

(2014) 07 KL CK 0166

In the High Court Of Kerala

Case No : Writ Appeal No. 797 of 2014 and connected cases

Fenny, K.P.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-07-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 154, 16, 162, 245

Indian Medical Council Act, 1956 — Section 20, 25, 33

Kerala University of Health Sciences Act, 2010 — Section 25

Citation : (2014) 3 ILR 361 : (2014) 3 KLJ 448

Hon'ble Judges : Dr. Manjula Chellur, C.J.; P.R. Ramachandra Menon, J

Bench : Division Bench

Advocate : M.K. Damodaran, Kurian George Kannanthanam, Renjith Thampan, Senior Advocates, C.P. Mohammed Nias, Tony George Kannanthanam, Thomas George, P.R. Reena, P.K. Vijayamohanam, Gilbert George Correya, Rajesh R. Pillai and M. Jithesh Menon, Advocate for the Appellant; Roshan D. Alexander, Senior Government Pleader, P. Sreekumar, (S.C., Kerala University, Health), T.B. Hood, M. Isha, V.A. Muhammed, Kaleeswaram Raj, P. Raveendran Pillai, Indira Raveendran, V. Rajendran, P. Riji, Sreedevi Kylasanath, C.S. Manu, K.I. Mayinkutty Mather, S.A. Saju, M.B. Sandeep and Titus Mani Vettom, Advocate for the Respondent

Judgement

Dr. Dr. Manjula Chellur, C.J.—These writ appeals are directed against common judgment of the learned Single Judge dated 6-6-2014.

2. In brief, the facts that led to filing of the above writ appeals are as under: Appellants herein were the writ petitioners. They are in-service of Government of Kerala in various Health Departments as Assistant Professors, etc. For the purpose of convenience, all documents are referred to as exhibited in W.A. No. 797/2014. So far as Post-graduate Degree/Diploma Courses 2014, Exhibit P-1 came to be issued by National Board of Examinations (for short NBE) and it is called All India Post-graduate Medical Entrance Examination 2014 (for short AIPGMEE 2014). Exhibit P-1 gives various informations including dates of examination and how on line applications can be accessed and completed. The

last date for submission of application was 13-11-2013. The examination dates for AIPGMEE were between 25th November and 6th December 2013. Declaration of results was to be by 31st January 2014. Clause 14.1 refers to qualifying criteria, i.e. minimum qualifying score in each category-General Category-50% score, SC/ST/OBC-40% score and Persons with Disability-45% score. State of Kerala, by Exhibit P-2, declared that PG Medical/Dental aspirant candidates from the State shall participate in AIPGMEE 2014 and obtain minimum eligibility marks as prescribed, for getting admission to post-graduate Medical/Dental courses so far as seats other than All India quota. State has decided to adopt AIPGMEE 2014 for admission to post-graduate Medical/Dental courses as conducted by NBE. Again, State issued Exhibit P-3 dated 5-11-2013 stating that NBE has issued notification for conducting a single common Entrance Examination - AIPGMEE 2014 for admission to various MD/MS and PG Diploma courses for the year 2014, and State of Kerala also adopted the same by notification dated 1-11-2013 and Commissioner for Entrance Examinations shall be the authority for conducting the allotment in the State Quota seats in PG Medical courses. Exhibit P-6 notification dated 18-2-2014 was issued by Government of Kerala, wherein, it is stated that Government, after examining the draft prospectus proposal in detail was pleased to approve the prospectus incorporating certain modifications which was appended to the order. As per clause 4.4.1 of Exhibit P-7, the qualifying criteria for in-service quota candidates in AIPGMEE 2014 was fixed as General Category-45%, SC/ST/OBC-35% and Persons with Disability-40% as against 50%, 40% and 45% respectively fixed under Exhibit P-1.

3. Several writ petitions came to be filed before learned Single Judge by in-service candidates challenging clause 4.4.1 of the prospectus. Learned Single Judge raised as many as five issues for consideration. Ultimately, learned Judge opined that in the facts and circumstances available, State was justified in fixing the qualifying criteria as stated in clause 4.4.1 of Exhibit P-7 as it reflects the policy of Government and it cannot be termed as unreasonable in any form. Further, learned Judge opined that State Government has exercised its statutory power to incorporate in the prospectus a provision which permits good number of in-service candidates to have the benefit of admission to Post-graduate/Diploma courses, despite the fact that such qualifying persons will be considered for admission only based on seniority along with other criterion. Therefore, the decision was neither arbitrary nor unreasonable nor suffers from any mala fides. Aggrieved by the judgment of the learned Single Judge, the above writ appeals are filed.

4. It is contended that select list has to be prepared based on seniority of candidates qualified in entrance test. Qualifying criteria at Exhibit P-1 was reduced by lowering the percentage of marks for in-service candidates. According to them, in the absence of legislation under Entry 66 of List I of Constitution, State has no competency to legislate on the subject and it does not occupy the field under Entry 25 of List III. They contend that learned Single

Judge was wrong in taking a view that since Regulations of 2010 was set aside by Apex Court in *Christian Medical College Vellore and Others Vs. Union of India and Others*, there was no central statute governing the field, hence, State could step in for filling up the gap by exercising its power under Entry 25. According to appellants, when the matter comes under Entry 66, whether the field is occupied or not, State cannot step in at all invoking the competency under Entry 25. Application of Article 254 of Constitution comes in only in matters coming under List III. The executive power of the State cannot be exercised at all by invoking Article 162 of Constitution even if the subject were to come under Entry 25 of List III because powers of the State to issue executive orders under Article 162 is circumscribed by Article 154. According to them, Kerala University of Health Sciences Act of 2011 authorises the University to fix minimum qualification for admission to any course, hence by executive order, Government cannot fix the qualification. They further contend that learned Single Judge was in error by opining that subject is covered by Section 5(3) of the State Enactment which is known as Kerala Medical Officers' Admission to Post-graduate Courses under Service Quota Act, 2008 (for short Service Quota Act). Section 5(3) does not empower the State to fix eligibility criteria but it authorises the State only to publish in the prospectus what is legally prescribed.

5. Sri Kurian George Kannanthanam, learned senior counsel appearing for appellants, referring to Exhibits P-1, P-2, P-3, P-6 and P-7 contends that State, after clearly opting out the qualifying criteria as prescribed under Exhibit P-1 which was again confirmed by Exhibit P-3 on 5-11-2013, was not justified in reducing the minimum qualifying criteria. Therefore, there is no justification in the reasoning of learned Single Judge in approving the action of State Government. According to him, factually also the reason indicated at 4.4.1 by the State is incorrect as there was no dearth of qualified service quota candidates available for admission.

