SHEPHALI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7369 OF 2019

Adv Om S/O Balkrishna Trivedi, Age 46 years, Occu. Legal Practitioner, R/o 1, Astavinayank Nagar, Erandol, Dist. Jalgaon. **...Petitioner**

Versus

1. **The State of Maharashtra through its Secretary,** School Eduction and Sports Department, Mantralaya Mumbai 0 32 (Copy to be served on the Government Pleader High Court of Bombay)
2. **The Director of Education,** (Secondary and Higher Secondary) Maharashtra State, Pune.
3. **The Deputy Director of Education,** Mumbai Division, Netaji Subhash Road, Charni Road (West), Mumbai – 4

...Respondents

Mr. S.B. Talekar, *Advocate i/b H. P. Randhir, for the Petitioner.*
Mr. R.S. Apte, Senior Advocate, *a/w Mr P.P. Kakade, Government Pleader and Mrs R. A. Salunkhe, AGP, for the Respondents.*

CORAM: S.C. DHARMADHIKARI & G.S. PATEL, JJ

DATED: 5th July 2019

ORAL JUDGMENT (*Per G.S. Patel, J*).—

1. Leave to amend in terms of the draft amendments tendered by Mr Talekar, taken on record and marked 'X' for identification. Amendments to be carried out in two weeks, without need for re-verification.

2. The Petitioner's son, Abhay Trivedi, was a student at the Anubhuti School in Jalgaon District. In 2019, Abhay appeared for the 10th standard Indian School Certificate Examinations, or ICSE, conducted by the Council for the Indian School Certificate Examination, New Delhi ("**the ICSE Council**"). The Council declared the ICSE 2019 results on 7th May 2019.

3. On 3rd June 2019, the 1st Respondent State and its authorities (the 2nd Respondent is the State Government's Director of Secondary and Higher Secondary Education, and the 3rd Respondent is the Deputy Director of Education, Mumbai Division) introduced a new policy. This is called the 'Best Five' policy. The State said that this 'Best Five' policy would apply to the ICSE results, i.e. to those students who sat for the ICSE exam and sought admission to the 11th standard in junior college.

4. The Petitioner assails this 'Best Five' policy in this writ petition under Article 226 of the Constitution of India. His challenge, as presented by Mr Talekar, is restricted. The context is this. In early days, the ICSE syllabus had no optional subjects. These were gradually introduced. Subjects were split into three

groups. Group I had three subjects. All are compulsory: English; one second language (an Indian language or a modern foreign language), and history, civics and geography. Group II has seven subjects: mathematics, science (physics, chemistry and biology), economics, commercial studies, modern foreign languages, classical languages and environmental sciences. There are 13 subjects in Group III, and these include, among others, art, performing arts, home science, cookery, yoga, etc.

5. The ICSE Council was established in 1958 by the University of Cambridge Local Examinations Syndicate with the assistance of the Inter-State Board for Anglo-Indian Education. The Council is a society registered under the Societies Registration Act, 1860. The Delhi Education Act, 1973 recognized the ICSE Council as a body conducting public examinations. The Council is now a representative body, with members drawn from the Government of India and various associations and bodies. It is administered by an Executive Committee consisting of a Chairperson and four members. The Chief Executive and Secretary of the Council is the ex officio Secretary of the Executive Committee. The Council and the Executive Committee periodically frame regulations governing the syllabus and examinations for the ICSE. The same Council or ICSE Board also conducts the Indian School Certificate or ISC examinations and Vocational Education Examinations. There is a Committee on Examinations and Subject Committees for drawing up and revising syllabuses and accepting suggestions. The ICSE Council has its own teams of trained examiners, specialists and advisers.

6. The ICSE Council's regulations contain comprehensive provisions for the course, including attendance, course work, choice of subjects and so on.

7. At this stage, we must note two aspects. First, that there is no equivalence between the number of 'subjects' and the number of actual examination papers. For instance, while the subject 'science' may be one, there may be three separate examinations for each of the constituent subjects of Physics, Chemistry and Biology. Until at least the early 1980s, ICSE students wrote about nine examination papers grouped all together into six 'subjects'. There were examination papers in English Language, English Literature, History and Civics (combined), Geography, Hindi, Mathematics, Physics, Chemistry and Biology. These constituted six subjects: English, History/Civics, Geography, Hindi, Mathematics and Science. At that time, there was a 'point' system, where students received pre-defined points depending on their exam scores in these six subjects. A point of 'one' was the highest. These were called the 'aggregate', and thus a student who got an 'aggregate' of 6 ranked highest in the ICSE examinations. There was no equivalent of this system in other state board examinations and therefore this system yielded to the usual marks-based system. Further, as we have noted, options came to be introduced.

