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IN THE HIGH COURT OF DELHI AT NEW DELHI

Pronounced on : 13.04.2009

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W.P. (C) 8122/2009

INDRAPRASTHA CANCER SOCIETY & ORS.

..... Petitioners

Through: Mr. Lalit Bhasin, Advocate for the
petitioner

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Rakesh Gosain, Advocate for NBE.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

Hon'ble Mr. Justice S. Ravindra Bhat (Open Court)

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1. The petitioner, which has established, and manages a Cancer Institute and Research Centre, challenges a circular issued by the National Board of Examination (NBE); the latter conducts the Diplomate of National Board (DNB) examination. The ground for challenge is that the said impugned circular is arbitrary and unreasonable.

2. The NBE was established, as a registered society in 1985. Its objective is to conduct post graduation examinations in the discipline of modern medicine and allied sciences, constitute a specialist board for each discipline

and coordinate with national and international bodies to further its objectives etc. It is contended that the NBE falls within the meaning of the expression “State” under Article 12 of the Constitution of India. Before September 2001 the NBE had not prescribed any norms or rules for payment of stipend to students undergoing DNB qualification. On 24.09.2001 a circular was issued to all accredited institutions mandating payment of stipend. The petitioner refers to a judgment of this Court, i.e. Dr. Vishal Sehgal v. Secretary Health and others, 116 (2005) DLT 493 and submits that such candidates could not claim parity with students undergoing post graduate degree courses in medicine and dentistry. The petitioner submits that on 31.07.2003 the Government of NCT (hereafter called “NCT”) stipulated a payment of Rs.10,000/- to such trainees with effect from the date of their enrolment for the entire duration of the course. The petitioner further refers to an order being Dr. Shiv Shankar Shahi v. Government of NCT of Delhi & Others, WP 19903/2004, where parity was claimed with MD/MS students in which the Court declined to grant such parity but directed payment of enhanced stipend of Rs.19,000/- per month. This judgment, states the petitioner, was set aside by the Division Bench which directed the matter to be re-considered (by the judgment dated 31.03.2006). In this background the NBE issued the impugned circular, directing payment of Rs.19,000/- as stipend. Clause 6 of the circular states that DNB trainees, in such accredited institutions, shall always be paid stipend equivalent to the sum paid by the

respective State Governments according to the pay revisions made by them.

The said impugned circular reads as follows:

"I am directed to convey to you that, in pursuance to the judgment delivered by the Hon'ble High Court of Delhi on 23rd November, 2005 and 6th January, 2006, the competent authority has decided the following: -

- 1. Payment of stipend to DNB trainees is mandatory for all NBE accredited institutions.*
- 2. DNB trainees shall be paid monthly stipend equivalent to the sum paid to MD/MS/DM/MCh trainees by respective State Govts., in institutions owned by them.*
- 3. The trainee (s) shall be paid monthly stipend as per Clause 92) above or as mentioned in the table below, whichever is HIGHER:*
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<i>Programme</i>	<i>First Year</i>	<i>Second Year</i>	<i>Third Year</i>
<i>Broad Specialties</i>	<i>Rs.10,000/-</i>	<i>Rs.11,000/-</i>	<i>Rs.12,000/-</i>
<i>Super Specialties</i>	<i>Rs. 14,000/-</i>	<i>Rs.15,000/-</i>	<i>Rs. 16,000/-</i>

- 4. The DNB candidates in accredited institutions in Delhi shall be paid monthly stipend of a minimum Rs.19,000/- or the stipend paid by the Government of India/Govt. of NCT of Delhi to their MD/MS/DM/MCh trainees in their respective year of studies, whichever is HIGHER.*
- 5. In strict compliance to the judgment delivered by the Hon'ble High Court of Delhi, on 6th January, 2006 DNB trainees (s) in Delhi shall be paid monthly stipend as per Clause 94) above w.e.f. 1st January, 2006.*

6. Notwithstanding the above, stipend to DNB trainees shall always be in equivalence to the sum paid by respective State Govs. As they revise them from time to time, or, as mentioned in Clause (3) and (4), whichever is HIGHER.

All accredited institutions are requested to implement these revised guidelines on stipend with IMMEDIATE EFFECT. This letter supersedes all earlier communications from NBE on stipend."

