

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HON'BLE ACTING CHIEF JUSTICE MRS.MANJULA CHELLUR

&

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

FRIDAY, THE 24TH DAY OF FEBRUARY 2012/5TH PHALGUNA 1933

WA.No. 192 of 2012 ()

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AGAINST THE JUDGMENT IN WPC.34131/2011 DATED 30.01.2012

APPELLANT(S) :

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FAWAS AJMAL

SON OF DR.AJMEL HABEEB,AGED 20 YEARS

2ND YEAR BACHELOR OF DENTAL SCIENCE STUDENT

ROYAL DENTAL COLLEGE,CHALISSRY,PALAKKAD DISTRICT

BY ADVS.SRI.V.A.MUHAMMED

SRI.K.E.HAMZA

RESPONDENT(S) :

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1. THE STATE OF KERALA  
REPRESENTED BY ITS SECRETARY TO GOVERNMENT  
HEALTH & FAMILY WELFARE DEPARTMENT  
GOVERNMENT SECRETARIAT,THIRUVANANTHAPURAM 695001
2. THE KERALA UNIVERSITY OF HEALTH SCIENCES THRISSUR 680 596  
REPRESENTED BY ITS REGISTRAR
3. THE PRINCIPAL  
ROYAL DENTAL COLLEGE  
CHALISSERY PALAKKAD DISTRICT 679536

BY SRI.P.SREEKUMAR,SC,KERALA UNIVERSITY OF HEALTH SCIENCES

BY GOVERNMENT PLEADER SRI.P.I.DAVIS

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 24-02-2012,  
ALONG WITH W.A. 225/2012 AND CONNECTED CASES, THE COURT ON THE SAME  
DAY DELIVERED THE FOLLOWING:

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**'C.R'**

**MANJULA CHELLUR, Ag.C.J  
&  
P.R.RAMACHANDRA MENON, J.**

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**W.A.Nos. 192, 225, 227, 228, 229, 230, 231,  
232, 234, 235, 236, 246, 249 and 267 of 2012**  
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**Dated this the 24<sup>th</sup> day of February, 2012**

**JUDGMENT**

**Manjula Chellur, Ag.C.J.**

These Writ Appeals are directed against the judgment dated 30.1.2012 in W.P(C).No.34131 of 2011 and other connected petitions filed by the present appellants. All the appellants were the writ petitioners before the learned Single Judge. As the subject matter of the Writ Petitions was common, they were heard and disposed of by a common judgment. Similarly, all the appeals are heard and disposed of by a common judgment.

2. The brief facts led to filing of the present appeals are as under: It is not in dispute, the appellants were admitted to the respondent College for Bachelor of Dental Science (BDS), after securing ranks in the entrance examination conducted by the Commissioner concerned for the year 2010-2011 admissions. The rank list drawn by the Commissioner providing admission of students to Medical Course in different Colleges in the State

pertain to Government Owned, Aided and Self Financing Colleges. The Kerala University of Health Sciences, Thrissur ('KUHS', for short) has to conduct public examinations of the appellants and accordingly issue qualification certificates as well as mark lists. At the time of admission of the appellants in 2010, the students were entitled to get grace marks upto a maximum of 10. Going by the existing regulations/syllabus for BDS made known to the appellants and others concerned, the authority concerned may award grace marks upto 10 in theory to students in one or more subjects (maximum of 5 marks per subject) to get a whole pass. The guideline stipulated for pass was that there should be a separate minimum marks of 45% for the University theory, (i.e., 45 marks out of 100) as indicated at Exhibit P1, was the claim before the learned Single Judge. It is not in dispute that petitioners/appellants before the learned Single Judge appeared for the first year BDS examination in August, 2011.

3. According to the appellants, they have secured separate minimum of 45% marks or more in the University theory as contemplated under Exhibit P1 and they have to be declared having passed the first year BDS. But, KUHS has taken the stand

that the appellants failed in the first year BDS examination for not having obtained 50% marks in University theory. This obstructs entry of the appellants to second year BDS class on the ground that they have not cleared the first year BDS. Such stand of the University was on account of Exhibit P3 order dated 15.11.2011. As the appellants need only 45 marks out of 100 for theory paper, they are entitled to attend the second year classes.

