

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Pronounced on : 09.09.2022

1) CWP No.15067 of 2020 (O&M)

Krishan Kumar ...Petitioner

Versus

State of Haryana and another ...Respondents

2) LPA No.700 of 2020 (O&M)

Amit LatharAppellant

Versus

State of Haryana and others ...Respondents

3) CWP No.16790 of 2020

Neetu DeshwalPetitioner

Versus

State of Haryana and another ...Respondents

4) CWP No.20396 of 2020

Dr. Kuldeep MalodiaPetitioner

Versus

State of Haryana and another ...Respondents

5) CWP No.12963 of 2021

VikasPetitioner

Versus

State of Haryana and another ...Respondents

6) CWP No.17198 of 2021

SompalPetitioner

Versus

State of Haryana and another ...Respondents

7) CWP No.12517 of 2021

Dr. Naresh KumarPetitioner

Versus

State of Haryana and anotherRespondents

**CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE ARUN MONGA
HON'BLE MR. JUSTICE SANDEEP MOUDGIL**

Present: Mr. Keshav Pratap Singh, Advocate with
Mr. Vishal Singh, Mr. Namish Sodhi, Mr. Anmol Puri,
Mr. D.S. Walia, Mr. Yatin Sharma and Ms. Tanu Priya Singh,
Advocates for the petitioner (in CWP No.15067 of 2020) and
for the appellant in LPA No.700 of 2020).

Mr. Rajat Mor, Advocate
for the petitioner(s) (in CWP No.16790 of 2020).

Mr. Roopak Bansal, Advocate
for the petitioner(s)
(in CWP Nos.20396 of 2020, 12517 and 12963 of 2021).

Mr. B.K. Bagri, Advocate with
Mr. Narender Kumar Sharma, Advocate
for the petitioner(s) (in CWP No.17198 of 2021).

Mr. B.R. Mahajan, Advocate General, Haryana, with
Mr. Jagbir Malik, Addl. A.G. Haryana and
Ms. Nikita Goel, Advocate
for respondent No.1-State of Haryana.

Mr. Kanwal Goyal, Advocate
for respondent No.2 (in CWP No.15067 of 2020).

Mr. Govind Goel, Advocate
for respondent No.6 (in CWP-15067-2020).

Mr. R.K. Malik, Senior Advocate with
Mr. Sandeep Dhull, Mr. Sunil Hooda, Advocates
for respondents No.3 to 8 (in CWP No.15067 of 2020).

Mr. Balvinder Sangwan, Advocate
for respondent No.2 (in CWP No.12517 of 2021).

Mr. Aditya Gautam, Advocate
for respondent No.2 (in CWP No.16790 of 2020).

Ms. Harpriya Khaneka, Advocate
for respondent No.2 (in CWP No.12963 of 2021).

Mr. Sanjiv Gupta, Advocate
for the applicant(s) (in CM Nos.13562 and 13563 of 2021).

AUGUSTINE GEORGE MASIH, J.

CM No.13562-CWP of 2021

Prayer in this application is for impleadment of applicant – Dr. Suresh Kumar son of Shri Dalip Singh as respondent No.9, being a selected candidate in pursuance to the advertisement which has been impugned in the writ petitions.

For the reasons stated in the application, the same is allowed. Dr. Suresh Kumar son of Shri Dalip Singh is impleaded as respondent No.9, subject to all just exceptions. Amended memo of parties appended along with the application is taken on record. Registry is directed to place the same at appropriate stage of the case.

CM No.13551-CWP of 2021

Prayer in this application is for placing on record photocopy of a letter dated 08.09.2009 as Annexure A-1.

For the reasons stated in the application, the same is allowed. Copy of letter dated 08.09.2009 is taken on record as Annexure A-1, subject to all just exceptions.

Main Cases

A Division Bench of this Court had referred this matter in *Krishan Kumar's* case (supra) to the Larger Bench vide order dated 25.08.2021 leading to the constitution of this Bench. The said order dated 25.08.2021 reads as follows:-

“The petitioner has filed this writ petition under Article 226 of the Constitution for quashing the essential qualification as prescribed in advertisement dated 7.9.2015 (Annexure P-1) for appointment to the post of Drug Inspector (Drug Control Officer) further for

quashing part of Serial No.11 Appendix B under Rule 7 of the Notification issued by Food and Drugs Administration Department, Haryana Government dated 13.11.2018 (Annexure P-10) (Haryana Food and Drugs Administration Department, Subordinate Office (Group-B) Service Rules, 2018) inter alia as the same is contrary to Rule 49 of the Drugs and Cosmetics Rules, 1945.

The impugned notification dated 13.11.2018 (Annexure P-10) was issued by Governor in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India.

In A.B. Krishna v. State of Karnataka; (1998) 3 SCC 495, Hon'ble Apex Court observed as follows:

“5. Rule-making power, so far as services under the Union or any State, are concerned, are vested in the President or the Governor, as the case may be, under Article 309 of the Constitution which provides as under:-

“309. Recruitment and conditions of service of persons serving the Union or a State – Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State: Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the

affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.”

6. It is primarily the Legislature, namely, the Parliament or the State Legislative Assembly, in whom power to make law regulating the recruitment and conditions of service of persons appointed to public services and posts, in connection with the affairs of the Union or the State, is vested. The legislative field indicated in this Article is the same as is indicated in Entry 71 of List I of the Seventh Schedule or Entry 41 of List II of that Schedule. The proviso, however, gives power to the President or the Governor to make Service Rules but this is only a transitional provision as the power under the Proviso can be exercised only so long as the Legislature does not make any Act whereby recruitment to public posts as also other conditions of service relating to that post are laid down.

7. The Rule-making function under the Proviso to Article 309 is a legislative function. Since Article 309 has to operate subject to other provisions of the Constitution, it is obvious that whether it is an Act made by the Parliament or the State Legislature which lays down the conditions of service or it is the Rule made by the President or the Governor under the Proviso to that Article, they have to be in conformity with the other provisions of the Constitution specially Articles 14, 16, 310 and 311.”

An intractable question has arisen in the present writ petition in view of provisions of Drugs and Cosmetics Act, 1940 and Notification dated 13.10.2018, Annexure P-10, issued by the State Government under Article 309 of the Constitution of India in a matter relating to recruitment of Drug Control Officers. Though, Section 21 of Drugs and Cosmetics Act, 1940 clearly lays down that appointment shall be made as per the qualifications prescribed, which would normally indicate the qualifications prescribed in Central statute. However, State Government invoked Article 309 of the Constitution of India and prescribed qualifications different from that prescribed by the Central Government. Though, undisputedly, the matter falls in the realm of List III, the State Government never choose to enact its legislation. Merely, for the purpose of laying down qualification, it invoked Article 309 of the Constitution of India. In such circumstances, it needs to be examined whether invocation of such powers would be sustainable in law; whether it would be hit by doctrine of eclipse; whether notification needs to be examined in light of provisions of Article 252 and 254 of Constitution of India. There is no clear answer forthcoming in the judgments referred to by the parties, particularly, 'Priyanka and others versus UPSC and others, passed in CWP-14287 of 2013. There is one another judgment of this Court in LPA-1778-2016 Sachin Saggar v. State of Punjab and others decided on 15.9.2016. However, the rules framed by Punjab Government regarding appointment of Drug Inspectors are in conformity with Rule 49 of Drugs & Cosmetics Rules, 1945 framed by Central Government, which is not so in State of Haryana. In State of Haryana, the experience prescribed in proviso to Rule 49 of Rules of 1945 framed by Central

Government, has been made one of the essential qualifications for appointment as a Drug Inspector.

There appears to be little doubt that the Drugs and Cosmetics Act, 1940 enacted by the Parliament under Central Statute is a complete legislation on the subject. Section 21 thereof reads as under:-

“21. Inspectors.—

(1) The Central Government or a State Government may by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Inspectors for such areas as may be assigned to them by the Central Government or the State Government, as the case may be.

(2) The powers which may be exercised by an Inspector and the duties which may be performed by him, the drugs or [classes of drugs or cosmetics or classes of cosmetics] in relation to which and the conditions, limitations or restrictions subject to which, such powers and duties may be exercised or performed shall be such as may be prescribed.

(3) No person who has any financial interest [in the import, manufacture or sale of drugs or cosmetics] shall be appointed to be an Inspector under this section.

(4) Every Inspector shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860), and shall be officially subordinate to such authority ⁴[having the prescribed qualifications,] as the Government appointing him may specify in this behalf.”

Section 33 of the Drugs and Cosmetic Act, 1940 empowers the Central Government to frame Rules

under the Act. In exercise of the powers conferred by Section 33 of the Act, the Central Government framed the Drugs and Cosmetics Rules, 1945. Rule 49 of the said Rules prescribes the qualification for appointment to the posts of Drug Inspectors. Rule 51 authorises certain Drug Inspectors to inspect the premises licensed for sale of drugs whereas Rule 52 authorises Drug Inspectors to inspect the manufacture of drugs or cosmetics. However, there is not even a whisper in the impugned advertisement dated 7.9.2015 as to whether Drug Inspectors (Drug Control Officers) are being appointed for the purpose of performing duties as prescribed under Rule 51 or Rule 52. Further, in the present case, the State invoked Article 309 of the Constitution prescribing essential qualifications for such appointments, which are at variance to those laid down in the Central Statute. Article 309 of the Constitution was invoked for the limited purpose of prescribing different qualifications. For all intents and purposes if the Central Act prevails, the experience as laid down in the proviso would not be essential qualification. However, if notification issued by the State under Article 309 of the Constitution is given effect to then experience become necessary and candidate not possessing the same cannot be considered eligible.

An important question therefore arises (1) whether State Government could have acted beyond the statutory provisions contained in the Central Act i.e. Sections 21 and 33 of the Act and Rules framed thereunder, prescribing qualifications and invoking Article 309 for this purpose.

While in the Rules of 1945, (2) whether the experience as contained in the proviso to Rule 49 of the 1945

Rules, whereas in the Rules framed by the State under Article 309 of the Constitution, the experience has been made as essential qualification. Therefore, another question arises (3) whether the Rules framed by the State under Article 309 of the Constitution would have overriding effect over the rules framed under Central Statue, the primary legislation governing the recruitment of Drug Inspectors.

A larger Bench needs to be constituted to decide these questions. The application for vacation of stay be put up before the said Bench.”

Krishan Kumar's writ petition with five other writ petitions and a Letters Patent Appeal, as mentioned in the heading, have been listed for decision and are, thus, being considered accordingly along with the Reference.

2. Learned counsel for the petitioners, who were led by Mr. Keshav Pratap Singh, Advocate, with reference to Section 103 of the Government of India Act, 1935 (hereinafter referred to as '1935 Act'), submits that the State Legislature has foregone its powers to amend or make rules, much less the service rules qua the post of Drug Inspector (In Haryana, named as 'Drugs Control Officer') governed under Chapter IV of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as '1940 Act'). He contends that once the resolution has been passed by the Provincial Legislature and the Central Legislature had proceeded to pass an Act, there would be no power left with the Provincial Legislature to amend or repeal the said legislation qua its own territory even if it falls within the Provincial Legislative List. His contention is that Section 103 of the 1935 Act is *pari materia* with Article 252 of the Constitution of India, where it

has further been clarified under Article 252 (2). After coming into force the Constitution, the Acts which were in force on the said day, have been protected and saved by virtue of Article 372 of the Constitution of India. With the State Legislature ceasing to have any share/power in respect of the matter, which has been surrendered by way of a resolution, Parliament alone would be authorized and entitled to legislate with respect to it irrespective of the fact whether the said item falls in List II or III of Schedule VII of the Constitution. In support of this contention, he has placed reliance upon the judgments of the Hon'ble Supreme Court in **M/s R.M.D.C. (Mysore) Private Ltd. Vs. State of Mysore** AIR 1962 (SC) 594, **Union of India Vs. Valluri Basavaiah Choudhary**, (1979) 3 SCC 324 and **Thumati Venkaiah etc. Vs. State of A.P.** (1980) 4 SCC 295.

3. His further submission is that as per Section 33 of the 1940 Act, Central Government alone has been specifically empowered to make rules for the purpose of giving effect to the provisions of the Chapter in which the said Section exists i.e. Chapter IV. On this basis, he contends that no State Government has the power to make rules under the 1940 Act. Had there been such an intention, it would have been so provided for in the Act. This, he states, with reference to Section 3 (e) (ii) of 1940 Act, which defines an Inspector appointed by the Central Government or the State Government under Section 21. Section 21 of the 1940 Act empowers the Central and State Government to appoint, by notification in the Official Gazette, such persons as it thinks fit having the prescribed qualifications, to be Inspectors for such areas, as may be assigned to them by the Central Government or the State Government, as the case may be. Similar is the position with regard to the duties which may be performed by him to be assigned. He, thus, contends that the Rule making

power having been restricted to the Central Government, the State is divested of its powers to frame Rules.

