High Court Order No. 1

Calcutta High Court (Appellete Side); Snigdhendu Ghosh vs State Of West Bengal & Ors on 19 July, 2018; in the High Court at Calcutta; Hon'ble Mr. Justice I.P.Mukerji and Hon'ble Justice Amrita Sinha, Ms. Manisha Bhowmick, Mr. Biplab Guha; Judgement On:19.07.2017; I.P. Mukerji, J.:-

I have had the privilege of going through the draft judgment prepared by my sister Amrita Sinha, J. I agree with the conclusions reached by her ladyship. Nevertheless, since this matter is of great importance I would like to deliver a separate concurring judgment.

The appellant is a very qualified and senior medical practitioner. In 1987, he obtained the MBBS degree from the Medical College, Kolkata. Thereafter, in 1992, he got the DCH qualification from Chittaranjan Seva Sadan, Kolkata. In 2009 he obtained MD in Pediatrics and DM in neurology from PGIMER, Chandigarh. He worked in the Dhanbad Railway hospital as paediatrician and thereafter with B. R. Singh Hospital. Now, he specialises in neurology and works with K. G. Hospital, in Chittaranjan, district Bardhaman.

It so happened that on or about 24th December, 2010 the regular ward doctors of the hospital were on leave. The appellant was in charge, although he was a specialist in neuroscience.

On that day, a young girl Purbasha Das of about 19 years of age was admitted to the hospital. Such admission was made on the advice of the out-door doctor. She was suffering from fever for two or three days accompanied by loose motion and nausea. The hospital had no blood testing facility. On clinical examination of the patient, the appellant prescribed a combination of two antibiotics and supporting drugs and IV fluid, namely, Cefotaxime, Ofloxacin, Rantac injection Paracetamol and IV fluid. Later, on 25th December, 2010 on receipt of blood test reports, including the report of Widal test he advised the addition of a third antibiotic, Chloromycetin, suspecting typhoid. The patient remained under his care till 26th December, 2010.

According to the statement made by the appellant before the State Consumer Disputes Redressal Commission, West Bengal, in the case subsequently started against him, CC Case No.40 of 2012, "the patient was responding to the treatment and her condition quite stable and improving till 26th December, 2010."

From 27th December, 2010 the appellant relinquished charge of the ward. Dr. Dipanjan Basak took charge of the patient.

The patient sharply deteriorated on 29th December, 2010. She developed acute respiratory complication. A chest x-ray was performed. She was then released from K. G. Hospital by her family and taken to Mission Hospital, Duragapur. She was admitted there on 30th December, 2010 in the very early hours, at 12.40 a.m. **This hospital made the diagnosis that she was suffering from septicemia with multi organ failure.** The chest x-ray and CT scan revealed pulmonary oedema and Acute Respiratory Distress Syndrome (ARDS). She expired that very night at 4.50 a.m. In the death certificate the cause of death was stated to be acute respiratory distress syndrome together with sepsis plus multiple organ dysfunction syndromes.

On 12th January, 2011 Mr. Himangsu Kumar Das father of Purbasha Das made a complaint to the Officer-in-Charge of Chittranjan Police Station, Chittaranjan, West Bengal against the appellant, alleging criminal negligence. **On 13th January, 2011 the police drew up an FIR (FIR No.1 of 2011 dated 13th January, 2011) against him and Dr. Dipanjan Basak alleging commission of death by negligence under Section 304A of the Indian Penal Code.**

On 18th March, 2011 the family of the deceased addressed a complaint to the Registrar, West Bengal Medical Council and others, including the Medical Council of India.

