***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 23rd March, 2011**

\+ W.P.(C) 714/2011, CM No.1507/2011 (for stay), CM No.2245/2011 & CM No.3075/2011 (both u/O-I R-10 CPC) & CM No.3076/2011 (of the intervenors u/S 151 CPC)

ASSOCIATION OF NATIONAL BOARD ACCREDITED INSTITUTIONS & ORS ..... Petitioners

Through: Mr. Neeraj Kishan Kaul, Sr. Advocate with Mr. Sashikaran Shetty, Ms. Anuparna Bardoloi & Mr. Prasanth P., Advocates.

Versus

UNION OF INDIA & ANR ..... Respondents

Through: Mr. Jatan Singh, CGSC with Mr. Ashish Kumar Srivastava & Mr. Kunal Kohal, Advocates for R-1 UOI.
Dr. Rakesh Gosain, Adv. for R-2.
Mr. Kailash Vasdev, Sr. Adv. with Mr. Siddharth Dias, Adv. for applicant in CM No.2245/2011.
Mr. Sumit R. Sharma, Adv. for applicant in CM No.3076/2011.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

RAJIV SAHAI ENDLAW, J.

1. The challenge in this petition is to the action of the respondent No.2 National Board of Examinations (NBE) of making certain changes in selection procedure for admission of the

"Broad Speciality Candidates" to the Diplomate of National Board (DNB) Programme. Earlier, NBE held a Common Entrance Test (CET), which was essentially an eligibility test and all those passing / clearing the said test were eligible to selection by any of the Institutes / Hospitals accredited with NBE with each Institute / Hospital holding its own further test / interview for such selection. Under the changed procedure, NBE is to, as per the position / rank in the merit list of CET, hold centralized counselling and allocate the applicants / students as per the choice of Institute / Hospital filled by them and as per their rank, to its accredited Institutes / Hospitals. The challenge is on the ground that the changed procedure interferes with the rights of the accredited Institutes / Hospitals to administer their own hospitals / educational institutions and which right of administration includes a right to select and choose students.

2. Since the counselling scheduled by the NBE for admissions to the January, 2011 Session was held up, the hearing of the petition was expedited.

3. The members of the petitioner no.1, and the petitioners no. 2 to 5 are private unaided Medical Institutions/Hospitals accredited to NBE for imparting training / education for Diplomate in Post Graduate medical education. Though the counsel for the NBE has contended that the petitioner no.1 Association does not represent the majority of Institutes/Hospitals accredited to it but the said question has not been found relevant inasmuch as howsoever few the members of the petitioner no.1 Association may be, they would still be entitled to make the challenge as raised in the present petition.

4. In or about the year 1975, upon de-recognition of the Membership of the Royal Colleges of Physicians (MRCP) / Fellowship of the Royal Colleges of Physicians (FRCP) qualifications in the field of medicine, a scarcity was felt of training opportunities for development of specialities in the field of medicine. NBE was set up in the year 1975 (and which became an independent autonomous organization in 1982) to evolve high and uniform standard of Post Graduate and Post Doctoral Examination in Medical Sciences and also to create additional specialities

without burdening the resources of the Central Government. DNB Programme was accordingly conceived and was granted recognition by the Medical Council of India. Under the said programme, NBE accredits /recognizes specialities in Medical Institutes/Hospitals having the requisite teaching/academic programmes and such Institutes/Hospitals found suitable are then accredited to NBE. Such accredited hospitals are then permitted to enroll candidates in the particular speciality for DNB Programme.

5. It is the stand of NBE that admission to DNB Programme by centralized counselling is intended to curb the corruption and all other evil practices associated with DNB admissions. It is contended that under the system hitherto prevalent, the candidates were at the mercy of the accredited Institutes/Hospitals for admission inspite of securing high rank in the CET ; that in such decentralized admission, merit had become the casualty and nepotism and favoritism and bias had taken the centre stage; that the students were also not getting the single window access for DNB admissions and the earlier selection process was tough and expensive for the students.

