
(1998) 12 RAJ CK 0025

In the Rajasthan High Court

Case No : Civil Writ Petition No"s. 4546 and 5224 of 1998

Dr. Vineet Singh and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 22-12-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 226

Citation : AIR 1999 Raj 187 : (1999) 1 WLC 667

Hon'ble Judges : J.C. Verma, J

Bench : Single Bench

Advocate : A.K. Sharma, P.S. Asopa, B.L. Sharma, R.K. Mathur, A.K. Bhandari, Prahlad Singh and Kamala Jain, Paras Kuhad and Vijay Singh, for the Appellant; Ashok Gaur, for the Respondent

Final Decision : Partly Allowed

Judgement

J.C. Verma, J.—The petitioners having passed their M.B.B.S. examination and after completing the requisite internship are eligible for admission to various Post-Graduate Courses being conducted in different disciplines of Medical Science for the Medical Colleges in the State of Rajasthan. The Pre-P.G. Entrance Examination is held for admission to such courses by the University of Rajasthan. The petitioners are aggrieved in regard to increase of reservations of in-service candidates from 25% to 50% and also of decreasing the qualifying marks for being selected in P.G. Course from 50% to 33% in the Pre-P.G. Entrance Examination in the year 1998 for admission to M.D./M.S./Diploma Course.

2. The University of Rajasthan had laid down the eligibility conditions for the said entrance test as mentioned in Ordinance 278-E to 278-G framed by the University. Certain reservations were mentioned therein i.e. (i) 25% of the total seats (irrespective of other reservations made thereunder) were to be filled up as per the allocations made by the Director General of Health Services, Government of India, (ii) 50% of the seats after excluding the seats to be filled in as per allocation by the Director General of Health Services, Government of India were

reserved for in-service candidates of the Rajasthan State Medical Services in various specialities out of which 8% seats were reserved for in-service natural born SC candidates and 6% seats were reserved for natural born ST candidates as per roster system to be notified by the State Government from time to time and the remaining seats were to be called the general seats and again 8% and 6% seats were to be reserved for the natural born SCs and STs and unfilled seats from those reserved categories as mentioned above, were to be filled up from the general category. The examinations were to be held on 6-9-1998. Minimum pass marks for qualifying the Pre-P.G. test was mentioned as 33% as per Syndicate's resolution.

3. The petitioner is aggrieved with the impugned communications dated 18-6-1998 and 10-7-1998 issued by the State Government and consequential resolutions passed by the Syndicate in the meeting held on 11-7-1998 in so far as they bring about a reduction in the minimum merit qualifying marks from 50% to 33% for admission to post-graduate courses in the Medical Science Colleges for Rajasthan and also so far as they prescribed a reservation quota in favour of in-service candidates and also increase it from existing 25% to 50% seats in P.O. Courses and all other orders passed and actions taken in this respect and prays them to be declared ultra vires, with a further prayer not to admit any candidate who has secured less than 50% marks.

4. It is the contention of the petitioner that the Principal and Controller of the S.M.S. Medical College vide its letter Annexure-1 dated 1-4-1997 had informed the Vice-Chancellor that as per the judgment of the Hon'ble Supreme Court for preparation of the merit list for such entrance test it was desired that the candidates securing less than 50% marks in the competitive examination be not included in the merit list. The basis for such direction is said to have been based on a judgment of the Hon'ble Supreme Court in Dr. Sadhna Devi and others Vs. State of U.P. and others, . The Principal and Controller of SMS Medical College had recommended the University of Rajasthan to follow the guidelines as given in the case of Dr. Sadhna Devi. The petitioner further submits that the University of Rajasthan vide the minutes of the meeting of the Academic Council held on 2-6-1998 (Annexure-3) had recommended that the minimum pass marks to qualify the Pre-P.G. Examination to admission to such course for fresh and in-service general candidates should be 50% and that of SCs/STs 40%, but still the University vide Annexure-5, impugned resolution dated 11-7-1998 in regard to admission had not accepted the resolution of the academic council and had resolved the qualifying marks to be 33% as suggested by the State Government. The University in resolution Annexure-5 had passed a resolution by observing as under :

"The Syndicate considered the recommendations of the Academic Council made at its meeting held on 22nd, 23rd and 24th June, 1998.

Resolved that the aforesaid recommendations of the Academic Council be accepted with the following observations:--

(1) Ref. Res. No. 23(ii) of the Academic Council and further reference to Res, No. 2(iii), dated 28-8-1997 to the Medical Faculty relating to minimum pass marks to qualify the Pre P.G. Test.

(A) Resolution No. 2(iii) of the Faculty of Medicine on the specific point of minimum pass marks was deliberated upon at length and after considering all aspects including D.O. letter No. 14(7)MRH/Gr.II/94/Pt. I, date 10-7-1998 from the Secretary to Government. Medical and Health Department, Rajasthan, Jaipur addressed to the Vice-Chancellor and copies to the Govt. nominees on the Syndicate, the Syndicate resolved that the said resolution of the Faculty as approved by the Academic Council be not accepted.

Resolved further that the minimum pass marks for qualifying in the Pre-P.G. Test for admission to Post-graduate Degree/Diploma courses be 33% as suggested by the State Government.

