

(2017) 09 DEL CK 0027

In the Delhi High Court

Case No : 5868 of 2017

ALOK BANSAL & ORS

APPELLANT

Vs

GURU GOBIND SINGH INDRAPRASTHA UNIVERSITY & ORS

RESPONDENT

Date of Decision : 20-09-2017

Acts Referred:

[Constitution of India](#), [Article 226](#) -
Indian Medical Council of India Act, 1956, Section 33, Section 20

Citation : (2017) 09 DEL CK 0027

Hon'ble Judges : Indermeet Kaur

Bench : SINGLE BENCH

Advocate : Akhil Sibal, Shivendra Singh, Kahnavi Mitra, Aditi Phatak, Mukul Talwar, Anita Sahani, T. Singhdev, Puja Sarkar, Michelle Biakthansangi Das, Tarun Verma, Suresh Chandra Sati, Pradeep C

Final Decision : Disposed off

Judgement

1. There are six petitioners before this Court. They are post graduate students (batch 2014-17) pursuing MD (General Medicine) from Vardhman Mahavir Medical College in Safdarjung Hospital which is affiliated to respondent no.1 (Guru Gobind Singh Indraprastha University).

2. Petitioners had taken their final MD examination in the months of May and June, 2017. Grievance is that the practical examination was conducted in violation of the principles contained in the Regulation 14 read with Appendix II of the Post Graduate Medical Education Regulations, 2000 (hereinafter referred to as the said Regulations). The minimum number of examiners was required to be 4 out of which at least 2 (50%) would be external examiners; they would be invited from other recognized universities from outside the State. This mandate for the external examiners to be from recognized universities outside the State had not been followed and one of the aforementioned examiners was an examiner from the institute within the State of Delhi i.e. the Lady Harding Medical College. The mandate of this Regulation having been violated a prayer has been made

that the present petitioners be permitted to be re-examined for the clinical/practical and oral examination for the purposes of awarding of their Post Graduate Degree.

3. Counter affidavits have been filed by the respondents. Respondent no.1 submits that the petitioners are post graduate students of the Vardhman Medical College which is affiliated to respondent no.1. A total number of 227 students appeared in the final examination. The result of the said final examination was accordingly declared which was for both theory and practical. Regulation 14 of the said Regulations stipulates that there shall be 4 examiners and 50% of the 4 examiners (i.e. 2 examiners) shall be External Examiners from recognized university outside the State; has in no manner been violated. The usual procedure followed is that the examiners (from the approved list) who have to conduct the examination are contacted telephonically. After many telephonic conversations and efforts, 2 external examiners from other universities outside Delhi who had agreed to act as external examiners were appointed. The examiners who had given their consent were Professor Rajesh Rajput, PGIMS, Rohtak and Dr. P.K.Dandona, SGP University, Haryana. Dr. P.K.Dandona had however expressed his inability to act as an external examiner. Thereafter in spite of the efforts by the respondent University to get an external examiner from a university outside the State of Delhi not being fruitful Dr.Madhur Yadav from Lady Harding Medical College had been appointed as the second external examiner; Dr.Madhur Yadav had the necessary adequate academic qualification. This was not a flouting of the Regulations as there is an adequate power with the University which permits the University to exercise its discretion in such exigency.

4. In the course of arguments respondent no.1 had been directed to file an additional affidavit; this was vide order dated 08.8.2017 asking respondent no.1 to detail the efforts made by respondent no.1 to procure the service of an external examiner from any other recognized university outside the State of Delhi in lieu of Dr.P.K.Dandona. The details of this explanation are contained in said additional affidavit which has been highlighted by learned counsel for respondent no.1. The said stand of respondent no.1 reads herein as under: "I state that as a routine affair reasonable efforts are usually taken by the examination branch to appoint external examiners for all the courses. As and when the examination branch receives the regret from the initially appointed external examiners, by considering date of examination nature of course etc. In order to avoid further delay, the approved panel of examiners are contacted through telephone to find out their convenience to be the external examiners. In the present case as well, after receipt of the regret letter other empanelled external examiners were contacted on telephone, but all the experts contacted, showed their inability to perform the duty of external examiner on 5th to 7th June 2017. However, the examination branch does not maintain any documentation in this regard. A compiled detail of regrets received from the external examiners (PG Medical courses) is annexed hereto as Annexure R-A/1."