6. The senior counsel for the petitioners has argued:

i. that the introduction of centralized counselling and allocation by NBE of students to seats available in each Institute/Hospital interferes with the fundamental right of the accredited Institutes/Hospitals to administer their Institutes/Hospitals and which right of administration, in the Eleven Judge Bench judgment of the Supreme Court in ***T.M.A. Pai Foundation Vs. State of Karnataka*** AIR 2003 SC 355 has been held to include a right to admit and select and choose students.

ii. though the Supreme Court earlier in ***Unni Krishnan, J.P. Vs. State of Andhra Pradesh*** AIR 1993 SC 2178 had placed certain restrictions on such rights of educational Institutions but in ***T.M.A. Pai*** (supra) the same was described as nationalization of education and which was held to be impermissible and contrary to Article 19(6) of the Constitution of India.

iii. that NBE as an examining body has no right to admit students in its accredited Institutes/Hospitals.

iv. NBE cannot take a stand that the accredited Institutes, if not agreeable to the said condition, were free to give up their accreditation.

v. On inquiry as to how the Institutes/Hospitals would suffer upon being allotted (through centralized counselling) the most meritorious students, it was contended that the Institutes/Hospitals have to satisfy themselves of the suitability of the candidate to the Institutes/Hospitals and as to the skill of the student in patient management; the Institutes/Hospitals may choose to prefer a candidate who in the past has worked with the Institution; that the Institute/Hospital in the case of DNB Programmes are more than merely an educational Institution; since the candidates are qualified MBBS Doctors and during the course of the Programme function in the hospital as doctors, Institute/Hospital have to see as to what a particular candidate can contribute to the Institute/Hospital.

vi. that the only role of NBE is to ensure that broad parameters of transparency and fairness are followed by the Institutes/Hospitals in admitting the students and to ensure maintenance of standards and which was successfully being done in the past by holding the CET as an eligibility test with the accredited hospitals being entitled to select any of the candidates found eligible in the said test.

vii. that though the accredited hospitals are strictly speaking not educational institutions but in the context of the DNB programmes are akin to educational Institutions.

viii. that under the system hitherto in vogue also, 50% of the members on the interview panel of each accredited hospitals were approved by NBE.

ix. that though the fee of the NBE course was approximately only Rs.50,000/- per annum but the hospitals were required to pay emoluments/salaries to the DNB trainees ranging from Rs.20,000/- to Rs. 40,000/- per month and thus the relationship between

the hospital and the student was not merely of a teacher-student but also of an employer-employee.

x. it was contended that the question involved is of taking away the right to choose of the hospitals and NBE cannot appropriate to itself the admission process.

xi. that as per the judgment in ***T.M.A. Pai***, as further clarified in ***Islamic Academy of Education Vs. State of Karnataka*** AIR 2003 SC 3724 (Five Judge Bench) and in ***P.A. Inamdar Vs. State of Maharashtra*** AIR 2005 SC 3226 (Seven Judge Bench), the State i.e. the NBE can take over/ appropriate to itself the admission process only if find malpractices; NBE had not given any notice to any of the accredited Institutes of any malpractice and merely giving that as a reason is not sufficient.

xii. that if this petition was to be dismissed, it would be tantamounting to rendering para 65 read with paras 40 and 53 of the judgment in ***T.M.A. Pai*** meaningless.

xiii. It was emphasized that notwithstanding ***Islamic Academy*** (supra) and ***P.A. Inamdar*** (supra), ***T.M.A. Pai*** reigns supreme.

xiv. Upon it being enquired from the senior counsel as to how the prospective candidates were to be expected to apply to over 700 accredited Institutes and to appear in interviews to be separately held by each and the decentralized system appeared to be bad for this reason alone, after taking instruction it was stated that all the Institutes/Hospitals in a State are willing to join together for holding their own centralized State wise counselling. Upon being further asked as to how that would be different from the centralized counselling by NBE, it is stated that such State wise centralized counselling would be by the Association of hospitals themselves and thus their rights to admit students would be preserved and which would otherwise be infringed if NBE were to hold centralized counselling.

7. The counsel for NBE has contended:

a. that the petitioner no.1 Association has no privity with NBE.

b. that in response to the public notices issued by the NBE inviting hospitals for inclusion in centralized counselling, a large number of Institutes/Hospitals had so applied for inclusion even prior to the filing of the present petition and which shows that the petitioner no.1 Association does not represent the interest of all. It is further contended that some of the petitioners have so applied even after filing of the present petition.

c. that the relationship of NBE with its accredited Institution is contractual and none of the judgments aforesaid dealt with the case of a contract as in the present case; here the Hospitals have contracted to abide by the terms of admission laid down by NBE and cannot resile from the same.

