IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

MAT 1595 of 2019

B. M. Birla Heart Research Centre
-Vs.-
State of West Bengal & Ors.

Before: **The Hon'ble Justice Arijit Banerjee**
&
The Hon'ble Justice Apurba Sinha Ray

For the Appellant	:	Mr. Aniruddha Chatterjee, Adv. Mr. Shibaji Kumar Das, Adv. Ms. Rupsa Sreemani, Adv. Mr. R. Ahmed Khan, Adv.
For the State	:	Mr. Sirsanya Bandopadhyay, Jr. Standing Counsel, Mr. Arka K. Nag, Adv.
For the Respondent No. 2		Mr. Avik Ghatak, Adv.
For the Respondent No. 4		Mr. Biswaroop Bhattacharya, Adv. Mr. Vivekananda Bose, Adv. Ms. M. Ghosh, Adv. Mr. R. Pal, Adv.
For the National Medical Commission.		Mr. Indranil Roy, Adv. Mr. S. Kr. Roy, Adv.
Judgment On	:	15.12.2023

Apurba Sinha Ray, J. :-

Factual Basis:-

1. The seeds of the present appeal were laid when a bereaved son lodged a complaint before West Bengal Clinical Establishment Regulatory Commission ('the Commission' in short hereinafter) through email on 12.05.2017 alleging untimely death of his mother due to :-

"Negligency in detection and causing delay in shifting the patient from the hospital. Not applying proper medication to the patient, improper diagnosis and negligency and misguiding patient party".

2. The Commission took steps and after hearing the Service Provider, viz BM Birla Heart Research Centre (BMBHRC in short hereinafter) through its Medical Superintendant and obtaining 3(three) affidavits from the concerned Superintendant, Dr. Sankar Sengupta, Dr. Ashok Giri, the in-charge of non-invasive procedure, and Mr. Manish Surekha, the Head Finance, B.M. Birla Heart Research Institute and also considering the relevant reports from Medical Council of India, West Bengal State Medical Council and other materials on record, came to the conclusion that though the Commission refrained from dealing with the alleged medical negligence part of the matter, it found serious lack and deficiency in patient care service from the side of the BMBHRC, and accordingly, it directed the latter institute to pay compensation to the tune of Rs. 20,00,000/- (Rupees Twenty Lakhs) to the bereaved family.

3. The said judgment and order of the Commission was challenged by the BMBHRC in a writ proceeding u/Art. 226 of the Constitution before a Single Judge of this Court, and after hearing the parties and also taking into consideration of the materials on record including certain reports which were filed during pendency of the said proceedings pursuant to the directions of the Learned Single Judge, the Learned Single Judge dismissed the said writ application holding that the conclusion arrived at by the Commission was correct and justified.

4. Being aggrieved and dissatisfied with the said judgment and order dated 24.09.2019, the present appeal was preferred from the side of BMBHRC on the ground, inter alia, that the Learned Single Judge did not consider the case of the petitioner as well as the materials on record properly and thereby came to a wrong finding.

Submission from the Bar:

Appellant:

5. Mr. Aniruddha Chatterjee, learned Advocate, appearing for the Appellant – BMBHRC argued that though the complaint was lodged alleging 'deficiency in service' and 'negligent treatment' against the Appellant and Dr. Shuvo Dutta, the Commission went on to adjudicate the complaint in violation of provision of section 38(iii) of the West Bengal Clinical Establishment (Registration, Regulation and Transparency) Act, 2017 ('The

Act, 2017' in short hereinafter) which prohibits the Commission to adjudicate any issue of medical negligence.

5.1 Though the Commission held that Dr. Giri was not competent enough to conduct and interpret the data of Echocardiography, the replies of the M.C.I pursuant to queries under Right to Information Act, reveal that Post Graduate Medical Education Regulation, 2000 is silent about such query. On the other hand, West Bengal Medical Council has, replied that even para-medical professionals are eligible to perform Echocardiography.

5.2 The learned counsel has also argued that Learned Single Judge called for a report from the M.C.I as to whether the educational qualification of Dr. Giri permitted him to perform the procedures on the patient as done by him in the instant case. Pursuant to such direction, the Law Officer of M.C.I sent a letter dated 25.6.2019 stating "that the Appellant has obtained MD Physician Qualification from St. Petersburg Medical Academy, Russian Federation and he has been granted registration to practice medicine after qualifying the Screening Test (Foreign Medical Graduate Examination) as provided for in Section 13 (4A) of the Indian Medical Council Act, 1956". In Paragraph No. 3 of the said report, it has been mentioned that Echo-cardiogram requires conduct of test and clinical interpretation of the data. In so far as the conduct of test is concerned it can be done by a Medical Graduate or even a paramedic (with training), but the minimum qualification required for the clinical interpretation of data of echo-cardiogram is MD (Medicine). Therefore, those with super specialist qualification of DM

(Cardiology) are better placed to clinically interpret the data of echo-cardiogram, which is absolutely contrary to the statements made in the last paragraph of the report which says that Dr. Ashok Kumar Giri was not entitled to "perform and interpret" the data of Echo-cardiogram. The said letter is also contrary to the reply given by the Medical Council of India to the application under Right to Information Act, 2005. The said Law Officer does not have any authority to decide the qualification of Dr. Ashok Kumar Giri to perform echocardiogram in the absence of any codified law and/or rules and regulations.

5.3 The appellant's learned counsel has pointed out that M.B.B.S Curriculum included cardiology in which echocardiography is also taught, and therefore, the Commission erred in holding that Dr. Giri being an M.B.B.S cannot conduct and interpret echocardiography. There is no rule or regulation which prohibits a medical graduate to perform echocardiogram. The decision reported at **(2012) 5 SCC 242 (Vijay Singh vs. State of Uttar Pradesh & others)** lays down that in a civilized society, punishment not prescribed under the statutory rules cannot be imposed. Moreover, in **(1989) 3 SCC 448 (Pyare Lal Sharma vs. Managing Directors & others)** it was held that the alleged act must constitute misconduct and penal under the law prevailing at the time of its commission and punishment cannot be inflicted if the act becomes penal subsequently. Learned counsel of the appellant has submitted that though the Commission is not entitled to deal with the issue of medical negligence, it held that Dr. Ashok Kumar Giri was

not entitled to conduct or interpret the data from echocardiogram report which in turn led to medical negligence. It is ridiculous to say that a doctor having M.B.B.S degree has right to treat the patient but does not have any right to interpret the result of echocardiogram conducted by him. There is nothing on record to show that the interpretation was wrong or for the alleged interpretation any harm was caused to the patient.

5.4 As regards the report of M.C.I filed pursuant to the order of Learned Single Judge, the learned Advocate for the appellant has argued that the author of the report submitted by the Medical Council of India is utterly incompetent person to say anything with regard to the technical part of the situation and further to opine that an MBBS doctor was barred under the law to perform echocardiogram. To be fair to the report, the report does not say that an MBBS doctor was in any way barred by law to conduct or interpret an echocardiogram report. It only says that MD and DM would be "better" placed to interpret. According to the Learned Counsel of the Appellant, it seems to be the personal opinion of the author, who has absolutely no experience in medical field. Learned Counsel hastened to add that in answer to a RTI query, both the Medical Council of India as well as West Bengal Medical Council have unequivocally stated that even para medics are entitled to carry out echocardiogram.

