
(2014) 02 KL CK 0044

In the High Court Of Kerala

Case No : Writ Appeal Nos. 3, 5 and 9 of 2014

Ashar

APPELLANT

Vs

Kerala University of Health Sciences

RESPONDENT

Date of Decision : 19-02-2014

Acts Referred:

Kerala University of Fisheries and Ocean Studies Act, 2010 — Section 12, 12(7), 12(8), 23, 25

Citation : (2014) 1 KLT 969

Hon'ble Judges : K.M. Joseph, J;A.K. Jayasankaran Nambiar, J

Bench : Division Bench

Advocate : Kurien George Kannanthanam, Sr. Advocate, George Poonthottam, Tony George Kannanthanam, Thomas George, Jiji Thomas, Abdul Raoof Pallipath, K.R. Avinash (Kunnath) and Gracy Poulose, Advocate for the Appellant; P. Sreekumar and Titus Mani Vettom, Advocate for the Respondent

Judgement

K.M. Joseph, J.—Being connected, the appeals are disposed of by a common judgment. The appellants are the writ petitioners. They joined the M.B.B.S. Course in 2012 in colleges affiliated to the 1st respondent University. They had to undergo study in Anatomy, Physiology and Bio-Chemistry. The first professional examination was held in the aforesaid subjects. The Medical Council of India has prescribed conditions for a pass in M.B.B.S. Examinations, relevant pages of which had been produced as Ext. P1 Regulations in W.P.(C) No. 28528/2013 (W.A. No. 3/2014). As per Ext. P1, for qualifying in the First Professional Examinations, a candidate must obtain 50% in aggregate with a minimum of 50% in theory, which includes orals, and minimum of 50% in practicals. The total marks prescribed is 200. Out of 200 marks, 40 marks are allotted to internal assessment. The internal assessment in turn consists of theory and practical and for the same 20 marks is set apart for each. In each of the three subjects, a candidate has to take the examination in two theory papers of 50 marks each. Besides, 20 marks are set apart for viva voce and 40 marks are set apart for practical. The resultant position under the Regulations framed by the Medical

Council of India is that out of 200 marks, a student must obtain minimum of 50% in theory, which includes viva voce and 50% in practical.

2. The appellant would appear to contend that in the examination they have secured marks which, in terms of the Regulations framed by the Medical Council of India, are sufficient to declare them as passed. The 1st respondent University through its Vice Chancellor invoking the power under S. 12(7) of the Kerala University of Health Sciences Act, 2010, hereinafter referred to as "the Act", under which the 1st respondent University is created, stipulated for an additional requirement that the student must obtain 50% marks in theory as a separate minimum. In other words, apart from obtaining 50% marks in theory and viva voce together, the student must also obtain separate minimum in theory alone. The appellants who have not obtained separate minimum in theory were declared as failed. It is in such circumstances, the Writ Petitions were filed challenging the prescription of separate minimum in theory and seeking other reliefs. The learned Single Judge dismissed the Writ Petitions. Being aggrieved, the Writ Appeals are filed.

3. In the appeals we heard Shri Kurian George Kannanthanam, learned senior counsel for the appellants in W.A. No. 3/2014, Shri K.R. Avinash, learned counsel for the appellants in W.A. No. 5/2014, and Shri George Poonthottam, learned counsel appearing for the appellants in W.A. No. 9/2014. We also heard Shri P. Sreekumar, learned counsel for the University and Shri Titus Mani, learned counsel for Medical Council of India.

4. It is contended by Adv. Shri Kurian George Kannanthanam that there is no power to make the impugned Regulations in exercise of the powers under S. 12(7) of the Act. He would point out that by Annexure-R1A dated 3-6-2011 the Vice Chancellor had in alleged exercise of power under S. 12(7) of the Act proceeded to "approve" Regulations made by the Board of Studies.

5. The Academic Council, the statutory body, which can make Regulations, approved the Regulations. The same was placed before the Governing Council and the Council approved the same in March, 2012. Under S. 44 of the Act, the Academic Council may make Regulations and place them before the Governing Council for approval. It will be open to the Governing Council to modify or to approve the Regulations as framed by the Academic Council. The Governing Body approved the Regulations as approved by the Academic Council. This effectively means that the competent body, the Academic Council, approved the Regulations which were in tune with the Regulations of the Medical Council of India and the Governing Body also approved the same. Nothing prevented the Governing Council from modifying the Regulations and provide that for the year 2012-2013 there will be a separate minimum for theory papers alone. It is pointed out that in a meeting of the Governing Council held in November, 2011, the Director of Medical Education, who is the member of the Governing Council would appear to have pointed out the need for separate minimum for theory papers. The Governing Council agreed. Thereafter, the Board of Studies would appear to have

considered the said issue. The Faculty of Medicine also approved the Regulations providing for separate minimum in theory papers and even though the Governing Council had in March 2012 approved the Regulations which had passed through the hands of the Academic Council and it was in tune with the Regulations framed by the Academic Council of India; in July 2012 the Vice Chancellor purported to invoke S. 12(7) of the Act and approved the Regulations providing that for the year 2012-2013 a student must obtain separate minimum in theory alone. This is impermissible, it is contended.

