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

% Judgment delivered on: 17.10.2016

+ W.P.(C) 9507/2016 & CM Nos.38018-38019/2016

PRIYANKA CHAUDHARY & ORS Petitioners

versus

NATIONAL BOARD OF EXAMINATIONS Respondent

Advocates who appeared in this case:

For the Petitioner : Ms. Bina Madhavan and Mr. Prateek Dhir, Advs.

For the Respondents Dr. Rakesh Gosain, Adv. for R-1

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT
17.10.2016

SANJEEV SACHDEVA, J. (ORAL)

1. The petitioners are candidates, who applied for admission to the Diplome of National Board Centralized Entrance Test. It is contended that in the entrance test, the petitioners got ranks between 29 to 119. Based on their merit all the petitioners were invited for the first round of counseling and petitioners as per the then available seats exercised their option and took confirmed seats in different disciplines.

2. It is contended that post the first round of counseling certain

candidates, who had taken admission opted out and accordingly the seats opted by those candidates fell vacant and are now included in the second round of counseling which would commence from 21st October, 2016.

3. It is contended that the petitioners who are far higher in merit should also be eligible for participating in the second round of counseling and given an opportunity to opt for the seats which have fallen vacant. One example that has been cited is that a seat in radiology in Artemis Hospital, Gurgaon was opted by a candidate who ranked 24 in the entrance examination. The said candidate has not joined the course and accordingly the said seat is now available and has been included in the second round of counseling. It is submitted that the said seat is a much sought after seat and is being offered to candidates who rank about 6001.

4. It is contended that the petitioners who rank from 29 to 119 are not being given the option for the said seat. Similarly it is contended that several other seats have been vacated and are not being offered to meritorious candidates and are now being offered to candidates far lower in rank.

5. The petitioners also seek to challenge clause 13.7 of the information bulletin which lays such a restriction.

6. Learned counsel appearing for the respondent submits that clause 13.7 of the information bulletin very clearly stipulates that candidates opting for a confirmed seat are not eligible to participate in subsequent round(s) of

counseling irrespective of their joining/non-joining/resignation from the seat already opted for.

7. Reliance is placed on decision of a co-ordinate bench dated 24th August, 2011 in WP(C) No.6125/2011 titled **Shikha Aggarwal v. Union of India** to contend that once a candidate has participated in the selection process without demur, the candidate is estopped from complaining that the selection process was not in accordance with the rules. Further reliance is placed on the said decision to contend that in case any relief were granted to the petitioner, the entire counseling would be set to naught.

8. Reliance is also placed by counsel for the respondent on the decision of the Hon'ble Supreme Court in **Arvind Kumar Kankane v. State of U.P.** (2001) 8 SCC 355 to contend that if candidates who had taken part in the first counseling were given a chance in subsequent counseling, it would start a chain reaction and the process of counseling would be endless and it would not be possible to commence and complete the academic course.

9. Clause 13.7 of the information bulletin reads as under :

“Candidates opting for a confirmed seat are NOT eligible to participate in subsequent round(s) of counseling irrespective of their joining/nonjoining/resignation from the seat already opted for.”

10. The petitioners had participated in the first round of counseling without demur. Perusal of the information bulleting shows that candidates

had the option not to appear in the first round of counseling and could have chosen to wait for the subsequent rounds. However, once the candidate has exercised the option to participate in counseling and has opted for a confirmed seat, as per the information bulletin, the candidate is not eligible for participation in subsequent rounds of counseling.

11. The petitioners were well aware of the rules laid down by the information bulletin and despite the same the petitioners participated in the counseling process without any demur. The petitioners have opted for confirmed seats and have taken admission. No doubt that the petitioners are meritorious, but on account of the application of the rules as laid down by the information bulletin, which is clear in terms of its application, the petitioners are clearly ineligible to participate in the second round of counseling commencing from 21st October, 2016.

12. Similar view has been expressed by the co-ordinate bench in **Shikha Aggarwal** (supra) wherein it is held as under :

“6. The cause of heartburn of the petitioner is that the first round of counseling is held for the top in the merit list to pick the stream and college/institute/hospital of his choice and the second round is held for the next in the merit list alongwith the opportunity to the ones who have already participated in the first round to change their stream in case some seats fall vacant, but the respondent board does not envisage the participation of the students who have already participated in the first round to again participate in the second round and thus robs the candidate the opportunity to take up another stream which could be available in the second round and was

not available at the first. The contention of the counsel for the petitioner is that the premier Institute such as AIIMS and others give provisional admissions in the first round leaving the window of opportunity open for them to change their choice in the second round and thus the same should be the procedure followed by the respondent Board. The National Board of Examinations administering the DNB degree has the liberty to frame its own rules and regulations and the rules of counseling or any other cannot be termed as unreasonable by comparing with the rules set forth by the AIIMS or any other body conducting examinations.

