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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

1 W.P.(C) 3285/2011

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 **Judgment dated 31.10.2012**

DR. VIPIN SIIARMA

..... Petitioner

Through: Ms. Mukti Chowdhary, Adv.

versus

NATIONAL BOARD OF EDUCATION & ORS. Respondents

Through: Dr. Rakesh Gosain, Adv. for R1 & R2

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. The pleadings in this matter are complete.
2. Rule. The writ petition is set down for final hearing and disposal.
3. By the present writ petition petitioner seeks quashing of order dated 25.4.2011 passed by the National Board of Examinations. Petitioner also prays for issuance of writ in the nature of mandamus directing the NBE to allow the petitioner to appear in the DNB Final Examinations.
4. The petitioner is a student of Secondary Diplomat of National Board (hereinafter referred to as DNB), PG course from Deen Dayal Upadhyay Hospital. Petitioner was admitted in July, 2007 in the Secondary Diplomat of National Board PG course which was to be considered in June, 2009. On account of a dispute with regard to the accreditation of the DDU Hospital by an order of 17.4.2009 NBE granted provisional renewal of accreditation in the Ophthalmology Department of DDU Hospital as it had lapsed on 30.6.2007. By an interim order dated 5.6.2009 the Court permitted the petitioner to appear in the examination scheduled on 13.6.2009 and 14.6.2009 subject to final outcome of the writ petition. The examination was to be held on 13.06.2009 and 14.06.2009.

During the final examination the petitioner unintentionally and by mistake failed to deposit his mobile phone with the invigilator in the second session on 14.06.2009. It is the case of the petitioner that the moment the petitioner realized his mistake the petitioner immediately and voluntarily deposited his mobile phone with the invigilator. It is contended that it was an innocent mistake on the part of the petitioner and not a fraudulent act neither any electronic data was present in the mobile phone nor during the course of examination the petitioner made any communication through the mobile phone. In support of the plea that carrying of the mobile phone in the examination hall was a genuine mistake, learned counsel submits that the phone was neither switched off nor on the silent or vibration mode but on the general ringing tone and had the petitioner any intention of using this device for unfair means the first precaution he would have taken was to keep the mobile phone on silent or vibration mode. It is also submitted that after the mobile phone was handed over to the invigilator no action was taken against the petitioner although the petitioner rendered his explanation to the respondents and it is only on 12.8.2009 when the result of the final DNB examination was declared that the result of the petitioner and all other students who had filed a writ petition in the High Court and who had appeared on the basis of an interim order, was also withheld. Petitioner was even at that stage was not informed that his result had been withheld on account of the mobile phone in his possession during the examination. Petitioner was telephonically informed to appear on 8.10.2009 before the Ethical Committee. No show cause notice was issued to the petitioner in writing. Petitioner explained his stand before the Ethical Committee. However, no decision of the Ethical Committee was communicated to the petitioner. The respondents continued to hold the mobile phone of the petitioner even

till that stage. Petitioner was never informed that any legal data was recovered from his mobile phone. Petitioner was allowed to appear in the final theory examination held in 2009. No objection was raised by the respondents which would show that even till December, 2009 no adverse decision had been taken by the Ethical Committee against the petitioner or else the petitioner would not have been permitted to appear in the final theory examination. According to the petitioner the order of the Ethical Committee dated 9.11.2010 was passed post December, 2010 but dated as 9.11.2010 which is evident from the fact that neither this order was communicated to the petitioner nor on the basis of this order the petitioner was prevented from appearing in the examination held in December, 2010. Counsel for the petitioner submits that after the incident and hearing before the Ethical Committee the petitioner requested the respondent No.1 to disclose the decision of the Ethical Committee vide letter dated 5.4.2010. A reminder was issued on 27.8.2010. A request was also made to disclose the result. The respondents maintained absolute silence. No response was sent to the request of the petitioner. The petitioner thereafter filed an application under the Right to Information Act when he was informed that the Ethical Committee had passed an order on 9.11.2010 holding the petitioner guilty for using unfair means and on the basis of the Ethical Committee barred the petitioner for a period of three years (6 attempts including the attempt of June, 2009 for appearing in the final theory examination). Even at that stage the respondents did not serve a copy of the order of 9.11.2010 to the petitioner. It is further alleged by counsel for the petitioner that in fact no order was passed on 9.11.2010 and the order passed after one year is a fake order. Petitioner thereafter moved an application under the Right to Information Act seeking the basis on which the punishment was awarded.

