

(2003) 04 AHC CK 0096

In the Allahabad High Court

Case No : C.M.W.P. No's. 6302 and 7002 of 2003

Abhishek Srivastava and Others

APPELLANT

Vs

Banaras Hindu University and Others

RESPONDENT

Date of Decision : 18-04-2003

Acts Referred:

Banaras Hindu University Ordinance — Ordinance 3
Civil Procedure Code, 1908 (CPC) — Section 11
Postgraduate Medical Education Regulations, 2000 — Regulation 9

Citation : (2003) 3 AWC 2481 : (2003) 2 UPLBEC 1249 : (2003) 2 UPLBEC 1152

Hon'ble Judges : Ashok Bhushan, J

Bench : Single Bench

Advocate : Ravi Kant, Arvind Srivastava, R.N. Singh and A.P. Shahi, for the Appellant; V.K. Upadhyaya, S.C. and Pankaj Naqvi, for the Respondent

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—Both the writ petitions raise common question of fact and law and have been heard together. Counter and rejoinder-affidavits in both the writ petitions have been exchanged and with the consent of the parties, the writ petitions are being finally decided.

2. Heard Sri Ravi Kant, Senior Advocate assisted by Sri Arvind Srivastava for the petitioners in Writ Petition No. 6302 of 2003 and Sri A. P. Shahi appearing for the petitioner in Writ Petition No. 7002 of 2003. Sri V. K. Upadhyaya has been heard for Banaras Hindu University.

3. It is sufficient to refer the facts and pleadings in Writ Petition No. 6302 of 2003 for deciding both the writ petitions.

4. Writ Petition No. 6302 of 2003 has been filed praying for issue of a writ order or direction in the nature of mandamus commanding the respondents to admit the petitioners in the Post Graduate course (M.D./M.S.) in the January, 2003/ July, 2003 session. A further prayer has been made for issuing a writ, order or

direction quashing Clauses 1.4 and 2.1.1(d) of the revised rules of admission to M.D./M.S. courses dated 24th December, 1998 (Annexure-2 to the writ petition).

5. Brief facts giving rise to the writ petition are : petitioners have completed their M.B.B.S. course with internship in the year 2003 from Institute of Medical Sciences, Banaras Hindu University, Varanasi. Petitioners were admitted in the M.B.B.S. course in the year 1997. The petitioners claim admission in Post Graduate course of Institute of Medical Sciences, Banaras Hindu University, Varanasi under institutional preference quota. In the meeting dated 14th November, 2002 of Postgraduate Medical Board, Faculty of Medicine, resolution was passed recommending that revised rules of admission to M.D./M.S. course as already approved in the meeting of Faculty of Medicine held on 6th March, 2002 together with the amendments thereof recommended by the Faculty be further amended to provide that the institute will be admitting the internal candidates (M.B.B.S. students of this institute) to seats not more than 60% of the total Post Graduate seats of Institute of Medical Sciences, Banaras Hindu University. The revised rules were appended as Appendix-A to the said resolution. Writ Petition No. 39142 of 2001 (Medical Students Association, Institute of Medical Sciences, Banaras Hindu University through its President v. Banaras Hindu University and Ors. was filed for the benefit of 96 batch (M.B.B.S. students) challenging the reduction of the institutional reservation in Institute of Medical Sciences, Banaras Hindu University and not to give effect to the order of the Vice-Chancellor dated 24th December, 2000 by which institutional preference was done away. In the aforesaid writ petition, an impleadment application was filed by Sandeep Bansal and others praying that the applicants be heard as interveners. The said Impleadment application was filed for the benefit of the members of the association. In the application, it was further prayed that petition be disposed of in terms of regulations promulgated by the Medical Council of India and the rules framed by the University in consonance thereto dated 14th November, 2002. Writ Petition No. 39142 of 2001 was disposed of by this Court vide its order dated 23rd January, 2003 directing that the University shall proceed in accordance with the resolution of the Post-graduate Medical Board dated 14th November, 2002. The Institute of Medical Sciences, Banaras Hindu University made admission of 42 students under institutional preference quota. The petitioners were denied the admission. The petitioner's case in the writ petition is that they are similarly situated to the abovementioned 42 students and they are also entitled for admission. The petitioners were not considered for admission in view of the criteria as laid down in amended rules of admission that the candidates with more than two failures/ supplementary in M.B.B.S. will not be eligible for admission to M.D./M.S. course. Petitioners have come up in this writ petition challenging the said criteria of revised rules, namely, Rules 1.4 and 2.1.1(d) and have prayed for a direction to the respondents to admit the petitioners in the Post Graduate Medical course.

