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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 15821 OF 2022**

- 1. SAVITA BALASO NIRUKE,**
Age about 32 yrs, Oc. Education,
R/o Kuditre Tal. Karveer,
Dist. Kolhapur
- 2. SANJAY DHONDU KOLEKAR,**
Age about 40 yrs, Oc. Education,
R/o 1058/B Vasudev Nagar, Fulewadi,
Ring Road, Kolhapur

... PETITIONERS

~ VERSUS ~

- 1. STATE OF MAHARASHTRA,**
through its Secretary,
Higher Education Department,
Mumbai 32
- 2. THE REGISTRAR/VICE
CHANCELLOR,**
Shivaji University Kolhapur
Kolhapur
- 3. THE DIRECTOR,**
Board of Examination and Evaluation,
Shivaji University Kolhapur,
Kolhapur.

... RESPONDENTS

APPEARANCES

FOR THE PETITIONERS **Mr Shaikh Abdul Azim M Hanif,**
with SC Mangle.

FOR RESPONDENT NO.1- STATE **Mr VM Mali, AGP.**

FOR RESPONDENTS NOS. 2 & 3 **Mr Vikram N Walawalkar.**

**CORAM : G.S.Patel &
S.G. Dige, JJ.**

DATED : 4th January 2023

ORAL JUDGMENT (Per GS Patel J):-

1. The consolidated Petition seeks a common relief for two Petitioners who are differently positioned. There ought to have been two separate Petitions as each Petitioner has a distinct cause of action and a distinct factual data set. Since, however, urgency is expressed, rather than lose time by directing the filing of a second Petition, or the withdrawal of this Petition and the filing of two fresh Petitions, we have proceeded with the hearing. There is also a consolidated reply filed on behalf of the 2nd Respondent by one Gajanan Ramakant Palse. The 2nd Respondent is the Registrar/Vice Chancellor of Shivaji University, Kolhapur. The Affidavit is filed by Deputy Registrar (Examination).

2. The 1st Petitioner, Savita Balaso Niruke, and the 2nd Petitioner, Sanjay Dhondur Kulkar, are both law students. The factual background briefly stated is this.

3. Savita took admission to the New Law College, Kolhapur in 2015. The New Law College is affiliated with the Shivaji University, Kolhapur. Sanjay obtained admission in March 2018 to the law course at the Shahaji Law College, Kolhapur.

4. Until March 2020, neither Savita nor Sanjay did well in their semester examinations. That is putting it at its mildest. They did very badly. Since 2015, Savita consistently failed a first semester examination until October 2019. After March 2020, the examinations were held online. Savita passed all the online examinations until October 2021. In March 2022, the examination was again offline but in Multiple Choice Question or MCQ format. Savita failed again. We only note these dates. Everybody knows what happened in the period between March 2020 and late 2021. The reasons why examinations were held online is also well known. We should not be understood to have expressed any view as to the reasons for this cycle of failing, passing, and failing yet again. Savita has applied for the revaluation of papers after March 2022, but without a fruitful result.

5. Sanjay's performance is hardly better. After he obtained admission to Shahaji Law College in March 2018, he failed in the examinations until October 2019. He successfully passed the online

examinations between March 2020 to October 2021, but in March 2022 failed the MCQ format offline examination.

6. It is in this factual background that the Petitioners seek a Mandamus in terms of prayer clause (a) at page 12. It reads thus:

“a. this Hon’ble Court be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other writ, order or direction directing Respondent Nos.2 and 3 to grant the petitioner No 1 and 2, 7 grace marks/Condonation of Deficit Marks in subject Law Of Crimes II Criminal Procedure Code, Labour Law II Industrial Law respectively in the 6th Semester Examination held on month of March 2022 and further declare that the petitioners have passed the 6th semester of the LLB course of 3 years law course conducted by the respondent number 2 and further to issue the result to that effect.”

7. The invocation for the grace marks is on the basis of certain ordinances, two in particular. We turn to these directly. These are at pages 25 to 27. We are concerned with Ordinance 94 and Ordinance 96, reproduced below.

O.94:(U.O.01.): Grace Marks for passing in each head of passing (Theory/Practical/Oral/Sessional) (External/Internal):

The examinee shall be given the benefit of grace marks only for passing in each head of passing (Theory/Practical/Oral/Sessional) in External or Internal examination as follows:

Head of Passing Grace Marks

Up to 50 2

51 to 100	3
101 to 150	4
151 to 200	5
201 to 250	6
251 to 300	7
301 to 350	8
351 to 400	9
401 and above	10

Provided that the benefit of such gracing marks given in different heads of passing shall not exceed 1% of the aggregate marks in that examination.