4. With reference to the powers which have been exercised by the State of Haryana under proviso to Article 309 of the Constitution of India to frame Haryana Drugs (Group-B) Service Rules, 1989 (hereinafter referred to as '1989 Rules') and Haryana Food and Drugs Administration Department Subordinate Office (Group-B) Service Rules, 2018 (hereinafter referred to as '2018 Rules'), he submits that the same would not be available to the State as the field is already covered and occupied by the 1945 Rules which have been framed by the Central Government in pursuance to and in exercise of powers conferred under Section 33 of the 1940 Act. His contention is that proviso to Article 309 of the Constitution of India is only a temporary or stop gap arrangement which can be pressed into service when there is no legislation or statutory rules framed thereunder governing the terms and conditions of the persons to be recruited. In case, where Rules are already in place and operative under a statute which are being followed by the State, there would be no power with the State to invoke proviso to Article 309 of the Constitution of India. His submission is that the 1945 Rules hold the field which lays down the qualifications of the Drug Inspectors and further, the powers and duties have already been prescribed under the 1940 Act and 1945 Rules, the State could not have laid down/prescribed the qualifications under proviso to Article 309 of the Constitution of India as it lacked jurisdiction. In support of this contention, he has placed reliance upon the judgments of the Hon'ble Supreme Court in **Chandra Prakash Tiwari and others Vs. Shakuntala Shukla** (2006) 6 SCC 127 and **D.R. Yadav and another Vs. R.K. Singh and another** (2003) AIR (SC) 3935.

5. Another submission, which has been put forth by the counsel for the petitioners, is with reference to Article 254 of the Constitution of

India. He submits that in case of any inconsistency between laws made by the Parliament and the laws made by the Legislature of the State, especially with regard to a situation which would arise as envisaged under Article 252 of the Constitution of India, where both Central and the State Governments have the power to legislate, the Central Act shall prevail, meaning thereby the State law to the extent it being repugnant is either eclipsed or void. As per Rule 49 of the 1945 Rules, as framed by the Central Government in exercise of its powers under Section 33 of the 1940 Act, qualifications of the Inspectors stand prescribed. It lays down the essential qualification which is degree in the fields prescribed therein. Two provisos to this rule have also been incorporated thereunder and as per first proviso, person(s) who has/have been appointed as Inspector(s) with the experience of 18 months in the fields/areas mentioned, shall be authorized to inspect the manufacture of substances mentioned in Schedule C. This cannot be said to be the essential qualification for appointment as an Inspector as it only authorizes a person who is already performing the duties of an Inspector to perform those specified duties/job as mentioned. State of Haryana by enacting the 1989 Rules and 2018 Rules has made this first proviso to Rule 49 as an essential qualification in purported exercise of its powers conferred under proviso to Article 309 of the Constitution of India. This incorporation of the experience as an essential qualification by the State of Haryana for appointment to the post of Inspector has led to the qualifications having been changed. Prescribing different set of qualifications which is in conflict with the Central Act and the Central Rules would amount to usurping the powers of the Central Government which is impermissible in law and not only will it be against the statutory provisions but in violation of the constitutional mandate. There being a conflict in the Rules as have been framed by the

State of Haryana viz-a-viz Central Act and the Central Rules, the Central Act and Central Rules would cover the field rendering the rules framed by the State of Haryana inoperative and void being repugnant to the Central Rules. In support of this contention, he has placed reliance upon the judgments in **Tumati Rangayya etc. Vs. The State of A.P. and others (F.B.)** 1978 AIR (A.P.) 106 and **M/s T. Khande Rao and Sons etc. Vs. State of Karnataka and others** 1979 AIR (Karnataka) 71.

6. Learned counsel for the petitioners has placed heavy reliance upon the Full Bench judgment of the Allahabad High Court in **Kuldeep Singh and others Vs. State of U.P. and another** AIR (2014) All. 200(F.B.) as also the Division Bench judgment of the Delhi High Court in W.P. (C) 2475 of 2019, titled as '**Union Public Service Commission Vs. Nidhi Pandey and another**', decided on 18th of February, 2020, wherein experience, as prescribed under Rule 49 of the 1945 Rules, was sought to be made an essential qualification for appointment as a Drug Inspector, which challenge has been accepted by the Central Administrative Tribunal by relying upon the Full Bench judgment of the Allahabad High Court in *Kuldeep Singh's* case (supra), where again, such a situation had arisen to conclude that the field having been occupied could not have been sought to be replaced by the Rules to be framed under the proviso to Article 309 of the Constitution of India. It has also been pointed out that the Special Leave to Appeal (C) 3437-3456 of 2021, titled as '**Director General, Central Drugs Standard Control Organization etc. Vs. Nidhi Pandey and another etc. etc.**', stands dismissed by the Hon'ble Supreme Court on 05.04.2021.

7. On this basis, it has been prayed by the counsel for the petitioners that the Reference needs to be answered by upholding the challenge to the statutory rules by setting aside/quashing the Rules which

have been framed by the State of Haryana under the proviso to Article 309 of the Constitution of India and as a consequence thereof, advertisement as also the process of selection in pursuance thereto be set aside and a fresh selection be held by giving an opportunity to all the persons who fulfill the qualifications as prescribed under Rule 49 of the 1945 Rules.

8. Learned Advocate General, Haryana, on the other hand, with reference to Section 103 of the 1935 Act, has contended that the submission of the counsel for the petitioners that the Act framed by the Federal Legislature on the basis of the resolution passed by the Provincial Legislatures authorizing the Federal Legislature to legislate on its behalf cannot be amended or varied by the State Legislature or that the State Legislature surrenders its powers to the Central Legislature cannot be accepted especially with reference to the language of Section 103 of the 1935 Act. He emphasizes that in the said section itself, it has been stated that the Act was passed by the Central Legislature with respect to any province, to which it applied, but could be amended or repealed by an Act of the Legislature or that province. He, thus, contends that the said Section 103 of the 1935 Act would hold the field and not Article 252 (2) of the Constitution of India. The argument of the counsel for the petitioners is based upon the assumption that the provisions of Article 252 (2) would be applicable but the same would not apply as the protection has been granted for the continuance of the existing laws under Article 372 of the Constitution of India as limited to the extent so provided under the said Article. He, therefore, contends that all laws in force in the Territory of India immediately before the commencement of the Constitution continue to be in force and would do so until altered, repealed or amended by the Competent Legislature or other Competent Authority. He, on this basis, contends that the State Legislature

has the power to alter, repeal or amend the 1940 Act as also the 1945 Rules framed thereunder. In support of this contention that pre-Constitution laws cannot be considered to have been enacted under Article 252 of the Constitution and Article 254 has no applicability to such enactments, he has placed reliance upon the judgments **Dr. Prakash Chandra Tiwari Vs. State of Madhya Pradesh and others** 1976 AIR (Madhya Pradesh) 50 (DB), **Pankajakshi (Dead) through LRs and others Vs. Chandrika and others** (2016) 6 SCC 157 (Constitution Bench) and **Kirodi (Since Deceased) through his LR Vs. Ram Parkash and others** (2019) 1 L.A.R. 374.

9. In the light of the above, it has been contended by the learned Advocate General, Haryana, that the exercise of powers conferred under the proviso to Article 309 of the Constitution would not be illegal or unconstitutional. In any case, he has asserted that neither the quality or basic qualifications prescribed under the 1945 Rules, as framed by the Central Government under Section 33 of the 1940 Act, have been compromised nor has the essential qualification been reduced, rather better qualification than the one which has been prescribed by the Central Government, has been provided under the rules framed by the State of Haryana. This, he asserts in the light of the accepted legal proposition that it is the employer, who has to see the local circumstances, the requirements and necessity and then prescribe the qualifications for appointment to a particular post. In any case, he contends that there is no inconsistency between the rules which have been framed by the Central Government and the State of Haryana, when only improvement in essential qualifications has been made.

10. Another submission which has been put forth by the learned Advocate General, Haryana, is that the Drug Inspector who is appointed as such is required to perform various duties as have been prescribed under the

1940 Act and the 1945 Rules. The said duties have been prescribed under Rule 52 of the 1945 Rules. The assigning of the duties has been left at the discretion of the State Government as also the Central Government depending upon the Appointing Authority. Since the Appointing Authority herein is admittedly the State, the duties have also to be taken and assigned by it and therefore, Inspectors appointed under Section 21 of the 1940 Act have been conferred with powers under Section 22 with the procedure to be followed by the Inspectors specified in Section 23 thereof to give effect to the duties and powers assigned/conferred on him. All this is left to the discretion of the Appointing Authority. The qualifications for appointment, therefore, was never intended to be restricted to the essential qualifications. The State would be entitled to have higher essential qualifications which would fulfill the requirement of not only performing the duties, responsibilities duly following the procedure and exercising powers as prescribed under the Act but to also perform the same effectively especially when candidates for appointment to the post are available with not only the prescribed essential academic and professional qualifications, but the required experience as well. Insistence of persons with basic essential qualification to be appointed would be justified in case there is dearth of qualified candidates with experience for appointment. To substantiate this contention, he has placed reliance upon the judgments of the Hon'ble Supreme Court in **S. Satyapal Reddy etc Vs. Government of A.P. and others** (1994) 3 SCT 837 (SC) and **State of U.P. and others Vs. Bhupendra Nath Tripathi and others** (2010) 6 SLR 298 (SC).

11. Learned Advocate General, Haryana, has also emphasized upon the aspect that the petitioners having participated in the selection process cannot then be permitted to challenge the validity of the Rules at this belated

stage when the process for selection had been initiated in the year 2015 with a corrigendum having been brought about in the year 2018 increasing the number of posts. The qualifications being known to the petitioners, they should have initially challenged the qualifications which were prescribed in the advertisement. Now having taken a chance and failed, they cannot be permitted to turn around and challenge the validity of the statutory rules. In support of this contention, reliance has been placed upon the judgment of the Division Bench of this Court in **Bhupinder Kumar Sharma Vs. State of Punjab and others** (2021) 3 SCT 45.

12. Learned Advocate General, Haryana, has also placed reliance upon the Division Bench judgment of this Court in CWP No.14287 of 2013, titled as '**Priyanka and others Vs. Union Public Service Commission and others**', decided on 22.09.2015, wherein the applications of the petitioners for appointment to the post of Drug Inspectors in the Central Drugs Standards Control Organization, Ministry of Health & Family Welfare, Department of Health and Family Welfare, had been rejected on the ground that they had not fulfilled the eligibility criteria in terms of the requisite duration of experience. With that grievance, they had approached the Central Administrative Tribunal, Chandigarh Bench, which had rejected the said challenge leading to the filing of the writ petition, where again, apart from laying down the qualification of degree in the specified fields incorporated experience, as laid down in first proviso to Rule 49 of the 1945 Rules, as an essential qualification. The Rules have been framed under Article 309 in the year 2010 i.e. the Central Drugs Recruitment Control Organization (Drugs Inspectors) Recruitment Rules, 2010. The Division Bench proceeded to hold that since the statutory rules provided for the same as an essential qualification, the writ had no merit and thus, dismissed the same. Review

Application preferred by the petitioners i.e. Review Application No.445 of 2015 has also been dismissed by the Bench on 19.02.2016, where the plea with reference to Rule 49 of the 1945 Rules was specifically pressed into service to contend that the experience was not essential qualification and the 2010 Rules being violative of Rule 49 of the 1945 Rules cannot sustain but the said plea was rejected.

13. On this basis, learned Advocate General, Haryana, proceeded to submit that the challenge to the statutory rules deserves to be rejected and the writ petitions dismissed.

14. Mr. Govind Goel, Advocate, counsel for respondent No.6 in CWP No.15067 of 2020, has, in addition to the submissions made by the learned Advocate General, Haryana, placed reliance upon the judgment in **Anupal Singh and others Vs. State of Uttar Pradesh through Principal Secretary, Personnel Department and others** (2020) 2 Supreme Court Cases 173, and contended that the petitioners having participated in the selection process, cannot challenge the selection. They lack *bona fides* and the writ petitions would not be maintainable on account of acquiescence. He has primarily attributed it to the delay on the part of the petitioners in challenging the statutory rules when they were aware that they were ineligible but still participated in the selection process. It has been contended by him that the item drug and cosmetic falls in the List No.III (Concurrent List) of the VIIth Schedule of the Constitution and both the Union and the States have legislative competence. His submission is that Rule 49 of the 1945 Rules framed by the Central Government and the 1989 Rules and 2018 Rules as framed by the Government of Haryana govern the qualifications for appointment to the post of Drug Inspector. They operate in their respective fields and there is neither any inconsistency or irreconcilability. In any case,

when two set of Rules operate in the same field, the two set of Rules have to be construed harmoniously especially when framing of the Rules under proviso to Article 309 of the Constitution are plenary piece of Legislation. The State Rules have to be held inconsistent only when there is direct conflict between the two. The essential qualification of experience, as has been prescribed under the 1989 Rules and 2018 Rules, have been so prescribed for the reason that the Drug Inspectors, who are appointed at the very inception, are able to inspect the manufacture of substances mentioned in Schedule C of the 1940 Act. Referring to the judgment of the Hon'ble Supreme Court in **B.S. Yadav and others Vs. State of Haryana and others** AIR 1981 Supreme Court 561, counsel contends that the legislative power vested in the State Legislature under the VIIth Schedule is exercised by the Governor under Article 309 just like the ordinance making power under Article 213 of the Constitution of India. Concurrent power of the VIIth Schedule so exercised by the Governor under Article 309 are valid and in consonance with law. Applicability of Article 246 which provides for subject matter of laws made by Parliament and by the Legislature of the States confers powers on the Centre and the States qua the Concurrent List, the only rider would be that there should not be irreconcilable to each other.

