IN THE HIGH COURT OF BOMBAY AT GOA

LD-VC-CW-43-2020

1. UNITED TRIBALS ASSOCIATIONS ALLIANCE
Society registered under the provisions of
Societies Registration Act 1960,
Having its office at C/o Prakash Velip,
Saraswati Niwas, Bharatkar Marg,
Quepem, Goa 403 705
Through its President
MR. NAMDEV FATARPEKAR
resident of F-5, Shiriji Apartment,
Opp. Kamat Estate Building,
Tonca, Caranzalem, Goa 403 002

2. MR. NAMDEV FATARPEKAR,
son of Shri Ramnath S. Fatarpekar,
64 years of age, Indian National,
Married, Businessman,
Resident of F-5, Shiriji Apartment,
Opp. Kamat Estate Building,
Tonca, Caranzalem, Goa 403 002
PAN No: AAOPF2270R,
Telephone :989098211 ....PETITIONERS

VERSUS

1. STATE OF GOA,
Through its Chief Secretary,
having Office at
Secretariat, Porvorim,
Bardez-Goa.

2. THE DEAN
Goa Medical College & Hospital,
Bambolim Goa

3. THE DIRECTOR
Directorate of Technical Education
Government of Goa,
DTE Building,Alto Porvorim,
Bardez-Goa 403 521

4. DIRECTORATE OF HEALTH SERVICES
Ministry of Health & Family Welfare
Government of India
Nirman Bhawan,
New Delhi - 110011 ....Respondents

Shri Abhijit Gosavi, Advocate for the Petitioners.

Shri D. Pangam, Advocate General with Ms. Ankita Kamat, Additional Government Advocate for the Respondents No.1,2 & 3.

Shri Pravin Faldessai, Assistant Solicitor General of India for the Respondent No.4.

Coram :- M.S. SONAK &

DAMA SESHADRI NAIDU, JJ.

Reserved on : 27th August 2020
Pronounced on : 7th September 2020

JUDGMENT : (*Per Dama Seshadri Naidu, J.*)

Heard. Rule. The learned Counsel for the respondents waive service.

Introduction:

The Rule of Reservation in professional courses. This problem is as constant and as recurrent as the Goan rains. It is monsoon time for the rains and for the litigation, too, pandemic notwithstanding.

2. In the admissions to the Under Graduate Medical Courses, there are two quotas: the All India Quota (AIQ) and the State Quota. Often, in fact annually, the AIQ seats remain unfilled; they revert to State Quota. Should the rule of reservation apply to that quota? That is the first question.

3. While determining the percentage of seats for each caste or community, now the State should also provide for Economically Weaker Sections. It is 10%. How should the State reckon this 10%? That is the second question.

Facts:

4. It is a Public Interest Litigation. The 1st petitioner, United Tribals Association Alliance, is a registered Society. It strives, as it claims, to protect the Scheduled Tribes' rights in the State of Goa. The second petitioner, Namdev Fatarpekar, is a member of that Society. The petitioners "have been working persistently for the effective implementation of the reservation policy as mandated under the Constitution of India".

5. The 1st respondent is the State of Goa; the 2nd respondent the Goa Medical College; and the 3rd respondent the Goa State's Directorate of Technical Education. In fact, the 3rd respondent oversees the admissions to the MBBS Course under the State Quota. It is under the common Prospectus for the First Year of Medical Undergraduate Course (MBBS) for the Academic Year 2020-2021. The 4th respondent, the Directorate of Health Services, a Central Government Agency, oversees the admission and counselling "for the graduate level seats in respect of All India Quota (AIQ)".

6. In September 2007, the State of Goa extended the benefit of reservation to the Scheduled Tribe Community (STC) in all educational institutions. The Government has reserved 12% seats for them. The rule of reservation covers the professional courses, too.

7. Across the country, in the admissions to the under-graduate medical seats, "15% of the total available seats" are to be filled under the AIQ. The remaining seats are under the State Quota. For the seats under the State Quota, the State Government's reservation policy applies. And for

the AIQ, the Central Government's reservation policy does. Indeed, the Centre's reservation policy covers the Scheduled Tribe students, too.

8. The admissions under AIQ in a particular state must also fulfill that State's admission criteria. So, often, most seats under AIQ remain vacant. After the second counselling, these unfilled seats revert to the State Quota. They are "deemed to be State Quota seats". The admissions in the State of Goa must be under the Regulations on Graduate Medical Education, 1997' ("the Regulations"). These Regulations have been framed under Section 33 of the Indian Medical Council Act 1956.

9. The Regulations, as the record reveals, were amended in 2015. The Amendment, as the petitioners plead, "clearly provides that AIQ seats remaining vacant" will be "deemed to be converted into State quota". Nevertheless, the State of Goa has not applied its rule of reservation to these reverted seats. Many states in the country, though, have been applying it. Thus, the Government's refusal to apply the rule of reservation to the reverted seats offends the constitutional mandate and the protection the Schedule Tribes enjoy. Besides, the petitioners also complain that from the total seats, the Schedule Tribe has not been getting its percentage of seats. It is because of the wrong calculation the State Government has adopted.

10. Now, given the prevailing Covid-19 pandemic, the admissions have been delayed and fallen behind the time-line prescribed in the Prospectus. But the process is to resume soon.

11. On 1st June 2020, the petitioner Society represented to the State authorities, first, to rectify the mistake in the number of seats allotted in the State quota to the students from ST Community. Second, it wanted the

authorities to extend the reservation to the reverted seats as well. But the authorities have remained unmoved. So they have filed this Writ Petition.

The Relief Sought:

12. The petitioners want the Court

(a) To direct the respondents to reserve 18 seats to the students from the Scheduled Tribe Communities in the MBBS Course in Goa Medical College for the Academic Year 2020-21.

(b) To direct the respondents, in terms of the Goa Government's reservation policy, to extend the benefit of reservation to seats reverted from AIQ to State Quota, at Goa Medical College.

(c) To quash and set aside clause 4.37 of the Common Prospectus for Admission to First Year of Professional Degree Courses, Session 2020-2021, in MBBS Course.

Arguments:

Petitioners:

13. Shri A. Gosavi, the learned counsel for the petitioners, has advanced a two-fold argument. The first one concerns the shortfall in the seat allocation under the State Quota; the second one concerns the non-application of reservations to the reverted seats.

14. To elaborate, Shri Gosavi has submitted that the number of seats reserved (12%) for the Schedule Tribe students for the present academic year is only 17. That allocation is less than what the ST students are entitled to: 18 seats. This short-changing the ST students contravenes the State's very own reservation policy.

15. As to the second issue—exclusion of the reverted seats from the protective cover of reservation policy—Shri Gosavi submits that many

states have followed a uniform policy and applied the rule of reservation, but not the State of Goa. The State's action, rather inaction, violates Article 15 of the Constitution of India. In this context, he reminds us that under the AIQ, the Central Government applies the reservation policy. In fact, it is 15% for the ST students. On reversion, too, the position should remain unchanged. The State's action is arbitrary, offending both Articles 14 and 15 of the Constitution.

16. Shri Gosavi has drawn our attention to Clause 4.37 of the Common Prospectus for "the admission to first-year professional degree course session 2020-2021." According to him, this Clause 4.37 contravenes the MCI Regulations on Graduate Medical Education, 1997. That is, the Prospectus contradicts and conflicts with the Regulations. That is impermissible.

The Respondents:

17. The learned Advocate General has advanced elaborate arguments. He has cited a handful of authorities, too. We will summarise those arguments:

(a) Merit is the norm; reservation is the exception. Merit should not suffer from excessive reservations.

(b) Reverted seats do not lose their characteristic; they are from the merit pool. The very AIQ has come into being to ensure that merit does not suffer in professional courses.

(c) If reserved seats remain unfilled, in academic admissions, there is no carry forward. Those seats will go to the Open Category. The same should happen here.

(d) For the State to apply reservation to the reverted seats, 50% ceiling comes in the way.

(e) The State has strictly followed the Centre's and the MCI's guidelines in designing the seat-sharing matrix.

(f) EWS is a separate category; it cannot be mixed with other reservations.

(g) EWS has enabled each State to have more seats; so from the increased seats, its share must be first separated.

(h) If the petitioners' method of reservations—dividing the ratio of seats under all reserved categories simultaneously—is followed, the Open Category will suffer. That defeats the policy purpose.

(i) The Prospectus truly reflects the scheme of seat-sharing given in MCI Regulations.

(j) The petitioners have not challenged the MCI Regulations.

18. Heard Shri A. Gosavi, the learned counsel for the petitioners, Shri Devidas Pangam, the learned Advocate General, for the respondents no.1 to 3 and Shri Pravin Faldessai, the learned Assistant Solicitor General of India for the respondent no.4.

Issues in Perspective:

19. The petitioners, a Scheduled Tribes Association and its member, have two grievances:

The First Grievance:

20. The seats which remain unfilled from the AIQ after the 2nd round counselling get reverted to State Quota. They are deemed to be State Quota seats. So, to those reverted seats, the rule of reservation must be applied. But the State directly offers those seats to Open Category. Thus,

the State's action violates Article 15 of the Constitution of India, the MCI Regulations, and the State Government's reservation policy, as well.

The Second Grievance:

21. In 2007, the Government of Goa reserved 12% seats in all educational institutions to the Scheduled Tribe students. But the authorities have been allotting a lesser number of seats. Confined to admissions into MBBS course, the Goa Medical College has 180 seats. Of these 180, 153 seats belong to the State quota. The reaming 27 seats belong to AIQ. If we apply a 12% reservation to the 153 seats, 12% translates into 18.36 seats. Rounded off, it is 18. But the seats allotted to the ST category are only 17. The petitioners want the authorities to remedy this arithmetic error affecting the academic prospects of the oppressed communities.

Discussion:

What should happen to the seats reverted from AIQ to State Quota?

The Problem Illustrated:

22. For the academic year 2018-19, the total seats were 150. Of those 150 seats, 128 seats went to State Quota and 22 to AIQ. 15 seats were allotted to the ST students from the State Quota. Out of 22 seats under the AIQ, 10 were filled and 23 reverted. As they were deemed to be State Quota, the total State Quota was 141 seats (128+13).

23. It is clear from the above example, so contend the petitioners, the State's refusal to apply the rule of reservation to the reverted seats violates its own reservation policy.

24. This academic year, too, it is no different. But to appreciate the

recurrence of reversion, let us tabulate AIQ seats in the last five years:

Academic Year	AIQ Seats	Filled	Vacant
2015-2016	22	12	10
2016-2017	23	06	17
2017-2018	22	12	10
2018-2019	23	10	13
2019-2020	27	8	19

(a) **The Statutory Position**:

25. The petitioners bring into focus the constitutional mandate of reservations, say, under Article 15. To begin with, this Article prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Based on any of these criteria, the State shall not discriminate against any citizen. To this general mandate, the first exception comes under clause (3) of Article 15. It enables the State to make "any special provision for women and children."

26. Then come the exceptions in clauses (4) to (6). It pays to extract them:

> Article 15. Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth.—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
> (2) ...
> (3) …
> (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

> (5) Nothing in this article or in sub-clause (*g*) of clause (1) of Article 19 shall prevent the State *from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions* including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.
>
> (6) Nothing in this article or sub-clause (*g*) of clause (1) of Article 19 or clause (2) of Article 29 shall prevent the State from making,—
>
> (*a*) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and
>
> (*b*) any special provision *for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) insofar as such special provisions relate to their admission to educational institutions* including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.
>
> *Explanation.*—For the purposes of this article and Article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.
>
> (italics supplied)

27. As we shall gather from Article 15, neither that Article nor clause (2) of Article 29 prevents the State from, say, reserving seats for the advancement of the Scheduled Castes and the Scheduled Tribes. Its constitutional validity stands upheld, a case in point being *Ashoka Kumar Thakur v. Union of India*[1]. It is because the historically disadvantaged

1 (2008) 6 SCC 1

groups must get special protection and help, so they can uplift themselves from poverty and low social status. In other words, only formal equality among all groups and communities results in no genuine equality. So for this reason, the special provisions have been engrafted into the Constitution through Articles 15 (4), 15 (5), 16(4), 16 (4-A), 46, and so on[2].

28. Until recently, the protective measures in the Constitution are essentially caste based; for the first time, Parliament has introduced clause (6) both in Article 15 and in Article 16 through the 103rd Constitutional Amendment. It enables the State to provide for the advancement of any "economically weaker sections of citizens" other than the classes mentioned in clauses (4) and (5) of Article 15. That advancement is through special provisions relating to, among others, their admission to educational institutions. For clause (5) of Articles 15 or 16, primarily caste is the base; for clause (6) of both these Articles, cash—better put, its lacking—is the base. To fulfill its pledge in the Preamble, the Indian Constitution has thus far travelled, it seems, from correcting historical inequalities to correcting societal imbalances. With the 103rd Amendment, it is trying to unravel or undo the Pareto principle—the law of vital few—and establish a truly egalitarian society. Of course, its constitutional validity is on the judicial anvil, before a Larger Bench of the Supreme Court.

