IN THE HIGH COURT OF BOMBAY A T GOA

WRIT PETITION NO. 260 OF 2005
WITH MISCELLANEOUS CIVIL APPLICATIONS NO. 482, 483,484,485,486,487 & 489 OF 2005

1. Master Saurabh Mohandas Kamat, student, aged 17 years, through his natural guardian and mother Smt. Nilima Kamat, r/o Ponda, Goa,

2. Master Siddhesh Devadas. student age 17years, through his natural guardian and father Shri Somnath Devadas, r/o Ponda, Goa,

3. Miss Mayuri Mohan Naik, student, age 17 years, through her natural guardian and mother Smt. Sujata Mohan Naik, r/o Ponda, Goa,

4. Miss Deepti Dinesh Lotlikar, student, age 17 years, through her natural guardian and father, Shri Dinesh Lotlikar, r/o Betalbatim, Goa. ... Petitioners

Versus

1. State of Goa, through its Secretary of Education, with his office at Secretariat, Legislative Assembly Complex, Porvorim, Goa and

2. The Directorate of Technical Education, Government of Goa, through its Director, with his office at Alto Porvorim, Goa. .... Respondents.

Mr. V. P. Thali with Ms. G. Pednekar, advocates for the petitioners.

Mr. S. S. Kantak, Advocate General with Ms. G. Bhonsle, Addl. Government Advocate for the respondents.

Mr. M. S. Sonak with Ms. Pooja Bharne, advocates for the intervenors in M.C.A. No.482, 483 & 484 of 2005.

Mr. M. B. Da Costa, Senior Advocate with Mr. J. A. Lobo, advocate for the intervenors in M.C.A. No.485 of 2005.

Mr. V. A. Lawande, advocate for the intervernors in M.C.A. No. 486 of 2005.

Mr. M. P. Amonkar, advocate for the intervenors in M.C.A. No.487 of 2005.

Mr. R. Satardekar, advocate for the intervenors in M.C.A. No.489 of 2005.

CORAM : S. S. PARKAR &
V. M. KANADE, JJ.

DATE : 28th/29thJuly, 2005.

ORAL ORDER (Per Parkar, J.)

By this petition, four students seeking admission to medical faculty as their first preference have challenged the final merit list displayed on 13th July, 2005, for admission to medical and dental faculties on the ground that the said list was prepared

in violation of Clause 5(5) (ii) of the Regulations framed under Section 33 of the Indian Medical Council Act, 1956 as amended in the year 1999 ("Regulations" for short).

2. The aforesaid petition has been filed in the following background. As per the Rules and Regulations and the Prospectus issued for the academic year 2005-2006 by the Director of Technical Education, Goa, the list of eligible candidates was put up on 8th July, 2005. Thereafter on 11th July, 2005, provisional merit list was displayed on the basis of comparative merits of the students who had passed the qualifying examination as well as Goa Common Entrance Test ("GCET" for short) and objections were invited. Thereafter the final merit list was displayed on 13th July, 2005, in which though the order of merit had not changed, but it affected the rights of the candidates from the general category like the petitioners, for securing admission to the medical and/or dental faculties from the seats that might be transferred to the general category for non-availability of sufficient number of candidates belonging to reserved categories of SC/ST/OBC. It is not in dispute that as per the provisional merit list displayed on 11th July, 2005, the seats which are reserved for the above three

reserved categories, would have remained unavailed of because of the shortage of the candidates with merit in the reserved categories. We were told across the Bar by the learned counsel for the respondents that 17 seats would have remained vacant for non-availability of candidates from the reserved categories. Significantly, it is also not in dispute that all the transferred seats were not likely to be filled for want of adequate merited students in the general category. However, the list which was put up on 13th July, 2005, showed that sufficient number of candidates even from the reserved categories were available for availing of the seats which were reserved for the students belonging to the above three categories and, therefore, no seat from the reserved category had remained vacant which could be transferred to the general category at the end of the admission round of the reserved category. According to the petitioners, the final merit list prepared on 13th July, 2005, is liable to be quashed and set aside as the Clause 5 (5) (ii) of the Regulations was not complied with as a result of which the candidates belonging to the reserved category who had obtained less than 40% marks were also shown on the merit list and, therefore, the petitioners were deprived of their right to avail

of the admission for medical or dental faculties, from the seats which would have been transferred from the reserved category to the general category.

3. As against that, on behalf of the respondents, an affidavit dated 19th July, 2005, has been filed by one G. V. Prabhu Gaonkar, who was holding the charge of Director of Technical Education. In the said affidavit, it is stated that even the merit list displayed on 13th July, 2005, has not contravened Clause 5(5) (ii) of the Regulations as the merit list was prepared of the candidates who had scored minimum prescribed marks at the GCET. It is stated that since at the GCET the negative marks were given to the students for giving wrong answers, the percentage was counted taking into consideration negative marks given for wrong answers. In paragraph 11 of the reply affidavit, it is stated as follows:-

> "11. I submit that the Merit List which is displayed is in tune with MCI Regulations and there is no breach of the same as will be shown below:-
>
> (a) Each paper comprised of 50 multiple choice questions with 4 marks for each correct answer and negative (-1 mark) for

each wrong answer. Thus in each paper the candidate with all 50 correct answers could score 50 x 4 = 200 as maximum marks and that candidates with all 50 wrong answers could score 50 (-1) = -50 marks as minimum. Thus marks which the candidates score are spread over a range from a minimum of minus 50 marks to maximum of plus 200 marks for each paper and therefore in the three papers of Physics, Chemistry and Biology taken together, minimum -150 to maximum of +600 is taken for the purposes of relative placement.