d. that DNB Programmes give an opportunity to the Hospitals to evolve into an educational Institute; that none of the accredited Hospitals have more than three seats in any speciality/department; that most of the accredited Hospitals were otherwise not educational Institutions and will continue to run even if opt out of the DNB Programme; that ***T.M.A. Pai*** dealt with the statutory obligation and not with a contractual relationship as is the case here; that none of the Hospitals were/are competent to conduct their own exams.

e. On inquiry as to what were the qualifying marks for CET hitherto before held by NBE, it was informed that anyone securing more than 50% marks was declared qualified. It was yet further informed that earlier, the marks secured by the qualifying candidates were not even disclosed though for the last three years the same were being disclosed.

f. On further inquiry as to whether the accredited Hospitals were in the admission process hitherto before in vogue, required to give any weightage to the marks secured in the CET, the answer is in the negative.

g. that centralized counselling was intended to provide uniformity.

h. ***T.M.A. Pai*** nowhere requires merit to be ignored.

i. that the accredited Institutions had not challenged the contract with the NBE and without challenging the contract are not entitled to maintain the petition.

j. that the petition suffers from laches and acquiescence inasmuch as the change was notified in the Bulletin brought out on 7th September, 2010 only while the petition was filed only in February, 2011 just before the central counselling was to commence. Reliance was placed on paras 22 and 23 of ***Dr. Preeti Srivastava Vs. State of M.P*** (1999)

7 SCC 120 to contend that there can be no dilution of merit at the super-specialization stage.

k. that since the seats are very few and limited, separate counselling by each Institute or by group of Institutes or even State-wise counselling was inconvenient and not feasible.

l. that ***T.M.A. Pai*** as interpreted in ***P.A. Inamdar*** has to be understood as the law today.

m. that NBE by introducing centralized counselling was not taking away any right of the Hospitals.

n. that there can be no estoppel against reforms. The earlier system was arbitrary and disregarded merit. The aptitude test held by the individual Hospital was opaque and not transparent.

o. that students are most important stakeholders in the controversy; centralized counselling is admittedly in the interest of the students; that even Article 51-A(j) of the Constitution provides for striving towards excellence.

p. there is no employer/employee relationship between DNB students/trainees and the Hospitals and the DNB students never attend to the patient on their own and are always accompanied by their guide.

q. reliance is placed on ***Ahmedabad St. Xavier's College Society Vs. State of Gujarat*** (1974) 1 SCC 717 emphasising the importance of merit and excellence in paras 46 to 48 and 77, 90 – 92, 94, 98, 145, 176, 206, 209 and 225.

8. The senior counsel for the petitioners in rejoinder has contended:

i. that the judgment in ***T.M.A. Pai*** has to be read fully and not in the light of ***P.A. Inamdar***.

ii. that the parameters evolved with respect to the educational Institutions apply to Hospitals accredited to NBE also. Copy of the catalogue of the NBE describing the DNB Programme as an educational /

academic programme was cited. It is contended that practical training is also education.

iii. NBE gives a Degree on the basis of that education.

iv. that the standard form of contract for accreditation of NBE is contrary to ***T.M.A. Pai.*** Again paragraphs from ***T.M.A. Pai***, ***Islamic Academy*** and ***P.A. Inamdar*** were read to emphasize that the Supreme Court has recognized the right of the educational Institutions to admit students.

v. that the petitioners cannot be asked to give up their such rights merely because no prejudice would be caused to them.

vi. in reply to the query of the Court as to how the two streams appearing to be flowing from ***T.M.A. Pai*** i.e., the right of the Institutions to select students on the one hand and merit being required to be followed on the other hand were to be reconciled, the senior counsel contends that if merit only were to be the criteria, the Institution would be left with no choice and thus the

system hitherto being followed of holding the qualifying examination with the choice being left to the individual Institutes/Hospitals to select from amongst those who have qualified, is in accordance with the judgment in ***T.M.A. Pai***.

vii. Attention is invited to para 35 of ***T.M.A. Pai*** to contend that it is not open to NBE to contend that Hospitals are bound by the contract or if they do not agree they are free to opt out.

viii. that if any of the accredited Institution defaults in following the criteria of merit while making their own choice of students, the same will always be subject to judicial review.

ix. that in the procedure now introduced of centralized counselling, no discretion or choice is left with the Hospitals.

