

(1995) 02 MAD CK 0097

In the Madras High Court

Case No : Writ Petition No. 13167 of 1994

R. Vinothkumar

APPELLANT

Vs

The Secretary, Selection Committee and Others

RESPONDENT

Date of Decision : 08-02-1995

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1995) 1 CTC 401 : (1995) 1 LW 351 : (1995) 2 MLJ 158 : (1995) WritLR 203

Hon'ble Judges : Srinivasan, J;Raju, J;Janarthanam, J

Bench : Full Bench

Advocate : Sathya Mohan and T.B. Ramamurthy, for the Appellant; R. Krishnamurthy, General, R. Muthukumaraswamy, Government Pleader and G. Sugumaran, for Respondents 1 to 3 and K. Gunasekar, Additional Central Government Standing Counsel for Respondent 4, for the Respondent

Final Decision : Dismissed

Judgement

Srinivasan, J.—I have had the advantage of reading the judgments of my learned brothers. I am unable to persuade myself to agree with the conclusion arrived at by them through I am bound to accept one part of the reasoning of Raju, J., in view of a judgment of the Supreme Court, which came to my knowledge a few days back, thanks to a Senior Advocate who appeared before me in another case.

2. I was a party to the Division Bench which decided A. Arul Latha Gold v. The Government of Tamil Nadu and Ors. (W.P.No. 14308 of 1994 - Order dated 29-11-1994 = 1995 (I) CTC 5). At that time, the earlier judgment of the First Bench of this Court in R. Maheswari v. The Secretary, Selection Committee, Tamil Nadu Professional Courses, Medical/Para-Medical Courses, 1994-95 (W.A.No. 1347 of 1994 Judgment dated 11-11-1994) was not brought to the notice of the Bench. Nor the Bench was made aware of the judgment of the Supreme Court in Institute of Chartered Accountants of India v. Inder Chand Jain 1992 (1) Suppl SCC 433. The facts of that case are somewhat peculiar and they have been fully

set out in that judgment. My learned brother Janarthanam, J. has also referred to same at some length. But, one crucial fact on which the decision in that rested has been omitted to be taken note of by my learned brother. In the Notification issued in that case calling for applications from the candidates, Column 3 related to the method by which Application from the Prospectus for B.S.M.S./ B.H.M.S./ B.A.M.S. Courses could be obtained by the aspirants for joining the Course. While it is stated that applications and prospectus will be issued either in person or by post on written application with a crossed Demand Draft for Rs. 100/- (Rupees one hundred only) drawn in favour of DIRECTOR OF INDIAN MEDICINE AND HOMEOPATHY, payable at Madras, obtained from any one of the Nationalised Banks on or after 2.5.94 and if the applications was required to be sent by post, a self addressed envelope of 33cm. x 12.5.c.m. stamped to the value of Rs. 4/- (Rupees Four only) should be enclosed along with requisition. It was expressly provided in that clause that delay on the part of the postal Department will not be considered. Such a clause was missing in Clauses 7 and 8, which related to the forwarding of completed applications by the candidates to the Directorate. Clause 7 gave the option to the candidates to send the completed applications with enclosures either by Registered Post or delivered in person on or before 5.00 P.M. on 6th June 1994. While the authorities took care to mention expressly that delay on the part of the postal Department will not be considered when application forms were being sent to the candidates by the Directorate on requisition, the authorities did not think it necessary or fit to say so when the completed applications were to be forwarded by the candidates to the Directorate within a particular date. That distinction between the two clauses was referred to expressly in paragraph 8 of the judgment and the Bench said thus:-

"A perusal of clauses 3 and 7 shows that when a candidate wants the application forms to be sent to him by post, a self addressed envelopeshall be enclosed along with the requisition. That self addressed envelope will be sent by authority to the candidate. If there is any delay on the part of the postal department in the delivery of that envelope to the candidate, such delay will not be considered by the authority viz., respondents 1 to3. In the context, the stipulation that "postal delay will not be considered" can refer only to that. The reason is quite obvious. The candidate having made the choice to get the application form by post, the authority will not be responsible if there is any delay on the part of the post office in delivering the form to the candidate. But, in the case of applications being sent by the candidate to the authority as evident from clause 7 of the prospectus, In such cases, the authority cannot disown responsibility, if there is any delay on the part of the post office. That is the reason for the absence of a provision relating to postal delay in clause 7 of the notification".

3. Apart from that, the Bench also took note of that fact that there was a column in the Application Form requiring the candidate to enter Register Number of the candidate given to him for the Entrance Examination. The Hall Ticket for the Entrance Examination reached the petitioner only on 20.6.1994. It was only from that Hall Ticket, the petitioner therein could ascertain his Register Number for

the entrance Examination. Taking note of the fact that the Hall Ticket reached the candidates only about that time, that last date for submitting applications for admission into the course was extended by the authorities till 27.6.1994 - 5.00 P.M. Thus, there were only seven days between the date on which the candidate could have filled up the application form and forwarded the same to the Directorate. Taking those factors into account, the Bench applied the principle laid down by the Supreme Court in the various judgments referred to therein, which are referred by Janarthanam, J. in his judgment as "common Denominator decisions" and held that the authorities nominated the Post Office as their agent when they gave the option to the candidates to send the applications by registered post or deliver the same in person at the office of the Directorate.

4. I am unable to accept the distinction sought to be made by learned brother that the principle of agency laid down by the Supreme Court in those judgments would apply only in cases where no option was given to the concerned persons and the only course available to them was to send the application by post. In my opinion, it makes no difference whether an option is given to the candidate to choose one of the two modes or no option is given to him and only one mode is prescribed for sending the applications. If the principle of agency as laid down by the Supreme Court in the judgments referred to in that case is applicable, there can be no doubt whatever that the post office would continue to be the agent of the concerned authorities. It cannot be said that in such cases, an option has been exercised by the candidate and the post office would become the agent of the candidate thereby. Cases of such option can only mean that the candidate is directed to adopt any one of the two modes prescribed by the authorities themselves. The cover for sending the application is provided by the respondents themselves. In such circumstances, the choice of the candidate is limited to those two modes and by adopting one of them, the candidate is only performing the contract in the manner prescribed by the authorities. Hence, it cannot be said that in such cases, the candidate has adopted a mode of his own and nominated the post office as his agent.

5. After all, the purpose of prescribing an alternative mode enabling the candidates to send their applications by registered post is to make it convenient to thousands of them who cannot afford to undertake a journey to the city of Madras and the office of the Selection Committee. Our country is still a poor one and there are many students who are below the poverty line but brilliant in studies. If everybody is made to go to the office of the Selection Committee many a meritorious candidate would not be able to think of it for want of funds to travel. Hence both the modes prescribed in the prospectus cannot but be on the same plank equally effective and a candidate choosing one of them cannot be placed at a disadvantage and treated differently. It follows, therefore, that if reasoning of my learned brother contained in paragraphs 24 and 25 of his judgment referring to Section 50 of the India Contract Act and illustration (d) thereto and the ruling in *G. Sumathi Vs. The Director of Medical Education, Madras* and others, will not hold good.

