

HIGH COURT OF MADHYA PRADESH : JABALPUR**(Division Bench)****W.P. No.5856/2016**

Dr. Sunny Juneja and othersPetitioners
versus
 State of M.P. and othersRespondents

W.P. No.13304/2015

Ayush Mehta Petitioner
versus
 State of M.P. and othersRespondents

W.P. No.5737/2016

Dr. Aashish Anand Gupta and anotherPetitioners
versus
 State of M.P. and othersRespondents

W.P. No.6554/2016

Dr. Amit Kumar JainPetitioners
versus
 State of M.P. and othersRespondents

W.P. No.6555/2016

Dr. Avijit Singh KhanujaPetitioner
versus
 State of M.P. and othersRespondents

W.P. No.6664/2016

Dr. Raghvendra Pratap Singh Thakur and anotherPetitioners
versus
 State of M.P. and othersRespondents

W.P. No.6878/2016

Dr. Prakhar SinghalPetitioner
versus
 State of M.P. and othersRespondents

Present: Hon'ble Shri Justice Hemant Gupta, Chief Justice
Hon'ble Shri Justice Vijay Kumar Shukla

Appearance:

Shri Anil Khare, Senior Advocate, Shri Manoj Sharma, Shri Pramod Thakre, Shri H.S. Chhabra, Advocates for the petitioners in the respective petitions.

Shri Sanjay Dwivedi, Dy. Advocate General for the respondents/State.

Shri Rahul Diwakar and Shri Aditya Khandekar, Advocates for the M.P. Professional Examination Board.

Whether approved for reporting : Yes

Law laid down:

- The Professional Examination Board cannot change the reasoning in support of the order which was passed and on which basis the show cause notice was issued. An order passed, cannot be permitted to supplant the reasons to support the allegations of use of unfair means.

Judgments relied upon:

(1978) 1 SCC 405 (Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others)

Judgment distinguished:

(2010) 6 SCC 614 (Chairman, All India Railway Recruitment Board v. K. Shyam Kumar and others)

2014 (III) MPJR 178 (Pratibha Singh Ku. (Minor) vs. The State of Madhya Pradesh and others)

Significant paragraphs: 11 & 14.

O R D E R (Oral)

{30th January, 2018}

Per: Hemant Gupta, Chief Justice:

1. This bunch of Writ Petitions is directed against an order passed by the Madhya Pradesh Professional Examination Board (for short “**the Board**”) on 20.02.2015 whereby, candidature of twelve candidates for admission to

Post Graduate Courses in Medicine was cancelled. For the sake of convenience, facts are taken from W.P. No.5856/2016.

2. The brief facts leading to the present petitions are that a Pre Post Graduate Entrance Examination, 2012 was held on 11.03.2012. As many as 3152 candidates appeared in the examination. After the result was declared and the petitioners were found meritorious and admitted in the Medical Colleges to undergo the Post Graduate Courses, the matter was investigated by the Special Task Force constituted by the State in respect of allegations of use of unfair means in the said examination. Eight candidates were charge-sheeted and also their admission cancelled vide order dated 29.03.2014. This Court in W.P. No.6397/2014 and other petitions, directed the Board to re-examine the candidature of all the candidates vide order dated 16.12.2014 while setting aside the cancellation of candidature of eight candidates. It is thereafter, the present order has been passed in respect of twelve candidates.

3. After the order was passed by this Court on 16.12.2014, a show cause notice was served upon 22 candidates on 13.12.2016. The show cause notice was in respect of model answer key of four sets of 200 questions, the copy of which was appended with the show cause notice as Appendix-I. The model answer key attached with the show cause notice is in a tabulated format giving answers of 200 questions of the four sets.

4. The petitioners responded to such show cause notice. After considering the reply filed, the Board relied upon Three Sigma rule i.e. (Average + 3 times of Standard Deviation) to arrive at a conclusion that 12

candidates have obtained more than 8 marks out of the 14 disputed questions. On the basis of such benchmark, the candidature of 12 candidates was cancelled. The Board has also arrived at a conclusion that out of 14 disputed questions, the 7 questions were cancelled whereas the answer key in respect of 7 questions was revised. It is also admitted fact that all the candidates were given marks for the seven questions cancelled. Since the answer key of the 12 candidates in respect of 14 questions is said to have matched with the model answer key, therefore, applying Three Sigma rule, the candidature of 12 candidates was cancelled.

