

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

TUESDAY, THE 3RD AUGUST 2010 / 12TH SRAVANA 1932

WP(C).No. 1722 of 2010(M)

PETITIONERS:

1. DR.A.FERDINAND, CIVIL SURGEON,
DISTRICT MODEL HOSPITAL,
PEROORKADA, THIRUVANANTHAPURAM.
2. DR.RAJEEVAN.A., CIVIL SURGEON,
DISTRICT HOSPITAL, KANNUR.
3. DR.V.S.SUNILKUMAR,
CIVIL SURGEON, DISTRICT MODEL HOSPITAL,
PEROORKADA, THIRUVANANTHAPURAM.
4. DR.BENNET XYLEM P.,
ASST.SURGEON, DISTRICT MODEL HOSPITAL,
PEROORKADA, THIRUVANANTHAPURAM.

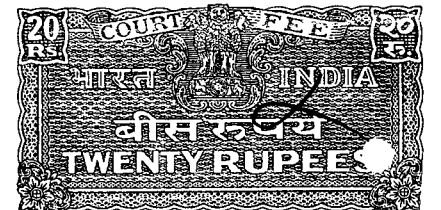
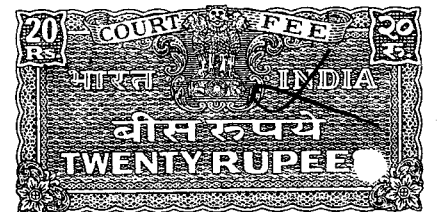
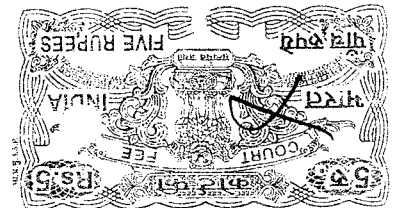
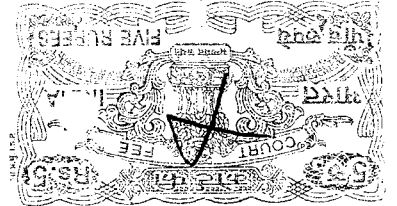
BY ADV. SRI.BABU VARGHESE.

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY ITS
SECRETARY, DEPARTMENT OF HEALTH &
FAMILY WELFARE, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.
2. DIRECTOR OF HEALTH SERVICES,
GENERAL HOSPITAL JUNCTION,
PALAYAM, THIRUVANANTHAPURAM.

R1 & R2 BY ADVOCATE GENERAL SRI. C.P. SUDHAKARA PRASAD.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 15/07/2010, ALONG WITH W.P.(C). NO. 1120/2010 AND CONNECTED
CASES, THE COURT ON 03/08/2010 DELIVERED THE FOLLOWING:



ANTONY DOMINIC, J.

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**W.P.(C) NOs. 1120, 1722, 7517, 7971,
7995, 8157, 8194, 8309, 9937, 10200,
10875, 12805, 12841 & 13000 OF 2010**
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Dated this the 3rd day of August, 2010

J U D G M E N T

These are writ petitions filed by Medical Officers working in the Kerala Health Services, questioning the validity of some of the provisions contained in the Kerala Health Services (Medical Officers) Special Rules, 2010 (hereinafter referred to as "Special Rules, 2010").

2. Appointment of Medical Officers in the Kerala Health Services was regulated by Executive orders issued by the Government of Kerala from time to time. While so, by GO(P) No.28/05/H&FWD dated 5/2/2005, Government of Kerala issued the Kerala Health Services (Medical Officers) Special Rules, 2005 (hereinafter referred to as "Special Rules, 2005"). Subsequently, certain amendments were carried out to the said rules vide GO(P) 1/07/H&FWD dated 2/1/2007. Based on these rules, options were called for from Medical Officers in service as on 31.12.2006, for placement in the speciality Cadres and norms for fixing seniority were incorporated in the Appendix to the Special Rules, 2005.

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While so, in supercession of the Special Rules, 2005, Special Rules 2010 was published by the Government vide GO(P) No.69/10/H&FWD dated 17/2/2010. These rules came into force w.e.f. 1st of of January, 2007.

3. As per the Special Rules, 2010, the service shall consist of 5 cadres, viz., Administrative Cadre, General Cadre, Speciality Cadre, Public Health Laboratory Cadre and Blood Bank and Clinical Lab (Transfusion Medicine) Cadre. The Speciality Cadre consist of the posts of Junior Consultant, Consultant, Senior Consultant and Chief Consultant.

4. The petitioners in these writ petitions are all Medical Officers, having the qualifications specified in the table to Rule 3 and all have opted for placement in the Speciality Cadre. As per the provisions contained in the Special Rules, 2010, posting as Junior Consultant in the Speciality Cadre is by placement based on options exercised, and by direct recruitment and the higher posts within the Cadres are to be filled up by promotion from the immediate lower category posts. It is also to be mentioned that the qualifications prescribed for the post of Junior Consultant are,

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Degree in Modern Medicine (MBBS) or its equivalent, Post Graduate Degree/Diploma in the concerned Speciality or equivalent qualification or Diplomate in National Board in the Speciality concerned, with minimum two years service as Assistant Surgeon. In so far as the higher posts are concerned, qualifications prescribed are the same as that of the lower posts in the concerned Speciality. For promotion to the post of Consultant, the minimum experience prescribed is 5 years as Junior Consultant, and for the post of Senior Consultant, the experience prescribed is three years as Consultant. However, there is no such prescription of experience for the post of Chief Consultant. Rule further provides that in direct recruitment to the post of Junior Consultant, other things being equal, candidates with Post Graduate Degree or Super Speciality Degree will be given preference over those with Post Graduate Diploma qualifications.

