

IN THE HIGH COURT OF BOMBAY AT GOA  
WRIT PETITION NO.88 OF 2005

Shri Gaurav Desai, aged 21 years, )  
resident of S/3, Gautam Apartments, )  
Near Maruti Temple, Aquem, )  
Margao-Goa. )... Petitioner

Vs.

1. The Goa University, )  
through its Registrar, )  
having office at )  
Taleigao Plateau, )  
Taleigao-Goa. )
2. The Gomantak Ayurveda )  
Mahavidyalaya & Research )  
Centre, through its Principal, )  
having office at Shiroda-Goa. )
3. Sunita G. Parab, )  
resident of Arrady Vaddo, )  
Candolim, Bardez - Goa. )
4. Sandhya Raveendran, )  
resident of Flat No.1, )  
Synthera Villa, )  
Ameywada, Toncar, Marcel-Goa, )
5. Priya Sawant, )  
resident of House No.M-48, )  
Housing Board Colony, )  
Alto Porvorim-Goa, )... Respondents

Shri M.S.Sonak, Advocate for the Petitioner.

Smt.A.A.Agni, Advocate for the respondent No.1.

Respondent Nos.2 to 5 absent, though served.

CORAM : R.M.S.KHANDEPARKAR &  
N.A.BRITTO, JJ

DATED : 1st May, 2006 Jpr

**JUDGMENT : ( Per R.M.S.Khandeparkar, J )**

1. Heard. Perused the records.

2. The petitioner is a student of the respondent No.2-college and having completed the course of Bachelor of Ayurvedic Medicine & Surgery (B.A.M.S.) is currently undergoing Compulsory Rotatory Internship. By the present petition, the petitioner is seeking to get the result of oral examination in the subject of Shalya Tantra held on 26th November, 2004 being quashed, and for direction to re-conduct the said oral examination, and in the alternative, for direction to the respondent Nos.1 and 2 to award two additional marks instead of grace marks to the petitioner in the oral examination in the subject of Shalya Tantra, and further direction to the respondents to award the petitioner Scholarships, Prizes, Medals and placement in order of merit for having secured first class in all the three B.A.M.S. Examinations, upon proper interpretation of Ordinance OA.5.16.4(a).

3. The petitioner, on completion of the Standard XII Examination and having secured 83.67% marks in the group of Physics, Chemistry & Biology, joined the

college of the respondent No.2 for BAMS Course. The said course comprises of three years and each year consists of one and half calendar year, besides compulsory rotatory internship of one year. The petitioner secured 1091 marks out of 1550 marks for the First Year of the Course, which corresponds to 70.38% and obtained distinction in four out of six subjects prescribed in the Course. In the Second Year, he secured 1179 marks out of 1750 marks, which corresponds to 67.37% and obtained distinction in three out of six subjects. In the Third Year, he secured 1157 marks out of 1850 marks, which corresponds to 62.54% and obtained highest marks in three out of six subjects. However, though he secured first class in five subjects and secured highest marks in three subjects during the Third Year, so far as the subject of Shalya Tantra is concerned, he obtained 126 marks out of 200 in Theory Examinations, which corresponds to 63% and 48 out of 100 marks in the oral examination. Thereafter, by award of two grace marks, the petitioner was declared as "passed" for the Third Year of BAMS Examination and the award of two grace marks was reflected in the mark list of the petitioner. Though, he was declared as "passed" and secured first class in five subjects, and even highest marks in three subjects, as he was awarded two grace marks to enable him to pass examination, applying the

provisions of Ordinance DA.5.16.4(a), he was held to be ineligible for any university scholarship, prizes, medals or placement in the order of merit. Being aggrieved by such denial of the benefits by taking resort to the said Ordinance, the present petition has been filed.

4. Firstly it is the contention of the petitioner that the respondent-University ignored the mandate of the Ordinance OC.21.12.2, which requires the examining bodies to ensure that only 50% of the examiners could be outsiders. Both the examiners appointed in the case in hand were external examiners in relation to the subject "Shalya Tantra". The Ordinance OC-21.12.3 categorically requires 50% marks should be allowed to the internal examiner and 50% marks shall remain at the disposal of the external examiner. Hence, the oral examination held in Shalya Tantra of the petitioner shall be set aside and the respondents shall be directed to re-examine the performance of the petitioner in the said subject. Secondly, it is sought to be contended that the grace marks allotted to the petitioner shall be awarded towards the practical examination in Shalya Tantra, not as grace marks but the marks attached to the performance of the petitioner. In the present case, only 80% marks was at the disposal of the external examiners. There was

