

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

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No. 8140 of 2022

**Dr. Kunal Saha
Vs.
West Bengal Medical
Council (WBMC) and another**

For the petitioner-in-person	:	Dr. Kunal Saha
For the Medical Council	:	Mr. Saibalendu Bhowmik, Mr. Biplab Guha, Mr. Rajsekhar Basu, Mr. Subrata Bhattacharya
Hearing concluded on	:	15.06.2022
Judgment on	:	29.06.2022

Sabyasachi Bhattacharyya, J:-

1. The petitioner is a registered medical practitioner in West Bengal and is an Overseas Indian Citizen. He has preferred the present challenge primarily for dissolution of the present body acting at the helm of the West Bengal Medical Council. Initially the matter was filed as WPO 382 of 2018, but later renumbered as WPA 8140 of 2022.
2. Although the petitioner had originally challenged the *vires* of Section 11 (2) of the Bengal Medical Act, 1914, he does not press such challenge at the final hearing.

3. The petitioner, appearing in person with the leave of court, submits that the five-year statutory term of the last elected Medical Council of West Bengal expired on July 15, 2018. No election, as provided in law, has been held since then and the last-elected body has been continuing in office unlawfully.
4. Section 11 (1) of the Bengal Medical Act, 1914 (for short, “the 1914 Act”) provides that the term of office of a member of the Council, nominated or elected under Section 4 or nominated under Section 5, shall commence on such date as may be notified in this behalf by the State Government in the Official Gazette.
5. Sub-section (2) of Section 11 says that, subject to the provisions of Sections 9 and 10, the term of office of members shall be five years *plus* such period as may elapse between the period of five years aforementioned and the date notified in the notification under sub-section (1) next following such period of five years.
6. The petitioner next places the provisions of the West Bengal Medical Council (Temporary Supersession) Act, 1985 (in brief, “the 1985 Act”).
7. As per Section 3 (1) of the said Act, with effect from the date of coming into force of the said Act and for a period of two years thereafter, the Medical Council shall stand superseded.
8. Sub-section (2) of Section 3, however, provides that the State Government may, if it considers necessary so to do, by notification published in the Official Gazette, extend from time to time the period of supersession referred to in sub-section (1) by any period not exceeding

six months at a time, so however, that the aggregate period of supersession under the section shall not exceed three years.

9. The 1985 Act was followed by the West Bengal Medical Council (Temporary Supersession) (Amendment) Ordinance, 2012, but the Ordinance was never translated into an Act.
10. It is submitted that, after the last-elected body completed its term on July 15, 2018, not only was no election held, no ad hoc committee was appointed either. It is, thus, argued that the said body has been continuing thereafter unlawfully and should immediately be dissolved. The petitioner also prays for directions to hold a new election.
11. The respondents, at the outset, object to the *locus standi* of the petitioner to maintain an application under Article 226 of the Constitution of India, since he is not a citizen or resident of India. The petitioner is a US citizen and cannot invoke fundamental rights under the Constitution, nor can he vote or stand as a candidate in the West Bengal Medical Council elections, it is argued.
12. As per the proviso to Section 4 (1) of the 1914 Act, no registered practitioner shall be entitled to vote or stand as a candidate for election at an election of members under the clause unless he-
 - (a) is a citizen of India ; and
 - (b) either resides or carries on his profession or is employed in West Bengal.
13. Further, Section 6(d) of the 1914 Act provides that a person shall be disqualified for being elected or nominated as a member of the Council

if he is not a citizen of India, either residing or carrying on his profession or employed in West Bengal.

14. Thus, the respondents contend, the petitioner has practised fraud upon the Election Commission and the Court by participating in the elections and moving this court in writ jurisdiction.
15. The respondents next contend that the 2018 election was duly notified on May 4, 2018 but could not proceed further due to an interlocutory order passed in another writ petition, bearing WP No. 13684 (W) of 2018.
16. Moreover, vide letter dated October 12, 2018, the Department of Health and Family Welfare, Government of West Bengal advised the Registrar, West Bengal Medical Council that, in its considered opinion, the Council may continue functioning till election of new Council.
17. The petitioner cites the judgment of *Lakshmi Charan Sen & Ors. Vs. A.K.M. Hassan Uzzaman & Ors.*, reported at AIR 1985 SC 1233, wherein it was held that no High Court in the exercise of its powers under Article 226 of the Constitution should pass any order, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked.
18. To counter the above, the respondents cite *Jaya Sen v. Sujit Kr. Sarkar*, reported at AIR 1998 Cal 288, for the proposition that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in the decision-making process.

