

**HIGH COURT OF DELHI AT NEW DELHI**

Bench: Justice Anup Jairam Bhambhani

Date of Decision: 06 November 2023

W.P.(C) 10836/2023 and CM APPL. 41962/2023

ARYAN KUMAR (MINOR) THROUGH FATHER RAVINDER KUMAR

..... Petitioner

versus

KENDRIYA VIDYALAYA & ORS.

..... Respondents

**Legislation:**

Article 226 of the Constitution of India,

CBSE Examination Bye-Laws, 1995

Article 106 of the Education Code for Kendriya Vidyalayas (KVS Education Code)

Delhi School Education Rules, 1973

**Subject:** Entitlement of the petitioner, a student who failed in Mathematics in Class-XI, to be promoted to Class-XII based on the substitution of marks with Physical Education, an additional subject, as per the CBSE Examination Bye-Laws.

**Headnotes:**

Educational Rights – Right to promotion from Class XI to XII – Petitioner seeking promotion to Class-XII despite failing Mathematics, proposing substitution with Physical Education marks – Contention based on CBSE Examination Bye-Laws allowing substitution of a 'main subject' with an 'additional subject'. [Para 10, 16, 23]

CBSE Examination Bye-Laws – Interpretation of Bye-Laws regarding promotion from Class-XI to XII – CBSE Bye-Law 40.1 permitting substitution of subjects to meet pass criteria – Conflict with KVS Education Code Article 106 – CBSE bye-laws to prevail. [Para 49.4, 49.8, 49.11]

Kendriya Vidyalaya Sangathan (KVS) – KVS Education Code's Article 106 in conflict with CBSE Examination Bye-Laws – KVS imposing additional criteria for promotion not permitted under CBSE rules – CBSE affiliation terms to take precedence. [Para 49.9, 49.11]

Judicial Review – Scope in the conflict of educational bye-laws – Supreme Court's authority on CBSE bye-laws having force of law – CBSE bye-laws binding over KVS code in case of conflict. [Para 49.10]

Decision – Petitioner entitled to promotion to Class-XII as per CBSE Examination Bye-Laws – Respondent school directed to facilitate petitioner's participation in Class-XII CBSE Examination for the year 2024. [Para 50, 51]

**Referred Cases:**

- Jigya Yadav vs. Central Board of Secondary Education and Others (2021) 7 SCC 535
- Puneet Singh (Minor) Through his Father Ramesh Singh vs. Modern School & Anr
- Master Dipansh Rawat Through His Guardian vs. The Baptist Convent Senior Secondary School & Ors. D.D. 29.03.2023 in W.P.(C) No. 3867/2023 (Del. HC)
- Master Varda Nanda vs. Central Board of Secondary Education & Ors. MANU/UC/0033/2017
- Neeti Singh Malik vs. Union of India MANU/DE/8939/2007
- G.B. Mahajan & Ors. vs. Jalgaon Municipal Council & Ors. AIR 1991 SC 1153
- Puneet Singh (Minor) Through his Father Ramesh Singh vs. Modern School & Anr 2015 SCC OnLine Delhi 11415

**Representing Advocates:**

Petitioner: Ms. Pooja Dhar, Ms. S. Ambica

Respondents: Mr. S. Rajappa, Mr. R. Gowrishankar for R1 and R2; Mr. Ashok Kumar, Ms. Chhavi Arora for R3.

**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

**J U D G M E N T**

**ANUP JAIRAM BHAMBHANI J.**

By way of the present petition filed under Article 226 of the Constitution of India, the petitioner, who is about 17 years of age and a student of Class-XI at respondent No.1/Kendriya Vidyalaya, Sector- 12, Dwarka, New Delhi Branch („respondent school“), seeks a writ in the nature of mandamus or an appropriate writ, order or direction, directing the respondent school to promote him to Class-XII, by taking into consideration the marks secured by

- him in Physical Education in the Class-XI Examinations instead of his marks in Mathematics, which (latter) subject he has failed to qualify.
2. Respondent No. 2 is the Kendriya Vidyalaya Sangathan („KVS“), which is a body under the Ministry of Education, Government of India, that governs and controls the respondent school; and respondent No. 3 is the Central Board of Secondary Education („CBSE“), which is the body that *inter-alia* conducts public examinations for Class-X and Class-XII based on a common curriculum. It is the curriculum and Bye-Laws of the CBSE that are in contention in the present matter.
  3. To have their students sit the examinations conducted by the CBSE, a school requires to be „affiliated“ to the CBSE. It is the admitted position that the respondent school is affiliated to the CBSE and therefore CBSE Bye-Laws are applicable to that school, as detailed hereinafter.
  4. Notice on this petition was issued on 16.08.2023; whereupon counteraffidavit dated 17.09.2023 has been filed by the respondent school and KVS. A short counter-affidavit dated 03.10.2023 has also been filed by the CBSE. Written submissions have also been filed on behalf of the petitioner and the respondent school.

