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W.A.No.2364 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.10.2022

CORAM :

THE HON'BLE MR.T.RAJA, ACTING CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

W.A.No.2364 of 2022

T.Udhaykumar

.. Appellant

v.

1. The Union of India
rep. by its Secretary to
Ministry of Human Resource Development
122-C, Shastri Bavan
New Delhi-110 001
2. The National Testing Agency
Ministry of Human Resource Development
C-20, 1A/8, IITK Outreach Centre
Sector-62, Noida
Uttar Pradesh-201 309
3. National Medical Commission (Under Graduate)
Pocket-14, Sector-8
Dwarka, Phase-I



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New Delhi-110 077

4. The Principal Secretary
Government of Tamilnadu
Health and Family Welfare (MCA-1) Department
Fort St. George, Chennai-600 009

5. The Secretary
Selection Committee
Directorate of Medical Education
162, Periyar EVR High Road
Kilpauk, Chennai-600 010

.. Respondents

Appeal filed under Clause 15 of the Letters Patent, against the order dated 13.10.2022 passed in W.P.No.27487 of 2022.

For Appellant :: Mr.R.Sankarasubbu for
Mr.Ilayaraja Kanthasamy

For Respondents :: Mr.K.Ramanamoorthy
Central Government Counsel for R1
Mr.G.Rajagopalan
Senior Counsel for
Mrs.Sunitakumari for R2
Mrs.R.Anitha
Special Government Pleader for R4
Mrs.M.Sneha for R5

JUDGMENT

(Judgment of the Court was made by the Hon'ble Acting Chief Justice)

Mr.T.Udhaykumar, being a Tamil medium student, appeared for the



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NEET(UG)-2022 examination conducted by the respondents for admission to the M.B.B.S. Degree course for the academic year 2022-23. His application number and roll number are 20410250158 and 4101310175 respectively. He was also allotted the examination centre, Chinmaya Vidyalaya at West Anna Nagar, Chennai and thereafter the examinations were also held on 17.07.2022.

2. Mr.R.Sankarasubbu, learned counsel appearing for the appellant/writ petitioner stated that the appellant, after appearing for the examination, duly answered all the answers and has performed fairly. Therefore, he was confident of getting good results. Finally the respondents had published the results of the NEET(UG)-2022 examination in its website along with the key answers for the questions. It is also brought to our notice that each question being answered would carry four marks and one mark will be deducted for each wrong attempt. But the appellant, without getting any negative mark, answered all the questions, except Question No.97 shown in Section-B. After reading repeatedly the Question No.97 with the key answers



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given therein, being very confident that the said question has been wrongly framed, in order to avoid negative mark, he chose not to make any attempt, because the key answers, namely, the four options given by the second respondent were not at all correct. Therefore, he has just left Question No.97 without answering the same. He was also under the bona fide impression that he would be granted the grace marks for the wrong Question No.97. Later on, the second respondent published the results of the NEET-2022 examination in their website on 07.09.2022 showing that the appellant has secured 92 marks out of 720 marks. On verification it was found that he was not granted the grace marks for the Question No.97. When the second respondent has fixed 93 marks as the cut off mark for the candidates belonging to Scheduled Caste category, it is his grievance that when the second respondent has framed Question No.97 wrongly, they are bound to award the four marks, as they have to be held responsible for framing the wrong question instead of the right Question. The appellant also, setting out his grievance, sent a representation on 08.09.2022 thru e-mail to the respondents, which did not evoke any response. Therefore, he was advised to



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file the writ petition.

3. When the matter was taken up, it was indicated by the other side counsel that only in a case where the candidate made an attempt to any one of the four key answers given to Question No.97, would be awarded the four marks. Therefore, to take instructions and also aggrieved by the said condition 3.2(b)(vi) of the bulletin, the learned counsel for the writ petitioner, inadvertently, without taking leave/liberty of the Court to prosecute a fresh writ petition, withdrew the writ petition. The appellant also sent a representation thru e-mail on 29.09.2022. He also made a detailed representation to the respondents on 11.10.2022. Again finding no response, on the next day, he filed the second writ petition. But the learned single Judge has dismissed the writ petition by holding that the writ petitioner, having failed to obtain leave/permission to prosecute a fresh writ petition, is not entitled to file the second writ petition for the same cause of action and for the same relief. Aggrieved thereby, the present appeal has been filed.