(b) The MCI Regulations provide that the minimum marks obtained in all 3 subjects should be 40 percent. Thus, if in any paper the candidate scores "ZERO" as minimum marks and 100 as maximum marks, then the candidates who have scored in a bracket of 0-49 marks (General Category) and 0-39 marks (in case of SC/ST/OBC Categories) are treated as not eligible for admissions.

(c) Thus for marks from the minimum of -50 to a maximum of +200, that is over the range of 250 marks, the first bracket of 50% (general category) works out to be 0.5 x 250 = 125 and for reserved category, it works out

> to 0.4 x 250 = 100.
>
> Therefore, the candidates who scored beyond this bracket that is more than +75 (-50 + 125 = 75) for General Category and +50 (-50 + 100 = +50) for reserved category are to be considered to be eligible for each subject. Therefore since the MCI regulations prescribed for marks in all subjects taken together the cut-off marks works out to 225 of the maximum 600 in General Category and 150 out of maximum 600 in Reserved Category."

It was therefore submitted on behalf of the respondents that Clause 5 of the Regulations has not been deviated from when the final merit list was displayed on 13th July, 2005.

4. This petition was moved before us on 18th July, 2005, directly in the Court, after giving notice to the office of the Government Advocates. Since the learned Advocate General had no instructions in the matter, the matter had to be placed on the next day's board. In the meantime, the respondents were directed not to give admission to the students belonging to the reserved categories, i.e SC/ST/OBC, who had got less than 240 marks in the aggregate in the subjects of Physics, Chemistry and

Biology ("PCB" for short) in the GCET for the medical and dental faculties, unless they were already admitted. On 19th July, 2005, when the matter was called out before us, preliminary objection was raised by the learned Advocate General that the students who were likely to be affected by the petition ought to be given notice and, accordingly, the petitioners were allowed to give public notice in four newspapers of Goa, as a result of which applications have been moved by the intervenors by filing affidavits and, therefore, the matter was kept for hearing on 25th July, 2005.

5. On behalf of the petitioners several contentions have been raised. Firstly, it is contended that the merit list displayed on 13th July, 2005, has in effect violated the requirement of minimum percentage for being in the merit list for admission to the medical and dental faculties. According to the petitioners, if the criteria laid down in the regulations is to be followed, then out of total 600 marks at the GCET a candidate from general category ought to have obtained minimum of 300 marks and the candidates belonging to the above three reserved categories ought to have obtained 240 marks, so as to comply with the Regulations requiring minimum 50% and 40% marks respectively

for the general category candidates and the reserved category candidates. By the 13th July, 2005 merit list the candidates who had obtained less than 300 and 240 marks were shown on the merit list, as a result of which though there was no sufficient number of candidates from the reserved category having obtained 240 marks in the GCET they were made eligible to get admission for the medical and dental faculties. Consequent upon the said lowering of the marks the seats which otherwise would have remained vacant in the reserved categories and, therefore, could be transferred as unclaimed/vacant seats to the general category, were allotted to the candidates belonging to the reserved categories, though they had obtained less than 240 marks in aggregate in subjects like PCB. It was contended on behalf of the petitioners that this amounted to lowering the standard laid down by the Medical Council of India and, therefore, was not permissible as held in some judgments of the Supreme Court, and this Court.

6. So far as this contention is concerned, on behalf of the respondents it has been argued that the State Government had to follow the Regulations whereby the candidates belonging to the reserved categories could become eligible to be put

on the merit list in case they get minimum of 40% marks and that criterion has not changed. According to the respondents, after the display of the provisional list on 11th July, 2005, certain objections were received and thereafter, the Committee of experts was convened on 12th July, 2005, which consisted of the Dean of the Medical College and Principals of the Engineering Colleges in Goa. In their meeting they found that because of the provision for negative marks in the GCET 50% of 600 would not be 300, but would be 225 marks and 40% of 600 would be 150 and not 240 marks. How these figures of 225 and 150 were arrived at has been explained in paragraph 11 of the reply affidavit filed by the Director of Technical Education which is quoted hereinabove. It is also argued on behalf of the respondents that the requirement laid down in the regulation is about percentage of 50 and 40 and not that a candidate must obtain 300 or 240 marks as such.