8. In the optional subjects system, some combinations were not allowed: for instance, a student could not take Sanskrit as a second language in Group I and also as a classical language in Group II; nor Economics in Group II and Economic Applications in Group III; etc. We note this because it is evident that this splitting into groups

is by no means casual or ad hoc but is evidently carefully considered and structured. A copy of these 2014 Regulations is in the compilation Mr Talekar tendered.

9. Until 2014, students had to take examinations in at least six subjects, and could optionally take a seventh. The three subjects in Group I were all compulsory. Only one subject was permitted in Group III. But in Group II, students had to take at least two subject, but could optionally take a third subject. The 2014 Regulations in Part II of Chapter II made all three Group I subjects compulsory, gave students the option of any two subjects in Group II, and the option of any one subject in Group III, thus making a total of six subjects to be taken for the ICSE final examinations. This pattern continued until 2016.

10. Also in that compilation is a copy of the 2017 ICSE Regulations. There was now a change in Part II of Chapter II. From this academic year on, the pattern reverted to the earlier pre-2014 system of six compulsory and an optional seventh subject.

11. The 2018 Regulations in this regard are the same as the 2017 Regulations.

12. In 2010, the State introduced a 'best of five' policy. This was challenged in Original Side Writ Petition No. 1109 of 2010, *Sangita Shah & Ors v State of Maharashtra & Ors*.[1] There, the policy was being applied in a discriminatory fashion. The 4th respondent was

[1] 2010 (112) Bom LR 2593.

the Maharashtra State Board of Secondary & Higher Education, and the 5th respondent was the ICSE Council. This High Court's Division Bench decision was rendered by one of us (SC Dharmadhikari J) on 23rd June 2010. The relevant portions, for our purposes today, are these:

> 58. **The decisions rendered earlier are relied upon even in the present case and Mr. Dada and Mr. Subramaniam urged that in an attempt to get over these binding judgments, the policy of best of five has been evolved. We find much substance in this contention of the learned Senior Counsel.** In the present case, a perusal of the Government Resolution indicates that this time the State uses the term 'bringing uniformity'. **In the garb of bringing uniformity for the assignment of marks, their computation and allocation of grades, what has been done is that a policy is evolved which enables picking up of five subjects of the SSC Board examination in which the best marks have been attained. However, the marks assigned to the best five subjects would be taken only in case of the students appearing for the (Xth standard) qualifying examination through the 4th Respondent Board.** From a perusal of the Government Resolution, the affidavits on record and the stand taken by the State before us, **it is more than clear that the best of five policy would not apply to the Petitioners and other students appearing for the same qualifying examination through the 5th Respondent Council/Board.** During the course of arguments, **we repeatedly called upon the learned Counsel appearing for the Respondents to take instructions and state as to whether the State would extend this policy to the students appearing for the qualifying examination through other Boards. The learned Advocate-General on instructions stated that**

the policy cannot be extended to them. It is for the 5th Respondent to upgrade its own students. They can choose their five best subjects and assign the marks on that basis. In other words, they can evolve their best of five policy but no clear assurance was forth coming as to whether the State would on its own apply the Government Resolution dated 25th February 2010 to all students appearing for the Xth standard examination irrespective of the Boards to which their institutions are affiliated. Therefore, the argument of the Respondent No. 5 becomes relevant. **Mr. Subramaniam handed in figures to the Court to buttress his submission that there is no disadvantage to SSC students. Instead, the Government Resolution is a windfall. The figures handed in shows that only 8298 students of Respondent No. 5 appeared for the Standard X examinations in the academic year 200910. The figure is not disputed by the Respondents. On the other hand, it is stated that 16,00,000 students took the Standard X examination through Respondent No. 4 Board.** We enquired from the Respondent-State as to whether there are few seats in premier Institutions in the State and that is the reason why the Government Resolution is made exclusively for the SSC Board students. **There is nothing to indicate that all the Junior College seats in the premier educational Institutes of the State would be cornered by non-SSC Board students and particularly by 8,298 students of Respondent No. 5 Board. No data, no figures, no record, no document is produced. Yet, the chanting that SSC Board students suffered all these years and are disadvantaged continued. The oral assertion unsupported by any material and in the teeth of binding Judgments of this Court must be necessarily rejected. In such circumstances, we are called upon to decide is to whether the policy evolved gives an unfair advantage to**

the students appearing through Respondent No. 4 Board and places Respondent No. 5 Board and its students at a disadvantage.

