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

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Judgment delivered on:22.07.2016

+ **W.P.(C) 5678/2016**

DEEPAK KUMAR

..... Petitioner

versus

ALL INDIA INSTITUTE OF MEDICAL
SCIENCES & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner
For the Respondents

:Mr. R.K.Saini, Mr Minal Sehgal and Mr Varun Najiath.
: Mr R.K.Gupta and Mr M.K.Singh

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

W.P.(C) 5678/2016 & CM No.23500/2016(stay)

1. The petitioner seeks quashing of the action of the respondents in declining/refusing to consider the petitioner for counseling as per his rank and merit in the post-lunch session of the second counseling and the action of the respondents in giving the petitioner counseling after a candidate below him in merit and rank. The petitioner also seeks cancellation of the admission/allotment of the seat in Nuclear Medicine in M.D. Course to

respondent No.4 and for a direction to respondent Nos.1 to 3 to hold counseling for the petitioner and respondent No.4 against the said seat in the order of merit.

2. The case of the petitioner is that the petitioner ranks 1835 in order of merit in the category of SC candidates. The second counseling was held on 13.06.2016. The counseling was to commence at 09.00 a.m. The candidates were to mark their attendance in the attendance register prior to commencement of the counseling. It is contended that the petitioner was present on 13.06.2016 and duly marked his attendance prior to the commencement of the counseling.

3. It is contended that the counseling, which was to commence at 9.00 a.m., commenced at 11.30 a.m. The counseling was stopped at 1.30 p.m. for an unscheduled lunch break. The candidates were required to report back at 2 p.m. at which time the counseling was supposed to commence post-lunch.

4. It is contended that the petitioner reached back at 2.20 p.m. and when he reached the Hall, where the counseling was being conducted, he found that counseling of the students in the post lunch session had already commenced. It is contended that the petitioner reached the Hall at 2.19 p.m. and the Dias at 2.20 p.m. It takes a few seconds to reach the Dias since it is a big hall and thus he reached at 2.20 p.m.

5. On enquiry, he was told that the student, whose counseling was being held at that point of time, ranked 1880. The said student has been arrayed as

respondent No.4 herein.

6. The case of the petitioner is that he immediately informed the Registrar as also the Sub-Dean that he had arrived and was senior in rank to respondent No.4, whose counseling was being held. It is contended that he even informed them that he wanted to opt for the seat in Nuclear Medicine, which seat was still available. The petitioner contends that even though the respondent No.4, at the time when the petitioner reached the Dias, had not yet given his option. The petitioner was told to wait for the counseling of respondent No.4 to get over. Respondent No.4 opted for the seat of Nuclear Medicine. The said seat was allotted to respondent No.4.

7. It is contended that at the time when the petitioner had interjected in the counseling of respondent No.4, respondent No.4 had not yet given his option and the option was given after more than a minute and that also after consulting someone over the phone.

8. It is contended that the petitioner, being senior in rank, could not have been denied the seat in Nuclear Medicine and the said seat could not have been offered to respondent No.4, who was junior in rank.

9. Reliance is placed on the following decisions:-

- (i) Judgment dated 22.07.2010 in **W.P.(C) No.4782/2010 titled Saurabh vs. Govt. of NCT of Delhi & Ors.** by a single judge of this court.
- (ii) Judgment dated 03.03.2011 in **W.P. (C) No.147/2011**

titled Gayatri & Ors. vs. University of Delhi & Ors. by a single judge of this court.

(iii) *Thufail & Anr. vs. University of Delhi & Ors.* 2015 (221) DLT 473

(iv) *Committee of Management, Maa Sharda Mahavidyalay, Shambhoopur Gahji, Azamgarh vs. State of U.P. & Ors.* (2004) 23 AIC 375 = 2004 SCC Online 956 of the Allahabad High Court

10. By order dated 15.06.2016 in the present petition, notice was directed to be issued and no interim protection was granted. The petitioner assailed the said order in LPA No.388/2016 titled *Deepak Kumar versus All India Institute of Medical Sciences & Ors..*

11. By order dated 22.06.2016, the Division Bench of this Court in the said LPA, directed that the video recording and other records of the second counseling be preserved. The video recording and other records of the counseling have been preserved and filed in Court.