5.5. According to the Learned Counsel it was vaguely pointed out by the lawyer of the Medical Council of India that the curriculum in respect of

MBBS course does not involve cardiology. But one of the main segments in the MBBS course is cardiology and to substantiate that the Appellant is annexing the "Harrison's Principles of Internal Medicine" for reference of this Court. Even the Appellant wishes to annex the question paper relating to cardiology which appears in the final exam of the MBBS course.

5.5.1. The basis of an MBBS degree is that a doctor having such degree has knowledge with respect to both medicine as well as surgery. It is completely not understandable that why such an argument was made by the Medical Council of India, who are the custodian of the medical field. It is the Medical Council of India which formulates and regulates the curriculum which doctors have to undergo rigorously in order to obtain a degree in MBBS.

5.5.2. It is also submitted that if the impugned order is allowed to stand, the life of Dr. Ashok Kumar Giri will be completely jeopardized and the Appellant Clinical Establishment will also be penalized for the same. Dr. Ashok Kumar Giri is, on the one hand, compelled by law to treat any patient who comes to him and if he does so he may be hauled up on the pretext that he does not have the right to even interpret an echocardiogram. This would lead to a lot of confusion in the mind of medical professionals and patient care providers.

5.6. So far as the issue of Ms. Chaitali Kundu is concerned, it is argued that analogy may be drawn from the fact that both the Medical Council of India as well as West Bengal Medical Council as stated earlier have unequivocally stated that even para medics are entitled to carry out echocardiogram. Chaitali Kundu is privileged to do the Echo-Cardiography in the IPD & OPD under the supervision of competent, expert and experienced Doctors in the field as in emergency situations the Echo-Cardiography Technician is privileged to perform Echo-Screening at Bedside with portable machine in presence of competent, expert and experienced Doctors to show the monitoring and measurement findings from the machine and record those as provisional report subject to clinical co-relation which she had exactly done in the instant case in hand under the supervision of Dr. Ashok Kumar Giri & Dr.Shuvo Dutta which was duly stated in the Affidavit affirmed by Dr. Ashok Kumar Giri and filed before the said Commission on 26th October, 2017 but the Commission did not take into consideration the same.

5.6.1. It is further stated that at that material point of time in the year 2011 when Chaitali Kundu was appointed as an Echo-Cardiography Technician in the said Clinical Establishment, there was no law in the field governing such aspect which will be evident from the statements made in the paragraphs hereinbefore. It is trite law that no Act, Rules, Laws, Bye Laws, Circular & Notifications can have any retrospective effect and is always prospective in nature until and unless specifically stated therein

which squarely applies in the case in hand. It is further trite law and a basic principle of natural justice that no one can be penalized on the ground of a conduct which was not penal on the day it was committed.

5.7. Learned Counsel of the Appellant has drawn the attention of the Court to the printed form of Discharge Summary and submitted that the Commission was oblivious to the fact that in the Discharge Form there are two counters for signatures as the discharge of the patient can be done either by the MO/SHO or by the Consultant Doctor. There exists no medical requirement or any law for signing of discharge form by both the authorities at the same time and hence no question of ratification by consultant doctor arises. Moreover from the records, it is evident that the patient was discharged at late night and it is absolutely an impractical thought to have the consultant doctor present at the hospital for signing the Discharge Certificate of the patient when she has already been referred by him to C.M.R.I at 9.30 pm.

5.8. Learned Counsel for the appellant has further argued that the decision making process which was adopted by the said Commission while arriving at the said judgment was grossly erroneous since during the process no expert opinion of any Cardiologist was taken by the Commission in coming to the decision as regards the manner of treatment of the patient or whether or not any irrational and unethical trade practice was resorted to. Dr. Shuvo Dutta is a qualified and competent Cardiologist but surprisingly the said Commission did not even think it fit and proper in directing Dr.

Shuvo Dutta to file an affidavit before the said Commission to explain the entire state of affairs particularly when he was the best person to do so and was also obliged to file an affidavit as he was categorically named in the main complaint by the respondent no. 4. The said Commission has arrived at a conclusion relying upon the affidavits filed by three persons namely Dr. Sankar Sengupta, Dr. Ashok Kumar Giri & Mr. Manish Surekha but found out the guilt of deficiency in patient care service and irrational and unethical trade practices as against six persons which included the above named three person along with Ms. Chaitali Kundu, Dr. Tanmoy Chakraborty and Dr. Shuvo Dutta respectively but no affidavit was called for from them which is absolutely illegal and arbitrary in consideration of the fact that they were the best persons to explain the incriminating circumstances as against them. Dr. Shuvo Dutta and Dr. Tanmoy Chakraborty were peculiarly left untouched by the said Commission though the said Establishment was penalized by the impugned judgment mainly based on their acts and actions which by itself is in flagrant violation of the principles of natural justice and fair play.

5.9. Learned Counsel has also pointed out that the Commission in order to properly adjudicate the issue ought to have a member who was a Cardiologist for proper understanding of the case and to come at a correct decision as to whether three Echo-Cardiogram findings indeed had any relation to the death of the patient or whether the difference of the Echo-Cardiogram findings may vary for that patient for that level or more with the

stated duration. Even no expert opinion from an independent cardiologist was sought for by the Commission. The said Commission also lost sight of the fact that the Echo-Cardiogram findings and Screening Report dated 7th May, 2017 which was allegedly done by Ms. Chaitali Kundu could not have any bearing on the death of the patient and more particularly the patient party could not have been aggrieved by the same particularly when it was only for the purpose of internal findings of the Primary Consulting Doctor.

5.10. Learned Counsel has further argued that the Commission has come to a finding that each one of the members having medical background quite actively participated in the deliberation and played a very crucial role in the decision making process but astonishingly the findings of each of the members and the reasons for the same have not been disclosed which by itself makes the judgment stereotyped and cryptic in nature. The award of a sum of Rs. 20 lakhs as compensation to the complainant is too harsh an amount in consideration of the fact that the service recipient during her lifetime was suitably employed in the Kolkata Police and the future prospects of her legal heirs and successors pursuant to her death are suitably protected and no prejudice would be caused to them, but, on the other hand, the said award tarnishes the name of the Clinical Establishment in the society and their goodwill and reputation are seriously prejudiced and hampered. Learned counsel for the appellant has submitted that the judgments relied upon by the respondent no. 4 herein reported at **AIR 1980 SC 1896 (Gujrat Steel Tubes Limited & Ors. Vs. Gujrat Steel Tubes**

Mazdoor Sabha & Ors.) & 2023 (1) SCC 634 (Shyam Sel And Power Limited & Anr. Vs. Shyam Steel Industries Limited) have no applicability in the facts and circumstances of the case. However, Learned Counsel for the appellant has placed reliance upon the case law reported at **1957 (2) All ELR Page 118, (Bolam v. Friern Hospital Management Committee), (1997) 1 SCC Page 9, (R. Thiruvirkolam Vs. Presiding Officer And Another), (2012) 5 SCC Page 242, (Vijay Singh Vs. State of Uttar Pradesh And Others), (1989) 3 SCC Page 448 para 21 (Pyare Lal Sharma Vs. Managing Director & Ors).**

Respondent No. 4

6. Learned Counsel Mr. Biswaroop Bhattacharyya appearing for the respondent No. 4 has submitted that neither the judgment and order of the Hon'ble Single Judge, nor that of the Regulatory Commission warrants any interdiction by this Court in the present appeal. According to him, the decision rendered by a statutory body (being the Commission) created by the Act of 2017 was challenged and the same was upheld by the Hon'ble Single Judge of this Court, and therefore, there is no scope for this Division Bench to interfere with the impugned judgment. In support of his contention the learned counsel has referred to the case law reported at **AIR 1980 SC 1896 (Gujarat Steel Tubes Ltd. and Ors. Vs. Gujarat Steel Tubes Mazdoor Sabha and Ors.).**

6.1. Learned Counsel for the respondent no. 4 has categorically submitted that a wrong order can be quashed only if it is vitiated by the fundamental flaws of gross miscarriage of justice, absence of legal evidence, perverse misreading of facts, serious errors of law on the face of the order, and jurisdictional failure. In the instant appeal neither the order is so wrong nor so perverse that the appeal even needs to be entertained.

