as the authorities are of the view that the candidates who have already opted for some discipline in the first and second Counselling are not entitled to be admitted against the third Counselling.

38. On behalf of Director, Medical Education and Training, U.P. Sri Sandeep Dixit argued that the Counselling has been done in a fair and right manner and there was no flaw in the same. He further argued that in view of various interim orders passed by this Court the Counselling has been conducted and admission have been given.

39. The candidates who have opted for any subject in any Counselling were clearly debarred under the brochure from participating in the subsequent Counselling but in view of interim orders passed by this Court they were permitted to participate.

40. The fact that 101 seats could not be filled in with 35% marks for reserve category candidates in the first Counselling as per directions issued by this Court has not been disputed by any of the parties including K.G. Medical College and the State. It has also not been disputed by any of the opposite parties that these seats were not made known to the candidates at the time of first Counselling nor they were disclosed about the exact number of seats which could not be filled in and admittedly they were not diverted to the general category candidates. Obviously these seats were subjected to Counselling in the second and third Counselling when the criteria for reserve category candidates were different than the one which was prevalent at the time of first Counselling. In the second Counselling the marks were reduced to 20% as against 35% and in the third Counselling they were raised to 40%.

41. In defending the admissions made by the opposite parties Sri Sandeep Dixit drew our attention to the brochure pointing out that the relevant date and time is the date of admission and not the date of Counselling as the Brouchure provides that the minimum eligibility criteria in reserve category candidates would be according to the U.P. Government Rules prevailing at the time of admission. The distinction which is sought to be placed before us is that the Counselling is not an

admission and therefore, actually on the date of admission, the criteria prevailing has to be seen.

42. We fail to understand the logic behind the above argument, as the selection is to be made on the date of Counselling on which date the criteria for selection which is to be applicable, would be relevant and not on the formal date of admission or joining the course. If the person is selected in the Counselling for a particular discipline as per his/her merit he or she cannot be admitted to any other course although the formal admission letter may be issued at later point of time. The cardinal principle of law has to be adopted in every such selection. The person should be eligible on the date of selection and not on the date of declaration of result.

43. After considering the arguments of the learned Counsel for the parties and the sequence of events narrated above, we find and feel that the opposite parties have adopted different yardsticks and different standards in the matter of Counselling for one and only one examination namely PGMEET 1998. The facts do establish that on the date of first Counselling which took place on 15th, 16th and 17th April, 1998 there was no provision for laying down 20% minimum eligibility criteria for reserve category candidates. This is supported by the fact that U.P. Act No. 14 of 1997 confined itself to PGMEET 1997 alone. The criteria which could have been applied was to be found in the Government orders dated 11th October, 1994 and second April, 1997. It was totally beyond the authority of the opposite parties to proceed for Counselling on the basis of 20% criteria when that criteria did not exist at the time of Counselling. More so when according to own instructions and guidelines issued in the Brochure the prevailing criteria as per U.P. Government Rules at the time of admission was to be applied. It appears that because of these considerations this Court restrained the opposite parties from adopting the criteria of 20% of minimum eligibility marks for reserve category and provided for Counselling with 35% marks. The reserved category candidates who could not secure 35% marks or more could not have any grievance if they were not permitted to participate in the first Counselling for want of minimum eligibility marks.

44. The necessary corollary of the first Counselling with 35% of minimum marks for reserve category candidates would be that if the seats remained unfilled under the said category the same should have been thrown open to the general candidates. This was not on equitable grounds but specifically in accordance with law as per dictum of the Hon'ble Supreme Court in Dr. Sadhana Devi Case (supra) . Besides this the Government order dated 2nd April, 1997 which was issued in pursuance of the said judgment also provided the same position and it was (sic) for the authorities to withhold those seats (101) in number and deprive the general category candidates, who fall within the eligibility from opting against those seats. This action was not supported by any law of authority and was violative of Article 14 of the Constitution of India. It was not open for the authorities concerned to act against the law and protect those seats for the