12. Learned counsel for the petitioner contends that the video recording would show that the petitioner had reached the Dias after the counseling of respondent No.4 had commenced and before the respondent No.4 had opted for the seat of Nuclear Medicine. He submits that the video recording shows that the respondent No.4 opted for the seat of Nuclear Medicine after over a minute of the petitioner informing the Registrar and the Sub-Dean of his option. He further contends that the video recording would show that when

the name of the petitioner had been called, one of the friends of the petitioner Dr. Manas, had informed the Registrar that the petitioner was present for counseling and is on his way and would be reaching shortly.

13. These allegations of the petitioner, for which the video recording has been produced, are not controverted by the counsel for respondent Nos.1 to 3. He however submits that the counseling was conducted in a fair manner and in accordance with the procedure laid down. He contended that the counseling in the post-lunch session was to commence at 2.00 p.m and all the candidates, who were present for the counseling in the pre-lunch session, were duly informed about the time of commencement of the post-lunch session of counseling.

14. Learned counsel for the Respondents 1 to 3 submits that the counseling was commenced at 2.10 p.m. after giving sufficient opportunity to the students to reach the Hall. Once the counseling commenced at 2.10 p.m., the candidates were called in the order of ranking. When number of the petitioner, i.e. 1835 was called, the petitioner was not present. Thereafter, candidate ranked 1834 was called and in the counseling, he opted for his seat, thereafter another candidate was called and he opted for his seat and then the rank No.1880, i.e. of the respondent No.4 was called for.

15. It is admitted that the Respondent No.4, during the process of counseling, did consult somebody over the telephone, which, it is contended is a normal process. It is submitted that the very purpose of counseling is to

guide and counsel the candidates in exercising their options and making a choice. It is submitted that once respondent No.4 had been called for his counseling, the counseling could not be stopped midway and only after the counseling of respondent No.4 was over, the next candidate was called. It is submitted that the petitioner was immediately thereafter given an option to choose from the seats, which were available, but the petitioner declined to do so. Thereafter the counseling continued and other candidates were called for counseling and they gave their options.

16. It is submitted that respondent No.4 was offered the seat at the time when his rank was called and the respondent No.4 duly opted for the seat in Nuclear Medicine, which was then available. He further submits that the entire process of the second counseling is over and rights have accrued in favour of respondent No.4.

17. Learned counsel for the respondents 1 to 3 further submits that in case at this stage, respondent No.4 is unseated, then it would have a rippling effect on the candidates who ranked below respondent No.4 and likewise they would also have to be unseated.

18. Respondent No.4, who appears in person, submits that there is no fault on his part. It is submitted that he was called for counseling as per his rank and he was offered the seats, which were available, and one of the seats, which was offered, was in Nuclear Medicine and he opted for the same. He submits that the option was exercised by him on 13.06.2016 and thereafter,

he has completed all the formalities and he has been allotted the seat. He further submits that the academic session commenced on 01.07.2016 and he is already attending the course. He submits that there is no fault or error on his part and there is now a vested right accrued in him in respect of the seat that has been allotted to him fairly by respondent Nos.1 to 3.

19. On perusal of the facts, it is clear that even though the petitioner may have been senior in rank to respondent No.4 but when the rank of the petitioner was called for counseling, he was not present.

20. The post-lunch session was to commence at 2.00 p.m. in fact was commenced at 2.10 p.m. The petitioner, even as per him, reached the Hall at 2.19 p.m., i.e., 19 minutes late. In the meanwhile, the counseling had already commenced and not only candidates senior to the petitioner but also two candidates apart from respondent No.4, who were juniors to petitioner had already been invited to exercise their options. The petitioner has really missed the bus.

21. The petitioner should have been vigilant. If the petitioner had reached the Hall for Counseling in the morning, then petitioner should have been ensured that when his turn for counseling came he is present. The petitioner reached twenty minutes late, by which time rights had accrued to various candidates, who were though junior to the petitioner, but had already been invited for counseling. The counseling for respondent No.4 had already commenced. The respondent Nos.1 to 3 could not have interpreted the

counseling of respondent No.4 and commenced the counseling of the petitioner. They could only do it after the counseling for the respondent No. 4 was over, which in fact they did.

