

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

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Date of decision: 13th July, 2015.

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W.P.(C) 5719/2015 & CM No.10285/2015 (for stay).

ATUL KUMAR VERMA

..... Petitioner

Through: Ms. Meenakshi Arora, Sr. Adv. with
Mr. Yashvardhan, Mr. Rajat Khattry
and Mr. Piyush Singh, Adv.

Versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr. Vivek Goyal and Mr. Jitendra Kr.
Tripathi, Adv. for R-1/UOI.
Mr. Amit Bansal, Adv. for R-2.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The petitioner, being the father of an aspirant for admission to the Indian Institutes of Technologies (IITs), for admission whereto Joint Entrance Examination (JEE) comprising of JEE (Main) and JEE (Advance) is held by the respondent no.2 Central Board of Secondary Education (CBSE) and the respondent no.1 Union of India (UOI), Ministry of Human Resource and Development respectively and whose ward / daughter had appeared in the JEE (Main) held on 4th April, 2015, has filed this petition seeking declaration that the questions no.9, 22 & 57 in Set 'C' of the said examination are conceptually wrong and seeking a direction to the

respondent no.2 CBSE to award 14 additional marks to the daughter of the petitioner and to prepare the All India Rank of the said examination by making the said addition to the marks of his daughter.

2. The petition came up first before this Court on 29th May, 2015 when the following order was passed:-

“The petitioner had appeared for JEE (Mains) Examination held on 04.04.2015. It is stated that more than 12 lacs students appeared for the said examination. The respondent released the answer keys to different sets of question papers in the public domain and also invited objections to the answer keys. It is stated that the petitioner objected to the answers in respect of question no.9, 20, 22, 57, 73 & 21 from the question papers (set C). The learned counsel for the respondent, who appears on advance notice, states that the objections received in response to the answer keys put in public domain were considered by the experts. And, in respect of certain questions the objections were accepted, while in respect of others the same were rejected. However, none of the objections furnished by the petitioner were found acceptable by the experts. Although, the learned counsel for the petitioner contends that the answers as furnished by the petitioner are correct, it is not possible to conclude that her views should prevail over the views of other experts appointed by the respondent. However, since the petitioner insists that the answers with respect to the aforementioned questions are incorrect and this is confirmed by certain coaching centres as well, I consider it appropriate to call upon the respondent to furnish the views furnished by the experts appointed by the respondent, to consider the objections to the answer keys. Let the same be furnished on the next date of hearing.

List on 01.07.2015.”

3. On 1st July, 2015 the counsel for the respondent no.2 CBSE stated that the reply directed to be filed would be filed by the next date; an advance copy thereof minus one annexure was however handed over to the counsel for the petitioner in Court.

4. Since only a specified number of students who appeared in JEE (Main) are entitled to take the subsequent JEE (Advance), it was on 1st July, 2015 enquired whether the daughter of the petitioner had appeared in JEE (Advance). It was informed that the daughter of the petitioner was not found eligible for JEE (Advance) by one mark but was still interested in improvement of her result of JEE (Main) since admissions to the Regional Engineering Colleges and National Institutes of Technology depend upon the rank in JEE (Main).

5. An affidavit as aforesaid has been filed by the respondent no.2 CBSE and to which a rejoinder has been filed by the petitioner. The counsels were heard on 7th July, 2015 and judgment reserved.

