

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.12.2014

+ **W.P.(C) 7080/2013**

INDIAN MEDICAL ASSOCIATION

..... Petitioner

versus

**MINISTRY OF LABOUR AND
EMPLOYMENT & ANR.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Atul Sharma and Mr Nitesh Jain.

For the Respondents : Mr Ripu Daman Bhardwaj, CGSC and Mr T.P.
Singh for R-1.
Mr Amit Kumar and Mr Ashish Kumar for R-2.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner impugns a notification No.U-16012/02/2012-SS-I dated 13.06.2013, issued by the Ministry of Labour and Employment inasmuch as it includes the name of respondent No.2 as a constituent member of the Employees State Insurance Corporation (hereafter 'ESIC'). The petitioner assails the appointment of respondent No.2 as a member of ESIC as being contrary to the provisions of the Employees State Insurance Act, 1948 (hereafter the 'ESI Act').

2. According to the petitioner, the appointment of Dr. Purshottam Lal (respondent No.2) is contrary to the provisions of the ESI Act as it is alleged that respondent No.2 was appointed without consultation with the petitioner. It is further asserted that respondent No.2 is disqualified by virtue of being a director on the Board of several companies, which are referred to as “Metro Group of Hospitals”. It is stated that the said companies are empanelled with the ESIC and, therefore, respondent No.2 is disqualified by virtue of Section 13(c) of the ESI Act.

3. Briefly stated, the relevant facts necessary for considering the controversy are as under:

3.1 The term of ESIC expired on 08.05.2012 and respondent No.1 commenced the process to reconstitute ESIC in terms of Section 4 of the ESI Act.

3.2 In terms of Section 4(h) of the ESI Act, the constitution of ESIC includes two members from the medical profession. Respondent No.1 has been accepting one nominee from Indian Medical Association (i.e. the petitioner) as a member of ESIC, since its first constitution in 1950. Respondent No.1 sought advice of the Ministry of Health and Family Welfare to continue with the said arrangement by an Office Memorandum dated 13/19.03.2012. This was agreed to by the Ministry of Health and Family Welfare and the same was communicated by an Office Memorandum dated 03.04.2012.

3.3 On 20.04.2012, respondent No.1 called upon the petitioner to provide the name of its representative for being appointed as a member of ESIC. In

response to the aforesaid letter, the petitioner submitted the name of Dr. Vinay Aggarwal as its nominee. It appears that, thereafter, respondent No.1 received recommendations for appointment of respondent No.2 as a member of ESIC, from other sources.

3.4 Thereafter, on 19.10.2012, respondent No.1 sent another letter to the petitioner calling upon the petitioner to provide some more nominations for appointment as a member of ESIC in order for the respondent No.1 to have a wider choice of nominees. Apparently, this request was not acceded to and the petitioner informed respondent No.1 that further names could be sent if the numbers of nominees to be appointed were increased.

3.5 Respondent No.1, thereafter, requested Medical Council of India (hereafter 'MCI') to furnish names of its nominees. However, no nomination was received from MCI and respondent No.1 proceeded to issue the impugned notification including the name of respondent No.2 as a member of ESIC.

4. The limited controversy to be addressed is whether respondent No.2 has been appointed as a member of ESIC, contrary to the procedure as specified in Section 4 of the ESI Act and whether respondent No.2 is disqualified for being appointed as a Member of ESIC by virtue of Section 13(c) of the ESI Act.

5. Before proceeding to address the controversy, it will be necessary to refer to Section 4(h) and Section 13 of the ESI Act which are reproduced below:-

“4. Constitution of Corporation - The Corporation shall consist of the following members, namely:-

XXXX

XXXX

XXXX

XXXX

XXXX

(h) two persons representing the medical profession to be appointed by the Central Government in consultation with such organisations of medical practitioners as may be recognised for the purpose by the Central Government.”

