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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 15.02.2018

Pronounced on: 22.03.2018

+ LPA 404/2016 & CM APPL. 25246/2016

MEENAKSHI JAIN

..... Appellant

Through: Ms. Meenakshi Jain, in person.

versus

DELHI MEDICAL COUNCIL & ANR. Respondents

Through: Mr. Praveen Khattar and Mr. Bapi
Das, Advs. for R-1.
Mr. Madhukar Pandey, Adv. for
R-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

Facts

1. The appellant questions the dismissal of her writ petition, by the judgment of a learned Single Judge of this Court (dated 25.04.2016).
2. The facts are that the appellant's father late Sh. P.K. Jain ("the patient" hereafter) was admitted to Indraprastha Apollo Hospital on 06.03.2009 at 1:00 p.m. for a non-cardiac surgery of incision and drainage of perianal abscess. He however passed away on 01.04.2009. On 09.04.2009 the appellant requested the hospital to provide her the patient's complete medical records. The hospital provided the complete

attested medical record on 11.04.2009 to her. Unsatisfied with the care and treatment given to her late father by the hospital and its doctors, the appellant sought expert medical opinion of Dr. (Prof.) V.J. Anand, Consultant Surgeon, (Formerly Director/Professor, Department of Surgery MAMC). Dr. Anand, after studying the files, on 16.02.2010 was of opinion that there was negligence on the part of the hospital and its doctors in medical care and management of the patient. The appellant therefore, complained to the Delhi State Consumer Disputes Redressal Commission on 19.03.2010 against the hospital and its doctors. The Commission directed the Dean, Maulana Azad Medical College to constitute an independent and competent Board of Doctors to give their expert opinion. The Dean constituted a three-member panel, which submitted its opinion dated 14.06.2010 to the Commission. The panel's opinion found certain deficiencies or negligence in the treatment of the patient. After considering that opinion the State Commission admitted the complaint of the appellant and issued notice to the concerned hospital and its doctors on 28.09.2010.

3. On 19.10.2010, the appellant filed a complaint for disciplinary action for professional misconduct and medical negligence against the hospital and its doctors under Section 10 (f) of the Delhi Medical Council Act, 1997 (hereafter "the Act") before the Delhi Medical Council ("Respondent"), being Complaint No.780/ 2010. In response to this, a disciplinary committee ("DC" hereafter) was constituted.

4. On 05.08.2011, the appellant attended hearing of the DC, though her request to adjourn the hearing since no non medical member was present was rejected. The next hearing was conducted on 25.08.2011,

which the appellant did not attend as the respondent failed to provide her with the additional documents filed by the opposite parties to enable her to file her rejoinder. The request sent to adjourn the matter was rejected and the hearing was concluded. Thereafter, the appellant received the certified copies of the said additional documents and requested time till 28.09.2011, when she filed the rejoinder. The council conducted and concluded the hearing on 21.10.2011. The DC passed an order dated 17.11.2011 rejecting the appellant's complaint.

5. The appellant was informed by the Delhi Medical Council's order of 18.07.2012 that the DC's order of 17.11.2011 was confirmed by it. She then checked the respondent's website and found that in the meeting of the Council dated 16.11.2011, the respondent modified the criteria for appointment of experts, lowering down the qualification criteria of the expert members with retrospective effect from 27.04.2010. In essence, the requirement of having post-graduate qualification with a 15 years experience (after obtaining such qualification) was modified to minimum of 10 years experience after obtaining post graduate qualification or 7 years post doctoral qualification experience.

6. The appellant on searching for the qualifications of the three expert members appointed for hearing Complaint No. 780/2010 found that Dr. Jamal Yusuf, one of the experts on the panel, did not possess the requisite qualifications as per the original criteria, which was later retrospectively amended. Aggrieved, she preferred W.P.(C)No. 5604/2012 before this Court, which was dismissed by the impugned judgment.

Contentions

7. The appellant, representing herself, principally contended that Dr. Jamal Yusuf was not eligible to be appointed as an expert member as per the eligibility criteria for appointment of a medical specialist to be an expert member of the DC as laid down by the Respondent itself in its Council meeting held on 27.04.2010. It is argued that his name could not have been included in the list of experts approved on 08.06.2011. This patent illegality, submits Ms. Jain, vitiated the entire disciplinary proceedings thereby nullifying the DC's decision.

