

(2003) 02 RAJ CK 0040

In the Rajasthan High Court

Case No : Civil Special Appeal (W) No. 503 of 2002 and 27 Ors.

Dr. Ajay Srivastava

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 05-02-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 15(4), 16(4)
Indian Medical Council Act, 1956 — Section 20, 33

Citation : AIR 2003 Raj 164 : (2003) 2 RLW 705

Hon'ble Judges : Y.R. Meena, J;M.R. Calla, J;Gyan Sudha Mishra, J

Bench : Full Bench

Advocate : Bajrang Lal Sharma and Raj Sharma, Paras Kuhad, Ajay Rastogi, R.C. Joshi, Lokesh Atrey and J.P. Gargey, for the Appellant; M. Rafiq, A.A.G. for Respondent No. 1, A.K. Sharma, for Respondent Nos. 2 and 3 and Bharat Vyas, for the Respondent

Final Decision : Allowed

Judgement

Calla, J.—These matters have come up before us on the basis of order dated 28.8.2002 passed by the Division Bench whereby the following questions law of considerable importance have been referred as also the appeals as a whole:-

1. Whether any reserved quota could not be separately specified for in-service candidates; merely because such in- service category is not mentioned in Article 15(4) and/or 16(4) of the Constitution of India?
2. Whether the prescribing of separate quota for in-service candidates stands, the test of reasonable classification under Article 14 of the Constitution of India?
3. Whether in view of the observations made by the Supreme court in para 10 in the case of State of Punjab v. Dayanand Medical College and Hospital and Ors. (supra), can it be said that once the Medical Council of India has prescribed 50% qualifying marks through regulation 9, there is no question of making any in-service candidate to be qualified for admission to post- graduate course at any

level of marks below 50%?

2. Learned Single Judge by his common judgment and order dated 11.6.2002 had decided 44 writ petitions. 28 appeals at hand arise out of the aforesaid order dated 11.6.2002. Briefly stated, these cases involve dispute between doctors and doctors. On one side, there are inservice doctors who are fresh medical graduates but both the categories of doctors are desirous of prosecuting the post graduate courses i.e. M.D./M.S. and Postgraduate Diplomas in various specialities. For the purpose of admission to these PG courses, 25% of the total seats are to be filled in as per the allocation made by the Director General of Health Services, Government of India; 50% of the remaining 75% seats are exclusively reserved for inservice candidates (Doctors) of Rajasthan State Medical Service in the various specialities as may be determined and fixed from time to time by the State Government, out of which 8% seats are to be reserved for in-service natural born scheduled caste candidates and 6% seats are to be reserved for in-service natural born scheduled tribe candidates as per the roster system to be notified by the State of Rajasthan has to communicate such number of seats in the respective specialities to the Principals of the respective Medical Colleges and the Convener, Central P.G. Admission Board, which takes up the exercise for admission on the basis of result of the Pre-P.G. Test. The remaining 50% out of the 75% seats are called general seats, 8% of which are reserved for natural born SC candidates and 6% of which are reserved for natural born ST candidates to be filled by roster system notified by the State Government. It has also been provided that all inservice doctors (Senior Demonstrators) selected by the R.P.S.C. are to be allowed automatic registration for post graduate seats in the same subjects in which they are selected.

3. While the requirements i.e. eligibility for appearing in the Pre-P.G. Medical Examination for simple medical graduates i.e. who have passed final MBBS examination is that they must be registered with the Rajasthan Medical Council, the same in respect of inservice candidates are as under:

For in-service candidates, the candidate should be duly selected medical officer by RPSC for the post of Civil Assistant Surgeon under the Rajasthan Medical & Health Services Rules, 1963,

should be below the age of 45 years and should have completed at least 3 years of service in Rural areas of the State of Rajasthan or two years of continuous service of Rural areas of Desert, Hilly or Tribal parts of the State

the Rural area is defined as a rural area where Rural allowance is admissible to the doctors who should have actually served in the rural areas

Application forms for such in-service doctors for Pre-P.G. Medical Examination have to be made only through the Director of Medical and Health Services with the certificate of rural experience,

any application received without the certificate of rural experience and/or without

the signatures of the Director of Medical and Health Services is not to be entertained.

and no application of in-service candidates shall be entertained by the University for such examination, if sent directly.

4. Post-graduate Medical Education Regulations, 2000 framed by the Medical Council of India in Regulation 9, provides for the selection of post graduate students as under:

"9. SELECTION OF POST-GRADUATE STUDENTS

(1) Students for Post-graduate medical courses shall be selected strictly on the basis of their academic merit.