second Counselling or subsequent Counselling that too for giving a chance to those reserved category candidates who were not eligible in first Counselling. It is not a question of accommodating either general category candidates or reserve category candidates as in the process of selection it is the "merit" which has to be recognised. The term "selection" may be in any field, pre-supposes "merit". The most talented candidate has to be selected for a particular post or course in any particular field or for any particular course in higher studies. Repeatedly it has been said that the most meritorious and talented student cannot be denied admission unless there is some law giving certain advantages to those who belongs to a separate cadre or class of students. The moment it was found that the candidates of reserved category were not available for filling up the seats falling in their category, as per law those seats should have been diverted to the- general category candidates eligible for the same. By not doing so such general candidates were compelled to opt for such courses/disciplines and institutions which were not of their liking and were meant for those who have secured lesser merit than those candidates.

45. The learned Counsel for the opposite parties including the learned Counsel for the petitioners who canvass for the reserved category could not explain and justify the reason for withholding such seats and also the reasons as to why they were not diverted to the general candidates in accordance with law. The law did not give any authority to opposite parties to keep those seats intact on the assumption that in future if Counselling takes place, the same shall be given to those candidates who may participate in subsequent Counselling. This kind of reservation has not been provided under law. The effect of such unreasonable and illegal action has been that the candidates belonging to general category who have secured more marks and were entitled for a better discipline or course and institutions of their choice were not given any opportunity to opt for the same. It is well known that the Counselling is done subject-wise and institution-wise on the basis of merit of the candidates. The authorities have given a complete go-bye to the criteria of merit while adopting such procedure, which was not provided under law leading to great injustice to general candidates who appeared in the first Counselling but could not opt the courses and institution of their choice.

46. We, therefore, find that this action of the opposite parties in not throwing open 101 number of seats which could not be filled in with the fixed eligibility criteria by the reserve category to the general candidates wholly unreasonable, arbitrary and in violation of the law, and the rules.

47. So far the second Counselling which took place on 30th November, 1998 and 1st December, 1998 is concerned the same was conducted with 20% criteria of minimum eligibility marks for reserve category and 45% marks for general category candidates in view of U.P. Ordinance No. 15 of 1998 converted into U.P. Act No. 9 of 1998. No doubt this second Counselling was done on the basis of criteria fixed in the relevant Statute but the same being under challenge, the

admissions were given on the request of all the candidates including the general category candidates as well as the reserved category candidates who participated in the said Counselling that their admissions would be subject to decision of the Writ Petition No. 3801 of 1998. Not only this with a specific directions of this Court that the admission be given subject to the result of the Writ Petition this fact was also mentioned in the admission letters. This all the candidates may be belonging to general category or reserved category, fully knew that they were taking admission subject to final decision which may be passed in the aforesaid Writ Petitions.

48. The State was fully aware that the Counselling has started on 15th April, 1998. According to the information brochure, the minimum eligibility criteria for the reserved categories was according to the Government Rules as were prevalent at the time of admission. We have already discussed that the criteria for Counselling would be the same which would be available and applicable at the time of Counselling. On the date of Counselling 35% minimum eligibility criteria was in existence as per Government Orders and also as per the orders passed by this Court on 15th April, 1998. The Counselling was done with the aforesaid criteria of 35% minimum eligibility marks for reserved category candidates, but the seats which remained unfilled (101) in Nos. for the reserved category candidates were not thrown upon and diverted to the general category candidates who were eligible but deprived by opting against these seats according to their merits. The promulgation of Ordinance No. 15 of 1998 on 20th October, 1998 i.e. much after the first Counselling. applying the same minimum eligibility criteria of 20% to the reserved category candidates which was provided in U.P. Act No. 14 of 1997 may not strictly fall in the realm of colourable legislation but the same, could not have been made applicable with respect of Counselling which had already taken place as far back as in April, 1998. The conversion of the said ordinance into Act would not be any consequence so far the present Counselling was concerned. The second or any subsequent Counselling only takes place in case the seats remained unfilled in the first Counselling i.e. only against the drop out vacancies. Changing the eligibility criteria for the drop out vacancies by lowering the merit can't be in consonance with the principle of natural justice as well as providing of equal opportunity to all the candidates. The eligibility criteria for admission to one particular course in one particular year against one particular examination can't change from stages to stages and from one Counselling to subsequent Counselling and again to the next Counselling even if the power to amend the Act is there that could not be said to be a bona fide exercise of power. Inasmuch as apparently it looks like that this merit criteria was lowered only with a view to accommodate certain class of students who could not succeed in participating in the original Counselling which is being called as first Counselling in April, 1998. Subsequent Counselling which is being termed as second Counselling waited till the ordinance was issued on 20th October, 1998. No reason has been given by the opposite parties in not holding second Counselling immediately after first Counselling has been taken

