

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 25th April, 2016

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W.P.(C) No.5604/2012 & CM No.11451/2012 (for stay).

MEENAKSHI JAIN

..... Petitioner

Through: Petitioner in person.

Versus

DELHI MEDICAL COUNCIL & ANR

.... Respondents

Through: Mr. Praveen Khattar, Adv. with Mr. L.D.S. Uppal, Asstt. Secretary, Delhi Medical Council.
Ms. Indu Malhotra, Sr. Adv. with Ms. Shel Trehan and Ms. Himanie Katoch, Advs. for R-2.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impleading the respondent Delhi Medical Council (DMC) as the sole respondent impugns (i) “the illegal modification approved in the meeting of the respondent DMC dated 16th November, 2011 whereby the eligibility criteria of qualification for appointment of experts was arbitrarily and perversely lowered down”; and further seeks that (ii) “consequently the hearing, proceedings and order dated 17th November, 2011 in a Complaint No.780/2010 of the petitioner before the respondent DMC as also the final approved order dated 18th July, 2012 be also quashed”.

2. It is the case of the petitioner:-

- (i) that the respondent DMC is the statutory body constituted under the Delhi Medical Council Act, 1997 (DMC Act) and has function *inter alia* to conduct hearing on complaints of medical negligence and professional misconduct against the medical practitioners and to give its decision thereon;
- (ii) that the father of the petitioner late Shri P.K. Jain, Advocate was admitted to Indraprastha Apollo Hospital on 6th March, 2009 at 1.00 p.m. and passed away on 1st April, 2009 due to gross, grave and reckless criminal negligence of the hospital and its doctors; the patient was admitted for a non-cardiac surgery of incision and drainage of perianal abscess – despite being a known cardiac patient, all his vital cardiac medicines and antiplatelet drugs were completely discontinued for continuous three weeks by the regular Cardiologist who also stopped visiting/evaluating the patient and in consequence whereof the patient succumbed to Myocardial Infraction;
- (iii) that the petitioner filed complaint before the Delhi State Consumer Disputes Redressal Commission on 19th March, 2010

against the hospital and its doctors and on 19th October, 2010 also filed a complaint for disciplinary action for professional misconduct and medical negligence against the hospital and its doctors under Section 10(f) of the DMC Act before the respondent DMC, being Complaint No.780/2010;

- (iv) that the petitioner also filed a complaint before SHO, PS Sarita Vihar on 12th October, 2010 for registration of FIR under Section 304A of Indian Penal Code, 1860 (IPC) and for forging and tampering of the medical record and being aggrieved by the inaction of the Police, filed application under Section 156(3) of Code of Criminal Procedure, 1973 (Cr.P.C.) along with complaint before the Metropolitan Magistrate (MM), Saket seeking registration of an FIR; aggrieved from one of the orders of the MM in the said complaint case, the petitioner preferred Crl. M.C. No.2504/2011 before this Court and this Court vide order dated 5th August, 2011 directed the respondent DMC to communicate its opinion on the complaint preferred by the petitioner in a sealed cover to the Court;

(v) that one of the documents produced by the respondent DMC in the aforesaid CrI. M.C. No.2504/2011 related to the meeting held by the respondent DMC on 27th April, 2010 where in the criteria for appointment of a Medical Specialist to be an expert member of the Disciplinary Committee was laid down as follows:-

“(i) He should be registered with Delhi Medical Council.

(ii) He should be a holder of post graduate qualification with minimum of 15 years of experience after obtaining the post graduate qualification.

(iii) He should be of high integrity and good standing.

(iv) He should have no conflict of interest.”

(vi) that the respondent DMC, on 15th February, 2012 communicated the decision of its Disciplinary Committee to this Court in CrI. M.C. No.2504/2011 in a sealed envelope and on perusal whereof this Court vide order dated 2nd July, 2012 dismissed CrI. M.C. No.2504/2011 preferred by the petitioner with clarification that the respondent DMC may proceed further qua its decision communicated to this Court;

- (vii) the respondent DMC vide order dated 18th July, 2012 confirmed the order dated 17th November, 2011 of its Disciplinary Committee;
- (viii) the petitioner on checking the website of the respondent DMC found that in the meeting held on 16th November, 2011 the respondent DMC had modified the criteria for appointment of Experts to lower down the qualifications of the Expert Members with retrospective effect from 27th April, 2010 as follows:-

“(i) He should be registered with Delhi Medical Council.