6. A counter-affidavit has been filed by the University in which it has been stated that revised rules have been framed by Post Graduate Medical Board which is

competent to lay down criteria for admission in Post Graduate courses. The criteria debarring candidates having more than two supplementary has been justified on the ground that student passing the examination in one attempt is apparently a serious student who is conscious of his studies and is thus sincere and better than those students who passed the course in more than one attempt. It has further been contended that petitioners themselves by the impleadment application in the earlier Writ Petition No. 39142 of 2001 have prayed for giving effect to the resolution dated 14th November, 2002 of Post Graduate Medical Board, hence the present writ petitions are barred by principle of constructive res-judicata.

7. Sri Ravi Kant, counsel for the petitioners, has raised following submissions in support of the writ petition :

(i) Post Graduate Medical Board has no jurisdiction to frame any criteria for admission in Post Graduate courses. The resolution dated 14th November, 2002 has neither been approved by executive council nor by academic council. Statute 18(xxiii) empowers the academic council to appoint committee for admission and under Statute 26, the said committee may deal with any subject assigned to it subject to subsequent confirmation by the authority which appointed it. The revised rules having been framed by an authority not empowered under the Act, Statutes and Ordinances to frame criteria for admission, the revised rules have no legal sanctity and hence the entire set of rules is not enforceable and inoperative.

(ii) Rules 1.4 and 2.1.1(d) are arbitrary and have no nexus with the object sought to be achieved. The petitioners cannot be treated to be ineligible for consideration admission in Post Graduate courses on the basis of the said arbitrary rules. Rules 1.4 and 2.1.1.(d) are contrary to the regulations framed by Medical Council of India for admission in Post Graduate courses.

(iii) Petitioners have more merit as compared to several students belonging to the same batch i.e., 1997 batch who have been admitted in Post Graduate Medical courses which further demonstrate that the offending part of revised rules have no nexus with the object, i.e., admission, on merit.

8. Sri V.K. Upadhyaya, learned counsel appearing for the University, refuting the submissions made by counsel for the petitioners, raised following submissions :

(i) in Writ Petition No. 39142 of 2001 an impleadment application was filed on behalf of the present petitioners praying that direction be issued to the respondents for implementing the resolution dated 14th November, 2002, hence challenge in the present writ petition to the revised admission rules, is barred by principle of constructive res judicata.

(ii) The Post Graduate Medical Board is fully empowered to lay down criteria for determining the merit in accordance with the ordinances framed by the University.

(iii) The revised rules have been framed laying down more stringent criteria for determining the merit, which is in consonance with the regulation framed by Medical Council of India. The students passing examination in supplementary cannot be treated to be meritorious and the rule has nexus with the object sought to be achieved.

(iv) Even if revised rules are treated to be in addition to Medical Council of India regulations, they are valid since it is with object to achieve merit and can be treated as additional criteria for having better candidates.

9. The counsel for both the parties have cited several decisions of the Apex Court, this Court and other High Courts in support of their respective submissions, which will be referred to while considering their respective submissions.

10. Before proceeding to consider the respective submissions on merit, it is necessary to consider the preliminary objection raised by counsel for the University regarding the writ petition being barred by principle of constructive res judicata.

11. A plea has been raised by counsel for the respondents that since in Writ Petition No. 39142 of 2001 (Medical Students Association v. Banaras Hindu University and Ors.) an impleadment application was filed on behalf of the petitioners and they did not challenge the revised rules and in the said petition, rather they prayed that admission be directed to be made on the basis of revised rules, the principles of res judicata are attracted in the present writ petitions and the writ petitions are liable to be dismissed on the said ground.

12. Writ Petition No. 39142 of 2001 was filed by Medical Students Association for the benefit of members of the association whose names were mentioned in Annexure-1 to that writ petition. The members for whose benefit the writ petition was filed belonged to 96 batch (M.B.B.S.). Following reliefs were prayed for in the writ petition :

(a) to issue a writ, order or direction in the nature of mandamus commanding the respondent-university to forthwith process the admission of the petitioners in accordance with the previously prevailing practice to the post graduate course of Institute of Medical Sciences, B.H.U. and in accordance with the directions issued by the Apex Court in this regard as per Annexures-8, 9 and 10.

