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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

968 WRIT PETITION NO.13928 OF 2021

SAMRUDDHI SAMBHAJI PADWAL AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

...
Mr S. S. Jadhavar, h/f Mr P. B. Rakhunde, Advocate for
petitioners;
Smt. M. A. Deshpande, A.G.P. for respondent No.1
Ms. Surekha Mahajan, Advocate for respondent Nos.2 & 3

**CORAM : RAVINDRA V. GHUGE
AND
S. G. MEHARE, JJ.**

DATE : 1st March, 2022

PER COURT:

1. This matter was heard extensively yesterday in view of the observations of the Hon'ble Supreme Court set out in paragraph No.2, of the order dated 18/02/2022, which reads as under :

“Having said so we may notice the submission of the learned Counsel for the appellants on merits where he relies on an order passed by a coordinate Bench in Writ Petition No.8928/2021 on 02/09/2021 filed by the petitioners(s)/appellants. This order, learned counsel states was placed on record along with the copy of the petition earlier filed. He has drawn our attention to the paragraph 3 of that Order where a concession is being

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made and recorded on behalf of the Board. In terms of the concession, it has been opined that the examination held in February, 2020 to appear in the Class Improvement Examination to be held by the Board in the last week of the September would be considered as the first attempt. It is thus the submission of the learned counsel for the appellants that the attempt made by him earlier should be taken as a first attempt.”

2. Since the learned Advocate for the Board, in her oral submissions contended that the Board had never given a concession to the petitioners before this Court (Coram : S. V. Gangapurwala and R. M. Laddha, JJ.) in Writ Petition No.8938/2021, when the order dated 02/09/2021 was passed, we therefore, dictated an order yesterday to make it very clear to the Board that if no concession was given by the Board when the earlier order was passed by this Court, it may say so provided an affidavit is filed.

3. For the sake of clarity, we are reproducing our order dated 28/02/2022 hereunder :

“1. We have considered the strenuous submissions of the learned advocates for the respective sides and have gone through the Government Resolution issued by the School Education and Sports Department, State of Maharashtra

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dated 02.07.2021. There is no dispute that vide the said Government Resolution, students who have passed the regular examination and desired to improve their performance, are entitled to two attempts, which should be consecutive pursuant to the main exam in which they have passed the subjects.

2. These petitioners had applied for the November 2020 supplementary exam, which could have been their first attempt. They, however, chose to remain absent from their exam on the ground of Covid-2019, though according to the learned advocate for the Board, approximately 41,00,000 (Forty One Lakhs) students appeared for the S.S.C. and H.S.C. exam offline in November 2020. In view of this situation, the second attempt of the petitioners could have been in March 2021. However, the examination was cancelled by the Board and as such no exams were conducted.

3. It is in this backdrop that they had approached this Court in Writ Petition No.8938 of 2021 seeking a direction that they should be declared as “passed” and a particular pattern of drawing an aggregate for the P. C.B. should be adopted. This Court (Coram : S. V. Gangapurwala and R. N. Laddha, JJ.) delivered an order on 02.09.2021 and did not accept the said request of the petitioners.

4. Consequentially, the exam was held in September 2021 and this attempt was taken by these three petitioners who passed the said examination. However, their aggregate of the Physics, Chemistry and Biology (P. C.B.) subjects, still turned out to be less than 50%.

5. The issue before us today is with regard to whether the September 2021 exam should be considered as being the second attempt in the backdrop of these petitioners having skipped the November 2020 exam, voluntarily. The

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submissions of the petitioners as have been recorded by the Hon'ble Supreme Court in it's order dated 18.02.2022 in the first paragraph on page No.2 are that the Board had granted the concession before this Court that the September 2021 exam would be considered as a first attempt. For the sake of clarity, paragraph No.3 of the order dated 02.09.2021 passed by this Court is reproduced as under :

“3. Ms. Mahajan, learned counsel for the Board submits that the Board would allow the students like the petitioners who had passed 12th standard examination held in February 2020 to appear in the class improvement examination to be held by the Board in the last week of September and the same shall be considered as their first attempt. The learned counsel further submits that the benefit of the Government Resolution dated 02.07.2021 is accorded to those students who had failed in February 2020 examination. The petitioners cannot be said to be similarly placed. The petitioners have passed the examination. The learned counsel submits that the similar issue has been dealt with by the Division Bench of this Court at Nagpur in Writ Petition No. 2708 of 2021 under judgment and order dated 01.09.2021.”

6. The learned advocate for the Board submits that no such concession was granted in the light of paragraph Nos.5 and 6 of the order dated 02.09.2021 which read as under :

“5. The Government Resolution dated 02.07.2021 may not be applicable to the petitioners. The petitioners have passed the examination in February 2020 and are eligible for the class improvement examination. The petitioners are accorded the benefit of the said.