5. Rule 4 provides that placement to the Cadres shall be ordered by the Government. Rule 5 provides for option for placement into the Cadres and Rule 6 provides that options on ce

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exercised shall be final. As per Rule 7, those Assistant Surgeons who have not exercised their options during the period of their probation in terms of Rule 5 or later, shall be deemed to have continued in the entry Cadre in the General Cadre. Rule 10 provides that those Medical Officers in the Administrative Cadre/General Cadre, who acquire Post Graduate Diploma/Post Graduate Degree/Diplomate in National Board or equivalent qualification in various Specialities while in service, shall be allowed to opt for the Speciality Cadre once, irrespective of the post they are holding and that they shall be considered for placement as Junior Consultant in Speciality Cadre by protecting their pay and allowances last drawn. It is further provided that at the time of first implementation of the Speciality Cadre, placement will be given in the corresponding or higher Cadres in the Speciality as eligible, for those Medical Officers who were in service as on 31st of December, 2006 and who acquire the prescribed Post Graduate qualification within such cut off date as ordered by the Government.

6. Rule 11 states that Medical Officers with more than

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one Speciality/Super Speciality qualification can opt for only one Speciality in the Speciality Cadre. Rule 12 deals with fixation of seniority. Sub Rule (i) provides that seniority in the feeder category in General Cadre on the date of passing of the Speciality qualification shall be the criterion for placement in the Speciality Cadre and that in the case of those entering service with Speciality qualification also, seniority in feeder category in general Cadre will be the criterion for placement in Speciality Cadre. Sub Rule (ii) provides that, at the time of first implementation of Speciality/Administrative Cadre, placement in the different categories in the Cadres will be given to the eligible medical officers in the corresponding feeder categories in the existing Cadre and that for those who are already in service as on 31st of December, 2006, seniority for placement in the Speciality Cadre will be governed by the points system in the Appendix. Sub Rule (iii) states that Medical Officers who have entered service on or before 31st of December, 2006 and have opted for Speciality Cadre, but have been placed in a lower category or Cadre in the Speciality, due to having lower points as compared to Medical

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Officers who are junior to them in the placement, will be given one time protection in placement and will be placed in the same Cadre or posts, where his or her juniors are placed in the same Speciality and that their pay also will be protected in the Cadre of placement. It is also provided that, further promotions in the Speciality Cadre shall be based on the seniority in the respective Speciality Cadre.

7. Rule 13 states that system of placement of Medical Officers already in service prior to the date of commencement of the Rules shall be as per norms specified in the Appendix and as provided in Rule 12. Appendix to the Special Rules lays down the norms for placement of Medical Officers already in service prior to the date of commencement of the Rules. The case of the petitioners turns mainly on the provisions of the Appendix, and therefore, I consider it profitable to extract these provisions for ready reference.

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APPENDIX

(See Rule 12)

Norms for placement of Medical Officers already in service prior to the date of commencement of these rules shall be as follows:

1. **On coming into force of these rules, the Medical Officers who are already in service as on 31st December, 2006 and continuing in service shall exercise option to any one of the following Cadres.**

Branch A	-	Administrative Cadre
Branch B	-	General Cadre
Branch C	-	Speciality Cadre
Branch D(a)	-	Public Health Lab Cadre
Branch D(b)	-	Blood Bank and Clinical Lab/ Transfusion Medicine Cadre.

2. **Those who are not exercising option to any of the Cadres shall be deemed to have continued in General Cadre - Branch E**

3. **Those recruited specifically for posts in Public Health Lab (Branch D) will not be allowed to opt other Cadres.**

4. **Based on the options to Speciality Cadre, accepted by the Government, seniority list of those who are eligible to be placed in each Cadre, in each category/post, shall be prepared and published. For this purpose, the criterion shall be the points awarded for the total qualifying service in the Health Services Department and the points for holding the Speciality/Super Speciality qualification and other conditions as per Rules.**

5. **Points awarded shall be as per the point system mentioned below:**

A- Graduates for each year of completed qualifying service in Kerala Health Service Department as on 31st December 2006 - 2 points (service rendered for 6 months and above in an year will be counted as 1 year for the purpose of calculating points as above.).

B- In addition to the points at A above the following points shall be given for each completed year of qualifying service in Kerala Health Services Department, after acquiring Speciality qualifications.

- (i) Post Graduate Diploma in opted Speciality - 1 point**
- (ii) Post Graduate Degree in opted Speciality - 2 points**
- (iii) Diplomate in National Board (Equivalent to Post Graduate Degree) in opted Speciality - 2 points.**
- (iv) Super Speciality degree in concerned discipline (DM/M.Ch) - 3 points.**
- (v) Post Graduate Degree like Master in Public Health, Master in Hospital Administration and Diploma in Public Health - 1 point.**
- (vi) Post Graduate Degree (MD community Medicine) - 2 points.**

C- A person having Post Graduate Diploma, Post Graduate Degree Speciality qualification in same Specialty, as the case may be given points for either Post Graduate Diploma/Post Graduate Degree at a time. Points will be awarded only for highest qualification in opted Speciality from the date of passing of the same or the date of entry in service which ever is later. Points for Post Graduate Diploma shall not be given for Speciality after the date of passing Post Graduate Degree and points for Post Graduate Diploma and Post Graduate Degree shall not be given after the date of passing super Speciality qualification.

D. The Maximum points that can be awarded by the above system to a person shall be limited to 50.

E(i) In the case of Speciality Cadre, the seniority for placement will be fixed based on the basis of the point system up to a cut of limit 50 points in each Cadre. For the medical officers or consultant who have got 50 points or more, Cadre seniority in the feeder category as the implementation of the Speciality Cadre will be reckoned for placement in the Speciality Cadre at the corresponding grade. For medical Officers having points below 50, seniority for placement will be assigned on the basis of higher point only. The Medical Officers who have been assigned in a lower post or category in the speciality Cadre due to having lower points compared to medical officers who are junior to them in terms of Cadre seniority, will be given one time protection for placement in the Speciality Cadre and he or she will be given placement in the same category where his junior has been placed in the same Speciality. Their pay will also be protected at the rates drawn in the existing Cadre. In such cases, seniority for further promotion in the Speciality Cadre will be reckoned as per the position in the seniority list prepared for the respective Speciality categories.