(ii) Minimum 10 years Post Graduate qualification experience or 7 years Post doctoral qualification experience.

(iii) He should be of high integrity and good standing.

(iv) He should have no conflict of interest.”

- (ix) that the petitioner on further enquiries came to know that one of the three Experts appointed for hearing of the complaint of the petitioner namely Dr. Jamal Yusuf, Cardiologist did not fulfill the criteria as existed prior to 16th November, 2011 because he

did not have 15 years experience having qualified medicine only in the year 1998;

- (x) the aforesaid vitiated the hearing and proceedings in Complaint no.780/2010 rendering it null and void;
- (xi) that the criteria of Expert Members was changed on 16th November, 2011 i.e. just a day before the order dated 17th November, 2011 of the Disciplinary Committee on the complaint of the petitioner; and,
- (xii) that the qualification of the Expert Member could not have been changed retrospectively and such change is *mala fide*.

3. It would thus be obvious that the challenge to the decision dated 18th July, 2012 of the respondent DMC of confirming the order dated 17th November, 2011 of the Disciplinary Committee on the complaint of the petitioner is only on the ground of one of the six members of the Disciplinary Committee not fulfilling the criteria as prescribed prior to the filing of the complaint though fulfilling the impugned modified criteria. There is a reason for such limited challenge. Else the petitioner, against the decision of the

respondent DMC has the remedy of appealing to the Medical Council of India (MCI).

4. Notice of the petition was issued and a counter affidavit has been filed by the respondent DMC contending (i) that the petition is not maintainable owing to the alternative remedy of appealing to the MCI being available to the petitioner; (ii) that the complaint dated 12th October, 2010 of the petitioner was on 11th November, 2010 taken up for screening before Executive Committee of the respondent DMC wherein the Executive Committee directed that written statements and medical records be asked from the concerned doctors and hospital; accordingly notice was sent to the Medical Superintendent of Indraprastha Apollo Hospital; (iii) on 16th December, 2010 the respondent DMC received a letter dated 14th December, 2010 from the Joint Secretary (Home), Government of National Capital Territory of Delhi (GNCTD) requesting for constitution of Medical Board of doctors to enquire and give opinion about the death of the father of the petitioner i.e. as to whether it was caused due to criminal negligence on the part of the doctors or not; (iv) on 28th January, 2011 a joint written statement of defense was received from the concerned doctors of Indraprastha Apollo Hospital; (v) on 14th February, 2011 the complaint was taken up for deliberation by the

Executive Committee of the respondent DMC which directed the matter to be notified for hearing before the Disciplinary Committee; (vi) that the Disciplinary Committee of the respondent DMC is constituted in terms of Section 21(1) of the DMC Act for inquiry in terms of Rule 32 of the Delhi Medical Council Rules, 2003; (vii) Rule 32 supra requires a complaint against a medical practitioner in respect of misconduct or negligence to be considered by the Registrar in the presence of the Chairman of the Disciplinary Committee and at least two Members thereof sitting together; (viii) that the complaint, on 15th January, 2011, came up before the Disciplinary Committee of the respondent DMC comprising of Dr. O.P. Kalra (Chairman), Dr. Prem Aggarwal, Shri Naseeb Singh, Dr. Vinod Khetarpal as Members and Dr. R.S. Mohil , Dr. Atul Goel and Dr. Jamal Yusuf as Expert Members; (ix) that the complaint was thereafter considered by the Disciplinary Committee comprising of Dr. O.P. Kalra, Dr. Prem Aggarwal, Dr. Vinod Khetarpal, Dr. R.S. Mohil, Dr. Atul Goel and Dr. Jamal Yusuf on 5th August, 2011, 25th August, 2011 and 7th October, 2011; (x) on 21st October, 2011 the matter again came up before the Disciplinary Committee comprising of besides the aforesaid six members also Ms. Avnish Ahalawat as legal expert; (xi) that though the respondent DMC in its meeting held on 27th April, 2010 laid down

