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

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Date of decision: 11th June, 2021

+ **W.P.(C) 5908/2021, CM APPLs.18687/2021 & 18688/2021**

ASSOCIATION OF MD PHYSICIANS

..... Petitioner

Through: **Mr. Adit S. Pujari, Mr. Chaitanya Sundryal and Ms. Kajal Dalal, Advocates.**

Versus

NATIONAL BOARD OF EXAMINATIONS & ORS.

..... Respondents

Through: **Mr. Kirtiman Singh, Advocate with Mr. Waize Ali Noor and Mr. Taha Yasin, Advocates for R-1.
Mr. Sushil Kumar Pandey, Sr. Panel Counsel for R-2.
Mr. T. Singhdev, Ms. Michelle B. Das and Mr. Abhijit Chakravarty, Advocates for R-3.**

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

[VIA VIDEO CONFERENCING]

1. The present writ petition has been filed by the Association of M.D. Physicians (petitioner Association) challenging the Notice dated 15th April, 2021 and Information Bulletin dated 16th April, 2021, titled 'Foreign Medical Graduate Examination Screening Test Information Bulletin- June, 2021 Session' released by respondent No.1/National Board of Examination

(NBE), by which the respondent No.1 has notified the schedule for conducting Foreign Medical Graduate Examination (FMGE)- June, 2021. The petitioner Association also seeks setting aside of the time schedule for the conduct of FMGE- June, 2021 and for postponement of the said Examination scheduled for 18th June, 2021 to a date no earlier than six weeks thereafter.

2. Issue notice. Notice is accepted by Mr. Kirtiman Singh, Advocate on behalf of respondent No.1/NBE. Mr. Sushil Kumar Pandey, Senior Panel Counsel accepts notice on behalf of respondent No.2/Union of India (UOI) and Mr. T. Singhdev, Advocate, accepts notice on behalf of respondent No.3/National Medical Commission (NMC).

3. In view of the urgency of relief sought, the present petition has been taken up for final hearing with the consent of the parties. The counsels were heard at length on 9th June, 2021 and the matter was adjourned for today i.e., 11th June, 2021. On account of paucity of time and urgency of relief sought, instead of filing a counter affidavit, respondents were directed to place on record documents with regard to decision taken by the respondent No.1 to hold the FMGE- June, 2021 on the scheduled date, including the steps taken that demonstrate COVID preparedness. The petitioner Association had also sought to place on record the Memorandum of Articles of the petitioner Association along with the Board Resolution passed in favour of Dr. Ravi Bhushan Gupta to file the present petition. Pursuant to the said Order, relevant records have been filed on behalf of the petitioner Association and respondents No.1 and 3 along with the judgments relied upon.

4. The petitioner is an Association of M.D. Physicians, which has on its rolls, foreign medical graduates who have completed their primary medical courses in medical educational institutions outside India. In accordance with the Indian Medical Council Act, 1956 (as amended in 2001) and Screening Test Regulations 2002, persons who have acquired medical qualifications outside India are required to qualify the FMGE in order to receive recognition for their medical qualifications and to be registered with the State Medical Councils in order to practice medicine in India. The petition has been filed through the Governing Body Member of the petitioner Association, Dr. Ravi Bhushan Gupta and a Resolution favouring the said Dr. Ravi Bhushan Gupta has been filed by the petitioner Association. It is further stated that 41 members of the petitioner Association (list given in Annexure P-5 at page 165 of the petition) are registered to appear for the FMGE- June, 2021.

5. The main plank of the argument of the counsel for the petitioner is that in light of the second wave of COVID-19 pandemic prevailing in the country, the FMGE- June, 2021 should be postponed to at least six weeks beyond the scheduled date. At pages 17 and 18 of the petition, the petitioner has given details of various examinations, which were scheduled in the months of May and June, 2021 and have been postponed. It is further stated that there are about 18,000 candidates registered for the FMGE- June, 2021 and there are only 46 Centres, where the said Examination is being held. It is also stated that candidates for the FMGE- June, 2021 would be required to travel beyond their home cities/towns to other cities/towns and would have to organise boarding and lodging in a different city, which could create problems during COVID times. It is further emphasized that as per the

Information Bulletin, the respondents have not provided any place where the candidates could place their mobile phones, valuables, etc. which would necessarily have to be carried by the candidates for travelling outstation to take the FMGE.

