

(1990) 08 MP CK 0012
In the Madhya Pradesh High Court
Case No : M.P. No. 1388 of 1989

Rahul Dixit and Others

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 09-08-1990

Acts Referred:

All India Council for Technical Education Act, 1987 — Section 10
Conduct for Entrance Tests and Admission Rules — Rule 1.7.1, 2.5.1(A), 2.5.1(B),
2.5.7, 2.5.8
Constitution of India, 1950 — Article 14, 15(4), 162, 162(2), 163

Citation : (1991) ILR (MP) 595 : (1990) JLJ 613 : (1990) MPJR 477 : (1990) 35
MPLJ 799 : (1990) MPLJ 799

Hon'ble Judges : T.N. Singh, J; R.C. Lahoti, J; K.K. Varma, J

Bench : Full Bench

Advocate : Madhukar Rao, for the Appellant; P.N. Kelkar, D.A.G., R.D. Jain and
H.D. Gupta for respondent Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

T.N. Singh, J.

Six petitioners have made a common cause staking their claim to admission in the State Engineering Colleges for the academic session 1989-90. They all appeared in the Entrance Test of 1989, conducted by the Professional Examination Board, Madhya Pradesh (hereinafter, "Board", third respondent) and secured marks in the range of 47 to 48.7 percent. When hearing of the petition was taken up on 3-5-1990, it appeared that there was conflict between two Division Bench decisions of this Court and it was also found that the two views were irreconcilable. This is how this larger Bench has taken seisin of the matter.

We may immediately refer, therefore, to those decisions. Indeed, we may observe also that the petitioners relied on the decision rendered by the Division Bench at the Main Seat on 24-4-1990 in the case of the Manoj Verma and Ors. v. State of Madhya Pradesh, M. P. No. 4916 of 1989, and submitted that their case

being same as that of the petitioners in that case, they were entitled to same relief. It is true that a direction was made in that case against the respondents to admit the petitioners in the 1st year Engineering course by providing additional seats for them, if necessary. But, it is equally true that another Division Bench of this Court, at Indore, refused to grant the same relief to similar petitioners by a common order, passed on 16-4-1990, in four writ petitions (M. Ps. Nos. 1580/89, 16/90, 25/90 and 63/90) and one Contempt matter (M.C.C. No. 263/89, Manoj Sood v. State of M. P.). This decision shall be hereinafter referred, for the sake of convenience, as Manoj Sood (No. 2) inasmuch as the Contempt matter arose out of the decision rendered on 1-8-1989 Manoj Vs. State of M.P. and Another,) to be referred hereinafter as Manoj Sood No. 1. Be it also mentioned that A. G. Qureshi, J. was a party to both decisions rendered at the Indore Bench. It may also be noted that before the Main Seat in Manoj Verma's case, the subsequent Indore Bench decision dated 16-4-1990 (Manoj Sood No. 2) does not appear to have been cited.

For conducting annual Entrance Test, the Board, admittedly, publishes a booklet, containing, what is described as "Rules of Conduct for Entrance Tests and Rules of Admission" (hereinafter, "Rules"). Before us are placed separate sets of Rules published in 1988 and 1989 admittedly framed under Article 162 of the Constitution. It has also come on record that the Board came into existence in virtue of the Gazette. Notification dated 19-4-1982 and obviously, it has since been discharging its function of holding the requisite Entrance Tests for students of "Engineering group" and "Medical group". It appears in the 1989 Rules that a total number of 1700 seats were available for admission in the first year of B.E. course of State Engineering Colleges, to be filled up categorywise: General-886; Scheduled Caste-229; Scheduled Tribe-401; Military Personnel-84; Freedom Fighter-50; Technical 50; Handicapped-22 (separate quota, in part).

Shortly put, petitioners' case is that in Annexure P/1, list published by the Director of Technical Education, Madhya Pradesh, as many as 180 "failure candidates of 1988 PET" have been selected for admission bypassing their claim illegally and arbitrarily. It is also their case that as per Annexure R/2 of the return of the respondents, which is order dated 11-10-1989 of the State Government, they were entitled to admission as the State Government had reduced the qualifying marks for "general" category candidates taking 1989 test. All of them had secured more than 47% marks and were accordingly qualified for admission under that order.

