
(2000) 03 BOM CK 0039
In the Bombay High Court
Case No : Criminal Appeal No. 344 of 1985

State of Maharashtra

APPELLANT

Vs

Dr. Rustom Franroze Hakim

RESPONDENT

Date of Decision : 15-03-2000

Acts Referred:

Employees State Insurance (General) Regulations, 1950 — Regulation 2, 59(2)
Employees State Insurance Act, 1948 — Section 93
Penal Code, 1860 (IPC) — Section 161, 21
Prevention of Corruption Act, 1988 — Section 5(1), 5(2)

Citation : (2001) ALLMR(Cri) 345 : (2000) CriLJ 3401 : (2000) 85 FLR 625 :
(2000) 1 LLJ 1123 : (2000) 2 MhLj 462

Hon'ble Judges : N.J. Pandya, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : I.S. Thakur, app, for the Appellant; Jehagir Gulabbhai Bilimoria and Daruwala, for the Respondent

Final Decision : Dismissed

Judgement

Marlapalle, J.—This is an appeal against the order of acquittal passed by the learned single Judge, in Special Case No. 37/82,"wherein, the accused was charged with an offence punishable u/s 161 of the I.P.C. and u/s 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947 (hereinafter referred to as the Act for short).

2. The prosecution case unfolds thus:-

The accused Dr. Rustom Franroze Hakim, was a registered medical practitioner with his dispensary at Lemington Road, Bombay - 7 and he was a panel doctor under the Employees' State Insurance Scheme (E.S.I. Scheme for short). He was an insurance medical officer as defined under Rule 2(n) of the Employees' State Insurance (General) Regulations, 1950. The complainant Shashikant was an insured person covered under the E.S.I. Scheme and he had registered his card with the accused. The complainant was entitled to free medical treatment

and for the reimbursement of medical benefits. It was alleged that on February 27, 1982 the complainant went to the dispensary of the accused as he was not feeling well, the accused examined him and gave an injection and charged Rs. 8/- for his treatment. The complainant again went to him on March 1, 1982 and he was treated and charged Rs. 14/- as medical fees. In a similar manner the accused treated the complainant on March 3, 1982 and March 4, 1982 and charged Rs. 15/- and Rs. 12/- respectively as his fees. The complainant went to the Anti Corruption Bureau on January 19, 1983 and lodged a report against the accused. Consequently a trap was arranged for the accused on March 6, 1982. The complainant went to the dispensary of the accused, where he was treated by the accused and when accused demanded Rs. 14/- for the treatment, the complainant handed over a currency note of Rs. 20/- to which anthracene powder was applied. The raiding party entered the dispensary of the accused after the complainant gave the agreed signal and the currency note of Rs. 20/- was recovered from a lady to whom the accused had given the note for change. The said lady was accused No. 2, who was subsequently discharged by the Special Court. Traces of anthracene powder were found on the hand of the accused. The Police completed the investigation and filed the charge-sheet against the accused after the necessary sanction was received from the Director, E.S.I. Scheme, Bombay for the prosecution of the accused.

3. During the course of trial the learned Special Judge, framed in all 8 issues for his determination. Issues Nos. 6 and 7 read thus:-

"6. Did he accept the aforesaid amount as a gratification other than legal remuneration as a reward for giving medical treatment in the exercise of his official function as a public servant?

7. Did he accept Rs. 14/- from the complainant on March 6, 1982 by corrupt or illegal means or by otherwise abusing his position as a public servant?"

4. On examining the evidence and on taking into consideration the rival submissions made before him, the learned Special Judge decided the issue as to whether the accused was a public servant within the meaning of Section 21 of the I.P.C.. The learned Special Judge held that though the Insurance Medical Officers are paid by the Corporation for treating the insured persons who had registered their cards in their dispensaries, it could not be said that such accused were performing any public duty for the Government and that the payment by way of fees paid to the insurance medical officers was not out of the Government revenue but out of a special fund consisting of the contributions made by the employees. The learned Special Judge concluded that it could not be held that the insurance medical officers were paid fees or commission by the Government for the performance of a public duty.

