

(2014) 05 DEL CK 0203

In the Delhi High Court

Case No : W.P. (C) 889/2013 & CM APPL. 1689/2013

Alka Gupta

APPELLANT

Vs

Medical Council of India and Another

RESPONDENT

Date of Decision : 05-05-2014

Acts Referred:

Constitution of India, 1950 — Article 141

Indian Medical Council Act, 1956 — Section 24(2), 33, 33(m)

Citation : (2014) 05 DEL CK 0203

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Anil Goel, Mr. Ashwani Goel, Advocates and Party-in-Person, Advocate for the Appellant; Maninder Singh, Senior Advocate, Mr. T. Singhdev, Advocate, Mr. Mohammad Ali Choudhary, Advocate for R-1, Mr. Rabin Majumdar, Advocate, Mr. D.K. Pradhan, Advocate for R-2, Mr. Karan Bharihoke, Advocate and Mr. Eklavya Bahl, Advocate for Dr. Pooja Bhatia, Advocate for the Respondent

Judgement

Manmohan, J.—Present writ petition has been filed seeking quashing of the order passed by the Ethics Committee of respondent-Medical Council of India (for short "MCI") dated 27th October, 2012 and the decision of the erstwhile Board of Governors of MCI dated 10th December, 2012 whereby, the name of the petitioner has been directed to be struck off from the Indian Medical register for a period of three years.

2. It is pertinent to mention that the husband of the deceased had filed a complaint dated 5th May, 2009 with the Police who had forwarded the same on 28th May, 2009 to the Government of NCT of Delhi requesting the Delhi Medical Council (for short "DMC") to give its opinion in this matter. Meanwhile, father of the deceased, respondent no. 2-Mr. S.P. Manchanda had also filed a complaint dated 10th June, 2009 with the DMC in the matter. The impugned decision and order of MCI has been passed in an appeal filed under Clause 8.8 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (for short "Regulations, 2002) by respondent no. 2-Mr. S.P. Manchanda, being

aggrieved by the order passed by the DMC dated 7th June, 2010.

3. The judgment in the present writ petition was reserved on 3rd December, 2013. The following order was passed:-

Alka Gupta

... Petitioner

Through

Mr. Anil Goel, Adv. with Mr.

Ashwini Goel, Adv. Mr. Rajeev

Kumar, Adv., Mr. Ratnakar

Maltiyar, with Petitioner in person.

versus

Medical Council of India and Anr.

Through

Mr. Ashish Kumar, Adv. With

Mr. Avijit Mani Tripathi, Adv. for

R-1.

Coram:

G.P. Mittal

03.12.2013

Arguments heard.

Reserved for the Judgment.....

4. Vide order dated 10th January, 2014, the same Court observed as under:-

... By a separate order, W.P. (C) 1334/2013 has been disposed of. There are doubts about maintainability of W.P. (C) 889/2013 in view of provision of Section 24(2) of the Indian Medical Council Act, 1956.

Since the matter has to be reheard, subject to orders of the Hon''ble the Chief Justice, list before the Roster Bench on 16.01.2014....

5. Thereafter, the matter was listed before this Court. In view of the aforesaid order, parties were called upon to assist this Court on the correct interpretation of Section 24(2) of Indian Medical Council Act, 1956 (for short "Act, 1956").

6. Mr. Maninder Singh, learned senior counsel for MCI stated that in the process of assisting this Court in terms of the order dated 10th January, 2014 and on

searching case law on the internet with reference to Section 24(2) of the Act, 1956 he found that a learned Single Judge of Calcutta High Court in Dr. (Mrs.) Rupa Basu (Banerjee) Vs. The State of West Bengal & Ors., W.P. No. 9740(W) of 2009, decided on 17th February, 2010 had held that in the light of the provisions of Section 24(2) of the Act, 1956, Clause 8.8 of Regulations, 2002 is unconstitutional.

7. Clause 8.8 of Regulations, 2002 is reproduced hereinbelow:-

8.8. Any person aggrieved by the decision of the State Council on any complaint against a delinquent physician, shall have the right to file an appeal to MCI within a period of sixty days from the date of receipt of the order passed by the said Medical Council:

Provided that MCI may, if it is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days allow it to be presented within a further period of 60 days.

8. The relevant portion of learned Single Judge's judgment in Dr. (Mrs.) Rupa Basu (Banerjee) is reproduced hereinbelow:-

36. Similarly in exercise of the powers conferred in clause (m) of Section 33 of the Act the Medical Council of India is empowered, subject to previous sanction of the Central Government, to make regulation to carry out the purposes of the Act so far as it relates to "the standards of professional conduct and etiquette and code of ethics to be observed by medical practitioners". So by virtue of such limited power conferred under clause "m", Medical Council of India cannot create any Appellate Authority or penal provision like removal of name from the Register maintained by itself or by the State Council. In fact Rules and Regulations are wheels of an enactment to give effect to the purposes and objects of an Act and cannot travel beyond the track laid down in the Act. Therefore, provisions of Rule 8.8 of the Regulation of 2002 made by the Medical Council of India in exercise of its powers conferred u/s 33(m) of the Act of 1956 are equally beyond its jurisdiction and as such unconstitutional because it has been set at rest in Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others, and Raj Kumar Yadav Vs. Samir Kumar Mahaseth and Others, that as per general principle of cognate rules any provision of any substantive law whether Central or State cannot be curtailed by making provision in delegated provision-in the instant case Regulation of 2002 made by the Medical Council of India.

