



IN THE HON'BLE HIGH COURT OF HIMACHAL PRADESH

SHIMLA

C.W.P. No.: 6124 of 2013

and

CWP No.: 6697 of 2013

Reserved on: 3.09.2013.

Pronounced on: 26.09.2013.

CWP No.6124 of 2013:

Sandeep Parekh

..... Petitioner

Versus

State of H.P. and others

..... Respondents

CWP No.6697 of 2013:

Sharath Babu N.M.

..... Petitioner

Versus

State of H.P. and others

..... Respondents

Coram:

The Hon'ble Mr. Justice A.M. Khanwilkar, Chief Justice.

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting? Yes.

For the petitioner(s): Mr.Ajay Mohan Goel and Mr.Onkar Jairath, Advocates.

For the respondents : Mr. Shrwan Dogra, A.G. with Mr. Romesh Verma & Mr.Anup Rattan, Addl. A.Gs., and Ms. Parul Negi, Dy. A.G. for respondents-State.

Mr.Dilip Sharma, Senior Advocate, with Ms.Nishi Goel, Advocate, for respondent-University.

Mr.B.C. Negi, Advocate, for respondent No.4 in both the petitions.

Justice A.M.Khanwilkar, C.J.

Both these petitions filed under Article 226 of the Constitution of India take exception to the admission process in respect of super speciality seats in D.M. (Cardiology) in Indira Gandhi Medical College (hereinafter referred to as IGMC), Shimla for the academic session 2013. On 6th June, 2013, the Controller of Examinations issued notice of entrance test for admission to D.M. (Cardiology) and M.Ch. (CTVS) courses-2013 notifying admission to two seats each in D.M. (Cardiology) and M.Ch. (CTVS) Courses in IGMC, Shimla. The eligibility condition in the said notice is stated thus:

“ELIGIBILITY CONDITIONS:

50% seats will be filled up by Bonafide Himachali In-Service Medical Officer (PHPS) Health cadre candidates who are either appointed on regular or contract. The bonafide contractual Medical Officers working through Rogi Kalyan Samities are also eligible to appear in the Entrance Test for admissions to the above courses if they possess the Service Conditions as prescribed in the Prospectus at Clause 2.1. Remaining 50% seats will be available for open competition from amongst Bonafide Himachali who have done PG from IGMC, Shimla/ Dr.RPGC, Kangra, at Tanda or from any Institute recognized by MCI.

The In-Service candidates are required to submit their application through proper channel or must attach 'No Objection Certificate' from the competent authority alongwith Application Form so as to reach in the University Office on or before the last date for submission of Application Form.

Education Qualification: The candidates should have passed/appeared in MD/MS (Allopathy) examination in the concerned subject as mentioned below or equivalent degree (s) duly recognized by the Medical Council of India and registered with the Central or State Medical Council:

- i) DM (Cardiology) Course: The candidate(s) should have passed/appeared in MD examination in Medicine or Paediatrics.
- ii) M.CH (CTVS) Course: The candidate(s) must have passed/appeared in MS examination in General Surgery.

Note: The upper age limit for the Direct candidates and for the In-Service GDO's will be 40 years and 45 years respectively as on 1st July, 2013.”

(emphasis supplied)

2. The Himachal Pradesh University, Shimla issued prospectus-cum-application form for entrance test - 2013 on behalf of the Government of Himachal Pradesh. The eligibility criteria specified in the prospectus provided in clause 2 thereof, which reads thus:

“2. ELIGIBILITY”

2.1 In-service Group (GDO Quota)

50% will be filled up by bonafide Himachali In-Service Medical Officer (HPS) Health cadre candidates who are either appointed on regular or on contract. The bonafide contractual Medical Officer working through Rogi Kalyan Samities are also eligible to appear in the Entrance for Admission to D.M. (Cardiology) /M.Ch (CTVS), if they possess following service:

Category	Area	Mandatory service period
I	Pangi Sub Division, entire Lahaul & Spiti Distt., Pooh area of Kinnaur Distt. (Pooh Tehsil & Hangrang Sub Tehsil) and Dodra Kwar Sub-Division of Distt. Shimla	2 years
II	Distt. Kinnaur (excluding Tehsil Pooh and Hangrang Sub Tehsil) and Bharmour Sub-Division of Distt. Chamba, Development Block of Chopal, Chuhra (excluding Dodra-Kawar area) Sangarh, Saraj, Anni, Tissa & Chhota Bhangal of Multan Tehsil and Bara Bangal area (Baijnath Block).	3 years
III	Development Blocks Shillai, Jubbal Kotkhai, Salooni, Rohru, Nankhari & Karsog	3 years
IV	Other areas of the State (excluding the above and Below)	4 years
V	Within the limits of Shimla Municipal Corporation, within the limits of Municipal Corporation Solan and within Baddi-Barotiwala- Nalargarh notified area.	5 years

NOTE: In case a Medical Officer has served in more than one above category of area, the mandatory service period will be calculated on pro-rata basis.