59. **That answer will be obviously in the affirmative. The State while evolving the best of five policy is discriminating between students who are similarly placed for admissions to XI standard Junior Colleges, the State has failed to satisfy the Court as to why the subject Government Resolution was restricted in its application to the students of Respondent No. 4 Board.** The argument that what the State has done is to upgrade its own students hardly impresses us. Further, Regulations 56, 58 59 of the said Regulations are amended and that is why the policy evolved is restricted to SSC students is a submission which hardly impresses us. The State may be permitted in law to accept the recommendations and proposals emanating from Respondent No. 4 for amending its own Regulations. The State may be empowered to sanction these amendments so that the students of Respondent No. 4 Board can be upgraded, if at all the Board thought it fit and that there was necessity of doing so. The question is not about what the Respondent No. 4 requested the State to do. In law, the Respondent No. 4 can forward proposals for amendment to its Regulations and the State is equally empowered to accept, approve and sanction them. The State while accepting the proposals and recommendations appears to have on its own decided to restrict the best of five policy to the students of Respondent No. 4 Board by excluding from its purview the non-SSC Board students. We have already held in the judgments in *Viraj Maniar* (90:10) (supra) and *Percentile* case (supra) that even Respondent No. 4 Board could not have called upon the State to make such an exclusion yet, what prevailed upon the State Government to exclude the non-SSC Board students is not clear to us at all and remains unexplained.

The argument that this is not an attempt to overreach the Court and by-pass and brush aside the binding judgments is without substance.

60. The State was very well aware of its stand before the Division Benches of this Court in earlier decisions. **The same plea of the SSC students being at an disadvantage is reiterated before us.** The learned Advocate-General with his usual fairness and ability did pursue it for some time, but the fact remains that on affidavit it has been more than once made clear by the State that the best of five policy is to remove the disadvantage to the SSC Board students. **The learned Advocate-General with all persuasion at his command, could not convince us that there was any disadvantage.** He only emphasized that the SSC Board constitutes the majority and the State could not have ignored their Academic Interest. **However, he was unable to substantiate the argument of disadvantage to SSC Board students by producing any material save and except urging that the Curricula, the exam and marking pattern of the ICSE students is less cumbersome and liberal.** Marks are assigned for subjects such as Cookery, Drawing, Art and Craft which increases their percentage in comparison to the SSC Board students. Therefore, it is possible for them to easily walk in prime Colleges. This results in disadvantage to SSC Board students and they suffer in the process. We are afraid we cannot accept this submission. Firstly, there is nothing to support this plea except the statement in the Government Resolution and the affidavit of the State. How the non-SSC Board students gained over years should have been demonstrated by producing statement of relative marks, the number of seats available in prime colleges and they being grabbed by the non-SSC Board students, though they are few in number, only on the basis of their liberal marking and high ranking. We are told to draw conclusions on the basis of the oral

statements across the Bar. Then, the plea of public outcry and anger of the SSC Board students was raised. We are afraid that emotions and sympathy can have no place in such matters and they cannot be decided on that basis alone. These pleas were raised in the earlier matters and the State miserably failed to substantiate them. Selfsame pleas as in "*Percentile*" case (*supra*) are reiterated before us and we have no hesitation in rejecting them. The learned Advocate-General then simplifies the entire exercise by terming it as nothing but correction of the Regulations pertaining to computation of marks, award of prizes and certificates. It is not as simple as that because the State Government Resolution read in its entirety shows that the non-SSC Board students will not be given the benefit of the best of five policy.

61. Ultimately, in this case the question is not of the power of the 4th Respondent Board to amend its own Regulations so as to upgrade its students or better their marks. Further, the power to amend the said Regulations so as to compute and calculate the marks and percentage in a particular manner is also not a disputed question. None have placed any extreme proposition on this issue. What the argument on behalf of the Respondents overlooks is the fact that the recommendations and proposals of academic bodies like Respondent No. 4 Board forwarded to the State have to be accepted, approved and sanctioned by the State. **It is while accepting, approving and sanctioning them that the State in this case took the decision that the policy of best of five should be restricted in its application to the SSC students.** It is clear that the State has taken such a decision but it could not substantiate its stand of keeping out the students of Respondent No. 5 Council. Thus, the benefit of best of five will not be available to the students of IC SE. All this is done at the stage of admission to Junior College (XI standard). **When**