7. On behalf of the petitioners, challenge is made that by the direct or simple method by which the percentage can be worked out there can be no doubt that 50% of the total marks of 600 would mean 300 i.e. the minimum marks required by the students belonging to the general category and 40% would mean

240 marks required to be obtained by the students belonging to the aforesaid three reserved categories. Instances were given to us of other States or institutions where the provision of transfer of seats to general category from the reserved categories have been made. Our attention was brought to the prospectuses of Armed Forces Medical College, Pune, Indian Institutes of Technology, All India Pre-Medical/Pre-Dental Entrance Examination 2005, All India Institute of Medical Sciences, New Delhi and All India Engineering/Architecture Entrance Examination, 2005. In the above institutions also a similar provision is made about negative marks in the competitive examinations, except that the ratio differs. Whereas the ratio in the GCET is 1 : 4, i.e. so far as the negative vis-a-vis positive marks are concerned the aforesaid institutions have given ratio of 1 : 3 but that will not make a difference. In those institutions also there is a provision for transfer of unfilled seats to the general category from the reserved categories, but it is not brought to our notice as to how the percentages have been calculated in those institutions. We assume that they might have also applied the direct or simple method as understood by all and there is no doubt that even the Director of

Technical Education, Goa, also applied initially the same direct or simple method of calculating the percentage and thereby the provisional list of 11th July was prepared.

8. It is argued on behalf of the petitioners that the merit list of 13th July, 2005, was prepared by adopting different method or device to calculate the percentage either to accommodate the candidates belonging to the reserved categories as 17 seats were remaining vacant and were, as per the rule of transfer given in the prospectus, liable to be trasferred to the general category, or to see that no medical/dental seats lapse. It was stated by the learned Advocate General on behalf of the respondents, that 17 seats were likely to lapse by following the merit list of 11th July, 2005, prepared on the basis of calculating the percentage by direct or simple method, normally known or understood by the people. He also stated and there is no dispute that even if those 17 seats had been transferred to the general category still about 8 or more seats would lapse for insufficiency of merit candidates even in general category. Therefore the allegation that the merit list of 13th July, 2005 was prepared as a subterfuge for giving admission to the candidates belonging to the reserved

categories, does not appear to be correct.

9. In support of the petition a number of judgments have been cited not only on behalf of the petitioners, but also the intervenors who sought to intervene in support of the petitioners because in case the petition is allowed and the merit list of 11th July, 2005 is restored, they are also likely to get the admission either for medical or dental faculties. Firstly, reliance was placed on the judgment of the Supreme Court in the case of ***State of Punjab vs. Dayanand Medical College & Hospital & Ors.,*** [(2001) 8 SCC 664]**.** In that case, referring to the judgment of the Constitution Bench of the Supreme Court in the case of ***Dr. Preeti Srivastava vs. State of Madhya Pradesh*** , [(1999) 7 SCC 120], it was held that the State can only add to the conditions for admission to the professional courses, subject to the standard laid down by the Union of India, i.e. by the Regulations of the Medical Council of India. It is well-settled that the standard laid down by the Medical Council of India is mandatory in nature and has to be complied with strictly and the State can only, if at all, put additional conditions to raise the standard for admission, but not to lower the standard.

10. Reliance was also placed on the judgment of the Supreme Court in the case of ***Dr. Indu Kant vs. State of U.P. & Ors.***, [1993 Supp (2) SCC 71]. In that case the Apex Court had held that the rule laying down the minimum percentage of marks in the entrance examination is valid and no direction can be given to the State Government to fill up any vacant seats by the candidates securing less than minimum qualifying marks. The next judgment relied on is in the case of ***State of Uttar Pradesh & Ors. vs. Dr. Anupam Gupta & Ors.***, [1993 Supp. (1) SCC 594]. Distinguishing the judgment of the Supreme Court in the case of ***Jeevak Almast vs. Union of India***, (AIR 1988 SC 1812), it was held that since that was a case of post-graduate specialized courses the standard could not be lowered in any way and, therefore, the merit could not be compromised and consequently, the admissions given by lowering down the standards in order to fill the vacant seats was struck down. The next case relied on by the counsel for the petitioners is in the case of ***Dean, Goa Medical College, Bambolim, Goa & Anr. vs. Dr. Sudhir Kumar Solanki & Anr.***, [(2001) 7 SCC 645], wherein it was held that the eligibility criteria for the medical courses which is statutorily stipulated,

cannot be held to be directory. There the Supreme Court was considering the eligibility criteria of ten years residence in the State of Goa. The Full Bench of this Court had allowed the students admission holding that the rule of ten years' eligibility is directory in nature. Though the Supreme Court took exception to the view taken by the Full Bench of this Court, ultimately it did not disturb the admission given by relaxing the rules.

