
(2006) 05 RAJ CK 0033

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 344, 2464, 2501 and 2557 of 2006

Rakesh Soni and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 08-05-2006

Acts Referred:

Constitution of India, 1950 — Article 309, 310, 311
Rajasthan Medical and Health Service Rules, 1963 — Rule 2, 24, 26, 26(1), 27
Rajasthan University Act, 1946 — Section 17, 20, 22, 23, 23A(1)
Rajasthan University Ordinances, 2009 — Ordinance 278, Ordinance 278E, Ordinance 278E(4), Ordinance 278G, Ordinance 278G(2)
University Grants Commission Act, 1956 — Section 2, 22, 22(3), 25, 26

Citation : (2006) 4 RLW 2778 : (2006) 3 WLC 520

Hon'ble Judges : K.S. Rathore, J

Bench : Single Bench

Advocate : Bajrang Lal Sharma and C.S. Sharma, in S.B.C.W.P. No. 2501/06, R.N. Mathur and R.K. Goyal, in in S.B.C.W.P. Nos. 344 and 2464/06 and Himanshu Agnihotri, in S.B.C.W.P. No. 2557/06, Lokesh Sharma, in S.B.C.W.P. Nos. 344, 2464, 2501 and 2557/06, R.A. Katta, in S.B.C.W.P. Nos. 344, 2464, 2501 and 2557/06, for the Appellant; Aslam Khan, for Mohd. Rafiq, A.A.G. in S.B.C.W.P. Nos. 344, 2464, 2501 and 2557/06, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Rathore, J.—Since all these writ petitions are involving similar question of law and facts, the same are decided by this common judgment.

2. In the writ petition preferred by Dr. Rakesh Soni & Others, the petitioners who were in service Medical Officers and regularly selected by the RPSC and serving as Medical Officer at different Health Centers, are challenging the consideration of candidates for admission in P.G. course in the category of in service who are serving on contract basis.

3. The University of Rajasthan issued an Instruction Booklet of Pre P.G. Medical Examination for Admission to MD/MS Diploma Course in the Medical Colleges of

Rajasthan. Candidates eligible as per the Ordinance 278-E and 278-G of the University of Rajasthan were required to appear in the aforesaid Examination.

4. Total seats for admission to MD/MS/Diploma courses to be filled by the aforesaid examination are 432. Out of which, 50% are to be filled in on the basis of result of All India Basis. Remaining 50% are available for Pre-PG Medical Examination 2006 of the State. Out of which, 50% seats are available for allotment to In-service candidates and 50% for non-service candidates.

5. The eligibility criteria for Pre P.G. Medical Examination for admission to MD/MS Diploma Course under In-service category is the candidate should be-

1. In-Service of State Government of Rajasthan;

2. Below the age 45 years; and

3. Should have completed atleast three years of service in Rural areas of the State of Rajasthan or two years of continuous service of Rural areas of Desert/Hilly or Tribal parts of the State (Rural areas are defined as a rural area where Rural allowance is admissible to the doctors).

6. The main challenge of the petitioners is with regard to the contract doctors as they cannot be considered as a member of service. Thus, the benefit of In-service category cannot be extended in favour of the doctors who are working on contract basis.

7. Learned Senior Counsel Shri Bajrang Lal Sharma appearing on behalf of the petitioners referred Rajasthan Medical Health Service Rules 1963 for short, "the Rules of 1963". More particularly referred Rule 2(f) of the Rules of 1963 which reads as under:

Members of the service" means a person appointed in a substantive capacity to a post in the service under the provisions of these rules or orders superseded by these rules and includes a person placed on probation.

8. In Rule 2(g), "Service" means the Rajasthan Medical and Health Service.

9. After referring the definition clause, learned Counsel for the petitioners referred Part-III which deals with the Recruitment and Rule 6 speaks about the method of recruitment which is reproduced as under:

Recruitment to the Service after the commencement of these rules by the following methods-

(a) by a direct recruitment in accordance with Part-IV of these rules;

(b) by promotion in accordance with Part-V of these rules;

(c) transfer from amongst persons holding substantively post of Junior Specialist in any other speciality provided he possesses the necessary qualification and experience prescribed in the Schedule for promotion to the post sought to be

filled by transfer.

10. Recruitment to the service by the aforesaid methods shall be made in such a manner that the persons appointed to the service by each method do not at any time exceed the percentage laid down in the Rules/Schedule of the total cadre strength as sanctioned for each category from time to time.