the State cannot and does not dispute that in admissions to Junior College students of statutory and non statutory boards can apply, then, while conferring a benefit on one set of students and excluding the other, it is the State which has lost sight of the mandate of Article 14 of the Constitution of India and the guarantee of equality enshrined therein. It is the decision of the State which is challenged and for the reasons afore-noted we are compelled to quash it. In other words, there would not have been any difficulty in upholding the policy decision of best of five if there was no discrimination. The discrimination being clear and on the face of it, we have no alternative but to strike down the decision of the State. Thus, we have proceeded on the basis that the 4th Respondent Board's powers in law may permit it to make the proposals for upgrading its own students and further act in such a manner so as to ease their tension and stress, but while accepting the proposals and recommendations the State could not have acted contrary to the Constitutional mandate. Precisely, this is what is done in this case. Further, the Rule of merit is also brushed aside by the State. A meritorious student must be allowed to pursue higher studies in an Institution which he chooses on the basis of his marks, Percentage and Ranking. Everybody can compete for the best College/Institution, irrespective of the Education Board to which he belongs, on the basis of his or her Merit. No attempt to lower the merit should be tolerated in academic matters and that is the Rule laid down in the Supreme Court decisions, which, we must respectfully follow.

62. **We are constrained to observe that as in the earlier judgments, namely, *Percentile* case (*supra*) and *Viraj Maniar* (*supra*), even in this matter the State has failed to substantiate its plea that the SSC Board students are at a disadvantage.** We have reproduced the

statements made in the affidavit in reply precisely for this reason. The first affidavit of the State very clearly in paragraph 3 states that the decision was taken considering disadvantage faced by its students. For the disadvantage to be substantiated, the State was aware, that something more should have been brought on record. We are sorry to hold that the State has once again failed to substantiate and prove its case of disadvantage to SSC Board students. **The Board may state anything in its affidavits, but the State's stand is clear when it sets out the plea of disadvantage.** It has been earlier observed that some distinction in the subjects and the manner of marking is not enough to substantiate this plea. **It has been very categorically held by two Division Benches of this Court that the plea of disadvantage to SSC students is not substantiated by placing only such figures and details of subjects.** Once Regulation 79(1) is not amended, then all are eligible, irrespective of the Boards to which they belong, for admission to Junior Colleges affiliated to Respondent No. 4 Board. If the State feels that there was disadvantage to SSC students which necessitates and warrants giving advantage only to them, then the necessary and relevant material should have been placed before us. This is not a case where the Petitioners can be called upon to discharge a burden of proving the contrary. The Petitioners have come to the Court with a clear assertion that there is discrimination writ large in the Government action. They have set out the necessary averments in the Petition and they have substantiated them by placing reliance on the binding judgments of this Court. They have pointed out and which is not denied that these decisions are not set aside or reversed by the Hon'ble Supreme Court. On the other hand, it is conceded that the State accepted the earlier judgments of this Court by not challenging them till date. Once this is the stand of the Petitioners, then it was

incumbent upon the State to meet their pleas and place before the Court necessary material in support of its stand that the SSC Board students were at disadvantage all throughout. Having failed to do so, we see no alternative but to hold that the impugned Government Resolutions are violative of the mandate of Article 14 of the Constitution of India which treats those placed equally in an equal manner. There is no basis for the assumption and pleas of the State as noticed above. In such circumstances, we allow this Writ Petition by the following order:

ORDER

The impugned Government Resolution/Order dated 25th February 2010 and the Corrigendum dated 14th and 16th June 2010 issued by Respondent No. 1 State are quashed and set aside.

In view of the fact that we have quashed and set aside the Government Resolution dated 25th February 2010 and Corrigendum dated 14th and 16th June 2010, the Respondent Nos. 1 to 4 are directed to forthwith commence the admission process (Online admission and admission process) without adherence to the best of five policy as set out in the Government Resolution dated 25th February 2010 and the Corrigendums thereto.

Needless to state that the on line admission process will commence and shall be completed without in any manner applying Rule 8 as set out in the Brochure which is issued by the State of Maharashtra and particularly Respondent No. 1. Further needless to add that Respondent Nos. 1 to 4 shall make the necessary modification/ changes in the mark list of the examination of the SSC students held in March-April 2010.