6. It is the case of the petitioner, (i) that after the JEE (Main) on 4th April, 2015 different reputed coaching institutes released the correct answer

key of the questions in the said examination; (ii) the respondent no.2 CBSE also subsequently released the answer key; (iii) the daughter of the petitioner (Ms. Amodini Vardhan) found several discrepancies and anomalies in the answer key published by the respondent no.2 CBSE and made a cross check of the said answer key with the answer key published by different reputed coaching institutes like FIITJEE, Brilliant, Aakash Institute, Resonance and the Time; the same also showed discrepancies in the answer key published by the respondent no.2 CBSE; (iv) representation dated 21st April, 2015 was made by the daughter of the petitioner to the respondent no.2 CBSE disputing the answers as given in the key in respect of questions no.9, 20, 22, 57, 73 & 21 from the said Set 'C' of the question paper; (v) however the respondent no.2 CBSE vide its response reiterated that the answers in its answer key to the questions aforesaid were correct; (vi) the result of JEE (Main) was declared on 27th April, 2015 in which the daughter of the petitioner scored 104 marks; the cut-off marks in the General Category students who could appear in JEE (Advance) was fixed at 105 marks; (vii) the daughter of the petitioner on 7th May, 2015 applied for her OMR sheet as well as calculation sheet and which were supplied on 15th May, 2015; therefrom it was found that the marks of the answers of the questions which

were conceptually wrong not counted and negative marking was done against such questions which led to the drop in the marks of the daughter of the petitioner below the cut-off marks for the General Category; and, (viii) that the answer key of the respondent no.2 CBSE with respect to questions no.9, 22 and 57 of four marks each is incorrect and the answers given by the daughter of the petitioner are correct and the daughter of the petitioner is thus entitled to additional 12 marks on this account; she is also entitled to be awarded additional two marks which have been deducted for wrongly answering questions no.9 & 57.

The petitioner in the petition, besides referring to the answer key with respect to the aforesaid questions published by the coaching institutes, has also pleaded having obtained expert opinion of two academicians and whose affidavits as to the incorrectness of the answer key of the respondent no.2 CBSE with respect to the aforesaid questions and correctness of the answers given by the daughter of the petitioner have been filed with the petition.

7. The respondent no.2 CBSE in its affidavit pursuant to the order supra dated 29th May, 2015 has stated, (a) that as per the scheme of JEE (Main) – 2015, the objections preferred by the petitioner were duly considered and finding no merit therein the subject experts of respondent no.2 CBSE

rejected the same; (b) the petitioner has no vested right to a review or to challenge the decision of the subject experts of the respondent no.2 CBSE; (c) that it is a settled law that it is for the experts / academic bodies and not for the Courts to go into the correctness of the answers contained in the answer key, as experts are the best judge of the subject / academic issues and these matters should be left to the wisdom of academic bodies and the Courts should not ordinarily interfere in the same; (d) for admission to NITs, Centrally Funded Technical Institutes like IITs etc. and other participating institutions, the merit / rank list is prepared by the respondent no.2 CBSE, based on 40% weightage to school Board marks in class 12th or equivalent examination and 60% weightage to JEE (Main) (the weightage to school Board / equivalent examination marks is considered only after normalization); (e) that under the scheme evolved by the respondent no.2 CBSE, answer key for JEE (Main) is uploaded on the website and challenges / objections to the answer key invited from the candidates; the objections so received are considered and examined exhaustively by the subject experts of the respondent no.2 CBSE; if the subject experts on examining the objections find that any answer contained in the answer key was not the correct answer, then on the advice of the subject experts the respondent no.2

CBSE modifies its answer key accordingly and gives appropriate benefit to the candidates; if the subject experts are of the view that the answer contained in the answer key is a correct answer, no modification in the answer key is made; (f) the respondent no.2 CBSE, as a policy, does not place any reliance on the assessment or evaluation made by the coaching institutes; (g) the respondent no.2 CBSE's decision on the challenge / objections stands final; (h) upon examining all the objections received for the Set 'C', the subject experts of the respondent no.2 CBSE came to the conclusion that they found merit only in the objection to questions no. 51 & 53 as in the case of question no.51 there was an error and for question no.53 there were two correct options; accordingly full marks of question no.51 were awarded to all the candidates and marks of question no.53 were awarded to the candidates opting for either of the correct options; and, (i) no merit was however found in the objections raised by the daughter of the petitioner to the questions no.9,20,22,57,73 and 21.