6. Sri Ranjith Thampan, learned senior counsel arguing for appellants in W.A. No. 801/2014 contends that exercise undertaken by State Government by virtue of Exhibit P-7 prospectus is nothing but an arbitrary action. According to him, when more number of candidates were available so far as service quota, there was no justification for the State to reduce the qualifying score and learned Single Judge has not answered that particular issue correctly. Reducing the minimum qualifying marks for service quota is discriminatory. According to him, notification at Exhibits P-2 and P-3 clearly indicate the intention of State to adopt qualifying criteria as indicated in Exhibit P-1 and unilaterally fixing the minimum qualifying marks as per clause 4.4.1 of Exhibit P-7 is without any justification. Further contends, by lowering of minimum qualifying marks for post-graduate admissions, candidates entitled for being considered for admission will be increased and further, in the light of allotment of seats based on seniority and other points which have to be taken into consideration, the persons who have scored less than the qualifying marks indicated at Exhibit P-1 will become eligible for post-graduate seats of their choice in preference to the candidates who have

scored more than the prescribed Bench mark at Exhibit P-1. He contends that attaining minimum qualifying marks has relation with standards of education. The need for common entrance test and minimum qualifying marks has to be determined in the field of medical education. It was further argued that there can be only one common entrance test for determining the eligibility for post-graduation of in-service candidates and those not in service. While contending that there cannot be any relaxation of minimum qualifying marks as prescribed at Exhibit P-1, he challenges clause 4.4.1 of the prospectus as discriminatory and arbitrary.

7. Sri Mohammed Nias, learned counsel for appellants in W.A. No. 809/2014 places emphasis on the words "as prescribed" at Exhibits 2 and 3 of Government Orders dated 1-11-2013 and 5-11-2013 and contends that as prescribed would clearly mean as indicated at Exhibit P-1. According to him, statement filed by respondent State and also additional counter now filed have to be taken into consideration. Without any reasonable justification or cause modification of qualifying marks is nothing but arbitrary action. He contends that Exhibit P-1, which was adopted by State Government, alone governs the field and Exhibit P-7 prospectus, especially clause 4.4.1 cannot be described as competency of the State to make modification of the qualifying marks.

8. Learned counsel for appellants in other writ appeals adopt the arguments of the learned senior counsel Sri Kurian George Kannanthanam and Sri Ranjith Thampan.

9. Sri Kaleeswaram Raj and Sri Mathew, learned counsel appearing for additional impleaded respondents, have placed their arguments supporting the arguments of appellants. According to Sri Kaleeswaram Raj, Exhibit P-1 is an executive order and Union of India has competency to issue such executive order in terms of Article 73. According to him, once Exhibit P-1 was adopted, any deviation from that is nothing but arbitrary. Even presuming such deviation is possible for State Government, it has to be in the realm of reasonableness. Placing reliance on several judgments of the Apex Court and also this Court, contends that learned Single Judge was not justified in dismissing the writ petitions as standards in higher education would be affected with clause 4.4.1 of Exhibit P-7 and contends that criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced. He contends that when the very object of selection process was to identify candidates capable of pursuing intensive medical training at post-graduate level, relaxation of qualifying criteria undertaken at Exhibit P-7 cannot be approved as laudable policy of the Government because no positive results can be achieved if laxity creeps in the assessment of the merit of candidates. When need for common entrance test and minimum qualifying marks is absolutely necessary in order to achieve uniformity with reasonable variance in the assemblage of students so far as merit is concerned, there cannot be hostile discrimination between two groups and similarly placed candidates as it would be violative of Article 14.

10. Sri Titus Mani, learned standing counsel for Medical Council of India, places his arguments substantially supporting the appellants herein. According to him, the finding and conclusion arrived at by learned Single Judge is not only faulty but incorrect so far as the opinion that in the absence of Regulation or Rules of statutory provision fixing qualifying marks for Post-graduate Medical Entrance Examination, State can bring in legislation under Entry 25, List III of Schedule VII of Constitution, as the field is not occupied by any central legislation. According to him, the doctrine of repugnance and unoccupied field applies only with reference to Article 254 and will not apply to Article 246 of the Constitution. He contends that State cannot while controlling education in the State, impinge on standards in institutions for higher education and cannot adversely affect the standards laid down by Union of India. According to him, Regulations were brought into effect in 1971 by Medical Council of India revised up to 1988. Clause 9 of Regulation 2000 was substituted in the year 2000. If clause 9 is not in existence, Regulation of 1971 alone will cover the field which is substituted by AIPGMEE 2014 issued by NBE, an instrumentality of Union of India. State Government can fill up the gaps and fill up the rules by issuing instructions so long as it is not inconsistent with the Rules already in existence. General instructions giving minimum qualifying score in each category if read together with Section 25 of MCI Act, 1956, 1971 Regulation occupies the field completely and governed by Union list, therefore State has no authority or power to make impugned clause in the prospectus reducing the qualifying marks.

11. As against this, learned Government Pleader Sri Roshan took us through the contents of Exhibit P-1 bulletin and qualifying criteria at 14.1 of Exhibit P-1. According to him, Exhibit P-7 prospectus is issued by State Government by virtue of competency of the State under Entry 25 of List III and also Section 5(3) of the Service Quota Act and none of the arguments raised by the appellants are sustainable. According to him, even at Exhibits P-2 and P-3 there is clear indication that State has reserved its right to prescribe criteria for getting admission and same was clearly indicated at Exhibit P-7 prospectus. Annexures III and IV to Exhibit P-7 clearly indicates number of seats available in each category of service quota. According to him, when Exhibit P-1 is issued by NBE, it cannot be considered as a statute or legislation falling under Entry 66 of List I, therefore it is not binding on the State Government. When the result or the score of NBE was opted as a matter of convenience, there is no obligation on the part of the State to stick on to the qualifying marks indicated at Exhibit P-1. Additional affidavit and the counter-affidavit filed would clearly indicate the competency of the State so far as Exhibit P-7 and the circumstances why such competency was exercised.

12. Sri Hood, learned counsel arguing for contesting respondents contends that once 2010 Regulations of MCI came to be struck down, practically, there was no regulation in existence, therefore, State alone has competency to indicate the norms and not NBE. Exhibit P-7 alone has to be considered as process starts only with issuance of Exhibit P-7 as declared under Exhibit P-6 notification. According

to him, the score card alone is issued so far as State quota which indicates the marks or result. As Service Quota Act of 2008 is applicable so far as seniority is concerned, the selection list will be prepared only on the basis of seniority, thereafter the eligibility or qualifying marks are seen. Therefore, reduction of marks is not a mala fide exercise. He also contend that once admission process is over, necessary parties must be arrayed as parties and giving consent by them is of no assistance so far as legal issue is concerned. With the above arguments he sought for dismissal of appeals.