the criteria as re-produced above for appointment of a Medical Specialist as an expert member of the Disciplinary Committee but in the subsequent meeting held on 8th June, 2011 had approved of a panel of Experts to be invited in respect of cases pertaining to medical negligence/professional misconduct and authorised the Secretary of the respondent DMC to invite the Expert from the list approved for purpose of examination of complaints of medical negligence/professional misconduct; (xii) that all the Experts invited for examination of the complaint of the petitioner are on the panel of Experts so approved by the respondent DMC in its meeting held on 8th June, 2011; (xiii) that in the meeting of the respondent DMC on 16th November, 2011, the Secretary of the respondent DMC informed that on review of the panel of Experts approved on 8th June, 2011 it was observed that some of the persons whose name appeared on the panel were not registered with the respondent DMC and that the criteria of 15 years postgraduate qualification experience as laid down in the council meeting on 27th April, 2010 needs to be re-examined as this limitation narrowed the pool of specialists who may be invited as expert members and as a result the respondent DMC was facing difficulty in procuring the services of the experts in different specialties to which the various complaints pertained and as such this criteria needed to be relaxed;

the respondent DMC after due deliberation modified the criteria of postgraduate qualification experience by observing that doctors fulfilling minimum ten years postgraduate qualification experience or seven years post doctoral qualification experience were eligible to be invited as experts; it was further directed that the names of the doctors not registered with the respondent DMC be removed from the panel of Experts prepared in the meeting of 8th June, 2011; (xiv) that there was thus no illegality in the modification and the petitioner had failed to enunciate how it has caused prejudice to her; (xv) there is no allegation in the petition that the Expert who did not fulfill the criteria laid down on 27th April, 2010 was biased; (xvi) the petitioner has failed to enunciate as to how the Expert who did not fulfill the criteria as laid down on 27th April, 2010 but who fulfilled the criteria as laid down on 16th November, 2011 has helped the opposite parties; that the modification was not specific to the complaint of the petitioner but applied to all complaints of medical negligence and professional misconduct in general; (xvii) that admittedly two of the three Experts examining complaint of the petitioner fulfilled the criteria as laid down on 27th April, 2010; (xviii) in any case the decision of the Disciplinary Committee has since been confirmed by the respondent DMC; (xix) that the criteria for postgraduate qualification

experience was framed by the respondent DMC in the meeting held on 27th April, 2010 though there is no statutory mandate to frame any such criteria; and, (xx) that the modification of the criteria does not affect the impartiality of dealing with the complaint of medical negligence.

5. One Dr. Vinayak Agrawal sought impleadment in the petition on the ground that the outcome thereof was likely to affect him and was vide order dated 27th September, 2013 impleaded as respondent no.2 and has also filed a counter affidavit which however is on the merits of the complaint of the petitioner and need to go where into is not felt since the challenge by the petitioner in this petition as aforesaid is limited to the decision of the respondent DMC being vitiated owing to the change in the criteria of the Experts.

6. The petitioner has filed a rejoinder to the counter affidavit of the respondent DMC *inter alia* contending that the respondent DMC has failed to disclose the reason for retrospectively changing the criteria on 16th November, 2011.

7. Vide order dated 19th February, 2015 the respondent DMC was directed to file an affidavit disclosing as to the number of cases in which Dr. Jamal Yusuf sat as a part of the Disciplinary Committee.

8. The respondent DMC in compliance has filed an affidavit disclosing (i) that during the period 27th April, 2010 to 16th November, 2011 Dr. Jamal Yusuf was part of the Disciplinary Committee of the respondent DMC as an Expert Member in one other complaint decided on 4th June, 2012 besides in the complaint of the petitioner.

9. Though the petitioner has filed a response to the aforesaid also but not controverting the aforesaid fact.

10. It is the contention of the petitioner appearing in person and also an Advocate:-

- (i) that as per Section 21(1)(v) of the DMC Act, the Disciplinary Committee is to comprise of an eminent medical specialist in the relevant specialty to which the complaint pertains, to be nominated by the respondent DMC;

- (ii) in discharge of duty under the aforesaid provision, the respondent DMC had formulated the criteria on 27th April, 2010;
- (iii) the said criteria could not be arbitrarily modified and especially lowered, that too retrospectively;
- (iv) that the respondent DMC has no power of review;
- (v) this alone establishes bias, impartiality, illegality and contravention of principles of natural justice which the respondent DMC being a *quasi-judicial* body is bound to follow;
- (vi) that no proper notice also of the meeting held on 16th November, 2011 in which the criteria was lowered has been given;
- (vii) reliance was placed on:-
 - (a) ***M/s Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad*** AIR 1969 SC 556;
 - (b) ***Dr. Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya*** AIR 1987 SC 2186

on the aspect of availability of alternative remedy being not a bar to a maintainability of a writ petition under Article 226 of the Constitution;

