

C.Nanda Kumar Vs. the Union of India

C.Nanda Kumar Vs. the Union of India

SooperKanoon Citation : sooperkanoon.com/926375

Court : Chennai

Decided On : Feb-23-2012

Judge : Vinod K.Sharma, J.

Appeal No. : W.P.No.28320 of 2011 And M.P.No.1 of 2011

Appellant : C.Nanda Kumar.

Respondent : The Union of India.

Advocate for Def. : Mr.M.Gopikrishnan, Adv

Advocate for Pet/Ap. : Mr.D.Ravichander, Adv

Judgement :

Prayer: Writ petition is filed under Article 226 of Constitution of India for the issuance of a Writ of Mandamus, directing the respondents to allot marks to the petitioner for the questions which carried multiple correct answers or questions with wrong answers for the Foreign Medical Graduation Exam, which was conducted on September 2011, by the 3rd respondent, so as to enable the petitioner to clear the Foreign Medical Graduation Exam .

ORDER

1. The petitioner prays for issuance of a writ in the nature of Mandamus, directing respondents to allot marks to the petitioner for the questions which carried multiple

correct answers or questions with wrong answers for the Foreign Medical Graduation Exam (FMGE), which was conducted on September 2011, by the National Board of Examinations, New Delhi, so as to enable the petitioner to clear the Foreign Medical Graduation Exam.

2. The petitioner qualified his M.D. Doctor of Medicine Course in Russia, by securing 84% marks. The petitioner, with an object to serve the downtrodden and uphold the dignity of the profession and to serve the society as dutiful Doctor, wants to practise in India.

3. The Medical Council of India conducts examination, called Foreign Medical Graduation Exam for graduates, who cleared the degree in foreign countries. The object of the examination is that the graduates of foreign country should possess knowledge of Indian standard and update their knowledge as per required standard of India. The Medical Council of India is the final authority to streamline and permit graduates of medicine to practise.

4. The petitioner appeared for the FMGE in March 2010. The minimum passing mark to clear the exam is 150 out of 300 and the question paper gives multiple choice questions. The answers made by the candidate are evaluated by the computer and the papers are also randomly scrutinized manually by the Officers. The petitioner secured 130 marks, therefore, had to write the exam again.

5. The petitioner appeared 4 times for this exam and secured 130 marks in March, 2010, 149 marks in September, 2010, 140 marks in March, 2011 and 149 marks in September, 2011.

6. It is the submission of the petitioner that revaluation or retotalling is not permitted, as is the case in other universities, therefore, candidates failing in exam, has no option but to re-write it. It is further submission of the petitioner that examination held in September 2011, had a lot of discrepancies, as some of the questions did not carry correct answers and some questions carried answers of more than one choice, therefore, it could not be the basis for proper assessment of the calibre.

7. The petitioner applied to the 3rd respondent National Board of Examinations, under the Right to Information to provide the answer sheet and the question paper. The petitioner was informed that photocopy of the question paper cannot be issued and for the answer sheet, the petitioner was directed to apply in the format annexed with the letter.

8. The case of the petitioner is, that action of the 3rd respondent in refusing to supply answer sheet in absence of application in proper format was illegal and contrary to Right to Information Act. The petitioner, however applied for supply of answer sheets in the prescribed format.

9. The petitioner, being aggrieved by the non disclosure of question paper, preferred appeal to the Appellate Authority. This request was denied vide order dated 16.11.2011, which reads as under: NBE has spent years to frame the questions that now form part of its question bank. The question bank is a very valuable resource for the NBE. NBE has got these questions prepared by making payments to the experts and NBE holds its intellectual property rights over these questions. The question bank is maintained to assess the minimum standard of Medical education in India, the same are scarce and in case these questions are shared with the third Party/Candidate/Institutions, the same will have a negative effect on the examination system. Therefore, questions of MCQ based examination cannot be shown/divulged.

10. The petitioner submits that the order passed by the appellate authority is illegal and against the provisions of Right to Information Act, on the ground, that it being quasi judicial authority, was required to give notice of hearing before rejecting the appeal. The petitioner also reproduced 5 questions, which, according to the petitioner, carried wrong answers, which read as under:

1. TREATMENT FOR SCABIES

A. Permethrin

B. Ivermectin

Both the answers are correct.