4. According to appellants, the stand of the University of 50% marks for theory paper has to come into force for the academic year 2011-2012 onwards and does not apply to the appellants, who joined the BDS course in 2010. As against this, the stand of the University before the learned Single Judge was, the Board of Studies formulated in Dentistry had recommended the regulations, scheme and syllabus for Bachelor of Dentistry, which was placed for approval of the Vice Chancellor, as the Academic Council was not yet constituted. However, the Vice Chancellor, exercising the power conferred by Sub-section (7) of Section 12 of the Kerala University Health Sciences Act of 2010 (for short, 'the Act'), approved the Regulations, where criteria for pass were indicated. Therefore, as per the said regulations, a

candidate should secure minimum of 50% in the University theory, apart from other criteria. According to the University, the regulations were published on the website of the University as early as 10.5.2011, much prior to notifying the examination. Therefore, no prejudice whatsoever was caused to the appellants and the University was justified in applying the criteria for pass as contemplated in the regulations in question for the examination conducted in August and September, 2011. They rely on Exhibit R2(a) regulations as brought out specifically for BDS course and according to them, they govern the case on hand.

5. The learned Single Judge, after referring to the contentions of the appellants as well as the respondent University, so also the regulations for the Bachelor of Dental Surgery, 2007 modified on 25.7.2007 and the regulations in question with reference to criterion for pass, ultimately opined that by virtue of Sub-Section (7) of Section 12 of the Act, the Vice Chancellor was justified in exercising the emergency powers of the Academic Council. Therefore, Sub-Section (2) of Section 44 of the Act was satisfactorily complied with as a declaration to the effect that regulations under challenge were applicable from the

admission year 2010 onwards was proper and correct. Consequently, the learned Judge opined that the regulations fairly applied to the appellants herein as contemplated at Exhibit R2(a). So far as Section 46 of the Act, the learned Judge opined that it only stipulates publication of regulations in the official gazette, but does not stipulate that the regulations would be effective only from the date of publication of the same in the official gazette. Accordingly, the learned Single Judge opined that none of the contentions raised by the appellants before him were sustainable. Hence, the Writ Petitions were dismissed. Aggrieved by the same, the appellants are before us.

6. According to the learned counsel appearing for the appellants, the learned Single Judge has not examined various pleadings of the appellants in the right perspective. It is further contended, the appellants were satisfied with the terms and conditions contemplated under Exhibit P1, which were in force at the time of admissions in 2010. Therefore, the appellants deserve to be declared having cleared first year BDS examination. In the arguments, the stress was on the applicability of the regulations in question only from 2011-2012 admissions and not for the

admissions in 2010, as the authorities concerned under the Act had not exercised their powers in accordance with the provisions of the Act.

7. Learned counsel for the appellants further stress upon the fact that though Exhibit P1 speaks of grace marks, such issue was not considered by the learned Single Judge. According to the appellants, there were several deficits at the time of announcing the results, as evidenced by Exhibit P6 series. According to him, when practical, viva etc. of the appellants were held in accordance with 2010 regulations, in the absence of proper official communication of the revised regulations to the Colleges concerned before conducting the First Year BDS examinations, the revised regulations are not at all applicable. They deny the stand of the University as not justified. Therefore, the judgment of the learned Single Judge deserves to be set aside. The learned counsel also placed reliance upon a decision of the Supreme Court reported in **Rajendra Agricultural University v. Ashok Kumar Prasad** (2010(1) KLT SN 4).

8. As against this, learned counsel appearing for the second respondent University contends, Exhibit P3 was brought into

existence as per the provisions of the Act. The decision to enhance the minimum marks to 50% was taken when the BDS Regulations were issued on 10.5.2011 on the website of the University, much prior to the notification of the examination. The appellants, having kept quiet, cannot be allowed to challenge the same now.

9. According to the University, it is entrusted with the duty of conducting various medical courses and it has a duty to see that the standard of medical education is not affected in any manner. So far as Dental Courses, there were several complaints regarding the deterioration of the standard. Therefore, the matter came up for consideration before various authorities of the University and a decision was taken to fix minimum of 50% in University theory for declaring a student passed in the examination. As on the date of such decision, the Academic Council was not yet constituted and the regulations were to be issued for conducting the examination. Therefore, the Vice Chancellor, exercised powers vested in him under Section 12(7) of the Act by issuing Exhibit R2(a) order bringing into force the BDS Regulations. It is further stressed on the fact that subsequently



the Academic Council in its meeting dated 28.7.2011 accepted the same and all the regulations were treated as valid.

