
(2010) 11 MP CK 0055

In the Madhya Pradesh High Court

Case No : Writ Petition No. 12111 of 2010

Sharad Kumar Tiwari

APPELLANT

Vs

The State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 30-11-2010

Acts Referred:

Councils Act, 1956 — Section 25(2)

Citation : (2010) 11 MP CK 0055

Hon'ble Judges : Vimla Jain, J;K.K. Lahoti, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. The Petitioner has sought following reliefs:

(I) The Hon''ble High Court may kindly be pleased to set aside the impugned order dated 23.8.2010 (Annexure P/1).

(II) The Hon''ble High Court may kindly be pleased to declare the Petitioner as pass candidate in continuing internship training by granting 5 grace marks making in one subject him eligible to continue his internship and become a registered medical practitioner;

(III)The Hon''ble High Court may kindly be pleased to quash the show cause notice dated 19.8.2010 (Annexure P/5)issued by the Respondent No. 2.

(IV)The Hon''ble High Court may kindly be pleased to restrain the Respondents from violating the judicial orders and further be penalized for their illegal act in humiliating the Petitioner;

(V) Any other writ, orderor direction that this Hon''ble Court may kindly deem fit and proper in the facts and circumstances of the case may also kindly be issued in the interest of justice.

2. The facts of the case are that the Petitioner is a student of M.B.B.S. (Final Part

II) who could not pass in the subject of Obstetrics and Gynecology as he had achieved 95 marks out of 200 in the subject of Obstetrics and Gynecology . As per Ordinance 56 revised, the Petitioner ought to have achieved 50% marks in the subject failing which, he could not clear the examination. It is pertinent to mention that the status of the Petitioner in respect of other subjects in the final part II Professional Examination MBBS course was as under:

1. Medicine : 167 Out of 300 2. Surgery : 160 300 3. Obstetrics & 95 200 Gynecology 4. Paediatrics 59 100

3. The Petitioner approached Respondent No. 3 for award of grace marks which was not awarded to the Petitioner. So the Petitioner filed a Writ Petition 6817/2010 (Sharad Kumari Tiwari v. State of M.P. And Ors.) which was decided on 23.7.2010 by which this Court on the basis of the contention made by the parties held that it was not disputed that the case was covered by the decision passed by this Court in W.P. No. 2266/2010 decided along with other writ petitions vide (3) common order dated 25.2.2010 and directed that the Petitioner shall be entitled for the same relief and his result was directed to be declared within 15 days from the date of the order. The declaration of earlier result by the University was set aside. Thereafter the Respondent No. 3 passed an order Annexure P/1 dated 23.8.2010 by which Respondent No. 3 decided the matter thus:

4. In compliance of the order passed by the High Court dated 25.2.2010 in W.P. No. 2266/2010, the Respondents found that the Petitioner was entitled for grace marks but in spite of award of maximum 5 grace marks, the Petitioner's result was not changed, as in the subject in which grace marks were allotted, the Petitioner could not get 50% marks. As per Ordinance 56, the Petitioner was required to earn 50% marks in every subject. The Petitioner required 10 marks which could not be provided as per the ordinance. This order is under challenge in this petition.

5. The learned Counsel appearing for the Petitioner submitted that from the perusal of mark-sheet Annexure P/1, the Petitioner got 481 marks out of 900 and by this way he earned near about 53.5% marks excluding grace marks and on getting 5 grace marks in the subject Obstetrics and Gynecology, the Petitioner was entitled to be declared as passed, but the Respondent No. 3 by misinterpreting the provision (4) and contrary to the decision of this Court, in W.P. No. 2266/2010 (Rajeev Kumar v. State of M.P. And Ors.) decided on 25.2.2010 wrongly, decided the matter of the Petitioner which order deserves to be set aside.

