

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction
(Appellate Side)

WPA 13067 of 2017
With
IA CAN 1 of 2017
(Old No. CAN 9020 of 2017)

Apurba Bhattacharya

-Vs.-

The State of West Bengal & Ors.

Before: The Hon'ble The Chief Justice Thottathil B. Radhakrishnan
&
The Hon'ble Justice Arijit Banerjee

For the Petitioners : Mr. Sabyasachi Chatterjee, Adv.
Mr. I. Dey, Adv.
Mr. A. Biswas, Adv.
Smt. Sayanti Sengupta, Adv.

For the State : Mr. Sirsanya Bandyopadhyay, Adv.

Heard On : 24.11.2020

CAV on : 24.11.2020

Judgment On : 08.12.2020

Arijit Banerjee, J.:

1. In this writ application filed as a Public Interest Litigation, the petitioner has challenged the vires of Section 36(2)(a) of the West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017 (hereinafter referred to as ‘the said Act’) to the extent the said provision permits the State Government to appoint a sitting High Court Judge as the Chairperson of the West Bengal Clinical Establishment Regulatory Commission (hereinafter referred to as ‘the said Commission’). The petitioner has also prayed for a declaration that the Notification dated 17 March, 2017 issued by the Department of Health and Family Welfare, Government of West Bengal, in exercise of power conferred by Section 36 of the said Act, appointing a sitting Judge of this Court as the Chairperson of the said Commission, subject to the concurrence of the Hon’ble Chief Justice of the Calcutta High Court.

2. Learned Counsel for the petitioner fairly submitted that the challenge to the Notification dated 17 March, 2017 has become infructuous since the Learned Judge, after taking charge as Chairperson of the said Commission, subsequently demitted that office. We record such submission. Accordingly, we are now concerned with only the issue as to whether or not Section 36(2)(a) of the said Act is *ultra vires* the Constitution of India.

3. Sections 36 and 37 of the said Act read as follows:

“36. (1) The State Government shall constitute a West Bengal Clinical Establishment Regulatory Commission to

exercise the powers and perform the functions conferred on the commission under this Act for the purpose of regulation and supervision of the functioning and activities of the clinical establishments licensed under this Act for ensuring accountability and transparency in dealing with patients by clinical establishments in providing patient care services, to advise the Government on measures be adopted for enhancing and augmenting the performance of clinical establishments in the State.

(2) The West Bengal Clinical Establishment Regulatory Commission shall consist of—

(a) a Chairperson, appointed by the State Government, who is or has been a High Court Judge or any officer who has held the office of Chief Secretary, Additional Chief Secretary in the State Government or any officer who has held equivalent post in the Government of India:

Provided that a retired High Court Judge, if appointed as Chairperson, may pursue his professional work;

(b) a Vice-Chairperson who is a person of eminence to be appointed by the State Government;

(c) members not exceeding eleven in number, to be appointed by the State Government, selected from the fields of medicine including diagnostics, public health, academia, social services, law, finance, public administration, nursing and consumer interests.

37. *(1) The Chairperson, the Vice Chairperson and the members shall hold the office of the Commission during the pleasure of the State Government.*

(2) If a casual vacancy occurs in the Office of any of the members of the Commission, whether by reason of his death, resignation or inability to discharge his functions owing to illness or any other incapacity, such vacancy shall be filled up by the State Government by making a fresh appointment.”

4. Referring to Section 37 of the said Act, Learned Counsel for the petitioner argued that the State Government has the final say as regards the appointment of the Chairperson of the said Commission. The State Government is the appointing authority. The Chairperson shall hold office during the pleasure of the State Government. If a sitting High Court Judge

is appointed as such Chairperson, he/she will not be able to discharge his/her duties independently by keeping the dignity and integrity of the judicial system intact. It was submitted that Section 36(2)(a) of the said Act is violative of Articles 50, 217, 219, 221, 224 of the Constitution of India which embody the cardinal principle of independence of the judiciary, which is a basic structure of the Constitution of India and which cannot be altered by enacting a provision in violation of the said cardinal principle. Further, a decision of the High Court Judge rendered as the Chairperson of the said Commission would be open to challenge before the High Court under Articles 226/227 of the Constitution of India. This is not desirable.

