

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

C.O. No. 1202 of 2021

**Royd Nursing Home and Healthcare Limited and Anr.
Vs.
The State of West Bengal and Ors.**

For the petitioners : Mr. Pranit Bag,
Ms. Jayati Chowdhury,
Ms. Ranjana Seal

For the opposite party
no. 2 : Mr. Atarup Banerjee,
Mr. Golam Nure Imrohi

Hearing concluded on : 14.07.2021

Judgment on : 22.07.2021

Sabyasachi Bhattacharyya, J:-

1. The first petitioner is a nursing home and a company registered under the Companies Act, 1956, represented by its director and shareholder, the second petitioner.
2. The present revisional application has been moved against an order bearing Order No. 2 dated February 24, 2021 passed by the West Bengal Clinical Establishments Regulatory Commission (opposite party no. 2) in Case Reference no. Kol/2019/000681. By the said

order, respondent no. 2 imposed a compensation of Rs. 1 lakh against the petitioner no. 1.

- 3.** The complaint before the Commission arose out of the unfortunate of a patient demise who had visited the petitioner no. 1-nursing home for Maxio-Facial Cosmetic Surgery. After having been administered anaesthesia, the patient allegedly had a seizure and was transferred to some other clinical establishment where the patient passed away after about three days of treatment.
- 4.** The Commission recorded that it enquired from the petitioner no. 1 whether the latter preserved the particular vial, syringe and/or any other equipment pertaining to the anaesthesia procedure. It was contended by the petitioner no. 1 that, soon after the incident, the patient had been shifted to some other establishment, of which the petitioner no. 1 had no track. After about three months thereafter, the petitioners received a complaint. Since there was no protocol to preserve the equipment about which the Commission enquired, the petitioner no. 1 had not preserved any such vial, syringe and/or any other equipment.
- 5.** The Commission went on to observe that the patient had a severe convulsion and shock during anaesthesia, on which the petitioner no. 1 should have reviewed the circumstances irrespective of any complaint. The first step of such review, according to the commission, should be to examine the vial and the syringe to find out whether there was anything wrong with the same.

- 6.** The Commission further found that it is true, had the Post Mortem been done, it could get the real answer as to the cause of the death; however, appreciating the mental state of the unfortunate husband of the patient at the material time, it was presumed by the Commission that he could not take any decision on that score, for which the husband cannot be blamed.
- 7.** In the penultimate paragraph of the impugned order, the Commission specifically found that, since it did not know the cause of the death in absence of the Post Mortem examination, it could not fix the responsibility for the demise. However, it could not brush aside the issue and that was highlighted before it. Accordingly, a “token” compensation of Rs. 1 lakh was imposed on petitioner no. 1 and ancillary were orders passed.
- 8.** Learned counsel for the petitioners contends that the impugned order is tainted by patent perversity since the Commission, despite arriving at the finding that it did not know the cause of death, imposed a compensation of Rs. 1 lakh against the petitioner no. 1.
- 9.** Learned counsel for the petitioners relies on Section 2(k) of the West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017 as well as Section 38(1)(iii) of the 2017 Act to argue that the petitioner squarely comes within the definition of “nursing home” as defined in the said Act and the Commission had lacked jurisdiction to decide on questions of medical negligence, which power is conferred solely on the State Medical Council.

10. Only after a complaint of medical negligence was dealt with by the concerned State Medical Council, the Commission-respondent no. 2 can assume jurisdiction.
11. In the present case, it is submitted, no medical negligence having been proved at any point of time and/or even made out, let alone being decided by the State Medical Council concerned, the impugned order was wholly without jurisdiction.
12. Learned counsel appearing for the opposite party no. 2, at the outset, places reliance on *Narayana Hrudyalaya Limited and Another V. West Bengal Clinical Establishment Regulatory Commission and Others*, reported at (2019) SCC OnLine Cal 6980, wherein it was held by this court, *inter alia*, that the Commission had the power to deal with such complaints, where a concession was given.
13. Learned counsel further contends that this court does not have jurisdiction under Article 227 of the Constitution of India to interfere with the matter of the respondent no. 2 in view of Section 46 of the 2017 Act having provided that no Civil Court shall have jurisdiction to entertain any suit or proceeding in any respect of any matter which an adjudicating authority or the West Bengal Clinical Establishment Regulatory Commission is by or empowered under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action ought to be taken in pursuance of any power conferred by or under the Act.