Reliance in the affidavit itself is placed on order dated 10th July, 2013 in W.P.(C) No.4323/2013 titled ***Master Gautam Bathla Vs. CBSE*** and on order dated 15th May, 2015 of this Court in W.P.(C) No.4777/2015 titled

Sushant Jain Vs. CBSE and on ***University Grants Commission Vs. Neha Anil Bobde*** (2013) 10 SCC 519.

8. The petitioner in its rejoinder has reiterated his petition and referred to ***Kanpur University Vs. Samir Gupta*** (1983) 4 SCC 309 and to ***Manish Ujjwal Vs. Maharishi Dayanand Saraswati University*** (2005) 13 SCC 744.

9. The senior counsel for the petitioner contended, (i) that a question relating to a Science subject could have only one correct answer; (ii) however the subject experts consulted by the petitioner, with respect to the questions to which objection has been taken by the petitioner opined that the same were not capable of one answer; (iii) that the factum of the answer key of the respondent no.2 CBSE being erroneous is established from the respondent no.2 CBSE having admitted the answer key qua some other questions being erroneous; (iv) some of the questions qua which objection has been taken did not have complete particulars and required the examinees to make assumption, making the question erroneous and incapable of a single answer; (v) that since there was a difference of opinion between the subject experts of the respondent no.2 CBSE and the other subject experts equally competent and qualified, this Court in exercise of its writ jurisdiction should refer the disputed questions to an independent expert viz. IIT, Delhi

or anyone else not connected with the respondent no.2 CBSE; and, (vi) that the subject experts of the respondent no.2 CBSE would naturally be inclined to, as far as possible, reiterate the answers in the answer key and would not be completely open to re-consider.

Attention of course was invited to the affidavits of the experts consulted by the petitioner and the reasons given by them in their affidavits / annexures thereto for the answer in the answer key being incorrect. The senior counsel for the petitioner during the hearing also handed over a chart to show, (a) that with respect to question no.9, the answer as per the FIIT JEE and Time was same as in the answer key, as per Resonance and Akash the question was theoretically wrong; (b) with respect to question no.22 (which the petitioner did not answer), according to Time the answer was the same as in the answer key, according to FIIT JEE the correct option was not available and according to Resonance and Akash the question was theoretically wrong; and, (c) with respect to question no.57, according to FIIT JEE, Resonance, Akash, Brilliant as well as Time the answer given by the daughter of the petitioner was correct and the answer in the answer key was wrong.

Also, besides the judgments referred to in the rejoinder, reliance was also placed on *Guru Nanak Dev University Vs. Saumil Garg* (2005) 13 SCC 749 with respect to the views of the subject experts of CBSE, which the CBSE had been directed to produce in Court, it was argued that the same did not give any reasons for the objections preferred by the daughter of petitioner being not sustainable and the answer key being correct.

10. The counsel for the respondent no.2 CBSE argued that the daughter of the petitioner, while preferring the objections to the answer key did not give any explanation for the answer in the answer key being wrong as is now given in the affidavits filed by the experts and thus the subject experts of the respondent no.2 CBSE while considering the said objections did not have the said opinion before them. It was further stated that the CBSE had been directed to produce the views of its subject experts as received then and had produced the views received of three subject experts consulted and of which one contained explanation. Reference, besides to the orders / judgments referred to in the counter affidavit was also made to the order dated 8th April, 2015 of the Division Bench of this Court of which the undersigned was a member in W.P.(C) No.2275/2010 titled *Dr. Rajeev Kumar Vs. Union of India* concerning JEE and where it was *inter alia* observed / held as under:-

