

## Ashhar Musharib Firdausi Vs University of Delhi and Others

**Court:** Delhi High Court

**Date of Decision:** Aug. 11, 2010

**Acts Referred:** Central Educational Institutions (Reservation in Admission) Act, 2006 " Section 2, 3, 5, 5(1), 5(2)

**Citation:** (2010) 172 DLT 539 : (2010) 6 SLR 413

**Hon'ble Judges:** Rajiv Sahai Endlaw, J

**Bench:** Single Bench

**Advocate:** Naushad Ahmad Khan, Rajesh Kumar Verma, Aquib Ali and Elanchezian, for the Appellant; Mohinder J.S. Rupal, for respondents 1 and 2, Neeraj Chaudhary, CGSC, Khalid Arshad and Mohit Auluck for respondent No. 3, Sana Ansari and Jitendra for Zubeda Begum, for respondents 4 and 7, for the Respondent

### Judgement

Rajiv Sahai Endlaw, J.

The important question which arises for consideration in this writ petition is whether the reservation of 27% seats

for Other Backward Classes (OBC) u/s 3 of the Central Educational Institutions (Reservation in Admission) Act, 2006 is dependent on increase in

the number of seats as provided in Section 5 of the Act, i.e. if the number of seats is not increased, whether it is the OBC candidates or the

General (Unreserved) category candidates to suffer.

2. The petitioner claiming to be an OBC appeared for admission to MBBS course offered by the Institutions under the Faculty of Medical

Sciences, University of Delhi and secured 97th rank in the OBC category. The petitioner as per his rank is not entitled to admission. However, the

present petition has been filed contending that the Medical Colleges under the Faculty of Medical Sciences, University of Delhi have not reserved

27% of the seats for OBCs as they are required to do under the Act. It is the case of the petitioner that if such 27% of the seats are reserved for

OBCs, the petitioner would be entitled to admission.

3. The petition came up first before this Court on 5th July, 2010. The counsel for the Faculty of Medical Sciences, University of Delhi appearing

on advance notice stated that the University runs only the University College of Medical Sciences and is thus responsible therefore only; it was

informed that of the other two Colleges falling under the Faculty of Medical Sciences, University of Delhi namely the Maulana Azad Medical

College is run by the Government of NCT of Delhi and the Lady Hardinge Medical College is under the Central Government and the question of

reservation in the said Colleges is decided by the Government of NCT of Delhi and the Central Government respectively. The role of the

University of Delhi vis-à-vis other two colleges was informed to be confined to the conduct of examination for admission only. In view of the

said statement, the Union of India and the Government of NCT of Delhi were ordered to be impleaded as parties to the petition. While issuing

notice of the petition, it was directed that one seat may be kept vacant for the petitioner if ultimately found entitled to admission.

4. On the next date i.e. 9th July, 2010, the counsel for University of Delhi sought variation of the interim order contending that the 27% reservation

for OBCs is to be out of the newly created seats only and the interim order was resulting in a seat being reserved out of the General Category and

to which the petitioner in any case had no right. However, the said contention was not accepted at that stage and the interim order continued.

5. Counter affidavits have been filed on behalf of the University, Lady Hardinge Medical College, Directorate General of Health Services,

Government of India and Maulana Azad Medical College.

6. The Lady Hardinge Medical College has contended that it being a women's College and the petitioner being a male is in any case not entitled

to admission therein and it is not a necessary or proper party. It was however informed to the said College that irrespective of whether the

petitioner can be admitted thereto or not, it ought to respond to the averment in the petition of being in any case required to reserve 27% of its

seats for OBCs. However, no further affidavit has been filed.

7. The University in its counter affidavit has stated that the last student admitted to the University College of Medical Sciences in the OBC category

has the rank of 65 and the petitioner being placed at rank 97 has no case for admission in the said College even in case of vacancy. It is further

pleaded that the University College of Medical Sciences has already reserved 27% of the seats for OBCs and all of which have been filled up.