6. It is submitted that even assuming there is power under S. 12(7) of the Act, the decision must be taken by the Vice Chancellor and not by the Board of Studies. It is submitted that a perusal of Annexure-RID would show the Board of Studies had framed the Regulations. It is contended that there is no power for the Board of Studies under S. 29 of the Act to frame Regulations. S. 12 of the Act only gives power to the Vice Chancellor who has to exercise power by himself and not approve a decision which was taken by another body, which had no power also. It is also contended that a perusal of S. 12(7) of the Act would show the power of the Vice Chancellor is to do something which can be done by any of the bodies under the Act only.

7. It is contended that power to make Regulations is lodged with the Academic Council. It is pointed out that under S. 25 of the Act, among other things, the Academic Council is empowered to frame Regulations. It is submitted that therefore the Academic Council can make Regulations. It can provide for conditions subject to which student may be admitted to an examination. The said power does not include the authority to approve the action of the Board of Studies. Therefore, when there is no power with the Academic Council to do something, then equally the Vice Chancellor cannot exercise power under S. 12(7) of the Act in the said matter.

8. Learned Senior Council would submit that there is repugnancy between the Regulations framed by the Medical Council and the University. While, it may be open to the University to frame Regulations providing for a higher standard, the impugned provision cannot amount to a provision for a higher standard.

9. Shri George Poonthottam, learned counsel appearing for the appellant in W.A. No. 9/2014, would submit that under S. 46 of the Act all statutes, ordinances and Regulations must be published in the Gazette. Ext. P2, in so far the Regulations are impugned was not so published. Our attention is drawn to the judgment of the Apex Court reported in *Rajendra Agricultural University Vs. Ashok Kumar Prasad and Others*, .

10. It is contended that there is no power under S. 12(7) of the Act to exercise any legislative power. S. 12(8) of the Act deals with power of the Vice Chancellor to exercise legislative power. Therefore under S. 12(7) of the Act the power of the Vice Chancellor is limited to exercise administrative power in case of a clear emergency. It is also contended that there is clear difference between the

Regulations of the Medical Council of India and the Regulations made by the Vice Chancellor. He would draw our attention to the Regulations of the Medical Council of India and point out that the Medical Council of India is the Supreme body and Experts in the field and they provided for the requisite standard on a national basis. He would further submit that Regulations provide for what is to be tested in an interview and practicals. After meticulously considering all matters the Council provided that a student must obtain minimum of 50% marks in the theory papers which is to include the marks in the viva voce also.

11. It is submitted that it will be open to the State or the University to prescribe a higher standard. Regulations made by the University are clearly inconsistent with the Regulations made by the Medical Council of India and therefore Regulations made by the Medical Council of India will prevail.

12. The learned counsel for the University submits as follows:-

From 2009 all the colleges in Kerala imparting medical education among other colleges are required to be affiliated to the 1st respondent University. Though the Act came into force in 2009, the First Statutes were framed only in the year 2013. Under S. 44 of the Act, the Academic Council may make Regulations. But in view of the requirement of S. 44, the absence of First Statutes completely disabled the Academic Council from making the Regulations. It is pointed out that the Universities in Kerala to which colleges imparting medical education were affiliated prior to the formation of the 1st respondent University also provided for a separate minimum in theory papers without taking into consideration the marks obtained in the viva voce also. Regulations were framed in 2010-11 which continued for the year 2011-12. They were made in tune with the Regulations of the Medical Council of India. The vital aspect that for maintaining a proper standard of medical education a separate minimum in theory alone was required and was in fact insisted upon by the Universities in Kerala itself and the MGR University in Tamil Nadu was overlooked when the Regulations were made for 2010-11. The Director of Medical Education brought out this grave anomaly in the meeting of the Governing Council in November, 2011. The Board of Studies and Faculty of Medicine also found that it is imperative to maintain standards of medical education that a student must not only obtain 50% aggregate in theory and viva voce together but they should also obtain separate minimum in theory. The Vice Chancellor acted upon the same. There was a clear emergency as unless and until the act was urgently done in view of the paucity of time, a grave error which was committed in relation to 2010-11 and 2011-2012 would have been repeated. It is submitted that marks obtained in theory papers and viva voce are aggregated for determining the minimum under the Regulations. A student may not have knowledge of fundamentals of the subject, he may get higher marks in the viva voce and on the basis of the same, even though he will be lacking in fundamental knowledge, he would actually be declared as passed. If there is Regulation providing for a separate minimum in theory itself, besides of course 50% aggregate in theory

and viva voce, the result would be the student must display his knowledge in the fundamentals of subject. At the same time, he must also satisfy minimum requirement prescribed by the Medical Council of India. It is in these circumstances that action is taken. As far as the action taken in Annexure-R1A is concerned, it is approved by the Academic Council and also by the Governing Body. It is contended that it related to year 2010-2011. It is submitted that it cannot stand in the way of the Vice Chancellor taking the decision. There is power under S. 12(7) of the Act. No doubt there is power under S. 12(8) of the Act also. It is contended that may be the Board of Studies may not have power to frame Regulations as such, nothing prevents the Vice Chancellor acting on the basis of the materials supplied by another body.

