

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.09.2013

+ LPA No.458/2013 & CM No. 9986/2013 (Stay)

DR. ANUSAR GUPTA

..... Appellant

versus

**ALL INDIA INSTITUTE OF MEDICAL SCIENCES
NEW DELHI & ORS.**

.... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Nitin K. Gupta.

For the Respondents : Mr Mukul Gupta, Sr. Advocate with Mr Rajat Katyal & Mr Rishab Kaushik for R-1/AIIMS.
Mr Anuj Aggarwal & Mr Gaurav Khanna for R-2/UOI.
Mr Rajeshwar Dagar for R-3.

AND

+ LPA No.506/2013& CM No. 10970/2013(Stay)

ALL INDIA INSTITUTE OF MEDICAL SCIENCES

..... Appellant

versus

DR. ANUSAR GUPTA & ORS.

.... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Mukul Gupta, Sr. Advocate with Mr Rajat Katyal & Mr Rishab Kaushik for appellant.

For the Respondents : Mr Nitin K. Gupta for R-1.
Mr Anuj Aggarwal & Mr Gaurav Khanna for R-2/UOI.
Mr Rajeshwar Dagar for R-3.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present appeals have been filed challenging the judgment dated 02.07.2013 passed by a learned Single Judge of this Court in W.P.(C) No.3926/2013. The writ petition being W.P.(C) No.3926/2013 was filed by the appellant in LPA No.458/2013 (hereinafter referred to as the 'Appellant'), *inter-alia*, challenging the system of reservation adopted by the All India Institute of Medical Sciences (the appellant in LPA No.506/2013) for admission to the course of Post Graduate MDS degree.

2. The appellant is from a specified backward class and was aggrieved as no reservation had been provided for candidates belonging to the specified backward classes (OBC category) in admissions to the course of Post Graduate MDS degree, in July 2013 session, being conducted by the All India Institute of Medical Sciences (hereinafter referred to as the respondent). The learned Single Judge noted that the appellant/petitioner had not challenged the allocation of seats before appearing in the entrance examination and had participated in the admission process for the session commencing in July 2013. Thus, no interference in the admission process was warranted at the instance of the appellant and the same was to be completed as per the allocation notified in the prospectus. However, the learned Single Judge found that the method adopted by the respondent for allocation of seats amongst general and reserved category was not in conformity with the Central Educational Institutes (Reservation in Admission) Act, 2006 and, thus, directed the respondent to take a fresh decision in the matter of providing reservation with respect to candidates

belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes in consultation with the Union of India. The respondent, being aggrieved by the conclusion arrived at by the learned Single Judge that the formula applied for allocation of seats amongst Reserved and General categories was neither legal nor just and fair, has preferred an appeal being LPA 506/2013 challenging the said finding of the learned Single Judge.

3. The controversy in the present case involves the methodology adopted by the respondent institution for allocation of seats amongst the General and Reserved categories in order to provide reservations for Scheduled Castes, Scheduled Tribes and Other Backward Classes in the Post Graduate MDS degree course as specified under Section 3 of the Central Educational Institutions (Reservation in Admission) Act, 2006 (hereinafter referred to as the 'Act').

4. The number of seats available in the PG/Post Doctoral courses are limited and it has, thus, not been possible to provide for the reservation as specified under Section 3 of the Act in every session. Therefore, the respondent has adopted a system whereby the specified reservation as applied to the number of seats available is calculated and if the resulting fraction is more than 0.5 then a seat is reserved for a particular category. However, if applying the percentage of reservation to the available seats, the fraction is less than 0.5 then the reservation for that category is not provided. The balance points are carried forward for the purpose of determining the reservation in the next session.

5. The writ petitioner is a qualified Doctor possessing a BDS Degree. The respondent issued a prospectus for admissions in the Post Graduate/Post Doctoral courses including Post Graduate Doctorate in Dental Sciences (MDS), for the July 2013 Session. As per the prospectus, the last date for registration of applicants was 06.04.2013 and the entrance examination for admission in the MDS course was scheduled to be held on 12.05.2013. The prospectus disclosed the expected date of declaration of results as 29.05.2013. The counseling sessions for admissions were scheduled for 12.06.2013 and 20.06.2013. The prospectus also disclosed the allocation of seats amongst the unreserved and reserved categories and in various specialities. The prospectus indicated that 5 seats were available in the course of Masters in dental surgery (MDS) and only one seat was reserved for candidates belonging to the Scheduled Castes and there was no reservation for candidates belonging to the OBC category.