(B) The Maximum age admissible for candidates for various P.G. Degree/Diploma Courses should be restricted to 45 years in place of 35 years."

5. Previous to that the Government vide Annexure-2 had informed the University that a decision has been taken to raise the reservation so far as the in-service candidates are concerned from existing 25% to 50%. The State Government had reiterated its stand of reducing cut-off marks vide Annexure-4 dated 10-7-1998 which letter is also under challenge. The instructions issued in this regard by the University of Rajasthan are attached as Annexure-7 in regard to entrance examination in the year 1998 about the eligibility and the method of selection which has already been narrated above.

6. It is the contention of the petitioner that Section 4(2) and Section 4(7) of Rajasthan University Act empowers the University to take measures to ensure that proper standards of teaching, examinations are maintained in affiliated colleges. Section 17 describes the various authorities of the University including the Syndicate, the Academic Council and the concerned Faculties. Section 22 empowers the Syndicate to maintain proper standards of teaching and examinations in consultation with the Academic Council. Section 23-A provides that the Academic Council shall have control and general regulations of, and shall be responsible for the maintenance of standard of teaching and examinations and empowers the Academic Council to propose Ordinances concerning admission to the University or to its examination, course of studies and curricula. Section 24 provides that the University shall have the faculty of Medicines and Pharmaceuticals and in this regard the University had formulated Ordinance 278-E to 278-G laying down statutory criteria. Section 30 of the University of Rajasthan Act prescribes the method of framing the Ordinances. Section 30(2) specifically prohibits the Syndicate to amend any draft proposed by the Academic Council, but has powers to reject or return it to the Academic Council for reconsideration either in whole or in part, together with any amendment which the Syndicate may suggest. It is the contention of the learned counsel for the petitioner that

the Syndicate in Annexure-5 could either accept or reject the resolution, but in no case could have amended the resolution passed by the Academic Council and thus lowering down the cut-off marks by the University from 50% to 33% was not done in accordance with law. It is the further contention of the petitioner that in any case, even if assuming it to have correctly and legally passed the resolution, there could not be any compromise made so far as merits were concerned. If the merits were fixed at 50%, reducing to 33% cut-off marks was against the spirit of number of judgments of this Court as well of the Hon''ble Supreme Court. It is submitted that the State Government has not been able to show any reasons, nor any reasons are spelled out as to how such an action of scaling down the minimum percentage of eligibility is conducive to the attainment of the excellence in higher studies in specialised subjects. It is the contention of the petitioner that the matter relates to the admission of the post-graduate courses and, therefore, regulatory powers in such matters necessarily have to be exercised in a manner as would further the cause of academic excellence. It is the submission of the learned counsel for the petitioner that the twin action of the respondents in cutting down the merit criteria and also increasing the percentage of in-service candidates is nothing but a colourable exercise of powers aimed at granting undue benefits to a class of candidates merely on the basis of their being on the rolls of the State Government and thus, it is a fraud played upon the petitioner. It is further submitted by the petitioner that this type of classification made by the respondent in the matter of disturbing available seats in P.O. Course by reserving a portion thereof, in favour of in-service candidates amounts to an unjustified and unreasonable classification which does not bear any nexus with the primary object i.e. maintenance and up-gradation of academic excellence in specialised subjects and is also opposed to public interest.

7. Reply has been filed on behalf of respondent Nos. 1 to 4. It is admitted that prior to the reduction of cut-off marks, the minimum qualifying marks as prescribed were fixed as 50% as qualifying marks. It is further submitted that the State Government had taken a decision to increase the quota of in-service candidates from 25% to 50% of the seats after full deliberations at different levels. It is stated that it was felt by the State Government that the Doctors after acquiring qualifications of M.B.B.S. and after being selected did not serve in the rural areas and due to this the State Government was facing difficulty in providing minimum medical facilities to the rural people. In-service candidates (doctors) who had served the Government of Rajasthan for five years and out of these five years if they had served rural area for three years, they were eligible and competent to acquire more specialized knowledge and thus the reservation of 50% seats for in-service candidates was with the purpose to make more specialised doctors available to the rural areas and this decision was approved by the Cabinet. It is further submitted by the respondent that the University of Rajasthan has been only authorised to conduct the examination and the State Government is fully competent to lay down the minimum marks for being

qualified for the P.G. Course and, therefore, the resolution dated 11-7-1998 passed by the Syndicate is in consonance with the decision of the State Government and cannot be challenged for the reason that it is up to the State Government to lay down the criteria for eligibility and also for fixing the minimum qualifying marks and also the reservation for in-service candidates.

8. In the writ petition certain other applications have also been filed by number of candidates who have been allowed to argue the matter on behalf of individual doctors for and against the writ petition as intervenors. Their replies have also been placed on record which are almost on the same line as is that of the State Government.

9. From the facts as narrated above, the following events are highlighted.

(1) Vide circular issued by the Director General of Health Services and as per the direction of the Hon''ble Supreme Court 25% of all the seats in P.G. Courses in Medical Colleges were required to be filled up on the basis of All India Entrance Test and the remaining seats were to be filled up at the State level.