5. The matter has been heard on different dates. The Board has been called upon to explain an argument raised by the learned counsel for the petitioners that while canceling the result of petitioners, 14 questions have been taken into consideration whereas only 7 questions should have been considered while examining as to whether the petitioners have indulged in unfair means. Learned Counsel for the Board sought some time to explain the anomaly, if any and if there is no anomaly, the Counsel was directed to produce the revised result by excluding the 7 questions, marks for which have been given to all the candidates.

6. After the said order was passed, an additional affidavit dated 24.10.2017 has been filed to contend that the petitioners and other similarly situated students have cheated in the examination and in connivance with the officers of the Board, they had obtained the model answer papers of the question paper one day prior to the examination and on the basis of the

model answer paper they have appeared in the examination and have secured beneficial marks. The stand of the Board is the following:-

“5. That in order to conduct an enquiry a three member committee was constituted and in order to catch the students who have cheated and have answered the marks exactly as per the model answer sheet, the best was available to the committee was to catch them by changed/alterd 14 questions of the model answer book. The approach of the committee was that the students whose answers match with the changed/alterd/modified/cancelled 14 questions of the model answer key will mean that they have cheated with the model answer key therefore they had applied the formula of 3 sigma rule which has already been upheld by this Hon'ble Court in W.P. No.1918 of 2014 in judgment dated 24.09.2014.”

7. It was also pointed out that the issue of use of unfair means is a separate question than the preparation of merit for the purpose of admission for which marks have been given to all the candidates including the petitioners but since the petitioners have been found to be indulging in unfair means, therefore, their candidature has been cancelled.

8. Subsequently, another order was passed on 30.10.2017 when learned counsel for the Board sought some time to file an affidavit in respect of all the petitioners how the marks in Column No.7 as reproduced in the impugned order has been arrived at. Thereafter, an additional affidavit has been filed by the Board on 10.11.2017. The petitioners have filed reply to such affidavits as well. Subsequently, on 27.11.2017 the learned counsel for the Board was directed to produce the original record which led to passing of the impugned order on 20.02.2015.

9. Mr. Diwakar has produced photocopy of the documents as original record is said to be with C.B.I. The said documents (72 pages) are kept on

record. It is pointed out by Mr. Diwakar that the Special Task Force, investigating the use of unfair means in the examination conducted by the VYAPAM has taken into possession Envelope “K”. The Envelope “K” is said to be an envelope containing model answers with questions prepared by the examination moderator. He refers to the relevant condition which read as under:-

“12. DESPATCH OF QUESTION PAPER:

(i)

(ii) The Key for objective type questions along with the solutions for numerical problem and list of reference books and the name of the reference books should be put inside the corresponding Temper Proof Envelopes “K” (No.....). All the entries on the top of the Envelope should be duly filled and should be sealed.

(iii)

10. The envelope “K” is said to contain the questions as well as model answer key of the questions which was in the hands of Dr. Pankaj Trivedi, Director of the Board. The allegation is that Dr. Pankaj Trivedi facilitated the handing over of such questions along with the answers to the petitioners to attempt the OMR answer sheets a day before the examination.

11. We have heard learned counsel for the parties at length and find that the stand of the Board is contradictory to what was stated in the show cause notice dated 13.12.2016. In the said show cause notice, the Appendix-I is the model answer keys of four sets. Such model answers have no questions attached thereto. Since, each model answer of a set has 200 answers, thus, it will be practically difficult for any person to co-relate the questions with the model answers, which is made basis of cancellation of the candidature of the

petitioners. The stand of the Board that the questions and answers both were available with the candidates is not part of the allegation on the basis of which show cause notice was served upon the petitioners. The Board cannot be permitted to change its stand than what was taken in the show cause notice and the order passed. The Board cannot give additional reasons to support the allegation of use of unfair means in the writ petition. The reference has been made to **Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others, (1978) 1 SCC 405**, wherein the Court held as under:-

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16]* :

“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”

Orders are not like old wine becoming better as they grow older.”