The petitioner claims that it has not only been paying in terms of the circular but in fact has been paying more. The payment structure, followed by the petitioner is as follows :

" BROAD SPECIALITIES

POST –MBBS-PRIMARY (Considered Equivalent to Junior Residents)

Junior Residents)

First year 28,000/-

Second Year-29,000/-

Third Year 30,000/-

POST – DIPLOMA – SECONDARY DIPLOMA considered Equivalent to Senior Residents Diploma)

First Year – 41,000/-

Second Year – 42,500/-

SUPER SPECIALITIES

POST – MD / MS/ DNB Gen. Med./DNB Gen. Surgery (Equivalent to Senior Residents)

First Year – 43,000/-

Second Year – 44,500/-

Third Year – 46,000/-“

3. The petitioner submits that the direction in clause 6 that DNB trainees are to be paid amounts each month according to what is paid by the State Government, to similar candidates is an unwarranted and arbitrary direction, which the NBE could not have issued. In this regard, it is submitted that DNB trainees cannot be treated as employees and certainly not at par with those undergoing post graduation degree programmes. The establishment of such parity through the impugned circular is questioned as violative of Article 14. It is submitted that once the petitioner institution is found to be paying more than the amounts stipulated in the impugned circular i.e. 19,000/- per month, a further requirement of having to pay the amount in accordance with the NCT's pay scales amounts to an illegal intrusion into the petitioner's autonomy, unsupported by or without authority of law.

4. The petitioner relies on the observations on the Vishal Sehgal case and submits that the Court had taken into account the fact that the two categories i.e. post graduate candidates and the DNB candidates, were different and therefore could not be treated equally in regard to payment of stipend. It was also urged that in the absence of any legal obligation, to pay the amounts as per NCT grades, the petitioner could not be compelled to pay such amounts. It is submitted that even otherwise the impugned order would result in grave financial repercussions to the petitioner institution,

which would be unjustifiably exposed to demands for payment of high stipends to DNB candidates without any legal justification.

5. The NBE, which was represented through counsel appearing on advance notice, submitted that the DNB course has been notified as equivalent to post graduation in medicine, surgery and dentistry. It refers to the notification published in the official gazette on 20.02.2009 including the DNB qualification in the schedule to the Indian Medical Council Act, 1956. The DNB also relies upon its stringent process for selection of candidates registered with the accredited institutions which have to mandatorily possess facilities of a minimum standard. The DNB refers to its rules, concerning with stipends [clause 2(q)] and submits that various facilities are to be provided by the institutions, who also are entitled to assign clinical and other work. In these circumstances, the direction to pay monthly amount of stipend equivalent to what is paid by NCT, cannot be challenged.

6. The above discussion shows that the writ petitioner is challenging the impugned notification to the extent it establishes parity of DNB candidates with those undergoing post graduate courses and also establish parity with those working in government institutions. It also questions the decision as unreasonable and not based on any law.

7. The petitioner's assumption that DNB course is not of the same standard as a post graduate degree, in this court's opinion, is unmerited. The NBE has placed on record a notification which has included the course as

equivalent to post graduation in medicine and dentistry; the notification also amends the schedule to the Indian Medical Council Act. Further, in view of the judgment of the Supreme Court reported as National Board of Examinations v.. G Anand Ramamurthy, AIR 2006 SC 2484, it is now, established that such DNB qualifications are as good as MD/MS qualifications. In these circumstances, the conclusion which the petitioner wishes the Court to draw would not be possible. Moreover the entire issue was again re-visited by another judgment of this Court in Jaipur Golden Hospital v. NBE WP(C) 1741/2007 decided on 20.03.2007. In that judgment, the Court held that the decision to fix a stipend and the order impugned in this case, though by other private hospitals, was legal and valid.

8. As far as the contention regarding denial of natural justice is concerned, this Court notes that the decision in Jaipur Golden Hospital case (supra) had considered the proceedings of the stipend committee, which took into consideration judgment and orders of the Court as well as other material circumstances in fixing the stipend. Further more the Court cannot be unmindful of the fact that the petitioner is not saying that stipend is not payable – it claims to be paying more than the prescribed amount. Its complaint is, however, that the impugned order is not founded on any legal obligation. The answer to this, in the Court's opinion is two fold. The first is afforded in *Vishal Sehgal's* case itself where even after rejecting the DNB candidates contractual right to claim stipend, the Court nevertheless proceeded to hold that denying such stipend on the basis of a condition in

the admission brochure would be unconscionable. The Court held as follows

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“43. Learned counsel for the Petitioners placed great reliance upon Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr., to contend that the term that the course is unpaid, is an unconscionable term. I think this is really the meat of the matter. The question is this: despite outward appearances, did Petitioner No.1 freely entered into the agreement?”