5. We are therefore, required to decide the only question as to whether private medical practitioners who are enrolled as panel doctors under the E.S.I. Scheme and are called as insurance medical officers are public servants within the

meaning of Section 21(12)(a) of the Indian Penal Code. It is submitted by the learned Assistant Public Prosecutor that u/s 93 of the Employees' State Insurance Act, 1948 (E.S.I. Act for short) all officers and servants of the Corporation shall be deemed to be public servants within the meaning of Section 21 of the I.P.C. and insurance medical officers are officers of the Corporation, appointed to provide medical benefit and to perform such other functions as may be assigned to them and shall be deemed to be duly appointed medical officers for the purpose of Chapter V of the said Act. It was therefore, submitted that such insurance medical officers are public servants. On the other hand the learned counsel for the respondent-accused has supported the view taken by the learned Special Judge that the insurance medical officers are not public servant as defined u/s 21 of the I.P.C.

6. In the case of *R.K. Dalmia Vs. Delhi Administration*, the Supreme Court held that a Chartered Accountant appointed by the Central Government to investigate into the affairs of an Insurance Company and remunerated by the Government for the work he was entrusted with, does not hold office and is not a public servant. In the case of *Srimati Kanta Kathuria Vs. Manak Chand Surana*, , the Apex Court held that an advocate appointed as Special Government Pleader to conduct a particular case does not hold any office of Government. In the case of *R.S. Nayak Vs. A.R. Antulay*, a Constitution Bench of the Supreme Court held that a member of the Legislative Assembly, though receives pay and allowances, he cannot be held to be in the pay of the State Government because legislature of a State cannot be apprehended in the expression "State Government" and therefore, he cannot be held to be a public servant. The Apex Court further held that a person would be a public servant under Clause (12)(a) of Section 21 of I.P.C. if (i) he is in the service of the Government, or (ii) he is in the pay of the Government or (iii) he is remunerated by fees or commission for the purpose of any public duty by the Government. In the case of *K. Veeraswami v. Union of India and Ors.* 1991 3 Scc 1891, Constitution Bench of the Supreme Court by majority held that a Judge of a High Court or of the Supreme Court is a public servant within the meaning of Section 2 of the Prevention of Corruption Act, 1947, whereas a minority view did not agree with this proposition and held that a Judge or Chief Justice of a High Court or Judge of the Supreme Court is a constitutional functionary, even though he holds a public office and the Prevention of Corruption Act, 1947 as amended by 1964 amendment is inapplicable to the Judges of the High Court and Supreme Court. In the case of *Ramesh Balkrishna Kulkarni Vs. State of Maharashtra*, , the Supreme Court held that a Municipal Councillor is not a public servant within the meaning of Section 21 of the Indian Penal Code and therefore, he could not be prosecuted under the provisions of Prevention of Corruption Act.

7. To decide the issue as raised in the instant appeal, it would be necessary for us to examine the scheme of the E.S.I. Act, 1948, the E.S.I. (General) Regulations, 1950 as well as the Central Rules framed under the said Act so as to find out (a) whether the panel doctors like the accused are paid fees from the

Government funds and (b) whether they perform public duty, by attending to the insured persons who are enrolled with them, under a contract entered with the Corporation.

8. Section 93 of the E.S.I. Act reads as under :-

"93. Corporation officers and servants to be public servants - All officers and servants of the Corporation shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (45 of 1860)".

The relevant portion of Section 21 of I.P.C. reads as under:-

"21. The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:-

.....

[Twelfth - Every 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(1 of 1956)].

Explanation 1. - Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2. - Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

Explanation 3. - The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election."

As far as the Prevention of Corruption Act, 1947 is concerned, there is no other definition of public servant than the definition as defined in Section 21 of I.P.C. The accused was prosecuted in the instant case for offences punishable under the said Act, as well as u/s 161 of I.P.C.

