
(2002) 11 AHC CK 0016
In the Allahabad High Court
Case No : Special Appeal No. 755 of 2002

Vani Pati Tripathi

APPELLANT

Vs

Director General, Medical Education and Training and Others

RESPONDENT

Date of Decision : 21-11-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 115
Graduate Medical Education Regulations, 1997 — Regulation 5
Indian Medical Council Act, 1956 — Section 33

Citation : AIR 2003 All 164 : (2002) 5 AWC 4226 : (2003) 1 UPLBEC 427

Hon'ble Judges : S.K. Sen, C.J; Ashok Bhushan, J

Bench : Division Bench

Advocate : Arvind Srivastava, for the Appellant; Ashutosh Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Ashok Bhushan, J.—Heard Sri Arvind Srivastav learned Counsel for appellant and Sri Ashutosh Srivastav learned counsel appearing for respondents.

2. This Special appeal has been filed by the appellant challenging the judgment dated 30-4-2002 passed by learned single Judge in Writ Petition No. 17570 of 2002 by which writ petition filed by appellant has been dismissed.

3. Facts giving rise to this appeal briefly stated are Combined Premedical Test (CPMT 2001) has been held by Lucknow University, in accordance with the order of the State Government dated 5-5-2001, CPMT 2001 contemplated holding of a common entrance test for several medical course including MBBS, BDS, BHMS, BAMS and BUMS, petitioner applied for appearing in CPMT 2001 and admit card was issued to the writ petitioner bearing roll number 206418. The writ petitioner appeared in the combined entrance test and obtained an overall rank of 18233. He appeared on 17-4-2002 before the Counselling Board where it was found that he did not possess aggregate 50% marks in Physics, Chemistry, Biology in

Intermediate Examination (eligibility examination) hence he was not entitled to seek admission in MBBS/BDS course. The writ petitioner filed a writ petition seeking mandamus commanding the respondents not to restrain the writ petitioner from taking admission in BDS Course on technical grounds. The writ petition was heard by learned single judge and dismissed by order dated 30-4-2002. The learned single Judge took the view that writ petitioner having secured 49.67% marks in qualifying examination, which is less than 50%, he is not eligible for admission to BDS course. The said judgment has been appealed by appellant by this appeal. Sri Arvind Srivastav, learned counsel for appellant in support of this appeal has raised following submissions :

1. The appellant having secured 49.67% marks in the Intermediate examination, the said mark has to be rounded up as to 50%, he contended that since his marks are more than 49.5% it has to be rounded up as 50% which makes him eligible for appearing in entrance examination for BDS course.
2. The University having permitted him to appear in CPMT 2001 it is stopped from taking the plea that appellant is not eligible to appear in BDS course.
3. The eligibility of securing 50% in the qualifying examination is discriminatory, arbitrary and violative of Article 14 of the Constitution of India. The test of merit is solely the entrance examination in which appellant has secured more than 50% marks hence he is fully entitled for admission in BDS course. Regulation 5(5) Proviso (ii) of the Regulations framed under Indian Medical Council Act, are ultra vires to the Constitution of India.
4. The Government Order dated 5-5-2001 which is a Executive instruction is ultra vires to the Constitution of India.

Learned counsel for appellant also cited several decisions in support of his submissions which will be referred to while considering the said submissions.

4. Sri Ashutosh Srivastav appearing for the respondents refuting the submissions of counsel for appellant contended that appellant is not eligible for admission in BDS course since he does not possess aggregate 50% marks in qualifying examination. He contended that principle of rounding up of the fraction of percentage is not applicable in the present case, percentage of marks of appellant which is 49.67 cannot be treated to be 50%. He contended that the conditions to appear in the entrance examination clearly anticipated that for admission in BDS course 50% marks are required in qualifying examination hence it is not open to appellant to now contend that said criteria is arbitrary. It has been further submitted that the requirement of having 50% marks in qualifying examination has been included in accordance with Regulations framed by Medical Council of India under Medical Council of India Act. Reliance has been placed by counsel for the respondent on several Judgments of this Court and Apex Court which will also be referred to while considering submission of the respective parties.

