In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P. No. 21498(W) of 2019
Dr. Subhash Chandra Tiwari
Vs.
West Bengal Medical Council and others

For the petitioner	:	Mr. Pratik Dhar, Mr. Sailesh Mishra, Mr. Samir Halder
For the State-respondents	:	Mr. Jishnu Chowdhury, Mr. Robiul Islam
For the WBMC	:	Mr. Saibalendu Bhowmick, Mr. Biplab Guha, Mr. Rajsekhar Basu
Hearing concluded on	:	22.11.2019
Judgment on	:	27.11.2019

Sabyasachi Bhattacharyya, J.:-

1. The petitioner is a doctor who completed his MBBS in the year 2004 and did Diploma in Tuberculosis and Chest Diseases (DTCD) in 2009 from the Medical College and Hospital, Kolkata. Thereafter, the petitioner did his MD in Tropical Medicine in 2013 from the School of Tropical Medicine at Kolkata. The petitioner

has been working as an associate consultant in the critical care unit of the Gastroenterology Department of the Apollo Gleneagles Hospital, Kolkata. On April 15, 2017, a minor child named Kuheli Chakroborty was admitted in the emergency room of the Apollo Gleneagles Hospital after being referred by the ESI Hospital, Joka as a case of passage of blood in stool since four days. The child was admitted under Dr. V.R. Srivastava (consultant pediatric surgeon) at bed no. P-20 of the pediatric ward of the hospital. The situation of the child was assessed by the on-duty pediatric doctor, who discussed with Dr. V.R. Srivastava, and, as per her advice the patient was referred to Dr. Vijay Rai (Gastroenterologist). On April 16, 2017, the child was seen by Dr. V.R. Srivastava and certain examinations were done as per her advice. Thereafter, later on the same day, the child was seen by Dr. S.C. Tiwari. The on-call Doctor from Gastroenterology Department, as asked by his Department, merely suggested Sigmoidoscopy to be done on April 17, 2017, Nil-per-mouth (NPM) for four hours with proper hydration, Enema (once) and certain blood and stool examinations.

2. In the evening of April 16, 2017 itself, Dr. V.R. Srivastava was informed regarding Sigmoidoscopy. Her advice was taken in that regard.

3. On April 17, 2017, Dr. V.R. Srivastava again saw the child and planned for Sigmoidoscopy, kept NPM from 11 a.m., and directed neotomic enema and the

patient was started being administered IV fluid at 11 a.m. Thereafter, at 2.45 p.m. the same day, the Dr. S.C. Tiwari, after discussion with the HOD, informed the pediatric ward doctor and also Dr. V.R. Srivastava that in view of no definite polyp having been found in the rectal examination, a decision was taken to do full length Colonoscopy on the next day after proper preparation.

4. At 4 p.m. on April 17, 2017, a phone call went from a pediatric ward doctor to Dr. S.C. Tiwari regarding Colonoscopy preparation, when he suggested proceeding as per protocol. The baby was subsequently assessed by the on-duty pediatric doctor and was found clinically stable. The baby was kept on NPM and maintenance IV fluid was started at 10 a.m. on April 18, 2017. Thereafter, Dr. V.R. Srivastava examined the baby, followed by the patient being sent to the Gastroenterology Department for endoscopic procedure, evaluated by Dr. Sanjay Mahawar (consultant anesthetist) and Dr. M.K. Goenka (consultant Gastroenterologist). Colonoscopy was then done by Dr. M.K. Goenka under close anesthetic monitoring by Dr. Sanjay Mahawar. Subsequently, medical procedure was adopted for the child and the child was in observation under Dr. Mahawar and by the Pediatric Intensive Care Unit (PICU) team led by Dr. P.S. Bhattacharya, Dr. D. Ghosh (Cardiologist) and also seen by Dr. M.K. Goenka and Dr. V. R. Srivastava. After successful resuscitation, the patient was shifted to PICU and the parents were counselled and updated about the entire events. In

PICU, the child was put on mechanical ventilation and medication and other supportive measures were administered as required, continuously assessed and treated by the PICU team as indicated above. According to the petitioner, Dr. M.K. Goenka, Dr. Sanjay Mahawar and Dr. V.R. Srivastava also attended the baby.

5. However, on April 19, 2017, the child again suffered from cardiac arrest and despite all efforts over a period of one-and-a-half hours, the child could not be revived and was declared clinically dead subsequently.

6. On July 4, 2017, the respondent no. 8 made a complaint before the West Bengal Medical Council. On November 20, 2017 at 2 p.m. the writ petitioner was called by the penal and ethical case committee for deposing in the matter of the death of the child, which was responded to by the petitioner. On February 28, 2018, the writ petitioner received a letter, wherein he was charged to have prescribed to administer a controversial drug, namely Exelyte, for the preparation of bowel in the four month-old baby named Kuheli. It was also alleged that the petitioner did not care to find the level of Serum Calcium before sending the baby for 'scopy' and that the petitioner did not bother to have the baby checked by any pediatric physician, although the baby was allegedly admitted to the petitioner's tertiary care hospital 72 hours before. It was also indicated in the notice that a meeting

would be held by the West Bengal Medical Council to consider the said charges and decide whether or not they should direct the petitioner's name to be removed from the Register of Registered Practitioners pursuant to Section 17/25 of the Bengal Medical Act, 1914 (hereinafter referred to as "the 1914 Act"). Ultimately, the petitioner's name was removed from the said Register by an order dated October 25, 2019, against which the present writ petition has been filed.