5. Submission being that after receiving the regret letter from Dr.P.K.Dandona, other external examiners were contacted but they had expressed their inability to act as an external examiner as a result of which Dr.Madhur Yadav was appointed as the external examiner. Annexure RA-1 filed along with the affidavit has been highlighted. It is pointed out that regret had been expressed on this count by 16 examiners and they were replaced by substitutes but qua three institutes (appearing at serial no.2, 15 and 16 of Annexure RA-1) no examiner could be found, as a result of which it necessitated respondent no.1 to appoint Dr.Madhur Yadav for the respondent college. The concern of the petitioners is evidenced at serial no.15 of the Annexure RA-1. As per this chart the earlier External Examiner Professor P.K.Dandona, Department of Medicine had expressed his regret on 14.3.2017 and in his place Dr.Madhur Yadav, Professor Lady Harding Medical College had been appointed on 29.5.2017 to conduct this examination. Learned counsel for respondent no.1 has highlighted Regulation 14 of the said Regulations (to be discussed later).

6. Respondent no.2 (Medical Council of India) has filed a separate counter affidavit. Initially it was by way of a short reply. The stand of respondent no.2 is that no regulation has been violated by respondent no.1; it has supported the stand of respondent no.1. It is pointed out that the said Regulations had in fact been amended in the year 2008 and by virtue of this amendment which was subsequently clarified in the meeting of the Post Graduate Medical Education Committee of the Council (dated 30.12.2016) this examination has to take place as a whole i.e. both the theory and the practical papers together and if the candidate does not appear in the theory he should be treated as absent and he would automatically fail as passing in both theory and practical held together is essential. The minutes of the meeting of the Post Graduate Medical Education Committee of the Council (dated 30.12.2016) had been reproduced in the counter affidavit of respondent no.2. They read herein as under: "The Postgraduate Medical Education Committee considered the matter and decided that as per Regulations, the candidate cannot appear for the examination in parts i.e. theory and practical separately in separate sessions. If the candidate does not appear in the theory, it is to be treated as absent & candidate will automatically fail because as per the Postgraduate Medical Education Regulations passing in theory and practical held together is essential. Candidates will have to appear again in both ? theory and practical together.

There is no provision in the Postgraduate Medical Education Regulation that the candidate can appear separately i.e. once in theory and next time in clinical paper examination."

7. Submission of learned counsels for respondents co-jointly being that besides the fact that Regulation 14 of the said Regulations has not been violated; that apart the prayer made in the petition seeking a re-conduct of the practical examination alone is not permissible as the examination has to be taken as a whole i.e. both the theory and practical paper.

8. In the course of arguments, learned counsel for the petitioners by laying emphasis on Clause (b) and Clause (c) of Regulation 14(1) points out that Clause (b) has clearly been violated. Attention has also been drawn to Appendix II and the guidelines for appointment of Examiners. Submission is that Regulation 14(1) (b) is a mandate and in no manner does it give discretion to the respondents to have an examiner from within the State and reliance by the respondents on sub clause (e) of Regulation 14 (1) along with Clause 2 of Appendix II is a misunderstanding of the legal position. Reliance has been placed upon the judgment of Madras High Court in M.Venkatesan Vs. Tamil Nadu Dr.M.G.R. Medical University Delivered on 25.11.2009 wherein also Regulation 14(2) was the subject matter of discussion; it is pointed out that where one of the external examiners was from within the State itself the Court had found it to be a flouting of the mandatory directions contained in Regulation 14; not being a procedural irregularity, the examination had stood cancelled. Learned counsel for the petitioners points out that that this Court has wide powers under Article 226 of the Constitution of India to mould a relief and if this Court is of the view that the Regulation has been flouted; it may not be necessary to cancel the entire examination but permission may be granted to the petitioners to have a re-examination for the practical/clinical and oral course. Reliance has been placed upon 2015 (6) ALD 546 Kanigalpula S.P.Manjeera and Ors. Vs. Dr.N.T.R.University of Health Sciences and Ors. a judgment of the Andhra Pradesh High Court to substantiate this submission. Submission being that where the Court had drawn a conclusion that the said Regulations had been flouted a re-examination of the practical examination alone had been permitted. Such a permission can be granted. Reliance has also been placed upon 2014 SCC OnLine Ker 21143 Ajith Kumar Vs. University of Kerala. It is pointed out that although this was a Ph.D.course but the proposition enunciated in the said judgment would also apply to the facts of the present case. Additionally reliance has also been placed upon a judgment of the Bench of the Himachal Pradesh High Court reported as ILR 1995 4 HP 2794 Dr.Meena Sharma Vs. H.P.University and Ors. Submission being that in this case also Regulation 14 was the subject matter of the discussion and where the Court had found that one of the two External Examiners was not actually external (within the meaning of Clause (b) of Regulation 14(1); conduct of a fresh oral and practical/clinical examination had been ordered. It is argued that in 2015 SCC OnLine Kar 3584 Vyshnavi A.Rao Vs.Rajiv Gandhi University a similar direction had been given which was only for a re-conduct of the practical/clinical and viva voce examination.