- (c) ***State of Gujarat Vs. Arvindkumar T. Tiwari*** AIR 2012 SC 3281 – enunciating difference between the eligibility which can be laid down by the Executive Authority/Legislature by way of statute or rules and qualifications which connote the additional norms laid down by the authorities and laying down that before a candidate is considered for a post or for admission to the institution, he must fulfil the eligibility criteria;
- (d) ***Tej Prakash Pathak Vs. Rajasthan High Court*** JT 2013 (8) SC 498 – to contend that Rules of games cannot be changed midstream or after the game is played; and,
- (e) ***State Bank of India Vs. Yogendra Kumar Srivastava*** Civil Appeals No.4125-28/86 dated 1st May, 1987 – laying down that unless the statute under which the rules are framed by the rule making authority specifically authorises

the making of rules with retrospective effect, such authority cannot frame any rule with retrospective effect.

11. The counsel for the respondent DMC contended (i) that the writ petition is not maintainable owing to availability of alternative efficacious remedy of appeal before the MCI under Regulation 8.8 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002; (ii) that in the absence of any plea of *mala fide* against the respondent DMC and the said Dr. Jamal Yusuf or of prejudice to the petitioner, the decision of the respondent DMC cannot be faulted with; (iii) that there is no statutory mandate on the respondent DMC to prescribe the criteria for appointment of an expert; (iv) the said criteria was prescribed on 21st April, 2010 for the respondent DMC's own exigencies; (v) prior thereto there was no criteria prescribed; (vi) that the said criteria had to be changed for the reasons pleaded in the counter affidavit; (vii) that the error/irregularity even if any in so changing the criteria with retrospective effect was neither intentional nor with reference to the complaint of the petitioner; and, (viii) that the respondent DMC at the relevant time was in the process of evolving and making provisioning for its own functioning and irregularities therein cannot affect the

decision otherwise arrived at by the respondent DMC in accordance with statutes and rules.

12. The senior counsel for the respondent no.2, (i) drew attention to Section 21(1) of the DMC Act prescribing the composition of the Disciplinary Committee and particularly to clause (vi) thereof which prescribes the said Committee to comprise of “a member nominated by Medical Association of Delhi with minimum ten years standing” and contended that there was thus no statutory violation in inclusion of Dr. Jamal Yusuf in the Disciplinary Committee which examined the complaint of the petitioner; (ii) that it is also not the case of the petitioner that any fundamental right of the petitioner has been violated thereby; and, (iii) that the rules prescribed on 21st November, 2010 for nomination of an Expert were merely an internal guideline of the respondent DMC which the respondent DMC could at any time change.

13. The senior counsel for the respondent no.2, on the aspect of retrospectivity of the modification made by the respondent DMC on 16th November, 2011 referred to:-

- (a) ***High Court of Delhi Vs. A.K. Mahajan*** (2009) 12 SCC 62 – upholding the retrospective application of service rule observing

that the amendment did not affect any absolute vested or accrued right;

- (b) ***Marripati Nagaraja Vs. Government of Andhra Pradesh*** (2007) 11 SCC 522 – holding that it is well settled rule that subject to constitutional limitation State may amend a recruitment rule with retrospective effect;
- (c) ***Government of Andhra Pradesh Vs. Sri Sevadas Vidyamandir High School*** (2011) 9 SCC 613;
- (d) ***Sonia Vs. Oriental Insurance Co. Ltd.*** (2007) 10 SCC 627;
- (e) ***Union of India Vs. Kartick Chandra Mondal*** (2010) 2 SCC 422;
- (f) ***Anil Chandra Vs. Radha Krishna Gaur*** (2009) 9 SCC 454;
- (g) ***P. Mahendran Vs. State of Karnataka*** (1990) 1 SCC 411; and,
- (h) ***N.T. Devin Katti Vs. Karnataka Public Service Commission*** (1990) 3 SCC 157

holding that administrative action/memorandums may have a retrospective effect if the intention of the authorities is revealed expressly or by necessary implication.

14. The petitioner in rejoinder contended that Section 21(1)(vi) is of no relevance being qua the nominee of the Medical Association of Delhi and drew attention to the panel of experts drawn up on 8th June, 2011 which contains the names of 12 other Cardiologists and contended that the respondent DMC could have chosen any other Cardiologist than Dr. Jamal Yusuf.