8. It is further urged by the appellant, that the defect of lack of eligibility of Dr. Yusuf could not be cured arbitrarily by lowering the eligibility criteria. It is contended that the Council in its meeting on 16.11.2011, retrospectively modified the criteria for appointment to DCs, by lowering the experience required to 10 years post graduate qualification experience or 7 years post-doctoral qualification experience and making it effective from 27.04.2010. It is argued that the lack of eligibility criteria hits at the root of the legality of the proceedings before the DC. It is argued that the actions of the Council in retrospectively modifying the eligibility criteria were illegal, arbitrary and *mala fide* and therefore attracted the jurisdiction of this Court under Article 226 of the Constitution.

9. Moreover, it is argued by the appellant that Dr. Jamal Yusuf and the Second Respondent (the doctor whose conduct was in question) were known to each other and it was for that reason alone that he was appointed as an expert member on the DC, even though he did not

possess the requisite eligibility criteria for appointment. This, argued the appellant, clearly proved the *mala fides* in the appointment of Dr. Yusuf.

10. The appellant relied on the decision of the Supreme Court in *Tej Prakash Pathak v. Rajasthan High Court*, (2013) 4 SCC 540 to contend that the eligibility conditions could not be retrospectively amended:

“No doubt it is a salutary principle not to permit the State or its instrumentalities to tinker with the 'rules of the game' insofar as the prescription of eligibility criteria is concerned as was done in the case of C. Channabasavaiah v. State of Mysore [AIR 1965 SC 1293] etc. in order to avoid manipulation of the recruitment process and its results.”

The appellant also placed reliance on the decision of the Supreme Court in *State of Gujarat v. Arvindkumar T. Tiwari*, AIR 2012 SC 3281:

“In a particular case, where it is so required, relaxation of even educational qualification(s) may be permissible, provided that the rules empower the authority to relax such eligibility in general, or with regard to an individual case or class of cases of undue hardship. However, the said power should be exercised for justifiable reasons and it must not be exercised arbitrarily, only to favour an individual. The power to relax the recruitment rules or any other rule made by the State Government/Authority is conferred upon the Government/Authority to meet any emergent situation where injustice might have been caused or, is likely to be caused to any person or class of persons or, where the working of the said rules might have become impossible.”

11. Learned counsel appearing for the Delhi Medical Council, Mr. Praveen Khattar contended that the neither the composition of the DC nor the proceedings impugned by the appellant suffered from any infirmity. Counsel contends that there was neither any illegality nor any *mala fides* in selecting Dr. Yusuf on the panel. Moreover, there was no

bias in amending the eligibility criteria retrospectively. It is argued that the Respondent/council was not under any legal obligation or any statutory mandate to frame policies or guidelines or rules relating to the eligibility criteria for appointment of a medical expert on the DC. Such a requirement was not found either in the Act or the Rules framed thereunder. Nonetheless, the Council in its meeting dated 27.04.2010 adopted a set of criteria specifying the eligibility for medical experts to be appointed to the DC, for ease of functioning and facilitating the smoother appointments for investigating allegations of negligence or malpractice. It is argued that these criteria adopted by the Council in its internal meeting had neither force of law, nor were they legally binding on the Council.

12. It was urged that the Council observed in practice that the criteria of 15 years post graduate qualification experience initially prescribed in the meeting held on 27.04.2010 needed re-examination as such limitation had significantly narrowed the pool of specialists who may be invited as expert members and as a result, the Council faced difficulties in procuring the services of the experts in different specialities to which various complaints pertained and therefore it was subsequently decided to relax this criteria. Counsel urged that the amendment was not directed specifically towards the appellant's complaint, but covers several other cases as well equally and as such was not targeted at causing the appellant any prejudice. Neither was it the appellant's case, nor was any proof adduced to the effect that Dr. Yusuf had acted in a biased manner against the appellant, or that his appointment prejudicially impacted the decision of the DC.