7. Learned senior counsel appearing for the petitioner argues that the petitioner has had a spotless career for 15 years and was employed by the Apollo Gleneagles Hospital and deputed as an on-call Doctor on the Gastroenterology team by the said hospital administration. It is argued that the West Bengal Medical Council, being the respondent no.1 herein, flouted the basic principles of natural justice in removing the writ petitioner from the Register of Registered Practitioners for three months. It is submitted that the notice dated February 28, 2018 itself exhibits a pre-determined mindset on the part of the respondent no. 1, inasmuch as it intimated the petitioner that the respondent no. 1 would consider the charges against the petitioner to decide whether or not they should direct the petitioner's name to be removed from the Register of Registered Practitioners under Section 17/25 of the 1914 Act, which was the maximum punishment for the alleged charges.

8. It is submitted that Section 17 of the said Act merely provides that every person who possesses any of the qualifications referred to in the schedule therein shall be entitled to be registered on compliance of the provisions therein.

9. Section 25, on the other hand, empowers the Council to direct the removal of names of the doctors from the Register and re-entry of names therein. Under Section 25(a)(ii), it is provided that the Council may direct that the name of any Registered Practitioner, whom the Council after due enquiry in the same manner as provided in clause (b) of Section 17 have found guilty by a majority of two-third of the members present and voting at the meeting, of infamous conduct in any professional respect, be removed from the Register of Registered Practitioners or that the practitioner be warned and that any name so removed may afterwards be re-entered in the Register.

10. It is argued by learned senior counsel for the petitioner that the complaint lodged by the father of the deceased patient with the Registrar, West Bengal Medical Council on May 17, 2017, did not even name the writ petitioner. It was mentioned that the concerned consultant pediatrician Dr. Vaishali Roy Srivastava and the members of her unit, including resident doctors, nursing staff and ward attendants, failed to communicate inter personally and even with the

patient party, as a result of which the medical treatment was hampered and delayed, leading to a state of dehydration of the deceased baby.

11. It is further submitted that the notice sent to the writ petitioner on February 28, 2018 directly mentioned that the petitioner's name might be removed from the Register of Registered Practitioners, without even mentioning the lesser punishment of issuing a warning to the petitioner, thereby betraying a pre-determined approach in that regard.

12. It was further mentioned in the said notice, sent by the respondent no.1 to the petitioner, that the petitioner had prescribed to administer a controversial drug, Exelyte, which the petitioner never did, nor is anything on record to show that the petitioner ever prescribed such drug to the concerned patient at all.

13. It is further argued that although the said notice sought to fix responsibility upon the petitioner, stating that the baby was admitted to the petitioner's tertiary care hospital, and the petitioner did not bother to have the baby checked by any pediatric physician, the said allegation was patently incorrect, since the records of the hospital itself would show that the baby was admitted not by the petitioner but under Dr. Vaishali Roy Srivastava, a consultant pediatric surgeon, and was assessed the same day by Dr. Roy Srivastava and was referred to Dr. Vijay Rai (Gastroenterologist). Moreover, the petitioner had all along been under

the care of competent doctors namely, Dr. V.R. Srivastava, Dr. S.C. Tiwari and others as indicated above. It is further alleged on behalf of the petitioner that, although the primary allegation against the petitioner was that the petitioner prescribed a controversial drug, the impugned order dated October 25, 2019 shows that Dr. Vaishali Roy Srivastava was charged with the administration of the said controversial drug. The charges framed against the petitioner were also administration of the said controversial drug and a repeat of the notice dated February 28, 2018 which had been sent to the petitioner.

14. After recording the charges, the respondent no.1-Council recorded in the impugned order that the Council then deliberated in camera. It was further recorded that during the course of deliberations, apart from other points already noted, it was summed up that, as far as the writ petitioner was concerned, he had been working in the Department of Gastroenterology in spite of not holding any specialized qualification in this field of practice.

15. Upon such 'deliberations', the Council unanimously observed that the petitioner, along with other doctors concerned, were guilty of infamous conduct in professional respect and the name of the petitioner, along with two other doctors, was removed from the Register of Registered Medical Practitioners, being

maintained by the respondent no.1-council, for a period of three months from the date of communication of the order in this respect.

16. The first limb of the argument of the petitioner is, thus, that the respondent no.1 acted beyond jurisdiction in removing the name of the petitioner from the Register on a charge on which neither any notice was given to the petitioner nor was the petitioner heard (such charge being that the petitioner had been working in the Department of Gastroenterology in spite of not holding any specialized qualification in the field of practice). It is argued that the Apollo Gleneagles Hospital, despite the petitioner having fully disclosed all his qualifications in his Curriculum Vitae, deputed the petitioner at the Gastroenterology Department and as such, there was no fault on the part of the petitioner in suppressing his qualifications or otherwise. It is argued that the basic principle of natural justice was violated by punishing the petitioner on a charge which the petitioner was never confronted with or given any hearing on.