“13. Disqualification. - A person shall be disqualified for being chosen as or for being a member of the Corporation, the Standing Committee or the Medical Benefit Council-

- a) if he is declared to be of unsound mind by a competent court; or*
- b) if he is an undischarged insolvent; or*
- c) if he has directly or indirectly by himself or by his partner any interest in subsisting contract with, or any work being done for, the Corporation except as a medical practitioner or as a shareholder (not being a Director) of a company; or*
- d) if before or after the commencement of this Act, he has been convicted of an offence involving moral turpitude.”*

6. Plainly, an appointment of a member of ESIC has to be made by the Central Government. However, two persons are to be included as members of ESIC as representatives of the medical profession. In terms of Section 4(h) of the ESI Act, such appointment has to be made by the Central Government *“in consultation with such organization of medical practitioners as may be recognized for the purpose by the Central Government”*. Concededly, respondent No.1 has been following the practice of accepting a nominee of the petitioner for being appointed as one of the member representing the medical profession as a constituent of

ESIC. However, a plain reading of Section 4(h) of the ESI Act does not suggest that the petitioner or any other organization of medical practitioners has been provided any right of nomination. The mandate of Section 4(h) of the ESI Act cannot be understood to confer a right to nominate any person as a member of ESIC; the only requirement for appointing persons to represent the medical profession is that such persons be appointed “*in consultation with organizations of medical practitioners*”. In this view, it cannot be disputed that it was incumbent upon respondent No.1 to appoint persons under Section 4(h) of the ESI Act (i.e. persons representing medical profession) in consultation with an organization of medical practitioners.

7. In the past, respondent No.1 had recognized the petitioner to be such organization of medical practitioners. However, this does not preclude respondent No.1 from recognizing any other organization of medical practitioners. It was, thus, open for respondent No.1 to make an appointment in consultation with MCI if the said body was recognized by the Central Government for the purposes of Section 4(h) of the ESI Act. However, the quintessential question is whether the appointment of respondent No.2 was made in consultation with any recognized organization of medical practitioners.

8. The learned counsel for respondents has contended that the communication exchanged between the petitioner and respondent No.1 indicates that the process of consultation was duly complied with. It is contended that respondent No.1 had invited the petitioner to suggest other names. And, since the petitioner had failed to do so, the respondent had no

further obligation to correspond any further. It is asserted that the respondent had considered the nomination made by the petitioner and it was within its right to reject the same.

9. In my view the expression “consultation” as occurring in Section 4(h) of the ESI Act has to mean a meaningful dialogue. Undoubtedly, the petitioner does not have any right to nominate any person as a constituent member of ESIC and the task for constituting ESIC is largely entrusted with the Central Government. Although, the State Governments also have the right to appoint one person each to represent their respective states. Insofar as appointing persons to represent medical profession is concerned, the Central Government is obliged to consult a recognized organization of medical practitioners. Such consultation is not an empty formality and has to be done in a meaningful manner. The least that is expected, is that the Central Government would elicit the views of a recognized organization of medical practitioners, regarding the candidature of respondent no.2. However, it is apparent that there was no dialogue between the Central Government and any other organization of medical practitioners with regard to appointment of respondent No.2. Whilst, it is correct that respondent No.1 is not obliged to accept any nominee of the petitioner, it was nonetheless incumbent upon respondent No.1 to discuss the candidature of any appointment that was sought to be made by the Central Government with a recognized organization of medical practitioners.

10. The Supreme Court in **Indian Administrative Service (S.C.S.) Assn. v. Union of India: 1993 Supp (1) SCC 730** described the process of consultation as under:

“(1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.”

11. A constitution bench of the Supreme Court in the case of **Chandramouleshwar Prasad. v. Patna High Court: (1969) 3 SCC 56** had explained the requirement of consultation in the context of appointment of District Judges as under:-