6.2. Learned counsel has stated that though it was argued by the learned advocate of the appellant that the judgment in Gujarat Steel Tubes Ltd. (supra) has been held to be per incuriam in the decision reported at (**1997) 1 SCC 9 para 11 (R. Thiruvirkolam Vs. Presiding Officer and another)**, it is argued that the ratio settled by the Hon'ble Supreme Court in **Gujarat Steel Tubes Ltd. and Ors. (Supra)** does not deal with the issue of judicial review in **R. Thiruvirkolam (supra)**. On the other hand the said case deals with a point completely different from the point settled in Gujarat Steel Tubes Ltd. (supra) and that has been passed by a larger bench than the bench constituted in **R. Thiruvirkolam (supra**). According to the Learned Counsel the reliance placed upon **R. Thiruvirkolam (supra)** case by the appellant is completely misplaced.

6.3. Learned Counsel for the respondent has submitted that neither Dr. Ashoke Giri nor Ms. Chaitali Kundu was eligible to conduct the test of echocardiography and interpret the data of such test to make a report. Both of them conducted the test and interpreted the data to make a report

without any supervision or guidance of a specialized medical practitioner and the same was not done in any emergency but in their usual course of practice. It transpires from the materials on record that Ms. Chaitali Kundu has passed the Higher Secondary Examination with a Commerce background and therefore, she did not pursue Chemistry, Physics and Biology in her Higher Secondary course. Thereafter, she has pursued an Electro-Cardiography Technique Training programme from Society for School of Medical Technology, Indian Mirror Street, Kolkata. She used to practice as an Echocardiography Technician without having requisite qualification for the same which amounts to irrational and unethical trade practice. Learned counsel of the respondent no. 4 has pointed out that Dr. Giri has completed MD. Physician Degree from St. Petersburg Medical Academy, Russia in 2001, which is equivalent to MBBS Degree in India. So far as Dr. Giri's Post Graduate Diploma in Clinical Cardiology obtained from Indira Gandhi National Open University is concerned, it is found that the same does not confer any additional specialization on Dr. Giri since under the provisions of Post Graduate Medical Education Regulation, 2000, neither the Post Graduate Diploma in clinical Cardiography is an recognized medical course nor is IGNOU a recognized institution to confer such diploma upon Dr. Giri. Thus, according to the respondent no. 4, Dr. Giri, for all practical purposes, is to be considered as a MBBS Doctor.

6.4. Learned Counsel submits that a medical practitioner who has only an MBBS or an equivalent degree is not supposed to practice as a specialist,

that is to say, he is not supposed to undertake any procedure, whether invasive on non-invasive, which falls in a domain of a specialty or a special branch of medicine and such procedures are only to be undertaken by the medical practitioner who have obtained additional qualifications commensurate with the specialty under which the procedure falls. Echocardiography is not taught in MBBS or in equivalent courses and is only taught in MD (Medicine), MD (General Medicine), MD (pediatrics) and MS (Respiratory Medicine). Echocardiography, being a non-invasive diagnostic procedure falling in the specialized domain of cardiology can be performed by a cardiologist that is a person who has obtained DM (Cardiology) degree upon having priorly obtained MD degree in Medicine, General Medicine or Pediatrics and Respiratory Medicines.

6.5. Learned Counsel of the respondent no. 4 has argued that under Section 27, the right to practice of a medical practitioner should be according to his qualifications. It is clear from the admission of Dr. Giri that he performed ECG in his due course of practice and not to attend to any emergency.

6.6. The Commission has rightly considered and decided the complaint made by the respondent no. 4 including the issue of the said Dr. Giri claiming to be a specialist without having any recognized special qualification concerned.

6.7. Learned Counsel has drawn the attention of this court to certain factual issues in the following manner:-

> "The mother of the respondent no. 4 was admitted in the Hospital on 3rd May, 2017 at about 11:20 PM and at the time of admission, the chief complaints and duration were: (1) Chest Pain for 3 days. (2) Shortness of breathing for 3 days, and (3) Fever for 2 days. From the clinical notes of the Hospital it will transpire that on 5th May, 2017, when the situation went critical, the appellant hospital has informed Dr. T.K. Bhoumik for the first time on 5th May, 2017. Even after repeated calls, the clinical establishment failed and/or neglected to arrange for Dr. Bhoumik or any other medical practitioner in his stead to examine the patient for more than 48 hours from being referred to the said doctor. The patient was kept in such condition without being afforded the course of action advised for her. It is only at 3 PM on 7th May, 2017, that the **clinical establishment arranged for** Dr. Bhowmick to see the patient and only after the condition of the patient started to deteriorate on the same day. **The respondent was advised to transfer the patient to multi-specialty hospital for treatment of the fever of unknown origin. It is further pertinent to note that the final observations recorded with reference to the patient shows that until the fever is cured, the required and/or advised procedures for curing her cardiac ailment could not be carried out. The clinical establishment kept the patient admitted for five long days knowing fully well that it is not well equipped to treat the immediate ailment of the patient and further that the procedures which could be carried out on her at the said establishment could only be done after her immediate aliment, viz, the fever, which the petitioner establishment is not equipped to cure, is first treated**. This lack of treatment of the immediate ailment of the patient ultimately resulted in her death within less than 24 hours from being discharged from the appellant hospital and being admitted in Calcutta Medical Research Institute."

6.8. He has further argued that the Learned Counsel for the appellant submitted that from 9:15 PM on 7th May 2017 for a period of almost 2 hours, the son and the other relatives of the patient, wasted valuable and precious time in taking a decision whether she would be transferred to a Multi Specialty Hospital and during that period the patient was continuously observed by the Doctors of the said Clinical establishment. Such contention of the appellant is false and is denied.

6.8.1. Learned Counsel submitted that the decision to transfer the patient to a multispecialty hospital was taken by Dr. Shuvo Dutta at 9:30 PM. as will transpire from the records. The answering respondent and his relatives, on being informed of such decision, readily agreed to the same. However, the staff of the appellant establishment made the answering respondent to do the rounds of various desks of the establishment on different pretexts and ultimately upon all dues with respect to the patient being cleared, issued the due clearance slip to the answering respondent at about 11:33 PM on 7th May, 2017 (Pg-325 of the Paper book). Even after that, the establishment kept on delaying the discharge of the patient unreasonably and finally discharged her in the early hours of 8th May, 2017, and the patient was then admitted to CMRI hospital within minutes of her discharge from the petitioner establishment. Due to the inordinate and unreasonable delay on the part of the clinical establishment in discharging the patient, she could not be admitted to CMRI in time and was admitted to CMRI at only 2 AM on 8th May, 2017.

