Can You be Punished for Something, which is not a Part of the Charge-sheet?

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The judgment of the Calcutta High Court in the matter of **Snigdhendu Ghosh vs. State of West Bengal & Ors** on 19 July, 2018 has answered many questions that arise when a medical negligence case is filed against a doctor, as follows:

- Limitation period in filing a complaint.
- Can you be punished for something which is not a part of the charge sheet?
- When can you appeal to GOI as a remedy?
- Can the High Courts interfere before all the remedies are exhausted?
- Can a council go to the Supreme Court? (This is like the lower court going to the Supreme Court against a High Court order).
- Is error of judgment negligence?
- Does giving three antibiotics in typhoid amounts to negligence?
- Is error in judgment an infamous act?
- When to pass a judgment in interim stage?
- Is it necessary for the Council to give reasoned judgments?
- What are the principles of natural justice?
- When challenging a Council decision, is it not necessary to make the patient a party?
- Can a doctor file compensation from Council for wrong decision?
- What did the Supreme Court do in this case?

West Bengal Medical Council vs Dr Snigdhendu Ghosh on 20 February, 2019/SLP/4132/2019/Arising out of impugned final judgment and order dated 19-07-2018 in MAT No. 28/2018 passed by the High Court At Calcutta). This petition was called on for hearing on 20-02-2019.

Coram: Hon'ble Mr. Justice Arun Mishra, Hon'ble Mr Justice Navin Sinha.

Order: No case is made out to interfere with the impugned order (s) passed by the High Court. The special leave petition is, accordingly, dismissed. However, this order shall not be treated as a precedent. Pending application(s), if any, shall stand, disposed of.

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; Judgment 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 pediatrician and thereafter with BR Singh Hospital. Now, he specializes in Neurology and works with KG 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 outdoor doctor. She was suffering from fever for 2 or 3 days accompanied by loose motion and nausea. The hospital had no blood testing facility. On clinical examination

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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 KG Hospital by her family and taken to Mission Hospital, Durgapur. 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 multiorgan failure.** The chest X-ray and CT scan revealed pulmonary edema 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 ARDS 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 Chittaranjan 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 6 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 KG Hospital, Chittaranjan, which led to her death in multiorgan failure with respiratory complications, even though the case 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 septicemia with multiorgan 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 KG 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, the patient was admitted to KG Hospital with 3-4 days history of vomiting, loose motion and fever. **A Widal test performed on the patient prior to admission to the hospital 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 edema 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:

- By specialization, he is a neurologist. As no regular doctors were available, he was put in-charge of the ward, where the patient was kept.
- 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 and 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, 2017 attaching its decision to remove his name from the register of medical practitioners by the required majority of two-third of the members present and voting, for a period of 1 year. The appellant was found guilty of infamous conduct.

The Council made the following observations:

- The appellant was "not rational" in treating the patient with three antibiotics;
- He was "deficient in his approach" not advising any blood test;
- 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 (WBMC) 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 within a forthnight 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 1 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 prayed 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 1 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 1 year.** More than 11 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, and 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 WB 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 outdated expression "infamous conduct". If the Council by a majority of two-third 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) 6SCC 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 than 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 judgment 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 offences 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 as follows:

"16. It has been observed by this Court in Suresh Chandra 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 3 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 two-third 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 to also 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. KG 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 1 year or suspension of his right to practice for a period of 1 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 practice for a period of 1 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.:-

HIGH COURT ORDER NO. 2

This appeal has been filed at the instance of the writ petitioner challenging the order dated 3rd January, 2018 passed by the Learned Single Judge in W.P. No. 31338 (W) of 2017 refusing to pass interim order in the matter. The appellant a medical practitioner filed the aforesaid writ petition being aggrieved by and dissatisfied with the decision of the West Bengal Medical Council (hereinafter referred to as "WBMC" for the sake of brevity) contained in memo bearing no. 3165-C/28-2011 dated 21st August, 2017, and the order dated 7th December, 2017 passed by

the Principal Secretary, Health and Family Welfare Department and the Appellate Authority of WBMC. By the order dated 7th December, 2017, the Appellate Authority dismissed the appeal preferred by the appellant against imposing penalty for removal of his name from the register of medical practitioners maintained by the West Bengal Medical Council for a period of 1 year from the date of communication of the order under Section 25(a) (ii) of the Bengal Medical Act, 1914.

