

(1954) 05 CAL CK 0012
In the Calcutta High Court
Case No : Matter No. 24 of 1954

Shila Banerjee

APPELLANT

Vs

B.C. Das Gupta and Another

RESPONDENT

Date of Decision : 20-05-1954

Acts Referred:

Constitution of India, 1950 — Article 14, 19
West Bengal Clinical Establishments Act, 1950 — Section 9
West Bengal Clinical Establishments Rules, 1951 — Rule 11

Citation : AIR 1954 Cal 571 : 58 CWN 705

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : M.N. Banerjee and S.K. Mukherjee, for the Appellant; A.G. and A.K. Sen, for the Respondent

Judgement

Sinha, J.—This is a rule calling upon the respondents to show cause why a writ in the nature of mandamus should not be issued commanding the said respondents to rescind, withdraw or recall the notifications being Nos. P.H. 2209/2A-9/52, P.H. 2210/2A-9/52 and P.H. 2211/2A-9/52 dated 9-8-1952 published on 11-8-1952 in the extraordinary issue of the Calcutta Gazette, and why the said respondents, its servants and agents should not be restrained from giving effect to or taking any steps under or in pursuance of the said notifications and why such further orders should not be made as to the Court may seem fit and proper.

2. The application arises in the following way. The West Bengal Clinical Establishment Act, 1950 came into operation on 23-11-1950. The title of the Act shows that it was an Act to introduce a system of registration and licensing in respect of clinical establishments and the preamble shows that it was expedient to introduce a system of registration and licensing in respect of such establishments.

3. In the Act, "clinical establishment" has been defined to mean a nursing home, a physical therapy establishment, a clinical laboratory or an establishment

analogous to any of them, by whatever name called. u/s 9 of the Act, the State Government has been given power to make rules for the purpose of carrying out the provisions of the Act. Such rules have been framed and are known as the West Bengal Clinical Establishment Rules, 1951. The original rules were published under notification No. Medl. 621/P.H.-2R-72/50 dated 11-2-1952. The rule No. 11, in so far as it relates to physical therapy establishments, runs as follows:

"11. No licence for a clinical establishment shall be granted unless the licensing authority is satisfied that the applicant and the clinical establishment fulfil the following conditions:

For Physical Therapy Establishment, (i) It is under the direct supervision of a properly qualified expert on the particular kind of treatment given in the establishment.

(ii) Save as hereinafter provided the employees of the establishment and the person or persons giving the actual treatment shall have the proper qualifications from institutions approved by the State Government for imparting such treatment.

(iii) In case the employees of the establishment and the person or persons giving the actual treatment do not possess the proper qualifications from institutions approved by the State Government, separate arrangements shall be made for the treatment of male patients and female patients in the Physical Therapy establishment; male employees shall be employed in the establishment meant for the treatment of male patients and female employees shall be employed in the establishment meant for the treatment of female patients and in such establishment it shall be prominently displayed whether the establishment is meant for the treatment of male or female patients.

(iv) Examination and treatment of female patients are conducted in the presence of a female agreed to by the patient."

4. Several further notifications have been issued dated 9-8-1952 published in the Extraordinary Gazette dated 11-8-1952. Relevant extracts therefrom are given below:

"No. P.H. 2209/2A-9/52.-9th August 1952. -- In exercise of the power conferred by Clause (ii) of the entries under the heading "For Physical Therapy Establishment" in Rule 11 of the West Bengal Clinical Establishments Rules, 1951, the Governor is pleased to approve the following institutions as institutions from which the employees of a Physical Therapy Establishment and the person or persons giving the actual treatment in such establishment shall have the proper qualifications for imparting such treatment, namely:

(i) the Chartered Society of Physio therapists. England;

(ii) the American Association of Physiotherapy, U. S. A. and

(iii) similar other associations in Norway, Denmark, Holland, Sweden and Australia.

No. P.H.2210/2A-9/52 -- 9th August 1952 --In exercise of the power conferred by Section 9 of the West Bengal Clinical Establishments Act, 1950 (West Bengal Act 56 of 1950), the Governor is pleased to make the following amendment in the West Bengal Clinical Establishments Rules, 1951, published under notification NO. Medl. 621/PH/2R-72/50, dated the 11th February 1952, in Part I of the Calcutta Gazette, Extraordinary, dated the 14th February 1952, as subsequently amended, namely:

AMENDMENT.