Respondents have averred, on the other hand, that all the "Merit candidates" of 1989 batch of "general" category, entitled to admission as per Rules, were duly selected and another 156 candidates of the waiting list of the same batch also offered admission, but the petitioners being below them, they could not be accommodated. It is admitted by respondents that as against their entitlement of 886 seats, a total number of 1155 candidates of "general" category have been selected for admission in State Engineering Colleges for the current academic

year and that could be done because of vacancies being available in the "reserved" categories. The break-up given in Annexure R/3 is as follows:

(a) First Merit List .. 843 (b) Waiting List of general category .. 129 (c) PET 1988 candidates .. 120 (d) Candidates of 1989 with 3% relaxation .. 110 in qualifying marks. _____ 1,202 Less - admitted in MACT (Central 47 Government Institution). _____ 1,155 _____

However, the datewise position of selection is better explained in Annexure R/4 showing, vacancies available and selections made datewise. Vacancies are noted as on 18-9-1989, 21-9-1989, 7-10-1989 and 27-10-1989 and admissions, or, for that matter, selections are also shown on respective dates, reaching at the final position on 6-11-1989 that 1155 seats in "general" category were duly filled up. To sustain the basis for the terraced selection, the dates are matched with Government orders passed on 8-9-1989 and 11-10-1989, which have come on record as annexures R/1 and R/2 of the Return. It has been averred and established on the basis of those orders, and indeed that is also the finding recorded in Indore Bench's order in Manoj Sood (No. 2), that the results of the Entrance Test of 1989 had shown a peculiar pattern in that sufficient number of candidates securing qualifying marks were not available in all categories. The position which appears undisputed on facts is that it was found possible to select for admission candidates of "general" category, beyond their entitlement, as a result purely of diversion of seats of the reserved categories on account of sufficient number of candidates of those categories being not available despite repeated relaxations given in two stages. What also appears to us unimpeachable is that the cut off qualifying marks for "general" category of candidates selected for admission at the second stage matched availability of seats and that turned out, under fortuitous circumstances, to be 439 marks. Petitioners have disclosed marks obtained by them in their rejoinders the highest is 438, secured by petitioner No. 2 Prabal Saxena: others have secured still lesser marks, the minimum being 429.

Petitioners' counsel Shri Madhukar Rao has pressed mainly three contentions, complaining infringement of Article 14 of the Constitution by the respondents. His first contention is that the "failed candidates" of 1988 batch are not entitled to preference over petitioners who had taken examination in 1989 and their entitlement is to be determined under the 1989 Rules read with Government order dated 11-10-1989 (Annexure R/2). Secondly, he contends, the "failed candidates"- could only have been admitted in "additional seats" as per direction made by this. Court on 1-2-1989 in Manoj Sood (No. 1) and respondents having failed to do so, they have , encroached upon the rights of the petitioners in violation of the judicial mandate. Thirdly, he contends, it would be a case of blatant discrimination if the petitioners' entitlement is overlooked and ignored in favour of the "failed candidates" who ought to have taken a fresh test as proposed in the same decision. However, relying on Manoj Verma's decision, rendered at the Main Seat on 24-4-1990, hereinabove referred, Shri Rao also

submitted that in the alternative petitioners are at least entitled to a mandamus against the respondents, directing them to create additional seats and to admit the petitioners therein.

Before proceeding to discuss the relevant decisions of this Court, we propose to extract below the relevant Rules of 1989. Chapter I of the Rules is captioned, "Rules for Conduct of Entrance Test for 1989" and Chapter II is similarly captioned to deal with "admission to State Engineering Colleges, Polytechnics and M.A.C.T., Bhopal 1989-90". We propose to extract few rules of Chapter II which we consider of immediate relevance to the controversy but we may refer first to the relevant provision of Chapter I also. As per Rule 1.7.1. candidates seeking admission in 1st year B.E. in a State Engineering College have to appear in only three subjects (Physics, Chemistry and Mathematics) of 12th Standard of (10 + 2) scheme, Chapter II:

"2.2. SEATS AND COURSES AVAILABLE. - The location of the colleges, availability of course of studies and the number of categorywise seats available for admission are indicated in Annexure A. The allocation of seats indicated for various courses is maximum and may be modified if necessary as may be warranted.