The facts of the case are as follows:

On 24th December, 2010, a 19-year-old girl was admitted in the female ward of Kasturba Gandhi Hospital, Chittaranjan, Burdwan with symptoms of fever, loose motion and vomiting which according to her father had been continuing for 3-4 days before such admission. The appellant though attached to the said hospital as Neurologist was in-charge of the female ward of the said hospital on and from 24th December, 2010 to 26th December, 2010 as the regular in-charge Dr Dipanjan Basak was on leave.

The girl was examined by Dr Ajay Kumar at the outpatient department and on his advice the girl was admitted in the hospital. The appellant examined her clinically and administered drugs like cefotaxime, ofloxacin, ondansetron, ranitidine and paracetamol as he was of the opinion that the patient was suffering from typhoid fever. At the time of admission, the father of the girl handed over certain pathological reports which also suggested that the girl was suffering from enteric fever.

According to the appellant, the condition of the girl improved upon administration of the aforesaid medicines and he included another drug namely chloramphenicol as he came to a fair conclusion that the patient was suffering from typhoid. The condition of the patient was stable till 26th December, 2010.

On 27th December, 2010, the regular in-charge Dr Dipanjan Basak resumed his duties and took over charge of the female ward, where the patient was admitted. The appellant did not have any occasion to treat the patient any further.

On and from 28th December, 2010, the condition of the patient deteriorated and on 29th December, 2010, the girl had serious respiratory problem. X-ray was conducted which revealed that one of her lungs was severely damaged and the other was seriously affected by pneumonia. The girl was referred to Mission Hospital, Durgapur. The girl expired on 30th December, 2010. The father of the victim girl lodged a complaint against the appellant before the West Bengal Medical Council on 12th January, 2011 as well as before the Officer-in-Charge, Chittaranjan Police Station, Burdwan on 13th January, 2011 praying for taking legal action against him and for cancellation of his medical registration.

Pursuant to the complaint lodged by the father of the victim, the police registered FIR and initiated a case against the appellant under Section 304A IPC. The police investigated the case and submitted the report in final form in the Court of the Learned Additional Chief Judicial Magistrate, Asansol on 20th November, 2013. The father of the victim being dissatisfied with the final report tendered by the police in the said case filed a Narazi petition before the learned Court which was taken up for consideration and further re-investigation was directed to be conducted by the police. As the question before the learned Court whether the death of the girl was due to rash and negligent act of the doctor required specialized skill, the learned Court referred all the medical documents in connection with the treatment of the victim girl to the Chief Medical Officer, Burdwan for his comment who in turn forwarded all the said documents to the Additional Chief Medical Officer of Health, Asansol who constituted a medical board consisting of himself and two other doctors. The board unanimously opined that the medication in the doses mentioned would have in the normal course of the event be sufficient to cure both the enteric fever and pneumonia. They further opined that however in a small percentage of case death may supervene in both enteric fever and pneumonia.

Vide order dated 19th July, 2014, the learned Court after perusal of the case diary came to the conclusion that there was no negligence on the part of the appellant in the treatment conducted by him since her admission in the said hospital. The final report of the police was accepted and the appellant was discharged from the said case.

The victim's father lodged another complaint against the appellant before the State Consumer Disputes Redressal Commission, West Bengal praying for taking legal action against the appellant and for cancellation of his medical registration. However, vide order dated 11th March, 2016, the said complaint case being No. CC/40/2012 was dismised for nonprosecution. The father of the victim lodged a further complaint against the appellant before the Registrar, WBMC on 18th March, 2011. The WBMC considered the charges and found the appellant guilty of infamous conduct in a professional respect and passed order for removal of his name from the register of registered medical practitioners maintained by the West

Bengal Medical Council for a period of 1 year from the date of communication of the order under Section 25(a)(ii) of the Bengal Medical Act, 1914. The appellant had been advised to submit his original medical registration certificate to the WBMC for the next course of action. The aforesaid order was communicated to the appellant by the Registrar, WBMC vide original medical dated 18th August, 2017. The appellant challenged the aforesaid order of the WBMC by filing appeal before the Principal Secretary, Health Department on 21st September, 2017. As the said appeal was kept pending for a considerable period of time accordingly the appellant preferred a writ petition before this Hon'ble Court being W.P. 26252 (w) of 2017 and vide order dated 10th November, 2017, this Hon'ble Court passed necessary orders upon the Appellate Authority to consider and decide the appeal in accordance with law within a fortnight from the date of communication of the order.