> Rule accordingly made absolute in the aforesaid terms.
>
> In view of the disposal of the Writ Petition, nothing survives in Notice of Motion No. 325 of 2010 and the same is disposed of accordingly.
>
> (*Emphasis added*)

13. It is at once evident that what was at issue in *Sangita Shah* was the patent discrimination, amounting to manifest arbitrariness and failing the Wednesbury unreasonableness test. One standard was applied to SCC Board students, and found to give them an advantage in junior college admissions. The same policy or principle or standard was not applied or even offered to be applied to students taking other 10th Standard board examinations. Hence the policy failed the Wednesbury unreasonableness test. This is a well-established standard of unreasonableness used in assessing applications for judicial review of State decisions. A decision is said to be "Wednesbury unreasonable", i.e. to fail this test, if it is so unreasonable that *no reasonable person acting reasonably could have made it*.[2] The test is stricter than merely showing that the decision was unreasonable, and far stricter than merely showing that the resultant decision was undesirable, or that a better decision was conceivably possible.

14. The 4th respondent board, Maharashtra State Board of Secondary & Higher Education, carried the matter to the Supreme

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[2] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, (1948) 1 KB 223 : 1947 (2) All ER 680.

Court.[3] On 13th July 2010, the Supreme Court passed an interim order. We reproduce it in full.

SUPREME COURT ORDER DATED 13TH JULY 2010 IN CIVIL APPEAL NO. 6256 OF 2010

UPON hearing counsel the Court made the following

O R D E R

We have heard learned counsel appearing for the parties at length.

Permission to file Special Leave Petitions is granted.

Leave granted.

Application for intervention is allowed.

Six weeks' time is granted to the respondents to file counter-affidavit. Three weeks' time thereafter is granted to the appellants to file rejoinder-affidavit.

Liberty is also granted to file additional documents within six weeks.

List these appeals for hearing in the month of October, 2010.

INTERIM ORDER

By way of interim order, we issue the following directions:

1. There shall be stay of the operation of the impugned judgment insofar as the unconstitutionality regarding the impugned Resolution dated 25.2.2010 and corrigendums dated 14th & 16th June, 2010 are concerned.

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[3] Civil Appeal No. 6256 of 2010, *Maharashtra State Board of Secondary & Higher Education v State of Maharashtra*.

2. The Division Bench has directed by way of its operative order in the following terms:

> "The impugned Government Resolution/order dated 25th February, 2010 and the Corrigendum dated 14th and 16th June, 2010 issued by respondent No. 1 State are quashed and set-aside.
>
> In view of the fact that we have quashed and set aside the Government Resolution dated 25th February, 2010 and Corrigendum dated 14th and 16th June, 2010, the respondent Nos. 1 to 4 are directed to forthwith commence the admission process (online admission and admission process) without adherence to the best of five policy as set out in the Government Resolution dated 25th February, 2010 and the Corrigendums thereto.
>
> Needless to state that the online admission process will commence and shall be completed without in any manner applying Rule 8 as set out in the Brochure which is issued by the State of Maharashtra and particularly Respondent No. 1.
>
> Further needless to add that respondent Nos. 1 to 4 shall make the necessary modification/changes in the mark list of the examination of the SSC students held in March-April, 2010.
>
> Rule accordingly made absolute in the aforesaid terms.

> In view of the disposal of the Writ Petition, nothing survives in Notice of Motion No. 325 of 2010 and the same is disposed of accordingly."

3. It is, therefore, apparent that the on-line admission process is directed to be proceeded without adherence to the best five rule in case of students who have appeared for SSC examination in March-April, 2010. Further, it has been directed that the fresh process will start without the application of Rule 8 as set out in the Brochure issued by the State of Maharashtra-respondent No.1 herein.

4. **Taking into consideration the welfare of vast number of students who have appeared for the examination, which is reported to be about 16 lakhs, as also the students who have appeared for the examination conducted by the Council for Indian School Certificate Examinations (for short as "ICSE"), we deem it fit to direct that the best five rule shall be made applicable to the students passing the present examination of SSC for admission to junior college. <u>However, this direction will be subject to the rider that the same best five rule shall also be made applicable even in the case of students passing ICSE examination.</u>** ***In their case, the best five rule shall be restricted to the subjects in Groups-1 and II only (as per their curriculum) and not for the Group-III subjects. There shall be a further rider that if the concerned student feels that he should also get the advantage of subjects of Group-III, he shall have an option to proceed on the basis of average of all the seven subjects without applying the best five rule. Thus, in case he exercises that option, his percentage shall be calculated by arriving at the average of all the seven subjects.***

> 5. Because of these directions, it shall not be necessary for the appellant-board to cancel the format of mark-sheets granted in case of SSC students. While proceeding with the admissions generally as also by on-line process, care shall be taken to see that the options given by the ICSE students are properly honoured and meticulous care will be taken in that respect.
>
> (*Emphasis added*)

15. This interim order, as can immediately be seen, eliminated the discrimination the High Court found between SSC and non-SCC students. It made the best-five rule applicable to ICSE students too, but restricted this to the best of five subjects in Groups I and II. A Group III subject could not be used for the best-five principle to apply.