(b) to Issue a writ, order or direction in the nature of mandamus commanding the respondent-university not to give effect to the order of the Vice-Chancellor dated 24.12.2000 for admission to post graduate course in the year 2001-2002 while processing the admissions of the petitioners."

In the said writ petition, an application dated 7th January, 2003 was filed for impleadment by one Sandeep Bansal making following prayer :

"It is, therefore, most respectfully prayed that this Hon"ble Court may be pleased

to hear the applicants as interveners and the petition be disposed of finally in terms of the Regulations promulgated by the Medical Council of India and the rules framed by the respondent-university in consonance thereto dated 14.11.2002 and necessary direction be issued to implement the same forthwith for admitting the members of the petitioner-association who are seeking admission in the year 2003 so that justice be done."

On the impleadment application, only order passed by this Court was "list in the next cause list on 8.1.2003". This Court disposed of the aforesaid writ petition vide its order dated 23rd January, 2003 by following order :

"I have heard Shri R.N. Singh, learned senior counsel assisted by Shri A.P. Shahi on behalf of the petitioner and Shri Pankaj Naqvi learned counsel appearing for the University. It appears that the resolution of the Post Graduate Medical Board of the University dated 14.11.2002 by which the Faculty of Medicine had decided to grant 60% institutional preference in Post Graduate Admission was not brought to the notice of the Hon"ble Apex Court and that is why the Hon"ble Apex Court had passed an order for the preference intake to the extent of 30% only. Since the earlier order of the Vice-Chancellor doing away with the institutional preference has not been extended with the acceptance of the resolution passed by the Post Graduate Medical Board on 14.11.2002, it is not necessary to go into the question regarding the extent of institutional preference to be given in the present case inasmuch as the petitioners are not aggrieved by the said decision and its validity is not under challenge in the present petition and the writ petition is disposed of with the direction that the university shall proceed in accordance with the resolution referred to above.

Since in the previous year admissions have been made on the basis of interim orders passed by this Court and/or the Apex Court wherein 60% institutional preference was permitted, admission already made would not be effected."

13. The question raised in the writ petition is as to whether on the basis of filing of the impleadment application praying for permitting the applicants to intervene in Writ Petition No. 39142 of 2001, the present writ petition can be said to be barred by principle of constructive res judicata. From the relief claimed in Writ Petition No. 39142 of 2001, it is clear that in the writ petition there was no challenge to the revised admission rules dated 14th November, 2002. The said writ petition was filed. In fact, on 22nd November, 2001 and the petitioners of that writ petition never prayed for amendment for challenging the revised admission rules dated 14th November, 2002. The right of intervener in a writ petition is only to support or oppose the writ petition. The intervener himself cannot pray for any relief in the writ petition nor intervener is in position of petitioner in a case. From the relief claimed in Writ Petition No. 39142 of 2001, it is clear that challenge in the writ petition was to the decision of the Vice-Chancellor doing away with the institutional preference for admission in Post Graduate courses. The interveners were not petitioners in the writ petition so as to make any prayer in the writ petition. Furthermore, while disposing of the writ

petition vide its judgment dated 23rd January, 2003, this Court observed that petitioners are not aggrieved by the said decision (resolution dated 14.11.2002) and its validity is not under challenge in the present writ petition. In view of the above, principles of constructive res judicata are not attracted in the present case. The decision of the Apex Court in M/s. Saraswati Industrial Syndicate Ltd. Vs. The Commissioner of Income Tax, Haryana, Rohtak, relied by counsel for the petitioners do support the contention of the petitioners that the right of intervenor is only to address argument in support of one or other side. Paragraph 12 of the said judgment is extracted below :

"12. Learned counsel for the intervenors submits that he is entitled to the same order as we have just passed. We cannot pass such an order in an Intervention application. The only purpose of granting an intervention application is to entitle the intervenor to address arguments in support of one or the other side. Having heard the arguments, we have decided in the assessee's favour. The intervenors may take advantage of that order."

14. Learned counsel for the university has relied on three decisions, Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, ; Sangappa Gurulingappa Sajjan Vs. State of Karnataka and Others, and 1997 (2) JLJ 362 (SC) In Forward Construction Co's. case (supra), the Apex Court took the view that Section 11 Explanation IV applies to P.I.L. It was laid down in paragraph 20 by the Apex Court :

"20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV Section 11, C.P.C. provides that any matter which might and ought to have been made ground of defence or attach in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force."