place and drop out vacancies were calculated. The result is that the reserved category candidates who were admittedly ineligible at the time of original Counselling (First Counselling) were not only permitted to participate in admission to that very course of PGMEET but were also given benefit of reserved seats which were not diverted to the general category candidates in view of specific Provisions of two Government Orders viz. 11th October, 1994 and 2nd April, 1997 and also the dictum of Hon'ble Supreme Court in the case of *Sadhana Tewari* (supra).

49. We have already discussed that this is not a question of accommodating the reserved category candidates or the general category candidates in a particular course but it is the bounded duty of the State and all those authorities who are responsible for conduct of the examination and to make the admission to adopt and follow the rules in uniform manner so that no prejudice is caused to any of the candidates. If the original Counselling had been done with the minimum eligibility criteria of 35% for the reserved category candidates the said criteria could not have been changed for the current admission at any subsequent stage of Counselling nor by means of amending the Act or issuing any other Government Order particularly in view of the fact that the criteria already existed on the date of Counselling and which was also given to understand to all the candidates by means of information brochure.

50. It has not been pointed out by the opposite parties as to under what compulsion and under what provisions of law they withheld the seats which should have been thrown open to the general category candidates. Not only this, these very seats were subject-matter in the subsequent Counselling and the candidates of reserved category who were prohibited and restrained from participating in the first Counselling having secured less than 35% marks in view of the orders passed by this Court on 15th April, 1998 in W.P. No. 868 (MS) of 1998 were indirectly given the same benefit of participating in the Counselling at a later convenient date namely the second Counselling with 20% marks or more but less than 35% marks. This defeats the whole intent and purpose of the order passed by this Court. No person or authority is above law and it is the prime duty of the State as well as the authorities to abide by the orders passed by the Court and not to circumvent them by adopting the delaying tactics. The opposite parties when found that the candidates having secured less than 35% marks cannot be allowed to participate in the first Counselling, by circumventing the orders of this Court and the relevant Law and rules, unlawfully, again made those seats available to those students who have secured less than 35% marks, in the second Counselling. There could not have been any confusion in the mind of the authorities regarding clear preposition of law that unfilled seats in the reserved category have to be diverted to the general category candidates and no such confusion has been pleaded also by the opposite parties in defence.

51. The third question as to what should have been the criteria for third Counselling, we are of the view that the criteria which was adopted in the first

Counselling namely 45% minimum marks for general category candidates and 35% marks for reserve category marks should have been adopted in the third Counselling. The reason is that the candidates of more merits are selected on lower criteria, the candidates having lesser merits, who are given chance in the subsequent Counselling against the drop out vacancies may or may not be having that higher merit. "Usually, the merit declines as the process of Counselling continues. The most meritorious will get first opportunity and likewise the merit descends and the seats are also lessened. The choice of different branches and courses also starts diminishing. Where the courses are to be allowed strictly on the basis of merit, one cannot assume that in the second Counselling and third Counselling the candidates of more merit than the candidates who had opted the first Counselling would necessarily be available. Of course there may be some cases, where the candidates of better merit have not opted for any course in the earlier Counselling with the hope that if they keep themselves in the waiting list they might be given an opportunity of opting a subject of their choice against the drop out vacancies but this is in the realm of exceptions, if not in realm of speculation.

