

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.CHITAMBARESH

THURSDAY, THE 31ST DAY OF MARCH 2016/11TH CHAITHRA, 1938

WP(C).No. 31364 of 2015 (U)

PETITIONER(S):

1. DR. GEETHU S., AGED 31 YEARS
S/O. SRI.R.SUKUMARA PILLAI, RESIDING AT MANGALAM HOUSE,
BHARATHANNOOR P.O.,
THIRUVANANTHAPURAM-695 609.
2. G.RAKESH PRADHAN, AGED 31 YEARS
S/O. G.SATHYANARAYANA, HOUSE NO.3-3-535, KUTBIGDA, KACHIGUDA,
BARKATPURA, HYDERABAD-500 027.

BY ADVS. SRI.O.V.RADHAKRISHNAN (SR.)
SMT.K.RADHAMANI AMMA
SRI.ANTONY MUKKATH
SRI.JOS LEO JOSE

RESPONDENT(S):

1. KERALA UNIVERSITY OF HEALTH SCIENCES
REPRESENTED BY ITS REGISTRAR, MEDICAL COLLEGE P.O.,
THRISSUR, PIN-680 596.
2. ACADEMIC COUNCIL
REPRESENTED BY THE VICE-CHANCELLOR,
KERALA UNIVERSITY OF HEALTH SCIENCES,
MEDICAL COLLEGE P.O., THRISSUR-680 596.
3. BOARD OF EXAMINATIONS
KERALA UNIVERSITY OF HEALTH SCIENCES,
MEDICAL COLLEGE P.O., THRISSUR-680 596.
4. MEDICAL COUNCIL OF INDIA
REPRESENTED BY THE SECRETARY, POCKET-14, SECTOR 8,
DWARAKA, NEW DELHI-110 077.
5. STATE OF KERALA
REPRESENTED BY ITS SECRETARY TO GOVERNMENT,
DEPARTMENT OF HEALTH AND FAMILY WELFARE,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001.

6. DR. SOMERVELL MEMORIAL OF CSI MEDICAL COLLEGE
REPRESENTED BY ITS MANAGER, KARAKONAM,
THIRUVANANTHAPURAM-695 504.

R1-R3 BY ADV. SRI.P.SREEKUMAR, SC, KERALA UNIVERSITY OF
HEALTH SCIENCES.

R4 BY ADV. SRI.TITUS MANI VETOM, SC, MEDICAL COUNCIL OF INDIA

R5 BY SR. GOVERNMENT PLEADER SMT.K.A.SANJEETHA.

BY Dr.THUSHARA JAMES, ADVOCATE, *AMICUS CURIAE*.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
29-03-2016 ALONG WITH W.P.(C) NO.33721/2015 AND CONNECTED
CASES, THE COURT ON 31.3.2016 DELIVERED THE FOLLOWING:

APPENDIX IN W.P.(C) No.31364 OF 2015

PETITIONER(S) EXHIBITS

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| EXHIBIT P1 | : PHOTOCOPY OF THE FACULTY OF MEDICINE CERTIFICATE DATED 7.5.2010 ISSUED TO THE FIRST PETITIONER BY THE UNIVERSITY OF KERALA. |
| EXHIBIT P2 | : PHOTOCOPY OF THE FACULTY OF MODERN MEDICINE CERTIFICATE DATED 31.7.2008 ISSUED TO THE SECOND PETITIONER BY THE DR.NTR UNIVERSITY OF HEALTH SCIENCE, ANDHRA PRADESH. |
| EXHIBIT P3 | : PHOTOCOPY OF THE INDIAN MEDICAL COUNCIL (POST GRADUATE) MEDICAL EDUCATION COMMITTEE RULES, 1961 AS PER NOTIFICATION NO.F.30-I/60-MI. DATED 14.7.1961 |
| EXHIBIT P4 | : PHOTOCOPY OF THE MEDICAL COUNCIL OF INDIA POST GRADUATE MEDICAL EDUCATION REGULATIONS, 2000 AS AMENDED UPTO MAY, 2013. |
| EXHIBIT P5 | : PHOTOCOPY OF THE REGULATIONS ISSUED BY THE FIRST RESPONDENT - KERALA UNIVERSITY OF HEALTH SCIENCES. |
| EXHIBIT P6 | : PHOTOCOPY OF THE RELEVANT PAGE MINUTES OF THE FIFTEENTH MEETING OF THE GOVERNING COUNCIL NO.15/GC/KUHS DATED 11.10.2013 OF THE FIRST RESPONDENT. |
| EXHIBIT P7 | : PHOTOCOPY OF THE EXAMINATION RESULTS (PROVISIONAL) DATED 27.7.2015 OF THE FIRST PETITIONER. |
| EXHIBIT P8 | : PHOTOCOPY OF THE EXAMINATION RESULTS (PROVISIONAL) DATED 14.7.2015 OF THE SECOND PETITIONER. |
| EXHIBIT P9 | : PHOTOCOPY OF THE SCORE SHEET OF THE FIRST PETITIONER IN RESPECT OF FIRST PAPER |
| EXHIBIT P10 | : PHOTOCOPY OF THE SCORE SHEET IN RESPECT OF PAPER-II OF THE FIRST PETITIONER. |
| EXHIBIT P11 | : PHOTOCOPY OF THE SCORE SHEET IN RESPECT OF PAPER-III OF THE FIRST PETITIONER. |
| EXHIBIT P12 | : PHOTOCOPY OF THE SCORE SHEET IN RESPECT OF PAER IV OF THE FIRST PETITIONER. |
| EXHIBIT P13 | : PHOTOCOPY OF THE SCORE SHEET OF THE SECOND PETITIONER IN RESPECT OF FIRST PAPER |
| EXHIBIT P14 | : PHOTOCOPY OF THE SCORE SHEET IN RESPECT OF PAER-II OF THE SECOND PETITIONER. |
| EXHIBIT P15 | : PHOTOCOPY OF THE SCORE SHEET IN RESPECT OF PAPER-III OF THE SECOND PETITIONER. |

: 2 :

- EXHIBIT P16 : PHOTOCOPY OF THE SCORE SHEET IN RESPECT OF PAPER-IV OF THE SECOND PETITIONER.
- EXHIBIT P17 : PHOTOCOPY OF THE QUESTION PAPER IN PAPER-II OF PG DEGREE EXAMINATIONS IN PAEDIATRICS (MD) -JUNE 2015
- EXHIBIT P18 : PHOTOCOPY OF THE PAPER-III - GENERAL PAEDIATRICS PG DEGREE EXAMINATIONS IN PAEDIATRICS (MD) -JUNE 2015
- EXHIBIT P19 : PHOTOCOPY OF THE REPRESENTATION DATED 1.9.2015 OF THE FIRST PETITIONER TO THE SECOND RESPONDENT.
- EXHIBIT P20 : PHOTOCOPY OF THE REPRESENTATION DATED 1.9.2015 OF THE SECOND PETITIONER TO THE CHAIRMAN, GRIEVANCE ADJUDICATION COMMITTEE, KUHS, THRISSUR.
- EXHIBIT P21 : TRUE COPY OF THE MINUTES OF THE 47TH MEETING OF THE STANDING ACADEMIC BOARD OF DR.M.G.R.MEDICAL UNIVERSITY DATED 18TH DECEMBER, 2013.

RESPONDENT(S) EXHIBITS

NIL.

//TRUE COPY//

P.S. TO JUDGE.

“C.R.”

V.CHITAMBARESH, J.

W.P (C) Nos. 31364, 33721, 32262, 31161,
30034, 25319, 31637, 31648, 33437, 32827
& 28520 of 2015

Dated this the 31st day of March, 2016

J U D G M E N T

“Life is a See-Saw but not so an examination” quipped a medico when confronted with the results of his Post-graduate medical examination after repeated attempts leaving him confusion confounded. The incongruity between the MCI (Medical Council of India) Regulations and the KUHS (Kerala University of Health Sciences) Regulations is highlighted.

