Constitutional Writ
PRESENT: The Hon'ble Mr. Justice Syamal Kanti Chakrabarti
Judgment on : February 17, 2010.
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W. P. 9740(W) of 2009
Dr. (Mrs.) Rupa Basu (Banerjee)
Vs
The State of West Bengal & Ors.

Point:
Power of appellate authority: When an appeal is preferred before any appropriate authority it is generally conceived that the appellate authority imbibes and assumes the entire power of the authority whose action is challenged before it - Bengal Medical Act, 1940- Ss. 25 , 26

Fact: The writ petitioner has challenged the order passed by the Principal Secretary, Department of Health and Family Welfare enhancing the penalty imposed upon her by the West Bengal Medical Council in respect of an allegation of negligence and violation of professional Ethics. The Council after due enquiry had decided to 'warn' the petitioner for professional misconduct and subsequently the Principal Secretary has decided that the name of the petitioner be removed by the West Bengal Medical Council for a period of six. The writ application has been filed on the ground that the said Principal Secretary acted as appellate authority in accordance with the provisions of Section 26 of the Bengal Medical Act, 1940 which has been impliedly repealed.

Held: Where the legislative wisdom is silent the findings of the appellate authority under Section 26 of the Act cannot be called in question or interfered with by the Writ Court on account of lack of professional experience or knowledge. More so when the report of the fact findings Penal and Ethical Cases Committee consisting of professional experts which found the petitioner guilty of professional misconduct has been conceded to by the Appellate Authority but the disagreement was only on enhancement of punishment from 'warning' to removal of name for six months from the Register. (Paragraph – 14)
To disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intendment. (Paragraph – 27)
In the absence of any thing in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed. Thus this

vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary. (Paragraph – 37)

When an appeal is preferred before any appropriate authority it is generally conceived that the appellate authority imbibes and assumes the entire power of the authority whose action is challenged before it. Once the State Government has identified the Principle Secretary, Health and Family Welfare Department, Government of West Bengal as the appellate authority in the instant case while exercising power under Section 26 of the Bengal Medical Act, the Secretary, Health and Family Welfare Department, Government of West Bengal assumes the entire power of the State Medical Council whose order is assailed before him. (Paragraph – 47)

Cases cited: (1999) 7 SCC 120 (Dr. Preeti Shrivastava –Vs- The State of MP and Ors.),
(2003) 8 SCC 490
(1998) 6 SCC 131
(2003) 8 SCC 490
(1998) 6 SCC 131
(1999) 7 SCC 120
AIR 1941 SC 16
AIR 1954 SC 1543
(2008) 4 SCC 720
(2006) 4 SCC 327
(2006) 8 SCC 279
(2007) 4 SCC 312
(1990) 2 SCC 288
AIR 2008 SC weekly 844
AIR 1984 SC 981
(2006) 4 SCC 327
(2005) 3 SCC 601
(2001) 5 SC 268
AIR 1953 SC 221.
AIR 1953 SC 221
1953 SCR 987 (Hossein Kasam Deda (India) Limited –Vs- Sate of MP)
In AIR 1967 SC 344
2006(4) SCC 327
2005 (3) SCC601
AIR 1964 SC 1511
AIR 1957 SC 540
(1976) 2 SCC 917
State of Bombay –Vs- Supreme General Films Exchange Limited, AIR 1960 SC 80
Dayabati –Vs- Inderjit, AIR 1966 SC 1423

AIR 1955 SC 314
1990(2) SCC 288
A 2008 SCW 844
A 1984 SC 981
2007 (4) Supreme 312
2006(8) SCC 279

For the Petitioner : Mr. Surajit Samanta,
Ms. Madhumita Roy,
Mr. Biswajit Samanta.
For the Respondent Nos. 1 & 2 : Mr. Joydip Kar,
Mr. Pratik Dhar,
Mr. Siddhartha Ghosh,
Mr. Surya Sarathi Saha.
For the Respondent No. 4 : Mr. Saugata Bhattacharyya,
Mr. Sayantan Mukherjee.
For the Respondent No. 3 : Mr. Saibalendu Bhowmik,
Ms. Manisha Bhowmik.
For the Respondent Nos. 5 & 6 : Mr. Subir Sanyal,
Mr. Ratul Biswas.

Syamal Kanti Chakrabarti, J.:

1. The present writ petitioner Dr. (Mrs.) Rupa Basu (Banerjee) has challenged the propriety and legality of the order dated 07.05.2009 passed by the Principal Secretary, Department of Health and Family Welfare, Government of West Bengal enhancing the penalty imposed upon her by the West Bengal Medical Council and in essence in this case authority of the appellate forum has been challenged after taking part in the proceedings before such forum having been dissatisfied with the enhanced punishment inflicted by such forum.

2. The fact of the case in a nutshell is that the petitioner is a qualified doctor having a registration certificate issued by the West Bengal Medical Council, the respondent no. 3 herein, and holds a diploma in Gynaecology and Obstatics from the Calcutta University and post graduate degree in the same field. Smt. Madhumita Baral, the respondent no. 6, is the wife of respondent no. 5, a railway employee. The respondent no. 6 conceived for the third time at the age of 34 years and instead of availing the railway medical facilities to which she is entitled as wife of a railway employee she had chosen admission in New Life Maternity Nursing Home, Chanditala, Hooghly under the petitioner and was admitted to the said

nursing home on 14.08.1999 for Lower Uterine Caesarian Section and bilateral tubectomy operation. Before that she was treated elsewhere and attended the OPD of Eastern Railways Hospital at Liluah on 23.07.1999 and was referred to Gynaecological department of B. R. Singh Hospital, Caluctta. On the morning of 15.08.1999 the patient underwent LUCS and bilateral tubectomy under the petitioner and gave birth to a female baby. Nine days thereafter, the said patient and her female baby were discharged from the nursing home on 24.08.1999. On 27.08.1999 on call the petitioner attended the respondent no. 6 for dressing the caesarian section scar. On 30.08.1999 the patient had a complaint of bleeding from the caesarian section scar and gave a call to the petitioner and the said complaint was taken care of by one Shri Asish Banerjee, a staff of the nursing home. But since the complaint persisted, Dr. Biplab Banerjee, the husband of the petitioner, who is also a medical practitioner, due to his social obligations visited the patient at her residence on 31.08.1999 and dressed the scar and prescribed medicines. The husband of the petitioner attended the said patient in the first week of September, 1999 at her residence on complimentary basis.

