

(2022) 10 DEL CK 0062

In the Delhi High Court

Case No : Civil Writ Petition No. 13435 Of 2022, Civil Miscellaneous Application No. 40785-40786 Of 2022

Santosh Trust & Anr.

APPELLANT

Vs

National Medical Commission & Ors

RESPONDENT

Date of Decision : 13-10-2022

Acts Referred:

Constitution Of India, 1950 — Article 226

National Medical Commission Act, 2019 — Section 26(1)(a), 26(1)(b), 26(1)(c), 28(1), 28(1)(f), 28(2), 28(3), 28(5), 28(6), 29(b), 29(c)

Citation : (2022) 10 DEL CK 0062

Hon'ble Judges : Sanjeev Narula, J

Bench : Single Bench

Advocate : Vikas Singh, Atul Sharma, Abhishek Agarwal, Kanicka Mittal, Abhishek Singh, T. Singhdev, Bhanu Gulati, Abhijit Chakravarty, Michelle B. Das, Ramanpreet Kaur, Monika Arora, Geetanjali Tyagi, Shivam Raghuwanshi

Final Decision : Disposed Of

Judgement

Sanjeev Narula, J

1. The present petition under Article 226 of the Constitution of India assails communications dated 02nd September 2022, 03rd September 2022 and 31st August 2022 [hereinafter collectively referred to as "Impugned Letters"] issued the Respondent No. 2/ Medical Assessment and Rating Board ["MARB"] of Respondent No. 1/ National Medical Commission ["NMC"], whereby, in response to applications seeking increase in seats in certain post-graduate medical courses in Petitioner No. 2/ Santosh Medical College and Hospital ["Petitioner-College"], MARB has: (i) Disapproved increase in seats in MS (ENT) from 4 to 7 Seats; (ii) Disapproved increase in seats in MS (Ophthalmology) from 5 to 8 Seats; and (iii) Partially allowed increase in seats in MD (Respiratory Medicine) from 2 to 4 instead of 2 to 5.

2. Petitioner-College has been offering various UG and PG courses since 1995. In

November 2021, it applied to NMC for starting a new post-graduate course as well as for increasing seats for certain PG courses, under Section 26(1)(a)(b), 26(1)(c) and 28(1)(f) of the National Medical Commission Act, 2019. Surprise inspections were carried out by assessors (separately for each course); assessors' reports found the college to be adequate in certain aspects. Petitioners state that no other inspection was carried out and no hearing was held. Later, on the basis of such assessors' reports, MARB passed the Impugned Letters. The status of application/request for increase in seats is as follows:

(i)

(ii)

(iii)

(ii) + (iii)

(v)

(ii) + (v)

Course

Existing seats

Additional seats applied for

Total expected seats

Additional seats allowed by MARB

Total seats for academic year 2022-23

MD (Respiratory Medicine)

02

03

05

02

Vide 'Letter of Intent' dated 31st August 2022

04

MS (Ophthalmology)

05

03

08

0

Vide 'Letter of Disapproval' dated 02nd September 2022

05

MS (ENT)

04

03

07

0

Vide 'Letter of Disapproval' dated 03rd September 2022

04

3. Mr. Vikas Singh, Senior Counsel for Petitioners, prays for urgent relief, as counselling for academic year 2022-23 has already begun. He argues that the second round of counselling begins on 14th October, 2022, and if relief is not granted by such time, the student intake of Petitioner-College will be adversely impacted and relief sought would be rendered infructuous.

4. The broad grounds of challenge to the Impugned Letters are as under:

a. MARB has taken new grounds of rejection, which do not form part of the assessors' reports [being alleged auction by DRT at the behest of HUDCO due to default in loan repayment by Petitioners]. This approach is impermissible as held by this Court in Santosh Trust v. NMC [Judgment dated 15th March 2022 in WP(C) 1958/2022.], wherein the instant Petitioners assailed similar letters issued by NMC whereby they had rejected increase in seats for MBBS, MS (Orthopaedics) and MS (Ob.-Gyn.) courses.

b. No deficiency was found by the assessors in their surprise inspections, as evident from their reports; in absence thereof, the Impugned Letters are bad in law.