44. At the outset, it is necessary to first appreciate the impact of the course being unpaid and what it entails. A DNB student joins a course of studies like any MD/MS student. The main difference between these two courses is that one lead to a post-graduate diplomate, while the other leads to a post-graduate degree. In most other respects, a DNB course is intended to be equivalent to an MD/MS course and is recognized as such by the Medical Council of India. There is, however, no doubt that a student undergoing an MD/MS course is academically better equipped than a student undergoing a DNB course. For this reason, an MD/MS student working as a Junior Resident perhaps has greater responsibilities and more onerous duties to perform than a Junior Resident of a DNB course. Apart from these broad qualitative differences, both categories of students perform by and large the same duties while working as a Junior Resident. Why is it then that an MD/MS student gets paid while working as a Junior Resident while a DNB student does not? Is the qualitative difference so great that a DNB student is entitled to nothing at all? The answer to this has to be in the negative. The thrust of the argument of the Respondents was that Petitioner No.1 is not entitled to any stipend because he joined a course knowing fully well that it is unpaid and so he cannot legitimately make a grievance of it.

45. No doubt, it was stated by the Respondents that DNB students working as Junior Residents do not perform the same duties as MD/MS students working as Junior Residents. This may be so, but there does not appear to be any substantial difference in the nature of duties of a Junior Resident, whether he is doing an MD/MS course or a DNB course. The difference lies in the degree of responsibility,

the level of skill and expertise employed rather than in the nature of the work. therefore, is the mandate that a DNB student will not get paid any stipend for the period of his junior residency unconscionable, as compared to payment being granted to an MD/MS student doing his junior residency? In Brojo Nath Ganguly, the Supreme Court viewed an unconscionable bargain, as "one which is irreconcilable with what is right or reasonable". Thereafter, the Supreme Court considered various decisions of the courts in the United States and in the United Kingdom and concluded (in paragraph 88 of the Report) :-

"....there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control of as a result of situations not of their creation."

46. On the question whether such a contractual transaction can be judicially reviewed, the Supreme Court answered in the affirmative. Expounding on the applicable principle it was held in paragraph 89 of the Report as follows :-

".....the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however,

will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

47. The next question that the Supreme Court considered was whether, in the light of the principle laid down, such a contract would be avoidable having been induced by undue influence as defined in Section 16 (1) of the Contract Act, 1872 or whether it is a void contract. The Supreme Court concluded that such a contract would be void as being opposed to "public policy" in view of Section 23 of the Contract Act. It was held in paragraph 91 of the Report as follows:-

"In the vast majority of cases, however, such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in Section 16(1). Further, the majority of such contracts are in a standard or prescribed form or consist of a set of rules. They are not contracts between individuals containing terms meant for those individuals alone. Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. To say that such a contract is only avoidable would be to compel each person with whom the party with superior bargaining power had contracted to go to court to have the contract adjudged avoidable. This would only result in multiplicity of litigation which no court should encourage and would also

not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void."

48. The Supreme Court noticed that "public policy" is not capable of a precise definition. It was then said in paragraph 92 of the Report that:-

"It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time."

Continuing in this vein, the Supreme Court then said as under:-

"It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution."

49. Summing up the legal position, the Supreme Court said in paragraph 93 of the Report that:-

"The types of contract to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void."

50. It hardly needs to be mentioned that Brojo Nath Ganguly has been followed and applied by the Supreme Court in a large number of decisions. Applying the law laid down to the facts of this case, it seems unreasonable that

two categories of more or less equally qualified doctors do more or less the same type of work, though with differing skills and expertise, yet one category gets a monthly stipend while the other gets nothing at all. It is possible to appreciate a situation where the DNB students get lesser stipend, but to deny them any stipend at all is unfair and unreasonable. If one looks at the available options from the point of view of Petitioner No.1, the obvious question that arises is whether he really had a meaningful choice while accepting the terms offered by Respondent No.3. The only real choice he had was Hobson's choice, namely, to complete the course without payment or not do the course at all. This is so because without undertaking any practical training or acquiring clinical knowledge, Petitioner No.1 cannot successfully complete the DNB course. He has necessarily, therefore, to go through a course of practical training and acquire clinical knowledge and on terms laid down by Respondent No.3, one of the terms being to complete the course without any payment at all. In the absence of any real freedom of choice and a complete lack of bargaining power, Petitioner No.1 had to accept the offer of Respondent No.3 of completing the DNB course without any payment."

9. The second reason, in the opinion of the Court is that when a participating institution wishes to be accredited, it is aware that stipend has to be paid to the candidate. Here it is not as if the candidates attends the institution merely to partake education; in every instance he is registered medical practitioner entitled by law to attend to clinical duties. The DNB course appears to be more practice oriented and as a result the participating hospital imparts more intensive practical training based education which involve extensive medical duties. Such being the case, the condition required by the NBE i.e. the stipend should be of a certain amount and that Government scales should be provided in case of a higher remuneration, are to be considered as a minimum norms or standard required to be followed by

each participating institution. It is well settled that even in case of trade and commerce, a private entrepreneur cannot be heard to complain that minimum wage fixed for a particular class of employment is arbitrary as he cannot afford to pay it (refer U. Unichoi v. State of Kerala) AIR 1962 SC 12; Chandra Bhawan Boarding & Lodging v. State of Mysore, AIR 1970 SC 2042).