As the Appellate Authority did not consider and dispose the appeal within the time specified by this Hon'ble Court, the appellant filed a second writ petition praying for passing necessary order for disposal of the appeal. The said writ petition being W.P. No. 28956 (W) of 2017 was taken up for consideration and vide order dated 11th December, 2017, the same had been disposed of based on the submission made on behalf of the WBMC that during pendency of the writ petition final order disposing the appeal had been passed by the Appellate Authority on 7th December, 2017.

The order of the Appellate Authority dated 7th December, 2017 communicated to the appellant vide letter dated 11th December, 2017 issued by the Joint Secretary to the Government of West Bengal was the subject matter of challenge in the writ petition being W.P. No. 31338 (W) of 2017. The learned Single Judge vide order dated 3rd January, 2018 had issued direction to file affidavit-in-opposition within 4 weeks and reply thereto within 2 weeks thereafter. The point of maintainability of the writ petition had been kept open. The learned Single Judge felt prudent not to grant any interim order at that stage. Being aggrieved the writ petitioner filed the instant appeal praying for necessary orders.

Submissions on Behalf of the Appellant

The primary charge framed against the petitioner vide letter dated 2nd August, 2016 issued by the Registrar, WBMC was as follows:

"It appeared that there was some commission of errors in medical management of one patient, young girl Purbasha Das at KG Hospital, Chittaranjan, which led to her death in multiorgan 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 septicemia with multiorgan 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 thereto you have been found prima facie guilty of infamous conduct in a professional respect".

The appellant had been directed to show cause in writing within 21 days why his name should not be removed from the register of registered practitioners pursuant to Section 17/25 of the Bengal Medical Act, 1914. The appellant had been requested to bring the certificate of registration in original and also updated registration certificate and to submit the same before start of hearing failing, which his case would be heard and decided *ex parte*. The appellant submitted his show cause before the Registrar, WBMC on 25th August, 2016. The WBMC took up the case of the appellant for hearing on 12th July, 2017 and after considering the charges found him guilty of infamous conduct in a professional respect and decided that his name be removed from the register of registered medical practitioners for a period of 1 year from the date of communication of this order in this respect under Section 25(a)(ii) of the Bengal Medical Act, 1914.

The WBMC at the time of passing the aforesaid order of removal of the name of the appellant from the register of medical practitioners observed the following:

"(a) Dr Snigdhendu Ghosh was not rational in continuation of treatment of the patient with three antibiotics at the initial stage.

(b) He was deficient in his approach in not advising any blood test to exclude the other prognosis of the case, if any.

(c) He was deficient in his approach in not advising in any chest X-ray of the patient to exclude the other prognosis of the case, if any".

The specific case made out by the appellant is that the charge had been framed after a period of 6 years from the date of the incident. The charge was

pre-determined and biased. The statements and findings mentioned in the charge were wholly incorrect. The charge specifically mentioned that 'there was some commission of errors in medical management' of the patient leading to her death. It was further mentioned that 'the quick onset indicated that between 27th and 29th December, 2010, there might be some errors in patient surveillance'.

The appellant strenuously contended that the patient was under his care from 24th December, 2010 to 26th December, 2010. He could not be held responsible for the acute respiratory complications that developed in the patient after the said date. It is also submitted that the patient was admitted in the hospital with the symptoms of fever, loose motion, vomiting for the last 3-4 days prior to her admission in the hospital. There was no indication of any RTI as alleged in the memorandum of charge. The widal test report of the patient was positive and accordingly the necessary antibiotics had been administered to her. Blood test was prescribed to detect: (a) Hemogram including malaria parasite, (b) malaria antigen (MP), (c) typhoid (Widal test), (d) liver function test (LFT), (e) hepatic condition (HBsAg) and (f) sugar/urea/creatinine.

It was categorically submitted that chest X-ray had not been advised because the patient did not show any signs of respiratory problem on and from 24th December to 26th December, 2010. It was pointed out that the death certificate issued by the Mission Hospital, Durgapur mentioned the cause of death as 'acute respiratory distress syndrome, sepsis and multiorgan dysfunction syndrome'.

The learned Advocate appearing for the appellant placed before the Court photocopies of the extracts from the book 'Principles of Respiratory Medicine' written by Farokh Erach Udwadia, Zarir F. Udwadia and Anirudh F. Kohli published by Oxford University Press wherein the clinical features of ARDS have been discussed. **It has been mentioned therein 'against a background of one of the etiologies mentioned earlier, the patient with ARDS present with rapidly worsening dyspnea and restlessness.** On examination, such a patient has tachycardia, tachypnea and increasing hypoxemia despite supplemental oxygen. Auscultation reveals scattered crackers and occasionally a wheeze. The condition may evolve rapidly over a few hours, or may take a few days to reach its maximum intensity. Respiratory distress is obvious, and the accessory muscles of respiration are active. Cyanosis may occur, but is not always evident in spite of severe hypoxemia".