2.2. DIRECT QUOTA

50% seats will be available for open competition from amongst:-

- (i) Bonafide Himachali who have done Postgraduation from Indira Gandhi Medical College, Shimla /Dr. RPGMC, Kangra at Tanda .
- (ii) Bonafide Himachalis who have done Post graduation from any institute recognized by MCI.

2.3. NUMBER OF SEATS

2.4. DISTRIBUTION OF SEATS

(i) Distribution of seats between (GDO's) in-service group and Direct group will be made by applying 2 point roster in the ratio 50:50 (speciality-wise) as under:-

1. H.P.H.S. (GDO group), 2. Direct group 3. H.P.H.S. (GDO group) 4. Direct group.

However, in case of non-availability of eligible candidate in one group the same will be filled by the other group and vice versa.

There will be no reservation of seats for SC, ST and other reserved categories.

(ii)There will be separate merit list for In-service and Direct group (speciality-wise)

2.5. QUALIFICATION & OTHER CONDITIONS/REQUIREMENTS FOR ADMISSION

- (i) The candidate must have passed M.D. Medicine or MD Paediatrics Degree for admission to D.M. (Cardiology) Course and M.S. General Surgery for admission to M.ch (CTVS) Course or its equivalent degrees duly recognized by the Medical Council of India provided the candidate who have appeared in these courses /examinations and the result of which has not yet been declared may also apply subject to the conditions that they will produce the degree at the time of Counselling .
- (ii) The upper age limit for the direct candidates will be 40 years of age as on 1st July, 2013 , provided however, in case of In-service GDO's candidates, the upper age limit will be 45 years as on 1st July 2013 .
- (iii) The candidate must have registered with the Central or State Medical Council.
- (iv) The In-service candidates are required to submit their application through proper channel or must attach "No objection Certificate" from their Employer alongwith application form so as to reach the University on or before the last date for submission of Application form."

3. For deciding the controversy brought before us, it may be useful to also reproduce addendum to above said notice of entrance test, dated 9th July, 2013, issued by the Controller of Examinations. The same reads thus:

**"Himachal Pradesh University
'Entrance Test Section'
Summer Hill, Shimla-171005**

No.HPU.DM/MCH (Super Speciality) ET/2013
Dated: 9th of July, 2013

ADDENDUM TO NOTICE OF ENTRANCE TEST FOR ADMISSION TO DM (Cardiology) & M.Ch (CTVS) COURSES- 2013.

In partial modification to this office notice dated 6.6.2013, the schedule for Entrance Test for admission to **DM (Cardiology) and M.Ch (CTVS) Courses has been changed** in view of the revised eligibility Criteria received from the State Govt. and now the Entrance Test for the same will be held on 21-07-2013 (**Sunday**) in **IGMC premises Shimla**. **The revised schedule for conducting the Entrance Test is as follows:**

1.	Last date for receipt of application forms in the Entrance Tests Section, H.P. University, Shimla-171005	16.07.2013
2	Issuance of Admit Card/Roll Nos to the Candidates personally or by their authorised representatives from the office of the Deputy Registrar, Entrance tests Section, Room No.10, Administrative Block, (Ground Floor) H.P. University, Summer Hill, Shimla-171005	18.07.2013 11.00 A.M. to 4.00 P.M.
3	Date of Entrance Tests at Indira Gandhi Medical College, Shimla	21.07.2013(Sunday)
4	Tentative date for displaying the list of candidates called for Practical/Clinical Exam in the University Notice Board and Website	23.07.2013

5	Date of Practical Examinations	24.07.2013 & 25.07.2013 at 11.00 am sharp
6.	Declaration of Result and Merit List	27.07.2013
7.	Date of 1 st round Counselling at New Examination Hall, IGNC, Shimla.	29.07.2013
8.	Last date of joining for the candidates admitted in 1 st round of Counselling to the allotted Course.	30.07.2013
9.	Commencement of Academic Session	1 st of August, 2013
10.	Last Date up to which students can be admitted against vacancies arising due to any reason at Indira Gandhi Medical College, Shimla	30.9.2013