2. ANTI TRYPSIN DEFICIENCY HAVE BEEN FOUND TO CAUSE

A. Bronchiectasis

B. Panacinar Emphysema

Both the answers are correct

3. HYPER SEGMENTED NEUTROPHILS ARE SEEN IN

A. Megaloblastic anaemia

B. Iron Deficiency Anaemia

Both the answers are correct

4. TEMPORAL LOBE - FUNCTIONS

A. Memory medical temporal

B. Emotion

Both the answers are correct

5. SCREENING TEST FOR WILSON'S DISEASE IS

A. Kayser Fliasher Ring

B. Low ceruloplasmin level

C. Copper excreted in urine 24 hour period

All three answers are correct

11. The ground of challenge by the petitioner is that he could not be allowed to suffer for the wrong committed by the 3rd respondent in not framing the question papers correctly. The stand of the petitioner is that in case question papers were rightly set, he would have cleared the exam.

12. Though in the petition, grievance of the petitioner is against the order passed by the appellate authority under the RTA, but in the prayer clause, the petitioner is not seeking the quashing of the impugned order, but only prays for allocation of marks to the petitioner for the questions, which carried multiple correct answers of questions with wrong answers.

13. In support of the contention that the impugned order of the appellate authority in rejecting the appeal of the petitioner, was illegal and not sustainable in law.

14. Learned counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court in Central Board of Secondary Education & Ant. vs. Aditya Bandopadhyay & ors, 2011-4-L.W.289, wherein the Hon'ble Supreme Court was pleased to lay down as under: 35. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information that is available and existing. This is clear from a combined reading of section 3 and the definitions of 'information' and 'right to information' under clauses (f) and (j) of section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non- available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide 'advice' or 'opinion' to an applicant, nor required to obtain and furnish any 'opinion' or 'advice' to an applicant. The reference to 'opinion' or 'advice' in the definition of 'information' in section 2(f) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act.

36. Section 19(8) of RTI Act has entrusted the Central/State Information Commissions, with the power to require any public authority to take any such steps as may be necessary to secure the compliance with the provisions of the Act. Apart from the generality of the said power, clause (a) of section 19(8) refers to six specific powers, to implement the provision of the Act. Sub-clause (i) empowers a Commission to require the public authority to provide access to information if so requested in a particular 'form' (that is either as a document, micro film, compact disc, pendrive, etc.). This is to secure compliance with section 7(9) of the Act. Sub-clause (ii) empowers a Commission to require the public authority to appoint a Central Public Information Officer or State Public Information Officer. This is to secure compliance with section 5 of the Act. Sub-clause (iii) empowers the Commission to require a public authority to publish certain information or categories of information. This is to secure compliance with section 4(1) and (2) of RTI Act. Sub-clause (iv) empowers a Commission to require a public authority to make necessary changes to its practices relating to the maintenance, management and destruction of the records. This is to secure compliance with clause (a) of section 4(1) of the Act. Sub-clause (v) empowers a Commission to require the public authority to increase the training for its officials on the right to information. This is to secure compliance with sections 5, 6 and 7 of the Act. Sub-clause (vi) empowers a Commission to require the public authority to provide annual reports in regard to the compliance with clause (b) of section 4(1). This is to ensure compliance with the provisions of clause (b) of section 4(1) of the Act. The power under section 19(8) of the Act however does not extend to requiring a public authority to take any steps which are not required or contemplated to secure compliance with the provisions of the Act or to issue directions beyond the provisions of the Act. The power under section 19(8) of the Act is intended to be used by the Commissions to ensure compliance with the Act, in particular ensure that every public authority maintains its records duly catalogued and indexed in the manner and in the form which facilitates the right to information and ensure that the records are computerized, as required under clause (a) of section 4(1) of the Act; and to ensure that the information enumerated in clauses (b) and (c) of sections 4(1) of the Act are published and disseminated, and are periodically updated as provided in sub-sections (3) and (4)

of section 4 of the Act. If the 'information' enumerated in clause (b) of section 4(1) of the Act are effectively disseminated (by publications in print and on websites and other effective means), apart from providing transparency and accountability, citizens will be able to access relevant information and avoid unnecessary applications for information under the Act.

37. The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information, (that is information other than those enumerated in section 4(1)(b) and (c) of the Act), equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.). Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising 'information furnishing', at the cost of their normal and regular duties.

Conclusion

38. In view of the foregoing, the order of the High Court directing the examining bodies to permit examinees to have inspection of their answer books is affirmed, subject to the clarifications regarding the scope of the RTI 54 Act and the safeguards and conditions subject to which 'information' should be furnished. The appeals are disposed of accordingly.