15. I have considered the rival contentions.

16. Though it was the contention of the counsel for the respondent DMC that even a challenge qua the constitution of the Disciplinary Committee could be made in the statutory appeal before the MCI but this Court having entertained the writ petition and the same having remained pending for over three years, I do not deem it appropriate to now, even if were to find any merit in the said plea of the respondent DMC, relegate the petitioner to the appellate remedy. I thus proceed to consider the limited challenge in the petition on merits.

17. DMC Act was enacted to provide for the constitution of the respondent DMC i.e. the Delhi Medical Council and the maintenance of a Register of medical practitioners engaged in the practice of modern scientific system of medicine in the National Capital Territory of Delhi and for matters connected therewith. The same, vide Section 3 constitutes the DMC to consist of (a) four members having registrable qualification as prescribed in the Indian Medical Council (MCI) Act, 1956 to be nominated by the Government; (b) one member from each medical college established by law in Delhi having a medical faculty, elected by members of the medical faculty of that college from amongst its permanent members of teaching faculty; (c) nine members to be elected by registered practitioners from amongst themselves including one member elected by the Delhi Medical Association; (d) Dean of the Medical Faculty of the University of Delhi as ex-officio member; and, (e) Director of Health Services of the Government as ex-officio member. Thus, to be a member of the respondent DMC, holding a qualification prescribed in the MCI Act is enough and the number of years for which the qualification is held is not a criteria. Section 7 prescribing the disqualifications for being elected or nominated as a member of the respondent DMC also does not disqualify a person on the basis of his age or experience as a doctor. Holding any

qualification prescribed in the MCI Act, even if it be a graduate qualification in medicine, is sufficient.

18. Section 10 of the Act prescribes the powers, duties and functions of the respondent DMC and which *inter alia* includes, to prescribe a code of ethics for regulating professional conduct of practitioners, to reprimand a practitioner or to suspend or remove his name from the register or to take such other disciplinary action against him as may be necessary or expedient and to receive complaints from public (including patients and their relatives) against misconduct or negligence by a medical practitioner, to proceed for inquest, take a decision on the merits of the case and to initiate disciplinary action or award compensation and similarly to take action against frivolous complaints. Section 21 titled ‘Disciplinary action including removal of names from the register’ is as under:-

“(1) The Council shall have a Disciplinary Committee comprising of--

- (i) a Chairman to be nominated by the Council;*
- (ii) a Member of Legislative Assembly of the National Capital Territory of Delhi, nominated by the Speaker;*
- (iii) a Legal Expert to be nominated by the Council;*
- (iv) an eminent publicman nominated by the Government;*

(v) *an eminent medical specialist in the relevant speciality to which the complaint pertains, to be nominated by the Council; and*

(vi) *a member nominated by Medical Association of Delhi with minimum ten years standing.*

(2) *If a registered practitioner has been, after due inquiry held by the Council or by the Executive Committee in the prescribed manner, found guilty of any misconduct by the Council or the Executive Committee, the Council may--*

(a) *issue a letter of warning to such practitioner; or*

(b) *direct the name of such practitioner--*

(i) *to be removed from the register for such period as may be specified in the aforesaid direction; or*

(ii) *to be removed from the register permanently.*

Explanation.--For the purpose of this section a registered practitioner shall be deemed to be guilty of misconduct if--

(a) *he is convicted by a criminal court for an offence which involves moral turpitude and which is cognizable within the meaning of the Code of Criminal Procedure, 1973 (2 of 1974), or*

(b) *in the opinion of the Council his conduct is infamous in relation to the medical profession particularly, under any Code of Ethics prescribed by the Council or by the Medical Council of India constituted under the Indian Medical Council Act, 1956 (102 of 1956) in this behalf.*

(3) *The Council may, on sufficient cause being shown, direct on any subsequent date that the name of a practitioner removed under the sub-section (1) shall be re-entered in the register on such conditions, and on payment of the prescribed fee, as the Council may deem fit.*

(4) The Council may, of its own motion, or on the application of any person, after due and proper inquiry and after giving an opportunity to the person concerned of being heard, cancel or alter any entry in the register, if in the opinion of the Council, such entry was fraudulently or incorrectly made.

(5) In holding any inquiry under this section, the Council or the Executive Committee, as the case may be, shall have the same powers as are vested in Civil Courts under the Code of Civil Procedure, 1908 when trying a suit, in respect of the following matters, namely:--

(a) enforcing the attendance of any person, and examining him on oath;

(b) compelling the production of documents;

(c) issuing of commissions for the examination of witnesses.