The learned Advocate also placed before this Court photocopy of extracts from the book 'Fishman's Pulmonary Diseases and Disorders' and placed before us a list of drugs which induced lung disease due to nonchemotherapeutic agents and submitted that none of the medicines, which had been prescribed by the appellant contained the aforesaid drugs and accordingly the medicines prescribed by the appellant were in no way responsible for the development/aggravation of the ARDS, which was the cause of the death of the patient.

The learned Advocate further submitted that the medical board which had been formed in terms of the order passed by the learned Additional Chief Judicial Magistrate, Asansol consisting of the Additional Chief Medical Officer of Health, Asansol and two other doctors had unanimously opined that the medication in the doses administered by the appellant would have in the normal course of the event be sufficient to cure both the enteric fever and pneumonia. However, in a small percentage of case death may supervene in both enteric fever and pneumonia. Accordingly, there had been no infamous conduct at all on the part of the appellant.

Section 25 of the Bengal Medical Act, 1914 gives the power to the Council to direct removal of names from the register and re-entry of names therein. Section 25(a) (ii) mentions that the Council may direct that the name of any medical practitioner whom the Council after due enquiry in the same manner as provided in Clause (b) of Section 17 have found guilty, by a majority of two-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 may be warned.'Infamous conduct' has not been defined in the Act. Clause 37 of the Code of Medical Ethics adopted by the WBMC mentions that disciplinary action may be taken against the registered medical practitioners upon offences and form of professional misconduct, which may be brought before the Council for disciplinary action. Decision on complaint against delinquent physician shall be taken preferably within 6 months. Clause 38 of the said Code mentions the disciplinary actions that may be taken by the WBMC, namely, i. Censure, ii. Warning, iii. Removal of name of the registered practitioner for a specific period up to 3 years or permanently according to the nature of offence and the decision to be taken by the WBMC. Clause 39 of the said Code lists the offences for which disciplinary action may be taken by the Council, namely:

a) Adultery or improper conduct or association with the patient,

b) Conviction by Court of Law for offences involving moral turpitude/criminal acts,

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

d) Violation of the Regulation-

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

   ii. If he/she does not maintain the medical records of his/her indoor patients for a period of three years as per Regulations.

(e) Sex determination test.

The appellant contended that since the cause of action arose in the year 2010 and the alleged inquiry was conducted and impugned order passed in 2017 the case was hopelessly barred by limitation and no action far less passing order of penalty could be passed on the basis of the said complaint. He further contended that none of his actions could be treated as infamous conduct in a professional respect and accordingly the penalty of removal of his name from the register of medical practitioners is bad in law and liable to be set aside.

The learned Advocate further submitted that the opening line of the charge-sheet mentioned 'that there was some commission of errors in medical management' and lastly it was mentioned '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' wherefrom it can be understood that there might be some errors in medical management on his part and the same cannot under any stretch of imagination be held to be infamous conduct by him. Moreover, as per the charge-sheet, there might be some error in patient surveillance between 27th and 29th December, 2010 but as the appellant was not in-charge of the patient after 26th December, 2010 accordingly he ought not to be held responsible for the same.

It was further submitted that the penalty proposed to be passed against the appellant was mentioned in the charge-sheet itself which shows that the WBMC had conducted the alleged enquiry with a predetermined and biased mindset. The authorities had made up their mind that irrespective of the outcome of the enquiry the punishment of removal of the name of the appellant was the only order that could be passed in the case. That was exactly the reason why the appellant had been directed to bring with him the original registration certificate at the time of the hearing. The learned Advocate for the appellant has taken a specific plea that the charge framed against the appellant and the reasons for his punishment are different. It has been pleaded that there had been gross violation of the principles of natural justice as the reasons mentioned in the charge-sheet were not the reasons for which punishment had been imposed upon the appellant. The issue of administering three antibiotics to the victim was not the charge against the appellant, whereas the order of punishment specifically mentioned that it was not rational for the appellant in continuation of the treatment of the patient with three antibiotics at the initial stage. He further submits that prescription of three antibiotics is not an uncommon phenomena in medical field.

The learned Advocate for the appellant denies that the appellant was in any manner deficient in not advising blood test of the patient which is an absolute perverse finding in as much as the appellant had advised as many as six blood tests which were duly conducted and necessary medicines had been administered upon taking into consideration the blood reports of the patient. The prescription to conduct blood test is annexed with the writ petition which is annexed with the application for stay.