13. In reply, learned senior counsel Sri Kurian George Kannanthanam and Kaleeswaram Raj contended that hostile discrimination is the exercise done by virtue of clause 4.4.1 of Exhibit P-7 and factually, the impugned provision is not at all based on any data. Therefore, the contentions raised by respondent State and contesting respondents have to be rejected.

14. Several judgments are quoted across the bar on behalf of appellants as well as State and contesting respondents with reference to competency of Union of India and State in respect of Entries in Lists I and III as also with reference to Articles 245, 246 and 254 of Constitution of India. The judgments referred to by learned senior counsel and other counsel appearing for appellants as well as standing counsel for MCI and counsel supporting the stand of appellants are narrated below:

15. Reliance is placed in P.H. Paul Manoj Pandian Vs. Mr. P. Veldurai, with reference to executive powers of the State under Article 162. It is explained under what circumstances such executive power could be exercised by the State.

16. Reliance is placed in Harish Verma and Others Vs. Ajay Srivastava and Another, . It clearly indicates that there has to be over all vigilance to prevent sub standard entrance qualification for medical courses.

17. Unnikrishnan v. State of Kerala 2008 K.H.C. 618 is a Three Bench Judge judgment of this Court which says if a policy fails to satisfy the test of reasonableness then High Court can declare policy decision of the State as invalid. Even the rule can be stuck down in spite of the delay in challenging the validity of the rule.

18. Vinod, K.M. (Dr.) and others v. State of Kerala and others 2012 (2) K.H.C. 797 refers to amendment brought to the prospectus for admission to PG medical/ diploma i.e., withdrawing negative marking for inservice quota candidates. It was held that such withdrawal of negative marking to one group of candidates amount to discrimination as against other group of candidates. It was also held that mere reservation of power by Government to amend the prospectus at any time, does not mean that they can amend the prospectus at any time and even if such amendment is necessary, it must be reasonable without any arbitrariness and it should not suffer from discrimination. It was further held that merit in the rank list is to allot more creamy and coveted disciplines to more meritorious candidates which could be ascertained by the performance of a candidate in

common entrance test and it was held that State or University cannot deviate or meddle with the standard fixed by MCI when they are not entitled to deal with lowering of qualifying marks, they are not entitled to deal with the process of assessment or evaluation of merit between two groups of candidates.

19. *Modern Dental College and Research Centre and Others Vs. State of Madhya Pradesh and Others*, was a decision wherein it was held that even in professional unaided educational institutions and private unaided institutions have right to devise rational manner of selecting and admitting students, certain degree of State control is required since State has duty to see that high standards of education are maintained in all professional institutions. In this judgment, Education and Universities Act of M.P. which provides entire selection process for undergraduate, graduate and post-graduate medical/dental colleges was held as unconstitutional as it is contrary and inconsistent with the ratio laid down in *T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others*, .

20. *Hindustan Lever and Another Vs. State of Maharashtra and Another*, is with reference to Lists I, II and III and competency of State and Union of India. Their Lordships held in this case that if any matter is within the exclusive competence of the Union, it becomes a prohibited field for the State Legislatures, vice versa, when the matter pertains to List II, where exclusive competency of State Legislature exists, it prohibits Union Legislature to make any law with regard to the same. It was further held that concept of occupied field is relevant in the case of laws made with reference to entries in List III. On various entries of List III, both Union and State have competency to make law, however, subject to the provisions of Article 254 of the Constitution.

21. *Mohammed Riaz Vs. State of Kerala*, was also relied to stress upon occupied field of previous entries in List III with reference to Article 254. Their Lordships held as under:

"The impugned State Act stands with assent of the President in terms of Art. 254(2) of the Constitution. When a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by the Parliament or an existing law with reference to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. This provision deals only with possible repugnancy between provisions of laws made by the Parliament and the laws made by the State with reference to any particular entry in the Concurrent List, i.e. List III. Recourse to Presidential assent under Art. 254(2) is not curative of the absence of legislative competence in terms of the provisions of Art. 246 and Seventh Schedule of the Constitution. Therefore, the support of Presidential assent in terms of Art. 254(2) would not save the impugned provisions of the State legislation if the subject deal with therein falls within the Union List.

Among the conclusions in Gopal D. Tirthani's case (supra), it has been specifically laid down that the requirement of minimum qualifying marks cannot be lowered or relaxed contrary to the M.C.I. Regulations and though there could be a separate and exclusive channel of entry or source of admission for in-service candidates, there has to be only one common entrance test for determining the eligibility for post-graduation for in-service candidates and those not in service. In a State where there are more universities than one, the appropriate provision of Regulation 9(2) would apply. The principles of law emanating from the above include that the prescription as to the requirement of an entrance examination with a minimum eligibility bench mark to be acquired in that entrance test for post-graduate medical education is within the field covered by Entry 66 in List I and the competence of the State Legislature to make a law with reference to Entry 25 in List III would not enable it to make any such law encroaching on the field occupied by Entry 66 in List I. The M.C.I. Regulations framed under S. 33 of the IMC Act is insulated from any contradiction by any State legislation. Therefore, the State cannot make a law doing away with the requirement, for in-service candidates, to participate in the common entrance test for admission to post-graduate medical courses and obtaining the minimum eligibility requirement prescribed by the M.C.I. in the Regulations."

22. K. Manjusree Vs. State of A.P. and Another, is also a Three Judge Bench judgment of the Apex Court which pertains to Andhra Pradesh State Higher Judicial Services Rules, 1958. In this case, minimum marks both for written examination and interviews were provided. It was held that authorities making rules regulating the selection can prescribe by rules the minimum marks both for written examination and interviews but if the selection committee want to prescribe minimum marks for interview, it should do so before the commencement of selection process and cannot introduce a new requirement of minimum marks in interviews, just before commencement of interview, which had the effect of eliminating candidates who would otherwise be eligible and suitable for selection.

23. In Parmender Kumar and others v. State of Haryana and others 2011 K.H.C. 5024, it was held that State Government cannot alter the terms and conditions just a day before counselling was to begin so as to deny the candidates, who had already been selected, an opportunity of admission in the courses by introducing a change at a later stage.

