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

Date of Decision: 2nd June, 2022

+ W.P.(C) 7866/2022 & CM APPL. 24035/2022 (*seeking stay*)

DR KHUNDONGBAM CHETAN Petitioner

Through: Mr. Abhijit Mani Tripathi, Advocate.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Kirtiman Singh, Ms Manmeet Kaur Sareen and Mr. Waize Ali Noor, Advocates for R-2 and 3.
Mr. Shaurya Sahay, Advocate for R-4.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J. (Oral):

1. The Petitioner [Dr. Khundongbam Chetan], a registered medical practitioner has qualified NEET-PG 2021 examination with All India Quota rank of 28858. Aspiring to get admission in the six-year post-MBBS direct DrNB course in Plastic and Reconstructive Surgery at Respondent No. 4-Institute [Shija Hospitals & Research Institute Pvt Ltd.], he opted for a seat at Respondent No.4-Institute for the said course in all rounds of counselling but, was the same not allotted to him. He contends that another candidate, with a higher rank, kept the seat blocked in the first as well as second round of counselling, but eventually never joined the said course, and consequently



the seat fell vacant on 04th March, 2022. In the afore-noted background, the Petitioner, *inter-alia*, contends that the vacant seat should be allotted to him or put up for a fresh round of counselling, failing which it would go waste.

2. Mr. Abhijit Mani Tripathi, counsel for the Petitioner, submits that common counselling for admission to PG courses was to be conducted (including DNB/ DrNB course), offered by Respondent No. 4-Institute, approved by Respondent No. 2 [National Board of Examinations/ “NBE”] and conducted by Respondent No. 3 [Medical Counselling Committee/ “MCC”], for the first time, pursuant to directions of the Supreme Court. In terms thereof, first round of counselling was held from 07th to 30th January, 2022 [“Round-1”] wherein the Petitioner applied for his first choice for the seat with Respondent No. 4-Institute in the DrNB course in Plastic and Reconstructive Surgery. However, another candidate [Dr. Roweena Eunice Niveditha], being higher in the merit list was allotted the seat. The second round of counselling was then conducted from 05th to 24th February, 2022 [“Round-2”] and the seat allotment *qua* the said course remained unchanged/ blocked and the Petitioner could not get the seat of his first choice. Later, as it transpires, Dr. Niveditha was allotted a seat in MS (Otorhinolaryngology) in CMC, Vellore on 24th February, 2022 and she submitted her resignation on 04th March, 2022.

3. Mr. Tripathi emphasises that since Dr. Niveditha did not join the course, Respondent No. 4-Institute sent an intimation to that effect to NBE and MCC. Subsequently, when Dr. Niveditha tendered her resignation, the institute immediately informed MCC i.e., the counselling authority,



regarding the vacancy and requested them to include the said vacant seat in further rounds of counselling. Subsequent reminders were sent by the said institute on 31st March, 2022, 16th April, 2022 and 09th May, 2022. However, Respondents failed to include the seat in any further round of counselling. Since the seat had become vacant, the concerned Respondents authorities ought to have placed the same in the MOP UP round which would have enabled the Petitioner to get admission against the seat. Mr. Tripathi submits that the Petitioner has a keen interest in the branch of Plastic and Reconstructive Surgery and has been aspiring for admission in this discipline for the last several years. Now that Dr. Niveditha has submitted her resignation, the vacant seat should be allotted to the Petitioner or a fresh round of counselling should be conducted. If the seat remains vacant for the next year, it will result in depriving medical students from learning and training opportunities *qua* the said super specialist course. The Petitioner is the only candidate who is pursuing its remedies to get admission in the said course and is also high in the merit list. He further states that a precious medical seat should not be wasted, and this would indeed not be in the interest of medical infrastructure of the country. Alternatively, he argues that fresh counselling be ordered if for any reason, the Court finds that the seat cannot be allotted to the Petitioner. In such an event, he is confident that Petitioner alone will get the admission, considering his higher rank.