no assessment done so far as 20% of the marks in the practical examination are concerned. Therefore, mere awarding grace marks is of no help to the petitioner, but those two marks should be awarded as part of the marks out of 20% at the practical examination. In the absence of such marks, the petitioner has been illegally denied his placement in the order of merits as well as scholarship, prizes and medals. Being so, but for the grace marks, and if those marks were secured in Shalya Tantra practical examination, he would have secured the place in merit list and could have availed the scholarship. On account of grace marks, he has been denied gold medal which he would be otherwise entitled to, having stood first in the First Year as well as Second Year of B.A.M.S. Course. Thirdly, it is the contention of the petitioner that the Ordinance No. OA.5.16.4(a) has been misconstrued by the respondent No.1, and therefore, the petitioner has been illegally denied the rightful place in the list of meritorious students as also has been wrongly denied scholarship, prizes, medals, etc. It is his contention that the respondents are refusing to give effect to the phrase "unless he/she is eligible to it" in the Ordinance OA.5.16.4(a). Since the petitioner has secured First Class First in the First Year and Second Year of B.A.M.S. Course, no other student is entitled to secure university scholarships, prizes, or

medals as the requirement is that the first rank should be secured in all the three years, and as such, denial of university scholarship, prizes, medals and placement in order of merits to the petitioner is, therefore, illegal and arbitrary. The Ordinance OA.5.16.2 itself provides award of grace marks in order to secure a class, honour or distinction, either on aggregate or individual subject. As such, if award of grace marks for securing class, honour or distinction is not regarded as a taboo by the Ordinance, by the same logic, the candidates whose marks are graced in order to pass an examination would not be declared ineligible for award of university scholarships or placement in order of merit, though he is eligible for the same even otherwise. The classification sought to be effected by Ordinance OA.5.16.4(a) is neither rational nor intelligible differentia. Such a differentia, if any, has absolutely no nexus with the object sought to be achieved by such classification. The petitioner is eligible for class on aggregate and first class in individual subjects without awarding any grace marks or for that matter, even by exclusion of grace marks. In such circumstances, denial of class and distinction to the petitioner is patently illegal. Drawing attention to the fact that the respondent Nos.3, 4 and 5 have obtained 1132, 1137 and 1119 marks,

respectively, out of total marks of 1850, it is submitted that even upon exclusion of two grace marks, the total marks obtained by the petitioner happen to be 1157 out of 1850 marks, which would disclose the petitioner having secured the highest marks in total.

5. On the other hand, it is the contention of the respondents that there were no internal examiners duly qualified to conduct the practical examination in the subject of Shalya Tantra available at the relevant time. As one Shri Bhatane, who was lecturer in the subject of Shalakyta Tantra teaching in the respondent No.2 college, had left the college sometimes before the practical examination could be held for the Third Year of B.A.M.S. Course, and none of the other teachers of the college was eligible for being appointed to conduct practical examination in the subject of Shalya Tantra, as they did not have five years' teaching experience in the subject which is otherwise required in terms of the Ordinance OC.21.12.2. Being so, considering the practical difficulty in the matter, a duly competent lecturer was appointed as examiner along with the external examiner. As regards failure to examine the students for 20% of the marks, there was appropriate scaling done in respect of all the students who were placed in similar situation and thereby they were allotted

additional marks. The scaling was done by adopting the formula normally applied for scaling, which is as under:-

" $(X \text{ upon } 80) \times 100$  where X denotes the marks secured by a candidate out of 80."

Being so, no prejudice is caused to the petitioner and there has not been any discriminatory treatment to the petitioner. The scaling has been done to all the students who had appeared for the practical examination on the said day in the said subject. No student is entitled to claim any mark otherwise than based on the evaluation of his performance in the examination and there being no allegation of malafide in the matter of allotment of marks to the petitioner in Shalya Tantra, there is no case made out to claim two additional marks, as a matter of right. If two grace marks awarded to the petitioner are to be excluded, the petitioner would fail and would not secure any class, as far as the Third Year B.A.M.S. examination is concerned. A student can be graced at his option either to pass in any head of passing or to secure class, honour or distinction on the aggregate. However, when a candidate is graced with marks, those grace marks cannot be compared with the marks which the candidate has earned on his own merit. Though the



student can be graced not only for passing a subject/head of passing and/or on aggregate but also for the purpose of awarding class, honour or distinction, however, grace marks cannot be taken into consideration while evaluating the academic merit of the students for the purpose of scholarship, order of merit, etc., unless the student is covered by the exclusionary clause of the said Ordinance. Otherwise it would mean that unequals are treated as equals and would prejudice meritorious students. The ranks can be awarded only to those students who have passed on their own merit and not who have managed to pass on the strength of grace marks. Considering the same, the decision of the respondents based on the said Ordinance cannot be found fault with.