6. Shri Purushaindra Kaurav, Counsel for Respondent No. 3 supported the decision of Respondent No. 3 in Annexure P/1, who submitted that in spite of getting 5 grace marks in the subject Obstetrics and Gynecology, the Petitioner was not entitled to be declared as passed as he could not achieve 50% marks in the subject and for this purpose, while considering the aggregate, the grace

marks are to be excluded as per Clause 12 of Ordinance No. 56 (revised) read with appendix A, which reads thus:

ASSESSMENT

To pass in each of the subjects a candidate must obtain 50% in aggregate with a minimum of 50% in theory including orals and minimum of 50% in practicals/ Clinicals.:

7. Stating aforesaid, it was submitted by Shri Kaurav that in the earlier pronouncement of this Court in Rajeew Kumar's case (supra) this assessment part not considered so the judgment is not applicable in the case of the Petitioner. He has also placed reliance to a judgment of the Apex Court in The Maharashtra State Board of Secondary and Higher Secondary Education Vs. Amit and Another, and submitted that grace marks are only notional and are not to be added in the aggregate to change the percentage and this Court should not interfere in such matter. He has also relied on the decision of the Apex Court in National Board of Examinations Vs. G. Anand Ramamurthy and Others, and submitted that this petition may be dismissed.

8. To appreciate rival contentions of the parties, it would be appropriate if the relevant provisions are referred. The provision for (5) grant of grace marks is provided in Ordinance 56 (Revised) which reads as under:

12. Grace marks: The Grace marks upto a maximum of five marks may be awarded at the discretion of the University to a student who has failed only in one subject but has passed in all subjects.

The Assessment clause in Appendix "A-2" is also referred which reads as under:

ASSESSMENT

To pass in each of the subjects and candidate must obtain 50% in aggregate with a minimum of 50% in theory including orals and minimum of 50% in practicals/ Clinicals.

Clause 32 of Ordinance No. 6 reads as under:

32. Notwithstanding anything contained in the concerned Ordinance an examinee, who fails by a total of not more than three marks in not more than two subjects in any of the B.A./B. Sc/B.SC (Home Science)/B. Co/B. Ed/B.P. Ed/LLB/B. Lib/B.D.S/B.P.T/B. M.L.T.I/B.V. Sc and other graduate examination except where it is held on a semester basis but secures more than the minimum aggregate marks required shall be given three grace marks to enable him to pass the examination.

Provided also that in case of MBBS, BHMS, BAMS, BUMS, BE, B. Farm. B. Tech., B. Arch, number of grace marks in one subject to pass the examination will be if the candidate secures minimum passing aggregate marks in total. The grace marks are only notional and are not added in the aggregate as to change the

percentage.

Passing in aggregate is "compulsory before benefit of marks is given.

Provided that if a candidate appearing at the Supplementary/Second examination, in one subject one grace mark shall be awarded.

9. A Division Bench of this Court in *Rajeev Kumar v. State of Madhya Pradesh and Ors.* had an occasion to consider Clause 32 of Ordinance No. 6 in which the Division Bench considering the question held thus:

We are concerned with the proviso to Clause 32 of the Ordinance 6 in the instant case as examination is that of MBBS. It is provided that number of grace marks in one subject to pass the examination will be given after the candidate secures minimum passing aggregate marks in total. The Clause 32 provides that:

32. Notwithstanding anything contained in the concerned Ordinance an examinee, who fails by a total of not more than three marks in not more than two subjects in any of the B.A./B. Sc/B.SC (HomeScience)/B. Com/B. Ed./B.P. Ed/LLB/ B. Lib/ B.D.S./B.P.T./B.M.L.T.I./B.V. Sc. and other graduate examination except where it is held on a semester basis but secures more than the minimum aggregate marks required shall be given three grace marks to enable him to pass the examination.

Provided also that in case of MBBS, BHMS, BAMS, BUMS, BE, B. Farm, B. Tech., B. Arch, number of grace marks in one subject to pass the examination will be 5 if the candidate secures minimum passing aggregate marks in total. The grace marks are only notional and are not added in the aggregate as to change the percentage.

Passing in aggregate is compulsory before benefit of marks is given.

Provided that if a candidate appearing at the Supplementary/Second examination, in one subject one grace mark shall be awarded.

emphasis supplied by us

Chapter IV regulation 12(4)(A)(d)(c) reads thus:

Pass: In each of the subjects a candidate must obtain 50% in aggregate with a minimum of 50% in Theory including orals and minimum of 50% in practicals/ clinicals