6. The petitioner appeared for the entrance examination for admission to the Post Graduate MDS degree course and was ranked at number 9. The petitioner belongs to an OBC category and secured the highest rank in that category. As there was no seat reserved for candidates belonging to the OBC category in the MDS course for the session of July 2013, the writ petitioner filed the writ petition, *inter-alia*, seeking a direction for reservation of 27% of the seats in the MDS course for OBC category for the July 2013 session. The appellant predicated his claim to admission in the respondent institution on the premise that even if one seat was reserved for OBC candidates, he, having secured the highest rank in the OBC category, would be entitled to admission against the same.

7. It is contended on behalf of the writ petitioner that as per Section 3 of the Act, 27% of the seats in Central Educational Institutions are required to be reserved for candidates belonging to the OBC category and as there were 5 seats available in MDS course, at least one seat ought to have been reserved for candidates belonging to the OBC category. In case, the reservation as specified under Section 3 of the Act was implemented by the respondent in respect of the admission to MDS course in the July 2013 session, the writ petitioner would be entitled to admission to that course. The appellant further contended that the system of allocation of seats adopted by the respondent was not in accordance with the Act and carry forward of reservation entitlement in the form of points was not permissible. The appellant has relied on the decision of a Constitution bench of the Supreme Court in the case of **T. Devadasan v. Union of India and Anr.**; AIR 1964 SC 179, in support of his contention that reservation quota cannot be carried forward to the next relevant period and is required to be exhausted in every session.

8. It was contended on behalf of the respondent that the seats in MDS courses are limited and in the July 2013 session, only 5 seats were available in MDS degree course in different specialities. While, only one seat each was available in the specialities of Orthodontics, Conservative Dentistry, Oral & Maxillofacial Surgery respectively, 2 seats were available in the speciality of Prosthodontics. The respondent being a Central Educational Institution was required to reserve 27% seats for candidates belonging to OBC categories, 15% for candidates for Scheduled Castes and 7.5% seats for Scheduled Tribes. It was pointed out that as the number of seats in MDS

were limited, it was not possible to provide reservation for all the reserved categories in each session. Accordingly, the respondent had adopted a method of giving points in proportion to the specified reservation. While, a seat was reserved in the event that the points available for any category exceeded +0.5, no reservation was provided in the event the available points were less than 0.5. The points available (either negative or positive were carried forward for determining reservation in the next session). It was submitted on behalf of the respondent that the percentage of reservation of seats as specified under the Act could be implemented in this manner. It was further contended on behalf of the respondent that the reservation as specified under Section 3 of the Act must be viewed at a macro level and implementing the same at micro level would create difficulties. All the Post Graduate Courses should be construed as a single class. If all the Post Graduate Courses were taken as a single branch of study, it had complied with the provisions of Section 3 of the Act.

9. Before addressing the controversy involved in the present petition, it is necessary to understand the method adopted by the respondent in giving effect to the reservation as prescribed for Scheduled Castes, Scheduled Tribes and Other Backward Classes. The system of providing for reservation can be understood by examining the allocation of seats amongst various categories as disclosed in the prospectus for July 2013 session, as also the reservation for admission to MDS course for various specialities in the previous two sessions namely July 2012 & January 2013. The allocation of seats for each speciality in MD/MS/MDS degree courses, for the July 2013 session, as disclosed in the prospectus is as under:-

“VI. M.D./M.S. & M.D.S.

1. The candidates joining M.D./M.S./M.D.S. degree courses shall be called Junior Residents in the Clinical Disciplines and Junior Demonstrators in Basic Clinical Disciplines. The number of seats available in each speciality for the **July 2013** session is shown below :