(b) Essential but only Enabling:

29. Given the historical reasons and the prevailing socio-economic conditions in the country, Parliament, with its constituent power, has felt

2Kailas v. State of Maharashtra, (2011) 1 SCC 793

that reverse discrimination is essential, without much temporal limitation. But this mandate is merely enabling. So the Supreme Court has held in *Gulshan Prakash v. State of Haryana*[3], that the principle behind Article 15(4)—applying equally to Article 15(5)—is that a preferential treatment can be given validly when the socially and educationally backward classes need it. This article enables the State Government to provide for uplifting SCs and STs by, among others, reserving seats for admission into educational institutions. Article 15(4) is not an exception but only a special application of the principle of reasonable classification. *Gulshan Prakash* further notes that Article 15(4) makes no mandatory provision for reservation. That is, the State's power to make reservations under Article 15(4) is discretionary. So the Constitutional Courts can issue no writ to effect reservation. Such special provision, indeed, may be made not only by the Legislature but also by the Executive.

30. On facts, *Gulshan Prakash* has observed that the State Government is the best judge to grant reservation for SC/ST/Backward Class categories at Post-Graduate level in admission. And the State of Haryana's decision not to reserve seats at the Post-Graduate level suffers no infirmity. To sum up, every State can decide on its own regarding reservations, and that decision may depend on various factors.

31. Last year, a Division Bench (at Goa) of this Court in *Kum. Pujal V. Nayak v. The Chief Secretary, Government of Goa*[4], to which one of us is a member (M. S. Sonak, J.), has reiterated the judicial mandate of *Gulshan*

3(2010) 1 SCC 477

4High Court of Mumbai (Goa Bench), decided on 23.09.2019

Prakash. It has held that Article 15(6) of the Constitution imposes no constitutional mandate or constitutional command. It is, in fact, an enabling provision.

32. Now, let us see what the statutory mandate has to say on the issue.

(c) MCI Regulations:

33. The Medical Council of India, exercising its rule-making power under Section 33 of the Indian Medical Council Act 1956, has formulated the "Regulations on Graduate Medical Education 1997". Later, with the Central Government's previous sanction, the MCI has amended them. These Regulations are called the "Regulations on Graduate Medical Education, 2015". They came into force at the beginning of 2016. The Amendment is two-fold: one concerns the Under Graduate course and the other Post Graduate courses. We will focus on the UG Courses.

34. The Amendment replaced, among others, Appendix E. This Appendix concerns the Schedule for Completion of Admissions into MBBS Course.

35. Vital for our purpose is the "Note" appended to this Appendix E:

> "1. All India Quota Seats remaining vacant after last date for joining, i.e. 9' August *will be deemed to be converted into state quota*."
>
> (italics supplied)

36. As we shall see later, much turns on the expression "deemed to be converted into state quota". When the MCI filed these Amended

Regulations before the Supreme Court, it has given its "stamp of approval" to them in January 2016. It was in *Ashish Ranjan v. Union of India*[5].

(d) Prospectus:

37. Now, let us see the Prospectus for Professional Degree Courses for 2020-21. Clause 4.37 deals with 15% AIQ applications for Medical and Dental courses. According to this clause,

> "[i]n case any seat(s) remain vacant, the same shall be offered to applicants from the merit list of the General Category in the Special round of admission notified separately, *subject to provisions of Medical/Dental Council of India regulations/Supreme Court guidelines.*
>
> (italics supplied)

38. We have to resolve whether the MCI Regulations and the Government-issued prospectus conflict. In the alternative, we also have to answer whether the State has been negating its own reservation policy by offering reserved seats directly to the Open Category students. But before we answer it, we need to tackle a handful of precedents the State has relied on.

(e) Precedents:

39. Usually, the private parties, eager to overcome the statutory strength the State enjoys, cite one too many precedents. But, here, it is the State that has come with an avalanche of authorities to convince us that the petitioners' stand is wrong in the face of the established precedential position.

Shilpa Suresh Shinde:

5WP (Civil) No.76 of 2015

40. *Shilpa Suresh Shinde v. State of Maharashtra*[6] is the State's flagship for it to sail safely through the litigious waters. To begin with, this decision turns on its own facts. The question *Shilpa Suresh* considers is this: "If for some fortuitous reason the quota of 25% of the seats which ought to be reserved for the candidates passing the All India Entrance Examination is unfilled, is the State entitled to reserve any of those seats by applying its reservation policy thereto?" There, "fortuitous" is the fulcrum, around which the case has revolved.

41. Thanks to *Pradeep Jain v. Union of India*[7], in every Post-Graduate Medical Course, 25% of the seats had to be filled up only with students who passed the All India Entrance Examination. That is, AIQ. Until 1999-2000, the State of Maharashtra had not insisted that the students under the AIQ, too, should have undergone one-year rural service as a precondition for admission. Until then, what mattered was the rank in the All India Entrance Examination. Against this Rule of rural service, the affected students' legal challenge failed. Caught unawares, no AIQ student could fulfill the rural service condition in the academic year 2000-2001.

42. With the change in the admission criteria, the entire AIQ of 140 seats remained unfilled. The State felt it would "mean wastage of State's resources and detrimental to the national interest". So it decided to fill these seats, too, with local candidates. That is how the State got additional seats for the local students "fortuitously". For the admission of the local students, the State, however, wanted to apply the same yardstick of merits

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6(2000) 4 Bom CR 242

7(1984) 3 SCC 654

as applied to other candidates selected in the State Quota—the reservations included. Questioning the reservation policy, some students approached this Court. Before a Division Bench, they contended that the additional seats were not part of the State Quota; so the State's reservation policy should not apply. Only the merit should be the criterion.

43. In this context, *Shilpa Suresh* has felt the issue is "no longer res integra". Thus, precedentially, it has relied on two earlier Division Bench decisions: *Jigna Priyavadan Desai v. State of Maharashtra*[8] and *Dr Dhondiba Dnyanoba Munde v. The State of Maharashtra*[9]. According to *Shilpa Suresh*, both *Jigna Priyavadan* and *Dr Dhondiba Dnyanoba* took the view that the reservation policy cannot apply to the AIQ seats. As the petitioner has now contended here, in *Shilpa Suresh*, the State argued that the additional seats would acquire the character of State Quota. But the Division Bench has held that "the only just and reasonable manner in which this fortuitous block of seats can [be] filled is by going strictly in accordance with merits." Their Lordships have also felt that the "quota of 140 and odd seats which have become available originally belonged to All India Quota and they do not change their character merely because of the unforeseen circumstance which has arisen in the current academic year."

44. We cannot fail to notice the *Shilpa Suresh*'s reasoning. It has felt that the additional seats came to State quota "fortuitously" and under "unforeseen circumstances". A one-off situation. For this reason, it has emphasised that these 140 and odd "fortuitously vacant seats" were

8WP 370/1999, decided on 23rd February 1999 by Y.K. Sabharwal, C.J. and A.P. Shah, J.

9W. P. Nos.3909 and 3910 of 1989, decision dated 28th August 1990.

originally from the AIQ, and their true character continues to be retained, even if they were filled with the local candidates.

45. What distinguishes the case before us from *Shilpa Suresh* is that the seats that have reverted to State's quota have not come fortuitously. Nor are there any unforeseen circumstances that prompted that reversion. Then, there were no Rules or Regulations on how these "fortuitous" seats must be treated. So *Shilpa Suresh* has preferred to preserve the original characteristic of those revered seats: merit. Here, the reversion is a contingency that has been planned for. There can be no cavil about the proposition that a case is an authority for what it actually decides and not for what logically follows from it[10]. Indeed, each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. "In deciding such cases, one should avoid the temptation to decide cases (as Cardozo said) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."[11] That is, "circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."[12]

10Union of India v. Meghmani Organics Ltd., AIR 2016 SC 4733

11Abdul Kayoom v. CIT [AIR 1962 SC 680

12Union of India v. Amrit Lal Manchanda (2004) 3 SCC 75

46. That said, *Shilpa Suresh* has referred to—but has not, in our view, relied on—*Dr. Jeevak Almast v. Union of India*[13]. But before referring to any other decision, let us see how the AIQ has come about.

Pradeep Jain (Dr):

47. In *Dr Pradeep Jain v. Union of India*[14], per Bhagwati J (as his Lordship then was), the Supreme Court has addressed the question "whether residential requirement or institutional preference in admissions to technical and medical colleges can be regarded as constitutionally permissible". Broadly speaking, *Dr Pradeep Jain* has highlighted the perils of parochial views such as "the sons of the soil" at the cost of "the nationhood", a hard-won concept. Reflecting the constitutional spirit, it has equated "domicile" with "nationality" rather than with "regionality". The Supreme Court has, in fact, adjudicated the case on the premise that "equal opportunity for all across the nation for education and advancement" is a constitutional imperative, as expounded by it earlier in *Jagdish Saran v. Union of India*[15].

48. In the above backdrop, *Dr Pradeep Jain* has considered under what circumstances the academic admissions may justifiably depart from "the principle of selection based on merit". And, finally, it has answered the question: "[T]o what extent can reservation based on residence requirement within the State or on institutional preference for students passing the qualifying examination held by the university or the state be regarded as constitutionally permissible?". To answer that question, *Dr*

13(1988) 4 SCC 27

14(1984) 3 SCC 654

15AIR 1980 SC 820

Pradeep Jain acknowledges that "so many variables depending on social and economic facts in the context of educational opportunities would enter into the determination of the question as to what in the case of any particular State, should be the limit of reservation based on residence requirement within the State or on institutional preference".

49. Eventually, *Dr Pradeep Jain* has held that the residence-based reservation "should in no event exceed the outer limit of 70 per cent of the total number of open seats after taking into account other kinds of reservations validly made." It has, nevertheless, clarified that this outer limit is subject to any reduction or attenuation the Indian Medical Council may make. Besides, it wanted this outer limit to get gradually and progressively reduced over the years.

Dr Dinesh Kumar (I):

50. The Supreme Court, through the same Bench that decided *Dr Pradeep Jain*, has given further directions and clarifications in *Dr Dinesh Kumar (I) v. Motilal Nehru Medical College*[16]. It has held that guided by marks obtained at qualifying examination held regionally, no State Government or University or Medical College should admit students to fill the 30% open seats—the seats unconnected with residence requirement or institutional preference—for the MBBS course. It must be based on the rank secured in an All-India entrance examination to be conducted by the Government of India or the Medical council of India. Of course, the same direction was given regarding 50% opens seats in PG Courses, too.

51. The Supreme Court in *Dr Dinesh Kumar (I)* has also explained the "true import" of *Dr Pradeep Jain*. It has first referred to its earlier directive:

16AIR 1985 SC 1059

at least 30 per cent of the open seats shall be available for admission of students on All India basis irrespective of the State or university from which they come. Then, it has clarified, "after providing for reservation validly made say for example for candidates belonging to scheduled castes and scheduled tribes, whatever seats remain available for non-reserved categories, 30% of such seat at the least should be left free for open competition and admission to such 30% open seats should not be based on residence requirement or institutional preference".

52. *Dr Dinesh Kumar (I)* has exemplified this clarification: Suppose there are 100 seats in a medical college or university and 30% of the seats are validly reserved for candidates belonging to SC and ST. That would leave 70 seats available for others belonging to non-reserved categories. Then, 30% of these 70 seats, that is 21 seats out of 70, but not 30% of the total seats, must be filled up by open competition regardless of residence requirement or institutional preference.

Dr Dinesh Kumar (II):

53. In the wake of *Dr Pradeep Jain* and *Dr Dinesh Kumar (I)*, some State Governments and a few other agencies, such as the University of Bombay, expressed their difficulties in implementing the scheme suggested by the Medical Council of India. So, the Supreme Court felt it "necessary to iron out these difficulties", and accordingly gave, among others, these directions in *Dr Dinesh Kumar (II) v. Motilal Nehru Medical College:*[17]

(1) For the present at least, the All India Entrance Examination shall be held in English medium and not in any regional language.

17(1986) 3 SCC 727

(2) The number of seats available for admission based on All India Entrance Examination must be not less than 15%, instead of 30%, of the total seats in each medical college or institution, excluding the reservations validly made.

(3) There is no limiting of the reservations available to SC, ST, and OBC to 50%. It is open to State Governments to make reservations without violating constitutional guarantees.

