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

% *Date of decision: 30.07.2020*

+ W.P.(C) 4716/2020

DR. PRANAY NIJHAWAN Petitioner
Through Mr. Shivendra Singh, Adv.

Versus

NATIONAL BOARD OF EXAMINATIONS & ANR.... Respondent
Through Mr. Kirtiman Singh, Mr. Waize Ali
Noor and Mr. Rohan Anand, Advs. for R-1
Mr. Vijay Joshi, Adv. for R-2

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

This hearing is conducted through Video Conferencing.

CM No.16969-16971/2020

Exemption allowed, subject to all just exceptions.

W.P.(C) 4716/2020

1. This Writ Petition is filed to direct respondent No.1/NBE to unfreeze the seat of the petitioner and to permit him to participate in the subsequent rounds of counselling to be conducted by respondent No.1/NBE. The case of the petitioner is that the petitioner received his degree in MBBS from University College of Medical Sciences (UCMS) and Post Graduate Medical Diploma in Anaesthesiology (D.A.) from Maulana Azad College (MAMC) which are both affiliated to University of Delhi. The petitioner appeared in

both Post Diploma Centralized Entrance Test (PDCET 2020) on 20.12.2019 and National Eligibility-cum-Entrance Examination Post Graduate Examination (NEET-PG Examination 2020) on 5.1.2020. Both the exams were conducted by respondent No.1. The petitioner states that he has qualified both the examinations conducted by respondent No.1. While in PDCET 2020, he has a rank of 128 in the speciality Anaesthesiology and in NEET-PG Examination 2020 the petitioner qualified with a rank of 51753.

2. On 01.07.2020, the Respondent No.1 declared the result of 2nd Round allotment of DNB seats for admission to the 2020 session. The Petitioner was allotted a seat in the Hindu Rao Hospital in the speciality Anaesthesiology. On 03.07.2020, the Respondent No. 1 extended the last date for payment of the first year course fee in respect of the 2nd round of DNB counselling from 05.07.2020 to 10.07.2020.

3. On 10.07.2020, the Petitioner, waited in vain for the whole day for any notice of Respondent No.1 that would bring a change in the payment schedule. In the end, the Petitioner made payment of the First Year Fee of Rs. 1.25 lakhs around 4:57 pm to freeze his seat on the assumption that there would be no further extensions or tinkering with the time schedule. It is pleaded that to the shock and surprise of the petitioner on 11.07.2020, he noticed that there was a further extension of payment of fees by Respondent No.1 NBE up to 20.07.2020. The Petitioner now states that he has been gravely prejudiced by this last minute extension inasmuch as now he has been knocked out from subsequent round of counselling which is to now begin by the end of this month. His prayer is that he may be allowed to participate in the subsequent round of counselling.

4. It is stressed that the Petitioner is primarily aggrieved by the notice of

extension for payment of the First Year Fee belatedly uploaded by the Respondent No. 1/NBE on its official website around 11.55 pm on 10.07.2020 pursuant to the second round, after the Petitioner and several other similarly situated candidates had locked their preferences and made the payments to freeze their choices thinking that no further extensions of time would be provided. It is pleaded that the petitioner may have changed his decision to pay the fees after the second round of counselling in the additional time granted to pay the same given at the last moment.

5. Learned counsel for the respondent has opposed this petition. He has pointed out to clause 4.6 of the Handbook issued to candidates which specifically prohibits a candidate like the petitioner who has already opted for a seat and taken his admission to participate in subsequent rounds of counselling. He also relies upon judgment of a Co-Ordinate Bench of this Court in *Priyanka Chaudhary vs, National Board of Examinations, 2016 SCC OnLine Del 5691*. He also relies upon the latest judgment of the Madras High Court in the case of *Dr. Sandeep P.S vs. The Government of India, 2020 SCC OnLine Mad 1263*.

6. I may first look at clause 4.6 of the handbook for admissions to DNB (Post Diploma) Courses 2020 Admission Session. The said clause reads as follows:-

“4.6 Additionally, while a candidate may participate in the various rounds of counseling in accordance with the specific eligibility criteria therefore and the various terms and conditions for each round of counseling given below, if at any stage a candidate “Freezes” his/her allotment (i.e. confirms that he/she wishes to take the seat allotted to him/her) he/she will not be permitted to participate in any subsequent rounds of counseling and shall stand exited from the counseling

process. This ineligibility will also will be attracted if, after opting to freeze his/her allotment, he/she either does not pay the requisite course fees or does join the Institute concerned within the stipulated time.”

7. Hence, as per the said clause, if at any stage, a candidate freezes his admission he will not be permitted to participate in the subsequent rounds of counselling and shall stand exited from the counselling process.
8. Reference may also be had to the judgment of this court in the case of ***Priyanka Chaudhary vs, NBE (supra)*** where it was held as follows:-

“1 . The petitioners are candidates, who applied for admission to the Diplomate 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.

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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 bulletin 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) 4 SCC 171 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)

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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)"

9. Reference may also be had to the judgment of the Madras High Court in the case of *Dr.Sandeep P.S. vs Govt. of India, 2020 SCC OnLine Mad 1263* where the court held as follows:-

“32. I have considered the rival submissions. I must, at the outset, point out that *Clause 4.5* of the handbook which is under challenge does in fact affects the right of candidates who are allotted seats in the first round of counselling as per their choice to retain the seat and participate in the second round of counselling also in order to better their chances. The moot question therefore is as to whether such a provision could be subject matter of challenge by way of a writ petition under Article 226 of the Constitution of India. Various statistics have been relied upon by the respective counsel to justify their respective stand. Be that as it may, as pointed out by the Honourable Supreme Court in various decisions the attempt of the court should be to ensure that merit is not sacrificed while framing rules or procedure for counselling and admission to such super speciality courses particularly in the field of medicine. While the petitioners would contend that the second respondent which is offering super speciality postgraduate courses in medicine is bound to follow the procedure that is suggested by the Medical Council of India for admission to such postgraduate courses, the second respondent would claim that it is a autonomous body and it is free to adopt its own procedure.