9. During the pendency of this writ petition, the following applications for impleadment have been filed.

i. CM.2245/2011 by an Association of 20 unaided Christian Minority Educational Institutions accredited to NBE.

ii. CM.No.3076/2011 by two doctors who took the DNB Examination in December, 2010 and were declared successful.

iii. CM.No.3075/2011 of another doctor who has also cleared the entrance test.

The counsels for all the applicants were also allowed to intervene and heard on the writ petition.

10. The senior counsel for the applicant in CM No.2245/2011 (Minority Institutions) contended:

(a) that the hospitals would be liable for negligence / faults of the students admitted for the DNB programmes and working as Doctors in such hospitals and thus ought to be left with choice of selecting most suitable candidate.

(b) Reliance is placed on ***Lila Dhar v. State of Rajasthan*** AIR 1981 SC 1777 on the right of the employer to choose an employee.

(c) CET held by NBE is a test of theoretical knowledge and does not give any indication of the aptitude.

(d) reliance is placed on paras 62 - 66 of ***St. Stephen's College Vs. The University of Delhi*** AIR 1992 SC 1630 on the purpose of the interview and providing for the rights of Minority Institutions.

(e) ***Preeti Srivastava*** (supra) was concerned with reservation and is thus not relevant for adjudicating the controversy as has here arisen.

(f) that the Christian Institutes/Hospitals are generally in rural areas and a student admitted thereto merely on merit without wanting to work in or taking aptitude for rural areas is not likely to contribute to the hospital and is likely to leave causing loss to the hospital.

(g) Reliance is made to paras 62-65 and 67 of ***Sindhi Education Society Vs. The Chief Secretary, Govt. of NCT of Delhi*** (2010) 8 SCC 49 also summarizing ***T.M.A. Pai***.

(h) Reference is made to para 35 of ***Inder Parkash Gupta Vs. State of Jammu and Kashmir*** (2004) 6 SCC 786 to contend that for a few cases of bad selection having been made by the accredited institutions in the past, the practice hitherto prevalent cannot be blamed.

(i) Attention is invited to paras 90 - 93 of ***P.A. Inamdar*** to contend that the rights of minority institutes cannot be interfered with.

11. The counsel for NBE in response to the aforesaid contentions has urged:

(A) that the past record shows that only 16% of the candidates selected by the minority institutions belonged to the minority community.

(B) attention is invited to the admission of the petitioner in rejoinder that seats remained vacant under the old system also.

(C) that training is the dominant part of the DNB Programme and employment is only penumbral. The DNB trainees are attached to specialists who look after

non-critical patients and thus the occasion for the DNB admittees to deal with the patient independently does not arise.

(D) With respect to the payment of salary, reference is made to ***Dr. Vishal Sehgal Vs. Secretary (Health)*** 116 (2005) DLT 493 where direction was issued for payment of stipends to DNB students.

(E) that the accredited Hospitals if at all taking work from the DNB admittees are doing so of their own accord and NBE has no objection if they do not take work from the students/DNB trainees.

(F) that the judgment in ***St. Stephen's*** case (supra) was on the premise of the applicants belonging to different boards of examinations; here in view of the CET no question of disparity arises.

(G) Reliance was placed on ***A.P. Christians Medical Educational Society v. Government of Andhra Pradesh*** (1986) 2 SCC 667 on it being not permissible to raise the bogey of minority.

(H) it is reiterated that it is only a handful of institutions which are opposing the change.

12. While the counsel for the applicant in CM No.3076/2011 has supported the petitioners, the counsel for the applicant in CM No.3075/2011 has supported NBE. Counter allegations have been made of the said applications having been filed at the instance of the respective parties.

13. As would be apparent from the above, the entire case of the petitioners rests only on ***T.M.A. Pai***. It is thus deemed expedient to first examine whether ***T.M.A. Pai*** bestows any such right on the members of the petitioner as claimed by them and which will be violated by centralized counselling and allocation of students by NBE.

14. The opinion of B.N. Kirpal, C.J. for himself and G.B. Pattanaik, S. Rajendra Babu, K.G. Balakrishnan, P.V. Reddi, and Arijit Pasayat, J.J. in the said judgment, after holding the right to establish and run educational institutions to be a right to carry on any activity/occupation within the meaning of Article 19(1)(g) and Article 26(a) of the Constitution of India and further holding that the decision in

Unni Krishnan (supra) case insofar as it framed the scheme relating to grant of admission and fixing of the fee to be not correct and overruling the directions given to UGC, AICTE, Medical Council of India and Central and State Governments in that case, proceeded to consider as to whether there could be Government Regulations in case of private institutions and if so to what extent. The said discussion commencing from para 46 of the judgment was done under the heads of:-

(a) Private Unaided Non-Minority Educational Institutions.

