

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.08.2019

PRONOUNCED ON : 16.08.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Writ Petition No.21298 of 2019 and
W.M.P.No.20516 of 2019

Dr.Premanand Pasur Sengottaiyan ... Petitioner

Vs

1.Union of India,
Represented by Secretary to Government,
Ministry of Health and Family Welfare,
Nirman Bhavan,
Near Udyog Bhawan Metro Station,
Maulana Azad Rd,
New Delhi - 110 011.

2.National Board of Examinations (NEET-SS 2019),
Represented by Director,
Medical Enclave, Ansari Nagar,
Mahatma Gandhi Marg,
Ring Road,
New Delhi - 110 029.

3.Director General of Health Services,
Directorate General of Health Services,
Nirman Bhavan,
Near Udyog Bhawan Metro Station,
Maulana Azad Rd,
New Delhi - 110 011.

... Respondents

Prayer :- This Writ Petition is filed under Article 226 of the Constitution of India for a writ of Mandamus directing the second respondent to furnish the question and answers (responses) and conduct re-totalling/revaluation of the petitioner's responses in Urology (Genito-Urinary Surgery) Examination and Cardio Vascular and Thoracic Surgery Examination including General Surgery in both the online examinations conducted on 28.06.2019 and to award appropriate marks on the basis of his actual performance to the petitioner and

consequently revise the petitioner's ranking in the merit list of NEET - SS 2019 within a limited time frame.

For Petitioner :Mr.M.Ravi

For Respondents 1 & 3 :Mr.Rabu Manohar
For 2nd Respondent :Mr.Anand

ORDER

The case of the petitioner is as follows:-

The petitioner herein appeared in NEET - SS 2019 for admission to Super Speciality Courses i.e., M.Ch (Urology) and M.Ch(Cardio Thoracic and Vascular). He performed well in the examination. On self assessment done on the basis of recollecting the questions and the answers, he expected about 310 out of 400 marks in Urology Exam (130 marks in General Surgery plus 180 marks in Urology) and about 275 marks in Cardio Thoracic and Vascular examination (130 marks in General Surgery plus 145 marks in Cardio Vascular and Thoracic Surgery). To his shock and dismay, only 170 marks awarded for Urology examination (General surgery and Urology) and 148 marks for Cardio Thoracic and Vascular Examination (General surgery plus Caardio Thoracic and Vascular). The marks awarded is far below the marks he deserve. So, he is constrained to infer that the marks he secured in General Surgery is not taken into account due to inadvertence.

2.The petitioner contends that, the gross difference between the marks he deserve and the marks awarded, must be either on account of omission to include the marks awarded in General Surgery examination or inappropriate marks published or, even omission to award appropriate marks for all the correct responses. If his response to the online examination is furnished to him, he could demonstrate how he is deprived a minimum of 130 marks in each of the examinations. If that illegality is rectified, his placement will be within 20 ranks.

3.The results were published on 15/07/2019. Immediately, he requested through email to furnish the questions and answers of the online examinations and to re-total his marks in Urology, Cardio Thoracic and Vascular. In view of the counselling likely to be scheduled in short span of time, the writ jurisdiction is invoked.

4.The respondents contentions are as follows:-

In the counter, the 2nd respondent deny the allegation of discrepancy in the marks awarded to the petitioner. According to the respondents, a fool proof system of evaluation is followed which requires little intervention. In order to ensure transparency in the examination process, the number of questions attempted/un-attempted is shared to all the candidates who appeared for the NEET SS 2019.

5.The examination was conducted through online. The question paper consists of 100 questions in two parts. Part -A (40 questions) and Part - B (60 questions). Part A General Surgery paper is common for both Urology; and Cardio Thoracic and Vascular examination. So, the candidates taking both the examinations have to attend only 160 questions in total. They were instructed to complete Part A and Part B in the first exam (M.ch - Urology) exam in the case of the petitioner) and while taking the second exam (M.ch - Cardio Thoracic and Vascular) they need not attend Part A but wait for 45 minutes till questions for part B displays. This instruction to the candidate which actually have no response was taken as a question not attempted. Therefore, for all the candidates who took up two exams, while intimating them, the total number of questions (attempted and un attempted) was shown as 161, this is due to inadvertent inclusion of the instruction. This error was later rectified and another e-mail was sent on 03/07/2019 to all the candidates showing the question paper-wise total number of attempted/unattempted questions by the candidates in NEET - SS 2019. The attempt of the petitioner to seek access to the question paper under the guise of seeking answer sheet is unfair and cannot be entertained. The issue pertains to a matter of knowledge and skill in answering the questions by the candidates. The Court has no role to play in it. The activity of the respondents is part of their routine administrative activity. There is neither a lapse; nor inaction; nor any undue act and nor a malafide in the said exercise. The Court should refrain from interfering the administrative acts of the respondents.