19. The petitioner further contends that the interim order passed in WP No. 13684 (W) of 2018 has long expired and is no longer subsisting. Hence, in any event, there is no deterrent order to restrain elections of the Medical Council since long.
20. The petitioner also relies on several previous judgments delivered in connection with other writ petitions filed by the present petitioner to highlight that the said Benches had upheld the *locus standi* of the petitioner to maintain a writ petition under Article 226 of the Constitution of India, including *Dr. Kunal Saha v. The State of West Bengal & Anr.* [2016 SCC OnLine Cal 72], a co-ordinate Bench judgment of this court, and another Division Bench judgment with the same name, reported at *AIR 2015 Cal 370*.
21. As a counter argument to the above, the respondents rely on *Chandrashekar & Ors. Vs. Addl. Special Land Acquisition Officer* [AIR 2009 SC 3009]. In paragraph no. 11 thereof, the Supreme Court observed that the directions of the Magistrate are subject to provisions of an Act, Regulation and Code and in case of conflict, the statute itself prevails.
22. It is argued that the above proposition holds true in lending primacy to Section 11 (2) of the 2014 Act over the judgments of this Court wherein it was held that the petitioner has *locus standi* to file a writ petition and participate in the Medical Council elections.
23. The respondents also cite *AIR 1962 Cal 338* [*The State Vs. Keshab Chandra Naskar*] for the proposition that only an aggrieved party can challenge an action and not a volunteer.

- 24.** Learned counsel for the respondents next relies on *The Rajasthan State Industrial Development & Investment Corpn. V. Subhash Sindhi Cooperative Society Jaipur &Ors.*, reported at AIR 2013 SC 1226, in order to elaborate the scope of Article 226 of the Constitution, wherein it was held that writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. A writ does not lie to create or establish a legal right but to enforce one that stood already established.
- 25.** On the issue of applicability of Article 14 only to citizens of India, the respondents cite *State of Arunachal Pradesh Vs. Khudiram Chakma*, reported at 1994 (Supple) (1) SCC 615.
- 26.** Lastly, by placing reliance on Section 3 of the 1914 Act, the respondents argue that the West Bengal Medical Council has perpetual succession, since it cannot exist in a vacuum. Hence, learned counsel submits, the present body has the authority to continue till the next elections are held/notified.
- 27.** Upon hearing the rival contentions of parties, there remains no doubt that the last-elected Medical Council of West Bengal had already spent five years of its tenure on or about July 15, 2018.
- 28.** The sole order on record is an order dated August 16, 2018 passed by a co-ordinate Bench in WP No. 13684 (W) of 2018, whereby the respondent nos. 2, 3 and 4 therein (apparently including the Medical Council) were restrained from proceeding any further with the West Bengal Medical Council election, 2018 pertaining to the categories of

Section 4 (1) (g) and 4 (1) (h) of the Act of 1914 till the end of November, 2018 or until further orders, whichever was earlier.

- 29.** However, nothing has been produced by the respondents to show that the said order was subsequently extended, even in the teeth of the denial by the petitioner. Although the respondents hint that they have filed a vacating application, no copy thereof has been produced in court. The respondents have failed to show any endeavour on their part to expedite the hearing of the matter, although the same is pending for the last four years. Hence, in the absence of any subsisting stay order having been produced, such initial grant of a limited ad interim stay cannot be projected as justification for the respondents to hold their hands for so long with regard to holding the elections of the Medical Council.
- 30.** Moreover, the said limited injunction order was passed keeping in view the alleged irregularities perpetrated in the build-up to the then electoral process. Such impediment could be obviated if the previous steps taken for election were given a go-bye in their entirety and the process was resumed afresh, under appropriate checks and/or supervision, if need be.
- 31.** The primary consideration in the matter is the proper ambit of Section 11 (2) of the 1914 Act.
- 32.** A plain reading of sub-section (2) of Section 11, as a standalone provision, seems to confer on an once-elected/nominated Council the charter to continue till the next notification which, as per sub-section (1), is published by the State Government in the Official

Gazette, signifying the commencement of the term of office of the next-elected Council.

