

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.5340 of 2007

**Smt. Supriya Sarkar
Vs.
The State of West Bengal and others**

For the petitioners	:	Mr. Manik Das Mr. Falguni Majhi
For the West Bengal Medical Council	:	Mr. Saibalendu Bhowmik Mr. Biplab Guha Mr. Rajsekhar Basu Mr. Subrata Bhattacharjee Ms. Srilekha Chattopadhyay
Hearing concluded on	:	11.11.2022
Judgment on	:	16.11.2022

Sabyasachi Bhattacharyya, J:-

1. The petitioner has preferred the instant writ petition against a Memo bearing no. 3050-C/73-2004 dated January 15, 2007 whereby respondent No. 3, the Registrar, West Bengal Medical Council (for short, "the WBMC") informed the petitioner that the WBMC (respondent no. 2) had decided 'not to proceed further' with her complaint against the respondent no. 5, who is a medical practitioner. The complaint had been lodged on the ground of alleged infamous professional conduct of respondent no. 5.

2. Allegedly, the petitioner had gone to the respondent no. 5, an Orthopaedic Surgeon, with a pain on her left wrist, when the latter advised immediate X-ray at one 'Ma Fouzdari X-Ray Clinic', attached to his chamber. The X-ray plate and report were allegedly not given to the petitioner but handed over directly to the respondent no. 5, who opined that the petitioner had a "Scaphoid Fracture" and required a plaster. Thereafter the petitioner went to other medical practitioners and had X-rays taken in other diagnostic centres, all of whom were unanimous that she did not have a Scaphoid Fracture and no plaster was required.
3. However, the petitioner complains that when she met respondent no. 5 on the next scheduled date, and showed him the prescriptions, X-ray plates and reports obtained elsewhere, the respondent no. 5 became furious, was reluctant to see those documents and threw those away as well as abused the petitioner and the other physicians in filthy language. As per the complaint, respondent no. 5 then forcibly applied P.O.P. encircled plaster on the left wrist of the petitioner and applied sling, advising 6 weeks' immobilization. The X-ray plate was then handed over without, however, the radiologist's report.
4. Thereafter the petitioner visited other doctors, who opined that there was no bone injury and also had the plaster removed.
5. Thereafter certain notices of hearing were given to the petitioner, which the petitioner allegedly did not receive. However, the third reminder was admittedly received by her.
6. Shorn of unnecessary details, the petitioner sent the documents sought from her by the WBMC and appeared and deposed before the Penal and

Ethical Cases Committee (hereinafter referred to as the PEC), which is the respondent no. 4 herein.

7. Subsequently, by Memo No. 3060-C/73-2004 dated January 15, 2007, the Registrar, WBMC informed the petitioner that the WBMC, after considering the report of the PEC at their meeting held on January 9, 2007, decided 'not to proceed further' in that regard.
8. The petitioner has challenged the said decision in the writ petition.
9. At the outset, learned counsel for the WBMC (respondent no.2) argues that the writ petition is not maintainable in view of the availability of an alternative remedy in the form of an appeal under Section 26 of the Bengal Medical Act, 1914 (for short, "the BMA").
10. In answer to such objection, learned counsel for the petitioner submits that sub-section (1) of Section 26 provides for appeals to the State Government from decisions under Section 17 and Section 25 of the BMA. The instant case, however, is not covered by either of those sections and thus, is not appellable.
11. Learned counsel for the petitioner then argues that no hearing was given to the petitioner at any stage, either before the PEC or the WBMC. The WBMC, in its affidavit-in-opposition, refers to Rule 8 (2) of the Rules framed under the BMA; but the said Rule does not contain any bar to an opportunity of hearing being given to the complainant. Rather, deprivation of such opportunity in the present case was in violation of principles of Natural Justice.
12. It is further alleged that the 'Reasoned Order' subsequently furnished on behalf of the WBMC was signed only on April 11, 2007, whereas, the

impugned decision to drop the proceedings was communicated by the WBMC about three months before, that is, on January 15, 2007. Thus, the reasoned order was drafted later, as an afterthought.

13. In reply, learned counsel for the WBMC argues that even under criminal law, no right of cross-examination is conferred upon the complainant unless charges are framed and charge sheet is filed. Moreover, in Rule 8 of the relevant Rules or elsewhere, there is no provision for affording any opportunity of hearing to the complainant before the WBMC decides, on the basis of the PEC report, whether an enquiry is to be conducted or not on the basis of the complaint.
14. Thus, no law or Rule has been violated by the WBMC in taking the impugned decision. The decision was taken by the WBMC in its meeting dated January 9, 2007 upon considering the PEC report duly and it communicated the same on January 15, 2007. Hence, there is no discrepancy of dates.
15. Inasmuch appellability of the impugned decision is concerned, it is contended that appeals have been provided in Section 26 (1) of the BMA “from every decision” under Sections 17 and 25. Hence, the present challenge is covered by the appellate provision.
16. Learned counsel for the WBMC cites a Division Bench judgment of this Court in *Kunal Saha v. W.B. Medical Council*, reported at (2006) 4 CHN 166, for the proposition that an order dropping the complaint against a medical practitioner is appellable under Section 26 of the BMA.
17. Learned counsel next cites another Division Bench judgment of this Court, rendered in *Medical Council of India v. State of West Bengal*, reported at

(2012) 1 CHN 46. In the said case, an argument was advanced that in view of the Central Act, namely, the Indian Medical Council Act, 1956 and the Regulation of 2002 framed thereunder, the appeal ought to have been preferred and decided under the said Regulation of 2002. However, the Bench turned down the said proposition, holding that the Central Act does not override the BMA, that is, the State Act.