Code *		Total Seats	UR	OBC	S.C.	S.T.	Sponsored/ Foreign
	A. CLINICAL SCIENCES						
01	Anaesthesiology	7	4	1	1	1	2
02	Community Medicine	3	2	1	0	0	3
03	Dermatology & Venereology	2	0	1	0	1	1
04	Emergency Medicine	1	0	0	1	0	1
05	Geriatric Medicine	3	1	1	0	1	2
06	Medicine	7	3	2	1	1	0
07	Nuclear Medicine	4	2	1	1	0	2
08	Obst. & Gynaecology	8	4	2	1	1	2
09	Ophthalmology	16	9	4	2	1	3
10	Orthopaedics	4	2	1	0	1	2
11	Otorhinolaryngology	3	1	1	0	1	3
12	Paediatrics	2	1	1	0	0	1
13	Psychiatry	7	3	2	1	1	2
14	Radio Diagnosis	6	3	2	1	0	0
15	Radiotherapy	5	2	2	1	0	3
16	Surgery	7	4	2	1	0	1
17	Phy. Med. & Rehabilitation	5	2	1	1	1	3
	B. BASIC CLINICAL SCIENCES						
18	Anatomy	3	1	1	1	0	3
19	Biochemistry	4	2	1	1	0	3
20	Biophysics	2	1	1	0	0	3
21	Forensic Medicine	3	1	1	1	0	3
22	Lab. Medicine	0	0	0	0	0	3
23	Microbiology	3	2	1	0	0	3
24	Pathology	4	2	1	1	0	1
25	Pharmacology	4	2	1	1	0	3
26	Physiology	3	2	1	0	0	3
	C. MDS						
27	Conservative Dentistry	1	1	0	0	0	1
28	Orthodontics	1	1	0	0	0	1
29	Oral & Maxillofacial Surgery	1	1	0	0	0	0
30	Prosthodontics	2	1	0	1	0	0
	GRAND TOTAL (A+B+C)	121	60	33	18	10	58

* Code/Discipline to be used by Sponsored/Foreign National candidates only”

10. An examination of the reservation system adopted by the respondent since July 2013 indicates that the respondent provides for reservation in admission to various specialities at two levels. The first being the reservation based on the total number of seats available for admission in each session. The prospectus for July 2013 session indicates that overall 121 seats were available in MD, MS & MDS degree courses. 90 seats were available in Post Graduate degree course in Clinical Sciences which included 17 different specialities, 26 seats were available in Basic Clinical Sciences which included 9 specialities and 5 seats were available in MDS degree course which includes 4 specialities. Thus, in aggregate 121 seats were available in 3 disciplines and 30 specialities. Out of 121 seats that were available, 33 seats were reserved for candidates belonging to OBC category, 18 seats and 10 seats were reserved for candidates belonging to Scheduled Castes and Scheduled Tribes respectively. Thus, 27.5% of the overall seats in the July 2013 session were reserved for OBC candidates and 14.88% and 8.3% of the total seats were reserved for candidates belonging to Scheduled Castes and Scheduled Tribes respectively. Thus, if viewed from the perspective of the total seats available for the July 2013 session, there could be no dispute that the respondent did provide for the reservations as specified under the Act.

11. The reservation at the speciality level has also been provided by the respondent by adopting a formula of giving points for the requisite percentage of reservation required for each category. However, since the seats in different disciplines are limited, it is not possible to provide for the specified percentage of reservation for all reserved categories in every

speciality and in every session. The respondent has adopted a point roster system for ensuring that reservation for all the Categories (i.e., SC, ST and OBC) are also provided for each speciality. The percentage of reservation prescribed for each category is multiplied with the number of seats available for each category and the resultant number is taken as the points available in respect of the particular category for a particular speciality. One whole point corresponds to a seat for the concerned reserved category. In the event the points allocated to a category in respect of a speciality is more than 0.5 the same translates to reserving a seat in a particular speciality for that category. Since one point equals one seat the difference in points, being the difference in points allocated and points utilised in providing reservation of seats, are carried forward to the next session. This system was adopted from the July 2012 session. The allocation of seats in different specialities of MDS course amongst the three reserved categories and the unreserved category for the three sessions commencing July 2012, January 2013 and July 2013 are as under:-

JULY 2012 SESSION

Speciality	Total	UR	SC	ST	OBC
Orthodontics	3	2	0	0	1
Prosthodontics	2	1	0	0	1
Conservative Dentistry	2	1	0	0	1
Oral & Maxillofacial Surgery	1	1	0	0	0
Grand Total	8	5	0	0	3

JANUARY 2013 SESSION

Speciality	Total	UR	SC	ST	OBC
Orthodontics	1	0	1	0	0
Prosthodontics	1	1	0	0	0
Conservative Dentistry	2	1	1	0	0
Oral & Maxillofacial Surgery	1	0	0	0	1
Grand Total	5	2	2	0	1

JULY 2013 SESSION

Speciality	Total	UR	SC	ST	OBC
Orthodontics	1	1	0	0	0
Prosthodontics	2	1	1	0	0
Conservative Dentistry	1	1	0	0	0
Oral & Maxillofacial Surgery	1	1	0	0	0
Grand Total	5	4	1	0	0

