

(2006) 07 GUJ CK 0061

In the Gujarat High Court

Case No : Special Civil Application No. 11157 of 2006

Vinodkumar Rasiklal Vahoniya

APPELLANT

Vs

University of Bhavnagar and Others

RESPONDENT

Date of Decision : 13-07-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 15(4), 16, 29

Indian Medical Council Act, 1956 — Section 19A, 33

Indian Medical Council Regulations, 2000 — Rule 1, 23(2), 3, 4, 4(1)

Postgraduate Medical Education Regulations, 2000 — Regulation 9, 9(2), 9

Citation : (2006) 07 GUJ CK 0061

Hon'ble Judges : R.S. Garg, J;M.R. Shah, J

Bench : Division Bench

Advocate : Hemant K. Makwana, for Petitioner 1, K.B. Trivedi, AG and Sangeeta Vishen, AGP as Amicus Curiae, for the Appellant; J.R. Nanavati and A.R. Thacker, for Respondents 1 - 2 and N.V. Solanki, for Respondent 3, for the Respondent

Judgement

R.S. Garg, J.—The petitioner Vinodkumar Rasiklal Vahoniya being dissatisfied by non-fructification of his desire/strong will to secure admission in Post Graduate Degree Course run by the respondent no. 1 University of Bhavnagar, is before this Court with a challenge to and submission that admission to postgraduate course other than M.CH. & MD, specially, Rules 4[1], 4[2], 4[3] and 5.4[a] and 5.4[b] be declared as unconstitutional being arbitrary, as they enable Bhavnagar University to convert a reserved seat, reserved for Scheduled Tribe candidate into unreserved seat and that a writ be further issued that the petitioner is entitled to admission in postgraduate course (Medicine) and that admission of respondent no. 3, namely, Dr. Ripal H. Dhariya is contrary to the provisions of Article 15[4] and the policy of the State in relation to reservation and admission to reserved candidates.

2. It is to be noted that respondent no. 1 Bhavnagar University [SUniversity? for short] started imparting education in Medical Courses since 1996 and was recognized as such by Medical Council of India. The University declared P.G.

Medical Courses in various subjects other than M.Ch. & D.M., colleges of the above courses are affiliated with Bhavnagar University. For the present session, rules were made effective from January, 2006. The University declared detailed admission programme along with selection criteria for selection of the candidates to the P.G. Medical Courses. Copy of detailed programme along with Ordinance and detailed Rules of admission has been annexed by the petitioner at Annexure:A. The petitioner desirous of pursuing studies further made application since after his completion of M.B.B.S. in the year 2004 from B.J. Medical College, affiliated to the Gujarat University. The petitioner claims and the fact is not seriously disputed by the respondents that he belongs to Scheduled Tribe category. Case of the petitioner is that he was called for interview on 19.5.2006 in the office of the Dean of Medical College, Bhavnagar and after he was selected, he was asked to deposit a sum of Rs. 9,850/- towards fees. It is further submission of the petitioner that Bhavnagar University had prepared and declared merit list of 2006 pertaining to different categories. Apart from the first merit list, they prepared second merit list of the candidates who are coming from other universities of Gujarat and third merit list was also prepared pertaining to candidates who had passed their examinations from the universities of other States. According to the petitioner, his name was included in the second merit list, that is, a candidate who had passed from some university of Gujarat and not from the respondent University. It is an assertion of the petitioner that he was called for interview, he was given confirmation letter, but immediately after issuance of the letter, he was called back and was denied admission on the ground that he was not eligible having not passed from the respondent University.

3. The petitioner says and submits that the rules framed by Bhavnagar University relating to admission so far as they propose to dereserve a seat, reserved for Scheduled Tribe candidate are per se illegal, contrary to the provisions of the Constitution of India and the State policy relating to reservation. His submission is that institutional preference may not be bad, but the University is not entitled to dereserve a reserved seat on non-availability of an institutional candidate of the reserved category, but is obliged to offer the seat to a student of the same category even if he is a person who has passed from any other University of Gujarat. His submission is that 2 seats in the course of Medicine and Gynecology were reserved by the respondent University for Scheduled Tribe candidates, though the petitioner was comparatively meritorious to the institutional candidate, seat of Gynecology was offered to institutional Scheduled Tribe candidate namely, Pratixa Z. Chaudhari. His submission is that after the seat was offered to Pratixa Z. Chaudhari, other seat ought to have been offered to the petitioner as no other Scheduled Tribe candidate of the University was available, who could compete against the petitioner. Submission is that the Rule of the University, when it says that on non-availability of institutional candidate, seat would stand dereserved, it would be offered to institutional candidate and on non-availability of institutional candidate, seat is to be offered to general category student who has passed from any other University of Gujarat and thereafter, it is