52. The Hon^{ble} Supreme Court in the case of Dr. Preeti Srivastava v. State of Madhya Pradesh, reported in AIR 1999 Supreme Court 2894 (supra), has held that regulations and guidelines given by the Medical Council of India in this connection, though persuasive and not having any binding force, cannot be totally ignored by the State Authorities but must be broadly kept in view while undertaking the exercise of short listing of eligible candidates for being admitted to post graduate medical courses. The Medical Council of India has power to issue the guidelines but the State Government no doubt while applying the same in the third Counselling should have considered that in case these guidelines are applied in the third Counselling that will prejudice the interest of the candidates.

53. Besides this there is only one examination namely PGMEET 1998 and for one admission, different criteria cannot be adopted in three stages of Counselling. The nomenclature of first, second and third Counselling is simply a misnomer as it does not depict the correct version of the Counselling. As a matter of fact the Counselling is one where all the seats are open to all the eligible candidates may be general or reserve category and it is because of the fact that drop out vacancies occur that subsequent Counselling takes place for filling up those vacancies. In such an event the subsequent Counselling cannot be said to be Counselling as a new Counselling but it is only a way or method to fill up the unfilled seats. For this subsequent Counselling, therefore, a different criteria as against the criteria for original Counselling cannot be adopted. If the same is done the same would be contrary to principle of natural justice and would not afford equal opportunity in the matter of seeking admissions to all the candidates. It would be an irony that those candidates who could not succeed in the first Counselling for one reason or the other are required to compete on the higher level of merit in the subsequent Counselling.

54. The holding of third Counselling on the basis of criteria laid down by Medical Council of India of 50% for general category candidates and 40% for reserve category candidates is undoubtedly a criteria which has been laid down in pursuance of the direction issued by the Hon"ble Supreme Court but the same should have been made applicable from the next examination and not in the instant examination and that too at the stage of third Counselling.

55. The Supreme Court in para 28 of the judgment of Dr. Preeti Srivastava (supra) has observed that:

"Therefore, the purpose of such a common entrance examination is not merely to grade candidates for selection. The purpose is also to evaluate all candidates by a common yard sticks."

56. In view of the discussion made above, we find the whole process of Counselling for PGMEET 1998 was vitiated by adopting different standards, at different stages of the one and only one examination for admission to post graduate classes, which was not only in violation of the conditions advertised, but also was contrary to existing Government orders and the dictum of the Hon"ble Supreme Court in Dr. Sadhana Devi's case (supra). Besides being violative of the interim orders passed by this Court, on 15.4.1998.

57. We further find that the Hon"ble Supreme Court while pronouncing in the case of Dr. Preeti Srivastava (supra) had taken note in para 6 of the judgment, about the fact that, for admission effected in 1998, the State of U.P. again has prescribed a cut-off, percentage of 20% marks for the reserved category candidates, and further in paragraphs 63 and 115 while giving the judgment prospective effect, has protected the admissions made under the impugned Act, viz U.P. Act No. 14 of 1997. Paras 63 and 115 are being quoted below :

Para 63.-"In the premises, the impugned Uttar Pradesh Post Graduate Medical Education (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1997 and G.O. dated 7.6.1997 of the State of Madhya Pradesh are set aside. However, students who are already taken admission and are pursuing courses of post graduate medical study under the impugned Act/ G.O. will not be affected. Our judgment will have prospective application. Further, pending consideration of this question by the Medical Council of India, the two States may follow the norms laid down by the Medical Council of India for lowering of marks for admission to the under-graduate M.B.B.S. Medical Courses, at the post graduate level also as a temporary measure until the norms are laid down. This, however, will not be treated as our having held that such lowering of marks will not lead to a lowering of standards at the post graduate level of medical education. Standards cannot be lowered at this level in public interest. This is a matter to be decided by an expert body such as the Medical Council of India assisted by its Post Graduate Medical Education Committee in accordance with law."