Copy of the minutes of 8.10.2009 was also demanded. In reply to this query the respondents served minutes of meeting held on 30.3.2010. Relevant extract of the rules of NBC were also supplied to the petitioner.

5. Aggrieved by the order passed by the NBC, the petitioner filed a writ petition which was withdrawn as an alternate remedy by way of an appeal to the Executive Director was available to the petitioner. Appeal was filed by the petitioner on 13.3.2011 and the order was reserved. The appeal was not decided within the eight weeks period allowed by the Court. However, the Appeal Committee, partly allowed the appeal and reduced the punishment from six semesters to three semesters and it was also observed that the punishment would not be reflected in his future career. It is this order as also the order passed by the Ethical Committee which is subject of challenge before this Court. Learned counsel for the petitioner submits that the impugned orders of 25.4.2011 passed in appeal upholding the order dated 9.11.2010 are completely arbitrary as mere possession of a mobile phone does not cover any of the categories mentioned in the rules for punishing the petitioner. It is contended that the respondents have failed to address the issues raised by the petitioner in the appeal. The respondents have failed to appreciate that an innocent mistake by the petitioner could put a black spot on the petitioner's career. It is submitted that the case of the petitioner would not be covered by any of the four categories more particularly category No.4 sought to be relied upon by the respondents in passing the impugned order. Counsel submits that there is no material on record to suggest that either the petitioner was caught using the mobile phone or receiving a call or any material to show that any offending material was stored in the memory of the mobile phone or any analysis of the sim card to suggest that there was any intention on the part of the petitioner to use the mobile phone as a medium of unfair

means. It is strongly urged before this Court that mere possession of the mobile phone cannot entail the punishment melted out to the petitioner in the absence of any reasonable material to show that the petitioner either intended to use or used the mobile phone during the examination. Counsel submits that the petitioner has admitted the possession of the mobile phone but disputed that the phone was carried to the examination hall with the intent to use it for mass copying and for unfair means. It has also been contended that the harsh punishment has been melted out to the petitioner on account of the fact that he was one of the parties who filed WP(C) No.9563/2009 challenging the order of the respondent No.1 related to the presentation of the DDU Hospital which writ petition was allowed in favour of the petitioner. It is also the submission of learned counsel for the petitioner that the petitioner has been a good student throughout his academic career and has never been involved in any activities of unfair means. Petitioner stood at rank 2 in the DNB Entrance Examination in Anesthesia and also secured second rank in DA examination theory in G.R.M.C Gwalior. Petitioner has also earned a good reputation in the DDU Hospital where he was studying. Counsel further submits that the petitioner has suffered immensely from the year 2009 as he has chosen not to appear in the examination till the dark spot in his career is removed. It is submitted that petitioner has already suffered since 2009 and thus the impugned orders may be quashed and set aside.

6. Dr. Rakesh Gosain, learned counsel for the respondent No.2 submits that on 14.6.2009 during the course of examination the Centre Supervisor after spotting/detecting the mobile phone with the petitioner registered a case of use of unfair means in the examination. The original answer sheet of the petitioner was taken away and another blank answer sheet was handed

over to the petitioner for completion of his examination. It is submitted that the decision of the respondents cannot be imputed or tilted with arbitrariness, perversity or unreasonableness warranting interference under the discretionary jurisdiction of the High Court. The power of judicial review under Article 226 of the Constitution of India would look only to the decision making process and not the decision. Counsel submits that due publicity has been given that possession of mobile phone is prohibited during the examination and possession would tantamount to use of unfair means has been notified to candidates on various occasions through newspaper, notification, admit cards, information, bulletin for the examination including at the time of the examination printed on the question papers as also printed on the jacket of the booklet. Attention of this Court is drawn on the definition of unfair means as per the guidelines in the bulletin of information which reads as follows:-

“Unfair means includes canvassing for support of a candidate with examiners of DNB Exam/NBE office/any other functionary/use of electronic gadgets as Mobile Phones during exam/impersonation/use of study aids as books/notes etc. during exam/Influencing any functionary of exam system/any other act intended to breach the sanctity of examinations process.”