In the present case, the petitioners on whose behalf impleadment application was filed in Writ Petition No. 3914:2 of 2001 had neither challenged the revised admission rules nor it can be said that the said revised rules might and ought to have been directly and substantially in issue in earlier case. The writ petitioners

of that writ petition were not aggrieved by the revised admission rules which fact was specifically noted in the judgment of this Court dated 23rd January, 2003. In view of this, the said decision does not support the contention of counsel for the respondents. Judgment of Sangappa Gurulingappa Sajjan's case (supra) was in a case in which it was held that plea available but not raised in first instance cannot be allowed to be raised in special leave petition. The ratio laid down in the said case has no application in the facts of the present case. The last decision cited by counsel for the respondents in Madhya Pradesh Public Service Commission case (supra) was a case in which the respondent, Om Prakash Gupta, himself has filed both the writ petitions. By first writ petition he prayed that examination be quashed and answer-book be re-evaluated and in the second writ petition he prayed that he should be selected for the post of Civil Judge IInd Class. In the facts of that case, Apex Court held that principle of constructive res judicata are attracted. In view of foregoing discussion, it cannot be said that present writ petitions are barred by principle of constructive res judicata due to filing of intervention application by one Sandeep Bansal for the benefit of other students of 97 batch.

15. The first submission raised by counsel for the petitioners is with regard to status of the revised admission rules framed by Post Graduate Medical Board. Elaborating his submissions, the counsel for the petitioners, has referred to Statutes 18 (xii) and 18 (xxiii) which are extracted below :

"18. Subject to the provisions of the Act, the Academic Council shall, in addition to all other powers vested in it, have the following powers, duties and functions, namely :

(i)

(xii) to recommend to the Executive Council draft ordinances regarding examinations of the university on the conditions on which students should be admitted to such examinations and the working maintenance and use of the university library ;

.....

(xxiii) to appoint committee for admission to the university ;

....."

Further Statute 26 has been referred stating that decisions taken by the committee appointed by the academic council or executive council are subject to subsequent confirmation by the said committee. In reply to the said submission, learned counsel for the university has referred to Section 18 of the Banaras Hindu University Act, 1915 (hereinafter referred to as Act). Section 18(1)(a) of the Act is quoted below :

"18 (1) Subject to the provisions of this Act and the statutes, the ordinances may provide for all or any of the following matters, namely :

(a) the admission of the students to the university and their enrolment as such ;
....."

The counsel for the university further referred to ordinances framed regarding admission. Ordinances with regard to M.D./M.S. has been referred to by learned counsel for the university including Ordinance 3(c). Ordinance 3(c) (as amended) is extracted below :

"(3) Registration :

(a).....

(c) The Post Graduate Medical Board of the institute will admit the candidates on merit depending upon the seats available in any subject or specially on the recommendation of the Research Committee of the respective department or specially which will also recommend, supervisor and co-supervisor, if any, for each candidate. The names of the registered candidates along with names of the respective supervisors will be sent to the Registrar, Banaras Hindu University for records. The criteria for determining the merit of the candidates will be framed by the Post Graduate Medical Board whose decision in all matters of registration, shall be final."

The above Ordinance 3(c) clearly provides that admission by the Post Graduate Medical Board shall be on merit. The ordinance further provides that criteria for determining the merit will be framed by Post Graduate Medical Board.

16. From the provisions, as extracted above, it is clear that revised rules of admission framed by the Post Graduate Medical Board are not any amendment in earlier ordinances nor they have been framed by committee appointed under Statute 18 by the academic council or executive council. Statute 26, which requires subsequent confirmation by the authority appointing the committee is not attracted in the present case since the power to make admission has been given to Post Graduate Medical Board under the ordinances framed u/s 18 of the Act. As noted above, Section 18(1)(a) of the Act provides that ordinances may provide for admission of students to the university. There is no dispute that ordinances have been framed in exercise of the said power u/s 18 of the Act which also provide for admission in M.D./M.S. courses. Ordinances framed for admission to M.D./M.S. courses empower the Post Graduate Medical Board to admit the candidates on merit. The criteria has been laid down in Ordinance 3(c) i.e., merit. Ordinance 3(c) further provides that criteria for determining the merit of the candidate will be framed by the Post Graduate Medical Board. The counsel for the petitioners when faced with the aforesaid ordinance empowering the Post Graduate Medical Board to make admission in M.D./M.S. courses has submitted that Ordinance 3(c) empowering the Post Graduate Medical Board to fix criteria for determining the merit is arbitrary and is an excessive delegation. He submitted that criteria for admission was required to be laid down in ordinances and Post Graduate Medical Board was to only do act of admission as per the

