

(2021) 06 DEL CK 0085

In the Delhi High Court

Case No : Civil Miscellaneous No. 16529 Of 2021 In Civil Writ Petition No. 5355 Of 2021

Dr. Vivek Kumar & Ors

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 18-06-2021

Acts Referred:

Constitution Of India, 1950 — Article 53, 73, 77, 246
Dentists Act, 1948 — Section 3(1)(e), 3(1)(f) 5, 7, 8, 15, 16, 16A, 19, 20, 53A, 54
Regulations Of The Dental Council Of India, 1956 — Regulation 5, 8, 8(1), 9, 39, 46, 56(i), 57
Trademarks Act, 1999 — Section 84(2)

Citation : (2021) 06 DEL CK 0085

Hon'ble Judges : Amit Bansal, J

Bench : Single Bench

Advocate : Paramjit Patwalia, Rupal Luthra, Chetan Sharma, Anil Soni, Sahaj Garg, Devesh Dubey, Vinay Yadav, Akshay Gadeock, Aakansha Kaul, Purushendra Kaurav, Sunny Choudhary, Abhinav Shrivastava, Nirmal Prasad

Final Decision : Disposed Of

Judgement

Amit Bansal, J

C.M. No. 16529/2021 (for stay) in W.P.(C) 5355/2021

1. The present writ petition impugns Order dated 11th May, 2021 issued by the respondent no.1 (Government of India) by which respondent no.1 has

asked the respondent no.3 (Dr. Ashok Khandelwal) to discharge the functions of President of the respondent no.2, Dental Council of India (council)

with immediate effect. A further direction is sought to the respondent no.2 council to elect a Chairman of the respondent no.2 council through the

process of circulation, as provided in Clauses 3 (5) and 8 of the Regulations of the Dental Council of India, 1956 (Regulations) till the posts of

President and Vice President remain vacant.

2. Along with the said writ petition, the petitioners have also filed the present application, being C.M. No.16529/2021 for staying the operation of the impugned Order dated 11th May, 2021.

3. The writ petition was heard by the Roster Bench on 18th May, 2021 and on which date, counsels for the respondents were asked to obtain instructions whether elections could be held for the post of Vice President of respondent no.2 council sometime in the near future. The matter was adjourned to 27th May, 2021, on which date counsels for the respondents informed the Court that conducting elections would have to await a 40 daysâ?? notice period as per the Regulations and therefore, cannot be conducted anytime soon, which was opposed by the petitioners. The matter was adjourned for 4th June, 2021 for the respondent no.1 to obtain instructions. On 4th June, 2021, the Roster Bench recused from hearing of the present petition and in view of the fact that the application for interim relief had been adjourned on the last two occasions, the matter was placed before the Vacation Bench on 7th June, 2021.

4. With the consent of the counsels appearing in the matter, the interim application (C.M. No.16529/2021) was heard on the said date and orders were reserved. As directed, both sides have filed written submissions as well as pleadings in W.P.(C) Nos.9053/2020 and 5339/2021, which as per the respondents are connected with the present petition. When the matter was argued on 7th June, 2021 learned senior counsel for the petitioners submitted that an application for placing on record additional documents has been filed, whereas the counsels for the respondents stated that they have filed an application for tagging the present petition with W.P.(C) No.9053/2020. However, the same were not on record. Considering the nature of the applications, the counsels were directed to e-mail the said applications to the Court Master and I have perused the contents of the said applications/documents filed with the applications before passing this Order.