2. The petitioners are Post-graduate medical students who have failed in their M.D/M.S/Diploma courses either because they did not secure the minimum in one of the four theory papers or in one of the clinical/practical tests. The petitioners challenge the relevant clause in the KUHS Regulations as being repugnant and inconsistent with the MCI Regulations as regards the prescription for a pass in their examinations for the course. The petitioners have also a case that the KUHS Regulations have not been notified

as yet in the Gazette and that their eligibility to pass in the examinations for the course should be judged according to the MCI Regulations. The petitioners contend that they should be permitted to appear for the theory or the clinical/practical (in which they have failed) without insisting on the appearance for all the papers and practical again.

3. The Kerala University of Health Sciences ['the University' for short] on the other hand asserts that the KUHS Regulations are not in any way repugnant to the MCI Regulations and that the candidates cannot pass the examinations piece-meal. The right of the University to prescribe stricter conditions for a Post-graduate medical student to be declared passed is emphasised stating that it is only a step for raising the level of standard. The University adds that its autonomy to fix higher standards in order to declare a candidate as having passed the Post-graduate medical examination cannot be interfered with in exercise of the writ jurisdiction. The Medical Council of India points out that the petitioners are entitled to relief only if they establish the repugnancy between the MCI

Regulations and the KUHS Regulations.

4. I heard Mr.O.V.Radhakrishnan, Mr.Govindh K. Bharathan, Senior Advocates, Mr. George Poonthottam, Mr.Kaleeswaram Raj and Mr.S.M.Althaf, Advocates on behalf of the petitioners as well as Mr.P.Sreekumar, Standing Counsel for the University. I also heard Mr.Titus Mani Vettom, Standing Counsel for the Medical Council of India, Mrs.Sanjeetha.K.A., Senior Government Pleader and Dr.Thushara James, Advocate who holds for herself a good academic record as Amicus Curiae.

5. Clause 3.16. of KUHS Regulations of Post-graduate Medical Courses which ought to have been made by the Medical Council in the manner prescribed by Statutes fixes the criteria for pass for a candidate and is to the following effect:-

“3.16.CRITERIA FOR PASS - MD/MS/
DIPLOMA COURSES

A candidate who has secured minimum of 50 percent marks for theory (40 percent separate minimum for each paper), 50 percent for Clinical/Practical including oral shall be declared to have passed in that subject.

A candidate who fails in one subject either theory/practical shall have to appear

for all the papers including theory and practical.”

Thus the cut off marks to secure a pass is 50 percent in theory (with a stipulation that a separate minimum of 40 percent marks is to be obtained for each paper) in addition to 50 percent marks in Clinical/Practical including Oral. Only then shall a candidate be declared to have passed in that subject and a candidate who has failed in one subject either in the theory or in practical shall have to appear again for all the papers including theory and practical. The petitioners have not been declared successful in the Post-graduate Medical Course for the reason that they have failed to secure the minimum for the theory and the practical in all the subjects simultaneously.

6. The corresponding clause in the MCI Regulations framed in accordance with Section 33 of the Indian Medical Council Act, 1956 by the Medical Council with the previous sanction of the Central Government is to the following effect:-

“14. The examinations shall be organised on the basis of 'Grading' or 'Marking system' to evaluate and to certify candidate's level of

knowledge, skill and competence at the end of the training. Obtaining a minimum of 50% marks in 'Theory' as well as 'Practical' separately shall be mandatory for passing examination as a whole. The examination for M.D./ MS,D.M.,M.Ch shall be held at the end of 3rd academic year and for Diploma at the end of 2nd academic year. An academic term shall mean six month's training period."

There is no insistence that the candidate should have obtained a separate minimum of 40 percent marks for each paper in addition to an aggregate of 50 percent marks in total in theory in order to secure a pass in the MCI Regulations. Also there is no insistence that the candidate who has failed in one subject either theory or practical should again appear for all the papers including theory and practical in the MCI Regulations as in the KUHS Regulations.