**BRIEF FACTS**

5. In Class-XI the petitioner opted for English, Business Studies, Accountancy, Economics and Mathematics as his 05 „main subjects“.

In addition to that, the petitioner opted for Physical Education as an „additional subject“. In March 2023 the petitioner sat his final examinations for Class-XI and as per the results declared on

28.03.2023, he has obtained the following marks :

<b>Subjects</b>	<b>Final Theory (80)</b>	<b>Practical / Project (20)</b>	<b>Overall Marks (100)</b>	<b>Overall Grade</b>
Business Studies	27	15	42	C2
Accountancy	27	15	42	C2
English	41	13	54	C1
Economics	27	12	39	D
Mathematics	12	14	26	E

6. It may be stated here for clarity, that as per the rules of the CBSE, as detailed hereinafter, if a subject involves a theory and practical / project paper, to be

able to qualify, a student must obtain atleast 33% marks in each of the theory and practical / project papers as also 33% marks in the aggregate.

7. The breakup of marks that the petitioner got in the initial and supplementary examinations in Mathematics are as follows :

<b>Examination</b>	<b>Final Theory (80)</b>	<b>Practical/Project (20)</b>	<b>Overall Marks (100)</b>
Initial Examination	12	14	26
Supplementary Examination	19	14	33

8. Since the petitioner obtained less than 33% marks in Mathematics, he was required to take a supplementary examination in that subject. However, even in the supplementary examination held on 19.04.2023, he was unable to secure 33% marks, and the school accordingly declared him as an „essential repeat“ on 29.04.2023, that is to say, he has been asked to repeat Class-XI.
9. However, in the additional subject, *i.e.* Physical Education the petitioner scored the following marks :

<b>Subject</b>	<b>Final Theory (70)</b>	<b>Practical/Project (30)</b>	<b>Overall Marks (100)</b>	<b>Overall Grade</b>
Physical Education	26	15	41	C2

10. The essential contention raised on behalf of the petitioner is that since the school is affiliated to the CBSE, it is bound by the CBSE Examination Bye-Laws, 1995 („CBSE Examination Bye-Laws“); and that as per the CBSE Examination Bye-Laws, the petitioner is allowed to *substitute* the marks secured by him in Physical Education in place of the marks secured in Mathematics. It is argued that since that is so, the petitioner fulfils the CBSE“s requirement of having obtained at least 33% in each of 05 subjects, in the theory and practical/project papers, as also 33% overall; and is therefore entitled to be promoted to Class-XII.
11. The court has heard Ms. Pooja Dhar, learned counsel appearing for the petitioner; Mr. S. Rajappa, learned counsel appearing for respondents Nos. 1 and 2. Though, as recorded in order dated 16.08.2023, respondent No. 3/CBSE had initially submitted that they are only a *pro-forma* party, it transpired that since the interpretation of the CBSE Examination Bye-Laws was in question, *vide* order dated 22.09.2023 the CBSE were permitted to file a counter-affidavit in the matter; and the court has also heard brief

submissions advanced by Mr. Ashok Kumar, learned counsel appearing for the CBSE.

### **SUBMISSIONS ON BEHALF OF THE PETITIONER**

12. Ms. Dhar submits that since the respondent school is affiliated to the CBSE, it is bound by the CBSE Examination Bye-Laws and must adopt the „pass criteria“ prescribed in those Bye-Laws. It is argued that it is impermissible for the respondent school to adopt any other pass criteria.
13. Ms. Dhar draws attention to communication dated 16.09.2022 issued by the Assistant Commissioner (Acad.) to *all* schools operating under KVS relating to the “*Assessment and Evaluation Practices for classes III to VIII and IX and XI in the Academic Session 2022-2023*”, in particular to the following portion thereof in the context of Senior Secondary Classes, *i.e.* XI and XII, which reads as under :

#### **“For Secondary Classes :- (IX- X)**

1. *CBSE Circular No. CBSE/dir(ACAD)/2022/ dated 20-05-2022, Circular No.ACAD-57/2022 on Assessment and Evaluation Practices of the Board for the session 2022-23 need to be strictly followed.*
2. *The qualifying marks for class XI students in each subject for promotion shall be 33% in each subject. It is to further clarify that in a subject where practical components are involved; separate pass (33%) is required in Theory component and Practical component respectively. This implies that students need to score 33% out of 70 (Theory) and 33% out of 30 marks in Practical separately. Similarly, Students need to secure separate pass (33%) Theory Component (33% out of 80) and Internal Assessment (33% out of 20) for subjects having Internal Assessment. The overall 33% marks are also required for the promotion of the students in the next higher class.”*

14. Counsel further submits that even as per their own rules, in particular Article 106 of the Education Code for Kendriya Vidyalayas („KVS Education Code“), KVS requires a student to pass in 05 subjects in Class-XI in order to be promoted to Class-XII.