17. It is further argued that the Fundament Right to practice the medical profession, as guaranteed under Article 19(1)(g) of the Constitution, was violated by the impugned order. That apart, the petitioner was charged with 'infamous conduct' and not medical negligence, which was on a much higher footing than mere negligence. Infamous conduct, it is argued, was hinted at in Rule 37(iii) of the

Code of Medical Ethics framed by the respondent no.1 itself. In the said provision, it is indicated that the instances of professional misconduct punishable therein (although not constituting a complete list of infamous acts which may be punished by erasure from the Register) were indicated in Rule 39 of the said Rules. Rule 39 reads as follows:

"39: <u>Offences for which disciplinary action may be taken by the Council are</u>:

(a) Adultery or Improper conduct or association with a patient.

(b) Conviction by Court of Law for offences involving moral turpitude/Criminal Act.

(c) Misconduct:

The following acts of commission or omission on the part of a physician shall constitute professional misconduct rendering him/her liable for disciplinary action

(d) Violation of the Regulation:

(i) If he/she commits any violation of these Regulations.

(ii) If he/she does not maintain the medical records of his/her indoor patients for a period of three years as per regulations 3.1 and refuses to provide the same within 72 hours when the patient or his/her authorized representative makes a request for it as per the regulation 3.2.

(iii) If he/she does not display the registration number accorded to him/her by the State Medical Council or the Medical Council of India in his clinic,

prescriptions and certificates etc. issued by him or violates the provisions of regulation 4.

(e) Sex Determination Tests:

On no account sex determination test shall be undertaken with the intent to terminate the life of a female foetus developing in her mother's womb, unless there are other absolute indications for termination of pregnancy as specified in the Medical Termination of Pregnancy Act, 1971. Any act of termination of pregnancy of normal female foetus amounting to female foeticide shall be regarded as professional misconduct on the part of the physician leading to penal erasure besides rendering him liable to criminal proceedings as per the provisions of this Act."

18. The petitioner, it is argued, did not come within the periphery of any of such acts.

19. Rule 38, on the other hand, provided for disciplinary action by the respondent no.1 which are as follows:

"38. Disciplinary Action may be taken by West Bengal Medical Council as follows:

(i) Censure

(ii) Warning: First warning is not to be recorded in the Registration Certificate but the subsequent warning is to be recorded in the Registration Certificate.

(iii) *Removal of name of the Registered Practitioner for a specific period upto 3 years or permanently according to the nature of offence and the decision to be taken by the West Bengal Medical Council."*

20. It is argued that the notice sent to the petitioner at the first instance threatened of the ultimate punishment of removal of name from the Register, instead of even giving a hearing or intending to hear the petitioner on the lesser punishments of censure or warning. This, in itself, reeked of bias.

21. In this context, learned senior counsel cites a judgment reported at *(1998) 8 SCC 1 [Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others]*, wherein it was inter alia held that an alternative remedy would not operate as a bar in at least three contingencies, namely where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. The aforesaid judgment was followed in the next judgment cited by learned senior counsel for the petitioner, reported at *(2007) 9 SCC 593 [POPCORN Entertainment and another vs. City Industrial Development Corpn. and another]*.

22. Learned senior counsel thereafter cites a judgment reported at *(2019) 2 SCC 282 [S.K. Jhunjhunwala vs. Dhanwanti Kaur and another]*, wherein it was indicated, by following the *Jacob Mathew's* case, a celebrated judgment in the field, that the standard of care required by professionals generally, and medical practitioners in particular, followed from law laid down in *Bolam vs. Friern Hospital Management Committee [(1957) 2 All ER 118 (QBD)].* It was reiterated that the standard of care is judged in the light of knowledge available at the time of the incident and not the date of trial. The standard to be applied for judging whether the person charged has been negligent or not would be that of an ordinary competent person exercising ordinary skill in that profession. It was not possible for every professional to possess the highest level of expertise or skills in the branch in which he practices. As such, the standards of a reasonably competent practitioner in his field were what were to be applied in adjudicating negligence of a medical practitioner.

23. Learned senior counsel relies on *Kusum Sharma and others vs. Batra Hospital and Medical Research Centre and others* reported at *(2010) 3 SCC 480,* in particular paragraph no. 89 thereof, to reiterate the proposition that a medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine

without a halter round his neck. It was further held that it was our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

24. Learned senior counsel next cites a judgment reported at *(2009) 12 SCC 78 [Union of India and others vs. Gyan Chand Chattar],* for the proposition that an enquiry is to be conducted against any person giving strict adherence to the statutory provisions and principles of natural justice. The charges should be specific, definite and giving details of the incident which formed the basis of charges. No enquiry can be sustained on vague charges. Enquiry has to be conducted fairly, objectively and not subjectively. Finding should not be perverse or unreasonable, nor should the same be based on conjectures and surmises. There is a distinction between proof and suspicion. Every act or omission on the part of the delinquent cannot be misconduct. The authority must record reasons for arriving at the finding of fact in the context of the statute defining misconduct.