7. Section 19A of the Indian Medical Council Act, 1956 (the 'Act' for short) empowers the Medical Council of India to prescribe the minimum standards of medical education by Universities other than Post-graduate medical qualifications. Section 20 of the Act empowers the Medical Council of India to prescribe

standards of Post-graduate medical education for the guidance of the Universities and may also advise the Universities in the matter. This is to secure uniform standards for Post-graduate medical education throughout India and the Central Government may constitute a Post-graduate Medical Committee from among the members of the Council for this purpose. The Post-graduate Committee shall consist of nine members all of whom shall be persons possessing Post-graduate medical qualifications and experience of teaching or examining Post-graduate students of medicines. The views and recommendations of the Post-graduate committee shall be placed before the Council who shall agree with it or forward the same to the Central Government for a decision in case of any disagreement. The relevant part of Section 20 of the Act is as follows:-

“20. Post-graduate Medical Education Committee for assisting Council in matters relating to post-graduate medical education.- (1) The Council may prescribe standards of Post-graduate medical education for the guidance of Universities, and may advise Universities in the matter of securing uniform standards for Post-graduate medical education

throughout India, and for this purpose the Central Government may constitute from among the members of the Council a Post-graduate Medical Education Committee (hereinafter referred to as the Post-graduate Committee).

- (2) The Post-graduate committee shall consist of nine members all of whom shall be persons possessing Post-graduate medical qualifications and experience of teaching or examining Post-graduate students of medicine.
- (3) x x x x
- (4) x x x x
- (5) The views and recommendations of the Post-graduate Committee on all matters shall be placed before the Council; and if the Council does not agree with the views expressed or the recommendations made by the Post-graduate Committee on any matter, the Council shall forward them together with its observations to the Central Government for decision."

It is evident from the MCI Regulations that the Post-graduate Committee has not recommended for the insistence of a minimum of 40 percent marks for each paper or for the simultaneous pass in the theory as well as the practical in one go.

8. None of the petitioners have challenged the insistence of a separate minimum of 40 percent marks

for each paper in the KUHS Regulations in addition to the aggregate minimum of 50 percent marks for theory and 50 percent marks for clinical/practical. The issue is already concluded by the decision in Ashar.A.M. and others v. Kerala University of Health Sciences and another [2014 (1) KLT 969 (DB)] ofcourse relating to the examinations for the MBBS Course. The following excerpt will be useful:

“A student who is weak in theory which essentially means the fundamental knowledge of the subject was able to obtain pass marks under the Regulations of the Medical Council of India by drawing upon marks obtained in the viva-voce. By prescribing a separate minimum of 50% in the theory papers alone without aid of the marks in the viva-voce, the University was clearly raising the bar by insisting that the student must possess the higher level of knowledge of the fundamentals of the subject concerned. This clearly amounts to fixing a higher standard and no question of repugnancy arises. It is noteworthy that the University has not lowered the standard by doing away the requirement of 50% marks in the aggregate in theory and viva-voce.” (emphasis supplied)

The University has thought it wise that the student

must possess a higher level of knowledge of the fundamentals of the subject securing atleast 40 percent marks for each subject and the raising of the bar cannot be found fault with.

9. Clause 5 of the MCI Regulations describes the components of the Post-graduate Curriculum and the KUHS Regulations do not prescribe any change in the components which indicate that the focus is on component system than on composite system. Clause 5 is as follows:-

“5. COMPONENTS OF THE POST GRADUATE CURRICULAM:

The major components of the Post-graduate Curriculum shall be:

- * Theoretical knowledge
- * Practical and clinical skills
- * Writing Thesis/Research articles
- * Attitudes including Communication Skills
- * Training in Research Methodology, Medical Ethics and Medico-legal aspects”

A reading of Clause 14 of the MCI Regulations can lead to a reasonable conclusion that a candidate should pass in the theory and the practical (by obtaining the

minimum marks prescribed) which take in all the components of the Post-graduate Curriculum. The words 'whole examination' in the pre-amended Regulations and the words 'examination as a whole' in the amended Regulations do not make much of a difference in the context in which it appears. It is true that the words 'as a whole' mean 'altogether' or 'all things considered' or 'one thing or piece' and the word 'whole' does not mean otherwise. The Universal dictionary describes the word 'whole' as 'containing all the appropriate component parts' and the expression 'as a whole' appearing in the MCI Regulations can as well be treated as an idiom. An idiom is after all a group of words whose meaning is different from the meaning of the individual words and one is at a loss to find the purport and intent of the amendment made to the MCI Regulations in this regard. The fate of the students should not dangle on the basis of such nebulous or slippery words and it is only fair that the Medical Council of India clears the ambiguity by an explanation or amendment of the MCI Regulations. This is particularly so since the counter affidavit filed by

the Medical Council of India is conspicuously silent as to whether the MCI Regulations insist on a simultaneous pass in the theory and practical. The MCI Regulations cannot ipso facto lead to the conclusion that a Post-graduate medical student should pass the theory and practical simultaneously in a composite system and not individually in a component system.