3. It further transpires that after birth of the female baby she has become a victim of “Birth Asplysia” and underwent prolonged treatment but expired on 18.02.2002 on way to B. R. Singh Hospital being referred to by the Chanditala Rural Hospital, Hooghly.

4. During the end of July, 2004, the petitioner received a memo bearing no. 1492-C/75-2004 dated 22.07.2004 from the West Bengal Medical Council through its Registrar with a copy of complaint dated 29.06.2004 of Shri Sushanta Kumar Baral, the respondent no. 5, alleging medical negligence against her and three other doctors namely, Dr. Ajay Kumar Paul, Dr. Amlan Sen and Dr. Biplab Banerjee. She gave her reply on 16.08.2004 denying and disputing each and every allegation complained of, i.e., allegation of negligence and violation of professional ethics. Thereafter, on 20.12.2004 she received another notice from the Registrar of the West Bengal Medical Council requesting her to appear before the Penal and Ethical Cases Committee on 29.12.2004 with all documents in original relating to the treatment of respondent no. 6. On 29.12.2004 she was examined by the Penal and Ethical Cases Committee and made her deposition. Thereafter, she received a memo bearing enquiry no. 229-C/75-2004 dated 21.12.2005 from the West

Bengal Medical Council containing the following four charges as she was found prima facie guilty of infamous conduct in professional respect.

5. The articles of charges are quoted below:-

"a) That you attended on Smt. Madhumita Baral during her antenatal period and admitted her in the New Life Maternity Hospital at Chanditala, Hooghly on 14.08.1999 and performed an elective Caesarean Section Operation (L.U.C.S.) on 15.08.1999. The operation was done by you with Spinal Anaesthesia though you have written as General Anaesthesia in the discharge certificate.

b) That knowing fully well that this pregnancy was a post-Caesar you did not care to take proper precaution during the operation and had taken an unqualified person to assist you during the operation.

c) That you did not care to take one Paediatrician in the operation theatre during the operation and thereafter for proper care of the baby.

d) That you have performed Tubectomy at the time of L.U.C.S. though the same was not indicated."

6. On 11.09.2008 the petitioner was informed by the Registrar, West Bengal Medical Council that after due enquiry the first three charges framed against her as mentioned in the notice of enquiry had been substantiated and the West Bengal Medical Council had decided to 'warn' the petitioner for professional misconduct. (Annexure P/18 to the Writ Petition).

7. On 18.03.2009 the petitioner received a communication from the department of Health and Family Welfare, Government of West Bengal with direction to appear before the Principal Secretary of the said Department for personal hearing in the matter of an appeal under Section 26 of the Bengal Medical Act, 1914 preferred by the complainant, i.e., respondent no. 5, Sushanta Kumar Baral challenging the decision of the Medical Council and on 08.12.2008 she was handed over a copy of such appeal (Annexure P/21 to the Writ Petition). And thereafter, she addressed a letter dated 21.04.2009 to the said Principal Secretary (Annexure P/22 to the Writ Petition). After conclusion of hearing on 03.04.2009 and 24.04.2009 the Principal Secretary, Department of Health and Family Welfare, Government of West Bengal by order dated 07.05.2009 has decided that the name of the petitioner be removed by the West Bengal Medical Council for a period of six months with effect from the date of receipt of the said order by the Council and

the said decision was communicated to her by the Special Secretary of the said Department in a communication dated 11.05.2009 (Annexure P/23 to the Writ Peititon).

8. The petitioner has now challenged the legality and propriety of such order of the Principal Secretary, Department of Health and Family Welfare, Government of West Bengal on the ground that the said Principal Secretary acted as appellate authority in the instant case in accordance with the provisions of Section 26 of the Bengal Medical Act, 1940 which has been impliedly repealed. It is her contention that the powers of the appellate authority against the orders of a State Medical Council is now vested with the Medical Council of India in terms of the provisions of rule 8.8 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

9. Learned lawyers for both the contending parties have concentrated their arguments regarding legality and propriety of such order of the Appellate Authority mainly on points of law relating to applicability of relevant Act and Rules framed thereunder in respect of professional misconduct committed in 1999 but complained in 2004.

10. On account of the infirmities in the order of the Principal Secretary, Department of Health and Family Welfare, Government of West Bengal, acting as the appellate authority under Section 26 of the Bengal Medical Act, 1914 the petitioner has preferred an appeal on 07.06.2009 under Rule 8.8 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 before the Medical Council of India challenging the order of the West Bengal Medical Council dated 11.09.2008 with prayer for condonation of delay in preferring the appeal with further prayer for hearing after decision of this Hon’ble Court on the instant petition.

11. Learned lawyer for the petitioner has further contended that in the instant case the treatment was made by the petitioner on or about 15.08.1999 and the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 came into force with effect from 11th March, 2002. The Code of Medical Ethics of the West Bengal Medical Council was adopted and approved in 2003 on the basis of Medical Council of India circular dated 18.04.2003. Thereafter, the complaint of alleged medical negligence was made on 29.06.2004 by respondent no. 5 relating to the events of treatment of respondent no. 6 and her baby by the petitioner between

14.08.1999 and 24.08.1999. Under the new regulation of 2002 the appellate authority has been prescribed as The Medical Council of India and as such since the complaint was lodged after implementation of the regulation in 2002, the present case will be governed under the new regulation and the appeal shall lie before the Medical Council of India which has, however, been contradicted by the respondent nos. 1 and 2.

12. From the argument advanced by learned lawyers for both respondents it emerges that the Indian Medical Council Act, 1956 is prospective and it has not repealed the Bengal Medical Act, 1914. The action taken by the West Bengal Medical Council has not been accepted by the complainant who has preferred the appeal before the State Government in its Health and Family Welfare Department, before whom the writ petitioner appeared and which has decided the appeal. Now it is to be considered whether such action on the part of the State Government constitutes any breach of any existing law or not and how far the right of appeal is tenable in law.

