

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 28th November, 2018

+ LPA 580/2018, CM Nos.42580-42582/2018

DR ASHWANI MAICHAND Appellant

Through: Mr. Nagendar Rai, Sr. Adv. with
Mr. Abinash Kumar & Mr. Manoj
Kumar, Advs.

versus

RAVI RAI & ORS Respondents

Through: Mr. Abhinav Shrivastava, Adv. with
Mr. Rahul Gupta & Ms. Sana Kamra,
Advs. for R-1
Mr. Praveen Khattar, Adv. for R-
3/DMC

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM Nos.42581-42582/2018

Exemption allowed subject to all just exceptions.

Application stands disposed of.

LPA 580/2018

1. The challenge in this appeal by Dr. Ashwani Maichand is, to the order / judgment dated August 20, 2018 passed in W.P.(C) No. 10625/2017. Suffice it to state, vide the order / judgment dated

August 20, 2018, the learned Single Judge has decided two writ petitions being W.P.(C) Nos. 10506/2017 and 10625/2017 both filed by Mr. Ravi Rai.

2. The two writ petitions were filed by Mr. Ravi Rai against the Medical Council of India and two surgeons namely Dr. Rahul Kakran and Dr. Ashwani Maichand (the appellant herein). Mr. Ravi Rai's grievance was qua the order dated August 23, 2017 passed by the Medical Council of India whereby it had exonerated the appellant herein from culpability, during the treatment of Mr. Rai, which led to the operation of his left foot instead of right foot.

3. The facts as noted from the record are in the evening of June 19, 2016, Mr. Rai slipped from the stairs of his house, which resulted in injuries being inflicted on both his legs as well as his lower back. He was rushed to Fortis Hospital, located at Shalimar Bagh, New Delhi. He was registered as an in-patient under the supervision of Dr. Maichand and Dr. Kakran. A diagnostic X-ray was conducted, on that very day, on the right foot of Mr. Rai. Since, Mr. Rai was informed that he had suffered a fracture on his right foot, he was advised to get a CT scan done of his right foot on June 20, 2016. Accordingly, X-rays were conducted on Mr. Rai's left leg

and backbone. A CT scan was done of Mr. Rai's right leg and backbone. Upon examination of the results of the diagnostic tests, Mr. Rai was informed that he had suffered a "comminuted" fracture on his right foot and since, his condition was serious, he would have to undergo a surgery which would involve fixation of screws on the right foot followed by a plaster-of-paris cast. Insofar as the left leg and spine were concerned, it was suggested to him that he should undertake physiotherapy. The aforesaid advice was given by the appellant. Mr. Rai underwent physiotherapy twice. The record of X-ray, as noted by the learned Single Judge, showed that though Mr. Rai had fractured his spine, information qua this aspect was not given to him. Further, as advised, Mr. Rai was prepared for surgery on June 20, 2016. Accordingly, Mr. Rai's right foot was marked using a marker, in preparation of surgery, which was to be performed on the said foot.

4. The learned Single Judge also noted that the record showed that despite Mr. Rai having fractured his spine, he was administered anaesthesia via the spinal cord by Dr. Sharma. Post surgery, when Mr. Rai had recovered from anaesthesia, he discovered that instead of his right foot, his left foot had been operated upon. The surgeon

Dr. Kakran, who had performed the surgery, had inserted the screws in Mr. Rai's left foot. Having discovered the error, Mr. Rai took discharge from Fortis Hospital and got himself admitted in Max Hospital, Shalimar Bagh, New Delhi, for getting his right foot operated. The FIR No.424/2016, dated June 22, 2016, was registered in Police Station Shalimar Bagh, under Sections 336, 338 & 34 of the Indian Penal Code, 1860 against the delinquent doctors. Parallely, the Disciplinary Committee of the DMC, based on media reports, representation of the police and on the complaint of Mr. Rai's father, commenced its proceedings.