10. The Legislative competence of Parliament and the Legislatures of the States to make laws under Article 246 is regulated by the Seventh Schedule to the Constitution and the relevant entries as regards medical education in Universities are as follows:-

“List I - Union list

Entry 66: Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

List III - Concurrent list

Entry 25 : Education, including technical education, medical education and Universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

Therefore any control of medical education by the State in the Universities is subject to the co-ordination and

determination of standards in institutions for higher education by the Union evident by a conjoint reading of Entry 66 of List I and Entry 25 of List III. It is apposite to extract the following observations of the Constitution Bench of the Supreme Court in Dr.Preethi Srivastava and another v. State of Madhya Pradesh and others [(1999) 7 SCC 120]:

“Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also co-ordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union Legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government.”

The Supreme Court following Dr.Preethi Srivatsava's case (supra) and Adhiyaman's case [(1995) 4 SCC 104] has again in Maharashtra University of Health Sciences

v. Paryani Mukesh Jawaharlal and others [(2007) 10 SCC 201] held as follows:-

“MCI has been set up as an expert body to control the minimum standards of medical education and to regulate their observance. The Regulations framed by the MCI with the previous sanction of the Central Government, in regard to any of the matters referred to in Section 33 of the Indian Medical Council Act, 1956, will have statutory force and are mandatory. Universities must necessarily be guided by the MCI Regulations. Any Regulations made by the Universities which are inconsistent with the MCI Regulations or which dilute the criteria laid down by the MCI will not be valid to the extent of inconsistency or dilution.” (emphasis supplied)

That the state legislation to the extent it is inconsistent with the central legislation including subordinate legislation would be inoperative has been reiterated even recently in Kalyani Mathivanan v. K.V.Jeyaraj and others [AIR 2015 SC 1875].

11. whether there is any repugnancy between the MCI Regulations and KUHS Regulations has to be tested in the light of the principles laid down by the

Constitution Bench of the Supreme Court in Deep Chand v. State of Uttar Pradesh [AIR 1959 SC 648]. It is held therein as follows:-

“Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

- (1) whether there is direct conflict between the two provisions;
- (2) whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature and
- (3) whether the law made by Parliament and the law made by the State Legislature occupy the same field.”

MCI Regulations do not explicitly state that a candidate should secure a minimum of 50 percent marks in the theory and practical simultaneously in order to be successful as in the KUHS Regulations in which case only there would be a direct conflict. KUHS Regulations on the other hand explicitly state that a candidate should secure a minimum of 50 percent marks in the theory and practical simultaneously in order to be successful which is absent in MCI Regulations. The inevitable conclusion therefore is that there is no

direct conflict or repugnancy between the MCI Regulations and the KUHS Regulations in the prescription of a simultaneous minimum. But one cannot lose sight of the fact that a candidate could be declared as 'passed' if the MCI Regulations are adopted and at the same time declared as 'failed' if the KUHS Regulations are adopted. The KUHS Regulations are not consistent with or in conformity with the MCI Regulations in the matter of prescribing a minimum of 50 percent marks in theory and practical simultaneously in order to secure a pass in the examinations.

12. Yet another provision in the MCI Regulations which throws light as to whether each head of passing is permissible in the theory and practical (including clinical and viva-voce examination) is clause 14(4) thereof which is extracted hereunder:-

“14(4)(b) Theory:

(i) x x x x

(ii) x x x x

(iii) The theory examinations shall be held well in advance before the clinical and Practical examination, so that the answer books can be assessed and evaluated before the commencement of the clinical/practical

and oral examination.