25. Lastly, learned senior counsel for the petitioner cites a judgment reported at *2019 SCC OnLine SC 932 [Maharashtra Chess Association vs. Union of India and others]*, wherein it was held by the Supreme Court, inter alia, that the principle, that the writ jurisdiction of a High Court can be exercised where no adequate

alternative remedies exist can be traced to early times. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the aggrieved party having other adequate legal remedies. The mere existence of alternative forums, where the aggrieved party may secure relief, does not create a legal bar on a High Court to exercise its writ jurisdiction. It is only one of the factors to be taken into consideration by the High Court amongst several others.

26. It is argued that in the event there is an injustice, the writ court cannot shut its eyes to it.

27. Learned counsel appearing for the respondents-authorities argues that an alternative remedy is available to the petitioner under Section 26 of the 1914 Act as well as under Section 24 of the Indian Medical Council Act, 1956 (hereinafter referred to as "the 1956 Act"). Rule 27 of the Indian Medical Rules, 1957 make it amply clear that the provision of Section 24 of the 1956 Act operates as a second appeal from the appellate jurisdiction exercised under Section 26 of the 1914 Act.

28. It is submitted that the petitioner has come with unclean hands since it has been pleaded in paragraph no. 39 of the writ petition that no alternative efficacious remedy is available to the petitioner.

29. Learned counsel for the respondents-authorities, in particular the respondent no. 1, argues further that Section 25, read with Section 17, of the 1914 Act provides that a majority of two-thirds of a specialized body of people can remove a medical practitioner from the Register of such Practitioners.

30. The rules framed under Section 33(2)(I)(d) of the 1914 Act, as amended, provides an elaborate procedure for conducting such enquiries and there is no question of any bias in that regard. It is further submitted that Form V, under Rule 10 of the said Rules, provides a format for a notice to be given to the practitioner-in-question under Section 17 or 25 of the 1914 Act, which stipulates that the Council would consider the charges mentioned in such notice and decide whether or not they should direct that the practitioner's name shall not be registered or that his name be removed from the Register of Registered Practitioners. As such, the notice given to the writ petitioner was in consonance with the said form and did not indicate any pre-meditation in that regard. Learned counsel relies on the judgment reported at *(2014) 5 Supreme Today 735 [Gorkha Security Service vs. Government of India].* Placing particular reliance on paragraph nos. 12 to 20 of the said judgment, it is argued that if a notice does not contain the highest punishment of blacklisting, no punishment could be meted out by blacklisting the noticee and the notice would be bad. As opposed thereto, in the present case, the respondent no. 1 has mentioned the highest punishment which could be

given to the petitioner in the notice and as such, the respondent no. 1 could not be faulted for doing that. A lesser punishment could always be meted out to the petitioner despite such notice.

31. By relying on the judgment reported at *(2003) 12 SCC 578 [State (Union of India) vs. Ram Saran],* it is argued that paragraph no. 8 thereof lays down that the provision of a special statute is to be strictly followed and such cases cannot be governed by the general law. As such, it is argued that the appeals provided in the special statutes-in-question ought to have been resorted to by the petitioner.

32. Relying on the judgment reported at *(2011) 5 SCC 305 [State of Uttar Pradesh vs. and others vs. Hirendra Pal Singh and others],* it is submitted that where grant of stay amounts to grant of final relief, such stay ought not to be granted. In this case, it is submitted that Gazette Notification of the removal of the name of the petitioner has already been published and as such, the grant of stay would create many complications.

33. Learned counsel next relies on the judgment reported at *(2004) 6 Supreme Today 509 [Management of Krishnakali Tea Estate vs. Akhil Bhartiya Chah Mazdoor Sangh]* for the proposition that an additional fact can be taken if evidence is available on it, even if no charge was framed to that effect.

34. By relying on the case of *Som Datt Datta vs. Union of India and others*, reported at *AIR 1969 SC 414*, it is argued that reason is not always necessary, if not provided for in the statute. Since Section 25 of the 1914 Act does not contemplate any reason being assigned, it could not be said that the impugned order was vitiated due to lack of reasons. By relying on the third edition of Halsbury's Laws of England (Volume 26), the definition of "infamous conduct" was argued by learned counsel for the respondent no.1. Section 129 of the said volume defines infamous conduct, which is as follows:

> **"129. Infamous conduct.** *Infamous conduct means serious misconduct judged according to the rules, written and unwritten, which govern the medical profession (g). If it is shown that a practitioner has done something in pursuit of his profession which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competence, it is open to the disciplinary committee to say that he has been guilty of infamous conduct in a professional respect. The question is, not whether what was done was an infamous thing for anyone else to do, but whether it was an infamous thing for a medical practitioner to do. All act which is not done in a professional respect does not come within the definition (h)."*

35. In the present case, although the complaint by the patient's family did not contain the name of the petitioner specifically, it might not have been possible for the said complainants to know the complete details of the negligence, amounting

to infamous conduct. It was sufficient, it is argued, that during investigation, the involvement of the petitioner was found out and a notice was sent indicating the charge against him. During enquiry, it is argued, other charges came out, for which the petitioner was punished. Such charges have been categorically laid down at page 104 of the present writ petition, which is a part of the impugned order, and the final summing up at page 106 indicates that the charge of not being qualified, as alleged, was not the sole ground for removal of the name of the petitioner. Deposition and other factors were also taken into consideration.