6. The present petition has been vehemently opposed by the counsels appearing on behalf of the respondent No.1/NBE, respondent No.2/UOI and respondent No.3/NMC. Mr. Kirtiman Singh, learned counsel appearing on behalf of the respondent No.1/NBE submits that (i) Dr. Ravi Bhushan Gupta is not authorised to file the present petition; (ii) the petition has been filed belatedly; (iii) there are 18,600 candidates who are registered for the exam in June, 2021; (iv) the FMGE is held twice a year, in June and December; (v) even during the COVID-19 pandemic, the FMGE has been held in August, 2020 and December, 2020; (vi) as opposed to the examinations mentioned at pages 17 and 18, FMGE is not an entrance examination for any educational institution, there are no restrictions on the number of attempts for taking the FMGE and does not involve fixation of any seniority. Accordingly, if any of the members of the petitioner Association are not inclined to take the said exam in June, 2021, they are free to take the exam when it is held next; (vii) the FMGE is in public interest as candidates who are successful in the said Examination would be added to the workforce of doctors of the country, which is much needed in COVID times; and, (viii) there are 98 centres spread across 51 cities where the Examination would be held, which is more than double the number of centres when the Examination was held in pre COVID times.

7. In support of his submissions, learned counsel appearing for respondent No.1/NBE has filed the relevant provisions of the Information

Bulletin for the FMGE held in June, 2020, December, 2020 and the FMGE proposed to be held in June, 2021. The relevant provisions from the Information Bulletin- June, 2021 with regard to safety measures taken on account of COVID-19 are set out below:-

“6.4. TEST DAY PROCEDURES: NBE shall be conducting the Social Distanced - Computer Based Test (SD-CBT) in safe and secure environment maintaining social distancing norms wherever needed. NBE reserves its rights to review the test day processes of conduct of CBT in wake of changing scenario of COVID-19 pandemic;

6.5. Entry of Candidates as per Time Slots given in the Admit Cards: Candidates are required to report at the ‘Reporting Counter’ of test venue at as per time indicated in their admit cards. To avoid crowding at the test venue entry, there will be staggered time slots for candidates to report. The reporting counter will close 30 minutes prior to the test start time. This will allow time for security checks, identity verification and checking in for examination;

6.10. Barcode/QR Code Reader at Entry Points: The candidate will flash the admit card and ID proof for verification to the exam functionary standing across the table with barcode/QR code reader. Candidate shall be informed about the assigned lab number. At no time will the exam functionary touch any document of the candidate;

6.11. Isolation Labs: All candidates will be checked at the entry point for fever with the thermo guns. In case, any

candidate is observed to be having above normal temperature or displaying any symptoms of COVID-19 infection, he/she will be allowed to take the examination in a separate isolation lab.

6.17. Candidates will be compulsorily required to carry following items with them to the examination lab:

- **Face Mask**

- *Exam related documents (Admit card, ID Card etc)*

Please read the admit card carefully for items permitted to carry inside the examination centres.

6.21. After verification of ID and capture of Face ID, candidates will be escorted to the designated computer terminal at the test centre ensuring social distancing and a Invigilator will assist the candidate for check-in process of the test;

Other relevant provisions of the Information Bulletin with regard to the choice of examination centre are as under:-

7.4. During submission of online application form, candidate will be able to see only those cities where testing seats are available. While the city will be chosen by the candidate himself / herself at the time of online submission of application form, allotment of test centre/venue in the chosen city shall be done by NBE;

7.5. In case testing seat is not available in the State/UT in which the candidate prefers to appear in FMGE, he/she can choose the option OTHERS from the list of States/UTs at the time of selection of the State/UT during online submission of application form. NBE will make all efforts to ensure that the

candidate is allotted a testing centre in the State of correspondence address of the candidate. In case testing seat is not available in the concerned State due to logistic, administrative or other reasons, testing centre in a nearby State shall be allocated. Candidates opting for OTHERS option shall be informed about their testing city by 20th May 2021.”