It was submitted that principles laid down by the Hon'ble Supreme Court in the various judgments dealing with medical negligence had not been followed by the authorities at the time of deciding the case of the appellant. Judgments relied upon by the appellant:

i. Kusum Sharma and Others vs. Batra Hospital and Medical Research Centre and Others reported in (2010) 3 SCC 480.

ii. Jacob Mathew vs. State of Punjab reported in (2005) 6 SCC 1.

iii. Union of India and Others vs. Gyan Chand Chattar reported in (2009) 12 SCC 78.

iv. Anant R. Kulkarni vs. Y.P. Education Society and Others reported in (2013) 6 SCC 515.

v. Sawai Singh vs. State of Rajasthan reported in (1986) 3 SCC 454.

vi. Anil Gilurker vs. Bilaspur Raipur Kshetriya Gramin Bank and Another reported in (2011) 14 SCC 379.

Submissions on Behalf of WBMC

At the time of hearing the main point raised by the learned Advocate appearing on behalf of WBMC

was that the appeal was being heard against refusal to pass interim order and accordingly the main matter ought not to be heard on merits. It had been vehemently contended that there is an alternative remedy available to the appellant under Section 24 of the Indian Medical Council Act, 1956, where the appellant may prefer appeal before the Government against the impugned order of penalty. It had been further contended that this was the third writ petition filed by the appellant on the self-same cause of action and accordingly the writ petition and the appeal arising therefrom is liable to be dismissed on the ground of constructive res judicata.

The learned Advocate for the respondent specifically contended that WBMC is not obliged to give reasons for their decision adopted in their meeting held on 12th July, 2017. It has been submitted that the Bengal Medical Act, 1914 is a valid piece of legislation and as per provision of Section 25(a)

(ii) the Council by a majority of two-thirds of the members present and voting at the meeting may direct removal of the name of the registered practitioner for infamous conduct in any professional respect.

It has been submitted that since there is a specific provision for preferring appeal as per provision of Section 24 of the Indian Medical Council Act, 1956 accordingly the instant appeal is liable to be rejected on the ground of availability of alternative remedy.

He further submitted that there is no scope for passing any interim order in the instant appeal as the impugned order of penalty had already been given effect to and the name of the appellant had already been struck off from the register of medical practitioners. It has been submitted that the respondents will lose an appellate forum if the appeal is entertained and the scope of the writ petition ought not to be enlarged before the Hon'ble Appeal Court. The learned Advocate further submits that there had not been any occasion on the part of the learned Single Judge to decide the matter on merits and accordingly the appeal Court ought not to hear out the main matter. He submits that the writ petition is at an interim stage and no order ought to be passed, which may decide the main issue and may grant the final relief in favor of the appellant. He prays for remand of the matter before the learned Trial Judge so that he can place the entire facts and defend the case on merits.

Judgments Relied Upon by WBMC

i. Cicily Kallarackal vs. Vehicle Factory reported in (2012) 8 SCC 524.

ii. Authorised Officer, State Bank of Travancore and Another vs. Mathew K.C. reported in 2018 (1) Supreme 471.

iii. Council for Indian School Certificate Examination vs. Isha Mittal and Another reported in (2000) 7 SCC 521.

iv. Forward Construction Company and Others vs. Provat Mandal (Regd.), Andheri and Others reported in AIR 1986 SC 391. v. Sheela Devi vs. Jaspal Singh reported in 1999 AIR SCW 2214. vi. Medical Council of India vs. State of West Bengal reported in 2012 (1) CHN (Cal) 46.

v. Unreported judgment of this court dated 1st September, 2011 passed in W.P. No. 781 of 2011 (Dr. Shyama Prasad Sar vs. The State of West Bengal and Others).

Observations of the Court

In Kusum Sharma and Others (supra) Supreme Court held that medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. We cannot take the benefits without taking risks. In this case, Court reiterated the observations made in the land mark judgment of Jacob Mathew vs. State of Punjab (supra) that in the law of negligence professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. The standard to be applied for judging whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.

In Jacob Mathew's case the Hon'ble Supreme Court heavily relied on the judgment delivered in the case of Bolam vs. Friern Hospital Management Committee reported in (1957) 2 All. ER 118 where in it had been observed that a doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view. Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care. The Hon'ble Supreme Court on

scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom has laid down certain principles while deciding whether the medical professional is guilty of medical negligence or not. Some of them are as follows:

1. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.
2. A medical practitioner would only be liable where his conduct fail below that of the standards of a reasonably competent practitioner in his field.
3. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.
4. Just because a professional looking at the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount negligence.
5. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.
6. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients.