12. An analysis of the above allocation indicates that in the July 2012 sessions, 3 seats were available in the Speciality of Orthodontics. Applying 27%, 15% and 7.5 % reservation for the SC, ST and OBC categories respectively translates to 0.81 point for OBC category, 0.45 point for SC category and 0.225 for the ST category. Since, the points awarded to OBC category for calculation of reservation was more than 0.5, one seat was reserved for the OBC category. No seat was reserved for SC or ST category as their respective points were less than 0.5. The balance two seats

available in the said speciality were thus made available to candidates from the unreserved category. Since, no points were utilised in providing reservation for SC and ST categories, their points were carried forward to the next session. Since, 1 point utilised for the OBC category was more than the points allocated to the OBC category, the difference being negative 0.19 was also carried forward to the next session. Only one seat was available in the speciality of Orthodontics in the session of January 2013 and the same was made available for the SC candidate because after awarding points as per reservation for the session and adjusting the carried forward points, the resultant points available for different categories was as under:

- (i) OBC : 0.08 (i.e $-0.19 + 0.27$)
- (ii) SC : 0.60 (i.e $0.45 + 0.15$)
- (iii) ST : 0.30 (i.e $0.225 + 0.075$)

As the points available for OBC category and ST category were less than 0.5, no seats were reserved in the speciality of orthodontics for those categories and their points were carried forward to the next session. As the balance of points available for SC category was more than 0.5, a seat was reserved for the SC category and the resultant balance of negative 0.4 points was carried forward for the next session. The statement indicating the calculation of points for allocation of seats in Post graduate MDS course in various specialities is tabulated below:-

BRANCH WISE CALCULATION OF SEATS FOR JULY 2012

Branch of MDS	Total seats	Due seats (SC) 15%	Due seats (ST) 7.5%	Due seats (OBC) 27%	Seats Provided (SC)	Seats Provided (ST)	Seats Provided (OBC)
Orthodontics	3	.45	.225	.81	0	0	1
Prosthodontics	2	.30	.15	.54	0	0	1
Conservative Dentistry	2	.30	.15	.54	0	0	1
Oral & Maxillo-facial Surgery	1	.15	.075	.27	0	0	0

BRANCH WISE CALCULATION OF SEATS FOR JANUARY 2013

Branch of MDS	Total seats	*Due seats (SC) 15%	*Due seats (ST) 7.5%	*Due seats (OBC) 27%	Seats Provided (SC)	Seats Provided (ST)	Seats Provided (OBC)
Orthodontics	1	-0.40	.30	.08	1	0	0
Prosthodontics	1	.45	.225	-0.19	0	0	0
Conservative Dentistry	2	-0.40	.30	.08	1	0	0
Oral & Maxillo-facial Surgery	1	.30	.15	-0.46	0	0	1

BRANCH WISE CALCULATION OF SEATS FOR JULY 2013

Branch of MDS	Total seats	*Due seats (SC) 15%	*Due seats (ST) 7.5%	*Due seats (OBC) 27%	Seats Provided (SC)	Seats Provided (ST)	Seats Provided (OBC)
Orthodontics	1	-0.25	.375	.35	0	0	0
Prosthodontics	2	-0.25	.375	.35	1	0	0
Conservative Dentistry	1	-0.25	.375	.46	0	0	0
Oral & Maxillo-facial Surgery	1	.45	.225	-0.19	0	0	0

*After adding the points carried forward from previous session and after deducting the points on allocation of seats.

13. It can be seen from the above analysis that the respondent has been able to provide the prescribed reservations of 27%, 15% & 7.5% for candidates belonging to OBC, SC & ST categories respectively for admission in the Post Graduate degree courses for the July 2013 session in respect of the total seats available in that session. However, the respondent has not been able to provide the specified reservation for various categories in each speciality. This is on account of the fact that the number of seats available in each speciality is very limited and it is impossible to provide reservation for a fraction of a seat. The requirement of the specified reservations for the OBC category in the disciplines of Clinical Sciences and Basic Clinical Sciences for the July 2013 session have been met, as 27.77% seats in Clinical Sciences and 30.76% seats in Basic Clinical Sciences have been reserved for the OBC category in the July 2013 session. However, no reservation has been provided for the OBC category in MDS course. This is on account of the negative points, in respect of the specialities in Prosthodontics and Oral & Maxillofacial surgery, carried forward from previous session and inadequate points in the other two specialities.

