

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

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Judgment Reserved on: 05th October, 2016
Judgment Delivered on: 03rd November, 2016

+ W.P.(C) 8242/2016

POONAM

..... Petitioner

versus

GURU GOBIND SINGH
INDRAPRASTHA UNIVERSITY & ANR

..... Respondents

Advocates who appeared in this case:

For the Petitioners: Mr. Aditya Jain, Adv

For the Respondents: Ms. Anita Sahani, Adv. for R-1
Mr. Atul Kumar, Adv. for R-2

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. The Petitioners seek a mandamus thereby directing the Respondents to give admission to the petitioner in the college under Respondent No. 1 (hereinafter referred to as the University) and a direction to Respondent No. 2 Central Board of Secondary Education (hereinafter referred to as the CBSE) to declare that the petitioner has cleared class 12th examination with more than 50% marks.

2. It is contended that the Petitioner cleared Class 12 in the year 2012 from the Government Girls Senior Secondary School, Pitampura under the examination conducted by CBSE. In her Class 12th examination, the Petitioner secured 36 marks in Physics, 49 marks in Chemistry and 53 marks in Biology. The petitioner failed in theory part of the Physics paper.

3. It is contended that as per the information bulletin of the University, the eligibility criteria for admission to the Bachelor of Science (Nursing), *inter alia* required a candidate to pass in 12th class of 10+2 of CBSE with Science (Physics, Chemistry and Biology) or equivalent with a minimum aggregate of 50% marks in Physics, Chemistry and Biology provided that the candidate passed in each subject separately.

4. Since the petitioner had not passed in Physics subject and was also not satisfied with her performance in the Chemistry and Biology papers, she applied for the improvement examination in all the three subjects.

5. It is contended that as per Bye-Law 44.1 of the CBSE Examination Bye-Laws 1995 (hereinafter referred to as the Bye-Laws), for subjects involving practical work, in case the candidate has passed in the practical part at the main examination, the candidate is allowed to appear only in theory part and the marks obtained in

practical part in the main examination are carried forward and accounted for. Since the petitioner had cleared the practical part of all the three subjects in the main examination, the petitioner was not entitled to appear in the practical part of any of the three papers.

6. It is contended that the petitioner appeared in the improvement examination in theory part of the Physics paper but on account of medical reasons could not appear in the theory part of the Chemistry and Biology papers.

7. It is contended that the petitioner scored 28 marks in the improvement examination in the theory part of the physics paper. In cumulative of the practical part and the theory part of the Physics paper, the petitioner scored 51 marks. In the marks sheet issued to the petitioner by CBSE, for the improvement examination, the petitioner has been shown as “Absent” in the column of theory part of the Chemistry and Biology papers. In the Total column, the marks shown are that of the practical part of the main examination with a suffix “FT” meaning “Failed in Theory”.

8. It is contended that the Petitioner appeared in the Common Entrance Test – 2016 (CET-2016) in Bachelors of Science (Nursing) with the Respondent No.1. The Petitioner secured 30th Rank in the CET-2016.

9. On 01.09.2016, the University invited candidates who had secured Rank from 1 to 200 to appear for First counseling/Admission on 10.09.2016. The petitioner based on her rank was eligible for admission in a college under the Respondent No.1. It is contended that when the Petitioner appeared on 10.09.2016 with the requisite documents for counseling, the officials of the University, verified the documents of the Petitioner and found them in order. However, at the time of allocation of the seat another official informed the Petitioner that the documents were not in order and that there should be one mark sheet instead of two and the petitioner was denied admission. The petitioner has thus approached this court.

10. The University filed a short reply to the Petition contending that the CBSE who conducts the examination for class XIIth does not have any policy or guidelines on the subject as to which marks are to be considered for the purposes of admission at the graduate level. In these circumstances, each University across the country has its own practice with regard to the mark sheet issued by the CBSE.

11. It is contended that for the Joint Entrance Examination (Main) Conducted by CBSE itself for admissions into Engineering programmes, it is clearly mentioned for 12th qualifying examinations, that the candidate willing to appear in the improvement examination to improve the qualifying examination marks, will have to appear in

all the five subjects for improvement. The Candidate can appear for improvement in the succeeding year only. On the results being declared the candidate has to submit as to which year's qualifying examinations marks are to be considered for the purpose of declaration of final merit.