15. Reliance was also placed on the judgment of the Hon'ble Supreme Court in Institute of Chartered Accountants of India vs. Shaunak H.Satya and others, (2011) 8 SCC 781, wherein the Hon'ble Supreme Court was pleased to lay down that; The term 'intellectual property' refers to a category of intangible rights protecting commercially valuable products of human intellect comprising primarily trade mark, copyright and patent right, as also trade secret rights, publicity rights, moral rights and rights against unfair competition (vide). Question papers, instructions regarding evaluation and solutions to questions (or model answers) which are furnished to examiners and moderators in connection with evaluation of answer scripts, are literary works which are products of human intellect and therefore subject to a copyright. The paper setters and authors thereof (other than employees of ICAI), who are the first owners thereof are required to assign their copyright in regard to the question papers/solutions in favour of ICAI. Consequently, the question papers, solutions to questions and instructions are the intellectual properties of ICAI. Information can be sought under the RTI Act at different stages or different points of time. What is exempted from disclosure at one point of time may cease to be exempted at a later point of time, depending upon the nature of exemption. Information relating to the intellectual property, that is, the questions papers, solutions/model answers and instructions, in regard to any particular examination conducted by the appellant cannot be disclosed before the examination is held, as it would harm the competitive position of innumerable third parties who are taking the said examination. Therefore it is obvious that the appellant examining body is not liable to give to any citizen any information relating to question papers, solutions/model answers and instructions relating to a particular examination before the date of such examination. But the position will be different once the examination is held. Disclosure of the questions papers, model answers and instructions in regard to any particular examination, would not harm the competitive position of any third party once the examination is

held In fact the question papers are disclosed to everyone at the time of examination. The appellant voluntarily publishes the suggested answers in regard to the question papers in the form of a book for sale every year, after the examination. Therefore section 8(1)(d) of the RTI Act does not bar or prohibit the disclosure of question papers, model answers (solutions to questions) and instructions if any given to the examiners and moderators after the examination and after the evaluation of answer scripts is completed, as at that stage they will not harm the competitive position of any third party.

16. This writ petition is contested by respondent no.3, by raising primary objection to the challenge to the examination is not in proper manner by submitting that the Hon'ble Supreme Court of India in Sanjeev Gupta vs. Union of India, (2005) 1 SCC 45, has approved the pattern and syllabus for FMG Exam. It is also the stand taken that if the question papers and keys are revealed to the general public, then the FMG Examination will lose its purpose of conducting medical examination, as the candidates will be aware of the limited questions and its answers.

17. It is also submission of the respondent no.3, that human anatomy does not change with time, therefore, it is limited choice of questions for FMG Exam, therefore, it will not be proper to disclose the question papers, as in the event of questions being revealed, then the very purpose of conducting the examination would stand defeated.

18. The stand of the respondent is prima facie contrary to the law, laid down by the Hon'ble Supreme Court in the case of Central Board of Secondary Education & Ant. vs. Aditya Bandopadhyay & ors, and Institute of Chartered Accountants of India vs. Shaunak H.Satya and others, (supra), but the main objection is to the maintainability of the writ petition in this Court, for want of territorial jurisdiction.

19. The contention of the learned counsel for the respondents was that the examination, was conducted at New Delhi and all the respondents have their seat of Office at New Delhi and no cause of action, has arisen within the territorial jurisdiction of this Court.

20. It is also the contention of the learned counsel for the respondents, that the residence of the petitioner cannot give cause of action to the petitioner, to invoke the writ jurisdiction of this Court in absence of any cause of action, which may have arisen within the jurisdiction of this Court.

21. It was further contended by the learned counsel for the respondents, that in any case, rules of the examination, stipulate that jurisdiction regarding subject matter of the examination will be only of Delhi Courts, therefore, even if for the sake of argument, it is taken, though not admitted that this Court has jurisdiction, still the jurisdiction would be that of Delhi Courts only, as the petitioner has taken the exam, subject to specific condition that all disputes of exam should be raised subject to jurisdiction of New Delhi. It is settled law that the parties by consent, though cannot give jurisdiction to the Court, having no jurisdiction, but can restrict jurisdiction to one Court, when more than one Courts has the jurisdiction to try the case.