5. It was submitted that a sitting High Court Judge acting as the Chairperson of the said Commission will not be able to discharge his duties without fear or favour and in an impartial manner, inter alia, because of the provision of Section 53 of the said Act which reads as follows:

“53. (1) In the discharge of its functions, the Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.”

It was submitted that the independence of the judiciary will be compromised if a sitting High Court Judge also acts as the Chairperson of the said Commission.

Learned Counsel finally referred to the decision of the Hon'ble Supreme Court in the case of ***T. Fenn Walter and Ors. v. Union of India: (2002) 6 SCC 184*** and in particular to Paragraph 16 of the reported judgment which reads as follows:

“16. Having regard to various constitutional issues raised by counsel on either side we are inclined to formulate some broad guidelines as to the manner in which the appointment of a sitting Judge of a High Court to a Commission should be dealt with:

(1) Appointment of a sitting Judge to the following offices may not be objectionable:

(a) As a Commission of Inquiry under the Commissions of Inquiry Act.

(b) Judicial office which is of such a high character and where it has to be filled up by a sitting Judge to fulfil the requirement of law e.g. under Article 262 of the Constitution of India which provides for adjudication of any dispute with respect to the use, distribution or control of water or any inter-State river or river valley,

read with the Inter-State Water Disputes Act, 1956.

(c) Where expertise and experience of a sitting Judge is required to discharge the functions, a sitting Judge may be appointed, for example, as a Member of the Finance Commission or Law Commission.

(2) Appointment of a sitting Judge to a Tribunal is not desirable where the adjudicating Members are composed of other Members who are not Judges or qualified to be appointed as Judges, such as bureaucrats, revenue officials etc.

(3) So also, appointment of a sitting Judge to a Judicial Tribunal is not desirable where the statute or the rules and regulations framed therein contemplate provisions for removal from such office or other disciplinary action by any authority.

(4) When a sitting Judge is appointed to a post or Tribunal, he shall be amenable to the disciplinary jurisdiction only in the manner provided for in Article 124(4) of the Constitution of India if he is a Judge of the Supreme Court or in the manner provided for in proviso (b) to Article 217(1) read with Article 124(4) of

the Constitution of India if he is a Judge of a High Court.

(5) Where the post may not be a wholetime post but the nature of duties are such that his order as a Tribunal or Commission would be subjected to the supervisory jurisdiction of the High Court under Articles 226, 227, a sitting Judge of the High Court may not be appointed to such post, but if the sitting Judge concerned has only a short period to retire from service, he may be appointed, but after accepting the full-time post, he shall not sit as a Judge and discharge duties and functions (both judicial and administrative) as a sitting Judge of High Court, even though he may not demit office consequent on his appointment to a full-time post.

(6) When the Chief Justice of a High Court is consulted for appointment of a sitting Judge as Member, Chairman, Vice-Chairman or President of any Court, Commission or Tribunal and it is a wholetime post, the Chief Justice shall bear in mind the relevant circumstances and shall not compromise the dignity of the office of the sitting Judge and shall strive to preserve the independence of judiciary.

(7) When a sitting Judge who has only a short period to retire from service is appointed to a post, he shall express his willingness to relinquish the remaining tenure as a Judge and then only his service shall be made available for such post.”

6. Learned Counsel for the State submitted that the decision of the Hon’ble Supreme Court in **T. Fenn Walter and Ors.** (supra), itself envisages situations in which a sitting High Court Judge may be appointed as a Chairperson or Member of a Commission or Tribunal. In particular he referred to sub-paragraphs 5, 6 and 7 under Paragraph 16 of the aforesaid Supreme Court judgment which has been extracted above. Relying on the aforesaid portion of the Hon’ble Supreme Court’s judgment, Learned Counsel submitted that since the Supreme Court itself contemplated cases in which a sitting High Court Judge could be appointed as a Member or Chairperson of a Commission or Tribunal, Section 36(2)(a) of the said Act cannot be held to be unconstitutional.