4. Mr.R.Sankarasubbu, learned counsel appearing for the appellant, to



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maintain the writ appeal and also the second writ petition before the learned single Judge, placed before us the following judgments:-

- (1) (1962) 1 SCR 574 - *Daryao and others v. State of U.P. and others*;
- (2) (1983) 4 SCC 309 - *Kanpur University thru Vice Chancellor and others v. Samir Gupta and others*;
- (3) (2008) 1 SCC 494 - *Sarva Shramik Sanghatana (KV), Mumbai v. State of Maharashtra and others*;
- (4) (2012) 1 SCC 157 - *Sanchit Bansal and another v. Joint Admission Board and others*;
- (5) Division Bench judgment of High Court of Orissa, Cuttack dated 24.07.2018 made in W.P.(C) No.9890 of 2018 (*Dibya Jyoti Nanda v. CBSE and another*).

Relying upon the said judgments, it is his submission that when a poor counsel represents a strong and fair case of any litigant, inadvertently withdraws the writ petition without properly securing leave/liberty to prosecute a fresh writ petition, for the wrong committed by a lawyer/Advocate, innocent litigant cannot be made to suffer, which is the settled legal position. In the present case, when the appellant hails from the downtrodden community, namely, Scheduled Caste community and has also



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secured 92 marks which is 1 mark below 93 marks, which is the cut off marks to pass in the NEET examination, and he was wrongly denied four marks on account of framing a wrong Question No.97, he is entitled to come to this Court. But his case was not properly presented before the Court by the earlier counsel and withdrawn the writ petition. Therefore, the writ petitioner made a representation and filed the instant writ petition for the aforesaid prayer. Thus the writ petition is maintainable.

5. Again referring to Section 141 of the Code of Civil Procedure, he argued that the procedure put against the writ petitioner by the learned single Judge that after filing the writ petition, while withdrawing the same, leave should have been obtained for filing a fresh writ petition, failing which the second writ petition cannot be presented, is contrary to the said provision. A reading of Section 141 clearly shows that the procedure provided in this Court in regard to suits cannot be made applicable to any proceedings initiated under Article 226 of the Constitution. This legal aspect has been overlooked by the learned single Judge, he pleaded.



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6. Again taking support from Article 46 of the Constitution of India, he once again pleaded that a poor appellant hailing from Scheduled Caste community, having secured 92 marks in the NEET(UG)-2022 examination and has got a fair chance of success before this Court to get into the zone of consideration in the counselling, the learned single Judge ought to have entertained the writ petition, more particularly, when Article 46 of the Constitution states that the State shall promote with special care the educational and academic interest of the weaker sections of the people and in particular of the Scheduled Castes and Scheduled Tribes. This Court ought to have protected the interest of the appellant to do social justice. As this aspect also has been overlooked while dismissing the second writ petition, the impugned order has to go. Inasmuch as when the appellant's prayer for grant of four grace marks for erroneously framing the Question No.97 is answered finally, he would have certainly gone into the zone of consideration to take part in the counselling. Therefore, no prejudice would be caused to anyone, if the appeal is admitted and consequently his grievance is heard for awarding



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four grace marks for the wrong framing of Question No.97.