14(4)(c) Clinical/Practical and Oral

(i) x x x x

(ii) x x x x

(iii) x x x x

A candidate shall secure not less than 50% marks in each head of passing which shall include (1) Theory, (2) Practical including clinical and viva voce examination.”

The above clauses necessarily imply that the theory examinations fall under one head and that the Practical examinations fall under another head and each head of passing by securing 50 percent marks is in the contemplation of the Medical Council of India. The MCI Regulations do not also stipulate that the candidate would forfeit his marks obtained in theory or practical in case of short coming in one compelling him to re-do the exercise all over again. The long and short of it is that the KUHS Regulations are inconsistent with the MCI Regulations which is capable of being interpreted as permitting a candidate to pass separately in the heads of theory and practical. Such discrepancy has been deprecated in Maharashtra University of Health

Sciences's case (supra) and the KUHS Regulations are evidently void to the extent of the inconsistency with the MCI Regulations.

13. It remains to be seen as to whether better wisdom dawned on the University to impose stricter conditions for the candidates to secure a pass on the basis of the recommendations of the Academic Council while framing KUHS Regulations. The total number of members in the Academic Council of the University is 57 and the quorum for its meeting shall be 11 being one-fifth of the total members or 10 whichever is less as per Section 25(2) of the Act. The motley crowd of 10 members in the Academic Council can even be made out of Professors from Dental, Ayurveda, Homeopathy, Nursing, Pharmacy Colleges and from Medical Laboratory Technology. The Academic Council is not better equipped than the Post-graduate Medical Education Committee consisting of 9 members all of whom possess Post-graduate medical qualification as per Section 20 (2) of the Act. What then is the rationale and justification of the University to impose stricter conditions in the KUHS Regulations when the same is not

recommended by even the Post-graduate Medical Education Committee ?

14. The Chief Justice M.Y.Eqbal (as he then was) speaking for the Bench in the Tamilnadu Dr.M.G.R.Medical University v. P.Anand [2012 (1) MLJ 865] observed as follows while quashing the Regulations which were inconsistent with the MCI Regulations:

“37.Therefore, MCI being conscious of the fact that there should not only be a uniform pattern of education, but uniform examination regulations which deals with attendance, internal assessment, University examination and distribution of Marks to various disciplines framed Regulation. In the earlier part of this order, we have extracted regulation 12(4) of the MCI Regulation. A perusal of the said regulation makes it clear that a candidate would be declared pass in each of the subject if he/she obtained 50% in aggregate with a minimum of 50% in theory including orals and minimum of 50% in practicals/clinicals. These regulations having been framed by a Central body are not merely directory, but are binding on the appellants University. Therefore, the University may not justified in framing a regulation which is inconsistent with the

MCI Regulation.

38. On a careful reading and comparison of Regulation 12(4) of MCI Regulation and the impugned guidelines issued by the Appellant University, it is prima facie clear that the manner in which a candidate would be declared to have been passed, has been modified by the appellant University, thus being inconsistent with the MCI Regulation. The appellant University seek to justify their action by stating that the stipulation in the guidelines framed by the appellant does not lower the norms laid down by MCI, but has fixed higher standards in order to achieve excellence in education. On a perusal of the impugned guidelines framed by the appellant University, we fail to understand as to how it would satisfy the test of prescribing higher standards." (emphasis supplied)

To the same effect is the decision in Dr.S.Sasikala Devi v. The Tamilnadu Dr.M.G.R.Medical University and another [WP (C) No.19981/2015] wherein it was held that the inconsistent Regulations of the University have no nexus with the object sought to be achieved.

15. It is evident from Clause 3.15.4 of the KUHS Regulations that there shall be four theory papers

out of which one shall be of Basic Medical Sciences and one shall be of recent advances with regard to that speciality. Clinical/Practical examinations for the subjects shall be conducted to test the knowledge and competence of the candidates for undertaking independent work as a Specialist/Teacher for which candidates shall examine cases. One can understand if the candidate is required to appear again in the theory and related practical of the particular paper if he has failed to secure the minimum prescribed in that subject as per the norms. But what is the purpose in requiring the candidate to write all the four theory papers again if he has failed in one practical or undergo Clinical/Practical tests again for all the subjects if he has failed in one theory paper? Repetitive undertaking of examinations after having secured the minimum prescribed does not scale up the standard and can only be termed as oppressive from the point of view of the student. The repetitive appearance in examinations under the KUHS Regulations has no rationale nexus with the object sought to be achieved and is obviously violative of Article 14 of the

Constitution of India. The correct test of reasonableness has been propounded by Chief Justice Patanjali Sastri in the celebrated decision of State of Madras v. V.G.Row [AIR 1952 SC 196] and the following observations are apposite:-

“It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.”