“20. As far as the suggestion, for the objections to the answer key to be reviewed by an independent body of experts, we are of the view that in the light what we have been informed, of the answer key prepared by the question setter being examined by the experts from all the seven IITs and the final answer key being prepared only thereafter, there is no need for the objections to the answer key being considered / reviewed by an independent body of experts. We have rather enquired from the counsel for the petitioner as to where the said process is to end – in the event of the independent body of experts differing from the experts of the IIT, whether not the next step would be to seek judicial review thereof. In our view no judicial review of the answer key is ordinarily permissible. The said aspect has been dealt in detail in recent judgments of this Court in **Salil Maheshwari Vs. The High Court of Delhi** MANU/DE/2085/2014 (DB) and in **Manoviraj Singh Vs. University of Delhi** (judgment dated 25th September, 2013 in WP(C) No.5074/2013) and need is not felt to elaborate further. Suffice it is to say that the process of examination and selection of the candidates cannot be made an unending exercise which would result in the admissions and the academic session being delayed and which cannot be permitted.”

On the basis of the above it was argued that the matter is no longer *res integra*. It was further contended that in **Kanpur University** supra the experts of the examining body themselves had admitted to the wrong and the said judgment is thus not applicable.

11. The senior counsel for the petitioner in rejoinder contended that, (i) unlike as per the procedure in JEE (Advance) where objections to the answer key are referred to persons other than those who had framed the answer key, even though of the IITs only, the consideration of the objections to the answer key of JEE (Main) conducted by respondent no.2 CBSE is not by independent persons; (ii) that thus the observations aforesaid of the Division Bench in ***Dr. Rajiv Kumar*** pertaining to JEE (Advance) would not have application to JEE (Main); (iii) that once according to all the coaching institutes as well as the experts consulted by the petitioner including the expert whose affidavit is filed along with the rejoinder, the answer in the answer key to question no.57 is wrong, the same ought to invite a reference by this Court of the dispute to an independent expert and the petitioner will be bound thereby.

12. During the course of hearing it was enquired whether any other objections besides from the petitioner were received to the aforesaid three questions. The counsel for the respondent no.2 CBSE answered in the affirmative and informed that the objections of the others also to the said questions were negated. The senior counsel for the petitioner responded that it matters not whether the challenge is by one candidate or by several in as

much as once there is a difference of opinion, an independent expert necessarily has to be consulted.

13. Before considering the rival contentions I may observe that this Court is inundated with writ petitions concerning academic matters, so much so that a separate Roster therefor has been created. Though the said matters in the past pertained to challenge to the administrative actions of the academic institutions / bodies viz. of cancelling an examination, rustivating a student, but off late the said challenge has expanded to all facets of education and the zenith thereof is evident from the challenge in this petition, seeking judicial review of the marking in an examination or of the decision of an examining body of what the correct answer to a question in an examination should be. I have pondered, whether the power conferred by the Constitution of India on the High Courts under Article 226 to issue to any person or authority orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of any of the rights conferred by Part-III and for any other purpose extends to the High Courts in exercise of said power reviewing the appropriate / correct answer to a question in an examination held whether to test comparative merit or for admission or for selection or posting.

14. The Supreme Court, in *Tata Cellular Vs. Union of India* (1994) 6 SCC 651 was concerned with the extent of judicial review of decisions *bona fide* arrived at in tender cases and on a review of case law it was *inter alia* held that:-

- (i) there are inherent limitations in exercise of power of judicial review;
- (ii) judicial review is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficent power;
- (iii) the restraint has two contemporary manifestations - one is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits;
- (iv) these restraints bear the hallmarks of judicial control over administrative action;
- (v) judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself;

- (vi) unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power;
- (vii) that the concern of the Court while exercising the power of judicial review should be confined to, (a) whether a decision-making authority exceeded its powers; (b) committed an error of law; (c) committed a breach of the rules of natural justice; (d) reached a decision which no reasonable tribunal would have reached or; (e) abused its powers;
- (viii) therefore, it is not for the Court to determine whether a particular policy or a particular decision taken in the fulfilment of that policy is fair;
- (ix) the Court is only concerned with the manner in which those decisions have been taken;
- (x) if the decision-maker understood correctly the law that regulates his decision-making power and has given effect to it, his decision cannot be said to be illegal, inviting interference;