to be offered to the students of university of other State and if none is ready and willing to opt for the subject and the seat still remains un-filled, then, it is to be re-reserved and is to be offered to the students belonging to reserved category, leaves no chance in favour of the petitioner or any other person belonging to the reserved category, because, looking to the number of the candidates opting for P.G. Courses and less number of availability of seats, it is almost impossible or it would be a chance one in million. The submission is that the University is entitled to give preference to its candidate in comparison to an outsider if in-house/in-University candidate has secured more than cut-off marks and less than what the outsider has obtained but university cannot dereserve the seat nor such seat can be offered to general category student. Further submission in the writ application is that once a seat is reserved for a particular class/community, then, dereservation is not permissible on the ground of institutional preference, because, institutional preference is to be given to a person, who belongs to same class or category.

4. It is submitted that the manner in which the University has framed Rules, would clearly show that they are proposing filling of the seats by their candidates only and they are, in fact, not leaving any chance in favour of any outsider.

5. The petitioner submits that the Rules be declared ultra vires the policy of the State Government, different judgments of the Supreme Court and the Rules framed by the Medical Council of India.

6. The University in its reply has submitted that in accordance with the policy of the Medical Council of India, Rules were framed and in any case, the petitioner, who had applied for admission even after knowing the Rules, cannot be allowed to challenge the Rules after the game is over. It is also submitted by the respondent no. 2, so also by the respondent no. 3 [candidate, who has been offered admission] that the University under the right of admission to in-institutional candidate or right of preference, is entitled to close the doors for every outsider. It is further submitted that once the University selects particular criteria and observes the same for long, then, it cannot be allowed to be challenged by anyone. The respondents, in their separate replies have submitted that respondent no. 3 is all through meritorious candidate, who stood third in the general category merit list, but finding that in-institutional candidate would not be available in the course of Medicine, she gave up her right and immediately thereafter, she was offered seat in the subject of Medicine. It is the submission of the respondent no. 3 that if the petition is allowed at this belated stage, then, her admission would be jeopardized and the entire selection list would stand disturbed. It is also submitted that the petitioner is not entitled to any benefits, because, he is not in-University candidate. Placing reliance upon the Rules framed by Medical Council of India, it is submitted by the respondents no. 2 that as they are strictly observing the Rules and as there is no violation of any policy of the government, Constitutional mandate or the judgment of the Supreme Court, the petition be dismissed.

7. Learned Counsel for the petitioner, after taking us through Rules 4 and 5 submitted that if Rule 4 applies to the general category and Rule 5 of the Rules of respondent University applies to the reserved category, then, both the Rules could not be mixed to give extra benefit to in-institutional or in-University candidate. It is submitted that institutional preference can be given to a person if he has secured above cut-off marks, but less than the marks obtained by any outside competitor, the submission is that if inside candidate is not available, then Rule relating to dereservation cannot be put or used as a sword against rights of the petitioner, because, he is entitled to admission against the seat which is reserved for Scheduled Tribe.

8. Learned Counsel for the University, placing reliance upon Rule 9 of the Rules framed by the Medical Council of India, submitted that a perusal and fair understanding of the Rules would provide that only the University is entitled to give preferential treatment to its own students and in case, the respondent University has opted for particular mode or selection and has accordingly framed Rules, then, nobody can be allowed to challenge the said Rules. Learned Counsel for respondent no. 3 submitted that on a fair reading and understanding of Rule 9 of Medical Council of India Rules, 2000, it would be clear that 50% quota reserved for in-institution candidates cannot be disturbed by any outsider and the University would be entitled to refuse issuance of the admission form to any outsider. It is also submitted that while giving preference to reserved category student of the same University, University finds a suitable candidate, it can admit student in the course, but in the eventuality of non-availability of such candidate, the seat can, justifiably be dereserved, because, by dereserving the seat, the University is referring to the merits of the student. Placing reliance upon certain judgments of the Supreme Court, it is submitted that in-institutional preference is not illegal and in any case, preference can always be given to the institution candidate in comparison to an outsider and if the University is dereserving a seat to give preference to its meritorious candidate, then, an outsider belonging to reserved category cannot raise hue and cry nor can create much ado about nothing.