54. As to the last direction, we may extract what *Dr Dinesh Kumar (II)* has said, for it has some bearing on the issue before us. The Court has acknowledged that it would not be right for it "to limit the reservations which can be validly made by a State Government in the matter of admission to the MBBS/BDS Course and the Postgraduate Course to 50% of the total number of seats." It has, in this context, taken note that "there are some states like Tamil Nadu and Karnataka which have reservations far exceeding 50% in admissions to MBBS/BDS Course". So it did "not propose to restrict such reservations to 50%." Then it has said:

> [W]hen we say that we do not propose to limit the percentage of reservations to 50 as suggested by the Government of India, we should not be understood as laying down that the State Government may make reservations to any extent it likes or that the percentage of reservations can validly exceed 50 without violating any constitutional guarantees. *We are not going into this question because it does not directly arise for determination in this case.*"
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> (italics supplied)

55. As we have seen, up to now no decision referred to above has expressly dealt with the constitutionally protected reservations for SCs and STs in, say, medical admissions. If there is any reference to this issue, that

is in *Union of India v. R. Rajeshwaran*[18]. There, the findings are on the converse; the Supreme Court has refused to rule on the rationale of reservations in professional courses. In fact, it has left for the discretion of the State Governments, as it did in *Dr Dinesh Kumar (II)*. So, let us see what this decision says.

R. Rajeshwaran:

56. In *R. Rajeshwaran*, the respondent filed a writ petition in the High Court of Madras. He wanted the State to apply the rule of reservation to the SC and ST students in the seats set apart for an all-India pool in MBBS or BDS list. He contended that the State had a constitutional obligation to provide a special reservation for the advancement of socially and educationally backward classes in the all-India quota, too. That writ petition was allowed. The Union of India took the matter to the Supreme Court.

57. Keeping in view the altered percentages for AIQ, *R. Rajeshwaran* has worked out the scheme: Let us assume a State has 100 seats with 15% reserved for SCs and 10% for STs. Of the remaining 75 seats, 60 seats will be filled by the State Government as unreserved, and 15 seats will be earmarked for the AIQ. As that scheme itself deals with how the All India Quota should be worked out, *R. Rajeshwaran* has not thought it appropriate "to travel outside the said provisions to find out" whether there should be reservations even in AIQ. It has, then, emphasised that each State could, anyway, provide for reservation for the SCs and STs in the 85% of the seats available with them. In the end, *R. Rajeshwaran* has cautioned that if judiciary meddled with this quota, it would "land in innumerable and

18(2003) 9 SCC 294

insurmountable difficulties". In this case, are the petitioners asking us to meddle with this quota? We will answer.

Dr. Jeevak Almast:

58. In *Jeevak Almast*, the question was "whether the unfilled seats should revert back to the respective States and/or institutions or what other method should be adopted to fill up the vacancies". The petitioner has contended that there is unanimity among all the parties that no seat should go unfilled. In that context, the Supreme Court has observed that "our country does not have sufficient number of qualified doctors and every step should, therefore, be taken to turn out as many doctors with post-graduate qualification as possible." It has eventually held that the unfilled seats in AIQ should revert to the State Quota. Indeed, the question whether the State's reservation policy should apply to those reverted seats has never been in *Jeevak Almast's* contemplation. It was a non-issue there, or it passed *sub silentio*.

59. As we have already noticed, *Shilpa Suresh* has followed this Court's earlier co-equal Bench decisions in *Jigna Priyavadan Desai* and *Dr Dhondiba Dnyanoba Munde*.

Jigna Priyavadan Desai:

60. In *Jigna Priyavadan Desai*, the petitioner argued that the seats reverted from AIQ to the State Quota would have no reservation applied. The State argued on the contrary. Eventually, a Division Bench of this Court has concluded that the issue of applying reservations to the quota reverted to the State stands answered in the negative—no reservation

applies. To conclude thus, it has relied on this Court's earlier decision in *Dr Dhondiba Dnyanoba Munde*. The material part of the decision reads:

> The point sought to be urged is concluded in favour of the petitioner by a Bench decision of this Court dated 20th August 1990 in Writ Petition No.3909 of 1989 and Writ Petition No.3810 of 1989 [*Dr. Dhondiba Dnyanoba Munde v. The State of Maharashtra & Ors.*]. The Bench, relying upon various decisions, including the decision of the Supreme Court in the case of *Dr Jeevan Almast v. The Union of India*, has held that to such a seat reservation would not apply.

Dr Dhondiba Dnyanoba Munde:

61. *Dr Dhondiba Dnyanoba Munde* assumes importance because its case holding has influenced two later Division Bench decisions: *Shilpa Suresh* and *Jigna Priyavadan Desai*. All these three decisions concern the question whether the rule of reservation applies to unfilled seats of the AIQ if they revert to the State. The respondents insist that this case must guide the case before us, too.

62. Admission denied into the post-graduate medical course, the petitioner has filed this writ petition. He has raised two issues: (1) The rules deducting marks because the candidate has passed the undergraduate course in more than one attempt are *ultra vires*. (2) The seats reverted to the university from the AIQ should be re-notified and subjected to all the admission criteria. Indeed, the first issue does not concern us; the second issue does. But to what extent?

63. *Dr Dhondiba Dnyanoba Munde* has held that the rules are intra-vires. According to it, the candidates who pass the exams in one attempt must have an incentive. The decision on the second issue, to the extent relevant, needs elaboration. To put that issue in perspective, I may note

that admissions take place under three categories: (i) All India Entrance Examination (25%); (ii) In-Service Candidates (15%); (iii) The Students of the University (60%). In *Dr Dhondiba Dnyanoba Munde*, what clinches the issue is Rules 6 (b) and 6 (5) of the Rules. It provides for reservation—34% for the backward classes. But the reservation does not apply to the seats to be filled through all India competition and through in-service candidacy. That is, those two streams are exclusively on merit.

64. As we have already noted, "certain seats are reserved and earmarked for the All India Entrance Examination". When they remain unfilled, they revert to the "respective colleges". In that year, too, certain seats reverted, and they were filled as per the Government's directions. The petitioner contended that those reverted seats must have been re-notified unfilled "in accordance with the rules for admission."

65. After referring to a Supreme Court judgment[19] the Division Bench has held that the seats reverted from the AIQ must be available for those who have not been found eligible under the All India Entrance Examination and also "the students who sought admission at the colleges but could not get it". Thus, a common list was to be drawn up of the unsuccessful candidate from the streams of college and All India Entrance Examination. In this context, let us extract what *Dr Dhondiba Dnyanoba Munde* tells about excluding reservation to the "seats remaining vacant":

> "18. Rule 6 (5) states that the seats remaining vacant in any of the in-service category above shall be filled in from the candidates from that University from the waiting list purely on merit.

19The copy of the Division Bench's judgement we secured after some difficulty contained no details of the Supreme Court judgement it has referred to.

> 19. Thus, reading of rules 5 and 6 make the following positions clear that 34% reservation is available only after excluding 25% of the All India Entrance Examination and 15% of the in-service candidates. This is made more clear with reference to Rule 6 (5) with regard to the seats remaining vacant in respect of in-service category to be filled in purely on merit."

66. As we may appreciate, the reverted seats must be filled with the missed-out candidates from two streams: all India entrance and university students. All along the rule of reservation has not been applied to all India entrance. Under Rule 6 (5), the reservation has not been applied even to the university students if they are seeking admission in the unfilled seats. In fact, these university students were getting a second chance after their initial failure to secure admission. Thus, the legislative intent is clear in *Dr Dhondiba Dnyanoba Munde.*

67. Examined deeper, *Dr Dhondiba Dnyanoba Munde* explains the rule of reservation illustratively. And, of course, this illustration was based on the then extant rules.

> "When 100 seats are available, 25 or to be allotted to the All India Entrance Examination, 15 are to be allocated for in-service candidates, and 60 or to be allocated to the students of the university area and consequently the seats remaining vacant with reference to in-service candidates and All India Entrance Examination had to be filled in from the candidates from the university area purely on merit, as the said seats would carry the same character on return."

68. The observation in *Dr Dhondiba Dnyanoba Munde* that "the [reverted] seats would carry the same character on return" is essentially a rule-based observation rather than a legal proposition of universal application. Before closing our discussion on *Dr Dhondiba Dnyanoba Munde*, we may as well observe that calling the unfilled seats from All India Entrance Examination "reverted seats" is a misnomer. They did not

exclusively belong to the State or the universities; still the unsuccessful candidates under the All India Entrance Examination got a second chance. So did the university students. Thus, the unfilled seats are composite in their character.

Sameer Anant Deshpande:

69. In *Sameer Anant Deshpande v. State of Maharashtra*[20], the issue concerns the admission into the PG courses of Medicine for the January 2001 batch. The admission was into the seats returned from the All India Entrance Examinations 2001 quota: 25%.

70. The appellant, belonging to open category, had scored highest marks in Ophthalmology, but he could not get admitted into either the post-graduate degree or diploma in that discipline; the lone seat for MS (Opth.) was reserved for a candidate belonging to Nomadic Tribes and that of Diploma for the OBC candidate. So he challenged the 100 per cent reservation, but later he confined the challenge only to the diploma seat. The Tribunal allowed the appeal. In anticipation of the appellant's admission into the PG Diploma, the Deputy Director appointed him to the post of Medical Officer.

71. Thus, the appellant was admitted to the PG Diploma. After about eight months, the first respondent published an advertisement, inviting applications to fill in the returned seats from the AIQ as well as the vacant seats from the institutional quota of January 2001 batch. There was one seat for MS (Opth.) from AIQ. And for that, the appellant applied. His claim rejected, the appellant approached the Tribunal. Another aspirant

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202001 (4) Mh. LJ 870

filed one more appeal. The Tribunal directed the Dean of Government Medical College to consider the competing claims "on merits, provided these appellants . . . resigned from the Diploma registration". Against the Tribunal's order, the aggrieved aspirants filed three writ petitions.

72. By a common judgment, this Court allowed all the three writ petition. It directed the Dean to consider the claims by following the Government-framed Rules of Admission. That consideration should not affect admissions already made, though. This judgment has led to three intra-court appeals. Elaborate as *Sameer Anant Deshpande* was, it has not dealt with the reservations of SC and ST to the reverted seats. On the contrary, it held, as *Dr Dhondiba Dnyanoba Mundhe* did, that reverted seats should be filled up with the candidates from the merit list. To conclude thus, *Sameer Anant Deshpande* has, among other cases, followed *Dhondiba*. And it has reached its conclusions based on the Admission Rules of 1971. It has pointed out that in the wake of this Court's Full Bench decision in *Ashwin Prafulla Pimpalwar* v. *State of Maharashtra*"[21], the State Government amended the admission rules for post-graduate courses. Thereafter, it has considered the Rules, 2, 6, and 10. None concerned the reservations.

73. In paragraph 22 of the judgment, *Sameer Anant Deshpande* refers to *Dr Dhondiba Dnyanoba Mundhe* and says that the issue in that case "is similar to the one at hand". Besides, it has held that the State cannot apply the reservation policy against such seats as they were the seats from the AIQ, and they ought to be filled up only on merit. In the next paragraph, it

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21 1991 Mh. LJ 1336

holds that if the seats reserved for the AIQ remain vacant and are returned to the respective institutes, they must be filled "as per the rules". That part of the observation reads thus:

> "[T]hese returned seats are required to be filled in by the institutions *as per the rules and the law laid down, from amongst the candidates who are unsuccessful in obtaining admission either against the institutional quota or against the All India quota* and the admissions are done strictly on the basis of merit. The reservation policy is not made applicable while filling in the return seats from the All India quota.
>
> (italics supplied)

74. We have already discussed how the Admissions Rules of 1971 were interpreted in *Dr Dhondiba Dnyanoba Mundhe*. And in *Sameer Anant Deshpande*, too, the Court emphasised that the admission to the reverted seats must be "as per the rules and the law laid down". Indeed, that the rules of reservations do not apply to the reverted seats is not the law; that admissions to those seats must be as per the governing Admissions Rules is.

Dr Prachi Almeda:

75. Now, let us take *Prachi Almdea v. Dean, Goa Medical College*[22]. Admitted under the 15% all India quota into Goa Medical College, the petitioner passed out and completed her internship, including rural posting. She was, thereafter, granted permanent registration under the Goa Medical Council, too. When the petitioner applied for a post-graduate course, she was denied admission. It was on the grounds that she did not fulfill the 'residence' condition. The authorities insisted that the petitioner must have resided in Goa for 10 years in terms of the Goa (Rules for Admission for

22(2001) 7 SCC 640

Postgraduate degree Courses of the Goa University at Goa Medical College) Rules, 1998.