11. Reliance is also placed on the judgment of the Supreme Court in the case of ***Gurdeep Singh vs. State of J. & K. & Ors.***, [1995 Supp (1) SCC 188]. That was a case where there were 12 vacant seats which were sought to be filled from the quota of the sports category. The allotment of the seats from that quota was challenged by another student and the said challenge was upheld on the ground that one student was given admission by adding mountaineering sports to the list of sports category and from that fact it was quite obvious that the said sport was added with a view to favour a particular student, as a result of which another student who could have been considered and allotted the seat was deprived of the same. In that context, the Supreme Court held that it was a mala fide exercise of power and the advantage

was secured by "strategem and trickery", but the Supreme Court hastened to add that the courts do and should take human and sympathetic view of matters. Thus, the said allotment of seat was struck down on the ground of attribution of eligibility long after the selection process was over and, therefore, it was held to be a case of mis-use of power. It was observed that a tendency of that kind where advantage is gained by illegal means cannot be permitted to be retained as it jeopardized the purity of the selection process itself. Reference was also made to the judgment of the Supreme Court in the case of ***Dr. Sadhna Devi & Ors. vs. State of U.P & Ors.***, (AIR 1197 SC 1120), where the question was again about the admission to the post-graduate medical courses. There were also reservations made for the SC/ST/OBC. Dispensing with the requirement of obtaining minimum qualifying marks in entrance examination was held not to be permissible. That was a case where the condition of obtaining minimum marks was relaxed because otherwise seats available to the reserved class could not have been filled from that category. Setting aside the allotment of a seat to a candidate from the reserved category by lowering the standard of admission, it was held that if the candidates from the

reserved category failed to secure even the minimum qualifying marks, then the seats reserved for them should not be allowed to go waste, but should be made available to the candidates belonging to the general category, otherwise there would be "a national loss".

12. Strong reliance was placed on the aforesaid judgments on behalf of the petitioners and it was pointed out that in the present case there was already a provision for transfer of such seats to the general category, in case the seats are not filled by candidates from the reserved category. Then reference was made to the judgment of the Supreme Court in the case of ***Harish Verma & Ors. vs. Ajay Srivastava & Anr.***, [(2003) 8 SCC 69]. In that case the admissions given to the post-graduate medical education to in-service candidates, who had secured marks less than the minimum prescribed by Regulation 9 framed by the Medical Council of India, were struck down and set aside as an inevitable consequence for which the successful candidates who would be held entitled to admission for the said course on merits, could not be made to suffer for no fault of theirs. Reference was also made to the judgment of the Constitution Bench of the

Supreme Court in the case of ***Dr. Preeti Srivastava,*** (supra), in which it was held that the Rules and Regulations enacted by the Medical Council of India are mandatory, having statutory force and must be complied with and the authorities have no power to lower the standard for admission to the medical courses. That was also a case where the Court was considering the admission to the post-graduate courses in medicine.

13. As against this, the learned Advocate General on behalf of the State has pointed out to us that there were in all 100 seats available for medical faculty, out of which 15% seats i.e. 15 seats are ear-marked for the candidates from All India quota and the remaining 85 seats were available for the State. Out of these remaining 85 seats, 29 seats are available for the reserved category and 45 seats for medicine are available for the students from the aforesaid three categories, while 11 seats are reserved for other categories, but they qualify only in case they get 50% marks. Thus, the 29 seats allotted to the three reserved categories i.e. SC/ST/OBC could be filled from the candidates belonging to those three categories who have obtained minimum 40% marks in GCET. It was further pointed out that considering that no qualified

candidate is available from the physically handicapped and freedom fighters categories, there would be net 8 seats vacant if the admissions were to be given as per the merit list of 11th July, 2005. It is also stated by the learned Advocate General that like last year, this year also there is possibility of some seats reverting to the State from the All India quota.

14. Relying on the aforesaid judgments cited on behalf of the petitioners, it was strongly contended by Mr. Thali that a different method or device ought not to have been adopted for calculating the percentage in order to see that no seats remained vacant. It is true that if there are no candidates eligible having minimum standard of qualification, it would be better that the seats go vacant, rather than allotting them to the candidates who are below standard. On behalf of the respondent, the learned Advocate General has categorically denied that the merit list of 13th July, 2005, was prepared by adopting a different method of calculating the percentage of marks with a view either to accommodate the candidates belonging to the aforesaid three reserved categories, or to see that no seats lapse. He also pointed out to us that in the reply affidavit filed by the Director of Technical

Education, it is not stated that the merit list of 13th July, 2005, was prepared with a view to see that medical seats do not lapse, but the percentage was calculated on that basis only with a view to see that the students should not unnecessarily suffer because of the negative marks given, though the seats were available.

15. It does not appear to us that the merit list of 13th July, 2005, was prepared with a view to accommodate the candidates from the reserved category. It was stated that after receiving objections to the provisional merit list of 11th July, 2005 on 12th July, 2005 a committee of experts, i.e. the Dean of Medical College and the Principals of the Professional Colleges in Goa was convened to find out what would be minimum marks required to be obtained as per the norm laid down by Clause 5 of the Regulations, i.e 50% for the students from the general category and 40% for the three reserved categories and the experts in their meeting were of the opinion that since negative marks were given to the students, 50% out of the total marks of 600 would not be 300, but 225 and 40% out of 600 would not be 240, but 150. At the first blush no doubt it sounds improper to swallow that 225 out of 600 marks would amount to 50% or 150 out of 600 marks

would be equivalent to 40%. One thing is certain that if there had been no sufficient number of students in the reserved category having obtained 150 marks in the three subjects of PCB, the seats would have been transferred to the general category and the students from the general category who have obtained less than 300 marks but minimum of 225 marks in PCB would have been eligible for getting admission to the medical faculty.