6.8.2. CMRI Hospital is situated right beside the appellant establishment. It takes only a minute or so to travel from the gate of the establishment to CMRI Hospital. It is clear from the due clearance slip issued at about 11:33 PM on 7 May 2017 that the respondent No. 4 had already taken a decision to shift his mother to CMRI Hospital and has as such cleared the dues. There was no reason for the respondent no. 4 to wait from 11.33 PM of 7th May 2017 till 2:00 AM 8th May 2017 for getting his mother admitted to CMRI Hospital upon clearance of all dues at BM Birla. This only shows that the Respondent No. 4 had promptly acted on the advice of the doctors at Petitioner establishment to transfer his mother to CMRI Hospital but it is the delay caused by the petitioner establishment to discharge the patient, which resulted in drastic deterioration of her condition. Valuable time was lost in attending to the conditions which set in during the time of such delay and ultimately resulted in the death of the patient.

6.9. According to the learned counsel of the respondent no. 4 the appellant establishment has concocted the discharge summary issued in respect of the patient since deceased. He has also contended that on one hand the appellant is saying that the patient was in a critical condition at the time of her admission but when she was discharged from the clinical establishment, in the discharge certificate, described how the patient, who was admitted in a critical condition, was treated, stabilized and then discharged in a stable condition. The petitioner has miserably failed to clarify before the Commission the reason for such anomalous and

contradictory stance. It has only been submitted by the appellant that due to a typographical error, the words "instable condition" has gone down as "in a stable condition". Such explanation, apart from being a glaring example of afterthought on the part of the petitioner, does not also explain why the words, "With conservative therapy the condition of the patient was stabilized and in due course patient was mobilized progressively..." were used in the earlier part of the same sentence in the discharge certificate. It is further stated that an explanation in writing was already obtained by the Commission from Dr. Tanmoy Chakraborty regarding the observation made in the discharge certificate. Under such circumstances, it was not obligatory for the Commission to again call upon Dr. Chakraborty for making the same statements again. Not calling upon Dr. Chakraborty for explaining the said discrepancies in the discharge certificate and instead relying on his written explanation has not caused any prejudice to the petitioner, nor has it resulted in violation of the Principles of Natural Justice and Fair Play.

National Medical Commission:-

7. Learned counsel for National Medical Commission has submitted before this court that the Learned Single Judge has very rightly and pertinently pointed out the status of a specialist so far as the medical science is concerned. In this regard the learned counsel has referred to paragraph 10 of the judgment passed by the Learned Single Judge. For the purpose of

proper understanding he has read out the said paragraph before us. The said paragraph is quoted hereinbelow:-

> "Learned Advocate appearing for the fourth respondent has relied upon Sections 23, 26, 27 of the Indian Medical Council Act, 1956 and submitted that, Dr. Ashok Giri was not supposed to practice as a specialist. He was not supposed to undertake a procedure for Echocardiography. He did not have the additional qualification commensurate with the speciality that he claimed. Echocardiography is not taught in M.B.B.S. or equivalent courses. It is only taught in MD (Medicine), MD (General Medicine), MD (Pediatrics) and MD (Respiratory Medicine). According to him, ECG can be performed by a cardiologist, that is, a person who has a degree in DM (Cardiology) after having requisite MD degree. He has submitted that, Dr. Giri claims to have served as in charge of Non-invasive Department (Investigations Services) of the petitioner which includes echocardiogram. It means that, Dr. Giri consciously undertook echocardiography without there being a medical emergency to do so. According to him, Dr. Giri is not a specialist although he was employed by the petitioner as a specialist and the petitioner allowed Dr. Giri to act as a specialist in a field which, Dr. Giri could not have acted as a specialist."

Reply by the Appellant:-

8. In reply, the Learned Counsel for the appellant has submitted that **Gujarat Steel Tubes Ltd. & Ors. (supra)** cited by the respondent no. 4 has been overruled. The impugned order of the Learned Single Judge is a perverse one. If the evidence on record is not considered, that is perversity.

He has further submitted that BM Birla is a Heart Research Institute and it was not for the purpose of treating patient having fever. Dr. Shuvo Dutta was the Cardiologist but he was not asked to attend hearing before the Commission. He was the Attending Cardiologist but no complaint was lodged against him. Commission has no jurisdiction to deal with medical negligence issues which are barred under Sections 37 and 38 of the Act, 2017. The Learned Single Judge did not consider the same. The ratio decidendi in Jacob Mathew's case is squarely applicable in this case. He has further submitted that there is no law that a person from commerce background cannot perform ECG. Learned Counsel has further stated that the appellant is, in fact not allowed to have adjudication either in Commission or in the Court of the Learned Single Judge. Dr. Giri can perform ECG. Dr. Shuvo interpreted the result of ECG whereas Ms. Chaitali Kundu only operated the ECG Machine. In MBBS, Cardiology was taught, and therefore Dr. Giri can treat for Cardiology. If he can treat cardiology, then he can also interpret the ECG. Moreover, an MD doctor is better placed to interpret does not mean that Dr. Giri cannot interpret.

Court's view:-

9. The loss of the mother of a human being cannot be compensated by any quantum of money. The loss is irreparable and cannot be filled up. It is also true that man is not immortal and therefore every human being has to leave the earthly world at a certain point of time. Undoubtedly, the demise

which is untimely becomes painful and unbearable to near and dear ones of the deceased.

10. Another aspect of human lives is that though the physical body of a particular human being is the closest and dearest of the person concerned but sometimes the said person may be unaware what is going on inside his/her body. Even the relatives may be unaware about the condition of his/her near and dear ones. Mysteriously, we may not know at certain point what is going on inside our bodies.

11. With this prelude we would like to enter into the merits of this case and before that we would like to consider the history of the patient, Arati Pal with which she was admitted in the BM Birla Heart Research Institute on 3rd May, 2017. As per records and also the affidavit of Dr. Sankar Sengupta, the medical superintendent of BM Birla Heart Research Institute, it is found that "Arati Pal was admitted in BM Birla Heart Research Institute on 3rd May, 2017 at CCU with H/O of chest pain along with SOB (shortness of breathing) and fever for three days. She was a known patient of hypertension and was having rheumatoid arthritis along with DMARD and suspected to have ACS (N Stemi)."

12. After her death the probable cause of death was mentioned as "ACS, Sepsis, multi organ failure with background of Rheumatoid arthritis and immuno compromised state due to DMARD". Therefore, from the admission

records of Arati Pal in BM Birla Heart Research Institute it was found that she was admitted with chest pain having fever and also shortness of breathing.