16. This is what Mr Talekar emphasizes. What he overlooks is the subsequent portion which we have also highlighted, viz., that ICSE students taking seven subjects could opt out of the best-five rule and take the average of *all seven* subjects (three compulsory from Group I, three optional from Group II, and one additional from Group III). Even at that time, students had the option of taking two *or* three subjects in Group II. Those students who opted for only two subjects in Group II would thus take only six subjects and not seven. For them, the Supreme Court's interim direction of an optional averaging *did not apply*. They were bound by the best-five rule. The average of all subjects, including the single Group III subject, applied *only to those students who took seven subjects, not to those who took six subjects*. A Group III subject could enter the frame

of reference *only* for those who took seven subjects and not for those who took only six.

17. For completeness, we note also the final order of the Supreme Court disposing of this Civil Appeal on 18th August 2011.

O R D E R

1. These Civil Appeals have been filed by Maharashtra State Board of Secondary and Higher Secondary Education and others challenging the judgment dated 23.6.2010 passed by the High Court in Writ Petition No. 1109 of 2010. That was a petition filed by few students through their parents challenging the constitutional validity of Resolution/Order dated 25.2.2010 and corrigendums dated 14 & 16 June, 2010 issued by the State of Maharashtra. By the impugned Government Resolution, the amendments made to the regulations were granted approval.

2. **Maharashtra State Secondary and Higher Secondary Education Board-appellant herein had introduced a scheme by which insofar as the examination of 10th standard is concerned though the students had to write six papers in all, the best average percentage of score in best five subjects only was to be considered for the purpose of admission to the 11th standard. Needless to say that the students had to pass in all the six subjects. This arrangement was challenged by the students who were appearing for Indian School Certificate Examinations ("ISCE" in short) because they had to write the papers in seven subjects and they felt that this was an unfair advantage given to the students of the State Board inasmuch as percentage of the State Board to the 11th standard would raise in comparison to the percentage of the students of ISCE**

who had to write the papers in seven subjects. The High Court accepted this contention and quashed the Government Resolution as well as the amended regulations by the Board holding the same to be discriminatory.

3. The matter came up to this Court. At that time, the whole admission process of about 16 lakhs students in the State of Maharashtra was stuck up and as the High Court in its operative order had directed the cancellation of all the mark lists wherein the score in the best five subjects alone was shown for the purpose of admission to 11th standard. **Be that as it may, when the matter came up before this Court, an interim order was passed on 13.7.2010 taking into account the state of affairs at that time. The interim order runs thus:**

[***The Court set out the interim order we have already quoted***]

4. The admissions to 11th standard then proceeded on the basis of the aforesaid interim order. **In order to balance the equities in the aforesaid interim order, it was directed that even the students of ICSE could give their choice for the best five subjects if they so felt. An option was also left open that if they so felt, <u>they could also ask for the score in all the seven subjects</u>, in which they had appeared, to be taken into consideration for deciding the percentage for the admission to 11th standard.**

5. Needless to say that the admissions proceeded on that basis for the academic years 2010-2011 and 2011-2012.

6. Before the admissions for the academic year 2011-12 were started, the appellant amended their regulations and admittedly brought them in tune with the interim order passed by this Court on 13.7.2010.

7. When the matter came up today, Mr. C.U. Singh, learned senior counsel appearing for the Maharashtra State Board of Secondary and Higher Secondary Education -appellant argued that **since the amendments have now been made in tune with the interim order passed by this Court on 13.72010, in fact these appeals have become infructuous. Mr. Singh points out that all the petitioners/students who had filed the writ petition before the High Court got the advantage of the interim order dated 13.7.2010 and have now been admitted to class 11th standard on the basis of their score in the best five subjects or as the case may be, in all the seven subjects.** Mr. Singh, therefore, prays that the appeals may be disposed of as having become infructuous.

8. Mr. Arvind Savant, learned senior counsel appearing for the students/parents, however, submits that in one sense, the appeals have become infructuous. However, even the amendments brought up by the Board to the regulations are in challenge in a Writ Petition No. 7 of 2011 filed before this Court under Article 32 of the Constitution. He apprehends that if these appeals are disposed of as infructuous, it may affect the merits of Writ Petition No. 7 of 2011.