5. The first submission of counsel for appellant is to the effect that his marks should be treated as 50% after rounding up of the fraction of marks as to whole marks i.e. 49.67% be rounded up as 50%. When an eligibility criteria has been fixed for appearing in an examination which is basis of a particular percentage in the examination, every candidate seeking admission must possess the minimum percentage. The principle of rounding up of fraction of marks cannot be held to be applicable in a competitive examination. The principles of rounding up has been applied in calculating the majority of particular votes where the votes can not be expressed in fraction. In case where Statute or Rule provides that particular decision has to be taken by special majority of votes and while determining the majority, votes come in fraction then the fraction of a vote is always rounded up to whole since votes cannot be expressed in fraction. Learned single Judge has also referred to Judgment of this Court pertaining to casting of votes i.e. Wahid Ullah Khan Vs. District Magistrate, Nainital and others, while explaining the word majority of more than one half the Full Bench held in paragraph 14, which is extracted below :

"14. Next, coming to the facts in the present case, if the words, "more than one half are not superfluous then what meaning is to be given on the facts of the present case where admittedly the total strength of the members of the Board is fifteen. In referring order, the Division Bench held which is also the argument on behalf of the petitioner, that half of the members out of fifteen cannot be seven and half which is an impossibility. Therefore, it has to be rounded to eight and if this be the half the use of the words "more than half would only be nine members. This interpretation to the provisions of this Act, with respect, we do not accept. Rounding of a figure is only where a particular figure has to be arrived at, It may be for some relevance where half of the total number is necessary to be arrived at and in case seven could not be half and mathematically seven and half is half of fifteen then the principle of rounding of could be applied. In fact, various provisions or rules provided the rounding of where such contingency has to be arrived at, but in case where total number is fifteen and if the meaning of the word "majority" is more than one half and any number which is more than half would be a number of majority votes. In order to arrive at majority votes it is not necessary first to find the mathematical figure of half of the total to be seven and half and round that figure as there cannot be seven and half members to eight and then add up one number to make the majority of more than one half. That is to say, to make it nine. This argument is misconceived when majority could be any number, which is more than half, then any number which could be said to be more than half would be a majority number. If it was not a case of votes in a given case any fraction, which is more than half even before it is totalled up to a rounded figure would be a majority figure. However, this is not true in the matter concerning a person voting as he cannot be divided into fraction. The true intention by using the said words is this provision is that such a number has to be a number which is more than half. It cannot be doubted that number 8 out of total number which is 15 is a number

more than half thus would be covered by the words majority votes. Eight would be a majority vote in a total number of fifteen and in case eight persons voted in favour of no confidence motion then that number would be a majority of more than one half of the total number of members of the Board and such a resolution would be deemed to have been carried out the motion of no-confidence as against the Chairman u/s 87A of the Act.

6. The second instance where the fraction is rounded up are the cases where seats have to be determined according to percentage of reservation for appointment or for admission in an educational institution. When number of seats come into fraction, the said fraction, is rounded up according to the prescription of Rule or statute. In those cases rule or statute always provides that fraction to be rounded up to whole or a fraction up to some extent be ignored. The above principle has been applied since a seat or a post cannot be expressed in a fraction because seats and posts are always in whole number. For a competitive examination eligibility and the selection on the basis of merit sometimes depend on one mark. One mark when expressed in percentage may generally come in fraction but the said fraction cannot be ignored nor it can be said that the said fraction is insignificant.

7. Learned counsel for the appellant placed reliance on a single Judge judgment of this Court in *Rajan Seth v. State of U.P.* (1992) 1 UPLBEC 636. The aforesaid case arose out of admission in MBBS in Medical College, Jhansi. The writ petitioner made an application to the Principal, Medical College, Kanpur seeking his transfer to Medical College, Kanpur. From the facts of the case it appears that 5% vacancies were to be filled up by transfer. Since 5% of 191 seats come to 9.55, for working out the number of seats, the fraction less than 5 has to be ignored and the figure has to be rounded up to make 10 seats. In the facts and circumstances of the aforesaid case this Court held that 9.55 should be rounded up to 10 seats. The aforesaid decision does not help the appellant in the present case. As observed above rounding up principle has been applied while determining the quota of seats or while determining the majority of votes. The said case relates to seats. Seats and posts cannot be expressed in fraction, hence in this case fraction is rounded up but marks obtained by candidate in an examination can be expressed in fraction and when a particular merit is required as eligibility the principle of rounding up of less marks to the next higher percentage cannot be accepted. There is no principle that percentage of marks can only be expressed in round figure. Counsel for the appellant could not show any authority or rule in support of his submission.