(b) Private Unaided Professional Colleges.

(c) Private Aided Professional Institutions (Non-Minority).

(d) Other Aided Institutions.

15. Insofar as the members of petitioner are concerned, there is no dispute that they would fall in the category (b) above i.e. Private Unaided Professional Colleges. The same have been dealt with in paragraphs 67 to 70 of the judgment. With respect thereto it was held in para 68 that though they are entitled to autonomy in their administration but at the same time, they can not forgo or discard the principle of merit. It was thus held permissible for the University or

the Government at the time of granting recognition, to require a Private Unaided Institution to provide for merit based selection while at the same time giving the management sufficient discretion for admitting the students. One of the methods suggested was of some percentage of seats being reserved for admission by the management out of those students who have passed the Common Entrance Test held by itself or by the State/University and have applied to the College concerned for admission, while the rest of the seat may be filled up on the basis of the counselling by the State Agency. In paragraph 70, it was reiterated that Professional Educational Institutions have to get recognition from the concerned University which normally require certain conditions to be fulfilled before recognition; conditions of affiliation or recognition which pertain to the academic and educational character of the Institution and ensure uniformity, efficiency and excellency in educational courses required to be followed were held to be not violating even the provisions of Article 30 of the Constitution of India. The only rider was that such conditions should not be such as may lead to governmental control or administration of Private Educational Institutions.

16. The very fact that the Bench deemed it appropriate to deal separately with Professional Colleges/Institutions and segregated them from Schools/Colleges (i.e. Non-Professional), in my view, prohibits that what has been expressly laid down in the paragraphs of the judgment relating to Professional Colleges/Institutions from being coloured by what has been held/laid down with respect to other Non-Professional Colleges/Institutions. Thus paras 49, 50, 53 to 55, 58, 59, 65 & 66 on which strong reliance has been placed by the senior counsel for the petitioners and which have been read repeatedly, but fall under the category of Non-Professional Colleges/Institutions cannot be said to be applicable to the present case concerning professional institutions.

17. V.N. Khare, J., S.S. Mohammed Quadri, J. and Ruma Pal, J. while delivering their separate opinion did not deal with the said aspect and concurred with the opinion aforesaid of B.N. Kirpal, J.

18. S.N. Variava, J. speaking for himself and Ashok Bhan, J. though dissenting on some aspects with other nine Judges, but in para 394 of the judgment held that an educational institution must grant admission

on some identifiable and acceptable manner and is entitled to refuse only in exceptional cases. With respect to the Professional Colleges/Institutions they also reiterated that the same has to be governed by merit alone.

19. It would thus be seen that as far as the Professional Colleges/Institutions are concerned, all the eleven Judges comprising the Bench in ***T.M.A. Pai*** spoke in one voice only, that it is the merit alone which is to govern the admission process and the recognizing Body as NBE is, is entitled to impose restrictions in this regard. B.N. Kirpal, C.J. speaking for the majority went to the extent of holding that such restrictions would be reasonable within the meaning of Article 30 i.e. vis-à-vis Minority Institutions also.

20. The emphasis by the senior counsel for the petitioners on paras 2, 3, 28, 29, 35 to 38, 40 & 43 of the judgment in ***T.M.A. Pai*** is also not found apposite. The said observations in criticism of the view in ***Unni Krishnan*** have to be read in the context of the argument raised before the Bench. The criticism of ***Unni Krishnan*** judgment was that the low fee seats were found to be filled by affluent but more

meritorious students who had the facilities of better School and coaching available to them. It was thus found that the economically weaker students were ultimately falling in the category from which ***Unni Krishnan*** permitted higher fee to be charged and were thus found to be subsidizing the education of the affluent students. It was primarily for this reason that the scheme framed in ***Unni Krishnan*** was set aside by the Supreme Court.