9. The petitioner has filed his rejoinder-affidavit, reiterating his submissions with further submission that Article 15[4] and Article 29 of the Constitution cannot be allowed to be violated on the ground of institutional preference, because, constitutional provisions are of paramount consideration and nobody can be allowed to violate the said policy of the government.

10. We have heard the parties at length. Both the parties have placed their strong reliance on the judgments of the Supreme Court, which are in the matter of Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, (1984) IILLJ481SC , A.I.I.M.S. Students Union Vs. A.I.I.M.S. and Others, and celebrated judgment of the Supreme Court in the matter of Saurabh Chaudri and Others Vs. Union of India (UOI) and Others, .

11. Placing reliance upon these judgments, Mr. J.R. Nanavati, learned Senior

Counsel for the respondent University and Mr. Solanki, learned Counsel for respondent no. 3 submit that if there is a presumption of constitutionality in relation to an institutional reservation and no undue mileage is sought by the University, then, such policy as adopted by the University cannot be held to be ultra vires. On the other hand, Mr. Makwana, learned Counsel for the petitioner, seeking shelter under the very same judgments submits that institutional preference should be based on a reasonable and identifiable classification and if such preference is a matter of State policy and if it can be invalidated in the event of it being violative of Article 14 of the Constitution, then, the Court can always interfere in the matter. His submission is that he is not challenging institutional reservation, but his challenge is to the Rules which virtually put an absolute ban on the entry of outsiders. His submission further is that if the petitioner is to be thrown out on the availability of in-institution candidate of the reserved category, then, he cannot raise any grievance, but in case, an unequal of reserved category is treated equal with unreserved or general category, then, his fundamental rights stand violated.

12. We have heard the parties at length. So far as the judgments in the matter of AIIMS Students' Union [supra] and Dr. Pradeep Jain [supra] are concerned, these have been considered in detail by the Apex Court in the matter of Dr. Saurabh Chaudhari. Chief Justice V.N. Khare, [as he then was], speaking for himself and for Hon'ble Shri R.C. Lahoti and Agrawal, JJ, observed as under:

The ideal situation, although it might have been to see that only meritorious students irrespective of caste, creed, sex, place of birth, domicile/residence are treated equally but history is replete with situations to show that India is not ready therefor. Sociological condition prevailing in India compelled the makers of the Constitution to bring in Articles 15 and 16 in the Constitution. The said articles for all intent and purport are species of Article 14 which is the genus in a sense that they provide for exception to the quality clause also. Preference to a class of persons whether based on caste, creed, religion, place of birth, domicile of residence is embedded in our constitutional scheme. Whereas larger interest of the country must be perceived, the lawmakers cannot shut their eyes to the local needs also. Such local needs must receive due consideration keeping in view the duties of the State contained in Articles 41 and 47.

Hon'ble Judge further observed as under:

Constitutional interpretation is a difficult task. Its concept varies from statute to statute, fact to fact, situation to situation and subject-matter to subject-matter. Perceptions are yet to be perceived by the court which would meet all situations while laying down emphasis for achieving excellence in all spheres of life keeping in view Chapter IV-A of the Constitution of India which provides for fundamental duties, circumstances and compulsions faced by the State in this behalf and led the courts to uphold a statute providing for reservation for a special class of people. Mostly they suffer from disability either of belonging to an oppressed community or by way of economical, cultural or social imbalances. The courts

shall all along strive hard for maintaining a balance.

The Apex Court, through Hon^{ble} Shri V.N. Khare [C.J. as he then was] also observed as under:

Reservation by institutional preference is not ultra vires Article 14. Article 14 forbids class legislation but does not forbid reasonable classification, which means: [1] it must be based on reasonable and intelligible differentia; and [2] such differentia must be on rational basis. Hence, the argument, whether institutional reservation fulfills the above mentioned criteria or not must be judged on the following:

1. There is presumption of constitutionality.
2. The burden of proof is upon the writ petitioners as they have questioned the constitutionality of the provisions.
3. There is a presumption as regards the State's power on the extent of its legislative competence.
4. Hardship is of a few cannot be the basis for determining the validity of any statute.

The court while adjudicating upon the constitutionality of the provisions of the statute may notice all relevant facts whether existing or conceived. The court may therefore notice the following:

[i] The State runs the universities.

[ii] It has to spend a lot of money in imparting medical education to the students of the State.

[iii] Those who get admission in postgraduate courses are also required to be paid stipends. Reservation of some seats to a reasonable extent, thus, would not violate the equality clause.

[iv] The criterion for institutional preference has now come to stay. It has worked out satisfactorily in most of the States for the last about two decades.