11. Rule 6-A deals with the deputation in emergency which is reproduced hereunder:

Any person appointed to the Rajasthan Service of Medical and Health on or after 26.10.62 shall, if so required, be liable to service in any defence service or post connected with the Defence of India, on deputation to any part of India in connection with any emergency for a period of not less than four years including the period sent on training, if any.

12. Further given much emphasis on Part-IV which provides for Procedure for Direct recruitment and also referred Rule 26 which deals with the "Urgent Temporary Appointment" which is reproduced as under:

(1) A vacancy in the Service which can not be filled in immediately either by direct recruitment or by promotion under the rules may be filled by the Government or by the (authority competent to make appointment), as the case may be, by appointment to the post by promotion or by appointing temporarily thereto a person eligible for direct recruitment to the Service, where such direct recruitment has been provided under the provisions of these rules:

Provided that such an appointment will not be continued beyond a period of one year without referring the case to the Commission for concurrence, where such concurrence is necessary, and shall be terminated immediately on its refusal to concur.

(2) In the event of non-availability of suitable persons, fulfilling the requirements of eligibility for promotion, Government may, notwithstanding the condition of eligibility for promotion required under Sub-rule (1) above lay down general instructions for grant of permission to fill the vacancies on urgent temporary basis subject to such conditions and restrictions regarding pay and other allowances as it may direct. Such appointments shall however, be subject to concurrence of the Commission as required under the said sub-rule.

13. After referring the aforesaid provisions of the Rules of 1963 tried to make out the case that in case of emergency there is provision for appointment a doctor on urgent temporary basis under Rule 26 only in case of emergency and non-availability of the selected candidates through R.P.S.C. but nowhere the Rules empower the respondents to appoint the doctors on contract basis.

14. In support of his submission he referred Article 309 of the Constitution of India which deals with the recruitment and Conditions of service of person serving Union or a State and Article 310 speaks about the tenure of persons

serving Union or State. And as per Article 311 Union or State empower for dismissal, removal or reduction in rank of person employed in the civil capacity under the Union or State.

15. As the Rajasthan Medical & Health Service Rules, 1963 are framed exercising power conferred by the proviso to Article 309 of the Constitution of India and these rules only regulating the recruitment to posts in, and the conditions of service of persons appointed to the Rajasthan Medical and Health Service.

16. And as per the Rules substantive vacancy after due selection by any of the methods of recruitment prescribed under these Rules and includes an appointment on probation or as a probationer followed by confirmation on the completion of the probationary period. And the petitioners are duly selected candidates and are the members of Rajasthan Medical & Health Service and fulfill other eligibility conditions to be eligible under In-service category and thus they are fully eligible for being selected for M.D./M.S./Diploma Course through Pre-PG Medical Examination in the category on "In-service" candidates.

17. It is not disputed that the petitioners fill up the Examination form and appeared in the examination and after issuance of the merit list, this writ petition has been preferred challenging the consideration of contract doctors in the category of in-service.

18. It is also not disputed that Pre-PG Medical Examination 2006 was held on 26.2.2006 and the result of which was declared and published in the daily newspaper "Dainik Bhaskar" 27.2.2006. The petitioner were declared successful in the Pre-PG Medical Examination, 2006. Since their merit is below the contract doctors therefore, being aggrieved by the merit, the petitioners chosen to submit this writ petition challenging the eligibility criteria for contract doctors and their consideration in In-service category on the ground that the candidates who are not the members of service and are appointed on contract basis on consolidated salary of fixed amount of Rs.8000/- are also treated as In-service candidates and have been included in the list prepared for In-service category which is contrary to the statutory Rules.

19. It is also alleged that the contract doctors are appointed by a committee headed by the District Collector who appoints them and this is not a mode for recruitment under the Rules of 1963. Their appointment is not a substantive appointment. The contract doctors are not the members of the service as defined under the Rules of 1963. The inclusion of contract doctors in he list of In-service has diluted he quota reserved for In-service doctors who are members of service to such an extent that the petitioners 1 to 3 though are declared successful in the Pre-PG Exam but will not be considered for admission to MD/MS/Diploma courses at all since the total seats for other backward classes of In-service are 23 only.

20. It is also not disputed that notification for PG counseling 2006 has been issued and published in the daily news paper Dainik Bhaskar on 19.3.2006 calling

he eligible and successful candidates of Rajasthan Pre-PG Entrance Examination 2006 and are directed to appear before the Central PG Admission Board on the Scheduled time and the date mentioned in the notification. The date fixed for In-service category candidates is 4th April, 2006 as per notification dated 19.3.2006.