In Rule 11 of the said rules for Clause (iii) of the entries under the heading "For Physical Therapy Establishment" substitute the following namely:

"(iii) In the case of an establishment where the employees of the establishment and the person or persons giving the actual treatment do not have the proper qualifications from institutions approved by the State Government under Clause (ii);

(a) the employees of the establishment and the person or persons giving the actual treatment shall have such qualifications as may be determined by regulation made by the State Government in this behalf;

(b) separate arrangements shall be made for the treatment of male patients and female patients in the establishment and it shall be prominently displayed whether the establishment or a particular part thereof is meant for the treatment of male or female patients; and

(c) males shall be employed for the treatment of male patients and females shall be employed for the treatment of female patients." NO. P.H. 2211/2-A-9/52 -- 9th August 1952 --In exercise of the power conferred by Sub-clause (a) of Clause (iii) of the entries under the heading "For Physical Therapy Establishment" in Rule 11 of the West Bengal Clinical Establishments Rules, 1951, the Governor is pleased to make the following regulation determining the qualification which the person or persons giving the actual treatment therein, who do not have the proper qualifications from institutions approved by the State Government under Clause

(ii) of the said entries, shall have, namely:

Regulation.

A person giving actual treatment in a physical. Therapy Establishment who does not have the proper qualifications from an institution approved by the State Government under Clause (ii) of the entries under the heading "For Physical Therapy Establishment" in Rule 11 of the West Bengal Clinical Establishments Rules, 1951, shall possess,

(1) a certificate of passing the Matriculation Examination of the Calcutta University or an equivalent examination;

(2) practical experience for a period of at least five years as a trainee or as an assistant to a qualified Physio-Therapist, in the Physio-therapy Department of a Government hospital or a hospital recognised by the State Government; and

(3) satisfactory knowledge of the following subjects, namely:

(a) basic anatomy, specially of bones, joints and muscles,

(b) basic physiology with rudimentary knowledge of diseases in which massage is indicated or contra-indicated;

(c) mechanism and use of remedial apparatuses, and

(d) physics and application of electrical appliances used in modern Physio-therapy; Provided that, notwithstanding anything contained in Clause (1) or Clause (2) or Clause (3), a person who, on the date of publication of this regulation in the Calcutta Gazette, Extraordinary, is employed in a Physical Therapy Establishment and has continuously been so employed for a period of not less than four years shall not be deemed to be disqualified for continuing: to be so employed.

(i) till the 15th day of September 1952, if he possesses a certificate of passing the annual examination of Class VI of a recognised High School,

(ii) thereafter till the 15th day of August 1953, if in addition to possessing a certificate of passing such examination, he also passes within the 15th day of October 1952 a test examination in respect of the qualifications referred to in Clause (3), held by a person or persons appointed in this behalf by the authority referred to in Rule 7 of the West Bengal Clinical Establishments Rules, 1951, and

(iii) after the 15th day of August 1953, for such further period, under such additional conditions as may be specified in this behalf by the State Government."

5. The petitioner claims to be a qualified physio-therapist having experience in the particular line for a period of over six years. She appeared at a qualifying examination held at the Directorate of Health Services, Government of West Bengal, on or about 3-11-1952 and duly passed therein.

6. It will appear from the rules set out above that no one can be employed or impart treatment in a physical therapy establishment unless such a. person has a qualification from foreign institutions-mentioned in notification No. P.H.2209/2A-0/52 set out above, or has the Indian qualification mentioned in the regulations set out in notification No. P.H. 2211/2A-9/52. It will further appear that in the case of persons possessing foreign qualifications mentioned above, such a person can treat patients of both the sexes, whereas persons having Indian qualification cannot do so. In the case of a physical therapy establishment employing persons with Indian qualification, separate arrangements have to be

made for the treatment for male patients and female patients and it has to be permanently displayed whether the establishment or a part thereof was meant for the treatment of male or female patients, and males are to be employed for the treatment of male patients and females are to be employed for the treatment of female patients.