13. For the purpose of determination of the merit of this case relevant provisions governing the present case under the Bengal Medical Act, 1914 are quoted below:-

"***Section 25. Power to Council to direct removal of names from register, and re-entry of names therein.***- *The Council may direct-*
(a) that the name of any registered practitioner-
(i) who has been sentenced by any Court for any non-bailable offence, such sentence not having been subsequently reversed or quashed, and such person's disqualification on account of such sentence not having been removed by an order which the State Government is hereby empowered to make, if it thinks fit, in this behalf; or
(ii) 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-thirds 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
(b) that any name so removed be afterwards re-entered in the register."

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"***Section 25A. Effect of removal of name from register.***-*(1) A registered practitioner whose name has been removed from the*

register under clause (a) of section 25 shall forthwith surrender his certificate of registration to the Registrar, and the name so removed shall be published in the Official Gazette.
(2) If the name of a registered practitioner removed under clause (a) of section 25 is afterwards re-entered in the register as provided in clause (b) of that section the fact of such re-entry shall be published in the Official Gazette and the certificate of registration shall be returned to the registered practitioner by whom it was surrendered."
"***Section 26. Appeal to State Government from decision of Council.***-
(1) An appeal shall lie to the State Government from every decision of the Council under section 17 or section 25.
(2) Every appeal under sub-section (1) shall be preferred within three months from the date of such decision."
14. From a plain reading of the aforesaid provisions of Section 26 of the Bengal Medical Act, 1914 it appears that there is no indication of professional qualification of the appellate authority to be appointed under this provision. It has been contended by the learned lawyer for the petitioner that the Principal Secretary in the instant case is a member of the Indian Administrative Service having no experience in the medical profession and he cannot and should not sit in appeal to decide the propriety of the finding of the West Bengal Medical Council based on the report of the Ethical Committee consisting of highly skilled professionals who are the competent authority to decide and judge the real nature of infamous conduct in any professional respect committed by a doctor. Since Section 26 or any other provision of the Act does not prescribe the professional qualification of the Appellate Authority required for deciding an appeal against the findings of the State Medical Council under Section 25 of the Act, I hold that where the legislative wisdom is silent the findings of the appellate authority under Section 26 of the Act cannot be called in question or interfered with by the Writ Court on account of lack of professional experience or knowledge. More so when the report of the fact findings Penal and Ethical Cases Committee consisting of professional experts which found the petitioner guilty of professional misconduct has been conceded to by the Appellate Authority but the disagreement was only on enhancement of punishment from 'warning' to removal of name for six months from the Register.
15. It also appears that the Bengal Medical Act, 1914 was adapted by the

i) Government of India (Adaptation of Indian Laws) order, 1937,
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ii) The Indian Independence (Adaptation of Bengal and Punjab Acts) order, 1948 and
iii) The Adaptation of Laws order, 1950 which is still in force and not repealed by any express provision of the Indian Medical Council Act, 1956.

16. On the contrary the Indian Medical Council Act, 1956 was enacted by the Parliament and came into force with effect from 01.11.1958 with the objects to provide for the reconstitution of the Medical Council of India and the maintenance of a Medical Register for India and for matters connected therewith. It does not affect constitution and functions of the State Medical Councils in any way.

17. Relevant provisions of this Act are quoted below for the purpose of adjudication of the extent of powers vested in the Medical Council of India to regulate professional conduct of a doctor by Amendment of the Act in 1964.

"***Section 20A. Professional conduct.****-(1) The Council may prescribe standards of professional conduct and etiquette and a code of ethics for medical practitioners.*

(2) Regulations made by the Council under sub-section (1) may specify which violations thereof shall constitute infamous conduct in any professional respect, that is to say, professional
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misconduct, and such provision shall have effect notwithstanding anything contained in any law for the time being in force."

"***Section 24. Removal of names from the Indian Medical Register.****- If the name of any person enrolled on a State Medical Register in removed therefrom in pursuance of any power conferred by or under any law relating to registration of medical practitioners for the time being in force in any State, the Council shall direct the removal of the name of such person from the Indian Medical Register.*

(2) Where the name of any person has been removed from a State Medical Register on the ground of professional misconduct or any other ground except that he is not possessed of the requisite medical qualification or where any application made by the said person for restoration of his name to the State Medical Register has been rejected, he may appeal in the prescribed manner and subject to such conditions including conditions as to the payment of a fee as may be laid down in rules made by the Central Government in this behalf, to the Central Government, whose

decision, which shall be given after consulting the Council, shall be binding on the State Government and on the authorities concerned with the preparation of the State Medical Register."

18. From such provisions the following propositions can easily be inferred:-

a) There shall be two Registers of medical practitioners one to be maintained by the State Medical Councils and the other by the Medical Council of India.

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b) When the name of a person enrolled on a State Medical Register is removed therefrom by the State Medical Council in exercise of any power vested in it and for the time being in force in such State, the Medical Council of India shall direct the removal of the name of such person from the Indian Medical Register.

c) Such removal of name from the Indian Medical Register is, therefore, a routine work and statutory mandate independent of any exercise of discretionary power of the Medical Council of India to sit in appeal against the order of removal of name from the State Medical Register.

d) In the event of removal of name on grounds of professional misconduct from the State Medical Register and in the event of refusal to restore such name in the Register by the State Medical Council, the aggrieved person may prefer appeal in the prescribed manner to the Central Government.

e) The Central Government shall decide the matter after consulting Medical Council of India.

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f) The decision so taken by the Central Government shall be binding upon the State Government as well as State Medical Council.

g) The power to hear and decide appeal by the Central Government is a delegated power which cannot be redelegated to the Medical Council of India which has been identified by the Legislature in its wisdom as a consulting agency of the Central Government to aid and advise Central Government in deciding appeal.

19. Under Section 33 of the new Act, the Medical Council of India with the previous sanction of the Central Government is empowered to make regulations relating to the standards of the professional conduct and etiquette and code of ethics to be

observed by medical practitioners under clause (m). Such power obviously does not confer upon the Medical Council of India to usurp the power of appellate authority of the Central Government to remove name of a person from the State Medical Register on grounds of professional misconduct.