[v] Even those States which defied the decision of the Supreme Court in *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, had realized the need for institutional preference.

[vi] No sufficient material has been brought on record for departing from this well-established admission criterion.

[vii] Institutional preference is based on a reasonable and identifiable classification.

[viii] Giving of such a preference is a matter of State policy which can be invalidated only in the event of being violative of Article 14.

[ix] The students who would get the benefit of institutional preference being on identifiable ground, there is hardly any scope for manipulation.

Mr. Justice S.B. Sinha in his separate concurring judgment observed as under:

Article 14 prohibits discrimination in any form. Discrimination as its worst form would be violative of the basic and essential features of the Constitution. The validity of institutional reservation must be judged on the touchstone of the equality clause contained in Articles 14 and 15. Even applying the said tests, institutional reservation cannot be held to be unconstitutional.

Hon"ble Shri Laxmanan, J., in his further concurring judgment observed as under:

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

13. From the judgment of the Supreme Court, it would be clear that reservation by institutional preference is not ultra vires Article 14. Article 14 forbids class legislation, but does not forbid reasonable classification which means [a] it must be based on reasonable and intelligible differentia; and [b] such differentia must be on rational basis. From the observations made by the Constitution Bench of the Supreme Court, it is clear that there is a presumption of constitutionality in favour of the Rules, hardship of a few cannot be basis for determining validity of a statute. It would also be clear from the above judgment that the reservation of some seats to a reasonable extent would not violate equality clause, institutional preference is based on reasonable and identifiable classification, giving up such preference is a matter of State policy which can be invalidated only in the event of being violative of Article 14 and that the student who would get benefit of institutional preference being on identifiable ground, there is hardly scope for manipulation.

14. Rules framed by the respondent University are to be examined on the touchstone laid down by the judgment of the Supreme Court. Before we refer to the Rules framed by the University, we must refer to Rule 9 of the Postgraduate Medical Education Regulations, 2000. Medical Council of India, in exercise of the powers conferred by Section 33 read with Section 19A of the Indian Medical Council Act, 1956 [102 of 1956] with the previous sanction of the Central Government has made the said regulations, which are to be called "Postgraduate Medical Education Regulations, 2000". The said Regulations are to come in force on the date of their publication in the official gazette, it is undisputed that the said Regulations have been published and have been gazetted on 22nd August, 2000. It is also undisputed that the said Regulations still hold the field. The said Regulations have been brought into existence with the laudable object that the postgraduate medical education shall produce competent specialists and/or

medical teachers. Rule 9 of the said Rules/Regulations relates to selection of postgraduate students. It reads as under:

9. SELECTION OF POSTGRADUATE STUDENTS:

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

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

[i] On the basis of merit as determined by a competitive test conducted by the State Government or by the competent authority appointed by the State Government or by the university/group of universities in the same State; or

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

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

[iv] Combination or [i] and [iii]

Provided that wherever entrance test for Postgraduate admissions is held by a State Government or a university or any other authorized examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical courses shall be fifty per cent for all the candidates;

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

15. According to Sub-rule [1] of Regulation 9, all student for postgraduate medical courses are to be selected strictly on the basis of their academic merits. For determining academic merits, university/institution may adopt any of the four procedures provided in Regulation 9[2] for degree and diploma courses. The first procedure for selection is on the basis of merit as determined by competitive test conducted by the State Government or by the competent authority. The second procedure which, in the alternative can be adopted is to observe merits as determined for a central competitive test held at the national level. Third procedure which can be adopted is on the basis of the individual cumulative performance at the Ist, IInd and IIIrd M.B.B.S. examinations, if such examinations have been passed from the same university. Regulation-9 provides for 4th category by combining Clause 1 and Clause 3. It further provides that wherever entrance test for postgraduate admissions is held by the State Government or university or any other authorised examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical course shall be fifty per cent for all the candidates. It further provides that in non-governmental institutions, fifty per cent of the total seats shall be filled by the

competent authority and the remaining fifty per cent by the management of the institution on the basis of the merits. A fair understanding of Rule 9 of Regulations, 2000 of Medical Council of India would make it clear that the university or institution may opt for one of the criterion out of many. In the present case, University says and submits that fifty per cent seats have been dedicated to All India Quota while fifty per cent are reserved for in-institutional candidates keeping in view that merits are not to be sacrificed and the person aspiring to take admission has obtained minimum fifty per cent marks and is fit for admission.