12. It is contended that the University has followed the practice of considering the last of the two marks sheet issued by CBSE. It is submitted that a number of candidates, who have got the second marks sheet upon improvement, approached the University for Admission in different courses. Those candidates who qualified for admission based on the improvement exam result have been given admission while those who did not qualify on the basis of improvement exam have not been given admission. It is contended that the University has followed this policy without any discrimination and has chosen to consider the marks which are later given by the CBSE and not better marks, out of the two.

13. It is submitted that applying the aforesaid policy, since petitioner had opted for improvement in Chemistry and Biology papers and the CBSE had issued the mark sheet stating “FT” i.e. Failed in Theory, the petitioner has been denied admission.

14. Learned counsel for the University conceded the fact that the said practise of considering the marks which are later given by the

CBSE and not the better of the two marks is not incorporated in any bye law, rule or regulation and is also not part of the information bulletin issued by the University. Learned counsel for the University admitted that the candidates have not been put to notice of any such practise.

15. Learned counsel for CBSE submitted that when a candidate appears in an improvement examination, the mark sheet is issued only for the improvement paper and no consolidated mark sheet is issued.

16. Learned counsel for CBSE conceded that there is no bye law or rule to the effect that if a candidate opts for an improvement examination in a subject, he/she would forfeit the result of the main examination. Learned Counsel further conceded, that if a candidate opts for an improvement examination but does not improve the marks, he/she can still rely upon the earlier result and the mark sheet because the original mark sheet is not cancelled by CBSE and continues to remain valid.

17. For resolving the controversy, we would need to examine the Bye-Laws of CBSE under which a candidate is entitled to take an improvement examination.

18. Bye-Law 44 which deals with Improvement of Performance and Upgrading of Performance reads as under:

"44. Improvement of Performance/Upgrading of Performance

44.1 Senior School Certificate Examination

(i) A candidate who has passed an examination of the Board may reappear for improvement of performance in one or more subjects in the succeeding year only; however, a candidate who has passed an examination of the Board under Vocational Scheme may reappear for improvement of performance in the main examination in the succeeding year or the following year provided they have not pursued higher studies in the mean time. They will appear as private candidates. Those reappearing for the whole examination may, however, appear as regular candidates also if admitted by the school as regular candidates. The candidate(s) appearing for improvement of performance can appear in the subject(s) in which they have appeared for the Examination.

(ii) For subjects involving practical work, in case the candidate has passed in practical at the main examination, he/she shall be allowed to appear in the theory part only and marks in practical obtained at the main examination shall be carried forward and accounted for. In case a candidate has failed in practical he/she shall have to appear in theory and practical both irrespective of the fact that he/she has already cleared the theory examination.

(iii) Candidates who appear for improvement of performance will be issued only Statement of Marks reflecting the marks of the improvement examination.

(iv) A candidate appearing for improvement of performance in one or more subjects cannot appear for

additional subject simultaneously.

(v) Candidates appearing in six subjects at the Senior School Certificate Examination having been declared 'Pass' by virtue of securing pass marks in five subjects as per Rule 40.1(iv) may appear in the failing main subject at the Compartment Examination to be held in July the same year provided he/she had appeared at the Examination held in March in the said subject.

44.2 Upgrading of Performance - Secondary Examination

(i) A candidate who has obtained minimum Grade D in the five subjects under Scholastic Area A and a Qualifying Certificate/Grade-sheet Cum Certificate of Performance at the Secondary School Examination may reappear at the examination for upgrading of performance in one or more subjects in the main examination in succeeding year only, provided he/she has not pursued higher studies in the meantime. He/she shall appear as a private candidate. Those reappearing in the whole examination may appear as regular candidates also. The candidates appearing for upgrading of performance in the examination can appear in the subject(s) in which they have appeared for the examination.

(ii) A candidate appearing for upgrading of performance shall appear in the syllabus prescribed for Summative Assessment II only for the year of examination.

(iii) Candidates who appear for upgrading of performance shall be issued only Statement of Subject wise Performance reflecting the grades obtained in the

said examination.

(iv) A candidate appearing for upgrading of performance in one or more subjects cannot appear for additional subject simultaneously."