3. RESERVATION OF SEATS. - Reservation of seats for certain categories have been made for admission to the colleges and the percentage of seats so reserved has been indicated below and details given in Annexure A.

5. MODE OF SELECTION. - 2.5.1(A) An entrance examination shall be conducted by the Professional Examination Board, Bhopal for selection of candidates for admission to Engineering Colleges/Polytechnics for courses as indicated in Annexure-A.

Note:- 1. The merit list will be prepared by the Professional Examination Board coursewise and categorywise on the basis of performance of the candidates in the entrance examination.

Those candidates of reserved category who have obtained more marks than the marks of the last candidates qualifying for admission under General Category but could not be admitted against seats reserved for their respective category will be eligible for admission under General Category, subject to availability of vacancy.

2.5.KB) QUALIFYING MARKS IN PET. - For admission to State Engineering Colleges/MACT, Bhopal/Polytechnics, candidates will have to secure minimum aggregate percentage of marks in PET as mentioned in the following table:

S. No.	Colleges	Categorywise percentage	G	C	T	M	F	E	H
1.	State Engineering	50							
35	25	50	50	50	50				
	Colleges and MACT								
2.	Polytechnics.	30	20	15	30	30	30	30	30

"Note" omitted. The letters G, C, T, M, F, E, and H stand for "General", "Scheduled Castes", "Scheduled Tribes", "Military Personnel", "Freedom Fighter", "Technical" and "Handicapped", respectively.

5.2. The Director of Technical Education, Government of Madhya Pradesh/Head of the Institution concerned will offer admission to the colleges in accordance with the merit list of each college prepared by the Professional Examination Board.

5.7. Vacant Seats in Reserved Categories. - In case eligible candidates, to the extent of reservation in any. reserve category are not available then the vacant seats of the reserved category will be filled from the waiting list of candidates in general category.

7, The State Government reserve the right to amend any rule/procedure for admission and any modification so made shall be binding".

For comparison, Note 3 of Rule 2.5.1 (A) of 1988 Rules is also extracted:

"For admission against State Engineering Colleges and State quota seats in MACT the candidate will also have to appear in the additional General English paper and obtain not less than 25% marks therein. The marks obtained in General English would not be reckoned for determining the merit."

We may refer now to order dated 29-3-1988 which, however, did not come up for the consideration of the Division Bench of this Court decided on 13-9-1988, *Awadeesh Nema and Others Vs. State of Madhya Pradesh and Another*, . It appears therefrom that State Government had taken decision in regard to two matters considering "hardship" caused to candidates who had appeared in 1988 Entrance Test in which a paper on "General English" was introduced for the first time in that year and a large number of candidates had failed to qualify in that paper. It was found necessary and expedient to make early amends for that in order to finalise the admission process, which was held up at the last stage to pendency of the petition, by providing that: (i) for the Entrance Test 1989, for admission in State Engineering College's, the question paper on "General English" be deleted; (ii) candidates who were qualified in Physics, Chemistry and Mathematics and whose names were included in the Merit List (of 1988) be granted admission in 1989 without asking them to take fresh test in that year if they had secured higher marks in those subjects. The validity of this order was challenged in *Manoj Sood (No. 1)*. It is noteworthy that in *Awaneesh Nema (supra)*, the candidates taking Entrance Test in 1988 but had failed in "General English" paper had challenged their disqualification. That was repelled by the Court on the ground that the said requirement prescribed in the 1988 Rules in that regard was neither arbitrary nor unreasonable. That decision has been upheld by the Apex Court. However, the Court repelled also- another grievance of petitioners holding that under Rule 2.7 the State Government had validly granted relaxation to SC/ST candidates to fill up vacant seats of that category and complaint of infraction of rights of candidates of "general" category under Rule 2.5.8 was meritless. *Nivedita Jain's case*, AIR 1988 SC 487 was relied on.