7. Learned counsel for respondent No.1 next submits that the Examinations Ethics Committee meeting of 8.7.2009 was held and the case of the petitioner was discussed. This committee comprises of 16 members. In the meeting it was decided that an opportunity should be given to the petitioner to represent his case in defence. The petitioner was called to appear on 8.9.2009. Since the examination Ethics Committee could not meet and decide the cases of unfair means prior to the DNB Examination, the petitioner in all fairness was permitted to appear in December, 2009 for the DNB Examination provisionally. The Ethics Committee met on

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30.3.2010 and after due deliberations decided to debar the petitioner for six attempts commencing from June, 2009. Consequently, the petitioner was debarred from June, 2009, December, 2009, June, 2010, December, 2010, June, 2011 and December, 2011. This decision was conveyed to the petitioner on 9.11.2010. The Appeal Committee carefully examined the material on record and also considered the fact that the petitioner had deactivated the sim card on 14.6.2009. The committee was unable to use the sim card to analyze the log of the mobile phone. It is contended that the case of the petitioner was examined by the Ethics Committee and hearing was granted to the petitioner. Thereafter, the committee constituted by the Executive Director also had an opportunity to interact and assess the petitioner. Both the committees were dissatisfied with the defence of the petitioner and accordingly passed the order. It is submitted that this is not a fit case for judicial review as the sentence is neither unconscionable nor decided the ambit and scope of the sentencing provision and the same cannot be interfered while exercising the power of judicial review. It is urged before this Court that the punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence. It is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Any interference would erode the confidence of the authorities and pollution and purity of the examination system has to be efficacious and has to compound to prevent future wrong doers. In the rejoinder the petitioner has pointed out since the incident had taken place on 14.6.2009 and the mobile phone was not returned till the year 2011 to prevent any misuse of the sim card the petitioner requested for de-activation of the sim card in the month of July, 2009.

8. Learned counsel for the petitioner further submits that on an enquiry made from the vodafone where the petition was registered the petitioner was informed that even if the sim card is disconnected the material is kept for a period of six months still nothing is on record as to whether the petitioner was permitted to produce the material or at any point of time the respondents called upon the service proprietor to provide the details till 14.6.2009 or any other date.
9. I have heard learned counsel for the parties and considered their rival contentions. The petitioner was appearing for the final examination, which commenced from 13.6.2009. On 14.6.2009 during the course of examination a mobile phone was spotted/detected by the Central Supervisor in the possession of the petitioner. The mobile phone was confiscated. The answer sheet of the petitioner was also taken away by the Central Supervisor. A blank fresh answer sheet was handed over to the petitioner and he was asked to re-write the examination.
10. It is not in dispute that the petitioner was informed telephonically to appear before the Ethical Committee on 8.9.2009. The petitioner was granted an opportunity of hearing. Thereafter the order of Ethical Committee was not communicated to the petitioner despite request made by the petitioner, copies of which have been placed on record. Petitioner made an application under Right to Information Act. The petitioner was informed of the order, which had been passed on 9.11.2010 after more than one year from the date of the incident. The petitioner was barred for a period of three years (six attempts) including attempt of June, 2009, for appearing in the final theory examination.
11. The first submission of counsel for the petitioner is that the petitioner carried the mobile phone in the examination hall inadvertently, innocently and by mistake. Elaborating her arguments further, learned counsel for the