6.The petitioner in nutshell, in paragraph No.5 of his affidavit has illustrated his case as below:-

".... a minimum of 54 questions in Urology subject examination have been correctly answered by me (correct response). Thus 54 x

4 marks = 216 marks ought to have been allotted in Urology subject alone. As 'General Surgery' marks have been totally omitted to be added, the same has been construed as negative response and as such 40 marks (one mark reduced for each negative response: 40 x 1) have been deducted and as 6 responses in Urology is incorrect, 6 more marks would have been deducted. Thus out of 216 marks to be awarded to me for my correct response to my 54 questions (54x4) in Urology subject, 46 marks have been deducted and 170 marks have been awarded to me. Thus it is apparently evident that the marks awarded to me in General Surgery has been omitted to be included in the total marks published in Urology subject. Likewise the marks awarded to me in Cardio Vascular and Thoracic Surgery subject also is apparently exclusive of the marks secured by me."

The respondent has annexed the break up marks secured by the petitioner in the exam, which is extracted below:-

Subject	Urology (Genito - Urinary Surgery)	Vascular Surgery/CARDIO Vascular and Thoracic Surgery / Thoracic Surgery / Paediatric Cardiothoracic Vascular Surgery
Roll No.	1944104007	1944104007
Name of the Candidate	Premanand Pasur Sengottaiyan	Premanand Pasur Sengottaiyan
Father's Name	Sengottaiyan	Sengottaiyan
Mother's Name	Malliga	Malliga
No.of correct responses in Part A	18	18
No of incorrect responses in Part A	22	22
Score Part A (1 to 40)	50	50

Subject	Urology (Genito - Urinary Surgery)	Vascular Surgery/CARDIO Vascular and Thoracic Surgery / Thoracic Surgery / Paediatric Cardiothoracic Vascular Surgery
No of correct responses in Part B	36	29
No of incorrect responses in Part B	24	18
Score Part B (41 to 100)	120	98
Score (out of 400)	170	148
Super Speciality specific cut off score for qualifying NEET -SS 2019 (50 th percentile)	165	191
Percentile	54.1576	19.7556
Total No. of correct responses	54	47
Total No. of incorrect responses	46	40
NEET - SS 2019 Super Specialty Specific Rank	1062	395

7.As a rejoinder to this counter, the petitioner has stated that, the contention of the respondents is against the ratio laid by the Hon'ble Supreme Court in CBSE -vs- Aditya Bandopadhyay and others (Civil Appeal No.6454 of 2011 dated 09.08.2011). The respondents cannot deprive the right of the petitioner to know 'whether his responses were properly assessed'. They cannot take shelter behind the contention that the question bank is proprietary in nature. No prejudice will be caused to the respondents by producing the questions, responses and the answer keys.

8. From the rival contentions, the following questions emerge for consideration:

"1) Whether question papers are proprietary in nature to refuse disclosure ?;

2) Whether the candidates have right to seek re-totalling/revaluation of his/her answers/responses ?;

3) Whether the candidates are entitled to get copy of the answer key and their answer sheets ? and

4) Whether the issues relating to NEET-SS 2019 Examination is a routine administrative activity. If so, are Courts restrained from exercising its power of judicial review ?"

9. In the counter affidavit, the respondents have explained the process undertaken by them to finalise the questions. The relevant portion of the counter is extracted verbatim :-

"4(a). All the question papers of NEET-SS 2019 were reviewed by subject matter experts/faculty members after the conduct of the exam to review all the questions asked in the exam and correctness of the answer keys. These review workshops were done sub specialty-wise for all the different super specialty courses.

(b). The master question papers with NBE were matched with the master question papers for NEET-SS 2019 provided by the technology partner and it was confirmed that the sequence of questions (question Ids and option Ids) in both the master question papers and answer key templates are the same.

(c)The answer key's submitted by a subject matter expert for question banking and used in the question paper have been checked three times by subject matter experts at different stages before feeding these answer keys for evaluation of result.

(d)The answer keys for NEET-SS 2019 was prepared, verified and re-verified after the completion of review workshop. The answer keys were updated in the answer key template provided by the technology partner for NEET-SS 2019 and the same was verified and shared with the technology partner for generation of scores at their end.

(e)Two teams independently prepared the result of NEET-SS 2019 and it was cross verified. After this, the scores of all the candidates provided by the technology partner's team were also used to match scores prepared by NBE team. All the three results matched and no discrepancy was noted.

(f)Another third team also matched the scores provided by technology partner and NBE along with the tie-breaking criteria as mentioned in information bulletin for NEET-SS 2019.

(g)Thus, multiple results were prepared by independent teams and tallied.