8. Learned counsel for appellant further contended that when the fraction is less than .5 it shall be ignored and when fraction is more than .5 it should be rounded up to the next figure. From a close scrutiny of the above submissions it is clear that said submission is neither workable or acceptable nor it has any substance rather it may lead to analogous and unsatisfactory result. In between .5 to one while expressing in way of percentage of total marks there may be several

numbers and by rounding up of all such numbers to next whole figure unequal will be made equal. Counsel for appellant relied upon judgment of this Court New India Assurance Co. Ltd. Vs. R. Srinivasan, Learned counsel for appellant contended that Courts are not to act upon the principles that every procedure is to be taken as prohibited unless it is expressly provided for by the Courts. Reliance has been placed in paragraph 17 of the said Judgment which is quoted below :

" 17. But that is not the end of the matter Mohmood, J. in his dissenting judgment in the Full Bench case of Narsingh Das v. Mangal Dube observed. "The Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle, prohibitions cannot be presumed, and in the present case, therefore, it rests upon the defendants to show that the suit in the form in which it has been brought is prohibited by the rule of procedure applicable to the Courts of justice in India."

9. The aforesaid case does not help the appellant in any manner. The aforesaid case arose under Consumer Protection Act 1986 in which question raised before the Apex Court was that in view of the dismissal of the first complaint filed by the respondent the second complaint on the same facts and cause of action would lie or not? In that context observation of Full Bench Judgment of our Court was extracted in Paragraph 17 of the Apex Court. In the present case the question is not of procedure to be followed in a case but whether the marks of the appellant can be increased by resorting to principle of rounding up. The reference of aforesaid case is completely out of place. Learned counsel for appellant has failed to show any rule or even administrative instruction permitting the rounding up of marks for purpose of eligibility. It is thus clear that there is no substance in the first submission raised by learned counsel for appellant.

10. The second submission of learned counsel for appellant is based on the principles of estoppel. The contention is that the University having permitted the appellant to appear in entrance examination, it is not open to the University to say that appellant is not eligible to appear in BDS course. As noted above, there is common entrance examination for different courses. This Court by an earlier order directed the counsel for respondents to produce the original form which was filled up by the appellant, Since the appellant has contended that he had applied only for BDS and MBBS course and University having permitted him to appear in the examination cannot now take stand that appellant is ineligible. Learned counsel for respondent produced the original form of the appellant which he filled up for appearing in CPMT 2001. The original form did not contain any column regarding giving option for appearing for a particular course. The form was common for all courses. The instructions pertaining to CPMT 2001 examination has been brought on record as Annexure C-A-1. Instruction 2GA (V) provide that for MBBS and BDS course a candidate must have passed qualifying

examination in Physics, Chemistry and Biology with aggregate 50% marks. The condition 2 GA(VI) provided that for BAMS, BHMS and BUMS candidate should have passed qualifying examination with 35% marks but marks of appellant being more than 35% he was in any view qualified for aforesaid three courses. Thus the University cannot have refused issuing admit card to the appellant. Thus, merely by issuing admit card by the University it cannot be said that University treated appellant eligible for BDS and MBBS courses.

11. In view of the aforesaid facts the submission of learned counsel for appellant that University/respondents are stopped from taking the plea that the appellant does not fulfil the eligibility for BDS course is not made out. The judgment of learned single Judge relied upon by the appellant reported in 1994 (1) ESC 74 Km Pratibha Srivastav v. Purvanchal University, Jaunpur is not applicable in the present case. In the aforesaid case the University permitted the petitioner to appear under a mistake hence this Court applied principle of equitable estoppel. As observed above, in this case, there was no mistake on the part of University in permitting the appellant to appear in the entrance examination since he was eligible at least for three courses and the entrance examination was common on the basis of same examination form. The judgment of the Apex Court 2000 (8) SCC 73 : AIR 2000 SC 3706 Tata Iron and Steel Company v. Union of India for the proposition of estoppel by conduct is not applicable. In the aforesaid case the Apex Court held that issue of estoppel by conduct can only be said to be available in the event of there being precise and unambiguous representation. In the present case there is no representation by the University, that the appellant has been treated to be eligible for appearing in BDS course. The aforesaid judgment has no application in the present case.

12. The third submission of learned counsel for appellant is that the prescription of 50% marks as eligibility condition for appearing in entrance examination is ultra vires.

13. The fourth submission of the counsel for appellant is also to the same effect i.e. challenging the said condition in the Government Order dated 5th May 2001. Although the appellant has not made any prayer in the writ petition challenging the Government Order dated 5th May 2001 and Regulation 5 (ii) Proviso, we have permitted the appellant to raise this submission in this appeal. The appellant filed an amendment application bringing on record aforesaid ground of challenge and the prayer to declare Regulation 5 (ii) of Medical Council of India as well as Government Order dated 5-5-2001 as ultra vires. Both the submissions of learned counsel for appellant being inter-related we are considering both these submissions together.