8. The Directorate General of Health Services, Government of India has in its counter affidavit stated that it is responsible for admission under the

15% All India Quota only and in which quota, 27% of the seats are being reserved for OBCs. It is also stated therein that the Government of India

has already issued instructions to all central institutions for maintaining the infrastructure and other teaching facilities in accordance with Medical

Council of India's norms. It is also informed that a meeting of representatives of all concerned Institutions, including LHMC was called on 22nd

January, 2010 to review the implementation of reservation for OBC candidates and to prepare Annual Plan 2010-11 in respect of 27% OBC

reservation in all the Central Government Educational Institutions and to increase the seats as per new norms of MCI. Minutes of the said meeting

have been annexed to the counter affidavit; with respect to LHMC, it is recorded therein that though some seats were increased in 2008-09 but in

the years 2009-10 & 2010-11 there has been no increase and that by the end of the year 2011 the required infrastructure will be made available.

LHMC in the said Meeting sought extension of time of minimum two years for giving full effect to 27% reservation. From the minutes of the said

meeting, it transpires that other Medical Colleges are also facing problems in increasing seats in terms of Section 5 of the Act. The Meeting ended

with decision to seek extension of two years for increasing the seats.

9. The Maulana Azad Medical College in its affidavit has stated that upon being required to make reservations under the Act aforesaid, reference

was made inter alia to Medical Council of India to increase the intake capacity for MBBS by 5% of the existing strength; that the said proposal is

still pending consideration.

10. What has emerged from the pleadings aforesaid is that of the three aforesaid Colleges, only the University College of Medical Sciences has

reserved 27% seats for the OBCs; the other two i.e. Lady Hardinge Medical College & Maulana Azad Medical College have not. From the

minutes aforesaid however it transpires that Lady Hardinge Medical College though has reserved some seats for OBCs but is not reserving to the

extent of 27%.

11. The question which arises for consideration is whether the reservation of 27% seats for OBC is to come into effect immediately on

promulgation of the Act aforesaid or is to be out of the seats to be increased, also under the said Act. The relevant provisions of the Act in this

regard are contained in Section 3 & Section 5 thereof which are as under:

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.

5. Mandatory increase of seats. - (1) Notwithstanding anything contained in Clause (iii) of Section 3 and in any other law for the time being in

force, every Central Educational Institution shall, with the prior approval of the appropriate authority, increase the number of seats in a branch of

study or faculty over and above its annual permitted strength so that the number of seats, excluding those reserved for the persons belonging to the

Scheduled Castes, the Scheduled Tribes and the Other Backward Classes, is not less than the number of such seats available for the academic

session immediately preceding the date of the coming into force of this Act.

(2) Where, on a representation by any Central Educational Institution, the Central Government, in consultation with the appropriate authority, is

satisfied that for reasons of financial, physical or academic limitations or in order to maintain the standards of education, the annual permitted

strength in any branch of study or faculty of such institution cannot be increased for the academic session following the commencement of this Act,

it may permit by notification in the Official Gazette, such institution to increase the annual permitted strength over a maximum period of three years

beginning with the academic session following the commencement of this Act; and then, the extent of reservation for the Other Backward Classes

as provided in Clause (iii) of Section 3 shall be limited for that academic session in such manner that the number of seats available to the Other

Backward Classes for each academic session are commensurate with the increase in the permitted strength for each year.

12. On a plain reading of the provisions aforesaid, I am of the opinion that reservation of 27% seats for OBCs is to come into effect immediately

and is not dependent on increase in seats u/s 5 of the Act.

13. The controversy aforesaid has also been the subject matter of an earlier judgment dated 10th September, 2008 of this Court in WP(C) No.