4. On the objections taken by counsel for NEB and MCC, by placing reliance on the judgment of the Supreme Court in ***Dar-us-Slam Educational***



Trust & Ors. v. Medical Council of India and Ors.,¹ it is contended that reliance upon the said judgment is misplaced as in subsequent decisions of the Supreme Court in *Ashish Ranjan v. Union of India*,² and in *Association of Private Medical & Dental Colleges of Chhattisgarh v. State of Chhattisgarh*,³ it has been clarified that the directions given in the afore-said judgment would apply only to undergraduate courses and not postgraduate courses. Further, reliance is placed on a decision by a co-ordinate bench of this Court in *Dr. Shivam Chugh v. National Board of Examination and Ors.*,⁴ to contend that an identical argument urged by the counsel for NBE therein by placing reliance on the decision of *Dar-us-Slam* (*supra*), was rejected by the Court.

5. Mr. Kirtiman Singh, counsel for NBE and MCC, places reliance on the information bulletin of MCC to explain the manner in which the seats are allotted in the Round-1 and Round-2 of counselling. Mr. Singh submits that Petitioner's contention regarding Dr. Niveditha not joining/ reporting for the seat in question, is misplaced. The option of resigning from college is only allowed after Round-1 of MCC counselling and considering that the entire admission process is online – resignations are accepted only in online mode and not offline. The limitation for allowing resignations only after first round of counselling and not during or after Round-2, has been imposed in light of the judgment of the Supreme Court in *Dar-us-Slam* (*supra*). Thus, no candidate could resign from the seat at the end of Round-2 of MCC

¹ W.P.(C) 267 of 2017 with connected matter.

² W.P. (C) 76 of 2016.

³ (2017) 8 SCC 627.

⁴ 2019 SCC OnLine Del 10546.



counselling and consequently, no resignations during or after Round-2 of counselling can be permitted. Mr. Singh further stated that the conditions imposed in *Dar-us-Slam* (*supra*) are also applicable for admission to postgraduate courses.

6. The Court has given due consideration to the contentions advanced by the counsel for the parties.

7. The issue in the instant petition lies in a narrow canvas. The grievance of the Petitioner is regarding the deprivation of opportunity to obtain admission in the six-year post-MBBS direct DrNB course in Plastic and Reconstructive Surgery run by Respondent No. 4-Institute. According to the Petitioner, he has been denied of this opportunity as a consequence of the failure on part of NBE/ MCC to act on the communications addressed to them by Respondent No. 4-Institute, notifying that Dr. Niveditha, who had been allotted the seat in the first and second round of counselling (Round-1 and Round-2), failed to join against the allotted seat, leaving it vacant.

8. Assuming Respondent No. 4-Institute was punctilious and acted with due promptitude intimating MCC about the vacant seat, the question nonetheless is whether such 'vacant seat' should be allotted to the Petitioner or another MOP UP round or stray vacancy round counselling should be directed. The seat is question is in a niche post-MBBS course and leaving the same vacant, ostensibly looks like a wastage of a national resource, which the Courts have often endeavoured to circumvent. However, this cannot be the sole guiding reason. Pertinent question arises *qua* the legal



right of the Petitioner.

9. As per MCC records, the seat allotted to Dr. Niveditha in Round-1 of counselling was shown as reported. The last date for her to resign from the allotted seat after Round-1 of counselling was 03rd February, 2022. Indeed, this was not done by her, and thus, the seat then stood finally allotted to Dr. Niveditha. While she may not have physically turned up to take up the allotted seat, however, it cannot be denied that Dr. Niveditha had not resigned or given up her claim on the allotted seat. The concept of resigning from the seat is explained in the information bulletin given in a question-answer form by MCC, the same has been reproduced by them in their counter affidavit, which reads as follows: -

***“Q. No. 16:** Is it necessary to join allotted Medical/ Dental College in Round-1 to get chance to participate in next round (2nd Round)?*

***Ans:** If a candidate does not report at the allotted institute in Round-1, this will be considered as ‘Free Exit’ (option available only in Round-1). However, candidates who have not joined (the round- 1 allotted seat) by availing the free exit option may participate again in /Round-2 after logging in with their earlier Registration details.*

*In case a candidate wants to ensure /retain his/her Round-1 seat and wants to **upgrade** his/her allotted seat, he/she **should join** Round-1 seat and give willingness for Up-gradation at the allotted college. However, if a candidate wants to participate directly in Round – 2 without retaining the Round-1 seat he/she may not join the college and do choice filling for Round-2 since Round-1 has free exit option. In the above said case the Round-1 seat of the candidate will be cancelled and he/she cannot claim the Round-1 seat.*

Please not that in case you are satisfied with the seat allotted to you in Round-1 and do not give willingness for up-gradation in Round-2 as ‘Yes’, you will not be considered eligible for participating in Round-2 i.e. for upgradation of your choice.