20. But the Medical Council of India framed the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 contrary to such express provision of the
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Act. The relevant provisions of said Regulations are quoted below:-

"***Rule 8.1*** *It must be clearly understood that the instances of offences and of professional misconduct which are given above do not constitute and are not intended to constitute a complete list of the infamous acts which calls for disciplinary action, and that by issuing this notice the Medical Council of India and or State Medical Councils are in no way precluded from considering and dealing with any other form of professional misconduct on the part of a registered practitioner. Circumstances may and do arise from time to time in relation to which there may occur questions of professional misconduct which do not come within any of these categories. Every care should be taken that the code is not violated in letter or spirit. In such instances as in all others, the Medical Council of India and/or State Medical Councils have to consider and decide upon the facts brought before the Medical Council of India and/or State Medical Councils.*

Rule 8.2 *It is made clear that any complaint with regard to professional misconduct can be brought before the appropriate Medical Council for Disciplinary action. Upon receipt of any complaint of professional misconduct, the appropriate Medical Council would hold an enquiry and give opportunity to the registered medical practitioner to be heard in person or by pleader. If the medical practitioner is found to be guilty of committing professional misconduct, the appropriate Medical Council may award such punishment as deemed necessary or may direct the removal altogether or for a specified period, from the register of the name of the delinquent registered practitioner. Deletion from the Register shall be widely publicized in local*
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press as well as in the publications of different Medical Association/Societies/Bodies.……

Rule 8.7 *Where either on a request or otherwise the Medical*

Council of India is informed that any complaint against a delinquent physician has not been decided by a State Medical Council within a period of six months from the date of receipt of complaint by it and further the MCI has reason to believe that there is no justified reason for not deciding the complaint within the said prescribed period, the Medical Council of India may –
(i) *Impress upon the concerned State Medical Council to conclude and decide the complaint within a time bound schedule;*
(ii) *May decide to withdraw the said complaint pending with the concerned State Medical Council straightway or after the expiry of the period which had been stipulated by the MCI in accordance with para (I) above, to itself and refer the same to the Ethical Committee of the Council for its expeditious disposal in a period of not more than six months from the receipt of the complaint in the office of the Medical Council of India.*"
Rule 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:*
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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."
21. Thus by such provision Medical Council of India has assumed the power of Appellate Authority for deciding the propriety of any findings and imposition of penalty imposed upon a medical practitioner on grounds of professional misconduct and that for the purpose of preferring such appeal by any aggrieved person the period of limitation has been fixed for a period of sixty days from the date of receipt of the order passed by the State Medical Council which may be extended for a further period of 60 days for sufficient cause to the satisfaction of the Medical Council of India. So by necessary implication the maximum period of limitation will be 120 days from the date of receipt of the order passed by the State Medical Council. In the instant case, admittedly the petitioner received order of the West Bengal Medical Council on 11.09.2008 but she preferred the appeal on 07.06.2009 long after expiry of the maximum period of limitation. Therefore, such appeal is barred

by limitation and cannot be entertained by the Medical Council of India. In paragraph 14 of their reply affidavit, Medical Council of India, respondent no. 4, has also averred that such appeal is neither in proper format nor required fee has been deposited by the petitioner as per their prescribed procedure.

22. Learned lawyer for the petitioner has contended that the regulation of 2002 was made by the Medical Council of India in exercise of the powers conferred under the Indian Medical Council Act, 1956. Once there has been made provision for preferring appeal against findings of the State Medical Council under the regulation of 2002 made with the approval of the Central Government, the provisions of Section 26 of the Act of 1914 have been impliedly repealed since the subsequent enactment was in the same field of legislation and there could not be two different appellate authorities at the same time from orders passed by the State Medical Council, one under Section 26 of the Bengal Medical Council Act, 1914 and the other under Rule 8.8 of the regulations of 2002 made in pursuance of the Indian Medical Council Act, 1956. He has further contended that the provision of Section 26 of the Bengal Medical Act, 1914 is repugnant to the provisions of the Indian Medical Council Act, 1956 and the regulations made thereunder in 2002. Though ‘legal medical and other professions’ is in the Concurrent List against item no. 26 of List III of the VIIth Schedule of the Constitution, by virtue of the provisions of the Article 254 of the Constitution of India the provisions of the central legislation and rules framed thereunder would prevail and any provision of the state Act repugnant to the central Act/ rules framed thereunder would be without any force of law and all actions taken under such repugnant provision would be void ab initio and therefore, liable to be set aside and quashed.

23. Learned lawyer for the respondent no. 5, The Medical Council of India, has also partly supported the contention of the petitioner that the regulation made by the Medical Council of India is binding and mandatory but the appeal preferred by the petitioner is neither in proper format nor required fee has been submitted by her and therefore, such appeal is repugnant to the statutory provisions of the Indian Medical Council Act, 1956 and in complete violation of the regulations 8.8 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. He has also relied upon the principle laid down in (1999) 7 SCC 120 (Dr. Preeti

Shrivastava –Vs- The State of MP and Ors.), (2003) 8 SCC 490 and (1998) 6 SCC 131 and as such the present case of the petitioner deserves to be considered by the Court in view of the statutory and mandatory regulations of 2002.
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24. Both parties have referred to plethora of cases in support of their respective contentions which are noted below:-
For the Petitioner:
1) (2003) 8 SCC 490
2) (1998) 6 SCC 131
3) (1999) 7 SCC 120
4) AIR 1941 SC 16
5) AIR 1954 SC 1543
For the State of West Bengal:
1) (2008) 4 SCC 720
2) (2006) 4 SCC 327
For the State Medical Council:
1) (2006) 8 SCC 279
2) (2007) 4 SCC 312
3) (1990) 2 SCC 288
4) AIR 2008 SC weekly 844
5) AIR 1984 SC 981
6) (2006) 4 SCC 327
7) (2005) 3 SCC 601
8) (2001) 5 SC 268
25. While defending the act of the appellate authority learned lawyer for the State respondent has contended that Section 26 of the Bengal Medical Act is the outcome of a statute made by the state legislature under Concurrent List and any regulation framed by the Medical Council of India cannot override the statutory provision of Section 26 of the Act. He has further contended that under the Indian Medical Council Act, there is no provision for appeal by a third party (other than the delinquent physician) to be preferred before the Medical Council of India and Section 26 of the Bengal Medical Act has not been repealed by the Act of 1956. In fact it is a patent lacunae of the Act of 1956 which cannot be cured by the Medical Council of India by creating any appellate authority in exercise of its power conferred under Section 33(m) of the Act of 1956. In fact Section 20A and Section 33(m) of the Indian Medical Council Act, 1956 do not provide any provision for appeal and since the Parliament has not made any provision in favour of the Medical Council of India as appellate