E(ii) In Administrative Cadre, Cadre seniority among the Medical Officers who have opted to the Cadre will be protected and ranked accordingly for placement in the Cadre.

E(iii) At the time of first implementation of the Speciality Cadre postings, Medical officers who have entered in service on or before 31st December, 2006 and acquired Post Graduate qualifications or Cadre promotion before 31st August, 2009 will be eligible for protection of seniority in the Speciality Cadre, with service points to be counted upto 31st December, 2008 and Speciality points upto 31st August, 2009.

F- Leave without allowances will not be treated as qualifying service for calculating point system.

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G- Medical Officers whose options have been accepted shall be given posting in Speciality Cadre, based on the seniority in the select list prepared for the Specialty Cadre as above. The senior most shall be posted as Chief consultant(s) in the available vacancies of Chief Consultants, and thereafter the available vacancies of Senior Consultants, Consultants and Junior Consultants as the case may be, shall be filled up in the order of seniority in the select list. This will be subject to the one time protection for placement as provided in Rule 12.

H- The vacancies in various categories if any existing in the Administrative Cadre and vacancies in the Administrative Cadre due to option to other Cadres shall be filled up based on the Cadre seniority of the incumbents in the select list prepared for Administrative Cadre.

I- In the absence of promotion due to non-availability of vacancies in higher posts, the existing system of time bound higher grade promotions for doctors in Health Services Department, on completion of 8 years and 16 years will be continued in each Cadre also, in the first 3 grades that is from entry or General Cadre or Junior Consultant to Consultant after 8 years and from Consultant to Senior Consultant after 16 years and similarly from Junior medical Officers and equivalent categories to Assistant Director or Superintendent or equivalent categories after 8 years and from the latter to Deputy Director of Health Services grade after 16 years.

J- Those who opted for Speciality Cadre, but do not have the prescribed qualifications as per Special Rules will be continued in the General Cadre.

K. The seniority list in each Cadre will be revised with effect from 1st April every year and those who have acquired Speciality qualifications during 1st January to

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31st December, of the previous year will be considered for placement in the Speciality and Administrative Cadres based on available vacancies.

8. According to the petitioners, the Government had taken a policy decision to introduce Speciality Cadre in the Health Services Department with a view to make available to the patients in all Government hospitals under the Department of Health Services, adequate and efficient medical treatment under experienced and qualified Medical Officers in each Speciality Cadre and that such a decision has been taken in the interest of the patients. It was stated that it was in pursuance to this policy decision, that the Government introduced the Special Rules, 2005 vide GO(P) No.28/05 dated 5/2/05, which was amended by GO(P) No.1/07 dated 2/1/2007. Subsequently, realising that if the aforesaid Rules were implemented, several Specialists with Post Graduate and Super Speciality qualifications will be pushed down in the seniority list due to protection or weightage given to service seniority, as a result of which Medical Officers who have acquired Post Graduate qualification later and having relatively lesser experience as Specialists will get preference for placement in

Consultant posts, Special Rules, 2005 were substituted with the Special Rules, 2010. It is stated that the Special Rules, 2010 runs counter to the aforesaid object for implementing the Speciality Cadre and that Diploma holders will be stealing a march over Post Graduate Degree holders and in the process, the whole object providing better medical care by qualified Specialists itself will be defeated. Petitioners contended that this has occurred due to the fact that in the Special Rules, 2010, point system has been adopted for fixing seniority and for further promotions, Post Graduates are equated with Diploma Holders, as a result of which, Diploma Holders, and particularly those having longer service, will get accelerated promotions over the Degree Holders, despite the superior qualifications possessed by them. It is stated that such a Special Rule, compromising efficiency of service, is contrary to the object sought to be achieved and is arbitrary, and violative of the fundamental rights of the members of the service like them, having superior Post Graduate and Super Speciality qualifications.

9. Another contention raised was that with the introduction of the Special Rules, 2010, seniority enjoyed by the

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petitioners as on 31/12/2006 has been upset. It was contended that the Rule deprives the existing members of the service of their vested rights of seniority. According to the petitioners, this has occurred on account of the fact that the Special Rule has operated with retrospective effect and that any Rule having retrospectivity and resulting in depriving an accrued right of a member of the service is unconstitutional, and is liable to be struck down. It was also contended that the method specified in the Special Rules, 2010 for determination of seniority is opposed to the provisions contained in Rule 27 of Part II KS & SSR. It was also argued that the Special Rules, 2010 has been framed in exercise of the powers conferred under Kerala Public Services Act, 1968 and that Section 2(2) of the Act mandates that every Rule made, shall be laid before the Legislative Assembly and that the Special Rules, 2010 have not been laid before the Legislative Assembly as required, and for that reason, the Rule is invalid.

10. On behalf of the State, learned Advocate General contended that the petitioners cannot be heard to complain against the provisions of the Special Rules, 2010, for the reason

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that the petitioners who were already in service at the time of implementation of the Special Rules had the freedom to opt for any one of the Cadres constituted by the Special Rules or not to exercise their options. It was pointed out that Rule itself provided that those who did not opt for placement, shall be deemed to be continued in the General Cadre. Therefore, it was argued that the petitioners having understood the provisions contained in the Special Rules, 2010 and having voluntarily opted for placement as per the Special Rules, cannot now contend that the provisions are invalid for any reason whatsoever. Learned Advocate General further contended that by virtue of the provisions contained in the Special Rules, seniority has been protected. It was also argued that, in the point system adopted for determining seniority, those with Post Graduate Degrees and Super Speciality qualifications are given higher points as compared to Diploma holders, and therefore, the contention that Post Graduates and Super Speciality holders are treated disadvantageously is unsustainable.