13. Shri George Poonthottam submits that the principle of fixing higher standard was propounded by the Supreme Court in cases relating to admissions.

14. Learned counsel for the University submits that there is power under S. 12(8) of the Act for the Vice Chancellor to regulate in a situation where there are no Regulations inter alia. According to him, exercise of such power is to be followed by course of action which is indicated therein. It is further contended that there is no question of any repugnancy. It is also further contended that court may take into consideration the fact that Regulations came into force from July, 2012 and the writ petitions were filed only in 2013.

15. There are two questions, which pointedly arise for our decision. They are as follows:

1) Whether the prescription of a separate minimum in theory which has been done by the Vice Chancellor purporting to exercise power under S. 12(7) of the Act is authorized?

2) If the said decision is so authorized, whether prescription is repugnant to the Regulations enacted by the Medical Council of India?

16. If we take the second issue first, we are of the view that there is no repugnancy. There is no dispute that in view of the law laid down by the Apex Court, the State or the University is entitled to prescribe higher standard. (See Dr Preeti Srivastava and Another Vs. State of M.P. and Others, , and Visveswaraya Technological University and Another Vs. Krishnendu Halder and Others,).

17. We must notice in this regard that as contended by the learned counsel for the Medical Council of India the standard fixed by the Medical Council purports to be the minimum standard. Therefore, nothing prevents the University from prescribing higher standards. The question of fixing higher standard may have arisen in the context of cases which related to admission of students. We are of the clear view that the principle of the decision is the presence of power of the State or University traceable to Entry 25 of the List III of the Seventh Schedule. Therefore, the prescription of higher standard cannot be limited to the stage of

admission. Once power of prescribing higher standard is ceded to the State or University, the higher standard can be prescribed even at the stage of examinations and in relation to the same. Further question is whether the impugned prescription of minimum marks in theory papers is repugnant to the Regulations of the Medical Council for the reason that it will not amount to prescribing a higher standard. Instead of raising standard from 50% to a higher percentage the University has proceeded to lay down different parameters and in doing so it violates the standard fixed by the Medical Council, runs the argument. We are unimpressed by the said argument. Even prior to the prescription of separate minimum by the impugned decision, the Universities in State of Kerala were apparently prescribing separate minimum for theory. A University in Tamil Nadu was also prescribing higher standard by a separate minimum (MGR University), it is submitted. The Director of Medical Education noticed that marks obtained by the students in the viva voce were being utilized for getting 50% in theory and viva voce together. In other words, the drawback in the prescription of minimum standards by the Medical Council of India was it provided for 50% in theory and viva voce together. 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. Thus, we reject the argument in this regard.

18. The next question which arises for consideration is whether the Vice Chancellor acted within his powers. In this regard it is necessary to refer and extract the following provisions of the Act:-

"Section 12(7). If there are reasonable grounds for the Vice Chancellor to believe that there is an emergency which requires immediate action to be taken, he shall, take such action as he thinks necessary, and shall at the earliest opportunity, report in writing, the grounds for the emergency and the action taken by him to such authority or body which, in the ordinary course, would have dealt with the matter. In the event of a difference arising between the Vice Chancellor and the authority, on the issue of existence of such an emergency, or on the action taken or on both, the matter shall be referred to the Chancellor whose decision shall be final:

Provided that where any such action taken by the Vice Chancellor affects any person in the service of the University, such person shall be entitled to prefer, within thirty days from the date of receipt of the notice of such action, an appeal to the Chancellor.

Section 12(8). Where any matter is required to be regulated by Statutes or Regulations but no Statutes or Regulations have been made in that behalf, the Vice Chancellor may, for the time being, regulate the matter by issuing such directions as the Vice Chancellor thinks necessary, and shall at the earliest opportunity thereafter, place them before the Governing Council or other authority or body concerned for approval. The Vice-Chancellor may, at the same time place before such authority or body for consideration the draft of Statutes or Regulations required to be made in that behalf.

Section 25 inter alia provides as follows:

Powers and duties of the Academic Council.--(1) The powers and duties of the Academic Council shall be,--

(i) to advise the Governing Council on all academic matters;

(ii) to make regulations;

XXX XXX XXX

(vi) to prescribe the qualifications for admission of students to the various courses of studies and to the examinations;

(vii) to make provisions for the admission of students to various courses of studies on the basis of merit and in order to maintain the standards of education;

XXX XXX XXX

(xxiii) to advise the University generally on all academic matters and submit to the Governing Council feasibility reports on academic programmes recommended by the Senate at its last annual meeting;

Section 29. Powers and functions of the Board of Studies.--(1) The Board of Studies shall have the following powers and functions, namely:

(a) to recommend, upon reference to it by the Governing Council, Academic Council or the Faculty concerned or otherwise, the courses of studies, the subject or group of subjects within its purview;

(b) to recommend books, including text-books, supplementary reading and reference books and other material for such courses of study;