21. In support of his submissions, the petitioners referred a judgment of Hon"ble Supreme Court in the case " Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and Others, . More particularly para 4, 12, 13, 16 and 21. Para 13 is reproduced as under:-

Article 309 lays down that subject to the provisions of the Constitution, Acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. The proviso to this article confers power upon the President or the Governor, as the case may be, to make rules regulating the recruitment and the conditions of service of persons appointed to services and posts in connection with the affairs of the Union or the State. Article 311 affords several protections to persons employed in civil capacities under the Union or a State. In view of Clause (2) of this article, holder of a civil post under the Union or a State cannot be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and he is given a reasonable opportunity of being heard in respect of those charges.

22. In para 16, Hon"ble the Supreme Court after referring a Constitution Bench judgment in the case "Roshan Lal Tandon v. Union of India" (SCR P. 295) wherein the nature of right possessed by a Government servant and also his status after his appointment to a post under the Government was considered wherein it was observed as under:-

It is true that the origin of government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. It is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties.

In para 21, Hon"ble the Supreme Court observed that-

While working as a contractual employee respondent I was not governed by the relevant service rules applicable to Drugs Inspector. He did not enjoy the privilege of availing casual or earned leave. He was not entitled to avail the

benefit of general provident fund nor was he entitled to any pension which are normal incidents of a government service. Similarly, he could neither be placed under suspension entitling him to a suspension allowance nor could he be transferred. Some of the minor penalties which can be inflicted on a government servant while he continues to be in government service could not be imposed upon him nor was he entitled to any protection under Article 311 of the Constitution. In view of these features it is not possible to hold that respondent No. 1 was a government servant.

23. The petitioners further placed reliance on the judgment of Hon^{ble} the Supreme Court in these case Keshav Chandra Joshi and others etc. Vs. Union of India and others, and their Lordships of Hon^{ble} the Supreme Court have held as under:-

In those peculiar circumstances this Court though recognized that appointment according to rules is a condition precedent, adopted the rule of deemed relaxation and deemed promotion to the service in accordance with the rules. Rule 27 of the Rules gives power to the Governor that if he is satisfied that the operation of any rule regarding conditions of service of the members caused undue hardship in a particular case; he may consult the Public Service Commission; notwithstanding anything contained in the Rules and dispense with or relax the requirement of the conditions of service and extend the necessary benefit as is expedient so as to relieve hardship and to cause just and equitable results. The word "may" consult the Commission has been used in the context of discharge of statutory duty. The Governor is obligated to consult the P.S.C. Therefore, the word "may" must be construed as to mean "shall" and it is mandatory on the part of the Governor to consult the P.S.C. before the exempting or relaxing the operation of rule regarding conditions of the service of a member to relieve him from undue hardship and to cause just and equitable results. There is a distinction between "rules of recruitment" and "conditions of service". To become a member of the service in a substantive capacity, appointment by the Governor shall be preceded by selection of a direct recruit by the P.S.C; undergoing training in Forestry for two years in the College and passing Diploma are conditions precedent. If the contention of the promotees that rules of recruitment are conditions of service is accepted, it would be open to the Governor to say that "I like the face of 'A' and I am satisfied that he is fit to be appointed; I dispense with the rules of recruitment and probation and appoint 'A' straightway to the service in a substantive capacity as Assistant Conservator of Forest. Take another instance. Passing the prescribed tests during probation is a condition of service. Similarly efficiency bar stands as an impediment for the promotee's confirmation. On consideration of the record and on objective satisfaction, in an appropriate case, the Governor may relax those or other similar conditions. So passing the tests prescribed is a condition of service. Therefore, the rule which effects the right to confirmation or similar provision is a condition of service.

Accordingly, we have no hesitation to hold that the promotees have admittedly been appointed on ad hoc basis as a stop-gap arrangement, though in substantive posts, and till the regular recruits are appointed in accordance with the rules. Their appointments are de hors the rules and until they are appointed by the Governor according to rules, they do not become the members of the service in a substantive capacity. Continuous length of ad hoc service from the date of initial appointment cannot be counted towards seniority. The Governor shall have to make recruitment by promotion to substantive vacancies in the posts of Assistant Conservator of Forest, if not already made, in accordance with Rule 5(b) read with Appendix "B" and Rule 6. Their seniority shall be counted only from the respective dates of appointment to the substantive posts in their quota under Rule 6 as per the rules. The direct recruits having been appointed in accordance with Rule 5(a) read with Appendix "a", their seniority shall be counted from the date of their discharging the duties of the post of Assistant Conservator of Forest and the seniority of the direct recruits also shall accordingly be fixed. The inter se seniority of the direct recruits and promotees shall be determined in accordance with Rule 5, 6 and 24 in the light of the law declared in the judgment. All the employees are entitled to all consequential benefits. On account of the pendency of judicial proceedings, if any of the employees become barred by age for consideration for promotion to cadre posts, the appropriate Governments would do well to suitably relax the rules and do justice to the eligible conditions.