(2) Vide Annexure-1, dated 1-4-1997 basing on the judgment of Dr. Sadhna Devi v. State of U.P. the Principal and Controller of SMS Medical College had desired the Vice-Chancellor not to admit the students obtaining less than 50% qualifying marks.

(3) The Division Bench of this Court in Kavita Jain''s case on the challenge being made by the in-service doctors to the effect that 50% marks cannot be laid down as qualifying marks for the in-service candidates, upheld the decision of the Government/University of fixing 50% marks of the in-service candidates as well.

(4) On 18-6-1998, communication was addressed to the authorities by the State Government to increase the existing quota of in-service candidates from 25% to 50%.

(5) Academic Council has taken a decision on 24-6-1998 recommending 50% marks as qualifying marks and 40% marks for SCs/STs.

(6) On 10-7-1998 the Government had suggested 33% cut-off qualifying marks.

(7) On 11-7-1998 the Syndicate had approved the cut-off marks as 33%.

(8) Advertisement was issued on 29-7-1998 for holding Pre-P.G. Entrance Test and examinations were held on 6-9-1998.

10. With the abovesaid facts the counsel for the petitioner submits that the action of the respondents by writing a letter to the University, the action was not initiated by a competent authority and it could have only been done by the University and there was no legal sanction behind such action. It is further submitted that the action of the respondent is also violative of Articles 14, 15(4) and 16 of the Constitution of India. There is excessive reservation up to 50% of the in-service seats which has been enhanced by almost cent per cent and the

prescribing 33% minimum qualifying marks is bad and is beyond the University Act. The qualifying marks should not be less than 50%. It is also challenged that the resolution of the Syndicate is against the provisions of the Rajasthan University Act and is totally non-speaking.

11. The points require to be determined in the present petition are summed up as under:--

(1) Whether it is the State Government who is competent to fix the qualifying cut-off marks or it is the University to fix up such criteria for the admission to P.G. Courses.

(2) Whether the cut-off marks as fixed by the State Government and recommended to the University to be 33% is within the competency of the authorities or whether the authorities should have continued to adopt 50% qualifying marks for the said courses.

(3) Whether the Syndicate is competent to modify the recommendations as recommended by the academic council or it is bound to return the recommendations u/s 30(2) of the Rajasthan University Act or in alternative can accept or reject the same;

(4) In the circumstances of the case, whether it was essential for the Syndicate to have accepted the recommendations of the Government and to incorporate it in the Ordinance.

(5) Whether the authorities were competent to reserve the seats for in-service candidates and if so whether enhancement of the reservation from 25% to 50% was ultra vires of the Constitution of India and whether such reservations could be enhanced for the purpose as narrated in the written statement.

PROPOSITION NOS. 1 AND 2. namely :

(1) Whether it is the State Government who is competent to fix the qualifying cut-off marks or it is the University to fix up such criteria for the admission to P.G. Courses.

(2) Whether the cut-off marks as fixed by the State Government and recommended to the University to be 33% is within the competency of the authorities or whether the authorities should have continued to adopt 50% qualifying marks for the said courses.

12. Counsel for both the parties rely on the judgment in the case of Dr. Sadhna Devi and others Vs. State of U.P. and others, ; State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others, ; Aarti Gupta and Others Vs. State of Punjab and Others, ; Dr. Ambesh Kumar Vs. Principal, L.L.R.M. Medical College, Meerut and Others, ; Dr. Ajay Kumar Agrawal and others Vs. State of U.P. and others, ; Ombir Singh v. The State of U.P. 1992 (5) SLR 529 : 1992 AIR SCW 3218 ; Dr. Indu Kant Vs. State of U.P. and others, , State of Uttar Pradesh and others Vs. Dr. Anupam Gupta, etc., ; Ajay Kumar Singh and Others Vs. State

of Bihar and Others, ; Anant Madaan and others Vs. State of Haryana and others, .

13. In the case of Dr. Sadhna Devi and others Vs. State of U.P. and others, , the State of U.P., by virtue of executive instructions had been making reservations for admission to P.O. Degree Courses and diploma courses to the extent of 21 % for Scheduled Castes, 2% for Scheduled Tribes and 27% for Backward Classes. A circular dated 31-8-1995 was issued by the U.P. Government wherein the requirement of 35% qualifying marks for the written examination had been cancelled for the reserved seats on the contention that the candidates had failed to score any mark in the test, they Would be eligible for admission as long as there were vacancies in the special categories. It was contended that the ultimate power to fix norms and standards for admission to post-graduate medical courses vests in the Medical Council of India under the Indian Medical Council Act, 1956 and, therefore, the regulations framed by the Medical Council of India will prevail over any law or executive instructions issued by any State Government. It was observed that the right of the State Government to reserve admission to Post-Graduate Medical Courses for SC/ST and members of OBCs was not in dispute. The only dispute in Dr. Sadhna Devi's case was whether the State Government was entitled to do away altogether with the system of obtaining minimum qualifying marks for getting admission to these courses. It was held by the Supreme Court that it was open to the State Government to say that the selection to the post-graduate medical courses should be made on the basis of the performance of the candidates in the MBBS examination only. But the State Government had chosen to hold a test among the persons who had passed the MBBS examination in order to select candidates for post-graduate course, it had laid down minimum qualifying marks for admission. Candidates belonging to the three special categories who secure the minimum qualifying marks will have to be admitted so long as their quota of seats is not filled up. But it was not open to the Government to say that even the special category of candidates must be selected for the postgraduate courses and in that situation the merit would be sacrificed altogether. The circular dated 31-8-1995 issued by the State Government with a direction that there shall be no minimum qualifying marks for Scheduled Castes/Scheduled Tribes/Others Backward Classes candidates in the written examination for admission to postgraduate and diploma courses was held to be illegal, with a further direction that if there were no SC/OBC candidates available on account of failure of the candidates in the category, the seats be filled up from the general category.