authority, the existing Act will continue and any creature of the statute made by the Parliament cannot incorporate or create any appellate authority by virtue of its delegated power which is not contemplated by the Parliament. Therefore, in exercise of the limited power conferred under Section 33(m), the Medical Council of India cannot frame any rule to override the statutory provision of Section 26 of the Bengal Medical Act or Section 24(2) of the Indian Medical Council Act, 1956 as the case may be. Moreover, in the instant case the petitioner appeared before the appellate authority, made her submission and when the appellate authority enhanced the punishment she has challenged the authority of the appellate forum. So the doctrine of estoppel by conduct will be operative in this case. This argument has, however, been refuted by the learned lawyer for the petitioner who has contended that right to appeal is a statutory right against which the doctrine of estoppel is inapplicable.

26. In the midst of such argument the nature of the right claimed by the petitioner is to be determined first. Obviously the complainant being dissatisfied with the findings of the State Medical Council preferred an appeal before the Principal Secretary, Health and Family Welfare Department, Government of West Bengal, representing the state within the meaning of Section 26 of the Bengal Medical Act. Having regard to the principles laid down in the cases referred to in paragraph 24 above, obligation of my judicial conscience is much impressed to dwell upon the principle laid down in AIR 1953 SC 221. In AIR 1953 SC 221 and 1953 SCR 987 (Hossein Kasam Deda (India) Limited –Vs- Sate of MP) it has been set at rest by the Hon’ble Apex Court that a right of appeal is not merely a matter of procedure. It is a matter of substantive right. The right of appeal from the decision of an inferior Tribunal to a superior Tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior Court.

27. To disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication. In AIR 1967 SC 344 it has been further observed by the Hon’ble Apex Court that the decision in Hossein Kasam Deda’s case

proceeded on the grounds that when a lis commence, all rights get crystallised and no clog upon a likely appeal can be put, unless, the law was made retrospective, expressly or by clear implication. Therefore, unless it can be proved conclusively that the lis had commenced before the amendment of the law, the rule in Hossein Kasam Deda's case cannot apply.

28. Relying upon the above principles, I hold that the right of appeal claimed by the petitioner in the instant case is a substantive right and it is to be looked into if such substantive right can be taken away or amended by any creature of a statute by virtue of any delegated legislation as contemplated in Section 33(m) of the Indian Medical Council Act, 1956.

29. I have already referred to sub-Section 2 of Section 24 of the Indian Medical Council Act, 1956 (paragraph 17 above) which deals with removal of names from the Indian Medical Register maintained by the Medical Council of India following removal of name of a Medical Practitioner by the State Medical Council under the Bengal Medical Act, 1914. Under this provision where the name of any person has been removed from a State Medical Register on the ground of professional misconduct or any other ground except that he is not possessed all the requisite medical qualification or where any application made by the said person for restoration of his name to the State Medical Register has been rejected, he may appeal in the prescribed manner and subject to such condition including conditions as to the payment of fees as may be laid down in the rules made by the Central Government in this behalf, to the Central Government whose decision shall be given after consulting the council which shall be binding on the State Government and on the authorities concerned with the preparation of the State Medical Register. This provision undertakes that Central Government is the appellate authority relating to removal of name from a State Medical Register under the Indian Medical Council Act, 1956 which came into force with effect from 1st November, 1958 and that only the aggrieved doctor can prepare such appeal and none else.

30. The Central Act has been framed with the object of reconstitution of the Medical Council of India and the maintenance of a medical register for India and for matters connected therewith which are embodied in its preamble. In the repealing Section 34 of this Act it is specifically provided that the Indian Medical Council Act, 1933 (Act 27 of 1933) was

repealed by the Indian Medical Council Act, 1956 without affecting any of the state laws in force at the material time. Therefore, the central legislature has consciously kept State Medical Councils constituted by the State legislatures outside its purview and has allowed the State Councils to function under the State laws. So I conceive that there is no apparent contradiction between the Central Act of 1956 and the State Act of 1914.

31. Therefore, the next pertinent question comes for consideration is to see whether the provision contained in sub-Section (2) of Section 24 of the Indian Medical Council Act, 1956 has overriding effect upon the provision contained in Section 26 of the Bengal Medical Act, 1914 which is an Act of the state legislature.

32. In Section 26 of the Bengal Medical Act it has been specifically mentioned that appeal shall lie against any decision of the State Medical Council before the State Government from every decision of the council under Section 17 or Section 25 which is open to every aggrieved person. In sub-Section (2) of Section 24 of the Indian Medical Council Act, 1956 it has been prescribed that appeal by delinquent practitioner shall lie against removal of name from State Medical Register to the Central Government who will decide the matter after consulting the Medical Council of India and such decision shall be binding upon the State Council and on the authorities concerned with the preparation of the State Medical Register. Thus the Central Government and the State Government have been made two Appellate Authorities for deciding the same issue giving liberty to the aggrieved person to chose either of the forum.