***Q. No. 17:** What is second round of online allotment process & who are eligible for the same?*

***Ans:** Round-2 of online allotment process is up-gradation round wherein the candidates who have not registered initially during round-1 can register and participate for round-2.*

*• Candidates who have **joined** Round-1 allotted seat can opt for up-*



gradation during Round-2. And, candidates who were allotted Round-1 seat but did not join it, can also participate without fresh registration.

Therefore, the following categories of Candidates are eligible for seat allotment in 2nd Round:

[...]

Category-III: Candidates who have reported/joined at allotted institute during the joining period of round-1 of allotment and submitted willingness for participating in second round up- gradation as 'Yes'.

[...]

Q. No. 20: If I give consent for up-gradation of my choice during Round-1 and if my choice is upgraded, is it necessary to join at college allotted during second round? Or in case I change my decision of upgrading choice, can I continue to study in college allotted through first round of allotment?

Ans: In case candidate is allotted seat during the Round-1 of allotment process and his choice is upgraded in Round-2, the seat allotted during the first round will be automatically cancelled immediately (and allotted to somebody else eligible as per merit) and candidate will have to join the college / seat allotted during second round. If candidate does not join the college/seat allotted during the second round, within stipulated time, as per schedule, his/her Refundable Security Deposit will be forfeited. After joining the allotted institute in Round-2 the candidate will not be eligible to participate in any other round of counselling (For AIQ as well as Deemed/ Central University counselling)/ The names of such candidates who have joined in Round-2 of AIQ/ Deemed/ Central University/DNB will be circulated to all state counselling authorities for prohibiting them to participate in any other counselling. Seat can also be up-graded in the same college by change of category i.e. ST/SC/ OBC to UR or PwD to non-PwD seat) in such a case the candidate has to take fresh admission on the up-graded seat. Candidate who did not get any Up-gradation in Round-2 will continue to study in the same college."

10. In light of the above scheme, Petitioner's contention that Dr. Niveditha had, never reported/ joined the institute, is misplaced. The seat was allotted to her and she retained it during Round-2 of counselling and it did not fall vacant till such time she submitted her resignation.

11. Further, Supreme Court observations in ***Dar-us-Slam*** (*supra*)



reproduced hereinafter are also relevant: -

“3. As per the judgment of this Hon’ble Court in the case of *Ashish Ranjan vs. Union of India & Ors.* [(2016) 11 SCC 225], there shall be only two rounds of common counselling each conducted by the DGHS/State Government or authority designated by the State Government for All India Quota (including Deemed University) and State Quota seats respectively.

4. After the second round of counselling for All India Quota seats, the students who take admission in All India Quota seats should not be allowed/permitted to vacate the seats. This would ensure that very few seats are reverted to the State Quota and also All India Quota seats are filled by students from the all India merit list only. The students who take admission and secure admission in Deemed Universities pursuant to the second round of counselling conducted by the DGHS shall not be eligible to participate in any other counselling.”

12. Although, the Petitioner has contended that the decision in *Dar-us-Slam* (*supra*) is not applicable to postgraduate courses, however, the order of the Apex Court in SLP(C) (No.) 10487/2021 dated 16th December, 2021 [titled - *Nihila P. P. v. The Medical Counselling Committee (MCC) & Ors.*] suggests to the contrary. Relevant portions of the said decision are reproduced as under: -

“The proposed modified scheme of Online 4 rounds of counselling will be in tune with the prevailing norms of counselling (including the fees and security deposit) being followed for Central Institutes/Universities. The silent points of the scheme are as follows:

“a) There will be 04 rounds of Online counselling i.e. AIQ Round I, AIQ Round 2, AIQ Mop-up Round and AIQ Stray Vacancy Round.

b) The seats which were earlier reverted back to the respective States after the completion of Round 2 of AIQ will continue to be filled in the AIQ MopUp Round and AIQ Stray Vacancy Round to be conducted by MCC of DGHS, MoHFW in online mode.