(6) All the inquiries under this section shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 of the Indian Penal Code (45 of 1860).

(7) (a) For the purpose of advising the Council or the Executive Committee, as the case may be, on any question of law arising in any inquiry under this section, there may in all such inquiries be an assessor, who has been for not less than ten years--

(i) an advocate enrolled under the Advocates Act, 1961, or

(ii) an attorney of a High Court.

Explanation.--For the purpose of this sub-section, in computing the period during which a person has been enrolled as an Advocate, there shall be included any period during which he was enrolled as an Advocate under the Indian Bar Council Act, 1926.

(b) Where an assessor advises the Council, or the Executive Committee, as the case may be, on any question of law as to evidence, procedure or any other matter, he shall do so in the presence of every party or person representing a party to the

inquiry who appears thereat or if the advice is tendered after the Council or the Executive Committee has begun to deliberate as to its findings, every such party or person as aforesaid shall be informed what advice the assessor has tendered. Such party or person shall also be informed if, in any case, the Council or the Executive Committee does not accept the advice of the assessor on any such question as aforesaid.

(c) Any assessor under this section may be appointed either generally, or to any particular inquiry, and shall be paid the prescribed remuneration.”

19. It will immediately be noticed that though for being a member of the Disciplinary Committee no experience, whether for a legal expert or for a publicman or for a medical specialist to be nominated by the respondent DMC is prescribed, such experience of ten years is prescribed only for a nominee of the Delhi Medical Association on the Disciplinary Committee and for an assessor for advising the Council or the Executive Committee on a question of law, under Section 21(1)(vi) and Section 21(7)(a) has been respectively prescribed. It thus appears that wherever the legislature felt the need to prescribe experience, the same has been done. Section 30 of the DMC Act empowers the Government to make rules to carry out the purposes of the Act and *inter alia* to provide for manner for taking disciplinary action etc. against registered practitioners and though in exercise of the said powers the Delhi

Medical Council Rules, 2003 have been framed but the same also under the head 'Inquiries'; in Rule 32 provides as under:-

“32. Complaint against medical practitioner.(1) The Council may inquire into complaint against medical practitioner either suo motu or on the basis of any complaint made to the Council in respect of misconduct or negligence of any medical practitioner for the purposes of the Act through the Disciplinary Committee. The proceedings shall be conducted by the Registrar in the presence of the Chairman, Disciplinary Committee and at least two members thereof sitting together.

The complaint shall contain the following particulars:--

- (a) the name, description and address of the complainant;*
- (b) the name, description and address of the opposite party or parties, as the case may be, as far as they can be ascertained;*
- (c) the facts relating to the complaint, when the cause of action arose and what are the grounds or causes of the complaint;*
- (d) the documents in support of the complaint if any;*
- (e) the relief which the complaint claims.*

No complaint shall be entertained unless it is in writing and signed by the person making it. The complaint shall be verified by the complainant. The complainant shall file six copies of the complaint along with such number of copies as there are opposite parties in the complaint. All anonymous and frivolous complaints shall be rejected.

Procedure on receipt of complaint.--*The Council shall on receipt of a complaint--*

- (a) Refer a copy of the complaint to the opposite party mentioned in the complaint directing him to give his*

version of the case within a period of fifteen days of receipt of copy of the complaint.

- (b) Where the opposite party on receipt of a complaint referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the Council, the Council shall proceed to adjudicate the complaint--*
 - (i) on the basis of evidence brought to its notice by the complainant where the opposite party omits or fails to take any action to represent his case within the time given by the Council, or*
 - (ii) on the basis of evidence brought to its notice by the complainant and the opposite party, where the opposite party denies or disputes the allegations contained in the complaint.*
- (c) On the date of hearing or any other date to which hearing could be adjourned, it shall be obligatory on the parties to appear before the Council. Where the complainant fails to appear before the Council on such days, the Council may in its discretion either dismiss the complaint for default or decide it on merits, where the opposite party fails to appear on the date of hearing, the Council may decide the complaint ex-parte.*
- (d) The decision of the inquiry shall be implemented and communicated to the respective parties and to others as may be required. In case there is any difference of opinion amongst themselves, the opinion of the majority shall be the decision.”*

20. A conjoint reading of Section 21 and Rule 32 shows that (i) though Section 21(1) provides for constitution of the Disciplinary Committee but Section 21(2) provides for the inquiry to be held by the Council or the

Executive Committee of the Council in the prescribed manner; (ii) Rule 32(1) provides for the Council to enquire into the complaint through the Disciplinary Committee but provides for the proceedings of the Disciplinary Committee to be conducted by the Registrar of the Council in the presence of the Chairman of the Disciplinary Committee and at least two members only out of five (other than Chairman) prescribed in Section 21(1), sitting together; and, (iii) however Rule 32 while laying down the procedure on receipt of complaint again provides for adjudication of the complaint by the Council and not by the Disciplinary Committee.