10. This court also notices the judgment in the *Jaipur Golden case*, where the matter, pertaining to the validity of this very impugned order, was examined in detail; the court held that:

“16. Having examined the records available with the NBE, it is apparent that the stipend of Rs.19,000/- per month for DNB trainees has been fixed not merely on the basis of the decision of the learned Single Judge dated 06.01.2006 but on the basis of an independent and separate enquiry and investigation conducted by the committee itself. Even the Division Bench decision of 31.03.2006, which set aside the order of the learned Single Judge, made it clear that, ordinarily, it is not for the court to fix the amount of stipend but for the executive. In this case, it is clear that the power of fixing the stipend vests with the NBE. This aspect has not been negated by the Division Bench while passing the order dated 31.03.2006 and this aspect was clearly confirmed by the learned Single Judge in the Dr. Vishal Sehgal case (supra) in paragraph 56 of the said decision by observing that the quantum has to be worked out by the hospital in consultation with the NBE. IN that case, the hospital was Deen Dayala Upadhyay Hospital. There is no doubt that the exact quantum that is to be paid by way of stipend may be worked out by the accredited institution/hospital in consultation with the NBE. However, it is open to the NBE to fix a minimum amount of stipend to be paid by any of the accredited institutions. In the present case, the circular had merely prescribed the minimum amount of stipend and it is always open to the accredited institutions to fix a higher amount of stipend in consultation with the NBE. In my view, that is the manner in which the decision of the learned Single Judge in the case of Dr. Vishal Sehgal (supra) has to be construed.

17. It is therefore clear that the impugned circular dated 08.05.2006, although it ostensibly gives an indication that it was passed merely on the basis of the decision of the learned Single Judge passed on 06.01.2006, has actually been issued after deliberations of the Stipend Committee, which has come to an independent conclusion, based on logical reasoning and sound premises. The reasoning being that the average stipend being paid in Delhi for DNB candidates was between Rs.17,000/- to 21,000/- and the committee thought it fit to fix the average of these two limits, which came to Rs.19,000/- per month. It is another matter that this amount has coincided with what the learned Single Judge had recommended/directed by his order dated 06.01.2006. The Division Bench decision, upsetting this direction of the learned Single Judge, did not in any way come in the way of the NBE to independently fix the amount of Rs.19,000/- per month by way of a stipend. This is what has been done by the NBE and, therefore, the circular dated 08.05.2006 cannot be faulted. Consequently, the grievance of the petitioner that accreditation was not being granted for non-compliance with the conditions of this circular, is also not well founded.

18. The learned counsel for the hospitals submitted that, in any event, rules of natural justice ought to have been followed before the circular dated 08.05.2006 was issued. He submitted that the petitioner/hospitals ought to have also been consulted or heard before the amount was fixed. In the present case, the committee had gone through with its deliberations starting from 16.11.2005 and ending on 21.04.2006. It has looked into various pieces of information collected by it and has also taken a sample of the accredited institutions to arrive at the said decision. Although practical considerations alone cannot be sufficient to override the requirements of natural justice, it must be seen as to whether the procedure adopted by the Stipend Committee was reasonable or not. In my view, the committee has followed a very reasonable approach and has considered the entire range of stipends, which includes not only those institutions which were taken in the sample but also others and the committee has fairly taken the view that the average stipend should be fixed as the minimum. This has been fixed taking into the interest of the DNB candidates. I see no infirmity in the procedure adopted by the respondents.

19. Accordingly, the writ petitions filed by the Jaipur Golden Hospital and Tirath Ram Hospital are dismissed. Insofar as the writ petition filed on behalf of the DNB trainees is concerned, I am of the view that their grievances have been taken care of by the circular dated 08.05.2006 and which ought to be implemented in letter and spirit. The parties shall bear their own costs."

11. In view of the above, this Court is of the opinion that the challenge to the impugned order cannot be sustained. The same is neither arbitrary nor unreasonable; the writ petitioner does not in any event disclose how and if so to what extent the increased expenditure would deprive it or cause such financial set-backs as may be termed unreasonable. After all it is a private commercial hospital being managed on business principles; it does not disclose its receipts, expenditure or profits or for that matter, the structure of fees recovered from various classes of patients. For the above reasons, the writ petition has to fail, it is accordingly dismissed.

(S. RAVINDRA BHAT)
JUDGE

May 06, 2009
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