7. Mr.G.Rajagopalan, learned Senior Counsel appearing for the second respondent, heavily opposing the maintainability of the writ appeal, submitted that law is applicable to all. When it is trite law that either a suit or writ petition filed is withdrawn without securing leave/liberty from the Court, for the same cause of action and also for the same relief, the same party cannot file the second writ petition. This rule has been evolved only to avoid multiplicity of proceedings. If the argument advanced by the learned counsel appearing for the appellant to maintain the second writ petition that was dismissed for the reasons mentioned therein, is accepted, then every litigant, who suffered a dismissal by withdrawing the writ petition, will repeatedly visit the Court that would create multiplicity of proceedings leading to the arrears of cases. In support of his submissions, he relied upon the judgment of the Supreme Court in *Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and others, (1987) 1 SCC 5* and the Division Bench judgment of this Court dated 08.06.2011 made in Review



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Application No.72 of 2011 in Writ Petition No.16933 of 2009 (P.Shanmugam v. The Registrar General, High Court of Madras and another). Therefore, the impugned order passed by the learned single Judge dismissing the writ petition holding clearly that the writ petitioner having failed to secure leave/liberty to prosecute the second writ petition, is perfectly in order. Hence, no interference is called for, he pleaded.

8. Mrs.M.Sneha, learned counsel appearing for the fifth respondent, taking a pass over for getting written instructions from the fifth respondent, submitted that for the 6,067 seats available for the M.B.B.S Degree Course throughout the State of Tamil Nadu, there are 22,404 eligible candidates securing the cut off marks i.e., 93 marks waiting to take part in the counselling. She has also submitted that all the 22,404 candidates shown in the provisional list are entitled to get their names registered as per their choice so as to take part in the first round of counselling going to commence from 19.10.2022 and all of them are going to be called as per the ranking given in the provisional list for certificate verification and this process will



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continue till 28.10.2022. Finally, the allotment orders will also be issued through online on 30.10.2022. Thereafter, the selected candidates will join the college of their choice and if for any reason any candidate/candidates failed to join, these vacancies will also be filled up based on the cut off marks in the second round of counselling. She further submitted that the available vacancies for the Scheduled Caste candidates are only 900, whereas 4,112 eligible candidates belonging to Scheduled Caste community are shown in the provisional list. Therefore, the awarding of four grace marks, she pleaded, may not help the appellant to secure any seat for the M.B.B.S. Degree course in the Government seats for this academic year.

9. However, Mr.Sankarasubbu, learned counsel appearing for the appellant, at this stage, submitted that the writ petition has been filed not only for getting admission to the M.B.B.S.Degree Course, but also for getting the appellant eligible for securing admission in the Government/Self financing private medical colleges, both in the country and outside the country. Therefore, unless the appellant secures the pass marks in the NEET



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examination i.e., 93 marks, he will not become eligible to secure admission anywhere for the academic year 2022-23.

10. We have heard the learned counsel appearing for the parties. It is not in dispute that the appellant/writ petitioner, after finding that he has not been awarded the four marks for the Question No.97, immediately made a representation on 8.9.2022 to the authorities and finding no response, filed the writ petition on 9.9.2022 before this Court. However, the learned counsel who appeared for the writ petitioner, inadvertently, withdrew the writ petition to make a representation, without obtaining leave/liberty from the Court. Thereafter, he sent a representation thru e-mail to the respondents on 29.09.2022 espousing his grievance. He also made a detailed representation to the authorities on 11.10.2022 by registered post ventilating his grievance for the award of grace marks as he has got a fair chance of success to compete with the other eligible candidates. But the authorities did not respond to any of his representations. Therefore only, on the next day, the appellant was constrained to file the second writ petition before the Court.



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Therefore, on the peculiar facts and circumstances of this case, since the authorities concerned have not responded to the grievance of the appellant/writ petitioner, accepting the bona fide reasons, in the light of the settled legal position that a litigant should not suffer for the fault committed by the Advocate, as the appellant who is aspiring to pursue the medical course during the academic year 2022-23, we are inclined to entertain the writ appeal.

11. Besides, when the appellant/writ petitioner hailing from downtrodden community, has secured 92 marks in the NEET-(UG) 2022 examination, in view of the wrong key answers given to Question No.97, he failed to secure the four marks. It is also the admitted case of both parties that the key answers to Question No.97 have been wrongly given. It is not out of context to mention herein that Article 46 of the Constitution of India says that the State shall protect the economic interests of the weaker sections of the society, in particular, of the Scheduled Castes and Scheduled Tribes. In this context, Article 46 of the Constitution of India is extracted as follows:-



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"46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

12. A perusal of the above clearly shows that the State shall promote with special care the educational and economic interests of the weaker sections of the people, especially Scheduled Castes and Scheduled Tribes from social injustice. Therefore, the second respondent being instrumentality of the State cannot refuse to award the four marks to the appellant who belongs to the weaker section of the society. Moreover, it is also pertinent to refer to Section 141 of the Code of Civil Procedure, which is given as under:-

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.