14. In *Ombir Singh v. State of U.P.* AIR 1992 SCW 3218 (supra), rule fixing 50% marks to be obtained at entrance examination as minimum qualifying marks for admission to P.O. Courses were held to be legal. It was further held that no exception could be taken to the same. It was a case where out of 439 seats available in general category out of which only 300 candidates had secured minimum qualifying marks i.e. 50% marks and 139 seats were still lying vacant and similarly 78 vacancies were lying vacant in the reserved categories, it was

averred that it was not in the interest of petitioners and also nation to keep the seats vacant and, therefore, lowering of minimum percentage of qualifying marks in the entrance test be allowed. It was observed by the Hon''ble Supreme Court that it was for the State Government to have taken note of such situation and to have amended the rules for admission so as to fill all the seats available for P.O. Courses. The contention or the argument raised that the State Government had no power to lay down further eligibility qualification for being considered for admission in the P.G. Courses in addition to eligibility criteria laid down by the Medical Council was negated in view of the judgment in Dr. Ambesh Kumar Vs. Principal, L.L.R.M. Medical College, Meerut and Others, . It was observed as under : ----

"We have given our thoughtful consideration to the aforesaid submission. It may be noted that the aforesaid rule of minimum qualifying marks for admission to post-graduate courses was in vogue for the last many years and large number of seats remained vacant in earlier years also. It was for the State Government to have taken note of such situation and to have amended the rules for admission so as to fill all the seats available for post graduate courses. So far as any mandamus or direction to be given by this Court is concerned, we refrain from doing so because this Court has repeatedly held that the rule laying down minimum qualifying marks for admission to post-graduate medical courses is legal and no exception can be taken to the same. Even in Dr. Ambesh Kumar case, the rule laying down minimum of 55 per cent and 52 per cent marks in MBBS respectively for admission to post-graduate degree and diploma courses was held to be valid. An argument was raised in the aforesaid case that the State Government had no power to lay down further eligibility qualification for being considered for admission in the post-graduate courses, in addition to the eligibility criteria laid down by the Medical Council in its regulations but the aforesaid contention was negated and it was held as under :

"The order in question merely specifies a further eligibility qualification for being considered for selection for admission to the postgraduate courses (degree and diploma) in the Medical College's in the State in accordance with the criteria laid down by the Indian Medical Council. This does not in any way encroach upon the Regulations that have been framed under the provisions of Section 33 of the Indian Medical Council Act. On the other hand in order to promote and further the determination of standards in institutions for higher education, the State Government who runs these colleges provide an additional eligibility qualifications."

We can only recommend that the State Government may take suitable steps for redressing the long felt grievance of the doctors to fill up all the vacant seats for post graduate courses and which would be a step in the larger public interest also. The State Government may do so for admission to post graduate courses for 1992 and in that case, the State Government would take immediate steps without any loss of time so that the candidates may also join the 1992 academic

session for post-graduate studies without any disadvantages. It is further made clear that in doing so such candidates who having secured more than 50% marks and having already been allotted the specialities would not be disturbed in any manner. The vacant seats would however be filled strictly in accordance with merit in the entrance examination and according to the combined merit list of the whole State of Uttar Pradesh. The State Government would be free to issue fresh order relaxing the requirements of minimum marks to such extent which may meet the necessity of maintaining academic standards for admission to post graduate courses as well as the regulations prescribed by the Medical Council of India in this regard. This, in our view, would be perfectly within the powers of the State Government and would not be violative of Article 14 of the Constitution."

15. In *Ajay Kumar Singh v. State of Bihar* AIR 1994 SCW 2515 (supra), it was held that the regulation of admission of students subject to post-graduate medical courses falls outside the purview of Entry 66, List I, which means that it continues to inhere in Entry 25 of List III. The State which has established and is maintaining these institutions out of public funds must be held to possess the power to regulate the admission policy consistent with Article 14 except to the extent provided for by Entries 63 to 66 of List I. Such power is an integral component of the power to maintain and administer these institutions. The State will regulate the admission policy and at the same time adhere to the standards determined by the India Medical Council. The Supreme Court had observed as under at page 2532 (of AIR SCW):

"Even if one relates the Indian Medical Council Act to Entry 25 of List III in addition to Entry 66 of List I, even then the position is no different -- for the Indian Medical Act does not purport to regulate the admissions or admission policy to post-graduate medical courses. The field is thus left free to be regulated by the State. The State can make a law or an executive rule; in this case it was chose to make an executive rule."