9. Ms. Indu Malhotra, learned senior counsel appearing for the Council for ISCE submits that in fact there has been a change in the syllabi and if the appeals are disposed of, that is likely to affect the Council-ISCE inasmuch as the ISCE has to hold examinations in all the States and is not limited to the State of Maharashtra.

10. **Considering all these contentions, we are of the clear opinion that these appeals have become infructuous and are liable to be disposed off as such. We also make it clear that this disposal is being done**

without considering the merits of the impugned judgment. It was contended before us that the amendments which have been made to the regulations were only limited to the period covered by these appeals meaning thereby only for two academic years. **Mr. Singh makes it clear that these amendments would not be treated to be limited to two years only and would continue to be in field unless they are further amended.**

11. We do not express anything in respect of the powers of the appellant/State Government to amend their regulations because that subject is not before us.

12. **We, accordingly, modify the judgment of the High Court to the extent that has been indicated above in terms of the interim order dated 13.7.2011 which has now been given the final shape by way of amendments in regulations.** We make it clear that this order will not be viewed as an expression of opinion on the merits.

13. Mr. Singh points out that four out of eight petitioners/students in W.P. (C) No. 7 of 2011 have already been admitted to 11th standard. He does not have instructions regarding the other four students. Mr. Savant also does not have the instructions as to whether the petitioners in the Writ Petition No. 7 of 2011 have been admitted or not. We feel that it will not be for us to entertain this Writ Petition under Article 32 of the Constitution. We grant liberty to the petitioners to approach the High Court by way of a Writ Petition under Article 226 of the Constitution, if they so feel.

14. The Civil Appeals and Writ Petition stand disposed of accordingly.

(*Emphasis added*)

18. Thus, the interim order of the Supreme Court of 13th July 2010 cured the mischief noticed by the Division Bench of this Court. The State amended the regulations to bring them into conformity with the Supreme Court's interim order. But what is noteworthy is that even the final order emphasizes that as regards ICSE students, the best-five rule applies, and *only those students who take seven subjects* can lay claim to an average of *all seven subjects*. The 'average of all subjects' principle was never applied to students who took only six subjects.

19. The Petitioner's son, Abhay, took only six subjects. His average in the five subjects (because he took only five) is 94%. If he is allowed to take the average of all six subjects, i.e. to include the single subject from Group III, his average is 95%. In that 1% gap, there could be several hundreds or thousands of competing students. Abhay wants admission to the 11th Standard at St Xavier's College, Mumbai in the Arts stream. Often, the cut-off percentage is a fractional figure such as 94.2% or 94.8%. If such a cut-off comes into play, Abhay will not gain admission.

20. We had before us another challenge to the best-five rule for the current year in *Yashvi Navdeep Vora v State of Maharashtra & Ors.*[4] That brought a challenge to a State Government letter of 19th June 2019. We called on Mr Apte, learned Senior Counsel appearing in that petition too, to take instructions. He did, and tendered an affidavit filed by Deputy Director of Education, Mumbai, Rajendra Manek Ahire. On 27th June 2019, we noted the statement in that

[4] Original Writ Petition (L) No. 1921 of 2019.

affidavit, and also that the petitioner in that case said through her counsel that her grievances stood redressed. This is our order of 27th June 2019:

> 1 This petition under Article 226 of the Constitution of India challenges a letter of 19th June, 2019.
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> 2 That purported to restrict the benefit of the Best-5 Scheme to the students appearing for the SSC Examination of the respondent-Board and the relief sought is, to that extent, it is unconstitutional.
>
> 3 The petitioner before us along with other students appeared for the SSC examination, but under the auspices of the ICSE Board.
>
> 4 The petitioner appeared and the results were declared on 7th May, 2019. On 3rd June, 2019, the State, through the respondent No.3, outlined its policy styled as Best-5 and that was to be followed uniformly for the CBSE and ICSE Board.
>
> 5 The date for admission for the First Year Junior College standard eleven admissions were notified and by the impugned letter, the Government informed the concerned authorities that the Junior Colleges in the State of Maharashtra affiliated to the respondent No.6 will consider the percentages of the first five subjects as listed in the mark-sheet for eligibility for admission.
>
> 6 It is this letter which is challenged. When the writ petition was placed before us, Mr. Apte, learned senior counsel appeared on behalf of the respondent Nos.1 to 3 and sought time.
>
> 7 At his request, we placed the matter today. An affidavit has been filed by the State and the other two

respondents, of the Deputy Director of Education, Mumbai Region, Shri Rajendra Manek Ahire. In this affidavit, the deponent outlines the policy in the following terms :