6. As regards the reasoning of Rajun, J., I am bound to agree with that part of it which is to the effect that the stipulation that the applications should reach the office of the Selection Committee before a particular time on a particular date, is more a matter of condition which operates as a condition precedent and thereby will exclude the principle of agency. I am obliged to do so on account of the Judgment of the Supreme Court in *Institute of Chartered Accounts of India v. Inder Chand Jain* 1992 (1) Suppl SCC 433, which came to my knowledge a few days ago. In the said case, the Council of the Institute of Chartered Accounts framed Regulations, Chapter VI of which dealt with Elections. Sub-regulation (2) of Regulation 87 provided that the nomination of a candidate shall be forwarded by registered post of the Secretary by name so as to reach him not later than 5.00 P.M. on the specified date. The Proviso to the sub-regulation was that a nomination delivered against an acknowledgment before the aforesaid time and date shall be deemed to have been so forwarded and so having reached, if the Secretary is satisfied that the nomination has been duly forwarded by registered post at least 48 hours before the aforesaid time and date. In that case, the respondent forwarded his nominations by registered post to the Secretary on May 17, 1991 and May 18, 1991 respectively. The nominations, however, did not reach the Secretary by 5 P.M. on May 21, which was the final time and date prescribed for receipt of nominations. Actually they were received by the Secretary by registered post on May 23 and May 27 respectively. The nominations were rejected on the ground that they were received after the time fixed and the name of the respondent was not included in the list of candidates who had filed their nominations for election to the Council. The respondent filed a Writ Petition in the Bombay High Court to quash the order rejecting his nominations. The Division Bench of the Bombay High Court held that the only mode by the Regulation was to tender the nomination by registered post and the rigour of the rule that the nominations must reach before the specified date and specified time, was relieved by the insertion of the Proviso. It was, therefore, held that once the Secretary was satisfied that a nomination had been duly forwarded by registered post to him at least 48 hours before the specified date and time, it must be deemed to have been received within the time provided. On that basis, the High Court made the rule absolute. It was that judgment which was challenged before the Supreme Court. The Supreme Court did not agree with the view expressed by the Bombay High Court and said as follows: -

"7. In our view, there is a considerable force in the submission of learned Attorney General. It is trite to say that in construing any regulation or rule it would not be proper to ignore any part of it except in special circumstances. Moreover, accepting the construction placed by the Bombay High Court on the said Proviso would lead to a startling result; for example, a nomination might have to be treated as received within the specified time and date even though it might never have reached the Secretary at all or might reach the Secretary after the date of the election, merely because the Secretary is satisfied that the nomination had been duly forwarded to him by registered post at least 48 hours

before the specified time and date. It is not unknown that the letters sent by registered post are occasionally received after a long delay of several weeks and on some occasions they do not reach at all. If the construction placed on the said proviso in the impugned judgment were accepted, in such a case as aforestated the entire election would have to be set aside leading to great confusion and hardship. This consequence must necessarily follow if the view taken by the Bombay High Court were to be accepted. In our opinion, the entire scheme of sub-regulation (2) and the proviso shows that one of the main pre-conditions required before a nomination must be received by the Secretary before the specified time and date.

8. It is true that the rule, in terms, requires that the nominations should be sent by registered post, but taking into account the fact that such a nomination posted more than 48 hours before the specified time and date, it was provided that if the nomination was delivered, let us say, by hand to the Secretary before the specified time and date against acknowledgment that nomination would be treated as having been validly received provided the Secretary was satisfied that the nomination was forwarded by registered post to him by the candidate 48 hours prior to the specified time and date. It was contended on behalf of the respondent that in the light of the proviso to sub-regulation (2) of Regulation 87 what was intended to be prescribed by the use of the expression so as to reach him not later than 5.00 P.M. on the specified date" in clause (ii) of sub-regulation (2) of Regulation 87, was that the nominations which have been forwarded by registered post to the Secretary 48 hours before the specified time and date of the election must be deemed to have reached the Secretary in time. In our view, this contention is fallacious. What is meant by the use of the aforesaid expression in sub-regulation (2) of Regulation 87 is that the nomination must be forwarded by registered post to the Secretary so as to reach him in fact or actually reach him not later than 5.00 P.M. on the specified date. The rigour of the rule is relaxed by the proviso under which if the nomination was delivered against an acknowledgment before the specified time and date, it would be deemed to have been forwarded and to have reached as provided in clause (ii) of sub-regulation (2) referred to earlier provided the Secretary was satisfied that the nomination had been duly forwarded by registered post at least 48 hours before the aforesaid time and date."

7. After laying down the law as aforesaid, the Supreme Court set aside the judgment of the Bombay High Court and- held that the nomination of the respondent was liable to be rejected on the ground that it was not received in time. But on the facts, the Court found that the elections had already been postponed and the proposed dates for elections will be fixed thereafter and under those circumstances, the Court directed that all the nominations received upto the end of August 1991 must be treated as received in time, provided that the Secretary is satisfied that they were forwarded by registered post 48 hours before the time and date specified earlier.

8. Though the Supreme Court had not referred to any of the judgments compendiously called by my learned brother Janarthanam, J. as "Common Denominator decisions", I am bound by the ratio of the judgment and it is only for the Supreme Court to reconsider the correctness of the same, if any occasion arises. In view of the said declaration of law, I have to agree with Raju, J. that the stipulation contained in the prospectus prescribing the last date for receipt of the application forms at the Selection Committee Office as 15th July 1994 at 5.30 P.M. is a condition precedent. The application of the petitioner not having reached the office within the said time, deserved to be rejected.

9. However, I am unable to agree not only with the remaining part of the reasoning of Raju, J. but also the conclusion arrived at by him. My learned brother has observed that it is the uniform practice adopted all these years that such belated applications received after the stipulated time were not taken out of their envelopes and the covers received and that in matters of this kind, relief cannot be granted to the one who comes to the Court alone and cases similar and alike should also be considered on comparative assessment of merits. I am unable to accept that part of the reasoning of my learned brother. Here are my reasons:

10. No reliance can be placed on uniform practice adopted in previous years as in this year the circumstances are entirely different. The Selection List published in the first instance on 17.7.1994/18.7.1994 was challenged on several grounds. The main grounds on which it was attacked before the Supreme Court was that it did not give effect to the rule of reservation laid down by the Supreme Court. Taking note of that aspect of the matter, the Supreme Court gave certain directions and passed certain orders on 1.8.1994, 9.8.1994 and 10.8.1994. Pursuant to the order dated 1.8.1994, the respondents published another list on 3.8.1994 indicating the marks obtained by the selected candidates in brackets. Again, by the order dated 10.8.1994, the Supreme Court gave directions to admit some more candidates in the merit quota i.e., "open Category", as if the reservation had been confined to 50%. Thus, sixty-two candidates were selected. The list of 62 candidates was published only after the hearing of the matter was taken up by our Full Bench on 5.12.1994 and that too at our instance. Apart from that, admittedly, the original list published on 17.7.1994/18.7.1994 included certain candidates who were selected wrongly on the basis of marks awarded for their Sports qualifications pursuant to G.O.Ms.No. 118 dated 21.2.1994. Admittedly, eight candidates were selected wrongly on that basis. Thus, the selection list published on 17.7.1994/18.7.1994 did not finalise the selection of candidates for the Medical Courses. The selection could be completed in accordance with law only after our Full Bench took up the batch of Writ Petitions for hearing.

11. In such circumstances, the question will undoubtedly arise whether the petitioner is entitled to get justice at the hands of this Court particularly when he has performed his obligations strictly in accordance with the instructions

contained in the prospectus. He has not contravened any of the conditions prescribed therein. He posted the application sufficiently in advance, i.e., on 11.7.1994 and in the normal course any citizen in this country is entitled to expect that the registered post handed into the post office at Kotagiri, Nilgiris District, would certainly reach the office of the Selection Committee before 5.30 P.M. on 15.7.1994. For no fault of his, the Postal Department delayed the matter and the post was received in the Post Office at Madras on 16.7.1994 and delivered to the Office of the Selection Committee on 19.7.1994 only. There is no reason or justification to make the petitioner suffer for the lethargy of the postal authorities when he has not committed any mistake and when he is entitled to get an admission on the basis of the marks obtained by him.

12. It is seen that the petitioner has secured 288.20 marks out of 300. He belongs to Backward Class and the cut-off marks for that Class as on 18.7.1994 was 287.05. It is seen from the Selection List that Serial Numbers 168 to 290 in the Merit List of B.C. Candidates scored 288.15 and lesser marks. Thus, there were 123 candidates who had secured lesser marks, but they were selected and included in the merit list. The cut-off marks were reduced further as on 4.12.1994 when 62 candidates were selected as per the directions of the Supreme Court in the merit quota. On that date, the cut-off marks were only 286.85. It will be grave injustice to deny the petitioner admission to the Medical Courses on the ground that the postal authorities had delayed the delivery of the application form at the office of the Selection Committee. If the selection had taken place in the normal course and had been finalised in the usual manner as on 17.7.1994/18.7.1994, there could not have been any question of considering the application of the petitioner, which reached that office much later than the prescribed time. But, in this year, the selection could not be finalised because of the mistakes committed by the concerned authorities in introducing new unsustainable policies which have been already held to be so in the judgment of our Full Bench dated 23.12.1994 and adoption of a rule of reservation contrary to the rule laid down by the Supreme Court. In such cases, this Court ought to consider, in my opinion, whether justice should be rendered to the petitioner by directing his application to be considered by the authorities.