24. The judgment passed by this Court was upheld by Hon'ble the Supreme Court in the case "Dr. Mukesh Garg and Ors. v. State of Rajasthan". Learned Counsel for the petitioners who was also counsel in the case on behalf of the respondents and particularly on behalf of contract doctors tried to distinguish this judgment and submitted that this judgment is distinguishable and also referred the judgment of Hon'ble Supreme Court rendered in Special Leave to Appeal No. 11944/05 in the case of "Dr. Rajesh Kumar Jain and Ors. v. State of Rajasthan and Ors." wherein Hon'ble the Supreme Court has observed as under:-

The short point involved in this petition is about the eligibility of temporary and ad hoc employees being eligible or not for admission to fifty per cent of the total seats ear-marked for in-service candidates in the Post-Graduate course for the Academic Year 2005-2006. The High Court, by the impugned judgment, has held that in-service category includes ad- hoc/temporary/contract medical officers and, on that basis, has come to the conclusion that the said categories of medical officers were rightly included in the in-service categories and the result was rightly declared, including the said categories as well. The challenge to their inclusion was made before the High Court by the petitioners, who claim to be regular and substantive medical officers. The thrust of the petitioner's submission before the High Court and again before this Court is that in the notification and instructions issued for the Pre-Post-graduate Examination, 2005, for admission to M.D./M.S./Diploma Courses, the "in-service category" does not include the aforesaid category of ad hoc/temporary/contract medical officers. The

impugned judgment has, however, noticed that this category of medical officers are appointed by having recourse to the provisions of Rule 26 of the Rajasthan Medical and Health Service Rules, 1963.

We have been taken through the corrigendum/notification issued for Pre-Post-graduate Medical Examination for the years, 2002, 2003 and 2004. The submission is that in those three years, it was clearly stipulated that the condition of selection by the Rajasthan Public Service Commission (for short, "R.P.S.C") has been relaxed for "this year only". As opposed to this, there is no such relaxation in the instructions issued for the pre-Post- graduate Medical Examination for the Academic Year 2005-2006, as above referred. On this basis, the aforesaid category of medical officers belonging to ad hoc/temporary/ contract service are sought to be excluded. We find that in the years 2003, 2003 and 2004, the relaxation had to be granted because of the condition of the medical officer being neglected through the R.P.S.C. Unlike, the those three years, there is no such condition for the present Academic Year 2005-2006. This being the state of affairs, there was no requirement of stating in he instructions about the relaxation of the condition of selection through the R.P.S.C. Under these circumstances, we find no infirmity in the view taken by he High Court. The SLP is, accordingly, dismissed.

25. And after referring the judgment rendered by this Court and Hon"ble Supreme Court, learned Counsel for the petitioners submitted that Hon"ble Supreme Court has upheld the judgment passed by this Court under the impression that the contract appointment was made by invoking the provisions of Rule 26 of the Rules of 1963. Thus, the judgment by which the contract doctors are found eligible to be considered in the in-service category for admission in M.D./M.S./Diploma Courses is distinguishable.

26. The petitioners also referred the Ordinance 278-E and 278-G and after referring the Ordinance submitted that the candidates" appointment on contractual basis should not have been considered against in-service quota as it is contrary to the Ordinance 278-E and the provisions of Rules of 1963. But the petitioners failed to challenge the validity of the amendment made by the University in the Ordinance 278.

27. In the case of Dr. Deepak Goyal v. University of Rajasthan the distinguishable feature to that of Dr. Rakesh Kumar and Ors. is that Dr. Deepak Kumar Goyal challenged the validity of Ordinance 278-E and 278-G on the ground that the amendment is contrary to the original Ordinance.

28. Learned Counsel Shri R.N. Mathur for Dr. Deepak Kumar Goyal referred Rule 2(f)(g)(i) and Rule 26 of the Rules of 1963 and the amendment is challenged on the ground that the amendment is unreasonable, unjust and contrary to the Constitution of India.

29. He referred Section 17 of Rajasthan University Act to show the authorities of the University. As per Section 17, the following shall be the authorities of the

University, namely:-

- (i) the Senate,
- (ii) the Syndicate,
- (iii) the Academic Council,
- (iv) the Faculties,
- (v) the Board of Studies,
- (vi) the Board of Inspection, and
- (vii) such other bodies of the University as may be declared by the Statutes to be the authorities of the University.