- 14.** Thirdly, learned counsel for the opposite parties contends that, contrary to the arguments of the petitioners, the petitioner no. 1 in a letter dated February 20, 2021, written to the Secretary of opposite party no. 2, clearly denied that any surgery was conducted in the year 2019. However, such allegation was subsequently belied by the arguments advanced on behalf of the petitioners before the Commission. Learned counsel places reliance on paragraph no. 2 of such letter annexed at page 30 (Annexure P-2) of the present application under Article 227 of the Constitution of India.
- 15.** Learned counsel for the petitioners, in reply, reiterates that no complaint was lodged regarding unnatural death at any point of time by the husband/relatives of the patient. As such, the petitioners did not have any duty or reason to preserve the relevant vials and syringe of anaesthesia for an indefinite period thereafter. In fact, the patient met her unfortunate fate in a different clinical establishment than petitioner no. 1, that too, three days after she was treated in the petitioner no. 1 – nursing home.
- 16.** The first complaint was received after three months by the petitioner no. 1, before which there was no occasion for the petitioner no. 1 to preserve such equipment pertaining to the administration of anaesthesia on the said patient.
- 17.** It is seen from the impugned order and the materials on record, as well as upon considering the respective submissions of the parties, that, although the victim of the unfortunate incident-in-question had

allegedly suffered a seizure, she was immediately transferred to some other clinical establishment where she was treated and expired three days thereafter. No complaint was made before or against the petitioner no. 1 prior to three months thereafter.

18. The opposite parties have failed to substantiate the allegation that the petitioners had exhibited negligence in not preserving the vials, syringe and equipment used for the anaesthesia of the patient, or that there was any statutory duty on the part of the petitioners to do so. That apart, it is not practical or possible for clinical establishments to preserve each and every used vial, syringe and/or other equipment used for anaesthesia. Such preservation of all equipment would be an impractical scenario since there will be a consequent accumulation of considerable junk and would create storage issues unnecessarily.
19. More importantly, the Commission categorically held in the impugned order itself that it did not know the cause of death in absence of any Post Mortem examination and could not fix the responsibility for the unfortunate death. Even after arriving at such finding, the petitioner no.1 was unreasonably directed to pay a compensation of Rs.1 lakh. It is beyond logic as to how, in the absence of any material to fix responsibility and without fixing the responsibility on anyone, the petitioner no.1 could be saddled with compensation, of whatsoever amount. Hence, the findings and observations of the Commission in the impugned order are diametrically contrary to the conclusion arrived at in imposing costs on petitioner no.1.

- 20.** Although the circumstances of the demise-in-question were extremely unfortunate for the victim and her family, the petitioner no.1 could not be saddled with compensation of any amount, since the Commission specifically arrived at the finding that it could not fix responsibility on anyone for the death.
- 21.** That apart, Section 38(1)(iii) categorically stipulates that allegations of medical negligence have to be dealt with by the State Medical Council concerned, which is a pre-requisite for the Commission to assume jurisdiction. In the absence of any such prior adjudication in the present case, the Commission lacked jurisdiction to pass the order of compensation.
- 22.** *Narayana Hrudyalaya Limited* (supra) was rendered on a different footing altogether. Since there had been a concession on behalf of one of the parties to compensate the victim. The issue decided in the said judgment involved the question whether, despite the bar under Section 38(1)(iii) of the 2017 Act, the Commission could impose compensation if a concession on that score was given by the Clinical Establishment.
- 23.** Such question was distinct and different from the issue involved in the present allegation, since there was no concession, at any point of time, from the end of the petitioner.
- 24.** In the absence of any such concession, the ratio of the cited judgment is not attracted to the present case. Thus, the respondent no. 1- Commission acted patently without jurisdiction in entertaining the

complaint and granting compensation of Rs. 1 lakh against the petitioner no. 1. Such assumption of jurisdiction is patently contrary to law as contemplated in Section 38(1)(iii) of the 2017 ct, and, as such, is bad in law.

- 25.** In view of the above considerations, C.O. No. 1202 of 2021 is allowed, thereby setting aside Order No. 2 dated February 25, 2021 passed by the West Bengal Clinical Establishment Regulatory Commission, in Case Reference No. Kol/2019/000681 (Sunil Kumar Saha Vs. Royd Nursing Home & Healthcare Ltd.).
- 26.** There will be no order as to costs.
- 27.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)