36. It is specifically argued that since there is a specialized body in the form of an appellate forum, this court should not entertain the present application under Article 226 of the Constitution of India.

37. Learned counsel for the State adopts the same argument as to the writ petition not being maintainable. In this regard, the judgment reported at *(2003) 3 SCC 186 [Cellular Operators Association of India and others vs. Union of India and others],* was referred to.

38. Regarding *Whirlpool (supra)*, learned counsel for the respondent no.1 argues that the present case does not fall within the exceptions provided therein for interference under Article 226 despite the existence of alternative remedy. It is argued that the petitioner was registered with the respondent no. 1-council and

was bound by its Code of Ethics. As such, the respondent no.1-council had jurisdiction to mete out the punishment to the petitioner. The Code of Ethics relied on by the petitioner itself indicates, in Rule 37(iii) thereof, that the misconduct indicated therein are not exclusive or comprehensive.

39. As far as fundamental rights are concerned, learned counsel for the respondent no.1 indicates that clause (6) of Article 19 of the Constitution prohibits the exercise of such right and such right is not unfettered.

40. It is lastly argued that the violation of natural justice, as alleged, is not codified but general. In the present case, the statute provides for a specific procedure, read with the rules-in-question, which were followed by the respondent no.1. In the event of general principles of natural justice clashing with a particular statute, the statute shall prevail, as in the present case. Thus, it is argued that the writ petition ought to be dismissed.

41. The first question which crops up in this context is whether this court has jurisdiction under Article 226 of the Constitution of India to interfere in the matter at all, in view of the appellate provisions provided in Section 26 of the 1914 Act as well as under Section 24 of the 1956 Act, read with Rule 27, of the Indian Medical Council Rules, 1957 (hereinafter referred to as "the1957 Rules").

42. *Whirlpool (supra)* is a landmark judgment in this context, the principle of which has also been followed in the *POPCORN* Case *(supra)*. Paragraph no.15 of *Whirlpool (supra)* lays down the three contingencies where alternative remedy would not be a bar for the constitutional courts to interfere under the writ jurisdiction. Such three contingencies are:

(a) Where the writ petition has been filed for the enforcement of any of the Fundamental Rights or;

(b) Where there has been a violation of the principle of natural justice or;

(c) Where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

43. The judgment of *Maharashtra Chess Association vs. Union of India and others*, reported at *2019 SCC OnLine SC 932*, lays down that the mere existence of alternative forums does not create a legal bar on a High Court to exercise its writ jurisdiction but is one of the factors to be taken into consideration amongst several others. The High Court, it was held, must look at the case holistically and make a determination as to whether it would be proper to exercise its writ jurisdiction.

44. The present case, thus, has to be tested on such yardsticks as laid down in the aforesaid judgments.

45. The first ground taken by the petitioner is that the petitioner was removed from the Register of Registered Medical Practitioners on a charge which was never communicated to the petitioner, thereby not granting any opportunity to the petitioner to disprove the said charge. It is further argued that the initial complaint lodged by the parents of the deceased patient did not name the petitioner at all.

46. The initial complaint dated May 17, 2017, specifically named Dr. Vaishali Roy Srivastava and also referred to the members of her unit, including resident doctors, nursing staff and others, apart from other doctors.

47. Attributing a liberal interpretation to the complaint lodged, since the death of a little child deserved extra care and caution, it may be construed that the expression "resident doctors" included the writ petitioner as well. As such, the non-mention of the petitioner by name in the complaint might well have been due to ignorance of the patient's parents regarding the specific names of all concerned, which is rightly argued on behalf of the respondent no. 1.

48. However, the communication sent to the petitioner by the respondent no.1 on February 28, 2018, mentioned primarily the charge that the petitioner had

prescribed to administer a controversial drug, Exelyte, to the baby. It was also alleged therein that the petitioner did not assess the level of Serum Calcium before sending the baby for 'scopy'. The other allegations were that the baby was admitted to the petitioner's tertiary care in the Hospital and the petitioner did not bother to have the baby checked by any pediatric physician. It was further alleged that the petitioner did not care to find whether the anesthetist concerned checked the baby prior to sending to 'scopy'.

49. On such grounds, the said notice directly issued a threat that it would decide whether or not the respondent no. 1 should direct that the petitioner's name be removed from the Register pursuant to Section 17/25 of the Bengal Medical Act, 1914.

50. In this context, it is immediately seen that Section 17 of the 1914 Act has no applicability in the matter, since the same pertains to persons possessing any of the qualifications referred to in the Schedule being entitled to be registered. The said section, as such, relates to registration for the first time and not de-registration.

51. Section 25 is more applicable to the present case, in particular Section 25(a)(ii). The said provision proceeds on the premise that there was an "infamous conduct in any professional respect" and provides that, after "due enquiry", if the person

concerned is found guilty by a majority of two-thirds of the members present and voting at the meeting, the person shall be removed from the Register or be warned.