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Explanation.--In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceedings under article 226 of the Constitution."

A careful perusal of the above provision would show that the procedure provided in this Court in regard to suits cannot be made applicable to any proceedings initiated under Article 226 of the Constitution of India. In this regard, useful reference can be had from the judgment of the Supreme Court in the case of *Sarva Shramik Sanghatana (KV), Mumbai v. State of Maharashtra and others*, (2008) 1 SCC 494, wherein the Supreme Court, while considering the issue as to the filing of the application under Section 25-O(1) of the Industrial Disputes Act, 1947 as to the closure of the undertaking, held that when the application was withdrawn without seeking liberty to file application, if need be, at a later stage, fresh application is held maintainable. Therefore, we are of the considered view that the writ appeal filed by the appellant is certainly entertainable, making it clear that the same is confined to the appellant alone, as he has diligently approached this Court without any delay. Further, inasmuch as the date for registration to take part



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in the counselling has started today (19.10.2022), the apprehension shown by the second respondent that this order would open a Pandora box, cannot hold the Court back from granting the relief in a genuine and bona fide case, when this Court has found against the second respondent in framing the key answers for Question No.97 wrongly. Therefore, the argument advanced by the learned Senior Counsel citing condition 3.2(b)(vi) of the information bulletin that unless a candidate makes an attempt, he would not be awarded the four marks is untenable, for the reason that the appellant, after finding that wrong answers have been given to the Question No.97, has chosen not to attempt the said question. Therefore, the said argument made by the learned Senior Counsel for the second respondent is repelled on the facts and circumstances of this case. In this context, paragraph-17 of the Division Bench judgment of the High Court of Orissa in *Dibya Jyoti Nanda v. CBSE and another*, W.P.(C) No.9890 of 2018 dated 24.07.2018 is extracted hereunder:-

"17. A casual submission made by the Director, NEET, CBSE, that if this Court interferes in this matter it would open a Pandora box, should not



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hold the Court back from granting relief in a genuine case where discrepancy in evaluation of marks has been found and not explained by the authorities."

13. For the foregoing reasons and conclusions, on consideration of the facts and circumstances of this case, while rejecting the arguments of the learned Senior Counsel appearing for the second respondent as to the maintainability of the writ appeal/second writ petition and also for not awarding the four grace marks, we hereby direct the respondents to award four grace marks to the appellant alone for the Question No.97 in respect of the NEET(UG)-2022 examination, for the reason that the said question has been wrongly framed as held by us in this order. Since it is represented before us that the registration for the counselling has started today, the second respondent is directed to issue the revised mark sheet, so that the appellant will be able to take part in the counselling, if he is otherwise coming in the zone of consideration as per the cut off marks fixed for the Scheduled Caste candidates, conducted by the respondents for securing admission to the



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M.B.B.S. Degree Course in the Government/self financing private medical colleges to be chosen by him in the State or outside the State, making it clear that this order is passed in the peculiar facts and circumstances of this case and may not be treated as a precedent.

14. With the above direction, the impugned order is set aside and the writ appeal stands allowed. Consequently, C.M.P.Nos.17914, 17915 of 2022 are closed. However, there is no order as to costs.

Speaking order

(T.R.,A.C.J.) (D.K.K.,J.)

Index : yes

19.10.2022

ss

To

1. The Secretary to Union of India
Ministry of Human Resource Development
122-C, Shastri Bavan
New Delhi-110 001

2. The National Testing Agency
Ministry of Human Resource Development
C-20, 1A/8, IITK Outreach Centre



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THE HON'BLE ACTING CHIEF JUSTICE
AND
D.KRISHNAKUMAR,J.

SS

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