(2) For determining the academic merit, the university/institution may adopt any one of the following procedures both for degree and diploma courses:-

(i) On the basis of merit as determined by a competitive test conducted by the State Government or by the competent authority appointed by the State Government or by the university/group of universities in the same state; or

(ii) On the basis of merit as determined by a centralised competitive test held at the national level; or

(in) On the basis of the individual cumulative performance at the first, second and third MBBS examinations, if such examinations have been passed from the same university; or

(iv) Combination of (i) and (iii);

Provided that wherever entrance test for Post-graduate admission is held by a State Government or a university or any other authorised examining body, the minimum percentage of marks for eligibility for admission to eligibility for admission to post-graduate medical courses shall be fifty per cent for all the candidates;

Provided further that in non-Governmental institutions fifty percent of the total seats shall be filled by the competent authority and the remaining fifty per cent by the management of the institution on the basis of merit."

5. Thus, selection is to be made on the basis of the academic merit and the University may adopt any of the following procedures:

(i) merit as determined by the competitive test;

(ii) merit as determined by the centralised competitive test held at national level;

(iii) on the basis of the individual cumulative performance at the first, second and third MBBS examination if such examinations have been passed from the same University; and

(iv) Combination of the merit determined by competitive test and merit as determined by the centralised competitive test.

6. In the Scheme of Regulation 9 of the Regulations wherever entrance test for post graduate admissions is held by the State Government or the University or any other authorised examining body, the minimum percentage of marks for eligibility for admission to the post graduate medical courses shall be 50% for all the candidates with the further proviso that in non-governmental institutions, 50% of the total seats shall be filled in by the competent authority and the remaining 50% by the management of the institution on the basis of merit.

7. The inservice doctors filed petitions with the case that a separate quota for inservice doctors had been fixed on the basis of a conscious policy decision taken by the State Government for upgrading the professional skill and knowledge of those doctors who are in the employment of the State Government and who have rendered services in the rural areas, have gained valuable experience and would thus be providing better medical services to the needy people of the State. The State Government also followed the policy of prescribing lower minimum qualifying marks as compared to the minimum marks prescribed at the Pre-P.G. Entrance Examination for simple medical graduates i.e. non service candidates. On behalf of the petitioners, it had been averred in the writ petitions that placing reliance upon this policy decision of the Government, they having been duly selected medical officers by the RPSC, had served in rural areas because of the incentive that as inservice doctors they will get preference and liberalised conditions for the purpose of admission to the postgraduate courses. According to the petitioners, they form a separate source so as to fill up the specified percentage of seats in the postgraduate courses. It has also been stated that vide communication dated 18.6.98, the State Government had conveyed its policy decision to the University of Rajasthan for increasing the quota of inservice candidates from 25% to 50% of the total seats available and to reduce the minimum eligibility marks at the Pre- P.G. Entrance Test from 50% to 33%. This policy decision of the State Government was assailed in the case of Dr. Vineet Singh and Ors. v. State of Rajasthan in Writ Petition No. 4546/98 but the same was upheld, even by the Apex Court. The State Government has justified its action of prescribing lower percentage of minimum qualifying marks for inservice candidates because of their inherent dis-similar situation because at the level of 50% of the qualifying examination marks in the entrance examination, a large number of seats reserved for inservice candidates would have remained unfilled and the very object and purpose of providing a separate quota for inservice candidates was being defeated. Likewise, when Pre-P.G. examination was held in the year 2001, 50% marks were prescribed for general medical graduates whereas it was 33% for the inservice candidates. This time again, the challenge to the selections was made by the non service doctors by way of filing Writ Petition No. 2375/2001 i.e. Dr. Ramji Sharma and Ors. v. State of Rajasthan and Ors. and other connected writ petitions and all these petitions were also dismissed on 3.10.2001. On 12.9.2001, the Government of India had issued a

general circular to the Vice Chancellors of the Universities and other concerned authorities laying down guidelines for admission in under graduate and post graduate medical courses providing therein that with a view to ensure that adequate number of candidates are available for full utilisation of the reserve quota of seats, all concerned authorities should take requisite action to dispense with the system of negative marking being followed by some of the examining bodies in the admission tests for Professor course which is working against the interest of reserved category candidates.

8. On 20.9.2001, the Medical Council of India, in the purported exercise of its powers u/s 33 read with Section 20 of the Indian Medical Council Act, 1956 has framed Postgraduate Medical Education (Amendment) Regulations, 2001 wherein the existing first proviso to Regulation 9 of the Regulations has been substituted by the following proviso:

Provided that wherever entrance test for Postgraduate admissions is held by a State Government or a University or any other authorised examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical courses shall be 50 per cent for general category candidates and 40 per cent for the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes."