16. In *State of Uttar Pradesh and others Vs. Dr. Anupam Gupta, etc.,*, vide Government instructions a circular was issued that the merit shall be determined for admission to the P.G. Courses on the basis of 50% marks obtained in the competitive examination and 50% marks for general candidates, 40% marks for Scheduled Tribes with weightage of 1.65% of the minimum marks i.e. 50 marks in total. The only contention was that so far as the prescription of 50% minimum marks within eligibility criteria to seek admission in P.G. Courses was not arbitrary, however, it was contended that initial press-note inviting applications for entrance test did not say that 50% minimum marks in the entrance test was as a condition for admission to the P.G. Examination and, therefore, denial of admission for not securing 50% cut off marks in entrance examination was sought to be held illegal. The doctrine of promissory estoppel was also pressed into services. The Supreme Court held that securing 50% marks at the entrance test is one of the condition precedent to become eligible for admission into the post graduate degree and diploma courses and is consistent within the view

expressed by the Supreme Court in Dr. Ajay Kumar Agarwal's case.

17. In Dr. Ambesh Kumar Vs. Principal, L.L.R.M. Medical College, Meerut and Others, , the State Government vide notification had laid down the eligibility qualifications i.e. obtaining for 50% marks or 52% marks for being eligible for consideration for admission to the post graduate degree/diploma courses respectively on the basis of merit in accordance with the regulations made under the Indian Medical Council Act. The order modifying to certain extent the earlier notification dated 15-12-1982 wherein the criteria for admission to post-graduate courses was on the basis of merit only. Two questions arose for consideration before the Hon"ble Supreme Court; whether the State Government was competent to make the aforesaid order in question exercising of executive powers under Art. 162 of the Constitution. It was observed that the State Government can exercise its executive powers and make order referred in Entry 25 of current list in the absence of any law made by the State Legislature, it was observed as under :

"Two questions arise for our consideration which are firstly whether the State Government is competent to make the aforesaid order in question in exercise to its executive powers under Article 162 of the Constitution. This Article specifically provides that the executive powers of the State shall extend to matters with respect to which the legislature of the State has power to make laws. Entry 25 of the Concurrent List i.e. List III of the Seventh Schedule to the Constitution provides as follows :--

"Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I: vocational and technical training of labour."

"The State Government can in exercise of its executive power make an order relating to matters referred to in Entry 25 of the Concurrent List in the absence of any law made by the State Legislature. The impugned order made by the State Government pursuant to its executive powers laying down the eligibility qualification for the candidates to be considered on merits for admission to the post graduate courses in Medical Colleges in the State is valid and it cannot be assailed on the ground that it is beyond the competence of the State Government to make such order provided it does not encroach upon or infringes the power of the Central Government as well as the Parliament provided in Entry 66 of List I. Entry 66 of List I is in the following terms:--

"Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions."

"The Government who runs these colleges has the right to prescribe a test of eligibility as has been held by this Court in the case referred to above."

"It is for the State to consider and to see that the seats are filled up in all the disciplines and they are not left vacant in spite of a large number of applicants

applying for admission in the various disciplines and the State Government has to evolve such criterion of eligibility that all the seats in different MD, MS degree and diploma courses are filled up."

18. In *State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others*, , it was held that under Art. 162 of the Constitution of India, the executive power of a State extends to the matter with regard to which the Legislature of the State has power to make laws. As there is no legislation covering the field of selection of candidates for admission to medical colleges, the State Government would, undoubtedly, be competent to pass executive orders in this regard.

19. In a Division Bench judgment of this Court in the case *Dr. Kavita Jain v. State of Rajasthan* in D.B. Special Appeal No. 1282/97 decided on 1-10-1997 arising out of Civil Writ Petition No. 4526/97, the action of the respondent State in prescribing 50% qualifying marks even for in-service candidates was challenged by a candidate who was in the employment of the State of Rajasthan on the ground that the in-service candidates be considered for admission into the post-graduate course of Medicine, Surgery diploma against the vacancies reserved for in-service candidates in accordance with their comparative merit without subjecting them to attain the minimum qualifying marks for admission in the said courses which were recently fixed at 50% for all categories of candidates. The admission related to the year 1997. At the time of passing the judgment only 25% of the total seats were available for the in-service candidates. Learned single Judge out of whose judgment the special appeal had arisen had ruled out the possibility of the Court giving a mandate on the respondents as to give an exemption as sought by the petitioners regarding the embargo of securing minimum qualifying marks of 50% and thought it wise not to interfere with the impugned decision of the University of Rajasthan which was taken in consultation with the Director of Health Services by way of adopting the method of fixing 50% as the qualifying marks in consonance with the guidelines of the Supreme Court judgment in *Sadhna Devi's* case. It was further observed that the respondents would be quite at liberty to fill in the left over seats earmarked for the in service candidates if such sufficient number of candidates are not available within 50% minimum qualifying marks and the left over reserved seats might therefore, be filled in by selecting candidates from the general category who might have obtained the minimum qualifying marks of 50%. It was observed that the Medical Council of India is responsible for maintenance of standards of Medical education in terms of Section 33 of the Act of 1956. The University of Rajasthan on the other hand is primarily responsible for admission to the post-graduate courses and the conduct of the post-graduate studies. The conduct of the entrance examination is, however, exclusive prerogative of the State Government. There is no statutory Act in the State of Rajasthan in respect of the entrance examination. This power is exercised by the State by way of is executive orders under Article 162 of the Constitution. Relying on *Sadhna Devi's* case it was held that the University of Rajasthan and the Ordinances framed by

the University of Rajasthan cannot govern the issue relating to the conduct of the entrance examination for PG courses and this power is exercisable exclusively by the State Government only accordance to the laws laid down by the Supreme Court. It was further observed as under:--