24. In P.V. Indiresan Vs. Union of India (UOI) and Others, at paragraph 44, Their Lordships held as follows:

"The minimum eligibility marks for admission to a course of study is always declared before the admission programme for an academic year is commenced. An institution may say that for admissions to its course, say Bachelor's degree course in Science, the candidate should have successfully completed a particular course of study, say 10 + 2, with certain special subjects. Or it can say that the candidate should have secured certain prescribed minimum marks in the said

qualifying examination, which may be more than the percentage required for passing such examination. For example, if a candidate may pass a 10 + 2 examination by securing 35% marks, an institution can say at its discretion that to be eligible for being admitted to its course of study, the candidate should have passed with at least a minimum of 40% or 50% or 60%. Whatever be the marks so prescribed, it should be uniform to all applicants and a prospective applicant should know, before he makes an application, whether he is eligible for admission or not. But the "cut-off procedure followed by JNU during those days had the effect of rewriting the eligibility criteria, after the applications were received from eligible candidates. If the minimum eligibility prescribed for an admission in an institution was 50% and a candidate had secured 50%, he could not be denied admission, if a seat was available, based on a criterion ascertained after the last date for submission of applications."

25. In *Varghese Philip Vs. State of Kerala*, , Their Lordships held that it is not permissible to change the eligibility criteria for admission to a course by modifying or amending the prospectus after the last date fixed for submission of applications, as it is unjust, unfair and arbitrary.

26. In *E.P. Royappa Vs. State of Tamil Nadu and Another*, . Their Lordships held as under:

"Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any officer under the State. It is only an instance of application of the concept of equality enshrined under Article 14, therefore, Article 14 is genus and Article 16 is species."

27. In *Dr Preeti Srivastava and Another Vs. State of M.P. and Others*, at paragraphs 35, 52 and 53, Their Lordships held as under:

35. The legislative competence of Parliament and the legislatures of the States to make laws under Article 246 is regulated by the VIIth Schedule to the Constitution. In the VIIth Schedule as originally in force, Entry 11 of List II gave to the State an exclusive power to legislate on "education including universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III."

Entry 11 of List II was deleted and Entry 25 of List III was amended with effect from 3-1-1976 as a result of the Constitution 42nd Amendment Act of 1976. The present Entry 25 in the Concurrent List is as follows:

"25. 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."

Entry 25 is subject, inter alia, to Entry 66 of List I, Entry 66 of List I is as follows:

"66. Co-ordination and determination of standards in institutions for higher

education or research and scientific and technical institutions."

Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also co-ordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly while considering the cases on the subject it is also necessary to remember that from 1977, education, including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.

52. Mr. Salve, learned counsel appearing for the Medical Council of India has, therefore, rightly submitted that under the Indian Medical Council Act of 1956 the Indian Medical Council is empowered to prescribe, inter alia, standards of post-graduate medical education. In the exercise of its powers under Section 20 read with Section 33 the Indian Medical Council has framed regulations which govern post-graduate medical education. These regulations, therefore, are binding and the States cannot, in the exercise of power under Entry 25 of List III, make rules and regulations which are in conflict with or adversely impinge upon the regulations framed by the Medical Council of India for post-graduate medical education. Since the standards laid down are in the exercise of the power conferred under Entry 66 of List I, the exercise of that power is exclusively within the domain of the Union Government. The power of the States under Entry 25 of List III is subject to Entry 66 of List I.

53. Secondly, it is not the exclusive power of the State to frame rules and regulations pertaining to education since the subject is in the Concurrent List. Therefore, any power exercised by the State in the area of education under Entry 25 of List III will also be subject to any existing relevant provisions made in that connection by the Union Government subject, of course, to Article 254.

28. State and contesting respondents relied on The Joint Action Committee of Airlines Pilots Associations of India and Others Vs. The Director General of Civil Aviation and Others, which was in respect of the proposition how executive instruction made and issued have to be considered. The challenge was to Circular dated 29-5-2008. It was contended that the authority who had issued the circular had no competence, therefore cannot be enforced. It was held that in a democratic set up like ours, persons occupying key positions are not supposed to mortgage their discretion, volition and decision-making authority and be

prepared to give way to carry out commands having no sanctity in law. If any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, same would be patently illegal. Unless the authority which has been conferred with competency under the statute passes the order, it does not confer any legality to such executive orders. The authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed, otherwise it is nothing but violating the constitutional scheme. The authority who has vested with the power to exercise its discretion alone can pass the order and not otherwise.

29. In *Saurabh Chaudri and Others Vs. Union of India (UOI) and Others*, at paragraphs 60 to 63, Their Lordships held as under:

"60. In this context it is relevant to examine the relevance of an entry in the State List or Concurrent List.

61. "Education" appears both in Union List as also in the Concurrent List. The relevant entries in the Constitution are as under:

List I

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

List III

"25. 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."

62. An argument has been advanced that different interpretation is needed having regard to the shift of constitutional entry from List II to List III. One of us *T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others*, , had to say the following:

"Further, under clause (2) of Article 246 Parliament and subject to clause (1) the Legislature of any State are empowered to make law with respect to any of the matters enumerated in List III, Seventh Schedule and under clause (3) of Article 246, the Legislature of any State is empowered to enact law with respect to any of the matters enumerated in List II in the Seventh Schedule subject to clauses (1) and (2). From the aforesaid provisions it is clear that it is Article 246 and other articles which either empower Parliament or State Legislature to enact law and not the entries finding place in three lists of the Seventh Schedule. Thus the function of entries in three Lists of the Seventh Schedule is to demarcate the area over which the appropriate Legislatures can enact laws but do not confer power either on Parliament or the State Legislatures to enact laws. It may be remembered, by transfer of the entries, the character of the entries is not lost or destroyed. In this view of the matter by transfer of contents of Entry 11 of List II to List III as entry 25 has not denuded the power of the State Legislature to

enact law on the subject "Education" but has also conferred power on Parliament to enact law on the subject "Education".

63. Shifting of the entry from the State List to the Concurrent List is not, thus, relevant inasmuch the State in absence of any Parliamentary act has the legislative competence to enact a statute laying down reservation for entry in any course of studies including the medical courses."

30. In *Suraj R.K. Vs. Anil P. and Others*, , Their Lordships held as under:

"We are unable to accept this contention because, in our view nothing obliges the Government or the Commissioner of Entrance Examination to verify before issuing prospectus as to whether there are eligible members of the teaching staff of the Medical Education Service seeking admission and if so whether they are willing to join the course for which admission is offered. Similar is the position with regard to those serving the Health Service because Government cannot be expected to verify in advance availability of eligible candidates and if available to further verify whether they are interested to go for higher studies which is absolutely a matter of their choice."

31. From the above submissions and principles on behalf of appellants, State and contesting respondents, one has to see what is the legal position and the position factually.