Let it be mentioned that *Manoj Sood (No.1)* was a public interest litigation to espouse the cause of candidates taking 1989 test conducted by the Board who had expressed the apprehension that as many as 311 candidates who had

"failed" in English might get admission in virtue of the order dated 29-8-1988 to fill up general seats ignoring their claim. The contention which prevailed with the Bench deciding the case was that the "failed candidates" were favoured by a "reservation" under the order dated 29-8-1988 and that was unconstitutional, being in gross violation of Article 14 of the Constitution. We do not propose to say any thing in regard to the holding or the reasons stated, but we would still like to observe that according to 1988 Rules [Note 3, Rule 2.5.1(A), above referred] candidates who "failed" in English could still have their names placed on the Merit List, as merit had to be determined in terms of the standard prescribed in Rule 2.5.1(B). It was only their right to be offered admission that was affected by their failure to secure not less than 25 % marks contemplated under the said Note. Indeed, for good reason, in our view, the first part of the order dated 29-8-1988 was not challenged and Government decision to delete "English" paper from 1989 test must be deemed to have been upheld. In para 15, notice was taken not only of Rule 2.8, but also of Rule 2.7, whereunder Government reserved the right to amend any Rule, making modification made binding on all. The Bench refrained from making any observation in regard to that provision, although in *Awaneesh Nema* despite the question being not mooted the purport of Rule 2.7 (as has been pointed out above) was still noted.

Although implicit reliance has been placed on paras 26 and 30 of the decision in *Manoj Sood* (No. 1) by instant petitioners, we do not think that the contention pressed on that basis carries any weight. Those are still extracted in extenso:

"26. We cannot afford to be oblivious to the plight of those three hundred and odd candidates, who on an assurance made to them by the State, did not appear at the PET examination, held this year. While they cannot be preferred against those selected for admission on the basis of merit and without going into the legality and legalism of their claim of Promissory Estoppel against the State, particularly when the State does not dispute it. We hope that the State will fetch out all its resources to accommodate them, but certainly not at the cost of those meritorious ones selected this year, but by creating additional seats in the State Engineering Colleges and not otherwise, encroaching upon the rights of successful and selected candidates of this year.

It is, however, op to the State to accommodate such students as are covered by the decision. Annexure R/1, by providing additional seats without in any manner infringing of encroaching upon the rights of the candidates who have appeared in the PET examination this year (1989) and if for some reason it is not feasible, then a fresh examination be held at the earliest so that those deprived of an opportunity of appearing at the PET examination this year (1989) because of the assurance given by the respondent-State as per decision, Annexure R/1 (which now stands quashed by Order of this Court) may appear at such Examination and compete in a common test".

We see sufficient force in the contention pressed on behalf of the respondents that in the above extract, the second part of the order dated 29-8-1988, has

rather been conditionally maintained and it is for this reason that it became necessary for the State Government to pass subsequently, on 8-9-1989, the order Annexure R/1. The order is in three parts and we are concerned in this matter only with the first two parts. In that order, qualifying marks were reduced by 10% for candidates of Scheduled Castes and Scheduled Tribes taking the 1989 test. Indeed, by an express reference to the decision in M. P. No. 899/88 1990 MPLJ 791 (Manoj Sood No. 1), decision was also taken that all general category candidates securing minimum qualifying marks in the 1989 test be granted admission and thereafter; the candidates who had already taken the Entrance Test in 1988 but had failed in "English", though otherwise qualified, be given admission in State Engineering Colleges during the year 1989.

When it was stated in Manoj Sood (No. 1) by this Court that "the State will fetch out all its resources to accommodate them, but certainly not at the cost of those meritorious ones selected this year", it was meant to protect the right of the "failed" candidates. Indeed, what was prohibited was that they would not be given preference over those duly "selected" during the current year. Petitioners obviously being not "selected" when the Merit List of 1989 candidates was first drawn up, then can certainly have no grievance in respect of the second part of the order dated 8-9-1989 to complain that said order had in any manner infringed their right or had encroached upon their entitlement. They were not "successful and selected candidates", of current year when their entitlement to admission was determined and it was due to the privilege conferred on all unsuccessful candidates under order dated 11-10-1989, by relaxing qualifying marks by 3% that some candidates of their group could also be accommodated and given admission in seats earmarked for "reserved" categories.

