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

% **Date of decision: 28th May, 2012**

\+ **LPA No.487/2011**

ALL INDIA INSTITUTE OF MEDICAL SCIENCES **.....** Appellant
Through: Mr. Sahil S. Chauhan, Adv for Mr. Mehmood Pracha, Adv.

Versus

VIKRANT BHURIA **.....** Respondent
Through: None.

CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This intra court appeal impugns the order dated 22nd December, 2010 of the learned Single Judge dismissing *in limine* WP(C) No. 8558/2010 preferred by the appellant. The said writ petition was preferred impugning the decision dated 12th November, 2010 of the Central Information Commission (CIC) directing the appellant to furnish to the respondent the information sought by the respondent. Notice of this appeal and of the application for condonation of 106 days delay in filing this appeal was issued vide order dated 26th May, 2011 and the operation of the order dated 22nd December, 2010 of the learned Single Judge was also stayed. The

respondent remained unserved with the report that "a lady at the address of the respondent refused to accept the notice on the ground that the respondent was working at "Jabwa" and she had no knowledge of the notice". The respondent was directed to be served afresh but no steps were taken by the appellant. When the matter came up before us on 1st March, 2012, being of the view that the matter was fully covered by the judgment of the Supreme Court in ***The Institute of Chartered Accountants of India v. Shaunak H. Satya*** (2011) 8 SCC 781, the counsel for the appellant was asked to satisfy this Court as to the merit of this appeal. The counsel for the appellant sought adjournment from time to time and in these circumstances on 30th March, 2012 orders were reserved in the appeal with liberty to the counsel for the appellant to file written arguments. Written arguments dated 11th April, 2012 have been filed by the appellant and which have been considered by us.

2. The respondent in his application dated 5th April, 2010 had sought the following information from the Information Officer of the appellant.

> "1. Certified copies of original questions papers of all Mch super-speciality entrance exam conducted from 2005-2010.

2. Certified copies of correct answers of all respective questions asked in Mch super-speciality entrance exam conducted from 2005-2010."

3. The Information Officer of the appellant vide reply dated 21st April, 2010 refused to supply the information sought on the ground that the "questions and their answers are prepared and edited by AIIMS, thus the product remains 'intellectual property' of AIIMS. Since these questions are part of the question bank and likely to be used again, the supply of question booklet would be against larger public interest". The provisions of Section 8 (1) (d) and 8(1) (e) of the Right to Information Act, 2005 were also invoked.

4. The respondent preferred an appeal to the First Appellate Authority. The First Appellate Authority sought the comments of the appellant AIIMS. AIIMS, besides reiterating what was replied by its Information Officer added that the information asked was a part of confidential documents which compromises the process of selection and thus could not be disclosed. Though the order of the First Appellate Authority is not found in the paper book, but it appears that the appeal was dismissed as the respondent preferred a second appeal to the CIC.

5. It was the contention of the appellant before the CIC that there are limited number of questions available with regard to super-speciality subjects in the question bank and that the disclosure of such questions would only encourage the students appearing for the exam to simply memorize the answers for the exam, thereby adversely affecting the selection of good candidates for super-speciality courses. It was thus argued that the question papers of the entrance examination for super-speciality courses could not be made public.

6. CIC vide its order dated 12th November, 2010 (supra), noticing the admission of the appellant that the question papers could not be termed as 'intellectual property' and observing that the appellant had been unable to invoke any exemption sub-clause of Section 8(1) of the Act to deny information and further holding that the refusal of information was not tenable under the Act, allowed the appeal of the respondent and directed the appellant to provide complete information to the respondent.

7. The learned Single Judge, as aforesaid dismissed the writ petition of the appellant challenging the aforesaid order of CIC *in limine* observing that the appellant had not been able to show how the disclosure of the entrance

exam question papers would adversely affect the competitive position of any third party and thus Section 8(1)(d) was not attracted. It was further observed that there was no fiduciary relationship between the experts who helped to develop the question bank and the appellant and thus Section 8(1)(e) also could not be attracted.

