

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 589/2021

Dr. Ashok s/o Shrawan Bawaskar,
Akshay Hospital, Khamgaon, Jhunjhunwala Plot,
Civil Lines, Khamgaon, Dist. Buldana – 444 303.

PETITIONER

.....VERSUS.....

1. The National Medical Commission,
through its Registrar, Pocket-14, Sector-8,
Dwarka Phase-I, New Delhi – 110 077.
2. The Ethics and Medical Registration Board,
c/o National Medical Commission, Pocket-14,
Sector-8, Dwarka Phase-I, New Delhi – 110 077.
3. The Maharashtra Medical Council, Mumbai,
through its Registrar, 189-A, Anand Complex,
First Floor, Sane Guruji Marg, Arthur Road Naka,
Chichpokali (West), Mumbai – 400 001.
4. Buldana District Pathology Association,
through its Secretary, Dr.Gopal Murlidhar Soni,
Soni Pathology Laboratory and Blook Bank,
Farshi, Main Road, Buldana – 444 303.

RESPONDENTS

Shri Shajal S. Sarda, counsel for the petitioner.
Mrs. Radhika G. Bajaj, counsel for the respondent nos.1 and 2.
Shri V.P. Panpalia, counsel for the respondent no.3.

CORAM : A. S. CHANDURKAR AND SMT. M.S. JAWALKAR, JJ.

DATE : 06TH APRIL, 2022.

ORAL JUDGMENT : (PER : A.S. CHANDURKAR, J.)

RULE. Rule made returnable forthwith and heard the learned
counsel for the parties.

2. This writ petition filed under Articles 226 and 227 of the Constitution of India raises a question as regards the power of the Ethics and Medical Registration Board to stay the disciplinary action taken by the State Medical Council against a registered medical practitioner for professional misconduct while considering an appeal preferred to it against such action under Section 30(3) of the National Medical Commission Act, 2019 (for short, 'the Act of 2019'). According to the Ethics and Medical Registration Board there is no power conferred on it to stay an order passed by the State Medical Council taking disciplinary action against a registered medical practitioner or a professional while considering such appeal.

3. The petitioner is a registered medical practitioner and his name is registered with the Maharashtra Medical Council. A complaint was filed against the petitioner on 17.05.2018 by the fourth respondent with the Maharashtra Medical Council. The petitioner was called upon to submit his explanation which he did on 27.06.2018. The petitioner was then served with a notice of charges on 10.10.2019. It was stated that the petitioner had violated Articles 1.1.1, 1.1.2, 1.4.1 and 1.9 of Chapter-I of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (for short, 'the Regulations of 2002'). The petitioner submitted his reply to the aforesaid statement on 24.10.2019. Thereafter on 02.12.2020, an order was passed by the Maharashtra Medical Council

holding that the petitioner was found negligent and involved in gross professional misconduct. On that count, the Maharashtra Medical Council directed removal of the petitioner's name from the register of the Council for a period of two months. The said punishment was to be implemented on expiry of the appeal period. The petitioner was informed that he could prefer an appeal against that order to the Ethics and Medical Registration Board as provided under Section 30(3) of the Act of 2019. On 08.12.2020, the petitioner filed a review application before the Maharashtra Medical Council which on 17.12.2020 informed the petitioner that there was no provision for reviewing its decision. Thereafter the petitioner on 22.12.2020 filed an appeal under Section 30(3) of the Act of 2019 challenging the order dated 02.12.2020. Alongwith that appeal, the petitioner also filed an application for grant of stay to the order dated 02.12.2020 during the pendency of the appeal. Since the petitioner did not receive any notice of hearing from the National Medical Commission he on 08.01.2021 issued a communication requesting that his matter be placed before the Ethics and Medical Registration Board. The petitioner was informed by the Ethics and Medical Registration Board that there were some deficiencies in his appeal which were required to be removed. The petitioner took steps to remove those deficiencies by his communication dated 11.01.2021. The petitioner on 19.01.2021 addressed a mail to the Ethics and Medical Registration Board praying that his stay application be considered. Since no cognizance of this as well as the subsequent