c. The assessors are experts in the field, and when there is no allegation of bias or malafide made against them, there is no reason to discard their reports, and instead it should be treated as sacrosanct. [Reliance placed on: Manohar Lal Sharma v. Medical Council of India, 2013 10 SCC 60, at paragraph no. 27; and Medical Council of India v. Kalinga Institute of Medical Sciences, 2016 11 SCC 530.]

d. Without prejudice, since the statute provides for rectification in case deficiency was found by the assessors, an opportunity should have been afforded to Petitioners to explain their stand or remedy the same.

e. No hearing was given to Petitioner-College before the Impugned Letters were issued, nor any other form of opportunity given to explain and/or correct the alleged deficiencies.

f. Petitioner-College provided adequate, correct and complete data, as per the standard form supplied by NMC itself. In the assessor's reports, no deficiencies or inadequacy of data have been noted, and the Petitioner College has been found to be eligible for the aforesaid increase in intake capacity.

g. Considering that Petitioner-College was designated as a 'Covid Hospital' [Petitioner-College states that it was declared as a 'Covid-19 Hospital' and acquired from 28th March 2020 by the District Magistrate, Ghaziabad, vide orders No. 354/JudicialAssistant-2 nd/Coronavirus/2020 dated 28th March 2020. Subsequently, the Hospital was designated and retained as L3 Covid-19 Hospital by the Government of Uttar Pradesh vide its Order No.-172/Five-5-2021 dated 01st February 2021 due to second surge of Covid-19 patients It was retained as level-3 dedicated Covid Hospital vide UP Govt. Order ME-1/2021/1525 dated 09th April 2021 till 31st August 2021. It was then allowed to operate its regular OPD / IPD, Surgeries, procedures and Investigations for non-Covid patients from 01st September 2021.], many of its regular facilities were halted during such time. This aspect has not been considered by MARB in its Impugned Letters. In fact, this factor has immensely weighed with co-ordinate bench of this Court which allowed a writ petition of a similarly placed medical college. [Reliance placed on: Dr. M.K. Shah Medical College and Research Centre v. Union of India, 2022 SCC OnLine Del 938.]

h. In case of minor deficiencies, no-reinspection is required and permission can be granted by the Court itself. [Reliance placed on: Rajiv Memorial Academic Welfare Society & Anr. v. UOI & Anr., 2016 11 SCC 522, at paragraphs 17-19.]

5. Mr. T. Singhdev, counsel for NMC and MARB, at the outset, states that there is grave inadequacy in the data provided by the Petitioner-College. He states that column 8 of the Standard Assessment Form, which is filled by the assessors in their reports on the date of inspection, requires data for past three calendar years, whereas, Petitioner-College has provided data for only one and a half years. No data has been provided for the so-called Covid period, i.e., from 21st March 2020 to 31st August 2021, citing the Petitioner-College's declaration as a 'Covid-19 Hospital' by the Government of Uttar Pradesh. The data provided for first 3 months of 2020, and last three months of 2021, is unreliable at best, and suspicious at worst, and is wholly insufficient to draw a conclusion that seat augmentation requested by Petitioner-College is warranted. He further states that the Standard Assessment Forms for the three disciplines have been filled on the date of the inspection i.e., 20th August 2022, 26th August 2022 & 29th August 2022, whereafter the same were transmitted to MARB. It is the Petitioner-College that is solely responsible for insufficient data provided to MARB. In response to the allegation of lack of hearing provided to the Petitioner-College, Mr. Singhdev states that no opportunity is required under the Act, and this has also been recognized by the Supreme Court.

Reliance placed on: Manohar Lal Sharma v. Medical Council of India, 2013 10 SCC 60, at paragraph no. 19, which reads as under:

"19. MCI, while deciding to grant permission or not to grant permission, is not functioning as a quasi-judicial authority, but only as an administrative authority. Rigid rules of natural justice are, therefore, not contemplated or envisaged. Rule 8(3)(1) of the Establishment of Medical College Regulations (Amendment) Act, 2010 (Part II), provides for only an "opportunity and time to rectify the deficiencies". Compliance report is called for only to ascertain whether the deficiencies pointed out were rectified or not. If the MCI is not satisfied with the manner of compliance, it can conduct a surprise inspection. After that, no further time or opportunity to rectify the deficiencies is contemplated, nor further opportunity of being heard, is provided."