Main Clause 32 of Ordinance 6 provides for the minimum aggregate marks to be secured by candidate than in two subjects grace marks can be given. The proviso to Clause 32 provides for grant of grace marks in case of MBBS. The marks are to be given in one subject, to pass the examination 5 marks will be given if the candidate secures minimum passing "aggregate marks in total". The words "aggregate marks in total" has to be given full effect to and when we consider the main part of Clause 32 it is not disputed that the total of all subjects has to be considered for counting the minimum aggregate marks. In proviso when the

expression has been used "aggregate marks in total", both the words aggregate and total have been used which have to be given full effect to make out aggregate of out of total marks. It is apparent that out of total marks available whether incumbent is having the requisite aggregate in the criteria for award of grace marks. Passing in aggregate is compulsory before award of grace marks. In case person has not qualified in aggregate out of total marks available in examination the grace marks can not be given as per the aforesaid provision. Petitioners are admittedly having more than 50% of the aggregate marks in total, thus, they are entitled for award of 5 marks of grace in one subject. In the other course as provided in main Clause 32 not more than 3 marks can be given in two subjects, but, in the course of MBBS in one subject 5 marks will be given, thus, the interpretation suggested by Shri Purushendra Kaurav cannot be accepted that in the subject in question in theory and practical the aggregate of 50% should be obtained, thereafter grace marks can be given in theory or practical, in case of necessity. If the submission is to be accepted the expression used would have been aggregate marks in theory and practical which is not mentioned in proviso to Clause 32. The expression used "aggregate marks in total" has been given full effect , as reference given in the main provision of Clause 32 is to the total of all the papers, thus, we find as to its proviso the submission raised by Shri Purushendra Kaurav to be unacceptable. Accordingly we direct the University to examine grant of grace marks to the Petitioners and to declare their revised result within a period of 15 days from the date of receipt of certified copy of this order.

10. Though it is correct that specifically the assessment referred in Appendix A-2 was not considered by the Division Bench but while considering the contention of Shri Kaurav, the learned Counsel for Respondent No. 3, this question was specifically dealt with by the Division Bench and the contention was repelled. This Court specifically considered the question and found that the interpretation of University of earning 50% marks in all subjects was not correct while the total aggregate in all subjects was to be seen. As the aforesaid controversy has already been considered and decided by this Court in the case of Rajeev Kumar(supra) and we do not find any reason to differ with this, it is not necessary for this Court to re-examine the same contention of the Respondent.

11. In Amit and Anr. (supra), the Apex Court held that the grant of grace mark being a matter of concession and which tends to dilute academic standards, regulations dealing with grant of grace marks should not be generously and liberally construed. The Division Bench has considered the relevant provision, interpreted in its true meaning and has extended the benefit to the student. In G. Anand Ramamurthy and Ors. (Supra), the Apex Court held that "the direction of the High court to the Petitioner to hold examinations against its policy in complete disregard to the mandate of this Court for not interfering in the academic matters particularly when the interference in the facts of the instant matter lead to perversity and promotion of illegality was not justified". But such position is not here. The aforesaid judgment on facts of the present case is not

applicable.

12. In this case, the Petitioner has already approached to this Court by filing Writ Petition bearing No. 6817/2010 in which the Division Bench of this Court directed Respondent No. 3 to pass an order in accordance with law laid down earlier by the Division Bench in W.P. No. 2266/2010 of Rajeev Kumar (supra) in which this Court has (9) specifically interpreted the relevant provision and has decided the law. The aforesaid direction has to be complied with by Respondent No. 3 in letter and spirit. But it appears that by misconstruing the aforesaid judgment, the order Annexure P/1 has been passed.

13. In the result, this petition is allowed. The Respondent No. 3 is directed to give benefit of the judgment in Rajeev Kumar (supra) to the Petitioner and to declare the result of the of Petitioner after grant of grace mark and to issue a revised mark-sheet to the Petitioner. The aforesaid exercise shall be made by Respondent No. 3 within a period of 30 days from the date of communication of this order.

14. The Petitioner has also challenged Annexure P/5 issued by M.P. Medical Council, Bhopal by which the Petitioner has been asked to show cause because the Petitioner was not declared passed in the final year MBBS Part II Examination, therefore, the Petitioner was not entitled for provisional registration u/s 25(2) of the Indian Council Act, 1956 and the Petitioner can not be permitted for the requisite rotatory internship training.

15. As this Court has quashed the order of Respondent No. 3 Annexure P/1 dated 23.7.2010 and has directed Respondent No. 3 to declare the result of the Petitioner, at present we direct that the Show cause notice (Annexure P/5) shall remain in abeyance till the final result is declared by Respondent No. 3 as per direction issued by this Court.

16. Considering the facts, the Petitioner shall be entitled for the cost of this petition. Counsel's fee Rs. 2,000/-

Certified copy as per Rules.