“7. The question arises whether the action of the Government in issuing the notification of October 17, 1968 was in compliance with Article 233 of the Constitution. No doubt the appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the article is that the Governor should make up his mind after there has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits. This does not mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court

about B's claims vis-a-vis A's to promotion, B's appointment cannot be said to be in compliance with Article 233 of the Constitution. The correspondence noted above which passed between the High Court and the Secretariat from 28th September, 1968 to 7th October, 1968 shows that whereas the High Court had definitely taken the view that Misra as the senior Additional District and Sessions Judge should be directed to take charge from Chakravarty, the Government was not of the view that according to the records in its appointment department Misra was the senior officer at Shahabad among the Additional District and Sessions Judges. Government never suggested to the High Court that the petitioner was senior to Misra or that the petitioner had a better claim than Misra's and as such was the person fit to be appointed temporarily as District and Sessions Judge. Before the notification of October 17, 1968 Government never attempted to ascertain the views of the High Court with regard to the petitioner's claim to the temporary appointment or gave the High Court any indication of its own views with regard thereto excepting recording dissent about Misra's being the senior officer in the cadre of Additional District and Sessions Judges at Arrah. Consultation with the High Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion. The Governor cannot discharge his function under Article 233 if he makes an appointment of a person without ascertaining the High Court's views in regard thereto. It was strenuously contended on behalf of the State of Bihar that the materials before the Court amply demonstrate that there had been consultation with the High Court before the issue of the notification of October 17, 1968. It was said that the High Court had given the Government its views in the matter; the Government was posted with all the facts and there was consultation sufficient for the purpose of Article 233. We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and

examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In our opinion, the notification of October 17, 1968 was not in compliance with Article 233 of the Constitution. In the absence of consultation the validity of the notification of October 17, 1968 cannot be sustained.”

(emphasis supplied)

12. It is well settled that no hard and fast rule can be laid as to the manner in which consultation must take place and the same has to be determined on the facts and circumstances of each case. The intention of the Parliament in enacting the provision that appointment of members representing medical profession be made in consultation with a recognized organization of medical practitioners, is to ensure that the opinion and expertise of such organization is availed of by the Central Government in respect of such appointment. In this view, it was mandatory for Central Government to obtain inputs from the petitioner or any other such organization before appointing respondent no.2 as a member of ESIC.

13. Applying the aforesaid principles to the facts of the present case, it is clear that insofar as appointment of respondent No.2 is concerned, there was neither any dialogue nor an effort made for such consultation with the petitioner or MCI.

14. Thus, in my view, the appointment of respondent No.2 is in violation to the procedure as mandated under Section 4(h) of the ESI Act.

15. In view of the above, it is not necessary to consider whether respondent No.2 is disqualified by virtue of Section 13(c) of the ESI Act. However, since the learned counsel had addressed arguments in this regard, I feel it is appropriate to consider this issue also.

16. It is not disputed by respondent No.2 that respondent No.2 is a Director on the Board of several companies - “Metro Group of Hospitals” which have entered into a contract for providing services to ESIC. In response to a query put by the Court, learned counsel for respondent No.2 had also submitted that respondent No.2 and his family members own over 59% share holding in the said companies. The question whether respondent No.2 is disqualified has to be considered in the backdrop of the aforesaid facts.

17. Mr Parag Tripathi, the learned senior counsel, appearing for respondent No.2 contended that Section 13(c) of the ESI Act applies to all members of ESIC and not just medical professionals appointed pursuant to Section 4(h) of the ESI Act. It was contended that an engagement as a medical practitioner was excluded from the rigor of disqualification as specified under Section 13(c) of the ESI Act. He further submitted that in this context the exclusion of a medical practitioner would take in its sweep even a company which offers medical services. In other words, he submitted that a contract between ESIC and a medical practitioner, would not disqualify the said medical practitioner from being appointed as a member of ESIC and this disqualification would also not be attracted if the member was a director of a company that offered medical services. According to him a contract for providing medical services to ESIC would

not disqualify a person from being appointed as a member of ESIC irrespective of whether the contract was in his individual capacity or with a company in which the person was a director. This contention was controverted by the learned counsel for the petitioner who submitted that a contract with a medical practitioner in his individual capacity for providing medical services stood on a completely different footing than a contract with a company where such persons were shareholders and directors.