15. Counsel submits that Bye-Law 40.1 of the CBSE Examination ByeLaws<sup>1</sup> requires a candidate to secure (atleast) 33% marks in the theory component, practical/project component as well as in the aggregate, in all 05 subjects, in order to qualify in that subject. Counsel argues however, that under the CBSE Examination Bye-Laws a candidate is permitted to *substitute* a „main subject“ with an „additional subject“, provided that after such substitution the candidate continues to have English or Hindi as one of the

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<sup>1</sup> titled “Pass Criteria (Senior School Certificate Examination) under Chapter 7 : Scheme of Examination”

main subjects and provided that the additional subject so chosen is also offered by the CBSE as an „elective subject“.

16. In the present case therefore, the contention is that even though the petitioner has failed to qualify in Mathematics, since he did not get 33% marks in that subject even at the supplementary examination, he is entitled to replace Mathematics with Physical Education in which (latter) subject, the petitioner has received 41/100 *i.e.* more than 33% marks. Accordingly, the contention is that once Mathematics is replaced with Physical Education as a main subject, the petitioner fulfils the criteria of having got 33% marks in each main subject (individually, in the theory and practical components) as well as 33% marks in the aggregate, as seen in the table below :

<b>Subjects</b>	<b>Final Theory (80)</b>	<b>Practical / Project (20)</b>	<b>Overall Marks (100)</b>	<b>Overall Grade</b>
Business Studies	27	15	42	C2
Accountancy	27	15	42	C2
English	41	13	54	C1
Economics	27	12	39	D
Physical Education	26	15	41	C2

17. It is argued however, that ignoring the CBSE Examination Bye-Laws and the Pass Criteria provided therein, the school is denying promotion to the petitioner to Class-XII based upon Article 106 of the KVS Education Code (as amended *vide* communicated dated 05.06.2018), which says *inter-alia* that in order to qualify for promotion, a candidate must obtain 33% marks in all subjects – *without counting the additional subject*. It is submitted that KVS is not entitled to impose the criterion that an additional subject (even if offered as an elective subject) cannot replace one of the 05 main subjects, since that criterion is not in accordance with the CBSE Examination Bye-Laws.

18. Ms. Dhar relies upon the judgment of the Supreme Court in **Jigya Yadav vs. Central Board of Secondary Education and Others**<sup>2</sup>, in which the Supreme Court has *inter-alia* held that bye-laws issued by the CBSE have the force of law and must be regarded as such for all legal purposes and not merely as contractual terms between a school that seeks affiliation and the CBSE. Counsel further submits that the Supreme Court has categorically

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<sup>2</sup> (2021) 7 SCC 535

- observed that all significant aspects of education have to be dealt with *only* as per the rules of the CBSE.
19. It is further submitted that though the Class-XI examinations are conducted internally by the school and not by the CBSE, the Senior School Curriculum 2022-2023 issued by the CBSE clearly stipulates that Class-XI and XII are a *composite course*; and that students may only take those subjects in Class-XI which they intend to continue with in Class-XII. It is argued that by reason thereof, the Pass Criteria under Bye-Law 40.1 applicable to Class-XII *would apply equally* to Class-XI.
20. Attention in this behalf is drawn to para 3.1.1.3(n) of the Senior School Curriculum 2022-2023 relating to the Scheme of Study, which again says :
- “n) If a student has taken 6th subjects, and if he/she fails in any one of first five subjects, the same will be replaced by the 6th subject provided the candidate satisfies the scheme of studies i.e. after replacement either Hindi or English remains as one of the main five subjects.”*
21. It is argued that it is mandatory for a school to comply with the CBSE Examination Bye-Laws to bring uniformity among all affiliated schools; and if every school is permitted to apply different criteria in its internal examinations, then such uniformity would be lost.
22. Ms. Dhar argues that though Bye-Law 37(ii) of the CBSE Examination Bye-Laws <sup>3</sup> states that Class-IX and Class-XI examinations are to be conducted internally by the schools, that only means that the CBSE has delegated the responsibility of conducting such examinations to the schools. It does not imply that a school can apply different or more stringent criteria than those provided by the CBSE for Class-X and Class-XII examinations, which are conducted by the CBSE itself.
23. In these circumstances, it is submitted that the petitioner has duly qualified Class-XI, having obtained 33% marks in each of the 05 subjects – after replacing Mathematics with Physical Education as the 5<sup>th</sup> subject – individually and overall; and therefore, the petitioner deserves to be promoted to Class-XII.

### **SUBMISSIONS ON BEHALF OF KVS**

24. Opposing the grant of relief, Mr. Rajappa, learned counsel appearing for the respondent school and KVS, submits that the petitioner’s case must be decided on the basis of the promotion policy of KVS, which mandates that to

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<sup>3</sup> titled “General Conditions under Chapter 7 : Scheme of Examination”

be declared „passed“ in Class-XI examinations, a student must obtain 33% marks in *all* the subjects *without* counting the additional subject. It is argued that apart from the qualifying marks in each subject being 33%, in a subject involving theoretical work as well as practical/project work, a student must obtain 33%



marks in theory and 33% marks in practical/project work individually, as also 33% marks in the aggregate, in order to clear that subject.