22. In support of the contention that this Court has not jurisdiction, learned counsel for the respondents placed reliance on the judgment of the Hon'ble Supreme Court in the case of Alchemist Limited and another vs. State Bank of Sikkim and others, AIR 2007 SC 1812, wherein the Hon'ble Supreme Court was pleased to lay down that; ...The judgment of the High Court was sought to be supported inter alia on the grounds; that (i) A was carrying on business at Ahmedabad; (ii) orders were placed from and executed at Ahmedabad; (iii) documents were sent and payment was made at Ahmedabad; (iv) credit of duty was claimed for export handled from Ahmedabad; (v) denial of benefit adversely affected the petitioner at Ahmedabad; (vi) A had furnished bank guarantee and executed a bond at Ahmedabad, etc. Allowing the appeal and setting aside the order of the High Court, the Supreme Court held that none of the facts pleaded by A constituted a cause of action. Facts which have no bearing with the lis or dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. In Kusum Ingots & Alloys Ltd. v. Union of India (UOI) & Anr., (2004) 6 SCC 254 : JT 2004 (Supp. 1) 475, the appellant was a Company registered under the Indian Companies Act having its Head Office at Mumbai. It obtained a loan from the Bhopal Branch of the State Bank of India. The Bank issued a notice for

repayment of loan from Bhopal under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The appellant Company filed a writ petition in the High Court of Delhi which was dismissed on the ground of lack of territorial jurisdiction. The Company approached this Court and contended that as the constitutionality of a Parliamentary legislation was questioned, the High Court of Delhi had the requisite jurisdiction to entertain the writ petition. Negating the contention and upholding the order passed by the High Court, this Court ruled that passing of a legislation by itself does not confer any such right to file a writ petition in any Court unless a cause of action arises therefor. The Court stated; A distinction between a legislation and executive action should be borne in mind while determining the said question. Referring to ONGC, it was held that all necessary facts must form an 'integral part' of the cause of action. The fact which is neither material nor essential nor integral part of the cause of action would not constitute a part of cause of action within the meaning of Clause (2) of Article 226 of the Constitution. In National Textile Corporation. Ltd. & Ors. v. Haribox Swalram & Ors, (2004) 9 SCC 786 : JT 2004 (4) SC 508, referring to earlier cases, this Court stated that the mere fact that the writ petitioner carries on business at Calcutta or that the reply to the correspondence made by it was received at Calcutta is not an integral part of the cause of action and, therefore, the Calcutta High Court had no jurisdiction to entertain the writ petition and the view to the contrary taken by the Division Bench cannot be sustained. From the aforesaid discussion and keeping in view the ratio laid down in catena of decisions by this Court, it is clear that for the purpose of deciding whether facts averred by the petitioner appellant, would or would not constitute a part of cause of action, one has to consider whether such fact constitutes a material, essential, or integral part of the cause of action. It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the suit/petition. Nevertheless it must be a 'part of cause of action', nothing less than that. In the present case, the facts which have been pleaded by the Appellant Company, in our judgment, cannot be said to be essential, integral or material facts so as to constitute a part of 'cause of action' within the meaning of Article 226(2) of the Constitution. The High Court, in our opinion, therefore, was not wrong in

dismissing the petition. For the foregoing reasons, we see no infirmity in the order passed by the High Court dismissing the petition on the ground of want of territorial jurisdiction. The appeal, therefore, deserves to be dismissed and is accordingly dismissed. In the facts and circumstances of the case, however, we leave the parties to bear their own costs.

23. Learned counsel for the petitioner, in order to rebut the objections of territorial jurisdiction of this Court, placed reliance on the judgment of the Hon'ble Supreme Court in *Om Prakash Srivastava vs. Union of India and another*, (2006) 6 SCC 207, wherein the Hon'ble Supreme Court was pleased to lay down as under: 6. Clause (2) of Article 226 of the Constitution is of great importance. It reads as follows:

226.(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

7. The question whether or not cause of action wholly or in part for filing a writ petition has arisen within the territorial limits of any High Court has to be decided in the light of the nature and character of the proceedings under Article 226 of the Constitution. In order to maintain a writ petition a writ petitioner has to establish that a legal right claimed by him has *prima facie* either been infringed or is threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction and such infringement may take place by causing him actual injury or threat thereof.

8. Two clauses of Article 226 of the Constitution on plain reading give clear indication that the High Court can exercise power to issue direction, order or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action wholly or in part had arisen within the territories in relation to which it exercises jurisdiction notwithstanding that the seat of the Government or authority or the residence of

the person against whom the direction, order or writ is issued is not within the said territories. (See ONGC v. Utpal Kumar Basu.)

24. On consideration of the matter, I find that the facts pleaded in the writ petition, and the prayer does not show, that any cause of action or part thereof has arisen within the territorial jurisdiction of this Court, nor the respondents are residing within the territorial jurisdiction of this Court, therefore, the objection of the respondents with regard to territorial jurisdiction of this Court, is upheld, and the writ petition is ordered to be dismissed, being not competent in this Court.

25. The Office is directed to return the writ petition to the petitioner for presentation before the Court of competent jurisdiction.

26. No costs. Connected miscellaneous petition is closed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com