21. Pursuant to the observations (supra) in para 68 of the judgment that the management of Professional Colleges/Institutions can be permitted to admit students qua certain percentage of seats, the Government fixed the said percentage. The same was challenged on the ground that the same did not give full freedom to the Private Unaided Institutions and which led to the judgment in ***Islamic Academy***. The contention of the students as noted in para 4 of the judgment was that separate examination by each Institution was proving costly and harassing to the students. It was the contention of the Government also as recorded in para 10 of the judgment that separate criteria had been laid down in ***T.M.A. Pai*** for Professional Colleges/Institutions. V.N. Khare, C.J. speaking for himself and S.N. Variava, K.G. Balakrishnan and Arijit Pasayat, JJ. in para 12 held that

distinction had been made between Professional and Other Educational Institutions as it is in the national interest to have good and efficient professionals and national interest would prevail even over minority rights; it was for this reason that in Professional Colleges, both minority and non-minority, merit had been made the criteria for admission. Para 68 of ***T.M.A. Pai*** was held to be laying down that in non-minority Professional Colleges, admission to students, other than the percentage given to the management, can only be on the basis of merit as per the Common Entrance Test conducted by Government Agencies.

22. S.B. Sinha, J. in his separate opinion in ***Islamic Academy*** also in paras 67, 77, 117, 162 & 165 of the judgment held that insofar as Professional Colleges/Institutions are concerned, merit alone would be the criteria for admission.

23. ***P.A. Inamdar*** in which all the seven Judges constituting the Bench spoke through the opinion of R.C. Lahoti, C.J. also in para 97 of the judgment held that Regulations could be imposed in national interest. In para 107 and 110 of the judgment, it was held that Professional Colleges/Institutions constitute a class by themselves and

merit and excellence assumes special significance therein. It was also reiterated that the same was in national interest. In para 108 of the judgment, it was said that the right to administer does not include a right to maladminister. Para 113 clarified that the second part of para 68 of ***T.M.A. Pai*** regarding seat sharing was only a suggestion and not binding. Paras 124 and 126 of ***P.A. Inamdar***, emphasized by the senior counsel for the petitioners are in the context of Reservation Policy of the State and not in the context of admission; what they lay down is that the State cannot enforce its Reservation Policy on the Unaided Private Professional Educational Institutions. The same cannot be read as laying down, as was sought to be urged, that the State or the affiliating or the recognizing Body cannot provide for merit based admission. Rather, discussion with respect to "admissions" commences from para 130 of the judgment and in para 131, it has been reiterated that different considerations apply to Professional/Educational Institutions – such education cannot be imparted by any Institution unless recognized by or affiliated with any competent authority created by law – excellence in education and maintenance of high standards at this level are a must – to fulfill these

objectives the State can and rather must in national interest step in.It was further held that education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth. Any ambiguity is removed from the discussion in paras 133 to 135 and 143 of the judgment providing for professional education to be made accessible on the criteria of merit and non-exploitative terms to all eligible students on uniform basis.

24. I therefore find that insofar as the Non-Minority Private Professional Colleges/Institutions are concerned, in all the three judgments and by all the Hon'ble Judges who have rendered their opinions, it has been held that they constitute a class by themselves and admission thereto is in national interest required to be merit based and Regulations can be framed for merit based uniform admission process thereto.

25. Insofar as making admission on merit based uniform admission process is concerned, there can be no better system for admission than through the CET and counselling. It has been so held in :-

a. ***Rajiv Mittal Vs. Maharshi Dayanand University*** (1998) 2 SCC 402 where it was held that the system of counselling for the purpose of granting admission to the various Medical Colleges in the State is the most equitable one where options are given of various seats to the students in accordance with their overall merit position in the combined entrance examination, which examination is competitive in character.

b. ***Anand S. Biji v. State of Kerala*** (1993) 3 SCC 80 wherein infact the system of counselling, for allotment of the candidates declared successful in All India Post Graduate Entrance Examination was first devised to eliminate unequal results and the delays.

c. The Full Bench of this Court in ***V.K. Shukla Vs. Union of India*** 1993 III AD (Delhi) 1073 also recognized that the best and the most equitable manner of filling the Post Graduate seats is by holding counselling.

d. ***Archit Vashisht Vs. Guru Gobind Singh Indraprastha University*** MANU/DE/8569/2007 also recognized the methodology of counselling as a universally accepted procedure conforming to fairness and affording maximum opportunity in a symmetrical manner to the candidates as per their merit.

e. ***Sunint Kaur Vs. Guru Gobind Singh Indraprastha University*** ILR (2005) 1 Del 215 also recognized counselling as effective in ensuring that the most meritorious candidate is offered the first option for a chosen course and that almost all seats are filled up at the earliest.