18. Interestingly, the learned counsel appearing for respondent No.1 did not support the stand of respondent No.2 and submitted that Section 13(c) of the ESI Act should be read to disqualify any person who is a director of a company which has a subsisting contract with ESIC. Thus, according to respondent No.1's stand respondent No.2 stood disqualified from being appointed as a member of ESIC. However, the learned counsel for respondent No.1 submitted that it had been the past practice of respondent No.1 to accept nomination made by the petitioner of persons who were otherwise interested in companies/hospitals, which had subsisting contracts with ESIC. He pointed out that even Dr. Vinay Aggarwal, who had been the nominee of the petitioner for past eight years, was also on the board of directors of a company called Crosslay Remedies Limited which owned a hospital in the name and style of Pushpanjali Crosslay Hospital and the said hospital had a subsisting contract with ESIC.

19. In my view, the question whether Dr Vinay Aggarwal was disqualified from being appointed as a member is not a subject matter of controversy in the present petition and therefore is not required to be examined. The only question that remains to be answered is whether in the

given facts, respondent No.2 is disqualified from being appointed as a member of ESIC by virtue of Section 13(c) of the ESI Act.

20. A plain reading of Section 13(c) of the ESI Act indicates that any person who either directly or indirectly by himself or by his partner, has any interest in a subsisting contract with the corporation is disqualified from being appointed as a member. The only two exclusions to such disqualification are: (a) where a person is interested '*as a medical practitioner*'; and (b) where a person is a '*shareholder (not being a Director) of a company*'. Thus, where a person has an interest in a subsisting contract with ESIC as a medical practitioner, he will not incur the disqualification under Section 13(c) of the ESI Act. The principal question to be asked is whether Dr. Purshottam's interest in a contract subsisting between Metro Group of Hospitals and ESIC can be considered as an interest "as a medical practitioner". In my view, the answer to this question would be in the negative as respondent no. 2's interest in the contracts subsisting between ESIC and Metro Group of Hospitals is as a shareholder of Metro Group of Hospitals. Undisputedly, the Metro Group of Hospitals has to provide the medical services under the subsisting contracts and it is well settled that an interest of a shareholder or a director is not identical with that of a company.

21. In **Bacha F. Guzdar v. Commissioner of Income Tax, Bombay:** AIR 1955 SC 74, a constitution bench of the Supreme Court held that there was a qualitative difference between the property of a company and the interest of its shareholders. In that case it was contended that dividends received by shareholders from a company, which was engaged in

agricultural activities was exempt from tax. It was urged that, the dividends also assumed the character of agricultural income and were thus exempt from tax. A shareholder acquires a right to participate in the profits as and when distributed, but the shareholder will have no right in the property of the company. The Supreme Court explained the above proposition of law in the following words:

“7. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The interest of a shareholder vis-a-vis the company was explained in the Sholapur Mills Case [(1950) SCR 869, 904] . That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. It is true that the shareholders of the company have the, sole determining voice in administering the affairs of the company and are entitled, as provided by the Articles of Association to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company.

The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders.”

22. In the present case, respondent No.2 has an undeniable interest in the Metro Group of Hospitals and the ESIC. Such interests can certainly not be termed as interests as a medical practitioner but as a shareholder of Metro Group of Hospitals. Respondent no. 2 is also a director on the board of Metro Group of Hotels. Although, interest as a shareholder *simpliciter* is

also excluded from Section 13(c) of the ESI Act but an interest as a shareholder who is also a director does not fall within the said exclusion. Therefore, the exemption from incurring a disqualification that is available to a shareholder of a company having subsisting contracts with ESIC, is not available to respondent no. 2.

23. The respondent no.2's interest as a shareholder and a director of Metro Group of Hospitals are commercial interests which do not fall under the exclusion of Section 13(c) of the ESI Act. The fact that the said companies have subsisting contracts with ESIC for providing medical services does not render respondent no.2's indirect commercial interests in those contracts as interests as a medical practitioner.

24. In view of the aforesaid, respondent No.2 would be disqualified from being appointed as a member of ESIC. Accordingly, the writ petition is allowed and the impugned notification insofar as it appoints respondent No.2 as a constituent member of ESIC, is set aside.

VIBHU BAKHRU, J

DECEMBER 09, 2014

pkv/rk