Para 115.-"The Writ Petitions and the civil appeal arising out of the SLP as well as

the review petitions would stand disposed of accordingly in the aforesaid terms and the judgments rendered by the High Courts will stand modified and the impugned orders passed by the State authorities will also stand set aside accordingly. However, the present judgment will operate purely prospectively and will not affect the admissions already granted by the concerned authorities in the post graduate medical course prior to the date of this judgment, in other words, the State authorities will have to comply with the direction contained in this judgment and put their house in order for regulating the admissions to post graduate medical courses starting hereinafter in the medical institutions concerned. Order accordingly."

58. It appears that full facts were not brought to the notice of their Lordships with respect to Counselling for PGMEET 1998. The aforesaid facts indicated that the provisions of U.P. Act No. 14 of 1997 were not applicable to PGMEET 1998 and were also not available to the opposite parties even at the time of Counselling on 15th, 16th and 17th April, 1998. The Counselling was also made in pursuance of the interim orders passed by this Court according to the then existing Government orders namely 11th October, 1994 and 2nd April, 1997 which prescribed 35% minimum eligibility criteria for reserved category candidates and 45% for general category candidates. In that Counselling 101 seats were illegally withheld as per orders of the Apex Court, these should have been diverted to the general category candidates. It was after a lapse of 6 months that U.P. Ordinance No. 15 of 1998 was promulgated prescribing 20% marks as minimum eligibility criteria for reserved category candidates as was provided in U.P. Act No. 14 of 1997 for 1998 examination also.

59. Certain students challenged the U.P. Ordinance No. 15 of 1998 and this Court passed an order that Counselling may be done under the provisions of the said ordinance but the admissions were not allowed.

60. Later on, on the request of all class of students who were facing difficulty for want of admission this Court modified the order permitting admissions but the same were subject to decision of the Writ Petition with clear instructions that the said fact should be mentioned in the admission letter also. Under these circumstances the admissions were given to the reserved category candidates having 20% minimum marks.

61. The Hon'ble Supreme Court while setting aside the impugned Uttar Pradesh Post Graduate Medical Education (Reservation for Schedule Castes, Scheduled Tribes and Other Backward Classes) Act, 1997 (U.P. Act 14 of 1997), has held that students who had already taken admission and are pursuing courses of Post Graduate Medical study under the impugned Act shall not be affected. The admission of these students, therefore, who had taken admission through second Counselling on the basis of 20% criteria under the U.P. Ordinance No. 15 of 1998 by which U.P. Act No. 14 of 1997 was amended shall not be affected.

62. So far the third Counselling is concerned, the same has taken place after

10.8-1999 i.e. after the pronouncement of the judgment by the Apex Court, and therefore, we feel that such admissions can be tested independently.

63. We have already found that the eligibility criteria in the third stage of Counselling could not have been changed from the criteria which was in vogue the time of first Counselling that too, by raising the standard and the criteria of 20% marks for reserved category already stood stuck off, by the Supreme Court on 10-8.1999, the Counselling has taken place on 23.8.1999, accordingly the ends of justice would met by issuing the following directions.

(1) All such students who have participated in the third Counselling with the norms prescribed by the Medical Council of India on 17.8.1999 shall be given admission to the courses, to which they have opted, and seats have been allocated.

(2) If any seat, still remains unfilled, subsequent Counselling may be held, with the criteria of 45% and 35% marks for general and reserve category candidates respectively i.e. the criteria which was (sic) the original (first) Counselling.

(3) The bar, that once a candidate has already opted for some seat, in the earlier Counselling shall not be a bar for the third Counselling which has already taken place or in any further subsequent Counselling, if it is to take place because of the peculiar facts and circumstances of the case.

(4) The admission given in response to first Counselling and second Counselling shall not be disturbed.

64. In result all the Writ Petitions and the Special Appeal stand disposed of accordingly.