"Thus, the University of Rajasthan and the Ordinances framed by the University of Rajasthan, cannot govern the issue relating to the conduct of the entrance examination and that of fixing the qualifying marks for entrance examination for PG Courses and this power is exercisable exclusively by the State Government only according to the laws laid down by the Supreme Court. Ordinance 278-E cannot operate in the field as an exclusive statute relating to the norms for admission to post graduate courses. It cannot thus be contended that the Ordinance 278-E exclusively occupies the field relating to the norms for admission and this field cannot be encroached upon by the Government and cannot be covered up by executive instructions given by the State Government which in the facts" of the case has been so done in consultation with the University of Rajasthan.

"The fact that the power relating to the conduct of entrance examination and the norms governing the entrance examination are within the exclusive prerogative of the State Government, is evident from the observations in *Dr. Sadhna Devi and others Vs. State of U.P. and others*, as also in the case of *State of Uttar Pradesh and others Vs. Dr. Anupam Gupta, etc.,*, wherein the scheme in respect of the entrance examination was prescribed by the U.P. Government and not by the University. Even in Rajasthan, the entrance examinations are conducted by the Government of Rajasthan. The Supreme Court clearly laid down that the ultimate power to fix the norms for admission to post-graduate medical courses is vested with the State Government. Thus, the apparent conflict between Order 278-E and the Government's executive instructions, is totally misconceived one and cannot stand as a bar to the fixation of a minimum norm as qualifying of 50% marks for due qualification. We do not find any conflict in between Order 278-E and the executive instructions to be militating against each other, because Order 278-E only controls the norms of eligibility and the executive instructions are regarding the fixation of qualifying marks despite the eligibility. The Ordinance is silent on the issue of the qualifying marks for entrance examination and it is not all pervasive in character with regard to the norms of qualification. It is a well settled proposition of law that when there are gaps existing in the statute or a statutory rule, it can be so filled up by way of executive instructions. We do not think that the prescription of qualifying marks can be declared invalid on the ground that the same is contrary to Order 278-E."

20. As per the law laid down by the Apex Court and also by the Division Bench of this Court in *Kavita Jain's* case, it goes without saying that it is the prerogative of the State Government to prescribe the minimum qualifying marks. In the cases aforesaid Courts were dealing with the challenge made to the provisions made of prescribing the minimum qualifying marks which is different in different

States. It is 50% in most of the States. The minimum qualifying marks had been reduced by the State even up to 35% whereas in the case of Post-graduate Institution of India courses in Chandigarh it is 60% or 80%. The facts stand established that it is ultimately the State which is authorised to regulate the admissions of the PG Courses of the Medicines by prescribing the minimum qualifying marks and, therefore, the contention of the petitioner that prescribing of 33% minimum qualifying marks by the State for the admission to P.G. Courses to be illegal cannot be accepted. It is the 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 initially there were 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% for the year 1997, but if the Government had felt certain difficulty in continuing 50% of the qualifying marks, the Government in its wisdom had taken a decision to reduce the qualifying marks from 50% to 33% for all the categories. It cannot be said that any of the petitioner or the candidates have been discriminated against. Even though it is desirable that more meritorious candidates be admitted, but it is always not true that by fixing 50% minimum qualifying marks the object can be achieved. The qualifying marks only prescribes the entitlement for consideration for admission, but still the admissions are to be made on the unified merit list of the candidates who had appeared in the examinations. No fault can be found with the prescribing of minimum qualifying marks as prescribed by the State and confirmed by the University of Rajasthan.

PROPOSITION NO. 5. namely;

(5) Whether the authorities were competent to reserve the seats for in-service candidates and if so whether enhancement of the reservation from 25% to 50% was ultra vires of the Constitution of India and whether such reservations could be enhanced for the purpose as narrated in the written statement.

21. From the writ petition and the prayer made therein the petitioners are desiring this Court to declare the reservation of the seats in PG courses in favour of any candidate (in-service) on the basis that he happens to be in employment of the State Service, be declared illegal and further in the alternative to declare that there were no circumstances for increasing the quota of in-service candidates from 25% to 50%.

22. In the case of Shashi Prabha v. State of Punjab, AIR 1984 P & H 434, it was held that the specification of source does not have any different effect than what reservation made in terms of Article 15 of the Constitution have. Technically, the specification of source may not be called the specification of source and may also not be called the reservation in terms of Article 15 of the Constitution, but in general sense of the word of "specification of source" does amount to reservation. Shashi Parbha and Others Vs. Punjab University and Others, was again followed by Punjab and Haryana High Court in the case of Dr. Suresh Sharma v. State of Punjab reported in 1986 (2) SLR 205 holding that the

reservations meant for in-service candidates for the admission of PG courses amounted to reservation under Article 15 of the Constitution.