The Hon'ble Supreme Court in the said judgment of Kusum Sharma (supra) specifically directed that the aforementioned principles must be kept in view while deciding the cases of medical negligence. It should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.

In the case of Union of India and Others vs. Gyan Chand Chattar (supra) relying upon the case of Sawai Singh vs. State of Rajasthan (supra) Supreme Court held that in a domestic enquiry the charge must be clear, definite and specific as would be difficult for any delinquent to meet the vague charges. There must be fair play in action particularly in respect of an order involving adverse or penal consequences. The Court held that an enquiry is to be conducted against any person giving strict adherence to the statutory provisions and principles of natural justice. No enquiry can be sustained on vague charges. The findings should not be based on conjectures and surmises. Every act or omission on the part of the delinquent cannot be a misconduct. The same principle has been reiterated in the case of Anil Gilurker (supra).

The case of Anant R. Kulkarni (supra) cited by the learned Advocate of the appellant is on the similar line of the above case wherein the Court reiterated that a delinquent should not be served with a charge-sheet without providing him a clear, specific and definite description of the charge against him. When statement of allegations are not served with the charge-sheet, the enquiry stands vitiated, as having been conducted in violation of the principles of natural justice.

The judgment referred to above in the case of Cicily Kallarackal, Authorized Officer, State Bank of Travancore and Another, Council for Indian School Certificate Examination and Sheela Devi is primarily on the ground of not entertaining writ petitions due to availability of alternative remedy. There is no second opinion about it. What is required to be seen is whether the alternative remedy available to the petitioner is efficacious and whether the action of the respondents is vitiated by jurisdictional error or patent violation of the principles of natural justice so as to enable the writ Court to exercise jurisdiction in the matter.

In the instant case, the cause of action arose on 13th January, 2011, when a complaint was lodged by the father of the victim girl who expired on 30th December, 2010. As per Clause 37 (iv) of the Code of Medical Ethics published by the WBMC a decision on complaint against a delinquent physician shall be taken preferably within 6 months. Admittedly in this case, the charge memo was issued against the petitioner on 2nd August, 2016, and final order had been passed for removal of the name of the appellant on 21st August, 2017.

Moreover, from the order of punishment it can be seen that the appellant had been punished on the basis of infamous conduct which was not specified in the memorandum of charge i.e.; **the appellant was punished for an offence not mentioned in the charge memo.** The appellant did not have any opportunity to controvert the allegation mentioned in the order of penalty. The same appears to be gross violation of the

principles of natural justice as the Hon'ble Supreme Court has repeatedly observed in various decisions that the **charge leveled against a delinquent must be specific** and there must be fair play in action in respect of an order involving adverse or penal consequences resulting in loss of job or livelihood.

A plain reading of the charge memo issued against the appellant shows that there appeared some commission of errors in medical management in respect of the victim, which led to her death due to multiorgan failure. It was mentioned that no blood count or chest X-ray was performed. It was further mentioned that the quick onset of probable pulmonary edema or ARDS between 27th and 29th December, 2010 indicated, there might be some errors in patient surveillance and on that score the appellant cannot be absolved in his responsibilities and had been found *prima facie* guilty of infamous conduct in a professional respect. Admittedly blood tests were advised by the appellant when she was admitted at the hospital. The prescription for conducting blood test and the test reports are annexed with the writ petition. It is further admitted that the appellant treated the patient from 24th December, 2010 to 26th December, 2010. The period when the alleged ARDS developed in the victim the appellant was not in-charge of the patient. Accordingly, the question of committing error in patient surveillance between 27th and 29th December, 2010 does not arise at all. **Moreover, neither the charge memo nor the impugned order of WBMC and the appellate authority indicate that the condition of the patient deteriorated and turned fatal due to the medicines administered by the appellant. In the absence of the specific charge to that effect the appellant could not have been held to be guilty of the alleged misconduct.**

The appellant submitted his show cause to the charges mentioned in the charge memo. The order of penalty speaks otherwise. It states that the appellant was not rational in continuation of the treatment of the patient with three antibiotics at the initial stage. **The order did not suggest that the patient expired due to intake of three antibiotics.** The appellant was not given any opportunity to meet the charge of using three antibiotics for treatment of the patient.