Now, further to the complaint of Mr. Himangsu Kumar Das the learned Additional Chief Judicial

Magistrate, Asansol on 2nd April, 2013 constituted a Medical Board consisting of the ACMOH, Asansol, Dr. Nilanjan Chattopadhya and Dr. Srikanta Gongopadhya. **This Medical Board opined that the medicines prescribed by the appellant were adequate for enteric fever and pneumonia.**

The family of the deceased did not stop there. **They moved the State Consumer Disputes Redressal Commission. They did not prosecute the matter there and the complaint was dismissed.**

On 6th April, 2011 the Medical Council of India had asked the State Medical Council to enquire into the case and take action within six months under Clause 8.4 of the Indian Medical Council (promotional conduct, etiquette and ethics) Regulation, 2002. **On 19th August, 2014 the learned Additional Chief Judicial Magistrate discharged the appellant as prima facie no negligence could be attributed to him.**

After an enquiry, on 2nd August, 2016, the appellant was charge-sheeted by the West Bengal Medical Council. It was issued under Section 17 read with Section 25 of the Bengal Medical Act, 1914, The charge-sheet was as follows: "It appeared that there was some commission of errors in medical management of one patient, young girl, Purbasha Das at K.G. Hospital, Chittaranjan, which led to her death in multi-organ failure with respiratory complications, even though the case was initially appeared to be a case of Enteric Fever. **Even though she was admitted with the diagnosis of RTI, no blood count or chest x-ray was performed.** On 29-12-2010 the patient developed acute respiratory complications and then chest x-ray was performed. She was subsequently referred to Mission Hospital, Durgapur where the diagnosis came out to be septicaemia with multi-organ failure. Chest x-ray and Ct revealed occurrence of probable pulmonary edema or ARDs. **This quick onset indicated that between 27th and 29th December, 2010 there might be some errors in patient surveillance and on this score, you cannot be absolved of your responsibilities and that in relation there to you have been found prima facie guilty of infamous conduct in a professional respect."**

Thereupon, the appellant was charged with "error in patient surveillance" and "infamous conduct under the Bengal Medical Act, 2014."

There seems to be contradiction at the initial stage of the proceedings. The charge-sheet dated 2nd August, 2016 stated that the patient was admitted to K. G. Hospital "with the diagnosis of RTI" (respiratory tract infections). This is quite contradictory to other records. According to the appellant and not contradicted by any record that the patient was admitted to K. G. Hospital with three to four days history of vomiting, loose motion and fever. **A Widal test performed on the patient stated prior to admission to the hospital stated that there was an indication of Typhoid or enteric fever. At any rate there was no blood testing facility at the hospital.**

In fact, the charge sheet notice did not allege that the administration of triple antibiotics by the appellant caused death or injury to the patient. It simply said that on 29th December, 2010 the patient developed acute respiratory complications. X-ray and CT scan were carried out which revealed the existence of pulmonary oedema and ARDS.

This stage quickly set in between 27th and 29th December, 2010. On 25th August, 2016 the appellant gave a detailed reply to the charge-sheet. His main points of defence were

i) by specialisation he is a neurologist. As no regular doctors were available he was put in charge of the ward where the patient was kept.

ii) the patient was admitted into the hospital with symptoms of vomiting and loose motion. There was a pathological report accompanying her which indicated that she suffered from typhoid. In those circumstances, the appellant administered the combination of three antibiotics. It is an approved practice amongst responsible medical practitioners possessing ordinary skill to use this

kind of combination drugs to treat enteric fever or typhoid, according the appellant.

The patient improved while in his charge between 24th December, 2010 till 26th December, 2010. Thereafter, the doctor who was originally in charge of her Dr. Dipanjan Basak took over her responsibility on 27th December, 2010 at about 9 a.m. If at all the condition of the patient deteriorated it was after the appellant relinquished charge of the patient. The treatment that was given to the patient by the appellant could not have been the cause of her death.

On 21st August, 2017 the appellant received a communication from the Council dated 18th August, 2010 attaching its decision to remove his name from the register of medical practitioners by the required majority of 2/3 of the members present and voting, for a period of one year. The appellant was found guilty of infamous conduct.

The Council made the following observations:

a) The appellant was "not rational" in treating the patient with three antibiotics;

b) He was "deficient in his approach" not advising any blood test;
c) He was "deficient in his approach" not advising any chest x-ray

On 7th September, 2017 he preferred an appeal from the decision of the West Bengal Medical Council before the Appellate Authority constituted under Section 26(1) of the Bengal Medical Act 1914.

Simultaneously, a writ was preferred in the Court challenging the decision. On 10th November, 2017 the writ application (WP No.26252(W) of 2017) was disposed of by this court directing the Appellate Authority to dispose of the appeal pending before it a within fortnight from the date of communication of the said order.

