

\$~6 (2021 Cause List)

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 21st December, 2021

+ W.P.(C) 11213/2021 & CM APPL. 34519/2021

DR. AKANT PANDEY Petitioner
Through: Mr. Nishant Datta &
Mr. Pradeep Bhardwaj,
Advocates.

versus

THE NATIONAL BOARD OF
EXAMINATIONS & ANR. Respondents
Through: Mr. Ruchira Gupta &
Ms. Akanksha Sisodia,
Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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The proceedings in the matter have been conducted through video conferencing.

1. The petitioner is a doctor. He enrolled for the Diplomate of National Board [“DNB”] examination and has cleared the theory component of the said examination. The grievance with which he has approached the Court concerns the maximum number of attempts available for clearing the practical component of the DNB.

2. The undisputed position is that, in terms of the Information Bulletin issued for the DNB Final examination from time to time, a candidate is given maximum of three attempts to clear the practical

examination. The petitioner availed of those three attempts in the June 2019 session, December 2019 session and December 2020 session. However, he was unable to score the minimum pass marks of 150/300. The respondent no.1-National Board of Examinations [“NBE”] has, therefore, taken the position that he cannot be granted any further attempts.

3. The petitioner first approached this Court with regard to this grievance in W.P.(C) 9748/2021. The reliefs sought in W.P.(C) 9748/2021 were as follows:-

“a) Issue a writ in the nature of Mandamus or any other appropriate writ, order or direction directing the Respondents No.1 and 2 to permit the Petitioner to participate in the upcoming practical examination likely to be held in October, 2021;

b) Issue a writ in the nature of Mandamus or any other appropriate writ, order or direction directing the Respondents No.1 and 2 to provide copies of answer sheets of the Petitioner in respect of examination held in 03.07.2021 while also directing the Respondents to consider Petitioner’s request for re-checking and/or re-evaluation of Petitioner’s examination papers;

c) Issue a writ in the nature of Certiorari or any other appropriate writ, order or direction quashing or setting aside the rule/order/circular/notification dated 22.06.2020 inter alia imposing limit of three attempts in practical examination being arbitrary, unconstitutional and without any legal basis, especially after change in pattern and also considering the prevailing coronavirus situation;

d) any other or further relief, which this Hon’ble Court may deem fit and proper in the above facts and circumstances of the case may also be passed in favour of

the petitioner and against the respondents, in the interest of justice.”

4. By an order dated 07.09.2021, the petitioner was permitted to withdraw the writ petition with the following observations:-

“1. The present petition has been filed by a doctor who is a candidate for the D.N.B. (Diplomate of National Board) in Family Medicine. The petitioner seeks a direction upon the respondents, permitting him to participate in the practical examination schedule to be held in October, 2021.

2. After some hearing, Mr. Rajesh Yadav, learned Senior Counsel for the petitioner seeks permission to withdraw the writ petition unconditionally, but with liberty to pursue his representation dated 30.08.2021 with the respondents.

*3. Mr. Yadav submits that the petitioner is conscious of the fact that he has taken the practical examination three times, which is the maximum permitted under the relevant circular of the respondent no.1/National Board of Examinations [“NBE”], and **he only seeks sympathetic exercise of the respondent’s discretion on the grounds stated in his representation dated 30.08.2021.** Ms. Ruchira Gupta, learned counsel who appears for the NBE on advance notice, states that the representation will be decided within a week.*

***4. The writ petition is dismissed as withdrawn unconditionally.** The respondents will however decide the petitioner’s representation in their own discretion and communicate their decision to the petitioner within one week.”¹*

¹ Emphasis supplied.

5. The petitioner's representation dated 30.08.2021 was for essentially the same relief: -

“Therefore, it is my humble request that I must be given one more opportunity to participate in practical examination coming up in October 2021 and also provide me the copies of answer sheets of the practical examination held on 03.07.2021 and also request you to kindly consider reevaluation or rechecking of my result while your department considers the present representation to remove this restriction of three attempts altogether being arbitrary and without any basis.”²

6. The petitioner's representation has been rejected by the NBE vide a communication dated 14.09.2021 noting the maximum number of attempts as aforesaid. Against this decision, the petitioner has filed the present writ petition.