9. It is this amendment made by the Medical Council of India on 20.9.2001, in the Regulation that the controversy which stood settled upto the Supreme Court, arose again when the Pre-P.G. Medical Examination for the year 2002 was held by the University of Rajasthan on 21.4.2002 and the University issued instructions for Pre-P.G. Medical Examination, 2002. For the purpose of selections, as aforesaid, in the year 2002, counselling was scheduled to be held on 26.4.2002 for inservice candidates, on 27.4.2002 for physically handicapped inservice candidates and on 28.4.2002 and 29.4.2002 for non service candidates. Total 330 seats were notified for different PG courses, out of which quota of 155 seats was reserved for inservice doctors, and out of quota of 155 seats in general category, 8 percent seats were reserved for SC candidates and 6 per cent were reserved for ST candidates. Similarly, 8 per cent seats were reserved for SC candidates and 6 percent seats were reserved for ST candidates in the category of inservice doctors also and 5 seats were each were further reserved for physically handicapped persons in general category as well as in the category of inservice doctors. The case of the inservice doctors is that because of the high percentage of qualifying marks at the level of 50%, against 155 seats meant for inservice doctors, only 20 inservice candidates could be selected in OBC category and nine inservice doctors under other categories, and against the 10 seats means for physically handicapped doctors, only 3 could qualify, as against 12 seats reserved for scheduled caste inservice doctors only one candidate could qualify and no candidate from scheduled tribe could be selected out of inservice doctors although nine seats were reserved for candidates belonging to Scheduled Tribes. The say of the inservice doctors is that high percentage of qualifying

marks at the level of 50% has created a highly anomalous and absurd situation defeating the very purpose of setting apart certain number of seats for this category of candidates and it goes without saying that the inservice doctors form a separate class by themselves as compared to the fresh medical graduates. It is also the case of the inservice doctors that Regulation 9 framed by the Medical Council of India is not at all meant for the inservice doctors and in case the Government wants its inservice doctors to acquire post graduate qualification for better patient care and for that purpose, if separate standards are laid down for the category of inservice doctors, no exception could be taken thereto. While fresh medical graduates are holders of simple degree of M.B.B.S. the inservice doctors have faced open selection before the R.P.S.C. for appointment as Civil Assistant Surgeon/Medical Officer; have worked for a longer duration in the rural areas and they could appear in the Pre-PG Entrance Test only in case their applications are forwarded by the Director of Medical & Health Services. They are much more rich in experience as compared to the simple medical graduates and therefore, if the Government wants more experienced hands i.e. inservice doctors, to acquire post graduate qualification and for that purpose, if the provisions are made, which are liberal as compared to the requirements for freshers, it appears to be rational and justified.

10. The questions have been hotly contested before us on behalf of both the sides. On the questions and issues involved in these matters, reliance placed on the same set of Supreme Court decisions by both the sides has certainly made out task interesting but more tough.

11. In the case of Dr. Ramji Sharma and Ors. v. State of Rajasthan, wherein the petitioners, were non service doctors, the Court clearly observed in Para 17 that they did not fall into the category of inservice candidates for whom a separate source was there, to fill up the seats in post graduate courses so as to upgrade the level of professional skill and knowledge of doctors who had been recruited in the State Medical Services. The court observed as under :

"They have rendered services in rural areas, secured valuable experience and after successful completion of PG courses would be providing better medical services to the people of Rajasthan. It is because of the policy decision of the State Government that they took Government employment and spent valuable period of their lives serving in rural areas. In my considered view the inservice doctors would constitute a distinct class by themselves. Having closely scanned "2000 Regulations" I find that they do not at all deal with the issue of setting apart seats in post graduate studies for the benefit of inservice doctors.

12. After quoting Regulation 9, the Court has further observed as under ;

"A close look at Regulation 9 demonstrates that it is silent in regard to a serving officer of the State Government entitled to be selected against the quota of seats allocated to in service doctors, Regulation 9 applies only to the students in general category and in my opinion it cannot be made applicable to inservice

medical officers of the State Government. "Students in general category" and "inservice medical officers of the State Government" are two distinct classes and two "unequals" cannot be made as "equals" by misinterpreting Regulation 9. The competence of the State Government to prescribe 33% marks as the minimum eligibility criteria for admission to P.G. Courses has already been upheld by their Lordships of the Supreme Court in *Pre P.G. Medical Sangharsh Committee v. Dr. Bajrang Soni* (supra) as already noticed in the foregoing paras of this judgment. In *Dr. Preeti Srivastava* (supra) the issue of "inservice doctors" was not the one posed before the Constitution Bench of the Hon"ble Supreme Court. In my considered view the ratio indicated in *Pre PG Medical Sangharsh Committee v. Dr. Bajrang Soni* is squarely applicable in the instant cases."