- (xi) a decision would be regarded as unreasonable if it is impartial and unequal in its operation;
- (xii) a decision taken after taking into account all the factors which ought to be taken into account is ordinarily not to be held as unreasonable;
- (xiii) if the scope of judicial review is too broad it would turn the various authorities / agencies into little more than media for transmission of cases to the courts and that would destroy the value of the agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields;
- (xiv) it is not the function of a Judge to act as a super board or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator;
- (xv) no judicial review by the non-expert Judge is permitted of the discretion exercised by the expert; and,
- (xvi) if a Court were to review fully the decision of a body such as a State Board of medical examiners, it would find itself

wandering amid the mazes of therapeutics of boggling at the mysteries of the pharmacopoeia - such a situation is not a case of the blind leading the blind but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question.

15. When I apply the aforesaid principles to a plea, seeking judicial review of the answer key which the question setter / s with or without consultation with other subject experts has prepared and who, upon objection being raised thereto has reiterated the answer key, with or without the assistance of other experts, and which answer key has been uniformly applied to all the candidates taking the examination, in my view the answer is unequivocal that no judicial review lies.

16. Judicial review, as aforesaid is of the decision making process and not of a decision which the authority / body has been entrusted in the scheme of things to take. If that be the case, how, without there being any averments impugning the process by which answer key has been processed, can the Court be said to be empowered to review the answer key or for that matter

the question paper. It is settled position in law that merely because the decision / action, of which judicial review is sought, being wrong in the opinion of the Court or of several others, is no ground for entertaining judicial review thereof unless any illegality or unreasonableness in arriving of the decision or taking of action is shown. The parameters of illegality and unreasonableness also are, as laid down in *Tata Cellular* supra. Applied to questions in an examination and answer key thereto, they would be say, where the preparation of question paper and the answer key is by person not an expert in the subject or in violation of any rule prescribed therefor or if inspite of merit being found in objection preferred thereto no correction thereof is carried out inspite of procedure prescribed therefor or if there is any bias or other uncalled for motivation in preparation thereof. This list is certainly not meant to be exhaustive but is certainly meant to be illustrative.

17. Unless the Courts, though accustomed to resolve / adjudicate on disputes, curb their temptation to interfere with the question paper and answer key inspite of counter view, of other subject experts, being brought before them and there being thus a dispute as to which view is correct, the Universities and the examining bodies on whom the said function has been entrusted, would loose their sheen and the respect in which they are held. I

would go to the extent of saying that if the Courts, which cannot possibly be experts in all subjects, on the basis of opinions to the contrary obtained from other ‘ independent’ subject experts, were to start setting aside the questions and answer keys *bona fide* prepared by the subject expert and who *bona fide* continues to believe in correctness thereof, we may reach a day where no self respecting expert would agree to partake in the exercise of setting the question papers and answer key (and which mostly is honorary or for nominal remuneration) for the fear of his / her opinion, *bona fide* held being pitted against that of other in Court and his name and honour being sullied in the process. We, in my opinion, ought not to allow our Universities and examining bodies being so reduced to a ‘medium’ as the Supreme Court observed in ***Tata Cellular*** instead of Centres of learning and expertise. If they have ceased to be so, the jurisdiction under Article 226 ought to be exercised to set right their functioning rather than the Court taking over the mantle of correcting the question paper set and answer key thereto framed by them.

18. Notice may be taken of ***H.P. Public Service Commission Vs. Mukesh Thakur*** (2010) 6 SCC 759. The petitioners therein had sought re-evaluation of the paper of Civil Law in the examination held for selection for the post

of Civil Judges. The High Court directed the answer sheet of the petitioner to be sent to another examiner for re-evaluation and as per the re-valued marks held the petitioner eligible for appointment and disposed of the writ petition directing the petitioner to be appointed. The Supreme Court, while setting aside the said judgment, held, (a) that it was not permissible for the High Court to examine the question paper and the answer sheet itself particularly when the examining body has assessed the *inter se* merit of the candidates; (b) if there was a discrepancy in framing the question or evaluation of the answer, it was for all the candidates appearing in the examination and not for the petitioner alone; (c) it is a matter of chance that the High Court was examining the answer sheets relating to law; had it been other subjects like Physics, Chemistry and Mathematics, such a course could not have been adopted by the High Court; (d) that the course adopted by the High Court was not permissible.