13. I cannot accept the contention that there are 600 and odd belated applications, and if relief is granted to the petitioner, it should be granted to all the other applicants whose applications reached the Selection Committee Office later than the prescribed time. The cut-off marks were published in the newspapers when the results were announced and every candidate who aspired for admission to the Medical Courses were fully aware of the same. If any other candidate had secured more than the cut-off marks and his application had been rejected on the ground of belated receipt thereof, he could have and would have approached the Court. The writ petitions, which were considered by our Full Bench, were pending in this Court for nearly five months and the pendency thereof was also widely known. Apart from that, it is not known as to how many of the said 600 applicants had posted the applications before the prescribed date

and how many of them had secured the required cut-off marks. That is why, I wanted to give a direction to the respondent to open the 600 envelopes which were stated to have been received after the prescribed date and time and ascertain the facts. But, I could not convince my learned brothers to agree to the same and such a direction could not be issued. I am of the opinion that justice cannot fail just because it will cause practical inconvenience. No individual can be denied justice just because there were several other persons who are similarly placed. I am reminded of the saying of the immortal Tamil poet Subramania Bharathi whose patriotism is too well known throughout the country:-

(We will destroy the world if an individual has no food.)

The spirit in which the poet said so must be appreciated and the underlying principle must be invoked whenever there is a threat of failure of justice.

14. Just as the Supreme Court has in the Institute of Chartered Accountants of India case (1992 (1) Suppl. SCC 433) gives a direction to the Council of Chartered Accountants that all the nominations received upto the end of August 1991, though it was beyond the date prescribed by the Council earlier, must be treated as received in time subject to certain condition, I would give a direction in this case to the authorities to consider all the applications which were posted at least two days prior to 15.7.1994 and find out as to how many of them are entitled to get admission on the basis of marks.

15. In fact, when the interlocutory applications for stay of further proceedings of admission to the Medical Courses filed by the petitioners in the Writ Petitions came up before a learned single judge of this Court, he passed an order on 28.7.1994, the relevant portion of which reads as follows:-

"5. On the above analysis of the cases, I am inclined to grant the following interim order, which in my opinion, will safeguard the interest of the selected candidates as well as the petitioners, who are hopeful of selection. The following interim directions are given, which are subjected to modification by the Court, which takes up the cases for final disposal.

(i) The entire selection for the First Year M.B.B.S., Course 1994-95 and the First Year B.E., Course 1994-95 shall be subject to the ultimate result of the writ petitions and the selected candidates shall join the courses at their own risk.

(ii) If any one of the petitioners is able to establish that he or she, ought to have been selected if the correct principles had been applied and succeeds in the Writ petition, he or she shall be given admission without raising the plea of want of vacancy or want of seats."

16. Thus, this Court took care to say that the entire selection was subject to the ultimate result of the Writ petitions. If in a case relating to election to the Council of Chartered Accountants relief could be granted by taking note of a subsequent event that the election had been postponed, afortiori relief should be granted to a student who is fully qualified to be admitted to medical course by taking note

of the fact that selection had not been finalised when he approached the Court and the Court has passed an order that the selection will be subject to the result in the writ petitions. In such circumstances, the Court ought to grant relief to the petitioner as it is found that he is entitled to admission on the basis of the marks obtained by him. It will be a travesty of justice to deny him any relief and dismiss the writ petition. This Court, which is not only a Court of law but also a Court of equity, should not close its eyes to the facts and circumstances of the particular case and refuse to grant relief on a supposedly uniform practice. It is well known that justice is soul and law is the body. It has been observed by a learned Judge of the Supreme Court that law and justice are not distant neighbours.

17. In the result, I would allow the Writ Petition and issue a direction to the respondents to consider the application of the petitioner for admission to the Medical Courses for the Academic Year 1994-95 as prayed for by him.

18. Before parting with the case, I would like to point out that it would be better if the respondents may consider making a suitable provision in future to safeguard the interests of meritorious candidates against the vagaries, of the postal service. Appropriate conditions may be included in the prospectus. The Government Pleader is requested to inform the concerned authorities accordingly.

Janarthanam, J.—Challenging the selection of students for Professional Courses for the academic year 1994-95, a batch of Writ Petitions (W.P. No. 12517 of 1994 etc., (S.R. Bhupeshkar v. The Secretary, Selection Committee, Madras-10 and Anr. batch of cases) had been filed and they were heard at length, by a Division Bench of this Court, comprising one of us (Raju, J.) and AR.Lakshmanan, J. By a common order dated 15.11.1994, the said Bench referred those matters to a Full Bench on the following reasoning:-

"14) After careful consideration of all these, we are of the view that these Writ Petitions deserve as also are required to be considered by a larger Bench than a Division Bench, some of the issues, particularly one relating the reservation is excess of 50%, the validity of T.N.Act 45/94 and the applicability of reservation policy of Payment Seats, involve substantial questions of law relating to the interpretation of the provisions of the constitution and are of great general and public importance. Further, we find that some of the issues, though have been raised and answered on more than one occasion by various Benches (single, as well as Division Benches) relentlessly the same points are raised once over again every year in respect of some selection or the other for admission to Professional Courses, under the pretext of seeking reconsideration of such earlier rulings even de hors any justification or for any substantial reasons taking advantage merely of the fact that these issues have been earlier adjudicated by single or Division Benches of this Court. To give a quietus to all these and to have an effective and final adjudication of some of these often recurring importance and vital questions of law, we consider it appropriate and necessary that these Writ Petitions shall be placed before a larger Bench than a Division Bench to hear and dispose of these

cases and decide such issues."

Consequently, those matters were listed before us.

2. In the meantime, the State Government of Tamil Nadu announced that in the matter of reservation, the directions issued by the Supreme Court of India for the academic year in question were complied with fully. Therefore, it was agreed to by all the parties that the question of reservation need not be decided in those cases.

3. The remaining questions, which fell for consideration in those cases, are reflected, as below:-

"(A) (i) Has any candidate been selected by implementing G.O.Ms.118 dated 21.2.1994?

(ii) Is the withdrawal of the G.O.by the Government illegal and arbitrary?

(B) Has any fraud been played in the guise or retotalling the marks awarded in the qualifying examinations?

(C) Should the marks awarded in the qualifying examinations be totally ignored and fresh selection be directed on the basis of marks awarded in the entrance examination?

(D) Has there been any fraud in the valuation of answer scripts in the entrance examination?

(E) Is the method of selection contrary to Clause 8.2(a) of the prospectus issued by the Directorate of Medical Education?

(F) Is the reservation provided in Clauses 3.5 of the prospectus for Special Categories in Government Colleges violative of Articles 14 and 15 of the Constitution of India?

(G) Is the Allotment of seats in Perundhurai Medical College to the wards of employees of the Transport Corporation illegal?

(H) Miscellaneous questions arising in some individual cases.

4. Those questions have been considered and the aforesaid batch of cases have been disposed of by a common order dated 23.12.1994; of course, de-linking the present Writ Petition therefrom (and directing another Writ Petition No. 13976 of 1994 to be posted in the usual course). The present action has therefore been posted separately before us for disposal.

5. The petitioner had been successful in the Higher Secondary Examination held in March, 1993. However, he appeared for the improvement examination held in March, 1994 in the subject. "Physics". He appeared for the Tamil Nadu Professional Courses Entrance Examination (TNPCEE), 1994 under registration number 133030.

6. As per the notification issued for admission the professional courses MBBS/ BDS/B.PHARMACY/B.Sc. (NURSING)/BPT/BOT/BMRSc for 1994-95 Session, applications were required to be submitted on or before 15.7.1994 at 5.30p.m. The relevant portion of the notification is as follows:

"9. Last date for issue of Prospectus/Application forms at the Government Institutions - 15th July, 1994, 5.30 PM.

10. Last Date for Receipt of Application Forms for MBBS/ BDS/ PARA MEDICAL COURSES at the Selection Committee Office - 15th July, 1994, at 5.30 P.M."