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48. Section 27 of the Bengal Medical Act is also a bar to suits and other legal proceedings in like cases. It has been stated therein that no suit or other legal proceeding shall lie in respect of any act done in exercise of any power conferred by this Act on the State Government or the Council or any committee of council or the Registrar. Since the appellate authority has exercised the power conferred

in it by Section 26 of the Act in exercise of its bona fide official power no legal proceeding shall lie against his order issued in exercise of the power conferred under specific provision of Section 26 of the Act by virtue of which he has assumed the power also conferred u/s 25 of the Act. Moreover, I agree with the views of the learned lawyer for the State who has contended that alternative remedy in Writ jurisdiction is not maintainable in view of availability of alternative remedy of statutory appeal u/s 26 of the Act of 1914 or for that matter of fact u/s 24(2) of the Act of 1956 which has been fully utilised by the present writ petitioner. From this point of view, I hold that the instant writ petition is not maintainable in law and I further hold that the mischief committed by the petitioner in 1999 though complained of in 2004 shall come under the purview of the Bengal Medical Act, 1914 in case of the complainant and not under Rule 8.8 of the Regulation of 2002 which is unconstitutional. I also conclude that there is no illegality, violation of the principles of natural justice and want of jurisdiction in the impugned order of the Principal Secretary to the Government of West Bengal, Health and Family Welfare Department which should be interfered with by the Writ Court to prevent any miscarriage of justice and abuse of the process of law.

9. Mr. Maninder Singh further stated that upon an appeal being filed, the Division Bench of Calcutta High Court vide judgment dated 29th September, 2011 in Medical Council of India Vs. State of West Bengal and Others, has held as under:-

35. We supplement expressing our views to what Parliament has not done the same cannot be done by the Council which is the creature of the Act, even with the approval of the Government. It appears that the said Regulation has been accepted by the Supreme Court in the case of Moloy Ganguly v. Medical Council of India and Ors. in W.P.C. No. 317 of 2000. We think the Hon'ble Apex Court has merely approved incorporation of regulation but it has not expressed any opinion of its overriding applicability. We quote the relevant portion of the Supreme Court decision in case of P.C. Kesavan Kuttynayar Vs. Harish Bhalla and Others, -

22. As suggested by the learned Attorney General, the following provisions could be added in the Code of Ethics prescribed by the Medical Council of India:

8.7. Where either on a request or otherwise the Medical Council of India is informed that any complaint against a delinquent physician has not been decided by a State Medical Council within a period of six months from the date of receipt of complaint by it and further, MCI has reason to believe that there is no justifiable reason for not deciding the complaint within the said prescribed period, the Medical Council of India may-

(i) impress upon the State Medical Council concerned to conclude and decide the complaint within a time-bound schedule;

(ii) may decide to withdraw the said complaint pending with the State Medical Council concerned straight away or after the expiry of the period which had been

stipulated by MCI in accordance with para (i) above to itself and refer the same to the Ethics Committee of the Council for its expeditious disposal in a period of not more than six months from the receipt of the complaint in the Office of the Medical Council of India.

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41. We have merely observed the legal position as to the status of the aforesaid legislation. However, we cannot accept the ruling of the learned Trial Judge as the same being ultra vires, we cannot do so bearing judicial discipline in mind, as we notice the Supreme Court in the aforesaid case has directed to incorporate the same. We think that the matter can be reconsidered by the Hon''ble Supreme Court only in this aspect when occasion will arise.

42. In view of the discussion as above we uphold the judgment and order of the learned Trial Judge dismissing the appeal preferred by Rupa, we, however, allow appeal of the Medical Council of India partly, and set aside declaration of ultra vires of clause 8.8 of the said Regulation made by the learned Trial Judge. This issue is left for future decision of the Hon''ble Supreme Court. We stay permanently the operation of the aforesaid regulation (8.8) for this case only. As far as enhance of punishment is concerned we do not wish to substitute our wisdom, as Appellate Authority under State Act with detailed reason and fact finding imposed punishment which does not appear to be shockingly disproportionate. We, therefore, uphold this decision. Thus both the appeals are disposed of. Stay of operation of this judgment is prayed for, such prayer for stay is granted till 6th November, 2011.

10. Mr. Maninder Singh pointed out that though the matter is pending adjudication before the Supreme Court in SLP (C) No. 33306-33308/2011-Rupa Basu (Banerjee) Vs. State of West Bengal & Ors., yet the Apex Court vide order dated 12th December, 2011 has stayed the operation of the judgment passed by the Division Bench of Calcutta High Court in Medical Council of India Vs. State of West Bengal & Ors (supra) and also the order of State Government of West Bengal dated 11th May, 2009. The relevant portion of the aforesaid order dated 12th December, 2011 is reproduced hereinbelow:-

In the meanwhile, operation of the impugned judgment shall remain stayed along with order dated 11.6.2009 passed by the Government of West Bengal, Department of Health and Family Welfare shall remain stayed.