The charge of administering three antibiotics was not mentioned in the charge memo. The appellant did not have any chance or scope to deal with the said charge. The appellant ought to have been given a reasonable opportunity to defend his stand. This in my view is serious violation of natural justice.

It appears from records that on the complaint lodged by the father of the victim before the police station the learned Additional Chief Judicial Magistrate, Asansol referred the medical documents in respect of the victim to the Chief Medical Officer Health, Burdwan who forwarded the papers to the Additional Chief Medical Officer of Health, Asansol. A medical board was constituted consisting of the Additional Chief Medical Officer of Health, Asansol along with two other doctors. The board unanimously opined that the medication in the doses mentioned would have in the normal course of the event be sufficient to cure both the enteric fever and pneumonia. However, in a small percentage of case death may supervene in both enteric fever and pneumonia. The above unanimous **decision of the doctors suggests that the procedure of treatment adopted by the appellant was neither illegal nor new or uncommon in medical jurisprudence.** In fact it was an accepted practice by the doctors and it was quite normal to treat the patient with the said medicines.

The WBMC may have a divergent opinion about it but the same ipso facto does not render the procedure adopted by the appellant wrong or the conduct of the appellant infamous. Moreover, the report of the medical board was not challenged by the complainant and the order of the Ld. Court dismissing the complaint case had attained finality as far back as on 19-07-2014. Trying the appellant for the same offence all over again and penalizing him for the same is absolutely illegal and not permissible in law. As regards observation of not advising chest X-ray of the patient the appellant had already dealt with the same in his show cause. He has specifically stated that chest X-ray was not done as there was no symptom of RTI. He further stated that there is no protocol at Kasturba Gandhi Hospital to perform chest X-ray in every case of fever. The report of Widal test conducted for detecting typhoid being positive he was quite certain that it was a case of enteric fever and necessary medicines were administered. The patient responded to the medicines as long as she was under the care and treatment of the appellant.

The judgment of Forward Construction Company and others (supra) referred to by the learned Advocate for the respondents deal with the principles of *res judicata*. It has been strenuously submitted by the learned Advocate for the respondent that the appellant had filed three writ petitions on the self-same cause of action. This appeal arises out of the third writ petition filed by the appellant. It has been mentioned earlier that the first writ petition was filed praying for expeditious disposal of the appeal filed by the appellant against the impugned order of

the WBMC. The second writ had been filed as the appeal preferred by the appellant had not been disposed of within the time as specified by this Hon'ble Court on the first writ petition filed by the appellant. The present writ petition out of which this appeal arises had been filed challenging the order dated 7th December, 2017 passed by the Principal Secretary, Government of West Bengal, Family Welfare Department being the appellate authority of the WBMC. The order impugned in this writ petition was not in existence when the first and the second writ petitions were filed. Accordingly, the question of *res judicata* cannot and does not arise at all.

The judgment of Medical Council of India (supra) referred to by the learned Advocate of the respondent dealt with the vires of certain regulations of the Indian Medical Council (Professional Conduct Etiquette and Ethics) Regulation 2002 and the same has no matter of application in the present case. The judgment of Dr Shyama Prasad Sar (supra) clearly states that no provision for appeal can create a compulsion to lodge an appeal for a right, essentially a thing conferred, cannot be imposed nor is exhaustion of a statutory remedy of appeal a mandatory requirement for maintaining an application under Article 226 of the Constitution of India. Whether a petition under Article 226 should be entertained when a statutory remedy is not exhausted is to be examined on the facts and circumstances of the case concerned. It has been further held that in cases where it *prima facie* appears that the impugned order is vitiated by jurisdictional error or patent violation of the principles of national justice discretion can be exercised in favor of entertaining the petition.

In the instant case, it is evident from records available before this Court that there has been flagrant and **patent violation of the principles of natural justice, equity and fair play.**

Relegating the appellant to avail the statutory remedy would not in my opinion be the proper approach in the instant case. The prayer made by the learned Advocate appearing for the respondent for remanding the matter back to the trial court for hearing the same also does not hold good in the facts and circumstance in the instant case. The same will only entail in delay of the matter further. To avoid the same this Court vide order dated 23rd April, 2018 had admitted the appeal and directed that the appeal would be heard out on the papers of the stay petition and all formalities had been dispensed with. The parties have advanced exhaustive arguments for days together and remanding the matter back to the trial Court for deciding the same would result in valuable loss of judicial hours apart from causing immense harassment and mental agony, which the appellant is suffering since August 2017 when the order for removal of his name was passed by the WBMC. **No fruitful purpose will be served by remanding the matter to the learned trial Judge.** We have noted that out of the penalty period of 1 year imposed on 18/21 August, 2017 more than 10 months have already elapsed. Less than 2 months are left for the petitioner to serve the entire period of punishment of removal of his name from the register of medical practitioners. He has already suffered enough due to the erroneous decision of the WBMC.