communication dated 24.01.2021 in that regard was taken, the petitioner approached this Court by filing the present writ petition on 29.01.2021 seeking a direction to be issued to the Ethics and Medical Registration Board to decide his application for stay and/or the appeal preferred by him under Section 30(3) of the Act of 2019. After the filing of the writ petition, the petitioner was informed by the Ethics and Medical Registration Board on 12.02.2021 that since there was no provision in the Act of 2019 to grant interim relief the request made by the petitioner in that regard could not be considered. By amending the writ petition, the petitioner has also challenged the communication dated 12.02.2021 issued by the Ethics and Medical Registration Board.

4. Shri Shajal Sarda, learned counsel for the petitioner submitted that under the provisions of Section 30(3) of the Act of 2019 the petitioner had preferred an appeal challenging the disciplinary action taken against him by the Maharashtra Medical Council. The Ethics and Medical Registration Board had the jurisdiction to set aside the order passed by the Maharashtra Medical Council while finally deciding the appeal. If the Ethics and Medical Registration Board could set aside the order of the Maharashtra Medical Council in exercise of appellate power it could during the pendency of an appeal before it also stay the order passed by the Maharashtra Medical Council. According to him, the disciplinary action taken against the petitioner was to be implemented after expiry of the

appeal period. Since the petitioner had filed the appeal within the prescribed period, it was likely that even before the appeal was finally decided the order of punishment of removal of the petitioner's name from the register of the Council would be implemented. This would render the appeal infructuous. Placing reliance on the decision in *Sakiri Vasu Versus State of Uttar Pradesh & Others* [(2008) 2 SCC 409] it was submitted that there was an implied power with the Ethics and Medical Registration Board to pass incidental interim orders during the pendency of the appeal. He therefore submitted that the interim protection granted by this Court on 29.01.2021 be continued till the appeal preferred by the petitioner was finally decided by the Ethics and Medical Registration Board by allowing the writ petition.

5. Mrs. Radhika Bajaj, learned counsel for the respondent nos.1 and 2 relied upon the reply filed on behalf of the said respondents and submitted that the Act of 2019 had repealed the Indian Medical Council Act, 1956. In view of provisions of Section 61(2) of the Act of 2019 the Regulations of 2002 were still applicable to the Ethics and Medical Registration Board till they were replaced by new Regulations that would be framed under Section 57 of the Act of 2019. The Regulations of 2002 did not provide any power to the Ethics and Medical Registration Board to stay or grant any interim protection to the concerned medical practitioner during the pendency of an appeal

preferred by him against the order passed by the State Medical Council. It was in this backdrop that there being no provision to grant interim relief, the petitioner's application for grant of stay could not be considered. It was further submitted that the appeal in question would be decided as required by Regulation 8.8 of the Regulations of 2002 in accordance with law.

Shri V.P. Panpalia, learned counsel for the respondent no.3 submitted to the orders of the Court.

6. We have heard the learned counsel for the parties at length and we have perused the documents on record. We have given due consideration to the relevant statutory provisions and we are of the view that on application of settled legal principles it would have to be held that the Ethics and Medical Registration Board has an implied power to stay the disciplinary action taken against a registered medical practitioner or a professional by the State Medical Board during the pendency of an appeal preferred by such aggrieved registered medical practitioner or professional under Section 30(3) of the Act of 2019.

7. The facts giving rise to the writ petition are not in dispute and it is common ground that against the disciplinary action taken by the Maharashtra Medical Council, the petitioner has filed

an appeal under Section 30(3) of the Act of 2019 which is to be considered by the Ethics and Medical Registration Board. The provisions of Section 30(3) of the Act of 2019 being relevant the same are reproduced hereunder:

“30. *State Medical Councils. – (1)*

2.