11. It was stated that by virtue of Clause 5(D) of the Appendix, Diploma holders with longer service, are sought to be

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equated with Degree holders at the level at which both the Degree holders and Diploma holders acquire 50 points. It is stated that on that basis the placements are given into the Speciality Cadre. According to the learned Advocate General, once Diploma Holders with longer service are equated with Degree holders and are placed in the Speciality Cadre concerned, there is a fusion of both classes of Doctors and that in the matter of further promotions, both the Degree holders and Diploma holders are treated equally. It was contended that, therefore, the petitioners cannot argue that the Diploma holders are given any preference in the matter either for placement or for further promotion to the higher posts. It was also stated that in terms of the provisions contained in the KS & SSR, it was for the Government to fix the qualifications, and that once the Government have fixed the qualifications and framed the Special Rule, or constituted a Speciality Cadre, as has been done in this case, it reflects a policy decision of the Government and that a policy decision of the Government or subordinate legislation embodying a policy decision, cannot be subjected to challenge in a writ proceedings.

except on the limited grounds indicated by the Apex Court and this Court. It was contended that in this case, petitioners have not made out any of the vitiating circumstances, and that, therefore, the challenge against Special Rules is unsustainable.

12. Learned Advocate General also contended that the provision in the Public Services Act, 1968 for laying the rules before the Legislature is only directory and that even if the Rule is not laid before the Legislature, that will not affect its validity. It was further contended that a legislation cannot be attacked on the ground that it is motivated or to help anyone of the categories of employees. According to the learned Advocate General, such a challenge will not lie against a legislative exercise as reflected in the Special Rules, 2010. The counsel appearing for the party respondents also supported the learned Advocate General.

13. I have considered the submissions made.

14. Section 2 of the Kerala Public Services Act, 1968 provides that the Government may make Rules, either prospectively or retrospectively, to regulate recruitment, and conditions of service of persons appointed, to public services and

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posts in connection with the affairs of the State of Kerala. Admittedly, petitioners are persons appointed to Public Service and posts in connection with the affairs of the State, and therefore, in terms of the provisions contained in Section 2(1) of the Act, Government is empowered to make rules and such rules can either be prospective or retrospective. Admittedly, the Special Rules, 2010, have been framed in exercise of the powers conferred under Section 2(1) of the Act.

15. As per the Special Rules, 2010, five Cadres, viz., Administrative Cadre, General Cadre, Speciality Cadre, Public Health Laboratory Cadre and Blood Bank and Clinical Lab (Transfusion Medicine) Cadre have been constituted. The Special Rules also specifies the hierarchy within each of these Cadres, the method of appointment, qualification for placement and promotion to the various posts. It also provides that on the coming into force of the Rules, Medical Officers who are already in service as on 31st of December, 2006 and continuing in service shall exercise option to any one of the Cadres and that those who are not exercising option shall be deemed to have continued in

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the General Cadre. Once options are exercised to Speciality Cadre, seniority list of those eligible to be placed in each Cadre/posts shall be prepared and published. The criterion for fixing seniority shall be points awarded for the total qualifying service in the Health Services Department and the points for the Speciality/Super Speciality qualification and the other conditions laid down in the Rules. The manner in which points are to be awarded is indicated in Rule 5 contained in the Appendix to the Special Rules. As per Rule 5, for each year of qualifying service of Graduates as on 31st of December, 2006, two points are awarded. In addition, for each completed year of qualifying service after acquiring Speciality qualifications-Post Graduate Diploma holder, Post Graduate Degree holder, Diploma in National Board, or Super Speciality Degree Holder, Post Graduate Degree like Master in Public Health, Master in Hospital Administration and Diploma in Public Health and Post Graduate Degree (MD Community medicine), Medical Officers are awarded 1, 2, 2, 3, 1 and 2 points respectively. It is further provided that points are to be awarded for highest qualification in opted Speciality from the date of

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passing the qualification or date of entry in service, whichever is later and that points for Post Graduate Diploma shall not be given for Speciality after the date of passing the Post Graduate Degree and points for Post Graduate Diploma and Post Graduate Degree shall not be given, after the date of passing of Super Speciality qualification.

16. Rule 5(D) provides that the maximum points that can be awarded by the above system to a person shall be limited to 50. Rule 5(E)(1) provides that seniority for placement will be fixed on the basis of the point system up to a cut of limit 50 points in each Cadre and that for the Medical Officers or Consultants, who have got 50 points or more, Cadre seniority in the feeder category as on the implementation of the Speciality Cadre will be reckoned for placement in the Speciality Cadre, at the corresponding grade. It also provides that for Medical Officers having points below 50, seniority for placement will be assigned on the basis of higher points only and that the Medical Officers who have been assigned in a lower post or category in the Speciality Cadre due to having lower points compared to Medical Officers who are junior to them

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in terms of the Cadre seniority, will be given one time protection for placement in the Speciality Cadre and will be placed in the same category, where his junior has been placed. Rule E(iii) provides that at the time of first implementation of the Speciality Cadre postings, Medical Officers who have entered service on or before 31st of December, 2006 and acquired Post Graduate qualifications or Cadre promotion before 31st of August, 2009 will be eligible for protection of seniority in the Speciality Cadre, with service points to be counted up to 31st of December, 2008 and Speciality points up to 31st of August,2009. Rule (G) provides that Medical Officers whose options have been accepted shall be given posting in the Speciality Cadre based on the seniority in the select list prepared for the Speciality Cadre concerned and that the senior most shall be posted as Chief Consultant, and thereafter, the available vacancies of Senior Consultants, Consultants and Junior Consultants, as the case may be, shall be filled up in the order of seniority in the select list, subject to one time protection of placement as provided in Rule 12.