Provided further that the benefit of gracing of marks under this Ordinance shall be applicable only if the candidate passes the entire examination of semester/year.

Provided further that this gracing is concurrent with the rules and guidelines of professional statutory bodies at the All India level such as AICTE, MCI, Bar Council, CCIM, CCAIH, NCTE, UGC etc.

O.96 (U.O.04) Condonation:

If a candidate fails in only one head of passing, having passed in all other heads of passing, his/her deficiency of marks in such head of passing may be condoned by not more than 1% of the aggregate marks of the examination or 10% of the total number of marks of that head of passing in which he/she is failing, whichever is less. However condonation, whether in one head of passing or aggregate head of passing be restricted to maximum up to 10 marks only.

Condonation deficiency of marks be shown in the statement of marks in the form of asterisk and Ordinance number. Provided that this condonation of marks is concurrent with

the rules and guidelines of professional statutory bodies at the All India level such as AICTE, MCI, Bar Council, CCIM, CCIH, NCTE etc.”

8. Each ordinance operates in a slightly different way although in the same field, i.e., relating to grace marks and or condonation. The phraseology in each is slightly different. The Petitioners rely on the proviso to Ordinance 94 as the first limb of the argument. The first proviso, highlighted above, says that where the grace marks are given in different heads of passing, these grace marks must not exceed 1% of the aggregate marks ‘*in that examination*’. The Petitioners submit that the phrase ‘*that examination*’ means the examination for that entire academic year and not per semester. The total number of aggregate marks per semester is 500; therefore, 1% of a 500 marks aggregate would not help the Petitioners. They would receive at best only 5 grace marks, insufficient to see them through. The Petitioners therefore say that what should be taken into account under the phrase ‘that examination’ is the *total* of the aggregate marks of *both* semesters for a given academic year, i.e., a total of 1000 marks. If so, 1% of that would give each of them 10 marks, and this would be sufficient for their purposes.

9. The answer on behalf of the Shivaji University is that this is a complete misreading of Ordinance 94. The submission is that the expression ‘*that examination*’ means, and can only mean, the examination which the student has appeared for, and in which candidate has failed. It is submitted that accepting the submission of the Petitioners will open the floodgates and all manner of undeserving and unmeritorious students will get grace marks,

diluting academic standards. It is argued that if that phrase ‘that examination’ is not restricted to the examination in which the student failed, then there is no logical reason why it should be the aggregate of *all* examinations required to pass the LLB examination. In a third year law course this could be the aggregate of six semesters of 500 marks each, aggregating to 3000 marks and 1% of that would result in a grace amount of 30 marks. It would be even higher for a five year law course. This is argued to demonstrate the untenability and even absurdity of the consequences of accepting the Petitioners’ submissions. It is submitted that on that interpretation canvassed by the Petitioners, no law student ever needs to pass any examination and at the end of five years can get through simply on the basis of grace marks.

10. The second submission by the Petitioners is based on Ordinance 96 extracted above. There is a slightly different phraseology here and the emphasis is not on the words ‘*that examination*’ but on the expression ‘*head of passing*’. Emphasis is laid on the operative portion of Ordinance 96. It is submitted, and some law is cited in support of this submission and to which we will presently turn, that if a candidate fails in only one ‘head of passing’ but has passed in all other heads of passing, the deficiency of marks in ‘*such head of passing*’ may be condoned by not more than 1% of the aggregate marks of the examination or 10% of the total marks of that ‘head of passing’ in which the candidate has failed, *whichever is less*. There is a further restriction or a cap that the deficiency can be condoned only to the extent of 10 marks and no more. The submission here is that the expression ‘*head of passing*’ cannot be restrictively read since Ordinance 96 is a beneficial provision meant

to assist deserving students. It is not to be rigidly construed. If there is any benefit of doubt in the interpretation of Ordinance 96, it must be given to the student.

11. Reliance is first placed on a decision of the Division Bench of this Court in *Sonali Govind Badhe vs State of Maharashtra and Anr.*¹ This was a case where the Petitioner passed the B.Sc examination in 1999–2000. She then took admission to the M.Sc. course in that year. She completed M.Sc.–Part I in 2006–2007. She was then admitted to M.Sc.–Part II. She was doing her M.Sc. in Analytical Chemistry. She appeared for that examination in November 2007. The division of marks was 20 marks for internal and 80 marks for external with a total of 100 marks in this ratio. The M.Sc. course was also in four semesters. She had successfully completed the first semester and obtained 289 marks out of 500 marks. In the second semester, the petitioner was not declared passed because she did not have sufficient passing marks in the subject of Physical Chemistry–II. She then obtained 327 marks out of 500 in the third semester and 361 marks out of 500 in the fourth semester. It is because of the second semester marks that she was shown as failed. The threshold for passing was 40 marks out of 500. To pass the University examination, the minimum passing was 32 out of 80. The petitioner had obtained 18 out of 20 in internal marks and 23 out of 80 in the University examination, thus getting 41 out of 100 marks. Despite this, she was declared as failed because for the University marks she did not get 32 out of 80 but got only 23 out of 80. Then there was the application for reverification and so forth. In the *Sonali Badhe*