14. Medical Council of India with the previous sanction of Central Government has made regulation, namely, Regulation on Graduation Medical Education 1997, Clause 5 of aforesaid Regulation is regarding procedure for selection to MBBS course.

15. The aforesaid Regulations were amended by Amendment 1999 published in the Gazette of India May 10, 1999. The amended Regulation 5 provides as follows :

(5) Procedure for selection to MBBS course shall be as follows :

(i) in case of admission on the basis of qualifying examination under Clause (I) based on merit, a candidate for admission to MBBS course must have passed in the subject of Physics, Chemistry, Biology and English individually and must have obtained a minimum of 50% marks taken together in Physics, Chemistry and Biology at the qualifying examination as mentioned in Clause (2) of Regulation 4, In respect of candidates belonging to Scheduled Castes, Scheduled Tribes or Other Backward Classes, the marks obtained in Physics, Chemistry, and Biology taken together in qualifying examination be 40% instead of 50% as above.

(ii) in case of admission on the basis of competitive entrance examination under Clauses (2) to (4) of this regulation a candidate must have passed in the subjects of Physics, Chemistry, Biology and English individually and must have obtained a minimum of 50% marks taken together in Physics, Chemistry and Biology at the qualifying Examination as mentioned in Clause (2) of Regulation (4) and in addition must have come in the merit list prepared as a result of such competitive entrance examination by securing not less than 50% marks in Physics, Chemistry and Biology taken together in the competitive examination. In respect of candidates belonging to Scheduled Castes, Scheduled Tribes or other Backward classes the marks obtained in Physics, Chemistry and Biology taken together in qualifying examination and competitive entrance examination be 40% instead of 50% as stated above.

Provided that a candidate who has appeared in the qualifying examination the result of which has not been declared, he may be provisionally permitted to take up the competitive entrance examination and in case of selection for admission to the MBBS course, he shall not be admitted to that course until he fulfils the eligibility criteria under Regulation 4."

16. A perusal of Regulation 5 as amended in 1999 marks it clear that admission to MBBS course is held on the basis of marks obtained in qualifying examination and on the basis of a competitive entrance examination. Regulation 5 (ii) as amended in 1999 makes it clear that where admission is taken on the basis of a competitive entrance examination, candidate must have passed in the subject of Physics, Chemistry, Biology and English and must have obtained a minimum of 50% marks taken together in Physics, Chemistry and Biology at the qualifying examination. Thus the regulation of Medical Council of India itself provides that a candidate must have passed qualifying entrance examination with aggregate of 50% marks in Physics, Chemistry and Biology for taking competitive examination. State of Uttar Pradesh provides selection for course on the basis of competitive examination. The aforesaid regulation thus clearly provided for the aforesaid prescription.

17. The Apex Court in its Constitution Bench Judgment *Dr Preeti Srivastava and Another Vs. State of M.P. and Others*, , has laid down that regulation framed by Medical Council of India has to be followed and the State cannot provide any inconsistent criteria. It has been further held that in addition to norms laid down by Medical Council of India State may lay down other additional norms for admission in a manner not inconsistent with or in the manner which does not dilute the criteria so laid down. Following was laid down in Paragraph 45 of the aforesaid judgment :

"45. In *Dr. Ambesh Kumar Vs. Principal, L.L.R.M. Medical College, Meerut and Others*, a State order prescribed 55% as minimum marks for admission to postgraduate medical courses. The Court considered the question whether the State can impose qualifications in addition to those laid down by the Medical Council of India and the regulations framed by the Central Government. The Court said that any additional or further qualifications which the State may lay down would not be contrary to Entry 66 to List I since additional qualifications are not in conflict with the Central regulations but are designed to further the objective of the Central regulations which are to promote proper standards. The Court said (SCC p. 552, para 26) : (at p. 406 of AIR) :

"The State Government by laying down the eligibility qualification namely the obtaining the certain minimum marks in the MBBS Examination by the candidates has not in any way encroached upon the regulations made under the Indian Medical Council Act nor does it infringes the Central power provided in Entry 66 of List I of the Seventh Schedule to the Constitution. The order merely provides an additional eligibility qualification".

None of these judgments lays down that any reduction in the eligibility criteria would not impinge on the standards covered by Entry 66 of List I. All these judgments dealt with additional qualifications-qualifications in addition to what was prescribed by the Central regulations or statutes".

