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22.05.2024
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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P.A. No. 12069 of 2024

Apollo Multispecialty
Hospitals Ltd. & Anr.
Vs.
West Bengal Clinical Establishment
Regulatory Commission & Anr.

Mr. Deepan Kumar Sarkar,
Mr. Biswajit Kumar,
Ms. Mahima Chowdhury,
Mr. Indradeep Basu
...for the petitioners

Mr. Samrat Sen, Ld. A.A.G.,
Mr. Avik Ghatak,
Mr. Soham De Dhara
...for the respondent no. 1

Mr. Soumava Mukherjee,
Mr. Subhankar Chatterjee
...for the respondent no. 2

1. Affidavit of service filed today be kept on record.

2. The petitioners challenge an order passed by the West Bengal Clinical Establishment Regulatory Commission, whereby the said Commission directed the petitioner No. 1/Clinical Establishment (CE) to give a discount in terms of Advisory-14 issued by the said Commission.

3. The apparent premise of the said order was that a judgment of a learned coordinate Bench, which was cited before the Commission, did not touch Advisory-14.

4. Learned counsel for the petitioners, by placing reliance on the said judgment of the coordinate Bench, argues that Advisory-14 as well as other Advisories issued, which pertained to the fixation of rates of medicines and consumables, was not only touched but set aside by the said order of the learned coordinate Bench. As such, it is argued that the very premise of the said order is bad in law and, as such, the order ought to be set aside.

5. Learned senior counsel appearing for the Commission contends that there is a distinction between putting a cap on the discount to be provided on the price of medicines and consumables and fixation of such price.

6. By placing reliance on the various provisions and clauses of Section 38(1) of the West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017, learned senior counsel argues that the said provision empowers the Commission to exercise various functions, including the regulation and supervision of clinical establishments, examination and consideration of complaints regarding patient care service, deviation from declared fees and charges, alleged irrational and unethical trade practice alleged before the Commission, etc.

7. Learned senior counsel relies on the definition of “trade practice” as given in Section 2(z) of the

2017 Act in arguing that overcharging patients for medicines, which are procurable at different rates depending on the manufacturing company, amounts to unfair trade practice and might not directly pertain to fixation of rates only.

8. Learned senior counsel seeks to draw a distinction between a fetter being put by Advisory no. 14 on the Clinical Establishments having to give a discount on the prices of medicines and consumables on the one hand and fixation of prices on the other.

9. Upon hearing learned counsel for the parties, the issue which is germane for the present consideration boils down to the interpretation of the order passed by the learned coordinate Bench on June 14, 2023 in W.P.A. 3858 of 2022.

10. As rightly pointed out by learned senior counsel for the Commission, the Advisories under consideration there had been issued by the Commission without prior approval of the State Government, as required under Section 52 of the 2017 Act.

11. Among other ancillary issues, the power of the Commission to issue such Advisories and orders under Section 38(1)(iv) of 2017 Act fell for adjudication before the said Bench. Section 38(1)(iv) pertains to making regulations with regard to fixation of rates or charges for treatment of indoor

patient department and outdoor patient department, including diagnostics and also to ensure compliance with fixed rates and charges by Clinical Establishments.

12. While deciding the issue, the learned Single Judge, in no uncertain terms, held that the Advisories and the orders (including Advisory-14) were unconstitutional and not binding on the petitioners. The Commission was directed to recall and rescind the said Advisories and were prohibited from giving any effect to the impugned Advisories and order to the extent of fixation of rates and charges for Clinical Establishments in a manner which is contrary to Section 38(1)(iv) of the 2017 Act.

13. In the present case, Advisory-14 states that it is common knowledge that medicines are now readily available of any brand in the State at a discounted price. Some of the traders would also offer discount to the extent of 20 per cent. However, the Clinical Establishments are charging the in-house patients on M.R.P. for the medicines supplied by them either on their own or through the pharmacy operating in their premises. The Commission, accordingly, felt that the clinical establishments must give at least 10 per cent discount to all medicines and 20 per cent discount in case of consumables supplied directly by them or

through the pharmacy situated within their premises and/or tied up with the said clinical establishment.

14. Thus, the meat of the matter dealt with by such Advisory directly pertained to charging by clinical establishments of the in-house patients on the maximum retail price for medicines *supplied by them*, either on their own or through the pharmacy as well as regarding consumables *supplied directly by them or through the pharmacy* situated within their premises and/or tied up with the said clinical establishments.

15. Hence, the subject matter of Advisory-14 was clearly charging of in-house patients, which comes within the purview of indoor patient department within the contemplation of clause (iv) of Section 38(1) of the 2017 Act and relates to medicines and consumables supplied by the clinical establishments, which also comes squarely within the purview of clause (iv), which states that the regulations would be with regard to "fixing of rates or charges" for indoor and outdoor patient department treatment, including diagnostics and to ensure compliance with fixed rates and charges by the clinical establishments.

16. Thus, there cannot be any manner of doubt that Advisory-14 squarely relates to fixation of rates or charges for indoor patient departments

17. In fact, as rightly pointed out by learned counsel for the petitioners, in paragraph 6(e) and paragraph 6(k) of its opposition in the writ court, the Commission itself had taken a stand that the said Advisory (Advisory-14) has, in effect, fixed the charges of medicine and consumables by fixing the minimum quantum of discount to be given.

18. Hence, even apart from the interpretation of Advisory-14 by this Court, the Commission itself admitted that the Advisory touches the fixation of charges of medicines and, thus, came within the ambit of the Advisories which were clearly set aside and the Commission was directed to recall or rescind such Advisories by the order of the learned coordinate Bench.

19. Hence, the approach of the Commission in the impugned order to the effect that Advisory-14 has not been touched upon by the said order is perverse, being palpably contrary to the letter and spirit of the said order of the coordinate Bench.

20. As such, the very premise of the impugned order is untenable in the eye of law. The learned Single Judge of the coordinate Bench having clearly set aside the Advisory-14 alongwith others, which was the very basis of the direction given by the Commission in the impugned order to the petitioner no. 1/clinical establishment to give the discounts as enumerated therein, the impugned order is

required to be set aside, being not tenable in the eye of law.

21. Accordingly, W.P.A. No. 12069 of 2024 is allowed on contest, thereby setting aside the impugned order dated March 05, 2024 passed by the West Bengal Clinical Establishment Regulatory Commission to the extent that it directs the petitioners to give discount in terms of Advisory-14 issued by the Commission.

22. There will be no order as to costs.

23. Urgent Photostat certified copy of this order, if applied for, be made available to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)