Besides this, the Eligibility Criteria for In-Service Candidates in Clause 2.1 has been amended as under:

“ 50% seats will be filled-up by In-Service medical Officer (HPHS) Health Cadre candidates (Regular/Contract/RKS appointees). The contractual Medical Officer working through Rogi Kalyan Samities are also eligible to appear in the Entrance for admission to D.M. (Cardiology/M.ch)(CTVS), if they possess service mentioned in the prospects.”

Sd/-
 (Dr. Narendra Awasthi)
 Controller of Examinations.”
 (emphasis supplied)

As a result of this notification, the eligibility condition qua in-service candidates has been modified to be simplicitor “in-service medical officer (HPHS) Health Cadre candidates (Regular/Contract/RKS appointee)”. The original condition of being a bonafide Himachali in respect of in-service candidate has been done away with.

5. In both these petitions, admittedly, the petitioners are neither bonafide Himachalis nor in-service candidates. Pursuant to the aforesaid notice, both of them were keen on being admitted to super speciality course in D.M. (Cardiology).

6. In Writ Petition No.6124 of 2013, the petitioner secured MBBS degree from Jawahar Lal Institute of Post Graduate Medical Education and Research (Pondicherry University). He then did M.D. in General Medicine from

Kasturba Medical College, Mangalore, affiliated to Manipal Academy of Higher Education (deemed to be a University under UGC Act No.3, 1956) in April, 2010. He then served in the Department of Cardiology in Indira Gandhi Medical College and Hospital, Shimla as Registrar from 2nd August, 2010 to 31st July, 2011. He left the Registrarship on account of ill health of his father. He had applied for admission to the said Course even in the previous academic session pursuant to entrance test notice dated 30th May, 2012. He was considered and was shown at Sl.No.9 amongst the ten eligible candidates, but could not be admitted for want of seats. He has asserted that pursuant to the aforesaid notice for admission to D.M. (Cardiology), dated 6th June, 2013, he intended to participate in the admission process, but his form was not accepted on the ground that he was a Non-Himachali, vide communication dated 20th July, 2013 issued under the signature of Deputy Registrar (Entrance Tests).

7. It is admitted that the said admission process continued further in which Dr. Vivek Rana was selected against one seat earmarked for bona fide Himachali. As no candidate was found eligible qua the second seat for D.M. (Cardiology) Course earmarked for in-service candidate, the Controller of Examinations issued notice of special entrance test for admission to D.M. (Cardiology) Course – 2013, dated 3rd August, 2013, which reads thus:

**“Himachal Pradesh University
“Entrance Tests Section”
Summer Hill, Shimla- 171005.**

No.HPU.DM/MCH(Super Speciality)Special ET/2013

Dated: 3rd of August, 2013

**NOTICE OF SPECIAL ENTRANCE TEST FOR
ADMISSION TO DM (Cardiology) & M.Ch (CTVS)
COURSES - 2013.**

An MCQ type Special Entrance Test for admission to unfilled **one seat in DM (Cardiology) and 2 seats in MCh (CTVS)** Courses in Indira Gandhi Govt. Medical College & Hospital, Shimla will be held on **25-08-2013 (Sunday)** at IGMC premises.

ELIGIBILITY CONDITIONS

One seat in DM (Cardiology) and one seat in MCh (CTVS) will be filled – up by In- Service Medical Officer (HPHS) Health cadre candidates (Regular/ Contract/ RKS appointees). The contractual Medical Officers working through Rogi Kalyan Samities are also eligible to appear in the Entrance Test for admissions to DM (Cardiology)/ Mch (CTVS) if they possess the Service Conditions as prescribed in the Prospectus at Clause 2.1. Remaining one seat in MCh (CTVS) Course will be available for open competition from amongst Bona fide Himachali who have done PG from IGMC, Shimla / Dr. RPGC, Kangra, at Tanda or from any Institute recognized by MCI. However, in case of non-availability of eligible candidate in one group, the same will be filled up by the other group and Vice-Versa.

The In-Service candidates are required to submit their application **through proper channel or** must attach '**No Objection Certificate**' from the competent authority along with Application Form so as to reach in the University Office on or before the last date for submission of Application Form.