18. The appellant himself has brought on record even the earlier Government order dated 17th February 2000, at page 33 of the paper book of the special appeal. The said Government order provides for conditions for examination for the CPMT 2000-2001. The condition 5 (GA) contains to similar condition that general candidate belonging to general category is to achieve 50% aggregate marks in Physics, Chemistry and Biology in qualifying examination as well as in a competitive entrance examination. The submissions of the learned counsel for appellant is that the aforesaid eligibility for the first time was laid down on 5-5-2001 and is not in consonance with the regulations made by Medical Council of India as stated above. When the regulation of Medical Council of India itself provides that where admission is taken on the basis of competitive examination candidates must possess 50% marks both in qualifying and entrance examinations no exception can be taken to by the Government order issued by State of U.P. dated 5-5-2001 and conditions of the Entrance Examination 2001.

19. Learned counsel for appellant vehemently submitted that 50% marks in qualifying examination is arbitrary and ultra vires to the Constitution of India. Submission of learned counsel is that many meritorious candidates who may not have achieved 50% marks in the examination are excluded from appearing in the competitive test which is arbitrary, ultra vires and violative of Article 14 of the Constitution of India, elaborating his submissions learned counsel submitted that by prescribing the cut of marks for appearing in entrance examination a large number of candidates have been denied opportunity to show their merit, His contention further is that the admission in medical Colleges is to be on merit and merit referred to in the regulation of medical Council of India is merit to be shown in the entrance examination. The contention of learned counsel for appellant that requiring of 50% marks in the qualifying examination for appearing in eligibility test is arbitrary and discriminatory cannot be accepted. The prescription of aforesaid marks has nexus with the object to be achieved. Admission in medical course is taken on the basis of merit and the requirement of aforesaid condition is a step towards achieving the merit. Further looking to everyday increasing number of candidates seeking admission, prescription of reasonable cut of marks cannot be said to be arbitrary. Since if there is no cut of marks everyone how so low merit he may have, has to be allowed to go through the process. Prescription of 50 marks for examination test can neither be said to be arbitrary nor discriminatory.

20. Counsel for appellant has also referred to regulations framed by Dental Council of India approved by Government of India by letter dated 27th June 1983. Regulation under heading "selection of student" has been referred and relied upon by learned counsel for appellant which is extracted below :

"Selection of Students :

The selection of students to a Dental college should be based solely on merit of the candidate and for determination of merit, the following criteria be adopted uniformly throughout the country:

(a) In State, having only one Dental College and one University/Board/Examining Body conducting the qualifying examination, the marks obtained at such qualifying examination be taken into consideration, exception being MBBS degree holders.

(b) In State, having more than one University/Board/Examining Body conducting the qualifying examination (or where there are more than one Dental College under the administrative/control of one authority), a competitive entrance examination may be held so as to achieve a uniform evaluation due to the variation of the standard of qualifying examinations conducted by different agencies.

(c) A competitive entrance examination is absolutely necessary in the case of Institutions of all India character.

(d) To be eligible for selection through competitive entrance examination a candidate must have passed any of the qualifying examination as enumerated under the head-note "Admission to B.D.S. Course" (above)

Provided that a candidate who has appeared in a qualifying examination, the result of which has not been declared, may be provisionally allowed to take up the competitive entrance examination and in case of his selection for admission to dental course, he shall not be admitted thereto unless in the meanwhile has passed the qualifying examination.

Provided also that a candidate for admission to the Dental Course must have obtained not less than 50% of the total marks in English and Science subjects taken together (I) at the qualifying examination (or at a higher examination) in the case of dental college where the admissions are made on the basis of marks obtained at these examinations or

(ii) 50% of the total marks in English and Science subjects taken together at the competitive entrance examination where such examinations are held for selection.

Provided further that in respect of candidates belonging to Scheduled Caste/ Scheduled Tribes, the minimum marks required for admission shall be 40% for general candidates. Where the seats reserved for Scheduled Castes and Scheduled Tribes students in any State cannot be filled for want of requisite number of candidates fulfilling the minimum requirements prescribed from the State, then such vacant seats may be filled up on All India basis with Scheduled Castes and Scheduled Tribes candidates getting not less than the minimum prescribed pass percentage."