7. Although the petitioner has obtained a rule challenging the notifications as a whole, only a limited point has been urged in support thereof and it is as follows. The petitioner states that inasmuch as she is considered to be a person qualified to impart treatment, the rules, in so far as they discriminate between persons having a foreign qualification and an Indian qualification, by compelling separate arrangements to be made for treatment of male patients and female patients and by preventing a person from treating the opposite sex, are based on no reasonable basis and are therefore void under Article 14 of the Constitution, It is further said that this restriction upon the carrying out of her profession is an unreasonable restriction and as such bad under the provisions of Article 19(1)(g) of the Constitution.

8. The constitutionality of the West Bengal Clinical Establishments Act (56 of 1950) and the rules framed thereunder including the notification mentioned above, were the subject matter of two decisions given by me -- "Tara Charan Mukherjee v. B. C. Das Gupta" AIR 1954 Cal 133 (A) and -- "Gopal Chandra Mukherjee v. B. C. Das Gupta", (unreported judgment dated 24-11-1953 in matter No. 153 of 1952 (Cal) (B)). In both the cases I have held the Act and the rules to be intra vires. In the latter case, however, the particular aspect that I am called upon to decide now was broached and in respect thereof I stated as follows:

"There is however one narrow ground in which it seems to me that the rules have proceeded on a classification which is not rational and it is this. Under Rule 11(ii) the qualification for employment and imparting actual treatment must be from an approved institution, which under notification No. P.H.2209/2A-9/52, are all foreign institutions. This rigour has however been mitigated by an amendment of Sub-rule (iii) read with the regulations framed thereunder....In other words, the male person with a foreign qualification can treat a female patient, a male person with an Indian qualification cannot treat a female patient. There seems to be no rational basis whatever for this classification, unless we presume that basically we have no moral fibre at all and we can only acquire the same by going to foreign countries and obtaining foreign education. I am happy to say that Mr. Sen has not asked me to make any such assumption."

I held however that the person who could complain must be a person directly affected by the discrimination and that the petitioner in that particular case was not such a person. In the present case, the petitioner certainly belongs to a category which is directly affected by the impugned provisions. I must therefore consider the point more fully. In my previous judgment, I mentioned only the question of discrimination. Now however the rules have been challenged from

two points of view. Firstly, they have been challenged from the point of view of being an unreasonable restriction on the fundamental right of the petitioner to practise her profession. Secondly, they have been challenged from the point of view of discrimination which is not based on any rational basis and as such void as infringing Article 14 read with Article 13(2) of the Constitution.

9. The reasons why I upheld the validity of the Act and the Rules, in so far as foreign qualifications have been made compulsory, and/or are given preference, are to be found in my decisions mentioned above, particularly in "Matter No. 153 of 1952 (Cal) (B)". I have pointed out that the science of physio-therapy is a comparatively modern innovation and such treatment required technical knowledge and equipment. I proceeded to say that as long as adequate facilities were not obtainable in India for proper training in such a science and/or the imparting of treatment in accordance thereof, it was by no means unreasonable to give preference to foreign qualifications and/or foreign training, in countries where without doubt there exist a comparatively higher standard of training in this somewhat abstruse subject. It will appear however from the Rules that the State considers a person to be eligible for practising the science of physio-therapy if the person has passed a test which is held by the State of West Bengal.

In spite of the fact that in the petition the petitioner has challenged that there existed no difference between a foreign training and such as was obtainable in India, the counter-affidavit is cryptic and does not indicate in what respect the standard reached by the foreign institutions were higher than the tests which are held by the State Government. I will, however, assume for the moment that the standard of foreign training is somewhat higher than that obtaining in India. It will be remembered that the science of physiotherapy is but a limb of medical science. It has not been suggested and certainly not argued that the science of physio-therapy and its curative effects are confined to the treatment of maladies which are peculiar to any particular sex, like, say, the science of obstetrics or Gynaecology. As a matter of fact, some of the standard text books which are included in the curricula of all foreign institutions were placed before me during the hearing of "matter No. 153 of 1952 (Cal) (B)", and going through them I do not find that the science of physio-therapy is confined to the treatment of maladies peculiar to any particular sex.