16. Bhavnagar University has proposed Admission Ordinance and Rules for admission to Postgraduate Degree Medical Courses other than M.Ch. & D.M. at the medical college affiliated with Bhavnagar University. The said Ordinance and Rules for admission are effective from 1st January, 2006.

17. Barring constitutional validity of Rules 4.1, 4.2, 4.3 and 5.1, 5.2, 5.3 and 5.4[a] and [b], constitutional validity of other Rules has not been challenged. The said Rules 4 and 5 read as under:

4. Selection: Selection of candidates eligible under Rule 1 for seats under Rule 3.0 will be done category wise on the basis of merits as laid down herein further.

1. With implementation of rules for once a year interview (as per directive of MCI & Supreme Court). Preference will be given to candidates who have graduated from this University and have completed their internship in last two year on or before 31st March of year of admission i.e. For interview of year 2006 preference will be given to the candidates who have completed their internship between 1-4-04 to 31.3.06.

Explanation:

As final M.B.B.S. Exam is conducted twice a year, the batch can be designated as Batch A & Batch A-1, thus batch A1 & B can be included in 1st yearly interview, in second yearly interview batches B, B1 & C can be included and likewise in any circumstances, if any supplementary examination is conducted, then candidate passing in that exam shall be treated along with the candidates passing in one of the two regular exams provided he/she has completed internship in the aforesaid period.

2. After 4.1, the next preference shall be given to the candidates who have passed from this university and have completed internship within 3 years previous to the last date of submission of forms and are not eligible to apply under Rule 4.1.

3. Candidates graduating from any other University located in Gujarat State, not enrolled anywhere in P.G. Courses[Diploma or Degree] will be considered after selection of the candidates in the merit list as per Rule 4.1 and 4.2.

4. Any vacancy after operation of Rule 4.3 shall remain unfilled, however, this

provision may be relaxed in the subjects of Anatomy, Physiology, Biochemistry, Forensic Medicine, Preventive & Social Medicine, Pharmacology and Microbiology only at the discretion of the University, only for the candidates graduating from out of State Universities, provided they fulfill other requirements for PG admission in this University.

5. The candidate will be given a choice of subject according to his merit level. He will have to choose registration with residency out of the available choices in different subjects at the time of interview. The allotment of P.G. Teacher will be done by P.G. Committee. No student shall be given P.G. Admission without Residency (or higher post).

6. Seats can only be utilized in the same academic year by 31st May.

5. Seven percent of seats available for P.G. Degree and Diploma under Rule 3 will be reserved for candidates belonging to Scheduled Caste, 15% of seats will be similarly reserved for ST candidates and 27% of seats will be similarly reserved for candidates belonging to Socially and Educationally Backward Class (SEBC) students. The student desiring admissions under SEBC category will have to submit a certificate that they are not included in the creamy layer from the competent authority as prescribed by the Govt. of Gujarat from time to time along with the applications. 3% of seats will be reserved for physically handicapped candidates in each category.

5.1 These seats reserved for the candidates belonging to SC/ST and SEBC recognized as such in the State of Gujarat and not those or whose parents have migrated from other State to Gujarat State.

5.2 For allocation of seats to this reserved a 100 point Roster freshly prepared in June 2003 will be applied. (Govt. of Gujarat Resolution is enclosed along with point roster), for the seats available after DGHS quota.

5.3 Only Resident seats will be considered for calculating reserved seats.

5.4[a] In case the seats reserved under Rule 5.0 remain vacant due to non-availability of the candidates of the specified category up to Rule 4.1 selection, they shall be treated as unreserved seats and will be filled up by the candidates on the basis of merit from those who are eligible as per Rule 4.1 from the same university and if seats remain vacant further will be filled by candidates of other universities of state and lastly from the candidates of the universities of other states.

[b] Of these, unfilled seats will be subsequently re-reserved after operation of 4.1 and if some seats remain vacant due to non-availability of candidates from merit list of reserved candidates, these will be again unreserved for category under 4.2 if thereafter reserved seats remain unfilled it will be again reserved for candidates under Rule 4.3. If still unfilled then it will be unreserved for candidates of category 4.3.

5.5 Candidates seeking admission under Rule 5.0 will have to produce the caste certificate from the competent authority as prescribed by the Government of Gujarat from time to time, and submit it along with the application. The candidates will not be allowed to change the case category thereafter.

5.6 In case of doubt of discrepancy about the caste certificate, decision of the Director, Social Welfare, Gujarat State shall be final.