21. Learned counsel contended that since for dental course there is no requirement of prescription of 50% marks in the qualifying examination hence the State cannot insist for aforesaid requirements. It is to be noted that in the appeal or in the amendment application which has been filed by the appellant, the aforesaid regulation have not been referred to or relied upon. However taking into consideration the aforesaid regulations the Government Order requiring 50% of marks in qualifying examination, is not inconsistent with the aforesaid regulation of Dental Council of India. The aforesaid prescription in any manner does not dilute regulation of Dental Council of India. The Apex Court in the case of Dr. Preeti Srivastav (*supra*) has reaffirmed and laid down that State Government can prescribe any additional criteria for admission which is not inconsistent with regulation of the Medical Council of India/Dental Council of India. Learned counsel for appellant while attacking Government Order dated 5th May 2001 has also contended that the said Government Order has not been published as required by Section 28 of U.P. State Universities Act 1973.

22. The Apex Court in *State of Uttar Pradesh and others Vs. Dr. Anupam Gupta, etc.*, had occasion to consider the question of admission on the basis of Post Graduate Medical Entrance Examination. In case before the Apex Court there was requirement of securing of 50% marks in the entrance examination. The

respondent to the appeal had not secured 50% minimum marks prescribed. The respondent filed writ petition in the High Court challenging the prescription of 50% of minimum marks as eligibility criteria. The High Court upheld prescription of 50% marks but finding that the vacant seats were available for admission directed for giving admission to the writ petitioner. State filed appeal in the Apex Court, The Apex Court held in the aforesaid judgment that securing 50% marks at the entrance examination is one of the condition precedent to become eligible for admission. Paragraph 11 of the judgment is quoted below :

"11. Accordingly we hold that securing 50 per cent marks at the entrance examination is one of the conditions precedent to become eligible for admission into the postgraduate degree and diploma courses. This is also consistent with the view expressed by this Court in Dr. Ajay Kumar Agarwal case in the view we refrain to go into whether there actually exist vacant seats (if need be we would decide/get decided and suitable directions would follow)."

23. The Apex Court disapproved the direction of the High Court to give admission on the vacant seat and had allowed the appeal.

24. Learned counsel for appellant has also placed reliance on the Division Bench Judgment of this Court in Special Appeal No. 223 M/s. 2000 State of M.P. v. Krishna Kumar Misra. The aforesaid case pertained to admission in MBBS course for the year 1999. The advertisement was issued on 22-4-1999. The medical Council of India framed regulation dated 10-5-1999 prescribing minimum qualification for admission to MBBS students who have secured 50% marks in Physics, Chemistry, Biology and English together. The examination was held on 11th July 1999. It was contended before the Division Bench that advertisement which was issued did not provide minimum requirement of obtaining 50% marks in Physics, Chemistry, Biology and English. The Division Bench of this Court after considering various decisions of the Apex Court held that authorities conducting examination were bound to declare the result in accordance with the regulations framed by Medical Council of India. The order passed by learned single Judge giving admission to the candidates who did not obtain 50% marks in qualifying examination was set aside. It was held by the Court :

"The contention of Mr. D. P. Singh learned Counsel for the respondents that the Judgment in the case of Dr Preeti Srivastava and Another Vs. State of M.P. and Others, cannot operate retrospectively, is totally misconceived. It is settled proposition of law by various pronouncements of Hon'ble Supreme Court that every judgement of the Court operate retrospectively unless and until it is made prospectively. On 10-8-1999, the Judgment of Hon'ble the Supreme Court in Dr. Preeti Srivastava was pronounced. The authorities conducting the examination were bound to declare the result in accordance with regulations framed by the Medical Council of India, because of the fact that such regulations were held to be binding in view of pronouncement of Hon'ble the Supreme Court in Dr Preeti Srivastava and Another Vs. State of M.P. and Others, if they would be watered down the pronouncement of Hon'ble the Supreme Court they could be hauled for

not complying with."

In the aforesaid judgment the Division Bench upheld the prescription of 50% of aggregate marks in qualifying examination on the basis of regulation framed by Medical Council of India, even though in the advertisement there was no such prescription. In the present case, the advertisement clearly stipulated possessing of minimum 50% of marks in qualifying examination. The aforesaid judgment is fully attracted in the facts and circumstances of the present case which clearly lays down that person not possessing 50% marks is ineligible.