(a) Clause (5) of the Instructions to Candidate in the prospectus reads thus:

(5) Completed Application form with enclosure may be delivered in person or sent in the cover provided, by Registered Post to:

The secretary, Selection, Committee, sabarmathi Hostel, K.M.C. Hospital Campus, Madras 600 010.

Before 5.30 PM on.....1994".

(b) So, the last date and time for receipt of the application forms were fixed by the said notification. It was also open to the intending applicants to send the applications even by registered post. Infact, along with the application form, the Selection Committee supplied a cover its address printed, in which the application was required to be sent.

7. The petitioner, claiming to satisfy the conditions of eligibility, was stated to have sent the application form No. 03790 for MBBS Course, with enclosures, in the cover provided by registered post, through Kothagiri Post office as early as on 11.7.1994 and the despatch so effected was delivered to the addressee/the Secretary. Selection Committee on 16.7.1994, that is, beyond the targeted date and time. The results were stated to have been published on 19.7.1994 in the leading newspapers, inclusive of THE HINDU. To the petitioner's surprise and bewilderment, he did not find his registration number in the list of successful candidates, though he secured 288.2 out of 300 marks, exceeding the cut off mark of 287.05 for BC candidates like him, and consequently, he resorted to the present action for issuance of a Writ of Mandamus directing the respondents- in particular, the first respondent, to consider his application, select and admit him for the MBBS course he has applied for, contending that the entrustment of his application to Kothagiri Post Office on 11.7.1994, well in advance to the last date and time of receipt of such applications, namely, 15.7.1994, at 5.30 P.M, would tantamount to the receipt of the application by the Secretary, Selection Committee-addressee, inasmuch as the said post office is to be construed, in the eye of law, as its agent, on the facts and in the circumstances of the case and that even otherwise, on the principles adumbrated u/s 50 of the Indian Contract Act, 1872 (Act No. IX of 1872 - for short "IC Act"), he must be deemed to have performed in full his part of the obligation, by sending the application, by registered post, as per the instructions to candidate, contained in the prospectus

very well in time.

8. The first respondent - the Secretary, Selection Committee alone filed a counter refuting the allegations, as respects the contractual obligation and the principle of agency, in view of the specific conditions imposed in the notification and the instructions to candidate in the prospectus, not only about the manner of submitting the application either in person or by post; but also specifying that the same shall be done within the time limit, so as to reach its office and since the application of the petition had been received beyond the prescribed time, he had not been considered for admission to the First MBBS Course for the academic year in question.

9. The principle of agency and contractual obligation, as being canvassed for consideration in the present action, not having arisen in the other actions, which had been disposed of, as adverted to earlier, the present action alone had to be de-linked from them. Arguments on those points have been heard.

10. On the question of application of the principle of agency, in respect of receipt of application - sent by registered post, through post office-by the Selection Committee for admission to the professional courses, contrary opinions emerged from two different Division Benches of this Court (the former consisting of K.A.Swami, CJ & Somasundaram, J. and the latter consisting of one of us (Srinivasan, J.) and S.S. Subramani, J.).

11. Both the former and the latter Division Benches of this Court, referred to and considered certain decisions, emerging from the High Courts and the Apex Court of this country, touching upon the moot and vexed question as to when and under what situation and circumstances, a post office is being constituted as an agent of either of the debtor/sender or of the creditor/addressee. Paradoxical it is to find, however, contrary" opinions, as adverted to earlier, came into existence, although the principle evolved from the decisions of the Apex Court serve as a Common Denominator, in arriving at the conclusion by the respective Division Benches. Such being the case, better it is before delving deep into the rationable or reasoning, which prompted the respective Division Benches to arrive at a conclusion of its own-to refer to and consider those decisions of the Apex Court, by and by, to have a firm grasp of the principle that can be culled out from them, and is so done, the knotty tangle posed can be united and solved with ease and grace and without any difficulty whatever.

12. In The Commissioner of Income Tax, Bombay South, Bombay Vs. Ogale Glass Works Ltd., Ogale Wadi, ; the assessee, namely. M/s. ogale Glass Works Ltd., (respondent) was a limited liability company incorporated and carrying on business in Aundh, which, in those days, was an Indian State outside British India. It was accordingly a non- resident Company for the purposes of the Indian Income Tax Act(for short IT Act").

(a) The assessee manufactures lanterns and other glasswares at its Works in Aundh State. In the relevant accounting years the assessee secured some

contracts for the supply of lanterns and other glasswares to the Government of India. The price of goods supplied under the contracts were paid by cheques drawn on the Reserve Bank of India, Bombay. The cheques used to be received by the assessee in Aundh and cashed through its Bank at Bombay.

(b) The assessee, being a non-resident Company, its liability to British Indian Income Tax depended upon its receipt of income within British India. In the course of proceedings for the assessment of the assessee to Income Tax for the relevant accounting years, the assessee contended that its profits on the sales accrued and were received in the Aundh State where it received payment by the receipt of the cheques. The Income Tax Officer, and, on appeal, the Appellate Assistant Commissioner held that the assessee received income, profits or gains in British India in as much as the cheques were drawn on a Bank in Bombay and had been cashed in Bombay and accordingly taxed the assessee u/s 4(1)(a) of the IT Act. On appeal by the assessee, the Income Tax Appellate Tribunal upheld the assessment.

(c) Being aggrieved by the order of the Tribunal, the assessee applied for a Reference of the case to the High Court for the determination of the question of law which arose out of the Tribunal's Order and the Tribunal agreeing that a question of law did arise out of its order, referred the following question to the High Court, along with a statement of the case:

"Whether on the facts of the case, income, profits and gains in respect of sales made to the Government of India was received in British India within the meaning of Section 4(1)(a) of the Act?"

(d) At the hearing of the Reference by the High Court, learned advocate for the assessee contended, inter alia, that the cheques were received by the assessee in full satisfaction of the debt due to it by the Government of India and that the debt of the Government of India, had been discharged by the acceptance of the cheques by the assessee in Aundh, The High Court felt that in order to determine this contention, it would be necessary for the Tribunal to find certain further facts and accordingly the High Court remanded the reference back to the Tribunal with a request to submit a Supplementary Statement of the case. The Tribunal, in turn, submitted a Supplementary Statement of the case.

(e) In the Supplementary Statement of the case, reference is made to clause 15 of the conditions of the contract governing supplies made by the assessee to the Government of India. The system of payment under that clause was that 90 per cent of the price of each consignment would be paid on proof of despatch of the stores from a Railway Station or port in India after inspection and the balance of 10 per cent would be paid on receipt of the consignment in good condition. That clause also provided:

"Unless otherwise agreed between the parties, payment for the delivery of the Stores will be made on submission of bills in the prescribed form in accordance with instructions given in the Acceptance of Tender by cheque on a Government

Treasury in India or on a branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business."

(f) The assessee used to submit bills in prescribed form and on the form used to write:

"Kindly remit the amount by a cheque in our favour on any Bank in Bombay."

(g) After the submission of the bills the assessee used to receive from the Government cheques drawn on the Bombay branch of the Reserve Bank of India along with a memo stating:

"The undersigned has the honour to forward herewith cheque No.....dated.....in payment of the bills noted below."

Then followed a tabular statement setting out the number, date and amount of the cheques. On the top of the memo there was a direction that it.

"be immediately returned to the controller of the Supply Accounts with the acknowledgment form on the reverse duly signed and stamped when necessary."

The acknowledgment form was thus expressed:

"The undersigned has the honour to acknowledge cheque No.....dated.....for Rs.....in payment of the bills note in the first column in the reverse.

(h) After receipt of the cheques, the assessee used to endorse it in favour of Aundh Bank Ltd., Ogalewadi Branch which in its turn used to endorse them in favour of the Bombay Provincial Co-operative Bank Ltd., Bombay. The last named bank cleared the cheques through the clearing house in Bombay.

(i) The Supplementary Statement of the case further records that the Aundh Bank Ltd., used to credit the assessee's account on the very day the cheques were received from the assessee with the amount of the cheque less the collection charges and that the assessee used to credit the account of the Supply Department and make corresponding debits to the Bank's account and the Bank charges account.

(j) The High Court, however, on consideration of the materials, answered the question in the negative and the matter had been further agitated before the Supreme Court, with Special Leave under Article 136 of the Constitution of India.