8. Learned counsel for the respondent No.1/NBE has placed on record certain communications between respondent No.1/NBE and the examination conducting agency, wherein it has been communicated to the examination conducting agency to take extra precautions in holding of the FMGE on account of the pandemic. The respondent No.1/NBE has also placed on record Minutes of the Examination Committee Meeting held on 3rd June, 2021, where all aspects with regard to holding the FMGE- June 2021 on 18th June, 2021 were discussed and in the end, it was decided that the Examination should be held on the scheduled date of 18th June, 2021. Relevant portion of the aforesaid Minutes are produced hereinafter:-

“Members were apprised that the next diet of FMGE is scheduled to be held on 18th June 2021 for which 18601 candidates have submitted their applications. The examination shall be conducted on a computer-based platform at 98 test centres across 26 states in 51 cities in the country.

Prof Lal further emphasized that timely conduct of this examination is necessary to enable the foreign medical graduates to get registered with state medical councils to start contributing in the fight against COVID-19 as registered medical practitioners.

NBE has taken measures to ensure implementation of the advisory of the Government of India on social distancing and other preventive/protective measures at examination centres. The examination is being conducted in SD-50 model with every alternative seat being vacant and following COVID appropriate behaviour.

Additional measures are being taken to minimize the risk of COVID-19 by providing all candidates with a protective gear safety kit comprising of a face shield, a face mask and 5 hand sanitizer sachets. It will be mandatory for all candidates to wear the face shield at all times and during entry & exit where crowding is anticipated.

Prof. D.K. Sharma opined that the COVID-19 cases are gradually coming down across the country. The FMGE candidates are not licensed so far to practice and, therefore, the conduct of this examination would enable them to get registered with the Medical Councils and this will help in augmenting human resources in managing COVID-19 pandemic. He was of the opinion that with COVID appropriate behaviour, NBE can conduct the examination as per prescribed schedule. However, he expressed his concerns over the ongoing lockdown in certain areas of the country for which he suggested that NBE should write to the concerned authorities for providing curfew passes to the candidates. He further suggested that approval of the President, NBE should be taken today itself so as

to write to MoHFW for seeking the concurrence of the Govt. of India.

*Prof. Rajbahadur informed that a recruitment examination in the State of Punjab for around 17,000 candidates was recently conducted successfully wherein all the candidates and staff were required to bring a negative RT-PCR report undertaken within last 72 hours. **He further suggested that NBE should write to the Chief Secretaries and DGPs of all states so as to facilitate the smooth conduct of this examination.***

Dr. Raviraju endorsed the submissions of other members.

The OSD to President, Dr. Rakesh Sharma, apprised the committee that the President, NBE has conveyed his approval to go ahead with the examination as recommended by the Examination Committee and to write to the Govt. of India regarding the same.

*After detailed deliberations, the committee decided that **the FMGE June 2021 Examination should be conducted on 18th June 2021 as per schedule with COVID appropriate behaviour and maintaining social distancing with SD-50 model and use of Protective Gear for all candidates and exam personnel.***

*The committee further decided that all candidates, staff on duty and NBE appointed Appraisers should come with a **negative report of COVID-19 RT-PCR/ RAT/ CBNAAT/TrueNAT done within 72 hours prior to the conduct of FMGE June 2021 examination.***

Candidates failing to bring the said report shall be required to take the examination in Isolation Labs with COVID-19 symptomatic candidates.”