14. In the given factual matrix the following questions arise for our consideration:

- (i) Whether the appellant is entitled to challenge the seat allocation amongst various categories after having participated in the examination and failing to secure a seat on the basis of merit?

- (ii) Whether the method of carry forward of reservation (in the form of points) is permissible?
- (iii) Whether the method adopted by the respondent for implementing the prescribed reservation is unjust or unfair?
- (iv) Whether the method adopted by the respondent is contrary to the legislative intent of the Act?

15. It is now well settled that remedy under Article 226 of the Constitution of India is a discretionary remedy and the courts will refrain from exercising discretion in favour of a litigant who participates in a selection process without protest or demur and subsequently challenges the same after having failed to get selected. We concur with the decision of the learned Single Judge that in any event the appellant having appeared in the entrance examination, on the basis of the prospectus which disclosed that there was no reservation in favour of the OBC category for admission to the Post Graduate MDS degree course, cannot now challenge the same. The Supreme Court in the case of **Ramesh Chandra Shah and Ors. v. Anil Joshi and Ors.**: AIR 2013 SC 1613, considered the case of candidates who appeared in a written test as disclosed in the advertisement and having failed in the selection process sought to challenge the same. The Supreme Court held that respondents who had been unsuccessful were disentitled from seeking relief under Article 226 of the Constitution of India and held as under:-

“17. They appeared in the written test knowing that they will have to pass the examination enumerated in para 11 of

the advertisement. If they had cleared the test, the private respondents would not have raised any objection to the selection procedure or the methodology adopted by the Board. They made a grievance only after they found that their names do not figure in the list of successful candidates. In other words, they took a chance to be selected in the test conducted by the Board on the basis of the advertisement issued in November 2011. This conduct of the private respondents clearly disentitles them from seeking relief under Article 226 of the Constitution. To put it differently, by having appeared in the written test and taken a chance to be declared successful, the private respondents will be deemed to have waived their right to challenge the advertisement and the procedure of selection.

18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

XXXX XXXX XXXX XXXX XXXX

24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.”

16. In the case of **Manish Kumar Shahi v. State of Bihar: (2010) 12 SCC 576**, the Supreme Court held as under:-

“16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or

process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”

17. A similar view has also been expressed by the Supreme Court in the case of **Dhananjay Malik and Ors. v. State of Uttaranchal and Ors.:** (2008) 4 SCC 171, wherein the court held as under:-

“7. It is not disputed that the respondent-writ petitioners herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as BPE or graduate with diploma in Physical Education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.”

18. Therefore, the Appellant cannot challenge the admission process after having appeared in the entrance examination without protest and with the knowledge that there was no reservation in favour of the OBC category for admission to the Post Graduate MDS degree course in the July 2013 session and is disentitled to challenge the same and seek relief under Article 226 of the Constitution of India. LPA 458/2013 is liable to be dismissed on this ground alone.

19. The learned counsel appearing for the appellant has contended that the system of carry forward of reservation is impermissible and it is necessary that percentage of reservation provided should be implemented in every session. The appellant placed reliance on the decision of a Constitution Bench of the Supreme Court in the case of **T. Devadasan** (*supra*) in support of his contention that any system of providing reservation which includes carry forward of reservation to the next session would be unconstitutional. At the outset, we must note that the decision of the Supreme Court in **T. Devadasan** (*supra*) stands overruled by the decision of a larger Constitution Bench of the Supreme Court in **Indra Sawhney v. Union of India: (1992) 3 Suppl SCC 217**. In paragraph 859 of the said decision it has been expressly held that;

“(d) Devadasan was wrongly decided and is accordingly overruled to the extent it is inconsistent with this judgment.”

20. In **T. Devadasan** (*supra*), the Supreme Court was considering the policy of carrying forward of seats reserved for certain categories to the next period where such seats could not be filled for want of qualified candidates. Mudholkar J. delivering the majority opinion struck down the rule for carry forward of reservation quota as the same had resulted in 65% of the available seats being reserved for candidates belonging to Scheduled Castes/Scheduled Tribes in that year. The Court applied the principle enunciated by the Supreme Court in an earlier decision in **M.R. Balaji v. State of Mysore: AIR 1963 SC 649**, wherein it was held that reservation exceeding 50% of the seats available would be unconstitutional. Justice

Subba Rao did not agree with this view and in his dissenting opinion expressed as under:

“(26) We are only concerned with the interpretation of the constitutional provisions, but not with the policy underlying it. The makers of the Constitution laid down that provision shall be made for the reservation of appointments and posts in favour of such Castes and Tribes. The only question, therefore, is whether in the instant case the State did not provide for the reservation of appointments or posts, I find it difficult to say that the provision for “carry forward” is not for the reservation of appointments for the said Castes and Tribes. The reservation of appointments can be made in different ways. It is not for this Court to prescribe the mode of reservation.”