(c) to advise the Faculty or Faculties concerned regarding improvements in the courses of study;

(d) to recommend names of suitable persons to the Board of Examinations for inclusion in the panels for appointment of paper-setters and Examiners at the University examinations in the subject;

(e) to recommend to the Board of Examinations, names of persons suitable for appointment as examiners or evaluators for evaluation of thesis and dissertations and for conduct of viva voce examinations, wherever prescribed, for awarding

post-graduate doctorate and higher degrees;

(f) to suggest organisation of orientation and refresher courses in the subject;

(g) to prepare requirements in respect of teaching of the subject at various levels in respect of teachers and their qualifications, library, laboratory and hospital equipment and consumables for use in the laboratory and to recommend the same to the Planning Committee for formulating the norms and requirements for granting affiliation to colleges and for granting recognition to institutions by the University.

Section 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;

(ii) the admission of students to the various courses of study and to the examinations;

(iii) the qualifications of teachers;

(iv) the appointment and prescription of duties of the Boards of Studies and examiners;

(v) recognition of examinations, degrees and diplomas of the Universities as equivalent to the examinations, degrees and diplomas of the University; and

(vi) all other matters which under the provisions of this Act, the Statutes and the Ordinances are to be, or may be, prescribed by the Regulations.

(2) All regulations made under this Act shall have effect from such date as the Academic Council may direct, but every Regulation so made shall be laid before the Governing Council during its next succeeding meeting.

Section 46, Publication in the Gazette.--All Statutes, Ordinances and Regulations made under this Act shall be published by the University in the Gazette.

19. The power to make Regulations is clearly vested with the Academic Council. However, the First Statutes were not made till the year 2013. This means that in July, 2012 when the Vice Chancellor took the impugned decision, the Academic Council could not have made the Regulations, in view of the requirement, not only that the Regulations are to be made subject to any Statutes but more importantly they are to be made in the manner prescribed by the Statutes. We are not oblivious of the principle enunciated in the decision of the Supreme Court in the Mysore State Road Transport Corporation Vs. Gopinath Gundachar Char, , which was followed in V. Balasubramaniam and Others Vs. Tamil Nadu Housing Board and Others, , to the effect that the power available must be ascertained on a consideration of the provisions. Had it been the mere requirement that Regulations are to be made subject to the Statutes, perhaps the Academic

Council could have made the Regulations on the strength of the principles enunciated therein even without Statutes. In S. 44 of the Act, however, the Academic Council was obliged to make Regulations in the manner prescribed by the First Statutes. This means that the Academic Council could not have made the Regulations without the Statutes. At any rate, in such circumstances, if the Vice Chancellor thought that there is urgent action required, he could not be faulted, if the action is otherwise authorized. Thus, we come to the conclusion that it was a case where if it is conceded that the matter is to be governed by the Regulations, the body which could lawfully make the Regulations was disabled from doing so.

20. Next question which would have to be considered is whether there was an emergency under S. 12(7) of the Act. We have noted the contentions of the appellants. It is contended that the Vice Chancellor had made the Regulations by Annexure-R1A in June, 2011. The Academic Council by Annexure-R1B decided to approve the Regulations. The contention runs that the Academic Council has also decided not to provide for a separate minimum in theory. The decision of the Academic Council was taken up by the Governing Council in March, 2012 and the Governing Council approved the Regulations. Neither the Academic Council nor the Governing Council thought it fit to incorporate a condition to provide for a separate minimum for theory alone. It is contended that the Regulation is made so as to hold good till it is amended or modified, which is in answer to the contention of the learned counsel for the University that what was considered by the Academic Council was the Regulations for the year 2010-2011.

21. Shri Kurian George Kannanthanam poses the question that, if that be so, how it is the same Regulations held good for 2011-"12 also. Therefore, it is contended that the Regulations made were to hold good, unless it is modified at the hands of the Governing Council. The Governing Council did not think it fit to modify the Regulations when it came before it in March, 2012. At least the Governing Council could have modified it and provided that from 2012-"13 onwards there must be a separate minimum for theory, as was done by the Vice Chancellor runs the argument. Thus, when the competent body under the Act did not think it fit to incorporate the impugned condition and what is more the Academic Council specifically ruled out incorporating a separate minimum, it is inconceivable as to how Vice Chancellor could have acted in the manner he did. Per contra, the contention of the University is that there was an emergency, which arises from the realization of the mistake that was committed in not imposing the separate minimum which in fact was being enforced by the Universities in Kerala earlier, prior to the coming into force of the respondent University. It was imperatively required to maintain proper standards in medical education. This mistake was pointed out by the Director of Medical Education in the meeting of the Governing Council held in November, 2011 and the Council approved it. It gained momentum when it received consideration at the hands of Board of Studies. The Board of Studies "framed" or rather made the proposal. It was recommended by the Faculty of Medicine, which means the opinion of the

teachers of medicine who best know what is required to maintain sufficiently high standards in the field of medical education concerned. It is when this situation arises and the matter came up on 24.7.2012 and classes were to commence on 1.8.2012 for the year 2012-"13 the Vice Chancellor had no option but to act on an emergent basis. He would also contend that what is considered by the Academic Council was approval of the so-called Regulations made by the Vice Chancellor not only in respect of M.B.B.S. Course but in various other courses. It was approved by the Academic Council. He would also point out that actually it related to year 2010-11. He would also point out that when the matter reached the Governing Council in March, 2012 the first year of 2010-11 and 2011-"12 had already commenced and ended. That is to say the First year of the M.B.B.S. Course commencing from 2010-11 and 2011-"12 would have ended.