On its own term and language, in our view, the order Annexure R/1 dated 8-9-1989 is violative neither of the judicial mandate of Manoj Sood (No. 1) nor of any of the Rules. Let it be recalled that neither in that decision nor in Awanesh Nema (supra) any of the Rules have been declared invalid or it has been held that any candidate can rest his entitlement for admission outside the Rules or even that when any act was done by the Board or the State Government or any of its functionaries in accordance with the Rules, there can be any valid complaint by a candidate denied admission. True, there can be a cause for grievance founded on violation of any constitutional imperative if any act was done under the Rules in that manner. When" decision in m Manoj Sood (No. 1).was rendered, the factual position was not clear and, therefore, the Bench deciding that case took the view that the action of the State Government proposed under order dated 29-8-1988 to give admission to "failed" candidates of 1988 batch would be unconstitutional inasmuch as that would tantamount to creating an unauthorised "reserved" category (uncontemplated under the Rules) as also in violation of Article 14 of the Constitution.

When the names of the petitioners were not included in the "Merit List" or even in the "Waiting List", it was because their performance fell short of the

requirement contemplated under Rule 2.5.1(B). When diversion was made of vacant seats of "reserved" category, that was done under Rule 2.7 and in that Rule, there is nothing to indicate that the State Government's right contemplated thereunder was circumscribed in any manner to divert vacant seats of the "reserved" categories, to be filled up in any particular manner; in other words, not to fill up all the diverted seats in stages, but to amend also simultaneously the requirement contemplated under Rule 2.5.1(B) uniformly to affect in the same manner candidates of "general" and "reserved" categories. It is also to be noted that the "Waiting List" contemplated under Rule 2.5.7 can be compiled with the names of only those candidates who had obtained the qualifying marks contemplated under Rule 2.5.1(B) and the petitioners can have no reason to complain that under Rule 2.7.7 or under any other Rule the State Government was duty-bound to include names of unsuccessful candidates also in the "Waiting List" merely because seats in "reserved" category were vacant. In other words, Rules do not rule out the possibility or admissibility of a terraced selection. To support our view, we rely on Apex Court's decision in Col. A.S. Sangwan Vs. Union of India (UOI) and Others, which was also a case of policy decision, albeit of Central Government exercising power under Article 73 of the Constitution. It was held: "a policy once formulated is not good for ever; it is perfectly within the competence of Union of India to change it; rechange it; adjust it and readjust it according to the compulsions of the circumstances and imperatives of national consideration", subject, albeit to the constitutional imperatives underlined in Article 14.

It is heartening to note that records were put straight in Manoj Sood (No. 2) and Qureshi, J. [who was also a party to the judgment in Manoj Sood (No. 2)] took pains and care to explain the first decision in repelling the contention that the State Government and other respondents had acted in violation of judicial mandate and were liable to be proceeded in contempt on that account. A large part of the judgment is devoted to tracing the development that took place at different stages and steps taken in that regard by the State Government to meet the exigency arising from a large number of seats remaining vacant due to paucity of qualified candidates in 1989. The action of the State Government in acting in accordance with the Rules by filling up the seats in stages was found valid and in that regard in paras 12 and 14, care was taken to explain the earlier decision, in particular, the purport of the direction made in Manoj Sood (No. 1), para 26, in the context of the contention and holding noted in paras 22, 28 and 29. It was held: "the principle on which the order of the Government was quashed was simply this that the candidates of last year could not be considered for admission vis-a-vis the meritorious candidates who were eligible for admission in the current year", and the writ petitions and also the contempt matter flopped as the Court found that "none of the meritorious candidates was denied admission for accommodating the 1988 failures". In para 18, a categorical finding was recorded holding that the State Government had "admitted all candidates who were eligible for admission under the Rules" and it was also

rightly held that the general relaxation of 3% in qualifying marks which came at the last stage would not relate back to the date of initial qualification because "the Rules (had) not been repealed or amended; (and) the Rules were (as) before".