30. Section 20 deals with the Functions of the Senate. Section 20(a) speaks about making Statutes, and of amending and repealing Statutes, subject to confirmation by the Chancellor. Section 22 deals with the Functions of the Syndicate and Section 22(a) to make, amend and cancel Ordinances and Section 23 deals with the composition and term of the office of Academic Council and Section 23-A(1) provides that the Academic Council shall have control and general regulation of and be responsible for the maintenance of the standards of teaching and examination within the University. And Section 30 provides how Ordinances to be made. Section 30(3) stipulates that all Ordinances made by the Syndicate shall be submitted to the Senate, and shall be considered by the Senate at its next meeting. The Senate shall have power, by a resolution passed by a majority of not less than two-thirds of the members voting, to cancel any Ordinance made by the Syndicate and such Ordinance shall, from the date of such resolution, be void".

31. After referring Sections of Rajasthan University Act, 1946, Mr. Mathur tried to make out his case that the amendment which has been made in the Ordinance is under the dictate of the government. It is not disputed by Mr. Mathur that after receiving alleged mandate from the government, the University has followed the procedure as laid down under the Act but the dictate of the Govt. to amend ordinance is contrary to the spirit of the amendment and the University being autonomous body, the state authority should not interfere with the affairs of the University. It is absolutely domain of the University and to this effect he has referred reply submitted by the University. He also referred Annexure-R/2 by which the state government written a letter dated 3.1.05 to the Deputy Registrar, Rajasthan University to the effect to amend the Ordinance 278-E and 278-G.

32. Mr. Mathur in support of his submissions placed reliance on the judgment passed by Hon''ble the Supreme Court in the case Prof. Yashpal and Another Vs. State of Chhattisgarh and Others, of the judgment Hon''ble Supreme Court referred Halsbury''s Laws of England (4th Edn., Reissue) Vol.15 with regard to definition of the University and how it is incorporated which is described as under:-

A university is the whole body of teachers and scholars engaged, at a particular place, in giving and receiving instruction in the higher branches of learning; such persons associated together as a society or corporate body, with definite organization and acknowledged powers and privileges (especially that of conferring degrees), and forming an institution for the promotion of education in the higher or more important branches of learning; also, the colleges, buildings and other property belonging to such a body. Although the institutions to which it refers are readily identifiable, precise and accurate definition is difficult. The essential feature of a university seems to be that it was incorporated as such by the sovereign power.

Hon"ble the Supreme Court has further held as under:

The State Legislature can make an enactment providing for incorporation of universities under Entry 32 of List II and also generally for universities under Entry 25 of List III. The subject "university" as a legislative head must be interpreted in the same manner as it is generally or commonly understood, namely, with proper facilities for teaching of higher level and continuing research activity. An enactment which simply clothes a proposal submitted by a sponsoring body or the sponsoring body itself with the juristic personality of a university so as to take advantage of Section 22 of the UGC Act and thereby acquires the right of conferring or granting academic degrees but without having any infrastructure of teaching facility for higher studies or facility for research is not contemplated by their of these entries. Section 5 and 6 of the impugned enactment are, therefore, wholly ultra vires, being a fraud on the Constitution.

Hon"ble the Supreme Court has also observed as under:-

Entry 66 which deals with coordination and determination of standard in institutions for higher education or research and scientific and technical institutions is in the Union List and Parliament alone has the legislative competence to legislate on the said topic. The University Grants Commission Act has been made with reference to Entry 66 See Prem Chand Jain v. R.K. Chhabra and Osmania University Teachers' Assn. v. State of A.P. The Act has been enacted to ensure that there is coordination and determination of standards in universities, which are institutions of higher learning, by a body created by the Central Government. It is the duty and responsibility of the University Grants Commission, which is established by Section 4 of the UGC Act, to determine and coordinate the standard of teaching curriculum and also level of examination in various universities in the country. In order to achieve the aforesaid, the role of UGC comes at the threshold. The course of study, its nature and volume, has to be ascertained and determined before the commencement of academic session. Proper standard of teaching cannot be achieved unless there are adequate infrastructural facilities in the campus like classrooms, libraries, laboratories, well-equipped teaching staff of requisite caliber and a proper student-teacher ratio. For this purpose, the Central Government has made a number of rules in exercise of powers conferred by Section 25 of the UGC Act and the Commission