15. As regards the entitlement and powers of the employer to have higher qualification or to prescribe the additional qualification, he has placed reliance upon the judgments in **Maharashtra Public Service Commission through its Secretary Vs. Sandeep Shriram Warade and others** (2019) 6 SCC 362 and **APJ Abdul Kalam Technological University and another Vs. Jai Bharath College of Management and Engineering Technology and others** (2021) 2 SCC 564, to support this plea. He, on this basis, contends that the qualification as has been prescribed by the State of

Haryana in exercise of its powers under the proviso to Article 309 of the Constitution of India is fully justified and in accordance with law, where no lower qualification than the minimum prescribed has been laid down.

16. Mr. Govind Goel, has further emphasized upon the fact that since it is an item which is in the Concurrent List and as per the settled proposition in law in the light of the judgment of the Hon'ble Supreme Court in the case of **State of Bihar and others Vs. Shree Baidyanath Ayurved Bhawan (P) Ltd. and others** (2005) 2 SCC 762, even if there is an Act which has been passed by the Parliament, the State would have the power to legislate especially when the Act which has come into existence because of the operation of Section 103 of the 1935 Act, the said Act can be amended or repealed by the Parliament and also by the State Legislature. However, such amendment by the State Legislature would be subject to Presidential assent to amending or repealing of the same. In support of this argument, he has placed reliance upon the judgment of the Hon'ble Supreme Court in **Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.** (1976) 1 SCC 466. Reliance has also been placed upon the judgment of the Hon'ble Supreme Court in **A.S. Krishna and others Vs. State of Madras** AIR 1957 SC 297 to contend that the question of repugnancy will arise with reference to the legislation falling under the Concurrent List and they must be repugnant to each other. Unless the State Act being repugnant to the Central Act, it would not be void. However, to the extent of its repugnancy, the same would be void. He, thus, contends that there being no conflict between the Central Rules and the State Rules, the challenge to the statutory rules, as framed by the State of Haryana, is without any basis. Prayer has, thus, been made for dismissal of the writ petitions.

17. We have considered the submissions made by the learned counsel for the parties and with their assistance have gone through the pleadings, records and the judgments relied upon by them.

18. In the Reference, there are three questions which arise for the Larger Bench to be considered as per the Reference order dated 25.08.2021, which read as follows:-

1. Whether the State Government could have acted beyond the statutory provisions contained in the Central Act i.e. Sections 21 and 33 of the 1940 Act and the 1945 Rules framed thereunder by prescribing qualifications invoking Article 309 of the Constitution of India for this purpose?

2. Whether the experience as contained in the first proviso to Rule 49 of the 1945 Rules as framed by the Central Government can be made an essential qualification by the State framing rules under Article 309 of the Constitution of India?

3. Whether the rules framed by the State under Article 309 of the Constitution of India would have overriding effect over the rules framed under Central statute, the primary legislation governing recruitment of Drug Inspectors?

19. Facts in these cases are not in dispute and can be stated briefly that the Haryana Public Service Commission (hereinafter referred to as 'Commission') issued an advertisement dated 10.09.2015 for direct recruitment of four posts of Drugs Control Officer (nomenclature changed

from Drugs Inspector vide notification dated 09.01.2008 and hereinafter referred to as Drugs Inspector for the sake of convenience in the light of the fact that under the 1940 Act and 1945 Rules, the said term has been mentioned and used) in Health Department, Haryana. Thereafter, on 04.06.2019, a corrigendum was issued, whereby posts of Drugs Inspector were increased to 26 from 4 and the last date for filling the online applications was kept as 18.06.2019. Recruitment test was conducted by the Commission on 03.10.2019 and result thereof was announced on 12.12.2019. Candidates three times the number of posts were called for the further process. Since the number of qualified candidates were less than three times the posts advertised, an amended result was declared on 04.06.2020. Screening/scrutiny process was initiated by the Commission and the documents from the candidates were called for and the same were scrutinized. Names of the petitioners were not included in the list primarily for the reason that they did not possess the experience, which was prescribed in the advertisement, which had been made the essential qualification as per the initial notified 1989 Rules and the 2018 Rules.

20. It is, at this stage, that the petitioners approached this Court by filing the writ petitions, wherein the essential qualifications as prescribed in the advertisement and as notified by the Food and Drugs Department, Haryana Government, dated 13.11.2018, were challenged on the ground that the essential qualifications as prescribed in the 1940 Act read with the 1945 Rules framed thereunder have been violated, where the qualification which has been prescribed is a Bachelor degree in the fields as specified therein. There was no experience required for initial appointment to the post of Drugs Inspector and that the first proviso to Rule 49 of the 1945 Rules relates to experience in the specified fields mentioned therein entitling and

making the Drugs Inspector eligible and authorized to inspect the manufacture of substance contained in Schedule C of the 1940 Act. This experience having been made the essential qualification for appointment to the post of Drugs Inspector is unsustainable in the light of the fact that the said 1945 Rules, which have been framed under the Central statute by the Central Government, would prevail over the statutory rules framed under the proviso to Article 309 of the Constitution of India which has a limited shelf-life and it operates as the stop-gap arrangement until provisions with regard to regulating the recruitment is made by or under the Act of appropriate Legislature under this Article and Rules so made shall have effect subject to provisions of any such Act. On this basis, it has been pleaded that the field being already occupied with the framing of the Central Act and thereunder the Rules, the rules framed by the State cannot operate.

21. To this, State has responded by asserting that in the light of the provisions as contained in Section 103 of the 1935 Act, the operation of the said Act so framed by the Central Government on the basis of the resolution of the Provincial Legislature, did not bar amendment/repeal of the said Act by the State Legislature and the same could be so done at any time. It has also been asserted that Article 252 of the Constitution would not be applicable in this case as the same operates when an Act has been passed under Article 242 of the Constitution of India. It is, therefore, contended that the State has the power and jurisdiction to amend the rules which have been framed by the Central Government.

22. For proceeding to answer the questions raised in the Reference, the background and the history of the Drugs and Cosmetics Act, 1940 needs to be gone into. As per the Statement of Object and Reasons of the Drugs and Cosmetics Act, 1940, on receipt of recommendations of the Drug

Enquiry Committee, which had been constituted to regulate the import of drugs into then British India, was introduced in the Central Legislative Assembly in 1937. The said Select Committee appointed by the Central Legislative Assembly opined that more comprehensive measures providing for the uniform control of the manufacture and distribution of drugs as well as of import was desirable. The Government of India asked Provincial Governments to invite the Provincial Legislatures to pass resolution under Section 103 of the Government of India Act, 1935, empowering the Central Legislature to pass an Act for regulating such matters relating to the control of drugs as fall within the Provincial Legislative List. Such resolutions having been passed by all the Provincial Legislatures, when received by the Government of India, led to the introduction of the Drugs Bill in the Central Legislative Assembly, which came to be passed by the Central Legislative Assembly. The same received the assent of the Governor General on 10.09.1940 and thus, came into force. By Section 2 of the Drugs (Amendment) Act, 1964, its nomenclature has been amended by adding the word 'cosmetics' after the word 'drugs' making it 'The Drugs and Cosmetics Act, 1940'. The said Act extends to the whole of India.

23. At this stage, reference to Section 103 of the 1935 Act would be necessary before we proceed further, which reads as follows:-

“103. If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislature, it shall be lawful for the Federal Legislature to pass an Act for

regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.”

A perusal of the above would show that the operation of this Section commences with the Provincial Legislature passing a resolution empowering the Federal Legislature to pass an Act for regulating the matter which falls under the Provincial Legislative List. When the Federal Legislature passes an Act for the said purpose, it becomes binding upon the said Province, however, the said Act as passed by the Federal Legislature in relation to any Province, to which it applies, can be amended or repealed by an Act of the Legislature of that Province.

24. With the coming into force of, the Constitution of India, the statutes which were in operation on the said date, were protected under Article 372 of the Constitution of India. The relevant sub-Section (1) of the said Article reads as follows:-

“372. Continuance in force of existing laws and their adaptation. – (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.”

A perusal of the above Article would show that all laws in force in the Territory of India before the commencement of the Constitution

of India continued to operate until altered or repealed or amended by a Competent Legislature or other Competent Authority. It may, however, be added here that the said laws would be subject to the other provisions of the Constitution of India, meaning thereby that the laws in violation of the constitutional provisions would cease to operate.

25. Reference at this stage may be made to the judgments of the Hon'ble Supreme Court in *Union of India Vs. Valluri Basavaiah Choudhary's* and *Thumati Venkaiah etc. Vs. State of A.P.'s* case (supra) which would explain the position with regard to the provisions as contained under Section 103 read in conjunction with Article 252 of the Constitution of India which deals with the power of Parliament to legislate for two or more States by consent and by adoption of such legislation of any other State which would be *pari materia* to Section 103 except for Article 252 (2), where, on an Act being passed by the Parliament as per the resolution of the Legislature(s) of the House(s) of the States, the Parliament would have the power and jurisdiction to amend or repeal the said Act. This is the basic difference between the two, which needs to be kept in mind while dealing with the matter.

What is apparent, therefore, is that the Act as framed by the Federal Legislature i.e. 1940 Act and 1945 Rules framed under Section 33 thereof continue to operate till date qua the State of Haryana as there has been no amendment or repeal by an Act of the legislature of the State.

26. Moving on to the aspect as to whether the State of Haryana has foregone its power to amend or make rules much less the service rules qua the post of Drugs Inspector, suffice it to say that the power to amend and repeal the Act is very much with the State of Haryana but since such a power has not been invoked, the said 1940 Act and 1945 Rules framed thereunder

continue to operate in the light of the provisions of Section 103 of the 1935 Act read with Article 372 of the Constitution of India.

27. The next aspect which needs to be referred to and highlighted is whether the State of Haryana could frame Rules under proviso to Article 309 of the Constitution of India especially when the 1945 Rules as framed by the Central Government under Section 33 of the 1940 Act are still operational ?

28. Section 33 of the 1940 Act reads as follows:-

“33. Power of Central Government to make rules.—

(1) The Central Government may [after consultation with, or on the recommendation of, the Board] and after previous publication by notification in the Official Gazette, make rules for the purpose of giving effect to the provisions of this Chapter:

Provided that consultation with the Board may be dispensed with if the Central Government is of opinion that circumstances have arisen which render it necessary to make rules without such consultation, but in such a case the Board shall be consulted within six months of the making of the rules and the Central Government shall take into consideration any suggestions which the Board may make in relation to the amendment of the said rules.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) provide for the establishment of laboratories for testing and analysing drugs [or cosmetics];

(b) prescribe the qualifications and duties of Government Analysts and the qualifications of Inspectors;

(c) prescribe the methods of test or analysis to be employed in determining whether a drug [or cosmetic] is of standard quality;

(d) prescribe, in respect of biological and organometallic compounds, the units or methods of standardisation;

(dd) prescribe under clause (d) of [section 17A] the colour or colours which a drug may bear or contain for purposes of colouring;

(dda) prescribe under clause (d) of section 17E the colour or colours which a cosmetic may bear or contain for purposes of colouring;

(e) prescribe the forms of licences [for the manufacture for sale or for distribution], for the sale and for the distribution of drugs or any specified drug or class of drugs [or of cosmetics or any specified cosmetic or class of cosmetics], the form of application for such licences, the conditions subject to which such licences may be issued, the authority empowered to issue the same [the qualification of such authority] and the fees payable therefor [and provide for the cancellation or suspension of such licences in any case where any provision of this Chapter or the rules made thereunder is contravened or any of the conditions subject to which they are issued is not complied with];

(ee) prescribe the records, registers or other documents to be kept and maintained under section 18B;

(eea) prescribe the fees for the inspection (for the purposes of grant or renewal of licence) of premises, wherein any drug or cosmetic is being or is proposed to be manufactured;

(eeb) prescribe the manner in which copies are to be certified under sub-section (2A) of section 22;

(f) specify the diseases or ailments which a drug may not purport or claim [to prevent, cure or mitigate] and such other effects which a drug may not purport or claim to have;

(g) prescribe the conditions subject to which small quantities of drugs may be manufactured for the purpose of examination, test or analysis;

(h) require the date of manufacture and the date of expiry of potency to be clearly or truly stated on the label or

container of any specified drug or class of drugs, and prohibit the sale, stocking or exhibition for sale, or distribution of the said drug or class of drugs after the expiry of a specified period from the date of manufacture or after the expiry of the date of potency;

(i) prescribe the conditions to be observed in the packing in bottles, packages, and other containers of drugs [or cosmetics], [including the use of packing material which comes into direct contact with the drugs] and prohibit the sale, stocking or exhibition for sale, or distribution of drugs [or cosmetics] packed in contravention of such conditions;

(j) regulate the mode of labelling packed drugs [or cosmetics], and prescribe the matter which shall or shall not be included in such labels;

(k) prescribe the maximum proportion of any poisonous substance which may be added or contained in any drug, prohibit the manufacture, sale or stocking or exhibition for sale, or distribution of any drug in which that proportion is exceeded, and specify substances which shall be deemed to be poisonous for the purposes of this Chapter and the rules made thereunder;

(l) require that the accepted scientific name of any specified drug shall be displayed in the prescribed manner on the label or wrapper of any patent or proprietary medicine containing such drug;

(n) prescribe the powers and duties of Inspectors [and the qualifications of the authority to which such Inspectors shall be subordinate] and [specify the drugs or classes of drugs or cosmetics or classes of cosmetics] in relation to which and the conditions, limitations or restrictions subject to which, such powers and duties may be exercised or performed;

(o) prescribe the forms of report to be given by Government Analysts, and the manner of application for

test or analysis under section 26 and the fees payable therefor;

(p) specify the offences against this Chapter or any rule made thereunder in relation to which an order of confiscation may be made under section 31;

(q) provide for the exemption, conditionally or otherwise, from all or any of the provisions of this Chapter or the rules made thereunder, of any specified drug or class of drugs [or cosmetic or class of cosmetics; [and]

(r) sum which may be specified by the Central Government under section 32-B.”