We may now refer to the decision in Manoj Verma's case which, according to respondents' counsel, Shri R. D. Jain, does not lay down the law correctly. He has submitted that the Bench deciding that case has wrongly interpreted the decision in Manoj Sood (No. 1)., On facts also, counsel submitted the decision is not correct. At para 8 of the judgment, it has been observed that the State Government was bound to reduce simultaneously the qualifying marks of 1989 candidates of general category also in rendering the order dated 8-9-1989 when that privilege was granted to the candidates of Scheduled Castes and Scheduled Tribes categories and that was not done "with intention to provide berth to candidates of PET 1988". It has indeed to be pointed out that in taking that view the Bench overlooks the fact that occasion for passing the order dated 8-9-1989 arose as a result of seats of reserved category (S.C./S.T.) having remained vacant and, therefore, there was no compulsion on the State Government to extend on that date the same privilege to "general" category candidates also of 1989 batch. Counsel has rightly submitted, in our view, that in holding so the Bench overlooked the law laid down in Nivedita Jain's case (supra). Their Lordships in that case, upheld the total relaxation of minimum qualifying marks for candidates belonging to Scheduled Castes/Scheduled Tribes category because candidates of "general" category could not complain "of hostile discrimination on that account in view of State's competence in that regard being contemplated under Articles 15(4) and 162 of the Constitution and that can be circumscribed only by express provision to the contrary. Shri Jain is right in submitting that the said fundamental flow is reflected in the entirety of the decision in Manoj Verma. For that, he referred us to the holding therein at para 9 that "State Government enjoyed power to make reservation for SC/ST but the power should be exercised in a manner so as not to sacrifice merit altogether....." That holding runs in the face of the supreme judicial dicta, but law was also not correctly laid down in proposing to hold that Manoj Sood (No. 1) be read as codifying the law and necessity of testing any complaint of denial of admission on the touchstone of the Rules was obliterated.

We think, Shri Jain is right in pointing out that in Manoj Verma, the Bench overlooked that "unsuccessful" candidates of 1989 of "general" category were benefited and not discriminated under order dated 11-10-1989 by which 3% reduction in qualifying marks to that category generally had been allowed. It was necessary to note that all "general" candidates of 1989 who were originally "unsuccessful" but became eligible for consideration as a result of 3% reduction in qualifying marks could claim admission in diverted seats only to the extent possible, matching vacancies. In other words, all candidates securing 423 marks could not claim that they must all be granted admission inasmuch as their entitlement depended on sequence of events following orders dated 8-9-1989

and 11-10-1989 which were validly passed in accordance with the Rules. We cannot sit in appeal on facts, on the judgment rendered in Manoj Verma's case by this Court and indeed, we are told that SLP against that judgment is pending in Supreme Court. On law, we must reiterate the point that accrual of right to admission in any State Engineering College of any candidate taking test conducted by the Board depends on his entitlement contemplated under relevant Rules. But, the primacy of Rule 2.5.1 read in conjunction with Rule 2.5.7 and 2.7 and the role thereof in the facts and circumstances of this case has unfortunately been diluted in Manoj Verma on the wrong premises that Manoj Sood (No. 1) has done so. Happily, Manoj Sood (No. 2) has set in correct perspective the rationes of the earlier decision, Manoj Sood (No. 1).

For the reasons given above, we must reject Shri Rao's first contention that "failed" candidates of 1988 batch of "general" category have been given preference over the petitioners and in doing so, the entitlement of the petitioners for admission under 1989 Rules has been overlooked. However, the main plank of Shri Rao's contention raised on Manoj Sood (No. 1) that those candidates could only be admitted in "additional Seats" or they could not be admitted without asking them to take a "fresh test", has to be disposed of more specifically. We refer for that purpose first to clarification of the relevant direction in Manoj Sood (No. 2). In that decision, it has been made clear that "the additional seats", were directed to be created on the assumption that vacant seats were not available as the factual position had not been clear on the date on which the decision in Manoj Sood (No. 1) was rendered. In the penultimate para in Manoj Sood (No. 2), answer was stated "clearly in the negative" to the question, "whether the State should have created additional seats for those persons when the seats were already vacant because of the non-availability of meritorious candidates in the year 1988?".