33. Although Section 3 of the 1914 Act (as amended till date) stipulates that the West Bengal Medical Council shall be a body corporate and have perpetual succession and a common seal, and shall by the said name sue and be sued, the said provision refers to the juristic personality of the Council and, obviously, not the individuals comprising it at any particular point of time.
34. Strangely, however, although the constitution of the Council, as provided in Section 4 of the 1914 Act, contemplates a majority of the members to be elected by several different bodies of people, while a few are nominated, the expiry of the tenure of the committee has been kept rather open-ended in terms of its outer time-limit.
35. Section 11 (2), although mentioning the tenure first to be of five years, rushes on immediately thereafter to qualify the same with the rider, “... *plus such period as may elapse between the period of five years aforementioned and the date notified in the notification under sub-section (1) next following such period of five years.*”
36. It is well-settled that superfluity cannot be imputed to the Legislature; however, the period of “five years” in the preceding portion of sub-section (2) of Section 11 is rendered rather redundant and superfluous if the next portion is to be read literally.
37. Again, Section 11A (4) first provides that the President of the Council shall hold Office for a period of five years, but immediately goes on to qualify the said period with the phrase “... *or until his successor is*

nominated, whichever is longer.” which, again, renders the five year period of tenure academic and toothless.

- 38.** Thus, on a purposive construction of both provisions, that is, Sections 11 (2) and 11A (4), the principle of *Ejusdem Generis* has to be followed. The succeeding parts of both sub-sections, in consonance with the five-year tenure stipulated immediately prior thereto, cannot but be construed to be of reasonable temporal proximity within five years from commencement.
- 39.** At a more fundamental level, the 1914 Act (even as amended) envisages a Medical Council to be constituted in such a manner that a majority of its members are elected from a wide spectrum of the medical, academic and administrative cadres. Only a minority of the members are to be nominated by the State Government. In essence, such procedure, which lends primacy to the electoral process over nomination, ensures the underlying democratic spirit in constitution of such council.
- 40.** From another perspective, such an approach is an essential check and balance to the wide powers given to the Medical Council, which has the potential not only to affect the entire medical fraternity but the society at large, in view of the important role played by the medical practitioners and intelligentsia, academics, scholars and those associated with them at all levels.
- 41.** The quality and direction of administration of medicine and its offshoots in the state are under the direct supervision and authority of the West Bengal Medical Council, which is an autonomous council, not subject to direct control by the State.

42. Hence, transparency and the democratic principle are of utmost importance in formation of such Council.
43. It is an admitted position that the last elected body spent its five-year tenure long back, in the year 1988. In the last 34 years, which is almost seven times five, neither has any *ad hoc* body been appointed, nor any election held.
44. The expression “five years” in Section 11 (2) has yielded to the “plus”-period appearing thereafter, so much so as to lose its relevance. Such a prolonged tenure, as enjoyed by the present Medical Council, could not have been intended by the legislature when the concept of election was introduced in the 1914 Act, which survived all its subsequent amendments as well. Such provision has been rendered a meaningless formality, if not farce, by the conduct of the Council as well as the State in letting its stale composition to perpetuate indefinitely.
45. There is no explanation for the inordinate delay of three decades in stalling elections even prior to 2018, when WP No. 13684 (W) of 2018 was moved and a stay order passed therein. In fact, precious nothing is produced on behalf the respondents, despite repeated queries of court, to show that the interim order passed in the said writ petition was at all extended beyond November, 2018.
46. Even if the said interim order had been extended, no urgency has been exhibited on the part of the respondents in moving their purported vacating application or to have the said writ petition heard out finally. In fact, the interim order could not be a bar for the present Council, which is living on an inordinately prolonged lease of life, to seek leave of

the Court to initiate a fresh electoral procedure, relinquishing the previous electoral process impugned in WP No. 13684 (W) of 2018.