5329/2008, titled Tandan Kumar v. University of Delhi. This Court held that though the Act aforesaid had come into force on 3rd January, 2007

and with effect from the academic session commencing in 2007 but owing to the interim order dated 29th March, 2007 of the Supreme Court in

Ashoka Kumar Thakur Vs. Union of India (UOI) and Others, (whereby the Supreme Court upheld the reservation of 27% seats for OBC), for all

practical purposes the Act had come into force on 10th April, 2008 only i.e. w.e.f. beginning of the academic session 2008 and with which session

this Court in Tandan Kumar (supra) was concerned. Taking a cue from Section 5 of the Act, it was held that the applications for increase in intake

capacity could have been submitted thereafter only. It was also noted that qua Medical Colleges, the intake capacity could not be increased

without approval of the MCI. This Court, while holding the petitioner therein to be not entitled to any relief of admission in the OBC category in the

year 2008 held that "the grant of reservations to the OBC has to be only from out of the additionally created / approved seats". Section 5(1) was

held to be preserving the number of seats for the General Category (Unreserved Seats) as were existing before the enforcement of the Act. It was

thus held that reservation for OBC category cannot be granted by reserving any seats from the unreserved category seats. This Court however

directed the Maulana Azad Medical College & Lady Hardinge Medical College to ensure compliance of the provisions of the Act from the next

academic session of 2009-10.

14. Unfortunately, the order aforesaid of this Court in Tandan Kumar remains uncomplied. As aforesaid, inspite of the Act having come into force

at least two academic sessions ago, the seats reserved under the Act for OBCs remain non-existent in Maulana Azad Medical College and below

27% in Lady Hardinge Medical College.

15. It was considered whether the interpretation by the undersigned of Section 3 & 5 of the Act as aforesaid being different as found in Tandan

Kumar, the matter should be referred to a Division Bench. However, on further consideration, I find that judgment in Tandan Kumar was

pronounced immediately after the reservation for OBCs was upheld in Ashoka Kumar Thakur (supra). The Court then was guided by there being

possibly no time for the Institutions to avail of Section 5. Being fully conscious, directions for the next academic year 2009-10 were issued.

However, now as aforesaid two academic sessions have already passed. It was enquired from the counsels for Maulana Azad Medical College &

Lady Hardinge Medical College whether in accordance with the directions in Tandan Kumar, the applications for increase in intake to

accommodate 27% seats for OBCs have been made; the answer is in the negative. As aforesaid, Maulana Azad Medical College is pursuing its

application only for 5% increase. The counsel for Maulana Azad Medical College has of course contended that increase of seats in Medical

College is not a simple affair and a lot of additions to infrastructure have to be made and which Maulana Azad Medical College for one reason or

the other has not been able to do till now. The controversy now has to be decided in the aforesaid context and which is much different from the

context in which Tandan Kumar was decided. The question now is that even if any Central Educational Institution is unable to so increase the seats

or has not so increased the seats, whether reservation for OBCs is to await such increase. It was therefore not felt necessary to refer the matter to

the Division Bench.

16. My reasons for the conclusion reached in para 12 above are as under:-

(i) The reservation u/s 3(iii) has not been made "subject to" Section 5. The reservation u/s 3(iii) is to come into effect immediately on promulgation

of the Act and in view of interim order in Ashoka Kumar Thakur, w.e.f. academic session 2008-2009.

(ii) Section 5(1) also does not provide that "to effect reservation in Section 3(iii)", the seats shall be increased. It only obligates the Institutes to

increase the number of seats so that the seats available for unreserved category after the coming into force of the Act are not less than those before

such reservation.

(iii) While Section 3(iii) is for the benefit of the reserved category, Section 5 is to prevent prejudice to the unreserved category from reservation, of

which for OBCs was introduced for the first time by the Act. The two are independent of each other.

(iv) The effect of the non obstante clause at the beginning of Section 5(1) has been considered. The obligation u/s 5(1) to increase the seats is

notwithstanding anything contained in Section 3(iii) or in any other law.