6. Mr. Vikas Singh, in rejoinder, explains that the plea of alleged inadequacy of data is misconceived. In the intervening time period, Petitioner-College could not admit non-Covid patients as it was declared as a 'Covid-19 Hospital' and beds in such hospitals were to be reserved for treatment of Covid patients. Thus, it was not performing the full breadth of its regular functions and the data of such time period, could be misconstrued. For example, very few major or minor surgeries would have been undertaken during Covid times in the ophthalmology department. Thus, only data of non-Covid times, when the Petitioner-College was operating at its full functioning, has been provided. He also highlights that none of the three assessors raised any objection to the data so provided at the time of inspection, and moreover, the column-headings were filled in by the assessor or on their instructions, which cannot, now, be interpreted against the Petitioner-College.

ANALYSIS:

7. Section 28(1) of the NMC Act, 2019 provides that prior permission from MARB is required for increasing number of seats in a medical course. An application in this regard is made under Section 28(2), which is either approved or disapproved under Section 28(3) in reference with the criteria specified. Section 29(b) provides for adequate academic faculty and other necessary facilities to ensure proper functioning of the medical college. Section 29(c) further provides for adequate hospital facilities. Inspection reports form the basis for MARB's decision making process. During the course of inspections, an assessor gathers information which is put down in a standardized form prescribed by MARB/NMC. The first page of the Standard Assessment Form details instructions for the Dean/ Principals of the medical colleges and Assessors. Clause 2 stipulates that the form has to be filled completely and Clause 7 states that the Dean/ Principal is responsible for filling up the data in the form.

8. In an attempt to justify/ nullify the action of MARB, as the case may be, counsels for both sides have painstakingly taken this Court through minute details of the assessors' reports which are contained in Assessment Forms in each of the three disciplines – MD (Respiratory Medicine), MS (Ophthalmology) and MS (ENT). However, this Court cannot place itself in the shoes of MARB and decide each of such technical aspects which are best left to the judgment of

experts. The Supreme Court, too, has categorically held in a catena of judgments, that when an expert team of assessors, after inspection, certifies an inspection report, then it is not for the courts to sit in appeal over it. Thus, at the outset, it must be clarified that interference of this Court must be circumspect, and present judgment shall not get into the correctness or details of the data laid out in the assessors' reports, as tempting as such interference may be. It needs no reiteration that that it is only in rare cases, when the decision of an executive authority is so arbitrary or contrary to the facts at hand, and demonstrably, ex-facie wrong, should the court check such exercise of arbitrary power and assume the role of such authority for the purpose of granting substantive final relief.⁷ In this light, the court has considered following factors in coming to a conclusion.

A. MD (Respiratory Medicine)

9. MARB, vide Letter of Intent dated 31st August 2022, increased the seats from 2 to 4, instead of 2 to 5, citing the following reasons: "(1.) Teaching unit is not complete, no appointment letter for Sr. Resident, he has work as Assistant Professor for 1 year and 8 months in the same college. (2.) Special equipments in Pharmacology and Radiology are inadequate." (sic). However, assessor's report dated 20th August 2022, to the contrary, categorically remarks that the infrastructure, faculties and clinical material at Petitioner-College is adequate; no deficiency has been recorded.

10. Mr. Singhdev also points out that the Petitioner-College was granted a hearing by MARB on 14th September 2022, whereafter a 'final Letter of Disapproval' was issued by MARB on 14th September 2022.

B. MS (Ophthalmology)

11. MARB, vide 'Letter of Disapproval' dated 02nd September 2022, did not allow any increase in seats in MS (Ophthalmology), citing the following reasons: '(i) Specialty clinics have less cases (surgery), EB registration still pending. Specialty work specially surgery need to increase. (ii) No surgical facilities. (iii) OPD attendance overall has not yet increased to original values since 2019. (iv) Diagnostic tests in Microbiology are inadequate. (v) Eye bank is not established, nor corneal surgery and specialty work is very less.' With respect to this discipline, assessor's report dated 26th August 2022, categorically remarks that "There are adequate machine and equipment but the various special clinics run with few surgical cases. Eye bank is registered with EVAI, registration with state govt is pending and still under commissioning."