76. In the above context, the Supreme Court has held that the students falling under the 15% AIQ should be allowed to compete in the State where they studied despite the rule of residence. According to *Prachi Almeda*, "this principle is evolved on dictates of necessity and the need for adjusting equities in the matter of fair and proper implementation of the scheme evolved for providing a quota of seats to be filled up on all India basis on merits performance."

Dean, Goa Medical College:

77. *Sudhakar Kumar Solanki v. Dr Sudhakar Kumar Solanki*[23] is the decision the same Bench of the Supreme Court decided close on the heels of *Dr Prachi Almeda*, applying, of course, the same principle. On facts, the court has also held that the petitioner was born in 1976 in State of Goa, Daman and Diu. Even after the separation of Goa in 1987, he continued to be resident of Union Territory of Daman and Diu. His living in the Union Territory during the earlier period taken into account, the petitioner has satisfied the residence requirement of 10 years.

78. But in this case, the Supreme Court has tellingly observed about the inviolability of the eligibility criteria. They should either be unconstitutional, thus, unenforceable; or be valid, thus, enforceable. *Sudhakar Kumar Solanki* has held that no admission criterion can be said to be

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23(2001) 7 SCC 645

> merely directory or for any reason, illegal. An eligibility criterion statutorily stipulated can by no means to be held to be directory resulting in a nebulous state of affairs in the matter of selection of candidates for admission. There could be only two alternative courses, namely, *either the rule is unconstitutional or illegal for any reason and, therefore, to be struck down or on the other hand valid and invariably and uniformly enforceable without any reservation whatsoever, as binding and mandatory in character.*
>
> (italics supplied)

NTR University of Health Sciences:

79. Under the relevant Regulations of Admission, say, for PG Medical Course, the State of Andhra Pradesh reserved 46% seats for SC, ST and BC candidates. It was in the 85% seats reserved for the local candidates as per the Presidential Order. The State left 15% seats for the non-local candidates. In that 15% too, certain potential beneficiaries insisted that the rule of reservation must be followed.

80. In the above context, in *G. Babu Rajendra Prasad v. G. Babu Rajendra Prasad*[24], the Supreme Court has held that Articles 15 and 16 of the Constitution of India are enabling provisions. Under them, the State would either adopt a policy or make laws providing for reservations. "How and in what manner the reservations should be made is a matter of policy decision of the State. Such a policy decision normally would not be open to challenge subject to its passing the test of reasonableness" and other criteria.

81. Before us, the petitioners are not questioning the State's policy, nor are they insisting that the State should reserve a certain percentage of

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24(2003) 5 SCC 350

seats in the reverted AIQ. All they wanted is this: enforce the policy. And that policy, according to them, provides for reservation.

AIIMS Students' Union:

82. In December 1995, AIIMS held an All-India entrance examination for admission to post-graduate courses. The three writ-petitioners were the medical graduates who participated in the examination; they were not from an AIIMS-affiliate college. The Prospectus declared that the selection should be on merits. But 1/3rd seats were reserved for the Institute's in-house candidates. The Institute would prepare two merit lists for the two categories. For the institute's in-house candidates, not only 33% but also another layer of reservation has been provided. The second layer reserves 50% of seats discipline-wise for them. Of course, the overall reservation should not exceed 33%.

83. Besides, at the counselling, the Institute's in-house candidates were given a priority; they would be called first and would be allotted seats in P. G. disciplines of their choice. The general category candidates would have only the left-over seats—a Hobson's choice. In this context, *AIIMS Students' Union v. AIIMS*[25] has examined the institutional preference and deplored this "super reservation". True, in this case the Supreme Court has elaborately considered the concept of reservations in its myriad forms. But that considered was confined to institutional and regional reservations.

84. The Supreme Court has noted that "reservation unless protected by the Constitution itself, as given to us by the founding fathers and as adopted by the people of India, is sub-version of fraternity, unity and

25(2002) 1 SCC 428

integrity and dignity of the individual." This observation imparts colour and context to the rest of the Supreme Court's observations in *AIIMS Student's Union*. Thus, to reiterate, we may observe that what has been considered and elaborated in that case is the institutional reservations. It has affirmed that reservations with no constitutional protection negate equality—the constitutional cornerstone.

Union of India:

85. *Union of India v. K. Jayakumar*[26] was rendered in September 2002 but was reported in 2008. Before the High Court of Madras, in public interest litigation, the respondent wanted the rule of reservation for SC & ST (15%) applied for the admissions in the AIQ. The High Court, "by a cryptic order", concluded that "the reservation being a constitutional mandate, it would be for the Government to follow the same in future and the writ petition was disposed of accordingly." Aggrieved, the Union Government appealed to the Supreme Court.

86. In the appeal, the Union of India has contended that *Dr Dinesh Kumar (II)* and *R. Rajeshwaran* have already answered this question in the negative: no reservations should apply. But the respondent countered that argument with the Supreme Court's later decision in *Preeti Mittal* v. *Gaganjot Kaur Saira*[27]. So, *K. Jayakumar* has examined the case holding of *Preeti Mittal*.

87. *Preeti Mital* did have, according to *K. Jayakumar*, "certain observations ... [that] may lead to an assumption that even there can be a

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26(2008) 17 SCC 478

27(1999) 3 SCC 700

reservation against seats meant for all-India pool". But on scrutiny, *K. Jaykumar* has found that "the question [of reservation in *Preeti Mittal*] was neither directly in issue nor has been considered or answered." *K. Jayakumar* felt that *R. Rajeshwaran* has directly dealt with the question and answered it, too. In that process, *K. Jayakumar* has also held that in *Preeti Mittal*, "a particular clause of the proceedings, namely Clause 3, was in fact under consideration. The observation, if any, while interpreting that clause, cannot be held to be a ratio in the matter to hold that even in respect of the seats meant to be filled up on the basis of an all-India entrance examination, the provision of the reservation should apply". Precisely, this reasoning applies all other cases we have considered so far. The statutory scheme then governing the admissions dictated the case outcomes. And they all concerned AIQ (merit) versus regional or institutional reservations.

Shreyash:

88. Yet another decision the learned Advocate General quoted is *Shreyash v. State of Maharashtra*[28], decided by a Division Bench of this Court, per S. A. Bobde J (as his Lordship then was). Here, too, 31 seats have fallen vacant from the AIQ. They were reverted to the State Quota. Rule 2.3.2 regulated how these seats should be filled. And it mandated that AIQ seats surrendered to the state "shall retain their original character." Vacancies under AIQ shall be filled in by 30% Open Category candidates.

89. In interpreting Rule 2.3.2 of Admission Rules, *Shreyash* has observed that "the Rule prescribes nothing further." It has not prescribed which authority should fill up these seats; nor has it prescribed the specific

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28 High Court of Bombay, Nagpur Bench, decided on 30.09.2011

manner in which these seats should be filled up. That is to say, it has not specified whether the seats are amenable to any quota based on regional or constitutional reservation. Though these seats are subjected to constitutional reservation, their original character, held *Shreyash*, is openness and "devoid of any provincial or regional reservation". Therefore, the surrendered seats have not been subjected to "regional reservation" because introducing such regional reservation would be contrary to the original character in which there is no regional reservation. Here, before us, the reverted seats original character included constitutional reservations. On their reversion it those seats retained their original character, they must admit of reservations.

90. To our understanding, *Shreyash* was decided in the light of Rule 2.3.2 of Admission Rules. This Rule has two vital features: (a) the reverted seats shall retain their original character; (b) vacancies under AIQ should be filled in with Open Category candidates. The original character it talks about in the first part gets revealed in the second part—Open Category. There can be no doubt what Rule 2.3.2 has mandated, and *Shreyash* has been accordingly decided. Here, in the case before us, neither condition comes into play. If this Rule-supported original-character theory is extended here, it favours the petitioners.

Raghuvir Saini:

91. This is a recent judgment. About 3309 (out of 9446) AIQ seats of 2020 reverted to the State Quota. The petitioner wanted the Court to declare that those unfilled AIQ seats have lapsed. In this context, the Supreme Court, per Kanwilkar J, has observed that when the 2nd round of counselling was concluded, and the final list notified, the vacant seats have

been transferred to State quota. It was "in terms of the decision of [the Supreme Court] in *Ashish Ranjan v. Union of India*[29], and these seats are required to be filled as per the principle set out therein."

92. In other words, *Raghuvir Saini v. Union of India*[30] has declared that

> "all the vacant AIQ seats will have to be now treated as State Quota Seats and dealt with accordingly."

93. Again, the Supreme Court in *Raghuvir Saini* has reiterated its consistent view that the reverted seats must be "treated as State Quota Seats" and must be "dealt with accordingly".

The Gist of the Judgments:

94. After following the decisional trajectory from *Pradeep Jain* to *Raghuvir Saini*, we cannot but conclude that AIQ has originated in the sphere of public law remedies as an antidote to provincial pandering in professional courses. Throughout, the Apex Court has emphasised that regional and institutional importance in professional education should not trump the constitutional concept of domicile. And the pan-Indian professional excellence is the goal to be aimed at. In that process, merit should occupy a place of primacy. That said, the Supreme Court, as we have understood, has never been averse to constitutionally consecrated, essentially caste-based, reservations in any sphere. Even on the reservations in the AIQ, the Supreme Court has treated it as the Executive's policy prerogative.

95. Equally emphatic is the judicial assertion in various judgments, both of this Court and the Supreme Court, that the admissions in the

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29(2016) 11 SCC 225

30Supreme Court of India, decided on 14.08.2020

reverted quota must be according to the Regulations that govern the admissions. So, now, we must see what Rules govern the admissions in the State of Goa.

Do the MCI Regulations and the Government-issued Prospectus conflict?

96. In fact, the petitioners have argued before us the Prospectus contradicts, even negates, the Regulations. So clause 4.37 of the Prospectus must yield to the "Note" appended to Appendix E of the MCI Regulations.

97. If we need a precedential prop to hold that the MCI's Regulations are mandatory, we need look no further than *Medical Council of India vs. State of Karnataka*[31]. In that case, a three-Judge Bench of the Supreme Court has held that the "Indian Medical Council Act is relatebale to Entry 66 of List I (Union List). It prevails over any state enactment to the extent the State enactment is repugnant to the provision of the Act". More particularly, *Medical Council of India* case has observed that "Regulations framed under Section 33 of the Medical Council Act with the previous sanctions of the Central Government are statutory." Indisputably, MCI's Regulations, including those we are concerned with, have been framed under Section 33 of the Indian Medical Council Act 1956.

98. As we have already observed, the Prospectus says that the seats remaining unfilled in AIQ "shall be offered to applicants from the merit list of the General Category in the Special round of admission [to be] notified separately". This is one limb. The other limb is that those admissions must be "subject to provisions of the Medical/Dental Council of India regulations/Supreme Court guidelines". We need to harmonise, if we can,

31(1998) 6 SCC 131

the Prospectus's proclamation—the reverted seats must be filled with the applicants from the merit list of the General Category—with its subjection of the admissions (even of the reverted seats) to MCI Regulations.

99. The Amended Regulations have not directed that the reverted seats must be filled with the candidates from the merit list. It, nevertheless, declares that the AIQ seats remaining vacant "will be deemed to be converted into state quota." It is the State's contention that the very AIQ came into being as a bulwark against excessive reservations. And the admissions into AIQ ought to be animated by the spirit of merit. So the State wants us to view the scheme of admissions keeping in view the original intention behind the AIQ. Indeed, AIQ was, initially, a judicial device to prevent policy perversion. It has taken root from Article 143 of the Constitution. Later, this AIQ was given legislative legitimacy, too. So, now, AIQ has been well-entrenched.

100. More than once we have stressed that AIQ had never been a device aimed against the constitutionally protected reservations—enabling as they are. They aimed at remedying the provincial and institutional reservations. Nether has constitutional protection. And, through all these decades, the Supreme Court has treated the application of reservations even to AIQ as the State's policy prerogative. True, at the inception, the rule of reservation did not apply to AIQ; but now it does. In fact, under the AIQ the Scheduled Tribe has more percentage (15%) for it than under the State Quota (12%).

101. All the precedents, binding or persuasive, we have considered above have been decided as per the statutory scheme. And in most cases,

then, there was no rule of reservation applied. So the Courts have held, as was done in *Shreyash*, the AIQ seats would not lose their character even when they reverted to the State Quota. If we apply that line of reasoning—though that reasoning, in fact, is unavailable here—we must conclude that the rule of reservation applies to the reverted AIQ for the Centre has subjected the Quota to reservations. But given the statutory changes, we must decide the issue in tune with the legislative mandate—even subordinate or delegated.

102. Legislative intent, a matter of mythical notion for some, is a question of interpretation. The Legislature, literally, is a babel of many voices, but legislation is a compromised common voice of that multitude. So we anthropomorphise this legislation as if it were human and attribute intentions to it. That accepted, how to gather that intention?

103. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." So held Chief Justice John Marshall. And that was in 1803, when an institution called the Supreme Court of the United States was insignificant and almost non-existent. And that was when Jefferson, the president, was dismissive of the Judiciary. Perhaps, *Marbury v. Madison*[32] was the single stroke of judicial bravery that saved the constitutions across the continents.

104. Here, at the home front, a Division Bench of this Court in *Kum. Pujal V. Nayak*, *per* one of us (M. S. Sonak J), has held that "from out of the interpretations possible or the courses open to the State, there is nothing

32 5 US 137 (1803)

wrong in the State adopting an interpretation or a course of action which is consistent with the constitutional norm of equality and non-arbitrariness."

What is a Prospectus?

105. A prospectus, as defined in Shorter Oxford English Dictionary, is a printed document notifying the chief features of a forthcoming publication, issue of shares for commercial enterprise, etc. Also "a brochure or pamphlet detailing the courses, facilities, etc., of an educational institution." In fact, the Prospectus under the Company Law has a definite legal connotation. But Prospectus in other senses—say in the academic sphere—has only lexical denotation. It is, as the Supreme Court has held in *Charles K. Skaria v. C. Mathew (Dr)*[33], "a fairly comprehensive repository" of the directions, for example, issued by the State Government regarding the selection of candidates. In the generic sense, it is no species of a legal document with rights or obligations flowing from it. It must accord with its sources, such as the statutory scheme or Regulations. For us, if it assumes its own life and contradicts the Rule or Regulation, which it is supposed to reflect or recapitulate, it must perish. It is a mere memo of mangled information.

106. Now, we must accept that notwithstanding the equivocation in the Prospectus, what guides the admissions to the reverted AIQ seats is the Regulations on Graduate Medical Education, especially its note to Appendix E.

Legal Fiction:

33(1980) 2 SCC 752

107. The Note to Appendix E of the Regulations on Graduate Medical Education treats the reverted AIQ seats as "deemed to be converted into state quota". According to the Black's Law Dictionary, the verb "deem" carries the meaning "(1) to treat (something) as if (a) it were really something else, or (b) it has qualities that it does not have". The second meaning the Lexicon gives is this: "(2). to consider, think, or judge."

108. We may say deeming is a legislative device that makes fictional factual. The Appeals Court has held in *St Alwyn v A-G (No. 2)*[34] that "sometimes the word is used to impose for the purpose of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible".

109. As the *Oxford Companion to Law*[35] clarifies, 'deeming' is a common modern kind of legal fiction. "Particularly in statutes it may be provided that one thing shall be 'deemed to be' another, e.g., that a dog shall be deemed to be a natural person, in which case the 'deemed' thing must be treated for the purpose of the statute as if it were the thing it is statutorily deemed [treated] to be."

34[1952] AC 15

35David M. Walker, The Oxford Companion to Law, Clarendon Press, Oxford, 1980).

110. In Chapter 5, under 'Subsidiary Rules', G. P. Singh in his *magnum opus*[36] has traced the jurisprudential contours of 'Legal Fiction'. According to the learned author, the Legislature is quite competent to create a legal fiction. In other words, it can enact a deeming provision for assuming the existence of a fact which does not really exist. But it must be subject to the limitation that the declaration of non-existent facts as existing does not offend the Constitution. Although the word 'deemed' is usually used, legal fiction may be enacted without using that word, too.

111. G. P. Singh further elaborates that in interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created. And after ascertaining this, the Court must assume "all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction". Lord Asquith of Bishopstone has felicitously enunciated this concept in *East End Dwelling Co. Ltd. v. Finsbury Borough Council*[37]:

> If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative State of affairs had in fact existed, must inevitably have flowed from or accompanied it… The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that State of affairs.

112. Let us not 'boggle our imagination' when it comes to the inevitable corollaries of that state of affairs: treating the reverted AIQ as

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36G. P. Singh, Principles of Statutory Interpretation, LexisNexis, 14 ed., 2016, 416

37(1951) 2 All ER 58

the State Quota. Let us accept whatever flows from our treating the reverted quota as the State Quota. That said, let us also guard ourselves against any extension of this deeming fiction beyond the purpose for which it is created.

For What Purpose the Regulations have created this Legal Fiction?

113. Earlier, the reversion of seats from AIQ was 'fortuitous', accidental; the authorities were clueless about how they should treat them. Later, that fortuity has become a certainty—an annual affair. It is no longer a one-off event. So the MCI wanted to bring even these reverted seats into a procedural fold. So the legal fiction. Once they are deemed—or treated—as State Quota, the reverted seats get coalesced as if they were from State Quota throughout. If this proposition is accepted, we find no difficulty to hold that whatever applies to the State Quota should apply to the reverted seats. To hold otherwise—that the reverted seats must be given to the general category on 'merit'—we find no base. Nowhere. The piety of a policy intention does not impart legality to a policy proposal if it contravenes a Rule or a Regulation.

114. To conclude, we hold that the State's stand, as reflected in the Prospectus, that the reverted seats should be available only to the meritorious open category violates the MCI's Regulations on Graduate Medical Education 1997. After all, the very Prospectus says that the admission from the general category must be subject to the MCI's Regulations. And those Regulations, as we understand, do not permit even by implication such a course of admission.

Breaking the Sealing:

115. Last, we will address the issue of the ceiling. The Government argues that if the State applies the rule of reservation to the reverted seats, first merit suffers. Second, it breaks the 50% ceiling the Supreme Court has fixed.

116. In *MR Balaji v. State of Mysore*[38] the Supreme Court held that the reservations under Article 15(4) could not exceed 50% of the seats: "Speaking generally and in a broad way, a special provision should be less than 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case." Later, *Indra Sawhney v. Union of India* reiterated, but it has also talked about an exception. In para 810 of the judgment, it has held:

> [W]ile 50 per cent shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas, the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised, and a special case made out.

117. First, the constitutional validity of the 103rd Constitutional Amendment is pending before the Supreme Court's Larger Bench. So is *E. V. Chinnaiah v. State of Andhra Pradesh*[39]. Those Benches, perhaps, will revisit, among others, the 'means test', the 'creamy layer' and the '50-per cent cap'. Incidentally, we may also refer to this Court's reasoning for the State to cross the 50% ceiling. That was in *Dr Jishri Laxmnarao Patil v.*

38AIR 1963 SC 649

392004 AIR SCW 6419

Chief Minister of State of Maharashtra[40]. A Division Bench of this Court (per Ranjit More J), has held that the Marathas declared as a socially, educationally, and economically backward class, "the total percentage of the state population entitled to the constitutional benefits and advantages as listed under the article 15(4) and the article 16(4) will be around 85%. This is a compelling extraordinary situation demanding extraordinary solution within the constitutional frame work." It has also added that the judicial verdicts have categorically pronounced that the reservation policy frame and constitutional mandate as regards SCs and STs are so sacrosanct that there is no need of quantifiable data or its verification whatsoever. "It has also to be in proportion to their population needing no distinction to be made as regards adequate vis-a-vis proportionate as to be done in case of reservations to other backward class of citizens."

118. According to *Dr Jishri Laxmnarao Patil*, the scenario that emerges would be "to accommodate remaining 63% (85% - 22%) backward class population in remaining 29% reservation allocation as a condition by the ceiling of 50%. This is an extraordinary situation and exceptional circumstances emerging in the State." That said, this decision, too, is sub judice before the Supreme Court.

119. Instead, we will examine the issue in a different perspective. When the State introduced reservations under Article 15(4) of the Constitution into the State Quota, it knew about the ceiling. So it ensured that all vertical reservations, put together, have not crossed the limit. Now, the beneficiaries of those reservations are asking the State to implement those reservations. Then, there arises an ambiguity: How a scheme or

40(2019) 4 Bom CR 481

policy should be read or interpreted. That being the Judicial Department's duty, we interpret and hold that the scheme admits of reservations. So the revered seats, forming part of the State Quota, are amenable to the rule of reservation.

120. The policy interpreted thus, now the State shows us a hurdle. As with Article 15(4), the Constitution added another clause—clause (6). That provides for 10% reservation to Economically Weaker Sections. That reservation implemented, the ceiling stands breached. First, the State has not challenged that clause (6) violates the ceiling. It cannot. Moreover, it is only a respondent. Besides, if the ceiling is immutable, what falls foul of it is clause (6) not clause (4) of Article 15. We cannot invalidate what came first by upholding what came later.

121. Let us employ a metaphor to appreciate the State's stand or its legitimacy. You have room for three, but you have invited another, the fourth. You are generous. Now, you turn to one of the three and tell him to leave for there is room only for three. Generosity at one place should not amount to scarcity at another. If one must go, that must be the last one. To sum up, pay Paul if you please; you be praised. But do not rob Peter.

122. Here that situation does not arise. There is no challenge from any quarter about the breach of the ceiling. We need not be tilting at windmills. Suffice to say, there remains no hurdle for the State's applying the reservation to the reverted seats, too.

123. If look back, *R. Rajeshwaran* has cautioned against the judicial meddling with any State's policy prerogative on providing reservations to the constitutionally-recognised, marginalised sections of the society. That is a converse case. Here, we are called upon to answer whether the MCI

Regulations, having statutory force, have permitted the amalgamation of the AIQ seats with the State Quota on reversion. If that amalgamation happens, what consequences should follow? That alone we have answered.

The Second Question:

124. Has the Government been allotting to the Schedule Tribe fewer seats than it has been entitled to under its 12%?

125. Let us see how the seat allocation happens among a few important categories. For this academic year, the total seats are 180. Of these 180 seats, 27 go to AIQ and 153 to the State Quota. To these 153 seats, the rule of reservation applies. That means, The ST quota must be 12%. And 12% of 153 comes to 18.36. Rounded off, the ST quota must be 18 seats. Yet they are given only 17 seats. Let us see whether the Government has been wrong in applying the percentages of reservations.

126. Simply put, from the total seats, the Government is first separating Economically Weaker Section (EWS) quota of 10%. That means, from the State Quota's 153 seats, first it takes away 15 seats; then, 138 seats remain. To these 138 seats, the Government applies the rule of reservation. So the ST category gets 17 seats. The petitioners contest this method of seat allocation. They wanted the State to divide all percentages of reservation from the total State Quota—simultaneously.

127. The Government counters this argument. According to it, the EWS quota does not affect other statutory or constitutional reservations. It is, in fact, evident from Article 15(6) of the Constitution. Only last year did the MCI permit the State

Government to increase its seats from 150 to 180 to accommodate the EWS quota. That means, EWS quota does not carve out its share from the existing seats; instead, it takes its share from the increased seats. So from that increased seats, its share must be separated. Whatever remains must be taken as the quota available for all, including the reserved categories. With this arrangement, the reserved communities have not been affected. They get more seats than what they had last year—thanks to Article 15 (6).

128. We will tabulate, taken from the third respondent's counter, how the seat allocation has been and how the petitioners want it to be:

No. of Seats	Column A Seat distribution in 2019-20 before 10% EWS	Column B Seat distribution in 2019-20 after 10% EWS	Column C Seat distribution in 2019-20 if the petitioners' contention accepted
Total Seats	150	180	180
AIQ (15%)	22	27	27
EWS	Nil	15 (10% of 153)	15
State Quota (Balance)	128	138	153 (if EWS included)
ST (12%)	15	17	18
OBC (27%)	35	37	41
General	67	73	65

* The minor reservations such as SC, Freedom Fighter, Ex-Service Men, etc., were omitted.
** Horizontal reservation for Persons with Disability is shown

clubbed.

129. According to the third respondent, as per the "Central Guidelines", while implementing EWS reservation, the authorities should ensure that existing seat matrix remains unaffected. That is, the number of seats allotted to various categories before implementing 10% EWS reservation should not adversely vary. It also points out that the MCI has increased the number of seats keeping in view only this central guideline. Eventually, he adds that if the petitioners' contention is accepted, the Open Category would be deprived of the seats they had before EWS implementation. Let us see how the Constitution provides for this. Inserted through Section 2 of the Constitution (One Hundred and Third Amendment) Act, 2019 (w.e.f. 14-1-2019), clause (6) of Article 15 reads:

> (6) Nothing in this article or sub-clause (*g*) of clause (1) of Article 19 or clause (2) of Article 29 shall prevent the State from making,—
>
> (*a*) *any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5);* and
>
> (*b*) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30, which in the case of reservation would be *in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.*
>
> *Explanation.*—For the purposes of this article and Article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.
>
> (italics supplied)

130. India hitherto had caste reservation; now, for the first time, it has brought in the class reservation. As seen from the Statement of Objects and Reasons, Parliament has felt that economically weaker sections of citizens have largely remained excluded from attending the higher educational institutions and public employment because of their financial incapacity to compete with the persons who are economically more privileged. It has acknowledged that the benefits of existing reservations under clauses (4) and (5) of Article 15 and clause (4) of Article 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness. So it has invoked the Directive Principles of State Policy as contained in Article 46 of the Constitution. This Article enjoins the State to "promote with special care the educational and economic interests of the weaker sections of the people", among other things. For now, the policy ambivalence whether 'weaker section' must have 'caste' as an essential factor stands legislatively set at rest. Of course, this Constitutional Amendment is before a Larger Bench of the Supreme Court.