has also made regulations in exercise of power conferred by Section 26 of the UGC Act and to mention a few, the UGC Inspection of " Universities Rules, 1960, the UGC Regulations, 1985 Regarding the Minimum Standards of Instructions for the Grant of the First Degree, UGC Regulations, 1991 Regarding Minimum Qualifications of Appointment of Teachers in Universities and Colleges, etc. UGC with the approval of the Central Government and exercising power u/s 22(3) of the UGC Act has issued a schedule of degrees which may be awarded by the universities. The impugned Act which enables a proposal on appear only to be notified as a university and thereby conferring the power upon such university u/s 22 of the UGC Act to confer degrees has the effect of completely stultifying the functioning of the University Grants Commission insofar as these universities are concerned. Such incorporation of a university makes it impossible for UGC to perform its duties and responsibilities of ensuring coordination and determination of standards. In the absence of any campus and other infrastructural facilities, UGC cannot take any measures whatsoever to ensure a proper syllabus, level of teaching, standard of examination and evaluation of academic achievement of the students or even to ensure that the students have undergone the course of study for the prescribed period before the degree is awarded to them.

33. Mr. Mathur also referred a case of Hon"ble the Supreme Court in the case Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and Others, which is already referred by learned Sr. Counsel Shri Bajrang Lal Sharma as the contract doctors are not acquired status of member of service and cannot be considered in-service quota for the purpose of admission in M.D./M.S./Diploma Course and also tried to distinguish the judgment rendered by Hon"ble the Supreme Court in the case Rajesh Kumar Jain and Ors. (supra). and other distinguishable fact with regard to the petitioner is that the p preferred this writ petition before appearing in the examination.

34. The distinguishable fact is that the petitioner already admitted in P.G. Diploma Anesthesia for the year 2004 and pursuing his study in this diploma course and the petitioner only challenging the validity of the amendment in the Ordinance 278-E but so far admission is concerned he is already given admission in diploma course since 2004. Thus, no relief is claimed for admission to the M.D./M.S./Diploma Course except to declare Ordinance 278-E and 278-G as ultra vires.

35. The same arguments are advanced by Mr. Mathur in case of Dr. Babulal Buri wherein also the petitioner challenging the validity of Ordinance 278-E and 278-G.

36. In the writ petitions filed by Dr. Rakesh Soni and Others and Dr. Varsha Gupta, the only challenge is inclusion of the doctors who are working on contract basis in the category of in- service candidates but appeared in the examination and after declaration of the result and after issuance of merit list, preferred present writ petitions. But in both these writ petitions, the petitioners have not challenged the validity of Ordinance 278-E and 278-G.

37. Per contra, learned Counsel for the respondents have submitted that the present controversy has already been decided by this Court and Hon"ble Supreme Court in the case "Dr. Mukesh Garg and Ors. v. State of Rajasthan and Ors." S.B. Civil Writ Petition No. 1676/04 : 2004(3) RLW Raj. 1718 wherein the question with regard to inclusion of the doctors who were working on the contract basis has already been considered and this Court has held that-

The doctors who are rendering their services in the rural and hilly area they are included in the in-service category which cannot be said to be contrary to the provisions of law and this practice in continuously in operation since last three years and the petitioners at this stage after participating in the examination and after declaration of the result cannot challenge the validity of the eligibility criteria as they are estopped to challenge the same.

38. Learned Counsel for the respondents further submitted that earlier when the judgment rendered by this Court and Hon"ble Supreme Court the Ordinance was not amended and the contract doctors who were considered as in-service candidate on the basis of Circular and now since the University has amended the Ordinance and published the programme and issued the instruction booklet to all the candidate who appeared for Pre-PG Medical Examination 2006 and all the petitioners are well aware of the terms and conditions as stipulated in the Instruction Booklet which stipulates that the Candidates eligible as per 0.278-E and 0.278-G of University of Rajasthan are required to appear in the aforesaid examination for seats mentioned in 1(b) below. Condition No. 1 prescribed Seats and Reservations which reads as under:

(a) 50% of the total seats available in various MD/MS/Diploma courses will be filled in as per allocations made by the Director General of Health Services, Government of India, New Delhi, on the basis of the result of All India Competitive Entrance Examination for admission to P.G. Courses (MD/MS/ Diploma) on open merit, as per directions of Hon"ble Supreme Court of India;

(b) Remaining 50% of the total seats available in various MD/MS/Diploma courses will be filled in on the basis of merit in the Pre-PG Medical Examination 2006. Out of these seats allotment to In-Service and Non-Service candidates would be a per 0.278-E & G of University of Rajasthan. Further distribution of seats among General and Reserved categories shall be as per rules and regulations of Medical Council of India (MCI) and directive of State Govt./Hon"ble Courts in this regard".