criteria. From the Ordinance 3(c), it is clear that there is no lack of power with the Post Graduate Medical Board from making admission or laying down the criteria for determining the merit. The revised rules for admission have been framed by the Post Graduate Medical Board in exercise of power vested in it under the said Ordinance 3(c). The submission of counsel for the petitioners that it is an excessive delegation cannot be accepted. The criteria for admission has already been laid down in Ordinance 3(c) i.e., merit. How merit for admission in M.D./M.S. courses can be determined has been left to an expert body, Laying a guideline by the Post Graduate Medical Board when authorised by statutory rules cannot be said to be arbitrary or an excessive delegation. The decision of the Apex Court in *Kiran Gupta and Others Vs. State of U.P. and Others Etc.*, fully support the stand taken by the university. Following was laid down by the Apex Court in paragraph 12 of the said judgment :

"12.....

The essence of the essential legislative function lies in the Legislature formulating a policy in respect of a matter within its field of legislation and translating It into words of an enactment to do it with binding authority. The legislative policy, as could be gathered from the aforementioned provisions, appears to us to constitute a Commission which is a statutory body consisting of experts and leave the question as to how it should proceed with the method of recruitment and promotion of teachers to the post of Principals/Headmasters to that Commission. A plain reading of that clause shows that the Legislature has delegated the power of preparation of guidelines on matters relating to the method of recruitment to the Commission which is in the sphere of effectuation of the legislative policy rather than in the realm of laying down a legislative policy."

17. In view of what has been said above, the Post Graduate Medical Board was fully empowered to lay down criteria for finding out merit for admission in M.D./M.S. courses and the decision of the Post Graduate Medical Board dated 14th November, 2002 cannot be held to be beyond its authority nor said decision required approval by the executive council or by the academic council. The first submission of counsel for the petitioners has no substance.

18. The second and third submissions of counsel for the petitioners are being considered together. Offending part of revised rules for admission challenged in the writ petitions are as follows :

"1.4. The candidates with more than two failures/ supplementaries in M.B.B.S./ B.D.S. Professional Examinations will not be eligible for admission to M.D./M.S./ M.D.S. courses.

.....

2.1.1 (d) Those having more than two supplementaries will not be considered for M.D./M.S. admission."

The abovesaid rules provide that candidates with more than two failures/supplementaries in M.B.B.S. professional examinations will not be eligible for admission.

19. The Medical Council of India in exercise of power under Sections 33 and 19A of Indian Medical Council Act, 1956 have framed regulations, namely, "Post Graduate Medical Education Regulations, 2000". u/s 19A, the Council is empowered to prescribe minimum standard of medical education. Section 33(1) empowers the Council to frame regulation with regard to admission to professional examinations. Regulation 9 of the aforesaid Regulation 2000 is with regard to selection of Post Graduate students, which is quoted below :

"9. Selection of Post-graduate students.--(1) Students for Postgraduate Medical courses shall be selected strictly on the basis of their academic merit.

(2) For determining the academic merit, the university/institution may adopt any one of the following procedures both for degree and diploma courses--

(i) on the basis of merit as determined by a competitive test conducted by the State Government or by the competent authority appointed by the State Government or by the university/group of universities in the same State ; or

(ii) on the basis of merit as determined by a centralised competitive test held at the national level ; or

(iii) on the basis of the individual cumulative performance at the first, second and third M.B.B.S. examinations, if such examinations have been passed from the same university ; or

(iv) Combination of (i) and (iii) :

Provided that wherever entrance test for Post-graduate admissions is held by a State Government or a university or any other authorised examining body, the minimum percentage of marks for eligibility for admission to Post-graduate Medical courses shall be fifty per cent for all the candidates :

Provided further that in non-Governmental institutions fifty per cent of the total, seats shall be filled by the competent authority and the remaining fifty per cent by the management of the institution on the basis of merit."

Regulation 9 requires that students for Post Graduate Medical courses shall be selected strictly on the basis of their academic merit. In the present case, criteria as mentioned in Regulation 9(2)(iii) has been applied which require that academic merit be determined on the basis of individual cumulative performance at the first, second and third M.B.B.S. examinations.

20. The submission of counsel for the university is that revised rules of admission have been framed by the Post Graduate Medical Board for determining the merit as conducted by regulations framed by Medical Council of India. The submission is that revised admission rules are in consonance with the aforesaid Regulation 9.