19. Bye-law 44 of the CBSE Bye-Laws allows a candidate, who has passed an examination of the Board, to reappear for improvement of performance in one or more subjects in the succeeding year only. The candidate(s) appearing for improvement of performance can only appear in the subject(s) in which they have appeared in the main Examination. For subjects involving practical work, in case the candidate has passed in the practical part at the main examination, he/she is allowed to appear in the theory part only and marks in practical part obtained at the main examination are to be carried forward and accounted for. In case a candidate has failed in the practical part he/she is to appear in theory and practical both irrespective of the fact that he/she has already cleared the theory examination.

20. The said Bye-Law further provides that candidates who appear for improvement of performance are to be issued only Statement of Marks reflecting the marks of the improvement examination.

21. Candidates appearing for improvement of performance in one

or more subjects cannot appear for additional subject simultaneously and a candidate who has obtained minimum Grade D in the five subjects under Scholastic Area A and a Qualifying Certificate/Grade sheet Cum Certificate of Performance at the Secondary School Examination is entitled to reappear at the examination for upgrading of performance in one or more subjects in the main examination in succeeding year only, provided he/she has not pursued higher studies in the mean time. Candidates who appear for upgrading of performance are to be issued only Statement of Subject wise Performance reflecting the grades obtained in the said examination.

22. The Bye-Laws do not stipulate that a candidate who opts for an improvement examination forfeits the result of the earlier examination. Candidates are not even put to notice that if they opt to take an improvement examination, they would forfeit their earlier result.

23. There may be situations where a candidate fails in a paper of the main examination and per force has to appear in the improvement examination. In such a situation, the candidate has no option but to rely upon only the result of the improvement examination. But there may be situations where a candidate has otherwise passed the examination but for other reasons wishes to improve his/her result. In such situations, making a candidate forfeit the earlier result and that

also without putting the candidate to notice that the earlier result would be forfeited would cause grave prejudice and hardship to the candidate.

24. There may also be cases, like the present, where a candidate opts for an improvement examination but on account of medical or other reasons absents himself/herself from appearing. For such candidates to forfeit the result of the main examination would be causing grave prejudice and hardship.

25. A candidate who has otherwise passed an examination and wishes to merely better the earlier performance, may not exercise such an option, if he/she were informed that the earlier result would be forfeited. Furthermore, the stand of the CBSE is not that the result of the earlier examination is forfeited. The stand is that they do not issue a consolidated mark sheet but issue a mark sheet of only the improvement examination. The candid admission on the part of CBSE is also that the earlier mark sheet is not cancelled and continues to remain valid. If the first mark sheet is not cancelled and remains valid, then the marks obtained by the candidate in the first examination would also stand and the candidate would be entitled to choose the better of the two, unless the same is excluded by any rule or regulation.

26. Post appearing in the improvement examination, candidates

retain possession of both the mark sheets. As per both the counsel for the University and the CBSE, if a candidate appears in an improvement examination and he is not able to better his performance, that candidate can still seek admission by presenting his earlier mark sheet. If such a situation is acceptable, then how can the University refuse to accept the better of the two marks obtained by a candidate.

27. In the present case, the Petitioner was not required to appear in the Biology and Chemistry paper since the petitioner had failed only in Physics Paper. The petitioner opted to appear in Biology and Chemistry papers only for improving the scores. Since, the petitioner had passed the practical part of the Biology and Chemistry papers, the petitioner was not eligible to appear in the practical part of the said paper and could only appear in the theory part. The petitioner could not appear in the theory part of the said papers because of medical reasons. In the mark sheet issued by CBSE for the improvement examination, the marks of the practical part of the said papers has been carried forward and the petitioner has been shown as “FT” i.e. “Failed in Theory”.

28. Coming to the contention of the University, that the University has followed the practice of considering the last of the two mark sheet issued by the CBSE and this practise has been applied without any

discrimination and the university has chosen to consider the marks which are later given by the CBSE and not the better marks, out of the two. It may be noted, that there is no Rule, Regulation or Bye-Law pointed out that stipulates such a condition. Even the Information Bulletin is silent on this aspect.