We would also like to add that the decision in Manoj Sood (No. 1) has to be read in the manner that it does not violate constitutional mores. It has been pointed out to us that in the matter of creating additional seats, the State Government does not have a free hand after enactment of All India Council for Technical Education Act, 1987, for short, the "Act". The long title of the Act spells out its objects "proper planning and co-ordinated development of the technical education system throughout the country..... and proper maintenance of norms and standard in the technical education system and for matters connected therewith". It is submitted that the "Council" constituted under the Act is vested with wide powers and exercises comprehensive control on existing and proposed "technical institutions" as provided in section 10 of the Act. We agree with counsel that a mandamus cannot issue to the State Government, therefore, to create additional seats to meet any particular contingency in a manner not contemplated under the Act.

Support for the view taken, we find in the reliance of Asif Hameed and others Vs. State of Jammu and Kashmir and Others, and Thaper Institute of Engineering

and Technology, Patiala (Deemed University) Vs. Abhinav Taneja and others, High Court was" held incompetent in Asif Hameed, to issue direction to State Government to constitute "statutory body" for selection to Medical Colleges after setting aside the selection made at the instance of the unsuccessful candidates. It was observed that policy making power and exercise of that function by the Executive within the sphere of its activities was a matter which was outside the purview of judicial review. The only limit on Executive's actions is that contemplated either under a statute or the constitution itself. In Thaper Institute's case, the last date of admission had expired and direction was prayed in the writ petition by four candidates to extend the date and to admit them by alleging that six seats were lying vacant. The Institute opposed this prayer and submitted, inter alia, that no seats were vacant. High Court's order granting the writ was held incompetent and without jurisdiction.

In so far as the question of petitioners taking a "fresh test" is concerned, that has two answers. The mandate of Manoj Sood (No. 1) is not in those terms. At para 30 of that decision, it was contemplated that a fresh test for all candidates be held and that would include not only candidates who had already appeared in 1989, but the 311 "failed" candidates of 1988. We would like to read that direction also to be optional in nature in order to constitutionalise that. State Government in our view, cannot be faulted for not exercising that option as that would have given rise to a cause of grievance to the "successful" candidates of 1989 by subjecting them to a situation of double jeopardy. Besides, as earlier hinted, it is difficult to tar the "unselected" candidates of 1988 batch as "failed" candidates, bereft of any right and entitlement. They had already taken the test and they had obtained the qualifying marks as per Rule 2.5.1(B) and they failed to get selected as a result of Note No. 3 of Rule 2.5.1(A) blocking their way. Even it would be possible for them to complain similarly of double jeopardy because in 1989 there was no requirement of taking test in "English".

We would also like to observe that at one stage, during the course of hearing, Shri Rao had raised the objection that the order dated 8-9-1989 (Annexure R/1) lack's constitutional backing as it is riot expressed in the name of the Governor, as contemplated under Article 166(2) of the Constitution. We were accordingly required to investigate that position and records were placed before us to satisfy us that the Order reflected decision of the State Cabinet. The combined effect of Articles 162, 163 and 164 is that executive power pi a State contemplated under Article 162 is exercised by the State Cabinet ("Council of Ministers") and under Article 166(2), the decision of the State Cabinet when expressed and authenticated in the manner contemplated thereunder, is immune to challenge. Although Shri Rao has referred us to Constitution Bench decision in Chitralekha's case AIR 1984 SC 1823 , at para 4, that position is made clear. The decision of the State Government not expresed and authenticated in strict compliance of the constitutional requirement is not a nullity. Their Lordships noted that the law in that regard had been settled long back in Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others, They also referred to Ghaio Mall and Sons Vs.

The State of Delhi and Others, to reiterate that the provisions of Article 166 are only directory and not mandatory and, therefore, it can be established as a question of fact that the impugned order was issued, in fact, by the State Government or the Governor.