10. According to the learned counsel, the need for invoking emergency clause was the need to conduct examinations on time, therefore, no malafides could be pointed out against the authority concerned in exercising such powers and there is no challenge as to the framing of the regulations as such. The power conferred on the Vice Chancellor is intended to meet the situation contemplated under Section 12 of the Act. Therefore, in the absence of any malafides or ill-motivated intention, there cannot be any challenge to the regulations in question. In the wisdom of the Vice Chancellor, he could decide upon the nature of emergency as he is the competent person to decide the same, is the stand of the University before this Court. They further stress upon the fact that the regulations provide sufficient check to prevent the misuse of the powers as the Statute contemplates that original authority could differ from the opinion of the Vice Chancellor on the issue of emergency. Since the Academic Council has accepted the decision of the Vice Chancellor, it leads to the presumption of existence of emergency. Therefore, this

Court, at this stage, need not go into the issue of existence of necessity or emergency at the relevant point of time, is the submission on behalf of the University.

11. In reply, the learned counsel for the appellants rely upon Exhibit P5 communication sent to various Colleges along with the revised regulations indicating the intention of the University was to introduce the regulations only from 2011-2012 as indicated in Exhibit P5. Therefore, there is no justification for the University to contend that it was applicable from 2010 onwards.

12. We have gone through the judgment of the learned Single Judge, various provisions of the Statute and the revised regulations under dispute. From the submissions on behalf of the appellants and the University, what we could gather is, there is no serious dispute with regard to any of the regulations as such. But, the real dispute seems to be with regard to the applicability of the regulations for the admissions of 2010.

13. According to the appellants, the regulations would come into force only with effect from academic year 2011-2012, as the regulations have not yet come into force as contemplated under the Statute. According to the University, the revised regulations

are applicable to the appellants, who got admission in 2010, as the revised regulations are brought into force in accordance with the Act by exercising the powers vested in the Vice Chancellor in an exigency or emergency situation.

14. The second respondent University has to work in accordance with the Kerala University of Health Sciences Act, 2010. Prior to 2010 there were different Universities and now all medical courses are brought under one University, i.e., the second respondent University. As the second respondent University was a new University, Academic Council was not yet constituted as on the date of admissions of 2010. The regulations, which were in force at the time of admission of 2010 were Exhibit P1. It is not in dispute, as per the norms prescribed by the University then, the criteria for pass are as under:

***“Criteria for a pass:***

*For declaration of pass in a subject, a candidate shall fulfill the following criteria:*

*a) Fifty percent of the total marks in any subject computed as aggregate for a) theory, i.e., written, viva voce and internal assessment and b) practicals including internal assessment (150 marks out of 300).*

*b) A candidate shall secure a minimum aggregate of 50% marks in the theory section, which includes University theory examination, viva voce examination and internal assessment (i.e. A minimum of 100 marks out of 200). Besides there should be a separate minimum of 45% for the university theory (i.e. 45 marks out of 100).*

*c) In the University Practical/clinical examination, a candidate shall secure 50% of University practical marks and Internal Assessment combined together i.e. 50/100 marks. Besides there should be a separate minimum of 45% for the University Practical/clinical exam (i.e. 34 marks out of 75).*

*d) In case of Pre clinical Orthodontics, Pre clinical Prosthodontics and Pre clinical Conservative Dentistry in 2<sup>nd</sup> BDS, where there is no written examination, minimum for pass is 50% of combined total marks of the University Practical, viva voce and the internal assessment i.e. 50/100 marks for each subject.*

*e) Successful candidates-who obtain 65% or more of grand total marks i.e. Total of all subjects, shall be declared to have passed the examination for first-Class. Other successful candidates will be placed in Second Class. A candidate who obtains 75% and above of grand total marks is eligible for Distinction. Only those candidates who pass the whole examination in the first attempt will be eligible for distinction or first class."*

14. As per the revised regulations, which are under challenge, the criteria for pass are as under:

**"Criteria for a pass:**

*For declaration of pass in a subject, a candidate shall fulfill the following criteria:*

*i. Fifty percent of the total marks in any subject computed as aggregate for (a) theory i.e., written, viva voce and internal assessment and (b) practicals including internal assessment (125 marks out of 250).*

*ii. A candidate shall secure a minimum aggregate of 50% marks in the theory section, which includes University theory examination, viva voce examination and internal assessment (i.e. a minimum of 75 marks out of 150). Besides this there should be a separate minimum of 50% for the university theory (i.e. 50 marks out of 100).*

