

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya

W.P.A 3858 of 2022

Apollo Multispeciality Hospitals Limited & Anr.

vs.

West Bengal Clinical Establishment Regulatory Commission

For the petitioners	:	Mr. Ratnanko Banerji, Sr. Adv. Mr. Sarvapriya Mukherjee, Adv. Mr. Biswajit Kumar, Adv. Mr. Deepan Sarkar, Adv. Ms. Mahima Cholera, Adv.
For the respondent	:	Mr. Samrat Sen, Ld. AAAG. Mr. Manali Ali, Adv. Mr. Avick Ghatak, Adv.
Last Heard on	:	16.05.2023.
Delivered on	:	14.06.2023.

Moushumi Bhattacharya, J.

1. The petitioner no.1 is in the business of providing healthcare services and is a "Clinical Establishment" as defined under section 2(c) of The West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017 ("the Act"). The petitioners pray for a Declaration as well as for Mandamus with regard to certain Advisories and an Order dated 02.07.2021, issued by the respondent West Bengal Clinical Establishment Regulatory Commission. The petitioners pray that the impugned Advisories and the Order be declared as discriminatory, perverse and without jurisdiction and a Mandamus be issued commanding the respondent to recall and rescind the impugned Advisories and the Order.

2. The 26 impugned Advisories between 27.07.2020 and 07.09.2021 and the impugned Order dated 2.07.2021 were issued by the respondent Commission for fixation of rates and charges by Clinical Establishments ("CEs") from patients in the State. The Advisories were meant for private hospitals and covers the petitioner no. 1.

3. According to learned counsel appearing for the petitioners, the impugned Advisories and Order were made without jurisdiction and are contrary to section 38(1)(iv) of the Act. Counsel submits that the power to issue Advisories is circumscribed by the Act and specifically section 38(1)(iv) thereunder. Counsel relies on the specific provision of section 38(1)(iv), giving power to the Commission to fix rates and charges and urges that the Commission cannot

hence exercise those powers under residuary provisions of the Act to fix rates and charges for the CEs in the State. It is submitted that even if the impugned Advisories are considered to be administrative instructions, the power to issue such Advisories cannot be delegated to the Commission.

4. The learned AAAG appearing for the respondent Commission submits that the Act of 2017 is a social welfare legislation for the benefit of patients who are "service recipients" under section 2(w) of the Act. Counsel submits that the legislation was enacted to deal with the lack of transparency in the functioning of CEs and the exploitation of patients. Counsel relies on *Union of India v. Moolchand Kharaiti Ram Trust; (2018) 8 SCC 321* as well as the Coordinate Bench decision in *Dr. Md. Rezaul Karim v. State of West Bengal; AIR 2018 Cal 18*. Learned counsel submits that the impugned Advisories should hence, be considered in the light of the legislative intent to tackle the problems of patients.

5. Counsel further submits that only a few of the 26 Advisories actually relate to fixation of rates and charges and that all the Advisories are in the nature of administrative instructions. It is submitted that the fixation of rates and charges were based on reports of expert committees appointed by the Commission and that the Commission has issued Advisories on the implied power to do all such acts which are necessary for execution of the authority given to the Commission by the Act. Counsel places section 38 to urge that the provision is wide enough to include the powers necessary for ensuring proper

functioning of the duties of the Commission and that the entire gamut of the Advisories were issued not only under section 38(1)(iv) but under other provisions including sections 33, 38(1)(i), 38(1)(iii), 38(1)(v), 38(1)(vi) and 41 of the Act. Counsel submits that there is no impediment on the Commission carrying out the objectives as contemplated in the Act in the form of stop-gap measures till rules and regulations are framed by the State Government. It is also submitted that the State Legislature does not lack the legislative competency to regulate rates charged by private CEs and relies on Entries 6 and 66 of List II of the Seventh Schedule under Article 246 of the Constitution. Counsel concludes that the impugned Advisories/Order do not suffer from any infirmity, statutory or otherwise.

6. The decision of the Court is given under the following heads. The conclusions of the Court form part of the discussion.