9. Also placed on record is a letter dated 3rd June, 2021 that was sent by the respondent No.1/NBE to the respondent No.2/UOI wherein it was communicated that the Examination Committee has approved the conduct of FMGE- June, 2021 on 18th June, 2021 and approval from respondent No.2/UOI was sought. The said letter also placed on record the following measures that would be taken in holding of the exams:-

“1. Admit Cards to be considered as curfew passes/COVID E-PASS.

2. Protective Gear Safety kits comprising of face shield, face mask and hand sanitizers to be provided to all candidates and exam personnel with adherence to COVID Appropriate Behaviour.

3. Examination to be conducted with Social Distancing (SO-50 model) with every alternate seats vacant.

4. Negative RT-PCR/RAT/CBNAAT/TrueNAT within 72 hours of exam date is MANDATORY for candidates and exam personnel. Candidates failing to bring the report shall have to take the examination in isolation labs created for the purpose, with symptomatic candidates.”

10. On 11th June, 2021, respondent No.2/UOI conveyed its approval to hold the FMGE- June, 2021 on 18th June, 2021 with all precautionary measures and protocols for COVID-19, as mentioned above in the letter dated 3rd June, 2021.

11. Mr. T. Singhdev, Advocate appearing on behalf of the respondent No.3/NMC has placed on record the petition filed by the present petitioner Association along with two other associations under Article 32 of the Constitution of India on 12th May, 2021 before the Supreme Court, being W.P.(C) No.585/2021, in which respondent No.3/NMC was a party. In the said petition, it is mentioned that the petitioner Association comprises of foreign medical graduates who are awaiting the taking of qualifying exam i.e., FMGE to enrol themselves as medical professionals in India and foreign medical graduates who had taken the December, 2020 FMGE and failed to qualify the same. He draws attention of the Court to the prayers made before the Supreme Court. The relevant prayers (a), (d) and (h) are set out below:-

“a) Issue an appropriate writ, order or direction directing the Respondents to exempt Foreign Medical Graduates (who have obtained their primary medical qualification from outside India) from qualifying the Foreign Medical Examination as a one-time measure for being inducted as Doctors to aid the COVID-19 workforce of healthcare professionals; or in the alternative

d) Issue an appropriate writ, order or direction to the Respondents to reduce the qualifying criteria for those Foreign Medical Graduates that will take the Foreign Medical Graduate Examination in June 2021 to bring such qualifying criteria at par with that of the NEET PG Examination 2020;

h) Alternatively, Issue an appropriate writ, order or direction suspending the requirement of qualifying the Foreign Medical Graduate Examination for all Foreign Medical Graduates during the Covid 19 pandemic;”

12. The said petition was listed before the Supreme Court on 1st June, 2021 on which date notice was issued for 11th June, 2021. However, no interim relief was granted. I am informed that on 11th June, 2021, the matter was further adjourned to 15th June, 2021.

13. Mr. Singhdev submits that having not been successful in obtaining any interim relief from the Supreme Court, the present petition was filed by the petitioner Association on 6th June, 2021 and was listed before this Court for the first time on 9th June, 2021. Learned counsel for the respondent No.3 draws attention to paragraph 6 (a) on page 18 of the present petition wherein a reference was made to the petition filed by the petitioner Association before the Supreme Court, however, it was not stated that similar reliefs as sought in the present petition, were also sought before the Supreme Court. Reference is also made to paragraph 8 of this petition wherein it has been stated that no similar petition has been filed by the petitioner Association before any Court/quasi-judicial authority.

14. Both the counsels for the respondents also submit that the petitioner Association has indulged in forum shopping. Having filed the petition before the Supreme Court and not being successful in obtaining interim relief, the present petition has been filed before this Court without fully disclosing what was sought in the Supreme Court or filing a copy of the said petition. In this regard, reliance is placed on paragraphs 4, 10, 15 and 16 of the judgment of the Supreme Court in ***Udyami Evam Khadi Gramodyog***

Welfare Sanstha & Anr. Vs. State of Uttar Pradesh & Ors. (2008) 1 SCC 560.

