

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
C. P. NO. D-6096 & 5452 / 2015

Date	Order with signature of Judge
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| 1) | For orders on CMA No. 33942/2015. |
| 2) | For hearing of CMA No. 30547/2015. |
| 3) | For hearing of main case. |

26.11.2015.

Mr. Luqman-ul-Haque Advocate for Petitioner.
Mr. Ghulam Mustafa Mahessar AAG.
Mr. Afaq A. Saeed Advocate for respondents No. 2 to 4.

Through these petitions the petitioner has sought the following relief(s):-

C.P.NO. D-5452/2015

Declare that the petitioner is entitled to make four attempts to pass each MBBS semester examination conducted by the respondents No.3 and 4.

Declare that the verbal demand for payment of US\$ 15,000/- over and above the examination fee already received by respondents No.3 and 4 is unjust, arbitrary and illegal.

Direct the respondents to allow the petitioner to sit in 5th Semester Examination for which she has already paid examination fee and which examination is scheduled from 12th September, 2015 onwards; and”

C.P.NO. D-6096/2015

Declare that the Petitioner is entitled to make, remaining two out of four attempts, to pass 3rd year MBBS semester-VI examination conducted by the respondents No.3 and 4.

Declare that the demand for payment of US\$ 9639/- toward repeat 3rd year MBBS college fee is unjust, arbitrary and illegal.

Direct the respondents to allow the petitioner to sit in 3rd year MBBS Semester-VI Examination 2015 scheduled to be held from 6th October, 2015 onwards; and

At the very outset Counsel for respondents No. 2, 3 & 4 submits that in both these petitions, the petitioner has obtained Ex-parte ad-interim orders of mandatory nature dated 9.9.2015 and 5.10.2015

respectively, by concealing material facts, whereby, the petitioner did not disclose to the Court that she had earlier filed a petition bearing No. 1292 of 2015 in respect of the same cause of action, which had been dismissed by this Court vide judgment 12.6.2015, and the same was also impugned before the Hon'ble Supreme Court by filing Civil Petition for leave to appeal bearing No. 413-K of 2015 which was also dismissed by the Apex Court on 27.8.2015, whereas, without disclosing such crucial facts, the petitioner obtained ad-interim orders, whereby, the respondents were directed by this Court to allow the petitioner to sit in the examinations being held on 12.9.2015 and 6.10.2015 subject to the conditions that the respondents will not announce the results. Per Counsel both the petitions are hit by principle of Resjudicata and are therefore liable to be dismissed.

While confronted the Counsel for petitioner, though concedes, that earlier a petition was filed by the same petitioner, but submits that in that petition the facts were somewhat different and a fresh cause of action has accrued to the petitioner, inasmuch as in that petition there were other petitioners as well, and, therefore instant petitions are not hit by Resjudicata. However, the Counsel has candidly admitted that while filing instant petitions, such fact was neither disclosed, nor the copy of the said judgment was placed before the Court, while obtaining ad-interim orders / directions. Counsel further submits that since according to the petitioner instant petitions have been filed for a separate cause of action, therefore, the fate of the earlier petition was not disclosed, however, tenders an apology for such non-disclosure of the previous proceedings.

We have heard both the Counsel and have perused the record. It is an admitted position that the petitioner along with several other petitioners had earlier filed a petition bearing No.D-1292 of 2015 which was dismissed by us vide judgment dated 12.6.2015, whereas, the same was also impugned before the Hon'ble Supreme Court, wherein, vide order dated 27.8.2015, Civil Petition for Leave to Appeal has been dismissed. Insofar as the present petitioner is concerned, the relevant facts and discussion with regard to the petitioner's case has been stated in Para 5 and 7, relevant findings whereof reads as under:-

5.....“From perusal of the documents annexed with the Memo of Petition, it appears that petitioner No. 1 having Roll No. 1004061, had appeared in the 3rd year MBBS Semester V Examination in July 2014, and had failed in 6 out of 8 subjects. She then appeared in the 3rd year MBBS Semester VI Examination in November, 2014, and had failed in 5 out of 6 subjects. Thereafter she appeared in the 3rd year Semester V (repeat) examination 2014, in 6 subjects and could only pass in 2 and again failed in 4 subjects. She then appeared in 3rd year Semester VI (repeat) exams 2014 in 6 subjects and could only pass in 1 and failed in 5 subjects.