1 MANU/MH/0782/2008.

matter, reliance was also placed on an Ordinance. This was Ordinance No 4 and it is set out in the judgment under the caption of 'condonation' along with another Ordinance that dealt with grace marks. In *Sonali Badhe's* case, the expression for grace marks was not '*that examination*' but was '*head of passing*' and this was the same expression that occurred in Ordinance 4. The learned Advocate for the petitioner submits that otherwise Ordinance 4 in the *Sonali Bahde* case was in terms identical to the present Ordinance 96. The Division Bench noted that Ordinance 4 replaced the earlier Ordinance 137 in its entirety. It then proceeded to address Ordinance 4 as it then stood. It considered the decision of another Bench of this Court in *Ajay Prakash Ambagade v University of Pune & Ors*² (which is also separately cited before us). In paragraphs 13, 14, 15 and 16, the Division Bench in *Sonali Badhe* held as follows:

"13. For the Ordinance to apply the following requirements are essential.

- (1) The candidate must fail in only one head of passing, having passed all heads of passing.
- (2) His/her deficiency of marks in such head of passing may be condoned by not more than 1% of the aggregate marks of the examination, or;
- (3) 10% of the total number of marks of that head of passing in which he/she is failing, whichever is less.

Insofar as Item-2 is concerned, there can be no difficulty in interpreting as it speaks not more than 1% of the aggregate marks of the examination. As an illustration, if the total number of marks to be allotted was 2000. 1% would be 20 which however is limited to maximum of 10 marks. What is clear however is what has to be considered is aggregate

2 (2007) All MR 804.

marks of the examination.

14. We now consider the third requirement. Is 10% restricted only to the head of passing in that subject and or is it head of passing of the entire examination. If in the first instance, the aggregate marks of the examination are to be considered we fail to see considering the language of the Ordinance why it cannot be read ejusdem generis, considering that the object of the Ordinance is to give grace marks and the clear language of the Ordinance does not speak of head of passing in that subject which was the language used in Ordinance 137 of the earlier Ordinance. It, therefore, presupposes that there is a clear departure from the earlier Ordinance which restricted it only to the head of passing in that subject, whereas under Ordinance 4 the language used as total number of marks of that head of passing. In the instant case, that head of passing carries 1600 marks. As can be seen from Ordinance 1, the benefit of grace marks should be given only for passing in each head of passing. That had can be Theory, Practical, Oral, Sessional, in External or Internal Examination. Therefore, what has to be considered is the marks to be allotted for the head of passing. In our opinion, this would be the correct interpretation.

15. In the instant case, it is UEX and it carries altogether 1600 marks. It is a beneficial Ordinance framed for the benefit of the students who otherwise are successful but have failed to secure the requisite marks in one subject. If the object of the Ordinance is to give benefit to the students then the Courts must give effect to that intent, which would subserve the larger purpose of the Ordinance and thereby give effect to the intent of the delegates who made the Ordinance. The delegates knowing fully well its earlier Ordinance 137 have departed from the language of that Ordinance and have made an Ordinance which uses different language than Ordinance 137. We are, clearly,

therefore of the opinion that the interpretation sought to be given by the petitioner must be accepted and the expression “head of passing” must be considered against total marks which are to be allotted under the head UEX.

16. For the aforesaid reasons, we hold that the petitioner is entitled to 10 grace marks in terms of Ordinance 4 of the Ordinances of the University and consequent to, the respondents are directed to add 10 marks to the petitioner’s total in Physical Chemistry-II and declare the result of the petitioner.”

12. In paragraph 14, quoted above, the Division Bench noted that there was a departure from the new Ordinance 4 from the earlier Ordinance 137 that it replaced. The earlier Ordinance 137 was restricted only to the head of passing in that subject whereas the replaced Ordinance used the language ‘*total number of marks of that head of passing*’. The Division Bench held is that what was to be considered was the marks to be allotted for the head of passing. Then the Division Bench looked at the University examination and said that it carried altogether 600 marks. Now the difference, and this critical for our purposes, is that in *Sonali Bhade’s* case the petitioner had passed all semester examinations and was short of marks for the University examination *only in the second semester*. The Division Bench therefore did not have occasion to consider the alternative argument regarding the use of the expression ‘*whichever is less*’.