9. Per contra learned counsel for respondent no.1 points out that such a permission cannot be granted. The discretionary powers granted to the university are culled out from a reading of Regulation 14(1)(e) along the Appendix II and the use of the word "ordinarily" as appearing in Clause (2) of the Appendix II clearly explains that where the University after all efforts has not been able to procure the presence of an external examiner from outside the State, this being the "ordinary" rule, in the alternate respondent no.1 could procure the presence

of external examiner from within State itself. Learned counsel for respondent no.1 has placed reliance upon the definition of the word "ordinarily" as has been discussed by the Apex Court in AIR 1961 SC 1346 Kailash Chandra Vs.Union of India. It is pointed out that "ordinarily" does not mean regularly but usually and normally. For the same proposition reliance has also been placed upon a judgment of the Division Bench of the Kerala High Court reported as 1977 LawSuit (Ker) 77 and a judgment of the Division Bench of the Orissa High Court reported as AIR 1987 Ori 215; submission being that the word "ordinarily" as used in Appendix II read with Clause (2) of Regulation 14(1) making the appendix a part of the said Regulations carves out an exception which in the nature of a proviso in favour of the respondent University.

10. These arguments of respondent no.1 have been adopted by respondent no.2. Learned counsel for respondent no.2 additionally points out that the relief sought for by the petitioners cannot be granted as in all subsequent judgments i.e. after the minutes of the meeting of the Post Graduate Medical Education Committee of the Council (30.12.2016) a clarification has been made explaining that both the theory and the practical/clinical examinations have essentially to be conducted together and the result of the examinations has to be declared as a whole. Submission being that after this explanation had been given by the Committee on 30.12.2016 the subsequent judgments of the Benches all over the country have supported this explanation and held that even presuming that there is a violation of the Regulations, the entire examination has to be cancelled. The prayer made by the petitioners seeking a re-examination of the practical/clinical and the oral examination by itself is not permissible. Reliance has been placed upon a judgment of Punjab and Haryana High Court in CWP No.8366/2016 (O&M) Ravinder Kaur Vs. Medical Council of India and Ors. delivered on 04.7.2016. Submission being that the Court had drawn a conclusion that the said regulations provided that the examination has to be passed as a whole; a candidate had to obtain 50% marks in theory paper and 50% in practical/clinical examination separately and one cannot be segregated from the other. For the same proposition reliance has also been placed upon a judgment of the Bench of Kerala High Court in WP(C) No.27404/2016 Dr.Rajeev K.S. and ors. Vs. Kerala University of Health Sciences delivered on 17.10.2016 wherein the guidelines of the minutes of the Committee of the Medical Council of India dated 30.12.2016 had been considered and it was held that in the light of this clarification of respondent no.2, the theory and practical paper could not be segregated.