8. The appellant in its written submissions before us urges:

i. that the subject matter of this appeal is not covered by the judgment of the Supreme Court in ***Shaunak H. Satya*** (supra) as the facts and circumstances are completely different;

ii. that the entrance examination for super-speciality courses was introduced by the appellant only in the year 2005;

iii. that at the level of super-speciality examinations, there can be very limited questions, which are developed gradually; that such question papers are not in public domain; that a declaration is also taken from the examinee appearing in the said examination that they will not copy the questions from the question papers or carry the same;

iv. per contra, in ***Shaunak H. Satya*** (supra) the Institute of Chartered Accountants (ICA) was voluntarily publishing the suggested answers of the question papers in the form of a paper book and offering it for sale every year after examination and it was owing to the said peculiar fact that it was held that disclosure thereof would not harm the competitive position of any third party;

v. that the information seeker in ***Shaunak H. Satya*** (supra) was a candidate who had failed in examination and who was raising a question of corruption and accountability in the checking of question papers; per contra the respondent herein is neither a candidate nor has appeared in any of the super-speciality courses examination conducted by the appellant;

vi. that the appellant consults the subject experts, designs the question papers and takes model answers in respect of each question papers; such question papers prepared by experts in a particular manner for the appellant are original literary work and copyright in respect thereof vests in the appellant;

vii that the examinees taking the said examination are informed by a stipulation to the said effect on the admit card itself that civil and criminal proceedings will be instituted if found taking or attempting to take any part of the question booklets;

viii. that copyright of appellant is protected under Section 8(1)(d);

ix. that Section 9 of the Act also requires the Information Officer to reject a request for information, access whereto would involve an infringement of copyright subsisting in a person other than a State;

x. that the appellant also gives a declaration to the paper setters to protect their literary work - reliance in this regard is placed on Section 57 of the Copyright Act, 1957;

xi. that at the stage of super-speciality, there can be very limited questions which can be framed and if the question papers of all the examinations conducted from 2005-2010 are disclosed, then all possible questions which can be asked would be in public

domain and that would affect the competitive position of students taking the examinations.

9. We have minutely considered the judgment of the Apex Court in ***Shaunak H. Satya*** (supra) in the light of the contentions aforesaid of the appellant and find -

i. that the information seeker therein was an unsuccessful examinee of the examination qua which information was sought;

ii. that the ICA had pleaded confidentiality and invoked Section 8(1)(e) of the Act for denying the information as to "number of times the marks of any candidate or class of candidates had been revised, the criteria used for the same, the quantum of such revision and the authority which exercised the said power to revise the marks";

ii. that the CIC in that case had upheld the order refusing disclosure observing that the disclosure would seriously and irretrievably compromise the entire examination process and the instructions issued by the Examination Conducting Public Authority to its examiners are strictly confidential;

iii. it was also observed that the book annually prepared and sold by the ICA was providing 'solutions' to the questions and not 'model answers';

iv. however the High Court in that case had directed disclosure for the reason of the suggested answers being published and sold in open market by the ICA itself and there being thus no confidentiality with respect thereto. It was also held that the confidentiality disappeared when the result of the examination was declared.

10. The Supreme Court, on the aforesaid finding, held-

i. that though the question papers were intellectual property of the ICA but the exemption under Section 8(1)(d) is available only in regard to intellectual property disclosure of which would harm the competitive position of any third party;

ii. that what may be exempted from disclosure at one point of time may cease to be exempted at a later point of time;

iii. that though the question papers and the solutions/model answers and instructions cannot be disclosed before the

examination but the disclosure, after the examination is held would not harm the competitive position of any third party inasmuch as the question paper is disclosed 'to everyone' at the time of examination and the ICA was itself publishing the suggested answers in the form of a book for sale every year, after the examination;

iv. the word "State" used in Section 9 of the Act refers to the Central Government or the State Government, Parliament or Legislature of a State or any local or other authority as described under Gazette of the Constitution;

v. use of the expression "State" instead of "public authority" showed that State includes even non-government organizations financed directly or indirectly by funds provided by the appropriate Government;

vi. ICA being a 'State' was not entitled to claim protection against disclosure under Section 9.