A perusal of the above would show that the power to make Rules has been conferred upon the Central Government for the purpose of giving effect to the provisions of the Chapter, in which the said Section finds mention. It would not be out of way to state that Section 33 falls in Chapter IV of the 1940 Act, which deals with the manufacture, sale and distribution of drugs and cosmetics. In this Chapter, Section 21 deals with the appointment of Inspectors having the prescribed qualifications, their powers and duties which is to be prescribed by the Appointing Authority which can be the State Government or the Central Government.

29. The powers of the Inspectors have been specified in Section 22 and the procedure to be followed to give effect to the duties and powers to be exercised have been elaborated in Section 23. Then comes Section 33 (1) which empowers the Central Government to make rules. In sub-section 2 (b) thereof, the qualifications and duties of the Inspectors have been mentioned apart from that of the Government Analysts under the Rules. Similarly, under sub-section 2 (n), the powers and duties of Inspectors and the qualification of the authority to which such Inspector shall be subordinate etc. have been mentioned, meaning thereby that rules qua these aspects

without prejudice to the generality of the powers conferred under sub-section (1) of Section 33 have been mentioned.

30. It is, in exercise of these powers, the 1945 Rules have been framed, wherein the qualifications of the Inspectors have been laid down under Rule 49 of the 1945 Rules, which reads as follows:-

“49. Qualifications of Inspectors. —A person who is appointed an Inspector under the Act shall be a person who has a degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialisation in Clinical Pharmacology or Microbiology from a University established in India by law:

Provided that only those Inspectors:

(i) Who have not less than 18 months' experience in the manufacture of at least one of the substances specified in Schedule C, or

(ii) Who have not less than 18 months' experience in testing of at least one of the substances in Schedule C in a laboratory approved for this purpose by the licensing authority, or

(iii) Who have gained experiences of not less than three years in the inspection of firms manufacturing any of the substances specified in Schedule C during the tenure of their services as Drugs Inspectors;

shall be authorised to inspect the manufacture of the substances mentioned in Schedule C:

[Provided further that the requirement as to the academic qualification shall not apply to persons appointed as Inspectors on or before the 18th day of October, 1993.”

A perusal of the above would show that the main rule mentions the minimum essential qualification for appointment of Inspectors which has been prescribed as a degree in the fields so specified therein. First proviso thereto deals with the entitlement and eligibility of an Inspector to be

authorized to inspect the manufacture of substances mentioned in Schedule C. For a person to be eligible under this proviso, any one of the three different types/nature of experience relating to manufacture, testing and inspection of substances specified in Schedule C along with the period mentioned qua that experience should be possessed. It needs to be emphasized here that experience relating to manufacture or testing of 18 months as laid down, can be obtained from any source but so far as the third experience which has been laid down as not less than three years has to be during the tenure of his service as a Drugs Inspector, meaning thereby that this experience is in-service experience on the post of Drugs Inspector. The experience, therefore, as prescribed in the first proviso to Rule 49 cannot be termed as the essential qualification for appointment as a Drugs Inspector under the 1945 Rules. That apart, Rule 51 lays down and specifies the duties of an Inspector to inspect premises licensed for the sale of drugs, while Rule 52 specifies the duties of an Inspector authorised to inspect the manufacture of drugs and cosmetics. Before authorisation to exercise duties and powers under Rule 52, experience as prescribed in the first proviso is to be possessed or achieved. This also throws light on the aspect that for appointment as Drug Inspector experience is not mandatory or essential.

31. Normally speaking proviso is an exception to the main provision although it does not exclude the operation of the provision itself. The Hon'ble Supreme Court in **S. Sundaram Pillai and others Vs. V.R. Pattabiraman and others** (1985) 1 SCC 519 has dealt with the aspect of interpretation of the proviso in following terms:-

“The well established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to

something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment.”

Meaning thereby that the proviso cannot be used to import the enacting part of something which is not intended to be there but does control the main provision. In **Halon Auto Links Private Limited Vs. State of Madhya Pradesh** (2008) 13 SCC 185, the Hon'ble Supreme Court has held as follows:-

“...the function of a proviso or an exception is that it qualifies the generality of the main enactment by providing an exception and taking out as it were from the main enactment a portion which but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of the proviso to read it as providing something by way of an addendum. In *Madras & Southern Maharashtra Rly. Co. Ltd Vs. Bezwada Municipality*, it was held as under:”

32. In catena of judgments, it has been settled by the Hon'ble Supreme Court that while interpreting any provision of the statute, the plain meaning has to be given effect to and if the language thereof is simple and unambiguous, there is no need to traverse beyond the same. Applying these principles, it is apparent that the experience referred to in the first proviso to Rule 49 of the 1945 Rules has not been made an essential qualification for appointment to the post of Drug Inspector, but the same is in violation to a specified nature and duties to be performed after gaining a particular experience and being authorized by the Competent Authority for performing such responsibility as conferred.

33. Now moving on to the Rules which have been framed under the proviso to Article 309 of the Constitution of India by the State of Haryana i.e. 1989 Rules; Rule 7 deals with the qualification which reads as follows:-

APPENDIX B
(See Rule 7)

<i>Sr. No.</i>	<i>Designation of post</i>	<i>Academic qualifications experience, if any, for recruitment</i>	<i>and Academic qualification and direct experience, if any, for appointment other than by direct recruitment</i>
1	2	3	4
1	Deputy State Drugs Controller	XXXXXXXXXX	
2	Assistant State Drugs Controller	XXXXXXXXXX	
3	Senior Drugs Inspector	XXXXXXXXXX	
4	Drugs Inspector	(a) Second Class Bachelor degree in Pharmacy or Pharmaceutical Chemistry. (b) 1½ years experience in manufacturing of at least one of the substances specified in Schedules C appended to the Drugs and Cosmetics Act, 1945 or 1½ years experience in testing of at least one of the substances specified in said Schedules C in a laboratory approved for the purpose by the licensing authority or Three years experience in inspection of Firms manufacturing any of the substances specified in the said Schedule C. (c) Adequate knowledge of Hindi.	

In 2018 Rules, Section 7 thereof deals with the qualification which reads as follows:-

CWP No.15067 of 2020 (O&M) & Connected cases

<i>Sr. No.</i>	<i>Designation</i>	<i>Academic qualifications and experience, if any, for an appointment by direct recruitment</i>	<i>Academic qualification and experience, if any, for an appointment by other than direct recruitment</i>
11.	Drugs Control Officer	(a) Second Class Bachelor degree in Pharmacy or Pharmaceutical Chemistry; (b) 1½ years experience in manufacturing of at least one of the substances specified in Schedules C or appended to the Drugs and Cosmetics Act, 1945; or 1½ years experience in testing of at least one of the substances specified in said Schedules C in a laboratory approved for the purpose by the licensing authority; or Three years experience in inspection of Firms manufacturing any of the substances specified in the said Schedule C; and (c) Hindi or Sanskrit upto Matric or Higher Education	By transfer/deputation:- 1. Two years experience as Drugs Control Officer; 2. (a) Second Class Bachelor degree in Pharmacy Pharmaceutical Chemistry; (b) 1½ years experience in manufacturing of at least one of the substances specified in Schedules C appended to the Drugs and Cosmetics Act, 1945; or 1½ years experience in testing of at least one of the substances specified in said Schedules C in a laboratory approved for the purpose by the licensing authority; or Three years experience in inspection of Firms manufacturing any of the substances specified in the said Schedule C; and (3) Hindi or Sanskrit upto Matric or Higher Education

It may be pointed out here that the academic qualifications for appointment to the post of Drug Inspector (in 2018 Rules nomenclature changed to Drug Control Officer) remain the same.

Another difference which has been brought about is under the mode of appointment in the 2018 Rules by including 'transfer and deputation' apart from direct, whereas under the 1989 Rules, the only mode of recruitment that was provided was 'direct'.

34. Perusal of the above 1989 Rules and 2018 Rules would show that the experience specified thereunder has been made a part of the essential qualification. Except for this change, there is no other difference with regard to the qualification prescribed under the 1945 Rules framed by the Central Government and the qualification prescribed under the 1989 and 2018 Rules framed by the State of Haryana.

35. The question, therefore, needs to be now considered is whether the experience, which is not made an essential qualification under the 1945 Rules as framed by the Central Government in exercise its powers conferred under Section 33 of the 1940 Act, which was legislated by the Centre, could be made an essential qualification by the State by invoking proviso to Article 309 of the Constitution of India and that too, with reference to Section 103 of the 1935 Act, under which the 1940 Act had been legislated?

36. Article 309 of the Constitution of India reads as follows:-

“309. Recruitment and conditions of service of persons serving the Union or a State.—Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate

Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.”

37. The Division Bench of this Court had an occasion to examine the extent and operation of the powers to be exercised under proviso to Article 309 of the Constitution in CWP No.20447 of 2020, titled as 'Dr. Joginder Pal Singh and others Vs. Union of India and others', decided on 01.03.2021. In para 12 thereof, it has been held as follows:-

“12. A perusal of the above would show that the recruitment and conditions of service of the persons is first of all subject to the other provisions of the Constitution and the Acts of the appropriate Legislature which may regulate the recruitment and the conditions of service of the persons appointed to the public services.

Proviso to Article 309 is only a temporary or stop-gap arrangement which is pressed into service or brought about to hold the field for a limited period i.e. until provision is made by or under an Act of the appropriate Legislature regulating the recruitment and the conditions of service of the persons. In case of such an Act covering the field which was erstwhile being occupied by the rules framed under proviso to Article 309, the said Act of the appropriate legislature would come into effect from the date of its enforcement and the rules framed under proviso to Article 309 will have to give way to the statutory provisions wherever found inconsistent to the statutory provisions of the Act and the regulations/rules framed thereunder. It can be said that life of the Rules framed under the proviso to Article 309 is limited and govern the service conditions of the employees till the relevant statutory provisions of the Act and/or the Rules or Regulations framed thereunder come into force.

In other words, Article 309 is a transitional and an enabling provision conferring the power on the executive to make Rules with regard to conditions of service of the

civil servants having a limited life span until the appropriate Legislature legislates on the subject. This is apparent from the language of the Article where the power to make provisions for regulating the services is left to the Legislature. Proviso to this Article thus, operates to fill the vacuum until appropriate legislation comes into force. Once any Act made by the appropriate Legislature, which is relatable to Article 309 comes into force, the Rules made under proviso to this Article must and would give way. The source of power which flows from the proviso to make Rules dries up the moment appropriate legislation covering the scope and ambit of the Rules so framed under Article 309 becomes operational. It requires to be pointed out here that the Rule making power under Article 309 cannot be exercised if the Legislature has already made a law occupying the field. If there is a conflict between the Rules framed under Article 309 and the law made by the Legislature, the law made by the Legislature will prevail.”

38. Reference at this stage can be made to the judgment of the Hon'ble Supreme Court in *D.R. Yadav's* case (supra), wherein it has been held that the rules framed under Section 309 are transitory in nature and give way to the special rules framed. After reproduction of the proviso to Article 309, it has been stated by the Hon'ble Supreme Court as follows:-

“On a plain reading of the said provision, there cannot be any doubt whatsoever that rules framed thereunder would apply so long as a statute or statutory rules or any other subordinate legislation governing the conditions of service are not enacted or made or not otherwise operating in the field. In other words, rules made under proviso to Article 309 of the Constitution are for a transitory period and the same would give way to the special rules once framed. However, if a statute or rules

made thereunder was/were already operating in the field, the general rules made under proviso to Article 309 would not apply to the Services created thereunder. The submission of Mr. Dwivedi to the aforementioned extent appears to be correct.”

In **A.B. Krishna Vs. State of Karnataka** 1998 (2) S.C.T. 57, the Hon'ble Supreme Court, in paras 6, 7 and 9 thereof, has been held as follows:-

“6. It is primarily the Legislature, namely, the Parliament or the State Legislative Assembly, in whom power to make law regulating the recruitment and conditions of service of persons appointed to public services and posts, in connection with the affairs of the Union or the State, is vested. The legislative field indicated in this Article is the same as is indicated in Entry 71 of List I of the Seventh Schedule of Entry 41 of List II of that Schedule. The Proviso, however, gives power to the President or the Governor to make Service Rules but this is only a transitional provision as the power under the Proviso can be exercised only so long as the Legislature does not make an Act whereby recruitment to public posts as also other conditions of service relating to that post are laid down.

7. The Rule-making function under the Proviso to Article 309 is a legislative function. Since Article 309 has to operate subject to other provisions of the Constitution, it is obvious that whether it is an Act made by the Parliament or the State Legislature which lays down the conditions of service or it is the Rule made by the President or the Governor under the Proviso to that Article, they have to be in conformity with the other provisions of the Constitution specially Article 14, 16 310 and 311.