The mental anguish which a student has to face in the event of his losing a theory or practical by marginal marks necessitating re-appearance for all the papers in theory and practical in order to secure a pass is unimaginable. It is possible that a candidate who has passed in the first attempt may fail in the same examination in the second attempt and the vicious

circle of pass and fail will only result in unfairness to the extreme. Clause 3.16 of the KUHS Regulations to the extent it insists that 'a candidate who fails in one subject either theory/practical shall have to appear for all the papers including theory and practical' is unreasonable and arbitrary.

16. Much was argued on the question of examiner variability on account of multiple valuation and reliance was placed on the following observations in Sanjay Singh and another v. U.P.Public Service Commission, Allahabad and another [(2007) 3 SCC 720]:

“Some examiners are liberal in valuation and tend to award more marks. Some examiners are strict and tend to give less marks. Some may be moderate and balanced in awarding marks. Even among those who are liberal or those who are strict, there may be variance in the degree of strictness or liberality. This means that if the same answer-script is given to different examiners, there is all likelihood of different marks being assigned. If a very well-written answer-script goes to a strict examiner and a mediocre answer-script goes to a liberal examiner, the mediocre answer-script may be awarded more marks than the

excellent answer-script. In other words, there is “reduced valuation” by a strict examiner and “enhanced valuation” by a liberal examiner. This is known as “examiner variability” or “hawk dove effect”.

The relevant clause in the MCI Regulations is as follows:-

“14(1)(b): For all Post Graduate Examinations, the minimum number of Examiners shall be four, out of which atleast two (50%) shall be External Examiners, who shall be invited from other recognised Universities from outside the State. Two sets of Internal Examiners may be appointed one for M.D/M.S and one for Diploma.”

The relevant clause in the KUHS Regulations is as follows:-

“3.15.1.(ii): For all Post-graduate Examinations, the minimum number of Examiners shall be four, out of which atleast two (50%) shall be External Examiners from outside the State. One of the Internal Examiners shall be a Professor or Head of the Department.”

Thus both the MCI Regulations and the KUHS Regulations speak of multiple valuation by four Examiners out of which two shall be External Examiners and the remaining

two shall be Internal Examiners and no revaluation is also provided therefore. The valuation of each of the papers by four different examiners reduces the arbitrariness and the importing of two External Examiners makes the system fool proof beyond any internal interference. The 'examiner variability' or the 'hawk dove effect' would come into play only if the answer scripts are divided amongst several valuers in view of the large number of candidates and does not apply to a valuation of limited number. Multiple valuation of each paper by all the four examiners - two external and two internal - gives little room for examiner variability and reduces arbitrariness in the valuation to a large extent. The refusal of the University to have revaluation again in the circumstances is wholly justified and the accusation of the petitioners as regards valuation hinged on the 'hawk dove' theory is unfounded.

17. Section 44 of the Kerala University of Health Sciences Act, 2010 ['KUHS Act' for short] prescribes that the Academic Council may make the KUHS Regulations in the manner prescribed by Statutes

providing for the conduct of examinations as well. The relevant part of the same is extracted hereunder:-

44. Regulations:-

(1) Subject to provisions of this Act, the Statutes and Ordinances and the approval of the Governing Council, the Academic Council may make regulations in the manner prescribed by Statutes, providing for all or any of the following matters, namely:-

- (i) the courses of studies and the conduct of examinations;

It is conceded that the Kerala University of Health Sciences First Statutes, 2013 came into force only on 29.4.2013 whereas the KUHS Regulations containing the impugned clauses were being enforced even with effect from 1.6.2010 itself. The Academic Council could not have therefore made the KUHS Regulations in the manner prescribed by the Statutes and subject to the provisions of the KUHS Act, Statutes and Ordinances and the approval of the Governing Council. It is also not disputed that the KUHS Regulations have not hitherto been published by the University of Health Sciences in the Gazette as is mandated under Section 44 of the KUHS Act when alone it can come into force.