21. The dissenting opinion of Justice Subba Rao was upheld by the Supreme Court in a later decision in the case of **State of Kerala and Ors. v. N.M. Thomas and Ors.**: AIR 1976 SC 490. In **Indra Sawhney** (*supra*), the Supreme Court held as under:

“**817.** We are of the respectful opinion that on *its own reasoning*, the decision *insofar as it strikes down the rule* is not sustainable. The most that could have been done in that case was to quash the appointments in excess of 50%, inasmuch as, as a matter of fact, more than 50% of the vacancies for the year 1960 came to be reserved by virtue of the said rule. But it would not be correct to presume that that is the necessary and the only consequence of that rule. Let us take the very illustration given at pp.691-92, - namely 100 vacancies arising in three successive years and 18% being the reservation quota – and examine. Take a case, where in the first year, out of 18 reserved vacancies 9 are filled up and 9 are carried-forward. Similarly, in the second year again, 9 are filled up and another 9 are carried-forward. Result would be that in the third year, $9 + 9 + 18 = 36$ (out of a total of 100) would be reserved which would be far less

than 50%; the rule in *Balaji* is not violated. But by striking down the rule itself, carrying forward of vacancies even in such a situation has become impermissible, which appears to us indefensible in principle. We may also point out that the premise made in *Balaji* and reiterated in *Devadasan* to the effect that clause (4) is an exception to clause (1) is no longer acceptable, having been given up in *Thomas*.”

22. The dissenting opinion of Subba Rao, J in *T. Devadasan* (*supra*) and paragraphs 815-818 of the majority opinion in *Indra Sawhney* (*supra*) were in relation to carry forward of reservation quota in the context where the appointment from the specified category could not be made for want of qualified candidates and the thus the quota was carried forward to the next period. In the present case, both unutilized quota as well as the balance of over utilized reservation quota is carried forward. Nonetheless, the principles discussed in *T. Devadasan* (*supra*) and *Indra Sawhney* (*supra*) would be relevant, since, the only question to be addressed is whether reservation in admissions is being provided or not. Indisputably, the provision for “carry forward” is for the purposes of providing reservation in admissions. The reservations in admissions can be made in different ways and the point roster system which is based on carry forward of reservation quota (both negative and positive) is one such system of providing allocation of seats for the purposes of reservation. We find no principle under which this system could, *per se*, be considered as impermissible or unconstitutional.

23. In the present case, the seats available for Masters in Dental Surgery (MDS) in various specialities are very limited and it is, thus, impossible for

reservation as specified under Section 3 of the Act to be implemented in each speciality for every session or even if seats in two sessions are aggregated for purpose of calculation of reservation. In order to fully implement the specified percentages of reservation for each speciality in each session, the capacity of the respondent no. 1 institution to conduct the PG/Post Doctoral courses would have to be increased manifold which in the present case is clearly not feasible. In order to overcome this limitation, the respondent has adopted the methodology of providing the specified reservation for each category on the basis of the overall admission to PG/Post Doctoral courses conducted by it. However, with respect to each speciality, the reservation policy has been so worked so as to also achieve the requisite percentage of reservation for each category albeit, spread over a number of sessions. We are hard pressed to imagine a methodology which would give effect to the legislative intent of providing the specified reservation for the reserved categories. In the event, the specified reservation is applied on admission made for the Post Graduate course of Masters in Dental Surgery (MDS) on an annual basis, the same would not result in the specified reservation being implemented in each speciality and we are unable to understand as to how the reservation policy of providing reservation for the reserved categories in each discipline would be fulfilled. Given the limited number of seats that are available for admission, in our view the legislative intent would be best served by ensuring that the specified reservation in admission is provided in each speciality, even though the same may have to be spread over a few sessions. The policy of providing reservation is only to ensure that those persons who are unequally placed, get the necessary support to be included for education in

various mainstream disciplines. The methodology adopted by the respondent indisputably serves this end. The fact that additional reservation provided in one session is compensated by reducing reservation in the next session and vice versa does not render the methodology of providing reservation either arbitrary or unreasonable given the situation that providing the specified reservation in each speciality in every session is simply not possible on account of limited seats. Providing reservation has to be viewed from the perspective of providing reservation for a class of persons and not individuals. Thus, even though candidates of a reserved category seeking admissions in a particular sessions may not be able to get the benefit of reservation, the same does not imply that the benefit of desired reservations has not been made available to the specified class.