The Advisories and the Order of the Commission which are under challenge:

7. The West Bengal Clinical Establishment Regulatory Commission issued 26 Advisories from 27.07.2020 to 07.09.2021. The Advisories cover a wide range of subjects and include :

- admission of pregnant women in CEs
- discharge of patients after treatment
- allocation of vacant beds
- ensuring sufficient stock of high-end antibiotics

- statutory conditions for the license to be issued to CEs
- ambulance services
- grievance redressal system in the CEs

Several Advisories were also issued specifically in relation to the Covid-19 Pandemic including the expenses charged by CEs in the Out Patient Department, charges for conducting Covid tests, bed charges for Covid patients, increasing the number of beds for treatment of Covid, giving priority to Covid-related treatments over elective surgeries.

8. The Advisories which are of concern to the petitioners are related both to fixation of rates and charges by the CEs and include charges levied by pathological laboratories towards home collection for conducting Covid tests, advance payments charged at the time of admission of a patient, providing daily updates regarding billing and modes of payment, capping the rates for investigation, direction on the CEs to display their rate charts with break-up of services offered by the CEs, the mode of imposing full day charges at the time of discharge of the patients and fixation of radiological and pathological charges.

9. Advisory-19 dated 24.12.2020 is in the nature of a clarification that the Advisories were applicable to all patients and are not restricted to treatment for Covid.

10. The impugned order issued by the Commission on 2.7.2021 caps the rates for radiological and pathological tests by giving a tabulated prescription of

rates for these tests. The order makes the rates applicable to CEs with more than 150 sanctioned beds and having National Accreditation Board for Hospitals & Healthcare Providers (NABH) accreditation with the condition that the Hospital will not enhance the rates if the rates being charged by them were lower than the suggested rates. The impugned order was directed to come into force with immediate effect.

The West Bengal Clinical Establishment Act, 2017 prescribes the procedure for fixation of rates / charges:

11. The captioned subject can be found in section 38 of the Act which provides for the powers and functions of the Commission. Section 38 is set out below:

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.

Section 52 supplements the power of the Commission to make regulations, with the prior approval of the State Government and by notification, which are not inconsistent with the Act and the Rules. Section 52 is set out below:

52. 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.

Section 36, which is also relevant in this context, is the grounding force for the constitution of the Commission. Section 36(1) provides that the State Government shall constitute a West Bengal Clinical Establishment Regulatory Commission “to exercise the powers and perform the functions conferred on the

commission under this Act for the purpose of regulation and supervision of the functioning and activities of the clinical establishments licensed under the Act for ensuring the accountability and transparency” in the workings of CEs.

12. The Act of 2017 makes it clear that making of regulations by the Commission is a condition-precedent for fixation of rates and charges for patients or in other words, the Regulations shall first be framed followed by the fixation of rates / charges in accordance with the Regulations. Section 52 clarifies the position with regard to the manner in which the regulations shall be made by the Commission, namely, regulations shall be made with the previous approval of the State Government and by way of a notification.

13. The admitted factual position is that the Commission has not framed any regulations till date. This would be evident from the orders passed by the Division Bench of this Court in a Public Interest Litigation being WPO(P)/10/2021 (*Bhaskarananda Halder v. The State of West Bengal*). The orders dated 14.12.2021, 28.01.2022, 04.03.2022, 08.07.2022 records the submissions made on behalf of the State that regulations under section 38(1)(iv) are yet to be framed by the Commission. The Commission’s letter dated 29.07.2022 to the Principal Secretary, Health and Family Welfare Department of the State also makes it clear that the Regulations are yet to be framed and approved by the State Government in terms of section 52 of the Act.

14. Therefore, the statutory substratum of the Advisories and Order issued by the Commission, to the extent of the mandate under section 38(1)(iv), is absent.

15. In *Vital Nutraceuticals Private Limited v. Union of India*; 2014 SCC OnLineBom 165, a Division Bench of the Bombay High Court held that the Commission cannot exercise powers with the aid of unilateral executive Advisories until the State Government frames regulations under section 38(1)(iv).

Can Advisories be issued under any of the other provisions in the 2017 Act?