In alternative, the submission of counsel for the university is that in case the revised rules of admission are treated to be as additional rules for determining the merit, the same is also permissible since the said rules did not dilute, in any manner, the requirement as contemplated under Regulation 9. The submission is that Post Graduate Medical Board is free to frame any additional rule for determining the merit.

21. The question as to whether the State Government or university is empowered to frame any additional rule for admission apart from one provided in regulations of Medical Council of India, has already been settled. Apex Court in *Dr Preeti Srivastava and Another Vs. State of M.P. and Others*, laid down that although the university cannot minimise the criteria for selection laid down by Medical Council of India but it can lay down other additional norms. It was held in paragraph 36 :

"36. It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the union in exercise of powers under Entry 66, List I. For example, a State may, for admission to the Post Graduate Medical courses, lay down qualifications in addition to those prescribed under Entry 66 of List I. This would be consistent with promoting higher standard for admission to the higher educational courses. But any lowering of the norms laid down can, and do have an adverse effect on the standard of education in the institutes of higher education. Standards of education in an Institution or college depend on various factors.Thus, competency of the University or Post Graduate Medical Board to lay down any additional law for determining the merit or providing for more stringent method for determining the merit cannot be doubted."

22. The principal submission of counsel for the petitioners is that revised admission Rules 1.4 and 2.1.1(d) are not in conformity with Regulation 9 of Regulations 2000 and further it has no nexus with the object sought to be achieved. Whereas the contention of university's counsel is that they are in consonance with Regulation 9 and have nexus with the object sought to be achieved.

23. The criteria for determining the merit has been laid down in Regulation 9 of Regulations 2000. The key words used in Regulation 9 are "individual cumulative performance". The word "cumulative" as has been defined in Webster Comprehensive Dictionary Encyclopedic Edition is as follows :

"Cu-mu-la-tive adj. (1) Gathering volume, strength, or value by addition or repetition, steadily increasing. (2) Consisting of portions gathered or collected one after another. (3) Increasing or accruing, as unpaid Interest or dividends, to

be paid in the future. (4) Law Reinforcing of proving previous evidence. Cumulatively adv."

"Individual cumulative performance" as used in Regulation 9 denotes that merit has to be determined on the basis of taking together the performances by students in all the three professional examinations. The word "cumulative" is wide enough to include the performance of a candidate in a supplementary examination also. Thus, for determining the merit, the performance of a candidate in supplementary examination has also to be looked into. The offending rule in the present case is the rule which provides that a student having more than two supplementaries will become ineligible. Supplementary examination is an examination which is undertaken by a candidate to clear a paper which he could not clear in the main examination. Regulations framed by Medical Council of India pertaining to graduate medical education, i.e., Graduate Medical Education, 1997 also contain regulation pertaining to training period and time distribution for M.B.B.S. course. Regulation 7 of the aforesaid regulation do permit a student chances for passing the subjects in which he failed in Phase-I Pre-clinical. The ordinances of the university regulating the examination do also normally provide for permitting supplementary examination for clearing the paper in which a candidate failed. There is no dispute between the parties that supplementary examinations were taken in accordance with relevant rules in which petitioners passed. By clearing a supplementary examination, a candidate gets the same degree and is declared pass. The marks secured by a candidate in supplementary examinations are added for finding out his percentage of passing the examination and for purposes of merit.

A candidate who has done well in a supplementary examination and has earned a high percentage of marks cannot be ignored for consideration of his merit only because there are two supplementaries to his credit. A student appears in supplementary examination for variety of reasons. A meritorious candidate may also fell ill at the time of examination or while appearing, may be under serious illness which may diminish his performance. In supplementary, if he clears the paper and acquires high merit, it cannot be ignored as observed above. The words "cumulative performance" as used in Regulation 9 embrace in it the performances in supplementary also. The performance of a candidate in supplementary, even if it is in each year, it cannot be ignored nor it can be said that said candidate has become ineligible. In case such interpretation is accepted, this will not be taking into consideration the cumulative performance of a candidate for determining the merit as contemplated in Regulation 9. The Apex Court judgment relied by counsel for the petitioners in *Abhijit Vs. Dean, Government Medical College, Aurangabad and Another*, , does support the contention of the petitioners. In the said case, the appellant who stood first in order of merit in third M.B.B.S. examination sought admission in M.S. degree course. The admission was denied to the candidate on the ground that he passed third M.B.B.S. examination in second attempt. Apex Court held in paragraphs 3 and 4 :