25. It is further argued that *vide* Minutes of Meeting dated 06.03.2018, the Board of Governors of KVS, which is its apex body for making policies and rules, has approved Article 106 of the KVS Education Code, the relevant portion of which reads as follows :

*2. In order to be declared as having passed the Class XI Examination, a candidate shall obtain 33% marks in all the subjects (**without additional subject**). The pass marks in each subject of examination shall be 33%. In case of subject involving practical/project work of a candidate must obtain 33% marks in theory and 33% in practical/project separately in addition to 33% marks in aggregate in order to qualify in that subject.*

(emphasis supplied)

26. It is further explained that a candidate who fails in any of the 05 subjects in the session ending examinations for Class-XI is placed in a „compartment“ in that subject; and is required to appear in a compartment examination, which he must pass to be eligible for promotion to Class-XII. It is pointed-out that in the present case the petitioner did not qualify in Mathematics in the session ending examination nor in the compartment examination, whereupon he was declared as an „essential repeat“ in Class-XI, that is to say he is required to repeat the entire course for Class-XI.
27. It is argued that the petitioner has not challenged Article 106 of the KVS Education Code, which is therefore binding upon him; and must govern his promotion from Class-XI to Class-XII.

28. It is also submitted that Bye-Law 40.1(vi) which was added in Chapter 7 of the CBSE Examination Bye-Laws *vide* notification dated 25.10.2006 issued by the CBSE was subsequently deleted; which further supports the submission that Bye-Law 40.1 has no application to the session ending examinations conducted by the school *for ClassXI* and applies only to the examinations conducted by the CBSE *for Class-XII*.

29. For reference, clause (vi) which is stated to have been deleted, says this :

**40.1 Pass Criteria (Senior School Certificate Examination)**

(i)-(v)

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*(vi) In order to be declared as having passed the Class XI Examination a candidate shall obtain 33% marks in all the subjects. The pass marks in each subject of examination shall be 33%. In case of subject involving practical work a candidate must obtain 33% marks in theory and 33% in*

*practical separately in addition to 33% marks in aggregate in order to qualify in that subject.*

*(emphasis supplied)*

And, it is argued, that after deletion of clause (vi), the pass criteria in Bye-Law 40.1 read as follows :

***Pass Criteria (Senior School Certificate Examination)***

- (i) A candidate will be eligible to get the Pass Certificate of the Board, if he/she gets a grade higher than E in all subjects of internal assessment unless he/she is exempted. Failing this, result of the external examination will be withheld but not for a period of more than one year*
- (ii) In order to be declared as having passed the examination, a candidate shall obtain a grade higher than E (i.e. atleast 33% marks) in all the five subjects of external examination in the main or at the compartmental examinations. The pass marks in each subject of external examination shall be 33%. In case of a subject involving practical work a candidate must obtain 33% marks in theory and 33% marks in practical separately in addition to 33% marks in aggregate in order to qualify in that subject.*
- (iii) No overall division/distinction/aggregate shall be awarded*
- (iv) In respect of a candidate offering an additional subject, the following norms shall be applied:*
  - (a) A language offered as an additional subject may replace a language in the event of a candidate failing in the same provided after replacement the candidate has English/Hindi as one of the languages.*
  - (b) An elective subject offered as an additional subject may replace one of the elective subjects offered by the candidate. It may also replace a language provided after replacement the candidate has English/Hindi as one of the languages.*
  - (c) Additional language offered at elective level may replace an elective subject provided after replacement, the number of languages offered shall not exceed two.*
- (v) Candidates exempted from one or more subjects of internal examination shall be eligible for appearing in external examination and result shall be declared subject to fulfilment of other conditions laid down in the Pass Criteria.*

*(emphasis supplied)*

30. As a sequitur, it is submitted that upon deletion of clause (vi), CBSE has left it to the individual schools to frame their own rules/criteria for promotion of students from Class-XI to Class-XII. Attention in this behalf is drawn to short counter-affidavit dated 03.10.2023 filed by the CBSE, and in particular para 9 thereof, where the CBSE has stated that it neither supervises the examination

nor the promotion, evaluation and compartment examinations for Class-XI; nor does it control the same because Class-XI examinations are conducted internally by the school. It is the submission on behalf of KVS that it is therefore not obligatory upon KVS to follow the CBSE Examination Bye-Laws since they *do not specifically cover* promotion of a student from Class-XI to Class-XII. It is emphasized that since the CBSE has done-away with a specific Bye-Law with regard to promotion of a student to Class-XI to Class-XII, it is clear that the CBSE recognizes the autonomy of schools to conduct the Class-XI examinations internally, based on their own pass criteria.