26. The senior counsel for the petitioners could also not controvert the same or show that it is not so.

27. The system of counselling through Single Window System is found to be in consonance with what has been held by the Supreme Court also as aforesaid that admission in Professional

Institutions/Colleges has to be purely on the basis of merit; admission through counselling is more likely to effectuate the intention of the Supreme Court.

28. As aforesaid, NBE has introduced centralized counselling and allocation of seats, citing malpractices in the admission process hitherto before followed. I also do not find any merit in the contention of the senior counsel for the petitioners that such inferences could not have been drawn without issuing notice to the Institutions indulging the same or that the NBE could not appropriate the right unto itself only after giving such notice and establishing the malpractice. I find that in ***Islamic Academy*** also in para 15, judicial notice was taken of the prevalent reality of the educational institutions profiteering and demanding capitation fee and the resultant hardship to the students. During the last over nine months on the Roster relating to educational matters, some instances have come to my notice also of the parents or other close relatives of the admitted students working as Senior Consultants in the Hospitals or of the Hospitals being unable to explain as to why admission was given to one student over other. In present days, when Hospitals have to compete with each other for retaining the

best Consultants, judicial notice can be taken of the practice of the Hospitals admitting the Wards and other close relatives of Senior Consultants in an attempt to retain their services.

29. Even otherwise inspite of my repeated coaxing as to how the Hospitals would suffer if allocated the most meritorious student who has opted for them, no satisfactory answer save for assertion of the right has been forthcoming. The reasons given of suitability, employee-employer relationship etc. do not find any basis in the pleadings and appear to have been taken as an afterthought. NBE has already clarified that it does not insist upon the Hospital taking work from the said students and the work if any so taken is in any case not the dominant part of the DNB curriculum. Similarly, no force is found in the argument of the allocated student leaving, causing a vacancy. A student who has sought admission is unlikely to leave. The students make choice of Institute/Hospital depending upon their convenience and the argument raised is found to be divorced from reality.

30. The senior counsel for the petitioners has also repeatedly contended that the practice hitherto before prevalent has been working successfully and does not call for a change. However the said practice is at least three decades old. There is a sea change since then. The number of applicants and competition today cannot be compared to what it was then. In today's competitive atmosphere where students compete for fraction of a percentage, I do not find any justification in all those who qualify the CET with 50% being considered alike. A student who qualifies with 50% cannot be placed at par with the one who qualifies with over 90%.

31. I also do not find any force in the proposal that the Institutes/Hospitals be permitted to hold their own State-wise counselling. The procedure suggested by the senior counsel for the petitioners has several pitfalls and there is every possibility of a more meritorious student being denied admission to an Institute/Hospital of his choice, if such procedure is followed. The procedure suggested would also be detrimental to the interest of the students as they would be required to make several applications and appear for counselling in several States. Infact the possibility of the available seats remaining

vacant would be much more in such a system. Moreover, I fail to see any reason for the unaided professional Institutes/Hospitals to oppose the centralized counselling when they also claim to be admitting the most meritorious student. They have not been able to controvert that through the process of centralized counselling, they will get the most meritorious student. If that be so, the only reason for opposing the centralized counselling has to be necessarily presumed to be, an intent to admit less meritorious student for extraneous considerations. This cannot be permitted.

32. I have during the course of hearing enquired from the senior counsel for the petitioners that even if his contention of the right to admit students having been conferred on the Professional Colleges/Institutions were to be accepted, how it should be reconciled with the right on the other hand of the students, of a fair, uniform, merit based selection process with least inconvenience. The only reply which was forthcoming was that the matter having been settled by ***T.M.A. Pai***, is not to be looked any further.

33. In this regard I may notice that even in ***T.M.A. Pai*** in para 64 it was held that the Institutions are for the students and not vice versa. The merit based admission/selection to Professional Colleges/Institutions having been held to be in national interest, it cannot but be held that the right of the most meritorious students cannot be disregarded.

