
(2013) 11 MAD CK 0185
In the Madras High Court
Case No : Writ Petition No. 33813 of 2012

Dr. Easwaran DNB, FRCS

APPELLANT

Vs

Tamil Nadu Medical Council and Another

RESPONDENT

Date of Decision : 08-11-2013

Acts Referred:

Citation : (2013) 8 MLJ 707

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : Easwaran Party in Person, for the Appellant; Veera Kathiravan and V.P. Raman, for the Respondent

Judgement

K.K. Sasidharan, J.

Introductory Summary:

1. Whether the breach of "duty to take care" on the part of a medical professional would attract the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (hereinafter referred to as "Ethics Regulations, 2002") so as to enable the aggrieved to proceed against the concerned doctor for professional misconduct before the Medical Council, is the core issue raised in this writ petition at the instance of a Surgeon, complaining that the Doctor who treated his father for cancer failed to take reasonable care, resulting in his death.

The Factual History:

The petitioner is a Surgeon. He took his father for treatment for cancer in Apollo Hospital, Chennai in April, 2010. The Surgeon, Anesthetist, the Medical Superintendent and the Hospital were highly negligent. The Doctor failed to take reasonable care and as a result of his negligence in treating, the cancer recurred within a year and spread to other parts of the body. It was mainly on account of "BOTCHED UP" operation and the failure to give Radiotherapy which was

essential to prevent recurrence of cancer.

2. The petitioner who was temporarily away returned to India in January 2011. He found that his father had decreased hearing on the operated side. The petitioner met Dr. Rayappa again and he advised MRI, which showed a big tumour and it was in fact bigger than previous time. He got his father operated in another Hospital in April 2011 and he received Radiotherapy. But the cancer spread to other parts of the body and he finally passed away in January 2012.

3. The petitioner who is a qualified Medical Practitioner of considerable experience was convinced that it was only on account of the sheer negligence and breach of duty of care that the cancer spread to other parts of the body, and as such he preferred a complaint before the Tamil Nadu Medical Council on 6.1.2012 requesting to take disciplinary action against the concerned Doctors for their professional misconduct. The petitioner submitted a similar complaint before the Medical Council of India. Since there was no follow up action by the statutory authorities, the petitioner preferred another complaint to the Medical Council of India on 26.7.2012. The Medical Council of India by its communication dated 19.9.2012 called upon the Tamil Nadu Medical Council to investigate the complaint preferred against Dr. Rayappa and take necessary action within a period of six months under clause 8.4 of Ethics Regulations, 2002. Even then the Tamil Nadu Medical Council failed to take any action. Feeling aggrieved by the indifferent attitude of State Medical Council, the petitioner is before this Court.

4. The Registrar, Tamil Nadu Medical Council in his counter affidavit contended that the Council has no power to take action relating to medical negligence. According to the Council, only in case of professional misconduct action could be taken by the Council. It was further contended that the petitioner has already approached the consumer forum claiming compensation and as such the complaint before the Council is not maintainable.

5. The Medical Council of India (hereinafter referred to as MCI) in its counter affidavit indicated the salient features of Ethics Regulations 2002. The MCI submitted that the State Council was requested to look into the complaint with notice to the concerned medical professional.

Rival Submissions:

6. The petitioner who argued in person by placing reliance on the Ethics Regulations, 2002 contended that the medical practitioners owe a duty of care to his patient and the breach of such duty, would amount to professional misconduct. According to the petitioner, even medical negligence would come under the term "Professional misconduct", in case basic facts are present in a given case.

7. The learned counsel for the State Medical Council submitted that it is only a case of medical negligence and as such remedy is elsewhere.

8. The learned Standing Counsel for MCI submitted that the State Council was

obliged to look into the complaint with notice to the petitioner and the Medical Professional and to decide the matter on merits. According to the learned counsel, MCI is only an appellate forum and as such decision should be taken only by the State Council.

The Core Issue:

9. The only question that arises for consideration in this writ petition is whether the allegation regarding breach of duty to care would attract disciplinary proceedings for professional misconduct.