17. Therefore, based on the point system, seniority list is

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finalised and on that basis, placement is to be made to the Speciality Cadre concerned. Once placement is made in the order of seniority, further promotions within the Speciality Cadre, will be based on the qualification and experience laid down in the table attached to Rule 3 providing for method of appointment and qualification. In other words, once points are awarded, seniority lists are drawn and placements are made, further promotion will be based on the criteria laid down in the table to Rule 3. In so far as Speciality Cadre is concerned, a Junior Consultant with five years service is eligible for promotion as a Consultant and a Consultant with three years service is eligible to be a Senior Consultant and Senior Consultants are eligible to be promoted to the post of Chief Consultants. Once placement is made into the Speciality Cadre, Post Graduate Degree holders and Diploma holders are treated equally for further promotions. This being the general scheme of the Rules, the question is whether these rules, adopting point system for fixing seniority or treating all those posted in the Speciality Cadre equally for promotion are invalid for any of the reasons pointed out by the petitioners.

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18. Before addressing the respective contentions, it should be stated that Rule 5(D) of the Special Rules providing that maximum points that can be awarded by the point system shall be limited to 50, was challenged before this Court in WP(C) No.24060/08. Contention was that the Rule was unconstitutional, in as much as the maximum points have been capped at 50. Following the dictum laid down by the Apex Court in **Maharashtra State Board of Secondary and Higher Secondary Education and another v. Paritosh Bhupesh Kumarsheth** (1984 SC 1543) and this Court in **Pankajakshy & others v. Georege Mathew and others** (1987(2) KLT 723), this Court upheld the Rule by judgment dated 30/11/2009 with the following findings:

7. *As already stated, the justification offered by the Government to sustain Clause 5-D of the Special Rules is that, they are seeking to equate both diploma holders and degree holders after a prescribed period of service, inspite of the difference in the qualification that are possessed by them. According to the respondents, the diploma holders matured by longer experience attain qualitatively equivalence with degree holders and it is on that basis, they have decided to cap the point at 50 and thus equalize them at that level. In my view, this logic now offered by*

the respondents cannot be said to be arbitrary or unreasonable one to call for the interference of this court, exercising powers under Article 226 of the Constitution of India.

8. As pointed out by the Apex Court in Maharashtra State Board of Secondary and Higher Secondary Education and another v. Paritosh Bhupesh Kumarsheth (1984 SC 1543) , this Court is not concerned about the wisdom of the policy as reflected in the special rules and is not expected to substitute its court's view in place of the views of the Government.

19. Writ Appeal No.467/2010 filed against the judgment. Division Bench was dismissed by judgment dated 15th of March, 2010 and para 4 of the judgment reads as under:

The Special Rules reflect the policy of the Government that after a few years' service, the Post Graduate Diploma holders can be treated as equivalent to the Post Graduate Degree holders. Of course, the rule making authority has treated the Post Graduate Degree holders as superior hands, as for each completed year of service, they are awarded 2 points, whereas Post Graduate Diploma holders are awarded only one point. But, a capping at 50 points is made to ensure that the Diploma holders with longer years of service also get a chance for placement in the speciality Cadre opted. We find it difficult to subscribe to the view canvassed by the appellant that the above stipulations are arbitrary and therefore, violate his fundamental rights guaranteed under Article 14 of the Constitution of India. A difference of opinion for this court is not a ground to interfere with a statutory provision. There are several options before the administrator. One of the options has been adopted

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and the same is reflected in the Special Rules. The same cannot be described as beyond the powers of the rule making authority or ultra vires. We fully agree with the view taken by the learned Single Judge, on the validity of the Special Rules. Accordingly, the Writ Appeal fails and it is, accordingly, dismissed.

20. Therefore, adopting the reasoning that the Rule reflected a policy of the Government to equate the Diploma holders and Degree holders on the basis that Diploma holders matured by longer experience attain qualitative equivalence with Degree holders, the Rule was upheld by this Court. This judgment was affirmed by the Division Bench also.

21. Before dealing with the respective contentions, it is necessary to examine the scope of judicial review of policy decisions and subordinate legislations with reference to the precedents that were cited by both sides.

22. **Pankajaksy & others v. George Mathew and others** (1987(2) KLT 723), was decided following the Apex Court judgment in **Maharashtra State Board of Secondary and Higher Secondary Education and another v. Paritosh Bhupesh Kumar Sheth** (AIR 1984 SC 1543). In that judgment, the Division Bench held that the Rule made by an authority

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exercising delegated powers under a statute can be challenged on grounds that it is ultra vires the parent Act, that it is opposed to the fundamental rights, and on the ground that it is opposed to other plenary laws. It was further held that in order to ascertain whether a Rule is ultra vires the Act, the Court can go into the question whether the Rule contravenes, expressly or impliedly, any of the provisions of the statute or whether, it achieves the intent and object of the Act and whether it is unreasonable to be manifestly arbitrary, unjust or partial, implying thereby want of authority to make such rules. Reference was also made to the judgment in **Narayanan Nair v. State of Kerala** (1988(1) KLT 894), where it was held that unreasonableness of a statutory rule, uncertainty in its language and unworkability in its operation, leading to the reasonable conclusion that it is manifestly arbitrary, will invalidate the Rule as beyond the powers conferred under the Statute, for no authority would have intended to give authority to make such rules. Reference was also made to the Apex Court judgment in **A.Satyanarayana and others v. S.Purushotham and others** {(2008) 5 SCC 416} and contended that this Court



must determine the issue having regard to the effect of the subordinate legislation in question and that there must exist a rational nexus between impugned legislation and the objective that is sought to be achieved.

23. Admittedly, the Rule in question is in the realm of subordinate legislation and it reflects a policy decision of the Government. The grounds on which policy decision of the Government or a subordinate legislation can be interfered by a Court of law, has been indicated by the Apex Court in the judgment in **Maharashtra State Board of Secondary and Higher Secondary Education and another v. Paritosh Bhupesh Kumarsheth** (AIR 1984 SC 1543), where it has been held as follows:

"----- It would be wholly wrong for the court to substitute its own opinion for that of the legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations

acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the Statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the Statute.

-----. The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any draw backs in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal

infirmary, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution.