11. Arguments have been heard. Record has been perused.

12. What has to be first and foremost interpreted by this Court is the relevant Regulation of the Post Graduate Medical Education Council Regulations, 2000. These Regulations are dated 22.8.2000. These Regulations have been made by the Medical Council of India in exercise of the powers conferred upon it by Section 33 read with Section 20 of the Indian Medical Council of India Act, 1956. This is with the previous sanction of the Central Government. Regulation 14 is

relevant for the purposes of this petition. It reads herein as under: "14. EXAMINATIONS

The examinations shall be organised on the basis of grading or making system to evaluate and certify candidates level of knowledge, skill and competence at the end of the training and obtaining a minimum of 50% marks in theory as well as practical separately shall be mandatory for passing the whole examination. The examination for M.S., M.D, M.Ch shall be held at the end of 3 academic years (six academic terms) and for diploma at the end of 2 academic years (four academic terms). The academic terms shall mean six months training period.

The above clause 14 is substituted in terms of Gazette Notification published on 20.10.2008 and the same is as under:-

"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.

(1) EXAMINERS

(a) All the Post Graduate Examiners shall be recognised Post Graduate Teachers holding recognised Post Graduate qualifications in the subject concerned.

(b) For all Post Graduate Examinations, the minimum number of Examiners shall be four, out of which at least 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.

(c) Under exceptional circumstances, examinations may be held with (three) examiners provided two of them are external and Medical Council of India is intimated the jurisdiction of such action prior to publication of result for approval. Under no circumstances, result shall be published in such cases without the approval of Medical Council of India.

(d) In the event of there being more than one centre in one city, the external examiners at all the centres in that city shall be the same. Where there is more than one centre of examination, the University shall appoint a Supervisor to coordinate the examination on its behalf.

The above clause 14.1(d) is deleted in terms of Gazette Notification published on 20.10.2008.

(e) The examining authorities may follow the guidelines regarding appointment of examiners given in Appendix-I."

13. The unamended clause as also the amended clause (amended on

20.10.2008) have been reproduced.

14. Admittedly, it is the amended Regulation 14 which is now applicable. This Clause provides that the examination shall be organized on the basis of grading or marking system to evaluate and certify candidates level of knowledge, skill and competence at the end of the training and obtaining a minimum of 50% marks in theory as also in the practical separately are mandatory for passing this examination as a whole. Clause (b) of Regulation 14(1) specifically provides for all Post Graduate Examiners (like the present one). Minimum number of examiners shall be 4; 2 of the 4 examiners (50%) shall be external examiners. They shall be invited from a recognized university outside the State. 2 internal examiners may be appointed; one for M.D./M.S. and another for Diploma. Clause (c) contains exceptional circumstances which which examinations may be held with 3 (three) examiners but 2 of the 3 examiners must still be external; the justification of adopting this action shall be given to the Medical Council of India and only then would the result be declared. Sub clause (e) of Regulation 14(1) states that the Examining Atuhrotiy may follow the guidelines regarding appointment of examiners given in Appendix II.

15. Appendix II is Post Graduate Examination Guidelines on appointment of Post Graduate Examiners. Clause 1 of Appendix II had been amended on 20.10.2008 and lays down the qualifications of these examiners as under: "The above clause 1 is substituted in terms of Gazette Notification dated 20.10.2008 and the same is as under:-

"No person shall be appointed as an internal examiner in any subject unless he/she has three years experience as recognized PG teacher in the concerned subject. For external examiners, he/she should have minimum six years of experience as recognized PG teacher in the concerned subject.""

16. As per this criteria the internal examiner must have experience of 3 years as a recognized Post Graduate teacher in the concerned subject. For the external examiner, he must have 6 years experience as a recognized Post Graduate teacher in the concerned subject. Sub clause (2) of Appendix II is relevant; it reads as under:

"There shall be at least four examiners in each subject at an examination out of which at least 50% (Fifty percent) shall be external examiners. The external examiner who fulfils the condition laid down in clause-1 above shall ordinarily be invited from another recognised university, f.rom outside the State: provided that in exceptional circumstances examinations may be held with 3 (three) examiners if two of them are external and Medical Council of India is intimated with the justification of such examination and the result shall be published in such a case with the approval or Medical Council of India."

17. As per Sub clause (2), there shall be 4 examiners for examination of each subject. 2 examiners must be external, the external examiners must have a qualification as laid down in Clause (1) (supra). They shall ordinarily be invited

from another recognized university outside the State. In exceptional circumstances examinations may be held with 3 examiners of whom 2 must be external and MCI has to be intimated with the justification of this examination and the result shall be published only after the approval of the MCI.