Analysis:

10. The petitioner alleges professional misconduct on the part of the medical professional who treated his father for cancer. According to the petitioner, the Doctor agreed to treat his father. There was a contractual relationship between the Doctor and patient. The Doctor was expected to take care of his patient. The breach of such duty would amount to a professional misconduct.

Medical Negligence:

11. Medical negligence is the failure of a medical practitioner to provide proper care and attention and exercise those skills which a prudent, qualified person would do under similar circumstances. In order to make out a case of "Medical Negligence" the party must plead and prove that there was a legal duty to exercise due care, there was breach of such duty and it would give a claim for damages.

12. The MCI is a statutory authority constituted by an Act of Parliament with the object inter alia, to regulate medical education in India and to formulate Regulations and guidelines with regard to standard of conduct of Medical Education in the Country.

13. Section 20A of the Indian Medical Council Act, 1956 empowered the Indian Medical Council to frame Regulations prescribing standards of Professional Conduct and Etiquette and a code of Ethics for Medical Practitioners. The MCI was given authority to specify the nature of violations which would constitute professional misconduct.

14. The MCI in exercise of the power conferred u/s 20A of the Act framed detailed Regulations in the name and style of Indian Medical Council (Professional Conduct, Etiquette and Ethics), Regulations, 2002. Though there are indications as to which violation would amount to professional misconduct, the MCI in clause 8.1 of Ethics Regulation has given discretion to include other forms of misconduct attracting disciplinary proceedings for professional misconduct.

The Statutory Provisions:

15. Clause 8 of Chapter - 8 of the Ethics Regulations reads thus:

Chapter 8

8. Punishment and Disciplinary Action

8.1 It must be clearly understood that the instances of offences and of Professional misconduct which are given above do not constitute and are not intended to constitute a complete list of the infamous acts which calls for disciplinary action, and that by issuing this notice the Medical Council of India and or State Medical Councils are in no way precluded from considering and dealing with any other form of professional misconduct on the part of a registered practitioner. Circumstances may and do arise from time to time in relation to which there may occur questions of professional misconduct which do not come within any of these categories. Every care should be taken that the code is not violated in letter or spirit. In such instances as in all others, the Medical Council of India and/or State Medical Councils have to consider and decide upon the facts brought before the Medical Council of India and/or State Medical Councils.

8.2 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 deemed 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.

8.3 In case the punishment of removal from the register is for a limited period, the appropriate Council may also direct that the name so removed shall be restored in the register after the expiry of the period for which the name was ordered to be removed.

8.4 Decision on complaint against delinquent physician shall be taken within a time limit of 6 months.

8.5 During the pendency of the complaint the appropriate Council may restrain the physician from performing the procedure or practice which is under scrutiny.

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

The Nature of Relationship:

16. The Medical Profession is considered and treated as a noble profession. It is the responsibility of the Doctor to take reasonable care of his patient and to take all possible efforts to save his life. The contract between the practitioner and the

patient would commence the moment the Doctor agreed to treat the patient. The patient, very often is unaware of the nature of treatment and the medication. He entrust everything with the Doctor with a fond hope that he would do everything possible at his command for a speedy recovery. It is only this positive thought which makes the patient to believe the medical practitioner fully and in a way blindly.

17. The Supreme Court in *Dr. P.B. Desai Vs. State of Maharashtra and Another*, considered in extenso the Doctor-Patient relationship. The Supreme Court observed:

37. It is the responsibilities that emerge from the doctor-patient relationship that forms the cornerstone of the legal implications emerging from medical practice. The existence of a doctor-patient relationship presupposes any obligations and consequent liability of the doctor to the patient.

39.....Fact remains that when a physician agrees to attend a patient, there is an unwritten contract between the two. The patient entrusts himself to the doctor and that doctor agrees to do his best, at all times, for the patient. Such doctor-patient contract is almost always an implied contract, except when written informed consent is obtained. While a doctor cannot be forced to treat any person, he/she has certain responsibilities for those whom he/she accepts as patients. Some of these responsibilities may be recapitulated, in brief:

(a) to continue to treat, except under certain circumstances when doctor can abandon his patient;

(b) to take reasonable care of his patient;

(c) to exhibit reasonable skill: The degree of skill a doctor undertakes is the average degree of skill possessed by his professional brethren of the same standing as himself. The best form of treatment may differ when different choices are available. There is an implied contract between the doctor and patient where the patient is told, in effect, "Medicine is not an exact science. I shall use my experience and best judgment and you take the risk that I may be wrong. I guarantee nothing."