13. Before we turn to the rival argument on Ordinance 96, it is worth noting that Savita failed in the subject of Law of Crimes-II/Code of Criminal Procedure for the result declared on

21st October 2022. The semester VI result was that she was declared failed: she obtained 28 marks out of 100. Sanjay failed the Labour Law-II/Industrial Law examination and obtained 28 marks out of 100. He was declared to have failed semester VI of the third year.

14. The submission on behalf of the University is that the Petitioners' interpretation of Ordinance 96 is incorrect. The subject of condonation in essence deals with a percentage of the aggregate marks for that particular examination, i.e., 1% of 500. Again, this would have the same result of yielding only 5 marks, insufficient for both purposes. But Ordinance 96 also provides for 10% of the total number of marks for that head of examination in which the candidate fails. Now taking the two actual results before us this means that Savita could get 10% of 100 for the Law of Crime/Code of Criminal Procedure paper and Sanjay could get 10 marks out of 100 for the Labour Law/Industrial Law paper.

15. However, Ordinance 96 then puts in a further restriction. This requires both computations to be done and prescribes that the grace marks to be given are *whichever of the two is less*. This is our first point of departure from the submission that the *Sonali Badhe* case set down some generalised principle of beneficial legislation that is contrary to the plain meaning of the Ordinance. The *Sonali Badhe's* decision does not say that what is to be given to the candidate in question is "*whichever is more*".

16. Ordinance 96 has two concepts. One is '*the head of passing in which he/she is failing*'. Only 10% can be reckoned of this. The second concept is 1% of '*the aggregate marks of the examination*'. It is impossible to read Ordinance 96 as contemplating a different measure for '*examination*' from Ordinance 94. In *Sonali Badhe*'s case this was not the situation. There, Ordinance 137 was replaced entirely by Ordinance 4. Here, the Petitioners are invoking either of the two Ordinances or both, whichever is most beneficial. If that be so, the interpretation of the phrase '*examination*' must be consistent and common to both Ordinance 94 and Ordinance 96. It cannot be that for Ordinance 94 '*examination*' means the examination for that semester but for Ordinance 96 the interpretation adopted by Court should be something entirely different.

17. What the Petitioners really say is that they must get 1% of 1000 marks under Ordinance 96, which would be 10 marks because the aggregate would be 1000 marks, or there must be a 10% out of 100 which is also 10 marks. There would therefore be no question of either of these results being less than the other.

18. Ordinance 96 clearly contemplates that the two computations will be different, and one will be less than the other. This is why it says '*whichever is less*'. The Petitioners seem to believe that this phrase can be rendered entirely ineffective by simply returning a result where the total number of grace marks obtained on either computational basis is exactly the same, giving them 10 marks, whichever way one reckons it.

19. We turn to Exhibits “A” and “B” to the Affidavit in Reply at pages 47 and 48. The document at page 47 pertains to Savita and shows that she has failed at the examinations held in October 2015, October 2016, March 2017, October 2017, March 2018, October 2018, March 2019, and October 2019. These were all for the three-year LLB course, first semester. In March 2020, and this continues until October 2021 when the examination were all online, Savita not only passed but passed with distinction. Sanjay’s results are similar. The physical examinations in March 2018 and October 2019 were for semester I and semester II of the three-year law course. He passed the online examinations held in March 2020 until October 2021, and then failed again, now for the semester VI of the three year course, in March 2022.

20. We do not see any conflict between the view that we have taken and the view expressed by the Division Bench in *Sonali Badhe’s* case. Even if the Ordinances are beneficial and meant to assist students, this does not and cannot mean that an interpretation contrary to the plain and literal meaning of the words should be accepted, nor that the words ‘examination’ or ‘head of passing’ can be liberally expanded to return a result which, as we have pointed out above, in the submission of the 2nd Respondent, would result in a complete absurdity. Even a beneficial Ordinance demands that the student must be worthy of receiving the benefit. The entire pattern for these two law students is decidedly odd: repeatedly failing the physical examinations, then suddenly passing the online examinations with flying colours, only to fail physical examinations again.

21. We find no merit in the Petitions. They are dismissed with no order as to costs.

22. We regret the delay in uploading this order, which occurred due to a confusion and mistake in saving and transmitting the transcribed soft copies.

(S. G. Dige, J)

(G. S. Patel, J)