24. In our view, the method of applying point roster system to provide the desired reservation is neither unjust nor unfair. On the contrary, given the fact that only a few seats are available in different specialities, perhaps this system may be the only method which ensures that each reserved category is provided the benefit of reservation in each speciality of MDS course.

25. The learned Single Judge has held that the formula devised by respondent no. 1 does not result in complying with the mandate of the Act inasmuch as the respondent has been unable to provide reservation in each discipline on the basis of the annual intake. In this context, it would be relevant to refer to Section 3 of the Act which is reproduced below:-

“3. Reservation of seats in Central Educational Institutions.— The reservation of seats in admission and its

extent in a Central Educational Institution shall be provided in the following manner, namely:-

- (i) out of the annual permitted strength in each branch of study or faculty, fifteen per cent. seats shall be reserved for the Scheduled Castes;
- (ii) out of the annual permitted strength in each branch of study or faculty, seven and one-half per cent. seats shall be reserved for the Scheduled Tribes;
- (iii) out of the annual permitted strength in each branch of study or faculty, twenty-seven per cent. seats shall be reserved for the Other Backward Classes.”

26. Section 2(b) and 2(j) of the Act define the expressions “annual permitted strength” and “teaching or instruction in each branch of study” respectively. Section 2(b) and 2(j) of the Act are reproduced as:-

“(b) ‘annual permitted strength’ means the number of seats, in a course or programme for teaching or instruction in each branch of study or faculty authorised by an appropriate authority for admission of students to a Central Educational Institution;”

“(j) ‘teaching or instruction in any branch of study’ means teaching or instruction in a branch of study leading to three principal levels of qualifications at bachelor (undergraduate) masters (postgraduate) and doctoral levels.”

27. The expression “each branch of study or faculty” has to be interpreted as either the branch of Dental Surgery and the various specialties has been considered to be subjects in that branch of study or

each speciality can be considered to be a separate branch of study. It is apparent that considering the courses at a micro level would make the implementation of the Act an impossibility as applying the reservation to fewer seats would result in smaller fractions. At the same time, allocating the reserved seats to only one or the other specialty would also not be in conformity with the rationale of providing reservations uniformly in all courses. The provisions of section 3 of the Act so far as possible ought to be read in a manner so make the provisions of the Act workable. In the event the expression “each branch of study or faculty” is interpreted to be mean all courses resulting in PG/Post Doctoral Courses, there would be no controversy since the 61 number of seats out of 121 have been reserved for the reserved categories. The specified reservation having been provided, there would be no violation of section 3 of the Act.

28. The problems arise only in the event, Dental Sciences or the different specialities included therein are taken as separate branches of studies. In the event MDS course is interpreted to be a separate branch of study, even then there is no violation of section 3(iii) of the Act that is in so far as reservation for the OBC category is concerned. This is so because the annual strength is required to be considered for the purposes of reservation and in the present case, the annual strength would include two sessions of July 2012 and January 2013. The aggregate seats available in the MDS course in July 2012 and January 2013 session were 13 and 4 seats were reserved for candidates belonging to OBC category. Although, no seats are reserved for OBC category in the July 2013 session it is apparent that reservation would be available for the OBC category in the next session on

account of carry forward of points accumulated in the present session. 0.35, 0.35 and 0.46 points of reservation in admission to courses in Orthodontics, Prosthodontics and Conservative Dentistry stand in favour of OBC category and even if limited seats are made available in the said specialties in the next session, some seats would definitely be reserved for candidates belonging to the OBC category under the current point roster system. However, the problem is more acute with regard to reservation for candidates belonging to Scheduled Tribes. Section 3(ii) of the Act provides for 7.5% reservation for ST category and as the number of seats are limited it has been impossible to provide reservation for this category. The aggregate seats in MDS in the July 2012 and January 2013 session was only 13 and, 7.5% of the said number still falls short of one. It is, thus, apparent that in cases where the number of seats falls below a given threshold, providing the specified reservation on annual strength would be impossible. As discussed hereinbefore, providing reservation considering each speciality to be a separate branch of study would also be impossible for the same reason.