22. The action of the respondent Nos.1 to 3, in completing the counseling of respondent No.4 and then invited the petitioner, for counseling cannot be faulted. Furthermore, there is no fault of the Respondent No.4. He opted for one of the seats, which was offered at the time when he was called for counseling. It may be a hard case for the petitioner but in these circumstances, the petitioner himself is to be blamed.

23. The judgment, relied upon by the learned counsel for the petitioner is in the case of Saurabh (*supra*) dated 22.07.2010 does not support the case of the petitioner in fact it supports the case of the respondents. Paras 8, 9 and 10 of the said judgment reads as under:-

“8. The contention of the respondent University is that under the Rules [framed by the Supreme Court in Sharwan Kumar (*supra*)], there is no power whatsoever to undo the forfeiture on failure to attend counseling. It is thus contended that this Court ought not to direct what is not provided for. I am unable to accept the said proposition in absolute terms. The law has always recognized the principle of “act of god” or “force majeure” or “impossibility beyond human control”. A student who owing to his/her brilliance or sheer dint of hard work has achieved success and entrance to a coveted Medical College, if for such reasons is prevented from attending counseling cannot be dealt a double blow by denying him even chance of admission in wait listed category. It is not as if the Court is unseating student who has already been admitted or in whom

rights have accrued. The Court would only be putting such student ahead of other students, lower in rank and who as of today have not secured admission and in whom no rights have accrued and who as of now have a mere chance of admission. The rule of forfeiture is intended to prevent the same student from securing admission in several medical colleges and which may lead to seats ultimately remaining vacant.

9. The Supreme Court in judgment in Sharwan Kumar has only provided for forfeiture. The Supreme Court in that case did not consider whether failure to appear for counseling for reasons beyond control of the candidate such forfeiture could be waived/set aside or not. The said question was however expressly for consideration before the Division Bench in Saniya Siddiqui (supra) and the Division Bench as aforesaid has held that depending upon the facts of the case, the University can be directed to consider the case of the candidate. The Division Bench in Saniya Siddiqui refused to consider the facts of that case (which the counsel for the respondent University states are similar to this case) for the reason of seat by that time having already been filled up and the other candidate i.e. Zini Chaurasia having relinquished seat in another medical college. However that is not the position here.

10. The counsel for the respondent University has also referred to the judgment of Division Bench of this Court in Dr. Reema Chawla Vs. University of Delhi 104 (2003) DLT 868 to contend that even if the candidates who have failed to appear in counseling are again put in the waitlist as per their rank, it would have a cascading effect. I do not agree. As aforesaid, the waitlisted candidates above/before whom the candidate (who had failed to appear for counseling and is found to have been owing to reasons beyond his control) is placed, have no rights till then. Their chance to admission cannot be placed at a higher pedestal than merit. The Division Bench had given the reason of “chain reaction” which would upset the entire counseling

taken place till then. That is not the position in such cases.”

24. It is clear from reading of the above judgment that one of the factors that weighed in the mind of the Court was that the Court was not unseating a student, who has already been admitted or in whom rights had accrued. Further, it may be noted that the Court was only putting such a student (petitioner therein) ahead of other students, lower in rank and who, as of that date had not secured admission and on whom no rights had accrued and who as of that date had a mere chance of admission. It may further be noted that the Court was dealing with the issue of forfeiture of counselling. The said judgment does not further the case of the petitioner.

25. In the present case, there is no issue of forfeiture of counseling. The stand of respondent Nos.1 to 3 is that the next counseling is to commence on 25.07.2016 and the last date for application is today at 5 p.m. and the petitioner is entitled to apply for the said counseling and would be then ranked in accordance of his merit.

26. The reliance placed by the petitioner on the decision in the case of **Gayatri & Ors.** (*supra*) is also misplaced. The said petition concerned admission in the course of M.Phil in African Studies. Irregularities in the admission process were alleged in an earlier writ petition, The respondent - University had constituted a Committee, which found irregularities in the admission process and suggested cancellation of the admissions. The admission of the petitioners therein was cancelled based on the Enquiry

Report. The Court after noticing the facts, held as under:-

“23. Moreover, I am of the view that once the facts show that the petitioners have been wrongfully shown a preference by the Head of the Department, the petitioners on such ground alone are not entitled to any discretionary relief. The students who are prepared to start their academic career by indulging in trickery and deceitful means can expect no sympathy from this Court. Such students would destroy the fabric of the society. Moreover once the University has itself found irregularity in the process by which the petitioners were admitted, to create confidence in the student community as a whole it is necessary that this Court does not interfere with the said process. Allowing an advantage gained by wrongful means to be retained will jeopardize the purity of selection process itself and engender cynical disrespect towards the judicial process and embolden errant authorities and candidates into a sense of complacency and impunity.”