(k) The question that was canvassed before the Supreme Court was: "Whether the sale proceeds were received in British India where the cheques were; delivered?" (1) In answering the question, the Supreme Court, in paragraph 15 (pp.435-436) observed:

"(15).....There can be no doubt that as between the sender and the addressee that the cheque be sent by post that makes the post office the agent of the addressee.

After such request the addressee cannot be heard to say that the post office was not his agent and, therefore, the loss of the cheque in transit must fall on the sender on the specious plea that the sender having the very limited right to reclaim the cheque under the Post Office Act, 1898, the Post Office was his agent, when in fact there was no such reclamation. Of course if there be no such request, express or implied, then the delivery of the letter or the cheque to the post office is delivery to the agent of the sender himself.

Apart from this principle of agency, there is another principle which makes the delivery of the cheque to the post office at the request of the addressee a delivery to him and that is that by posting the cheque in pursuance of the request of the creditor the debtor performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance (see Section 50 of the Indian Contract Act and illustration (d) there to)."

(m) Applying the above principles to the facts found by the Tribunal, what the Supreme Court observed in paragraph 17 (page 436) is relevant, which reads as under:

".....The engagement of the Government was to make payment by cheques. The cheques were drawn in Delhi and received by the assessee in Aundh by post. According to the course of business usage in general to which, as part of the surrounding circumstances, attention has to be paid under the authorities cited above the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles and according to the Tribunal's findings, they were in fact received by the assessee by post.

"Apart from the implication of an agreement arising from such business usage the assessee expressly requested the Government to "remit" the amounts of the bills by cheques. This, on the authorities cited above, clearly amounted in effect to an express request by the assessee to send the cheques by post. The Government did act according to such request and posted the cheques in Delhi. It can scarcely be suggested with any semblance of reasonable plausibility that cheques drawn in Delhi and actually received by post in Aundh would in the normal course of business be posted in some place outside British India.

This posting in Delhi, in law, amounted to payment in Delhi. In this view of the matter, the referred question should, with respect, have been answered by the High Court in the affirmative. We, therefore, allow the appeal and answer the question accordingly."

13. In *Shri Jagadish Mills v. I.T. Commissioner* AIR 1959 SC 1160, the appellant, namely, *Shri Jagadish Mills Ltd.*, was a public joint stock company incorporated under the then Baroda State Companies Act and having its registered office at Baroda. The appellant was the owner of a textile mill and carried on" business in manufacturing and selling textiles at Baroda.

(a) In the accounting years 1942 and 1943, tenders were invited by the Government of India for some of the articles "manufactured by the appellant and the appellant submitted its tenders to the Government of India, which accepted the tenders and placed orders for supply of goods manufactured by the appellant. These orders were accepted by the appellant at Baroda and the deliveries of the goods manufactured by the appellant and sold by it to the Government of India were pursuant to the said orders to be and were in fact effected F.O.B. Baroda. In fact so far as the manufacture and sale of the goods supplied to the Government of India were concerned, as also the deliveries thereof, everything took place at Baroda, outside the then British India.

(b) According to the conditions of the contracts governing the supplies made by the appellant to the Government, the system of payment was, that unless otherwise agreed upon between the parties, payment for delivery of the goods would be made on submission of the bills in the prescribed form in accordance with the instructions given in the acceptance of the tender by a cheque on a Government Treasury or a Branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business. The appellant after effecting deliveries of the goods, submitted bills in the prescribed printed form which contained the sentence that "Government should pay the amount due to the appellant by cheque" but the appellant did not request or write to the Government, in what way the payment by cheque was to be made by Government to the appellant. After submission of the bills, cheques through post from the Government drawn on a Government Treasury or on a branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business. The said cheques were received at Baroda by the appellant from the Government, along with a memo stating:

"The undersigned has the honour to forward herewith cheque....No.....dated....in payment of the bills noted below."

(c) Then followed a tabular statement setting out the number, amount and date of the bills. On the top of the memo there was a direction that "it be immediately returned to the Controller of Supplies Accounts, with the acknowledgment form on the reverse duly signed and stamped". The acknowledgment form was expressed as follows:

"The undersigned has the honour to acknowledge cheque No....dated.....for Rs. in payment of the bills noted in the first column on the reverse."

(d) The payments made by cheques were accepted by the appellant unconditionally and in full satisfaction of its claim for goods supplied to the Government. On receipt of such cheques, the appellant endorsed the same and sent them either to Bombay or Ahmedabad in the Banking account of the appellant at such places.

(e) By his orders dated September 20, 1945, and March 16, 1943, for the assessment years 1942-43 (account year being calendar year 1941) and

1943-44 (account year being calendar year 1942), the Income Tax Officer held that the sums of Rs. 1,98,643/- and Rs. 4,96,365/- being the amount of the cheques received by the appellant for the goods supplied to the Government of India amounted to receipt of income, profits and gains in British India during the said accounting years inasmuch as the said cheques were drawn on banks in British India and were liable to tax.

(f) On appeal to the Appellate Assistant Commissioner from the said orders of the Income Tax Officer, the Appellate Assistant Commissioner confirmed the orders of the Income Tax Officer and dismissed the appeals.

(g) From the said decision of the Appellate Assistant Commissioner, the appellant appealed to the Income Tax Appellate Tribunal. The Tribunal, however, held that even though the appellant did not write to the Government saying that the cheques be sent by post, there was an implied request to the Government to send the cheques by post, observing that where a person in Baroda writes to another in Delhi to send the money due to him by a cheque, there is an implied request to send the cheque by post. The appellant could not have intended that the cheques would be sent otherwise than by post and it was not the case of the appellant that the cheques received from the Government were delivered by hand on behalf of the Government to the appellant at Baroda. In that view of the matter, following the decision of the Supreme Court in *The Commissioner of Income Tax, Bombay South, Bombay Vs. Ogale Glass Works Ltd., Ogale Wadi*, the Tribunal held that the amounts of the cheques referred to above were received by the appellant in the taxable territories and as such the appellant was liable to tax u/s 4(1)(a) of IT Act.

(h) The appellant applied for Special Leave to appeal against the said order of the Tribunal under Article 136 of the constitution of India, which was granted.

(i) The Supreme Court, reiterating the principle, as enunciated in *The Commissioner of Income Tax, Bombay south v. Ogale Glass Works Ltd.*, (Supra) expressed in paragraph 18 (page 1165) thus:

"18... The stipulation in the contract between the appellant and the Government was that the payment would be made by cheques. The Government of India was located in Delhi and the cheques would be necessarily drawn by it from Delhi. Could it be imagined that in the normal course of affairs the cheques thus drawn in Delhi would be sent by a messenger to Baroda so that they may be delivered to the appellant in Baroda? Or that the officer concerned would, come to Baroda himself and hand the same over to appellant in Baroda? The only reasonable and proper way of dealing with the situation was that the payment would be made by cheques which the Government would send to the appellant at Baroda by post. According to the course of business usage in general which appears to have been followed in this case, the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles. If that were so, there was imported by necessary implication an implied

request by the appellant to send the cheques by post from Delhi thus constituting the Post Office its agent for the purposes of receiving those payments."

(j) The Supreme Court ultimately expressed the opinion that the Income -tax Appellate Tribunal was right in the conclusion to which it came and accordingly dismissed the appeals.

14. In *Indore M.U. Mills v. I.T. Commissioner (Central) Bombay* AIR 1966 SC 1466, the assessee/appellant, during the relevant accounting years, was a non-resident. It carried on the business of manufacturing textiles goods at Indore then situated in an India State and had offices at Indore and Bombay.

(a) The assessee supplied goods to the Indian Stores Department, Government of India, under purchase orders placed by the latter with the assessee at Indore. Duplicate copies of the assessee at Indore used to be sent to the Government of India in British India. The goods used to be inspected at Indore by an inspecting officer of Government and the inspection certificates were issued at Indore. One of the conditions of the contract was that the delivery would be FOR. Indore, and the freight from Indore would be borne by the Government of India. The goods used to be despatched by railway from Indore station and the railway receipts used to be made out in the name of the representative of the Government. There were two types of purchase orders, namely, (1) Purchase war order, and (2) bulk purchase order, Clause 9 of the bulk purchase order was in these terms:

"9. Payment: Unless otherwise agreed " Received Payment

One anna receipt

Stamp on original only

Contractor's

Signature."