12. Learned counsel for the Board relies upon a Supreme Court judgment in the case of **Chairman, All India Railway Recruitment Board v. K.**

Shyam Kumar and others, (2010) 6 SCC 614 to contend that since it is a case of mass copying, therefore, the principle laid down in Mohinder Singh Gill's case would not be applicable. Learned counsel for the respondents relies upon para 45 of the judgment which read as under:-

“45. We are of the view that the decision-maker can always rely upon subsequent materials to support the decision already taken when larger public interest is involved. This Court in *Madhyamic Shiksha Mandal, M.P. v. Abhilash Shiksha Prasar Samiti*, (1998) 9 SCC 236 found no irregularity in placing reliance on a subsequent report to sustain the cancellation of the examination conducted where there were serious allegations of mass copying. The principle laid down in Mohinder Singh Gill case is not applicable where larger public interest is involved and in such situations, additional grounds can be looked into to examine the validity of an order. The finding recorded by the High Court that the report of CBI cannot be looked into to examine the validity of the order dated 4-6-2004, cannot be sustained.”

13. Learned counsel for the respondents also relies upon a Division Bench judgment of this Court in the case of **Pratibha Singh Ku. (Minor) vs. The State of Madhya Pradesh & Ors., 2014 (III) MPJR 178** wherein, the question examined was as to whether Professional Examination Board has been legally constituted. Different affidavits were filed on behalf of the respondents including the Board, but, the Court found that if in the extracts of the office noting and the original record have not been expressly adverted to in the reply affidavit which was prepared without proper research and perhaps in haste, therefore, the omission or lapse cannot be the basis to answer the issue under consideration disregarding the factual position

emanating from the office noting and the original official record maintained in the ordinary course of justice. The relevant extract read as under:-

“21. After having considered the rival submissions, the moot question that arises for consideration is: whether the existing Board has been lawfully constituted and was competent to enquire into matters pertaining to pre-admission professional examination conducted by it? No doubt, the thrust of challenge of the petitioners was founded on the provisions of the Act of 2007 (I). Even the respondents, including the Board, while opposing the said grounds responded as if the existing Board was functioning and exercising powers under the Act of 2007(I). That stand, obviously, was taken in the written response filed by the Board without proper research and, in fact, contrary to the factual situation emerging from the official record. It is only during the course of arguments, while responding to the queries posed by the Court, effort was made to dig out the relevant official records to justify the existence of the present Board and its authority. Indeed, the extracts of the office notings and the original record have not been expressly adverted to in the reply-affidavit filed by the Board, which, as aforesaid, was prepared without proper research and perhaps in haste on instructions of the uninformed officials. The draftsman of the affidavit did not think it necessary to enquire into all the relevant facts before filing the return of the Board. That omission or lapse, however, cannot be the basis to answer the issue under consideration disregarding the factual position emanating from the office notings and the original official record maintained in the ordinary course of business. To do substantial justice and expound the correct factual and legal position on the issue under consideration, in our opinion, is the bounden duty of the Court. For that, the Court can look into the office notings in the original official record and not answer the issue merely on the basis of incorrect stand taken in the reply affidavit filed on behalf of the Board. We, therefore, hold that in larger public interest the Board must be allowed to modify its stand consistent with the official record and to place the same on record before the Court.”

14. However, we find that both the judgments are not applicable to the facts of the present case. It is not a case where the show cause notice was

served in haste but was served after there was a direction of this Court setting aside the cancellation of the candidature of eight candidates. The Board has relied upon specific model answers along with the show cause notice. Such model answers, as per the arguments of Mr. Diwakar, were not the answers leaked but the answer key prepared by the Paper Setter or by the moderator. Such was not the allegation levelled in the show cause notice. Therefore, there is complete change in stand from what is given in the show cause notice and what is sought to be relied upon during the course of arguments. Therefore, the judgment in **All India Railway Recruitment Board (supra)** is of no help when the present is not a case of mass copying but use of unfair means by 22 candidates out of over 3000 candidates. The finding of use of unfair means is arrived at on the basis of inferences rather than any direct evidence. It is not a case of direct evidence of copying but on the basis of Three Sigma rule which prompted the Board to cancel the candidature of petitioners. The judgment of this Court is again not applicable where the constitution and functioning of the Board itself was subject matter of examination. Therefore, we find that the judgments referred to by the learned counsel for the respondents are not applicable in the facts of the present case.

15. Consequently, we **allow** the present writ petitions and set aside the order dated 20.02.2015. The respondents shall grant consequential benefits to the petitioners in accordance with law.

(Hemant Gupta)
Chief Justice

(Vijay Kumar Shukla)
Judge