33. If this sub-Section (2) of Section 24 is considered as a provision for preferring Appeal against removal of name from a State Medical Register it is to be presumed that such forum has been created by Central legislature without abolishing or extinguishing existence of statutory provision for appeal under Section 24 of the Bengal Medical Act, 1914. In rule 8.8 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002 it has been provided that any person aggrieved by the decision of the State Medical Council or any complaint against delinquent physician shall have the right to file an appeal to the MCI within a period of sixty days from the date of receipt of the order passed by the State Medical Council. Provided that the Medical Council of India

may, if it is satisfied that the appeallant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of sixty days. Apparently, the provisions of Rule 8.8 is contrary to the provision of sub-Section (2) of Section 24 of the Act of 1956 under which the regulations of 2002 were made and the regulation cannot override the express provision of the Act and as such the Medical Council of India cannot be treated as an appellate authority against any decision of the State Medical Council as provided in Rule 8.8 which is contrary to sub-Section (2) of Section 24 of the Act. Learned lawyer for the petitioner has, however, relied upon the principles laid down in (2003) 8 SCC 490 (paragraphs 22, 23) and claimed that clauses 8.7 and 8.8 of the Code of Ethics prescribed by the Medical Council of India are within its ambit for which Hon'ble Apex Court directed it to take appropriate steps for inclusion of similar provisions under the Medical Council Act, 1956. I hold said principle will not be applicable in the circumstances of this case, firstly because facts therein relate to failure on the part of the State Medical Council to take a decision against delinquent physician within prescribed period of six months and secondly, said ratio indicates infirmity of the legislation which lends support to the contentions of the respondent State Medical Council as well as State Government. Where the Parliament has specifically identified the Medical Council of India as a consulting authority for the Central Government who will hear the appeal in case of removal of name of the person from a State Medical Register on the grounds of professional misconduct or any other ground except that he has not possessed all the requisite medical qualifications, but the appellate forum so created by the Parliament in 1956 Medical Council of India cannot by Regulation exclude the jurisdiction of the appellate authority created under Section 24(2) of the Indian Medical Council Act, 1956 or under Section 26 of the Bengal Medical Act, 1914.

34. Therefore, instead of repealing or abolishing the appellate authority prescribed under Section 26 of the Bengal Medical Act, passed by the State Legislature the Central Government in the instant case has created and identified itself as another forum under Section 24 of the Act of 1956 for such appeal in respect of a subject under the Concurrent List of the Seventh Schedule to the Constitution only for the limited purpose of

preferring appeal by the aggrieved physician.

35. On the contrary in exercise of the powers conferred under Section 20A read with Section 33(m) of the Indian Medical Council Act, 1956, Medical Council of India with the previous approval of the Central Government has framed The Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. For the purpose of discussion both the provisions of Section 20A and 33(m) of the Act are quoted below:-

"***Section 20A. Professional conduct.****-(1) The Council may prescribe standards of professional conduct and etiquette and a code of ethics for medical practitioners.*

(2) Regulations made by the Council under sub-section (1) may specify which violations thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any law for the time being in force."

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"***Section 33 -*** *The Council may, with the previous sanctioned of the Central Government, make regulations generally to carry out the purposes of this Act, and without prejudice to the generality of this power, such regulation may provide for……*

Section 33(m) – *the standard of professional conduct and etiquette and code of ethics to be observed by medical practitioners.*"

Thus Section 20A empowers the Medical Council of India to prescribe standards of professional conduct, etiquette and a code of ethics for medical practitioners violation whereof shall constitute infamous conduct in any professional respect having overriding effect upon any law for the time being in force and as such power is confined to the definition of professional misconduct. Relying upon the principle laid down in (1998) 6 SCC 131 learned lawyer for the petitioner has contended that Regulation made by the Medical Council of India is mandatory and shall override State enactment. In the said case the Hon'ble Apex Court while considering the relative merits of Section 33 and 19A of the Indian Medical Council Act, 1956 in connection with increase in number of admission capacity in medical collages/ universities by the State Government held that such function is the exclusive function of the Medical Council of India. Said ratio is inapplicable in

the case of determining appellate jurisdiction under Section 24(2) and 33(m) of the said Act and as such distinguishable. Similarly, I do not find any relevancy of the principles laid down in (1990) 7 SCC 120 relating to standards of education and admission criteria by lowering qualifying marks in determining merit of this case though relied upon by the learned lawyer for the petitioner. In exercise of such power conferred under Section 20A Medical Council of India cannot usurp the power conferred upon the Central Government under sub-Section 2 of Section 24 of this Act as Appellate Authority.

36. Similarly in exercise of the powers conferred in clause (m) of Section 33 of the Act the Medical Council of India is empowered, subject to previous sanction of the Central Government, to make regulation to carry out the purposes of the Act so far as it relates to "the standards of professional conduct and etiquette and code of ethics to be observed by medical practitioners". So by virtue of such limited power conferred under clause 'm', Medical Council of India cannot create any Appellate Authority or penal provision like removal of name from the Register maintained by itself or by the State Council. In fact Rules and Regulations are wheels of an enactment to give effect to the purposes and objects of an Act and cannot travel beyond the track laid down in the Act. Therefore, provisions of Rule 8.8 of the Regulation of 2002 made by the Medical Council of India in exercise of its powers conferred under Section 33(m) of the Act of 1956 are equally beyond its jurisdiction and as such unconstitutional because it has been set at rest in 2006(4) SCC 327 (paragraphs 4,15,16 and 17) and 2005 (3) SCC 601 that as per general principle of cognate rules any provision of any substantive law whether Central or State cannot be curtailed by making provision in delegated provision – in the instant case Regulation of 2002 made by the Medical Council of India.

37. In AIR 1964 SC 1511 it has been set at rest that where vested rights are affected by any statutory provision, the said provision should normally be construed to be prospective in operation and not retrospective, unless the provision in question relates merely to a procedural matter. Undoubtedly, the Legislature is competent to take away vested rights by means of retrospective legislation and is competent to make laws which override and materially affect the terms of

contracts between the parties; but unless a clear and unambiguous intention is indicated by the Legislature by adopting suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. However, retrospective operation appears to be clearly implicit in the provision construed in the context where it occurs. In other words, a statutory provision is held to be retroactive either when it is so declared by express terms, or the intention to make it retroactive clearly follows from the relevant words and the context in which they occur. Further, in AIR 1957 SC 540 and (1976) 2 SCC 917 the same principle has been echoed. It is stated therein that statutes should be interpreted, if possible, so as to respect vested right. The golden rule of construction is that, in the absence of any thing in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed. Thus this vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise. In the State of Bombay –Vs- Supreme General Films Exchange Limited, AIR 1960 SC 980 it is further set at rest by the Hon'ble Apex Court that with an impairment of the right of appeal by putting a new restriction thereon of imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment.

38. Viewed from the above principles so laid down by the Hon'ble Apex Court I hold that sub-Section (2) of Section 24 and rules framed under such Act are all prospective in nature and at the same time by virtue of this enactment the provision laid down in Section 26 the Bengal Medical Act has neither been repealed nor has become non-est.