7.....In our opinion the contention of the petitioners being misconceived in facts and law is not correct and is hereby repelled. It also appears to be against Regulation No.4 issued by PMDC as referred to hereinabove, which provides that no student shall be promoted to the next class unless all the subjects of the previous class are cleared. The representative of the respondents present in Court has not denied that they are allowing the petitioners to make another attempt in the Regular Exams of junior batch, which according to the record placed before us has already been held in March 2015 and petitioner No.1 had applied to appear in such examination along with the junior batch and was also issued a fee challan in this respect, however, she, instead of appearing in the said examination has filed instant petition. It has been contended on behalf of the respondents that they can appear in Semester V and Semester VI examinations along with the junior batch and make an attempt to clear those papers / subjects in which they had failed, however, they cannot be promoted to the next class, pending examination and passing of the subjects, in which they have failed in 2014. Record further reflects that in fact one such exam has already been held in March 2015, in which petitioner No.1 had applied and was also issued a fee Challan, however, she has chosen to file instant petition along with others, through which they had also sought restraining orders in respect of conduct of such examinations. On 12.3.2015, this Court had refused to grant any interim relief to the petitioners.....”

Perusal of the above findings reflects that the cause of action is more or less identical and has perhaps been differently worded in prayer clause of these petitions, otherwise the case of the petitioner is only to the extent, that the petitioner is entitled to make a 3rd and 4th attempt in respect of papers in which she had failed in Vth & VIth Semester (regular as well as supplementary examination). Such aspect of the matter has already been dealt by us in our judgment dated 12.6.2015, and in fact the respondents had even conceded that they would allow the petitioner to appear in the 3rd and 4th attempt for the Vth and VIth semester in respect of the failed papers, however, subject to payment of tuition fee and attending classes with the junior batch as she was not entitled to be promoted to the fourth year. Whereas in the instant petitions the petitioner has prayed that she may be allowed to sit in the Vth and VIth

semester examination by making her 3rd and 4th attempt and for such purposes the payment of tuition fee as well as examination fee may be dispensed with, as she had already paid such fee previously. It would not be out of place to mention that in that very judgment we had also recorded our observations in Para 14 in this regard which reads as under:-

14...“However, before parting, we may observe that this shall not preclude the petitioners from appearing in the failed subjects of 3rd professional (Semester V & VI) along with the junior batch, as and when the same are conducted by the respondents. Moreover, considering the peculiar facts of instant case and the hardship already faced by the petitioners, and also for the reason that they have already paid substantial amount of tuition fee, we direct the respondents to consider the request of the petitioners, if any, sympathetically, with regard to reduction and or waiver of Tuition Fee payable in respect of the failed subjects, and if the rules so permit, accommodate the petitioners to the maximum extent possible. The petition stands dismissed, however, subject to above observations.”

Even before the Hon’ble Supreme Court a statement was made by the Counsel for the petitioner that the petitioner(s) are ready and willing to take above Exam but the respondents have raised the amount of fee exorbitantly and may, therefore, be directed to reduce such fee. The Hon’ble Supreme Court while rejecting such plea observed as follows:

In the first place, case of the petitioners before the High Court was not for reduction of examination fee, secondly, we in the facts and circumstances of the case, do not find it appropriate to regulate the affairs of the respondents Institution in the manner as sought by the petitioners. The leave is, therefore, refused. The Petition stands dismissed.