(b) Instructions Nos. 13 and 14 with regard to payment were as follows:

"13. If payment is desired to be made to the Contractor's bankers or other parties, the endorsement must be completed on the Bill Form (W.S.B. Form No. 116) and signed separately and the word "Self" scored out;

"in addition, a power of attorney will be necessary in such cases except when payment is desired to a Bank mentioned in the Second Schedule to the Reserve Bank Act.

14. Payment in all cases will be made to the Contractors by the Accounts Officer named in the Acceptance of Tender by means of crossed cheques, unless a specific request is made to the contrary for the issue of an open cheque on the bill."

The assessee used to make out bills in the prescribed form. The receipt clause in

the completed bill used to be in the following terms;

"Please pay by cheque to self on a bank at Indore".

(c) The receipt clause in the bill used to be signed in advance on behalf of the assessee on an one anna Stamp. The bills with the signed receipts of the assessee then used to be sent to the Controller of Supplies, New Delhi after the latter was debited with the amounts of the bills in the books of the assessee. On receipt of the bills, the Government of India used to draw cheques on the Reserve Bank of India, between the parties, payment for the delivery of the stores will be made on submission of bills in the prescribed form in accordance with the instructions given in the acceptance of Tender by cheque on a Government Treasury in British India or on a branch in British India of the Reserve Bank of India or the Imperial Bank of India transacting Government business."

(d) From the judgment of K.T. Desai, J., it appeared that in the High Court, both parties agreed that the aforesaid C1.9 was one of the terms, on which all the goods were supplied by the assessee. In paragraph 2 of Petition for Leave to appeal to the Supreme Court and paragraph 3 of the appellant's Statement of Case also, the assessee, it seems, stated that the contracts between the parties were subject to the aforesaid C1.9. The prescribed form of the bill (Form No.WSB 116) which the assessee was required to submit to the Government of India, Department of Supply, contained inter alia, the following receipt clause:

"Please pay by cheque

to Self/Bank on Bank/Treasury

at.....

Contractor's Signature."

Bombay in favour of the assessee and used to send them by post to the assessee at Indore. On receipt of the cheques, the assessee used to credit the Controller of supplies in its books with the amount of the cheques, and then used to deposit the cheques in their account with the Imperial Bank of India, Indore, and thereupon, the Bank used to credit the assessee in the aforesaid account with the amount of the cheques.

(e) The question that arose was whether, on those facts, the profits of the assessee, a non-resident, in respect of the supplies were received by the assessee in British India and, therefore, taxable under Sections 4(1)(a) of IT Act.

(f) Before the Appellate Tribunal and at all stages of the assessment proceedings, the contention of the revenue authorities was that the profits were received at Bombay where the cheques of the Reserve Bank of India, Bombay were encashed. The Appellate Tribunal negatived the said contention and held that the amounts of the cheques were received by it (assessee) at Indore.

(g) On the application of the Commissioner of Income Tax Central Bombay, u/s 66(1) of the IT. Act, the Tribunal referred the following question of law to the Bombay High Court:-

"Whether the assessee-company is liable to pay tax in the taxable territories on the ground that the sale proceeds, which included the profit element therein, were received in taxable territories?"

(h) The High Court of Bombay answered the question in the affirmative holding that the cheques were received by the assessee through its agent, the Post Office in British India and the revenue authorities were entitled to urge the said contention for the first time in the High Court.

(i) There was an appeal to the Supreme Court, on a Certificate being granted by the Bombay High Court.

(j) Of the two questions, which arose for consideration before the Supreme Court, Question No.I alone is relevant for our present purpose and it reads as under:

"Was the post office, the agent of the assessee to receive the cheques representing the sale proceeds on its behalf and did the assessee, consequently receive the sale proceeds through its agent in British India?"

(k) The Supreme Court, after referring to catena of decisions on the subject, ultimately expressed its opinion in paragraph 10 (page 1470) as below:

"(10)... We are satisfied that the Post Office was the agent of the assessee for the purpose of receiving the cheques representing the sale proceeds and the assessee received the sale proceeds in British India where the cheques were posted, and consequently, the profits in respect of the sale were taxable u/s 4(I) (a). The High Court, therefore, rightly answered the question in the affirmative."

15. In *Annada Prasad v. State* AIR 1989 Orissa 130, the petitioner serving as Medical Officer in the Primary Health Centre, Kotpad, in the district of Koraput, made an application to take the entrance Examination for selection of candidates for undergoing two year P.G. Course in one of the Government Medical Colleges in the State, pursuant to admission notice, which stipulated that applications in the prescribed form should reach the Convenor-Principal, MKCG Medical College, Berhampur, by 30.5.1988, during office hours by registered post only. He posted his application on 27.5.1988 at the post Office located in the campus of MKCG Medical College, Berhampur. Though the post-office is located at a distance of 100 yards from the office of the Convenor-Principal, the application sent by registered post was received in the office of the Convenor only on 1-6-1988. His application was treated as not to have been received within the time stipulated that is, by 30-5-1988. Hence he was not allowed to take the examination.

(a) The petitioner filed a Writ Petition for declaration that his application, on the facts and in the circumstances of the case should be deemed to have been

received in the office of the Convenor by the stipulated date and for a mandamus or an appropriate order directing the opposite parties to admit him to the course.

(b) The short question that arose for consideration was whether, on the facts and in the circumstances of the case, the application was received on 27-5-1988 or 1-6-1988.

(c) Learned counsel appearing for the petitioner contended that when the admission notice, as per Annexure 5 stipulated that application should be delivered by despatching the same by registered post only and not by any other manner", the post office acted as the agent of the addressee and delivery to the post-office on 27-5-1988 was delivery to the Convenor on that date.

(d) Learned Additional Government Advocate appearing for the opposite parties, however, submitted that the petitioner should have despatched his application sufficiently ahead of time taking into account the postal delays that sometimes occur. The opposite parties were not responsible for the delivery of postal article on 1-6-1988, there was no illegality in the rejection of the application.

(e) In consideration of the projection of the rival submissions, as above, the attention of the Division Bench of the Orissa High Court and been invited to the various decisions of the Supreme Court (as referred to in the previous paragraphs). The Principle, which the said Division Bench culled out from those decisions, is getting reflected in paragraph 3 (page 131) as below:

"....Where delivery can be made in a mode at the option of the sender, the agency through which delivery is made acts as the agent of the sender whereas if delivery is made by way of despatch in the mode stipulated or prescribed by the addressee, the agency through which the article is dispatched act as the agent of the addressee."

(f) After evolving the principle, as above, what the said Division Bench said in the case before it, as reflected in paragraph 5 (page 132), which is relevant for our present purpose, reads thus:

"5. Para 6.3 of the prospectus as well as the admission notice stipulated that the application could only be sent "by registered post only and not by any other manner."

Hence, the petitioner could not have (been)-(sic) delivered his application in the office of the Convenor even if he wanted to. He had to post and did post in the Post Office located inside the campus of the College barely 100 yards away from where the office of the Convenor is located. By requiring the applicant to send the application through post, the Convenor nominated the Post Office as his agent. Therefore, if the application was received in the office of the Convenor on 1,6.88, the petitioner cannot suffer. It should be deemed to have been delivered on 27.5.88. Having regard to the distance that the letter was to travel, posting three days before cannot be considered to be unreasonable. The petitioner, therefore, should not suffer for the time the letter took in its journey of 100

yards from the post office to the office of the Convenor."

16. In the case covered by the former Division Bench (W.A. No. 1347 of 1994 - K. Maheswari v. The Secretary, Selection Committee and Anr.), the appellant-petitioner was an applicant seeking admission to the First Year Bachelor of Physiotherapy Course for the academic year 1994-95. As per the notification issued and instructions to candidates, applications were required to be submitted on or before 15.7.1994 at 5.30 PM to the Secretary, Selection Committee, Sabarmathy Hostel, Kilpauk Medical College Hospital Campus, Madras - 600 010, with an option to the applicant to submit the application either in person or by registered post. The appellant sent her application by registered post on 14-7-1994 from Gingee Post Office and the same was delivered to the addressee/ Selection Committee on 19-7-1994.