29. Although, it is trite law that each provision in the enactment has to be construed in such a manner that it is in consonance with the legislative intent and promotes the legislative object and the provisions of a statute have to be construed so as to make it effective (*“Ut Res Valeat Potius Quam Pereat”*), it is difficult to accept the contention that all the three disciplines i.e., Clinical Sciences, Basic Clinical Sciences and Dental Surgery should be considered to be a single branch of study for the purpose of section 3 of the Act. Section 2(b) of the Act defines the expression

“annual permitted strength” to mean the number of seats, in a course or programme for teaching or instruction in each branch of study or faculty authorised by an appropriate authority. The expression “appropriate authority” is defined under Section 2(c) of the Act as:

“(c) “appropriate authority” means the University Grants Commission, the Bar Council of India, the Medical Council of India, the All India Council for Technical Education or any other authority or body established by or under a Central Act for the determination, coordination or maintenance of the standards of higher education in any Central Educational Institution.”

It is apparent that the relevant appropriate authority approving the intake of students in the course of Dental Sciences and other fields of medicine are different. Whereas, in the former it is the Dental Council of India, it is the Medical Council of India in the latter. The faculties for the two courses are also different. Thus, it would erroneous to consider the MD and MDS degree courses as a single “branch of study”.

30. In view of the above, it is apparent that provisions of section 3 of the Act have not been complied with. The respondent has provided the specified percentage of reservation for the reserved categories and further implemented a system that effectively allocates seats in all disciplines and specialities equitably and as per the legislative intent of the Act which is to provide reservation for all categories in all educational courses. Nonetheless, the letter of the Act has not been complied with on account of limited number of seats and it being impossible to provide reservation of seats in fractions.

31. Having held that Section 3 of the Act has not been complied with, we must add that it is a settled principle of law and has been reiterated by the Supreme Court in various cases that when there is a necessary or invincible disability to perform the mandatory part of the law then the law does not compel one to do that which one cannot possibly perform. In such circumstances, the mandatory character of the provision becomes directory and its non-compliance can be excused. In the case of **In re, Presidential Poll,:** (1974) 2 SCC 33, a Constitution Bench of the Supreme Court was considering a Reference made by the President under Article 123(1) of the Constitution of India as to whether the mandate provided in Article 62(1) of the Constitution of India regarding the completion of the election process for filling up the vacancy of the President before the expiry of the term of office and also the mandate provided in Article 62(2) of the Constitution of India regarding the completion of the election process, within six months, for filling up the vacancy of the President in the case of death, resignation or removal of the President before the expiry of its term, are mandatory or directory in character. The Supreme Court observed in para 15 of the judgment that impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in case of death of a candidate does not rob Article 62(1) of its mandatory character. The Supreme Court further held that:

15. The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that *impotentia* excuses. The law does not compel one to do that which one cannot possibly perform.

“Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.” Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse.....”

32. In our view, the above principle would be applicable in the present case where although the petitioner has adopted a system to provide the specified proportion of reservation, but nonetheless is unable to implement the same in the defined period owing to the limited number of seats.

33. In view of the discussions above, we set aside the finding of the learned single judge that the system adopted by the respondent for providing reservation is unjust and unfair.

34. In our view, the learned Single Judge rightly declined to interfere in the admission process at the instance of the appellant who in any event was disentitled to lay any challenge to the allocation of seats or the admission process once having participated in the admission process conducted in terms of the prospectus issued by the respondent.

35. In view of the fact that the provisions of section 3 of the Act have not been complied with, we uphold the direction to respondent no. 1 to examine the matter afresh, for future admissions, in the light of the provisions of the Act and take a fresh decision for providing reservation in consultation with the Union of India. However, we clarify that in the event the respondent is unable to formulate a workable and better system of providing reservation

in accordance with the Act, the respondent would be at liberty to continue with the present point roster system.

36. LPA 458/2013 is dismissed and LPA 506/2013 is allowed to the extent as indicated above and, accordingly, all the pending applications are disposed of.

37. The parties are left to bear their own costs.

SEPTEMBER 11, 2013
`MK'/RK



VIBHU BAKHRU, J

BADAR DURREZ AHMED, J