7. It is also a settled legal position that a candidate after participating in the selection process of taking the entrance examination and the counseling process cannot turn around and challenge the same as the rules and guidelines framed by the respondent-Board were within the knowledge of the petitioner before participating in the same and therefore, the petitioner thus waives off her right to challenge the said counseling procedure once having taken the said examination. It would be relevant here to refer to the judgment of the Apex Court in the case of Dhananjay Malik vs. State of Uttranchal (2008)4SCC171 which has reiterated the said legal position in the following words:

"In the present case, as already pointed out, the writ petitioners- respondents herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done."

(Underlining supplied)

13. In **Shikha Aggarwal** (supra) a coordinate bench of this Court has clearly held that a candidate after participating in the selection process by taking the entrance examination and the counseling process cannot turn around and challenge the same. The candidate is deemed to have waived off the right to challenge the decision of the examiner once having taken the said examination.

14. The Supreme Court in **Arvind Kumar Kankane** (supra) has held as under :

“2. A learned Single Judge of the High Court interpreting the rules directed that when after the first counselling any subsequent counselling is decided to be held for allocation of remaining seats including those which have fallen vacant subsequent to the first counselling, the same shall be notified to the public and the first date of each subsequent counselling will be reserved for the candidates who were allotted seats at the earlier counselling and who wish to change their seats and out of the candidates, who were allotted seats at the first counselling, who turn up for subsequent counselling on the first date which is served for such students, distribution of seats which have fallen vacant subsequent to the first or earlier counselling will be done according to merit. The change of seat to these students who have been allotted seats during the first and earlier counselling will be permitted only in respect of seats which have fallen vacant after the first counselling and not of the left over seats.

3. Aggrieved by these directions, an appeal was preferred by the Director General of Medical Education and Training. The Division Bench, after considering the scheme of admission and conditions imposed therein and the decisions of the Full Bench of Delhi High Court in Veena Gupta (Dr) v. University

of Delhi and of High Court of Punjab & Haryana in Anil Jain v. Controller of Examinations, held that any seat which is available and which has not been included in any of the three counselling by mistake should be filled in, in order of merit amongst the wait listed candidates. Normally, when a seat is available, the same should be included in the initial counselling. If by mistake a seat is not included in the initial counselling then the effect is that nobody opts for the same. If now the said seat is sought to be offered to all the candidates for counselling, the result would be that all the candidates who took part in the first counselling should be given a chance, in order of merit, to opt for the same seat. This will start a chain reaction and ultimately there will be one seat more, which would become available for the second counselling. There again a chain reaction will start leading to the third counselling. The effect of putting the seat back for counselling for all candidates would, therefore, be to upset the entire counselling which had already taken place. Prima facie though it appears to be somewhat unfair, there is no alternative, apart from leaving the seat unfilled, but to offer the said seat to the wait listed candidates. It was also noticed that once the academic course commences the same will have to be completed within a period of three years and if the counselling goes on continuously for a long period then it may not be possible to fulfill that condition and thereby upset the course of study itself. On this basis, the Division Bench set aside the order made by the learned Single Judge and allowed the appeal. It is against this order and connected matters that the present appeals are filed by special leave.

4. We have carefully examined the contentions put forth before the High Court and before us and we are of the view that the finding recorded by the Division Bench and Delhi High Court in Dr. Veena Gupta case and the High Court of Punjab & Haryana in Anil Jain case is in accordance with the reason and stands the test of rationality. It is clear that once an option is

exercised by a candidate on the basis of which he is allotted the subject and thereafter that candidate is allowed to participate in subsequent counselling and his seat becomes vacant, the process of counselling will be endless and, as apprehended by the High Court, it may not be possible to complete the academic course within the stipulated period.

5. The grievance made is that if a choice subject like surgery and medicine is given up by a candidate and that seat becomes vacant it may go to a candidate who is lower in rank in the merit list. This is only a fortuitous circumstance dependent on so many contingencies like the student, who has been allotted a seat in medicine, giving up the said seat and that seat falling vacant and thereafter the same is allotted to a candidate who is lower in rank in the merit list. Such freak circumstances cannot be the test of reasonableness of the Rule.”

(Underlining supplied)

15. The Supreme Court in Arvind Kumar Kankane (supra) has held that such a condition which puts an embargo on the candidates, who have taken part in the first counseling from participating in subsequent rounds, is in accordance with reason and stands the test of rationality. The Supreme Court has noticed that if such a process, as propounded by the petitioners, was permitted, it would upset the entire counseling which had already taken place and would set off a chain reaction leading to further rounds of counseling.

16. In the present case also one of the petitioners is rank 29 and is opting for a seat which has fallen vacant because candidate ranked 24 has vacated the same. If the petitioners were to participate in subsequent round of

counseling then the seat being vacated by the petitioner rank 29 would then be offered to candidates ranking 30 down to 6,000 and likewise in the case of all the seats of the petitioners. This would unsettle the entire counseling process which would then become unending.

17. In view of the above, I find no merit in the petition. The same is dismissed.

Order *Dasti* under signature of the Court Master.

OCTOBER 17, 2016
VLD

SANJEEV SACHDEVA, J