18. It is a co-joint reading of these clauses read with the Appendix which has to decide the case one way or the other. Based on this interpretation this Court will decide whether these Regulations have been flouted in the instant case or not.

19. In Clause (b) of Regulation 14(1) the word "shall" has been emphasized at two points; in the post graduate Examination, out of 4 examiners 2 shall be external examiners. The second mandate is that the said External Examiners shall be invited from another recognized university outside the State. The use of the word "may" in Clause (b) is again relevant in view of the criteria laid down for the internal examiners. Clause (b) states that the internal examiners "may be appointed one for M.D./M.S. and one for diploma". The use of word "may" for the purposes of internal examiners and the use of word "shall" as the criteria for the external examiners makes out a clear distinction qua their categorization. In the same context Clause (c) is also relevant. Clause (c) provides that in an exceptional circumstance the examination may be held with 3 examiners but nevertheless 2 out of 3 must be external. The relaxation on the external examiners is not made even in Clause (c). The third examiner may alone be an internal examiner. Clause (e) gives a discretion to the examining authority to follow the guidelines regarding the appointment of examiners. The use of word "may" in Clause (e) indicates the intent of the Regulation making Authority i.e. a discretion of the examining authority to may or may not follow the Guidelines contained in the said appendix.

20. The Guidelines are contained in Appendix II. The examination of Clause (2) of the Appendix II shows that out of 4 examiners, 2 examiners (50%) shall be external examiners; they have to fulfill the qualification contained in Clause (1) which is qua their academic qualifications and experience. This is not in dispute in the instant case. The use of the word "ordinarily" carving out an exception giving a discretion to the respondent University to invite an external examiner who although is regularly from outside the State but in exceptional circumstances from within the State itself is not quite correct. This is the interpretation which respondent no.1 seeks to give to the word "ordinarily" as appearing in Sub Clause (2) of Appendix II. The latter part of Clause (2) speaks of the exceptional circumstances where the examination can be conducted with 3 examiners again of whom 2 of the said examiners have to be member of the external examiners; there is no relaxation on the external examiners.

21. Clause (2) of the Appendix II is a Guideline. The examining authority may or may not follow this Guideline. Regulation 14 (1)(b) being the substantive provision mandates that out of 4 examiners, 2 examiners have to be external examiners; the mandate again being that the 2 external examiners necessarily have to be invited from another recognized university from outside the State. A

relaxation can only be given for the internal examiners; the internal examiners may be appointed, one for M.D./M.S. and one for diploma. Sub clause (c) of Regulation 14(1) permits an examination with 3 examiners which again mandates 2 of the said examiners to be external.

22. Thus harmonious reading of Clause (b) of Regulation 14(1) read with Clause (2) of Appendix II maintains the mandatory requirement of the 2 examiners being from a recognized university from outside the State. Attempts to reconcile the said provisions lead only to one single interpretation which is that the word "ordinarily" does not relax the condition of the external examiners who mandatorily have to be from outside the State.

23. This interpretation is also favoured keeping in view the object of the Regulations. The nature of the present course; i.e. a post graduate/superspeciality medical course is of high academic standard where a total transparency in the selection process of such a student has to be strictly followed. The evaluation by an objective methodology of the papers for such high standards of excellence to be maintained is the objective.

24. This Court is thus of the view that by appointing Dr.Madhur Yadav (admittedly an examiner from Lady Harding Medical College within the State of Delhi) Regulation 14 of the said Regulations has been flouted. This not being a mere procedural irregularity but it goes to the root of the matter.