16. The Commission relies on sections 38(1)(ii), 38(1)(iii), 38(1)(v) and 33 for the power being conferred upon the Commission by implication to issue Advisories for fixing rates and charges.

17. However, contrary to the above, section 38(1)(i) gives a general power to monitor the functioning of clinical establishments, while section 38(1)(iii) is for examining complaints with regard to patient care service including irrational and unethical trade practices alleged by aggrieved patients. Section 38(1)(v) empowers the Commission to look after the transparency of CEs in dealing with patients. Section 33 deals with right of the Commission to award compensation in case of injury or death of the service recipients/patients i.e., person who seeks or receives any healthcare from any CE or service provider (which has been defined under section 2(w)).

18. The sections relied upon by the Commission would show that they are in the nature of residuary provisions conferring a general power on the Commission to monitor the functioning of CEs. Although, the power under 38(1)(iii) includes unethical “trade practice”, as defined in section 2(z)(i), the generality of the provision shown must however give way to and fit into the specific provision in section 38(1)(iv) which authorises the Commission to fix rates and charges but subject to Regulations being framed for that purpose.

19. The argument that the statutory source of the Advisories is not only under section 38(1)(iv) but also under the other sub-sections of section 38, would have been acceptable had section 38(1)(iv) also been flexible in its contours without fixing the power to framing of Regulations. The Commission’s argument would also have withstood scrutiny had the Act been silent on the mechanism for fixing of rates and charges. The Commission in that case would certainly have had the authority to fill in the gap by administrative instructions or executive orders in the form of Advisories. This however, is not the case as the gap has completely been filled up by section 38(1)(iv) (Refer: *Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Company of India Ltd.*, (1972) 2 SCC 560). In fact, there is no gap at all.

20. Moreover, section 52 makes it clear that Regulations may be drawn by the Commission only with the previous approval of the State Government and by way of a suitable notification which must not be inconsistent with the Act and Rules. The Commission is hence only a delegated authority of the State for

the purpose of making regulations. Sections 38(1)(iv) read with 52 charts a defined route for fixing the rates and charges which has not been followed in the present case. The Commission seeking recourse under other residuary provisions is plainly impermissible in law. The Commission must simply make Regulations for fixing of rates and charges. That's all that there is to it.

21. The Commission also relies on section 33 of the Act. Section 33 deals with the compensation which the Commission can award in appropriate cases and pre-supposes not only injury to or death of the service recipient but also negligence or deficiency being the cause of such injury/death. The charges must also be substantiated before the Commission can direct compensation to be paid to the victim under the said provision. The present case does not involve any negligence or deficiency in providing service. Section 33 is therefore not relevant.

22. Moreover, permitting sections 38(1)(i) or (iii) or (v) to become pro-active and substitute the object of section 38(1)(iv) on the pretext of a vacuum, will amount to a darning and patchwork exercise of the fabric of section 38 of the Act which is not permissible. It is a well-established canon of construction that the Court should read a section as it is and not attempt to re-write the section to suit the parameters of the matter before it; *A.R. Antulay v. Ramdas Srinivas Nayak*; (1984) 2 SCC 500. It is equally well settled that general provisions are eclipsed on the enactment of specific provisions with a specific purpose:

Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd.; (1972) 2 SCC 560.

23. The Commission's act in issuing the Advisories does not find support from any of the provisions relied upon. The law on the subject is conclusively settled; namely, that an authority must exercise power conferred by a statute as prescribed by the statute or not at all; any other manner in which the power is exercised is necessarily forbidden. (*Nazir Ahmad v. The King-Emperor; AIR 1936 PC 253 (2), State of Andhra Pradesh v. A.P. State Wakf Board; 2022 SCC OnLine SC 159, Saral Wire Craft Private Limited v. Commissioner of Customs, Central Excise and Service Tax; (2015) 14 SCC 523.*)

The Advisories/Order are in any event arbitrary and without basis

24. The Commission's case is that the rates and charges were sought to be fixed by way of the impugned Advisories pursuant to a Report filed by a High-Powered Committee. This is stated in the affidavit filed by the Commission. The Report which forms part of the supplementary affidavit of the Commission indicates however that the Report relates to "Protocol on Investigations on Covid-19 Patients". The Report suggests modes of investigation of Covid-19 patients and the only suggestion made in the Report is that the cost of tests should not be higher by reason of the patient being admitted in ITU/CTU where the bed charges are higher. The Report bears the signatures of doctors who appear to constitute the "High-Powered Committee".