8. XXXX XXXX XXXX

9. It is no doubt true that the Rule-making authority under Article 309 of the Constitution and Section 39 of the Act is the same, namely, the Government (to be precise, Governor, under Article 309 and Govt. under Section 39), but the two jurisdictions are different. As has been seen above, power under Article 309 cannot be exercised by the Governor, if the legislature has already made a law and the field is occupied. In that situation, Rules can be made under the Law so made by the legislature and not under Article 309. It has also to be noticed that Rules made in exercise of the rule-making power given under an Act constitute Delegated or Subordinate legislation, but the Rules under Article 309 cannot be treated to fall in that category and, therefore, on the principle of "occupied field", the Rules under Article 309 cannot supersede the Rules made by the legislature.”

39. In the present case, the 1945 Rules have been framed by the Central Government under the powers conferred on it under Section 33 of the 1940 Act. This power to frame rules is only available to the Central Government and the State does not have any power to frame rules. Since the field is already occupied and there is an appropriate Act with rules framed thereunder, the power as available to the State under proviso to Article 309 of the Constitution of India would not be exercisable by the State. If the powers under proviso to Article 309 could not be exercised, being not available, the statutory rules framed by the State Government thereunder cannot hold the field as there is no jurisdiction conferred on the State Government for such purpose under the Act governing the field.

40. So far as the constitutional provisions as contained under Article 252 is concerned, which confers power to Parliament to legislate for two or more States by consent and by adoption of such Legislature by any

other State is concerned, there can be no doubt that the Parliament can legislate when the resolution to this effect has been passed by House(s) of the Legislature(s) of the State(s) concerned relating to the matters, where the Parliament has no powers to make laws. On such legislation having been made by the Parliament, the State ceases to have powers either to amend or repeal the said Act. The power has been successfully conferred upon the Parliament for these purposes under Article 252 (2). This finds mention in Article 252 (2) of the Constitution of India.

41. Part XI of the Constitution of India deals with the relations between the Union and the States. Chapter I thereof deals with the legislative relations i.e. distribution of legislative powers. Article 246 deals with the subject matters of laws made by the Parliament and the Legislatures of the States, wherein the three lists enumerating the matters upon the Parliament and the State Legislature have been mentioned. These three lists are (i) the Union List, (ii) the Concurrent List and (iii) the State List. Residuary powers of Legislation have been conferred on the Parliament under Article 248 of the Constitution. Articles 249 and 250 relate to situations where the Parliament may legislate with respect of matters in the State List. Article 251 deals with a situation where there is inconsistency between the laws made by the Parliament under Articles 249 and 250 and laws made by the Legislature of the States.

42. Article 254 deals with a situation where there is inconsistency between the laws made by the Parliament and the laws made by the Legislatures of the States. According to this Article, in a matter which falls in the Concurrent List, if any provision of the State Legislature is repugnant to any provision of law made by the Parliament, law made by the Parliament

shall prevail and the law made by the State Legislature shall, to the extent of repugnancy, be void.

Article 254 (2) relates to the matters enumerated in the Concurrent List which contains that any provision repugnant to the provision of an earlier law made by the Parliament which has received the assent of the President, such State law shall prevail in that State, however, the proviso confers powers upon the Parliament to legislate on such legislation to the extent of adding to, amending, varying or repealing the law so made by the Legislature of the State. This Article makes it amply clear that in a matter which has fallen in the Concurrent List, both the Central as well as State Government can legislate. The law so made by the Legislature of the State even if the same is repugnant to the provisions of law made by the Parliament and if the same has been reserved for consideration of the President and has received his assent shall prevail in that State otherwise in case of repugnancy, law made by the State Legislature shall, to the extent of repugnancy, be void.

43. When this principle is taken up and considered in the light of Section 103 of the 1935 Act, read with Article 372 of the Constitution, which saves all the laws in force in the Territory of India immediately before the commencement of the Constitution with a rider to the effect that the said law shall continue in force until altered or repealed or amended by a Competent Legislature or other Competent Authority. It may be added here that all laws which were in force at the time of commencement of the Constitution have to be consistent with the constitutional provisions as it has been made specifically subject to other provisions of the Constitution under Article 372 itself.

Elaborating further on this aspect, in case the matter related to the law which is saved by Article 372 with regard to its enforceability and continuity thereof, if falls in the enumerated list (I) of the Seventh Schedule of the Constitution i.e. The Union List, the same can be altered or repealed or amended by the Parliament alone. Similarly, with regard to the item which falls exclusively within the matters enumerated in the List (II) in the Seventh Schedule of the Constitution i.e. State List, the State Legislature will have the power to alter, repeal or amend the said law, whereas the matter which falls in the List (III), as enumerated in the Seventh Schedule of the Constitution i.e. Concurrent List, the Parliament and the State Legislatures will have the similar powers of altering, repealing and amending the State law. This can be so said with reference to Article 246 of the Constitution.

44. Section 103 of the 1935 Act confers the power on the Federal Legislature to legislate on the matter, for which it had been conferred with the power to pass an Act as per the resolution of the Provincial Legislature, the amendment and repeal of the Act could be carried out by the Legislature of that Province.

45. Present is a case where admittedly, the matter in question falls in the realm of IIIrd list i.e. Concurrent List, where the State Legislature, not only in light of Section 103 of 1935 Act, but also under Article 372 of the Constitution, could alter or repeal or amend the 1940 Act, however, in case the said alteration or repeal or amendment is repugnant or inconsistent to the Central Act, the assent of the President after it has been reserved for consideration, has to be received as provided for in Article 254. On receipt of such assent, the provision as passed by the State Legislature shall prevail.

46. The said route has not been followed by the State of Haryana. Instead of amending the 1940 Act, it has only proceeded to frame its own set of Rules exercising its powers purporting to be under proviso to Article 309 of the Constitution under a misconception and in violation of the constitutional provisions. This is so in the light of the restricted operational jurisdiction conferred under the proviso to Article 309 of the Constitution as elaborated above.

47. As per the provisions of 1940 Act, which admittedly had been passed by the Central Legislature, the power to make Rules have been conferred under Section 33 upon the Central Government and none other. There is no power conferred on the State to make rules under this Act. Unless an amendment is made to the Act at least to the extent of empowering the State to make rules, the State has no jurisdiction and power to make or frame rules, it being an occupied field as the 1945 Rules have already been framed by the Central Government in exercise of its powers under Section 33 of 1940 Act.

48. That being so, the rules as framed by the State of Haryana i.e. 1989 Rules and 2018 Rules under proviso to Article 309 of the Constitution of India cannot hold the field rather the 1945 Rules shall prevail and operate. In the light of the above, the qualification as prescribed under the advertisement dated 07.09.2015 making experience to be an essential qualification for appointment to the post of Drugs Inspector (for Haryana 'Drugs Control Officer') cannot sustain.

49. As regards the argument of the counsel for the respondents that there is no inconsistency between the statutory rules as framed under Article 309 of the Constitution and those framed by the Central Government in exercise of its powers under Section 33 of the 1940 Act, qua this, suffice it to

say that the said aspect need not to be gone into in the light of the fact that there is no power conferred upon the State under the 1940 Act when the rules have been framed by the Central Government under Section 33 which are in operation and hold the field as it is not the case of the State or other respondents that the said 1940 Act or the 1945 Rules have been amended or repealed by the Parliament or the State Legislature.

50. With regard the contention of the learned Advocate General, Haryana and Mr. Govind Goel, Advocate that the petitioners having participated in the selection process and failed, cannot be permitted to turn around challenging the validity of statutory rules by placing reliance upon the judgment of the Division Bench of this Court in *Bhupinder Kumar Sharma Vs. State of Punjab and others'* case (supra) and by Mr. Govind Goel in the judgment of the Hon'ble Supreme Court in *Anupal Singh's* case (supra), suffice it to say that where the challenge is to the jurisdiction and authority of the State to frame rules and that to the source and power, the said aspect cannot be an impediment or a bar to challenge the advertisement even at a later stage. The *bona fides* cannot be questioned on this ground and technicalities in itself cannot be a ground for denying a right to challenge an illegality which emanates from a non-existent origin nor can the Court close its eyes when the challenge is found to be sustainable on the basis of the lack of jurisdiction itself.

51. As regards the stand of the learned Advocate General, Haryana, as well as Mr. Govind Goel, relating to specifying the higher qualifications than the essential qualifications prescribed for appointment which the employer can and thus, cannot be said to be illegal, the said aspect need not to be gone into for the simple reason that it has been held that the State of Haryana did not have the power, authority and jurisdiction to make rules

under Article 309 of the Constitution of India as 1945 Rules were holding the field and the same being an occupied field could not have been so pushed into service to make it applicable as this would violate not only the constitutional provision but the statutory provision also apart from the basic principles of law and interpretation. The reason for saying so is that the State of Haryana lacks authority to frame rules as under Section 33 of the 1940 Act, the power and jurisdiction to frame rules has been conferred only on the Central Government and none else.

52. Another aspect which needs to be highlighted at this stage is that mere selection for an advertised post does not confer an indefeasible right upon the candidates for appointment against the post on which they have been selected. Reference to the judgments of the Hon'ble Supreme Court in **Commissioner of Police and another Vs. Umesh Kumar** 2020 (10) SCC 448, **Punjab State Electricity Board Vs. Malkiat Singh** (2005) 9 SCC 22 and **Shankarsan Dash Vs. Union of India** (1991) 3 SCC 47 on this issue may be made.

53. In the present case, the private respondents are candidates find their names in the list of selected candidates, which had been prepared by the State but that alone would not entitle them for even consideration for appointment to the post, where it has been found and held that the State of Haryana did not have the authority and jurisdiction to frame rules under Article 309 of the Constitution of India. Selection, if any, made in pursuance to an advertisement based on such rules which have no feet to stand on and would thus, in any eventuality, not confer any right much less a legal right upon a candidate who finds its name included in the merit list.

54. Learned Advocate General, Haryana, has placed reliance upon the judgment of a Division Bench in *Priyanka and others Vs. Union Public*

Service Commission and others's case (supra), where the Division Bench had dismissed the challenge made on the ground of the experience having been made an essential qualification, suffice it to say that firstly Rule 49 of the 1945 Rules were not brought to the notice of the Court when the main writ petition was decided and it is in the review application that such a contention was raised. The said plea has also not been taken before the Central Administrative Tribunal, Chandigarh Bench, Chandigarh and therefore, the Division Bench had proceeded not to accept the challenge. We are afraid that the said judgment in our considered view does not lay down the correct law and therefore, the same is over-ruled in the light of our above reached conclusions.

55. The Full Bench judgment of the Allahabad High Court in *Kuldeep Singh's* case (supra) lays down the correct law and we are in agreement with the same and similarly, the judgment of the Division Bench of the Delhi High Court in *Nidhi Pandey's* case (supra), which judgment has been upheld by the Hon'ble Supreme Court with the dismissal of the Special Leave to Appeal (C) 3437-3456 of 2021, titled as 'Director General, Central Drugs Standard Control Organization etc. Vs. Nidhi Pandey and another', where under the similar circumstances as in the present case challenge to making experience as an essential qualification for appointment to the post of Drug Inspector has been accepted and the advertisement/Rules set aside keeping in view the 1945 Rules which still hold the field as there has been no amendment to the 1935 Act or the Rules framed thereunder by the Competent Authority i.e. the Central Government.

56. The answers to the questions as have been referred to vide order dated 25.08.2021 and as detailed in para 17 of this judgment has to be in the negative i.e.

1. The State Government could not have acted beyond the statutory provisions contained in the Central Act and the 1945 Rules framed thereunder by prescribing qualifications invoking Article 309 of the Constitution of India for this purpose;
2. The experience as contained in first proviso to Rule 49 of the 1945 Rules as framed by the Central Government and hold the field cannot be made an essential qualification by the State framing rules under Article 309 of the Constitution of India; and
3. The rules framed by the State under Article 309 of the Constitution of India do not have overriding effect over the rules framed under Central statute, the primary legislation governing recruitment of Drug Inspectors.

57. In the light of the above, challenge to the advertisement dated 10.09.2015 followed by corrigendum dated 04.06.2019 issued by the Haryana Public Service Commission for recruitment to the post of Drug Control Officer (Drug Inspector) being illegal, hereby succeeds. CWP Nos.15067, 16790, 20396 of 2020; CWP Nos.12963, 17198, 12517 of 2021 are allowed and so is LPA No.700 of 2020 by setting aside the judgment passed by the learned Single Judge dated 04.03.2020. The process initiated for selection and appointment to the posts of Drug Inspector (Drug Control Officer) in pursuance to the advertisement dated 10.09.2015 and corrigendum dated 04.06.2019 is hereby quashed.

58. All the pending miscellaneous applications stand disposed of as having been rendered infructuous.

(AUGUSTINE GEORGE MASIH)
JUDGE

9th September, 2022
Harish

(SANDEEP MOUDGIL)
JUDGE

ARUN MONGA, J.

1. I have had the privilege of reading the judgment authored by my Learned Brother Augustine George Masih, J. as also agreed to by learned brother Sandeep Moudgil, J. I too though concur with operative part of the judgment for allowing the bunch of writ petitions and LPA No. 700 of 2020, but would respectfully wish to add my own independent reasons in support thereof.
2. Reference before us requires adjudication of the questions substantially in the light of Rule 49 of the Drugs & Cosmetics Rules, 1945 (for short the 1945 Rules), framed under Section 33 of the Drugs & Cosmetics Act, 1940 (for short the 1940 Act) vis-à-vis Section 103 of Government of India Act, 1935, later retained as Article 372 and read with Articles 252/254 and 309 of the Constitution of India.
3. Succinctly, what has been held by my learned brothers is that since 1940 Act and the 1945 Rules framed thereunder continue to operate till date and the competent State legislature having not exercised its powers as envisaged under Article 372, to amend or repeal the 1940 Act and the 1945 Rules, the State Government, at present, is not empowered to frame any rules and/or any parallel or collateral rules qua the matters provided for in the 1940 Act and the 1945 Rules, as it lacks such power, the same being in the exclusive domain of Parliament/Central Government as per Section 33 of the Act *ibid*. That apart, once the Central Government invoked its powers under Section 33 to frame the rules on the subject matter, it is no more a field unoccupied and thus, Article 309 of the Constitution of India cannot be invoked to exercise powers of the State Legislature in an occupied field.