25. The Apex Court considered the similar controversy which arose from State of Madhya Pradesh pertaining to eligibility for appearing in the entrance examination for admission in Medical Course in Professional Examination Board and Another Vs. Prashant Agrawal and Another, The facts of that case are to be noted in some detail. The State of M.P. framed rules namely M.P. Pre-Medical Test 2000 Rules. The M.P. Pre-medical Test 2000 Rules followed India as extracted above. Regulation 5 of Medical Council, of India Regulation as well as Rule 2,52 of M.P. Pre-medical Test 2000 Rules provided that only those persons who had passed a qualifying examination with the level of marks in the subject as prescribed would at all sit for the competitive examination. The writ petition was filed before the Madhya Pradesh High Court and Division Bench of Madhya Pradesh High Court vide its Judgment reported in 2001 (1) MP LJ 438 Prashant Agarwal v. Professional Board, allowed the writ petition and directed the writ petitioner to take part in counselling as eligible for MBBS/BDS course. The writ petitioner before the M.P. High Court had not passed qualifying examination with 50% marks and had passed qualifying examination with 48.60% marks but he was allowed to appear in the PMT entrance 2001 examination. In the entrance examination he secured 73.3% marks. The writ petitioner was prevented from participating in counselling and he approached High Court. The Apex Court in the aforesaid judgment set aside the judgment of the High Court and upheld the eligibility criteria of possessing 50% marks for appearing in entrance examination. It was held in Paragraphs 8, 9 by Apex Court as follows :

"8. In this case, as already noted, the respondent had not obtained the requisite 50% and over marks in Physics, Chemistry and Biology when he took his 10+2 examination in 1996. Nevertheless he was allowed to sit for the competitive examination for the pre-medical test in 1999. He was wait listed but not selected. The P.M.T. Rules 2000 were framed by the State in keeping with the M.C.I. Regulations wherein the precondition of obtaining the least 50% marks in Physics, Chemistry and Biology for taking the competitive examination was introduced. The respondent impugned the P.M.T. Rules, insofar as it sought to debar those candidates who had not obtained the qualifying marks in the qualifying examination from sitting in the competitive examination. During the pendency of the writ petition, the respondent sat for the entrance examination without as it appears, any protest on the part of the University. The respondent qualified and it was only at the state of counselling that the respondent was

informed that he could not be placed for admission into any medical college because he was including to have sat for the competitive examination. The respondent filed an application for interim relief in the pending writ petition before the High Court. The High Court disposed of both the interim application as well as the writ petition by the judgment which is now impugned before us. The High Court was of the view that the rules prescribed eligibility criteria did not require the further qualification of minimum percentage of marks in the qualifying examination. According to the High Court this rule having stood unamended, amounted to allowing persons who did not have the qualifying marks in the qualifying examination to sit for the common entrance examination. The rules were read as if there were two modes of entry into the MBBS. The rules were read as if there were two modes of entry into the MBBS-course in all cases namely (1) the qualifying academic criteria and (2) the common competitive examination.

9. The learned counsel appearing on behalf of the appellants have submitted that the High Court has ignored the regulations and the rules and erred in doing away with the requirement of 50% qualifying marks in the qualifying examination. Learned counsel for the respondent on the other hand has reiterated the reasoning of the High Court and has submitted that the basis for selection is ultimately the common entrance examination and if the candidate is successful in the common entrance examination it would be an anomaly to deny the candidate admission merely on the basis of a requirement which did not form part of the eligibility criteria. A reference has been made to the decision on this Court in *Dr Preeti Srivastava and Another Vs. State of M.P. and Others*, Which has emphasised the need and the rationale behind the holding of the common entrance examination for the purpose of admission to the MBBS course.

10. In our view, there may be some ambiguity in Rule 2.2.2 of the P.M.T. Rules, 2000 as to the requirement for admission into the MBBS course. However, from a reading of Rule 2.5.2 it is clear that in what appear to be narrowing down on the basis of merit process the requirement of a particular percentage in the qualifying examination cannot be avoided. As we see it, under the PMT Rules, 2000 the first requirement to be fulfilled by any candidate seeking to obtain admission in the MBBS course according to the regulations and rules is that the candidate must have at least passed the qualifying examination. The second requirement is that the candidate should have passed the qualifying examination with the particular percentage prescribed. Those candidates who fulfilled the first and second criteria can then sit for the competitive examination. The first two requirements are relevant only for the purpose of determining whether the candidate can sit or is eligible for taking the common entrance examination. Of course actual admission to the college is made on the basis of the results of the common entrance examination and does not depend on the percentage that a candidate may have obtained in the qualifying examination. Nevertheless one has to be qualified according to the rules to sit for the common entrance examination. The decision in *Preeti Srivastav*'s case does not in any way prohibit

the State Government from framing rules which provide for the "double hurdle procedure" as envisaged in the decision of this Court in *State of Andhra Pradesh and Another Vs. Lavu Narendranath and Others etc.*, . On the other hand in view of the regulations framed by MCI, as laid down in *Preeti Srivastava* the universities have no option but to follow the regulations so framed. The fact that the respondent successfully passed the common entrance examination despite does not prohibit the authorities refusing him admission on the ground that he was disqualified from taking the examination."