It will not be out of place to mention that there was a direction for filing affidavit in opposition in the writ petition as far back as on 3rd January, 2018. We have been told that no affidavit had been filed in connection with the writ petition in terms of the direction passed by the learned trial Judge. In that view of the matter, this court vide order dated 23rd April, 2018 proposed to hear the appeal finally and dispose of the same on merits on the papers of the stay petition. It is pertinent to mention that the writ petition along with all annexures have been annexed with the application for stay. Going back to the charge memo it is seen that the WBMC charged the appellant for some errors on his part. **The Hon'ble Supreme Court in the case of Kusum Sharma (supra) reiterated the observation made by the Court in the case of Spring Meadows Hospital v. Harjol Ahluwalia, (1998) 4 SCC 39 that an error of judgment is not necessarily negligence.**

In the same case, the Court reiterates the observation made in the case of White House v. Jordan (1981) 1 WLR 246 that an **error of judgment may, or may not be negligent**, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence.

In Achutrao Haribhau Khodwa v. State of Maharashtra (1996) 2 SCC 634 referred to in Kusum Sharma's case, the Supreme Court noticed that *"44. In the very nature of medical profession, skills differ from doctor to doctor and more than one alternative course of treatment is available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution.* ***Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of***

action chosen by him was acceptable to the medical profession".

In Kusum Sharma, the Supreme Court reiterated the observation made in Jacob Mathew case that a doctor faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. The Court goes on to observe that it is a matter of common knowledge that after happening of some unfortunate event, there is a marked tendency to look for a human factor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. **A professional deserves total protection. It is to be kept in mind that to err is human**. Doctors may make errors of judgment but if they are punished for this then no doctor can practice his profession with a free mind. A doctor cannot perform with a sword hanging over his head. In a third world developing country like India with such huge population, limited resources, lack of proper infrastructural facilities and only a handful of doctors errors cannot be ruled out in its entirety. It is expected that the doctors would carry out their duty with utmost care and precision. But the doctor cannot be put to blame in each and every case when a mishap happens, and certainly not in this case. It is highly unfortunate that a girl lost her life at such a young age. The parents have lost their only child. May be the same doctor has saved the life of several other children. There are many patients who are desperately in need of medical assistance but due to dearth of medical professionals they have to suffer endlessly. It is the society at large who will suffer if the doctor is not allowed to practice for a certain period of time because the moment the penalty period is over the doctor will restart his practice and make up for his professional loss but the patient who remained without medical service may not get back the time to recover.

Decision

Applying the aforesaid principles laid down by the Hon'ble Supreme Court in the instant case, **it can be concluded that the act of the appellant certainly cannot be held as 'infamous conduct'**. The punishment of penalty in the absence of any specific charge is patently illegal and gross violation of the principles of natural justice, equity and fair play. **When two divergent and equally efficacious procedures for treatment was possible one by administrating two antibiotics and the other by administering lesser antibiotics adopting one would not amount to any error attracting the penalty of removal of the name of the appellant from the register of medical practitioners.**

The decision of the WBMC contained in memo bearing no. 3165-C/28-2011 dated 21st August, 2017 and the order dated 7th December, 2017 passed by the Principal Secretary, Health and Family Welfare Department and the Appellate Authority of WBMC **are set aside.** The WBMC is directed to re-enter the name of the appellant in the register of medical practitioners immediately without any delay and **preferably within a period of 48 hours from the date of receipt of a copy of this order.** The appellant is at liberty to resume practice forthwith.

The appeal is allowed. No costs.

(Amrita Sinha, J.)

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FDA Proposes New Regulations to Ensure Safety and Effectiveness of Sunscreens

The US FDA has proposed a rule that would update regulatory requirements for most sunscreen products in the United States. This significant action is aimed at bringing nonprescription, over-the-counter (OTC) sunscreens that are marketed without FDA-approved applications up to date with the latest science to better ensure consumers have access to safe and effective preventative sun care options. Among its provisions, the proposal addresses sunscreen active ingredient safety, dosage forms, and sun protection factor (SPF) and broad-spectrum requirements. It also proposes updates to how products are labeled to make it easier for consumers to identify key product information.