5. The findings of the Disciplinary Committee were against the appellant. The DMC accepted the findings of the Disciplinary Committee and recommended that the name of the appellant be removed from the State Medical register of the DMC for a period of 180 days after the expiry of 30 days from the date of the order.

6. Aggrieved by the order passed by the DMC, the appellant filed an appeal before the Medical Council of India. The Medical Council of India vide its order dated August 23, 2017, exonerated the appellant completely on the ground that he was absent on the day of the surgery due to personal reasons and thus, was not present

in the OT when surgery was performed on Mr. Rai. It was also of the view that the appellant was only involved in the planning of the operation, whereby, the decision taken was to operate the right leg and not the left leg and, therefore, whatever led to the operation of the left foot had no involvement of Dr. Maichand.

7. The learned Single Judge, on the basis of analysis of the record, found the following findings of fact:-

(i) Mr. Rai, on sustaining an injury to his lower limbs and lower back, was admitted to the Fortis Hospital on 19.06.2016, under the supervision of Dr. Maichand, Senior doctor, and Dr. Kakran.

(ii) On 19.06.2016, an X-Ray was carried out vis-a-vis Mr. Rai's right foot followed by CT-Scan of the same foot on 20.06.2016.

(iii) An X-Ray of Mr. Rai's left foot and backbone was conducted on 20.06.2016. On that very day, a CT-Scan of Mr. Rai's backbone was also carried out. The diagnostic test carried out revealed that the bone in the right foot had broken into many parts. In other words, it was a condition of comminuted fracture. Consequently, a decision was taken to perform a surgery on Mr. Rai's right foot. He was informed that the surgery would

involve fixation of screws, followed by a plaster-of-paris cast.

(iv) The X-ray of the left foot and the backbone revealed that Mr. Rai had suffered a fracture in these two parts of his body as well.

(v) Mr. Rai undertook two physiotherapy sessions despite the X-ray showing that he had fractured his spinal cord. The Physiotherapist, Dr. Dipti Jha, indicated that she was not informed that Mr. Rai had suffered a fracture in the left foot and the spine.

(vi) The anaesthetist, Dr. Yatish Sharma, was also informed only about the fracture in the right foot.

(vii) Prior to the surgery, the right foot was marked, as the plan was to perform surgery only on that foot.

(viii) The WHO-Check list, though, showed a marking made on the left side, the case record at page 52 showed that certain parts had been scored out. According to the DMC, both suggested tampering of records.

(ix) No consent of Mr. Rai was obtained, prior to the surgery with regard to the possibility of the operation being performed on the left foot. The DMC found that there was “un-displaced” fracture calcaneus on the left foot, which would have united or fused after eight (8) weeks, even if surgery was not performed.

(x) Dr. Maichand had admitted before the DMC that he and Dr. Kakran worked as a team and that even before the surgery, a decision was taken by the two of them to operate the left foot, in case excessive swelling was found on the right foot. It was also found by the DMC that Dr. Maichand had not conveyed this aspect either to Mr. Rai or the Anaesthetist, Dr. Yatish Sharma.”

8. On the issue, whether the appellant could have been exonerated completely, the learned Single Judge has, in paras 24 to 26 held as under:-

“24) Insofar as the first issue is concerned, in my view, the MCI was wrong in exonerating Dr. Maichand, completely. What has come to fore clearly, is that, Dr. Maichand was a senior doctor, under whose care and supervision, Mr. Rai had been admitted for treatment. The initial diagnostic test carried out on Mr. Rai had been seen by Dr. Maichand.

24.1) Therefore, knowledge would have to be attributed to Dr. Maichand, with regard to the fact that Mr. Rai had suffered a comminuted fracture on the right foot and a hairline fracture on the left foot and spine.