19. A Division Bench of this Court also recently in ***Salil Maheshwari Vs. The High Court of Delhi*** MANU/DE/2085/2014 held that, (i) a candidate in an examination who has not availed of the opportunity given for objecting to the answer key is estopped from raising a challenge at a belated stage; (ii) that the Supreme Court in ***Kanpur University*** has held that the answer key

must be assumed to be correct unless it is proved to be wrong and that it should not be held to be wrong by an inferential process of reasoning or by a process of rationalisation; it must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well versed in the particular subject would regard as correct; and if the traditional parameters of judicial review – illegality, irregularity, non-consideration of material facts or consideration of extraneous considerations or lack of *bona fides* in decision making process as contrasted with the decision itself, are satisfied can the decision be corrected in judicial review; (iii) in matters of judicial review which involve examination of academic content and award of marks, a circumspect approach, leaving evaluation of merits to the expertise of academics has to be effected; (iv) and, else judicial review is permitted only when decision is so manifestly and patently erroneous that no reasonable person could have taken it.

20. Mention at this stage may be made of In ***Re: v. Askew*** [1768] 4 2168, where Lord Mansfield considered the question whether mandamus should be granted against the College of Physicians and held “it is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practise this profession is trusted to the College

of Physician: and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; not arbitrary, capricious or biased; much less, warped by resentment, or personal dislike”.

21. In my view, it is the aforesaid principle which alone applies to the scope of judicial review of answer key.

22. That brings me to the judgments relied upon by the senior counsel for the petitioner. The ratio of *Kanpur University* has already been culled out by the Division Bench in *Salil Maheshwari* supra. Moreover *Kanpur University* and *Guru Nanak Dev University* pertain to an era where no opportunity was given for objecting to the answer key, though the answer key was published along with the result of the examination and where after the result was challenged. Since then, most examining bodies themselves or under directions of the Courts have devised a procedure of inviting objections to the answer key and considering the said objections and if satisfied therewith, correcting the answer key and thereafter declaring the result. After the said procedure has been followed, in my view there is no scope for judicial review of the answer key unless allegations of bias, *mala*

fide, non-consideration of relevant factors etc. which are traditionally the grounds for invoking the power of judicial review are made out. The Courts have directed the examining bodies which did not have the procedure of inviting objections to the answer key to follow the said procedure which the Courts felt was necessary to have a fair result of the examination and to eliminate the possibility of mistakes in the answer key. Once such a procedure has been followed, there can be no possible further challenges except on the traditional parameters of judicial review. If such challenges were to be allowed, the same would lead to disgruntled students filing one petition after other with opinions of the subject experts and which can vary and which will ultimately lead to delays in admissions and in commencement of academic session and all of which will be contrary to public interest and cannot be permitted and if permitted would amount to a cure worse than the disease of a possibility of error remaining in the answer key inspite of the procedure of inviting objections and considering the same being followed.

23. No case for judicial review within the traditional parameters thereof has been made out.

24. I am conscious that in some other cases also the Courts, in their zeal to prevent injustice, without going into the question whether the power exercised by them is within the confines of Article 226, issued directions for obtaining an opinion of an independent expert to resolve the differing versions of the examining body and the students as to the correctness of the answer key. However, a judgment where the said aspect has not been raised or considered cannot be a precedent. Now a time has come for a definite opinion to be taken, so that the students, in future, owing to the uncertainty in law, are not attracted to take a chance.

25. No merit is thus found in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

JULY 13, 2015
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