13. Thus, in this case, the court has categorically held that the inservice doctors form a distinct class and Regulation 9 is silent in regard to the serving doctors entitled to be selected against the seats allocated for inservice doctors and further that Regulation 9 applies only to the students in the general category and it could not be made applicable to inservice medical officers.

14. The decision of this Court in *Dr. Ramji Sharma's* case (supra) was taken to the Supreme Court and it was given out that SLP is pending but stay has been declined by the Supreme Court.

15. In the case of *Dr. Bajrang Soni and Anr. v. State of Rajasthan and Ors.*, in which increased seats from 25% to 50% for inservice candidates was under challenge, a division bench of this Court held that the increase of reservation of seats for inservice candidates from 25% to 50% did not warrant any interference and that this policy decision of the Government was based on reasons having nexus with the object sought to be achieved. It was felt by the Government that after acquiring qualification of MBBS, the doctors had been serving in rural areas; various posts of Junior Specialists were lying vacant in rural areas and persons with PG degrees were not available. When more PG doctors are available in the government service, they will be available for rural areas as well and for like reasons, it was held that the policy decision of the Government to increase the seats of inservice candidates from 25% to 50% was not arbitrary and there was rational basis and accordingly, the increase in seats from 25% to 50% for inservice doctors was upheld.

16. In the case of *Dr. Bajrang Soni* also, the matter was taken to the Supreme Court and in *Pre-PG Medical Sangharsh Committee & Anr. v. State of Rajasthan & Ors*, while affirming the decision rendered in the case of *Dr. Bajrang Soni v. State of Rajasthan* (supra), it was held by the Supreme Court that it was permissible for the Government to fix such source or classification of candidates from which selections for admission to postgraduate colleges in the State had to be made for yet another genuine, relevant and reasonable cause and purpose which has, sufficient nexus with the larger goal of equalisation of educational opportunities and to sufficiently prefer the doctors serving in the various hospitals run and maintained from out of public funds by the Government or Government

departments, in the absence of which there would be serious dearth of qualified post graduate doctors and experts to meet the requirements of such hospitals run by the State and State departments, the only avenue open for treatment of the large body of the ordinary common man, all over the State. This larger interest unlike reservation envisaged for SC/ST with different and laudable purpose to assist educationally backward class, is a distinct and vitally important public purpose in itself absolutely necessitated in the best of public interest."

17. While Dr. Bajrang Soni's case (supra) was affirmed, with regard to admission of inservice candidates to the post graduate course, reduction of minimum cut off marks from 50% to 33% by the State Government was upheld. In para 8 of the judgment, the Supreme Court made weighty observations in favour of inservice candidates as under:

"That apart, as rightly pointed out in one of the judgments of this Court noticed above, mere theoretical excellence or merit alone is no sufficient indicia of the qualitative merits of the candidates in the field of actual practice and application. The doctors, who are inservice candidates in various medical institutions run and maintained by the Government or government departments, have wide area and horizon of exposure on the practical side and they may not have the required extra time to keep themselves afresh on the theoretical side like an open candidate who may have sufficient time at his disposal to plod through books. The inservice candidates in contrast to the fresh or open candidates have to spend much of their time on attending and treating the patients in the hospitals they service gaining excellence on the practical side and, in our view, they would constitute a distinct class by themselves to be given a special treatment and no grievance can be made out on the ground that the minimum eligibility marks for their selection in respect of seats earmarked for them should also be the same as that of the fresh or open candidates. We could see no discrimination or arbitrariness involved in the special provision made to meet a just and appropriate need in public interest."

18. In the case of Dr. Vineet Singh and Ors. v. State of Rajasthan and Ors., prescribing of qualifying marks at 33% from 50% in Pre-P.G. Entrance Test was under challenge and the court held that prescribing of qualifying marks for inservice doctors is the prerogative of the State and it was function of the State Government to determine and prescribe the qualifying marks in the circumstances as may be applicable in the particular State. In the State of Rajasthan, there was no qualifying marks for any category and the admissions were being held simply in accordance with the merit list. Later on, the qualifying marks were fixed at 50%; in 1997, thereafter, the Government in its own wisdom had taken a decision to reduce the qualifying marks from 50% to 33%.