23. It has been laid down by the Supreme Court in *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, that the wholesale reservation made by some of the State Government on the basis of "domicile" or residence requirement within the State or on the basis, of institutional preference for students who have passed the qualifying examination held by the University or the State excluding all students not satisfying these requirements, regardless of merit is unconstitutional and void as being in violation of Article 14 of the Constitution. The classification has to fulfil two conditions :--

(i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group, and

(ii) that differentia must have a rational relation to the object sought to be achieved.

24. Relying on the case of *Dr. Pradeep Jain* the single Bench of Punjab and Haryana High Court in *Dr. Suresh Sharma's case* 1986 (2) SLR 205 (supra) had held that the reservation which the State Authorities prefer to all "preference" made in favour of the in-service candidates and the PCMS-II people for purposes of admission to these Courses fully meets the above-noted test. This was so confirmed by a Division Bench of the High Court in appeal in LPA NO. 313/86 decided on 30-7-1986. In my view if the State Government decides to reserve certain percentage of seats for in-service candidates for the reason that the in-service candidates are required to serve in the rural areas and also for the reason that they may be given a chance to improve their qualification while in-service by admission in PG Courses, it cannot be said that such reservation/classification made by the State are hit by voices of Articles 14, 15 and 16 of the Constitution of India or are discriminatory or arbitrary. It was also so held by the single Judge of Jammu and Kashmir High Court in the case of *Rajkumar Pandita Vs. State of J. and K. and Others*, .

25. In *Dr. Jagadish Saran and Others Vs. Union of India (UOI)*, , the Supreme Court had observed as under : at page 833 (of AIR)

"The class which enjoys reservation must be educationally handicapped. The reservation must be geared to getting over the handicap. The rationale of reservation must be in the case of medical students, removal of regional or class inadequacy or like disadvantage. The quantum of reservation should not be excessive or societally injurious, measured by the overall competency of the end-product, viz., degree-holders. A host of variables influence the quantification of the reservation. But one factor deserves great emphasis. The higher the level of the speciality the lesser the role of reservation. Such being the pragmatics and dynamics of social justice and equal rights, let us apply the tests to the case on hand."

26. It was further observed as under :-- at page 835 (of AIR)

"Even so, "reservation" must be administered in moderation, if it is to be constitutional. Some central technical institutions like the All India Institute of Medical Sciences, Delhi and Chandigarh and the Pondicherry Medical College have a much smaller fraction. Their circumstances may be different and we do not have the full facts, neither side having furnished more than fragments. Judicial surmise is too weak to be of decisional certainty. For reasons we have assigned 70% plus is too high at the post-graduate level in the half-proved circumstances. But we stop short of invalidating the rule because the facts are imperfect, the course has already started and the Court must act only on sure ground, especially when matters of policy, socio-educational investigation and expert evaluation of variables are involved. Judges should not rush in where specialists fear to tread. We spare the impugned regulation even though we are prima facie, sceptical, about the vires thereof. To doubt is not enough to demolish. When fuller facts are placed, the Court will go into this question more confidently."

"While reluctantly repelling the challenge of the petitioner we think two directions must be made in this case. If 70% reservation is on the high side and the petitioner is hopefully near "admission" going by marks and reservation, it is but just that he is given a chance to do his postgraduate course. Indeed, his coming to Delhi itself was a compulsion beyond his control, as we have noted earlier."

"But the question really is: Is the degree of reservation excessive ? Is 70% too much ? Too excessive a reservation could result in preference to graduate candidates of severely limited aptitude and competence over meritorious candidates from other institutions whose exclusion could result in aborting a part of our national talent. The determining factor, it appears to me, is the measure of reciprocity prevailing between the different educational institutions in India regarding the availability of admission to graduates of other institutions. It can hardly be supposed that if the medical graduates of the Delhi University are shut out from adequate consideration for admission to the post-graduate courses of other institutions merely because they did not graduate from those institutions they should not think it unjust that the hospitality of their own University to outside medical studies. This is a problem which can be tackled only on a national level, with all universities and other medical institutions coming together around a common table with the object of fashioning out a mutual reasonable quota reservation. A wise and far-sighted exercise, eschewing narrow parochial considerations, if called for. It is only by ajoining of hands across the entire nation that a suitable and enduring solution can be evolved and the turbulence which disturbs the student body set at rest."

"The question remains : Is a reservation of 70% excessive ? We have travelled through the record, and I agree with my learned brother that the material is so scanty, fragmentary and unsatisfactory that we are prevented from expressing any definite decision on the point. Although we gave sufficient opportunity to the

parties, the requisite material has not been forthcoming. Whether or not a reservation of 70% was called has not been established conclusively. Indeed, there is hardly anything to show that the authorities applied their mind to a cool dispassionate judgment of the problem facing them. Popular agitation serves at best to arouse and provoke complacent or slumbering authority; the judgment and decision of the authority must be evolved from strictly concrete and unemotional material relevant to the issue before it. Unfortunately, there is little evidence of that in this case. For that reason, I join my learned brother in the directions proposed by him."