"3. On behalf of the respondent, it was submitted that though the rules relating to admission to the Post Graduate course did not define what a second attempt was, the rules for appointment of Residents under the IIIrd year Residency Programme at Government Medical Colleges defined what was a second attempt and since those admitted to the M.S. Degree course were necessarily to be appointed to Residencies the rules applicable to those seeking admission to the M.S. degree course. In the first place, we do not see how the rules relating to appointment to Residencies could be made to regulate admission to the M.S. Degree course. In the second place, we do not think that even the rule on which the respondents rely justifies the deduction of five per cent marks, A note under Rule IV, 5(e) of the rules relating to appointment to Residencies is to the following effect :

"For the purposes of the reductions, non-appearance at any examination when due, is deemed as an attempt at the said examination."

We may at once say that the appellant was not "due" to appear at the examination as he had not put in the necessary attendance of the classes and clinics and had not even submitted his application form for the examination. We are also of the view that if the rule has the effect of treating failure to appear at the examination because of serious illness as non-appearance at the examination so as to make the candidate liable to a deduction of five per cent of marks when seeking admission to Post Graduate course the rule is indeed arbitrary.

4. In the circumstances, we think that there was no Justification for making the deduction of five per cent of marks. The appellant was entitled to have been admitted to the Post Graduate course in which he sought admission in July, 1986. Since that has not been done, the respondents are now directed to admit him in the course commencing in July, 1987. The appeal is allowed accordingly with costs. In view of what we have said no orders are necessary in the writ petition."

The observation of the Apex Court in the aforesaid case was that if any rule is made having effect of treating failure to appear in the examination because of serious illness so as to make the candidate liable to reduction of marks when seeking admission to Post Graduate course, the rule is indeed arbitrary.

24. Supplementary examination is held to make-up the deficiency in the main examination. A student after clearing the supplementary examination is treated to have cleared the main examination. Apex Court had occasion to consider supplementary examination in Council of Council of Homoeopathic System of Medicine, Punjab and others Vs. Suchintan and others, . Following was laid down by the Apex Court in paragraphs 36 and 37 of the judgment :

"36. The word "supplement" is defined in Oxford Dictionary, Seventh Edition, page 1072 :

"(T)hing added to remedy deficiencies ; part added to book etc., with further information, or to periodical for treatment of particular matter(s) ; of an angle,

(Math.) its deficiency from 180 (cf. COMPLEMENT) ; hence AL, ARY, (-me"n) adjs. (supplementary benefit). (ME, f.L. sup (plementum f.) plere fill ; see-merit)."

37. Therefore, the adjective "supplementary" means an examination to make up the deficiencies. Thus, it stands to reason only when deficiencies are made up, the whole becomes complete."

25. Treating a candidate who has more than two supplementaries as Ineligible for admission is denying consideration of his individual cumulative performance. As observed above, a candidate having more than two supplementaries may have shown extraordinary merit in supplementary examination but will become ineligible by virtue of aforesaid Rules 1.4. Treating a candidate ineligible who has passed more than two supplementaries have no nexus with the object sought to be achieved. "The object in making admission in Post Graduate course is to determine the merit. The word "cumulative performance" includes performance of a candidate in supplementary also. Making a candidate with two supplementaries ineligible for admission by rules framed by the university runs counter to the scheme for determining the merit as laid down in Regulation 9 framed by Medical Council of India. The contention of counsel for the petitioners has substance that there is no nexus with the object sought to be achieved.

26. The counsel for the petitioners pointed out from the chart annexed as Annexures-C.A.-1 and C.A.-7 filed by the university that some of the petitioners have higher percentage of marks in first, second and third professional examinations as compared to the students who have been admitted in Post Graduate course. From the chart filed as Annexures C.A.-1 and C.A.-7 to the counter-affidavit, it appears that one of the candidates, namely, Deepak Kumar Gautam has, admittedly, more percentage of marks as compared to candidates admitted. Merit of a candidate depicted in taking into consideration his marks in the first, second and third professional examinations along with marks in supplementary do depict his merit and it cannot be said that even though candidate has secured more marks in main and supplementary examinations than a candidate admitted, the said person has less merit.