131. For the third respondent, stricter construction of the reservation is the need of the hour. According to him, "reservation is exception to the general rule of merit". No longer so—at least constitutionally. Granted, in *MR Balaji v. State of Mysore*[41] the Supreme Court reckoned that clause (4) of Article 15 was an exception to clause (1) of Article 15 and, therefore, must be construed narrowly. But *State of Kerala v. NM. Thomas*[42], a

41AIR 1963 SC 649

42(1976) 2 SCC 210

Seven-Judge Bench overruled this proposition. It has held that Article 16(4) is not an exception but a facet of Article 16(1). Article 16(1) itself, according to *N. M. Thomas*, permitted reasonable classification between dissimilarly situated citizens. Besides, the equality of opportunity guaranteed under Article 16(1) was interpreted to be not merely formal or legal equality but 'proportional equality' or 'progressive elimination of pronounced inequality'.

132. The American courts have vainly wished their Constitution to be colour blind. But that was not to be. Oblivious of reality, if anyone idealises his world, history exacts its revenge; it repeats itself. India is no different. Caste replaces colour. We cannot idealise our world and dream of a casteless society. May that utopian dream come true! The sooner the better. Our Constitution recognises caste, for our collective psyche does it —conditioned by countless years of practice. Unless it is exorcised from the nation's psyche, the Constitution keeps reminding us of the historical injustice and imperative, too. Until the marginalised has been brought to the mainstream, every legislative provision needs a beneficial interpretation. We may agree that the greatest source of wealth is no longer land or factories; it is knowledge—that is education. Educating is empowering.

133. Once protective discrimination or affirmative action has been recognised as a facet of equality, it is difficult to hold that 'reservation' should suffer indignity even in interpretation. Once a policy stands constitutionally consecrated and statutorily stated, its plain words should guide our interpretation.

134. As seen from the record, the MCI, through its communication, dt.04.06.2019, has issued a "Guidance Note" about the process to be followed in reckoning the 10% EWS quota. Summarised, the relevant guidelines are these:

(a) The MCI would increase the seats for implementing 10% EWS quota.

(b) The increase in seats would entail no corresponding increase in infrastructure or faculty, right now.

(c) For implementing the EWS reservation, the increase in seats must be effectively 25% of the current intake.

(d) The seat increase must be after considering the total intake of students at the "state" level. That is, the existing reservation policy must be taken note of.

135. To employ the cliched analogy, I may note that reservation is the genus, and the two types of reservations—social-status (caste) based; economic-status (class) based—are the species. The latter one has not taken a bite from the existing cake. So the people already sharing that cake cannot complain. In fact, this new entrant has brought along with it a fresh piece of cake; that piece is more than it can bite into. It has not kept the whole piece for itself. Instead, it has kept that piece alongside the existing one—rather added to it—but has taken less than what it has brought. The former group has gained something because of the latter group's entry. So this group still cannot be seen complaining.

136. Let us see how it works out. Before the EWS's entry,

Goa had 150 seats. Under the State Quota, it had 128 seats. From these 128, ST got 15, OBC 35, and General 67. After the EWS's entry, Goa has 180 seats. State Quota is 153. From these, 153, EWS got 15, ST got 17, OBC got 37, and General got 73. If we accept the petitioners' arguments and allow all the reserved categories, both caste and class, to share the seats simultaneously, let us see how it goes.

137. Total seats are 180; State Quota is 153. From these 153, EWS gets 15 (unchanged), ST gets 18 (+1), OBC gets 41 (+4), and General gets 65 (-8).

138. The spirit behind Article 15 (6) is that the existing reservation ratio shall not be affected. Yet another class of the Society, namely the economically marginalised section, must get benefited. If we accept the Government's seat-sharing matrix, every section of the Society gets benefited. If we follow, on the other hand, the petitioners' principle, a few gain and a few lose. We agree General Category is not a 'reserved' category; it is a residuary category. It has no fixed share. But when we read a benefit into a provision, we should also ensure we do not insert harm into another. We cannot be oblivious that the seat increase is solely to accommodate the reservation under Article 15 (6) of the Constitution; it is not a general upward revision of seat allocation. That is why MCI has delinked this increase from the infrastructural requirement and faculty ration reckoning. If it collaterally benefits some, that is welcome. On the contrary, if it collaterally damages some other, that ought to be avoided, as far as

possible.

Conclusion:

Issue No.I: Should the rule of reservation apply to that quota?

Yes. The Rule of Reservation will apply to the reverted AIQ seats, for they are deemed to be the State Quota.

Issue No.II: How should we reckon this 10%?

First, the 10% seats meant for the EWS must be separated. To the remaining pool of seats, the State should apply the caste- or community-wise percentage.

Result:

The Writ Petition is partly allowed.

DAMA SESHADRI NAIDU, J.

NH

LD-VC-CW-43-2020

(***Per M.S. Sonak, J.***)

1. I have had the advantage of reading the opinion expressed by my learned Brother Hon'ble Mr. Justice Dama Seshadri Naidu, in this matter. In the introductory paragraph, my learned Brother, in his in inimitable style, has adverted to the following two issues which arise in this Petition :-

> *(a) In the admissions to the Under Graduate Medical Courses, there are two quotas : the All India Quota (AIQ) and the State Quota. Often, in fact annually, the AIQ seats remain unfilled; they revert to State Quota. Should the rule of reservation apply to that quota? That is the first question.*
>
> *(b) While determining the percentage of seats for each caste or community, now the State should also provide for Economically Weaker Sections. It is 10%. How should the State reckon this 10%? That is the second question.*

2. In so far as issue *(a)* is concerned, my learned Brother has ruled in favour of the Petitioners and held that the rule of reservation will apply to the reverted AIQ seats, as they are deemed to be the State quota.

However, in so far as the second issue is concerned, my learned Brother has ruled against the Petitioners and held that in the first place, 10% seats meant for EWS must be separated and only to the remaining pool of seats, the State should apply caste or communitywise percentage.

3. In so far as the second issue in relation to working out the percentage of the seats in the context of the increased seats for the EWS quota, I entirely agree with the opinion expressed by my learned Brother. However, in so far as the first issue is concerned, I am unable to agree with my learned Brother's opinion. Hence, the necessity of this dissenting opinion.

4. In so far as the first issue is concerned, Mr. Gosavi the learned Counsel for the Petitioners submits that the Regulations of Graduate Medical Education 2015, framed by the Medical Council of India (MCI) which entered into force sometime in 2016, make it clear that the AIQ seats remaining vacant after the last date for joining *i.e.* 9th August, will be deemed to be converted into the State quota. He submits that Regulations of Graduate Medical Education 2015 (MCI Regulations) constitute a complete Code and a legal fiction is created by Note-1 below

Appendix E. The said MCI Regulations make it clear that the AIQ seats remaining unfilled by 9th August of the concerned year, will be deemed to be converted to the State quota. He, therefore, submits that the Notification dated 7th September, 2007, which announces the reservation policy of the State Government in respect of the seats in all educational institutions in the State of Goa, will clearly apply and in terms of the same, the State Government is obliged to reserve 12 % seats in favour of the ST even in the unfilled AIQ seats which revert to the State quota and are deemed to form part and parcel of the State quota.

5. Mr. Gosavi submits that the legal fiction created by the MCI Regulations must be given full effect and Clause 4.37 of the Prospectus which denies such full effect, is *ex facie ultra vires*, arbitrary and unreasonable.

6. Mr. Gosavi relies on the decision of the Hon'ble Apex Court in the case of *Ashish Ranjan and ors. vs. Union of India and ors.*[43] to submit that the aforesaid MCI Rules have received the stamp of approval from

43 [(2016) 11 SCC 225]

the Hon'ble Apex Court and this is an additional ground to urge that such regulations are clearly binding upon the State Government.

7. Mr. Pangam, the learned Advocate General has relied upon four decisions rendered by various Division Benches of this Court, which, according to him, have taken the view that there can be no reservations in respect of unfilled seats from the AIQ which revert to the State quota. Further, the learned Advocate General submits that reservations is a matter of State policy and no writ of mandamus can issue to compel the State to make any reservations. He submits that there is absolutely nothing arbitrary or unreasonable in Clause 4.37 of the Prospectus, which merely declares the policy of the State Government that there shall be no reservations in respect of unfilled AIQ seats which revert to the State quota. He submits that the MCI Regulations merely provide that the AIQ seats unfilled by the 9th August of the concerned year, will be deemed to be converted into the State quota. However, the MCI Regulations no where provide that the State is obliged to apply the reservation policy in respect of such reverted seats. He relies upon a number of decisions in support of his contentions and submits that the issue, as raised by the Petitioner, is required to be decided against the Petitioner.

8. In the undermentioned decisions, rendered by the Division Benches of this Court, it is held that there can be no reservations to the unfilled seats from the AIQ which stand reverted to the State quota :

[i] Dr. Dhondiba Munde V/s. State of Maharashtra[44]*;*

[ii] Jigna Priyavadan Desai V/s. The State of Maharashtra & Ors.,[45]

[iii] Shilpa Suresh Shinde & Others V/s. State of Maharashtra and Others[46]

[iv] Sameer Anant Deshpande v/s. State of Maharashtra and Others[47]*,*

9. In *Munde* (supra), which was decided on 20th August, 1990, the Division Bench comprising of V.V. Kamat and N.P. Chapalgaonkar, JJ., upon construing the concerned rules of admissions, concluded that the

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44 W.P. No. 3909 of 1989 and 3910 of 1989 decided on 20.08.1990

45 Writ Petition No.370 of 1999 decided on 23.02.1999

46 WP No. 560 of 2000 decided on 24.03.2000

47 L.P.A. No. 60 of 2001 1410

unfilled seats from the AIQ are required to be filled in purely on merit and merit alone and consequently, there was no scope for application of the reservation policy of the State in respect of such unfilled seats reverted to the State quota.

10. The issue once again arose in *Jigna Desai* (supra), as to whether the reservation would apply to the seats diverted from the AIQ upon the entrance examination. This time, the Division Bench comprising Y.K. Sabhawal, CJ.(as His Lordship then was) and A.P. Shah, J., vide Judgment dated 23rd February, 1999, held that the point sought to be urged is concluded in favour of the Petitioner by the decision of this Court in *Munde* (supra) and the Bench, relying upon various decisions, including the decision of the Hon'ble Supreme Court in *Dr. Jeevan Almast vs. The Union of India*, reported in AIR 1988 SC 1813, has held that to such a seat reservation would not apply.

11. It appears that in *Jigna Desai* (supra), a plea was made for reconsideration of the decision in *Munde* (supra) by reference to a Larger Bench. However, this plea was turned down by observing the following in paragraph 4 :

> "*4. Having heard the learned Counsel for the Respondents, we do not think that the matter requires consideration by a larger Bench. We are in complete agreement with the view expressed in Munde's case (supra).*"

12. This very issue was once again raised in *Shilpa Shinde* (supra), which was decided on 24th March, 2000 by the Division Bench comprising B.N. Srikrishna, J. (as His Lordships then was) and Dr. S. Radhakrishnan, J. This Division Bench by reference to *Munde* (supra), and *Jigna Desai* (supra), held that in so far as this Court is concerned, the issue is no longer *res integra* as the two Division Benches of this Court have already taken a view that the seats from AIQ which divert to the State quota must, necessarily be filled up purely on merits, without any application of reservation policy.

13. The issue, thereafter, again arose in *Sameer Deshpande* (supra) which was decided by the Division Bench comprising B.H. Marlapalle and N.V. Dabholkar, JJ., on 14th September, 2001. Again, by reference to *Munde* (supra) and *Shilpa Shinde* (supra), the Division Bench held that the State cannot apply reservation policy against unfilled seats from the

AIQ which revert to the State quota and that such seats have to be filled in purely on merit. This Division Bench, in turn, also made reference to yet another decision of the Division Bench in the case of *Dr. Sangita Vyavahare vs. The State of Maharashtra and ors.*[48] in which it was again held that the returned/vacant AIQ seats are required to be filled in from the waiting list purely on merit and there was no question of applying any reservation policy in respect of such seats. The Division Bench noted that *Dr. Sangita Vyavahare* (supra) reliance was placed upon the decision of the Hon'ble Apex Court in *Dr. Jeevan Almast* (supra).