Educational Qualifications: The candidates should have passed/ appeared in MD/MS (Allopathy) examination in the concerned subject as mentioned below or equivalent degree(s) duly recognized by the Medical Council of India and registered with the Central or State Medical Council:

i) DM (Cardiology) Course: The candidate(s) should have passed / appeared in MD examination in Medicine or Pediatrics.

ii) M.CH(CTVS) Course: The candidate(s) must have passed/ appeared in MS examination in General Surgery.

Note: The candidate(s) appearing in qualifying examination will have to submit the copy of degree on the day of Counselling.

Age: The upper age limit for the Direct candidates and for the In-Service GDO's will be 40 years and 45 years respectively as on 1st July, 2013.

PROCEDURE FOR OBTAINING THE PROSPECTUS:

(i) **Downloading from the University websites:** The Prospectus-cum – Application form shall be downloaded from University Website i.e. www.hpuniv.nic.in or from www.hpuniv.in and such forms duly filled in should accompany the Prospectus / Entrance Test Fee of Rs.3500/- in the shape of Demand Draft drawn in favour of Finance Officer, H.P. University, Shimla while submitting the same in the University.

Note : It will be the entire responsibility of the candidates to procure the prospectus and submit the Application Form within the stipulated date. The University will not be responsible for any lapse/ delay for non-receipt/ misplacement of Application Form in transit.

Last Date: The Application Forms complete in all respect along with requisite documents and fee must reach the office of **Deputy Registrar(Entrance Tests), Room No.10, Ground Floor, Administrative Block, H.P. University, Shimla-171005** latest by **20-08-2013 up to 5.00 P.M.** either personally or through speed post.

PROCEDURE FOR OBTAINING ADMIT CARD/ ROLL NUMBER:

NUMBER: The Provisional Admit Card /Roll Numbers to the eligible candidates will be issued to the candidates or their authorized representative on **24-08-2013 from 11.00 A.M. to 1.00 P.M. by the office of the Deputy Registrar(Entrance Tests), Room No.10, Ground Floor, Administrative Block, H.P. University, Shimla-171005.**

All disputes are subject to legal jurisdiction of courts in Shimla only.

**Sd/-
(Dr. Narendra Awasthi)
Controller of Examinations”**

8. As per this notice, the aspirants were expected to submit application forms complete in all respects alongwith the requisite documents latest by 20th August, 2013. The petitioner (in the first petition), however, in the meantime, rushed to this Court by way of present writ petition filed on 6th August, 2013. After two adjournments, on 21st August, 2013, this Court directed the respondents to permit the said petitioner to appear in the examination to be held on 25th August, 2013, but on condition that his result was to be made subject to the outcome of the petition. The said petitioner accordingly appeared in the examination. Notably, this petitioner has not challenged the admission given to Dr.Vivek Rana in the direct quota being bonafide Himachali; nor Dr.Vivek Rana has been impaled as respondent in the writ petition. As a matter of fact, in para 10 of the Writ Petition, this petitioner has expressly given up the challenge to the admission of Dr.Vivek Rana. Be that as it may, during the pendency of the writ petition, the other candidates, who had applied pursuant to the notice of special entrance test, dated 3rd August, 2013, have moved application for intervention asserting that if the relief claimed by the petitioner were to be granted, that would, inevitably, impact the quota prescribed for admission to Post Graduate Courses from amongst in-service

General Duty Officers (GDOs), which was legitimate provision made for them.

9. The State Government as well as the University has contested the petition and would submit that it is always open to provide for independent source such as for in-service candidates and such provision is constitutionally permissible and moreso because there is shortage of super speciality doctors in the State of Himachal Pradesh and to ensure best patient care services and super specialist services to the people of the State, the State Government took a conscious decision to reserve (DM/M.Ch.) seats for in-service GDOs and bonafide Himachali only.