It shall be the petitioner''s duty to serve the respondents before the next date of hearing failing which the interim order passed today shall stand automatically vacated.

11. Mr. Maninder Singh did not dispute that the judgment of learned Single Judge in Dr. (Mrs.) Rupa Basu (Banerjee) Vs. The State of West Bengal & Ors. (supra) quashing Clause 8.8 of Regulations, 2002 got revived on the passing of the aforesaid stay order dated 12th December, 2011 by the Apex Court.

12. He, however, candidly stated that at present the Ethics Committee of the MCI under Clause 8.8 of the Regulations, 2002 was entertaining appeals by any person who was aggrieved by a decision of the concerned State Medical Councils, under the bonafide impression that the matter is pending adjudication before the Supreme Court and thus such appeals under Clause 8.8 were maintainable. He also admitted, as a matter of fact, that appeals were also being filed before the Ministry of Health & Family Welfare, Government of India u/s 24(2) of the Act, 1956, where the Central Government is statutorily obliged to seek the opinion of the MCI.

13. Mr. Maninder Singh stated that MCI as a statutory authority constituted under the Act, 1956, would take appropriate action in future in accordance with the law declared by this Court.

14. Mr. Karan Bharioke, learned counsel for Dr. Pooja Bhatia pointed out that the appeal filed by respondent no. 2-Mr. S.P. Manchanda before MCI under Clause 8.8 was dated 4th August, 2010, i.e., when the order dated 17th February, 2010 passed by learned Single Judge of Calcutta High Court (holding Clause 8.8 to be unconstitutional) was in force. He also stated that the impugned order was passed by the MCI on 20th February, 2013 when the orders passed by the Division Bench of Calcutta High Court had been stayed by the Apex Court and the order dated 17th February, 2010 passed by learned Single Judge of Calcutta High Court (holding Clause 8.8 to be unconstitutional) had revived.

15. Consequently, according to Mr. Karan Bharioke, the MCI neither had the jurisdiction to entertain the appeal filed by the complainant on the date it was filed, nor did it have the jurisdiction to pass the impugned order on the date it was pronounced.

16. Mr. Karan Bharioke submitted that the only remedy available to the respondent no. 2-Mr. S.P. Manchanda, against the order dated 7th June, 2010 passed by the DMC, was by way of a writ petition.

17. Mr. Rabin Majumder, learned counsel for respondent no. 2-Mr. S.P. Manchanda submitted that this Court was not bound by the decision of Calcutta High Court. He also submitted that neither learned Single Judge's judgment nor Supreme Court's order could be deemed to be a law declared to have a binding effect as is contemplated by Article 141 of the Constitution. According to him, the said decision and order were neither express nor founded on reasons or proceed on consideration of the issue.

18. Mr. Rabin Majumder relied upon another judgment of Calcutta High Court in Pijush Kanti Chowdhury Vs. State of West Bengal and Others, wherein it has been held as under:-

10..... Such interim order is binding upon the parties to the proceedings but the law is equally settled that by mere passing of an interim order staying the operation of a judgment with certain further conditions, the existence of the

said judgment is not wiped out and at the same time, for such interim orders inter parties, the authority of a decision as a precedent is never undermined. Unless a decision is set aside by the Superior Court, the said decision remains binding as a precedent though may not be binding upon the parties to the proceedings where the Superior Court has granted interim order..... but by mere grant of interim stay, the effect of a binding precedent is not destabilized.....

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12..... the Supreme Court in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, while pointing out the difference between an order of stay of operation of the order impugned and an order quashing the order itself:

While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.....

13. Therefore, the effect of the order of stay in a pending appeal before the Apex Court does not amount to "any declaration of law" but is only binding upon the parties to the said proceedings and at the same time, such interim order does not destroy the binding effect of the judgment of the High Court as a precedent because while granting the interim order, the Apex Court had no occasion to lay down any proposition of law inconsistent with the one declared by the High Court which is impugned.

19. Having heard learned counsel for parties, this Court is of the view that as interpretation of Section 24(2) of the Act, 1956 and validity of Clause 8.8 is pending consideration before the Supreme Court, it would be appropriate to await the said judgment.

20. This Court with utmost humility would like to state that it is not in agreement with the view expressed by the Calcutta High Court in Pijush Kanti Chowdhury (supra), as it is of the opinion that once a stay order has been passed by a superior court, the order of the lower court ceases to operate till the stay order is in effect. In fact, the judgment of the Supreme Court in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association, Madras (supra) relied upon in Pijush Kanti Chowdhury (supra) itself lays down that stay of an operation of an order means that the order would not be operative.

21. Consequently, issue rule. List the matter in the category of "Regular Matters" according to its seniority. The impugned order passed by the Ethics Committee of

MCI dated 27th October, 2012 and the decision of the erstwhile Board of Governors of MCI dated 10th December, 2012 are stayed till disposal of the petition. The application being CM Appl. No. 1689/2013 stands disposed of.