

S/L 15
24.07.2024
Court. No. 9
Suwayan

WPA 15170 of 2024

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

Mr. Papon Kumar Sarkar
Mr. B. Kumar
Mrs. Mahima Cholera

...for the Petitioners.

Mr. Atarup Banerjee
Mr. Rajdeep Pramanik

...for the respondent no. 1.

1. Affidavit-of-service as filed by the learned Advocate for the petitioners be taken on record.
2. The writ petition has been filed by a super specialty hospital, challenging an order passed by the West Bengal Clinical Establishment Regulatory Commission.
3. The respondent No. 2 does not appear despite service.
4. The petitioners allege that the order passed by the learned Commission dated April 29, 2024, is contrary to at least three decisions of the High Court at Calcutta. Reliance upon the decision of *Amvika Ranjan Tripathy vs. Apollo Hospital*, was erroneous. The Commission allowed cash discount on medicines to the patient, as per Advisory 14. The said Advisory was held to be not in conformity with the statute.
5. It is contended by Mr. Sarkar that Advisory 14 was in the nature of a directive imposed by the Commission, which the Commission was not empowered to issue under the West Bengal Clinical Establishment (Registration, Regulation and

Transparency) Act, 2017. According to Mr. Sarkar, although the representative of the petitioners pointed out the orders of this Court by which the Advisory 14 was set aside, the learned Commission did not take note of such submission, and once again imposed Advisory 14 in the case in hand.

6. Mr. Banerjee, learned Advocate for the Commission submits that the advisory was issued during the Covid-19 pandemic, in order to give some respite to those patient who could not afford treatment. Taking note of the impact of the pandemic and the loss of lives of lakhs and lakhs of patients, the Commission had risen to the occasion and directed clinical establishments to balance the situation by allowing certain discounts on medicines.

7. The question involved in this writ petition is whether the advisory could be imposed in the case in hand. Admittedly, the pandemic is over. Secondly, the Commission being a creature of a statute, has to function within the four corners of the statute. The law permits the Commission to issue recommendations, but not directives by making them compulsorily enforceable against clinical establishments and hospitals. Thirdly, the decision which was relied upon by the Commission in the matter of Amvika Ranjan Tripathy (Supra) was challenged before the High Court and a co-ordinate Bench set aside the Commission's order upon holding that the commission did not have any authority to issue such advisories. Relevant portion of the order passed by the learned co-ordinate Bench in WPA 11194 of 2024 is quoted below:

“8. Be that as it may, it transpires that the order of the learned Single Judge dated June 14, 2023 was unequivocal inasmuch as the same held all the Advisories under challenge there to the extent of fixation of rates and charges, including Advisory no. 14, to be irrational and violative of the petitioners’ right under Article 19(1)(g) of the Constitution of India and were, accordingly, struck down.

9. It was also observed clearly by the learned Single Judge in paragraph no. 40 of the judgment that the Advisories issued by the Commission to the extent of fixation of rates and charges to be made applicable for Clinical Establishments also came within the fold of such declaration and were accordingly struck down. Thus, the distinction sought to be made by the Commission in its impugned order between Advisory no. 14 and the rest, is palpably irrational and contrary to the judgment of the learned Single Judge.

10. It is well-settled that mere pendency of an appeal does not automatically operate as a stay of the order and, as such, in the absence of any stay order being passed by the Division Bench which is in seisin of the appeal against the learned Single Judge’s order, it cannot but be said that the order of the learned Single Judge is still binding and, thereby rendering Advisory no. 14, along with other Advisory under consideration there to the extent of fixation of rates and charges, to be inoperative and void.

11. In such view of the matter, the impugned order suffers from patent illegality, being contrary to the law laid down by this Court and, as such, ought to be struck down.”

8. A Hon’ble Division Bench of this Court has also held that the Commission could only act within the four corners of the statute and not beyond the same.

9. Powers and the functions of the Commission is prescribed under Section 38 of the Act, here as follows:

“38. (1) The Commission shall—

(i) monitor the functioning of clinical establishments;
(ii) regulate and supervise functions of clinical establishments as prescribed;

(iii) examine and consider complaints, filed manually or electronically through an online system in matters related to patient care service, deviations from declared fees and charges, refusal of supply of copy of medical records and allied matters, alleged irrational and unethical trade practice alleged before the Commission by aggrieved patient parties against clinical establishments and after issue of notice and hearing both parties, adjudicate, compensate and pass such other orders, as deemed appropriate:

Provided that any complaint of medical negligence against medical professionals will be dealt with by respective State Medical Councils:

Provided further that the Commission for the purpose of adjudicating disputes and appeal under this Act, shall have a quorum of the Chairperson and not less than two other members;

(iv) make regulations 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 establishments;

(v) enforce transparency in dealing with patients by the clinical establishments;

(vi) tender advice and make suggestions regarding measures to be adopted under this Act, for improving patient care services and redressal of grievances;

(vii) undertake planned or surprise inspections to examine and ascertain strict compliance by clinical establishments with provisions of this Act;

(viii) hear appeals arising from orders and decisions passed by the Adjudicating Authority in the Districts;

- (ix) have the powers to award such compensation as deemed appropriate not exceeding fifty lakh rupees, including interim compensation;
- (x) ensure that only properly trained medical and para-medical personnel like doctors, nurses, technicians, pharmacists are employed by the clinical establishment.”

10. The powers include monitoring, regulating and supervising the functions of the establishments. The power to consider complaints with regard to matters relating to patient care, level of service, deviation from fees charged and refusal to supply medical records, etc., is also bestowed upon the Commission.

11. Although, Mr. Banerjee also submits that Section 38(iv) permits the Commission to make Regulations by fixing rates for indoor and outdoor patients, including rates for diagnostic procedures etc., such regulations do not cover grant of discount on medicines. The law also does not permit the Commission to issue directives in the nature of advisories which deal with 10 per cent discount on medicines and 20 per cent discount on consumables supplied directly to the patients. The advisory at Page 47 of the writ petition, which is quoted below, does not indicate that such advisory was issued in exercise of powers conferred under Section 38(iv) of the said Act. The Advisory reads as hereunder.

“1. It is common knowledge of all, the 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%. 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.

2. The Commission thus feels, the clinical establishments must give at least 10% discount to all medicines and 20% 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.

You are requested comply with it.”

12. Moreover, Section 38(iv) talks about framing regulations. The procedure for making such regulations is prescribed by law. The approval of the state government is necessary in this regard. Thus, an advisory cannot be treated as a regulation under Section 38 (iv) of the said Act. A

Division Bench of this court held as follows:-

“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.”

13. Under such circumstances, the order impugned is set aside. The advisory cannot be imposed. The same cannot have any binding effect.

14. Accordingly, the writ petition is disposed of.

15. However, there will be no order as to costs.

16. Parties to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)