27. Reading of para 23 of the judgment in *Gayatri (Supra)* clearly shows that the petitioners were non-seating as the Court was of the view that the students, who were prepared to start their academic career by indulging in trickery and deceitful means could expect no sympathy from the Court. The learned judge held that such students would destroy the fabric of the society. Moreover, University itself found irregularity in the process of admission of the petitioner, to create confidence in the student community as a whole it was necessary that the Court did not interfere with the process. The learned judge held that allowing an advantage gained by wrongful means to be retained would jeopardize the purity of selection process itself. In these circumstances, the petitioners were declined relief. The judgment is clearly

not applicable in the facts of the present case.

28. The decision in the case of **Thufail & Anr.** (*supra*) also does not further the case of the petitioner. The Court in the said case was dealing, *inter alia*, with the admission of the students who were mistakenly admitted by the Colleges and whose admissions had been cancelled. The Court held that an admission to the educational institution, which is contrary to the conditions prescribed thereto, is illegal and void and does not vest any right in the student who had been so admitted. The Court also noted that the petitioners therein, who were wrongfully admitted and whose admission on detection of wrong had been cancelled, were themselves contributory to the same. They were aware or were deemed aware of the said error and ought not to have approached the colleges for admission. It is, in these circumstances, the Court held that a student, who in spite of being not entitled to admission, is allowed to retain the admission wrongly given to him and to which wrong he himself also is a contributory, will grow into a citizen with this understanding only of the country and its administration and in whatever vocation he/ she chooses, continue to be guided by this philosophy only that whatever is achieved, even if by hook or by crook,, cannot be taken back from him.

29. In the present case, respondent No.4 cannot be faulted and put in the same category. There is no error on the part of respondent No.4. He was entitled and eligible to be invited for counseling. He exercised the option when it was offered.

30. Reliance placed on the decision of the Allahabad High Court in *Committee of Management, Maa Sharda Mahavidyalay, Shambhoopur Gahji* (supra) is also misplaced. In the said case, the University had granted admission to the petitioner – students on 03.06.2004 and had cancelled by the same in a short period of 13 days on 17.06.2004 on certain irregularities, as there was a dispute with regard to intimation of the vacant seats. The Court found that there was no inordinate delay on the part of the University in cancelling the admission of the petitioner-students nor the petitioners could take benefit of any admission, granted in their favour by their institution, in the facts of their case. It was, in those circumstances, the Court held that rights of the candidates, who had secured better merit than the petitioners-students in the entrance examination of the University, could not be defeated because of the illegal admission process and the admission granted by the institution to the petitioners and the petitioners, whose admission had been cancelled, would have remedy to claim damages against the institution.

31. In the facts of the instant case, this judgment also does not apply. In the said judgment, the Court was dealing with an issue, where there was an irregularity in the entire admission process and noticing irregular admission, the admission process had already been cancelled and the petitioners were seeking restoration of their admission.

32. In the present case, there is no irregularity in the admission process. The respondents have conducted the counseling in a fair manner. The

petitioner, who himself was not present, when his rank was called for counseling, cannot now pass the blame on the respondents, the petitioner should have been vigilant. Further, it is not a case that the petitioner was prevented on account of circumstances beyond his control from reaching the Hall for Counseling on time. The petitioner is stated to have gone for lunch and over-stayed. The delay in reaching on time is solely attributable to the petitioner himself.

33. Vested rights have accrued in favour of Respondent No. 4. Even the teaching has commenced since 01.07.2016. If respondent No. 4 were to be unseated, then he would demand unseating of the candidate next in rank and so on which would then have a rippling effect on the entire admission process. This cannot be permitted to happen.

34. In view of the above, I find no merit in the petition. The petition is accordingly dismissed leaving the parties to bear their own costs.

35. *Dasti* under signatures of Court Master.

SANJEEV SACHDEVA, J

JULY 22, 2016
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