In the light of what we have stated above, the constitutionality of the impugned regulations has to be adjudged only by a three-fold test, namely (1) whether the provisions of such regulations fall within the scope and ambit of the power conferred by the statute on the delegate; (2) whether the rules/regulations framed by the delegate are to any extent inconsistent with the provisions of the parent enactment and lastly (3) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution."

It was following the principles laid down in this judgment that this Court decided **Pankajaksy's case** (supra).

24. In **Ekta Shakti Foundation v. Govt. of NCT of Delhi** {(2006) 10 SCC 337}, the Apex Court held that while exercising power of judicial review of administrative action, the Court is acting as an appellate authority and the Constitution does not permit the Court to direct or advise the executive in matter of policy or to sermonise qua any matter, which under the Constitution, lies within the sphere of the legislature or the

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executive, provided these authorities do not transgress their constitutional limits or statutory powers. The scope of judicial enquiry, was held to be confined to the question whether decision taken by the Government is against any statutory provisions or is violative of the fundamental rights of any citizen or is opposed to the provisions of the Constitution. The Apex Court reiterated that the correctness of the reasons which prompted the Government in its decision making to adopt one course of action instead of another, is not a matter of concern in judicial review and that the Court is not an appropriate forum for such an investigation. The Apex Court held that policy decision must be left to the Government as it alone can decide which policy should be adopted after considering all the points from different angles and that in the matter of policy decisions or exercise of discretion, so long as infringement of fundamental rights is not shown, the Courts will have no occasion to interfere and the Court will not, and should not, substitute its own judgment for the judgment of the executive in such matters. It was also indicated that in assessing the propriety of a decision of the government, the Court

cannot interfere even if a second view from that of the Government is possible.

25. In the judgment in **Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal** {(2007) 8 SCC 418}, it was held that a Court of law is not expected to propel into "the uncharted ocean" of Government policies and that once it is held that the Government have power to frame and reframe, change and rechange, adjust and re adjust policy, any such action of the Government cannot be declared illegal, arbitrary or ultra vires the provisions of the Constitution on the ground that the earlier policy had been given up, changed or not adhered to and that it cannot also be attacked on the plea that earlier policy was better and suited to the prevailing situation. Again in **A.Satyanarayana and others v. S.Purushotham and others** (2008(5) SCC 416), though it was held that a policy decision as reflected in a statutory rule pertains to the field of subordinate legislation and that the same would be subject to judicial review, inter alia, on the ground of being violative of Article 14 of the Constitution of India, it was cautioned that a legislative policy should not

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ordinarily be interfered with. It was further held that the power of the State to take a policy decision as a result whereof an employees chances of promotion are diminished cannot be the subject matter of judicial review, as no legal right is infringed thereby. However, it was also held that, by a policy decision, promotional avenues in respect of a category of employees cannot be totally nullified for all times to come and that such a policy would be hit by Article 16 of the Constitution. In the judgment in **Maju Balakrishnan v. State of Kerala** (2009(2) KHC 492), a Division Bench of this Court followed the judgment in **Pankajakshy's case** and upheld the policy of the Government absorbing the Engineering Staff of the PWD and Irrigation Departments into the newly formed Engineering wing of Local Self Government Department.

26. Having thus seen the clearly demarcated limits of Judicial Review, I shall proceed to examine the contentions raised. The petitioners in these cases have no case that the Special Rules, 2010 are ultra vires the parent statute viz., Public Services Act or any other plenary statute. On the other hand, their case is

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that the Special Rules are contrary to object that is sought to be achieved, that it affects the existing members of the service, that it upsets their seniority and, that the Diploma holders will steal a march over the Degree holders. In other words, their case is that the Rule is arbitrary and is violative of their fundamental rights. It is the correctness of these contentions, which needs to be examined.

27. As far as seniority of the Medical Officers, who were in service as on 31.12.2006 is concerned, point system has been adopted for preparation of the seniority list. The point system applies to all the members in service as on 31st of December, 2006. 2 Points each are awarded uniformly for the Degree which all the Doctors possess and nobody has a complaint that equality is not maintained in this respect. It is also obvious that Diploma holders are given 1 point, Post Graduates are given 2 points and those having Super Speciality qualifications are given 3 points for each completed year of service. In other words, those with superior qualifications are awarded higher points, and therefore, those with inferior qualifications, have not derived any additional

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advantage as compared to those with superior qualifications. In fact, till the introduction of the Special Rules, 2010, all Medical Officers were governed by common seniority, and therefore, with the implementation of the point system, Diploma holders are the losers. Therefore, Post Graduates or Super Specialists cannot argue that the point system as such is detrimental to them.

28. Then the only issue is regarding the correctness of Clause 5(D) capping the maximum points awarded at 50. The legality of Clause 5(D) has already been upheld by this Court in the judgment in WP(C) No.24060/08, which has been confirmed by the Division Bench in the judgment in WA No.467/2010. Therefore, the validity of such a policy is not open to challenge any longer. That apart, if such a rule was not adopted, the situation would have been unjust for the Senior Diploma holders, who, till the introduction of the Special Rules, 2010, were governed by a common list with other Medical Officers. This can well be illustrated with the help of an example. A Medical Officer with a Diploma, who has rendered 16 years of service as on 31/12/2006 will be eligible for 48 points. On the other hand, a

Post Graduate, with 12 years service, will also be eligible for 48 points. If there is no rule capping the maximum points at 50, in the 13th year of his service, the Post Graduate, who will have 52 points will become senior to the Diploma holder, who will have only 51 points for the 17 years of his service. This kind of a situation also cannot be in the interest of service and is avoided, because of Clause 5(D). Further, as held by the Apex Court in **Veneet Agrawal v. Union of India and others** (2007(13) SCC 116), once a policy has been upheld, Court cannot be repeatedly called upon to examine its validity contending that the issue has not been examined from a particular angle or the other.