10. The broad facts even in the second petition (CWP No.6697 of 2013) are similar. Even in this case, the petitioner did his MBBS and internship from J.J.M. Medical College Davangere under Rajiv Gandhi University of Health Sciences in March, 2009 and thereafter registered with Karnataka Medical Council. This petitioner did M.D. in General Medicine from IGMC, Shimla under Himachal Pradesh University in the month of June, 2013. Thereafter, he got himself registered with Himachal Pradesh Medical Council, Shimla. Pursuant to the notice, dated 6th June, 2013, even this petitioner intended to apply, but his application was rejected without giving anything in writing. It is asserted by this petitioner that his application was rejected presumably on the same ground as in the case of Sandeep Parekh, being a non-bonafide Himachali. Although this petitioner has adverted to the fact that Dr. Vivek Rana has been admitted against one seat being bonafide Himachali, even this petitioner has not impleaded him as respondent, nevertheless

has sought general relief for declaring the act of the respondent-State and the University of not affording super speciality seats in D.M. (Cardiology) in IGMC by way of open competition on merit and reserving the same for bonafide ~~Himachali~~ eligible candidates and in-service candidates of HPHS cadre as per prospectus-cum-application form for admission to D.M. (Cardiology) Course - 2013 in ~~IGMC~~, Shimla. Even this petitioner has challenged the notice for special entrance test dated 3rd August, 2013 and rejection of candidature of the petitioner being bad in law and to issue writ to the extent the seats in super speciality course in D.M. (Cardiology) in IGMC, Shimla have been reserved for bonafide Himachali candidates and in-service candidates. Even this petitioner has prayed for further relief to direct the respondents to fill the remaining one seat of super speciality course in D.M. (Cardiology) in IGMC, Shimla advertised vide notice dated 3rd August, 2013 on the basis of merit alone and allow the petitioner to participate in MCQ Type Test to be held on 25th August, 2013 for admission to the said seat and thereafter admit him to the super speciality course in D.M. (Cardiology) in IGMC, Shimla, if he is able to get admission on merit. This petition has been filed on 22nd August, 2013. It was listed before the Court on 23rd August, 2013, when interim relief on same term as in the companion matter, was granted. In other words, even this petitioner appeared in the entrance examination conducted on 25th August, 2013 on same terms.

11. In both these petitions, reliance is mainly placed on the dictum of the Apex Court that admission to Post Graduate and Super Speciality Course such as Cardiology, there should be

no reservation at all including on the basis of intuitional preference and admission should be granted purely on merit, on all India basis. This observation is found in the decision of the Apex Court in **Dr. Pradeep Jain and others vs. Union of India and others¹**, and restated by the Constitution Bench of the Apex Court in the case of **Dr. Preeti Srivastava and another vs. State of M.P. and others²**.

12. This plea has been countered by the respondents on the argument that the issue in the present petitions is now limited to the seat earmarked for in-service candidate, which is an independent source and it is open to the State to provide for quota for the in-service candidates, even in respect of Post Graduate and Super Speciality Courses. That is constitutionally permissible being a case of classification. It is, therefore, not a case of reservation as such, which will be hit by Articles 14, 15 or 16 of the Constitution. Further, in the guise of challenge to the admission process in respect of one seat of D.M. (Cardiology) earmarked for in-service candidate, the petitioners cannot be permitted to assail the basis of provision made in respect of the seat against which Dr. Vivek Rana has already been admitted being bonafide Himachali. The petitioners in both these cases can confine their challenge only to the process commenced on the basis of re-advertisement, dated 3rd August, 2013, for one seat of D.M. (Cardiology) earmarked for in-service candidate. As regards that challenge, the decisions of the Apex Court relied upon by the petitioners to urge that the admissions to the Post Graduate and Super Speciality Courses should be granted

¹(1984) 3 SCC 654

²(1999) 7 SCC 120

purely on merit, on all India basis and no reservation therefor is permissible, would be of no avail. Further, the petitioners did not submit application pursuant to the re-advertisement, dated 3rd August, 2013, and even for that reason cannot be permitted to challenge the admission process.

13. Taking the last contention of the respondents first, we are not inclined to non-suit the petitioners on this technical argument in the fact situation of the present case. Inasmuch as, at least in respect of the first petitioner, he had approached this Court on 6th August, 2013 and the matter was required to be adjourned for filing reply, which, in turn, was listed on 21st August, 2013. Until passing of the order, dated 21st August, 2013, the respondents did not even remotely indicate that the petition be entertained only if the petitioner was to submit application before 20th August, 2013. Had that stand been taken, we have no manner of doubt that the petitioner would have immediately complied with that requirement. Since this being hyper technical objection, we are of the considered opinion that the same deserves to be stated to be rejected.

