

07.05.2021
Ct. No.9
S/L No.1
BM/KS

(Via Video Conference)

W.P.A. 8864 of 2021

Nalini Nursing Home & Anr.

Vs.

State of West Bengal & Ors.

Mr. Ranajit Chatterjee

Mr. Arijit Dey

Mr. Dipak Ranjan Mukherjee

.....For the Petitioners

Affidavit of service filed on 5th May, 2021 was kept on record vide order dated 06.05.2021 while restoring the writ application to its original file and number on recall of the order. The communication has been made to the respondent no.3 through e-mail and also to the State through Government Pleader of the High Court at Calcutta but none has entered appearance on behalf of the respondents.

Mr. Ranajit Chatterjee, learned counsel appearing through video link on behalf of the petitioners submits that the writ petitioner no.1 is a renowned private nursing home, functioning for more than 40 years in the locality of Arambagh, District – Hooghly. It is registered under the provisions of West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017 as per

the license issued by the licensing authority under the said Act. The nursing home has specialized doctors for dealing with patients suffering from all kind of diseases. The nursing home has a maternity ward for taking care of women patients suffering from gynecological diseases. Delivery of newborn babies are also carried out by experienced gynecologists/obstetricians. The children born in the nursing home are taken care of by specialized pediatricians. The petitioners have invoked the prerogative power of this Hon'ble Court under the scheme of Article 226 of the Constitution of India under compelling circumstance as the CE License of the petitioner no.1 issued under the 2017 Act was abruptly cancelled by the respondent no.3 vide his office Memo No.516 dated 22.01.2021 by a cryptic non-speaking order and the petitioner no.1 challenged the said order by filing a statutory appeal on 18.02.2021 before the appellate authority under Section 26 of the said Act of 2017 within the specified time period. The appeal was registered as file No.334-Secy(HS)/H&Fw dated 19.02.2021 and File No.HAD/12M-11-2021, but, the petitioners learnt that the appellate authority is not functioning and the hearing of the appeal will not be possible in the near future. Since, the

petitioner no.1 is a private nursing home it has to deal with the patients with various diseases but because of the cancellation of the CE License of the petitioner no.1 by the respondent no.3 the nursing home would be threatened to be closed.

It is submitted on behalf of the petitioners that such cancellation of CE License of the petitioner no.1 has rendered the nurses and other regular employees of the nursing home jobless since the month of January, 2021. The appeal was filed on February 18, 2021 under the provision of Section 26 of the West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017 (in short the 'Act of 2017') and as per sub-Section 3 of Section 26 of the said Act which provides that the decision of the appellate authority shall be final and binding and as per Rule 41(6) framed under the said Act, the appellate authority is duty bound to hear out all the concerned and to receive oral and documentary evidence submitted by them and to consider the appeal and communicate its decision preferably within 45 days from the date of filing of the appeal. It signifies that the appellate authority has to dispose of the appeal within the period of 45 days. It has elapsed by now but it is pointed out that the

appellate authority has not yet entertained the appeal. The writ petitioners preferred the said appeal before the appellate authority on the following grounds:

- (i) *“The impugned order/notice dated 22.01.2021 is a non-speaking order and liable to be set aside on this ground alone.*
- (ii) *The adjudicating authority i.e. CMOH Hooghly, erred on facts and in law in seeking USG register and Form-I under PC & PNDT Act from Nalini Nursing Home as the said nursing home does not own any USG machine in its name, nor is it licensed to operate any USG machine.*
- (iii) *Nalini Nursing Home has close arrangement with different diagnostic centres in Arambagh, including Damodar Diagnostic centre, situated in the same premises, which is owned by Dr. Saikat Kundu, but the CMOH Hooghly, did not make any enquiry about the USG register or FORM – I of the said diagnostic centre.*
- (iv) *The purported finding of Chief Medical Health Officer, Hooghly, that the system of accounting is improper, for which your petitioners were unable to tender any cogent explanation in their reply to letter dated 13.01.2021 was vague and totally bereft of evidence.*
- (v) *The Chief Medical Health Officer of Health, Hooghly did not provide copy of any documents based on which it was alleged that overwriting was detected in the record of outcome of pregnancy.*
- (vi) *The Chief Medical Officer of Health, Hooghly failed to indicate any specific incident of misuse of signed blank*

birth report forms to justify the allegation of ethical malpractice.

- (vii) The Chief Medical Officer of Health, Hooghly, failed to indicate the lack of sufficiency of documentation of hand over of baby and has not shared any documents based on which the said allegation was proved to enable the petitioner to make meaningful defence.*
- (viii) No enquiry was held by the Chief Medical Officer of Health, Hooghly before passing the impugned order of termination dated 22.01.2021.*
- (ix) No personal hearing was given to the petitioners before passing the order of termination dated 22.01.2021 and hence the entire proceeding is vitiated by breach of principles of natural justice.*
- (x) Even assuming but not admitting that the entire enquiry and/or the actions of the Chief Medical Officer of Health, Hooghly, are valid in law, the punishment of termination of CE License imposed upon the petitioner nursing home is grossly disproportionate to the gravity of the charges levelled against it.*
- (xi) Due to the death of the erstwhile proprietor, Dr. Nema Chandra Kundu and almost simultaneous unavailability of your petitioner no.2, Dr. Kaushik Kundu, from daily operation due to his death condition and arrest of the Manager of Nursing Home (in connection with the said criminal case), it became difficult to retrieve necessary documents to enclose to the reply to the show cause.*
- (xii) The punishment imposed upon the petitioner nursing home shocks the conscience of any prudent person and*

accordingly, such punishment is also liable to be set aside.