26. The law laid down by the Apex Court in the aforesaid case completely covers the controversy raised in the present Special appeal, (sic) examination are bad, cannot be accepted. The appellant having not passed qualifying examination with 50% marks aggregate in Physics, Chemistry and Biology was ineligible to appear in the entrance test for BDS and MBBS course. The appellant being not eligible for MBBS and BDS course cannot pray for participation in counselling of BDS and MBBS course. The respondent has rightly treated the appellant not eligible for BDS course. The action of respondent was in accordance with the provisions of Medical Council of India Regulations and conditions laid down by the Government Order dated 5-5-2001 and the instructions pertaining to CPMT examination 2001, the submission of counsel for appellant that Medical Council of India Regulation and Government Order dated 5-5-2001 is ultra vires is rejected.

27. The submission of counsel for appellant that the Government Order dated 5th May 2001 has not been published u/s 28 Sub-section (5) of U.P. State Universities Act also does not help the appellant. The aforesaid submission of non-compliance of Section 28 Sub-section (5) of U.P, State Universities Act was also raised in *State of Uttar Pradesh and others Vs. Dr. Anupam Gupta, etc.*, which was repelled, following was laid down by the Apex Court in Paragraphs 8 and 9 ;

"8. In *Dr. Ajay Kumar Agrawal and others Vs. State of U.P. and others*, while approving the procedure laid down in *Dr. Dinesh Kumar* case this Court held that technicality in the issuance of the notification and non-compliance of statutory notification in terms of Section 28 (5) of the Act would not stand in the way, stating thus :

"There may be some force in the submission of learned counsel but we do not think in the present facts and setting of events and in particular for meeting the problem which has arisen we need approve a technical stand."

In Paragraph 11 this Court further stated:

"It is not disputed that in U.P. the prevailing practice was a 50 per cent base for allowing Post Graduate study to doctors with MBBS qualification..... We are of the view that it is in general interest that the 50 per cent cut-off base as has been adopted should be sustained."

It is, therefore, clear that technicality of non-compliance of Section 28 (5) in

issuing the letter dated February 20, 1990 was nailed past and approved the prescription of 50 per cent cut-off minimum marks as eligibility for admission into P.G. course in Medicine for 1990, though plausible to countenance the contention appeared to be of securing 50 per cent in qualifying examination in MBBS course. But the fact is that U.P. Government, in fact, conducted entrance examination in 1990 and adopted 50 per cent cut-off as minimum marks.

9. In *Dr. Ambesh Kumar Vs. Principal, L.L.R.M. Medical College, Meerut and Others*, this Court upheld the Government's power under Article 162 and held that where the number of seats for admission to various post-graduate courses both degree and diploma are limited and large number of candidates undoubtedly apply for admission to those courses of study, that where the number of seats for admission to various post-graduate courses both degree and diploma are limited and large number of candidates undoubtedly apply for admission to those courses of study, an order laying down qualifications for candidates to be eligible for being considered for selection for admission to the said courses on the basis of merit specified by regulation cannot be said to be in conflict with the regulations of All India Medical Council Act. It does not encroach upon the standard prescribed by the statutory regulations. Laying down further qualifications, of eligibility, promotes and furthers the, standard in the institutions. Thus it could be seen that this Court consistently laid down the criteria for conducting entrance examination to the post-graduate degree and diploma courses in Medicine and the best among the talented candidates would be eligible for admission. 50 per cent cut-off marks was also: held to be valid to achieve excellence in post-graduate special. Accordingly we uphold the prescription of 50 per cent cut-off marks for general candidates and 40 per cent for SCs and STs together with 1.65 per cent weightage of total marks i.e. 50 marks in total in entrance examination as constitutional and valid".

28. As observed above the Government Order is neither ultra vires nor can be said to be violative of Article 14 of Constitution of India as contended by learned counsel for appellant.

29. In view of the aforesaid discussions, we feel that no good ground has been made out for interfering with the judgment of learned single Judge. Learned single Judge has rightly dismissed the writ petition filed by the appellant finding the appellant to be ineligible for BDS course. This special appeal lacks merit and is dismissed. Parties to bear their own costs.