29. The eligibility criteria of the University is *“Pass in 12th class of 10+2 of CBSE with Science (Physics, Chemistry and Biology) or equivalent with a minimum aggregate of 50% marks in Physics, Chemistry and Biology provided that the candidate has passed in each subject separately”*. Once the University has prescribed the said eligibility criteria, all that the University can examine is as to whether the candidate as per the CBSE fulfils the said requirement or not.

30. It is CBSE which conducts the examination and declares the result of Class XII. Once a Mark Sheet has been issued by CBSE declaring a candidate as passed in 12th Class, then the University cannot go behind the Mark Sheet. If a candidate has qualified as per CBSE and both the mark sheets are valid then the University in absence of any rules to the contrary would not be justified in denying admission to a candidate. When CBSE rules do not stipulate that the marks of the earlier examination would be forfeited, then the University cannot deem them to be forfeited and that also on the basis of an unwritten practise.

31. Even if assuming the university has followed any such practise in the past, the so called practise is not part of any rule, regulation or bye-law and is also not part of the information bulletin. The so called practise is not notified and the candidates seeking admission are not made aware of any such practise.

32. If a candidate is aware of the consequences of opting for an improvement examination, the candidate would take an informed decision whether or not to opt for the same. Applying an unwritten practise of taking the result of the latter examination and that too without notice would cause grave prejudice to the candidates which action cannot be sustained. Even if such a practise has been followed in the past, such an action of the University cannot be sustained because the said practise has not been authorised by any rule, regulation or bye-law. Just because an illegality has been committed in the past, is no justification for the same to be permitted to be continued without any sanction of law.

33. Further reference may be had to Ordinance 10, Rule 11 (b)(i) of the University which deals with Conduct and Evaluation of Examinations for Programmes leading to all Bachelor's Degrees following the annual system of Examination. The said Ordinance reads as under:

“Ordinance 10: Conduct and Evaluation of

Examinations for Programmes leading to all Bachelor's Degrees following the annual system of Examination

(b)(i) A student obtaining less than 50% of maximum marks (including Annual examination and Teacher's Continuous Evaluation) assigned to a course and failing in the course shall be allowed to re-appear in an examination of the course in a subsequent year the course is offered, subject to maximum permissible period of (n+ 2) Academic year as mentioned in clause 4(c). The re-appearing students who secured less than 50% marks in the teacher's continuous evaluation have the option to repeat and improve the two class tests performance with the next batch of students, in such cases the improved internal marks, if received from the school/institution concerned at least 7 days before the commencement of Annual examination shall be considered, otherwise the previous internal marks already obtained by the student shall be taken into account without any modification. In such cases where the students opts to improve the two class tests performance with the next batch of students, the marks obtained in the two class tests will be proportionally increased to include the component of assignment / group discussion / viva voce.

(Underlining supplied)

34. Ordinance 10(b)(i) *inter alia* provides that if a student opts to repeat and improve the two class tests performance with the next batch students and the internal marks, if received, at least 7 days before the commencement of annual examination, shall be considered,

else the earlier marks would be considered. This implies that for its own annual examinations leading to the Bachelor Degrees, the University does not have any rule that stipulates that where student opts for an improvement examination, the earlier marks are forfeited. It stipulates that if improved marks are not received, the earlier marks shall be considered. If same analogy were to be applied, as has been contended by the Petitioner, the same would run counter to the so called practise which is stated to have been adopted by the University.

35. In view of the above, the action of the Respondent University in refusing to consider the marks of the petitioner obtained in the main examination and taking into account only the marks of the petitioner in the improvement examination in the Chemistry and Biology subjects and based thereon denying admission to the petitioner cannot be sustained and is accordingly quashed.

36. The Respondent University is directed to consider the marks of the petitioner of the Chemistry and Biology papers as obtained in the main examination and that of the physics paper as obtained in the improvement examination. The Respondent University shall grant admission to the petitioner as per rules. Since the Respondent University has been found at fault, the University is directed to ensure that the petitioner is able to cover-up the loss of attendance by extra classes etc. The Writ Petition is allowed in the above terms.

37. It is clarified that this court has not examined, the scope of power of the University to impose a condition that it would only consider the marks obtained in an improvement examination or the validity thereof because no such rule has been framed. This question is left open.

SANJEEV SACHDEVA, J.

NOVEMBER 03, 2016/HJ