29. Once the above position is cleared and the principles adopted for placement into the Speciality Cadre is upheld, the further question is whether the policy treating Degree holders and Diploma holders equally eligible for further promotions within the Speciality Cadre, is unconstitutional or not. In my view, the answer has to be in the negative. First of all, the policy of the Government equating the existing Diploma holders matured by longer experience, with Degree holders is already upheld by this

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Court in the judgment in WP(C) No.24060/08 and that judgment has been upheld by the Division Bench. Therefore, in principle, such equation already stands upheld. That apart, once points are awarded and degree holders and diploma holders are brought to an equal platform, unless there are justifiable reasons forthcoming, further continued classification based on educational qualification cannot be sustained on the touchstone of Article 14 of the Constitution of India. Of course, if efficiency of service required further preference to Degree Holders, that may have been a justification for further classification. In this case, such a justification has not been put forward by the Government, and on the other hand, the Government have consciously decided to treat Diploma Holders with longer experience with Degree Holders equally. This essentially is a policy decision of the Government and unless the policy is shown to be arbitrary, capricious or one that will bring about gross, unfair results, judicial policy should be one of judicial restraint. In my considered opinion, none of these vitiating circumstances have been made out. It may be that the prescription is some what cumbersome or may produce hardship

in some individual cases, but that is no reason to strike down a policy as unreasonable, capricious or arbitrary, attracting Articles 14 or 16 of the Constitution of India. Therefore, I am not persuaded to think that, in the facts of these cases, the petitioners can successfully challenge the Special Rules on the ground that the Diploma holders have stolen a march over the Degree holders or that the Special Rules are unconstitutional for the reason that for promotions within the Speciality Cadre, Diploma holders are treated equally with Degree holders.

30. It was contended that the method adopted for preparation of seniority laid down in the Special Rules, 2010 is against the provisions contained in Rule 27 of Part II KS & SSR and therefore, is illegal. First of all, Rule 2 of Part II KS & SSR provides that if any provision in the General Rules contained in Part II of the KS & SSR is repugnant to a provision in the special rules applicable to any particular service contained in Part III, the Special Rules in respect of that service will prevail over the provision in the General Rules in Part II of KS & SSR. Therefore, this argument of the petitioners is only to be stated and rejected



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and I do so.

31. It was then contended that the Rule for fixation of seniority is retrospective in nature and therefore, is unconstitutional. Reliance was placed on the Apex Court judgment in **T.R.Kapur v. State of Haryana** (1986 (Supp) SCC 584), **Chairman, Railway Board. v. C.R.Rangadhamaiah and others**{(1997)6 SCC 623}, **High Court of Delhi and others v. A.K.Mahajan and others** (AIR 2009 SC 2497). It is true that although the Government is competent to frame Rules either prospectively or retrospectively, retrospectivity to a Rule is subject to the well recognised principle that benefits acquired under the existing rules cannot be taken away by a retrospective Rule or a retrospective amendment to an existing Rule. This only means that by such retrospectivity, a vested right cannot be impaired. In other words, the employees who have already been promoted before the amendment of the rules cannot be reverted and their promotions cannot be recalled. It is also not possible to deprive any employee of his seniority, which again is an accrued right. However, in this case, the seniority assigned in pursuance

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to the Special Rules, 2010 only determines the basis for placement in the Speciality Cadre. Although the Rule governs the seniority of the employees who are in service as on 31st of December, 2006, the Rule does not become retrospective for that reason and this issue has been answered by the Apex Court in its judgment in **State of J&K v. Triloki Nath Khosa** (1974(1) SCC 19).

16...It is wrong to characterise the operation of a service rule as retrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes, undoubtedly operates on those who entered service before the framing of the rule but it operates in futuro, in the sense that it governs the future right of promotion of those who are already in service. The impugned rules do not recall a promotion already made or reduce a pay scale already granted. They provide for a classification by prescribing a qualitative standard, the measure of that standard being educational attainment. Whether a classification founded on such a consideration suffers from a discriminatory vice is another matter which we will presently consider but surely, the rule cannot first be assumed to be retrospective and then be struck down for the reason that it violates the guarantee of equal opportunity by extending its arms over the past. If rules governing conditions of service cannot ever operate to the prejudice of those who are already in service, the age of superannuation should have remained immutable and schemes of compulsory retirement in public interest ought to have

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foundered on the rock of retroactivity. But such is not the implication of service rules nor is it their true description to say that because they affect existing employees they are retrospective."

32. This judgment has been followed in several cases, including in **Chairman, Railway Board v. C.R.Rangadhamaiah** (1997(6) SCC 623, where it was held that:

20. It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively.

33. In my view, the law thus laid down by the Apex Court as above, completely answers the contention raised by the petitioners, and therefore, further examination of this issue is not warranted.

34. Now what remains is the contention that the Rule was not laid before the Legislature, and therefore is invalid. Section 2 (2) Of the Kerala Public Services Act, 1968 reads as under:

(2) Every rule made under this Section shall be laid as soon as may be after it is made before the

Legislative Assembly while it is in session for total period of 14 days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, the Legislative Assembly agrees that the rule should be either modified or annulled, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

This very provision has been examined by a Division Bench of this Court in the judgment in **Kunju Kunju v. State of Kerala** (2005 (1) KLT 364). Following the Apex Court judgment in **Jan Mohammad Noor Moohamad Bagban v. The State of Gujarat and anr.** (AIR 1966 SC 385), and **M/s. Atlas Cycle Industries Ltd. and others v. State of Haryana** (AIR 1979 SC 1149), the Division Bench repelled the contention in the following words:


It is not uncommon that the Legislature makes such a provision requiring the rule making authority to lay before it the rules framed under the Act. The object of such a provision is to keep supervision and control over the rule making authority. The extent of control which the Legislature wishes to exercise will depend upon the language used in the statutory provision. It may require the rule making authority to simply place before it the rules framed under the Act