16. The learned Advocate General contended that the aforesaid marks of 225 and 150 were fixed by the committee of experts on reasonable and sound mathematical principles and, therefore, they should not be interfered with by the court, unless it is found to be absolutely impossible to arrive at those figures by mathematical calculations. He placed reliance on the decision of the Constitution Bench of the Supreme Court in the case of ***The University of Mysore vs. C. D. Govinda Rao & Anr.***, (AIR 1965 SC 491). That was a case concerning appointment of a Research Reader in the University. For the said appointment the minimum qualification laid down was First Class or High Second Class Master's degree of an Indian university or an equivalent qualification of a foreign university, in the subject concerned. The

candidate who had applied for the post was having a foreign degree and, therefore, the question was whether the foreign degree obtained by the candidate was equivalent to High Second Class Master's degree of an Indian university. The university had appointed a board of experts for selection of candidates for the post of Reader, which had recommended the appointment of a candidate having a foreign degree, which was under challenge before the Court. It was held that normally the courts should be slow in exercise of their powers under Article 226 of the Constitution of India to interfere with the opinions expressed by the experts. It was further observed that if there is no allegation about mala fides against the experts who constituted the board, it would normally be wise and safe for the courts to leave the decision of academic matter to experts who are more familiar with the problems they face than the courts generally can be and the order of the High Court was set aside. Relying on the said dictum of the Constitution Bench of the Supreme Court it was submitted by the learned Advocate General that unless this Court finds that the exercise carried out by the experts in the field i.e. the Dean of the Medical College and the Principals of the Engineering Colleges, is

mala fide this Court should not interfere. He rightly pointed out that a perusal of the petition would show that mala fides are not alleged by the petitioner, nor can the same be inferred from the action of the respondents.

17. The next case relied on behalf of the respondents is the judgment of the Supreme Court in the case of ***U.P. Public Service Commission vs. Subhash Chandra Dixit & Ors.***, [(2003) 12 SCC 701]. That was a case where the Court was concerned about the appointment made by the U.P. Public Service Commission to the post of Civil Judge, Junior Division, where the U.P. Public Service Commission had applied the scheme of scaling of marks awarded by the examiners who evaluated the answer papers. There were about 14 examiners and each of them had evaluated 300 answer sheets, excepting language papers. It was found that there was wide disparity in awarding marks by the various examiners in respect of the same subject, as different examiners adopted different yard-sticks to award marks to the candidates and, therefore, the candidates were left at the whims of the examiners. Therefore a three-member committee was set up to carry out an in-depth study of the scaling system which gave a

report which was accepted by the Public Service Commission and, accordingly, the scaling down of the marks was done in order to bring about uniformity to some extent in the assessment of the written papers of the candidates. Setting aside the order of the Division Bench of the High Court interfering with the said scaling down of the marks because of the wide disparity and the arbitrariness in awarding marks to certain candidates, the Supreme Court upheld the merit list prepared by the Commission after scaling down the marks.

18. The next judgment cited on behalf of the respondents is that of the Supreme Court in the case of ***Dr. Uma Kant vs. Dr. Bhika Lal Jain & Ors.***, (AIR 1991 SC 2272). In that case the University of Rajasthan had invited applications for the post of Professor in the department of Botany. The University had followed the practice which was in vogue. It was observed by the Apex Court that if two interpretations are possible, the courts would ordinarily be reluctant to accept that interpretation which would upset and reverse the long course of action and would accept the interpretation made by educational authorities. Relying on the said judgment it was argued that Common Entrance Test

has been held for the first time in this State and so far there is no practice followed either way, not even of calculating the percentage in the direct and simple method on the basis of which the 11th July, 2005 merit list was prepared. After display of the provisional merit list of 11th July, 2005 and receiving some objections, the expert committee was constituted to consider as to what marks would be equivalent to 50% and 40% which is the norm laid down as the minimum qualification for being eligible for admission to medical/dental faculties and unless this Court finds that the method is absurd and is mathematically wrong, it should be slow to interfere. The learned Advocate General also placed reliance on the decision of the Supreme Court in the case of ***Dr. J.P. Kulshrestha & Ors. vs. Chancellor, Allahabad University & Ors.***, (AIR 1980 SC 2141). That is a judgment of the Three-Judge Bench of the Supreme Court, where the question was what is meant by the High Second Class which was the minimum qualification required for appointment to the post of Reader in the University. It was held that the court should not interfere with the decision taken by the committee consisting of academic experts who decided as to what percentage would tantamount to the High

Second Class.