18. According to Rule 4.1, preference is to be given to candidates who have graduated from Bhavnagar University and have completed their internship in last two years on or before 31st March of year of admission, that is, preference would be given to the candidates who have completed internship between 1.4.04 to 31.3.06. According to Rule 4.2, next preference is to be given to the candidates who have passed from Bhavnagar University and have completed internship within three years previous to the last date of submission of forms and are not eligible to apply under Rule 4.1. Rule 4.3 provides that candidates graduated from any other University located in Gujarat State, if, are not enrolled anywhere in P.G. Course (diploma or degree) will be considered after selection of the candidates in the merit list as per Rules 4.1 and 4.2. A fair understanding and reading of Rule 4.1 would make it clear that it has nothing to do with the reserved category and it really talks of the merits. Similarly, Rule 4.2 on its first blush says that the candidates who could not pass within two years for consideration of their cases under Rule 4.1, but have completed their internship in last three years would come next to the candidates falling in Rule 4.1. There appears to be nothing bad in it. Rule 4.3 on its plain reading would not amount to any discrimination when it talks of consideration of the outsiders after the process of Rules 4.1 and 4.2 is over. Institutional preference is a preference given to the students of the same institution/university, who are above cut-off marks, but below the marks obtained by an outsider.

19. One must not forget the basic distinction between reservation and preference. Reservation may be for whole class, which is just like that a compartment in the rail is reserved for the ladies, gents would not be allowed, but further reservation can be made in favour of old, sick and feeble women and then, authority can always say that preference would be given to sick, old and feeble women, then, other women travellers can be asked not to board the train, but in case, such persons are not available, it cannot be said that no woman would be allowed to enter in the compartment. Reservation is for a class or community. If reserved seat can be filled by a person belonging to the said category, then, none else would be entitled to it and in case, such candidate is not available, then, seat can be dereserved and can be offered to a general candidate.

20. Rule 4, if is read independent of Rule 5, there would appear to be no challenge to its correctness, but when Rule 4 is read with Rule 5, problem starts. Rule 5.1 provides for seats reserved for candidates belonging to SC, ST and SEBC recognized as such in the State of Gujarat and not for those whose parents

have migrated from other States to Gujarat State. Prima facie and even on a deep probe, we do not find any illegality in Rule 5.1. Rule 5.2 says that for allocation of seats to this reserved category a 100 point Roster through the list prepared in June, 2003 will be applied for the seats available after DGHS quota (All India Quota). The problem starts in Rules 5.3 and 5.4. Rule 5.3 says that only Resident seats will be considered for calculating reserved seats and in case of Rule 5.4[a], seats reserved under Rule 5.0 remain vacant, due to non-availability of candidates of a specified category up to Rule 4.1 selection, then, reserved seats shall be treated as unreserved seats and will be filled by the candidates on the basis of the merits from those who are eligible as per Rule 4.1 from the same university and despite this, if seats remain vacant, those will be filled by the candidates of other university or of the same State and lastly from the candidates of universities of other States. This Rule, in fact, means that on non-availability of a candidate belonging to the reserved category of the very same university, a seat would be dereserved, meaning thereby that any outsider belonging to the reserved class or community would not be allowed to compete for the seat which is for reserved category and for which, there is no claim by the in-institution candidate on the ground of reservation.

Rule 5.4[b] provides that after application of Rule 5.4[a], if seat continues to be vacant, then, it would be dereserved and if some seats remain vacant due to non-availability of candidates from merit list of reserved candidates, those would be again dereserved for category under 4.2 and so on.

21. According to the petitioner, if the seats are dereserved and the claim of the petitioner is rejected and thereafter the seat is offered to any other insider on the ground of merits, then, looking to the number of the candidates and less number of seats, seats would not be available to people like petitioner. We had asked the respondent University to file an affidavit that since after the start of the course, how many students who have passed from other universities belonging to reserved category have been admitted in the University, Dr. Ganesh Govekar, In charge Dean of Medical College, Bhavnagar, submitted to us that the reserved category students of other universities like present petitioner have less chances of admission in postgraduate courses or curriculum in Medical College, Bhavnagar. When we read Rule to Mr. Nanavati, he fairly submitted that it is almost impossible for an outsider reserved category candidate to secure admission in view of Rule 5.

22. Mr. Solanki, learned Counsel for the respondent no. 3 [admitted candidate], has submitted that a fair understanding of Rule 9[2][iii] of Medical Council of India Regulations, 2000 would make it clear that the University, in view of the said Rule and the provisions relating to dereservation can refuse to issue any form to an outsider belonging to a reserved category or even to a meritorious candidate of any other university. Though Mr. Nanavaty, learned Counsel for the University did not support the argument as it is too wide in its term, but however, submitted that the University has right to frame rules, accommodate its

students only and none can say that he has a right of admission.