This order was not complied with, by the appellate authority.

In those circumstances the appellant moved the writ application (WP No.28956 (W) of 2017). Upon having notice of this writ application the appellate authority preponed the hearing of the appeal from 6th December to 5th December, 2017. On 5th December, 2017 the appellant duly appeared before the appellate authority. On 7th December, 2017 the Joint Secretary (Medical Administration) department of health and family welfare passed an order upholding the decision of the West Bengal Medical Council. It held that between 24th December and 26th December, 2010 the patient was substantially under the care of the appellant. **It held that without blood culture, sensitivity chest x-ray test etc. three antibiotics could not have been administered simultaneously. On 11th December, 2017 the second writ application was disposed by this court recording that the appeal had been disposed on 7th December, 2017.**

The maintainability point was raised by Mr. Bhowmick, learned counsel for the Council. **He said there was an appeal provision before the Central Government from a decision of the Council removing the name of a medical practitioner from the register. Hence, the appellant ought to have availed of that remedy.**

An appeal from a decision of the Council under Section 17 read with 25 of the said **Act lies to the appellate authority, i.e., the state government. Under the said Act, there is no further appeal from the decision of the State Government.**

An appeal lies to the Central Government under the Central Medical Act, 1957 read with Rule 27 of the Central Medical Council Rules, 1957 against removal of a doctor's name from the register.

In my opinion, removal of name means permanent removal from the register. It means a situation where the right of a doctor to practice is taken away forever, and irreversibly. The appellant's licence to practice was suspended for one year. This is

temporary. It does not attract Rule 27 of the Medical Council Rules.

Even if there was such a remedy it should not be forgotten that the appellant, complains of various acts of commission and omission of the respondents which allegedly caused breach of the principles of natural justice. In the Whirlpool case (1999) 8 SCC 1 the Supreme Court told us that if a writ complains of breach of the principles of natural justice, a litigant could avoid the alternative remedy and come to the High Court in exercise of its jurisdiction.

Another point raised by Mr. Bhowmick was that the issues in this **writ had become res judicata.** I do not agree.

An issue becomes res judicata if it is adjudicated upon. Only if an issue is adjudicated upon, could the secondary issues be covered by the doctrine of constructive res judicata. For example six reliefs are sought from the court and five are granted, after adjudication. It can be said that the sixth was prayer for and refused. Therefore, an adjudication of some part of the issues raised is a sine qua non for operation of the principle of res judicata or constructive res judicata. **In this case, there has been no adjudication at all.** In the first writ, the Court referred the appellant to the alternative remedy without adjudication on the merits. In the second writ the Court merely recorded that the adjudicating authority had made a decision on the complaint made by the appellant. It can by no stretch of imagination be said that the Court had actually adjudicated upon the merits of the matter. **This plea of res judicata is in my opinion mischievous and is rejected. For those reasons the maintainability point fails.**

The third point raised by Mr. Bhowmick was that this appeal was from an order refusing to pass an interim order interfering with the decision of the council suspending the registration of the appellant for one year. He argued that if this Court proposed to pass any order it would tantamount to disposal of the writ application at the ad interim stage. He prayed for an opportunity to file an affidavit-in-opposition.

I reject the contention. **In this appeal we propose to dispose of the writ application for the following reasons. The suspension of registration was for a period of one year.** More than eleven months of the suspension has been suffered by the appellant. Keeping the writ pending on technical grounds would result in the appellant suffering the whole of the punishment without remedy. The writ would thereby become infructuous.

It is true that the Supreme Court in various decisions has said that the Court at the interim stage should not pass orders that would effectively dispose of the writ application. Reference may be made to Council for Indian School Certificate Examination Vs. Isha Mittal and Anr. reported in (2000) 7SCC 521, State of Uttar Pradesh and Ors. Vs. Ramsukhi Devi reported in AIR 2005 SC 284, Secretary, U. P. S. C Vs. S. Krishna Chaitanya reported in 2011 AIR SCW 4682, State of U.P. v. Hirendra Pal Singh reported in (2011) 5 SCC 305 cited by Mr. Bhowmick.

