

(2019) 12 CAL CK 0093

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 21787 (W) Of 2019

Narayana Hrudyalaya Limited & Anr

APPELLANT

Vs

West Bengal Clinical Establishment Regulatory Commission &
Ors.

RESPONDENT

Date of Decision : 02-12-2019

Acts Referred:

Evidence Act, 1872 — Section 114

West Bengal Clinical Establishments (Registration, Regulation And Transparency) Act,
2017 — Section 38, 38(1)(iii), 38(1)(ix)

Code Of Civil Procedure, 1908 — Order 23

Citation : (2019) 12 CAL CK 0093

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Sidhartha Banerjee, Avishek Guha, Ruchika Mall, Samrat Sen

Final Decision : Dismissed

Judgement

Sabyasachi Bhattacharyya, J

Affidavit-of-service filed in court today be kept on record.

The grievance of the writ petitioner is that the West Bengal Clinical Establishment Commission acted without jurisdiction in re-affirming its order dated July 4, 2019 whereby a compensation of Rs.5 lakh was directed to be paid by the petitioner hospital to the parents of a child, who met with her unfortunate death during her stay and treatment in the hospital.

Learned counsel for the petitioner argues that the Commission merely has power and assumes jurisdiction upon adjudication as to whether there was any medical negligence. In the absence of such adjudication, the Commission does not have any authority or power to pass an order of compensation. In this regard, learned Counsel cites the provisions of Section 38(1)(iii) of the West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017

(hereinafter referred to as the '2017 Act'). By placing reliance on the said provision, it is argued that an adjudication has to precede the passing of an order of compensation by the Commission.

In this regard, learned Counsel also cites a judgment reported at (2009)9 SCC 221 (Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and others), in particular paragraphs 137 and 157 thereof. It is argued on the strength of the said decision that the yardsticks of deciding on medical negligence or deficiency of service, which were to be adopted by courts, were categorically set forth in the said judgment and it was also observed that the individual liability of the doctors and hospitals must be judged on those criteria.

It is submitted that, in the present case, although the petitioner/hospital categorically alleged subsequently that no concession was given by the hospital on July 4, 2019, which will also be reflected from the written arguments filed on behalf of the petitioner/hospital before the Commission, the Commission incorrectly recorded a concession having been offered by one Dr. Joydeep Bhattacharjee, to pay the sum of Rs. 5 lakh, and subsequently refused to revoke the said order even upon a specific application in that regard being made by the petitioner.

Pointing out from the order dated August 14, 2019, learned Counsel for the petitioner submits that a different stand was taken by the Commission in the said order than the previous order dated July 4, 2019, wherein the alleged compensation was first recorded. Although in the first order, it was recorded that in deference to the desire of the Commission Dr. Joydeep Bhattacharjee, Medical Superintendent of the hospital, offered a sum of Rs.5 lakh as a token compensation, in the subsequent order dated August 14, 2019, the Commission recorded that the parents of the deceased patient did not agree to any amount being amicably settled between the parties, although the Commission gave such opportunity to the parties.

It was further recorded in the subsequent order that a sum of Rs.5 lakh was fixed as compensation by the Commission itself. Despite having recorded that it was left by the present writ petitioner on the Commission to decide on the matter on merits, the Commission erroneously construed the same as a concession and directed the said amount to be paid. As such, it is argued that the Commission acted without jurisdiction in recording such alleged concession erroneously and deciding on compensation without adjudicating on the matter at all on merits.

Learned Senior Counsel appearing for the respondent authorities submits that it is evident from the first order dated July 4, 2019 that Dr. Joydeep Bhattacharjee, who was the Medical Superintendent of the petitioner/hospital, specifically offered a sum of Rs.5 lakh as token compensation on behalf of the hospital. The same being accepted by the petitioner before the Commission, the Commission granted such amount as compensation. It is further recorded in the said order

that upon receipt of such sum, the complainant would not proceed as against the clinical establishment before any other forum, although the order would not preclude the petitioner from proceeding with the complaint before the West Bengal Medical Council.

In a previous portion of the same order dated July 4, 2019, it was recorded further that, on the issue of deficiency in service by the clinical establishment, the Commission had heard the parties.

Learned Senior Counsel appearing for the respondent authorities points out that although such concession was given by one Dr. Joydeep Bhattacharjee, medical superintendent of the petitioner/hospital, the recalling application was filed not by the said Dr. Bhattacharjee but by someone else by the name of Dr. Nitin Manjunath, who was apparently one of the doctors against whom allegations of negligence regarding the same death have been levelled by the patient's parents. It is argued that it was only Dr. Joydeep Bhattacharjee who could claim to have direct knowledge about offering or not offering the concession, but the said doctor did not come forward to affirm an affidavit in support of the recall application. Even the present writ petition, it is pointed out, has not been affirmed by Dr. Bhattacharjee but by Dr. Manjunath, who could not have any direct knowledge in the matter.

It is further pointed out from the order dated August 14, 2019 that the Commission categorically recorded that Dr. Manjunath was neither present on the day of hearing nor on the day when the recall application was heard, although he verified the petition, particularly paragraph numbers 8 and 9 thereof, as to being true to his knowledge. The Commission failed to appreciate how Mr. Manjunath made such assertion without being present at the hearing.

Upon considering the submissions of the parties and going through the relevant provisions of law, it is seen from Section 38 of the 2017 Act, that although sub-section (1)(iii) thereof provides that the Commission, upon hearing both parties, would adjudicate, grant compensation and pass such other orders, as it deems appropriate, the said provision cannot be construed to be limited in scope only to decisions on merit, even if a concession on that score is given by the clinical establishment-in-question.