vii. furnishing of information by an examining body, in response to a query under RTI Act, may not be termed as an infringement of copyright. The instructions and solutions to questions communicated by the examining body to the examiners, head examiners and moderators are information available to such persons in their fiduciary relationship and therefore exempted from disclosure under section 8(1)(d) of the Act and there is no larger public interest requiring denial of the statutory exemption regarding such information;

viii. the competent authorities under the RTI Act have to maintain a proper balance so that while achieving transparency, the demand for information does not reach unmanageable proportions affecting other public interests, which include efficient operation of public authorities and government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources.

11. The dissection aforesaid of the judgment ***Shaunak H. Satya*** in the light of the arguments of the appellant noted above does show that the

learned Single Judge has not dealt therewith. We have satisfied ourselves from perusal of the writ record that, at least in the writ petition, the same grounds were taken, whether orally urged or not. The same do require consideration and we do not at this stage deem it appropriate to remand the matter to the Single Judge.

12. We are conscious that though notice of this appeal was issued to the respondent but the respondent remains unserved. We have wondered whether to again list this appeal for service of the respondent, to consider the aforesaid arguments of the appellant and the response if any of the respondent thereto but have decided against the said course, finding the respondent to be a resident of Indore, having participated in the hearing before the CIC also through audio conferencing and also for the reason that inspite of the order of the learned Single Judge having remained stayed for the last nearly two years, the respondent has not made any effort to join these proceedings. We have in the circumstances opted to decipher the contentions of the respondent from the memoranda of the first and the second appeals on record and from his contention in the audio conferencing, as recorded in the order of the CIC.

13. The respondent in the memorandum of first appeal, while admitting the question papers and model answers to be intellectual property of appellant, had pleaded that publication thereof was in larger public interest as the aspiring students would be able to prepare and understand the pattern of questions asked in super-speciality entrance examination in future. It was also pleaded that question papers of most of the other examinations held were available to the students and generally only 10-20% of the questions were repeated. It was also his case that with the galloping advancement in medical science, the average student is not able to understand what to study and follow and preparation for the examination would be facilitated for the prospective examinees if the question papers are made public. In the memorandum of the second appeal it was also pleaded that when the best faculty was available to the appellant, if did not need to depend on old question papers. During the hearing via audio conferencing before the CIC, the respondent had contended that the question papers could not be termed as intellectual property and it was in larger public interest to provide the questions to the aspiring students who will be able to understand the pattern in which the questions are framed.

14. We tend to agree with the counsel for the appellant that the judgment of the Apex Court in ***Shaunak H. Satya*** (supra) cannot be blindly applied to the facts of the present case. The judgment of the Apex Court was in the backdrop of the question papers in that case being available to the examinees during the examination and being also sold together with suggested answers after the examination. Per contra in the present case, the question papers comprises only of multiple choice questions and are such which cannot be carried out from the examination hall by the examinees and in which examination there is an express prohibition against copying or carrying out of the question papers. Thus the reasoning given by the Supreme Court does not apply to the facts of the present case.

15. We are satisfied that the nature of the examination, subject matter of this appeal, is materially different from the examination considered by the Supreme Court in the judgment supra. There are few seats, often limited to one only, in such super-speciality courses and the examinees are highly qualified, post graduates in the field of medicine. Though the respondent, as aforesaid, has paid tributes to the faculty of the appellant and credited them with the ingenuity to churn out now questions year after year but we cannot ignore the statement in the memorandum of this appeal supported by the

affidavit of the Sub-Dean (Examinations) of the appellant to the effect that the number of multiple choice questions which can be framed for a competitive examination for admission to a super-speciality course dealing with one organ only of the human body, are limited. This plea is duly supported by the prohibition on the examinees from copying or carrying out from the examination hall the question papers or any part thereof. We have no reason to reject such expert view.

