

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 1601/2014

(SUBHASH VITTHALRAO THUL **VERSUS** THE STATTE OF MAHARASHTRA & OTHERS)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri A.V. Bhide, counsel for the petitioner.
Shri N.R. Patil, A.G.P. for the R-1.
Shri R.N. Badhe, counsel for the R-2 & 3.

CORAM : SMT. VASANTI A. NAIK AND
A.M. BADAR, JJ.

DATE : JULY 27, 2015.

By this petition, the petitioner seeks a declaration that the petitioner has passed the B.E. (Electronics and Telecommunication) Examination in first division. The petitioner seeks a direction to the respondent Nos.2 and 3 to appoint a third examiner for revaluing the papers of the petitioner in the subjects mentioned in the petition. The petitioner has also challenged Clause 8 of Ordinance No.5 of 2010 of Sant Gadge Baba Amravati University, as being illegal and arbitrary.

The petitioner appeared at the B.E. (Electronics and Telecommunication) Examination and passed in the second division. The petitioner wanted to improve the division to first division from the second division, hence, the petitioner took the benefit of Ordinance No.5 of 2010, of the Amravati university to re-appear at the examination in 1/3rd of the subjects of B.E. (Electronics and Telecommunication). The petitioner took all the three permissible attempts, however, the petitioner could not secure a first division as his percentage was lifted only till 59.92%. The petitioner claimed rounding off of the percentage and/or grant

of grace marks so as to declare that the petitioner had passed in the first division. The respondent-University declined to grant grace marks to the petitioner by relying on Clause 8 of Ordinance No.5 of 2010, which provides that a candidate appearing for the improvement of Class/Division shall not be entitled to take advantage of the provisions of Ordinance No.18 of 2001 or Ordinance No.10. In view of the rejection of the claim of the petitioner, the petitioner has filed the instant petition seeking a declaration that the petitioner has passed the B.E. (Electronics and Telecommunication) Examination in the first division, by relying on the provisions of Ordinance No.16 of 2007, specially Clause 21 thereof. The petitioner has also challenged Clause 8 of Ordinance No.5 of 2010 on the ground that the refusal on the part of the university to grant the benefit or the advantage of the provisions of Ordinance No.18 of 2001 to the candidates appearing for the improvement of Class/Division is arbitrary and discriminatory. It is the case of the petitioner that when the candidates taking only one attempt are permitted to improve their Class or Division by taking recourse to the provisions of Ordinance No.18 of 2001, there is no justification in the refusal on the part of the university to grant the benefit or advantage of Ordinance No.18 of 2001 to a candidate appearing at the examination for the second or the third time with a view to improve the Class or Division. According to the petitioner, Ordinance No.18 of 2001 does not make a reference to a repeater and hence the said Ordinance should have been made applicable to the case in hand.

On hearing the learned counsel for the parties and on a combined reading of Ordinance Nos. 5 of 2010, 16 of 2007 and 18 of 2001, it appears that the petitioner would not be entitled to the relief sought. Ordinance No.18 of 2001 provides grace marks for passing in a head or improvement of division/class or getting distinction in a subject. The petitioner could have claimed grace