22. Governing Council could not have possibly incorporated a condition for providing for minimum marks for theory alone for the 2010-11 and 2011-"12 batches. In view of the passage of time, but as far as 2012-"13 onwards it was a different situation, it is pointed out. Governing Council may not have imposed the restriction, but that is not sufficient to deprive the Vice Chancellor to exercise the extra-ordinary powers under S. 12(7) of the Act.

23. We are of the view that there is merit in the contention of the learned counsel for the University. In fact Adv. Shri Kurian George Kannanthanam does not for a moment have a case that the Vice Chancellor's perception of the emergency is questioned. Of course, he has the argument based on Governing Council approving Annexure-R1B decision of the Academic Council in March, 2012 which we have detailed above. We have noted the facts. While it is true that the Vice Chancellor had made Annexure-R1A on 11-6-2011 which was in tune with the Regulations made by the Medical Council and did not provide for a separate minimum and it was approved by the Academic Council and finally by the Governing Council in March, 2012, it is inconceivable how separate minimum could have been fixed for the year 2010-11 and 2011-"12 in March, 2012 by the Governing Council. But when the Vice Chancellor was alerted by the decision of the Governing Council on the basis of the matter being brought up by the Director of Medical Education who was a member of the Governing Council and through the deliberations of the Board of Studies and the recommendation of the Faculty of Medicine, that urgent action was required for the year 2012-"13, we would sustain the perception and consequent decision by the Vice Chancellor that there were grounds for him to act in an emergency. We must also remind ourselves the nature of oversight we have under the limited jurisdiction of judicial review.

24. The next question we must consider is the argument of Adv. Shri George Poonthottam whether the "Regulations" as it is described in Ext. P2 must be rendered ineffective on account of the fact that it was not published in the Gazette, as provided in S. 46 of the Act. No doubt S. 46 provides that all Statutes, Ordinances and Regulations made under the Act must be published in

the Gazette. The contention of Shri P. Sreekumar is that in the first place the impugned "Regulations" are really not made under S. 44 of the Act by the Academic Council. According to him, those Regulations which are made under S. 44 of the Act must be published in the official Gazette. Further more he would contend that a perusal of sub-section (2) of S. 44 of the Act would show that the Regulations are to take effect from such date as is provided for by the Council. Thus the said provision means that even without publication in the Gazette, Regulations made under S. 44 will come into force from the date on which it is intended to come into force. Still further more he would point out, the fallacy of the contention that the action taken under S. 12(7) of the Act must be published in the Gazette is that the very purpose of conferring power on the Vice Chancellor to act in a situation where emergent action is required is that the action must have legal effect with a sense of urgency. The whole purpose will be defeated, as the publication in Gazette would necessarily take time. Per contra, Shri George Poonthottam submits that publication in the Gazette is unavoidable. It is necessary at this juncture to notice some of the other objections to the purported exercise of power under S. 12(7) of the Act. S. 12(8) of the Act deals with the power of the Vice Chancellor to act in a situation where there are no Regulations or Statutes. The Vice Chancellor is empowered to regulate the matter by issuing directions.

25. However, the Vice Chancellor under, the said provision shall, at the earliest opportunity, place "them" before the Governing Council or other authority or body concerned for approval. The Vice Chancellor may also at the same time place the matter before such authority or body for consideration of the draft of the Statutes or Regulations required to be made in that behalf.

26. According to the learned counsel for the University, the difficulty in not making Regulations under S. 12(8) of the Act is the perceived difficulty in complying with the conditions under S. 12(8) of the Act. He would also submit that S. 12(7) of the Act was specifically quoted as the power under which the impugned decision was taken. Regarding the provision under S. 12(7) of the Act, argument of Shri George Poonthottam is that it is the mandatory requirement of such section that the Vice Chancellor is bound to at the earliest opportunity, report in writing, the grounds for the emergency and the action to be taken by him to such authority or body which, in the ordinary course, would have dealt with the matter. It is submitted that this conclusion is inevitable as is evident from the subsequent provision namely, if there is difference of opinion between the Vice Chancellor and the authority relating to the emergency, or on the action taken or on both, the matter shall be referred to Chancellor whose decision is to be treated as final. Therefore, if there is noncompliance of requirement under S. 12(7) of the Act a report in writing of the grounds for the emergency and the action taken, it is fatal, it is contended.