4. Having already got the benefit of what has been expressed eruditely by my Learned Brother Masih J., I shall now proceed in my endeavour.
5. Division bench reference order dated 25.08.2021 has arisen in a writ petition, bearing CWP No. 15067 of 2020 (for brevity, recitals herein are all therefrom), seeking quashing of the advertisement dated 07.09.2015 (P-1); further quashing entry at S. No. 11 under Rule 7 of the Haryana Food and Drugs Administration Department Subordinate Offices (Group B) Service Rules, 2018 and the advertisement dated 07.07.2020 (P-7), and also for quashing letter dated 07.07.2020 whereby the petitioner's candidature has been rejected saying that he does not fulfill the condition of required experience, the same being contrary to Rule 49 of the Drugs and Cosmetics Rules, 1945. Initially, the Full Bench was constituted to answer the reference made by the Division Bench but subsequently CWP No.15067 of 2020 alongwith other bunch of similar writ petitions and LPA No.700 of 2020 were all placed before the Full Bench for final disposal thereof.
6. Before proceeding further, it is pertinent to note that the qualifications for recruitment of Inspectors have been prescribed in The Drugs & Cosmetics Rules, 1945 and not in The Drugs & Cosmetics Act, 1940(for short -the Act). Section 21 the Act only states that the Central Government or the State Government may appoint such persons, as it thinks fit having the prescribed qualifications, to be Inspectors for such areas as may be assigned to them by the Central Government or the State Government, as the case may be. This being the position, it appears that what the State Government had in mind was the mandate of section 21 *ibid*, while

framing Rule 7 and entry at serial No. 11 of Schedule B of the Haryana Food & Drugs Administration Department Subordinate Offices (Group B) Services Rules, 2018 (for short 2018 Service Rules).

7. In the Drugs and Cosmetics Rules, 1945 (for short -Central Rules), the experience is contained in the proviso to the Rule, whereas, in the impugned Haryana Food and Drugs Administration Department Subordinate Offices (Group B) Service Rules, 2018 (the State Rules), framed by the State under Article 309 of the Constitution, the experience has been made as an essential qualification.
8. The very genesis of controversy is the advertisement dated 07.09.2015 originally published in respect of 4 posts of Drug Control Officers (earlier known as Inspectors until amendment) read with corrigendum dated 04.06.2019, increasing the total number of posts to 26. Relevant extract of the advertisement is as below:-

“Advt.No.2

Date of Publication: 10.09.2015

The Commission invites online applications for recruitment to 4 posts of Drug Control Officer in Health Department, Haryana. The break-up of posts is as under:-

<i>Name of Post</i>	<i>No. of Posts</i>	<i>Gen</i>	<i>SC of Hry.</i>	<i>BC(A) of Hry.</i>
<i>Drug Control Officer in Health Department, Haryana.</i>	<i>04</i>	<i>02</i>	<i>01</i>	<i>01</i>

x-x-x-x-x-x-x-x-x

Essential Qualifications:-

- i. Second Class
Bachelor degree in
Pharmacy. OR
Pharmaceutical Chemistry.*
- ii. One and half years experience in manufacturing of
at least one of the substances specified in Schedule C
appended to the Drugs and Cosmetic Rules 1945.
OR
One and half years experience in testing of at least*

one of the substances specified in the said Schedule C in a laboratory approved for the purpose by the licensing authority

OR

Three year experience in inspection of Firms manufacturing any of the substances specified in the said Schedule C

iii. *Adequate knowledge of Hindi/Sanskrit.*

iv. *Note:-Experience prescribed as essential qualification shall be reckoned from the date after obtaining the prescribed minimum academic qualifications.*

xxxxxxxxxxxx

6. Duties:- *To act as Drug Control Officer under the Drugs and Cosmetics Act & Rules and to discharge any other duty which may assigned anywhere within or outside the State of Haryana.*

xxxxxxxxxxxx”

9. Perusal of the advertisement above mentioned shows that the Drug Control Officers to be recruited against the advertised posts are to perform duties as may be prescribed by the competent authority.
10. In this regard, office memo dated 08.09.2009 issued by the competent authority i.e. the Principal Secretary to Government of Haryana, Health Department to the Director General, Health Services, Haryana is of certain significance and for ready reference is being reproduced herein below:-

1. *“Sub: Distribution of work of Drugs Control Officers and Senior Drugs Control Officers.*

a. Reference your U.O. No. nil, dated 17.07.2009 on the subject noted above.

2. *In exercise of powers conferred under Rule 60 of Drugs & Cosmetic Rule, 1945, Government grants permission to delegate powers by State Drugs Controller, Haryana to Senior Drugs Control Officers and Drugs Control Officers in the State as under:-*

1. Senior
Drugs
Control
Officers:

Issuing of retailer and wholesaler licenses and renewal of such licenses in addition to their own duties.

2. Drugs

To conduct inspection of

*Control
Officers:*

*Drugs Manufacturing
Units in their respective
district in addition to
their present duties. “*

The competent authority thus has exercised its power under Rule 60 of Drugs and Cosmetics Rule, 1945 to delegate the powers of inspection (supra) to Drug control Officers.

11. The duties/powers of an Inspector to perform/conduct inspection of the Drugs Manufacturing Units are covered under Rules 51 & 52 of the 1945 Central Rules. Same are as under:-

“51. Duties of Inspectors of premises licensed for sale.—Subject to the instructions of the controlling authority, it shall be the duty of an Inspector authorized to inspect premises licensed for the sale of drugs—

(1) to inspect [not less than once a year] all establishments licensed for the sale of drugs within the area assigned to him;

(2) to satisfy himself that the conditions of the licences are being observed;

(3) to procure and send for test or analysis, if necessary, imported packages which he has reason to suspect contain drugs being sold or stocked or exhibited for sale in contravention of the provisions of the Act or rules thereunder;

(4) to investigate any complaint in writing which may be made to him;

(5) to institute prosecutions in respect of breaches of the Act and rules thereunder;

(6) to maintain a record of all inspections made and action taken by him in the performance of his duties, including the taking of samples and the seizure of stocks, and to submit copies of such record to the controlling authority;

(7) to make such enquiries and inspections as may be necessary to detect the sale of drugs in contravention of the Act;

(8) when so authorized by the State Government, to detain imported packages which he has

reason to suspect contain drugs, the import of which is prohibited.

52. Duties of inspectors specially authorised to inspect the manufacture of 1[drugs or cosmetics].—

Subject to the instructions of the controlling authority it shall be the duty of an Inspector authorized to inspect the manufacture of drugs—

(1) to inspect 2[not less than once a year], all premises licensed for manufacture of 1[drugs or cosmetics] within the area allotted to him to satisfy himself that the conditions of the licence and provisions of the Act and Rules thereunder are being observed;

(2) in the case of establishments licensed to manufacture products specified in Schedules C and C (1) to inspect the plant and the process of manufacture, the means employed for standardizing and testing the drug, the methods and place of storage, the technical qualifications of the staff employed and all details of location, construction and administration of the establishment likely to affect the potency or purity of the product;

(3) to send forthwith to the controlling authority after each inspection a detailed report indicating the conditions of the licence and provisions of the Act and rules thereunder which are being observed and the conditions and provisions, if any, which are not being observed;

(4) to take samples of the drugs manufactured on the premises and send them for test or analysis in accordance with these Rules;

(5) to institute prosecutions in respect of breaches of the Act and rules thereunder.”

12. Rules 51 and 52 (*supra*) show that it shall be the duty of the Inspector, inter alia, in the case of establishments licensed to manufacture products specified in Schedules C and C (1) to inspect the plant and the process of manufacture, the means employed for standardizing and testing the drug, the methods and place of storage, the technical qualifications of the staff employed and all details of

location, construction and administration of the establishment likely to affect the potency or purity of the product and to take appropriate further steps/action. The first proviso below Rule 49 mandates that only those Inspectors who possess the experience as specified therein shall be authorized to inspect the manufacture of the substances mentioned in Schedule C. There is no quibble about the same. But the question here arises whether the experience as specified in the first proviso below Rule 49 can be made as a pre-recruitment eligibility condition under Rules 51 & 52 as against post-recruitment experience envisaged in Rule 49 which precedes Rules 51 & 52.

13. Before advertizing further, it would be pertinent to note that all the learned counsel are *ad idem* that the subject matter of Drugs and Cosmetics falls within the purview of List III (referred to as the Concurrent List) in VIIIth schedule of the Constitution. Vide clause (2) of Article 246 of the Constitution, the Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in the said List. The matter of drugs and poisons appears at entry No. 19 of List III- Concurrent List of the Constitution. Being so, one would have to necessarily look into whether State Legislature has the competence to enact, repeal and/or amend any part of the Central Rules, 1945 under the Drugs and Cosmetics Act- 1940 qua the subject matter already covered thereunder. Applicability or otherwise of theory of eclipse would assume significance in that context.
14. In that sense, Article 252 of the Constitution of India is also significant. No doubt, Article 252 applies in a situation where the subject matter is though exclusively in the State List, but two or more States may by passing a resolution empower the Centre to

make any enactment qua the State List. In such a scenario, State shall subsequently be governed by theory of eclipse, in view of Sub-Article (2) of Article 252, which clearly takes away the power of State Legislature otherwise vested in it, in view of its own act of empowering the Centre. It is a voluntary eclipsing of power by the State, what is otherwise its constitutional privilege as per State List. Whether the logic and theory of eclipse shall apply to a subject matter falling in concurrent list or not, we shall have to analyze that too.

15. For ready reference, Article 252 of the Constitution of India is as below:-

“252. Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State

(1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the House of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.”

16. As regards right to amend Central Act of 1940, applying the same analogy of Article 252(2) i.e. if a State by resolving so, loses its constitutional privilege in favour of Centre on a subject matter which is exclusively on “State list”, I see no reason how can the same privilege be assumed to be still retained by the State qua a Central Act on concurrent list, where the Centre has concurrent and, read

with Article 254, an overriding jurisdiction. Especially, once the State has itself resolved to surrender its privilege in favour of the Centre. Therefore, State has no power to amend the Central Act in the present case, unless its legislative Assembly rescinds the resolution passed in favour of Centre.

17. It is in the context of eclipsing its own power to make rules under the 1940 Act and to avoid treading in the Central domain, that the States have from time to time invoked powers under Article 309 of the Constitution of India to make rules regulating the recruitment and conditions of service of its employees, in this case for the Drug Inspectors/Drug Control Officers. Illustratively, reference may be had to The Punjab Health Department (State Service, Class III, Drug Inspectors) Rules, 1965 ; *The Uttar Pradesh Inspectors of Drugs Service Rules, 1980*; Central Drugs Standard Control organization (Drug Inspectors) Recruitment Rules, 1990; Central Drugs Standard Control organization (Drug Inspectors) Recruitment Rules, 2010. As recent as Central Drugs Standard Control organization (Drug Inspectors) Recruitment DRAFT Rules, 2020 were also notified by Centre for inviting objections, but it appears due to intervening covid pandemic, the same have not been finalized. From this, it does seem that qua the subject in the concurrent list, even if the State has resolved to surrender its power of legislation to the Centre, still it has the power to legislate for regulating the recruitment and conditions of services of the Drug Inspectors/Drug Control Officers in connection with the affairs of the State provided the State legislation is not repugnant to the Central legislation.

18. In the aforesaid background, theory of repugnancy as mandated under Article 254 of the Constitution of India assumes even greater importance. Article 254 is as below:-

“ 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.”

19. The subject of drugs and poisons being at entry No. 19 in the Concurrent List of VIIth Schedule of the Constitution, the power to legislate is vested both with the Centre as well as the State.
20. Article 254 of the Constitution provides that if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by

the Legislature of the State shall, to the extent of the repugnancy, be void. Indisputably, clause (2) of the Article *ibid* is not attracted in this case.