31. Responding to the reliance placed by the petitioner on paras 5 to 7 of the short counter-affidavit filed by the CBSE, it is explained that the CBSE has itself clarified in para 8 of the same affidavit that the CBSE is an Examining Body for candidates of Class-X and Class-XII, who appear for the Board Examinations held for those classes, but candidates can only sit those examinations *after fulfilling the criteria for promotion* from Class-IX to Class-X, and *from Class-XI to ClassXII*, as may be laid down by the concerned school.
32. KVS has also placed reliance on the decision of a Co-ordinate Bench of this court in ***Neeti Singh Malik vs. Union of India***<sup>4</sup>, to argue that that was an identical case in which the court has *inter-alia* held as under :

*“9. The Kendriya Vidyalaya Sangathan itself is a body constituted so as to set and implement standards in schools initially set up by the Ministry of Education, Government of India. They have been enforcing uniformity in standards across India. Subjecting them to local regulations would defeat the objective of the Sangathan. If the Petitioner's contentions are to be favored, the schools of the Sangathan would have to comply with local State Acts and Regulations, and also subject themselves to asymmetrical managerial structure, staffing patterns and standards of education. In these circumstances, having regard to the decision of the Supreme Court, the standards for promotion under Article 106 of the Sangathan's Code have to prevail. Since the petitioner could not score the minimum prescribed marks, she cannot claim a right to promotion to Class XII.”*

(emphasis supplied)

33. It is argued therefore, that the Co-ordinate Bench has held that KVS is not subject to local State Acts and Regulations, since that would make KVS subject to asymmetrical managerial structure, staffing patterns and standards of education; and that the standards for promotion laiddown in Article 106 of

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<sup>4</sup> MANU/DE/8939/2007

the KVS Education Code would prevail over those under the Delhi School Education Rules, 1973.

34. It is also argued that CBSE Examination Bye-Laws would have prevailed had there atleast been a specific bye-law dealing with promotion from Class-XI to Class-XII. Since a specific bye-law for that purpose stands deleted, there is no criteria laid down by the CBSE for promotion of a student from Class-XI to Class-XII.

35. Additionally, KVS has also placed reliance on the verdict of the Supreme Court in **G.B. Mahajan & Ors. vs. Jalgaon Municipal Council & Ors.**<sup>5</sup>, to submit that judicial review is not permissible in policy matters; and since Article 106 of the KVS Education Code is a matter of policy, the court may not interfere with the same.

36. In view of the above, it is argued, that it is impermissible for the petitioner to substitute his score in Mathematics with that in Physical Education; and therefore the petitioner cannot be promoted from Class-XI to Class-XII; and is ineligible to sit the CBSE Senior Secondary Certificate Examinations for Class-XII to be conducted in 2024.

#### **SUBMISSIONS ON BEHALF OF CBSE**

37. Relying upon the contents of short counter-affidavit dated 03.10.2023 filed on behalf of CBSE, Mr. Kumar submits that a school affiliated to the CBSE is expected to follow the CBSE Bye-Laws, rules, policies, and circulars, in letter and spirit. In particular, the CBSE Examination Bye-Laws along with the rules and regulations issued by the CBSE from time-to-time should be adhered to.
38. Attention in this behalf is drawn by the CBSE to para 7 of the short counter-affidavit, which may be extracted *in-extenso* :

*“7. That further, it is pertinent to mention that the Class XI & XII courses are a composite course and students need to take only those subjects in class XI which he/she intends to continue in classXII. It is further submitted that the Students can be offered a minimum of 5 or more subjects in class XI and the same subjects are required to be continued in ClassXII. In case, the student has taken a 6<sup>th</sup> subject (additional subject) and if he/she fails in any of first five subjects, the same will be replaced by the 6<sup>th</sup> subject, provided that the candidate satisfies the scheme of studies i.e. after replacement, either Hindi or English language remains as one of the main five subjects. Herein it is further pertinent to mention that Skill Electives can be offered along with any subject, as per the scheme of studies.”*

(emphasis supplied)

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<sup>5</sup> AIR 1991 SC 1153

39. On a pointed question put to him, Mr. Kumar has clarified that CBSE's policy is to adopt an interpretation of its Bye-Laws which favours students, within the bounds of what is contained therein. He has further emphasized that *CBSE's position is clear that Class-XI and Class-XII are a composite course and therefore Bye-Law 40.1, although it refers to Pass Criteria for the Senior Secondary School Certificate Examination, will be applicable to Class-XI equally as it applies to Class-XII.*
40. It is extremely important to record that in para 4 of short counteraffidavit dated 03.10.2023 filed on behalf of the CBSE, the extraction of Bye-Law 40.1 contains clause (vi), meaning thereby that the submission made on behalf of KVS that clause (vi) now stands deleted is incorrect, on point of fact.
41. After arguments in the matter were concluded and the matter was reserved for judgement, it transpired in the course of consideration in chambers, that a decision of a Co-ordinate Bench of this court in ***Puneet Singh (Minor) Through his Father Ramesh Singh vs. Modern School & Anr<sup>6</sup>***, which was relevant to the issue at hand, had not been cited by either of the parties. Accordingly, *vide* order dated 20.10.2023, the matter was re-listed and the said judgement was put to counsel, who were asked to address the court as to their reading of that decision.
42. Before summarizing the submissions made on behalf of the parties, in relation to the aforesaid judgement, it is useful to extract the relevant portion thereof, which reads as follows:

*"2. The petitioner took the examination conducted by the respondent No. 1 School for promotion from Class XI to Class XII but has not been promoted for the reason of having failed in the subjects of Business Studies, Economics and Mathematics. It is the*

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*case of the petitioner that he had submitted an application dated 5<sup>th</sup> February, 2015 to the respondent No. 1 School for allowing him to change the subject of Mathematics earlier taken by him in Class XI as the fifth subject, with the subject of Physical Education earlier taken by him as sixth subject and marks whereof were not to be computed. The counsel for the petitioner states that if the said substitution had been allowed, then, the petitioner having passed in the subject of Physical Education in the said examination, would be eligible to take the compartment examination only for the subjects of Business Studies and Economics and if clears the same, would be entitled to promotion to Class XII.*

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*“15. As far as the reliance by the counsel for the petitioner on Bye-Law 40.1(iv)(b) supra to contend that the petitioner as on 5th February, 2015 was entitled to change the subject of Mathematics for Physical Education inasmuch as the said Bye-law permits change even in class XII, is concerned, Bye-Law 40.1 deals with “Pass Criteria (Senior School Certificate Examination)” and Clause (i) to (iii) thereunder, prescribed the requirements to be declared „pass” in the Senior School Certificate Examination. Clause (iv) is titled “In respect of a candidate offering an additional subject, the following norms shall be applied”. It is thus borne out that Sub-clause (b) thereunder, providing for replacement of an elective subject offered as an additional subject with one of the elective subjects offered by the candidate, is for the computation of the result of the Senior School Certificate Examination i.e. Class XII examination and the reliance by the petitioner thereon vis-a-vis promotion from Class XI to Class XII is misconceived.”*

(emphasis supplied)

43. Apropos the above, Ms. Dhar submits that the said decision was in a case where the student had failed *in 03 subjects* in Class-XI, viz. in Business Studies, Economics and Mathematics, and had applied for *changing the subject* from Mathematics taken in Class-XI as the 5<sup>th</sup> subject (one of the 05 main subjects) to Physical Education taken as the 6<sup>th</sup> subject. Ms. Dhar argues that the decision in that matter proceeded on an interpretation of Bye-Law 26(i) of the CBSE Examination Bye-Laws which relates to *change in subject*, which the school had not permitted in that case since the application for change of subject had not been made within the timeline prescribed in the Bye-Law. Bye-Law 26(i) reads as under :

**26. Rules for Change in Subject**

*(i) Change of subject(s) in class XI may be allowed by the Head of the School but not later than 31st of October of that academic session.*

44. Ms. Dhar submits that the conflict in the said case was between the promotion rules formulated by the Department of Education, Government of NCT of Delhi under Rule 41 of the Delhi School Education Rules, 1973 *and* the CBSE Examination Bye-Laws issued by the CBSE. It was contended that the promotion rules did not permit any change in an elective subject at a belated stage in Class-XI and also did not permit sitting compartment examinations in more than 01 subject.

45. Ms. Dhar further points-out that it be noted that in the said matter the CBSE was neither a party, nor was any affidavit filed by them.

46. In view of the above, it is the submission on behalf of the petitioner that the observation of the court in that case to the effect that ByeLaw 40.1(iv)(b) allowing :

“ ..... replacement of an elective subject offered as an additional subject with one of the elective subjects offered by the candidate, is for the computation of the result of the Senior School Certificate Examination i.e. Class XII examination and the reliance by the petitioner thereon vis-a-vis promotion from Class XI to Class XII is misconceived.”<sup>6</sup>

was mere *orbiter dictum*, since it did not proceed to decide any arguments advanced, nor was there any discussion or reasoning for that observation.

47. On the other hand, Mr. Rajappa contends that the observation of the Coordinate Bench in para 15 of *Puneet Singh* (supra) is an opinion of a Coordinate Bench, which cannot be disregarded; and is in fact binding upon this court.
48. Mr. Kumar stands by his position that since Class-XI and Class-XII are a composite course, Bye-Law 40.1 clearly applies to both ClassXI *and* Class-XII.

### **DISCUSSION & CONCLUSIONS**

49. Upon a conspectus of the averments contained in the pleadings, the arguments made on behalf of the parties, as well as the legal framework obtaining in the matter, in the opinion of this court the following position emerges :
  - 49.1. There is no dispute as to the factual matrix of the matter. The petitioner took 05 main subjects in Class-XI, viz. Business Studies, Accountancy, Economics, English and Mathematics.  
  