In view of hereinabove, it appears that after having failed to get any relief with regard to the amount of fee for the examination under discussion, present petitions were filed without proper disclosure of the previous litigation entered into by the petitioner. It therefore, follows that insofar as preset petitions are concerned, the petitioner had in fact no cause of action and at the most and without prejudice, could have moved a contempt application in the earlier petition if the respondents had denied her to sit in the 3rd and 4th attempt of examination in respect of Vth and VIth semester of third professional, and, not through instant petitions, and that too without even disclosing complete facts, including the dismissal of the earlier petition. In fact the case as set up by the

petitioner is in respect of amount of fee and not against refusal by respondents in taking such examination. Such conduct on the part of the petitioner is not appropriate as the principle of Resjudicata very squarely applies to the case of the petitioners, whereas, Explanation V to Section 11 of Civil Procedure Code, also caters for the argument raised by the Counsel for the petitioner, that such aspect of the matter was though raised in the earlier petition, but, was not decided by this Court, which provides *that any relief claimed which is not expressly granted by the Court shall for the purposes of this section be deemed to have been refused*. The only grievance of the petitioner in these petitions is in respect of payment of fee while making the 3rd and 4th attempt in respect of failed papers of Vth and VIth Semester examination, which aspect of the matter has been expressly dealt with by us in our judgment dated 12.6.2015 passed in CP No. D-1292 of 2015, hence, there was no justifiable reason for the petitioner to have filed instant petitions, without even disclosing the relevant facts including the dismissal of the earlier petition.

Accordingly, we do not find any substance in the instant petitions which have been filed by concealment of facts and are also hit by principle of Resjudicata, and, are therefore, dismissed with cost of Rs. 5000/- each, which shall be deposited before the Nazir of this Court within 15 days from today. Needless to mention that all ad-interim orders passed in both these petitions stand vacated, pursuant to dismissal of these petitions and the respondents shall be at liberty to act accordingly.

Insofar as the conduct of the Counsel for the petitioner is concerned, the same also does not appear to be proper and appropriate, as under the Legal Practitioner's and Bar Council Act, 1973 as well as rules framed there-under, it is also the primary duty of the Counsel to advise its clients with all consequences and including the consequences for concealing facts from the Courts regarding earlier proceedings. Not only this, the Counsel for the petitioner, in the instant matter also could not have filed instant petitions by concealing the fate of the earlier petition, notwithstanding, that the Counsel, or the petitioner itself, was of the opinion that such disclosure was not relevant, as we are of the view that such facts must be disclosed before the Court so as to enable the court to dispense proper justice in accordance with law, whereas, the relevancy of the earlier proceedings can always be objected to while

arguing the matter. Moreover, the Counsel for the petitioner cannot plead any ignorance of such proceedings, as the same Counsel had appeared before the Hon'ble Supreme Court, and had prayed for the same relief as is being prayed through instant petitions. In the circumstances we are of the view that the conduct of the Counsel in the instant case does not appear to be appropriate and needs to be examined as otherwise this would permit unnecessary litigation with which the Courts are already burdened.

Though we are prima facie of the view that this amounts to Misconduct on the part of the Counsel as interim orders were obtained by concealing material facts, and, despite ample opportunity of hearing could not satisfactorily respond, therefore, it is a fit case to order suspension of his licence to practice in terms of Section 54 of the Legal Practitioners and Bar Councils Act, 1973, however, showing grace, have restrained ourselves from taking such action at this stage of the proceedings. Nonetheless, the observations hereinabove, shall be treated as a complaint under Section 41(2) of the said Act, whereas, the disciplinary committee of the Pakistan Bar Council shall initiate appropriate proceedings against the Counsel for the petitioner which shall be completed within three months or earlier as provided under section 41 (1A) of the Act, and thereafter shall place a proper compliance report before us through MIT-II.

To come up after three months for compliance.

JUDGE

JUDGE

ARSHAD/