18. An Act of a Parliament can be effective

from the date on which the same received the presidential assent whereas a subordinate legislation comes into force only when the same is published in the Gazette especially when prescribed by the Act. The law is settled by a Full Bench of this Court in R.K.V.Motors & Timbers (P) Ltd., v. Regional Transport Officer [1982 KLT 166] overruling Kochusara v. Gracy.C.T. and others [1973 KLT 880]. The Supreme Court has also categorically pronounced on this issue in B.K.Srinivasan v. State of Karnataka [AIR 1951 SC 467] which was followed in D.B.Raju v. K.H.Kandaraj and others [1990 (4) SCC 178]. It was observed therein as follows:-

“.....But unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to Government or other official dignitary. It is therefore, necessary that subordinate legislation in order to take effect must be published or promulgated in some suitable manner whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such

publication or promulgation. where the parent statute prescribes the mode of publication or promulgation that mode must be followed.” (emphasis supplied)

The above decision has been quoted with approval in *Rajendra Agricultural University v. Ashok Kumar Prasad and others* [2010 (1) SCC 730] in relation to an University Statute under the Bihar Agricultural Universities Act, 1987. It was held as follows:-

“When the Act lays down the manner in which a statute under the Act should be made, it shall have to be made in that manner and no other. The requirement that the statute should be published in the Official Gazette is an integral part of the process of 'statute making' under Section 36 of the Act. It is mandatory and not directory. Until publication in the Official Gazette, the statute will be considered as still being in the process of being made, even if it had received the assent of the Chancellor. A 'statute in the making' or a 'statute-in-process' is incomplete and is neither valid nor effective as a statute. So long as the Statute is not completely made, but is still in the process of being made, it can be cancelled, withdrawn or modified, without the need for 'publication'

of such cancellation, withdrawn or modification.” (emphasis supplied)

The decision in Ashar's case (supra) on this aspect is clearly distinguishable in as much as the decision impugned therein was taken in July 2012 by the Vice-Chancellor in the absence of the first statutes in terms of Section 12(7) of the KUHS Act. A reading of Section 12(8) of the KUHS Act makes it amply clear that such action or Regulations by the Vice-Chancellor are 'for the time being' till the matter is regulated by Statutes or Regulations under Section 44 thereof. The adhoc Regulations of KUHS made by the Vice-Chancellor of the University in the instant case cannot outlive the Statutes and fresh Regulations are to be made by the Academic Council under Section 44 of the KUHS Act. It necessarily follows that the KUHS Regulations containing the impugned clauses have no legal sanctity and ceases to have any force after the first statutes in the absence of any publication in the Gazette as mandated by Section 46 of the KUHS Act. The mere fact that the petitioners were admitted to the Post-graduate medical course at a time when the KUHS

Regulations were in force does not make it valid for the entirety of the course or thereafter. I am not however invalidating the admissions made or the Post-graduate medical degree granted pursuant to the KUHS Regulations since none of the affected candidates have been impleaded in a representative capacity.

19. It is declared that the KUHS Regulations is a statute in the making or a statute in process incomplete in itself and is neither valid nor effective as a statute applying the law laid down in Rajendra Agricultural University's case. There is no necessity to annul an incomplete statute or regulations which has ceased to be in force after the Kerala University of Health Sciences First Statutes, 2013 and the examinations cannot be conducted on its basis. The Medical Council of India is free to advise the University in the matter of securing uniform standards for Post-graduate medical education throughout India as per Section 20(1) of the Act. The Medical Council of India shall clarify as to whether each candidate should simultaneously pass the theory and practical securing 50 percent marks in each which can be incorporated in

the KUHS Regulations appropriately. The needful in this regard shall be done within an outer time limit of four months from the date of receipt of this judgment and the examinations for which process has already started shall however continue.

The writ Petitions are disposed of. No costs.

Sd/-
V.CHITAMBARESH,
Judge.

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