13. From the affidavit of Dr. Sankar Sengupta the medical superintendent of BM Birla Heart Research Institute, as was quoted in the order of the Commission, it is found that her echo was normal and TROP/T cardiac enzymes were critically elevated. She was planned to undergo CAG next day for recurrent chest pain on maximal medical therapy but due to fever it was deferred. She was treated for ACS and also covered with anti-biotics in view of suspected infection because of fever and elevated total count. Urine and blood cultures were sent to identify the source if any and imperical antibiotic started till the culture reports came. During course of the treatment the patient was seen by the physician for fever on 7th May, 2017 from CMRI and necessary advise was followed. On 7th May, 2017 around 7:45 pm the patient was progressively deteriorating and during the next few hours developed hypotension and was started on ionotropes and vasopressors for the same. The patient was attended to by Dr. Subho Dutta, the primary consultant at 9:15 pm on 7th May, 2017 and considering the patient's condition and also in view of possibility of sepsis causing hypotension, a decision to transfer the patient to a multi-specialty hospital was made after discussing with the patient's relatives. The patient was transferred to CMRI at 1:59 am on 8th May, 2017 for further management. In CMRI the patient was received in a state of shock with hypotension and was attended

immediately by the primary consultant. Treatment of shock and other organ support in the form of ventilation was continued. Due to worsening renal function she was planned for SLED also but the same could not be done due to hypotension. However due to progressive organ dysfunction she could not be resuscitated and she succumbed to her illness. The patient expired on 8th May, 2017 at 6:15 hours.

14. From the findings of the Commission, which were also affirmed by the Learned Single Judge, it is revealed that the Commission has come to the conclusion that death of Arati Pal was due to incompetent patient care service of BMBHRC, more particularly for Dr. Giri, and Ms. Kundu who failed to conduct proper ECG of the patient and to interpret the same properly. As if the death of Arati Pal, according to the Commission, was due to cardiac problem. In essence, it was the conclusion of the Commission that the BMBHRC had failed to make proper diagnosis of cardiac problem due to incompetence of the aforesaid doctor and Ms. Kundu. Had the ECG of the patient been done and interpreted by the BMBHRC' through a competent doctor and technician, such untimely death of Arati Pal might have been averted.

15. But such clear cut conclusion may be inappropriate in the realm of medical science. The probable cause of death has been mentioned as "ACS, Sepsis, Multi-organ failure with background of Rheumatoid arthritis and immuno-compromised state due to DMARD".

16. For the purpose of proper understanding and adjudication, it is very much pertinent to know the terms like 'ACS' 'Sepsis', 'immuno-compromised state due to DMARD'

i) ACS – Acute Coronary Syndrome – any condition brought on by a sudden reduction or blockage of blood flow to heart. Acute Coronary syndrome is most often caused by plaque or clot formation in the heart's arteries.

Coronary Angiogram – This test helps heart care providers see blockages in the heart arteries. The coronary angiography is considered as the gold standard in the assessment of the anatomy and physiology of the heart. (Harrison's Principles of Internal Medicine, 21st Edition, Volume II, McGraw Hill pg 1859).

Echo-Cardiogram – This test uses sound waves to create pictures of beating heart. It shows how blood flows through the heart and heart valves. An echocardiogram can help to determine whether the heart is pumping correctly. Common causes of Plasma Troponin Level Elevation may also include Sepsis and/or shock. (The ECG Made Easy, 9th Edition, John Hampton & Jonna Hampton ELSEVIER, Pg-124).

II) Sepsis – Sepsis is defined as a life-threatening organ dysfunction caused by a dysregulated host response to infection. Common clinical features include signs of infection, with organ dysfunction, plus altered mentation, tachypnea, hypotension, hepatic, renal or hematologic dysfunction. The

criteria in 2016 (sepsis-3) is suspected (or documented) infection and an acute increase in > 2 sepsis related organ failure assessment (SOFA) points. (Harrison's Principles of Internal Medicine, 21st Edition, Volume II, McGraw Hill pg 2241). Sepsis is the body's extreme response to an infection. It is a life threatening medical emergency. Sepsis happens when an infection already we have triggers a chain reaction throughout our body. Most cases of sepsis start before a patient goes to a hospital. So far as the causes of sepsis are concerned, it is found that when germs get into a person's body, they can cause an infection. If that infection is not stopped, it can cause sepsis. Bacterial infection causes most cases of Sepsis. Sepsis can also be a result of other infection, such as, Covid-19 or influenza or fungal infections. Most people who develop sepsis have at least one underlying medical condition, such as chronic lung disease or a weakened immune system. The early symptoms of sepsis may include, inter alia,:-

a) A high heart rate or weak pulse
b) Extreme pain or discomfort
c) Fever, shivering or feeling very cold
d) Shortness of breath

a) In medical science, A single diagnostic test for sepsis does not yet exist, and so doctors and healthcare professionals use a combination of tests and worrisome clinical signs, which include the following:-

The presence of an infection, very low blood pressure and high rate, increased breathing rate.

b) Severe sepsis occurs when sepsis causes the patient's organs to malfunction. This is usually because of low blood pressure, a result of inflammation throughout the body of the patient.

c) Septic shock is the last and most severe stage of sepsis. It has been defined as a subset of sepsis in which underlying circulatory and cellular/metabolic abnormalities lead to substantially increased mortality risk. Common clinical features include signs of infection plus altered mentation, oliguria, cool peripheries, hyperlactemia. Common risk factors for increased risk of infection include chronic diseases and immune suppression. (Harrison's Principles of Internal Medicine, 21st Edition, Volume II, McGraw Hill pg 2241). Sepsis occurs when the patient's immuno system has an extreme reaction to an infection. The infection throughout the body of the patient can cause dangerously low blood pressure. The patient needs immediate treatment if he has septic shock. Treatment may include anti-biotic, oxygen and other medication. Septic shock is a serious medical condition that can occur when an infection in our body causes extremely low blood pressure and organ failure due to sepsis. Septic shock is life threatening and requires immediate medical treatment. It is the most severe stage of sepsis. The difference between septic shock and sepsis is that while sepsis is life threatening and it happens when the patient's immune system overreacts to an infection, septic shock is the last stage of sepsis and is defined by extremely low blood pressure, despite lots of IV (intravenous) fluid.

d) The signs and symptoms of septic shock which is the third stage of sepsis can include (i) fast heart rate, (ii) fever or hypothermia (low body temperature) shaking or chills, hyperventilation (rapid breathing), shortness of breath etc.

e) When sepsis turns to septic shock the patient may experience additional symptoms**.** This includes very low blood pressure, lightheadedness, little or no urine output or heart palpitation, skin rash, cool and pale limbs etc. The patient's septic shock risk increases **if the patient has a weakened immune system which increases the patient's risk for sepsis**.

17. DMARDS:- Disease-modifying antirheumatic Drugs (DMARDs) are a class of drugs suggested for the treatment of inflammatory arthritides, including rheumatoid arthritis (RA), psoriatic arthritis (P&A) and ankylosing spondylitis (AS). They can also be used in the treatment or other disorders. DMARDS are so named because of their ability to slow or prevent structural progression of Rheumatoid Arthiritis. Most of such drugs have unfavourable toxicity profile. (Harrison's Principles of Internal Medicine, 21st Edition, Volume II, McGraw Hill pg 2761)

DMARDS are immunosuppressive and immuno modulatory agents.

The terms immunosuppressive denotes, **(as per Stedman's Medical Dictionary for the Health Professions and Nursing, Sixth Edition, Wolters Kluwer, Lippincott Williams & Wilkins)** prevention or interference

with the development of immunologic response, may reflect natural immuno logic unresponsiveness (tolerance), may be artificially induced by chemical, biologic or physical agents or may be caused by diseases.