6. The learned advocate for the petitioner has sought to rely upon the decisions of this Court in the matter of **Sunil Kumar Sharma & Ors. v. University of Bombay & Anr.**, reported in 1987 Mh.L.J. 124, and **Indranil D. Deshmukh v. Mumbai University through its Vice Chancellor & Anr.**, reported in 2004(2) Mh.L.J. 236.

7. The learned advocate for the University, on the other hand, has drawn our attention to the decision of this Court in **Dr. Manish Prabhakar**

**Khanolkar v. The Dean, Goa Medical College**, reported in 1995(1) Goa L.T. 279, and that of the Apex Court in the matter of **P.T.Rajan v. T.P.M.Sahir & Ors.**, reported in (2003)8 SCC 498, as well as in **Bhavnagar University v. Palitana Sugar Mill (P) Ltd. & Ors.**, reported in (2003) 2 SCC 111.

8. Upon hearing the learned advocates for the parties, and on perusal of the records, the following points arise for our consideration;

1. Whether appointment of both external examiners for conducting oral examination vitiates the oral examination in Shalya Tantra, and therefore, result of such examination is required to be quashed ?
2. Whether the petitioner is entitled to claim two additional marks in the Shalya Tantra, as a matter of right instead of grace marks ?
3. Whether the petitioner is entitled to claim scholarship, prizes, medals and placement in order of merit by taking recourse to the provisions comprised

under Ordinance OA.5.16.4(a) ?

9. As regards the first point under consideration, undisputedly, the challenge to the result of oral examination is essentially on the basis of the Ordinance OC.21.12.3 which reads thus:-

"In practical examination, 50 percent marks should be allowed to the internal examiners and 50 percent marks shall remain at the disposal of the external examiner."

Plain reading of this Ordinance would disclose that the same nowhere speaks about appointment of internal and external examiners. It speaks of 50% marks to be dealt with by the internal examiner and 50% marks by the external examiner. That by itself, it cannot be inferred that in no case and under no circumstances both the examiners be external examiners. On the contrary, the Ordinance No.AO.5.8 empowers the Chairman or Senior Examiner to depute examiners for conduct of the practical examination and it requires compliance thereof as far as practicable and in the interest of students. Undisputedly, in the case in hand, there was no qualified internal examiner available at the relevant time and the Committee constituted for appropriate decision in that regard

had to appoint both the examiners from the two different colleges to act as examiners for practical examination. In case, on account of non-availability of the internal examiner, no steps were taken in the manner they were required to be taken by the university, it would have resulted in a great prejudice and loss to the students. It cannot be disputed that the provisions comprised under the Ordinance in relation to the conduct of the examinations are essentially in the form of guidelines, which are to be followed in the interest of students and to ensure transparency in the process of examinations. However, every minor variation, depending upon the prevailing fact situation, cannot be construed as resulting in the examination to be rendered illegal or unauthorised, unless the student makes out a case of malafide or colourable exercise of powers by the concerned authorities. It is not the case of the petitioner that non-availability of the internal examiners was only in the case of the petitioner. In fact, that was a case in relation to the said subject for all the students. The first point for consideration, therefore, is to be answered in negative.

10. As regards the second point for consideration, undisputedly, the marks are allotted based on

evaluation of the performance of the student at the examination he appears. In the case in hand, it is not the case of the petitioner that his performance had not been evaluated by the respondents in the Third Year B.A.M.S. Examination. Neither there is allegation of malafide in the process of evaluation of performance. Accordingly, there is no provision in law which could entitle a student to secure marks otherwise than by way of evaluation of performance at the examination. Being so, the petitioner cannot claim, as a matter of right, two marks in place of grace marks. Undisputedly, in case of non-examination for 20 marks, it had been the case in respect of all the students and therefore, the respondents have scaled up the marks of all the students to compensate them in that regard by following a uniform formula for all the students, including the petitioner. Hence, this point is also to be answered in negative.

11. As regards the third point for consideration, the rules relating to the grace marks at the university examinations are to be found in Ordinance No.5.16, hereinafter called as "the said Ordinance". The rules therein apply to all the university examinations except where separate provisions for gracing are made by respective statutory Councils. In terms of clause (1) thereof, the gracing of marks is

permissible, unless otherwise provided expressly elsewhere; (i) to secure the requisite number of marks on the aggregate for passing examination, (ii) to secure the requisite number of marks to obtain exemption in individual subject/s, and (iii) to secure number of marks for obtaining the class, honours or distinction either on aggregate or in individual subjects. Clause (3) of the said Ordinance 5.16 deals with the circumstances covered by Item No.(i) and (ii) above while clause (2) of the said Ordinance refers to the circumstances covered by Item No.(iii) above.