52. In this context, learned senior counsel for the petitioner has argued that the allegation against the petitioner does not amount to infamous conduct. Moreover, the notice-in-question did not mention about the lesser punishment of being warned.

53. In support of such submissions, the petitioner also relied on the Code of Medical Ethics formulated by the respondent no.1 itself, Section 38 of which provides for disciplinary action which may be taken by the respondent no. 1. The notice mentioned the third and maximum action mentioned in Section 38, that is, the removal of name from the Register for a period up to three years or permanently, but omitted to mention the first disciplinary action, of censure and the second, of a first warning to be issued to the practitioner.

54. The petitioner's further point is that Section 39 of the said Code of Ethics indicates the offences for which disciplinary action may be taken by the council. Examples of such offences are, adultery or improper conduct or association with the patient, conviction by a court of law for offences involving moral turpitude/ criminal acts. The misconduct envisaged in Section 39 pertains also to violations

of the Regulations, not maintaining medical records of the indoor patients for a period of three years as per regulations, refusal to provide the same within 72 hours when the patient or his/her authorized representative makes a request for it, not displaying the registration number accorded to him / her in the clinic, prescription, certificates etc. or violation of Regulation 4 thereof and relating to sex determination tests. There is substance in the contention of the petitioner that the "infamous conduct in any professional respect", since not defined in the 1914 Act, has to be read in the light of *pari materia* material, as available from the Code of Medical Ethics framed by the respondent no.1 itself. The high level of misconduct which would tantamount to infamous conduct, as reflected in Section 39 of the Code of Ethics, is absent in the present case and as such, did not confer power on the respondent no. 1 under Section 25(a)(ii) to conduct any enquiry at all. From the inception, there arose no question of any complaint as regards negligence and the petitioner was never heard on medical negligence as well. The only allegation levelled was of infamous conduct on the charges as formulated in the notice dated February 28, 2018. It is thus palpable that, in any event, infamous conduct, as contemplated in the statute, was not even alleged by the respondent no.1 against the petitioner.

55. In this context, the respondent no. 1 has referred to Halsbury's Laws of England (third edition), Volume 26, in Section 129 of which the expression "infamous

conduct" was explained. It is seen that such conduct has to be of a level which is done in the pursuit of the profession of the medical practitioner and would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competence. The question was whether the act was infamous in the context of the medical practice of the person concerned.

56. In any case, "infamous", even as per the dictionary meaning, like its counterpart "famous", cannot refer to a single deed, unless it is so abominable and disgraceful that it would bring the entire medical community to disrepute. "Infamy", by its very definition, has to be over a period of time to make a person well-known for some bad quality or deed. The notoriety and disrepute associated with the outrageous or shocking act done by the concerned person can only attribute infamy on a person, in this context, regarding his professional conduct.

57. The allegation levelled in the notice to the petitioner pertained at best to alleged medical negligence and could not be elevated to the plane of infamy.

58. As such, the petitioner is correct in arguing that the respondent no. 1 had no jurisdiction at the outset, to exercise its power under Section 25(a)(ii) of the 1914 Act.

59. The next aspect which is required to be gone into is whether or not the principles of natural justice were violated in the present case. In this context, the judgment of *Gyan Chand Chattar (supra)*, cited by the petitioner, assumes relevance. In paragraph no. 35 of the said judgment, the Supreme Court held that the law can be summarized that an enquiry is to be conducted against any person giving strict adherence to the statutory provision and principles of natural justice. The charges should be specific, definite and giving details of the incident which formed the basis of the charges. No enquiry can be sustained on vague charges. An enquiry has to be conducted fairly, objectively and not subjectively. The findings should not be based on conjectures and surmises, since there is a distinction between proof and suspicion.

60. In the said reported judgment, the initiation of the enquiry against the respondent therein appeared to the Supreme Court to be the outcome of anguish of superior officers as there had been an agitation by the railway staff demanding the payment of pay and allowances. There was no case of substantial misdemeanour against the respondent therein except charge 6, which was totally vague.

61. In the context of the current uproar against medical practitioners in general, on the slightest pretext, and the resultant backlash being suffered by patients (which

is quite natural) in the patients not being admitted to emergency units readily and having to undergo several diagnostic tests, sometimes unnecessarily, before a doctor issues a certificate or a prescription, simply to protect themselves from public reaction, which has created an unnecessary pressure on the functioning of the medical practitioners, can be equated with the situation in the reported judgment of *Gyan Chand Chattar (supra).*

62. Taken in proper perspective, the judgment of *Kusum Sharma (supra)* also cited by the petitioner, in principle numbers VIII and IX of paragraph 89 thereof, succinctly puts the situation in proper perspective. It is stated therein that it would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck. It was reminded by the Supreme Court in the said judgment that it is the bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension. Such security to the medical professionals, in turn would ensure proper healthcare, which enures to public benefit. These aspects also lend a public interest ingredient in the matter, all the more justifying the interference by this court under Article 226 of the Constitution of India. The doctors, who are administering professional help to the patients, thereby virtually discharging a function of the State as guaranteed by the Constitution of

India, being Article 47 of the Constitution, which casts a duty on the State to raise the level of nutrition and the standard of living and to improve public health, as well as the right to protection of life as inherent in Article 21 of the Constitution of India, which has been interpreted several times to mean a healthy and full life, are entitled to the protection of law for discharging such functions, in the event the respondent no.1 creates an impediment thereto.