5.NBE, therefore, has in place a completely full proof method to ensure that the results do not suffer from any error whatsoever. It is respectfully submitted that the aforementioned facts would clearly establish that the process followed by the NBE that ultimately leads to the declarations of the results of a given examination is a robust and rigorous one with multiple checks at various levels. Accordingly, it is thus stated that neither was there an omission to include marks from the General Surgery examination nor was there an incident where inappropriate marks were given leave alone omission to award appropriate marks for all correct responses. The respondent submits that appropriate marks were awarded for all correct responses

and the results are as intimated to the candidate and they stand by the same."

10.The above explanation is in respect of the process, 'how the respondents have formulated the questions and ensured the correctness of the key answers'. In fact, this part of the examination process is not in dispute or questioned by the petitioner and neither the Court can interfere with this part of the exam process.

11.The petitioner is under the bonafide impression/inference that while evaluating his answer sheet, some error/omission has crept which has resulted in awarding lesser marks than his anticipation/he deserve. The inference may be not correct, but, 'whether it is correct or not' cannot be concluded by the respondents themselves. The candidate must be furnished with his response along with the key for him to know that his answers/ responses were properly evaluated without any omission or deletion. While recording so, this Court is not oblivious of the legal pronouncements that as far as the key answer set by the respondents are concerned, they are final and the wisdom of the Subject Expert Committee shall not be doubted.

12.In this case, the petitioner do not doubt the wisdom of the Experts who have set the key answers. His doubt is while evaluating, the marks scored by him in part A is presumed to be omitted. If the respondents furnish him the copy of the key answer and his answer sheet, the above presumption/inference can be cleared.

13.In CBSE -vs- Aditya Bandopadhyay case (cited supra) the Hon'ble Supreme Court has observed as follows:-

"25. An evaluated answer book of an examinee is a combination of two different 'informations'. The first is the answers written by the examinee and second is the marks/assessment by the examiner. When an examinee seeks inspection of his evaluated answer-books or seeks a certified copy of the evaluated answer-book, the information sought by him is not really the answers he has written in the answer-books (which he already knows), nor the total marks assigned for the answers (which has been declared).

What he really seeks is the information relating to the break-up of marks, that is, the specific marks assigned to each of his answers. When an examinee seeks 'information' by inspection/certified copies of his answer-books, he knows the contents thereof being the author thereof. When an examinee is permitted to examine an answer-book or obtain a certified copy, the examining body is not really giving him some information which is held by it in trust or confidence, but is only giving him an opportunity to read what he had written at the time of examination or to have a copy of his answers. Therefore, in furnishing the copy of an answer-book, there is no question of breach of confidentiality, privacy, secrecy or trust. The real issue therefore is not in regard to the answer-book but in regard to the marks awarded on evaluation of the answer-book. Even here the total marks given to the examinee in regard to his answer-book are already declared and known to the examinee. What the examinee actually wants to know is the break-up of marks given to him, that is how many marks were given by the examiner to each of his answers so that he can assess how his performance has been evaluated and whether the evaluation is proper as per his hopes and expectations. Therefore, the test for finding out whether the information is exempted or not, is not in regard to the answer book but in regard to the evaluation by the examiner.

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27. We, therefore, hold that an examining body does not hold the evaluated answer-books in a fiduciary relationship. Not being information available to an examining body in its fiduciary relationship, the exemption under section 8 (1)(e) is not available to the examining bodies with reference to evaluated answer-books. As no other exemption under section 8 is available in respect of evaluated answer books, the examining bodies will have to permit inspection sought by the examinees.

Re : Question (iv)."

14. The learned counsel for the respondents 1 and 3 would rely on a judgment of a Division Bench of the Delhi High Court in All India Institute of Medical Sciences v. Vikrant Buria (LPA No.487 of 2011 dated 28.05.2012), which has distinguished the case in CBSE -vs- Aditya Bandopadhyay (cited supra), on facts, and has held as follows:-

"19. We may further add that even in Central Board of Secondary Education Vs. Aditya Bandopadhyay (2011) 8 SCC 497 that Apex Court though holding that an examining body does not hold evaluated answer books in fiduciary relationship also held that the RTI Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy i.e. of transparency and accountability on one hand and public interest on the other hand. It was further held that when Section 8 exempts certain information, it should not be considered to be a fetter on the Right to Information, but an equally important provision protecting other public interests essential for fulfillment and preservation of democratic ideas. The Supreme Court further observed that it is difficult to visualize and enumerate all types of information which require to be exempted from disclosure in public interest and the legislature has in Section 8 however made an attempt to do so. It was thus held that while interpreting the said exemptions a purposive construction involving a reasonable and balanced approach ought to be adopted. It was yet further held that indiscriminate and impractical demands under RTI Act for disclosure of all and sundry information, unrelated to transparency and accountability would be counter productive and the RTI Act should not be allowed to be misused or abused."