*iii. In the University Practical /clinical examination, a candidate shall secure 50% of University practical marks and Internal Assessment combined together (i.e. a minimum of 50 out of 100 marks). Besides this there should be a separate minimum of 50% for the University Practical / clinical exam (i.e. 40 marks out of 80).*

*iv. In case of Pre clinical Orthodontics, Pre clinical Prosthodontics and Pre clinical Conservative Dentistry in*

*2<sup>nd</sup> BDS examination, where there is no written examination, minimum for pass is 50% of combined total marks of the University Practical, viva voce and the internal assessment (i.e. a minimum of 50 out of 100 marks) for each subject. Besides this there should be a separate minimum of 50% for the University Practical examination (i.e. 30 marks out of 60).*

*v. Successful candidates, who obtain 60 to 74% of grand total marks i.e. total of all subjects, shall be declared to have passed the examination in First class. Other successful candidates who obtain 50 to 59% of grand total marks will be placed in Second Class. A candidate who obtains 75% and above of grand total marks is eligible for Distinction. Only those candidates who pass the whole examination in the first attempt will be eligible for distinction or first class."*

15. We have to see whether the revised regulations framed by the second respondent University by invoking emergency clause by the Vice Chancellor have come into existence in accordance with the Statute or not. So far as the stand of the University that the University can prescribe higher standards than those prescribed by the National Bodies like Medical Council of India or Dental Council of India or All India Dental Council as such, there is no dispute by the appellants. The dispute is with regard to

the date from when these revised regulations would come into force. There cannot be any dispute with regard to the settled law that the University is entitled to prescribe higher standards as long as it is not less than the standards prescribed by the Dental Council of India. The appellants are relying upon the standard prescribed under the earlier university regulations as per Exhibit P1 as the said syllabus or regulation was the only regulation existed as on the date of admission of 2010. As already stated above, it is perfectly justifiable for the University to say, in order to maintain high quality and standard of education, they can prescribe higher standard than the standard prescribed by the Dental Council of India. Apparently, the revised regulations stipulated by the second respondent University now prescribe higher percentage of marks so far as criteria for pass especially in respect of minimum percentage of marks for the University theory. Similarly, with regard to the grace marks to be awarded, there is difference between the standard prescribed under earlier regulations and the revised regulations.

16. It is not in dispute that the Academic Council was not constituted till July, 2011 though the second respondent

University had come into force by virtue of the above Act and different authorities under the Act could be constituted. According to the appellants, change in the criterion for pass was issued only on 15.11.2011. Therefore, it was not applicable for the students of 2010 admissions. According to the University, the revised regulations were published on website on 10.5.2011 much prior to the notification of the date of examinations and it was very much within the knowledge of the appellants and the Colleges concerned. Therefore, the revised regulations alone would apply even to the admissions of 2010. In order to ascertain when the revised regulations or the regulations now formulated by the second respondent University have come into existence, one has to see whether the said regulations have taken birth in accordance with the procedure contemplated under the Act applicable to the second respondent University.

17. The relevant Sections are 12(7), 44(1) & (2), 46 and 83 (ii) of the Act. Section 12 of the Act reads as follows:

***“12. Powers of Vice-Chancellor.- (1) The Vice-Chancellor shall be the principal academic and executive officer of the University. He shall be responsible for the development of academic programme of the University.***



*He shall oversee and monitor the administration of the academic programmes and general administration of the University to ensure efficiency and good order of the University.*

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*(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."*

18. Section 12(7) contemplates, if the Vice Chancellor has reasonable grounds to believe that there is existence of exigency or emergency, which requires immediate action to be taken, he can take such action, provided he puts in writing the reasonable

grounds of emergency and reports the action taken by him to the authority, which, in the ordinary course, would have dealt with the matter. It is not in dispute that the authority or the Body in the ordinary course, which could have dealt with the regulations or the standard of regulations, is the Academic Council. Apparently, in the present case, the Academic Council was not yet constituted on the date of emergency clause invoked by the Vice Chancellor. However, it is also brought on record that on 28.7.2011 the Academic Council accepted the regulations in question.