This dictum of the Supreme Court is only true when the Court at the interim stage is evaluating the prima facie case of the parties. All the documents are not before the Court. They would be available on filing of affidavits. Hence the Court gives an opportunity to the respondents to file an affidavit dealing with the allegations in the petition. At the same time, on the prima facie case an interim order is passed. Since the entire evidence is not before the Court, the conclusions of the Court are prima facie. A final order should never be passed, at that stage. That would make hearing of the writ application, upon completion of affidavits, redundant.

In this case, all the essential documents are appended to the stay petition. The writ also involves substantial questions of law. When it is possible for us to dispose of the entire controversy between the parties on the basis of the papers before us **we do not think that this Court should observe the formality of inviting affidavits and sending the matter to the first Court for adjudication, thereby delaying justice to the point of defeating it.** This point of Mr. Bhowmick is also rejected.

Mr. Dhar learned senior Advocate, appearing for the petitioner made the following submissions.

He said that the accusation of wrong administration of three antibiotics was not included in the charge-sheet. The appellant had no opportunity of dealing with the charge that he had administered three antibiotics irrationally. Secondly, he submitted that the patient was admitted in the hospital on 24th December, 2010 she was under the care of the appellant till 26th. From 27th onwards she was admittedly not under the appellant. Her treatment was regulated by the regular doctor at the ward. According to the findings of the Council, the condition of the patient deteriorated when the appellant was not in charge of the ward.

He argues that the hospital did not have pathological facilities. That is why no blood test could be ordered at the time of the patient's admission. **Evaluating the condition of the patient and the blood test report which the patient's family obtained through an outside laboratory, which suggested enteric fever or typhoid, the appellant administered her three antibiotics.** The board which was formed by the Additional Chief Judicial Magistrate, Asansol found the treatment adequate to cure typhoid and Pneumonia. The appellant according to learned Counsel had adopted a mode of treatment which was approved by a responsible body of medical practitioners, satisfying the Bolam test (discussed later).

The order of the West Bengal Medical Council did not contain sufficient reasons to justify the punishment imposed on the appellant. The appellant had administered the right treatment and that the council has no case against him, Mr. Dhar said.

The appellant had been charged under the **Bengal Medical Act 1914** only. It is now the proper time to examine this Act. It constituted the West Bengal Medical Council. It prescribed a register of registered practitioners to be maintained.

"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 68[State Government] 7070. Word subs. for the word "are" by the Government of India (Adaptation of Indian Laws) Order, 1937. [is] hereby empowered to make, if 7171. Words subs. for the words "they think" by the Government of India (Adaptation of Indian Laws) Order, 1937. [it thinks] fit, in this behalf; or
ii. whom the Council, after due enquiry for the words "as provided in clause (b) of section 17" by W.B. Act 16 of 1954. [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 73[or that the practitioner be warned], and

(b) that any name so removed be afterwards re-entered in the register." It contains a very old and dated expression "in famous conduct". It the council by a majority of 2/3rd members of the council present and voting, after due enquiry, finds a registered practitioner guilty of "infamous conduct", his name is to be removed from the register of registered practitioners. Mr. Dhar tried to contend that the proceedings were also conducted under the Code of medical ethics adopted by the West Bengal Medical Council on the basis of the Indian Medical Council (Professional Conduct Etiquette And ethics) Regulations, 2002. This code of conduct may be supplementary to the Bengal Medical Act, 2014, but the records say that action against the appellant was taken under the said Act only.

An English decision of Bolam Vs. Friern Hospital Management Committee reported in (1957) was affirmed by the Supreme Court in Jacob Mathew Vs. State of Punjab and Anr. reported in (2005) 6 SCC 1, cited by Mr. Dhar.

If a medical condition involves the use of some special skill or competence then the test of negligent handling of the patient is not to be judged by the standards of an ordinary prudent man but according to the standards of an ordinary man professing and exercising that special skill.