25. The other documents in the supplementary affidavit filed by the Commission mentions the recommendation made by a Committee on rates for Pathological and Radiological Tests but are not part of the High-Powered Committee referred to in the Commission's affidavit. Moreover, the table of the allegedly recommended rates for the tests do not indicate any basis for fixation of the rates. There is nothing in the affidavit to suggest that the decision to fix rates and charges for private hospitals was pursuant to the recommendations of a Committee with a mandate for doing such, high, powerful or otherwise.

26. Further, although the Commission's case is that the impugned Advisories relate to the manner in which CEs are to treat Covid 19 patients, Advisory-19 dated 24.12.2020 makes it abundantly clear that the Advisories shall be applicable to all patients across the board regardless of Covid. The Commission has also sought to make these Advisories/Order enforceable and binding on CEs and clarified the same by directing refund of excess charges from CEs whereby rates and charges that have been charged are higher than those fixed in the Advisories. The Commission has also imposed penalty on CEs for acting in breach of the Advisories.

27. Therefore, apart from the fixation of rates and charges being wholly arbitrary and unsupported by any investigation and consequential findings/recommendations of a High-Powered Committee as alleged, the Commission has taken steps to implement the impugned Advisories by way of binding orders in default whereby the CEs would be liable to penalty.

The legal propositions relied on by the Commission do not apply to the facts of the present case :

28. The decisions cited on behalf of the Commission are under the following heads.

- The Act of 2017 is a social welfare legislation.
- Courts must endeavor to ascertain the legislative intent for a rule of construction which effectuates the intent rather than defeats it.
- A statute cannot and does not provide for all contingencies.
- The powers granted by a statute implies taking of measures which are indispensable to the exercise of such powers.
- The authority can fill up gaps and supplement the rules if the rules are silent on any particular point.
- Statutory authorities, in exercise of powers conferred under the statute, can issue administrative instructions even in the absence of Regulations.

29. A large number of decisions have been cited under each of the above points.

30. The said decisions are however not applicable to the law in the present case since the West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017 contains a specific provision in section 38(1)(iv) for fixation of rates and charges as also to ensure compliance of the rates fixed by the CEs. *Mohd. Fazlur Rahman v. Custodian of Evacuee Property; AIR 1956*

HYD 91, Income Tax Officer v. M.K. Mohammed Kunhi; AIR 1969 SC 430, Sakiri Vasu v. State of Uttar Pradesh; (2008) 2 SCC 409 would have applied in a case where the governing statute is silent on the power of the authority to do a certain act (which is fixing of rates and charges in the present case). *Narayan Prasad Lohia v. Nikunj Kumar Lohia; (2002) 3 SCC 572*, would have been applicable in a similar situation if section 38(1)(iv) would not have been enacted at all. The decision in *Mysore State Road Transport Corporation v. Gopinath Gundachar Char; AIR 1968 SC 464*, is an authority for the proposition that the Commission is empowered to perform all the essential functions for the sufficient performance of its duties.

31. The proposition that Courts must construe a legislation to implement the object is also irrelevant since the Act of 2017 does not contain any lacunae or ambiguity requiring a purposive construction of section 38 for the matter relating to fixation of rates and charges. At the cost of repetition, section 38(1)(iv) provides a complete answer to the issue and the section, hence, does not call for any interpretation.

32. It should also be stated that most of the decisions cited are with reference to service conditions of different authorities including of administrative personnel, school teachers and administrative service, judicial officers and are not applicable on that count.