47. However, for obvious reasons, the present Council members took no steps worthy of exhibiting their bona fides for taking steps to organize elections after the year 1988 but chose to hibernate in the stupor of protracted perpetuation of their power.
48. In such factual context, the citation relied on by the petitioner, that is, *Lakshmi Charan Sen & Ors. (supra)* does not have direct bearing, since the court is called upon in the present case not to pass any order to interdict or disrupt any imminent election, but to ensure facilitation of election.
49. Insofar as *Keshab Chandra Naskar (supra)* is concerned, the petitioner, being a qualified registered doctor whose name is appearing in the rolls of West Bengal and who is an Overseas Indian Citizen, and also a prospective candidate in the election, is very much an aggrieved party and not merely a “volunteer”. In fact, the petitioner’s right, in such capacity and as conferred on a proper reading of the 1914 Act, has undoubtedly been contravened, justifying the invocation of the writ jurisdiction by this Court.
50. The contravention alleged is not merely of Article 14, but also of Article 19 of the Constitution of India and the safety and well-being of the citizens at large, since the illegality affects the functioning of the entire medical community, which ultimately concerns the health and well-being of the entire community.

51. The opinion of the Department of Health and Family Welfare, as expressed in the communication to the Registrar of the West Bengal Medical Council dated October 12, 2018, is neither a legal opinion nor has any binding effect and, hence, has no relevance in the present context.
52. In the absence of any actual *ad hoc* appointment being made after July, 1988, the West Bengal Medical Council (Temporary Supersession) Act, 1985 acquires no significance whatsoever.
53. The 2012 Amendment Ordinance never ripened into a statute. Hence, it does not deserve consideration on an equal footing with the 1914 and the 1985 Acts.
54. Thus, this court expresses its reservations as to the palpable inaction on the part of the West Medical Council in not holding any elections and/or constituting a new Council since 1988.
55. Hence, **WPA 8140 of 2022 is disposed of** by directing that the present West Bengal Medical Council, which is continuing unlawfully and in contravention of the letter and spirit of law, shall stand dissolved with effect from July 31, 2022.
56. Respondent no. 2, that is, the State of West Bengal, shall appoint an *ad hoc* council, adhering to the relevant provisions of the Bengal Medical Act, 1914 (as amended till date) in that regard, for the limited purpose of conducting the next elections of the Council and carrying out the essential functions of the Council, within July 31, 2022. The said *ad hoc* body will start functioning on and from August 1, 2022.

- 57.** Till July 31, 2022, the present council shall exercise only the essential day-to-day financial and other activities of the West Bengal Medical Council, but shall not dispose of, transfer and/or encumber any asset of the council and/or assets over which it has powers of disposal statutorily. There will be no new registration and /or cancellation of registration of any registered medical practitioner by the present council till it stands dissolved. The present council shall not, till dissolution, take major or policy decisions in any matter vested in law with the council.
- 58.** The elections of the West Bengal Medical Council, as contemplated in Section 4 the Bengal Medical Act, 1914 (as amended till date), shall thereafter be conducted in accordance with law by the *ad hoc* Council, under the aegis of the Respondent No. 2-State, as expeditiously as possible. Keeping in view the volume of work involved, the outer limit for concluding such election process, including declaration of results, is fixed at October 31, 2022.
- 59.** Respondent no. 2 shall complete the process of nomination of members as envisaged in Section 4 of the 1914 Act and ensure that appropriate steps in terms of the 1914 Act are taken so that the formalization and all necessary paraphernalia regarding the constitution of the new, duly-elected Medical Council are completed latest by October 31, 2022.
- 60.** Due notifications will be made and steps taken for adherence to the above time-frame, so that the newly-elected council can start functioning effectively on and from November 1, 2022.

- 61.** This court does not intend to go so far as to intrude into the statutorily delineated domain of the Executive for the time being, but it is expected that the Respondent No. 2 and the *ad hoc* Council constituted by it shall ensure fair play and transparency in the entire process of elections, nominations, and other formalities for constitution of the new Council, as directed above and, prior to that, in appointing the *ad hoc* Council.
- 62.** It will, however, be open to all aggrieved parties/stakeholders to challenge any illegality and/or irregularity in the ensuing appointment of *ad hoc* Council and/or conduct of the West Bengal Medical Council elections before the appropriate forum.
- 63.** There will be no order as to costs.
- 64.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)

Later:

After the above judgment/order is passed, learned counsel for the respondent authorities prays for a stay of operation of the said order.

However, in view of the discussions made in the judgment as regards the present condition of affairs of the Medical Council and since sufficient time has been given for the conduct of the elections, such prayer is refused.

(Sabyasachi Bhattacharyya, J.)