A medical professional is not judged guilty because another professional of greater skill or knowledge would have prescribed a different treatment or conducted a surgical operation in a different way. It is enough that he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

Chief Justice R. C. Lahoti pronouncing the judgment of the Supreme Court remarked that a medical professional's skill had to be exercised with a reasonable degree of care and caution. He gains nothing by being negligent. He has everything to lose.

An error of judgment on the part of the professional was not negligence per se. A medical professional was entitled to adopt a procedure for the patient involving a higher element of risk but with greater chances of success then a procedure with lesser risk and high chance of failure. If this type of risk taking ended in ill consequences for the patient the doctor should not be hauled up for negligence. A medical practitioner cannot act in fear. If he has to worry about prosecution for every step he takes, then, he would not be able to render the service which is required of him.

I would like to quote a passage from a judgement of Denning LJ in Roe v. Ministry of Health reported in 1954 2 All ER. 131, referred to in Bolam; "Medical Science has conferred great benefits on mankind but benefits are attended by considerable risks. We cannot take the benefits without taking the risks. Doctors learn by experience which often teaches in a hard way".

In Kusum Sharma and Ors. Vs. Batra Hospital and Medical Research Centre and Ors. reported in (2010) 3 SCC 480, the Supreme Court reiterated the same principles as in the Jacob Mathew Vs. State of Punjab and Anr case. One may refer to a passage from an english decision in Maynard Vs. West Midlands Regional Health Authority reported in (1985) All.ER 635 (HL), set out in that judgment:- "In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care. " This case was also cited by
Mr. Dhar.

With regard to the point that the appellant was tried of offenses with which he was not even charged, Mr. Dhar relied in Union of India and Ors. Vs. Gyan Chand Chattar reported in (2009) 12SCC 78 which said that an **enquiry had to be conducted in compliance with the principles of natural justice. The charges should be specific, definite and detailed. The same principles were reiterated by the Supreme Court in Anant R. Kulkarni Vs. Y. P. Education Society and Ors reported in (2013) 6SCC** 515 and in Anil Gilurker Vs. Bilaspur Raipur Kshetriya Bramin Bank and Anr reported in (2011) 14 SCC 379.

I quote a very instructive passage from the judgment of Mr. Justice Sabyasachi Mukharji in Sawai Singh Vs. State of Rajasthan reported in (1986) 3SCC 454. Paragraph 16 and 17 are as follows:

"16. It has been observed by this Court in Suresh Cbandra Chakrabarty v. State of West Bengal [1971] 3 S.C.R. 1 that charges involving consequences of termination of service must be specific, though a departmental enquiry is not like a criminal trial as was noted by this Court in the case of State of Andhra Pradesh v. S. Sree Rama Rao [1964] 3 S.C.R. 25 and as such there is no such rule that an offence is not established unless it is proved beyond doubt. But a departmental enquiry entailing consequences like loss of job which now-a-days means loss of

livelihood, there must be fair play in action, in respect of an order involving adverse or penal consequences against an employee, there must be investigations to the charges consistent with the requirement of the situation in accordance with the principles of natural justice in so far as these are applicable in a particular situation.

17. The application of those principles of natural justice must always be in conformity with the scheme of the Act and the subject matter of the case. It is not possible to lay down any rigid rules as to which principle of natural justice is to be applied. There is no such thing as technical natural justice. The requirements of natural justice depend upon the facts and circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject matter to be dealt with and so on. Concept of fair play in action which is the basis of natural justice must depend upon the particular lis between the parties. (See K.L. Tripathi v. State Bank of India & Ors., [1984] 1 S.C.C.

43) Rules and practices are constantly developing to ensure fairness in the making of decisions which affect people in their daily lives and livelihood. Without such fairness democratic governments cannot exist. Beyond all rules and procedures that is the sine qua non."

The contention of the appellant is absolutely right. **He was not charged with having administered three antibiotics negligently. Yet he was tried for it.** It was not proper for the Council or the appellate authority to hold that administration of three antibiotics without blood test and chest x-ray was not proper conduct on the part of the appellant, when he did not have the chance to explain his line of treatment. This is clear violation of the principles of natural justice.