63. Another argument raised by the respondent no.1, that since the petitioner subjected himself to the respondent no.1 and its rules by registering himself as a medical practitioner, contains a basic fallacy. There has to be clarity on the concept of the right to pursue the medical profession. Such a right emanates from Article 19(1)(g) of the Constitution of India (being the *grundnorm* of all statutes in India), which confers on all citizens the right to practice any profession, or to carry out any profession, trade or business. The right to practice does not emanate from, or is created by, either the 1914 Act or the 1956 Act. The said Acts are merely statutes for the purpose of regulating medical practice and do not, by themselves, confer the right to practice.

64. In the event a person has the necessary qualifications and merit to claim registration as a medical practitioner under the Register, the respondent no.1 is

bound to register the name of such person; otherwise Article 14 of the Constitution would be squarely violated.

65. As such, it cannot be claimed by the respondent no. 1 that since the right to practice is conferred and/or created by the 1914 Act, the petitioner is bound by the said Act as far as the appellate provisions are concerned.

66. That apart, the judgments cited by the respondent no. 1 on the proposition that when a statute confers a right, the same has to be strictly followed, does not concern the present case, since such strict adherence to procedure is confined to the acts done under the statute. A right of appeal is a creature of statute and is independent of such procedure and as such, the principle-in-question only governs the actions taken by the respondent no.1 under the statute and not the preference of an appeal under the said Act.

67. That apart, both Section 24 of the 1956 Act and Rule 27 of the 1957 Rules envisage appeals on any ground other than that the person concerned is not possessed with the requisite medical qualifications. In the present case, as evident from the finding arrived at against the petitioner at page 106 of the writ petition, the ground for removal of the petitioner from the Register was only that he had been working in the Department of Gastroenterology in spite of not holding any specialized qualification in this field of practice. Such allegation falls squarely

within the exceptions enumerated in Section 26 and Rule 27, as mentioned above, pertaining to a person not possessing the requisite medical qualifications. Hence, in any event, any appeal under the said provision of the Central Acts and Rules is automatically ruled out by the provisions of those statutes themselves.

68. The only possible alternative remedy which could be available to the petitioner was an appeal under Section 26 of the 1914 Act. The 1914 Act contemplates the State Government as a forum of appeal. Such provision, by itself, defeats the logic in the argument of the respondent no.1 that the respondent no. 1 is comprised of people having expertise in the field and their decision being final as per the contemplation of the statute for such reason. The argument, that this court ought not to interfere under Article 226 of the Constitution of India with the decision of such experts, is defeated by the fact that the High Court is manned by Judicial Officers undergoing a minimum period of legal training and, at least as perceived, expertise in the field. This is squarely opposed to the 'State Government' as the appellate forum, which would at best be comprised of bureaucrats, not having such legal training. In such a scenario, it is doubtful as to whether an appeal to the State Government is an equally efficacious remedy, particularly in the context of *Whirlpool (supra),* rather than a writ petition under Article 226 before this court.

69. Even without such threadbare discussion about appellability of the instant decision, the said decision reeks of rampant violation of natural justice.

70. Although it has been argued that the decision (at page 106 of the writ petition) refers to "other points already noted", the context of the same was not other reasons for removal of the petitioner's name from the Register. The exact expression used in the sentences is that "during the course of deliberations, apart from other points already noted, it was summed up that:" after which the charges for removal of the concerned doctors followed. The narrative prior to such summing up in the impugned order is only comprised of the charges that were framed against the person concerned and the fact that they were called, apparently for hearing and then discharged. As such, the expression "other points already noted", do not refer to any ground or reason for dismissal but merely narrated the charges originally formulated against the concerned physicians. Hence, the only ground on which the writ petitioner's name was struck out from the Register was that he had been working in the Department of Gastroenterology in spite of not holding any specialized qualification in the field of practice.

71. First, the petitioner did not suppress anything (nor is there any allegation in that regard within the four corners of the notice or the impugned order) by furnishing

his entire Curriculum Vitae. It was the hospital which, knowing fully well the qualifications of the petitioner, engaged the petitioner in the Gastro Department, for which there was no responsibility, let alone fault, at all on the part of the petitioner.

72. Moreover, the charges which were levelled against the petitioner, both in the notice dated February 28, 2018 and as narrated in the impugned order dated October 25, 2019, do not include anywhere the ground that the petitioner had been working in the Department of Gastroenterology in spite of not holding any specialized qualification in this field of practice, although that was the sole ground on which the maximum punishment of de-registration was meted out to the petitioner.