marks for improvement of division (higher class) under the provisions thereof. However, Ordinance No.5 of 2010 which provides for improvement of class or division by taking additional attempts at the same examination clearly provides that a candidate appearing for improvement of class or division shall not be entitled to take advantage of the provisions of Ordinance No.18 of 2001 or Ordinance No.5 of 2010. Ordinance No.5 of 2010 only provides for additional attempts to improve the class or division and Ordinance No.18 of 2001 provides for grace marks for passing in a head or improving the class or division. Had the petitioner secured 59.92% marks in the first attempt, the petitioner would have been entitled to grace marks for improvement of division/class as per Ordinance No.18 of 2001. The petitioner had attempted at the same examination in some of the papers on three occasions (maximum prescribed) so as to improve his class/division. The petitioner had with open eyes availed the benefit of Ordinance No.5 of 2010 to attempt at some of the papers in the examination on three occasions with a view to improve the class/division. The petitioner was, however, unsuccessful inasmuch as the percentage of the petitioner was lifted only till 59.92%. As per Clause 8 of Ordinance No.5 of 2010, a candidate appearing for the improvement of class/division is not entitled to take advantage of the provisions of Ordinance 18 of 2001 that provides for grace marks for improvement of division/class. After having taken three attempts to improve the class/division as per Ordinance No.5 of 2010, the petitioner cannot be permitted to challenge Clause 8 of the said Ordinance. Before reappearing in 1/3rd of the theory subjects on three occasions, the petitioner did not challenge Clause 8 of Ordinance No.5 of 2010. The petitioner cannot be permitted to blow hot and cold and avail the benefit of the part of the Ordinance and challenge the rest of the part of it after availing the benefit under the said Ordinance and failing to succeed. It is a settled

position of law that a party availing the benefit of a provision cannot subsequently challenge the provision after being unsuccessful in securing the benefit. Even otherwise, we do not find that Clause 8 of Ordinance No.5 of 2010 is either arbitrary or discriminatory. By clause 8, two distinct classes are carved out, a class of candidates that are seeking improvement of class/division by resorting to Ordinance No.5 of 2010 and the other class of candidates not resorting to the said Ordinance and seeking the benefit of grace marks for improving the division/class by resorting to Ordinance No.18 of 2001. There is rationale behind creating the two classes, the first class being of those candidates attempting the examination only once for securing grace marks for improvement of the division/class and the other being of not so meritorious candidates that are permitted three attempts to improve their class/division. Since three attempts are already granted to the candidates resorting to Ordinance No.5 of 2010, the said candidates cannot be equated with the candidates, who lose their class or division just by a whisker in their first attempt. There is a nexus with the object that is sought to be achieved by creating the two classes. Since the classification is based on an intelligible differentia, it cannot be said that the University has discriminated between the candidates appearing at the examination only once and the candidates reappearing at the examination in terms of Ordinance 5 of 2010. The submission made on behalf of the petitioner that Clause 8 of Ordinance 5 of 2010 is arbitrary and discriminatory is liable to be rejected.

The reliance placed by the petitioner on Clause 21 of Ordinance No.16 of 2007 is ill founded, as the case of the petitioner would not be governed by Ordinance No.16 of 2007, but would be clearly governed by Ordinance No.18 of 2001 read with Ordinance No.5 of 2010. The marks of the petitioner cannot be rounded off, in view of Ordinance Nos.16 of 2007. Ordinance

No.16 of 2007 only relates to the procedure for providing photo copies of answer books to an examinee and an opportunity to the examinee to avail the redressal mechanism if he/she is not satisfied with the marks allotted. In the redressal mechanism in Ordinance No.16 of 2007, there is a provision for rounding off the marks of the paper that is revalued, if the total marks of the subject paper are a fraction. This Ordinance does not refer to awarding of grace marks or rounding off for securing a higher division/class. Ordinance No.18 of 2001 provides for grace marks for passing in a head, for improving a division/class or for getting distinction. Note B of this Ordinance provides grace marks for seeking higher division or class. The petitioner, however, cannot take advantage of Ordinance No.18 of 2001, as the petitioner had availed the benefit of Ordinance No. 5 of 2010 for taking three attempts in 1/3rd subjects of the examination with a view to improve the class/division and Clause 8 of Ordinance No.5 of 2010 provides that candidates taking the benefit of Ordinance No.5 of 2010 would not be entitled to take advantage of Ordinance No.18 of 2001.

Since the action of the respondent-University in not granting grace marks to the petitioner for improvement of class/division in view of Clause 8 of Ordinance No.5 of 2010 appears to be just and proper, the writ petition is dismissed with no order as to costs.

JUDGE

JUDGE