14. Apart from the decisions of the Division Benches referred to above, reference can also be made to the decision of the Division Bench of this Court in in *Shreyash vs. State of Maharashtra and ors.*[49] delivered by S.A. Bobde (as His Lordship then was) and M.N. Gilani, J., which also takes the view that no party can insist that there should be reservation in respect of unfilled AIQ seats once they revert to the State quota.

48 2000 (4) ALL.MR 167

49 2011 (6) Mh.L.J. 888

15. Mr. Gosavi, the learned Counsel for the Petitioner, however, submits that all the aforesaid decisions were rendered prior to 2016 *i.e.* prior to the MCI Regulations entering into force. He relies upon Note-1 below Appendix E to the MCI Regulations and the decision of the Hon'ble Apex Court in *Ashish Ranjan* (supra) to submit that in terms of the same, there is now a statutory fiction that the AIQ unfilled seats will be deemed to be converted into the State quota. He submits that the MCI Regulations have statutory force and, in fact, constitute a complete code, when it comes to admissions to medical colleges. He submits that the statutory legal fiction is required to be given full effect and the reservation policy of the State Government, as reflected in its Notification dated 7th September, 2007, is required to apply not only to the State quota seats as originally provided for, but also in respect of the deemed State quota seats, *i.e.* the seats deemed to be converted into the State quota. In short, he relies upon the principle in *East End Dwellings Co. Ltd., v/s. Finsbury Borough Council* [50] for interpretation of a legal fiction

16. In order to appreciate Mr. Gosavi's contention, it is necessary to reproduce Appendix E to the MCI Regulations along with the notes appended to the same :

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50 [1951] 2 AER 587

"2. In the "Regulations on Graduate Medical Education, 1997", Appendix E shall be replaced as under:

TIME SCHEDULE FOR COMPLETION OF THE ADMISSION PROCESS FOR FIRST MBBS COURSE

Sr. Nos.	Schedule for admission	Seats to be filled up by the Central Government through the All-India Entrance Examination	Seats to be filled up by the State Government/Institution
1	Conduct of entrance examination	Between 1st to 7th May	Between 10th to 17th May
2	Declaration of the result of the qualifying exam/entrance exam.	By 1st June	By 1st June
3	1st round of counselling/admission.	To be over by 25th June	Between 6th July to 15th July
4	Last date for joining the allotted college and the course	By 5th July	By 22nd July
5	2nd round of counselling/admission for vacancies.	Between 23rd July to 30th July	Between 10th to 22nd August
6	Last date of joining for the 2nd round of counselling/admission.	By 9th August	By 28th August
7	Commencement of	1st of August	1st of August

	academic session/term.		
8	Last date up to which students can be admitted/joined against vacancies arising due to any reason.		By 31st August

*Note 1.—**All-India quota seats remaining vacant after last date for joining i.e. 9th August will be deemed to be converted into State quota.***

2. Institute/college/courses permitted after 31st May will not be considered for admission/allotment of seats for current academic year.

A.*In any circumstances, last date for admission/joining will not be extended after 31st August."*

[emphasis supplied]

17. According to me, Appendix E to the MCI Regulations merely provides for the time schedule for completion of the admission process for the First MBBS Course. Note 1, as aforesaid, places beyond doubt the position that the AIQ seats remaining vacant after the last date for joining *i.e.* 9th August, will be deemed to be converted into the State Quota. Merely because Note 1 uses the expression *"deemed"*, that by itself may

not be sufficient to hold that Note 1 creates a legal statutory fiction in the present case.

18. In principles of statutory interpretations by Justice G.P. Singh, (14th Edition), this is what is observed in the context of the expression *"deemed"* at page 429 *:*

> "*It must, also, be noted that the word 'deemed' which is normally used to create a statutory fiction may also be used to put beyond doubt a meaning which may otherwise be uncertain or to give to the statutory language a comprehensive description that it includes what is obvious, what is uncertain and what is in ordinary sense impossible."*[51]

19. However, even if it is held that Note 1, as aforesaid, indeed creates a statutory or a legal fiction as contended by Mr. Gosavi, certain principles of interpretation of legal fictions need to be adverted in order to appreciate Mr. Gosavi's contention.

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51 *St. Aubyn (LM) v. A.G. (No.2), (1951) 2 All ER 473, p. 498: 1952 AC 15 (HL); referred to in Hira H. Advani v. State of Maharashtra, AIR 1971 SC 44, p.54 : 1969 (2) SCC 662: Waliram Waman Hiray (Dr.) v. Mr. Justice B. Lentin, AIR 1988 SC 2267, p. 2282 : 1988 (4) SCC 419; Premier Breweries v. State of Kerala, JT 1997 (10) SC 226, p. 231: (1998) 1 SCC 641 : (1998) 1 KLT 186. "*

20. In construing a legal fiction, the Court, in the first place, is bound to ascertain the purpose for which the fiction is created and it is only after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to giving the effect to the fiction. But, in so construing the fiction, the Court is not to extend the same beyond the purpose for which it is created or beyond the language of the section by which it is created. Further, it cannot also be extended by importing another fiction. In ***State of West Bengal vs. Sadam K. Bormal*** [52], the Hon'ble Supreme Court held that the above stated principles are *"well settled".*

21. In *East End Dwellings Co. Ltd.* (supra), no doubt, the House of Lord has held that if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative State of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that State of affairs.

52 (2004) 6 SCC 59.

22. However, before we reach the stage of applying the aforesaid principle, in *East End Dwellings Co. Ltd.* (supra), it is necessary to ascertain the purpose for which the legal fiction was created and it is only thereafter that full effect can be given to the legal fiction, so as to carry it to its logical conclusion. Again, even thereafter care has to be taken to ensure that the legal fiction is not to be extended beyond the purpose for which it was created or beyond the language of the section by which it was created. Certainly, a legal fiction cannot be extended by importing another legal fiction. (see *Commissioner of Commercial Taxes & ors vs. Swarn Rekha Cokes and Coals (P) Ltd., and Others*[53]*).*

23. As noted earlier, from the contents and placement of Appendix E and Note 1 below the same in the MCI Regulations, it is quite clear that the MCI was basically providing a time schedule for completion of the admission process for the First MBBS Course. Note 1 only clarifies that in case AIQ seats remain vacant after the last date for joining *i.e.* 9th of August of the concerned year, such seats shall neither lapse nor be wasted, but rather such seats shall be deemed to be converted into the State quota, so as to enable the concerned State Government to fill them up without

53 [2004] 6 SCC 689

the Central Government Agencies having any say in the matter. This, according to me, is the purpose discernible from Note 1 below Appendix E to the MCI Regulations.

24. In enacting Note 1 below Appendix E, the MCI was not even remotely addressing itself to the issue of reservation in respect of the AIQ seats remaining unfilled beyond 9th August which were to be deemed to be converted into the State quota. Therefore, I am unable to accept that the purpose of Note 1 or the legal fiction contained therein was even remotely concerned with the issue of making applicable the reservation policy of the State Government to the AIQ seats which were deemed to be converted into the State Quota. The very purpose for creation of legal fiction cannot be ignored or extended by applying the principle in *East End Dwellings Co. Ltd.* (supra).

25. Mr. Gosavi basically contends that to the AIQ seats which are deemed to have been converted into the State Quota, the reservation policy of the State Government should also be deemed to be applicable, without anything more. In effect, therefore, the contention seeks to extend the scope of the legal fiction beyond the purpose for which it was

created or beyond the language for which it was created, *inter alia*, by importing in it another legal fiction *i.e.* the deemed applicability of the reservation policy of the State Government. This, according to me, will not be the appropriate manner of construing the legal fiction.

26. To accept the contention of Mr. Gosavi, would amount to making applicable the reservation policy of the State Government, virtually by way of default. This is because, there is nothing in the MCI Regulations expressly or even impliedly, making applicable the reservation policy of the State Government to the unfilled AIQ seats, which are deemed to be converted into the State quota. The State Government, by enacting Clause 4.37 in the Prospectus, has made it clear that it is not its intention to subject such seats to its reservation policy. Therefore, by unduly extending the scope of the legal fiction beyond the legitimate purpose for which the same may have been enacted, the reservation policy of the State Government cannot be made applicable to such seats.

27. In *Ashish Ranjan* (supra), the issue of unfilled AIQ seats which are deemed to be converted into the State Quota, being subjected to the reservation, was not even remotely involved. In fact, the order

upon which Mr. Gosavi has placed reliance, was issued in order to ensure that all the stakeholders follow, in letter and spirit, the time schedule prescribed by the MCI and not make any deviation whatsoever. Therefore, it is not possible to accept Mr. Gosavi's contention that *Ashish Ranjan* (supra) is an authority for the proposition that the State Government is obliged to reserve the seats in favour of SC or ST candidates from out of the unfilled AIQ seats which are deemed to be converted into the State Quota.

28. Recently, the Constitution Bench of the Supreme Court in the case of *Tamil Nadu Medical Officers Association and ors. vs Union of India and ors.*[54] has held that the Medical Council of India Act is referable to Entry 66 List I of the VIIth Schedule to the Constitution of India which is a limited entry to lay down standards. Consequently, the MCI regulations providing for reservation for inservice candidates in PG medical course is *ultra vires* the Medical Council of India Act. The Constitution Bench has further held that it is the State can make regulations to provide reservation for inservice doctors in PG medical course.

54 . Writ Petition (Civil) No.252 of 2018 and ors. dtd. 31.08.2020

29. In the aforesaid case, the Constitution Bench was considering the issue as to whether the State Governments have any powers to reserve the seats for admission in postgraduate medical degree courses, for inservice candidates. The Constitution Bench held that the Entry 66 List I is limited to coordination and determination of standards in higher education, which could mean laying down of standard. Accordingly, the Medical Council of India which is being constituted under the provisions of the Indian Medical Council Act, 1956 is the creature of the statute enacted in terms of Entry 66 List I and has no power to make any provision for reservation, more particularly, for inservice candidates by the concerned States. Such power to make reservation is vested in the State Government in terms of Entry 25 List III of the Constitution.

30. The Constitution Bench also held that the regulation 9 of MCI Regulations, 2000 does not deal with and/or make provision for reservation and/or affect the legislative competence and authority of the concerned State to make reservation and/or to make special provisions like the provisions provided in separate source of entry for inservice candidates seeking admission to postgraduate courses. Therefore, the State Governments will be well within their authority and/or the legislative

competence to provide any separate source of entry for inservice candidates.

31. The Constitution Bench, in fact held that regulation 9 including, in particular, Regulation 9(IV) of the MCI regulations, 2000 which deals with reservation for inservice candidates will be *ultra vires* the Indian Medical Council Act, 1956 and it will be beyond the legislative competence under Entry 66 List I. The Constitution Bench also held that such regulations will be *ultra vires* the Articles 14 and 21 of the Constitution of India as well.

32. Though the Constitution Bench was dealing with the issue of reservations in favour of the inservice candidates at the Post Graduate level, the findings and reasoning in so far as the powers of the MCI are concerned, are quite relevant to the decision in the present case. The MCI Regulations, upon which Mr. Gosavi has placed strong reliance, do not even remotely deal with the issue of reservation in respect of unfilled AIQ seats which are deemed to be converted into the State quota. Yet, Mr. Gosavi contends that it is these MCI Regulations, which make the entire difference in the matter and on the basis of these MCI Regulations,

even the law laid down by not less than four Division Benches of this Court may be bypassed. In fact, this latest decision of the Constitution Bench in *Tamil Nadu Medical Officers Association* (supra), suggests that the MCI may not even have the competence to deal with the issue of reservations in a State, looking to the provisions of the Indian Medical Council Act, 1956 and the scheme in the Constitution of India. In such circumstances, it will not be possible to hold that the MCI Regulations can constitute the basis for bypassing the decisions of at least four Division Benches of this Court, or for holding that there must be any reservation in respect of the unfilled AIQ seats which are deemed to be reverted to the State quota.

33. In some of the decisions referred to by the Division Benches of this Court, there is reference to the *'fortuitous'* nature of seats from the AIQ that remain unfilled and are consequently reverted to the State quota. But, what is referred to as *'fortuitous'* was not whether such seats would be allotted to the State quota or not. There was nothing fortuitous about that aspect, both before or after the MCI Regulations entered into force in 2016. What was fortuitous was, whether any seats from AIQ would at all remain unfilled in any given year and would consequently revert to the State quota. That was the only fortuitous element which

continues both, before or after the MCI Regulations entering into force. Besides, the fortuitous nature of the seats, was not the only reason given in the decisions rendered by the Division Benches, but that was one of the reasons given by the Division Benches to take the view which they have ultimately taken on not less than five occasions. Therefore, it is not possible to hold that the MCI Regulations have altered the basis or fundamental basis upon which the decisions of the five Division Benches of this Court were premised.