Moreover, we permitted the appellant to produce and the appellant did produce at the time of hearing of the appeal a British medical advisory. It suggested that the use of three antibiotics concurrently was not uncommon to treat serious and drug resistant bacteria. Furthermore, in the hospital attended by the appellant, there was no facility for blood test. Using his clinical judgment, he prescribed three antibiotics. It is not controverted that the appellant was not the regular doctor at the ward where the patient was admitted. He was a neurologist. He was asked to take charge temporarily from 24th to 26th December, 2010, in the absence of the regular doctor of the ward. Hence, if the treatment procedure of the medical practitioners from the time of the admission of the patient to the hospital from 24th December, 2010 till her death 30th December, 2010 is to be examined and it is shown that more than one medical practitioner, including the appellant attended to the patient, one has to show whether any action of the appellant, between 24th and 26th December, 2010 contributed to the death of the patient. There is nothing on record to suggest that the administration of any medicine in those three days or the adoption of any other mode of treatment had caused the death of the patient or had contributed substantially or partially to her death. In fact, the records show that the patient got worse only from 27th December, 2010 and that the worsening of her condition was not due to any action on the part of the appellant.

It was contended by Mr. Bhowmick that whether the conduct of a registered practitioner complained against was infamous or not was decided by the Council by 2/3rd majority present and voting, in accordance with Section 25 of the said Act.. The Council might decide that his name was to be removed from the register of registered practitioners or that he be warned. **He said that there was no scope under the said Act to give reasons.**

I am unable to agree.

First of all, the Bengal Medical Act, 1914 is a very ancient Act. The principles of administrative law were just about germinating at that point of time. **It is true that the Act does not say that the council has to give reasons for its decision.** It only says that the members have to vote with regard to the conduct of the person under enquiry. **But there is a provision for enquiry.** Now this provision of enquiry has to be given an interpretation to make this Act compatible with the principles of administrative law of our age. **The principles of natural justice have to be necessarily read into the ambit and scope of the enquiry.** In my opinion, when the required

majority comes to a decision, the reasons in support thereof have to be given. No such reasons are available. The order of the appellant authority suffered from the same vice. The delinquent was being made to suffer serious civil consequences without any reasons.

In my opinion, while applying the Bolam Test, one has to not only assess the skill required of a doctor to treat a particular patient and the skill displayed by him in rendering the treatment but one has also to consider the medical facilities and technology available to him at the place of treatment or any other facility, readily available within a reasonable distance, on the requisition of the doctor, to treat the patient. The time available to administer treatment and the time within which the medical facility and technology could be availed of and which were availed of or not availed of by the doctor have to be taken into account. The facilities at the hospital of Chittaranjan were limited. The patient was admitted in the evening of 24th December, 2010. K. G. Hospital had no blood testing facility. In a small town like Chittaranjan one does not expect to find the most modern facilities for treatment. Therefore, if on the basis of the blood report of the patient of the following day, 25th December, 2010 which indicated Typhoid, the appellant using his clinical judgment had administered two antibiotics, the previous right and the third antibiotic on receipt of the blood report, it could safely be said by a responsible body of medical practioners having the skill to treat this kind of a tropical infection that the appellant had employed his medical skill reasonably, satisfying the Bolam test.

At the end I note that the victim patient's family was not represented in Court. On several occasions we had enquired of learned counsel for the appellant whether the victim had been noticed. He replied that the victim's family had been attempted to be served but could not be found. **Furthermore, I note that Mr. Bhowmick did not make any submissions on the merits of the case. He only raised the maintainability points discussed above.**

Thus, I hold that the removal of the name of the appellant from the register of practitioners for a period of one year or suspension of his right to practice for a period of one year was wholly without any basis and hence wrongful and illegal.

I set aside the impugned order of suspension of the appellant's right to practise for a period of one year made by the respondent council by its decision dated 18th August, 2017 and affirmed on 7th December, 2017 by the appellate authority, by quashing the same. The appellant will be entitled to resume practice immediately.

I have not gone into the question of any loss and damage suffered by the appellant for being denied the right to practice from 18th August, 2017 till the date of this judgment and order.

Such right of the appellant is kept open to be urged in a separate proceeding if he wants to initiate the same.

(I.P. Mukerji, J.) Amrita Sinha, J.:-