27. We have already found that the fixation of minimum in theory paper is a matter which had to be done by framing Regulations. Regulations are to be

framed by the Academic Council. We notice that in July, 2012 when the Vice Chancellor took the impugned decision, there were no First Statutes. There were circumstances in which the Vice Chancellor could exercise power in the matter and the real controversy would arise as to whether the power is available under S. 12(7) of the Act or it is available under S. 12(8) of the Act.

28. Power under S. 12(8) of the Act is the power to issue directions and regulate the matter when there are no Statutes or Regulations. Therefore, the first question to be decided is as to whether when Annexure-R1B was made by the Vice Chancellor in 2012, there were Regulations. We must also pose another question whether the power has been exercised by the Vice Chancellor or whether the Board of Studies have "framed" the Regulations.

29. The power of the Board of Studies is enumerated in S. 29 of the Act, which we have already adverted to. Our attention is drawn by the learned counsel for the University to S. 29(1)(a) of the Act. According to him, the Board of Studies is to recommend the course of studies, subject or group of subjects within its purview. Therefore, it has also power to recommend marks to be secured for being declared passed. We are unable to see merit in the said contention. The power under S. 29(a) of the Act is only for recommending the course of studies and the subject or group of subjects within its purview. The criteria, on the basis of which the student could be declared to have passed in the course is not covered by the same. In this regard we had fortified by S. 25 of the Act which deals with the powers and duties of the Academic Council. They include the power to prescribe the qualifications for admission of students to the various courses of studies and to the examinations. We may also notice clause (vii) of S. 25 of the Act. Thus, we hold that there is no power as such to provide for a statutory minimum in theory papers under S. 29 of the Act.

30. However, the question is whether Annexure-R1D could be treated as flawed for the reason that the Vice Chancellor has approved the same. Undoubtedly, as repository of statutory power there can be no gain saying that the Vice Chancellor has to exercise his discretion. He must take a decision in the matter. However, he may receive light from other quarters in the form of inputs provided by any other authority. There can be nothing wrong if the Vice Chancellor acts upon a decision taken by any authority or body. There is no prohibition in S. 12(7) or 12(8) of the Act which precludes the Vice Chancellor from acting on the basis of inputs. What is important is that at the end of the day the decision is taken by the Vice Chancellor by applying his mind and acting as any other statutory authority is expected to act. By giving approval to the opinion/decision of the Board of Studies and Faculty of Medicine, he was imparting validity and legal efficacy by declaring that it is his decision. Therefore, we see no illegality committed by the Vice Chancellor in acting upon the decision of the so-called Regulations framed by the Board of Studies and as recommended by the Faculty of Medicine.

31. Another argument raised by Shri Kurian George Kannanthanam is that under

S. 12(7) of the Act, there is power with the Vice Chancellor to do only those things which could be done by other authorities. Since there is no power with the Board of Studies, as aforesaid, and Academic Council could not act on the basis of the decision of the Board of Studies, therefore, the Vice Chancellor could not have acted on the basis of the decision of the Board of Studies. That is to say the power of the Academic Council is covered by S. 44 of the Act in making Regulations. The Academic Council has to act subject to the provisions of the Act, Statutes, Ordinances and also approval of the Governing Council, to make Regulations in the manner prescribed by Statutes. Only such power is available to the Vice Chancellor. In other words, the power of the Vice Chancellor under S. 12(7) of the Act must be power to do what the Academic Council could do. We are not impressed by the said argument.

32. The power under S. 12(7) of the Act is an extra-ordinary power. It is a power to act in an emergent situation. In this case the Academic Council was helpless and handicapped by the absence of First Statutes. If the Vice Chancellor has to exercise the power exactly as the Academic Council would exercise power, then the Vice Chancellor would also be handicapped by the absence of First Statutes.

33. Section 12(7) of the Act actually provides for emergent action. That is action in an emergency. Necessarily the action must be immediate action. The action must be action which could be taken by another authority or body which in the ordinary course would have dealt with the matter. In the ordinary course, the Regulations would have been made by the Academic Council. The Vice Chancellor is to report the matter to the Academic Council. But that is not to say that the Vice Chancellor is constrained by considerations of the procedure which would attach to the Academic Council. We also notice that the Vice Chancellor acts on inputs. There is no reference to any procedure to be followed by him before the action is taken. The proviso to sub-section (7) of S. 12 in fact only provides that where any such action taken by the Vice Chancellor affects any person in the service of the University, he can challenge the same by filing an appeal to the Chancellor within 30 days. Therefore, we would think that it is not open to the appellants to contend that because the Academic Council could not have acted on the basis of the decision of the Board of Studies, as there is no power of the Board of Studies to make any recommendation, the Vice Chancellor cannot act on the decision of the Board of Studies.