7. We have considered the rival contentions of the parties.

8. The sole ground on which the petitioner has challenged the vires of Section 36 (2)(a) of the said Act is that the said provision permits the State Government to appoint a sitting High Court Judge as Chairperson of the said Commission. The petitioner has no objection to the extent the said provision permits appointment of a retired High Court Judge to that post. According to the petitioner, a person ‘who **is** a High Court Judge’ cannot

also act as the Chairperson of the said Commission since the same would undermine the independence of the judiciary and will also be contrary to the guidelines laid down by the Supreme Court in the case of **T. Fenn Walter and Ors.** (supra).

9. The moot question therefore is, whether or not Section 36 (2)(a) of the said Act permits the Government to appoint a sitting High Court Judge as Chairperson of the said Commission who will simultaneously discharge dual functions of a High Court Judge and the Chairperson of the said Commission? In our opinion, the answer is in the negative. The petitioner would have had an arguable case had the proviso to Section 36(2)(a) not been there in the statute. The proviso states that a retired High Court Judge, if appointed as Chairperson, may pursue his professional work. This by implication clarifies that a sitting High Court Judge cannot, after his/her appointment as Chairperson of the said Commission, continue to act as a High Court Judge or discharge judicial functions as a High Court Judge.

10. A proviso is often used as a guide to the construction of an enactment. If the enacting portion of a section admits of any doubt, a proviso appended to it may help in deciphering the true meaning and effect of the enactment. In **West Derby Union v. Metropolitan Life Assurance Society: (1897) AC 647**, **LORD HERSCHELL** said: *“Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to having this scope or that, which is the proper view to take of it.”* In the same case **LORD WATSON** observed:

“I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light on the ambiguous import of the statutory words.” In ***Hindustan Ideal Insurance Co. Ltd. v. Life Insurance Corporation of India: AIR 1963 SC 1083, MUDHOLKAR J.*** said: *“There is no doubt that where the main provision is clear, its effect cannot be cut down by the proviso. But where it is not clear, the proviso, which cannot be presumed to be a surplusage, can properly be looked into to ascertain the meaning and scope of the main provision.”*

11. In the case in hand, although the main enactment *i.e.* Section 36(2)(a) of the said Act does not clearly state whether or not a sitting High Court Judge can at the same time discharge the dual functions of a High Court Judge and Chairperson of the said Commission, in our opinion, the proviso to Section 36(2)(a) makes the intention of the legislature amply clear. We read the proviso as stating by implication that a sitting High Court Judge who is appointed as Chairperson of the said Commission cannot continue to discharge judicial functions as a High Court Judge simultaneously with discharging duties as Chairperson of the said Commission.

12. On a meaningful reading and purposive construction of Section 36(2)(a) of the said Act read with the proviso thereto, we are of the clear opinion that the legislature, while enacting that provision, did not intend that a sitting High Court Judge who is appointed as Chairperson of the said Commission, shall continue to act as a High Court Judge simultaneously with functioning as Chairperson of the said Commission. Thus, while Section 36(2)(a) permits the Government to appoint a sitting High Court

Judge as Chairperson of the said Commission, since that person can start functioning as Chairperson of the Commission only after demitting office by way of superannuation or resignation or, at any rate, only upon ceasing to function as a High Court Judge, either in a judicial or administrative capacity, the petitioner's apprehensions ventilated in the writ petition are unfounded. Neither the judiciary's dignity will be undermined or its majesty compromised nor will there be any kind of conflict of interest.

13. As pointed out by Leaned Counsel for the State, the Hon'ble Supreme Court in **T. Fenn Walter and Ors.** (supra) clarified that upon being appointed in a full time post, a sitting Judge shall not sit as a Judge and discharge duties and functions (both judicial and administrative), even though he may not demit office upon his appointment to a full time post. It was further clarified that when a sitting Judge who is on the verge of retirement, is appointed to a post, he will record his willingness to relinquish the remaining tenure as a Judge and then only his service would be made available for such post.

14. In view of the aforesaid and in view of the construction that we have put on Section 36(2)(a) of the said Act, in our opinion, the said provision does not fall foul of any the Articles of the Constitution of India. Hence, we do not find any ground to strike down Section 36(2)(a) of the said Act as being *ultra vires* the Constitution of India or being otherwise illegal in any manner.

15. With the above observations, WPA No.13067 of 2017 is disposed of. However, there will be no order as to costs.

Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

I agree.

(Thottathil B. Radhakrishnan, CJ.)

(Arijit Banerjee, J.)