The Apex Court in Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, held:

A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some

particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view

to give the enacting part of the section, in case of conflict, an overriding effect over the provision of the Act or the contract mentioned in the non-

obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non-obstante clause or any

contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause

would not be an impediment for an operation of the enactment.

(v) I have considered whether the effect of the non-obstante clause is to make the reservation in Section 3(iii) for OBCs subject to increase in

seats.

(vi) I am unable to hold so for following reasons:

(a) The Legislature in Section 5(2) has provided a mechanism for seeking exemption from such reservation. If the reservation in Section 3(iii) were

to be dependent on the increase of seats u/s 5(1), there was no need for Section 5(2) inasmuch as without the increase, the reservation in any case

would not have come into force.

(b) If it were to be held that reservation u/s 3(iii) is dependent on increase in seats and till such seats are increased OBCs cannot claim reservation,

it would render Section 5(2) otiose and which interpretation thus cannot be accepted. In the interpretation of statutes the courts always presume

that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. See The

J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, .

(c) There is really no conflict between Section 3(iii) providing for reservation and Section 5(1) providing for increase in seats so as to keep the

number of seats available for unreserved category candidates same, irrespective of reservation for OBCs. The legislature did not foresee any

difficulty in so increasing the number of seats and provided a mechanism in Section 5(2) for the difficulty if any. The obligation to increase the seats

has been made ""notwithstanding any other law for the time being in force"" and which would include the laws providing for permissions from various

Regulatory Bodies viz MCI, AICTE, NCTE, UGC etc. Section 5(1) however requires the Educational Institutions to increase the seats with prior

approval of ""appropriate authority"" which has been defined in Section 2(c) as meaning the Regulatory Bodies aforesaid. Thus not only the

Educational Institutions required to increase seats but the Regulatory Bodies aforesaid are also obliged to grant approvals. Thus, as far as the

legislature was concerned, there was no possibility of increase in seats not happening, except in cases falling u/s 5(2) and for which provision is

made therein.

(d) The Act was promulgated to provide reservation inter alia for OBCs and the matter of increase in strength to maintain the number of seats

available for the General Category as before is incidental thereto. The failure to implement the incidental part of the Statute cannot be permitted to

override and defeat the object of the Statute. The object of the statute is not to increase the seats or to provide reservation for General

(Unreserved) category. The provisions of one section of a statute cannot be used to defeat those of another. The construction/interpretation which

reduces Section 3(iii) to a useless lumber or a dead letter, cannot be adopted. The Supreme Court (Pasayat J.) in Ashoka Kumar Thakur

(upholding the said Act) also reiterated that a construction which reduces the statute to a futility has to be avoided - a statute or any enacting

provision therein must be so construed as to make it effective and operative. The interpretation of statute by court should be to secure its objective

unless clear direction makes that end unattainable. This Court will have to reject the interpretation which will defeat the plain intention of the

legislature, even though there may be some inexactitude in the language used.

(e) To borrow from the speech made nearly 47 years ago, of Martin Luther King Jr., the cheque of reservation of 27% issued by the legislature to

the OBCs in accordance with the Constitution of the country cannot be made to bounce; when the architects of our Republic wrote the

magnificent words of the Constitution, they were signing a promissory note to which every Indian was to fall heir. This note was a promise for

advancement of socially and educationally backward classes of citizens. India cannot be made to default on this promissory note in so far as its

socially and educationally backward citizens are concerned. The sacred obligation of advancement of such classes cannot be allowed to be

dishonoured. The cheque of reservation given to these classes by enacting the CEI Act cannot be permitted to be called a bad cheque, a cheque

which has come back marked "insufficient funds" or "no increase in seats". The socially and educationally backward classes in need of

advancement who come to encash the cheque of reservation cannot be returned empty handed - they cannot be told that the great vaults of

opportunity of this nation are bankrupt - that the country's Educational Institutions to whom such reservation is confined are unable to enhance

their strength for infrastructure or financial reasons.

