
(1985) 12 GUJ CK 0019
In the Gujarat High Court

Dr. Arvind C. Shah

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 02-12-1985

Acts Referred:

Constitution of India, 1950 — Article 12
Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 161, 161, 165A, 165A
Prevention of Corruption Act, 1988 — Section 5(1)(d), 5(2)

Citation : (1986) 1 GLR 481

Hon'ble Judges : N.H. Bhatt, J

Bench : Single Bench

Judgement

N.H. Bhatt, J.—This application is filed by one Panel Doctor, so called popularly, panel being prepared by the Employee's State Insurance

Corporation constituted order the Employee's State Insurance Act, 1948. The Applicant herein and his compounder have been chargesheeted by

the Police Inspector, Anti-Corruption Bureau, Ahmedabad for the offence punishable under Sections 161 and 165-A of the Indian Penal Code

and also u/s 5(1)(d) punishable u/s 5(2) of the Prevention of Corruption Act, the allegation against them being that this petitioner, while working as

a Panel Doctor under the E.S.I. Scheme, Ahmedabad, had accepted Rs. 35/- from one Hansraj Vishwasbhai Chunara for issuing a certificate.

This amount was accepted by his compounder, the original accused No. 2 on behalf of the accused No. 1 and, therefore, both the accused were

stated to have committed the aforesaid offence.

2. The State proceeded on the assumption that the accused and his compounder were public servants, and had they not been so, the prosecution

for the above offence could not have been conceivably there. The accused gave an application Exh. 8 to the learned Judge of the City Civil Court

who was appointed as a Special Judge for the purposes of Prevention of Corruption Act. In the application itself it was inter alia contended that

under the rules of the Scheme an Allocation Committee was formed for selection of insured medical practitioners who like the petitioner were

private practitioners and were running their own dispensary. The Allocation Committee then recommended the selected private practitioners who

were put on the list of Panel Doctors who are known as Panel Doctors. These doctors are expected to treat the insured persons and their families

on a fixed capitation fee, so specifically designated. The petitioner also showed that the insured persons were free to choose their panel doctors,

that the limit of persons to be served also was fixed. The Panel Doctor was free to remove the name of the insured person by giving a notice and

the insured person also was likewise entitled to change the Panel Doctor. It was also set out in the application itself that in the Special Civil

Application No. 1999 of 1982 filed by this petitioner, the Director of the Employee's State Insurance Corporation had specifically averred that

Panel Doctors were not Government servants. The application therefore was given stating that the whole prosecution, was baseless, that the Court

had no jurisdiction to try the accused and therefore the proceedings be quashed. The learned Judge by his order rejected the application and that

has given rise to the present revisional proceedings.

3. The learned Public Prosecutor urged that at interlocutory stage the High Court should not interfere. Certain orders though passed during the

pendency of the proceedings have got the character of final orders and if it be so as per the settled legal position this High Court can intervene in

exercise of its revisional jurisdiction. Alternatively Mr. D.K. Shah for the petitioner submitted that when the serious sword of Damocles was

hanging over the head in the form of unfounded prosecution this Court should intervene even by invoking powers u/s 482 of the Criminal

Procedure Code. The Supreme Court has laid down the law very clearly that even the prosecution lodged by Police or the investigating agency

can be quashed if it is found that it is absolutely without any legs to stand upon. The only question therefore that requires to be examined is whether

the applicant doctor is a public servant as per the term defined u/s 21 of the Indian Penal Code. The said section gives a plethora of categories of

public servants. But if any stretch can be extended to any of those clauses only clause 12 can conceivably be relied upon. I, therefore, quote the

said clause 12 below:

Twelfth: livery person-

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as

defined in Section 617 of the Companies Act, 1956.

4. The learned Public Prosecutor, Mr. Trivedi, very vehemently contended before me that the petitioner could be said to be in the service or pay of

the Government or at any rate can be said to be a person remunerated by fees or commission for the performance of any public duty by the

Government. I do not agree with him. The scheme for the Act as examined by the Supreme Court is that the employers are under compulsion to

contribute certain amounts which amounts ultimately go to the raising of a fund which is handled by the Corporation under the control of the

Government. Even if we assume that the Corporation is a "State" for the purposes of Article 12 of the Constitution of India, every person whose

services on contract basis are requisitioned by the Corporation and therefore, by the State do not necessarily become public servants.