9. The Employees' State Insurance Corporation has been established by the Central Government for the administration of the E.S.I. Scheme in accordance with the provisions of the E.S.I. Act and the said Corporation shall be a body corporate by the name of Employees State Insurance Corporation having perpetual succession and a common seal and shall by the said name sue and be sued as is clear from Section 3 of the Act. The Corporation shall consist of

members as set out in Section 4 and their term will be as provided in Section 5. As per Section 7, the orders and decisions of the Corporation shall be authenticated by the signature of its Director General and all other instructions issued by the Corporation shall be authenticated by the signature of the Director General or such other officer of the Corporation as may be authorised by him. As per Section 16, the Central Government may, in consultation with the Corporation, appoint a Director General and a Financial Commissioner who shall be the principal officers of the Corporation and the Director General shall be its Chief Executive Officer. The Central Government may, at any time, remove the Director General or Financial Commissioner from office and shall do so if such removal is recommended by a resolution of the Corporation passed at a special meeting called for the purpose and supported by the votes of not less than 2/3rd of the total strength of the Corporation.

10. Chapter III of the Act, deals with finance and audit of the Corporation and Section 26 stipulates that all contributions paid under the Act and all other moneys received on behalf of the Corporation shall be paid into a fund called the Employees' State Insurance Fund which shall be held and administered by the Corporation for the purposes of the Act. The Corporation may accept grants, donations and gifts from the local authorities or any individual or body whether incorporated or not, for all or any of the purposes of the Act, and the account of the Corporation shall be operated by such officers as may be authorised by the Standing Committee with the approval of the Corporation. Section 27 which provided for the grants by the Central Government has been deleted with effect from June 17, 1967 and Section 28 sets out the purposes for which the fund may be expended. As per Section 30 all property acquired before the establishment of the Corporation shall vest in the Corporation and all income derived and incurred in this behalf shall be brought into books of the Corporation. Section 31 which stipulated that the expenditure by Central Government to be treated as loan, has been repealed with effect from June 17, 1967. Section 32 states that the Corporation shall in each year frame a budget showing the probable receipts and the expenditure which it proposes to incur during the following year and shall submit a copy of the budget for the approval of the Central Government. Section 34 stipulates that the Corporation shall maintain correct accounts of its income and expenditure in such manner as may be prescribed by the Central Government and the accounts shall be audited annually by the Comptroller and Auditor General of India. Section 35 mandates the Corporation to submit to the Central Government annual reports of its work and activities. Chapter IV deals with contribution and Chapter V deals with benefits to be offered to the insured employees and their family members.

11. The provisions as briefed hereinabove of the Act, indicate that the Corporation is an independent legal entity with its own source of income and it spends its own income from the contributions received from the insured employees and their employer without any grants or loan from the Central Government or the State Government. Section 59 empowers the Corporation

with the approval of the State Government, to establish and maintain in a State such hospitals, dispensaries and other medical and surgical services as it may think fit for the benefit of insured persons and their families. It further provides that the Corporation may enter into an agreement with any local authority, private body or individual in regard to the provision of medical treatment and attendance for insured persons and their families, in any area and sharing the cost thereof. This provision empowers the Corporation to enter into an agreement/ contract with private medical practitioners who are popularly known as panel doctors. Regulation 2(n) of the Employees' State Insurance (General) Regulations, 1950 defines the term insurance medical officer and it means "a medical practitioner appointed as such to provide medical benefit and to perform such other functions as may be assigned to him and shall be deemed to be a duly appointed medical practitioner for the purpose of Chapter V of the Act. The term insurance medical officer does not mean that he must be an employee of the Corporation or there exists a master servant or command - obedience relationship. The panel doctors are appointed by way of a contract: signed between the Corporation and such private practitioners and they are responsible to provide medical treatment to the insured persons (as well as to the families) who are registered with them and for such medical; service rendered by them, they submit the bills which are reimbursable by the Corporation as per the rates stipulated or agreed upon. The medical benefits so provided are from the dispensary/hospital/consulting room of such panel doctors and they are limited to such insured persons who are registered under them. The relationship between the Corporation and such panel doctors is therefore, merely contractual without any specific term of tenure and obviously the tenure is at the pleasure of each of the parties to the contract, as is clear from a copy of the contract which has been placed on record.