(vii) However that still leaves the question as to why the non-obstante clause was added to Section 5(1) if not to make it override Section 3(iii).

The answer is in, what number 27% is to represent - whether 27% of the increased seats or 27% of the permitted strength as on the date of

enforcement of the Act. The effect of the non-obstante clause is to first reserve 27% of existing permitted strength for OBCs and to then add to the

permitted strength, to make up for the seats reserved u/s 3(i) to (iii). The non-obstante clause refers only to Section 3(iii) and not to Section 3(i)

and (ii) because the reservation for SC/ST was in force since prior to coming into force of the Act.

17. Since the reason given for not increasing the seats as required u/s 5(1) was inability to increase the infrastructure, it was enquired whether

exemption/extension of time u/s 5(2) has been sought. The mechanism for exemption from increasing the seats u/s 5(1) is precise. The Institution

desirous of said exemption is required to make a representation to the Central Government and the Central Government if satisfied of the inability

of the Institution to immediately increase the number of seats is required to issue a notification in this regard permitting the Institution to effect the



increase in seats over a maximum period of three years. What is required to be done in a particular manner cannot be done in any other manner.

Thus any Institution which felt itself unable to immediately increase the seat was required to first satisfy the Central Government in this regard and

the Central Government on such satisfaction was required to issue a notification. On enquiry, it was informed that neither Maulana Azad Medical

College nor Lady Hardinge Medical College had made any representation nor any notification qua them has been issued. Thus, Section 5(2)

cannot be said to come into play and neither Maulana Azad Medical College nor Lady Hardinge Medical College can be said to have been

exempted from increasing the seats u/s 5(1).

18. It has come to my notice that the Cabinet has cleared the Bill to amend the CEI Act, inter alia to extend the time of maximum three years u/s

5(2) by another three years. However even if it were to become law, unless the procedure aforesaid is followed and the exemption granted, the

obligation to reserve 27% seats remains. The only way an Institution is permitted exemption from reservation u/s 3(iii) is by following the procedure

u/s 5(2) and not by merely contending that it could not increase the seats.

19. I am conscious that Section 5(1) was intended to strike a balance between the rights of OBCs and those in unreserved category. I am further

conscious that the view taken by me hereinabove will prejudice the students in the unreserved category in the event of Educational Institutions

continuing to flout the requirements of Sections 5 & 6 of the CEI Act. However I have rested my decision on the belief that there is a sense of

urgency today. If the choice has to be between an OBC and an Unreserved category student, now is the time to make real the promise of equality

which as it is, took over fifty years to take legal shape. Moreover, the Constitution Bench in Ashoka Kumar Thakur has given a window of five

years or may be ten for reservation for OBCs, before it is reviewed. Such time cannot be further shortened. To those in Unreserved category who

may be prejudiced, the only balm I can offer is ""Injustice is relatively easy to bear; what stings is justice"" to quote Henry Louis Mencken.

20. I however reiterate the direction already given by this Court in Tandan Kumar to both MAMC & LHMC to comply with the provisions of

Sections 5 & 6 of the CEI Act.

21. The next question however which arises is of the relief to be granted. It is informed that if 27% reservation for OBCs in Maulana Azad

Medical College were to be effected, 39 seats would become available and the petitioner would qualify for admission thereto. However, the fact

remains that none other except the petitioner has approached. The session has already begun. If at all in view of the interpretation followed above,

any OBC candidate is to be admitted even against the one seat ordered to be kept vacant under the interim order of this Court, the entitlement

thereto is of the OBC candidate next in queue and not of the petitioner. I, therefore, do not deem it appropriate to grant any relief to the petitioner.

However, with effect from the next academic year, Maulana Azad Medical College & Lady Hardinge Medical College are directed to carry out

the mandate of the Act by reserving 27% of the seats for OBC candidates, irrespective of whether they have complied with Section 5(1) or not.

22. The petition is disposed of. No order as to costs.