34. The Supreme Court in ***Dr. Pradeep Jain Vs. Union of India*** (1984) 3 SCC 654 held that in view of considerable paucity of seats in Medical Colleges to satisfy the increasing demand of students for admission, some principle has to be evolved for making selection of students for admission to Medical College and such principle has to be in conformity with requirement of Article 14. It was further held that the primary imperative of Article 14 is equal opportunity for all across the nation for education and advancement. It was yet further held that the effort must, therefore always be to select the best and most meritorious students for admission to Technical Institutions and Medical Colleges by providing equal opportunity to all. The Supreme Court also held that it would be against national interest to admit in Medical Colleges or other Institutions giving instruction in specialties,

less meritorious students when more meritorious students are available. The primary consideration in selection of candidates for admission to Medical Colleges was mandatorily held to be merit and it was further laid down that the object of any rules which may be made for regulating admissions to the Medical Colleges must be to secure the best and most meritorious student. It was yet further held that if equality of opportunity for every person in the country is the Constitutional guarantee, a candidate who gets more marks than another is entitled to preference for admission and this proposition has greater importance when we reach higher levels of education. The Supreme Court held that to devalue merit at the summit is to temporize with the country's development in the vital areas of professional expertise.

35. The judgment of the Apex Court in ***Dr. Pradeep Jain*** (supra) was approved by the Constitution Bench in ***Saurabh Chaudri Vs. UOI*** (2003) 11 SCC 146.

36. S.B. Sinha J., in the clarification reported in (2004) 5 SCC 618 of ***Saurabh Chaudri*** (supra) went to the extent of holding

> " Right of a meritorious student to get admission in a postgraduate course is a fundamental and human right, which is required to be protected. Such a valuable right cannot be permitted to be whittled down at the instance of less meritorious students."

37. Swatanter Kumar, J. speaking for the Division Bench of the Bombay High Court in ***Shri Francisco D. Luis Vs. The Director, Board of Secondary and Higher Secondary Education*** (2008) 110 BomLR 2892 proceeded on the premise that such right of a student is a Fundamental Right and any action of its infringement is liable to be set aside.

38. It would thus be seen that the right of a student to a fair, uniform, merit based selection process with least inconvenience and which is undoubtedly secured through Central Counselling has been conferred the status of a Fundamental Right. It is this Fundamental Right of the student which is pitted against the right even if any (though none has

been found) of the members of the petitioner to make a choice of the student to be admitted. In my mind there is no doubt whatsoever as to in such a situation, whose right is to give way and whose right is to prevail. While the right of the student, as aforesaid is in national interest, the right claimed by the Institute/Hospital is a mere private right, to serve no other purpose than to assuage the ego. The private right even if any must give way to the right in national interest. If any precedent is needed for the said purpose, reference may be made to ***Ramniklal N. Bhutta Vs. State of Maharashtra*** AIR 1997 SC 1236 and ***Mahadeo Savlaram Shelke Vs. Pune Municipal Corporation*** (1995) 3 SCC 33. Thus, the petitioner cannot claim any relief on this ground also.

39. I may also notice that though holding right to establish an Educational Institution to be an occupation within the meaning of Article 19(1)(g) but the view of Jeevan Reddi, J. in ***Unni Krishnan*** case that there has to be no business and profiteering in education has been upheld in ***T.M.A. Pai*** as is evident from para 162-L of the judgment.

40. Coming to the application of the Institutions accredited to the NBE belonging to the Minority Community, neither in the application nor in the arguments as aforesaid recorded, any case as a Minority Institution has been urged. The change in procedure has been challenged on the same grounds as urged by the petitioner and not on the ground of Minority status. Need is therefore not felt to deal with the said aspect. The arguments otherwise raised by the senior counsel for the intervenor on behalf of Minority Institutions have been dealt with in the discussion herein above.

41. Before parting with the matter, I may also record that the Supreme Court vide order dated 7th March, 2011 in WP(C) No. 380/2009 titled ***Simran Jain vs. Union of India*** has approved the Regulations on Graduate Medical Education (Amendment), 2010 (Part II) and the Postgraduate Medical Education (Amendment) Regulations, 2010 (Part II) providing for a single eligibility-cum-entrance examination for MBBS course known as 'National Eligibility-cum-Entrance Test for admission to MBBS Course' and a single eligibility-cum-entrance Examination for postgraduate courses known as 'National Eligibility-cum-Entrance Test

for admission to Postgraduate Medical Courses', to be held under the overall superintendence, direction and control of the Medical Council of India. The changed procedure of NBE impugned in this petition is found to be in consonance with the changes approved by the Apex Court.

42. The writ petition is therefore without any merit and is dismissed with costs of Rs.1,00,000/- on the petitioner payable to NBE within four weeks of today.

RAJIV SAHAI ENDLAW
(JUDGE)

23rd March , 2011
M/BS