19. Section 44 of the Act reads as follows:

*“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.*

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*(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.”*

20. Section 44 of the Act deals with the powers of the Academic Council to formulate regulations concerning several subjects which include the course of studies and the conduct of examinations. The regulations formulated by the Academic Council as contemplated under Section 44(1) of the Act will take 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 as contemplated under Section 44(2). Reading of Sub-Section (1) of Section 44 of the Act puts a mandate that subject to approval of the Governing Council, the Academic Council may make regulations in the manner prescribed by the Statute. The Governing Council has not yet approved the regulations in question which were accepted by the Academic Council, though the Governing Council did meet twice subsequent to acceptance of the regulations by the Academic Council. Reading of Sections 12(7) and 44 of the Act would indicate, whenever the Vice Chancellor exercises power under Section 12(7) of the Act, at the earliest the same has to be reported before the Academic Council. The second respondent University has to first satisfy that there was reasonable ground for

the Vice Chancellor to believe an exigency or emergency existed requiring immediate action by him. Thereafter, at the earliest opportunity, he should have placed the matter before the Academic Council. The action of the Academic Council under Section 44(1) of the Act has to have the approval of the Governing Council as indicated above. In the present case, no such approval is taken, though admittedly, two meetings of the Governing Council were held subsequent to the acceptance of the regulations by the Academic Council on 28.7.2011.

22. The learned counsel for the University further relies on Section 83(ii) of the Act, which reads as follows:

**“83. *Proceedings of the University not to be invalidated.*- No act or proceeding of the Senate or the Governing Council, Academic Council or any other authority or any body or committee of the University including a committee appointed by the Chancellor for the appointment of a Vice-Chancellor, shall be deemed to be invalid at any time merely on the ground that-**

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**(ii) there is any irregularity in the procedure of any such authority, body or committee not affecting the merits of the matter under consideration.”**

23. Reading of Section 83 indicates, the action taken by the Governing Council, Academic Council or any other authority under the Act cannot be annulled as invalid on the ground of any irregularity in the procedure adopted by such authority as long as it does not affect the merits of the matter under consideration. In the present case, the matter under consideration is the marks or percentage of marks needed to declare the appellants as passed in first year BDS examination. Definitely, the merit of the matter under consideration is affected. Therefore, the University cannot take protection under Section 83(ii) of the Act.

24. Then coming to Section 46 of the Act, it reads as follows:

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

25. Reading of Section 46 contemplates that Statutes, Ordinances and Regulations under the Act have to be published by the University in the official gazette. The decision reported in **Rajendra Agricultural University's case** (Supra) relied upon by the learned counsel for the appellant reads as follows:

*"Delegated or subordinate legislation is all pervasive and that there is hardly any field of activity*

*where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by Parliamentary legislation. But unlike Parliamentary Legislation which is publicly made, delegated or subordinate legislation is often made, unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient."*

26. Admittedly, the regulation in question is subordinate legislation. Section 46 of the Act is a general provision, which mandates publication of regulation etc. in the official gazette.

Exception to this provision is Section 44(2), which empowers the Academic Council to issue a direction when should such regulations take effect, ie., the date from when regulations come into force. If the second respondent wants to take protection under Section 44(2), it has to comply with all the provisions and follow the procedure contemplated in strict sense so as to take protection under Section 44(2). As already stated, though there were two meetings of the Governing Council subsequent to the Academic Council accepting the regulations, regulations were not placed before the Governing Council. Sub-Section (2) of Section 44 contemplates regulations made by the Academic Council to be laid before the Governing Council during the next succeeding meeting.

27. From the reading of the above provisions and in the facts and circumstances as stated above, it would only lead to the conclusion that the revised regulations of the second respondent University had not taken birth as contemplated under the Statute. We also make it clear neither the validity of the Regulations is the controversy with which we are dealing nor the competency of the University to form regulations or issue any order or ordinance

in order to maintain the standards of education. We are only dealing with the date of applicability of the revised regulations to the students of BDS course of 2010 admissions.

In view of the above reasoning and discussion, we proceed to allow the appeals setting aside the judgment of the learned Single Judge. We direct the second respondent University to revise the declaration of results of the students of first year BDS course by following the regulations, which existed as per Exhibit P1, within two weeks from the date of receipt of a copy of this judgment. Depending upon the results, the respondents shall permit eligible students to attend the second year BDS course. So far as attendance of such students for the second year BDS, the period of absence during the pendency of litigation with regard to the percentage of marks, cannot be taken into consideration.

**MANJULA CHELLUR,  
ACTING CHIEF JUSTICE**

**P.R.RAMACHANDRA MENON,  
JUDGE**

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