We reiterate once again that constitutional equity contemplated under the equality clause, Article 14, places a burden on the Court to strike a reasonable balance between competing rights and interests of the aggrieved vis-a-vis different organs of the State. When denial of "group justice" is complained, the court is bound to ascertain respective legal entitlement of concerned groups. Writ Courts are bound by rules of pleading and evidence like other Courts. Part III of the Constitution invests in a Writ Court special jurisdiction in regard to Executive and Legislative acts but contemplates also its duty to prevent discrimination by judicial acts such as of unequal application of laws by acting arbitrarily. See, in this connection - Budhan Choudhry and Others Vs. The State of Bihar, A. Lakshamana Rao AIR 1971 SC 190. That duty extends to interpreting judgment of a Court of co-ordinate jurisdiction appropriately to preempt complaints of non-application or arbitrary application of laws or of instruments having force of law. All executive acts validly done in exercise of the powers contemplated in that regard under Article 73 or 162 of the Constitution cannot be denied judicial protection without infringing Article 14.

Petitioners have grounded their claim, in the instant case, on 3% relaxation in qualifying marks contemplated under order dated 11-10-1989 and also on the holding in Manoj Sood (No. 1) in respect of the order dated 29-8-1989. We cannot afford to forget however that those orders as also the Rules derive legal force from Article 162 of the Constitution and both groups of competing candidates are subjected equally to those orders and Rules as are the State Government/respondents. We are bound therefore to recognise this position in evaluating the competing equities operating for and against the two groups. If respondents have not violated any constitutional mandate of Manoj Sood (No. 1) operating in petitioners' favour and they have also not violated any provision of the Rules, petitioners cannot complain infraction by respondents of Article 14 to claim relief. By merely affixing the label "failed" to the competing group, without due justification as they were not totally unqualified even in 1988, petitioners cannot bank upon the order dated 11-10-1989 as justice cannot be said to have been denied to their group. even if any of them missed a seat in the bus in which others of their group were carried. The lucky ones who reached their destination were indisputably more meritorious. The so-called "failed" candidates of group of 1988 batch who had lost a year deserve protection of their interest under order dated 8-9-1989 and under mandate of Manoj Sood (No. 1) which that order had enforced; the group of "unsuccessful" candidates of 1989 batch of "general" category cannot complain discrimination as their competitors of 1988 batch fulfilled norms of entitlement prescribed in 1989 Rules under which candidates were not required to be examined in "General English".

We sum up now and say that law was correctly laid down in Manoj Sood (No. 2) that all unsuccessful candidates of "general" category of 1989 batch cannot, banking upon 3% relaxation while lacking initial entitlement, claim admission in the diverted seats of "reserved" category. It was also rightly held that Manoj Sood (No. 2) was not meant to protect their right which, indeed, was born under order dated 11-10-1989, passed subsequent to that decision. In our opinion, Manoj Verma did not state the law correctly in holding the State Government had acted unconstitutionally in passing the order dated 8-9-1989 (also subsequent to Manoj Sood No. 1) and by granting arbitrarily thereunder 10% relaxation in qualifying marks only to candidates of "reserved" category and adversely affecting thereby candidates like the petitioners in violation of the mandate of Manoj Sood (No. 1). We do not accept the legal proposition stated in Manoj Verma that State Government was bound to treat alike candidates of "general" and "reserved" categories by extending to both groups simultaneously the same privilege of 10% relaxation in qualifying marks. We do not also feel inclined to agree with the view expressed in Manoj Verma that this Court can issue mandamus to State Government to create additional seats for candidates like the petitioners as we have not found the Government acting arbitrarily in violation of the Rules or of any valid judicial mandate or even violating in any manner constitutional injunction of Article 14. For this short reason we also hold Shri Rao's reliance on Sanjay Gulati AIR 1983 SC 386 grossly inappropriate where that penalty was imposed to purge the duly established constitutional sin.

In the result, the petition fails and it is dismissed, but in the facts, and circumstances of the case, we make no order as to costs.