34. Next we pass on to the consideration of the question whether there is power at all under S. 12(7) of the Act to take Annexure-R1D decision. In this regard, we cannot ignore S. 12(8) of the Act which we have extracted. S. 12(8) of the Act specifically empowers the Vice Chancellor to regulate when there are no Regulations or Statutes. Undoubtedly, separate minimum in theory is a matter which is required to be regulated by Regulations. In this context, the matter falls into two parts. In June, 2011 invoking the power under S. 12(7) of the Act the Vice Chancellor approved the "Regulations". Those Regulations were approved by the Academic Council. The Governing Body approved the decision of the

Academic Council. If Annexure-R1A decision following which there were Regulations, which have been approved by the Academic Council and Governing Council, are to be treated as Regulations within the meaning of S. 12(8) of the Act, then it could be said that S. 12(8) of the Act does not apply. On the other hand, if it is held that there were no Regulations despite the Regulations, which were approved by the Vice Chancellor in exercise of power under S. 12(7) of the Act vide Annexure-R1A, could it not be said that power existed under S. 12(8)? If there is power under S. 12(8) of the Act, could it not be further urged that there can be no power under S. 12(7) of the Act? Does S. 12(7) of the Act enable the Vice Chancellor to exercise legislative power? If S. 12(7) of the Act confers general power alone and since S. 12(8) of the Act purports to confer power to make Regulations, inter alia, could not the power under S. 12(7) of the Act, when it comes to an area covered by the power to make Regulations or rather to regulate under S. 12(8) of the Act be limited on the basis of the principle of general dictum *generaliter est interpretandum*?

35. One of the arguments raised by Shri George Poonthottam is that S. 12(7) of the Act does not cover legislative power. When we pointed out that in S. 12(8) of the Act the Vice Chancellor is not given the power to regulate the matter, when there is no Ordinance, his answer was that it only means that the Legislature has chosen to limit the exercise of legislative power only when there are no First Statutes or Regulations. In other words, the argument is that acting under S. 12(8) of the Act, there is an implied exclusion of power to make Ordinances and therefore Legislature apparently would not have intended to confer that power on the Vice Chancellor under S. 12(7) of the Act. In this regard we may notice that S. 23 of the Act provides power with the Governing Council to make Statutes, subject to the approval of the Chancellor. S. 23 also gives power to the Governing Council to make Ordinances.

36. The learned counsel for the University contends that S. 12(8) of the Act no doubt confers power on the Vice Chancellor to regulate the matter, when there are no Regulations or Statutes. However, it may so transpire that the Vice Chancellor may be confronted with an emergency, which calls for immediate action. His contention that in such circumstances notwithstanding the power under S. 12(8) of the Act to act when there are no Regulations, inter alia, he can still act under S. 12(7) of the Act.

37. In many cases the Vice Chancellor can take time and make Regulations or other matter regulated by giving direction, as provided under S. 12(8) of the Act. But there may be situations where he would have to act immediately, the crucial aspect would be the presence of an emergency.

38. It is the case of the University that if the Vice Chancellor had to take the decision in this case under S. 12(8) of the Act, he would have to contend with the position that he has not complied with the requirement in S. 12(8) of the Act, namely, he has not placed the matter before the Governing Council or other body concerned for approval and he would also have to place the draft of the

Regulations before the body. If, on the other hand, he can support his action under S. 12(7) of the Act, it is contended, he is only to report in writing about the grounds of emergency and the action taken to the concerned authority.

39. Section 12(7) of the Act is an extra-ordinary provision. What is contemplated is empowering the next high ranking officer after the Chancellor with the power to act urgently, when extra-ordinary situation arises. An emergency may require empowering somebody with the powers to effectively deal with the emergency. The Vice Chancellor is the one so chosen by the Legislature. Once it is found that there was an emergency, we think that it is necessarily to clothe the Vice Chancellor with power to act, even if it amounted to exercising the power vested in any one of the bodies under the Act. S. 12(7) of the Act specifically provides for the taking of action which any other authority or body in the ordinary course would have done. In our view when there is an emergency, nothing prevents the Vice Chancellor from donning the mantle of any other body and that would include the Academic Council also.

40. As regards the power under S. 12(8) of the Act, we may notice that in view of the fact that by virtue of the decision taken under Annexure-R1A which was approved as the Regulation by the Academic Council and Governing Body it could be said that there were Regulations within the meaning of S. 12(8) of the Act. But we will test the hypothesis that Regulations (so-called Regulations) are not actually Regulations made by the Academic Council and what it is contemplated is actually Regulations by the Academic Council itself under S. 44 of the Act. Even then we are of the view that presence of power to regulate the matter in the absence of Regulations by issuing direction would not take away the power of the Vice Chancellor to act in an emergency under S. 12(7) of the Act.

41. In short, there is power under S. 12(8) of the Act and also power under S. 12(7) of the Act to regulate by issuing direction and to take action respectively. The product of the exercise of the Vice Chancellor is actually intended to hold good, till they are properly dealt with by the concerned body. In this case, we notice and we re-iterate that in the absence of First Statutes, the Academic Council was disabled from making Regulations. Prescription of separate minimum for theory papers in M.B.B.S. was overlooked and not made applicable to the 2010-11 and 2011-12 batches. This grave anomaly was noticed at any rate. Action was taken by the only competent body namely, the Vice Chancellor. Any other interpretation would mean that despite the Legislature indicating its mind by articulating the power of the Vice Chancellor be it under S. 12(7) or 12(8) of the Act, we would have to concede to the state of complete helplessness and inaction in a situation which calls for immediate action. The action of the Vice Chancellor is therefore supported under S. 12(7) or 12(8) of the Act. If even for a moment power is available only under S. 12(8) of the Act even then the wrong quoting of the actual provision cannot deprive the Vice Chancellor of the statutory authority to take action.