32. Let us see whether factually State was justified in reducing qualifying score. Deputy Secretary, Health and Family Welfare has filed a counter-affidavit on behalf of State Government supporting their stand opposing the claim of petitioners/appellants indicating their stand before learned Single Judge. Averments from paragraph 8 onwards are relevant. According to them, Government had to introduce service quota with the sole intention to ensure services of doctors in health care institutions under Government centre for at least a period of five years after completion of their post-graduation course. They have specifically contended that Government is facing acute shortage of faculties, especially specialists like General Medicine, General Surgery, Anesthesia, Psychiatry etc. in Health Services Department, therefore, taking into consideration due care of general public, who have no other facility than public health institutions, Government introduced clause 4.4.1 in the prospectus under Exhibit P-7 to have optimum utilisation of service quota seats and to tide over dearth of specialists in Health Services Department. Primary, secondary and tertiary health care to the poor and downtrodden sections of society is given in Health Services Department and Medical Education Department. Among these two, Health Services Department is the first line of contact concerning common man. Apart from these two, Medical Services Department and Insurance Medical Services Department also need specialists. Totally 835 number of Primary Health Centres are in existence. Smallest rural unit covers a population of every 30000 in general areas and an average of 20000 population so far as tribal areas. Apart from this, Community Health Centres, 213 in number, are situated at secondary

level. Post-graduate Medical Officers in the above subjects are posted in each CHCs. Apart from this, there are 65 First Referral Units (FRUs), therefore, including specialists totally there are about 3681 posts in the cadre of Medical Officers, against which 3234 posts are occupied. Vacancy position is, 73 posts in PHCs, 72 posts in CHCs and 302 posts in FRUs. To substantiate the above vacancy position, one has to understand whether this vacancy position is with reference to specialists alone or other doctors also. When a specific question was put to learned Government Pleader, he fairly submitted, vacancies of 73 posts in PHCs 72 posts in CHCs and 302 posts in FRUs may not be specialists alone. One has to remember, these specialists include non clinical subjects like Micro Biology, Anatomy, Physiology, Forensic etc. Judicial notice can be taken to the fact that normally no candidate comes forward to join these subjects either at degree level or diploma level of PG course. Split up figure of ordinary doctors and specialists is not placed on record. In other words, according to respondent State, they have lowered qualifying marks in order to see more number of candidates are available, so that, no service quota seats fall vacant. According to them, final benefit of the entire exercise would come to common man, who depends on public health care system. Lowering of marks is necessary as service quota candidates may not be getting sufficient time to prepare for the entrance examination when compared to open category candidates. Only few candidates would be available having regard to the vacancy position in service quota in the past three years. In order to remove the deficit, they had adopted the present exercise, which is under challenge. They have also furnished vacancy position in Degree, Diploma and Super Speciality courses for the years 2011, 2012 and 2013 as under:

33. Therefore, according to them, they have introduced clause 4.4.1 in Exhibit P-7 prospectus. According to them, State has legislative competency to fix liability criteria in view of Act 29 of 2008, i.e., Section 5(3) of the Act. According to them, the Act recognizes competency of the State and its authorities to fix eligibility through the prospectus each year. Harish Verma's case (supra) is not applicable, according to them. Even otherwise, in Exhibit P-1 bulletin published by NBE clear indication is given that selection and admission to PG seats is subject to fulfilling the admission criteria, eligibility, and medical fitness as prescribed by respective Universities, Medical Institutions, MCI, State and Central Government. Therefore, competency of the State Government is recognised even under Exhibit P-1. They further contend that MCI itself recognizes that qualifying marks can be lowered, if sufficient number of candidates are not available in any category. However, they have not mentioned that this lowering of marks is with the consent of Union of India. This aspect is not at all considered by the respondents. According to them, the very idea of service quota was envisaged by Government for providing opportunity to the doctors, who serve Government, to improve and upgrade their carrier prospects. This would not only benefit the common public, but also the service candidates to secure seat.

34. Long years of service in the Department concerned all service quota

candidates acquire good practical experience and skills. They have no further opportunity to exhibit their knowledge in practical experience, therefore, joining PG course would enhance their academic knowledge. It is a fact that doctors who work round the clock get little time to update their academic knowledge whereas junior doctors having less period of service are equipped with better academic knowledge than the seniors. In order to give maximum benefit to senior doctors, not only the selection process is based on the marks of entrance, but is also based on the seniority. By adopting this method, once they get qualified in the entrance examination, depending upon their seniority, they get Diploma or Degree or Post-graduation faculty depending upon the ranking. In other words, after listing of the candidates, who get benchmark in the qualifying examination, final selection list will be prepared as per the seniority. Therefore, it is possible that a person, who gets better marks with less experience can find his/her place down the select list and a person with less meritorious marks can find better place because of seniority. This is not what is under challenge. The challenge is with regard to lowering the qualifying benchmark in the entrance examination for all categories, i.e., general, physically handicapped and OBCs so far as service quota.

35. During the pendency of appeals, in one of the appeals, first respondent has filed additional affidavit as directed by this Court. As per this, Exhibit P-7 was issued on 18-2-2014. Results of AIPGMEE was published on 7-2-2014. As per Exhibit P-7, a service quota candidate can apply for PG, Diploma or Degree only if he satisfies the eligibility criteria mentioned in clause 4 of the prospectus. Qualifying in this examination will not by itself make a candidate eligible for admission under State quota, as it is only one of the eligibility criteria. It includes academic, nativity, age and qualifying examination. Clause 8 of the prospectus refers to separate application and selection procedure. Unless the eligibility criterion is satisfied as stated above, such candidate cannot be considered. Clause 7.1 of Exhibit P-7 refers to satisfaction of other minimum eligibility conditions like minimum qualifying service of two years rural service and difficult rural service, so also non-availing of PG Degree qualification under service quota etc. as additional criteria for considering the application. Unless application submitted by a candidate is completed in all respects as indicated at Exhibit P-7, State Government will not be able to identify the eligible candidates. After scrutinizing validity of application, list of eligible candidates will be prepared, therefore, as on 18-2-2014, they claim they had no opportunity to identify the eligible candidates as per the prospectus. Therefore, they were not aware of eligible candidates before 18-2-2014.

36. State has also placed on record details of total number of seats available in Government Medical Colleges. There are 517 seats in degree and 159 seats in diploma courses. Out of this, 261 PG Degree seats and 80 Post-graduate Diploma seats are available for State quota and the balance will be allotted to All India quota. State Government, as per 2008 Act, has earmarked 79 PG Degree seats and 23 PG Diploma seats for in-service candidates. The number of in-service

candidates available prior to Exhibit P-1 prospectus, i.e., before lowering of qualifying marks was 298 and post-Exhibit P-7 is 461 candidates. This is in all four services, i.e., Health Services, Insurance Medical Services, Medical Education Services and Municipal Services. Allocation of seats in different streams on service quota keeps changing every year, i.e. by rotation. According to them, they were not aware of details of candidates, who were qualified without lowering of marks as per prospectus. It is also placed on record that on 22-11-2013, prospectus committee met and discussed what clauses to be included in the prospectus for the year 2014. The meeting was attended by Secretary to Government, Health and Family Department, Director of Medical Education, Director of Health Services, Director of Insurance Medical Services, Joint Commissioner for Entrance Examination etc. In the meeting one of the points discussed was, to fix a separate minimum eligibility marks for service quota candidates if sufficient number of candidates fail to secure minimum marks. A draft was prepared on 21-1-2014, i.e., details to be mentioned in the prospectus, which was sent for approval of the Government Director of Medical Education, by a note, requested the Government to include a clause in the prospectus indicating their intention to reduce qualifying marks in case sufficient candidates do not qualify in the entrance examination. However, for the sake of brevity, when the prospectus was published, clause 4-4.1 was included indicating why the lowering of marks are done. They claim they have valid reason for lowering of marks for service quota candidates.