73. This itself is a gross violation of the principles of natural justice.

74. Seen from another perspective, the "hearing" which was given to the petitioner was on the charges originally formulated in the notice against him, which did not contain the ground on which he was ultimately punished. Hence, the so-called hearing given to the petitioner was mere lip-service to the principle of *audi alteram partem* and no hearing worth the name was given at all on the ground for which the writ petitioner was ultimately punished.

75. That apart, the argument of the respondent no. 1, that the petitioner was not entitled to any hearing or reasons for the punishment at all, is also erroneous. The judgment cited in this context related to the Army Act. The principle governing the disciplined forces has given rise to the jurisprudence on the law relating thereto. The cardinal principle in such cases is that the alleged offender has to strictly comply with the directions of his superiors and to maintain discipline much above the standard of normal citizens, because of the nature of job they are performing. As such, a judgment on the Army Act, which has been cited by the respondent no.1, could not operate as a precedent in respect of the medical council, which is comprised of a body of medical practitioners and do not have any expertise in the judicial field.

76. The 'expertise' argument also vanishes into thin air if we consider the violation of natural justice in the present case. If the allegation was one of medical negligence, involving technical issues, undoubtedly the respondent no. 1-council would be aided by the expertise of its members to deal with the same. However, the flimsy single ground on which the petitioner was removed from the Register does not require any medical expertise but requires jurisprudential expertise, which medical practitioners are not otherwise expected to have.

77. In such view of the matter, it cannot be argued that the decision of an expert body should not be interfered with by this court, particularly in view of the gross violation of natural justice as indicated above.

78. It must further be mentioned that the categorical expression used in Section 25(a)(ii) is that "due enquiry" is a pre-requisite of a decision by voting. In the present case, the enquiry held, although giving a pseudo-opportunity to the petitioner to be heard, did not give any hearing at all on the ground on which he was ultimately removed. That apart, the said ground was not even in the control of the petitioner or the act of the petitioner at all, let alone an infamous conduct in his professional field. The service required to be rendered as per the judgments cited by the petitioner, is that of an ordinary professional having normal skills and not of the highest standard expected from a professional person of the said field. It was held in *Kusum Sharma (supra)* that a medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. There is no discussion at all and/or material to support the assumption that the petitioner failed in that regard, let alone committing any infamous act of such a notorious nature that it would bring his profession to disrepute and justify his removal from the Register, at the cost of his livelihood and casting an indelible stigma on the writ petitioner.

79. As it has already been held that the petitioner's right to practice is not merely a creation of the 1914 Act but is guaranteed by the Constitution, this court has ample jurisdiction to look into the violations of natural justice which have taken place in this case, as indicated above.

80. Clause (6) of Article 19 of the Constitution deserves mention in this regard, since the same imposes certain fetters to the right guaranteed under Article 19(1)(g). A mere perusal at Clause (6) indicates that nothing in sub-clause (1) (g) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by the said sub-clause. The expression "reasonable" has to be read into the actions of the respondent no.1 in the present case, which actions virtually defy all logic and seems a merely impromptu reaction on the part of the respondent no.1 to find out a scapegoat in the writ petitioner to absolve themselves of liability on the face of public uproar in respect of medical negligence which, in general, is at present afflicting the State of West Bengal.

81. Moreover, it is provided in clause (6) of Article 19 that the imposition of restrictions by the State law has also to be in the interest of the general public.

82. Although, undoubtedly, the concerned ethics are for the benefit and in the interest of the general public, it is also in the interests of the general public that

they are not deprived of proper medical assistance and care altogether, due to a reasonable backlash from the doctors, in the event medical practitioners are victimized irrationally on a regular basis and suffer unwarranted onslaught from the public and/or, at the behest of the public, by their own council.

83. Borrowing the language of *Kusum (supra)*, it would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck and it is the bounden duty and obligations of civil society to ensure that medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension. The said principle has also to be factored in while interpreting the expression "interests of the general public" as embodied in Clause (6) of Article 19 of the Constitution of India. Read in such light, the provisions of the 1914 Act cannot confer unfettered right on the respondent no.1 to make scapegoats out of innocent medical practitioners merely to avoid public criticism.

84. In view of the aforesaid discussions, the writ petition succeeds.

85. Accordingly, W.P. No.21498(W) of 2019 is allowed, thereby setting aside the order dated October 25, 2019 passed in the extraordinary meeting of the West Bengal Medical Council (respondent no.1), in so far as the same relates to the writ petitioner. Accordingly, the writ petitioner is absolved from the charges

levelled against him and the removal of the name of the petitioner from the Register of Registered Medical Practitioners is revoked. The rights of the petitioner to practice in the hospital concerned as well as anywhere else, to which he is otherwise entitled as per such registration, are revived from the date of this order. The respondent no.1 is directed to publish in appropriate Gazette Notifications and in all other modes, by which the removal of the name of the petitioner from the Register was published, to inform the general public that the said decision of removal has been revoked and the petitioner's name is reinstated in the Register of Registered Medical Practitioners. Such exercise shall be completed by the respondent no.1 within three weeks from date.

86. Due to the unnecessary harassment, stigma and loss of goodwill suffered by the petitioner, the respondent no. 1-council shall pay costs of Rs. 50,000/- to the writ petitioner within a fortnight from date.

87. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)