14. Reverting to the main issue under consideration, there could be no doubt that the Apex Court in Pradeep Jain's case (supra), in paragraph 22, in no uncertain terms, observed that admissions to Post Graduate and Super Speciality Courses such as Cardiology, no reservation at all, even on the basis of institutional preference, is permissible and admission should be granted purely on merit, on all India basis. This has been restated by the Constitution Bench of the Apex Court in the case

of Dr.Preeti Srivastava (*supra*). In paragraphs 68 and 69, the Court expounded thus:

“68. In the case of *Dr. Jagdish Saran v. Union of India* (AIR 1980 SC 820) this Court observed that at the highest scales of specialty, the best skill or talent must be hand-picked by selection according to capability. Losing a potential great scientist or technologist would be a national loss. That is why the Court observed that the higher the level of education the lesser should be the reservation. There are similar observations in *Dr. Pradeep Jain v. Union of India* (AIR 1984 SC 1420). Undoubtedly, *Dr. Pradeep Jain v. Union of India* did not deal with reservation in favour of the Scheduled Castes and the Scheduled Tribes. It dealt with reservation in favour of residents and students of the same University. Nevertheless it correctly extended the principle laid down in *Dr. Jagdish Saran v. Union of India* (*supra*) to these kinds of reservation also, holding that at the highest levels of medical education excellence cannot be compromised to the detriment of the nation. Admissions to the highest available medical courses in the country at the super-specialty levels, where even the facilities for training are limited, must be given only on the basis of competitive merit. There can be no relaxation at this level.

69. *Indra Sawhney v. Union of India* has also observed that in certain positions at the highest level merit alone counts. In specialties and super-specialties in medicine, merit alone must prevail and there should not be any reservation of posts. The observations in *Indra Sawhney v. Union of India* (1992 AIR SCW 3682 : AIR 1993 SC 477 : 1993 Lab IC 129) were in respect of posts in the specialties and super-specialties in medicine. Nevertheless, the same principle applies to seats in the specialties and super-specialties in medicine. Moreover, study and training at the level of specialties and super-specialties in medicine involve discharging the duties attached to certain specified medical posts in the hospitals attached to the medical institutions giving education in specialties and super-specialties. Even where no specific posts are created or kept for the doctors studying for the super-specialties or specialties, the work which they are required to do in the hospitals attached to these institutions is equivalent to the work done by the occupants of such posts in that hospital. In this sense also, some of the considerations under Art. 16(4) read with Art. 335 rub off on admissions of candidates who are given seats for specialty and super-specialty courses in medicine. Even otherwise under Art. 15(4) the special provisions which are made at this level of education have to be consistent with the national interest in promoting the highest levels of efficiency, skill and knowledge amongst the best in the country so that they can contribute to national progress and enhance the prestige of the nation. The same view has been upheld in *Dr. Fazal Ghafoor v. Union of India* (1988) Supp SCC 794 : (AIR 1989 SC 48) and *Mohan Bir Singh Chawla v. Punjab*

University, (1997) 2 SCC 171 : (1997 AIR SCW 609 : AIR 1997 SC 788)."

15. However, as aforesaid, in the present petitions, we can permit the petitioners only to agitate the validity and justness of the admission process in respect of one seat of D.M. (Cardiology) earmarked for in-service candidate as specified in notification dated 3rd August, 2013 and nothing more. The respondents are justified in relying on the decision of the Apex Court in the case of **Kumari Chitra Ghosh and another vs. Union of India and others**³ to contend that if the sources have been classified in proper manner having rational nexus with the object of imparting medical education and also for selection for the purpose and such classification is based on intelligible differentia, which distinguishes them from the group of persons left out is permissible. Indeed, in that case, the issue was in respect of pre medical examination of the Delhi University for admission to first year MBBS Course. The question is – whether the principle underlying the permissibility of classification based on intelligible differentia can be applied even to Post Graduate and Super Speciality Courses, as is contended.

16. The Apex Court while dealing with the case of admission to Post Graduate Medical Course, in the case of **Dr.Jagadish Saran and others vs. Union of India**⁴ examined the challenge to provision for ‘institutional quota’ “upto 70% of the seats” whether was violative of Articles 14 to 16 of the Constitution. In the present case, it is not a matter of “institutional quota” amounting to reservation under Article 15(4) or 16(4) as such, but a 50% provision made for the in-

³(1969) 2 SCC 228

⁴(1980) 2 SCC 768

service candidates. That cannot be considered as excessive.

The petitioner in the first petition was in service but he had left the Registrarship on 31st July, 2011 and was, admittedly, not in service whilst he made application pursuant to the advertisement in question.