33. It is settled law that the prospectus is the vital document which governs the admission procedure. A candidate who participates in the selection process based on the prospectus cannot turn around and challenge the very prospectus or a clause in the prospectus unless it is shown to be illegal or irrational. This court had in a number of cases relating to admissions to postgraduate Medical education has consistently held that the candidates who had applied for admission based on the conditions set out in the prospectus cannot challenge the conditions. Of course in the case on hand the petitioners had approached the court before the first round of counselling had commenced. However the counselling in effect commenced on 01-05-2020 and the candidates were required to furnish their online choices by 08-05-2020. The first counselling was done on 22-05-2020. The petitioners had filed the first writ petition on 17-05-2020 and were favoured with an interim order on 26-05-2020. The petitioners were aware of the existence of *Clause 4.5* in the handbook even when they had applied for admission. They had chosen to apply and also indicate their choices in compliance with the requirements of the instructions in the handbook. Only after exercising their choices the petitioners chose to challenge *Clause 4.5* on 17-05-2020. Mr. G. Sankaran, would vehemently contend that since the petitioners had approached the court before the first round of counselling itself, there is no delay and they cannot be non-suited on the ground of delay. I am unable to accept the said submission of the learned counsel for the petitioner for more than one reason. As rightly pointed out by the learned Senior Counsel appearing for the second respondent if the petitioners' challenge is accepted the entire counselling process will have to be restarted in the sense all the candidates who had been allotted a seat in the first round of counselling and who had frozen their seats should also be given an opportunity to take part in the second round of counselling which would necessarily result in further delay in the process which has already been delayed by the pandemic. There are about 700 candidates who had frozen the seats allotted to them in the first round of counselling. If *Clause 4.5* is tweaked and they are also allowed to participate in the second round of counselling while

retaining the seats allotted to them in the first round those 700 seats should also be shown as seats available in the second round of counselling. The second respondent in its counter affidavit has explained as to how this process accumulates more seats in the mop up round of counselling which go to candidates with lesser comparative merit. The Honourable Supreme Court in *Alapati Jyostna* (Supra) has considered the prevalent situation and after taking note of the fact that nearly 700 candidates had been allotted seats and have frozen their seats had refused to issue any directions for the present year. The Honourable Supreme Court in the said decision has also recorded the assertions made in the response filed by the Medical Council of India that a common counselling or a single online counselling in the coming years would definitely take care of the grievances. I am therefore of the considered view that it would not be appropriate for this court to interfere with the counselling at this stage for the present year.

34. Even on the merits of the challenge, as pointed out by the Honourable Supreme Court in *Arvind Kumar Kankane*, a freak circumstance by which a candidate with a lesser comparative merit gets a better choice by virtue of operation of *Clause 4.5* cannot be the test for reasonableness of the rule itself. Apart from the above observation of the Honourable Supreme Court, the Delhi High Court in at least two judgements referred to supra namely in *Reema Chawala v. University of Delhi* 2003 SCC OnLine Del 127 and *Priyanka Chaudhary v. National Board of Examinations*, 2016 SCC OnLine Del 5691, has upheld a similar clause found in the handbooks issued by the second respondent for the relevant academic years. I am unable to persuade myself to disagree with the reasons assigned by the Honourable Delhi High Court in support of its conclusions reached in the above two decisions. I must point out that the decisions relied upon by Mr. G. Sankaran relate to the Rules or Regulations framed by the Medical Council of India in respect of admissions to graduate and postgraduate courses offered by institutions and universities under the control of the Medical Council of India. Therefore the principles laid down in those decisions cannot be applied to test the reasonableness of the rule adopted by the second respondent. In *Dr. Divyesh J. Pathak v. National Board of Examination*, the

Delhi High Court has concluded that the second respondent herein is an independent body and it cannot be contended that it is bound by the advisories of the Medical Council of India. It has also been pointed out that the Medical Council of India and the National Board of Examinations are independent and autonomous bodies, neither can be made bound by the policy decisions taken by the other. I am therefore constrained to conclude that the challenge to *Clause 4.5* of the handbook cannot succeed and both the writ petitions deserve to be dismissed.”

10. It is hence a settled position of law that the petitioner having participated in the said DNB Centralised Counselling fully aware of the terms and conditions has himself chosen to freeze his allotment in the second round of counselling for the seat in question. When he took the seat he knew he would not be eligible for other rounds of counselling. He now seeks to wriggle out of the said clause on the ground that respondent No.1 at the last minute on 10.07.2020 has extended the last date for payment for seats by 10 days. I do not see how a last minute extension of the date of payment of fees changed the position. No irregularity has been done by the petitioner.

10. In my opinion, this extension of time to pay the fees cannot and does not give any right to the petitioner to overlook clause 4.6 of the aforesaid handbook issued by respondent No.1.

11. There is no merit in the present petition, Same is accordingly dismissed. All pending applications, if any, also stand disposed of.

JAYANT NATH, J.

JULY 30, 2020/n