5. Brief facts necessary for deciding the said application are given hereinafter. The present petition has been filed by four petitioners, who are members of the respondent no.2 council, which is the regulatory body for dentists in India, governed by the Dentists Act, 1948 (the Act). On 9th November, 2020, the then President of the respondent no.2 council, Dr. Dibyendu

Mazumdar was removed by the respondent no.1. Dr. Mazumdar challenged his removal by filing W.P.(C) No.9053/2020 before this Court, in which judgment has been reserved by a Coordinate Bench on 31st May, 2021. In terms of Clause 35 of the Regulations, the Vice President of the Council acts in place of the President in case the office of the President is vacant. However, in the present case, the erstwhile Vice President of the respondent no.2 council (Dr. Bharat Shetty) also tendered his resignation from the post of Vice President as well as the membership of respondent no.2 council on 3rd May, 2021. In light of the vacancy created in the posts of President as well as Vice President, respondent no.3, being a member of respondent no.2 council, was appointed by the respondent no.1 to discharge the functions of President of the respondent no.2 council with immediate effect till elections take place for the said post.

6. Mr. Patwalia, the learned senior counsel for the petitioners has primarily raised three grounds of challenge to the impugned Order dated 11th May,

2021. First, under the provisions of the Act the respondent no.1 does not have any power to appoint President of the respondent no.2 council. Reliance

is placed on Section 7 of the said Act to contend that the President or Vice President of the respondent no.2 council shall be elected by the members

thereof from among themselves. It was further contended that in terms of proviso to Section 7, respondent no.1 only has the power to nominate a

member to discharge functions of the President upon the first constitution of the Council, till the President is elected. Reliance is also placed on

Clauses 8 and 39 of the Regulations to contend that in the absence of the President and the Vice President every meeting of the Council/Executive

Committee shall be presided over by a Chairman to be elected by the members present, from among themselves. Accordingly, it is submitted that even

in the absence of the President/Vice President, there is no power vested with respondent no.1 to appoint a temporary President/Vice President and in

such a scenario a Chairman has to be elected by the members thereof, from among themselves. It was contended that the word "absence" in

Clauses 8 and 39 would also include in its ambit any vacancy to the post of President/Vice President. Section 7 of the Act and Clauses 8 and 39 of the

Regulations are set out hereinbelow for ease of reference:

7. President and Vice-President of Council."(1) The President and Vice-

President of the Council shall be elected by the members thereof from among themselves:

Provided that on the first constitution of the Council and until the President is elected, a member of the Council nominated by the Central

Government in this behalf shall discharge the functions of the President:

Provided further that for five years from the first constitution of the Council, the President shall, if the Central Government so decides, be a

person nominated by the Central Government, who shall hold office during the pleasure of the Central Government, and where he is not

already a member, shall be a member of the Council in addition to the members referred to in section 3.

(2) An elected President or Vice-President shall hold office as such for a term not exceeding five years and not extending beyond the expiry

of his term as member of the Council, but subject to his being a member of the Council, he shall be eligible for re-election.â??

Relevant provisions of the Regulations are provided as under:

â??8. (1) Every meeting of the Council shall be presided over by the President, or if he is absent, by the Vice-President, or if both the

President and the Vice-President are absent, by a Chairman to be elected by the members present, from among themselves.

(2) All references in this part to the President shall be read as referring to the person for the time being presiding over a meeting.

xxxxx xxxxx xxxxx

39. If both the President and the Vice-President are absent the members present shall elect one of their member to act as Chairman.â??

7. Second, it was contended by the learned senior counsel appearing on behalf of the petitioners that the respondent no.1 is not inclined to permit the

conduct of elections for the post of Vice President and reliance is placed in this regard on the letter dated 27th May, 2021, being Annexure A-3 to the

C.M. filed on behalf of the petitioners for placing on record additional documents. In the said letter, it is the stand of the respondent no.1 that the

elections of the Vice President may ideally be held after framing of Regulations in this regard. Further, opinion of the respondent no.2 council was

sought with regard to holding elections for the position of Vice President in the near future with the prospective timelines for the same. Though nothing

is placed on record to show what, if any, was the opinion of the respondent no.2 council, from the Order dated 27th May, 2021 passed by this Court, it

appears that the stand of the respondent no.2 council was that a 40 days notice is required for holding such elections.

8. Third, it was contended on behalf of learned senior counsel for the petitioners that the respondent no.3 should not have been appointed the

President, even on a temporary basis as he is neither the senior most member, nor the most experienced/qualified member of the respondent no.2

council.