In my opinion, therefore, a person is either qualified to impart treatment in physio-therapy or he (or she as the case may be) is not. It might be said that a person who has a foreign qualification is perhaps more fitted to treat the more complicated diseases or to impart more effectively the treatment thereof. But that would apply to diseases and their treatment and has nothing to do with the sex of the patient. It would be most unusual to find a physician or a surgeon confining himself to the treatment of a particular sex, unless, of course, he is an expert in diseases which are peculiar to that particular sex. If the rules are to be given effect to, the position reduces itself to this. A person having an Indian qualification may be presumed to know the science of physio-therapy and to

impart treatment thereunder. There is nothing to show that such a person is a specialist in the diseases of a particular sex, and yet the law forbids such a person to treat the opposite sex. What then is the ground upon which such discrimination can be supported? The only ground that I can think of is the moral ground, namely, that person having Indian qualifications has not sufficient moral fibre to treat the opposite sex.

10. The way that the learned Advocate General put his case was as follows: He argued that the legislature was at liberty, and indeed it was its duty, to frame legislation after taking due notice of the prevailing sociological condition. He said that until at least a decade ago, women had a very subordinate place in our society. He recalled the old decisions under the Hindu Law, including the judgments passed by the Judicial Committee, wherein it was Held that women in India required protection. Transactions in which women figured were made subject to special scrutiny. He points out that even now a woman cannot be arrested for a civil debt and under the Indian Penal Code a woman cannot be held guilty of adultery, even though she is a willing party, not even as an accessory. He followed this up by saying that if women were entitled to be protected from the action of males, there was nothing wrong in making special provisions in the Rules calculated for her benefit. The learned Advocate General however admitted that it would not be quite accurate to say that the position of women in India has continued to remain the same as it was in the days when the judgments referred to were passed or when the Indian Penal Code was promulgated.

He even said that perhaps the pendulum was swinging the other way. He however contended that the position of women in society was still not what was desirable and therefore a degree of protection was still necessary. Treating it as an abstract proposition, I do not think that I would differ with the opinion that the position of women in this country has not yet attained the desired perfection. Speaking of Hindus I must admit that while theoretically we place women upon a lofty pedestal, in practice there is still a lot of improvement to be desired. But what is to be considered is, how far such a proposition affects the issue in question. If a female patient desires to consult a male doctor, I do not quite understand how the question arises of protecting her. Protecting her from what? The patient suffers from a particular disease and she wishes to go to a particular doctor who, in her opinion, is competent to impart treatment and to cure her of the disease. Take the very unfortunate case of a female patient who is suffering from acute arthritis (a disease which is said to be peculiarly suited for treatment by physio-therapy) considering whether she should go to a doctor to be cured of the disease.

The normal process would be to think of going to the best expert, whether it be a male or a female. The patient might be an extreme moralist and as such may have a rooted objection to be treated by persons of the other sex. In such a case, nobody compels her to go to a male physician. But in all probability she will

find that a female specialist was not available, in which case she might waive her moral objections and go to the male specialist for treatment. In such a case, the question of moral protection would never enter anybody's mind, unless of course we start with the presumption that as a nation we are basically immoral and that male doctors treating female patients are to be considered as a menace. That, to my mind, indicates the existence of a diseased imagination. Again, this is only one aspect of the peculiar consequences that follow from a strict observance of the rules. Just as a male physiotherapist is prevented from treating a female patient, a female physio-therapsit is also prevented from treating a male. What Is the basis of such a rule? Assuming that the weaker sex requires protection from the clutches of the predatory male, is it to be argued that the converse proposition is also true? In my opinion, it is equally meaningless as the other.

11. The learned Advocate General, in passing, mentioned that the reports appearing in the newspapers in respect of such establishments in Calcutta threw a sufficient lurid light on the sociological angle impelling the authorities to promulgate rules as they have been framed. I pointed out to him that it was not possible to decide this case, or, in fact, any other case, on what appears in the newspapers. It is strange that if the moral angle was the impelling necessity for the promulgation of all these laws, that the Government had not been frank enough to say so, in any of the pleadings that have been placed before me in a series of cases relating to such institutions. For argument's sake, however, I shall assume that some of these institutions have been utilised for immoral purposes. That is a matter for police-action and calls for drastic measures to be taken against the offending institutions to weed them out. That cannot be an adequate reason for promulgating discriminating legislation and/or legislation with such violent restrictions on the liberty of the citizen to carry out his or her profession.