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or it may or may not require that the rules would be subject to its approval. The Legislature may also provide that it will have the power to modify or annul the rules if it so likes or it may like to exercise its control in such other manner as it may deem proper. It is equally open to the Legislature to provide as to what would be the effect if the rules are not laid before it. If no provision is made in this regard it would follow that the Legislature never intended that non-compliance with the requirement of laying rules before it should render them illegal or void. The language used in each statutory provision will show the extent of control and supervision which the Legislature wishes to exercise. In the case before us sub-s.(2) of S.2 of the Act merely requires the rules to be laid as soon as may be after they are made before the Legislative Assembly while it is in session for a total period of 14 days and the Legislature has kept with it the power to modify or annul the rules so made making it clear that anything done under the original rules prior to their modification or annulment shall be valid. It is thus clear that the validity of the rules does not depend upon their being laid on the table of the Legislative Assembly because the section does not provide that the Special Rules will be valid only if they are laid before the Legislative Assembly. Of course, the Legislative Assembly could modify or annul them and in that event the modified rules would have effect or they would have no effect in case they were annulled and even if they had been modified or annulled any action taken under the original rules has been protected and the same would be valid notwithstanding the modification or annulment of the Special Rules. Since the Special Rules were neither modified nor annulled by the Legislative Assembly they were valid as originally laid before it. As there is



no provision in sub-s.(2) of S.2 of the Act as to what would be the effect if the rules are not laid before the State Legislature, we are clearly of the view that the Legislature did not intend that the rules would be invalid if they were not laid before it. In this view of the matter the provisions of sub-s.(2) of S.2 of the Act have to be held to be only directory and not mandatory and, therefore, even if the Special Rules had not been laid before the Legislative Assembly they would be valid. The view that we have taken finds support from the observations of the Supreme Court in Jan Mohammad Noor Moomamad Bagban v. The State of Gujarat & Ann (AIR 1966 SC 385), where their Lordships in similar circumstances made the following observations:

"S.26(5) of Bombay Act 22 of 1939 does not prescribe that the rules acquired validity only from the date on which they were placed before the Houses of Legislature. The rules are valid from the date on which they are made under S.26(1). It is true that the Legislature has prescribed that the rules shall be placed before the Houses of Legislature, but failure to place the rules before the Houses of Legislature does not affect the validity of the rules, merely because they have not been placed before the Houses of the Legislature. Granting that the provisions of sub-s.(5) of S.26 by reason of the failure to place the rules before the Houses of Legislature were violated we are of the view that sub-s.(5) of S.26 having regard to the purposes of which it is made, and in the context in which it occurs, cannot be regarded as mandatory."

Again, in M/s Atlas Cycle Industries Ltd. & Ors. v. State of Haryana (AIR 1979 SC 1149), their Lordships were dealing with sub-s.(6) of S.3 of



the Essential Commodities Act, 1955 which provides that every order made under that section by the Central Government or any officer or authority of the Central Government shall be laid before both the Houses of Parliament as soon as may be after it is made. Holding that the said provision was directory, it was observed as under:

"From the foregoing discussions, it inevitably follows that the Legislature never intended that non-compliance with the requirement of laying as envisaged by sub-s.(6) of S.3 of the Act should render the order void. Consequently non-laying of the aforesaid notification fixing the maximum selling prices of various categories of iron and steel including the commodity in question before both Houses of Parliament cannot result in nullification of the notification."

35. Subsequently interpreting Section 31 of the Securities and Exchange Board of India Act, 1992, requiring laying of Rules before both Houses of Parliament, in the judgment in **Veneet Agrawal v. Union of India and others** (2007(13) SCC 116), it was held that the provision is only directory and not mandatory and even if the rules were not laid before the House at all, even then the non compliance could not be a ground to declare the rules framed under the Statute ultra vires.

36. In view of the legal position as above, this contention is also unsustainable and is only to be rejected.

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37. Therefore, for the aforesaid reasons, I am not persuaded to hold that the Rule is to be invalidated on any of the aforesaid grounds urged by the petitioners.

Therefore, writ petitions are only to be dismissed and I do

so.

Sd/-

ANTONY DOMINIC, JUDGE

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APPENDIX

PETITIONERS' EXHIBITS:

EXT.P.1: COPY OF THE KERALA HEALTH SERVICES (MEDICAL OFFICERS) SPECIAL RULES 2005.

EXT.P.2: COPY OF THE 'NOTIFICATION' DTD. 02/01/07 ISSUED BY THE R.1.

EXT.P.3: COPY OF THE G.O.(MS).74/07/H & FWD DTD. 30/03/07.

EXT.P.4: COPY OF THE G.O.(RT).NO.3596/2008 DTD. 30/10/2008.

EXT.P.5: COPY OF THE G.O.(MS).NO.583/08/H & FWD DTD. 28/11/2008.

EXT.P.6: COPY OF THE ORDER NO. EA (SPL.CELL) 73201/07 DHS DTD. 05/01/2009.

EXT.P.7: COPY OF THE G.O.(MS).107/09/H & FWD DTD. 30/04/2009.

EXT.P.8: COPY OF THE G.O.(MS).NO.152/09/H & FWD DTD. 06/06/2009.

EXT.P.9: COPY OF THE ORDER EA.(SPL.CELL) 73201/07 DHS DTD. 09/06/2009.

EXT.P.10: COPY OF THE ORDER EA.(SPL.CELL) 73210/07 DHS DTD. 30/12/2009 WITH THE RELEVANT PAGES OF ANNEXURES.

EXT.P.11: COPY OF THE REPRESENTATION DTD. 13/06/2009 FILED BY THE P.2. BEFORE THE R.2.

EXT.P.12: COPY OF THE APPEAL DTD. 06/01/2010 FILED BY THE P.1.

EXT.P.12.A: COPY OF THE APPEAL DTD. 07/01/2010 FILED BY THE P.2.

RESPONDENTS' EXHIBITS: NIL.

//TRUE COPY//

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P.A. TO JUDGE.

Prv.

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Handwritten signature and date