9. Per contra, it has been contended by the learned ASG appearing on behalf of the respondent no.1 (i) that respondent no.1 had to issue the impugned

Order dated 11th May, 2021 in view of the unprecedented situation, where the offices of both the President and the Vice President had fallen vacant;

(ii) it was contended that Regulation 8 and Regulation 39 come into play only when there is a temporary absence of both the President and the Vice

President and not in a situation where both the said offices are lying vacant; (iii) that neither the Act nor the Regulations deal with the situation when

the offices of the President as well as the Vice President are vacant; (iv) that the respondent no.3 was appointed on a temporary basis, in public

interest so that the respondent no.2 council continues to function with an effective regulator and so as to ensure smooth functioning of the respondent

no.2 council, till the elections were conducted for the said post; (v) that the respondent no.1 was empowered to issue the impugned Order as the

respondent no.2 council is directly under the superintendence and supervision of the respondent no.1. In this regard, reliance was placed upon Sections

3 (1) (e) and (f), 5, 8, 19, 20, 53A and 54 of the Act. Reliance is also placed on Articles 53, 73, 77, and 246 read with Entry 65 and 66 of List I and

Entry 25 and 26 of List III of the Constitution of India, in support of the contention that respondent no.1 has the power to issue executive directions so

as to cover unlegislated fields, in areas where the respondent no.1 has powers under the Constitution; (vi) that in the petition filed by the ousted

President, W.P.(C) No.9053/2020, judgment has been reserved and it was submitted that since the judgment in the said petition would have a bearing

on the present petition, this Court should await the judgment in the said petition or the present petition should be tagged with the said petition; (vii) that

no prayer for election to the posts of President or Vice President has been sought in the present petition; and, (viii) that appointment of the respondent

no.3 was purely temporary and ad hoc and has been done invoking the doctrine of necessity as the offices of President/Vice President are vacant and

an important body like the respondent no.2 council cannot be left headless.

10. Learned senior counsel appearing on behalf of the respondent no.3 has essentially adopted the submissions made on behalf of the respondent no.1.

He vehemently objects to the allegations against him and states that he is a reputed dentist and is fully qualified to be nominated to act as the President

of the respondent no.2 council. He further submits that this is a proxy litigation fought by the petitioners on behalf of the erstwhile President, Dr.

Dibyendu Mazumdar.

11. In rejoinder, learned senior counsel for the petitioners states that none of the provisions of the Act relied upon by the respondents viz. Sections 3

(1) (e) and (f), 5, 8, 19, 20, 53A or 54 give any power to the respondent no.1 to appoint the President of the respondent no.2 council. He further states

that the constitutional provisions relied upon by the respondents would have a role to play only if there were no statutory provisions. In the present

case, the Act is a self-contained legislation and therefore, executive orders invoking powers under the Constitution cannot be issued by the respondent

no.1. He prays that the impugned Order be stayed and a Chairman be elected by the six current members of the Executive Committee of the

respondent no.2 council and further that election be directed to be held for the post of Vice President.

12. I have considered the submissions made on behalf of learned counsels for the parties in light of the provisions of the Act and the Regulations. It is

clear from a reading of Clause 8 as well as Clause 39 of the Regulations that in the absence of the President/Vice President, members can elect the

Chairman among themselves, who shall preside over the meeting of the Executive Committee. It is obvious from the above that the said Chairman so

elected, will only preside over the meetings, but ipso facto, cannot perform the functions of the President/Vice President. Under the Act and the

Regulations, there are several instances where powers have been vested on the President and the said powers/functions can only be performed by the

President and not by the Chairman so elected under Regulations 8/39.