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petitioner submits that in case the intention of the petitioner was to use the mobile phone for unfair means the petitioner would have taken the basic precaution of keeping the mobile phone on a silent or vibration mode. Counsel next submits that even after the mobile phone was confiscated the SIM card of the phone was not analysed which would have clearly shown that neither any call was made or received nor any message was sent or received on the said mobile phone, however, for the reasons best known to the respondents the SIM card was not sent for analysis. It is further submitted that the petitioner was forced to ask for cancellation of the SIM card as he was without the mobile phone but cancellation of the SIM card would not have come in the way of respondents from seeking details from the service provider as the material is kept by the service provider for a period of six months. The second submission made by learned counsel for the petitioner is that the respondents were not satisfied as to whether the petitioner had violated any of the four categories of punishment as per the Rules and it is for this reason that for more than one year no order was passed by the respondents and the appeal filed by petitioner was also not decided within eight months' period granted by this Court.

12. It is also the submission of learned counsel for the petitioner is that the punishment, so awarded to the petitioner, does not fall in any of the four categories, as mentioned in the Regulations, as it is not a case where any study material was found from the possession of the petitioner with an intent of copying, nor the petitioner was found involved in mass copying, abetting, helping other candidates with the aid of unfair means nor was the petitioner found using any electronic device. Since the petitioner does not fall in any of the categories of the rule relied upon by the respondent,

no punishment could have been awarded to the petitioner much less debarring him for six attempts.

13. It is submitted by Ms. Mukti Chowdhary, counsel for the petitioner, that the Ethical Committee and the Appeal Committee have passed the Order without any application of mind and without reaching a finding that the petitioner had used the mobile phone for unfair means. It is also the submission of counsel for the petitioner that petitioner has been a good student, a respected Doctor and the order of punishment will always leave a black spot in his carrier. Ms. Chowdhary has also submitted that the case of the petitioner cannot be equated with the decisions relied upon by counsel for the respondents as finding study material in the possession of a candidate cannot be compared to spotting of a mobile phone in the possession of the petitioner.

14. The submission of learned counsel for the respondents are that all the candidates were duly informed that mobile phones are not permitted in the examination hall. In gross violation of the directions issued, the petitioner was spotted with a mobile phone on the beep of the mobile phone in the examination hall. It is further submitted that since the respondents have not violated the principles of natural justice, granted an opportunity of hearing to the petitioner and thereafter the impugned order dated 9.11.2010 was passed by the Ethical Committee and the order dated 25.4.2011 was passed by the Appellate Committee. It is next submitted that it is not a fit case for judicial review as the punishment awarded is not of a nature which would shock the conscience of the Court. It is also submitted that the punishment is designed to protect society by deterring the potential offenders and also by preventing the guilty party from repeating the offence.

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15. Learned counsel for the respondents submits that the petitioner had deactivated the SIM card so that the log of the mobile phone is erased. Since the petitioner was found with an electronic device the petitioner was rightly awarded the maximum punishment as per the Rules.

16. There is no doubt that the respondents have not violated the principles of natural justice, afforded a reasonable opportunity of hearing to the petitioner and thereafter passed the impugned order. It is also not in doubt that the candidates were duly informed that the mobile phones were not permitted in the examination hall, however, the respondents have failed to record a finding that the petitioner was found using the mobile phone, nor the respondents have recorded a finding that any attempt was made to approach the service provider to seek information with regard to the use of mobile phone during the period when it was in his possession. What is further surprising is that in the log of the mobile phone itself details are available with regard to calls made and received on the mobile phone and the message sent or received. Respondents did not even bother to ascertain from the log of the mobile phone as to whether the petitioner had used the mobile phone or received any message on the mobile phone during the examination. Another factor, which cannot be ignored, is that the mobile phone was not at the silent mode or the vibration mode as in case the petitioner had intended to use the mobile phone he would have taken the basic precaution of keeping the mobile phone in the silent mode, which would *prima facie* show that the petitioner carried the mobile phone in the examination hall by mistake. Another aspect of the matter, for which no satisfactory or reasonable explanation has been rendered by the counsel for the respondents, is the delay in deciding the case of the petitioner and the reasons for not communicating the order to the

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petitioner, which gives an impression that either the respondents were not serious or not sure of the action to be initiated as per the Rules.