37. With the above details on record, it is very clear that till a meeting of prospectus committee met in November, they did not even think of relaxing percentage of marks in qualifying examination. According to them, as on 18-2-2014, they did not have details of candidates, who were qualified in the entrance examination. Based on past experience, having regard to number of vacancy of posts existing in various units as explained above and also on the apprehension that sufficient number of candidates in service quota may not secure benchmark in the qualifying examination, they lowered the marks. On 1-2-2014, results were announced. They have not mentioned anywhere as per Exhibit P-1 bulletin whether separate State list was received by them prior to Exhibit P-7 or not. As per Exhibit P-1, all India list and also State list will be prepared and State list will be furnished to the authorities referred to in Exhibit P-1. As a matter of fact, learned Government Pleader was fair enough to admit that such list was obtained. Meeting in November indicates, only in case of necessity, when sufficient number of candidates were not available, then alone lowering of marks was requested. By the time Exhibit P-7 came to be published, they had taken a decision to lower percentage of marks in qualifying examination. They contend that as on 18-2-2014, they did not know the details of candidates, who qualified in the entrance examination, therefore, there are no mala fides in their exercise to benefit their candidates. When Director of Medical Education requested to lower marks only if sufficient number of candidates were not available, even without making the exercise of knowing whether sufficient in-

service quota candidates were available or not, having regard to the number of candidates qualified, i.e., 298 as against 79 Degree seats and 23 Diploma seats in Post-graduation, we fail to understand, in the exercise undertaken, where is application of mind on the part of the authorities? In fact, they have expressed apprehension of non-availability of sufficient number of candidates. In the past three years, so far as 2013, there was no vacancy of any seats in PG courses. Only in 2011 and 2012 vacancies were there. It is an admitted fact that if there are insufficient number of candidates in a particular service quota, it would go to Health Services. We do not even know the seats fell vacant during 2011 and 2012 were in the faculty of Medicine, Surgery and Anesthesia, Paediatrics etc. It is also possible that those seats were in non clinical subjects like Anatomy, Bio-Chemistry, Micro Biology etc. Therefore, there is total lack of application of mind before issuance of Exhibit P-7, so far as clause 4.4.1 is concerned. Whether this lack of application of mind will come in the way of approving the exercise of the Government? It is well-settled that a person entrusted with a discretion, must direct himself properly in law to use that discretion as a normal and prudent person. The authority must call its attention to the matters which it is bound to consider. Irrelevant matters cannot be considered. If the authority makes such exercise, it can be said that it was acting reasonably. It is well-settled that a decision-maker must make in mind with uppermost thinking, i.e., relevancy and reasonableness. Failure to adhere to such consideration would lead to a decision being challenged. Whether there is competency to exercise such discretion and while exercising such discretion whether there is reasonableness in the decision-making process has to be seen. There is total lack of application of mind on the part of the authorities so far as factual situation.

38. In the light of Exhibit P-1 bulletin published by NBE prescribing qualifying marks in the entrance examination conducted by NBE, an all India examination, approved by Central Government, whether State Government has power to issue prospectus diluting the eligibility criteria by reducing qualifying marks in the entrance examination?; What happens so far as minimum qualifying marks in the light of 2010 regulations being declared as unconstitutional by the Supreme Court in C.M.C. Velloor's case (supra)?; Whether State Government has competency to lower minimum marks (standards) as indicated in the prospectus, which is contrary to Exhibit P-1 issued by NBE with the approval of Union of India?; Whether Service Quota Act of 2008 empowers State Government under Section 5 of the Act to incorporate eligibility criteria less than what is prescribed for members of open category?; and whether State has executive power to incorporate such provisions by an executive order invoking power under Article 162 of the Constitution of India in the light of Kerala University of Health Sciences Act, 2010 (for short, "KUHS Act")?

39. In Exhibit P-1, it is stated, NBE is established by Government of India in 1975 with the object of improving the quality of medical education by establishing high and uniform standards of post-graduate examinations in modern medicine on All India basis and utilising existing health care

infrastructure for capacity building. It is also interested in conducting entry and exit examinations at post-graduate, post-doctoral level and licensing examinations as Screening Test for Indian Nationals with Foreign Medical Qualifications. So far as Exhibit.P-1, it is notified by Ministry of Health and Family Welfare, Government of India. It is conducting competitive entrance examination to All India 50% quota for MD/MS/Diploma Seats-2014. It further says entrance examination will be governed by the Rules and Regulations specified by the Government of India, Ministry of Health and Family Welfare/Directorate General Health Services/and orders of the courts.

40. Under sub clause 2.2 of clause 2--General Instructions (Terms and Conditions), it is clearly indicated that applicants have to note that appearance in AIPGMEE does not confer any automatic right to secure a post-graduate MD/MS and Diploma Seat. The selection and admission to Post-graduate courses in any medical institutions recognised for running MD/MS/Diploma courses as per Indian Medical Council Act, 1956 is subject to fulfilling the admission criteria, eligibility, medical fitness and such criteria as may be prescribed by the respective Universities, Medical Institutions, Medical Council of India, State/Central Government.

41. Sub heading 3 refers to eligibility criteria for AIPGMEE 2014. Clauses 3.1 and 3.3 refer to the fact that candidate must be an Indian citizen and must hold MBBS degree from a recognised medical college or a foreign medical degree included in the schedules to the Indian Medical Council Act.

42. Sub heading 9B is relevant for the purpose of present case as it refers to seats other than All India 50% quota seats in various States. It makes reference to the judgment in CMC Velloor pronounced on 18-7-2013 by Apex Court quashing NEET. The following are the relevant clauses, which read as under:

? AIPGMEE 2014 shall be conducted by NBE for filling of the All India 50% quota of MD/MS/Post Diploma seats and other States/universities/medical institutions may use the results of AIPGMEE 2014 at their discretion for admission to seats under their control.