15. It is also submitted by the respondents that on account of low pass percentage and tough qualifying criteria, the members of the petitioner Association were never keen to take the FMGE and have throughout made representations to relax the qualifying criteria of the said Examination or to allow its members to enrol without taking the said Examination.

16. In rejoinder, it was submitted on behalf of the learned counsel for the petitioner that though prayers (a) and (h) were made before the Supreme Court, however the same were never pressed. Therefore, it is not a case of forum shopping. He further submits that there are no misleading statements made in this petition and adequate disclosure has been made with regard to the petition filed in the Supreme Court. He further submitted that in the list of candidates/members of the petitioner Association given at page 165 of this petition, some are not vaccinated yet, and are therefore seeking postponement of the FMGE- June, 2021.

17. I have carefully considered the submissions of the parties. I find substance in the submission of the respondents that the petitioner Association has not been honest in its disclosure in the present petition with regard to the petition filed by it before the Supreme Court. In light of the prayers made before the Supreme Court in W.P.(C) No.585/2021, the petitioner Association should have clearly disclosed in the present petition the reliefs sought before the Supreme Court. In fact, a copy of the petition filed before the Supreme Court ought to have been placed before this Court. In paragraph 6 (a) referred to above, the petitioner has only made a vague and evasive reference to reliefs sought before the Supreme Court. A reading

of the prayers made before the Supreme Court, clearly brings out that the petitioner had sought exemption/suspension from the requirement of qualifying the FMGE- June, 2021 during the COVID-19 pandemic, which essentially amounts to the relief sought in the present petition of postponing the said Examination. Having not succeeded in getting any interim relief before the Supreme Court on 1st June, 2021, the present petition was filed before this Court on 6th June, 2021. On a query from the Court to the counsel for the petitioner Association whether, this fact that prayers (a) and (h) were not pressed before the Supreme Court, has been mentioned in the present petition, the answer is in the negative. It is trite that the petitioner approaching a Court under its writ jurisdiction has to come with clean hands. In the present case, I have no doubt in my mind that the petitioner Association did not come clean with regard to the prior petition filed before the Supreme Court and has indulged in forum shopping. Timing of filing of the present petition also leaves one in no doubt that the petitioner Association has indulged in forum shopping and is, therefore not entitled to invoke the equitable writ jurisdiction of this Court under Article 226 of the Constitution of India. In this regard, reference may be made to ***Udyami Evam Khadi Gramodyog Welfare Sanstha*** supra, relevant portions of which are set out below:-

“15. In the said counter- affidavit, it has further been disclosed that after being unsuccessful in their attempt to stall the recovery proceedings against the Samiti, a fictitious welfare Sanstha, namely, Udyami Evam Khadi Gramodyog Welfare Sanstha was started by Appellant 2. We, therefore, are of the

opinion that the attempt on the part of the appellants herein must be termed as "abuse of the process of law" .

16. A writ remedy is an equitable one. A person approaching a superior court must come with a pair of clean hands. It not only should not suppress any material fact, but also should not take recourse to the legal proceedings over and over again which amounts to abuse of the process of law. In Advocate General, State of Bihar v . M.P. Khair Industries" this Court was of the opinion that such a repeated filing of writ petitions amounts to criminal contempt."

18. Even though, in light of findings above, the petition is liable to be dismissed, I have examined the merits of the case as well. From the records produced by the respondents, it is clear that the respondents are fully conscious of the prevailing situation in the country on account of the COVID-19 pandemic and have taken all precautionary measures in holding of the FMGE- June, 2021. The Information Bulletin in respect of the FMGE- June, 2021 provides for the following:-

- Social distancing norms will be followed while holding the exam.
- Steps have been taken to avoid crowding at the test venue entry and there will be staggered time slots for candidates to report.
- Isolation labs for candidates who show symptoms of COVID-19.
- Mandatory for all candidates to wear a face shield at all times and during entry and exit where crowding is anticipated.