24.2) It has also emerged from the findings recorded by the DMC that Dr. Maichand and Dr. Kakran had agreed, even prior to the surgery, that if swelling was found in the right foot, surgery would be performed on the left foot. It

has further been brought to fore that this aspect of the matter was neither disclosed to Mr. Rai or the Anaesthetist, Dr. Yatish Sharma. Therefore, the fact that Dr. Maichand was not present during the course of surgery, for whatever reason, cannot completely efface his culpability in the matter. Dr. Maichand, as a senior doctor, owed duty of care to Mr. Rai. The fact that he failed to discharge that obligation is evident from the following:

(i) He failed to clinically examine Mr. Rai even when he complained of back pain and the X-ray showed that he had fractured his spinal cord.

(ii) He did not convey to the Physiotherapist i.e., Ms. Dipti Jha the fact that Mr. Rai had fractured his backbone and his left leg.

(iii) He did not ensure, the fact that Mr. Rai had fractured his backbone, was communicated to the Anaesthetist, Dr. Yatish Sharma.

(iv) Assuming that a decision was taken, even prior to the surgery by Dr. Maichand in consultation with Mr. Kakran, that in case swelling was found on the right foot on the day of surgery, the surgery would, instead be performed on the left foot (which, to my mind was a false stand taken to justify the surgery on the left foot), was a decision which was not communicated to Mr. Rai.

(v) At no stage, did Mr. Maichand communicate to Mr. Rai that instead of him, Dr. Kakran would be performing the surgery.

25) As a result of these acts of omission and commission, Dr. Maichand, in my view, not only contributed to the avoidable trauma but also to the surgery being performed on Mr. Rai's left foot, which as per findings recorded by the DMC, would have healed after eight weeks, even if no surgery was performed. An aspect which was not disputed by Dr. Maichand in his deposition before the DMC. Furthermore, as alluded to above, Dr. Maichand's negligence, exposed Mr. Rai to trauma of not only having to undergo the surgery, which was not required to be done, including screws being inserted in the left foot which would have healed, even otherwise, naturally within eight (8) weeks, but was also, exposed him to the danger and after effects of receiving anaesthesia in a fractured spinal cord and undergoing physiotherapy sessions.

26) Therefore, for the foregoing reasons, I am unable to persuade myself that the decision of the MCI, insofar as Dr. Maichand was concerned, was correct. The MCI has, in fact, glossed over the findings of fact, recorded by the DMC, in its order. Thus, I am inclined to set aside MCI's order dated 23.08.2017, insofar as Dr. Maichand is concerned."

9. Mr. Rai learned Senior Counsel appearing for the appellant would reiterate the only submission as was made on behalf of the appellant before the learned Single Judge that the appellant was not present in the operation theatre when the operation had taken place. We are unable to agree with the said submission of Mr. Rai. There is no dispute that the appellant was a Senior Doctor, under whose care and supervision Mr. Ravi Rai was admitted for treatment. Mr. Rai was examined first by the appellant only. The conclusion of the learned Single Judge was that the appellant owed a duty of care to Mr. Ravi Rai and he has failed to discharge the said obligation. In other words, the acts of omission and commission on the part of the appellant are not confined to the operation only but also as a treating Doctor.

10. Further the factual conclusions of the learned Single Judge, as noted above have not been contested before us. In the absence of any challenge to those conclusions, which clearly prove the culpability of the appellant, and the learned Single Judge has remanded the matter to the MCI for deciding the issue of quantum of punishment, the impugned Judgment cannot be faulted. The conclusion arrived at by the MCI exonerating the appellant

cannot be sustained. The plea of Mr. Rai, learned Senior Counsel for the appellant that the case of the appellant cannot be equated with Dr. Kakran is concerned, the same is premature. It is for the authorities concerned, while considering the issue of quantum of punishment to take into account, the culpability of the appellant on the basis of findings arrived at by the Disciplinary Committee of the DMC and as noted by the learned Single Judge. The appeal, being without any merit, the same is dismissed. No costs.

CM No.42580/2018 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

NOVEMBER 28, 2018/ak