c) The said rounds will only be conducted for the AIQ seats having All India character which are contributed by the States for 15% UG seats and 50% PG seats.

d) Fresh registration of candidates will be allowed in:

AIQ Round 1

AIQ Round 2

AIQ Mop-Up Round.

e) There will be no fresh registration for candidates in the AIQ Stray Vacancy Round.

f) There will be an option for up-gradation and free exit, only in Round 1 of the



AIQ counselling.

g) There will not be an option of up-gradation to Mop-up round from round 2.

h) Candidates who have joined the allotted seat in Round 2 and further rounds of counselling will not be allowed to resign and will also be ineligible to take part in further rounds of any type of counselling.

i) Candidates who have not joined the allotted seat in Round 2 will be eligible for further rounds of counselling subject to forfeiture of security deposit and fresh registration in only mop-up round.

j) The provisions with regard to security deposit, option of free exit and eligibility for participation will be as per the Gazette Notification No.MCI-34(41)/2018-Med./109835 dated 18/05/2018.”.

This Court has been informed that the modified schemes shall be implemented for the current year 2021- 2022 for admissions to NEET UG and PG.”

13. The Court finds merit in the contention of Mr. Singh that after Round-2 of counselling it was impermissible for Dr. Niveditha to resign from the said seat. While the Petitioner is certainly not such a candidate that has resigned from the said seat, however, if resignation was forbidden, the question arises as to whether such a seat can be considered as vacant which should have been put up for fresh round of counselling, as requested by the Petitioner. In that light, the contention *qua* resignation being prohibited assumes significance. The Court cannot accept the contention that simply because the candidate never joined the allotted course, within the stipulated time, the seat fell vacant, obligating MCC to put it in a fresh round of counselling. This cannot be interpreted from a reading of the judgments referred above and the conditions put in the information bulletin, extracted in the preceding paragraphs. It is a case of resignation and not of non-joining of a candidate, as put forth by the Petitioner. Dr. Niveditha had indeed joined / reported at the allotted institute.

14. While the Court agrees with the Petitioner that he did not have any



role to play in bringing about the circumstances which led to the present situation, however, the relevant question as noted above remains as to whether fresh MOP UP/ stray counselling rounds ought to be conducted for the said seat, on the assumption that the same had become vacant and ought to have been added to the pool for MOP-UP round. The Court cannot assume that there is an administrative lapse on part of NBE, MCC or counselling authorities. In this regard, the Court does not find any vested right in favour of the Petitioner and therefore, the principle of *no fault, no prejudice*, pressed by the Petitioner, is not applicable. The Petitioner's eligibility and merit also cannot be the sole determinant for succeeding in the instant case. Merit claim is always relative and it cannot be ruled out that there would many other deserving meritorious candidates having higher rank, who would also be eligible for the seat in question. Therefore, Petitioner cannot, on the basis of being vigilant, steal a march over others and claim a right of allotment of the seat.

15. The Court has certainly weighed the contention urged by the Petitioner *qua* wastage of a post-MBBS seat being contrary to the public interest. However, at the same time, the Court is mindful of the fact that direction for fresh round of counselling would be upsetting the nature of things that stand settled. The Court has also been informed that the admission process has been completed on 07th May, 2022. A detailed scheme has been framed for admission process through orders in terms of the orders of the Apex Court and in case of any shortfall or seat not being filled up, it does not necessarily mean that one more round of counselling should be conducted by MCC. It would not be advisable to go on altering



the scheme as and when the seats are found to be vacant. If such an approach is adopted, the process of admission will go on endlessly and be entirely incapable of conclusion, until all the seats under All India Quota are filled up and that cannot be the object of the scheme formulated for conducting MCC counselling. If fresh counselling is conducted, all the candidates, who have appeared in the NEET-PG examinations, would have to be given an opportunity to apply for the seat in question, and not the Petitioner alone. This would result in opening a pandora's box *qua* vacant seats where candidates would have resigned. Therefore, to embark upon such a process would perturb the entire admission process and courts have repeatedly cautioned against adopting this approach.

16. For the fore-going reasons, the Court finds no merit in the present petition and accordingly, the same is dismissed, along with other pending applications.

SANJEEV NARULA, J

JUNE 2, 2022
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