3. *A medical practitioner or professional who is aggrieved by any action taken by a State Medical Council under sub-section (2) may prefer an appeal to the Ethics and Medical Registration Board against such action, and the decision, if any, of the Ethics and Medical Registration Board thereupon shall be binding on the State Medical Council, unless a second appeal is preferred under sub-section (4).”*

Chapter VIII of the Regulations of 2002 relate to punishment and disciplinary action to be taken against the registered medical practitioner for professional misconduct. Regulation 8.8 thereof providing for the right to file an appeal reads as under:

“8.8 Any person aggrieved by the decision of the State Medical Council on any complaint against a delinquent physician, shall have the right to file an appeal to the MCI within a period of 60 days from the date of receipt of the order passed by the said Medical Council:

Provided that the MCI may, if it is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, allow it to be presented within a further period of 60 days.”

8. It is clear from the aforesaid provisions that a right of appeal against an order passed by the State Medical Council taking action against the registered medical practitioner or professional has been provided under Section 30(3) of the Act of 2019. There is no provision however conferring any power on the Appellate Authority to consider a request for staying the order of punishment as passed by the State Medical Council. It will therefore have to be considered as to whether there is an implied power with the Ethics and Medical Registration Board to consider the prayer for grant of stay to the order passed by the State Medical Council in the absence of any such express power being granted either by the Act of 2019 or under the Regulations of 2002.

In *Income Tax Officer, Cannanore Versus M.K. Mohammed Kunhi* [AIR 1969 SC 430] a somewhat similar question as regards the power of the Appellate Income Tax Tribunal under the Income Tax Act, 1961 to stay recovery of realisation of penalty imposed by the Departmental Authorities on an assessee during the pendency of an appeal before it was considered. After referring to the provisions of Section 254, 255 alongwith Section 131 of the Income Tax Act, 1961 it was found that such power had not been expressly conferred on the Appellate Tribunal. It was then observed that the right of appeal was a substantive right and questions of fact as well as law at large were open to review by the Appellate Tribunal. In a case where a penalty raising a large demand was imposed and the Appellate Tribunal was helpless in the matter of stay, the

entire purpose of the appeal would stand defeated if ultimately the orders passed by the Departmental Authorities were set aside. In paragraph 4 of the report it was observed as under:

“4. It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Sutherland Statutory Construction, Third Edition, Articles 5401 and 5402). The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective. In Domat’s Civil Law, Cushing’s Edition, Vol. 1 at page 88, it has been stated:

“It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it.”

Maxwell on Interpretation of Statutes, Eleventh Edition contains a statement at p. 350 that “where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.” An instance is given based on *Ex Parte, Martin*, (1879) 4 QBD 212 at p. 491 that “where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced.”

9. In *Grindlays Bank Limited Versus Central Government Industrial Tribunal & Others* [1980 (Supp.) SCC 420] the Hon’ble Supreme

Court considered the question as to whether the Industrial Tribunal had any jurisdiction to set aside an *ex parte* award when it was passed on evidence. It was noted that neither the Industrial Disputes Act, 1947 nor the Rules framed therein conferred any powers upon the Tribunal to set aside an *ex parte* award. In paragraph 6 of the said report it has been observed as under:-

“6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary.”

It was held that the Tribunal had the power to set aside an *ex parte* award.

10. We may note that in *Savitri Versus Govind Singh Rawat* [AIR 1986 SC 984] the question considered was whether a Magistrate before whom an application under Section 125 of the Code of Criminal Procedure, 1973 was made could make an interim order directing the person against

whom such application is made to pay reasonable maintenance to the applicant pending disposal of the application. After noting that there was no provision for passing of such interim order it was held that it was the duty of the Court to interpret the provisions in Chapter IX in such a way that the construction placed would not defeat the very object of the legislation. There being no express provision in that regard it was held that there was an implied power on the Magistrate to direct the person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance pending final disposal of the application.

11. Reference is also required to be made to the decision in *Super Cassettes Industries Versus Music Broadcast Private Limited* [AIR 2012 SC 2144] wherein the question considered was whether on a complaint made to the Copyright Board under Section 31 of the Copyright Act, 1957 the Board could pass an interim order in a pending complaint under Section 31(1)(b) of that Act. It was held that Tribunals discharging quasi-judicial functions are generally considered to be vested with incidental and ancillary powers to discharge their functions. Such incidental powers could be said to exist in order to preserve the *status quo* but not to alter the same. It is thus clear from the aforesaid decision that with a view to preserve the *status quo*, the existence of incidental powers has been recognized.