5. We have got fortunately the case of a medical practitioner working as a Panel Doctor under a similar scheme of the Maharashtra Government.

Though it was in the context of the Municipal law, in the case of Madhukar G.E. Pankakar Vs. Jaswant Chobbildas Rajani and Others, Madhukar

G.E. Pankakar Vs. Jaswant Chobbildas Rajani and Others, , in his classic language, "His Lordship Justice V.R. Krishna Iyer examined threadbare

the provisions of this Act and ultimately held, which is the ratio for our purposes, that a Panel Doctor does not hold any office provided under the

Government and he is not a subordinate officer or servant of the Government. In paragraph 16 of the judgment, while dealing with Section 58(1),

the proviso has been discussed, and as per that proviso the Government may discharge the responsibility of rendering medical service through

arrangement with medical practitioners who run their private clinics, in paragraph 20 of the judgment the Supreme Court says that the legal provisions under the Act and the Rules certainly make of an insurance medical practitioner a category different from one who runs a private clinic and enters into contractual terms for treatment of patients sent by Government, but does not clarify that he is not a full-fledged Government Servant who can be said to be in the pay of the Government. In paragraph 22 the learned Judge states that in expanding situation part-time participants in people's projects sponsored by Government cannot be stated to be holders of office of profit under the Government. In other words such part-time participants in people's projects sponsored by the Government are neither under the Government nor are they a part of any profit under the Government. In other words they get their own remuneration pursuant to the contract, but thereby they do not become public servants. Particularly in paragraph 29, while accepting the contention of the Advocate General there, the Supreme Court refers with an approval the observations of Ray, J. who in his turn had accepted the contention of the Advocate General that "medical practitioners gave nothing more than a voluntary undertaking to offer services in lieu of fees for professional service rendered and the inclusion of names in the list and preparation of the list did not have any effect of making the medical practitioner an employee of the State", (emphasis supplied). This feature, emphasised by Mr. Justice Krishna Iyer, was also not to be overlooked. Further observations in the very judgment of Ray, J. quoted as part of paragraph 29 are also illuminating. Accepting the opinion of the Advocate General, the learned Judge, held that the medical practitioners were really undertaking and offering services and if the undertaking was treated as a contract between the medical practitioner and the persons in charge of preparation of medical list, namely, the State or the Corporation it was a mere contract for services and not a contract of services". This proposition in its turn was extracted from the decision of Queen's Bench in the case of Gould v. Minister of National Insurance reported in (1951) 1 KB and also in (1951) 1 All. E.R. 368.

6. Once it is held that he is not in contract of service, but he renders the service pursuant to the contract and if he is paid for his services rendered, he cannot be said to be a person holding any office under the Government and unless a man holds an office under the Government he cannot be

designated to be a public servant is terms of Section 21 of the Act. In paragraph 41 of the said Judgment the Supreme Court observed as under:

An office of Insurance Medical Practitioner can be conjured up if it exists even where no doctor sits in the saddle and has duties attached to it qua

office. We cannot equate it with the post of a peon or security gunman who too has duties to perform or a workshop where Government vehicles

are required, or a Milk vendor from an approval list who supplies milk to Government hospitals.... If, in our case, had there been a fixed panel of

doctors with special duties and discipline, regardless of doctors being there to fill the positions or no, a different complexion could be discerned:

as in the case of specified number of Government pleaders, public prosecutors and the like, the offices surviving even if they remain unfilled. On the

other hand no rigid number of Insurance Medical Practitioners is required by the rules or otherwise. If an Insurance Medical Practitioner

withdraws, there is no office sticking out even thereafter called office of Insurance Medical Practitioner. The critical test of independent existence

of the position irrespective of the occupant is just not satisfied. Likewise, it is not possible to conclude that those doctors, though subject to

responsibilities, eligible to remuneration and liable to removal all with a governmental savour - cannot squarely fall wider the expression "holding

under Government" Enveloped though the Insurance Medical Officer is by Governmental influence, and working:, though he is, within an official

orbit, we are unable to hold that there is an "office of profit held by him and that he is" "under Government". This conclusion avoids the evil of

public duty conflicting with private interest and accommodation of more technical persons in semi-voluntary social projects in an era of expanding

cosmos of State activity." It is, therefore, evident, I would say too evident, to flog the dead horse of prosecution. It is suborn and to be declared as

such.

7. The result is that the prosecution of this Doctor and consequently the prosecution of his compounder are quashed. Rule is accordingly made

absolute.