19. The learned Advocate General then contended that candidates like the petitioners who belong to the general category have no vested right in the seats which are allotted to the reserved categories unless and until the said seats are transferred to the general category. Merely because the prospectus announces that seats remaining vacant from the reserved categories will be transferred to the general category does not bind the Government do so so. In that respect he relied on the decision of the Supreme Court in the case of ***Rajiv Kapoor & Ors. vs. State of Haryana & Ors.***. (AIR 2000 SC 1476), in which it was held that the High Court fell into serious error in sustaining the claim of the petitioners in that case before the High Court that selection and admissions for the course in question had to be only in terms of the stipulations contained in the prospectus issued by the University. It was observed that the error came to be committed by the High Court in assuming that the Government had no authority to issue any directions laying down any criterion other than the one contained in the prospectus and that the marks obtained in the written examination alone constitute proper assessment of the

merit performance of the candidates applying for selection and admission. He then also argued that merely because the prospectus uses the word "shall" in the clause in the prospectus for transfer of vacant seats from the reserved categories to the general category, it is not mandatory in the sense that the Government is obliged or duty bound to transfer the seats from the reserved categories to the general category. According to him, the Government had expressed an opinion while issuing the prospectus that it may divert the seats but it may not fill those seats also, which is left to the discretion of the Government. According to him, whether a provision is mandatory or directory in its nature depends on the consequences which are going to follow by not complying with or following that provision.

20. The learned Advocate General contended that the candidates from the general category do not have a vested right in the seats in the reserved categories unless and until they are transferred to the general category. It is open to the Government to take a policy decision as regards the seats which are not availed of of filled by a particular reserved category and unless and until pursuant to the provisions in the prospectus the Government as a

matter of fact transfers those seats to the general category, no candidate from the general category can claim admission to those seats as a matter of right. In this connection reliance was placed on the judgment of the Constitution Bench of the Supreme Court in the case of ***Kumari Chitra Ghosh & Anr. vs. Union of India & Ors.***, (AIR 1970 SC 35), wherein certain seats were reserved for certain categories for admission to medical college. The Government had a right to nominate the candidates to those seats which were reserved for the sons and daughters of residents of the Union Territory other than Delhi, which were supposed to be comparatively backward areas where there were no medical colleges of their own. The Central Government had made nominations in respect of 9 seats and the rest were thrown open to the general pool. The challenge was made even to the nominations made to the reserved seats by the Central Government which the Apex Court found were made by acting in a very reasonable way. In that context the Constitution Bench held that the candidates who belong to the general category did not have the right to challenge the nominations made by the Central Government in respect of reserved seats. Though the said decision may not be

strictly applicable to the present case, but the gravamen of the said decision is that the candidates from the general category had no right to challenge the nominations to those seats on the ground that they were not filled as per the rules. The contention on behalf of the appellants before the Supreme Court and the petitioner before the High Court was that since the nominations were not made in accordance with the rules the seats should have been thrown open to the general pool. That contention was held to be unfounded, as according to the Supreme Court the Government was under no obligation to release those seats to the general pool. In paragraph 12 of the judgment, it was observed as follows:-

> "It (the Central Government) may in the larger interest of giving maximum benefit to candidates belonging to the non-reserved seats release them but it cannot be compelled to do so at the instance of students who have applied for admission from out of the categories for whom seats have not been reserved. In our opinion the High Court is in error in going into the question and holding that out of the nine seats filed by nomination two had been filled contrary to the admission rules and these

would be converted into the general pool."

21. Reference was also made by the learned Advocate General to the judgment of the Division Bench of the Punjab and Haryana High Court in the case of ***Devinder Pal Singh vs. State of Punjab & Ors.***, (AIR 1982 P. & H. 533), wherein it has been held that seats which may be transferred because they are not filled from the reserved category is like a `bounty' and the candidates from open category have no vested right for the said seats. No doubt in that case the High Court had placed reliance on the judgment of the Apex Court in the case of ***State of M. P. vs. Nivedita Jain***, (AIR 1981 SC 2045), which was overruled by the Constitution Bench in the case of ***Dr. Preeti Srivastava*** (supra), but on a different point, i.e. regarding lowering down the minimum qualification prescribed for the admission to the professional courses.

22. The main question in this case is undoubtedly whether the respondents were right in preparing the merit list of 13th July, 2005, by working out a percentage taking into consideration the negative marks given in the GCET. In our view the said method adopted by the respondents is not wholly and

absolutely wrong. If that had been the case there would have been ordinarily no difficulty in quashing the merit list of 13th July, 2005. The learned Advocate General however, has presented before us some other aspects of the matter in addition to his contention that the marks of 225 and 150 considered by the experts as being 50% and 40% of the marks required to be in the merit list as per Clause 5(5)(ii) of the Regulations cannot be said to be wholly and absolutely wrong which would warrant interference by this Court in its writ jurisdiction. According to him, if the merit list of 13th July, 2005, is set aside and quashed which has been acted upon and the admissions have been given to the students in various faculties, it will upset not only admissions given for medical and dental faculties to the students who are appearing as intervenors on the respondents' side, but it will also have the effect of upsetting even admissions given in different branches of engineering i.e. Information Technology, Electronics & Telecommunications, Computer, Mechanical, Electrical & Electronics, Civil and Pharmacy courses. It is pointed out that some of the students who have been admitted to medical faculty on the basis of the final merit list prepared on 13th July, 2005, will

not be able to get admission as per their other choices as those seats have been already filled, unless the students who have taken admissions for the different branches of engineering or pharmacy are disturbed by setting aside their admissions though they are not parties to this petition. He points out that the schedule of admissions has been prepared as per the judgment of the Supreme Court in the case of ***Mridul Dhar (Minor) & Anr. vs. Union of India & Ors.***, (AIR 21005 SC 666), which has laid down the time schedule for preparing the merit list and giving admissions to the different faculties, so that the admissions and the commencement of lectures in the professional colleges are not delayed. It is pointed out that out of the 15 seats which are reserved for the candidates on all India basis the seats may revert to the State quota if they are not filled from the All India quota as it happened last year. It was argued that the directions given by the Apex Court in ***Mridul Dhar's*** case (supra), which are binding on the respondent State cannot be complied with if the admissions given pursuant to the merit list of 13th July, 2005, are set aside.