39. Now the relevant question for us is to decide whether the conduct of the petitioner will be governed under the Indian Medical Council Act, 1956 and regulation framed thereunder in 2002 which are prospective. It has already been pointed out that the imputation of professional misconduct relates to the period from 14.08.1999 to 24.08.1999 and the complaint was lodged for the first time on 29.06.2004 before the West

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Bengal Medical Council while the regulation of 2002 or the provision of Section 24(2) as the case may be are in operation.

40. So far as the regulation of 2002 is concerned, I have already pointed out that it has also not expressly made any provision for dealing with cases pending on the date of coming into force of the regulation with effect from 6th April, 2002. The right, liabilities and obligation arises as soon as the disputed act or commission is completed but as a general rule such act may be called in question at a later stage, subject to laws of limitation. Wherein act complained of was committed in 1999 but called in question in 2004 it cannot come under the purview of the Regulations of 2002 which came into force with effect from 06.04.2002 in absence of any express provision for its retrospective operation. Therefore, the action of the petitioner for the period from 14.08.1999 to 24.08.1999 though complained of in June, 2004, cannot be considered under the Regulation made prospectively in 2002.

41. In Dayabati –Vs- Inderjit, AIR 1966 SC 1423 the principles laid down by the Hon'ble Apex Court lends support to such
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contention. It is stipulated therein that as a general proposition, it may be admitted that ordinarily a Court of appeal cannot take into account a new law, brought into existence after the judgement appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Even before the days of Coke, whose maxim – a new law ought to be prospective, not retrospective in its operation – is oft-quoted, Courts, have looked with disfavour upon laws which take away vested rights or affect pending cases.

42. In AIR 1955 SC 314 also it is further held by the Hon'ble Apex Court that while considering applicability of amending Act to pending proceedings, in every case the language of the amending statute has to be examined to find out whether the Legislature clearly intended even pending proceedings to be affected by such statute. There is no authority for the proposition that an enactment can only take away vested rights of action for which legal proceedings have been commenced if there are in the enactment express words to that effect.

43. Relying upon the aforesaid principles and from a plain

reading of the provisions contained in Section 24 of the Indian Medical Council Act and the regulations made thereunder by the Indian Medical Council in 2002 as contained in paragraph 8.8 thereof I find that the provisions are prospective in view of the specific repealing provisions of Section 34 of the Act of 1956 which has only repealed the Indian Medical Council Act, 1933 by express provision and thereby the Parliament has not considered repealing of any other State Act prevailing at the material time. Therefore, the State Medical Council Acts prevailing at the time of enactment of the Indian Medical Council Act, 1956 were allowed by the Parliament to be continued and those are not affected in any way following enactment of the Indian Medical Council Act, 1956. Therefore, the State Act has overriding effect upon the Regulation framed by the Medical Council of India and its appellate provision contained in Section 26 are valid and operative in West Bengal. Whereas similar provisions contained in Section 24(2) of the Act of 1956 does not create any vested right to prefer appeal by third party against any penal proceedings of the State Medical Council and where as it has been inoperative inasmuch as the Central Government has divested itself of its appellate power by delegating the same in favour of the Medical Council of India while gave concurrence to the framing of Regulation of 2002 under Section 33(m) of the Act, the only course left open for the complainant being a third party to prefer such appeal under Section 26 of the Bengal Medical Act, 1914 before the State Government and his action cannot be treated as without lawful authority.

44. Now, therefore, the necessary constitutional implication thereof need be considered in light of repugnancy between the Indian Medical Council Act, 1956 and the Bengal Medical Act, 1914. Learned lawyer for the state has argued that the Act of 1956 has not repealed the Bengal Medical Act, 1914 and the Bengal Medical Act, 1914 is now an Act passed by the State Legislature which will come under entry no. 26 List III of the VIIth Schedule to the Constitution. On the contrary the Indian Medical Council Act, 1956 was promulgated by the Parliament under Entry no. 66 of List I of the VIIth Schedule with the objects of “co-ordination and determination of standards in institutions for higher education or research and scientific and Technical institution.” He has contended that when there is repugnancy between an Act passed by the

Central Government under List I of the VIIth Schedule and an Act passed by the State Legislature under Concurrent List, the Act made by the state Legislature shall prevail in the state under clause 2 of Article 254 of the Constitution because under clause 2 of Article 246 it has been specifically provided that notwithstanding anything contained in clause 3, Parliament and subject to clause 1 the State Legislature of any state also have power to make laws with respect to any of the matters enumerated in List III in the VIIth Schedule. I subscribe to the same views and hold that the Bengal Medical Act is the exercise of the power of the State Legislature contemplated under clause 2 of the Article 246 of the Constitution and in case of any repugnancy between two provisions on identical issue of the forum of appeal as in the instant case the law made by the State Legislature shall prevail as contemplated under clause 2 of Article 254 of the Constitution. While considering the present case I also find that under the Act of 2002 the Central Government has constituted an appellate forum under Section 24 of the Act for a limited purpose without repealing the existing provision contained in Section 26 of the Bengal Medical Act specifying the State Government as the appellate forum against any order made by a State Medical Council upon consideration of any allegation of professional misconduct and as such law made by State Legislature shall prevail over similar provision made by the Parliament. Learned lawyer for the State has drawn my attention to the principles laid down in (I) 1990(2) SCC 288 (paragraphs 21 and 22), A 2008 SCW 844 (paragraph 27) and A 1984 SC 981 to substantiate his claim that when two statutes may confer jurisdiction on two different for a for adjudication and if there is any apparent conflicts, the Court should interpret the competing provisions of the said statutes for giving effect to the harmonious construction of both of them. I hold that said principles are applicable in the present case while interpreting Section 24(2) of the Act of 1956 and Section 26 of the Act of 1914 so far as appellate forum is concerned and so far as the class or classes of persons who can come under the purview of these two appellate fora.