Immuno-compromised state due to DMARD signifies a weakened immune system of the patient.

18. Sustained low efficiency dialysis (SLED) is an increasingly popular form of renal replacement therapy for patients with renal failure in the intensive care unit. Advantages of SLED are efficient clearance of small solutes, good hemodynamic tolerability, flexible treatment schedules, and reduced clots.

Hypotension on low blood pressure – it means that the pressure of blood circulating around the body is lower than normal or lower than expected. Severe hypotension can be caused by sudden loss of blood (Shock), severe infection, heart attack or severe allergic reaction (Anaphylaxis).

19. From the very beginning of her admission at BMHRC the concerned doctors suspected that the patient Arati Pal had been suffering from infection. It is further found from the record that there was no remission from fever in spite of medication. Coronary Angiogram could not be done due to fever. It is also found that the patient developed hypotension and for which she was on ionotropes and vasopressors. It was further found from the record that on 7th May, 2017 at about 9:15 pm, considering the patient's condition and also in view of possibility of sepsis causing hypotension the

decision to transfer the patient to CMRI was taken. In CMRI the patient was received in a state of shock with hypotension. Treatment of shock and other organ support in the form of ventilation was continued. It is further reported that due to worsening renal function she was planned for SLED but the same could not be performed as she was suffering from hypotension (low blood pressure). It is further reported that due to progressive organ dysfunction she could not be resuscitated and ultimately the patient succumbed to her illness.

20. The above factual aspects coupled with medical condition of the patient suggest that the cause of her death may have been sepsis which culminated into septic shock. It is clear from the medical reports that several symptoms of sepsis arising out of infection were present in the patient, since though the patient Arati Pal was a known patient for hypertension she developed hypotension which might be the outcome of the severe sepsis. It should not be lost sight of that the patient had Rheumatoid Arthritis and was on Disease-modifying-antirheumatic Drugs causing a weakened immune system. Therefore, the possibility cannot be ruled out that the patient died due to septic shock causing malfunction of her different organs and as the severe sepsis could not be managed and controlled properly it might have caused the death of the patient. Therefore, the questions whether or not the doctors or the clinical establishment were at fault in diagnosis, are issues of medical negligence which the Commission could not

have adjudicated and the Commission had rightly refused to enter into that arena.

21. But from the above discussion, we can say that the Commission's conclusion that as there was a failure on the part of Dr. Giri and Ms. Chaitali Kundu, the victim could not get proper treatment or her untimely death could have been averted, cannot be said to be correct. In fact, there is no material on record showing that there was any nexus between the ECG report done by Dr. Giri assisted by Ms. Chaitali Kundu and the death of the patient Arati Pal. As the material on record is not at all sufficient to hold that it is only because of the ECG report as aforesaid, the nature and extent of patient's disease could not be unearthed, and such failure became fatal for Arati Pal, we have strong reservation to say that the BMHRC was responsible for such death on that score only. In short the reason given by the Commission in this regard is not tenable since, even if the correct ECG report was available, that might not have disclosed the extent of infection and sepsis found in the body of the patient.

22. But it does not mean that BMHRC can employ incompetent doctor and staff for the patient's care service. It is clear from the materials on record that it was alleged that Dr. Giri was not properly qualified in interpreting the ECG report and it was further alleged that Ms. Chaitali Kundu was also not qualified to act as ECG technician.

23. In Chapter 7 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, clause 7.20 has specified one of the professional misconducts of the doctors which is as follows:-

> "7.20. – A physician shall not claim to be a specialist unless he has a special qualification in the branch".

23.1. Under chapter 8 of the said Regulations, procedures for disciplinary action and punishment have been prescribed. In 8.2 Regulation it has been laid down as hereunder:-

> "It is made clear that any complaint with regard to professional misconduct can be brought before the appropriate Medical Council for Disciplinary action. Upon receipt of any complaint of professional misconduct, the appropriate Medical Council would hold an enquiry and give opportunity to the registered medical practitioner to be heard in person or by pleader. If the medical practitioner is found to be guilty of committing professional misconduct, the appropriate Medical Council may award such punishment as deem necessary or may direct the removal altogether or for a specified period, from the register of the name of the delinquent registered practitioner. Deletion from the Register shall be widely publicized in local press as well as in the publications of different Medical Associations/Societies/Bodies."

8.6 of the regulations prescribed hereunder:-

> "Professional incompetence shall be judged by peer group as per guidelines prescribed by the Medical Council of India."

23.2. Therefore, from the above it is found that if a physician falsely claims to be a specialist he is guilty of misconduct as laid down in 7.20 under chapter 7 of the Regulations, 2002. But to declare a physician to be guilty of professional misconduct under 7.20 as aforesaid, the disciplinary action is required to be taken by the concerned Medical Council and after giving reasonable opportunity of hearing to such medical practitioner, if the said medical council finds that he is guilty of committing professional misconduct, the said Council shall punish the delinquent by way of removing his name from the State Register permanently or for a limited period. Therefore, the allegation against Dr. Giri is such that he has committed professional misconduct under Regulation 7.20 and for which a specific provision has been made under Indian Medical Council (Professional Conduct, Etiquette and Ethics), Regulations, 2002 for determining whether he has committed any professional misconduct or not. The Commission has therefore no authority to observe that Dr. Ashok Giri was not qualified to conduct as well as interpret the ECG report. It may happen that if the State Medical Council initiates a disciplinary proceeding regarding his alleged professional misconduct and Dr. Giri is able to prove before the disciplinary committee of the State Medical Council that he is entitled to practice cardiology and is further entitled to conduct ECG and interpret the report, he may be exonerated from the said allegation. When specific provisions have been made to enquire about the alleged professional misconduct by a specialised body, the Commission cannot enter into the arena of that specialised body which has been rightly kept reserved for the medical

professionals. It is further found from Regulation 8.6 that such professional's incompetence can only be judged by a peer group as per guidelines prescribed by Medical Council of India. Therefore, there are specific provisions for dealing with such alleged professional misconduct of a medical practitioner. Therefore, unless the State Medical Council or National Medical Commission declares that the concerned doctor is not qualified to perform ECG, the Commission cannot hold Dr. Giri as unqualified. In fact, Commission has no authority to declare a medical practitioner as unqualified or incompetent for lack of requisite qualifications as the same is beyond its authority.

23.3. Therefore, if the alleged incompetence of Dr. Giri is not found by the concerned State Medical Council it would be preposterous to say at this stage that BM Birla Heart Research Institute has engaged incompetent and unqualified doctor and is guilty of deficiency in patient's care service. Therefore, unless the Medical Council of the West Bengal declares through specific and appropriate disciplinary action that Dr. Giri is an unqualified doctor the Commissioner has no authority to declare Dr. Giri as unqualified to perform ECG or to interpret the findings thereof.

23.4. The materials on record also show that the question whether Indira Gandhi National Open University can offer post-graduate diploma in clinical cardiology is under consideration of the Hon'ble High Court at Delhi. It is also found that cardiovascular disorder including non-invasive cardiology,

echocardiography is within the syllabus of MBBS course as per Harrison's Principles of Internal Medicine. However, without going into the said question the Commission ought to have relegated the matter to the State Medical Council or National Medical Commission for consideration. If the State Medical Council or the National Medical Commission found that Dr. Giri is unqualified then BM Birla Heart Research Institute could be held to be responsible for deficient patient care service for engaging unqualified doctor. But if the State Medical Council or the National Medical Council did not find Dr. Giri as unqualified then the charges against BM Birla Heart Research Institute for providing deficient patient care service would not have stood as regards appointment of Dr. Giri.