15. In All India Institute of Medical Sciences v. Vikrant Buria (cited supra), the information sought was the certified copies of original question papers of all M.Ch super speciality

entrance exam conducted from the years 2005-2010. The petitioner/information seeker was not a candidate. He was a stranger to the examination process. The submission of the petitioner and the respondent is precisely extracted by the Delhi High Court as below:-

"5. It was the contention of the appellant before the CIC that there are limited number of questions available with regard to super-speciality subjects in the question bank and that the disclosure of such questions would only encourage the students appearing for the exam to simply memorize the answers for the exam, thereby adversely affecting the selection of good candidates for super-speciality courses. It was thus argued that the question papers of the entrance examination for super-speciality courses could not be made public.

6. CIC vide its order dated 12th November, 2010 (supra), noticing the admission of the appellant that the question papers could not be termed as „intellectual property" and observing that the appellant had been unable to invoke any exemption sub-clause of Section 8(1) of the Act to deny information and further holding that the refusal of information was not tenable under the Act, allowed the appeal of the respondent and directed the appellant to provide complete information to the respondent."

In the above said context, the Delhi High Court has rightly observed as follows:-

"20. The information seeker as aforesaid is not the examinee himself. The possibility of the information seeker being himself or having acted at the instance of a coaching institute or a publisher and acting with the motive of making commercial gains from such information also cannot be ruled out. The said fact also distinguishes the present from the context in which Shaunak H.

Satya (supra) was decided. There are no questions of transparency and accountability in the present case.

21. When we apply the tests aforesaid to the factual scenario as urged by the appellants and noted above, the conclusion is irresistible that it is not in public interest that the information sought be divulged and the information sought is such which on a purposive construction of Section 8 is exempt from disclosure."

16. The facts of the present case is entirely different. The petitioner in this case is a candidate who took up the NEET -SS 2019. His prayer in the writ petition is to produce his answer sheet to know 'whether there is any omission in evaluation'. If yes, do revaluation/retotalling and give the corrected mark sheet.

17. The respondents contend that the entire examination process is a pure and simple administrative act. Hence, there is no scope for judicial review. This contention is both factually and legally incorrect. Any administrative action, if found to be arbitrary, to prevent injustice, the Courts have to necessarily interfere. Arbitrariness includes irrational and unreasonableness.

18. The respondents while conducting NEET for UG admission (MBBS) before releasing the mark sheet and rank list ensure the draft key answers are published and objections are invited before finalising the key answer. The candidates are provided with the copy of the answer coding sheet on payment of fees. Thus, the respondents ensure transparency in NEET exam conducted for UG. Whereas, when it comes to Super Speciality exam, these rights are denied to the candidates. Thus, the element of transparency lacks in this case. Though, the petitioner not entitled for re-totalling or re-valuation, his right to get the copy of the answer key and his responses cannot be denied.

19. Therefore, the queries formulated by this Court are answered as below:

"a)Right of getting information cannot be belittled under the guise of 'proprietary'. This a defence/right becomes non existence once the respondents invite the candidates to participate in the examination and gets his response. The questions once posed to the candidate for response, becomes public. The responder has a right to know 'whether his response is correct or not'. His demand for the key answer and his own answer sheet for verification cannot be denied on the ground of secrecy or proprietary. The respondents cannot refuse to share the correct key answer and the answer sheet of the petitioner, depriving the candidate's right to know the yardstick by which he was evaluated.

b)In the process of examination, information about the question setters, evaluators, place of evaluation alone can be opaque. Information like the key answers and the copy of the answer sheet cannot be screened from the judicial scrutiny or denied to the candidate. Such denial will be antithesis to right to information.

c)No examination which lacks transparency be claimed as routine administrative activity and get immunity from judicial review.

d)As far as the demand of re-totalling or re-valuation, it is not a right implied. Unless such right is provided specifically in the regulation or prospectus or instructions, the candidate cannot as a matter of right seek for re-totalling or re-valuation."

20.In view of the above, the writ petition is disposed of with a direction to the second respondent to furnish the petitioner the question and his responses in the NEET - SS 2019, Urology and Cardio Vascular and Thoracic Surgery Exam, including the General Surgery examination conducted on 28/06/2019. No

costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CCC)

//True copy//

Sub Assistant Registrar

jbm

To

1.The Secretary to Government,
Union of India,
Ministry of Health and Family Welfare,
Nirman Bhavan,
Near Udyog Bhawan Metro Station,
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+1cc to Mr.M.Ravi, Advocate SR.No.70906

+1cc to Mr.Rabu Manohar, Advocate SR.No.69561

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GMY (12/09/2019)