$~54

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

\+ **W.P.(C) 6058/2018**

PREM KISHORE ..... Petitioner

Through Mr Sunil Mittal, Senior Advocate with Mr Dhruv Grover, Ms Ashwarya Anand, Advocates.

versus

UNION OF INDIA AND ORS ..... Respondents

Through Mr Anil Soni, CGSC with Mr Abhinav Tyagi, Advocates for R1/UOI.
Mr Anand V. Khatri, Mr H. Sharma, Advocates for R2.
Mr T. Singhdev, Mr Tarun Verma, Ms Amandeep Kaur, Ms Puja Sarkar, Ms Bhakthansangi Das, Advocates for MCI.
Mr Praveen Khattar, Advocate for R4/DMC and MCI/R3.
Mr Subhash Kumar, Advocate for R5 to R10.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 29.04.2019

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning on order dated 01.06.2016 passed by the Delhi Medical Council (DMC) confirming the observations of the Disciplinary Committee of DMC that there was error of judgement in the treatment

of the petitioner's wife (since deceased) but rejecting the recommendation that the name of respondent no. 5 be removed from the Medical Register maintained by DMC. The petitioner also impugns the order dated 11.07.2017 passed by the Medical Council of India (MCI), upholding the decision of MCI on the recommendations of the Ethics Committee.

2. On 04.09.2013, the wife of the petitioner, Smt. Urmila Devi (hereafter 'the patient'), underwent "Robotic Ureterolysis", a surgery performed for removing the fibroid in the ureter. The said surgery was performed by respondent no. 5 to 9 (hereafter 'the concerned doctors') in respondent no.10 hospital (Shri Ganga Ram Hospital – hereafter 'the respondent hospital'). The petitioner claims that while operating the patient, respondent no.5 erroneously cut the external iliac artery and instead of addressing the same immediately, the concerned doctors put the haemoclips & suture on it and further continued with the Robotic surgery for another three hours. It is claimed that due to the aforesaid act of the concerned doctors, the petitioner's wife suffered heavy blood loss, which resulted in acute kidney failure.

3. After the operation, the patient was shifted to the ICU. The patient was kept on the dialysis support on the same day of operation and she was also on ventilator support. On 05.09.2013, the petitioner was intimated by the concerned doctors that the blood could not be cleaned using dialysis. Accordingly, the concerned doctors asked for the consent of the petitioner to put the patient on Continuous Renal Replacement Therapy (CRRT), and the petitioner agreed to the same.

On 06.09.2013, the patient suffered two cardiac arrests but she was revived. Thereafter, she suffered a third cardiac arrest after thirty minutes, from which could not be revived. She was declared dead at 3:40 pm.

4. The petitioner claims that the concerned doctor continued to perform the Robotic Ureterolysis surgery and failed to take any precautionary and protective measures intentionally in order to raise bills of the respondent hospital, and the said omission ultimately resulted in the death of the petitioner's wife.

5. Thereafter, on 11.09.2013, the petitioner applied to the respondent hospital seeking (i) complete videography of the operation; and (ii) Photocopy of full internal medical treatment record. The said documents were provided to the petitioner on 23.09.2013. It is alleged by the petitioner that the said documents were tempered and manipulated by the respondent hospital before they were provided to the petitioner.

6. On 16.12.2013, the petitioner filed a complaint against the concerned doctors as well as the respondent hospital, before (i) the SHO, PS Rajinder Nagar, Delhi; (ii) ACP Karol Bagh; and (iii) DCP, Central District, Delhi. An FIR (No. 355/2014) dated 06.08.2014 was lodged against the said respondents at PS Rajinder Nagar for offences under Section 304-A IPC.

7. Thereafter, the petitioner also filed a complaint dated 23.12.2013 before the MCI, which was forwarded to DMC for

adjudication. The Disciplinary Committee passed an order dated 11.04.2016 recommending that the name of respondent no.5 be removed from the State Medical Register of DMC for a period of thirty days. This was considered by DMC on 18.05.2016, and whilst it decided to uphold the observations, it concluded that since the Disciplinary Committee had concluded there was an error of judgment, no punishment is warranted.

8. Aggrieved by the aforesaid order, the petitioner filed an appeal dated 24.06.2016 before the MCI. The Executive Committee of MCI, by an order dated 11.07.2017, approved the recommendations made by the Ethics Committee to uphold the decision of the DMC dated 01.06.2016 and dismissed the aforesaid appeal. The said decision was communicated to the petitioner by a letter dated 17.08.2017, which is also impugned in the present petition.

9. At this stage, it would be relevant to refer to the observations made by the Disciplinary Committee of DMC which had considered the petitioner's complaint, the record of the case as well as the written statements filed by various doctors. The said observations are set out below:-

> "In view of the above, the Disciplinary Committee makes the following observations:-
>
> 1. Adequate preoperative assessment of the patient was done, on account of hemophilia carrier state of the patient, low Hemoglobin and deranged KFT reports. There was no haste shown by Dr. Sudhir Khanna while the option of surgery was

considered. The decision of moving forward with the robotic surgery was taken in consultation with the patient and her relatives. This procedure was a planned surgery.