17. In the case covered by the latter Division Bench (W.P. No. 14308 of 1994 - A. Arul Latha Gold v. The Government of Tamil Nadu and Ors.)(See 1995-I-CTC 5),the petitioner was an applicant for B.S.M.S. Course. Clauses 7 and 8 in the prospectus contained stipulations as respects the mode of despatch and delivery of the application forms by the intending candidates and also the time, within which the applications should reach the Directorate.

(a) Clause 7 of the prospectus reads as follows:

"7. Completed application with enclosures (securely stitched to it) should be sent by registered post or delivered in person duly superscribed and addressed as follows and reach Directorate on or before 5.00 P.M. on 6th June, 1994.

"Application for Admission B.S.M.S/B.H.M.S./B.A.M.S. Courses".

(As the case may be)

To:

The Director of Indian Medicine and Homeopathy,

Arignar Anna Government Hospital of Indian Medicine Campus, Arumbakkam, Madras 106.

Candidates who are employed should send their applications through proper channel".

However, the last date for receipt of applications, as initially prescribed, was subsequently extended till 5.0 P.M. on 27.6.1994.

(b) Clause 8 of the prospectus reads thus:

"8. Incomplete applications and applications received after the due date and time will be rejected summarily/"

(c) The petitioner chose to send her application by registered post. She posted the application in Neyoor P.O. on 22.6.1994 and obtained a receipt bearing

registration number 1022. The application so sent reached the Directorate on 29.6.1994, that is, beyond the targeted date.

18. Thus, it is crystal clear that the applications sent by the respective candidates by registered post, much earlier to the last date for receipt of applications, in the cases covered by both the Division Benches had been received by the respective addressees, beyond the targeted date. As already indicated, both the Benches considered certain decisions of the Supreme Court, as also the decision of the Division Bench of Orissa High Court - Common Denominator decision - for arriving at the conclusions.

19. In the case covered by the former Bench the prayer in the Writ Petition(W.P.No.15518 of 1994) was for issuance of a Writ in the nature of Mandamus directing her admission to the First year Bachelor of Physiotherapy Course for the academic year 1994-95 against free seat in any one of the self-financing institutions at Madras or any other private self-financing institution conducting B.P.T. Course, against a free seat, within a specified date.

(a) Learned single judge dismissed the said Writ Petition, leading to the filing of Writ Appeal, which had been rejected by the former Bench by order dated 11-11-1994.

(b) The former Division Bench distinguished the Common Denominator decision of the Supreme Court referred to above, by stating that they related to commercial contracts between the contracting parties and no third party or public interest was involved. As respects the common denominator decision emerging from the decision of the Division Bench of Orissa High Court, the distinguishing feature brought about was that was a case, in which the applications were invited only by registered post and not by any other mode and such a situation did not at all arise in the case before the said Division Bench.

(c) The said Bench penned down the arguments emanating from learned counsel for the appellant, as well as its rejection of such a submission, in paragraph 5 of the order, which is reflected as below:

"5. However, learned counsel appearing for the appellant submits that when the Selection Committee has accepted Post Office as an agency through which applications could be sent the moment the application was handed over to the Post Office, prior to the last date fixed, it must be deemed to have been submitted to the Selection Committee on the date it is handed over to the Post Office. As the petitioner has handed over the cover to the Post Office to be sent through registered post on 14.7.1994, the application must be deemed to have been filed well within time irrespective of the fact that it was delivered after 15.7.1994. We find it very difficult to accept this submission. The notification, as already referred to, apart from giving option to the candidates to send applications through post, it further specifically provides that the last date for receipt of the applications is 15.7.1994 at 5.30 P.M. The notification does not fix two dates; one for those who deliver the applications in person and another for

those who send the applications by post. Therefore, whenever a notification calling for applications fixes the date and time within which the applications are to be received irrespective of the fact whether such applications are sent through Post or by any other mode, as long as the same are not received within the time and date fixed, the same cannot be considered as having been received on the date it was handed over to the Post Office."

20. The latter Division Bench, however, lost sight of the crux of the principle, as evolved by the Common Denominator decisions emerging from the Apex Court of this Country, as well as the decision of the Division Bench of the Orissa High Court. For the sake of emphasis to drive home the point, the principle as evolved in those decisions, may be reiterated here: The principle is, where delivery can be made in a mode at the option of the sender, the agency through which delivery is made, acts as the agent of the sender; whereas, if delivery is made by way of despatch in the only mode stipulated or prescribed by the addressee, the agency, through which the article is despatched, acts as the agent of the addressee.

21. The principle, as understood by the latter Division Bench, is getting reflected by what is penned down in paragraph 11 of its order dated 29.11.1994, which is couched in the following terms:

"11. We are bound to follow the principle laid down by the Supreme Court in such clear terms. It is, therefore, obvious that the Post Office acted as the agent of respondents 1 to 3 when it received the application sent by the petitioner by registered post on 22.6.1994. When the second respondent had included clause 7 in the prospectus, that by itself would amount to a nomination by the second respondent of the Post Office as its agent. Consequently, the receipt of the application by the agent would amount to the receipt of the application by the Principal. In fact in clause 7 of the prospectus, an option is given to the candidate to deliver the application either to the agent or to the principal. In this case, the petitioner being the candidate, having chosen to deliver the application to the agent as mentioned in clause 7 of the prospectus cannot be deprived of her right to be considered for selection, just because the agent of the second respondent chose to pass it on to the principal only on 29.6.1994 which was after the prescribed date. When the agent received the application on 22.6.1994, it was very much within the time prescribed by the prospectus and the principal viz., the second respondent is bound to consider that application."

22. In the case, which fell for consideration before the latter Division Bench, clauses 7 and 8 in the prospectus, as already indicated, gave an option to the applicant either to send the application in person or despatch the same with all enclosures by registered post, besides stipulating that the application sent by either of the modes should reach the addressee on or before the stipulated date and time or otherwise, the same would summarily be rejected. It is thus clear that if conditions or stipulations are contained in the prospectus with an option being given to applicants to send the applications either in person or by

registered post and if an applicant prefers to send the application by registered post, by handing over the same at a post office some days earlier to the last date of receipt of applications and once such an option is exercised, it goes without saying that as per the principle evolved in the Common Denominator decisions of the Apex Court of this country, as reflected in the decision of the Division Bench of Orissa High Court, such post office must have to be construed to have been constituted as the agent of the sender/applicant and not the agent of the addressee/Directorate. Only if the post office is being constituted as the agent of the addressee, the receipt of application by such agent, long prior to the last date of receipt of application by the Principal / addressee / Directorate. In such a situation, the decision arrived at by the latter Division Bench of this Court cannot at all be stated to be in tune with the principle, as evolved by the Supreme Court, as indicated earlier.

23. In the case on hand, according to the Notification and instructions to candidate in the prospectus, the completed application form with enclosures may be delivered in person or sent in the cover provided, by registered post to the Secretary, Selection Committee, so that the application sent by either of the modes, reach the addressee before the targeted date and time, namely, 15th July, 1994 before 5-30 PM. The petitioner applicant, however, chose to send the application by registered post, through Kothagiri Post Office on 11-7-1994, four days prior to the targeted date namely, 15-7-1994. Having opted to do so, it goes without saying that, according to the principle, as evolved by the Supreme Court in the decisions cited supra, Kothagiri Post Office must be construed to have been constituted as the agent of the petitioner/sender/applicant and not the agent of the addressee/ the Secretary, Selection Committee.

24. Apart from the principle of agency, the facts of the case on hand cannot at all be said to have satisfied the principle underlying Section 50 of the IC Act and Illustration (d) thereto. A contract may be discharged by performance in the manner or mode indicated and the time within which the same is to be performed. In the case on hand, the twin conditions of mode of performance and time within which it is to be performed must have to be satisfied or otherwise, such performance will not be complete, even on the assumption of existence of a contractual relationship between the petitioner/applicant/sender and the addressee/Secretary, Selection Committee. No doubt true it is, as indicated earlier, the petitioner/applicant discharged one of the conditions, that is to say, mode of performance and not complied with the other condition, namely, the time within which the same has to be performed.