45. In the instant case admittedly the writ petitioner appeared before the appellate forum constituted under Section 26 of the Bengal Medical Act and after passing of the order she has challenged its propriety which is not permissible because

constitution of the forum under Section 26 of the Bengal Medical Act for a third party is not violative of and contradictory to the provisions of sub-Section 2 of Article 254 of the Constitution. He who claims equity must come with clean hands. But in the instant case the writ petitioner is coming with an intention to discredit the appellate authority after its findings against her which apparently is not the outcome of any bona fide intention or mistake of law. It is well settled in 2007 (4) Supreme 312 (paragraph 19) and 2006 (8) SCC 279 (paragraphs 20, 21 and 22) that a party may have a legal right including statutory right but if waived on her choice of election, she thereafter cannot be allowed to enforce the said right. Relying upon above principle I hold that the principle of estoppel on the basis of waiver will also be applicable in this case.

46. Much argument has been advanced by the learned lawyer for the petitioner that the instant case will be governed under clause 8.8 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 and the appeal shall lie before the Medical Council of India. I have already mentioned and reiterate that regulation cannot override the express provision of an act and since Section 24 of the Indian Medical Council Act, 1956 specify Central Government as the appellate authority against removal of any name of a medical practitioner on grounds of professional misconduct, the Medical Council of India who has been identified as a mere consulting agency cannot usurp such power and make a regulation empowering itself to be the appellate authority which is not the intention of the legislature. The legislative wisdom is not reflected in clause 8.8 of the regulation of 2002 and as such I agree with the learned advocate for the State that the same is not valid and legal for the purposes of identifying the appellate authority before whom an aggrieved person other than the delinquent physician may challenge propriety and legality of the findings of the West Bengal Medical Council. If such provision is not in existence in the eye of law, the alternative forum shall be the State Government. In the instant case the Act complained of relates to the period of 1999 and as such I hold that any aggrieved party is at liberty to choose State Government as its appellate forum and the delinquent physician can choose Central Government as well as State Government which is a substantive right which

cannot be denied or obliterated by any change of procedural law. In the instant case the writ petitioner as well as the complainant have chosen the State Government as their appellate forum under Section 26 of the Bengal Medical Act and they have subjected themselves to the jurisdiction of the appellate authority till its findings without challenging its propriety and thereby exhausted its right of appeal before a forum which is created by a statute and which has exercised its power lawfully within the ambit. At the same time in view of what has been stated in paragraph 42 above I further hold that the provisions of Section 24(2) of the Act of 1956 have become inoperative on account of delegation of such power, though impermissible, by the Central Government in favour of the Medical Council of India.

47. Learned lawyer for the petitioner has further contended that the Principal Secretary, Health and Family Welfare Department, Government of West Bengal is a member of the Indian Administrative Service having no special knowledge in the field of medical profession. So the petitioner has not received adequate justice before such appellate authority who sat in appeal against an order of the State Medical Council based on the report of their ethical committee consisting of medical experts. It has already been pointed out that in the case of Central Government in sub-Section 2 of Section 24 of the Act of 2002 it is stipulated that while hearing an appeal the Central Government shall take the opinion of the Medical Council of India as an expert but there is no such provision of taking any expert opinion by the appellate authority within the meaning of Section 26 of the Bengal Medical Act. Since the legislature in its wisdom has excluded the concept of expert opinion to be taken by the appellate authority of the State the Court cannot import new concept and take a view contrary to the intention of the legislature. When an appeal is preferred before any appropriate authority it is generally conceived that the appellate authority imbibes and assumes the entire power of the authority whose action is challenged before it. Once the State Government has identified the Principle Secretary, Health and Family Welfare Department, Government of West Bengal as the appellate authority in the instant case while exercising power under Section 26 of the Bengal Medical Act, the Secretary, Health and Family Welfare Department, Government of West Bengal assumes the entire power of the State Medical Council whose order is assailed

before him. Therefore, in the instant case while sitting in appeal he has assumed the power not only as an appellate authority under Section 26 of the Bengal Medical Act, in doing so he has also assumed the power conferred under Section 25 of the Act which vests power to the council to direct removal of names from the register and reentry of names therein on grounds of infamous conduct in any professional respect. The present case relates to negligent treatment resulting in death of an infant. The consequence of such negligence is very much within the comprehension of man of ordinary prudence, not to speak of a senior member of the Indian Administrative Service who had only dealt with the quantum of punishment on the basis of findings of the State Medical Council. In 2001 (5) Supreme 268 it has been held, inter alia, that the Appellate Authority has power to enhance the punishment when appealed from the adjudicating authority. Therefore, in the instant case while considering the appeal the appellate authority has rightly exercised the power under Section 25 of the Bengal medical Act which was within its ambit and not contrary to law. Since he has acted within the limits prescribed under the Bengal Medical Act, 1914, the Writ Court cannot interfere in its findings.

48. Section 27 of the Bengal Medical Act is also a bar to suits and other legal proceedings in like cases. It has been stated therein that no suit or other legal proceeding shall lie in respect of any act done in exercise of any power conferred by this Act on the State Government or the Council or any committee of council or the Registrar. Since the appellate authority has exercised the power conferred in it by Section 26 of the Act in exercise of its bona fide official power no legal proceeding shall lie against his order issued in exercise of the power conferred under specific provision of Section 26 of the Act by virtue of which he has assumed the power also conferred under Section 25 of the Act. Moreover, I agree with the views of the learned lawyer for the State who has contended that alternative remedy in Writ jurisdiction is not maintainable in view of availability of alternative remedy of statutory appeal under Section 26 of the Act of 1914 or for that matter of fact under Section 24(2) of the Act of 1956 which has been fully utilised by the present writ petitioner. From this point of view, I hold that the instant writ petition is not maintainable in law and I further hold that the mischief committed by the petitioner in 1999 though

complained of in 2004 shall come under the purview of the Bengal Medical Act, 1914 in case of the complainant and not under Rule 8.8 of the Regulation of 2002 which is unconstitutional. I also conclude that there is no illegality, violation of the principles of natural justice and want of jurisdiction in the impugned order of the Principal Secretary to the Government of West Bengal, Health and Family Welfare Department which should be interfered with by the Writ Court to prevent any miscarriage of justice and abuse of the process of law.

49. Considering all these aspects I hold that there is no merit in this writ petition which is accordingly dismissed. I make no order as to cost.

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50. Let Photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(**Syamal Kanti Chakrabarti, J.**)