

OD-13

WPO(P) No. 10 of 2021
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

BHASKARANANDA HALDER
VS
THE STATE OF WEST BENGAL & ORS.

BEFORE :

THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 12th July, 2023

Appearance :

Mr. Srikanta Dutta, Adv.

Ms. Rituparna Sarkar Dutta, Adv.

... for the petitioner

Mr. S.N. Mookerji, Sr. Adv./Ld. AG

... for the State

Mr. Samrat Sen, Sr. Adv.

... for the Commission

Mr. Pratik Dhar, Sr. Adv.

Mr. Pappu Adhikary, Adv.

Mr. Ritwik Pattanayak, Adv.

... for the respondent nos.4&5

The Court : In this Public Interest litigation the petitioner seeks for issuance of writ of mandamus directing the respondent nos.2 and 3, namely the West Bengal Clinical Establishment Regulatory

Commission, to comply with the provisions of Section 38(1)(i), (ii) and (iv) of the West Bengal Clinical Establishments (Registration, Regulations and Transparency) Act, 2017 within a specified time.

The learned Advocate for the petitioner would strenuously contend that in terms of Section 38(1)(i), (ii) and (iv), the West Bengal Clinical Establishment Regulatory Commission (hereinafter referred to as “the Commission”) has the power to monitor the functioning of clinical establishments, regulate and supervise the functions of clinical establishments as prescribed and also make regulation with regard to fixing of rates or charges for indoor patient department and outdoor patient department treatment including diagnostics and also to ensure compliance with fixed rates and charges by clinical establishment. Therefore, it is submitted that necessary direction to be issued to the respondents to frame such a regulation in exercise of their powers under Section 38(1)(i), (ii) and (iv).

We have heard the submissions of the learned Advocate General appearing for the State, the learned Assistant Advocate General for the Commission and the learned senior Advocate appearing for the respondent nos.4 and 5.

The first hurdle the petitioner has to cross is to satisfy the Court as to the maintainability of the prayers sought for in the writ petition. As noted above, the petitioner seeks for a direction to comply with the three of the clauses under Section 38(1)(i), (ii) and (iv) of the West

Bengal Clinical Establishments (Registration, Regulations and Transparency) of the 2017 Act. Undoubtedly, Section 38(1) enumerates the powers and functions of the Commission and one such power is to frame regulations for the purpose of fixing of rates or charges for indoor patient department and outdoor patient department treatment including diagnostics and also to ensure compliance with fixed rates and charges by clinical establishment. However, such regulation cannot be inconsistent with the provisions of the Act or the Rules framed thereunder in the light of the specific embargo under Section 52 of the Act. The said provision states that the Commission may, with the previous approval of the State Government, by notification, make regulations not inconsistent with this Act and the rules made thereunder to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act and patient care at the clinical establishments. In exercise of powers conferred under Section 59 of the 2017 Act, the State of West Bengal has framed the West Bengal Clinical Establishments (Registration, Regulations and Transparency) Rules, 2017 (hereinafter referred to as the 2017 Rules) and Rule 19 of the said Rules would be relevant. Rule 19(1) states that the clinical establishment shall have a right to impose different rates of user charges in consideration of the provision of different kind of services to be rendered by it subject to declaration of a rate-chart of user-

charges describing item-wise charges for all services along with concession, if any, which shall be published in the Information brochure and shall be displayed as a part of mandatory display under rule 22.

This is a Rule having been brought into place which empowers the Clinical Establishments to impose different rates of user charges, a writ of mandamus, as sought for by the writ petitioner, cannot be granted. That apart, as rightly contended by the learned Advocate General, the prayers sought for in the writ petition is premature since it appears that as on date the Regulation is yet to come into force or it is in the nascent stage of being prepared and approved. More importantly, the question would be as to whether this Court in exercise of power under Article 226 of the Constitution of India can issue a direction upon the respondents to enact a law, frame a rule or a regulation. This issue is no longer *res integra* and it will be beneficial to refer to the decision of the Hon'ble Supreme Court in *Union of India vs. Prakash P. Hinduja & Anr.*, (2003)6 SCC 195. In paragraph 30 of the said decision, the Hon'ble Supreme Court held that under our constitutional scheme Parliament exercises sovereign power to enact laws and no outside power or authority can issue a direction to enact particular piece of legislation. The Hon'ble Supreme Court referred to the decision in the case of *Supreme Court Employees' Welfare Assn. vs. Union of India*, (1899) 4 SCC 187, wherein it was

held that no court can direct a legislature to enact a particular law. It was further held that when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated authority. Further, the Hon'ble Supreme Court placed reliance on a decision in the case of *A.K. Roy vs. Union of India*, (1982) 1 SCC 271, wherein it was held that no mandamus can be issued to enforce an act which has been passed by the legislature.

In the light of the clear legal pronouncements, the prayers sought for cannot be acceded to as the learned senior Advocate appearing for the private respondents places reliance on the decision of the Hon'ble Supreme Court in the case of *Government of Andhra Pradesh & Ors. vs. P. Laxmi Devi (Smt.)*, (2008)4 SCC 720, wherein the Hon'ble Supreme Court pointed out that the hierarchy, i) the Constitution of India; ii) Statutory law, which may be either law made by Parliament or by the State Legislature; iii) Delegated regulations, which may be in the form of rules made under the statute, regulations made under the statute, etc.; and iv) Purely executive orders not made under any statute.

This decision has been relied on to show that a regulation, if any, framed in exercise of powers conferred under Section 38(1) of the

Act, it is subordinate to a rule which has been framed in the exercise of powers conferred under the Act.

Thus, for all the above reasons, prayers sought for cannot be granted.

In the result, the writ petition is dismissed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)