34. Mr. Gosavi also contended that the decisions of the four Division Benches mainly turned upon the interpretation of the rules framed by the State Governments in dealing with the unfilled AIQ seats which reverted to the State quota. This is correct to a certain extent. However, even in the present case, we have Clause 4.37 in the Prospectus which clearly provides that unfilled AIQ seats which are deemed to be reverted to the State quota, are to be filled in on the basis of merit from out of the candidates of the general category. Therefore, even this matter will have to be decided on the basis of Clause 4.37 of the Prospectus and unless the Petitioners make out a case for striking down Clause 4.37 of the Prospectus, there is really no scope for bypassing the decisions of at least five Division Benches of this Court, which have taken the view that the

reservation policy will not apply in respect of such unfilled AIQ seats which are deemed to be converted into the State quota.

35. Accordingly, by following the decisions of at least five Division Benches of this Court referred to above, I am of the opinion that even the first issue will have to be decided against the Petitioners.

36. The matter can be looked at from yet another perspective. The MCI Regulations, no doubt, provide that the AIQ seats remaining unfilled by 9th August, shall be deemed to form part of the State quota. But, even thereafter it is for the State to determine whether such *"deemed to be converted into State quota"* seats are to be subjected to the reservation policy of the State Government and if so, the extent thereof.

37. There is no mandate in the MCI Regulations to subject such *"deemed to be converted into State quota"* to the reservation policy of the State. There is also no mandate in the Constitution of India to provide any reservation in respect of any seats, much less in respect of such deemed State Quota seats. The provisions in the Constitution relating to reservations are only enabling. Therefore, no mandamus as

such can issue to the State Government to introduce reservations in such seats.

38. In *Gulshan Prakash (Dr.) and others v/s. State of Haryana and others*[55], the Hon'ble Apex Court has clearly held that the power of the State to make reservation under Article 15(4) of the Constitution of India, is discretionary and not mandatory. Therefore, no writ can issue directing the State to make provision for reservation. Hence, where a specific decision was taken by the State Government concerned not to have reservation for SC & ST candidates in Post Graduate Medical Courses, it was held that no mandamus could issue to direct the reservation.

39. Incidentally, even in *Gulshan Prakash* (supra), as in the present case, mandamus was applied for on the basis that the concerned State Government already had the policy to provide for reservations in favour of the SC & ST candidates at the Under Graduate level, and therefore there was no reason to deny the similar benefit at the Post Graduate level. Such contention was clearly turned down by observing that it is for the State to formulate policies in such matters and since the

55 [(2010) 1 SCC 47]

powers of the State Government are only discretionary, no mandamus could issue.

40. Mr. Gosavi, in fact, accepted the legal position that no mandamus can issue to the State to provide for reservation, since the provisions relating to reservations in the Constitution are only enabling and not imperative. However, he urged that the State Government already has the policy to provide for reservation, as is reflected in its Notification dated 7th September, 2007 and the Petitioners are merely seeking the correct implementation of such policy. According to me, the contention is merely an exercise in semantics. In fact, the Petitioners seek nothing, but a mandamus to make applicable the reservation policy in respect of the deemed converted State quota, which, according to me, is impermissible.

41. In *Union of Union of India v/s. Rajeshwaran and anr.*[56], a writ was sought to apply the rule of reservation to ST & ST in respect of those seats which are set apart for All India Pool in MBBS or BDS seats. The learned Single Judge of the High Court in fact, allowed the writ petition

56 (2003) 9 SCC 294

and made applicable the rule of reservation as prayed for by the Petitioners. As against such order, a writ appeal was preferred with an application seeking interim reliefs. Some limited interim relief was granted and as against the same, the Union of India instituted a Special Leave Petition before the Hon'ble Apex Court. The Hon'ble Apex Court, considering the nature of the matter and the issues involved in the case, transferred the main petition under Article 139A of the Constitution to itself and disposed off the main petition by squarely negating the petitioner's contention.

42. The Hon'ble Apex Court held that in *Ajit Singh & Others (II) v/s. State of Punjab,* 1999 7SCC 209, it was held that Article 16(4) of the Constitution only confers a discretion and does not create any constitutional duty or obligation. The language of Article 15(4) is identical and therefore, in view of the several decisions holding the field, it was held that no mandamus can issue to provide for reservation or relaxation in favour of the SC or ST categories and the judgments which take the contrary view, cannot be held to be laying down the correct position in law.

43. Thus, it is clear that the acceptance of the Petitioners' contention would mean issuance of a writ of mandamus to the State Government to reserve 12% seats in favour of the ST category in the deemed to be converted into State quota seats. In view of the law laid down by the Hon'ble Apex Court in *Gulshan Prakash* (supra) and *Rajeshwaran and anr.* (supra), no such mandamus can issue. This is an additional reason why the first issue raised in this Petition is required to be decided against the Petitioners.

44. The Petitioners have also challenged Clause 4.37 of the Prospectus, which, in terms, provides that the unfilled AIQ seats which may be deemed to be converted into the State quota, are to be filled in on the basis of merit from out of the candidates from the general category. Therefore, unless the Petitioners establish that Clause 4.37 of the Prospectus is either *ultra vires* any legislation or Part III of the Constitution, there is no question of the Petitioners being entitled to the reliefs which they apply for.

45. In *Dean, Goa Medical College, Bambolim Goa and anr. v. Dr. Sudhir Kumar Solanki and another*[57], the Hon'ble Supreme Court has

57 (2001) 7 SCC 645

held that an eligibility criterion statutorily stipulated in a prospectus, cannot be said to be merely directory or, for any reason, illegal, thereby resulting in a nebulous state of affairs in the matter of selection of candidates for admission. There could be only two alternative courses, namely, either the rule is unconstitutional or illegal for any reason and, therefore, to be struck down or, on the other hand, valid and invariably and uniformly enforceable without any reservation whatsoever, as binding and mandatory character. Therefore, unless the Petitioners make out a case for striking down Clause 4.37 of the Prospectus, this Clause will have to be enforced.

46. The Petitioners, according to me, have failed to plead and demonstrate any ground for striking down Clause 4.37 of the Prospectus, which clearly embodies the policy of the State Government that there shall be no reservation in respect of the unfilled AIQ seats which may have deemed to have been converted into the State quota.

47. According to me, Clause 4.37 of the Prospectus cannot be regarded as *ultra vires* Note 1 below Appendix E to the MCI Regulations, because there is absolutely nothing either in the Appendix E, or in Note 1,

below Appendix E, which says that the reservation policy of the State Government is to be made applicable in respect of unfilled AIQ seats which may be deemed to be converted into the State quota.

48. As noted earlier, the MCI Regulations do not even remotely deal with the application of reservation policy to the State quota seats or deemed to be converted into the State quota seats. Besides, if the decision of the Constitution Bench in *Tamil Nadu Medical Officers Association* (supra), is to be taken into consideration, then, it is doubtful whether the MCI is competent to make regulations in relation to the reservation of seats in Medial Colleges or Post Graduate Institutions. In fact, the Constitution Bench holds that it is within the province of the State Governments to determine such matters. Therefore, it is not possible to say that Clause 4.37 of the Prospectus is *ultra vires* the MCI Regulations.

49. Similarly, Clause 4.37 of the Prospectus cannot be said to be *ultra vires* Part III of the Constitution as being either unreasonable or arbitrary. The effect of Clause 4.37 of the Prospectus is, in fact, to ensure that the candidates who have secured highest marks and who are therefore in the higher position in the wait list of the general category, are required

to be considered for admissions against the AIQ seats which remain unfilled and are, therefore, deemed to be converted into the State quota.

50. According to me, there is neither any arbitrariness nor any unreasonableness in Clause 4.37 of the Prospectus. This clause merely echoes the principles explained by the Hon'ble Apex Court in *AIIMS Students' Union v/s. AIIMS and others*[58] that merit must be the test when choosing the best, according to this rule of equal chance for equal marks.

51. In *AIIMS Students' Union* (supra), the Hon'ble Apex Court has held that when protective discrimination for promotion of equalisation is pleaded, the burden is on the party who seeks to justify the *ex facie* deviation from equality. The basic rule is equality of opportunity for every person in the country, which is a constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance for the higher levels of education like postgraduate courses. Reservation, as an

58. 2002 1 SCC 428

exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped – the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there, the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation.

52. Mr. Gosavi did try to faintly urge that the Government Notification dated 7th September, 2007 which prescribes the reservation to the extent of 12 % in favour of the ST category at all the educational institutions in the State of Goa, will have precedence over Clause 4.37 of the Prospectus and, therefore, in case of any conflict between the Notification dated 7th September, 2007 and Clause 4.37 of the Prospectus, then, it is the former notification which will prevail and not Clause 4.37 of the Prospectus.

53. There is no dispute that the reservation policy of the State Government is not embodied in any legislation or statute enacted by the legislature. The Notification dated 7th September, 2007, at the highest, is only a notification issued in exercise of executive powers under Article

162 of the Constitution of India. So also Clause 4.37 of the Prospectus, can be said to be an exercise relatable to the exercise of executive powers under Article 162 of the Constitution of India. In such a situation, it is not possible to accept Mr. Gosavi's contention that Notification dated 7th September, 2007 is what is to be given precedence over the clear and categorical provision in Clause 4.37 of the Prospectus.

54. The Notification dated 7th September, 2007 is quite general in its application. However, Clause 4.37 of the Prospectus is quite specific or quite particular, when it provides that the AIQ seats which are deemed to be converted into State quota, will be filled in purely on the basis of merit from out of the candidates from general category. Therefore, when it comes to filling up of the deemed converted converted seats, Clause 4.37 of the Prospectus is a special provision or a particular provision in contrast with the general provisions contained in Notification dated 7th September, 2007, relied upon by Mr. Gosavi. This is yet another reason why no case has been made out for striking down Clause 4.37 of the Prospectus.

55. The learned Advocate General has also contended that in case the interpretation suggested by the Petitioners is to be accepted, then, the

percentage of reservation will exceed 50%, which is impermissible. According to me, this is also a valid consideration for upholding the validity of Clause 4.37 of the Prospectus. The reservations should, normally, not exceed the ceiling of 50%. Therefore, even where two interpretations are possible, the interpretation which contributes to maintaining the percentage of reservations at or around the ceiling of 50%, is certainly to be preferred over the interpretation which will certainly breach such ceiling by substantially wide margin. This is yet another reason for rejecting the challenge to Clause 4.37 of the Prospectus.

56. There is yet another reason as to why no final relief is due to the Petitioners in the present Petition. The Petitioners have offered statistics of past year about unfilled AIQ seats reverted to the State quota. From this, it was easily possible for the Petitioners to have assessed, at least by way of approximation, the number of students from the wait list of the general category who were likely to be admitted as against such reverted seats. In any case, beyond 9th August, 2020, the position of reverted seats would be quite clear and the Petitioners were in a position to actually identify the students from the wait list of the general category, who would be affected, if the relief applied for by the Petitioners were to be granted. However, the

Petitioners, have not chosen to implead any of such students as Respondents in this petition. Any grant of relief to the Petitioners would virtually amount to denial of admission to such students, without afford of any opportunity to such students to put forward their case in this matter. This is only an additional reason for denial of the relief.

57. For all the aforesaid reasons, I am of the opinion that even the first issue will have to be decided against the Petitioners.

58. As was made clear at the outset, in so far as the second issue is concerned, I, fully agree with the opinion expressed by my learned Brother that such an issue is required to be decided against the Petitioners.

59. Resultantly, I am of the opinion that this Petition is required to be dismissed.

M.S. SONAK, J.

Santosh.

LD-VC-CW-43-2020

UNITED TRIBALS ASSOCIATIONS ALLIANCE
AND ANOTHER. ….. PETITIONERS.

VERSUS

STATE OF GOA & ORS. …... RESPONDENTS.

Coram :- M.S. SONAK &
DAMA SESHADRI NAIDU, JJ.

PRONOUNCED ON : 7TH SEPTEMBER, 2020.

ORDER :

In view of the conflicting opinions, in so far as the first issue set out in paragraph 1*(a)* of the opinion expressed by M.S. Sonak, J., is concerned, we direct the Registry to place this matter before the Hon'ble The Chief Justice in order to enable him to take action in terms of Rule 7, Chapter I of The Bombay High Court Appellate Side Rules, 1960.

DAMA SESHADRI NAIDU, J. ***M.S. SONAK, J.***

Santosh.