19. In the case of Dr. Sadhna Devi v. State of UP, the medical graduates desirous of admission to P.G. Courses challenged the notification providing for reservation for SC/ST/OBC candidates in Post Graduate speciality and super speciality courses such as MD/MS.

20. In *AIIMS Students' Union v. AIIMS and Ors.*, a three Judges Bench of the Supreme Court, while considering the question with regard to institutional reservation based on rationale of continuity, admissions to post graduate courses in medical colleges and the question of reservation in the context of Article 15(4), Article 16(4) and Article 14, while holding that institutional reservation is not supported by the Constitution or constitutional principles, certain degree of preference for students of the same institution intending to prescribe further studies therein is permissible on the ground of convenience, suitability, familiarity with educational environment; such preference has to be reasonable and not excessive; the preference has to be prescribed without making excessive or substantial departure from the rule of merit and equality but has to be kept within limits; minimum standards cannot be so diluted as to become practically non-existent; such marginal institutional preference is tolerable at post graduate level but is rendered intolerable at still higher levels such as that of super speciality.

21. In para 31 of this judgment the Supreme Court also considered as to whether it was case of reservation or only a source of entry and considering the contention based on the case of *J. Duraisamy v. State of T.N.*, as to whether the reservation of 33% post graduate seats in favour of students of AIIMS was not a reservation and use of the expression "reservation" in this context was misplaced. In this context, in para 31, the Supreme Court further noted that in fact there are two sources of entry to PG courses of study in AIIMS which are (i) inhouse candidates of AIIMS and (ii) open category candidates i.e. students other than from AIIMS. Ratio of entry between the two sources was 33:67. Supreme Court further observed in this very para 31 that *K. Duraisamy v. State of T.N.* was one where limited seats available for post graduation were equally divided between inservice candidates i.e. doctors already in employment (of government or semi government bodies) and open category candidates which included, all candidates other than those falling within definition of inservice candidates. The Supreme Court further held that the State Government had undoubtedly power, as a matter of policy in so far as admissions to super speciality and PG Diploma/degree/MD/MS courses are concerned, to devise scheme for pattern of two sources of entry based upon a broad classification into two categories i.e. inservice candidates and non service or private candidates with each one of them allocated exclusively for their own category of candidates 50% of the seats; the ultimate selection for admission depending upon the inter se merit performance amongst their own category of candidates. A candidate belonging to one category could not move across to the other category and seek entry therefrom. Such scheme envisaged no reservation but classification of the sources from which admissions had to be accorded. It was also opined by the Supreme Court that the meaning contained purport of the expression "reservation" will necessarily depend upon the purpose and object with which it is used and it is to be noted that in the case of *K. Duraisamy v. State of T.N.* (supra) the inservice candidates did not belong to any weaker section of the

society nor were those who deserved or needed to be protected. The candidates in both the categories were medical graduates. Some of them had gone graduation sometime in the past and were either picked up in the government service or had sought for joining government service; because, may be, they could not get a seat in postgraduation and thereby continue their studies because of shortage of seats in higher level of course. On account of their having remained occupied with their service obligations, they became detached or distant from theoretical studies and therefore, could not have done so well as to effectively compete with fresh medical graduates at the P.O. Entrance Examination. Permitting inservice candidates to do post graduation by opening a separate channel of admittance, would enable their continuance in government service after postgraduation which would enrich health services of the nation. Candidates in open category having qualified in post graduation may not necessarily feel attracted to public service. Providing two sources of entry at the postgraduate level in certain proportion between the inservice candidates and otherwise candidates thus achieves the laudable object of making available better doctors both in public sector and as private practitioners. The object sought to be achieved is to benefit two segments of the same society by enriching both at the end and not so much as to provide protection and encouragement to one at the entry level.

22. The weighty observations as aforesaid made by the Supreme Court, in our opinion, furnish complete answer to the questions No. 1 and 2, as have been referred by the Division Bench and we are of the considered opinion that certain number of percentage of seats for the purpose of admissions to the post graduate courses in medical studies could certainly be set apart or specified for inservice doctors as a separate and distinct source for admission to the said course and the same does withstand itself on reasonable classification under Article 14 of the Constitution of India and notwithstanding the fact that such inservice category is not mentioned in Article 15(4) and/or Article 16(4) of the Constitution of India, the inservice candidates not forming a weaker section of the Society, could still be treated as a separate source for admission as a class different and distinct from the non service doctors in public interest and setting apart certain number of percentage of seals for inservice candidates does not offend any constitutional provision.