25. Worthy it is to mention at this juncture, the decision in the case of G. Sumathi Vs. The Director of Medical Education, Madras and others, , rendered by a Division Bench consisting of Bakthavatsalam, J. besides one of us (Raju, I), which happened to consider, on the norms and procedure in applying for admission for a particular professional course , certain decisions of this Court as well as the High Court of Andra Pradesh, as reflected in paragraph 11 (page 351)

thus:

"11. It is settled law that while considering the admission for a particular professional course, norms and procedures have to be construed properly and applicants have to comply with the conditions therein. It has been held by a Division Bench of this Court in Rathnaswamy, Dr. v. Director of Medical Education that the rules and norms to be strictly and solemnly adhered to. It has been approved by a later Division Bench which is reported in Suryanarayana Raju, G. Dr. v. The Government of Tamil Nadu & Other. In Romini Susan Kurian v. State of A.P. and Ors., it has been held as follows:

"...The prospectus issued by the University binds the candidates who seek admission and unless any portion of the prospectus is held to be illegal, Court cannot direct either amendment of the prospectus or consideration of the claim of a student in a manner otherwise than that provided in the prospectus...

In view of the settled position in law, if the conditions and the norms in the prospectus issued in this case are looked at, we are of the view that the petitioner herein cannot complain about her non-selection."

26. In the light of the principle evolved, as above, it cannot be stated that the petitioner, in the instant case, had complied with the stipulations or conditions of the prospectus in its entirety.

27. Thus, viewed from any angle, as projected above, the petitioner has to necessarily face dismal failure, the consequence of which is, the Writ Petition deserves dismissal.

28. In the result, the writ petition is dismissed. There shall, however, be no order as to costs, in the circumstances of the case.

Raju, J.—I have had the privilege of going through the opinion of my esteemed brother M.S.Janarthanam,J., directing the dismissal of the above writ petition. I entirely agree with the conclusions of my learned brother. But, at the same time I would like to add something more in support of the very conclusions.

2. The sum and substance of the issue raised in this case is as to the applicability of the principle of "agency" as available in the field of contractual law to the case of admissions to professional courses and a situation like the one on hand involving an obligation on the part of an applicant to such courses to submit his application so as to reach the concerned authority on or before a specified date and within the time stipulated therefor. On the very issue, as noticed by my learned brother judge there are two recent decisions available of which the one rendered in W.A. No. 1347 of 1994 on 11-11-1994 (R. Maheswari v. The Secretary, Selection Committee, Tamil Nadu Professional Courses Medical, Para-Medical 1994-95, Madras-10) by a Division Bench consisting of their Lordships The Hon"ble the Chief Justice K.A.Swami and T. Somasundaram, J. was the earliest in point of time. The learned Judges have also held therein, while repelling the plea made on behalf of the petitioner relying upon the principle of

"agency", as hereunder:-

"There is one more reason why we should prefer this interpretation. In the case of recruitment to public applications are received and if it is held that it is sufficient if the application is sent by post irrespective of the fact whether it is delivered to the addressee before the last date and time fixed for receipt of the applications as long as it is posted before the last date fixed for receipt of applications, it would upset the entire scheme of the examination and also the scheme of admission to the colleges, because these are required to be done within the time frame. It is also possible that an application sent through registered post before the last date, sometimes it may be delivered even after a month or so. such being the uncertainty, the Selection committee or the Recruiting Body cannot be made to wait indefinitely. There is also the possibility of such applications being lost in the transit and not delivered."

3. Thus, in my view also, in the case of admissions of colleges and recruitment's, there is no contractual relationship involved and as rightly emphasised by the Division Bench, public interest and interest of such of those applicants who submitted their applications so as to reach the concerned authority within the stipulated time are also involved. The application of the principle of "agency" would result in undermining the very time schedule fixed for finalising selections for admission and making the very selections subject to the vagaries of the postal services and virtually lead to a nebulous situation where finality at the earliest is desirable in public interest.

4. That apart, the stipulation in the prospectus enabling the applicants to have their applications delivered either in person or sent by Registered Post is meant to ensure to such applicant proper evidence of safe delivery within the stipulated time and does not involve any nomination of the postal authorities, as the agents of the authorities concerned with the selection. The stipulation in this regard, to my mind, is more a matter of condition, which also operates as a condition precedent for the very entertainment and consideration of the application itself. Unless the applicant concerned also ensures the delivery of the application within the stipulated time, to the concerned authority, whatever may be the mode of such delivery which the candidate himself has chosen to adopt or avail out of the alternatives available to him, the applicant forfeits his right to have his application considered by the Competent Authority. Mere personal hardship to the applicants or general notions of justice or abstract considerations of sympathies alone cannot be an effective substitute to exonerate an applicant from his obligation to ensure the delivery of his application to the concerned Selection Authority within the stipulated time, equally, the normal expectation of the applicant that his application may reach the Authority in time or the actual lapse in the postal service resulting in the belated delivery of the envelope containing the application cannot be used as lever against the Selection Authorities. Unless an applicant is able to have his application delivered to the Authority concerned within the stipulated time, the the Authorities concerned

with the selection are not obliged and have no duty in law to entertain the same for consideration or consider the claims of such an applicant along with the claims of others whose applications were delivered well within time for selection for admission. The decisions of the Supreme Court relied upon by the learned judges of the Division Bench (M.Srinivasan and S.S. Subramani, JJ.) in their order rendered in W.P.No.14398 of 1994 on 29-11-1994 A. Arul Latha Gold Rep. By Father and Natural Guardian K. Ayyappan v. Government of Tamil Nadu and 5 others (1995 (I) CTC 5) will, in my view, have no relevance or application to the case or situation on hand. The decisions of the Supreme Court were concerned more with the fixation of the sites of sale and the receipt of sale consideration for purposes of localising the place of earnings the Income and have nothing to do with the construction of a clause stipulating a condition, the non-fulfillment of which has the effect of denying an applicant the benefit of consideration of his application. The receipt of the application within the stipulated time being a condition for the very exercise of power by the competent Selection Authority, there is neither any scope for such Authority, even if it so desires, to exercise the power in respect of such an application belatedly received nor could this Court compel the exercise of power by such Authority notwithstanding the non-fulfilment of the condition precedent for its exercise. The decision of the Orissa High Court reported in Dr. Annada Prasad Pattnaik Vs. State of Orissa and Others, for the same reason does not lay down, with great respect to the learned judges, the correct principle of law and for my part, I am unable to subscribe to the said view expressed or the view taken by the learned judges of the latter Division Bench in W.P.No. 14308 of 1994, unaware of an equally binding earlier decision of another Division Bench of this Court. On a careful consideration of the ratio of the decisions of the two Division Benches of this Court referred to Supra, the one rendered in W.A.No. 1347 of 1994, is more convincing and preferable to the one rendered in W.P.No. 14308 of 1994, for me. With respect, I would stand by the ratio of the decision in W.A.No. 1347 of 1994.

5. Further, it is seen that adhering to the uniform practice adopted all these years, such as belated applications received after the stipulated time, during this year also, were not taken out of their envelopes and the covers received, as forwarded by the applicants have been retained without opening them and analysing the same with reference to the particulars furnished therein. Before the Division Bench which dealt with W.A. 1347/94 it has been stated that so far as Medical and Para-Medical Courses for which the Selection Committee in question was common, about 2,000 of such covers with applications have been received beyond the stipulated time and have been not opened at all. So far as first year M.B.B.S. Course alone is concerned, it is stated by the learned Advocate General that about 600 and odd such applications including that of the petitioner has been received beyond the stipulated time and the covers were not at all opened. It is by now well settled by the pronouncements of the Supreme Court that in matters of those kind relief cannot be granted to the one who comes to the court alone and cases similar and alike should also be considered on comparative

assessment of merits. If that be the position and if all the total number of such applications have to be considered, it may have an adverse impact on the selections already made and that too in respect of other Medical Courses also. Allowing such exercise to be undertaken at this stage would also be unfair and unjust, apart from the legality of the said course of action. Therefore, I am in entire agreement with the decision of Janarthanam, J. that this writ petition should be dismissed.

W.P. No. 13167 of 1994

Srinivasan, Janarthanam and Raju, JJ.

Per Curiam: In view of the majority opinion expressed, the writ petition is dismissed. There will be no order as to costs.