Moreover, as rightly pointed out by learned Senior Counsel for the respondent authorities, Clause (ix) of Sub-Section (1) of Section 38 specifically provides that the Commission has powers to award such compensation as deemed appropriate, not exceeding Rs.50 lakh, including interim compensation. The said clauses, being Clause (iii) and Clause (ix), read together, attribute an interpretation to the provisions of the said section which is in consonance with powers akin to Order 23 of the Code of Civil Procedure being conferred on the Commission. The language of Clause (iii) shows that, apart from adjudicating on merits, the Commission is empowered to compensate and pass such other orders as deemed appropriate as well, which, read in conjunction with a powers to award such

compensation as deemed appropriate, which has been separately provided in Clause (ix), indicates that such separate mentioning of the power, although indicated in clause (iii) itself, lends a standalone existence of clause (ix), even independent of Clause (iii) of Section 38(1). In the event the intention of the legislature was to confine all adjudications of the Commission merely to cases where there is a prior adjudication and not any concession, Clause (ix) would be unnecessary.

Although it can be argued that Clause (ix) merely fixes the upper limit for grant of compensation, and is not a separate power of the Commission divorced from Clause (iii), even in that case, the power of adjudication conferred on the Commission and to compensate and pass such other orders "as deemed appropriate", evidently indicates that the Commission has the power to pass orders on concessions as well.

Moreover, a concession, if recorded by a particular judicial or quasi judicial forum, the veracity of the same has to be considered by the said forum itself. In the present case, it was categorically found by the Commission in the order dated July 4, 2019, during the course of hearing and in deference to the desire of the Commission, Dr. Joydeep Bhattacharjee, Medical Superintendent of the petitioner-hospital, offered a sum of Rs.5 lakh as a token compensation on behalf of the petitioner. Implicit in such acceptance was an attribution, if not of any offence having been committed, but of an attempt to resolve the matter, which power has to be read into the expression "adjudicate" as provided in Section 38(1)(iii). Otherwise the powers of the Commission would not be complete and absurdity has to be attributed to the construction of Section 38 to the effect that, in case there is an adjudication on merits, the Commission has the power to decide the compensation, but if the parties or one of the parties choose to give a concession or agree on a quantum of compensation during or after hearing, then the Commission loses jurisdiction to pass an agreed order an order on concession, and a fresh application has to be made and/or a proceeding to be taken out before some other forum merely for recording such concession or the parties have to do it independently of the Commission despite pendency of the dispute before the Commission. Since it is well-settled that absurdity cannot be attributed to the intention of the legislature, but the effort of the Court always has to be a harmonious construction of the provisions, which is in consonance with reason befitting a man of ordinary prudence, the argument of the petitioner, that the Commission could not assume jurisdiction in case of concession, cannot be accepted at all.

The other aspect of the matter also cannot be denied. Although Dr. Joydeep Bhattacharjee, a Medical Superintendent of the hospital-in-question, specifically conceded to a specific sum of Rs.5 lakh as token compensation, he did not affirm the recall application, nor the present writ petition, which palpably shows that the best witness, who could throw light on the concession, was withheld by the petitioner, both before the Commission as well as this Court, thereby leaving it

open for the Commission below as well as this Court to draw an adverse interference against the writ petitioner and disbelieve its case that concession was not granted.

Mere irregular recordings or minor differences in recording of the facts in the first order dated July 4, 2019 and the second order dated August 14, 2019 cannot furnish a ground of challenge to the petitioner and to deny the concession given by it.

Although it was recorded that the matter was left to the discretion of the Commission, the petitioner's argument, that such "leaving the matter to the Commission" was on the aspect of adjudication, cannot be accepted at all. This is for the simple reason that the first order dated July 4, 2019 specifically recorded that the Commission had expressed its desire clearly for the purpose of the hospital deciding on any sum which they were willing to offer as compensation. Knowing the options fully well, the hospital, through Dr. Joydeep Bhattacharjee, Medical Superintendent, offered a sum of Rs.5 lakh as token compensation. As such, the matter being left to the Commission, in proper perspective, could not pertain to mere adjudication, since that is the function of the Commission in any event and would not require a submission in that regard.

"Leaving the matter to the Commission", after recording that the Commission gave an offer, which was accepted by the hospital and the hospital having conceded to a sum of Rs.5 lakh as compensation, attributes only one meaning to the expression "leaving the matter to the Commission", being that the Commission was to decide on the amount in question. However, this Court need not go into such detail, since the first order categorically recorded that even the amount-in-question was agreed to by the hospital and the hospital authority had asked for some time to pay the said sum, which was granted by the Commission. Such action of the petitioner/hospital categorically binds them by application of the principle of Estoppel.

Section 114 of the Evidence Act attributes presumption of correctness to official and judicial acts done, which covers the first order of the Commission, which is a quasi-judicial authority. In the absence of rebuttal, particularly by the person giving such concession, there is no reason to disbelieve such presumption.

As such, there is no scope of interfering with the impugned orders. The Commission was fully justified in upholding its own previous order dated July 4, 2019, directing the petitioner to pay the amount of compensation of Rs.5 lakh on concession.

Accordingly, W.P. 21787(W) of 2019 is dismissed.

The petitioner is directed to pay the amount of Rs.5 lakh as compensation to the parents of the deceased patient within a fortnight from date.

It is made clear that the merits of the claim of the patient's parents in the other proceedings against the individual doctors have not been gone into at all and the

present order does not bind the parties in those proceedings on merits.

There will be no order as to costs.

Urgent certified website copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.