23. Questions No. 1 and 2 stand answered accordingly.

24. The third question is as to whether any marks at any level below 50% could be prescribed for inservice candidates for the purpose of admission to the postgraduate medical studies, in face of Regulation 9 as framed by the Medical Council of India in its education regulations on 20.9.2001, in view of the observations made by the Supreme Court in para 10 in the case of *State of Punjab v. Dayanand Medical College and Hospital and Ors.* (supra).

25. Before we proceed to consider the case of *State of Punjab v. Dayanand Medical College and Hospital and Ors.* (supra), we may first advert to the case of

Dr. Preeti Srivastava and Anr. v. State of MP. In this case, the question which arose for consideration before the Constitutional Bench of five Judges of the Supreme Court was as under :-

"The question is whether apart from providing reservation for admission to the postgraduate courses in Engineering and Medicine for special category candidates, it is open to the State to prescribe different admission criteria, in the sense of prescribing different minimum qualifying marks, for special category candidates seeking admission under the reserved category."

26. It may be pointed out at the very outset that in Dr. Preeti Srivastava's case (supra), directly there was no question as to whether any preference could be shown to the inservice doctors or not for the admission to post graduate courses. The court considered the question as to whether it is open for the State Government to prescribe different admission criteria in the sense of prescribing different minimum qualifying marks for special category candidates seeking admission under the reserved category. In this context, in para 29 while rejecting the submissions of the State that there need not be any qualifying marks prescribed for the common entrance examination, the Supreme Court considered as to whether different qualifying marks could be prescribed for the open category of candidates and the reserved category of candidates. In para 29 it is also noticed that at the stage of admission to the MBBS course i.e. initial course, the Medical Council of India has permitted the reserved category candidates to be admitted if they have obtained qualifying marks of 35% as against the qualifying marks of 40% of the general category candidates. The Supreme Court has observed as under:-

"It is, therefore, basically for an expert body like the Medical Council of India to determine whether in the common entrance examination viz. PGMEET, lower qualifying marks can be prescribed for the reserved category of candidates as against the general category of candidates; and if so, how much lower. There cannot, however, be a big disparity in the qualifying marks for the reserved category of candidates and the general category of candidates at the post graduate level. This level is only one step below the apex level of medical training and education where no reservations are permissible and selections are entirely on merit. At only one step below this level the disparity in qualifying marks, if the expert body permits it, must be minimal. It must be kept at a level where it is possible for the reserved category candidates to come up to a certain level of excellence when they qualify in the speciality of their choice. It is in the public interest that they have this level of excellence."

27. In the end of this judgment in para 116, the conclusions recorded by the Supreme Court at No. 3 and 5 are relevant for the purpose at hand and the same are reproduced as under :

"(3) The regulations and guidelines given by the Medical Council of India in this connection, though persuasive and not having any binding force, cannot be

totally ignored by the State authorities but must be broadly kept in view while undertaking the exercise of shortlisting of eligible candidates for being admitted to postgraduate medical courses.

(5) It is equally permissible for the State authorities while undertaking the aforesaid exercise of shortlisting to fix 50% minimum qualifying marks at the entrance test for the general category of candidates and to dilute and prescribe lesser percentage of passing marks for the reserved category of candidates as the exigencies of situation may require in a given year but in no case the minimum qualifying marks as reduced for the reserved category of candidates can go below 25% of passing marks for such reserved category of candidates. In other words, a play is available to the State authorities to prescribe different minimum passing marks for SC/ST and OBC eligible candidates between 50% and 25% as the prevailing situation at a given point of time may require. In such categories for SC, ST and OBC candidates different diluted passing marks can be prescribed, but this exercise has to be within the permissible limits of less than 50% and upto to minimum 25% passing marks for each of such reserved categories. No eligible candidate belonging to the reserved category who does not obtain minimum percent of passing marks as diluted for such category of candidates by the State authorities can be considered to be eligible for undertaking postgraduate medical courses in a given year for which he has offered his candidature and if any seat reserved for such categories of candidates remain unfilled due to non availability of such eligible reserved category candidates to fill up such seat, then the said seat would go to general category candidates and will be available in the order of merit in the light of marks obtained by such wait listed general category candidates having obtained the requisite passing marks who otherwise could not get admitted due to non availability of general category seats earlier. The ratio of various decisions of this Court considered hereinabove will have to be implemented in the light of the aforesaid conclusions to which I have reached. The aforesaid practice has to be followed and should hold that field from year to year so long as Parliament does not pass any legislation for regulating admission to postgraduate medical courses either by separate legislation or by appropriately amending the Indian Medical Council Act by empowering the Medical Council of India to prescribe such regulations."