12. In the context of Section 30(2) of the Act of 2019 it is seen that a State Medical Council has the power to take disciplinary action against any professional or ethical misconduct by a registered medical practitioner or a professional. While doing so, it can impose penalty as prescribed. A remedy against such action by the State Medical Council is provided under Section 30(3) being an appeal to the Ethics and Medical Registration Board. A further remedy under Section 30(4) of the Act of 2019 is provided before the National Medical Commission against the order passed by the Ethics and Medical Registration Board. Under Chapter VIII of the Regulations of 2002 which continue to operate even today, punishment and disciplinary action has been prescribed. Under Regulation 8.2 the State Medical Council can direct removal either for a specified period or altogether the name of the delinquent registered medical practitioner or professional from the register maintained by it. The remedy of an appeal has been provided under Regulation 8.8 thereof. It is true that no provision has been made for staying the effect of the disciplinary action taken against a registered medical practitioner or a professional by the State Medical Council during the time the appeal preferred by such aggrieved registered medical practitioner or professional is considered either under Section 30(3) by the Ethics and Medical Registration Board or under Section 30(4) by the National Medical Commission. It is likely that as a consequence, by the time the appeal is decided the penalty awarded by the State Medical council would be suffered. As stated above, removal

from the register can even be for a specified period which period could come to an end even before the appeal is decided. It is in this backdrop that the incidental power to atleast preserve the *status quo* ought to be recognized as existing with the Ethics and Medical Registration Board while entertaining an appeal under Section 30(3) or with the National Medical Commission while entertaining an appeal under Section 30(4) of the Act of 2019. Recognition of such incidental power to stay the adverse action taken against a registered medical practitioner or a professional till the time such appeal is decided would make the appellate remedy more effective rather than being a remedy whereunder only final relief could be granted but no interim relief in aid of any final relief could be granted. As held in *Sakiri Vasu* (supra) when a power is given to an Authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. Such incidental or implied power with the Appellate Authority under Section 30(3) or 30(4) of the Act of 2019 to atleast preserve the *status quo* would therefore have to be recognized. We accordingly do so.

13. The facts of the present case are such that the State Medical Council has directed removal of the petitioner's name from the register of the Council for a period of two months from the date of the order. It is also directed that the punishment of removal from the register has to be implemented after the appeal period is over. The appeal preferred by the

petitioner is still pending though period of more than two months has passed. But for the interim orders passed by this Court the punishment imposed would have been suffered by the petitioner even prior to adjudication of his appeal. The petitioner would be faced with *fait accompli* if after suffering the punishment, his appeal is allowed by the Ethics and Medical Registration Board. The Appellate Authority would not be in a position to then restore the name of the petitioner in the register for the period for which it was directed to be removed. The situation would become irreversible. It is in this context that recourse to incidental powers of the Appellate Authority is warranted.

14. In the light of aforesaid discussion, it is held that (A) The Ethics and Medical Registration Board while hearing an appeal under Section 30(3) of the Act of 2019 possesses incidental powers which power would include granting stay to an order of penalty imposed by the State Medical Council under Section 30(2) of the Act of 2019. The mode and manner in which such incidental power is to be exercised and the terms and conditions to be imposed while exercising such power would be a matter within the discretion of the Ethics and Medical Registration Board. (B) It is directed that till such time the petitioner's application for grant of stay is considered by the Ethics and Medical Registration Board, the order dated 02.12.2020 passed by the Maharashtra Medical Council, Mumbai shall remain stayed.

(C) Consequently the communication dated 12.02.2021 issued by the Ethics and Medical Registration Board informing the petitioner that there was no provision for granting interim relief pending consideration of the appeal under Section 30(3) of the Act of 2019 is quashed and set aside.

15. Rule is made absolute in aforesaid terms with no order as to costs.

(SMT. M.S. JAWALKAR, J.)

(A.S. CHANDURKAR, J.)

APTE