21. Therefore, even though Centre has already exercised its power to make Rules under the enabling provision of Section 33 of Act, yet I am of the opinion that the State Government also has the power under Article 309 of the Constitution of India to make rules regulating the recruitment and conditions of service of Drug Inspectors/Drug Control Officers appointed in connection with the affairs of the State including prescription of qualifications but the parallel rules made by State ought not to be in conflict with the provisions made in the Central Rules.
22. According to Black's Law Dictionary, repugnancy means an inconsistency or contradiction between two or more parts of a legal instrument (such as a contract or statute).
23. In order to test the applicability of rule of repugnancy, what is required to be seen is in the event of State legislature having exercised its power in the domain of Concurrent List where Central legislation also pre-exists, the obedience of State statute must not result in the disobedience of the Central statute/Rule. In other words, the right created by the Central statute/Rule should not in any manner be abridged by the State statute/Rule.
24. Rule 49 as already reproduced in the main judgment may be also seen at this stage.
25. Preamble of the 1940 Act shows that it was enacted to regulate the import, manufacture, distribution and sale of drugs and cosmetics.
26. Under Rule 49 of the Central Rules, a person who is appointed an Inspector under the Act shall be a person who has a degree in

Pharmacy or Pharmaceutical Sciences or Medicine with specialization in Clinical Pharmacology or Microbiology from a University established in India by law: Provided that only those Inspectors –(i) who have not less than 18 months experience in the manufacture of at least one of the substances specified in Schedule C, or (ii) who have not less than 18 months experience in the testing of at least one of the substances in Schedule C in a laboratory approved for this purpose by the licensing authority, or (iii) who have gained experience of not less than three years in the inspection of firm manufacturing any of the substances specified in Schedule C during the tenure of their services as Drug Inspectors; shall be authorized to inspect the manufacture of substances in Schedule C. As against this, under Rules 51-52 of the said Rules, from day one, it shall be the duty of an Inspector to inspect the manufacture of drugs or cosmetics including the manufacture of the substances mentioned in Schedule C and take the required steps/action as mentioned therein. In the absence of prescription of requisite experience of not less than 18 months in the manufacture or testing of at least one of the substances specified in Schedule C, persons not having such experience if appointed as Inspectors, will not be authorized/competent to inspect the manufacture of the substances mentioned in Schedule C and take the required steps/action until they have gained experience of not less than three years in the inspection of firms manufacturing any of the substances specified in Schedule C during the tenure of their services as Drug Inspectors. Till then, they would not be authorized and shall remain under prohibition against performing the

important part of their functions to inspect the manufacture of the substances mentioned in Schedule C.

27. Thus, it seems to me that there is a gap between the content and intent of the Central Rules. Rule 49 does not prescribe the experience as an essential requirement for initial appointment as Inspector, but the intent obvious from an overall reading of the 1945 Rules seems that from day one the duties of the Inspectors are, inter alia, to inspect the manufacture of substances mentioned in Schedule C and to take steps/action in terms of Rule 52 of the 1945 Rules. This lacuna leaves scope for consequences against the overall object, purposes and spirit of the Central Rules i.e. duty/power of the Inspector from day one, inter alia, to inspect the manufacture of substances mentioned in Schedule C.

28. Let us now see whether the action of the State Government in enacting the 2018 Service Rules has resulted in any repugnancy qua Central rules.

29. As against the Central Rules, vide entry at serial No.11 of schedule B read with Rule 7 of the State Rules, the experience has been made an essential qualification for initial appointment. It was open to the State while prescribing the experience as an essential requirement, to specify thereunder that from initial appointment, from day one itself, a person appointed will be required, authorized and competent to inspect the manufacture of substances mentioned in Schedule C and take the required steps/action as prescribed. But that was not done by the State. Had it been so done, the provision thus made in the State Rules, in essence would have covered and taken care of the apparent gap/ lacuna in the Central Rules and would have been in aid of the Central Rules requiring

the Inspectors from day one to inspect the manufacture of substances mentioned in Schedule C , in terms of Rule 52 of the 1945 Rules by virtue of having pre recruitment work experience. It could be then said that the entry at serial No. 11 of schedule B read with Rule 7 of the State Rules, whereby the experience had been made an essential qualification for initial appointment, was in fact, in aid, advancement and promotion of the objects and purposes of the Central Act/Rules.

30. A perusal of Central rules would reflect that they give a statutory right to the candidates who do not have any experience, to apply for the post of Drug Control Inspectors/Officers on the basis of their simply having gained the requisite academic qualification. Is that right in any manner diluted and/or abridged by the State Rules and/or does the obedience of State rules cause any disobedience to Central rules qua the said right, is the question?

31. As noted, the Central rules give a statutory right to the candidates who do not have any experience, to apply for the post of Drug Control Inspectors/Officers on the basis of their simply having gained the requisite academic qualification. Against this, the State Rules prescribe the possession of requisite experience as an essential eligibility qualifications for post in question and thus debar the candidates, who do not possess the requisite experience from consideration for the post. In this way, the eligibility and right of consideration of such candidates, who do not possess the requisite experience, is denied/taken away by the State Rules and thus, the State Rules cause disobedience to Central rules. To that extent, the impugned State rule has, therefore, to be held repugnant to the Central Rules.

32. Learned counsel for the petitioners heavily relied upon the full bench judgment in **Kuldeep Singh vs. State of U.P.**¹ In that case, for direct recruitment of Drug Inspectors, the essential qualifications prescribed under the U.P. State Drug Control Gazetted Officers' Service Rules, 1995 were a degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialization in Clinical Pharmacology or Microbiology from a University established in India by law. To be noted, initially the vacancies were advertised with the same eligibility requirements. However, later on, the Uttar Pradesh Public Service Commission issued a corrigendum dated 09.07. 2010, on the directions of the State Government, and thereby stipulated as part of the essential qualifications required for the post, at least eighteen months' experience of testing of at least one of the substances mentioned in Schedule C to the Rules or at least eighteen months' experience in the manufacture of one of the substances specified in Schedule C or three years' experience in the inspection of firms manufacturing any of the substances specified in Schedule C licensed for the manufacture of drugs. It seems obvious from the Full Bench judgment that relevant UP State Rules did not prescribe the experience, as essential qualifications, as was mentioned in the corrigendum to the advertisement.
33. Allahabad High Court Full Bench also noted that the Service Rules of 1995 in the State of Uttar Pradesh, in fact, were a clear recognition of the acceptance by the State of this position; Rule 8 of the Service Rules of 1995 adopted, as qualifications for direct recruitment to the post of Inspector of Drugs, those which have been prescribed in the rules made by the Central Government in

¹ **2014 SCCOnline ALL 5119**

accordance with the provisions of Section 33 of the Drugs and Cosmetics Act, 1940; hence, the qualifications which are prescribed in Rule 49 of the Central Rules were incorporated for the recruitment of candidates as Drug Inspectors in the State service; Rule 21(1)(a) of the Service Rules of 1995 which speaks of the confirmation of a probationer, provided that a probationer shall be confirmed at the end of the period of probation or the extended period of probation if he has acquired 18 months' experience in testing of a Schedule C substance in an approved laboratory; or has acquired 18 months' experience in the manufacture of a Schedule C substance as specified in the Drugs and Cosmetics Rules, 1945; Rule 21 (1) (a) of the State Service Rules 1995 was a clear indicator of the position that the acquisition of experience in the testing or manufacture of a Schedule C substance of a period of 18 months can take place after the appointment of a person as an Inspector of Drugs but before an order of confirmation is issued under Rule 21; and that if, as the State had then asserted before the bench, experience was a condition of eligibility, there would be no occasion to provide for the acquisition of experience as a condition for confirmation of the services of a probationer. On the contrary, Rule 21(1)(a) was indicative of the fact that a probationer may acquire the experience after appointment in service, but before an order of confirmation can be issued.

34. Full Bench *supra* also held that it is always open to the legislature or its delegate to suitably amend a statutory provision or, as in the present case, subordinate legislation to make the holding of the requisite experience as a condition of eligibility or a qualification for appointment but, that would have to be by an amendment of the

subordinate legislation. In these circumstances, it was held by interpreting Rule 49 of the Central Rules that the experience referred to in the first proviso thereof had not been made an essential qualification for appointment as a Drug Inspector and that the effect of the first proviso is that only an Inspector who holds the experience as specified in it is authorized to inspect the manufacture of a substance specified in Schedule C to the Rules.

35. Reference may, in particular, be had to para 17 of Full Bench judgment in Kuldeep Singh *ibid*. Speaking for the Bench, Dilip Gupta, J. *inter alia* expressed as below:-

“17. The Service Rules of 1995 in the State of Uttar Pradesh, in fact, are a clear recognition of the acceptance by the State of this position. Rule 8 of the Service Rules of 1995 adopts, as qualifications for direct recruitment to the post of Inspector of Drugs, those which have been prescribed in the rules made by the Central Government in accordance with the provisions of Section 21 of the Drugs and Cosmetics Act, 1940. Hence, the qualifications which are prescribed in Rule 49 of the Central Rules are incorporated for the recruitment of candidates as Drug Inspectors in the state service. Rule 21(1)(a) of the Service Rules of 1995 which speaks of the confirmation of a probationer, provides that a probationer shall be confirmed at the end of the period of probation or the extended period of probation if he has acquired 18 months' experience in testing of a Schedule C substance in an approved laboratory; or has acquired 18 months' experience in the manufacture of a Schedule C substance as specified in the Drugs and Cosmetics Rules, 1945. Rule 21 (1) (a) of the State Service Rules 1995 is a clear indicator of the position that the acquisition of experience in the testing or manufacture of a Schedule C substance of a period of 18 months can take place after the appointment of a person as an Inspector of Drugs but before an order of confirmation is issued under Rule 21. If, as the State now asserts, experience was a condition of eligibility, there would be no occasion to provide for the acquisition of experience as a condition for confirmation of the services of a probationer.

On the contrary, Rule 21(1)(a) is indicative of the fact that a probationer may acquire the experience after appointment in service but before an order of confirmation can be issued.”

36. Having perused the said Full Bench judgment, I am of the view that it is held therein that it is always open to the Legislature or its Delegate to suitably amend a statutory provision or, as in the present case subordinate legislation to make the holding of the requisite experience as a condition of eligibility or a qualification for appointment but, that would have to be by way of an amendment by the subordinate legislation. It was in this premise that Full Bench held, by interpreting Rule 49 of the Central Rules, that since the experience referred under the first proviso thereof has not been made an essential qualification for appointment as a Drug Inspector, the effect of the first proviso has to be necessarily that a serving Inspector who holds the requisite experience is competent to inspect the Manufacturing Units of the substances, as specified in Schedule ‘C’ to the Rules.
37. In Kuldeep Singh *supra*, the advertisement was at variance with the relevant UP Rules. It is not so in the instant case. Here, the Haryana State Rules have been framed by the competent authority in exercise of the powers under Article 309 of the Constitution. Full Bench Judgment in Kuldeep Singh’s case therefore, does not help the petitioners herein, being placed in the different facts and circumstances than in UP. If anything, the said judgment rather seems to support the respondents’ stand that the State has the power to legislate to regulate the recruitment and conditions of service of its employees. In **Union Public Service Commission Vs. Nidhi**

Pandey and another², Division Bench of Delhi High Court mainly relied upon the Full Bench judgment of Allahabad High Court in Kuldeep Singh *supra*. SLP against Nidhi Pandey judgment was dismissed *in-limine* vide an order dated 05.04.2021 passed by the Apex Court. I have since already opined that Full Bench judgment of Allahabad High Court does not help the petitioners herein, being placed in the different facts and circumstances than in UP. It follows, therefore, that the Division Bench judgment of Delhi High Court in Nidhi Pandey's case and the dismissal of SLP against it by the Apex Court also are of no help to the petitioners.

38. Undisputedly, Article 309 of the Constitution of India empowers the State legislature, of course subject to the other provisions of Constitution, to regulate the recruitment and conditions of service of persons appointed or to be appointed to public services/posts in connection with the affairs of the State. In present case, the Drug Control Officers are required to be appointed to carry out their duties in connection with the affairs of the State under the administrative control of the competent authority-the department of Health and Family Welfare. It seems that power of the State under Article 309 of the Constitution to make rules regulating the recruitment and conditions of service of its employees, includes the power to prescribe qualifications and lay down certain other requirements for recruitment and conditions of service e.g. minimum and maximum age, domicile, probation, confirmation, promotion etc. Central Rules are silent on such other requirements. It seems that the power of the State under Article 309 of the Constitution to make rules regulating the recruitment and conditions of service of its

² 2020 SCCOnline Del 1974

employees, is wider than the Centre's enabling power under Section 33 of the Act to make rules prescribing qualifications for Inspectors.

39. Section 33 of the 1940 Act is an enabling provision for the Central Government to make rules for giving effect to the provisions of the Act, including the prescription of qualifications for Inspectors. It does not seem to altogether wipe out or wholly prohibit the exercise of the power by the State to make rules regulating the recruitment and conditions of service of its employees. If the State were to be wholly barred from making rules for recruitment and conditions of service of its employees, in this case the Inspectors, there would be a vacuum left qua such other requirements to be prescribed for recruitment and conditions of service e.g. minimum and maximum age, domicile, probation, confirmation, promotion etc. Taken to its extreme, it would mean that the State cannot recruit any inspector, which would be a situation of vacuum. Trite it is to say, law abhors vacuum.

40. It would be unrealistic and defying logic to say that the field having been occupied by the 1945 Central Rules, the State cannot at all, in absolute terms, make Rules in exercise of its powers under Article 309 to frame rules regulating the recruitment and conditions of service of its employees. It seems to me that the State has the power under Article 309 to make rules for recruitment and conditions of service of its employees, including the prescription of qualifications. Of course, the effect of the Central legislation/Rules is, that such rules made by the State should not be in conflict with the Central legislation/Rules. I may attempt to explain it by a hypothetical illustration. Suppose, the State Rules had provided

exactly the same qualifications for Inspectors as in the Central Rules. Could it be said even then that the State Rules were bad in law, having been made in the field occupied by the Central Rules? The obvious answer would be 'no'.