28. The constitution bench of the Supreme Court has thus categorically concluded that the Regulations and guidelines given by the Medical Council of India are certainly persuasive but do not have a binding force. At the same time, they cannot be totally ignored by the State authorities. They have to be broadly kept in view while giving admissions to post graduate medical courses and it has also been held to be equally permissible for the State authorities to dilute and prescribe lesser percentage of passing marks for the reserved category of candidates as the exigencies of situation may require in a given year but in no case the minimum qualifying marks as reduced for the reserved category of candidates can go below 25% of passing marks for such reserved category of

candidates. A play is therefore, permissible to the State authorities to prescribe minimum passing marks between 50% to 25% for the reserved category candidates and this practice has to be followed so long as the Parliament does not pass any legislation for regulating admission to postgraduate medical courses either by separate legislation or by appropriately amending the Indian Medical Council Act by empowering the Medical Council of India to prescribe such regulations.

29. If we make an analytical study of the law as has been laid down by the constitutional bench of the Supreme Court in the aforesaid decision (Dr. Preeti Srivastava), the principle is clearly deducible that it is open for the State Government to lay down standards different than what are there in the regulations of the Medical Council of India and that the Regulations of the Medical Council of India has persuasive force but are not at all binding. In this context, once it is established that the inservice doctors could be treated as a separate and distinct class, and once it is held that the minimum qualifying marks could be lower for the reserved category candidates, subject to the condition that there cannot be wide disparity between the minimum qualifying marks for the reserved category candidates and the minimum qualifying marks for general category candidates at the level of post graduate medical education, and this principle which was laid down by the constitution bench in the case of Dr. Preeti Srivastava (supra), has been reiterated in para 10 of the judgment in the case of State of Punjab v. Dayanand Medical College (supra), we have no hesitation in holding that the State Government could certainly prescribe a lower percentage of marks for inservice doctors according to its policy and requirement and the prescription of minimum 50% marks for general category candidates by the Medical Council of India, is no legal impediment or an absolute bar against the State's power to fix a lesser percentage of qualifying marks for inservice doctors which has been considered as a separate and distinct class and separate source for the purpose of admission to the post graduate courses not at all comparable with simple and fresh medical graduates. Inservice doctors are those who after passing MBBS have faced the selections before the RPSC and have rendered rural service in the legitimate expectation that they will get some preference at the time when they seek to prosecute post graduate studies after completing the requisite rural service. The inservice doctors therefore, certainly form a special category, may not be reserved category like SC, ST or OBC and the constitutional bench of the Supreme Court has also used the term "special category candidates" which has been applied in the case of State of Punjab v. Dayanand Medical College (supra) and in other cases. On the basis of case of Dr. Ramji Sharma (supra) so far as this Court is concerned, it has to be taken that Regulation 9 does not apply and cannot be made applicable to the inservice medical officers of the State. So far as the prescribing of 50% seats for inservice doctors is concerned, it was upheld by the Division Bench of this Court in Dr. Bajrang Soni's case (supra) and the other part i.e. percentage of marks lower than 50% for them is concerned, the minimum cut off marks at 33% fixed by the

State Government was held to be valid by the Supreme Court in the case of Pre-PG Medical Sangharsh Committee (supra) while affirming the decision of the division bench of this Court in the case of Dr. Bajrang Soni v. State of Rajasthan.

30. Even on facts, the vacancy position for the year 2002 in respect of the seats for inservice doctors, as was disclosed before us, was that as against 10 seats of SC only one could be allotted and nine seats remained vacant; as against 7 seats for ST not even one could be allotted and all the seven were lying vacant and as against the general category candidates, against 111 seats, only 36 could be allotted and 75 seats meant for inservice doctors in general category were lying vacant. Similarly, for diploma course, not a single seat could be allotted either to SC/ST or general category candidates and 2, 1 and 24 respectively for SC/ST/general category candidates i.e. in all the 27 seats are lying vacant and thus, a total of 118 seats for inservice doctors are lying vacant. If such is the reality, the standards have to be varied and altered so that good and sizeable number of inservice doctors are also able to prosecute post graduate studies and their services are available for the patient care in the larger public interest and the medical services rendered by the State may also run efficiently and do not suffer the dearth of specialised doctors at the altar of standards which are away from reality.