12. To perform a public duty, one must occupy a public office or must be in the employment of the State or a Corporation established by the Government either under a Central or a State Act. A perusal of the contract signed between the Corporation and the panel doctor in pursuance of the enabling powers u/s 59(2) of the Act, there is nothing to show that a panel doctor is an employee of the Corporation and therefore, the contention that such a panel doctor performs a public duty by way of providing medical benefits to the insured persons or to their families as the case may be, cannot be sustained.

13. In the case of *Dr. Nanigopal Ghose Vs. State of West Bengal and Others*, a Division Bench of the Calcutta High Court held, that

(i) the remuneration which is payable to the insurance medical practitioner is paid not by the State Government or out of the funds of the State but is paid out of the contributions of the employers of the insured persons and of the Corporation.

(ii) a panel doctor gives nothing more than a voluntary undertaking to offer services in lieu of fees for professional service rendered and the inclusion of the

names in the list of panel doctors and the preparation of the list does not have the effect of making the medical practitioner an employee of the State.

(iii) the removal of such a panel doctor does not amount to removal from service but removal from the medical list of panel doctors;

(iv) the Corporation is a body corporate and is not the same as the State Government and

(v) the contract between the medical practitioner and the Corporation is a mere contract for services and not a contract of service.

In the case of *Dr. Arvind C. Shah v. State of Gujarat* 1986 [1] Guj Lr 481, a learned single Judge of the Gujarat High Court held that a private medical practitioner, whose name is included in the list of panel doctors of the E.S.I. Corporation is not a public servant as defined u/s 21 of I.P.C. and he cannot be prosecuted under the provisions of the Prevention of Corruption Act. The said judgment also indicates that the doctors on panel had not entered into a contract of service but it was a contract for service. Once it is found 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. Unless he holds such office, he cannot be a public servant u/s 21 of I.P.C.

14. In the case of *Madhukar G.E. Pankakar Vs. Jaswant Chobbildas Rajani and Others*, , the appellant was a panel doctor appointed under the E.S.I. Scheme and he was successful in the elections to the Municipal Council. He was a panel doctor under the E.S.I. Scheme on the date of nomination but he ceased to continue as such on the date of his election and his election was challenged on the ground that he was disqualified to contest the election in view of the bar u/s 16(1)(g) of the Maharashtra Municipalities Act, as he was holding an office of profit under the Government. The Supreme Court analysed the scheme of the E.S.I. Act and the Rules thereunder and held that:

(a) An insurance medical officer is not a Government servant but he is more than a mere, private doctor with the contractual obligations, for he undertakes certain functions which are regulated by law i.e the Rules framed u/s 96 of the Act.

(b) The E.S.I. panel doctor, though subject to responsibility, eligible to remuneration and liable to removal - cannot squarely fall under the expression holding office under Government and

(c) it cannot be held that a panel doctor holds an office of profit and that he is under the Government.

The above referred judgments of the Calcutta High Court and the Gujarat High Court have relied upon this judgment of the Supreme Court in the case of *Madhukar* (supra) and held that a panel doctor under the E.S.I. Scheme is not a public servant within the meaning of Section 93 of the E.S.I. Act, read with

Clause 12(a) of Section 21 of I.P.C. We are in respectful agreement with the said view as we hold that such panel doctors are not paid their fees or remuneration from Government funds and they are not performing any public duty, more so when they do not hold a public office, while they are under a contract entered between them and the Corporation u/s 59(2) of the Act.

15. We therefore, conclude that the order in appeal holding that a panel doctor is not a public servant within the meaning of Section 21 of I.P.C. does not call for any interference and we confirm the same view of the learned Special Judge. The prosecution initiated against the accused on the basis that he was a public servant within the meaning of Section 93 of the E.S.I. Act, therefore, renders unsustainable and prosecution proceedings are hereby quashed. Appeal against acquittal stands dismissed.