23. We had asked a pointed question to Mr. Nanavati and Mr. Solanki that if a general category candidate gets a chance of his selection in general category of university, yet one more chance in All India Quota and thereafter if he gets yet another chance in case reserved category candidate of the same University is not available and seat is dereserved, then, in such situation, is in-university candidate not given an upper hand. Mr. Nanavati and Mr. Solanki submitted that the petitioner would be entitled to compete in All India Quota and the University from which petitioner has passed out itself has opted for the same Rules. The submission is that the petitioner if is granted admission, then, he himself would be getting third chance and that would be giving him extra preference over the general category. According to them, the petitioner would have first chance in All India Quota, second chance as in-University candidate of his own university and third chance in the respondent University against the reserved seat. Mr. Makwana, on the other hand, submitted that reservation is for a particular seat, for particular class and if an inside candidate is not available, then, in accordance with the policy of the State as reflecting from the Government Resolution dated 15th April, 1991, the seat cannot be dereserved, but is to be offered to a student/candidate of the reserved category who has passed M.B.B.S. Degree examination and satisfactorily completed one year's compulsory in-housemanship [internship] from any recognized medical college in Gujarat as per Rules 6.1, 6.2 and 6.2[a] of Rules governing appointment of Residents at the government colleges and attached teaching hospitals in the State.

24. It would be noteworthy that at the inception, when we asked the learned Counsel for the respondents that whether other students or other universities are required to be joined as parties as our judgment may have far-reaching effect, Mr. Nanavati and Mr. Solanki submitted that as the dispute is in relation to interpretation of admission Rules of Bhavnagar University, none else is required to be joined. We proceeded with the hearing, but at a later stage, we thought that somebody should appear in the matter to represent the interest of the State, because, the matter is relating to State policy. Mr. Kamal B. Trivedi, learned Advocate General, at our request, assisted us. He submitted that the policy of the State as enshrined in its resolution dated 5th December, 1989, so far as it relates to Rule 23[2], has been modified on 15th April, 1991 and the State has observed that in case of non-availability of a reserved category candidate of the Residents, the seat shall be offered to other students of the same category who have passed their examination from the State of Gujarat. His submission is that Mr. Solanki's submission that University can refuse to offer forms to outsiders is misconceived, because, if that interpretation is attached to the Rules of the Medical Council of India, then, some of the Rules framed by Bhavnagar University will become nugatory, because, some of the rules propose admission to the outsiders. The submission, however, is that the government policy is to protect the reserved class and if any institution including the government is providing reservation to the downtrodden or poor class and

community, then, benefit should be widespread and it cannot be withdrawn with twisted approach. Submission is that in Rule 5 of the Rules of the respondent University, though reservation is provided, but the reservation is confined to in-institutional candidate and on his non-availability, reservation would virtually elapse. Submission is that if the government policy is to protect reservation and provide better facilities and congenial atmosphere to reserved class, then, benefit cannot be withdrawn by other rules, if the first provides for the benefit.

25. So far as reservation is concerned, none can say that reservation would not be a policy of the State Government. The Supreme Court, in the matter of Saurabh Chaudhari [supra] has observed that the ideal situation, although it might have been to see that only meritorious students irrespective of caste, creed, sex, place of birth, domicile/residence are treated equally but history is replete with situations to show that India is not ready therefor. Sociological condition prevailing in India compelled the makers of the Constitution to bring in Articles 15 and 16 in the Constitution.

26. According to the Supreme Court, preference to a class of persons based on caste, creed, religion, place of birth, domicile or residence is embedded in our constitutional scheme. Whereas larger interest of the country must be perceived, the lawmakers cannot shut their eyes to the local needs also. The Supreme Court was of the clear opinion that the reservation cannot be done away, because, country and its citizens are still not ready for it.

27. Medical Council of India Regulations, 2000 simply say that for determining academic merits, university/institution may adopt any one of the procedures provided in Regulation-9 both for degree and diploma courses. Out of many, one of the procedure/mode is to be adopted, then, simply because, some mode is adopted, it cannot be said that policy of the reservation would have no application. Once the State Government provides either in its rules, regulations or circulars which have force of law, that a particular policy of reservation is to be adhered to, then, a university run by the State Government cannot violate the mandate issued by the government. Current policy of the State is not to allow dereservation of the seats, but it would be clear that the respondent University in the name of institutional preference is proposing to dereserve a seat on non-availability of Resident/in-institution candidate for a reserved seat.