> "18 **I say that in short, the Respondent No.1 has decided to consider any five subjects of Group I and II only, out of six subjects in respect of candidates having their marksheet of six subjects in I.C.S.E. for process of admission to Standard XIth as the sixth subject is of Group III.** I say that **the Respondent No.1 has further decided that in case of candidates having seven subjects in the I.C.S.E. mark-sheet, the candidates will have 2 options available i.e., either to opt for any five best subjects from Group-I and II only, or if the candidates desire the advantage of all the seven subjects then, the percentage shall be calculated by arriving at the average of all the seven subjects for purpose of admission to Standard XIth.**"

8 **In the light of this stand of the State Government and the policy outlined in this affidavit, Mr. Chavan appearing for the petitioner says that the grievances of the petitioner as also students similarly placed like him stand redressed.**

9 The statements made in paragraph 18 and reproduced above so also the statements in the preceding paragraphs based on which paragraph 18 summarizes the policy were all accepted as undertakings to this Court.

10 In the light of the above, the writ petition need not be pursued further. It is disposed of. Needless to clarify that the procedure for taking admission and stated to be on-line

> will now contain the suitable changes and modifications in terms of this policy and will not make any reference to the impugned letter of 19th June, 2019 which, in any event, does not survive.
>
> (*Emphasis added*)

21. In our view, this is wholly consistent with the Supreme Court's interim order of 13th July 2010 and final order of 18th August 2011 in the *Sangita Shah* litigation. To put this beyond all controversy, the structure for ICSE students at the 10th Standard final or Board examinations is this:

(a) Students may take either six or seven subjects. The three subjects in Group I are compulsory for all students. From Group II, students may take two *or* three subjects. From Group III, only one subject can be taken.

(b) For all students, the general norm is the best-five principle.

(c) However, those students who take seven subjects, i.e. those who opt for an additional or third subject from Group II, have a further option of using the average of *all seven subjects*. This option is available only to them. It is not available to those who take less than seven subjects.

22. In our view, this is exactly in conformity with the regime that has held the field since 2010-2011 and the two Supreme Court orders referred to above.

23. What Mr Talekar seeks is now to introduce a modification allowing the option of an average of six subjects even to those who took only six and did not opt (though they could have) for an additional subject from Group II, making seven subjects. In other words, his petition is nothing but an attempt to re-write the entire edifice of the law from *Sangita Shah* in 2010 onwards. At no point since then was there ever an option of the average of six subjects as being an option for ICSE students. Even if the 2014-2017 regime allowed only for six subjects, it would make no difference for the simple reason that the current regime of permitting up to seven subjects is exactly the same as it stood in 2010 and 2011 when the matters were before the Supreme Court. There cannot be any further relaxation for those students who knowingly took six subjects when they had the option of taking a seventh (i.e. an additional subject in Group II).

24. In fact, we find the prayer in the writ petition to be wholly incorrect and misconceived. Prayer (B) reads thus:

> "(B) This Hon'ble Court by way of writ, order or directions in the like nature be pleased to direct the respondent authorities to consider and count the marks of the petitioner for six subjects from Group I, II and II as per the guidelines of the Hon'ble Apex Court as per communication dated 29th May 2012 issued by Respondent No. 3 (Exhibit "E") and further be pleased to direct the respondent to correct the information submitted online for admission to F.Y.J.C."

25. We leave aside the obvious typographical errors in this: the reference should be to the Petitioner's son, not the Petitioner; and the communication of 29th May 2012 is at Exhibit "C" at page 17, not Exhibit "E", which is the clarification of 29th June 2019. But this prayer is a patent misreading of the Supreme Court orders and of the 29th May 2012 communication also. That communication is consistent with the Supreme Court orders. It allows ICSE students to apply the best five rule to subjects in Group I and Group II only; and gives the further option of including Group III sole subject marks *only* to those students who have taken seven subjects. Mr Talekar, for some reason that escapes us, repeatedly ignores this all-important qualification of seven subjects throughout, whether in the Supreme Court orders or the 29th May 2012 communication at Exhibit "C". He proceeds on the wholly erroneous basis that the option of averaging from all three groups was always available to all students, irrespective of whether they took six subjects or seven subjects. It was not, and he is entirely in error. That option was only ever available to students who took seven subjects, three from Group I, three from Group II and one from Group III. The Petitioner's son took only six. The benefit of the average of all subjects is not available to him or those like him. It never was.

26. The petition is without merit. It is rejected. No costs.

(G. S. PATEL, J.) **(S. C. DHARMADHIKARI, J.)**