33. On a closer analysis of the decisions shown on behalf of the Commission i.e., *T Cajee v. U Jormanik Siem; AIR 1961 SC 276*, a Constitution Bench of the Supreme Court held that where executive power impinges upon the rights of

citizens, it will have to be backed by an appropriate law. In *V. Balasubramaniam v. Tamil Nadu Housing Board; (1987) 4 SCC 738*, the Supreme Court held that exercise of power by issuing administrative circulars/executive orders in the interregnum is untenable where regulations are to be construed with the approval of the Government. This was also the view in *Odisha Industrial Infrastructure Development Corporation Limited v. Pitabasa Mishra; (2018) 3 SCC 732*.

34. In the decisions cited, the particular executive orders/administrative instructions were also issued by the State and not by a delegated authority of the State which is the Commission in the present case.

35. With regard to the contention of the State's competence to frame regulations for capping rates, a Division Bench of the Bombay High Court in *Hospitals' Association, through the President, Dr. Ashok Arbat v. Government of Maharashtra; AIR 2021 Bom 9* may be referred to. The Bombay High Court was of the view that the State Legislature is not competent either to frame any law or to issue any notification for regulating the rates chargeable by private hospitals to non-covid patients. The Bombay High Court further held that the directions which were impugned before the Court cannot be treated to have been issued in exercise of the executive power under Articles 162 and 166 read with Article 13(3)(a) of the Constitution of India having the "force of law". It was further held that the notifications in question encroached on the fundamental rights of the petitioner i.e., Hospital's Association under Article 19(1)(g) of the Constitution of India. The notifications which were challenged before the Court

were issued by the State Government regulating the rates chargeable by private hospitals/health care providers to non-Covid patients.

36. A Special Leave Petition filed from the judgment of the Bombay High Court was dismissed on 19.07.2021. *Hospitals' Association* was also cited by the petitioners in the Public Interest Litigation before the Division Bench of this Court (*Bhaskarananda Haldar*) which has been referred to above.

37. The reliance placed on *Dr. Md. Rezaul Karim* and on the emphasis of the fact that the Act of 2017 is a social welfare legislation in India to cure an apprehended exploitation of patients by private hospitals is misplaced since the said decision was only concerned with a challenge made to the *vires* of the West Bengal Clinical Establishments Act, 2017. Hence, there was no question of any challenge to the Commission recommending a ceiling to the rates charged by private hospitals. In any event, the argument of a social welfare legislation cannot subsume the specific provisions of the legislation and inundate the course charted therein by measures taken regardless of those provisions.

38. The Act has an avowed object to regulate the activities of Clinical Establishments and preserve the rights of service recipients. This salutary purpose must however be realized through the route prescribed in the Act. The Commission has taken a closed by-lane which is not even a short-cut for travel to its chosen destination.

Conclusion:

39. The impugned Advisories and Order have clearly been issued in the absence of a statutory bulwark. The Advisories are neither reasonable nor supported by the findings and conclusion of a specialised body of experts with domain knowledge. The fixation of rates and charges are simply actions which muscle through the specific provisions provided in the Act for taking steps without stopping by to consider whether the conditions precedent for the Advisories have been satisfied. The Advisories are shots in the dark, without rationale and smack of random thinking and eureka moments of a body which owes its rites of passage to the Act of 2017. The language used further emasculates the Advisories and the Order.

40. WPA 3858 of 2022 is accordingly allowed by declaring that the Advisories issued by the Commission to the extent of fixation of rates and charges to be made applicable for Clinical Establishments and for all patients irrespective of Covid are without the authority of law and contrary to The West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017. Likewise, the impugned order dated 02.07.2021 is also declared to be irrational and violative of the petitioners' rights under Article 19(1)(g) of the Constitution of India. The facts urged leave little doubt that the fundamental right of the petitioner no. 1 to carry on business has been infringed without the authority of law. The Commission has not been able to justify the violation with precision or otherwise within the framework of the Act of 2017.

41. The Advisories and the Order are unconstitutional and are not binding on the petitioners. The West Bengal Clinical Establishment Regulatory Commission shall therefore recall and rescind the impugned Advisories and are prohibited from giving any effect to the impugned Advisories and Order to the extent of fixation of rates and charges for Clinical Establishments including the petitioner no. 1 in a manner which is contrary to section 38(1)(iv) of The West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017.

42. The Writ petition is disposed of in terms of the above.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)