28. Dereservation of a seat or non-reservation would put a reserved category candidate in competition with general category students. We can take a judicial note of the fact that the reservation policy is for the betterment of those who come from the grass-root level, have no facilities and are still striving to achieve the excellence. If the have's and have nots are treated equal, then, it may offend equality clause. Reservation is for those who cannot compete in the general category. Preference is in the class or category itself, because, it is something beyond reservation. Reserved seats inform the general category that you are outsiders to this category, while preference says to the person belonging to the very same category that he would be out if in-institutional resident

candidate is available. Reservation is for a class or community while preference is for the selected few. In the present matter, Rules 4.1, 4.2 and 4.3, if are applied to the general category only, then, there is nothing wrong in the said Rules, but when Rule 4.1 is allowed to operate in the field of seats reserved under Rule 5, then, it perilously borders unconstitutionality.

29. Rule 5.3, in fact, runs contrary to policy of reservation, because the Rule says that only resident seats will be considered for calculating reserved seats. Rule 5.4[a] would virtually violate the provisions of Articles 14 and 15 of the Constitution and judgment of the Supreme Court so also the Regulations issued by the Medical Council of India. Rule 5.4[a] provides that if a reserved seat remains vacant due to non-availability of the candidates of the specified category up to Rule 4.1, the same should be deemed to be unreserved or the said seat would stand dereserved. In our humble opinion, non-availability of reserved class candidate, who could be given preference would not make seat unreserved. The seat will have to be offered to a person who belongs to the same category if no person is available against him to have preference.

30. Preference, as we have already observed would be available to in-institution candidate, if he has more than cut off marks and even lesser marks than an outsider reserved category candidate. If reserved seats cannot be filled by in-institutional candidate, it cannot be declared to be dereserved. If this policy is allowed, then, an outsider would have no chance of an admission in the respondent University.

31. The manner in which Rule 5, specially Rule 5.4[a] has been framed would violate Articles 14 and 15 of the Constitution of India. It is also to be noted that Medical Council of India has nowhere said that policy of reservation is to be sacrificed in the name of excellence or merits. Comparative merits are to be examined in a class or community and not otherwise.

32. In our humble opinion, Rule 4.3, if it is allowed to be read that any person who graduated from any other university located in Gujarat State will be considered after selection of the candidates in the merit list as per Rule 4.1 and 4.2, and is applied to reserved category, then, such application would be ultra vires the Constitution, but if Rule 4.3 is read for general category candidates, then, Rule is not ultra vires.

33. So far as Rule 5.4[a] is concerned, it is apparently ultra vires the Constitution, it runs contrary to the Rules framed by the State, it runs contrary to the Regulations made by the Medical Council of India and the mandate of the Constitution.

34. During course of the arguments, when we had put a pointed question to the learned Counsel for the University and the admitted candidate that how could a seat reserved for Medicine be offered to the respondent no. 3 before the first counselling was over and how could she refuse the other offer, learned Counsel for the University and admitted candidate submit that in accordance with the

Rules, when in-institution reserved candidate is not available, then, the seat would stand dereserved and can be offered to a general category candidate, on this understanding, the seat was deemed to be dereserved and was included in the quota of the general category and as it was included in the quota of the general category, in the first counselling itself, it was available for being offered to the respondent no. 3, who was standing 3rd in the merit of general category. In our humble opinion, approach of the respondent University is per se illegal. According their own Rules, after the first counselling is over, if the seats are not filled or a candidate belonging to reserved category is not available, then only, a seat can be dereserved and such unfilled seats and dereserved seats can be offered to the aspirants in the second counselling. The action of the respondent University in offering course of Medicine to the respondent no. 3 in the first counselling is per se illegal and is running contrary to their own Rules. It is also to be noted that if this practice is allowed to continue, then, it would be enhancing general category quota and would provide further options to the general category candidate which is not the intent of the Rules/State's reservation policy and the constitutional mandate.

35. In view of the aforesaid discussion, action of the respondent in denying admission to the petitioner to the postgraduate course of Medicine is held to be bad. The respondent University is hereby directed to admit the petitioner to the postgraduate course and allow him to continue his studies in the said Course. So far as the respondent no. 3 is concerned, she would be entitled to approach the respondent University for reconsideration of her admission in accordance with law. The petition to the extent indicated above is allowed. Rule is made absolute. No costs.