? The concerned States universities/institutions that have decided to use the results of AIPGMEE 2014 are advised to widely publicise that they shall be utilising the result of AIPGMEE 2014 to fill up the Medical Post-graduate seats under their control and no separate competitive examination will be conducted by them for admission to academic year 2014-15.

? The State Authorities namely the Director of Medical Education of the State/ Principal Secretary of Medical Education/Vice-Chancellor/Principal/Superintendent of Institute or any other competent authority may approach the Ministry of Health & Family Welfare, Govt. of India/for obtaining result and data of the candidates for AIPGMEE 2014 from National Board of Examinations.

? NBE shall be providing only the data of candidates and their results without

applying the reservation prevalent in these particular States. The merit list/category wise lists for the State/University concerned shall be generated by the State itself as per their qualifying criteria, applicable guidelines and State reservation policies.

43. Under sub heading 14.1 qualifying criteria is mentioned wherein minimum qualifying score in each category was fixed, which reads as under:

Minimum qualifying score in each category is as follows:

The results of AIPGMEE 2014 can be made use of by other States, Universities, Medical Institutions at their discretion for admission to seats under their control. This means, other than All India quota seats, which is 50%, the result of NBE can be made use of to admissions in other States also. It further emphasises the necessity to widely publicise that there shall be utilisation of result of AIPGMEE 2014 to the field of degree/diploma medical post-graduate seats under their control and no separate competitive examination will be conducted by them for 2014-15. It also says how different authorities of the State can approach the Ministry of Health and Family Welfare, Government of India to obtain results and data of candidates of AIPGMEE 2014 from NBE. It also makes it clear that only the data of candidates and their results without applying any reservation policy available in their particular State will be provided by NBE. Therefore, the merit list/category wise list for the State/University concerned shall be generated by the State itself in accordance with the qualifying criteria, applicable guidelines and state reservation policy.

44. In terms of directions above, Exhibit P-2 Government Order came to be issued on 1-11-2013. Following are the relevant clauses:

? The admission to Post-graduate Medical and Dental courses in the Medical/Dental Colleges/Institutions in the State for the academic year 2014-15 will be on the basis of the All India PG Medical Entrance Examination 2014 (AIPGMEE 2014) conducted by National Board of Examinations (NBE). The PG Medical/Dental aspirant candidates from the State shall participate in AIPGMEE 2014 and obtain minimum eligibility marks as prescribed, for getting admission to Post-graduate Medical/Dental Courses.

? The Prospectus for admission to Post-graduate Medical/Dental courses will be issued by the Director of Medical Education with the approval of the Government. The Commissioner for Entrance Examinations will be the authority for conducting the admission and allotment in the State Quota seats in PG Degree/Diploma courses for the year 2014 and the Director of Medical Education will conduct admission and allotment to MDS course, observing the prevailing reservation principles for admissions.

? The Director of Medical Education will issue separate Notification regarding the schedule of application/examination of AIPGMEE 2014 as prescribed by the National Board of Examinations and the necessary instructions to the PG Medical/

Dental aspirant candidates, through the Official Website, Print and Visual Media.

It clearly indicates candidates from the State must participate in AIPGMEE 2014 and obtain minimum eligibility marks as prescribed to get admission. Prospectus for admission also will be issued by Director of Medical Education with the approval of Government and Director of Medical Education will conduct admission and allotment observing the prevailing reservation principles for admissions.

45. In the above paragraphs of Exhibit P-2, there is no indication that condition of minimum eligibility marks as prescribed would mean other than the qualifying score mentioned at Exhibit P-1. Apparently, there was no separate Government Order indicating different qualifying marks to be scored by in-service candidates in NBE 2014. Director of Medical Education shall issue prospectus which indicates that admission and allotment will be subject to reservation policy prevailing in the State.

46. At Exhibit P-3, it is mentioned that admission to medical PG aspirants from the State of Kerala must participate in AIPGMEE 2014 and obtain minimum eligibility marks as prescribed for getting admission to post-graduate medical courses. Prospectus for admission to post-graduate course shall be issued by the Director of Medical Education. On careful reading of Exhibits P-2 and P-3, at no point of time, there is any indication that minimum eligibility marks shall be something else other than Exhibit P-1. At Exhibit P-1, qualifying marks referred as qualifying score for the examination and in Clause 9B of Exhibit P-1 there is an indication that score in the examination can be made use of by various States and Universities to fill up the seats available other than All India quota. Apparently, examination was conducted in November 2013 and results were announced on 1-2-2014. Thereafter, Exhibit P-6 Government Order approving the prospectus incorporating certain modification as per Exhibit P-7 came to be issued. Clause 4.4.1 is the relevant provision which speaks of totally a different qualifying mark for the first time at Exhibit P-7. The court has to see whether in the light of Exhibit P-1 State has competency to modify the qualifying marks criteria so far as in-service quota candidates.

47. According to appellants in the light of Exhibit P-1 which was adopted by State Government in unequivocal terms, State was not justified in lowering down the qualifying marks which is not only without competency but arbitrary and unreasonable. According to State and contesting respondents at Exhibits P-2 and P-3 they have clearly mentioned the qualifying eligibility marks "as prescribed". Therefore, in the prospectus as the same being the commencement of admission and selection process, they had competency to modify the marks. So far as factual situation, they had not indicated at Exhibits P-2 and P-3 such intention, we are afraid, reading of Exhibits P-2 and P-3 by any stretch of imagination will not take us to conclusion that it was made clear as early as 1-11-2013 and 5-11-2013 that so far as in-service quota, Government is intending to indicate separate qualifying mark or bench mark.

48. Then coming to competency of State to incorporate clause 4.4.1 as part of prospectus at Exhibit P-7, we have to refer to various enactments. Section 33 of Indian Medical Council Act, 1956 empowers the council constituted under the Act to make regulations generally to carry out the purposes of the Act. Sub-clause (j) refers to the courses and period of study and of practical training to be undertaken, the subjects of examination and the standards of proficiency therein to be obtained in Universities or medical institutions for grant of recognised medical qualifications. It also refers to conducting of professional examinations, qualifications of examiners and the conditions of admission to such examinations at sub-clause (1) of Section 33.

49. Admittedly, in Medical Council of India Regulations of 2000 Regulation 9 refers to the procedure for selection of candidates for postgraduate courses. It came to be substituted by 2010 Regulations prescribing common entrance examination of NEET, a uniform examination for the entire country. This came to be declared as unconstitutional by Honourable Apex Court in CMC Velloor's case by judgment dated 18-7-2013. Regulation 9 of 2010, by substitution, disappears from the field with the quashing of said provision by the Apex Court. As Regulation 9 was by way of substitution, previous Regulation 9 will not automatically revive. This is the law declared by the Apex Court in *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, , paragraph 20, *Zile Singh Vs. State of Haryana and Others*, and *The Joint Action Committee of Airlines Pilots Associations of India and Others Vs. The Director General of Civil Aviation and Others*, Para 23. When new regulation ceases to exist by virtue of judgment of the Apex Court and in the absence of revival of earlier Regulation 9 of 2000, one has to see what happen to 2012 Regulations. So far as 2012 Regulations, being a sub regulation under Regulation 9, modification to earlier Regulation 9 by virtue of 2010 Regulations also will not survive. Therefore, so far as qualifying score, MCI Regulations are silent for academic year 2014-15.