18. The WBMC next relies on an unreported judgment of a co-ordinate Bench of this Court in *W.P. No. 7655 (W) of 2018 (Tara Chand Bairagi v. State of W. Bengal & Ors.)*. There, the learned Single Judge had, inter alia, followed the ratio of *Medical Council of India (supra)* and set aside the decision of the appellate authority whereby an appeal preferred by the complainant was rejected and directed the appeal to be heard on giving an opportunity of hearing to the petitioner.
19. Learned counsel for the writ petitioner, on the other hand, cites an unreported judgment whereby a Special Leave Petition against the Division Bench order of this court in *Medical Council of India (supra)* [clubbed with *Rupa Basu (Banerjee) v. State of West Bengal & Ors.*] was admitted and the operation of the impugned judgment of the Division Bench was stayed. It is submitted that the said SLP is still pending, for which the said Division Bench judgment cannot operate as a precedent. As such, it is contended that the unreported Single Bench judgment in *Tara Chand Bairagi (supra)*, which also followed the said Division Bench judgment, cannot operate as a binding precedent as well.
20. Moreover, it is submitted that the question as to whether an appeal was maintainable under Section 26 at the instance of a complainant had not

fallen for consideration in *Tara Chand Bairagi (supra)* and hence the same was at best to be treated as *Obiter Dictum*, which is not binding as a precedent.

21. Insofar as the facts of *Kunal Saha (supra)* is concerned, learned counsel for the petitioner argues that those were different from the instant case and the proposition advanced by the WBMC in the present case was not decided directly in the said case.
22. Thus, it is argued by the petitioners that not only is the present application under Article 227 of the Constitution maintainable in law, the impugned decision ought also to be set aside on merits.
23. Upon considering the cited judgments and the materials on record and arguments of counsel, the objection as to maintainability is required to be decided first.
24. The petitioner's contention, that the Division Bench judgment in *Medical Council of India (supra)* has lost its binding value due to the subsisting stay order of the Supreme Court, cannot be acceptable, being not tenable in the eye of law. Mere grant of stay of an order does not *per se* deprive it of its value as a precedent. A stay order at best stalls its operation and puts the same in hibernation, but does not tantamount to setting aside or effacing its value as a precedent.
25. However, a careful perusal of *Medical Council of India (supra)* discloses that the questions which fell for consideration there were as follows:
 - (i) Whether the learned Trial Judge is justified in upholding the authority of the State Government under State Act in entertaining and deciding the appeal; and

- (ii) Whether the aforesaid regulations 8.7 and 8.8 as incorporated in the existing regulation have been framed under Central Act can take away power of State Government under State Act?
- 26.** Such issues were decided therein, observing that the Central Act does not override the State Act. The findings made in the said decision as regards appellability under the State Act were not, by any stretch of imagination, germane for deciding the present case.
- 27.** In *Tara Chand Bairagi (supra)*, a question arose as to whether only orders of the Council under Sections 17 and 25 which were taken by a two-thirds majority were appellable under Section 26 of the BMA. The learned Single Judge held that irrespective of the decision being taken by a two-thirds majority or not, every decision under Sections 17 and 25 were appellable under Section 26. The question in the case at hand is completely different and was never decided therein. In its specific context, it was merely observed in the said judgment that “any person including the practitioner can prefer an appeal under Section 26 of the Act from every decision of the Council under Section 17 or Section 25”. The said expression “any person including the practitioner” was made in the passing, while deciding an entirely different issue, and the question as to whether an appeal is maintainable by the complainant under Section 26 never came up for herein or was decided specifically therein.
- 28.** Insofar as *Kunal Saha (supra)* is concerned, the facts therein were different from the present case. There, the WBMC initiated a proceeding against three doctors on a complaint by the writ petitioner and the Council recorded an order that the complaint had no merit. On a writ petition

against this order, the High Court directed to give further opportunity of hearing to the counsel of the complainant. In obedience to this order, of the High Court the Medical Council gave further opportunity to the learned counsel. When none appeared on the last date fixed for hearing, the matter was decided ex parte. In spite of availability of the legal remedy of appeal, the complainant came up with a second writ petition and the same stood dismissed, giving rise to the instant appeal. The appeal was also dismissed.

29. The Court held:

30. It was rightly pointed out by the learned Single Judge that there is a statutory provision of preferring appeal against the order of the Council in terms of S. 26 of the Bengal Medical Act. But even before getting the reasoned order of the Council, the appellant straightaway came up in a writ application. The action of the Council was quite justified in the fact of the present case and there is no reason to interfere with the order passed by the learned Single Judge.