17. In the case of **K.Duraisamy and another vs. State of T.N. and others⁵**, the three Judges Bench of the Apex Court considered the question regarding 50% quota in favour of in-service candidates in respect of Super Speciality Courses, as in the present case. Although it held that the consistent and authoritatively settled view of the Apex Court that at the Super Speciality level in particular, and even at the Post Graduate level, reservations of the kind known as “protective discrimination” in favour of those considered to be backward should be avoided as not permissible; but went on to observe that allocation of seats for admission in the form of quota amongst in-service candidates is not in the nature of reservation envisaged under Article 15(4) or 16(4) as such. In this decision, the Court was called upon to consider the opinion of the Full Bench of the Madras High Court. In paragraph 8, it has been observed that the Government possesses the right and authority to decide from what sources the admissions in educational institutions or to particular disciplines and courses therein have to be made and that too in what proportion. That was well established proposition of law. It then observed that reservation for and in favour of the in-service candidates cannot be equated or treated at par with communal reservation envisaged under Article 15(4) or 16(4), which are extended as special mechanics

⁵(2001) 2 SCC 538

of their implementation to ensure such reservations to be the minimum by not counting those selected in open competition on the basis of their own merit as against the quota reserved on communal considerations. It is then observed in paragraph 12 that provision for in-service candidates is to safeguard the interests of candidates who are already in service to enable them to acquire higher talents for the benefits of the patients to be treated in such Medical Institutions where the in-service candidates are expected to serve. That scheme is not by way of a mere reservation, but is one of classification of the sources from which admissions have to be made.

18. In the present case, it is not possible to hold that 50% provision made for in-service candidates was excessive. Further, provision is made for definite and fixed quota for the respective classified source of admission. No doubt, the argument of the petitioners proceeds that for the academic session 2013, only two posts of D.M. (Cardiology) were available and the manner in which the same were to be filled, would result in 100% reservation. In that, one seat was already filled by bonafide Himachali candidate and non-Himachali candidates were completely excluded from consideration. The second post available for D.M. (Cardiology) Course -2013 would now be filled from amongst in-service candidate.

19. However, for considering the grant of relief to the petitioners as has been noted earlier, we have to examine whether 50% quota for in-service candidates is constitutionally permissible or otherwise. Examining any other matter would inevitably result in allowing the petitioners to question the

admission given to Dr.Vivek Rana against the second seat of D.M. (Cardiology) in the category of bonafide Himachalis. That is not in issue in these petitions. For the same reason, it is not necessary to dilate on the argument of the respondents that by addendum issued on 9th July, 2013, the condition of bonafide Himachali has been done away with in respect of 50% seats to be filled up from amongst in-service Medical Officers (PHPS) Health Cadre candidates (regular/contract/RKS appointees).

20. Suffice it to observe that the dictum of the Apex Court in the cases of Dr.Pradeep Jain's and Dr.Preeti Srivastava's will have no application to the available seat of D.M. (Cardiology) to be filled from amongst the in-service candidates, which is to the extent of 50% of the seats available for D.M. (Cardiology) Course – 2013.

21. In the case of Pradeep Jain (supra), the question considered was no doubt with regard to admission to Post Graduate Course, but it was in respect of reservation on the basis of domicile or residential qualification within the State irrespective of merit and not qua the quota provided for in-service candidates. Even in the case of Preeti Srivastava (supra), the question was in respect of providing reservation for admission to Post Graduate Courses by prescribing different qualifying marks for special category candidates seeking admission under the reserved category. In paragraph 10 of the said decision, the Court noted that it was not examining the question whether reservations are permissible at the Graduate level in Medicine. Suffice it to observe that the permissibility of

providing quota for in-service candidate was not the issue considered in the aforesaid judgments.