12. Petitioners, in rejoinder to the counter-affidavit, have affirmed on affidavit that the 'Eye Bank' registration has now been obtained. To that extent, the deficiency pointed out by MARB stands cured.

C. MS (ENT)

13. In respect of the above course, Mr. Singhdev has highlighted MARB's primary objection qua inadequacy of data on clinical materials. Vide 'Letter of

Disapproval' dated 03rd September 2022, it did not allow any increase in seats in MS (ENT) citing the following reasons: "(i) Huge drop in clinical load over 3 years. (ii) Surgeries has become halved. (iii) IP and OP cases have also been reduced." (sic) With respect to this discipline, assessor's report dated 29th August 2022, categorically remarks that: "Assessment of ENT Department done on 30/08/2022. Adequate clinical material, equipment, Infrastructure & faculty available on inspection."

14. Additionally, Mr. Singhdev has averred that even in this case, the Letter of Disapproval dated 03rd September 2022 was only provisional in nature. Petitioner-College was granted a hearing by MARB on 14th September 2022, whereafter a final Letter of Disapproval was issued by MARB on 14th September 2022.

D. On mismatch between assessor's reports and Impugned Letters

15. Noticing that in most cases, there is an apparent mismatch between the assessor's report and Impugned Letters sent by MARB, to the effect that the assessors' reports indicate no inadequacy whereas MARB has taken a contrary stand, Mr. Singhdev was queried regarding Respondents' stand on this issue. He contends that the assessor is only an agent of MARB, who carries out a field visit, but the decision-making authority rests with MARB, which takes into consideration the inspection report as well as other considerations to arrive at its decision, and thus the comments made by the assessor are superfluous and non-binding.

16. This submission is vehemently opposed by Mr. Vikas Singh, who states that the prerogative is of the assessor to seek additional data at the time of inspection, and not of MARB at a later date. He states that MARB must consider the reports of the assessor, which are final in all respects, and this is the consistent practice and procedure followed by NMC in respect of all such applications for increase in intake capacity.

17. The Court is not convinced with the Respondents' stand qua lack of credibility of assessors' reports. MARB may be the final decision-making authority, but that does not mean that the assessors' reports, based on actual physical inspection of the college and verification of records, is to be brushed-aside whimsically. MARB assigns this crucial function of inspection to the assessor, who has to report on critical aspects that would ultimately form the basis for MARB taking an informed decision on the application of medical colleges. The assessors are senior medical professionals of reputed medical facilities. They are aware of the norms and regulations, and are also aided by their knowledge of and experience in the medical field. In the absence of any demonstrable error in the report, which has indeed not been shown by the Respondents, the remarks made by an assessor qua adequacy of infrastructure, faculty, etc., as noted above, must be given due regard and weightage.

18. Keeping the above in mind, it can be noticed that insofar as the discipline of

MD (Respiratory Medicine) is concerned, the decision of MARB is not sustainable. The only two cogent reasons discernible from the impugned communication are ex-facie contradicted by the assessor's report dated 20th August 2022, wherein no deficiency was found.

19. Further, the Court is unconvinced by the reasoning put forth to justify the restricted increase in intake capacity. Mr. Singhdev has argued that a certain faculty member - Dr. Mahendran - has been working as an Assistant Professor but was downgraded to a Senior Resident just 4 days before the inspection. This was labelled as suspicious by Mr. Singhdev, on the ground that it casts a doubt on the adequacy of faculty members and accuracy of data obtained. However, the assessor has observed in no unequivocal terms that the faculty is adequate. Contrary to the decision of MARB, the annexure to the assessor's report shows that the requirement of senior resident is adequately fulfilled, as Dr. Mahendran, at the fifth row of said table, meets the criterion. There is merit in Petitioners' argument that, notwithstanding whether his current position is of an Assistant Professor or a Senior Resident, it is an undisputed fact that since former position is senior to the latter position, it cannot be said that a senior resident is lacking, and thus the norms for adequacy of faculty are satisfied.