13. Counsel also urged that writ proceedings are not maintainable in any case, since an equally efficacious remedy was already available to the appellant under the statute to challenge the decision of the DC. This was by way of appeal to the Medical Council of India, against the decision of the Delhi Medical Council. On this ground alone, it is urged, this appeal should be dismissed.

14. It is lastly urged that even if there was any procedural irregularity in the appointment of Dr. Yusuf, it was undisputed that the other two members of the expert panel possessed the requisite qualifications and since the DC adopted a unanimous view with respect to the appellant's complaint, therefore any possible illegality in the appointment of Dr. Yusuf, could not vitiate the entire disciplinary proceedings.

15. Learned counsel, Mr. Madhukar Pandey, appearing for the second Respondent, Mr. Vinayak Aggarwal, who filed an intervention application in the original Writ Petition, adopted the submissions of the Medical Council. Additionally, he placed reliance on the case of *Marripati Nagaraja v. Govt of Andhra Pradesh*, (2007) 11 SCC 522, where it was held:

“The State, in exercise of its power conferred upon it under the proviso appended to Article 309 of the Constitution of India, is entitled to make rules with retrospective effect and retroactive operation. Ordinarily, in absence of any rule and that too a rule which was expressly given a retrospective effect, the rules prevailing as on the date of the notification are to be applied.”

On the strength of this decision, as well as the decision of the Supreme Court in *High Court of Delhi v. A.K. Mahajan*, AIR 2009 SC 2497, the counsel for the second Respondent argued that it was open to the Medical

Council to retrospectively modify the eligibility criteria for selection of an expert member on the DC, and this by itself would not be sufficient ground to declare the proceedings *void ab initio*.

Analysis and Conclusion

16. The appellant's only grievance in this appeal is with respect to the appointment of Dr. Yusuf on the panel of the DC. She contends that the said doctor could not have been appointed as he did not possess the eligibility criteria specified by the respondent in its meeting dated 27.04.2010. It would be useful to reproduce the relevant provisions of the Act and the Delhi Medical Council Rules, 2003 (hereafter "the Rules"). Section 21 of the Act provides for the constitution of a DC. Section 21 is given further content through Rule 32 of the Rules, which provides for the procedure to be adopted by the DC. Section 21 and Rule 32 are extracted below:

"Section 21: Disciplinary Action including removal of names from the register

"(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 public man 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 year 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 Court 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 subsection, 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.

Rule 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.”

17. Section 21, it is evident, provides that an eminent medical specialist should be part of a Disciplinary Committee. That provision does not provide for the eligibility criteria of such a specialist. Neither does Rule 32 afford any such indication. Further, there is no statutory mandate obliging the Council to frame any qualifications or eligibility criteria for appointment of such a specialist. Nonetheless, to ensure smoother functioning and uniformity in composition, as well as easier selection, the Council in its meeting dated 27.04.2010 adopted a set of criteria. However, the fact that the Council was not legally mandated to adopt any set of criteria at all, as is clear from a perusal of both Section 21 of the Act and Rule 32 of the Rules, persuaded the Learned Single Judge to hold that these eligibility criteria adopted in an internal meeting would not have the force of law and accordingly, any retrospective amendment to such a decision, would not attract the power of judicial review of this Court. The Learned Single Judge reasoned:

“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.

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.

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.”

18. This Court is in agreement with the view of the Learned Single Judge that these eligibility criteria adopted at a meeting of the Council, which it was not required to frame in the first place, would not have the force of law as delegated legislation deriving its authority from either the parent Act or the Rules framed thereunder. Its amendment even if made to act from an anterior date, would not ordinarily attract the power of judicial review of this Court. At the same time, this Court is cognizant of the fact that the Respondent Council is a statutory body constituted under the Delhi Medical Council Act, 1997 and as such is an instrumentality of the “State” under Article 12 of the Constitution. As a result, it has the duty to act in a manner that is free from bias, arbitrariness or manifest illegality. It should therefore be examined nonetheless, whether the retrospective amendment of the eligibility criteria, would in the circumstances, warrant the exercise of this Court’s power of judicial review.