41. Here the State Rules, as framed, seem to be an attempt to cover the gap between the content and intent of the Central Rules. Woefully, even that attempt too is not successful, inasmuch as, the State Rules do not prescribe that from initial appointment, the Inspectors from day one will be required *inter alia* to inspect the manufacture of substances in Schedule C of the Central legislation.
42. It would not be out of place to state that Rule 49 of Central Rules prescribes the requirements for eligibility/competency of certain set of Inspectors to perform their duties under Rule 51*ibid*. In my opinion, Rules 49, 51 & 52 have to be read together and obedience of all has to be ensured and any rule framed by the State, to the extent of its conflict with the Central Rules will have to necessarily make way for the latter.
43. Speaking of position in law, I am thus of the view that the State Government could exercise and has exercised its power under Article 309 of the Constitution of India to frame rules regulating the recruitment and conditions of service of Drug Inspectors/Drug Control Officers. In fact, similar exercise has also been carried out by other States viz. Uttar Pradesh Government, Punjab and Maharashtra Government and even the Central Government to frame independent rules of recruitment which includes prescription of qualifications.
44. It has been contended by Sh. B.R. Mahajan, the learned Advocate General that the test of the occupied field has to be seen from the

kaleidoscope of competent authority exercising its power of making general rules or the special rules. It is pointed out that there is an apparent gap between the content and intent of the Central Rules, in so far Rule 49 does not prescribe the experience as an essential requirement for initial appointment as Inspector, but the intent obvious from an overall reading of the 1945 Rules seems that from day one the duties of the Inspectors are, inter alia, to inspect the manufacture of substances mentioned in Schedule C in terms of Rule 52 of the 1945 Rules. That apart, the general rules of 1945 framed by Centre essentially regulate the standard and quality of drugs as against the special rules framed by the State Government under Article 309 of the Constitution of India governing the process of recruitment including prescription of qualifications. He would vehemently submit that, even otherwise, once special rules are enacted by the State in exercise of its powers under Article 309 of the Constitution of India then the same override the general 1945 rules framed by the Central Government.

45. In the premise, it is thus contended on behalf of the State, that its Rules being special in nature should override the Central Rules (termed as general in nature), to the extent of inconsistency *inter se*. However, I am unable to accept this contention. There is indeed a conflict *inter se* the Central legislation and the State legislation on concurrent list subject, but in view of the mandate of Article 254 of the Constitution of India, the Central legislation must prevail. The proposition as canvassed by learned Advocate General would be applicable, in a case where the state legislature enacts special and general rules on the same subject matter and there is some conflict *inter se*. As already observed above, the eligibility and right of

consideration of such candidates, who do not possess the requisite experience, provided for under the Central Rules, is denied/taken away by the State Rules and thus, the State Rules cause disobedience to Central rules. To that extent, the impugned State rule has, therefore, to be held repugnant to the Central Rules and has to give way to the Central Rules.

46. Sh. Govind Goel, learned counsel appearing for the private respondents (selected candidates) vehemently argued that there is no inconsistency since the very purpose of the current recruitment is that the duties assigned to the current Inspectors from day one would include inspection of the Drugs Manufacturing Units. I am afraid, I am able to persuade myself to accept his contention.
47. A perusal of the advertisement would reflect that it is nowhere stated therein that the recruitment is for a special class of Inspectors/Officers, who shall be required from day one to perform the duties, *inter alia*, to inspect the manufacture of substances mentioned in Schedule C and, take steps/action in terms of Rule 52 of the 1945 Rules and, therefore, instead of post-recruitment essential experience, as envisaged under Rule 45 of the Centre rules, under the impugned rule, the requirement of experience was being made mandatory as a pre-recruitment eligibility condition. The advertisement in question also rightly does not envisage any such things. The reason is not far to seek. The advertisement has to be inconsonance with the rules of recruitment framed by the State Government.
48. Qua the argument on theory of eclipse, in the light of Section 103 of 1935 Act read with Article 372 of the Constitution of India, I am of the opinion that in view of the State Assembly resolution

empowering the Centre to legislate on the subject by way of enacting Drugs and Cosmetics Act, 1940 and to make rules thereunder, the State Legislature, having once clipped its own wings, can-not fly in a sky which is now in the Centre's domain. State is thus precluded to frame any rules under Section 33 of the Act *ibid* in view of Article 252 (2) of constitution of India. Had the State chosen to rescind/amend the Assembly resolution empowering the Centre to make Rules under the Act and then proceeded itself to make its own Rules under the Act on the subject matter then it would have been an altogether different scenario.

49. However, such eclipse of the State's powers under Section 33 of the 1940 Act would not take away or negate its power under Article 309 of the Constitution of India to make Rules regulating the recruitment and conditions of service of Drug Inspectors/Drug Control Officers recruited in connection with the affairs of the State.
50. In **M/s R.M.D.C. Mysore vs. State of Mysore**³, relied upon by the learned counsel for the petitioner, it was noted that the subject of betting and gambling given in entry 34 of List II and the taxes on betting and gambling as given in entry 62 of List II were to be read as separate powers and, therefore, when control and regulation of prize competitions was surrendered to Parliament by resolutions of the State Legislature, the power to tax under entry 62 of List II, which is a separate head, cannot be said to have been surrendered. It is not the case of the petitioners herein that the State Legislature had passed any resolution for the surrender of its Constitutional power under Article 309 of the Constitution of India, to regulate the

³ **1962 AIR (SC) 594**

recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State. It cannot, therefore, be said that the State has abdicated or lost its Constitutional power of legislation in this behalf or that such power is exclusively vested in the Central Government. The judgment *ibid* does not, therefore, help the petitioners.

51. Learned Advocate General would also emphatically argue that essential qualifications for appointment to post are for the employer to decide and, the employer can and may prescribe additional requirements to augment the essential, including giving preference for work experience.
52. In **A.P.J. Abdul Kalam Technological University vs. Jai Bharath College of Management & Engg. Technology**⁴, Supreme Court has held that while it is not open to the Universities to dilute the norms and standards prescribed by AICTE (All India Council of Technical Education), it is always open to the Universities to prescribe enhanced norms. An earlier judgment rendered in **R. Chitrlekha vs. State of Mysore**⁵ was in turn relied upon, wherein a Constitution Bench of Supreme Court had enunciated that the question regarding the impact of Entry 66 of List-I on Entry 25 of List-III must be determined by a reading of the Central Act and the State Act conjointly and, thus held that a State Law providing for such standards, having regard to Entry 66 of List-I, would be struck down as unconstitutional, only if, the same is found to be so heavy or devastating, as to wipe out or appreciably abridge the Central field, and not otherwise. It was also held that when a State Act is in aid of the Parliamentary Act, the same would not entrench upon the latter.

⁴ (2021) 2 SCC 564
⁵ AIR 1964 SC 1823

If a State law prescribes higher percentage of marks for extracurricular activities in the matter of admissions to colleges, it cannot be thus said that it would be encroaching on the field covered by Entry 66 of List-I and held that when a State Act is in aid of the Parliamentary Act, the same would not entrench upon the latter.

53. No doubt, the Central Act and the Central Rules here also do not prohibit the competent authority- expressly or impliedly - against prescribing the additional requirement of experience as an essential condition for initial appointment of the Inspectors over and above the qualifications prescribed in the Central Rules. However, in my opinion any such prescription has to be within the constitutional framework. In case of conflict between State and Central legislation/Rules, on the particular subject in concurrent list, the mandate of Article 254 comes into play and the State Rule has to give way to the Central Rule to the extent of conflict therewith.
54. To sum up the broad principles, I may succinctly put the same as below :-

1. Article 309 of the Constitution empowers the State Legislature/Government, of course, subject to the provisions of Constitution to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the state.
2. This Constitutional power of the State government under Article 309 is wider than the Statutory power of Parliament/ Central Government under section 33 of the Drugs and Cosmetics Act, read with 1945 Rules, which

only prescribe the qualifications for appointment of drug inspectors.

3. Power of the Parliament Central government, limited to the prescription of qualifications for appointment of drug inspectors, does not exclude the powers of the State government to regulate the other requirements of the recruitment and conditions of service e.g. minimum and maximum age, domicile, probation, confirmation, promotion etc. Otherwise, there would be vacuum left for regulating other requirements for their recruitment and conditions of service. Central Rules are silent on these things. If the State too were to be wholly barred from making such rules for recruitment and conditions of service of its employees, then taken to its extreme, it would mean that the State cannot recruit any inspector.
4. It cannot, therefore, be said that the field is wholly occupied by Central Act/Rules or that State Legislature/Government is totally prohibited from entering into the partially unoccupied area.
5. On a subject in the concurrent list, the state legislature can further advance the purpose and object of the Central Act/Rules, by supplementing the eligibility conditions and adding the requirement of experience for appointment. Of course the effect of the Central legislation/Rules is that State rules should not be in conflict with the Central legislation/Rules.
6. The provisions of Constitution of India, Central Act and Rules there under and the State Rules need to be

harmoniously construed. In the event of conflict, Constitutional provision flowed by Central Act/Rules and then State Act/Rules shall prevail in that order.

7. Here the State Rules, as framed, seem an attempt to cover the gap between the content and intent of the Central Rules. Despondently, even that attempt too is not successful, in as much as, the State Rules do not prescribe that from the very initial appointment, the Inspectors will be required *inter alia* to inspect the manufacture of substances in Schedule C of the Central legislation from day one itself.

55. Resultantly, as an upshot of the above discussion, I am of the opinion that the impugned part of State Rules framed by the State under Article 309 of the Constitution governing recruitment of Drug Inspectors (re-designated as Drug Control Officer), to the extent and, in the manner, in which it prescribes the condition of experience as an essential requirement of eligibility for initial appointment is indeed repugnant to the Central rules. In other words, I do find that the same would indeed, either heavily or devastatingly, wipe out the Central Rules. Thus the impugned part of State Rules is held to be in conflict with the former. It is also held that the impugned part of Rules as framed by the State under Article 309 of the Constitution is not in aid of the Central Rules, prescribing the eligibility conditions for initial recruitment of Drug Inspectors/ Drug Control Officers.

56. Having recorded my limited dissenting opinion for the reasons as stated above, I respectfully answer the reference by the Division Bench as below:-

	REFERENCE	ANSWER
A.	Though Section 21 of 1940 Act clearly lays down that appointment shall be made as per the qualifications prescribed, which would normally indicate the qualifications prescribed in Central statute, but State Government invoked Article 309 of the Constitution of India and prescribed qualifications different from that prescribed by the Central Government. Undisputedly, the matter falls in the realm of List III, the State Government never choose to enact its legislation. Merely, for the purpose of laying down qualification, it invoked Article 309 of the Constitution of India. In such circumstances, it needs to be examined as under:- i. Whether invocation of such powers would be sustainable in law? ii. Whether it would be hit by <i>doctrine of eclipse</i>? iii. Whether notification needs to be examined in light of provisions of Article 252 and 254 of Constitution of India?	(i) The State Government, in exercise of its powers under Article 309 of the Constitution framed Rule 7 and entry at serial No. 11 of Schedule B of the Haryana Food & Drugs Administration Department Subordinate Offices (Group B) Services Rules, 2018 (for short 2018 Service Rules). By doing so, it did not act beyond the statutory provisions contained in the Drugs and Cosmetics Act, 1940. The first part of question No.1 framed above is answered accordingly. The State Government could in exercise of its powers under Article 309 of the Constitution India frame Rules prescribing the qualifications for appointment of Drug Inspectors/Drug Control Officers, even in the field already occupied by the Central Rules so long as the State Rules were/are not conflict with the Central Rules. The second part of question No. 1 is answered accordingly. (ii) The experience as contained in the first proviso to Rule 49 of the Central Rules could/can be made an essential qualification by the State framing the Rules under Article 309 of the Constitution of India, provided it was specified in the State Rules that from day one the duties of the persons appointed shall include, <i>inter alia</i>, to inspect the manufacture of substances mentioned in Schedule C and take steps/action in terms of Rule 52 of the 1945 Rules. Question No. (2) is answered accordingly. (iii) The impugned part of Rules framed by the State to the extent and in the manner in which it prescribes the condition of experience as an essential requirement of eligibility for initial appointment of Drug Inspector is indeed repugnant to the Central rules and does not have over riding effect over the Central Rules.

B.	Whether State Government could have acted beyond the statutory provisions contained in the Central Act i.e. Sections 21 and 33 of the Act and Rules framed thereunder, prescribing qualifications and invoking Article 309 for this purpose.	Constitutional power under 309 to regulate recruitment and conditions of service, including prescription of qualifications, can be exercised by State but in conformity with Article 254.
C.	Whether the Rules framed by the State under Article 309 of the Constitution would have overriding effect over the rules framed under Central statute, the primary legislation governing the recruitment of Drug Inspectors.	Central Rules shall prevail over those of State, in the event of any conflict.

57. In the ultimate analysis, however, I concur with the operative part and direction in the judgment authored by my learned brother Augustine George Masih, J. and agreed to by my learned brother Sandeep Moudgil, J. for setting aside the impugned advertisement and selection made pursuant thereto.

58. Before parting, it needs mention that the impugned advertisement was issued on 07.09.015; selection was finalized in 2020; but the appointments of the selected candidates remained stayed by virtue of interim orders of this Court and the advertisement and the selections are being quashed now in year 2022. In the meantime, a considerable number of qualified candidates, who were eligible at the relevant time, would/may have become overage. In fairness to them, the official respondents are expected to give an appropriate relaxation of upper age limit in the fresh selection to such candidates.

9th September, 2022
ashish

(ARUN MONGA)
JUDGE

Whether speaking/reasoned: **Yes**

Whether reportable: **Yes**