20. Further, the objection of inadequacy of special equipment in Pharmacology and Radiology is belied by the assessor's clear finding that the infrastructure is adequate. As the assessor has found that Petitioner-College meets the requisite criteria prescribed in the regulations, MARB could not, on its own whims and fancies and without any further reasoning, grant permission for a lesser number of seats. The adequate infrastructure and clinical material, as per the assessor's guide and regulations, entitled the Petitioner-College to the increase in intake capacity that it had applied for.

21. Apart from the two reasons cited in the impugned letter, Respondents in their counter-affidavit, have taken the lack of clinical data as another ground to oppose the request. This objection, having not been raised earlier, cannot be allowed to be urged at this stage to deny Petitioner-College's request. Petitioner-College is thus entitled to increase in seats for MD (Respiratory Medicine), as applied for.

22. As regards the other two disciplines, the Court finds gross violation of principles of natural justice and statutory provisions. When MARB received positive assessor's reports upon a surprise inspection, Petitioners could not have been suddenly slapped with disapproving orders, containing reasons that are being pointed out for the first time. Adequate opportunity should have been offered to the college to explain or make good the insufficiencies/ deficiencies if the same were noticed by MARB.

E. On inadequacy of data for the past 3 years

23. That said, Mr. Singhdev has laid considerable stress that the truncated data for three months (01st January 2020 to 20th March 2022) for Year 2, and four

months (01st September 2021 to 31st December 2021) for Year 3, does not fulfil the requirement of the Standard Assessment Form. He attributes this lacuna/deficiency to the Petitioner-College, arguing that the Standard Assessment form makes no distinction between Covid and non-Covid times. In the opinion of the Court, this objection is not merited. Though ultimate responsibility of the data would obviously be of the College, but the assessors are aware of the requirements of the form and the Act, as well as the criteria for determining the application for increase in intake. The assessors could have asked for the complete data, including for the period when the Petitioner was a 'Covid-19 Hospital', at the time of conducting inspection, if indeed such data was so germane. No objection or non-cooperation on the part of Petitioners has been recorded in the reports to this effect. Requisite data could also have been easily requisitioned for by MARB, if the data provided to the assessors did not fulfil its requirement for making an assessment. Further this deficiency could also have been rectified at a stage if/when the Petitioner was given a hearing. Mr. Singhdev has tried to explain this breach by arguing that there was practically no time available for granting an opportunity to rectify deficiencies to the medical colleges in the country, as the NEET PG-2022 had already taken place on 21st May 2022; result was declared on 02nd June 2022 and the counselling for admission to postgraduate courses was to commence shortly thereafter. He relies upon Notice dated 29th August 2022 issued by the Directorate General of Health Services, Ministry of Health & Family Welfare, Government of India, informing that that the counselling for admission to postgraduate courses which was to commence from 01st September 2022, had been postponed since the MARB was in the process of issuing letters of permission for start/increase in intake in postgraduate courses, which were to be concluded by 15th September 2022. Mr. Singhdev also argues that processing of all applications seeking increase in seats in postgraduate courses had been concluded by MARB till 15th September 2022 and as such, no fresh process can be undertaken at this stage, which shall stall and prolong the ongoing counselling process.

24. The above factors would still not discern the fact that MARB has deviated from the statute, and this cannot be countenanced. The opportunity of rectification ought to have been provided. While a hearing may not be a statutory right engraved in black letter, the argument does bear merit that if MARB found the assessor's report to be inadequate, it ought to have given an opportunity to the petitioner to produce additional data which was not asked for by the assessor. Indeed, it is not MARB's case that the assessor asked for, but was denied, access to data for a certain period. In fact, no adverse observation is made in the assessor's report to this effect. Thus, the inadequacy of data collected by the assessor, is a result of failure on part of the assessor, which cannot be attributable to Petitioner-College. However, as discussed above, admittedly the medical college was operating prior to the onset of Covid-19 pandemic at least since 01st September 2021. Indeed, in paragraph 20 of the writ petition it is categorically mentioned that Petitioner was permitted to operate

its regular OPD, IPD, Surgeries, Procedures & Investigation for non-Covid patients from 01st September 2021, till the date of inspection. It is also admitted that it has not even provided the data of the Covid patients handled by it. Therefore, the proper course of action would be in directing the Petitioner to provide the clinical data for the covid period, to MARB, to enable them to scrutinize the same when other parameters have been met, and the reference data justifies increase in intake, there should be no reason to deny the request.