24. Learned Counsel for the appellant argued that MD Cardiologist is better placed to interpret ECG Report does not mean Dr. Giri, being an MBBS, cannot interpret. It appears from the record that pursuant to an application dated 17.07.2017, the Medical Council of India by its reply dated 31.08.2017 has intimated the applicant regarding the relevant information sought.

25. The information sought was **"what are the norms of minimum qualification to perform echocardiography".**

26. To such query, the Medical Council of India has reported that **the post-graduate Medical Education Regulation, 2000 is silent with regard to such query.**

27. It is also found from the letter dated 25.06.2019 written by the Law Officer of the Board of Governors in supersession of Medical Council of India that "the procedure of echocardiogram requires conduct of tests and clinical interpretation of the data. In so far as the conduct of test is concerned it can be done by Medical Graduate or a para-medic (with training). It may be respectfully submitted that the minimum qualification required for the clinical interpretation of data of echocardiogram is MD (Medicine). Knowledge of cardiology is imparted in MD (Medicine) Course. Furthermore, a person with MD (General Medicine), MD (Paediatrics) and MD (Respiratory Medicine) are entitled to pursue DM (Cardiology). Therefore, those with super-specialist qualification of DM (Cardiology) qualification are better placed to clinically interpret the data of echocardiogram".

28. From the above two documents it prima facie appears that Medical Council of India by its letter dated 31.08.2017 did not say what are the minimum qualification to perform echocardiography. The second document that is letter dated 25.06.2019 issued by the Law Officer, Board of Governor in supersession of Medical Council of India has clearly mentioned that a Medical Graduate or a para-medic (with training) can conduct the eco-cardiogram test. It is further stated in the said letter that those with super-

specialist qualification such as MD or DM in the respective fields as aforesaid are better placed to clinically interpret the data of eco-cardiogram. Therefore, the said letter dated 25.06.2019 does not specifically state that a medical graduate cannot clinically interpret the data of eco-cardiogram. It only says that the persons having qualifications with MD or DM in the respective fields as aforesaid are better placed to clinically interpret the data of eco-cardiogram.

28.1. Now at this juncture a relevant question arises as to what would be the proper standard and qualification of a doctor to interpret the data of eco-cardiogram? Will it be for the highest degree holder in the relevant field or for a mere medical graduate? It has been decided in many a cases that the benchmark to determine negligence in law is the 'reasonable standard'. The 'reasonable standard' is fixed by law of averages. It is an average between the highest and the lowest standards. However, it is stated that while dealing with cases of professional negligence, the established jurisprudence is to benchmark by taking the lowest standard of skill and competence a professional is expected to possess. The judgment of Jacob Mathew's case reiterates this principle of benchmarking professional's standard by referring to **Michael Hyde and Associates Vs. JD Williams and Co. Ltd., a renowned English Court judgment.**

28.2. The celebrated observation of MacNair J in Bolam Vs. Frien Hospital Management Committee (1957) 1 WLR 582 is worth noting in this regard:-

> "Where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the rise of being found negligent. it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art"

29. In another English judgment reported at (2001) PNLR 233 CA, Learned Judge Sedley observed that "where a profession embraces a range of views as to what is acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable". Therefore, from the above discussion it transpires that our Hon'ble Supreme Court has been pleased to accept the English view regarding the standard of doctors by which their competence can be assessed. In this case though there is no direct evidence that due to alleged wrong report of ECG the patient Arati Pal succumbed to her illness, it prima facie appears that Dr. Giri holding an equivalent degree of MBBS of Indian jurisdiction has at least minimum standard of competence to conduct and interpret the ECG report, until it is reversed by an appropriate disciplinary proceeding as stated above.

29.1. It also appears from the syllabus for First Professional MBBS in Physiology including Biophysics of West Bengal University of Health Science that in MBBS Physiology is taught and further cardio-vascular system is also taught. It appears from such syllabus that under cardio-vascular system ECG, leads principles of normal recording, normal waves and internal and their interpretations, electrical axis of the heart including left and right axis deviation, clinical uses of ECG are also taught. The syllabus of MBBS course under All India Institute of Medical Sciences, Delhi has also disclosed that physiology is taught and therein cardio-vascular system of human body is also taught. Under the chapter cardio-vascular system ECG is also taught. It also prima facie found that Anatomy, Physiology, Cardiology etc. were taught in the relevant course of St Petersburg State Medical University. Therefore, from the above it cannot be said at this stage, that Dr. Giri does not have minimum standard or qualification for conducting and interpreting the data of eco-cardiogram until the same is held otherwise by the State Medical Council of West Bengal or the National Medical Commission.

30. So far as Ms. Chaitali Kundu is concerned it is true that she has graduated from commerce stream but at that time there was no law that a commerce graduate cannot become eco-cardiography technician. However, needless to mention that there is no material that the relevant ECG report by Dr. Giri assisted by Ms. Chaitali Kundu had any nexus with the death of the patient Arati Pal. Therefore, as the letter dated 25.06.2019 shows that a

para-medic (with training) can conduct ECG, I think Ms. Chaitali Kundu cannot be said to have conducted ECG unauthorisedly.

31. But as regards the allegation that Dr. Tanmoy Chakraborty had described an ill and unmobilized patient as a patient with stable physical condition, it appears to be a mistake on the part of Dr. Tanmoy Chakraborty. It appears from the record that Dr. Tanmoy Chakraborty had himself intimated the patient party about the deteriorating condition of the patient at the relevant point of time but in spite of that he had made comments in the discharge summary that the patient was mobilised and stabilised and was being discharged in a stable condition. The said comment does not conform to the notes in the medical records and papers which are maintained in the said clinical establishment. There is no reason to make such written comment beyond medical records. Now the question may arise that for each and every wrong of a doctor engaged in a hospital, is the clinical establishment responsible? Each case has to be considered on its own merits and also on the basis of the factual matrix of the case. In this case it appears that Dr. Tanmoy Chakraborty went beyond the medical records and wrote as per his whims and caprice. Be it mentioned that soon after the said incident or a few days or months thereafter Dr. Tanmoy Chakraborty had left BM Birla Heart Research Institute for reasons best known to him. There may be ample reasons for such resignation or departure from BM Birla Heart Research Institute. But no reasonable and

prudent man can make such irresponsible comment. This is a serious lacuna on the part of the Dr. Tanmoy Chakraborty alone.

32. The failure to submit utilization report for IV fluids cannot be viewed as serious lacuna on the part of the clinical establishment since the nature of disease suffered by the patient at the relevant point of time required lots of inter venus fluid to be instilled into the body of the patient.

33. It is true that the Commission can determine its own procedure for adjudicating the allegations under the Act, 2017. **But that does not mean that the Commission can ignore the fundamental principles of judicial procedure in adjudicating the same**. From the judgement of the Commission we found several discrepancies which were required to be addressed by the Learned Single Judge. First, apart from the complaint sent through email on 12.05.2017 no other written complaint is found in the paper book. Even at the cost of repetition we are quoting the complaint on the basis of which the relevant case being Complaint id; HGY/2017/000069 was initiated before the Commission:-

> "Negligency in detection and causing delay in shifting the patient from the hospital. Not applying proper medication to the patient, improper diagnosis and negligency and misguiding patient party".