39. In Clause 2 Eligibility Criteria for Admission is laid down which is made applicable to all candidates seeking admission to M.D., M.S. and Diploma Courses should have registration from Rajasthan Medical Council and completed satisfactorily one year"s compulsory rotating internship or would be completing the same before 30th April, 2006 after passing the final M.B.B.S. examination and secured atleast 50% marks (40% in case of natural born SC/ST and OBC) at the Pre-P.G. Medical Examina-tion-2006.

40. Similarly, eligibility for In-service category also laid down, the in-service category candidate should be in-service of State Government of Rajasthan and below the age of 45 years and should have completed at least three years of service in Rural areas of Desert/Hilly or Tribal parts of the State (Rural areas are defined as a rural area where Rural Allowance is admissible to the doctors).

41. Further, it was made clear that the candidates would be required to submit a certificate to above effect duly signed by the Director, Medical and Health Services, Government of Rajasthan, Jaipur, failing which his/her application will not be considered.

42. Given much emphasis on condition No. 1 where it is clearly mentioned that allotment to in-service and non-service candidate would be as per the Ordinance 278-E and 278-G of the University of Rajasthan. Knowingly fully, all the petitioners appeared in the Examination and after having knowledge of the merit list, they preferred the writ petition. Therefore, in view of the ratio decided by this Court and Hon'ble Supreme Court in the case of Dr. Mukesh Garg and Ors. (supra), they are stopped to challenge the eligibility criteria after participating in the written examination and after declaration of the result and this has been thoroughly considered in the case of Dr. Mukesh Garg.

43. Learned Counsel appeared for the respondents also placed reliance on the judgment rendered by the Division Bench of this Court in the case Deepak Goyal (Dr.) Vs. University of Rajasthan and Others, wherein the Division Bench of this Court has held that-

Writ petition filed after participation in selection process being fully conscious about the Instruction Booklet relating to Entrance Examination is not maintainable-Writ petition is not maintainable and the petitioners having taken a chance, estopped from challenging selection process.

44. It is also submitted on behalf of the respondents that the contract doctors are higher in the merit as comparison to the regular selected candidates, therefore, the petitioner preferred this writ petition knowing this fact and thus they are estopped to challenge the process on the basis of eligibility criteria after knowing fully participated in the examination.

45. Heard rival submission of the respective parties and upon perusal of the relevant provisions of Rajasthan Medical Health Services Rules, 1963 and Rajasthan University Act, 1946 and perused the relevant articles of Constitution of India and the judgments referred by the respective parties.

46. In the writ petition filed by Dr. Rakesh Soni and Dr. Versa Gupta, it is not disputed that they appeared in the examination and it is also not disputed that all the candidates who appeared in Pre-PG Medical Examination 2006 held by the University of Rajasthan, Jaipur were aware of the instructions issued by the university and the copy of the instruction booklet was made available to each of such candidate who has applied for appearing in the Pre-PG Medical Examination

2006 and as per Clause (b) of the Instruction Booklet, 50% of the total seats available in various MD/MS/Diploma Courses will be filled in on the basis of merit in the Pre-PG Medical Examination 2006. Out of these seats allotment to In-service and Non-Service candidates would be as per O. 278-E and % of the University of Rajasthan. Thus, they are well aware of the amendment made in Ordinance 278-E & Ordinance 278-G which reads as under-

Ordinance 278-E-IV(ii)

For seats reserved for in-service candidates as referred at Clause (II-b) the candidates should be duly selected by the RPSC under Rajasthan Medical & Health Services Rules, 1963 or should be working as Medical officer in Rajasthan Medical & Health Services on ad hoc/temporary/contractual basis and should be below the age 45 years and should have completed at least three years of service in Rural areas on State of Rajasthan or two years of continuous service of Rural areas of desert/hilly/tribal parts of the State. Rural area is defined as a Rural area where Rural Allowance is admissible to the Doctors who should have actually served in the Rural area. No application form for the Pre-PG Examination along with the certificate of Rural experience shall be accepted except under the signatures of D.M. & H.S. No application of in-service candidates shall be accepted by the University if sent directly".

Ordinance 278-G-II(ii)

For seats reserved for in-service candidates as referred to in Sub-clause (2) of Clause (1-b) the candidates should be duly selected by the RPSC under Rajasthan Medical & Health Services Rules, 1963 or should be working as Medical Officer in Rajasthan Medical & Health Services on ad hoc/temporary/contractual basis and should be below the age 45 years and should have completed at least three years of service in Rural areas of State of Rajasthan or two years of continuous service of Rural areas of desert/hilly/tribal part of the State. Rural area is defined as a Rural area where Rural Allowance is admissible to the Doctors who should have actually served in the Rural area. No application form for the Pre-PG Examination along with the certificate of Rural experience shall be accepted except under the signatures of D.M. & H.S. No application of in-service candidates shall be accepted by the University if sent directly.