F. Alternate Efficacious Remedy

25. Lastly, the Court must also deal with the objection regarding the maintainability of the petition raised by Respondents, inasmuch as they contend that Petitioner-College has not availed the remedy provided under Section 28(5) of the Act of preferring an appeal to NMC, and thereafter, of a second appeal to the Central Government, under Section 28(6) of the NMC Act, 2019. This objection is well-founded and has considerable merit. However, given the circumstances and the urgency expressed by the Petitioners, this Court is of the view that the same shall not be efficacious in the stringent timelines available, as by the time such appeal hearings are completed, the relief sought would have been rendered infructuous. In fact, this court has also perused the decision of a coordinate bench dated 01st April 2022 titled Dr. M.K. Shah Medical College and Research Centre v. Union of India 2022 SCC OnLine Del 938., whereby, the Court has struck down similar impugned communications and, instead of remanding the matter back to the Respondents for issuance of a fresh order, directed NMC to forthwith issue letters of permission to the concerned college so that it does not miss out on the next round of counselling. Thus, in light of peculiar factual circumstances, an exception is made in the present matter to entertain the petition despite existence of alternate remedy.

26. In coming to the directions laid out below, the following reasoning adopted by a coordinate bench of this Court in judgment dated 15th March 2022 in W.P. (C) 1958/2022 titled Santosh Trust v. NMC, also weighs with this Court:

"No doubt the respondents cannot be asked to lower the standards prescribed under the regulations however, simultaneously, in a situation like the present, when it is found that an institute like the petitioner which has been running for the last more than 20 years is not lacking in any infrastructure and has also rectified the deficiencies which were found at the time of initial inspections, that too when the said deficiencies were only on account of the Covid pandemic, it would also be against public interest to deny permission to the petitioner to increase the seats. At a time when the ratio of medical profession as vis-a-vis the population of the country is abysmally low, an increase in the number of PG and UG seats would certainly contribute to the bigger goal of strengthening the medical infrastructure of the country."

DIRECTIONS:

27. For the foregoing reasons, all the Impugned Letters are quashed. The Letters

of Disapproval, both dated 14th September 2022, in respect of MS (ENT) and MD (Respiratory Medicine) courses, issued pursuant to Impugned Letters, are also consequently struck down.

28. Qua MD (Respiratory Medicine), permission is granted to Petitioner-College to increase seats from 2 to 5, instead of 2 to 4. MARB shall issue the necessary approval to allow Petitioner-College to participate in counselling for Academic Year 2022-2023 forthwith.

29. As regards, MS (Ophthalmology) and MS (ENT), most of critical aspects necessary for grant for approval stand verified, and the only detail that remains to be seen is the adequacy of reference data relating to the Covid period (i.e., from 21st March 2020 to 31st August 2021). Accordingly, it is directed that Petitioner-College shall submit complete data in respect of clinical material for the past three calendar years included the abovementioned Covid period, to MARB, immediately, and not later than 3 days from the date of this judgment. Keeping in mind that the Petitioner-College has missed first round of counselling, and second round of counselling is to commence from 14th October 2022, any further delay would prevent it from participating even in the remaining rounds, thus, no re-inspection is being ordered. It is directed that the data furnished by Petitioner-College for the abovementioned period shall be examined by MARB, which shall take a fresh decision thereon within 48 hours of receipt of the data.

30. MARB shall take into consideration the observations made hereinabove, and keep in view assessors' reports in respect of the above-referred two disciplines, while taking fresh decisions.

31. If Petitioner-College fulfils the criteria, MARB shall proceed to issue permission/approval, and allow them to forthwith participate in the on-going counselling. If the decisions are against Petitioner-College, it shall be at liberty to assail the same, in accordance with law.

32. With the above directions, the petition is disposed of, along with pending applications.