21. It thus appears that the proceedings of the Disciplinary Committee though prescribed to comprise of six members can enquire into the complaint with a minimum coram of Chairman and any other two members only and is only to act as a fact finding body to place its recommendations before the Council which is to ultimately adjudicate the matter.

22. I may add that Supreme Court in *Narayan Prasad Lohia vs Nikunj Kumar Lohia* (2002) 3 SCC 572 in the context of an arbitral award held that even if the composition of the Tribunal is not in accordance with the agreement of the parties, the challenge to the arbitral award on the ground of

composition can be made only if the composition is not in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and not otherwise.

23. The decision / order dated 27th April, 2010 of the respondent DMC laying down the criteria for appointment of a Medical Specialist as an Expert member of the Disciplinary Committee, on the ground of violation whereof the petitioner is impugning the decision of the respondent DMC on the complaint of the petitioner is thus not found to have any statutory force.

24. Wanchoo J., though in minority in the ultimate outcome, in ***Jayantilal Amrit Lal Shodhan Vs. F.N. Rana*** AIR 1964 SC 648 beautifully expounded on the difference between “force of law” and “authority of law” often confused. It was held that many orders have the authority of law behind them but all of them cannot be said to be having force of law behind them. To have the force of law, the order must satisfy the basic concept of law i.e. must contain a rule regulating the conduct of the person, enforceable through a Court of law or through other machinery provided therefor. An order issued under the authority of law but not prescribing the course of conduct is not law if breach thereof is not enforceable in law. An order having authority of law

would be recognised by Courts but unless it prescribes a rule of conduct which persons “must obey”, there is no question of it being enforced by Courts. It is only orders which can be enforced in Courts which can be said to be having force of law.

25. In the same vein, in *State of Assam Vs. Ajit Kumar Sharma* AIR 1965 SC 1196 it was held that once the Rules framed by the University were found to be not having statutory force, no writ of mandamus for enforcement thereof can be issued. Reliance was placed on *M/s Raman & Raman Vs. State of Madras* AIR 1956 SC 463 holding the order of the Regional Transport Authority though constituted under the Motor Vehicles (Madras Amendment) Act, 1948, to be administrative in nature and not creating a right least a vested right and the change thereof pending appeal not being of any consequence. Similarly, in *Lakshmi Charan Sen Vs. A.K.M. Hassan Uzzaman* (1985) 4 SCC 689, finding no provision in the Representation of People Act, 1950 or in the Representation of People Act, 1951, under which the direction of the Election Commission of India could be justified, the direction was held to be not having force of law, violation whereof was enforceable in Court of law because the direction though binding on the Electoral Officer to whom they were issued, did not create any right or obligation in favour of anyone and

which right and obligation were not found to be contained in the Acts aforesaid.

26. A Division Bench of the High Court of Allahabad in ***Deepa Vashishtha Vs. State of U.P.*** MANU/UP/1301/1995 held that an order of transfer, made in violation of a guideline or instructions having no statutory force of law, cannot attract right of employee to challenge the same in writ jurisdiction and at the most the employee can represent on basis thereof.

27. On an analysis aforesaid of the DMC Act, I find the order dated 27th April, 2010 of the respondent DMC to be purely administrative, having no force of law and the proposition of law laid down in aforesaid judgments to be applicable thereto.

28. The composition of the Disciplinary Committee is not found to be contrary to the DMC Act or the Rules framed thereunder and in the absence of any plea of the outcome of the decision having been affected owing to change in criteria for selection of an expert member on the Disciplinary Committee, the minimum coram for proceedings before which is prescribed under the rules supra of Chairman and two (out of five) members only, I am

unable to find any ground to have been made out for setting aside of the decision of the respondent DMC on the complaint of the petitioner.

The petition is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

APRIL 25, 2016

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