31. Mr. Bharat Vyas, Advocate placed for our perusal an order of the Supreme Court, dated 4.9.2002 wherein the Supreme Court has held that there can be no doubt that these Regulations which have been named as Post Graduate Medical Education Regulations, 2002", are binding on the respondent University in view of the Supreme Court decision in the case of Preeti Srivastava and Anr. v. State of MP and Ors. (supra) and Medical Council of India v. State of Karnataka, We may straightaway observe that even if such Regulations are held to be binding on the University, there is no question of the same being binding in the same manner upon the State Government for the requirements of inservice doctors in terms of the decision of the Constitutional Bench in the case of Preeti Srivastava (supra) in view of Conclusion No.3 in this case as has been quoted in the earlier part of this judgment.

32. In yet another case of Ombir Singh and Ors. etc. etc. v. State of UP and Anr. etc. etc., cited by Shri Bharat Vyas, learned counsel appearing on behalf of the Medical Council of India, the Supreme Court has held that it is for the State Government to amend the criteria for admission and not for the Court to issue mandamus or directions in this regard as no legal or fundamental rights of the petitioner are infringed. In the present case, we are only considering as to whether the State Government could amend the criteria for admission at a level lesser than that prescribed by the Medical Council of India for inservice doctors or not.

33. It was also argued that the percentage of qualifying marks fixed for inservice doctors cannot be lower than what has been prescribed for the candidates belonging to reserved category i.e. SC, ST and OBC, and it was argued that for

candidates of reserved category i.e. SC/ST the minimum qualifying marks are 40% whereas in case of inservice doctors it was made to be 33%. We do not have to say as to what should be the percentage. It is for the State Government to consider as to what percentage of marks they fix for inservice doctors, while it may be lower than the minimum qualifying marks of 50% fixed for medical graduates of general category by the Medical Council of India, it has to be kept in view that as laid down by the Supreme Court there cannot be a wide disparity. On this principle, if 40% minimum qualifying marks have been fixed for reserved category the government may consider that what should be the level of the qualifying marks for inservice doctors and will it be reasonable to keep it lower than even that level which is prescribed for the reserved category candidates i.e. SC/ST/OBC?

34. Before parting with the case, we may also observe that after the order was passed by the learned Single Judge, the Government had approached the Medical Council of India and we are told that the Medical Council of India vide its letter dated 10.7.2002 has declined to consider the inservice doctors at a level lower than 50% of marks at the entrance test. The letter as has been sent by the Medical Council of India does not show that the question was considered by the Medical Council of India as a body and the contents and tenor of this letter shows that it is only the opinion of the author of this letter i.e. the Secretary of the Council which cannot be equated and treated at par with the opinion of the Medical Council of India as such as a body functioning under law. Therefore, this letter is of no consequence for this purpose. Besides this, as per the law laid down by the Supreme Court, it is always open for the Government to fix any percentage of qualifying marks lower than 50% for inservice doctors having regard to the fact that there is no wide disparity between the standards fixed by the Medical Council of India and the standards to be fixed by the Government. The third question as referred to us is answered accordingly.

35. The argument of estoppel, as has been raised against the original petitioners i.e. the appellants herein, is not at all tenable in view of the settled position of law that there cannot be any estoppel on a pure question of law. In the case of Government of A.P. v. M.A. Karim, it was held that the petitioners gave in undertaking that they would be bound by the judgment relating to seniority in a pending case and the judgment turned out adverse to them and therefore, a new writ petition was filed urging new grounds. It was held that the petitioners were not estopped from making challenge on the new grounds. In the instant case, it is a pure question of law which has been raised by the petitioners, as to whether the Government was estopped from fixing the percentage of qualifying marks at a level less than 55% and this question has to be decided on the basis of the constitutional provisions and we therefore, did not find that to be a fit case to throw the petitions on this ground.

36. Having answered the questions referred by the Division Bench before us, in the light of the conclusion arrived at by us, we allow all these appeals, set aside

the judgment and order dated 11.6.2002 passed as a common order and judgment by the learned Single Judge deciding the whole group of petitions and we make it clear that it will be open for the State Govt. to go ahead with the admissions of inservice doctors to the postgraduate courses on the basis of such percentage of qualifying marks which may be lower than 50 per cent and the fixation of the limit of 50% by the Medical Council of India in Regulation 9 is no legal impediment against the State Government; and while keeping the observations made hereinabove and in the light of this judgment, the State Government may proceed to fill up the seats which are lying vacant which were meant for inservice doctors at any percentage of marks lower than 50 but not having a wide disparity as laid by the Supreme Court and also by keeping in view the fact that the percentage of marks fixed for the reserved category candidates of SC/ST/OBC is 40% and it may be considered that the disparity does not go below 40%.