- (xiii) *The entire proceeding initiated against the nursing home is vitiated in the eye of law and all steps taken on the basis thereof, upto the passing of the final order of punishment is nullity in the eye of law and also liable to be quashed and set aside."*

It is submitted on behalf of the writ petitioners that on 02.09.2020, a pregnant lady, namely Arpita Laha, was admitted in the maternity ward of the petitioner nursing home. The father of the said lady gave an undertaking on 02.09.2020 at the time of admission that he was willing to abide by the rules of the nursing home. The lady also signed a Consent Form at the time of admission to the nursing home and immediately she was medically checked by the doctor. It was seen that there was 'premature labour' and there were various other complications as well. She gave birth to a baby boy on 03.09.2020 at 7.10 a.m. in the nursing home. The baby was grossly premature and weighed only 1.1. kg. at the time of birth. Necessary precautions were taken by the attending doctors to ensure that the baby as well as the mother survive. The baby was, however, required to be immediately treated in "neo-natal ICU" (NICU) but such facility was not available in

Nalini Nursing Home. Under the circumstances, immediately after the baby was born, the mother, Smt. Arpita Laha, sought for discharge. The father of the lady, namely, Sri Bholanath Ghosh, also sought for discharge of the patient and her child. The lady and her father said they wanted to get the baby admitted in another hospital/nursing home having the NICU unit. On the joint prayer of the father and the patient, the Nursing home authority discharged the new born baby and her mother on 03.09.2020. In the discharge summary, it was written "Primi at 28 weeks of gestational age with pre-term rupture of membrane and pre-term labour.

It is further stated that at the time of release, the father of Smt. Arpita Laha had written in his own hand that the patient was discharged on request. Photographs taken on 03.09.2020 reveal that the patient, Sm. Arpita Saha, was carrying her new born baby in her lap while leaving the nursing home. The nursing home authorities were unaware of any further developments concerning of the mother and the new born baby.

It further appears from records that one police complaint was lodged with the local police station on 16.10.2020 by the paternal grand-father of the new born child alleging that the

said new born child was missing and Arambagh P.S. Case No.376 of 2020 dated 16.10.2020 was started on basis of the said complaint.

My attention is invited to the pages 49 to 51 of the writ petition to contend that the bed head tickets of patients Arpita Laha would reveal that she was admitted on 2.9.2020 at 4 PM and discharged on 3.9.2020 at 4:20PM. In the photograph the said Arpita Laha is seen leaving the Nursing Home with her baby and her maternal grand father had taken the discharge at 03.09.2020 on request yet the paternal grandfather has filed the missing diary as is depicted from the aforesaid fact.

Be that as it may, learned counsel for the petitioner invites my attention to the order passed by the CMOH, Hooghly dated 22.01.2021 which reflects that termination of licence on receipt of the show cause notice by the petitioner on 19.01.2021 was passed with the observation that justification made in the letter are completely unacceptable and it was cancelled on the ground of gross violation of the PC&P NDT Act and WBCE(RRT) Act, 2017.

It would appear that the authority concerned being the respondent no.3 had not given personal hearing to the writ petitioners as required under sub Section 2 of Section 20 of

Act, 2017 which provide that a reasonable opportunity of hearing to the clinical establishment has to be given and only upon hearing, the licencing authority, if satisfied of any breach of provision of the said Act or the Rules made thereunder, may without prejudice to any other action, can take action against such clinical establishment by cancelling its registration and licence but not otherwise. It is further contended that the petitioners were not given the opportunity of being heard, therefore, there has been violation of the principle of natural justice.

A question arises in the judicial mind as to why a writ jurisdiction has to be invoked when there is forum for appeal in the statute itself. In this regard, learned counsel for the petitioners contends that the Hon'ble High Court can invoke its prerogative power under Article 226 of the Constitution in certain circumstances such as in case of violation of principle of nature justice, even though, the statute provides forum for appeal under Section 26 of the Act of 2017 and to fortify his submission he has relied on the observation in paragraph 15 of the Hon'ble Supreme Court in *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors.* reported in (1998) 8

SCC 1 which is reproduce hereunder for profitable consideration.

“15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

Thus, this Court prima facie finds that there has been a violation of principle of natural justice in not giving opportunity to the petitioner of being heard before the impugned order cancelling the license issued to the petitioners for running the said nursing home was passed.

I further find, although the appeal has been preferred before the appellate forum being the Special Secretary of the concerned department of the Government of West Bengal within period of limitation under Section 26 of the said Act,

nevertheless, the appellate authority has not entertained the appeal. It is expedient on the part of the appellate authority to take hearing of appeal as required under the provision of the said Act of 2017 and to decide the same within a period of 45 days.

Therefore, in view of inaction on the part of the appellate authority and in consideration of the grounds, inter alia, that there is no USG equipment in the Nursing Home rather the Nursing Home has collaboration with one Damodar Diagnostic Center situated in the said premises owned by Dr. S. Kundu and finding no such enquiry by the CMOH about the USG registration or form No.1 of the said Diagnostic Center, the license ought not to have been cancelled without assigning reasons. Ergo, the suspension of clinical service of the writ petitioner no.1 by Memo No.282 dated 13.01.2021 and termination of license vide memo No.516 dated 22.1.2021 be kept in abeyance till the decision is taken in appeal preferred by the petitioners before the appellate authority being the Secretary, Department of Health & Family Welfare, Government of West Bengal, Swasthya Bhawan, Sector-I, Salt Lake, Kolkata-700 091.

Accordingly, I direct the respondent no.2 to decide the appeal within a period of 30 days from the date hereof and to communicate the reasoned decision to the petitioners thereof.

For the reasons above, the writ application being W.P.A. 8864 of 2021 is disposed of

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis after compliance with all necessary formalities.

(Shivakant Prasad, J.)