The matter, however, does not rest here. Even if we were to assume that, because of the existing, conditions oi" society, our morals are not such as they should be, the point remains as to why per sons who possessed a foreign qualification should be deemed to be peculiarly exempt from the in famy of such an accusation. The learned Advocate General was hard put to defend this aspect of the matter. He argued that Indians who went abroad acquired a broader vision. They became familiar with the conditions of a society where the artificial barrier between the two sexes did not exist. All this to my mind is pure dialectical euphemism. Whether women in those particular foreign countries are treated by males with a broader vision is a matter of opinion. The relation of the two sexes is certainly more free, but whether a higher moral angle prevails in these countries is a matter upon which opinions may well differ. All this however is entirely irrelevant. "

If it could be shown that the nature of training imparted in these particular countries, and in the particular approved institutions made a person more adept at treating the maladies of a particular sex, then that would be quite an adequate

reason for making a distinction and imposing restrictions. Apart from that, I consider it as highly archaic and wholly unreasonable to consider the practice of medical science from the point of view of morality. A man and a woman practising the incomparable art of healing must be deemed to be above petty moral inhibitions. There might exist a rogue or a blackguard here and there, but I see no justification for treating one of the noblest professions on earth or any branch of it, as if it consisted wholly of moral lepers. In this respect I am unable to invest with a moral beatitude, any man, simply because he has gone to a foreign country or has obtained a foreign qualification.

It will be further observed that if sojourn in foreign countries necessarily results in what the learned Advocate General characterised as "breadth of vision", then is there any reason why institutions in the very same countries which are not approved, do not, or are not expected to, contribute an equal breadth of vision? For example, in England and America there are other Physio-therapeutic institutions but only two have been approved. It will be remembered that the breadth of vision is acquired not by reason of the training imparted in that particular institution but as a result of social contact in that particular foreign country. Therefore, there would exist no reason for coming to the conclusion that persons who obtained qualifications from other institutions in England and America have not acquired an equal breadth of vision and moral uplift.

12. Regard being had to the fact that in this country there has been a social segregation of the sexes for a very long time, it is perhaps not unreasonable to make separate arrangements for male patients and female patients. But, in my opinion, there is no justification whatsoever in introducing a peculiar restriction in the case of persons, having Indian qualifications confining such persons to the treatment of their own sex. Looked at from, the point of view of Article 19, the restriction is a wholly unreasonable one, and looked at from the point of view of Article 14 it must be held that there has been a discrimination and that the discrimination is not based on any rational basis and has no nexus with the object of the legislation. The object of the legislation is to license clinical establishments so that some amount of supervision can be extended as regards the standards prevailing in such establishments, and to ensure that a new form of scientific treatment is not left to the tender mercies of quacks and self-styled specialists duping the innocent public.

To that extent, the Act and the rules made thereunder have already been upheld by me, I must hold, however, that in the particular respect in which complaint has been made by the petitioner in this application, the rules have gone beyond the permissible limits.

13. The learned Advocate General has drawn my attention to the cases of -- Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, (C); --"State of Bombay v. P. N. Balsara" AIR 1951 SC 318 (D). In these cases, the general principles that are applicable to cases of discrimination have been laid down and are not disputed. The learned Advocate General argues that the onus lay on the

petitioner to show that she has been discriminated against. In my opinion, she has successfully shown that the rules which are binding on her, contain a provision which makes a discrimination and also contain an unreasonable restriction upon her fundamental right to practise her profession. The learned Advocate General also referred to the case of -- " Yusuf Abdul Aziz Vs. State, (E). I have already referred to this aspect of the case above.

14. The result is that I hold that the provision contained in Rule 11 (iii) (c) of the rules, framed under the West Bengal Clinical Establishment Act 56 of 1950, which runs as follows:

"Males shall be employed for the treatment of male patients and females shall be employed for the treatment of female patients"

infringes the provision of Article 19(1)(g) and Article 14 of the Constitution and as such is ultra vires and void. The rule is therefore made absolute only partially, namely, that the aforesaid provision is declared to be ultra vires and void and the respondents are directed to forbear from giving effect thereto and/or enforcing the same, and are further restrained from preventing the petitioner from treating male patients or from enforcing the said rule in respect of the institution where she is employed.

15. As this is a matter of interpreting the law which is not entirely free from difficulty, there will be no order as to costs.