He also took an additional subject, viz. Physical Education. The 05 main subjects were chosen from the „elective subjects“ offered by the KVS. The additional subject, viz. Physical Education, is also one of the „elective subjects“ offered.
  - 49.2. The petitioner has passed in 04 main subjects in the session ending examination conducted by the respondent school for Class-XI but has not obtained the requisite 33% in one to them, viz. Mathematics. However, the petitioner has obtained 33% *each* in the theory examination, in the practical examination, as well as overall aggregate in the additional subject, viz. Physical Education.
  - 49.3. The question is whether the extant bye-laws applicable to the present case permit the petitioner to substitute the marks obtained in Physical Education for the marks obtained in Mathematics. If he is permitted to do so, he would

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<sup>6</sup> para 15 of *Puneet Singh* (supra)

qualify to pass Class-XI and be promoted to Class-XII. However, if he is not permitted to do so, he would have to repeat Class-XI.

49.4. The decision of the matter turns on the interpretation of two provisions, viz. (i) Bye-Law 40.1, more specifically Bye-Law 40.1 clauses (iv) and (vi) of the CBSE Examination Bye-Laws; and (ii) Article 106 of the KVS Education Code.

49.5. Notably, though KVS has argued that Clause (vi) of Bye-Law 40.1 stands deleted, they did not specify as to when and by which resolution/decision of the Executive Committee of the CBSE such deletion was made. The fact is that in the short counter-affidavit filed on behalf of the CBSE, Clause (vi) of Bye-Law 40.1 has been extracted as part of the said provision.

On checking from the CBSE web-site also, it is seen that *ByeLaw 40.1(vi) continues to be part of the CBSE Examination Bye-Laws*. In fact, an order dated 29.03.2023 passed by Coordinate Bench of this court in W.P.(C) No. 3867/2023 titled ***Master Dipansh Rawat Through His Guardian vs. The Baptist Convent Senior Secondary School & Ors.*** also refers to Bye-Law 40.1(vi); as does a decision of Co-ordinate Bench of the High Court of Uttarakhand in ***Master Varda Nanda vs. Central Board of Secondary Education & Ors.***<sup>7</sup>

49.6. To be sure, the amendment to Bye-Law 40.1 of the CBSE ByeLaws was considered by the Examination Committee *vide* Minutes of Meeting dated 07.06.2006 (Item-IV)<sup>8</sup>, based on the following rationale :

***“ITEM IV: TO CONSIDER AMENDMENT IN RULE 13.1 AND ADDITION OF SUB RULE IN RULES 40.1 AND 41.1 OF THE EXAMINATION BYE LAWS RELATING TO REGULAR COURSE OF STUDY AND PASS CRITERIA FOR SR. SCHOOL CERTIFICATE EXAMINATION AND SECONDARY SCHOOL EXAMINATION.***

*The Controller of Examinations informed the Committee that a Circular dated 7.6.2001 was sent to all the affiliated schools advising them to follow the pass criteria of the Board for classes IX and XI as laid down for class X and XII under rules 41.1 and 40.1 respectively. But in view of many legal cases, the matter was referred to the legal advisor of the Board who has suggested amendment in the Examination Bye Laws to provide for specific attendance requirement and pass criteria for classes IX and XI also.*

*In rules 41.1 & 40.1 of Examination Bye-Laws, the pass criteria for the class X & XII examinations have been provided. The pass criteria for class IX & XI has however not been specifically prescribed in the Examination Bye-Laws. The schools, in absence of any clear cut pass criteria for Classes IX & XI in the Examination Bye-Laws are adopting*

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<sup>7</sup> MANU/UC/0033/2017

<sup>8</sup> subsequently approved by the Governing Body of the CBSE *vide* Minutes of Meeting dated 30.06.2006



different pass criteria for the said classes. The scheme of studies however, envisages an Integrated Course for Class IX & X leading to the Secondary School Examination and another Integrated Course for Class XI & XII leading to the Senior School Examination. Thus the pass criteria for the Class X & XII examinations should be also made applicable to Class IX & XI also.

\* \* \* \* \*

After detailed deliberations on the subject, the Committee resolved that the attendance requirement and pass criterion in Class IX & XI also be the same as in Classes X & XII and relevant Rules 13.1, 40.1 and 41.1 to be amended as under:

\* \* \* \* \*

**RULES ADDED – 40.1(vi) AND 41.1(vi)**

*In order to be declared as having passed the **Class XI** Examination a candidate shall obtain 33% marks in all the subjects. The pass marks in each subject of examination shall be 33%. In case of subject involving practical work a candidate must obtain 33% marks in theory and 33% in practical separately in addition to 33% marks in aggregate in order to qualify in that subject.*

\* \* \* \* \*

(emphasis supplied) 49.7. Bye-

Law 40.1(vi) expressly provides that to be declared „pass” in the Class-XI examinations, a candidate is required to obtain 33% marks in *all subjects*, with the pass marks in each subject being 33%. In case of subjects involving practical work and theory examination, a candidate is required to obtain 33% marks *each* – in theory, in practical and in the aggregate – to qualify a subject. *A plain reading of this Bye-Law leaves no manner of doubt that Class-XI examinations are covered by Bye-Law 40.1.*

49.8. Now, Bye-Law 40.1(iv)(b) expressly *permits substitution of an additional subject in place of a main subject* – provided that the additional subject is also offered as one of the elective subjects – and subject to the condition that even after such substitution, the candidate continues to retain either English or Hindi as one of the languages in the main subjects taken.