50. According to State of Kerala and contesting respondents, as on today, there is no regulation, rule or statutory provisions which enable appellants to contend that fixation of eligibility marks for PG medical entrance is covered by any legislation under Entry 66, List I of Constitution. Apparently, the controversy before us calls for consideration of Entry 66 of List I and Entry 25 of List III of Constitution of India. Entry 66 refers to competency of Union of India to lay standards of education in higher education level. Entry 25 of List III refers to education where both Union as well as the States have the power to legislate on education including medical/technical education, but, however, this is subject to the provisions in Entry 66 of List I which deals with laying down the standards in institutions for higher education or research and scientific and technical institutions as also co-ordination of such standards.

51. Admittedly, in the present case, we have to see whether there is any legislation under Entry 66. Apparently, it refers to co-ordination and determination of standards in institutions for higher education or research and

scientific and technical institutions. Entry 25 in List III is subject to the provisions in Entry 66. Admittedly, Exhibit P-1 is not part of the Regulations of MCI. But, however, it is issued by the Ministry of Health and Family Welfare, Government of India. We have to see whether it has support of Article 73 of the Constitution, which reads as under:

73. Extent of executive power of the Union.--(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend--

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not save as expressly provided in this constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

52. Articles 73 and 162 of Constitution deals with scope of executive powers of Union of India and the State respectively. These two Articles are primarily concerned with executive powers of Union of India on one hand and State on the other hand. It is well-settled that powers of Union executive or State executive, do extend to matters upon which they are competent to make legislation and they are not confined to matters over which legislation has been passed already. It would not be possible to frame an exhaustive definition of what executive functions mean and implies. Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. But in the guise of executive functions, neither the Union nor the State executive can go against the provisions of constitution or of any law. This is made clear under Article 154 of the Constitution. It does not flow from this Article that, for executive to function there must be a law in existence and powers of the executive are limited merely to carry out these laws.

53. In the present case, one has to consider Exhibit P-1 versus Exhibit P-7. Exhibit P-1 is issued with the approval of Union of India, i.e. Ministry of Health and Family Welfare. In the absence of Regulations of MCI as on today, which governs the filed, one has to consider Exhibit P-1 as the exercise of executive power and validity of the same referable to Article 73.

54. Then the question comes whether it is obligatory for State Government to follow the same in letter and spirit. In Exhibit P-1 itself it is made clear that result of NBE can also be adopted for seats available in various States other than

All India quota seats. In toto, Exhibit P-1, especially with reference to qualifying score in examination was adopted by State of Kerala as per Exhibits P-2 and P-3. Sections 5(1), (2) and (3) of Act 2008 read as under:

5. Procedure for selection.--(1) The Government may set apart seats not exceeding forty per cent of the total seats available to State quota in an academic year, for selection of Medical Officers under service quota considering their service under the Government for admission to Post-graduate Medical Courses in the Medical Colleges of the State in such manner as may be prescribed.

(2) The academic qualification for admission to the Post-graduate course shall be M.B.B.S. Degree with minimum fifty percent marks and the other qualifications shall be such as may be prescribed.

(3) The details of eligibility for admission, the duration of courses, allotment, fee to be paid, reservations of seats and such other details shall be published every year in the prospectus before the commencement of admission.

Section 5(1) only refers to allotment of 40% of total seats for the State in service quota candidates serving under various categories. Section 5(2) indicates that academic qualification for admission to the post-graduate course shall be MBBS degree with minimum fifty per cent marks and other qualifications shall be such as may be prescribed. Section 5(3) indicates the details of eligibility for admission, the duration of courses, allotment, fee to be paid, reservations of seats and such other details shall be published every year in the prospectus before the commencement of admission. None of these sub-sections refer to qualifying marks in the entrance examination. Other than qualifying marks, various qualifications so far as service quota like duration of service etc. are also taken into consideration. Section 25 of KUHS Act is also not applicable in the present case as the authority under the said enactment is the University. Exhibit P-7 is not issued by the University.

55. It is a well-settled position as Entry 66 deals with laying down standards in institution for higher education etc. by virtue of Entry 25 in List III State while making admissions may lay down other additional norms for admission or regulate admissions so long as it does not adversely impinge the standards prescribed by the Union of India. Clause 4.4.1 of Exhibit P-7 prospectus does not find its source to Service Quota Act or KUHS Act. It is also executive order. In the light of Exhibit P-1 which was adopted unequivocally at Exhibits P-2 and P-3 by the State, the State was not competent to change the qualifying score for in-service quota candidates in the middle of the game, after declaration of results of NBE. In detail we have discussed above non application of mind by the authority concerned at the time of incorporating clause 4.4.1 at Exhibit P-7.

56. Learned counsel Sri Hood arguing for contesting respondents contends that as first round admission is over, the appeals are bad for non-joinder of necessary parties because none of the candidates who have secured admission are made

parties. It is relevant to mention here that during the course of arguments, when appellants insisted for granting stay of judgment of learned Single Judge, Sri Hood opposed the same, therefore a conditional stay was granted which was conceded to not only by State but also Sri Hood. He is estopped to argue regarding non-joinder of necessary parties.

57. When State Government has adopted Exhibit P-1 by notifications at Exhibits P-2 and P-3 and results were announced on 1-2-2014, there is no justification to change the rules, i.e. Including clause 4.4.1 at Exhibit P-7. This is nothing but interfering with the executive orders issued under Exhibit P-1 which was adopted at Exhibits P-2 and P-3. Nothing is spelt out at Exhibits P-2 and P-3 which indicates that State Government has reserved such a right. Having adopted qualifying score of AIPGMEE 2014, it is nothing but changing their own decision to follow the qualifying score mentioned at Exhibit P-1 by introducing clause 4.4.1 at Exhibit P-7. When the very selection process is to identify candidates capable of pursuing higher medical training at post-graduate level, any exercise to meddle with the process of achieving the said goal is nothing but disastrous exercise. In the above circumstances, State has no competency to introduce clause 4.4.1 at Exhibit P-7.

In the light of above observations and reasoning, judgment of the learned Single Judge impugned in these appeals deserves to be set aside. Accordingly, set aside by allowing the appeals.

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