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Their attempt would be considered as a first attempt. The petitioners cannot claim to be at par with those students who have been given benefit of the Government Resolution dated 02.07.2021. The said aspect is also considered by the Division Bench of this Court at Nagpur in Writ Petition No. 2708 of 2021 (supra)."

"6. Miss. Mahajan, learned counsel submits that taking into account the predicament of many students, the Board would endeavour to declare the result of the examination to be conducted in September 2021 as early as possible."

She further submits that even in the affidavit-in-reply filed in Writ Petition No.8938 of 2021, no such concession was given by the Board.

7. We, therefore, called upon the learned advocate for the Board to take instructions and file an affidavit by tomorrow i.e. 01.03.2022 to take a clear stand as regards paragraph Nos.3, 5 and 6 reproduced above.

8. Taking into account the urgency expressed by the learned advocate for the petitioners as regards the practical exams that may take place tomorrow or the day-after-tomorrow and the written exams to be held on 04.03.2022, we are listing this petition on 01.03.2022 at 4.30 p.m.

9. Call for the case papers in Writ Petition No.8938 of 2021 along with this petition.

10. Stand over to 01.03.2022 at 4.30 p.m."

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4. Today, the Board has filed an affidavit-in-reply through Mrs. Sangita Asaram Adhapure, Assistant Superintendent, Maharashtra State Secondary and Higher Secondary Board, Division Latur, who is present before this Court. The affidavit-in-reply runs into nine paragraphs. In paragraph 1 of the affidavit, the scheme under which the improvement can be availed of, is mentioned. In the second paragraph, it is pointed out that there was an examination in March 2020 for the purpose of improvement. In paragraph 3, the history of the litigation in between the petitioners and the Board is narrated and at the end of paragraph 3, it is stated that they cannot be considered under the scheme for class improvement vide a 3rd attempt in March 2022.

5. In paragraph 4, the portion of the order of the Hon'ble Supreme Court dated 18/02/2022 has been referred to. In paragraph 5, it is stated that this affidavit has been filed pursuant to our order dated 28/02/2022. In paragraph 6, it is stated that the first attempt was of November 2020 which the petitioners did not avail of. In March 2021, the Board could not hold the examination and therefore, it would not be considered as a second attempt. Such examination was conducted in September-October 2021 and the petitioners have passed the examination.

6. In paragraph 7, it is stated that September 2021 examination cannot be termed as their first attempt. In paragraph 8, it is stated that the petitioners are putting forth a request for a 3rd attempt. In paragraph 9, it is stated that 3rd attempt for class improvement is not available and the petitioners have already exhausted their two attempts.

7. The order of this Court dated 02/09/2021, indicates that the Board had given a concession to treat the November 2021 examination as the first attempt, which was also the contention of the petitioners before the Hon'ble Supreme Court. We had expected the Board to take a clear stand as to whether such concession was given or not. However, despite 9 paragraphs of affidavit running into 9 pages, the Board has avoided making a statement that the Board did not give any concession to the petitioners in Writ Petition No.8938/2021, as was recorded in the order dated 02/09/2021.

8. We are aware of the law that a concession given by the Advocate on behalf of the client, out of inadvertence, would not bind the client. However, the Board itself does not want to take a

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stand that a concession as recorded in paragraph 3 of the order dated 02/09/2021, was never given by the Board.

9. As such, it is apparent that the Board does not want to deny that a concession was given which was recorded in paragraph 3 of the order dated 02/09/2021, by which, the examination which was scheduled to be held in the last week of September 2021 would be considered as the first attempt of these petitioners.

10. In view of the above, this petition is partly allowed.

11. We are informed that the petitioners' examination forms for the examination commencing from 04/03/2022 have already been submitted online by the their respective Junior Colleges. These forms have been rejected as the Board was of the view that they are not entitled for a 3rd attempt. However, considering the directions of the Hon'ble Supreme Court, respondent No.3 shall ensure that the online forms of the three petitioners which have been rejected, are treated as accepted and shall issue their Hall tickets and allot them the examination centers for appearing for the exams beginning on 04/03/2022.

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12. We make it clear that considering the scheme of the Board, these petitioners were not entitled to this 3rd attempt, but for the fact that the concession of the Board was recorded in the order dated 02/09/2021 in paragraph 3 in Writ Petition Nos.8928/2021, 8938/2021 and 9303/2021.

13. We make it clear that this order shall not be treated as a precedent and shall not be cited since this order rests on the concession given by the Board in the earlier round of litigation.

(S. G. MEHARE, J.)

(RAVINDRA V. GHUGE, J.)

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