27. The counsel for the university referred to K. Sujatha v. Marathwada University and Ors., 1985 Supp (1) SCC 155. In the said case, ordinances of the university required that candidate applying for admission must have obtained not less than 40% of marks in English and Science subjects taken together at one and the same attempt in the qualifying examination. The Apex Court was considering the specific ordinances of the university which require the candidate to pass in one and the same attempt. No such requirement has been shown either in the ordinances of the university or in the regulations of medical council requiring the candidate passing M.B.B.S. in one and the same attempt. The said case does not help the respondents in any manner. The counsel for the university has also placed reliance on Km. Darsha Ahuja and Ors. v. University of Agra and Anr., AIR 1982 All 359. In the said case, the Division Bench of this Court laid

down that prescribing a little higher standard than laid down by Medical Council of India is by no means repugnant to the regulations. It was laid down in paragraph 12A :

"12A. Having given the matter a careful thought, we are clearly of the opinion that the ordinances referred to above are by no means repugnant to the regulations framed by the Medical Council. The insistence by the Agra University that the candidates should secure 50% marks also in the clinical examinations in the Eye and E.N.T. only demands of the students slightly higher degree of proficiency in those subjects. If anything, it prescribes a little higher standard than that laid down by the Medical Council of India. It does not in the slightest degree run counter either to the letter or the spirit of the minimum standards laid down by the Medical Council of India in its regulations. As already noticed the primary concern of the Medical Council of India is to ensure that the education imparted by the universities and the Medical Institutions in India and the examinations conducted by them for the grant of medical degrees do not fall below the prescribed standard of proficiency expected of a medical graduate. There cannot be, we do venture to think, any serious objection if a medical institution or a university lays down a slightest more stringent standard for the examinations. We therefore, find no substance in the first submission." There cannot be any dispute with the proposition laid down by the Division Bench of this Court in the aforesaid case. The question, however, is whether the ordinances of the university provides for more stringent method for finding out merit or the method laid down by the university has no nexus with the object sought to be achieved. As observed above, discarding the candidates having more than two supplementaries is denying consideration of their individual cumulative performance in first, second and third professional examination which is not in consonance with Regulation 9. The said case, thus, also does not help the petitioners. Reliance has also been placed by counsel for the university in *Ku. Madhu Mittal v. State of Madhya Pradesh and Ors.*, AIR 1984 MP 59. In the said case the Division Bench of Madhya Pradesh High Court laid down that reservation is a concession. A candidate seeking to take advantage of such concession must fulfil all the conditions laid down under the rule. In the said case the Division Bench repelled the challenge to requirement in the admission rules about the bona fide resident of a freedom fighter which was challenged as discriminatory. The Division Bench upheld the rule contemplated for grant of reservation, hence the said case has no application in the present case. The counsel for the university has also placed reliance on three decisions of the Apex Court in which the principle of short listing has been upheld by the Apex Court. There is no dispute that short listing can be made by the university or the college for shortening the list of candidates by evolving a stringent method which will be more than eligibility required. In the present case the challenge has been made to the revised admission rules as arbitrary. There cannot be any objection to the short listing by the university. For example, university can fix a criteria of having particular percentage of marks in the M.B.B.S. professional examinations for

admission in Post Graduate courses which may be higher than one prescribed by Medical Council of India. No objection to that can be taken by any one. The decisions regarding short listing have no application in the present case. Lastly the counsel for the university has placed reliance on a Judgment of the Apex Court in Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, . In the aforesaid case, the Apex Court laid down the extent of judicial review by court to the matters relating to policy. Following was laid down in paragraph 18 of the judgment :

"18. The scope of judicial review permissible in the present case, does not require any elaborate consideration since even the minimum permitted scope of judicial review on the ground of arbitrariness or unreasonableness or irrationality, once Article 14 is attracted, is sufficient to invalidate the impugned circular as indicated later. We need not, therefore, deal at length with the scope of judicial review permissible in such cases since several nuances of that ticklish question do not arise for consideration in the present case."

Apex Court, thus, upheld the judicial review on the ground of arbitrariness or unreasonableness or Irrationality attracting Article 14 of the Constitution of India. As observed above, the offending rule in the present case being arbitrary, judicial review is permissible in the facts of the present case.

28. In view of what has been said above. Rules 1.4 and 2.1.1(d) of the revised admission rules dated 14th November, 2002 cannot be sustained and are hereby quashed. The respondents are directed to consider the cases of the petitioners for admission in M.D./M.S. courses in accordance with merit. It is, however, observed that admissions of any candidate already made shall not be disturbed by consideration of petitioners" admission as directed under this order.

29. The writ petitions are allowed accordingly.