19. The executive decision to retrospectively amend regulations, even to alter eligibility criteria, cannot by itself, be considered an illegality. After reviewing a catena of previous decisions, the Supreme Court in *High Court of Delhi v. A.K. Mahajan*, (2009) 12 SCC 62 held:

“In short, law regarding the retrospectivity or retroactive operation regarding the Rules of selection is that where such amended Rules affect the benefit already given, then alone such Rules would not be permissible to the extent of retrospectivity.”

In this case, the Court held that merely by virtue of the fact that an executive decision was given retrospective effect, would not render it unconstitutional, unless it takes away a benefit already conferred. In other

words, only when there is an accrued or a vested right, can it not be taken away by a retrospective operation of a direction/regulation.

20. Similarly, in *Arvindkumar Tiwari (supra)*, it was held:

“Fixing eligibility for a particular post or even for admission to a course falls within the exclusive domain of the legislature/executive and cannot be the subject matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service, for which appointments are to be made, or has no rational nexus with the object(s) sought to be achieved by the statute. Such eligibility can be changed even for the purpose of promotion, unilaterally and the person seeking such promotion cannot raise the grievance that he should be governed only by the rules existing, when he joined service. In the matter of appointments, the authority concerned has unfettered powers so far as the procedural aspects are concerned, but it must meet the requirement of eligibility etc. The court should therefore, refrain from interfering, unless the appointments so made, or the rejection of a candidature is found to have been done at the cost of 'fair play', 'good conscious' and 'equity'.”

21. It is therefore clear that what has to be seen is whether there was any accrued or vested right in this case which has been taken away, or if there has been a violation of fair play, good conscience or equity. On the aspect of any accrued or vested right, in the present case there was no right, statutory or otherwise, of the appellant to insist that her complaint had to be heard by an expert member on the panel with any particular qualifications. Neither does the Act nor do the Rules made pursuant thereto specify any eligibility criteria, nor do they obligate the Medical Council to frame rules in this regard. It seems clear that the only reason the Council adopted a set of criteria is to ensure easier and smoother

constitution of the DC, for administrative convenience. In these circumstances, it cannot be said that the criteria stipulated in the Council meeting of 27.04.2010 was in any manner binding on the Council, or that it created any sort of vested right on the appellant to insist on it being followed in the constitution of the DC.

22. Moreover, the Court is also not persuaded that the retrospective amendment to the eligibility criteria by the Council was fraught with *mala fides* or arbitrariness. The Council's explanation for the change is that after it adopted the initial criteria on 27.04.2010, in practice, it was found difficult to adhere to the criteria and procure services of medical experts fulfilling these criteria, while constituting expert panels for disciplinary hearings. Therefore, it sought to amend the criteria in order to make it easier for it to constitute such DCs to investigate complaints under the Act. It does not appear that such change was designed to prejudicially affect the appellant's complaint. Such a change would affect all complaints made in the interim period equally and does not seem to be targeted specifically towards the appellant's case. Nor is the present case one where the eligibility criteria (for inclusion in an expert panel) has been lowered to an impermissible extent such that there could not be effective adjudication of the complaints filed under the Act; *prima facie*, the requirement of 10 years post graduate qualification experience or 7 years post doctorate qualification experience seems to be sufficient in order to ensure that experts on the panel are well qualified to investigate the complaints. Beyond such a *prima facie* view, this Court does not possess the expertise or authority to delve into the adequateness of the

eligibility criteria of medical experts; nor do any objective judicially manageable standards exist for it to do so.

23. Finally, in the absence of any proof that Dr. Yusuf acted with malice or bias, the mere allegation that he was acquainted to the second respondent or that they worked sometime in the same hospital, would not be sufficient to cast aspersions on Dr. Yusuf's impartiality or say that the proceedings were vitiated on this ground. The appellant has not pointed out to any fact which would show that Dr. Yusuf acted in a biased manner and his involvement was the reason for the complaint being dismissed by the DC, which was subsequently confirmed by the Delhi Medical Council in its meeting on 04.07.2012.

24. In the circumstances, this Court is of the opinion that this appeal is unmerited. It is accordingly dismissed without order on costs.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MARCH 22, 2018