34. But in the body of judgment it is found in paragraph 5 wherein the Hon'ble Commission has observed as hereunder:-

> "During the hearing, the complainant elaborated his case of deficiency in service, negligence in diagnosis and consequent failure of providing proper treatment and delay in referring the patient to a multi specialty hospital against the Clinical Establishment, B.M. Birla and presented the factual background of the case and claimed sufficient compensation in accordance with law."

35. Now the relevant question may arise how and under what procedure a complainant can be allowed to elaborate his case of deficiency in service, negligence in diagnosis etc. when the process of adjudication has already started. There is no document nor any statement of the complainant showing how he elaborated his complaint during the pendency of the procedure. It is needless to mention that when a complaint was lodged there is little scope under any law that authorises the complainant to elaborate his initial complaint at the time of hearing of the case. If we go through the complaint as lodged before the Commission by way of sending email we shall find that the complainant alleges;

Firstly, there was negligence in detection of the diseases;

Secondly, there was a delay in shifting the patient from the hospital;

Thirdly, proper medication was not given to the patient;

Fourthly, improper diagnosis and negligence.

Fifthly, misguiding the patient party.

36. The negligence in detection of diseases and the allegation of not giving proper medicines to the patient and further improper diagnosis of the diseases are all matters or issues of medical negligence. Therefore, the said issues cannot be adjudicated by the Commission. There was no sufficient material on record to hold, that delay, if any, was caused only because of the clinical establishment and not from the side of the patient party. Furthermore, there is no material to show how the patient party was misguided by the clinical establishment.

36.1. The observation of the Hon'ble Commission that the discharge summary does not contain the signature of the doctor who acted as primary consultant of the patient and therefore the said failure on the part of the BM Birla Heart Research Institute also comes under the purview of deficient patient care service, is not correct. It appears that the Hon'ble Commission did not take into consideration the practical purposes for which the signatures of two authorised persons are required. It is obvious that at the dead of night one of such persons instead of two is likely to be available in the hospital or clinical establishment to discharge the patient for any emergency. However, no prejudice was caused to the patient party for not having the signature of Dr. Shuvo Dutta as primary consultant on the relevant portion of the discharge summary.

37. However, from the discussion it appears that the Commission has a duty under the law to see that unqualified doctors or technicians are not

engaged in the clinical establishment but this duty of the Commission has to be discharged very cautiously and circumspectively.

38. It is also found from page 5 of the Commission's judgment that one screening report dated May 7, 2017 at 8.05 pm of the service recipient was made over to the Commission by Dr. Shubo Dutta. It is also noted therein that the decision to transfer the service recipient was taken on May 7, 2017 at around 9:15 pm by her primary consultant Dr. Shuvo Dutta. The Commission found that the said eco-screening was done with a portable machine and the findings were recorded and interpreted with impression by one Ms. Chaitali Kundu. Now the question is how Dr. Shuvo Dutta can produce such eco-screening report dated May 7, 2017 before the Commission: was he called as a witness before the Commission or was he asked to submit an affidavit to that effect? Needless to mention that as Dr. Shuvo Dutta was the primary consultant of the patient, he was within the periphery of the complaint lodged by the son of the deceased. But it appears that the Commission without seeking any affidavit from Dr. Shuvo Dutta has accepted the eco-screening report dated May 7, 2017 directly from him surprisingly.

39. The Commission has also failed to give sufficient opportunities to Dr. Giri for refuting alleged imputation cast upon him.

40. In **2005 AIR (SC) 3280** (**State of Punjab Vs. Shiv Ram & Ors.)** the Hon'ble Apex Curt has been pleased to observe in paragraph 28 that unless

primary liability is established, vicarious liability on the state cannot be imposed. In (**2012) 5 SCC 242 (Vijay Singh Vs. State of Uttar Pradesh & Anr.)** the Hon'ble Supreme Court has been pleased to hold that in civilized society governed by rule of law, punishment not prescribed under statutory rules cannot be imposed. In the case of **(2005) AIR SC 3180 (Jacob Mathew Vs. State of Punjab & Anr.**), Hon'ble Apex Court has been pleased to quote from the **Halsbury's Law of England (Fourth Edition, Vol. 30, para 35)** as hereunder:-

> "The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.
>
> 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."

41. In **Gujrat Steel Tubes Limited & Ors. (Supra)** the Hon'ble Suprme Court has been pleased to lay down that an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The

difference is real, though fine. In **Wander Limited Vs. Antox India Pvt. Ltd. reported at 1990 (Supp) Supreme Court Cases 727** the Hon'ble Apex Court in paragraph 13 and 14 has laid down the correct principle on the relevant issue. According to Hon'ble Supreme Court:-

> "13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a mis-direction in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred - against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.
>
> 14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph (SCR 721)

> …. These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton..the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case."
>
> The appellate judgment does not seem to defer to this principle."

42. It is true that unless there is any palpable wrong, the judgment of Single Judge should not be interfered with by the Division Bench. But in our case it appears that the Learned Single Judge was not properly assisted to consider that when professional misconduct of a doctor is to be adjudicated by a specialized branch under a statute and rules made thereunder, the Hon'ble Commission could not have entered into such arena. The Learned Single Judge was not assisted in coming to the conclusion regarding the standard or degree of competence required for a medical professional. The learned Single Judge was also not assisted by drawing His Lordship's attention to the fact that sufficient opportunities were not given to the concerned doctor for refuting the allegation brought against him.

43. In fact, in our case, the issues of medical negligence and the issues of alleged deficient patient care services are so inextricably mingled up, the issues of patient care service cannot be taken up separately. In other words the issues of patient care service are dependent upon the competence of the concerned doctor or the ECG technician, and such technical issues which

are required to be addressed before the specialised branch, could not be adjudicated by the Hon'ble Commission. The instant fact was also not considered by the Learned Single Judge. There are sufficient materials on record which suggest that there are certain palpable wrongs in the Hon'ble Commission's order which were not properly addressed by the Learned Single Judge.

44. Considering all the aspects we are unable to uphold the judgment and order passed by the Learned Single Judge passed in WPA No. 7191 (W) of 2018 on 24.09.2019 and accordingly, we set aside the impugned judgment passed by the learned Single Judge as well as the order of the Hon'ble Commission. The instant appeal is, thus, allowed but without any order as to costs.

45. However, we make it clear that the complainant/aggrieved persons is/are at liberty to agitate all the issues regarding the medical negligence and deficient patient care service before the appropriate forum under the National Medical Commission Act, since the Indian Medical Council Act, 1956 has been repealed. In the event, the complainant approaches the forum as indicated above, such authority shall dispose of the matter without being influenced by any of the observations made in this judgment. The appellant is also given liberty to withdraw the sum of Rs. 15,00,000/- (Fifteen Lakhs) deposited with the office of the Registrar General, High Court at Calcutta in accordance with law, after the expiry of the period of appeal.

46. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(ARIJIT BANERJEE, J.)

(APURBA SINHA RAY, J.)