31. A thorough consideration of the said judgment shows that, in fact, initially the WBMC had recorded that the complaint had no merit. At that stage, a writ petition was moved and the High Court directed the Council to give further opportunity of hearing to the counsel of the complainant. In obedience to this order of the High Court, the Medical Council gave further opportunity to the learned counsel, but none appeared on the last date fixed for hearing and the matter was decided ex parte. Against such decision, it was held that an appeal under Section 26 was maintainable.

32. Even if we apply the principles laid down in *Kunal Saha (supra)*, in the said case, upon the dropping of the complaint initially, a writ petition was

preferred and decided. So the said report substantiates the petitioner's contention that the present writ petition is maintainable at this stage.

- 33.** Only upon further opportunity of hearing and final decision being taken ex parte, the Division Bench mandated an appeal under Section 26 of the BMA in the said case.
- 34.** Thus, upon consideration of all the cited judgments, the present writ petition is held to be maintainable, thereby turning down the objection raised by the respondents on the ground of maintainability.
- 35.** On merits, in the present case the petitioner was given several opportunities of hearing. The petitioner, in fact, participated in the proceedings and adduced evidence therein on June 12, 2006, the same date as the accused medical practitioner. Upon being asked as to whether she had anything more to add other than what was mentioned in her Letter of Complaint, the petitioner clearly answered in the negative and replied that she had nothing more to say.
- 36.** It is seen from the report of the PEC that all material witnesses deposed and the PEC took into consideration all the relevant facets of the case in preparing its report.
- 37.** The petitioner's contention, that there was discrepancy in the dates of the chain of events, does not hold water at all. The 'Reasoned Order' of the WBMC, which was signed by the Registrar on April 11, 2007, only indicated the chronology of events. The respondents' consistent case is that the report itself was prepared by the PEC on January 9, 2007 and submitted on the same date in the meeting held by the WBMC.

- 38.** The 'Reasoned Order' also indicated that after submission of the fact-finding report by the PEC on January 9, 2007, the WBMC, at their meeting held on the same date, after a thorough discussion and on going through the letter of complaint of the petitioner as well as the comments of the accused doctor and all associate doctors and their depositions and of the proprietor of Ma Fouzdari X-Ray Clinic, was of the opinion that the complainant/writ petitioner had suppressed, both in her letter of complaint as well as in her depositions before the PEC, that neither the X-Ray plate nor the report of her wrist injury from Ma Fouzdari X-Ray Clinic had been collected by her from the said X-Ray Clinic.
- 39.** That the same was handed over by the Clinic directly to the accused doctor, as alleged by the complainant, was a blatant lie, as confirmed by Sri Amitabha Mukherjee, the proprietor of the Clinic, in the opinion of the Council. Over and above such statement, the said proprietor of Ma Fouzdari X-Ray Clinic exhibited before the PEC the register maintained in the said clinic, wherein it was observed that the X-Ray plate and report and money receipt were all collected by the complainant/writ petitioner, contrary to her assertions.
- 40.** In such context only, the WBMC arrived at the conclusion that the complaint made by the writ petitioner could not be substantiated and hence decided "Not to proceed further" in the matter.
- 41.** Hence, there was no illegality or irregularity whatsoever in passing the said order and communicating such decision to the petitioner *vide* the impugned Memo.

- 42.** In the present case, even going by the ratio of *Kunal Saha (supra)*, the same was completely adhered to, since the petitioner was given the opportunity to depose and, only after exhaustive consideration of all the relevant materials and depositions, the impugned decision to drop the complaint was taken by the WBMC.
- 43.** Even if we consider the provisions of Rule 8 of the Rules framed under Section 33 of the BMA, the same does not contemplate any detailed judgment and/or opportunity of cross-examination at the preliminary stage of the Council, while forming its opinion, on the perusal of the PEC report, as to whether the case is one in which an enquiry ought to be held by the Council.
- 44.** As such, we cannot read such a further opportunity into the Rules, particularly since the Rules clearly provide for full opportunity of hearing to the parties only subsequently, that is, if an enquiry is actually initiated. In fact, Rule 15 (5) of the extant Rules provides a right of examination of a witness and cross-examination by the adverse party, and then re-examination by the party producing him. If such detailed procedure and the requirement of a detailed and reasoned order is incorporated even at the preliminary stage, which merely involves a consideration of the Council of the PEC report as per the Rules, it would be an abuse of the process of law and would involve a cumbersome proceeding even before the enquiry is decided to be held and the same commences which would, in turn, convolute the proceedings unnecessarily and create a clog due to pendency of lengthy proceedings on every single complaint. This would adversely affect the other statutory functions of the Medical Council.

- 45.** Thus, in the light of the above observations, the impugned decision of the WBMC to drop the proceeding against the accused medical practitioner on the basis of the writ petitioner's complaint was justified and taken well within the authority of the Council and within the four corners of law. There is no scope of interference with the said decision.
- 46.** Hence, the writ petitioner fails. W.P.A. No.5340 of 2007 is dismissed on contest, without, however, any order as to costs.
- 47.** Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)