13. Undoubtedly, the executive power of the respondent no.2 council vests with the Executive Committee, but the powers to give effect to the said decisions of the Executive Committee vest with the President. Illustratively, while the Executive Committee has the powers in respect of carrying out inspections (Section 15), withdrawal of recognition given to the institutes (Section 16) and withdrawal of recognition of recognised dental qualifications (Section 16A), the implementation of the said power of inspection vests with the President (Regulation 57) and no decision of the Executive Committee can be given effect without the approval in writing of the President (Regulation 46 (ii)). Further, under Part IX of the Regulations dealing with Finance and Accounts, the President has been authorized to perform particular functions. The President of the respondent no.2 council also has a role in appointment of ministerial and temporary staff for the respondent no.2 council (Regulation 56(i)). A reading of the Act and the Regulations leaves no doubt in my mind that the office of the President is essential for smooth functioning of the respondent no.2 council and the public functions of respondent no.2 council will be prejudiced in the absence of a President.

14. Learned senior counsel for the petitioners vehemently contends that the respondent no.1 has no powers to appoint a person to act as a President of the respondent no.2 council, whereas the learned ASG contends that, taking into account the overall powers of superintendence and supervision given to the respondent no.1 under the provisions of the Act/Regulations, respondent no.1 has the power to nominate/appoint a member of the respondent no.2 council to act as President on a temporary basis. He further invokes the doctrine of necessity in support of the same.

15. The doctrine of necessity was discussed in *Lalit Kumar Modi Vs. Board of Control for Cricket in India* (2011) 10 SCC 106, as being a common law doctrine that is applied to tide over situations where there are difficulties, on the premise that the law does not contemplate a vacuum and a solution has to be found out rather than allowing the problem to boil over. The said doctrine was also invoked by this Court in *Mylan Laboratories Limited Vs. Union of India & Ors.* 2019 SCC OnLine Del 9070; (2019) 263 DLT 748, where the court directed that even if the post of technical member of the Intellectual Property Appellate Board (IPAB) is lying vacant, the IPAB can still hear urgent matters and pass orders, even though

Section 84 (2) of the Trademarks Act, 1999 provides that an IPAB Bench shall comprise of one judicial member and one technical member. It was

noted that the Trademarks Act was silent on the procedure to be followed and adopted when there is a vacancy of a technical member or a technical

member is present but cannot participate.

16. In the present case, the question whether or not the respondent no.1 has the power to nominate/appoint a person to discharge the functions of the

President of the respondent no.2 council in the absence of an elected President/ Vice President, can only be decided at the final hearing of the present

petition and not at the interim stage. At this stage, I am only to take a prima facie view as to whether there is a necessity for appointing a member to

perform the functions of the President as a temporary arrangement. In my prima facie view, the doctrine of necessity has rightly been invoked by the

respondent no.1 in the present scenario, where the respondent no.2 council was left in an unprecedented situation without a President and a Vice

President.

17. It may be pertinent to refer to the following extracts from the impugned Order dated 11th May, 2021:

“4. WHEREAS, with the resignation of Dr. Bharat Shetty both the positions of President and Vice president of DCI have become vacant;

5. WHEREAS, it is noted that Regulation 39 of DCI Regulations, 1956 pertaining to Executive Committee meetings provides that “if

both the President and Vice President are absent, the member present may elect one of their members to act as Chairman.” Similarly,

Regulation 8(1) of the said Regulations provides that “or if both the President and the Vice President are absent, by a Chairman to be

elected by the members present, from amongst themselves,” It is further noted that both these Regulations refer to situations arising out of

absence of both President and Vice President, temporarily in meeting(s) of the Council/Executive Committee and not as a matter of routine

when none of them is in office till the next elections. The Act as well as the rules and regulations made thereunder, are silent in such a

situation.

6. AND WHEREAS, in the present scenario also, it is necessary in the public interest that DCI continues to function as an effective

Regulator for the Dental Education sector. Therefore, in the larger public interest as well as with a view to ensure smooth functioning of the

Council, it is essential that a temporary arrangement is made by giving charge of the President of the Council to some suitable person

temporarily till conduct of the elections for the said post.