49.9. In the opinion of this court, once KVS has sought and obtained affiliation to the CBSE *inter-alia* for Class-XI and Class-XII, KVS cannot impose on its students pass criteria for Class-XI which are in the teeth of specific pass criteria laid down by the CBSE *vide* Bye-Law 40.1.

49.10. The above view is based on the verdict of the Supreme Court in *Jigyva Yadav* (supra), where Supreme Court has categorically held as follows :

“117. Reverting to the CBSE Examination Bye-laws, the same are couched in the form of a code. They provide for all essential aspects relating to formal education of a student including admission, examination, migration, transfer, curriculum, fee for various services, issuance of verified certificates, modifications in certificates, etc. **This bye-laws, therefore, bind the parties and are duly enforceable in a court of law, even by way of writ remedies as we have seen in the present batch of petitions.**

“118. To put it differently, **the bye-laws of the Board have the force of law and must be regarded as such for all legal purposes. It would serve no meaningful purpose to hold these authoritative set of rules originating from an instrumentality of the State as mere contractual terms despite there being overwhelming public interest in their just application.**

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“120. .... **For a student enrolled with the CBSE, there is no other body of rules but the subject bye-laws for dealing with all significant aspects of her education.** ....”

(emphasis supplied)

- 49.11. As a sequitur to the above, in the opinion of this court, there can be no manner of doubt that in the event of any conflict between a bye-law framed by the CBSE and a code issued by KVS, the CBSE bye-law would prevail. In the present case, there is a clear conflict inasmuch as Article 106 of the KVS Education Code stipulates an additional criterion by which a candidate is not permitted to substitute an additional subject in place of a main subject in order to fulfill the pass criteria for Class-XI. Since Bye-Law 40.1(iv)(b) and (vi) specifically permit such substitution, Article 106 must yield to Bye-Law 40.1(iv)(b) and (vi).
- 49.12. Accordingly, the petitioner is entitled to substitute Physical Education (an elective subject taken as an additional subject) in place of Mathematics (an elective subject taken as a main subject). By doing so he would also continue to retain English as one of the main subjects. Since that is so, upon such substitution, the petitioner would have obtained 33% marks in 05 subjects, viz. Business Studies, Accountancy, English, Economics and Physical Education – in theory, in practical as well as in the aggregate – in each of the subjects.
- 49.13. In the above view of the matter, the petitioner fulfils the pass criteria contained in Bye-Law 40.1 of the CBSE Examination Bye-Laws.
- 49.14. Furthermore, this court is of the view that the observation made by the Coordinate Bench of this court in *Puneet Singh* (supra) cannot but be an *obiter*

*dictum* since, as correctly pointed-out by learned counsel for the petitioner, the decision of that case turned upon interpretation and application of Bye-Law 26(i) of the CBSE Examination Bye-Laws and was made in the backdrop of the promotion rules of the Department of Education, Government of NCT of Delhi. Moreover, it is also obvious that there is no discussion nor any reasoning in that judgment relating to Bye-Law 40.1. The court could not therefore have expressed an authoritative opinion in relation to Bye-Law 40.1 of the CBSE Examination Bye-Laws. Most importantly, the observation of the court in para 15 in that case proceeds *without Bye-Law 40.1(vi) having been brought to its notice*, which specifically sets-down the pass criteria for Class XI Examination.

50. Accordingly, the petition is allowed; thereby holding that the petitioner has fulfilled the pass criteria for Class-XI and is eligible to be promoted to Class-XII at the Kendriya Vidyalaya School, Sector12, Dwarka.
51. As pointed-out by learned counsel for the CBSE in the course of the hearing, the deadline for respondent No.1 school to sponsor the petitioner for the Class-XII Senior Secondary School Certificate Examination to be conducted by the CBSE in 2024, has passed. In the circumstances, respondent No.3/CBSE is directed to make available the requisite web-link and/or arrange alternate mechanism for Kendriya Vidyalaya School, Sector-12, Dwarka to upload/submit the petitioner's name as one of the candidates for Class-XII Senior Secondary School Certificate Examination to be conducted in 2024.
52. The petition stands disposed-of in the above terms.
53. Pending applications, if any also stand disposed-of.

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