16. The Sub-Dean of Examinations of the appellant in the Memorandum of this appeal has further pleaded that if question papers are so disclosed, the possibility of the examination not resulting in the selection of the best candidate cannot be ruled out. It is pleaded that knowledge of the question papers of all the previous years with correct answers may lead to selection of a student with good memory rather than an analytical mind. It is also pleaded that setting up of such question papers besides intellectual efforts also entails expenditure. The possibility of appellant, in a given year cutting the said expenditure by picking up questions from its question bank is thus plausible and which factor was considered by the Supreme Court also in the judgment aforesaid.

17. We also need to remind ourselves of the line of the judgments of which reference may only be made to ***State of Tamil Nadu Vs. K. Shyam Sunder*** AIR 2011 SC 3470, ***The Bihar School Examination Board Vs. Subhas Chandra Sinha*** (1970) 1 SCC 648, ***The University of Mysore Vs. C. D. Govinda Rao*** AIR 1965 SC 491, ***Maharashtra State Board of Secondary and Higher Secondary Education Vs. Paritosh Bhupeshkumar Sheth*** (1984) 4 SCC 27 holding that the Courts should not interfere with such decisions of the academic authorities who are experts in their field. Once the experts of the appellant have taken a view that the disclosure of the question papers would compromise the selection process, we cannot lightly interfere therewith. Reference in this regard may also be made to the recent dicta in ***Sanchit Bansal Vs. The Joint Admission Board (JAB)*** (2012) 1 SCC 157 observing that the process of evaluation and selection of candidates for admission with reference to their performance, the process of achieving the objective of selecting candidates who will be better equipped to suit the specialized courses, are all technical matters in academic field and Courts will not interfere in such processes.

18. We have in our judgment dated 24.05.2012 in LPA No.1090/2011 titled ***Central Board of Secondary Education Vs. Sh. Anil Kumar Kathpal***,

relying on the ***Institute of Chartered Accountants of India Vs. Shaunak H. Satya*** (2011) 8 SCC 781 held that in achieving the objective of transparency and accountability of the RTI Act, other equally important public interests including preservation of confidentiality of sensitive information are not to be ignored or sacrificed and that it has to be ensured that revelation of information in actual practice, does not harm or adversely affect other public interests including of preservation of confidentiality of sensitive information. Thus, disclosure of, marks which though existed, but were replaced by grades, was not allowed. Purposive, not literal interpretation of the RTI Act was advocated.

19. We may further add that even in ***Central Board of Secondary Education Vs. Aditya Bandopadhyay*** (2011) 8 SCC 497 that Apex Court though holding that an examining body does not hold evaluated answer books in fiduciary relationship also held that the RTI Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy i.e. of transparency and accountability on one hand and public interest on the other hand. It was further held that when Section 8 exempts certain information, it should not be considered to be a fetter on the Right to Information, but an equally important provision

protecting other public interests essential for fulfillment and preservation of democratic ideas. The Supreme Court further observed that it is difficult to visualize and enumerate all types of information which require to be exempted from disclosure in public interest and the legislature has in Section 8 however made an attempt to do so. It was thus held that while interpreting the said exemptions a purposive construction involving a reasonable and balanced approach ought to be adopted. It was yet further held that indiscriminate and impractical demands under RTI Act for disclosure of all and sundry information, unrelated to transparency and accountability would be counter productive and the RTI Act should not be allowed to be misused or abused.

20. The information seeker as aforesaid is not the examinee himself. The possibility of the information seeker being himself or having acted at the instance of a coaching institute or a publisher and acting with the motive of making commercial gains from such information also cannot be ruled out. The said fact also distinguishes the present from the context in which ***Shaunak H. Satya*** (supra) was decided. There are no questions of transparency and accountability in the present case.

21. When we apply the tests aforesaid to the factual scenario as urged by the appellants and noted above, the conclusion is irresistible that it is not in public interest that the information sought be divulged and the information sought is such which on a purposive construction of Section 8 is exempt from disclosure.

22. We therefore allow this appeal and set aside the orders of the CIC directing the appellant to disclose the information and the order of the learned Single Judge dismissing the writ petition preferred by the appellant. No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MAY 28, 2012
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