7. AND WHEREAS, having regard to the facts and circumstances enumerated in foregoing paras the Ministry orders that D r. Ashok

Khandelwal, Member of DCI, may discharge the functions of the President, DCI with immediate effect and till election takes place for the

said post or any other order issued relevant to the said post, whichever is earlier.

8. This temporary arrangement shall be subject to any litigation in the matter pending before any Court of law.â??

18. It may be pertinent to mention here that the impugned Order per se does not appoint the respondent no.3 as the President of the respondent no.2

council on a regular basis. It only provides that the respondent no.3 shall discharge the functions of President of the respondent no.2 council with

immediate effect till election takes place for the said post or any other order is passed relevant to the said post, whichever is earlier. It is further noted

that this arrangement shall be subject to any litigation in the matter pending before any Court of law. It appears that the said reference is to the

pending litigation, where the erstwhile President of the respondent no.2 council has challenged his ouster and where the judgment has been reserved

by a Coordinate Bench of this Court. In my prima facie view, respondent no.1 is right in contending that the functioning of respondent no.2 council

would be impaired in the absence of a President/Vice President and therefore, I see nothing wrong in respondent no.1 appointing someone to perform

functions of the President on a temporary basis.

19. I may further note that nothing has been pleaded on behalf of the petitioners as to the prejudice caused to the petitioners by the appointment of the

respondent no.3, to discharge the functions of the President of the respondent no.2 council except that there were more deserving candidates for the

said post. The petitioners have also failed to demonstrate that any act of the respondent no.3 while discharging the functions of President of the

respondent no.2 council has caused grave harm and prejudice to them.

20. The petitioners have not been able to establish any urgency or the balance of

convenience in their favour or the fact that irreparable injury and harm would be caused to them in case the interim relief as sought is not granted. The impugned order itself notes that this arrangement is only a temporary arrangement and would be subject to orders/judgments passed in the pending litigations, namely W.P.(C) Nos.9053/2020 and 5339/2021.

21. Though I am not inclined to stay the impugned Order, but I am inclined to maintain the democratic functioning of the respondent no.2 council. It is

essential that institutions like the respondent no.2 council, that perform important public functions, continue to retain their democratic character. After

all, democratic values are the essence of our society and elections are the bedrock of democracy. Though the election of the President is subjudice,

there is no impediment in election of the Vice President of the respondent no.2 council, as provided in Section 7 of the Act. I am not impressed with

the submission on behalf of the respondent no.1 that election of the Vice President of the council should await the framing of new regulations. The

new regulations, as and when they are framed, will take effect from a future date and will have no bearing on the elections conducted prior to that.

22. Accordingly, I direct the respondents to forthwith hold elections for the post of Vice President, as per procedure prescribed in the Act and the

Regulations. To carry out the process of holding of election in a smooth manner, I appoint Justice G.S. Sistani, retired judge of this Court, as an

Observer. Justice G.S. Sistani will consult with the Secretary and the members of the Executive Committee of the respondent no.2 council to carry

out the modalities of the election process, including but not limited to holding elections virtually and the notices to be sent to the members of the council

and will oversee the conduct of the elections. Keeping in mind the numbers and the geographical spread of the members of the respondent no.2

council, 40 days' notice as provided in Regulation 5, and as submitted by counsel for the respondent no.2 council before this court on 27th May,

2021, would be necessary. The Secretary of respondent no.2 council would render all assistance to Justice G.S. Sistani in holding of the elections.

Justice G.S. Sistani will be paid an honorarium of Rs. 2 lakhs by respondent no.2 council for the services rendered by him. Till the Vice President is so

elected, respondent no.3 will continue to discharge functions of the President in terms of the impugned Order dated 11th May, 2021, subject to

judgement/orders that may be passed in W.P.(C) No.9053/2020. Copy of this order may be provided to Justice G.S. Sistani, 3 Link Road, Jangpura, New Delhi - 110014 (Tel. 9871300034).

23. Needless to say, these observations are prima facie in nature, in the context of adjudication of the present application and shall not affect the final decision in the present writ petition.

24. The present application is disposed of in aforesaid terms.