42. Then there is a question relating to the effect of the consequent action of the

Vice Chancellor or rather omissions alleged against him. In this regard we must notice that pursuant to the agenda put forward by the Director of Medical Education, which included the item minimum percentage of marks to be obtained for University examinations, it was decided by the Governing Council that a minimum 50% marks should be made compulsory as separate minimum for theory papers in University examinations. The said decision was taken by the Governing Council on 29-12-2011. The Governing body is the highest body under S. 44 of the Act. Regulations made by the Academic Council are to be approved by the Governing Council. In this case no doubt the matter started at the wrong end as it were. That is, it started at the top with the decision of the Governing Council and finally ended with the Vice Chancellor approving as it were the decision of the Board of Studies which was also recommended by the Faculty of Medicine, that there must be 50% minimum for theory papers alone. In the light of this development, we must examine the effect of facts as unfolded in the context of the requirements under S. 12(7) and 12(8) of the Act. As far as S. 12(7) is concerned, it is to be noted that Academic Council in its meeting held on 7-10-2013 decided to approve the minutes of the Board of Studies and Faculty of Medicine (See Agenda 5.5 in Annexure-R1A produced along with the statement filed in the Writ Appeal by the 1st respondent University). Therein Appendix-XXV deals with the issue relating to 50% separate minimum for theory papers for all students from the academic year 2012-'13. Thus the said criteria has been approved by the Academic Council also. It may be true that under S. 12(7) of the Act Vice Chancellor is obliged to report the grounds on which he believes there is emergency and the action taken at the earliest opportunity to the competent body, in this case the Academic Council. Shri George Poonthottam is correct in contending that the consequence of the same is provided for in the power of the Chancellor to decide when there is a difference between the Vice Chancellor and authority on the issue regarding the action taken. In this case it is true that the decision taken as such was not placed along with the grounds at the earliest opportunity. Obviously, the explanation is that the ball was set rolling, in this case by the Governing Council which is the highest body which in fact has a power to even approve or not approve the action of the Academic Council has taken decision on 29.12.2011. The matter was considered by the Board of Studies as also the Faculty of Medicine and finally the Vice Chancellor takes action. There is no dispute which arose either at the instance of the Academic Council or of the Governing Council for that matter regarding the existence of the emergency or the action taken. On the other hand, Annexure-R1A (produced along with the appeal) would show that the Academic Council accepted the prescription of separate minimum for 2012-'13 onwards. Under S. 12(8) of the Act, the authority is bound to report the matter. In this case to the Academic Council. The matter started with the decision of the Governing Council and ended with the Vice Chancellor taking action. At any rate the Academic Council also approved the same. There is none to dispute the existence, of emergency or the action taken or both. Neither the Academic Council nor even Governing Council has any dispute with regard to the existence of the emergency or the action or

both.

43. It is no doubt true that S. 12(7) of the Act contemplates reporting the grounds and also action taken. It is open to the concerned authorities to raise a dispute in regard to the emergency or the action or on both. The Statutes provide for the method of resolving the dispute. The Chancellor has to decide the dispute. Apparently, this has not been followed in this case. But, already noted that we do not think we should interfere in the matter, as there is no dispute raised by the concerned authority, which in fact accepted the action taken and does not question the grounds for invoking S. 12(7) of the Act.

44. We must deal with the contention that the impugned Regulations have not been published in the Gazette. S. 46 of the Act, no doubt, requires that Regulations, inter alia, must be published in the Gazette. If the action taken under S. 12(7) of the Act cannot be treated as Regulations as such and not made under S. 44 of the Act, then no publication is necessary. More importantly in this context, we must not overlook one crucial aspect, as pointed out by the learned counsel for the University, action taken under S. 12(7) of the Act was on the basis of the perceived emergency, i.e., immediate result must be produced. If publication in the Gazette is required, necessary to produce the immediate result, then S. 12(7) of the Act may very well become a dead letter.

45. No doubt we are not impressed by the argument of the learned counsel for the University that in view of S. 44(2) of the Act, as the Academic Council must indicate from what date the Regulations will take effect, even without publication in the Gazette, it will take effect from the date specified by the Academic Council. Regulations made under S. 44 of the Act are a piece of subordinate legislation. Having regard to the position in law, unless there is publication, it may not take effect in the first place. The law would appear to be that the Regulations must be published in the Gazette and it will have effect from such earlier date as may be fixed by the Academic Council (See the decision reported in *Meerankhan v. State of Kerala* (2007 (4) KLT 430).

46. We may also notice in this case that there may be no complaint maintainable that the date from which the Regulations is to take effect was not mentioned. It is clear that the impugned Regulations were taken effect for the Academic year 2012-"13 onwards. In that situation, we are of the view that we need not interfere with the decision of the learned Single Judge. The appeals fail and they are dismissed.