23. It was then contended by the learned Advocate General that the present situation has arisen because there was

delay in filing the petition. The final merit list was displayed on 13th July, 2005, but the present petition was filed on 18th July, 2005 and the interim order was passed in the afternoon of 18th July, 2005 when this Court was moved by giving notice to the Government Advocate, who at that time naturally had no instructions in the matter. Though the same afternoon the authorities were informed that further admission process should be stopped, the admissions were already taken, except by one candidate for the medical faculty. Not only that, but so far as the different branches of engineering and the pharmacy courses are concerned, there is no minimum qualification laid down in the Regulations, as in the case of medical and dental faculties and, therefore, as soon as the final merit list was out on 13th July, 2005, admissions were taken by the candidates as per the merit list of 13th July, 2005, in all other faculties i.e. various branches of engineering and pharmacy and the lectures have already commenced in the engineering colleges. He also points out that the admissions to the other faculties like various branches of engineering and pharmacy could not be stopped even after 18th July, 2005, as neither interim order was obtained, nor there is

challenge to the admissions given in those faculties. He further points out that the prayers in the petition are limited expressly to the quashing and setting aside of the final merit list dated 13th July, 2005 " to the extent it has been prepared in breach of Clause 5 (5)(ii) of the said Regulations". These words are repeated in all the prayers, but the effect of allowing the petition or setting aside the merit list of 13th July, 2005, and restoring the meirt list of l1th July, 2005, will be much wider and, therefore, this petition is liable to be dismissed. He further argued that the effect of allowing this petition would be to set aside the admissions obtained by hundreds of students in different faculties pursuant to the list of 13th July, 2005, without giving them notice or impleading them as party-respondents or hearing them. He points out that the public notice which was given by the petitioners in the newspapers pursuant to the permission obtained from this Court on 18th July, 2005, was only meant for the candidates who were seeking admission to the medical and dental faculties and that limited notice was given in accordance with the limited prayers or reliefs sought in the petition.

24. The learned Advocate General also stated that

all the four petitioners, two of whom got barely 300 marks, had already taken admissions as per the merit list dated 13th July, 2005. The petitioner nos. 1, 3 and 4 had given first preference for medicine, second preference for dental faculties and third preference for pharmacy course. Petitioner no.2 had given first preference for medicine and second preference for engineering, for which he has already taken admission. He had not given option for dental faculty but was likely to be on the waiting list in the second round for medicine. Petitioner no.1 has already taken admission in pharmacy, which was his third choice and pursuant to the merit list of 11th July, 2005, he was to get admission for dental faculty. Petitioner no.3 has already obtained admission for dental faculty and she would have choice of getting admission for medicine if the merit list of 11th July, 2005 was followed. So far as petitioner no.4 is concerned, she has taken admission for pharmacy course and is likely to get admission for the dental faculty if the merit list of 11th July, 2005 is followed. Thus, according to the learned Advocate General, though all the petitioners have taken admission as per the final merit list dated 13th July, 2005, they have filed the petition challenging the said

merit list. We are, however, of the view that merely because they have taken the admissions in pursuance to the merit list dated 13th July, 2055, they cannot be debarred from challenging the said list in case they are likely to get admission as per their first preference, if the list of 11th July, 2005, is restored.

25. No doubt there are students or candidates who have sought intervention in this petition on both sides, i.e. there are students who have already obtained the admission for the medical faculty pursuant to the merit list of 13th July, 2005, who are supporting the respondent- State while others who are likely to get admissions if seats are transferred, have intervened in support of the petition. The learned Advocate General contended that the five intervenors represented by Mr. Sonak supporting the petitioners have no locus as they will not be adversely affected if the petition is allowed. On the contrary, they will be benefited. But one thing cannot be denied, if the petition is allowed the benefit will enure not only to the petitioners, but to all students who are likely to get admission in case the petition is allowed and, therefore, we heard at length not only the intervenors opposing the petition, but also the five intervenors represented by Mr. Sonak,

who supported the petition. In this respect reliance is rightly placed by Mr. Sonak on the decision of the Supreme Court in the case of ***Dr. Santosh Kumari (Mrs.) vs. Union of India & Ors.*** [(1995) 1 SCC 269], holding that the allotment of seats had to be given according to merit and it does not depend upon who comes to Court and who does not.