22. That takes us to the unreported decision of the Constitution Bench of the Apex Court in **Faculty Association of AIIMS vs. Union of India & others**, in Civil Appeal No.4500 of 2002, decided on 18th July, 2013. Reliance is placed on paragraphs 17 to 19 of this decision, which read thus:

“17. Although, the matter has been argued at some length, the main issue raised regarding reservation at the super-specialty level has already been considered in Indra Sawhney’s case (supra) by a Nine-Judge Bench of this Court. Having regard to such decision, we are not inclined to take any view other than the view expressed by the Nine-Judge Bench on the issue. Apart from the decisions rendered by this Court in Dr. Jagadish Saran’s case (supra) and Dr. Pradeep Jain’s case (supra), the issue also fell for considerate in Preeti Srivastava’s case (supra) which was also decided by a Bench of Five Judges. While in Dr. Jagadish Saran’s case (supra) and in Dr. Pradeep Jain’s case (supra) it was categorically held that there could be no compromise with merit at the super specialty stage, the same sentiments were also expressed in Preeti Srivastava’s case (supra) as well. In Preeti Srivastava’s case (supra), the Constitution Bench had an occasion to consider Regulation 27 of the Post Graduate Institute of Medical Education and Research, Chandigarh Regulations, 1967, whereby 20% of seats in every course of study in the Institute was to be reserved for candidates belonging to the Scheduled Castes, Scheduled Tribes or other categories of persons, in accordance with the general rules of the Central Government promulgated from time to time. The Constitution Bench came to the conclusion that Regulation 27 could not have any application at the highest level of super specialty as this would defeat the very object of imparting the best possible training to selected meritorious candidates, who could contribute to the advancement of knowledge in the field of medical research and its applications. Their Lordships ultimately went on to hold that there could not be any type of relaxation at the super specialty level.

18. In paragraph 836 of the judgment in Indra Sawhney’s case (supra), it was observed that while the relevance and significance of merit at the

stage of initial recruitment cannot be ignored, it cannot also be ignored that the same idea of reservation implies selection of a less meritorious person. It was also observed that at the same time such a price would have to be paid if the constitutional promise of social justice was to be redeemed. However, after making such suggestions, a note of caution was introduced in the very next paragraph in the light of Article 15 of the Constitution. A distinction was, however, made with regard to the provisions of Article 16 and it was held that Article 335 would be relevant and it would not be permissible not to prescribe any minimum standard at all. Of course, the said observation was made in the context of admission to medical colleges and reference was also made to the decision in State of M.P. Vs. Nivedita Jain [(1981) 4 SCC 296], where admission to medical courses was regulated by an entrance test. It was held that in the matter of appointment of medical officers, the Government or the Public Service Commission would not be entitled to say that there would not be minimum qualifying marks for Scheduled Castes/Scheduled Tribes candidates while prescribing a minimum for others. In the very next paragraph, the Nine-Judge Bench while discussing the provisions of Article 335 also observed that there were certain services and posts where either on account of the nature of duties attached to them or the level in the hierarchy at which they stood, merit alone counts. In such situations, it cannot be advised to provide for reservations. In the paragraph following, the position was made even more clear when Their Lordships observed that they were of the opinion that in certain services in respect of certain posts, application of rule of reservation may not be advisable in regard to various technical posts including posts in super specialty in medicine, engineering and other scientific and technical posts.

19. We cannot take a different view, even though it has been suggested that such an observation was not binding, being obiter in nature. We cannot ascribe to such a view since the very concept of reservation implies mediocrity and we will have to take note of the caution indicated in Indra Sawhney's case. While reiterating the views expressed by the Nine-Judge Bench in Indra Sawhney's case, we dispose of the two Civil Appeals in the light of the said views, which were also expressed in Dr. Jagadish Saran's case, Dr. Pradeep Jain's case, Dr. Preeti Srivastava's case. We impress upon the Central and State Governments to take appropriate steps in accordance with the views expressed in Indra Sawhney's case and in this case, as also the other

High

decisions referred to above, keeping in mind the provisions of Article 335 of the Constitution.”

23. In this case, the Apex Court was called upon to answer the reference as to whether reservation was inapplicable to speciality and super speciality posts in All India Institute of Medical Sciences and whether reservation policy was inapplicable for making appointments to the entry level faculty post of Assistant Professor and to super specialty posts and whether the resolutions adopted by AIIMS on 11.1.1983 and 27.5.1994 were liable to be struck down. Even in this case, the Court was not called upon to consider the constitutionality of quota provided for in-service candidates. As has been observed earlier, providing quota for in-service candidates cannot be considered as reservation under Article 15(4) or 16(4).

24. In view of the above, the challenge to the admission process in question with regard to one seat of D.M. (Cardiology) earmarked for in-service candidates is devoid of merits and hence these petitions should fail. The same are accordingly dismissed, so also the pending application(s), if any.

(A.M. Khanwilkar)
Chief Justice

September 26 , 2013.
(tilak)

(Kuldip Singh)
Judge.