(d) Not to undertake any procedure beyond his control: This depends on his qualifications, special training and experience. The doctor must always ensure that he is reasonably skilled before undertaking any special procedure/treating a complicated case.

(e) Professional secrets: A doctor is under a moral and legal obligation not to divulge the information/knowledge which he comes to learn in confidence from his patient and such a communication is privileged communication.

Conclusion: The formation of a doctor-patient relationship is integral to the formation of a legal relationship and consequent rights and duties, forming the basis of liability of a medical practitioner. Due to the very nature of the medical

profession, the degree of responsibility on the practitioner is higher than that of any other service provider. The concept of a doctor-patient relationship forms the foundation of legal obligations between the doctor and the patient.

18. The Supreme Court in *Dr. P.B. Desai v. State of Maharashtra* (supra) observed that when reasonable care expected of a medical professional is not rendered and the action on his part comes within the meaning of negligence, it can be safely concluded that the said Doctor did not perform his duty properly which was expected of him under the law and breached his duty to take care of the patient.

19. The State Medical Council was expected to consider the complaint as a whole and the materials produced by the petitioner to take at least a prima facie view as to whether a case for initiating proceedings for professional misconduct has been made out. The State Medical Council in its counter affidavit took a stand even before examining the material papers that the complaint is only a case of negligence and not a case of professional misconduct. The State Council failed to consider the basic fact that it was only after a careful perusal of the complaint, the MCI was pleased to forward it for initiating proceedings.

20. The question raised by the petitioner is no more res integra in view of the decision of the Supreme Court in *Dr. P.B. Desai v. State of Maharashtra* (supra). The Supreme Court stated the background of the said case thus:

(A)(i) Smt. Leela Singhi (hereinafter to be referred as the "patient"), wife of Shri Padamchandra Singhi, the complainant, was suffering from Cancer for which she was under medical treatment since the year 1977. As her condition did not improve and rather deteriorated over a period of time, in 1987 she was taken to America and was treated in Sloan Kettering Memorial Hospital in New York. However, it did not yield any positive results. The doctors in that hospital declared her beyond surgical treatment and she was sent back to India on 29.11.1987. In India, she had been under the medical supervision of Dr. A.K. Mukherjee, for a long time, who started administering the medication prescribed by the doctors in U.S.A. Within few days, the patient started suffering from vaginal bleeding because of which Dr. A.K. Mukherjee advised her for hospitalization. She was admitted to Bombay Hospital on 9.12.1987. After a few days of hospitalization, she was examined by Dr. P.D. Desai who advised "Exploratory Laparotomy (surgery)", in order to ascertain whether the patient's uterus can or cannot be removed in order to stop the vaginal bleeding.

(ii). Nod of a patient for Exploratory Laparotomy was duly taken who signed the consent form. Dr. Mukherjee, assisted by two other doctors, began the Exploratory Laparotomy procedure on 22.12.1987. On opening the abdomen, Dr. Mukherjee found plastering of intestines as well as profuse oozing of ascetic fluids. He immediately called Dr. P.B. Desai who was performing other surgical procedure in another operation theatre. Dr. P.B. Desai after seeing the condition of the patient from a distance, found that it was not possible to proceed with the

operation. He advised Dr. A.K. Mukherjee to close the abdomen. Dr. Mukherjee, thus, closed the abdomen. The condition of the patient, thereafter, deteriorated due to the formation of fistula. The patient remained in the hospital for treatment of the fistula. After remaining in the hospital for about 3 months she was discharged and taken home by the complainant. But she never recovered and ultimately passed away on 26.2.1989 at Jaipur.