19. Minutes of the Examination Committee held on 03.06.2021 have recommended the following additional safeguards in light of the prevalent situation:-

- Admit Cards to be considered as curfew passes/COVID E-PASS.
- Protective Gear Safety kits consisting of face shield, face mask and hand sanitizers have been sent by NBE at test centres for all candidates and exam personnel along with adherence to COVID appropriate behaviour.
- Examination to be conducted with Social Distancing (SD-50 model) with every alternate seat vacant.
- Negative RTPCR/ RAT/ CBNAAT/ TrueNAT within 72 hours of exam date is mandatory for candidates.

20. It is also noted in the said Minutes that the timely conduct of this Examination is necessary to enable the foreign medical graduates to get registered with State Medical Councils to start contributing in the fight against COVID-19 as registered medical practitioners. It is further noted that the COVID-19 cases have been on a steady decline across the country and examination centres for FMGE- June, 2021 have been increased by the respondents to more than double from when the examination was conducted in pre COVID times.

21. Once the respondents have considered the matter in its entirety and taken into account various factors in deciding whether to hold the Examination on the scheduled date, it is not for this Court in its jurisdiction under Article 226 of the Constitution to interfere with the said decision. This Court cannot substitute its own opinion with that of the examination conducting bodies. It has been held in a catena of judgments that

academic/examination conducting bodies are the expert bodies and there should be minimal interference with decisions of academic/examination conducting bodies. Reference in this regard may be made to ***Dr. J.P. Kulshrestha (Dr.) Vs. Chancellor, Allahabad University*** (1980) 3 SCC 418, ***Maharastra State Board of Secondary Education Vs. Paritosh Bhupesh Kumar Sheth*** (1984) 4 SCC 27, ***Bhushan Uttam Khare Vs. Dean, B.J. Medical College*** (1992) 2 SCC 220, ***All India Council for Technical Education Vs. Surinder Kumar Dhawan*** (2009) 11 SCC 726, ***Basavaiah (Dr.) Vs. Dr. HL Ramesh*** (2010) 8 SCC 372 and a recent decision of a Division Bench of this Court, of which I was a part, in ***Meenakshi & Ors. Vs. All India Institute of Medical Sciences & Ors.*** 2021 SCC OnLine Del 2715.

22. In the present case, there is no doubt that while arriving at the decision to hold the FMGE- June, 2021 on the scheduled date, the respondents have considered all aspects of the matter. I am satisfied that Respondents have taken adequate precautions to hold the FMGE- June 2021. It is an admitted position that the second wave of the COVID-19 pandemic reached its peak in India in April and early May and thereafter the numbers have been steadily declining. In fact, it would be in public interest if more doctors are added to the workforce in order to be prepared for a possible third wave of COVID-19. Even otherwise, there is no legal right in favour of the petitioner Association, representing 41 candidates, to seek postponement of an examination for which more than 18,000 candidates have registered. The candidates who are not comfortable taking the FMGE- June, 2021 are free to take it in the next session. The fact of the matter is that the COVID-19 pandemic is a reality that one has to live with, for at

least some time in the future, but all essential activities will have to go on, albeit with necessary precautionary measures.

23. It is also pertinent to note that the petitioner Association has approached this Court at a highly belated stage i.e., on 6th June, 2021 when the Information Bulletin for the FMGE- June, 2021 had been out since 16th April, 2021 and the peak of the second wave of the COVID-19 pandemic is seemingly behind us.

24. In light of the findings above, need is not felt to go into the issue whether Dr. Ravi Bhushan Gupta was authorised to file the present petition or not.

25. Accordingly, I find no merit in the present petition.

Dismissed with costs of Rs. 25,000/-.

JUNE 11, 2021
A/Sakshi R.

AMIT BANSAL, J

मात्यमेव जयते