12. It is to be noted that in terms of clause (2) of the said Ordinance, a candidate can be graced up to maximum of 1% of the maximum aggregate marks in order to secure a class, honours, distinction on aggregate whereas, a candidate can be graced up to 2% of the maximum marks in the subject/head of passing when the gracing is done for the purpose of securing class, honours or distinction in individual subject/ head of passing. However, on the whole, the grace marks so awarded cannot exceed 1% of the aggregate marks. When one head of passing is within another head of passing, inner head of passing requiring the grace marks for securing class, honours or distinction in individual subject shall be awarded grace marks first. While awarding grace marks for more than one subject or head

of passing, the subjects/ heads of passing shall be selected for award of grace marks in the order of increasing grace marks required for obtaining honours/distinction/passing.

13. In terms of Clause (3) of the said Ordinance, a candidate can be graced up to the maximum marks of 2% of the maximum aggregate marks in order to secure a pass on the aggregate. This provision also applies to the repeater or supplementary students irrespective of the number of papers appeared provided these marks were not utilised earlier. A candidate can be graced up to 5% of the maximum marks in the subjects/heads of passing or 1% of the maximum aggregate marks, whichever is less, in order to secure a pass or to secure exemption in individual subject or head of passing. The total grace marks so awarded cannot exceed 2% of the maximum aggregate marks. When one head of the passing is within another head of passing, the inner head of passing requiring grace marks are to be awarded grace marks first. While awarding grace marks for more than one subject or head of passing, the subject/head of passing shall be selected for award of grace marks in the order of increasing grace marks required for passing.

14. It is to be noted that the grace marks cannot

be utilised to claim scholarships, prizes, medals or placement in the order of merit. So also the persons obtaining grace marks for passing of examination are not entitled to be awarded with grace marks for class, honours or distinction. There is a clear provision in that regard incorporated in Clause (4)(b) of the said Ordinance. The clauses (a) and (b) of the said Ordinance read thus:-

"DA.5.16.4(a) - A candidate whose marks are graced in any head/heads/subject(s) for an examination under this Ordinance shall not be eligible for any University scholarships, prizes, medals, placement in order of merit for the said examination unless he/she is eligible to it even otherwise.

(b) Similarly, a candidate whose marks are graced in any head/heads/subjects under this Ordinance in order to pass the examination shall not be eligible for award of grace marks for the purpose of class, honours or distinction."

15. On plain reading of the Ordinance in question, and even assuming that the expression "even otherwise .....eligible" is interpreted in the manner



sought to be argued by the petitioner, the fact remains that but for grace marks, the petitioner cannot pass the Third Year Examination of B.A.M.S. Therefore, unless he passes the said examination, the question of he being placed in order of merit or being awarded with the scholarship does not arise. A student, who has failed in a subject, and therefore, would have also failed in the examination, but for grace marks, cannot claim to be arrayed in the list of meritorious students. There is no misconstruction of the said Ordinance by the respondents. The third point for consideration is also to be answered in negative.

16. In **Dr. Manish Prabhakar Khanolkar's case (supra)**, the Division Bench of this Court, while referring to the earlier Ordinance 5.18, which was then in force and which was similar to the Ordinance DA.5.16.4(a), had held that :-

"The Ordinances relating to awarding grace marks are so formulated that any grace marks awarded to a student cannot be used to prejudice other students. In other words, the Ordinance tacitly lays down that where the comparative merits are examined, these grace marks are to be excluded. ....

Wherever the excellence of the student is compared the grace marks have to be excluded. .... Therefore, wherever the academic merits of the candidates are to be graded or ascertained the grace marks should not be added."

We are clearly fortified in our view by this decision of our Division Bench.

17. In **Indranil D. Deshmukh's case (supra)**, this Court, after taking into consideration the peculiar facts of the case, had directed the university and its Board of Examinations to consider the application of Indranil for re-examination of his answer book in the light of his contention that because of the basic errors committed by the valuer of the paper in Intellectual Property Law, he was deprived of the remedy, which was sought to be pleaded by the university as efficacious alternate remedy against the claim of the petitioner he having secured 28 marks and not the prescribed 30 marks, whereas, **Sunil Kumar Sharma's case (supra)** was a case of valuation of answer books by different examiners without laying down guidelines as to valuation for assessment of the answer books. Therein one of the examiners while valuing answer books had failed all 22 students whose

answer books he had valued while other examiners had awarded higher marks to other answer books valued by them. In those circumstances, the answer books of 22 students, who had failed, were directed to be reassessed. This decision is of no help to the petitioner and clearly distinguishable on facts.

18. In the circumstances, it is not necessary to consider the decisions sought to be relied upon on behalf of the respondents.

19. In the result, the petition fails and is hereby dismissed. Rule is discharged with no order as to costs.

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