17. Respondents have awarded the maximum punishment as per the Rules of debarring the petitioner for six consecutive attempts, which was reduced to three consecutive attempts by the Appellate Committee. The relevant rules are reproduced below:

S. No.	Candidates Action	Penalty
01	Candidate who have been found in possession of study material, notes etc. or any other material with the intend to use for copying / being used for copying.	Cancellation of paper
02	Candidates found in possession of material as mentioned in (1) above and also found to have transcribed the same onto the answer sheet.	Cancellation of current paper plus being debarred from appearing in the next attempt.
03	Candidates found in possession / indulging in activities noted as per 1 and 2 above, in case the candidate in addition to these is found to be indulging in bringing of undue influence upon the invigilator etc. or use language / gestures against the invigilator / exam staff / officers or others involved with conduct of examination etc.	Cancellation of the current paper plus being debarred from appearing next two consecutive exams.
04	Candidates found involved in mass copying whereby he she is found abetting / helping other candidates to write the examination with aid of unfair means, <u>use of electronic devices</u>	Cancellation of the current paper plus being debarred for five consecutive attempts.

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in addition to anything and everything as described in 1,2, and 3 hereinabove.
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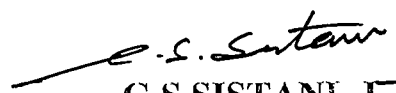
18. Respondents have relied upon Rule 4 for awarding the punishment. In my view the respondents have failed to record a finding that the petitioner was involved in mass copying, abetting and helping other candidates to write the examination with the aid of unfair means or use of electronic device in addition.
19. Learned counsel for the respondents has relied upon *Director (Studies), Dr. Ambedkar Institute of Hotel Management, Nutrition and Catering Technology, Chandigarh and Others v. Vaibhav Singh Chauhan*, reported at (2009) 1 SCC 59, in support of his submission that the Apex Court had held that mere possession of a slip during the course of examination was held as malpractice irrespective of the fact that the slip was actually used or not. The Apex Court had further held that it was wholly irrelevant as to whether the candidate had actually used the slip of paper found in his possession. This judgment, sought to be relied upon by counsel for the respondents, in my view is not applicable to the facts of the present case as possession of written material with a candidate cannot be compared to the possession of a mobile phone unless the mobile phone contains material which would then be comparable to written material.
20. In this case the respondents made no attempt to ascertain whether this mobile phone was either capable of storing material or in fact there was material in the mobile phone. There is nothing on record that in addition to the mobile phone there was any hidden device such as Bluetooth, ear phone or head phone, which was concealed in the body of the petitioner, which would show that there was any intention of bringing the mobile phone in the examination hall for the purposes of cheating.

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21. It is trite law that in judicial review the Court is not concerned with the decision but the Court must satisfy with a decision making process. No doubt respondents have followed the principles of natural justice, the Ethical Committee as also the Appellate Committee have considered the case of the petitioner but in my view the case of the petitioner does not fall in any of the Rules 1-4 nor the impugned order shows that respondents made any attempt to ascertain as to whether the mobile phone was brought to the examination hall with any intention of cheating. Respondents did not even bother to look at the log of the mobile phone, leave alone enquiry from the service provider.

22. The Court cannot also lose track of the fact that from the year 2009 till date the petitioner has not been able to sit in the examination. In my view the petitioner has already suffered for the mistake committed by him in not being careful and bringing the mobile phone in the examination hall. The petitioner has also suffered on account of delay in passing of the order by the respondents and not being communicated the same to the petitioner despite his requests and his application made under Right to Information Act.

23. In the peculiar facts and special circumstances of this case as more than three and a half years period has already elapsed from the date of the incident the petitioner has already approached this Court twice, I deem it appropriate and to meet the ends of justice to quash the order dated 25.4.2011. According, writ petition is allowed. The impugned order dated 25.4.2011 passed by respondent no.1 is quashed.


G.S.SISTANI, J

OCTOBER 31, 2012

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