26. Mr. Sonak also relied on the decision of the Supreme Court in the case of ***Dr. Sadhna Devi & Ors. vs. State of U. P. & Ors.,*** [(1997)3 SCC 90], in which it is held that if the seats remain vacant because the candidates from the reserved category do not secure the minimum qualification then they should not be allowed to go waste, but should be made available to the candidates belonging to the general category, otherwise it would be a national loss. The judgment of the Supreme Court in the case of ***State of T.N. & Anr. vs. S. V. Bratheep (Minor) & Ors.*** [(2004) 4 SCC 513] reiterates the same principle adumbrated in the earlier decision of the Supreme Court that the standard cannot be lowered only because some seats would remain vacant. In the case of ***Ombir Singh & Ors. vs. State of U.P. & Anr.*** [1993 Sup (2) SCC 64] it has been held that the vacant seats

should be filled strictly in accordance with merit in the entrance examination. It is further observed that the State Government would be free to issue fresh order relaxing the requirement of minimum marks to such extent which may meet the necessity of academic standards for admission to post-graduate courses as well as the Regulations prescribed by the Medical Council of India in this regard.

27. Mr. M. B. D'Costa, appearing for the intervenors who are supporting the respondents, has relied on the judgment of the Supreme Court in the case of ***Rajendra Prasad Mathur vs. Karnataka University & Anr.***, [1986 Supp. SCC 740]. In that case though the admission was not given in accordance with the prescribed merits or qualifications, the admission of the students already given four years ago was not set aside. Mr. D'Costa also relied on the decision of the Supreme Court in the case of ***Dr. Jeevak Almast vs. Union of India & Ors.***, [(1988) 4 SCC 27], wherein some relaxation was made in giving admission to medical colleges, which was not disturbed by the Supreme Court. This decision was not dissented in the subsequent case of ***State of U.P. & Ors. vs. Dr. Anupam Gupta***

& Ors., [1993 (Supp) 1 SCC 594], but only distinguished observing that that view was taken in the peculiar facts of that case. Mr. D'Costa then relied on the decision of the Supreme Court in the case of ***Principal Motilal Nehru Medical College & Ors. vs. Dr. Vandana Singh***, [1990 (Supp) SCC 343]. In that case the college took the view that since no all India candidates were available on the basis postulated in the scheme, it was appropriate to open the entire 100% admission to the candidates. The challenge to the said transfer was not countenanced by the Supreme Court holding that the decision taken by the State Government and the college was a practical one to tide over transitional difficulty and there was no justification to upset the same on the basis of a solitary application from an external candidate.

28. It is pointed out on behalf of the intervenors who are supporting the respondents, that one of the candidates has obtained 239 marks, just one mark short because of which he was not shown on the merit list of 11th July, 2005. Another student has got 235 marks i.e. just 5 marks short for being shown on the merit list prepared on 11th July, 2005. It is also pointed

out that some of the intervenors on the respondents' side who have taken admission for medical courses on the basis of the merit list of 13th July, 2005, will be able to get admission to the engineering as well as pharmacy courses to which they were entitled as per the merit list of 11th July, 2005 in accordance with the preference given by them, but since those seats are already filled, they cannot get admissions for those courses now.

29. We are of the view that when the criterion for calculating the percentage was changed after displaying the provisional merit list of 11th July, 2005, the respondents/authorities ordinarily ought to have prepared another provisional list and called for objections. Moreover, the device adopted this year should not be continued in future except after obtaining concurrence of the Medical Council of India.

30. Considering the aforesaid facts and the circumstances of the case and the various decisions of the Supreme Court cited before us and the likely consequences we have arrived at the following conclusions:

We are not quite impressed by the method used or the device adopted by the respondents to arrive at the marks required

for obtaining the minimum percentage on the basis of which the final merit list of 13th July, 2005, was prepared, but at the same time, it cannot be said that the method adopted to calculate the percentage is absolutely wrong and so absurd that the merit list prepared thereby needs to be quashed and set aside, eventhough it will have the effect of reversing the whole process of admission and in delaying the same not only for medicine and dentistry, but in the various other faculties as well which are not the subject of challenge in this petition. We are conscious of the fact that if the merit list of 13th July, 2005, is quashed and set aside and that of 11th July, 2005, is restored, it will upset not only the admissions given to the medical and dental faculties, but even the pharmacy and the various branches of engineering, though the reliefs in the petition are limited to admission to medical and dental faculties and the candidates who have taken admission to pharmacy and engineering faculties are not impleaded as respondents, nor notice of this petition was given to them. Lastly, the whole schedule of admissions which was prepared as per the directions given by the Supreme Court in the case of ***Mridul Dhar*** (supra) will be upset and delayed if the merit list of 13th July, 2005, is quashed.

31. In view of the above, we do not think it would be expedient to exercise the writ jurisdiction under Article 226 of the Constitution of India to quash and set aside the admissions given to the professional courses in this State pursuant to the merit list dated 13th July, 2005. The petition is therefore dismissed and the interim stay granted by this Court on 18th July, 2005, is vacated.

32. In view of the dismissal of the Writ Petition, the Miscellaneous Civil Applications No.482/05, 483/05, 484/05, 485/05, 486/05, 487/05 and 489/05 do not survive and shall stand disposed of accordingly.

33. Authenticated copy of this order may be issued to the learned advocates for the petitioners and the respondents.

S. S. PARKAR, J.

V. M. KANADE, J.

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