2. On perusal of the operative and anesthetic records, and video-documentation of the robotic procedure, it was evident that the robotic surgery lasted for approximately 3 hours. First episode of bleeding started approximately at 1 hour 15 minutes into the surgery. There was significant bleeding and the potential reason for this was injury to major vessels namely iliac vessels. There was no loss of telescopic vision during the procedure, and the bleeding was finally controlled using Polymer Locking Ligation clips and Metal Ligation clips. However, significant blood loss had already occurred. The team persisted with the robotic dissection because the surgeon felt that there was no loss of telescopic vision and bleeding was under control. Second episode of bleeding occurred at a different site approximately 2 hours 20 minutes into the procedure, which was also controlled using Metal Ligation clips. Finally, the intended procedure i.e. ureterolysis was accomplished robotically. The injured vessel was repaired with the help of a vascular surgeon by switching to open surgery procedure. But it seems that the primary surgeon took a long time to resort to this option in view of the injury to the vessels. This could be construed as an error of judgment on the part of the surgeon as he converted to open surgery at a later stage during the operation. This delay due to an error of judgment led to significant blood loss and subsequent complications."

10. There is no dispute that the surgery did not go as planned. The external iliac artery was damaged. Although, the same was treated,

however, the delay in addressing the issue ultimately proved to be fatal. The Disciplinary Committee of DMC had noted that respondent no.5 and his team had proceeded with the robotic dissection because the surgeon felt that there was no loss of telescopic vision and the bleeding was under control. The injured vessel was repaired subsequently by open surgery. The primary surgeon (respondent no.5) took a long time to resort to this option. According to the Disciplinary Committee, the same was an error of judgment on the part of the surgeon and the delay had led to the significant blood loss in subsequent complications.

11. According to the Disciplinary Committee, there was no negligence on the part of treating doctors. Plainly, an error of judgment – although has very serious consequences – cannot be considered as an act of negligence and, thus, warrants no punitive measure. In this view, the decision of the DMC and MCI not to impose punishment on respondent no.5 cannot be faulted.

12. According to the petitioner, the act of respondent no.5 and other doctors in proceeding with the robotic surgery without resorting to the open surgical procedure, is an act of negligence. It is earnestly contended by Mr Mittal that the delay in resorting to the open procedure cannot be countenanced, as it was an act of sheer negligence.

13. The question whether the delay, in taking aggressive steps for conducting an open surgery, amounts to gross negligence on the part

of respondent no.5 or was there mere error of judgment, is not an issue that can be examined by this Court in these proceedings under Article 226 of the Constitution of India.

14. It is well settled that the proceedings before the DMC and MCI are in the nature of a peer review. Undisputedly, there may be an element of subjectivity in the decision of DMC/MCI but the professional conduct of the treating doctors, for the purposes of disciplinary proceedings, is required to be adjudged on the anvil of the subjective opinion of the representatives from the medical profession (peers).

15. The Division Bench of this Court in ***Kamla Devi v. Union of India and Ors: LPA 55/2015, decided on 03.02.2015*** had held as under:-

> "8. .... Whether, as a matter of fact, there was negligence on the part of the respondents or not cannot be determined in writ proceedings under Article 226 of the Constitution. These are matters of evidence which, in fact, can be resolved only on the basis of material which is produced in the course of the trial of a suit. Where a claim intrinsically depends upon proof of an act of medical negligence, such a claim cannot be determined in exercise of a writ jurisdiction. Negligence when alleged against any person is a question of fact which can be decided by oral and documentary evidence and the Court under writ jurisdiction cannot decide such questions of fact…."

16. In the case of ***Sanjeev Bansal v. Indraprastha Apollo Hospital***

and Ors.: W.P.(C) 10451/2018, decided on 18.12.2018, this Court had referred to the decision in the case of ***Dr. Madhu Karna v. Medical Council of India & Anr.: W.P.(C) 5058/2011, decided on 16.09.2011*** and had observed that the scope of judicial review in such decisions is highly limited, and it is not open for the Court to sit as the first appellate court to examine the decision of DMC/MCI on merits and supplant its view over their decision. It was further observed that unless there is a patent error in the decision making process or that the decision is wholly arbitrary or unreasonable, no interference would be warranted.

17. Having stated the above, it is clarified that the finding of DMC and MCI will not preclude the petitioner from independently leading evidence to establish a case of gross negligence before the National Consumer Disputed Redressal Commission.

18. The petition is disposed of with the aforesaid observations.

VIBHU BAKHRU, J

APRIL 29, 2019
pkv/**RK**