25. On the second aspect of the matter i.e. the efforts made by respondent no.1 to seek substitution of Dr.P.K.Dandona, this Court had directed respondent no.1 to file an additional affidavit. The stand of respondent no.1 on this count is already reproduced (supra). The contention of respondent no.1 is that efforts were made telephonically to contact another external examiner in place of Professor P.K.Dandona but not having found a substitute it was necessary to appoint Dr.Madhur Yadav on 29.5.2017. There is no document filed on record by respondent no.1 to substantiate this statement. Annexure RA-1 has been filed alongwith additional affidavit. This gives a list of 16 institutes which as per respondent no.1, faced such a problem. Record shows that out of 16 institutes all of them got replacements for external examiners except those listed at serial nos.2,15 and 16. The case of institutes at serial nos.2,15 and 16 was accordingly put on a different pedestal. The case of the petitioners is at serial no.15. In the case of institute appearing at serial no.2 and 16 the regret of the said examiners has been expressed in the month of May, 2016. Examination of respondent no.1 was conducted on 05.6.2017. At such a short notice an external examiner could not have been appointed; this submission of respondent no.1 on this score may have force. The case of the petitioners is different. In their case the external examiner has expressed his inability to conduct the examination on 14.3.2017 which was almost three months away from the date of the examination which was scheduled for 05.6.2017. Effort made by respondent no.1 on this count to get another external examiner in terms of Regulation 14 appears not to be a genuine effort. The argument of learned counsel for the petitioners that no effort

had in fact been made by respondent no.1 on this count has strength. On this count also respondent no.1 had no justification.

26. This Court thus draws a conclusion that the Regulation 14 of the said Regulations has been flouted. This not being a procedural irregularity and going to the root of the matter what has now to be considered by this Court is as to whether the entire examination (i) i.e. both the theory and the practical examination has to be cancelled; (ii) whether it has to be qua the entire batch of students who had appeared in the said examination or to be restricted to the present petitioners; (iii) whether there can be a segregation of the theory and practical examination; and the theory paper remaining intact the practical paper can alone be evaluated.

27. On this score learned counsel for respondent points out that the amendments of 20.12.2008 in Regulation 14 and the use of the word "whole" which has now been substituted differently reflects the intent of the rule making Authority. The examination cannot be segregated (i.e. the theory and the practical) as the students have to pass the examination as a whole to qualify for the M.D. course. Learned counsel for respondents additionally points out that if the Court is of the view that the Regulation has been flouted and the external examiner who had conducted practical examination was not as per the Regulation, it would equally apply for the theory paper as well; if he was not competent to adjudge the practical examination the same examiner would not be competent to adjudge the theory paper also and the entire examination has to be cancelled and the whole re-examination has to be taken by the petitioners.

28. Learned counsels for the parties, both concur and agree that the status of the other candidates who have already qualified in this course should not be disturbed. This Court maintains that status quo.

29. This Court also notes and endorses the argument of the respondents which is to the effect that if the Regulation is found to be flouted and Dr.Madhur Yadav was not an external examiner within the meaning of Regulation 14 for the purposes of the practical examination; he could not qualify as an external examiner for the purposes of the theory paper as well.

30. On this count this Court approves the suggestion given by learned senior counsel for the petitioners which is that if the re-examination of the practical/clinical and oral course is ordered and a fresh set of examiners is appointed in terms of Regulation 14; for the purposes of the theory paper the answer sheets already submitted by the aforementioned six petitioners be reevaluated by the same set of examiners. Submission being that the M.D. course/superspeciality course is an intense course for which a deep-rooted and intense study has to be done by the students which may not be feasible again as all the petitioners are working doctors. Submission being that the theory papers already answered by the petitioners may be re-evaluated along with the permission to appear afresh in the practical/clinical and oral examination. This Court approves this suggestion.

31. Accordingly, this Court in its discretion directs respondent no.1 along with respondent no.3 to conduct a fresh examination in the practical/clinical and oral course for the aforementioned six petitioners. For the theory paper already answered by the petitioners, re-evaluation (by the same set of examiners who will conduct the practical/clinical and oral examination) will be carried out. This will answer the objection of the respondent that the examination has to be conducted as a whole i.e. theory and the practical together (in conformity with the clarification in terms of the minutes of the meeting dated 30.12.2016 of the MCI). The said examination of the petitioners be conducted within an outer limit of three months from today. Necessary examiners (both external and internal) shall be appointed as per the statutory regulations and this exercise shall be completed by the respondent university in consultation and in conformity with respondent no.3. The result will also be announced within that period.

32. Petition allowed and disposed of in the above terms.