(iii). The complainant filed a complaint with the Maharashtra Medical Council against Dr. P.B. Desai and also lodged criminal complaint against Dr. P.B. Desai with the Director General of Police, Maharashtra. Main allegation against Dr. P.B. Desai was that he did not take personal care and attention by preferring the operation himself. On the contrary he did not even bother to remain present there when Dr. A.K. Mukherjee started surgical procedure and opened the abdomen. Moreover, when Dr. Mukherjee, on opening of the abdomen, found that Cancer was at a very advanced stage and it would not be possible to proceed because there was fluid and intestines were plastered and he called Dr. P.B. Desai for advice, even then Dr. P.B. Desai did not examine the patient minutely. Instead, after seeing her from the entrance of the operating room, he advised Dr. Mukherjee to close the abdomen. So much so, even after the formation of the fistula and the pathetic condition of the patient, Dr. P.B. Desai never bothered to examine or looked after her. It was alleged that the very advise of Dr. P.B. Desai for surgical operation, even when doctors at U.S.A. had opined to the contrary, was inappropriate. It was, thus alleged that the aforesaid acts of omission and commission amounted to professional misconduct as well as offence punishable u/s 338 of the I.P.C. Since, there was no overt act on the part of the appellant, as the surgical procedure was performed by Dr. A.K. Mukherjee, charge of abetment u/s 109 of I.P.C. was also leveled against Dr. P.B. Desai. Dr. A.K. Mukherjee was also made accused in the said complaint. However, at a later stage, Dr. A.K. Mukherjee was dropped from the proceedings at the instance of the complainant.

(B) Dr. P.B. Desai was convicted by the Trial Court for an offence u/s 338 read with Section 109 of the Indian Penal Code. The Conviction was upheld by Additional Sessions Judge, Bombay and ultimately by the High Court of Bombay.

(C) The Supreme Court found that Dr. P.B. Desai has already been found guilty by the Maharashtra Medical Council. The State Medical Council having found him guilty of professional misconduct imposed the punishment of warning.

(D) The conviction u/s 338 was challenged before the Supreme Court.

21. While setting aside the judgment of conviction and sentence, the Supreme Court observed that the conduct of Dr. P.B. Desai constituted not only professional misconduct for which adequate penalty has been meted out to him by the Medical Council, and the negligence on his part also amounts to actionable wrong in tort. The Supreme Court explained the concept of "duty of care" which a Doctor owes towards his patient and the right of the aggrieved to file a petition

before the disciplinary committee of the State Medical Council. The Supreme Court said:

40. Once, it is found that there is "duty to treat" there would be a corresponding "duty to take care" upon the doctor qua/his patient. In certain context, the duty acquires ethical character and in certain other situations, a legal character. Whenever the principle of duty to take care" is founded on a contractual relationship, it acquires a legal character. Contextually speaking, legal "duty to treat" may arise in a contractual relationship or governmental hospital or hospital located in a public sector undertaking. Ethical "duty to treat" on the part of doctors is clearly covered by Code of Medical Ethics, 1972. Clause 10 of this Code deals with "Obligation to the Sick" and Clause 13 cast obligation on the part of the doctors with the captioned "Patient must not be neglected". Whenever there is a breach of the aforesaid Code, the aggrieved patient or the party can file a petition before relevant Disciplinary Committee constituted by the concerned State Medical Council.

22. In view of the judgment in Dr. P.B. Desai, the State Medical Council was not correct in its contention that the council has no jurisdiction to initiate disciplinary action against the medical professional pursuant to the complaint preferred by the petitioner.

The law:

23. The law is therefore clear, in view of the decision of the Supreme Court in Dr. P.B. Desai v. State of Maharashtra (supra) that the "Duty to take care" on the part of medical professional is covered by the Code of Medical Ethics, 1972 and any breach of such duty would give a cause of action to the aggrieved to initiate disciplinary proceedings for professional misconduct before the concerned State Medical Council.

Direction:

24. For the reasons set out above, a writ in the nature of a writ of mandamus is issued directing the Tamil Nadu State Medical Council to consider the complaints dated 6.1.2012 and 26.7.2012 and dispose it of on merits and as per law with notice to the concerned medical practitioners. Such exercise, without in any way being influenced by the above observation, shall be completed within a period of six months as provided under Clause 8.7 of Ethics Regulations 2002. In the upshot, I allow the writ petition. No costs.