27. In the case of Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., , while interpreting the reservations as contemplated in Article 16(4), the Supreme Court held that the irresistible conclusion in regard to the reservation as contemplated in Clause (4) of Article 16 should not exceed 50% and whereas reservation up to 50% should be the rule. It was held that it was not necessary to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It was held that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. It was held that there may be two type of reservations which may, for the sake of convenience, be referred as "vertical reservations" and "horizontal reservations". The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes may be called "vertical reservations" whereas reservations in favour of physically handicapped can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations -- what is called interlocking reservations. It was held that it is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally back ward classes referred to in Article 15(4). It is much wider. The Hon"ble Supreme Court was dealing with the case of reservation under Article 16.

28. In the present case, 25% seats have already been reserved for the Central quota and out of remaining 75% seats, 50% have been reserved for in-service candidates. The fresh graduates have been left with very small portion of seats. It is true that the Government is competent to allocate certain percentage of seats as reservation for in-service doctors provided they fulfil all other conditions i.e. minimum service of five years out of which three years service in the rural area, but nothing has been brought on record except the order impugned, to show as to under what data or circumstances, the Government was feeling handicapped in continuance of the earlier decision of 25% of reservation for in-service candidates, nor it has been brought on record that any vacancies were lying vacant for want of availability of PG doctors who were willing to serve in the rural areas. There is no averment that the doctors were not available to fill up the vacancies. There is truth in the contention of the counsel for the petitioner that in Rajasthan many PG doctors are awaiting appointments, rather the posts

are not being filled-up. The counsel for the State has also not been able to bring on record any document to show that after completing the PG Courses, the government doctor so qualified is put under any obligation to serve in the rural area. At the most, at present and as per the pleadings of the respondents, it becomes an admitted fact that the reservation of seats had been made for in-service doctors who have minimum of five years service out of which three years service has been put in by such doctors in the rural areas. This can be an award for those doctors who have served in the rural areas for three years and to my mind the earlier decision of the government to reserve 25% of seats for in-service doctors which was being continued till the present reservation increased from 25% to 50% for in-service doctors was perfect and justified. However, to increase the seats by almost 100% from 25% to 50% for in-service doctors is and could be termed as excessive reservation. It has also been pleaded that out of 337 seats 87 seats had been reserved for the nominees of the Director General of the Health Services which are known as All India Pre-P.G. Candidates. Out of remaining 250 seats available, 50% seats have been allotted to in-service candidates, but not a single in-service candidate had been declared successful in the Pre-P.G. Examination, 1998 and, therefore, a necessity was felt by the Government to decrease the qualifying marks. But no justification has been given by the State of Rajasthan for increasing of the reservation from 25% to 50% for the in-service candidates. Even from the record produced by the department neither there is any discussion nor particulars showing the necessity to increase the reservation for in-service candidates from 25% to 50%. In such circumstances, even though in the given circumstances, if any case is made out, the reservation for in-service candidates can be varied according to the necessity if so felt, but in the present case no circumstances had been brought out by the government as to why the reservation was so increased and thus the decision of the State Government to increase the reservation of the in-service candidates from 25% to 50% cannot be sustained as it would amount to excessive reservation as well. PROPOSITION NOS. 3 & 4. namely;

(3) Whether the Syndicate is competent to modify the recommendations as recommended by the academic council or it is bound to return the recommendations u/s 30(2) of the Rajasthan University Act or in alternative can accept or reject the same;

(4) In the circumstances of the case, whether it was essential for the Syndicate to have accepted the recommendations of the Government and to incorporate it in the Ordinance.

29. In regard to proposition Nos. 3 and 4 in the present circumstances, there is hardly any necessity to go into these aspects in view of the above discussion. However, Section 30(2) of the Rajasthan University Act, is very clear that in case Syndicate is not inclined to accept the recommendations of the academic council, it is the statutory bar for the syndicate to modify such resolution. It was either accept or reject it or sent it back with its recommendation to the academic

council for reconsideration.

30. In view of the fact that a Division Bench of this Court in the case of Dr. Kavita Jain (supra) had already held that it falls within the jurisdiction of the State Government to regulate the procedure of admission to the P.G. Courses in regard to the reservation of the qualifying marks, the propositions already stand answered in Kavita Jain's case.

31. For the above said reasons, the writ petition is partially allowed and it is held :

(1) that the prescribing of qualifying marks to be 33% for Pre-P.G. Examination, 1998 for admission to P.G. Courses was within the jurisdiction of the State of Rajasthan and cannot be interfered with and the prayer in this regard is rejected;

(2) that the reservation in regard to the in-service candidates by enhancing reservation from 25% to 50% has not been made on any (sic) ground at all and there is no jurisdiction brought on record for increasing such reservation and, therefore, the decision of the State of Rajasthan and all decisions in this regard raising the existing quota of reservation from 25% to 50% for in-service candidates are set aside as excessive, and the impugned orders in this regard are quashed and the earlier prescribing of reservation up to 25% is maintained.

32. The writ petition is allowed and the impugned orders in this regard are quashed.