47. As in Ordinance 278-G the doctors who are working on contractual basis also included and are eligible to appear in the category of in-service candidate.

48. Now the question raised regarding validity of eligibility criteria by the counsel appearing in the case of Dr. Rakesh Soni and Versa Gupta they have not challenged the validity of Ordinance 278-E and 278-G but only challenged on the ground that as per the provisions of Rajasthan Medical & Health Services Rules, 1963, the doctors who are working on contract basis who has not acquired status of member of service and thus the doctors who are working on the contract cannot said to be eligible to appear in the category of in-service for admission in P.G. Course.

49. As defined in Section 2(f), "member of service" means a person appointed in substantive capacity to a post in the service under the provisions of these rules or orders superseded by these rules, and includes a person placed on probation. Admittedly, the contract doctors who are working on contractual basis cannot acquire status of a member of service as they are not regularly appointed and only appointed on contract basis on consolidated pay. And considering the other provisions of Rules of 1963 which are referred by the learned Counsel for the petitioner that as per Rule 26 there is provisions of urgent temporary appointment. It is also not disputed that the appointment of the contract doctors are not made under Rule 26 but as held by this Court in the case of Dr. Mukesh Garg for the purpose of giving benefit to member of service and it is also made clear that they are appointed purely on consolidated pay for fixed term and since they are rendering their services in the rural, hilly and tribal area and filled a bond to serve the aforesaid areas for a period of atleast three years and also executed a bond in case of successful in the PG and Diploma course they would further render their services for five years on contract basis in the rural areas. It is also not disputed that the appointment is made in the dire need of the doctors in rural areas. Therefore, the appointment on contract basis has been made and they were only given incentives to appear in the Pre PG Examination in the category of in-service candidates and to this effect the University has amended the Ordinance to remove the anomaly in view of the observation made by this Court in the case Dr. Mukesh Garg that "it is expected from the State Government to laid down firm policy for ever and instruct the University to carry out the necessary amendment in the ordinance so that every year the doctors who are appearing in the examinations may not waste their valuable time by indulging in unwarranted litigations."

50. Pursuant to this direction, after consideration, the State Government thought it proper to instruct the University of Rajasthan to amend the Ordinance 278-E and 278-G and as not disputed by the learned Counsel for the petitioner that the University has followed the due process while amending the Ordinance as stipulated under the University Act, 1946. The amendment was incorporated by the University and the State Government only instructed to undertake the process to amend the Ordinance 278-E & G which does not mean that the amendment is made under the dictate of the government. Thus, the judgment referred by the counsel appearing on behalf of Dr. Deepak Goyal and Babu Lal Buri are not applicable as in these two writ petitions only challenge is to the validity of Ordinance 278-E and 278-G. The petitioners mainly challenged the amendment on the ground that the amendment in Ordinance 278-E and 278-G is contrary to the original Ordinance and should be declared null and void as being unconstitutional and further submitted that the amendment is unreasonable, unjustifiable and contrary to the Constitution of India but having thoroughly considered the facts and circumstances of the case and the judgments referred by the respective parties, I am not convinced with the submission made on behalf of learned Counsel Shri R.N. Mathur that the amendment incorporated by

the University in the Ordinance 278-E and 278-G is ultra vires and unconstitutional and reasonable and contrary to the provisions of law as well contrary to the provision of the Constitution of India.

51. As already observed here in above, the amendment is made with a view to give incentives to the doctors who are rendering their services in the rural, hilly and tribal areas on contract basis to appear in the Pre-P.G. Examination in the category of in-service category and contract doctors also rendering their services similar to the doctors who are rendering services after being regularly appointed. Therefore, the eligibility to appear in the examination cannot be said to be unreasonable and contrary to the provisions of law. Though I am fully convinced with the submissions made on behalf of the petitioner in the case of Dr. Rakesh Kumar that who are working on the contract basis cannot acquire status of member of service as per Rule 2(f) of the Medical & Health Rules, 1963 but simultaneously since the petitioner already appeared in the examinations process and the result is declared and now counselling is scheduled to be held on 8th May, 2006 as stated by the learned Counsel for the parties, they are not eligible to challenge the eligibility criteria which was duly informed and the petitioners are well aware of the conditions of eligibility criteria as laid down in instruction booklet Clause 1(b) and they already appeared in the examination and result also declared, as such they are estopped to challenge the eligibility criteria at this stage.

52. Consequently, all the writ petitions fail and are hereby dismissed having no merit.