7. At the outset, I am of the view that the writ petition does not lie in the light of the unconditional withdrawal of the petitioner's earlier writ petition. The relief sought in the present petition, framed in terms of challenge to the rejection of the representation, is essentially directed at the same result as the earlier writ petition. Upon unconditional withdrawal of a writ petition, albeit with liberty to pursue a pending representation, the petitioner abandons his right to institute a fresh writ petition for the same relief. It is significant that the petitioner was not granted any liberty to institute such fresh proceedings.

8. The judgment of the Supreme Court in *Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P., Gwalior and*

² Emphasis supplied.

*Others*³, has explained the position thus:-

*“8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/227 of the Constitution of India also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. He may as stated in *Daryao v. State of U.P.* [AIR 1961 SC 1457 : (1962) 1 SCR 574] in a case involving the question of enforcement of fundamental rights file a petition before the Supreme Court under Article 32 of the Constitution of India because in such a case there has been no decision on the merits by the High Court. The relevant observation of this Court in *Daryao* case [AIR 1961 SC 1457 : (1962) 1 SCR 574] is to be found at p. 593 and it is as follows:*

“If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata

³ (1987) 1 SCC 5

which has been argued as a preliminary issue in these writ petitions and no other.”

9. **The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that article.** On this point the decision in Daryao case [AIR 1961 SC 1457 : (1962) 1 SCR 574] is of no assistance. But we are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but **on the ground of public policy as explained above.** It would also discourage the litigant from indulging in bench-hunting tactics. **In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again.** While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, **the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission.** In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under

Article 21 of the Constitution since such a case stands on a different footing altogether. We, however leave this question open.”⁴

9. Be that as it may, I have heard Mr. Nishant Datta, learned counsel for the petitioner, on the merits of the present case also and find the petitioner’s case equally unmerited on that score.

10. The petitioner participated in the examination knowing fully well the contents of the Information Bulletin and the maximum number of attempts afforded to a candidate. Mr. Datta’s main argument is that the NBE changed the pattern of the examination by a notification dated 12.06.2020, which was applicable for the December 2019 session. He submits that, upon change of the pattern of an examination, the attempts taken by a candidate under the old pattern ought not to be counted against him.

11. I am unable to accept this contention. The examination in question was to be held in September, 2020 and the notification with regard to the change of pattern was issued on 12.06.2020. The most significant feature of the notification, however, is Clause 4 thereof, which reads as follows:-

“4. Practical Examination of all such DNB candidates who opt out of this revised scheme of Examination shall be held in the conventional manner at a later date when circumstances so permit. However, all such DNB candidates who opt out from this revised scheme of Examination will not be eligible for the NEET SS 2020 which is likely to be held in September 2020. Such DNB candidates shall be able to exercise their choice for opting out of this new revised scheme, if they desire to do

⁴ Emphasis supplied.

so, through login into their account at “Online Exit Examination Portal (OEEP).”

12. Clause 4 gave candidates an option to opt out of the revised scheme of examination and to await the examination held in the conventional manner, when circumstances permitted. In the light of this option given to the candidates, the argument advanced by Mr. Datta is of no force. In the circumstances arising out of the Covid-19 pandemic, the examining authority attempted to devise a revised scheme of the examination to obviate the need for large scale postponement and extension of the tenure of the course. It, nevertheless, permitted candidates who wished to take the examination in the conventional manner to opt out of the revised scheme. The petitioner, conscious of this choice, did not opt out, and took the examinations in the revised scheme, not just once, but twice. I do not see any force in Mr. Datta’s submission that he should nevertheless be given further attempts at the examination. There is no arbitrariness or unreasonableness in the actions of the NBE, visiting the petitioner with the consequences his own choice.

13. The role of the writ court in examining policy matters of this nature is extremely limited. The judgments of the Supreme Court *inter alia* in *All India Council for Technical Education vs. Surinder Kumar Dhawan and Others*⁵ and *Indian Institute of Technology Kharagpur and Others vs. Soutrik Sarangi and Others*⁶ make it clear that the writ court is not to sit as an appellate authority and re-examine the

⁵ (2009) 11 SCC 726

⁶ 2021 SCC OnLine SC 826

decisions of academic bodies on academic matters, except on a showing of manifest arbitrariness or unreasonableness. The present case falls far short of that high standard.

14. The writ petition, alongwith the pending application, is consequently dismissed.

PRATEEK JALAN, J

DECEMBER 21, 2021

'Bp'

