

**THE WEST BENGAL CLINICAL ESTABLISHMENT
REGULATORY COMMISSION.**

Present: Justice Ashim Kumar Roy, Chairperson.

Dr. Sukumar Mukherjee, Member.

Dr. Gopal Krishna Dhali, Member.

Dr. Makhan Lal Saha, Member.

Dr. Madhusudan Banerjee, Member.

CASE REFERENCE: REVIEW PETITION NO.1 OF 2018

**Arising out of order dated 15.12.17, passed in connection
with COMPLAINT ID:HOW/2017/000090**

**Kothari Medical Centre. Petitioner in the Review petition
(the Opposite Party in the complaint)**

-Versus-

**Mr. Chandan Kumar Set (Deceased). Respondent in the Review
Petition (represented by his
brother and the Son of the
service recipient, Mr. Tapan
Kumar Set)**

J U D G M E N T .

The Review application is directed against a judgment and order passed on December 15, 2017, by the West Bengal Clinical Establishment Regulatory Commission (hereinafter referred to as 'this Commission') in connection with Complaint ID:

HOW/2017/000090, holding the petitioner in this review petition guilty of deficiency in service and unethical trade practice under sub-section (iii) of section 38 of the West Bengal Clinical Establishment (Registration, Regulation and Transparency) Act, 2017 (hereinafter referred to as 'the said Act') and awarding a compensation of Rs. 1 lakh to the complainant on substitution, Tapan Kumar Set, son of the service recipient (deceased Annapurna Set) and the brother of the original complainant. The factual matrix of the case out of which the instant review application arises and the conclusion and the findings on which the compensation was awarded has been elaborately discussed and recorded in the main judgment and therefore, we do not consider it necessary to repeat the same once again.

2. It needs no debate that the provisions of section 44(f) of the 'said act' very much empowers and authorizes the Commission to review its final judgment and order. However, conferment of authority is one thing and exercise of the same is completely different. It is well-settled that invocation of review jurisdiction by any judicial body ought to be undertaken very cautiously and in exceptional cases, that too in the light of settled legal position. Review of any judgment is neither a vested right of the party seeking review, nor a matter of course.

3. To appreciate the correct legal position, when a review application be entertained and a concluded adjudication be reopened, it would be more apposite to refer to a very recent judgment of the Hon'ble Apex Court in the case of *Kamlesh Verma v. Mayawati&Ors.*, reported in (2013) 8 SCC 320. The summary of the principles noted down in paragraph 20 of the aforementioned decision is quoted below:

"Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

(A) When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in Chhajju Ram v. Neki and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius

and Ors., to mean "a rule". The same principles have been reiterated in *Union of India v. Sandur Manganese and Iron Ores Ltd. and Ors.*

(B) *When the review will not be maintainable:*

(i) *A repetition of old and overruled argument is not enough to reopen concluded adjudications.*

(ii) *Minor mistakes of inconsequential import.*

(iii) *Review proceedings cannot be equated with the original hearing of the case.*

(iv) *Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*

(v) *A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.*

(vi) *The mere possibility of two views on the subject cannot be a ground for review.*

(vii) *The error apparent on the face of the record should not be an error which has to be fished out and searched.*

(viii) *The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*

(ix) *Review is not maintainable when the same relief sought at the time of arguing the main matter had been negated."*

4. In the case at hand, review has been sought for, on various averments, which runs into a total of 13 paragraphs and as many as on 43 grounds.

Upon traversing the averments made in the review petition and the grounds relied on, it is apparent that same are repetitive in nature.

5. On the face of the averments and the grounds relied upon in the review petition, it is apparent that those were raised and well-considered by the Commission and negated. Still, the Commission is of the view, instead of rejecting this review application outright, it would be expedient for the ends of justice at least to consider whether a prima facie case for review has been made out or not.

6. (a) A new case is sought to be made out in this review petition that the sample of blood was drawn only once, sometime before 8.35 a.m., on 31.03.2017. While the test for Sodium and Potassium was done by one particular machine by using a part of the blood sample at around 8.35 a.m. and the report was prepared at 10.26 a.m., the remaining part of the self-same blood sample was tested for Calcium, Magnesium, Urea and Creatinine in another machine at around 12.13 p.m. and the report was generated at 13.49 p.m. It was then added that on 30.03.2017, the attending doctor advised for repeating the tests for Hb%, TC, DC, platelet, Sodium, Potassium, Calcium, Magnesium, Urea and Creatinine, on the next morning (i.e. on 31.03.2017 morning). Subsequently on the next morning, i.e. on 31.03.2017 at early hours, around 3.50 a.m. another attending doctor again advised for test of Sodium, Potassium, Creatinine and Urea. Accordingly, out of the blood sample drawn sometime before 8.35 a.m., on 31.03.2017, all the test advised on 30.03.2017 and on 31.03.2017 were done by two different machines, at two different times.

Even assuming for the sake of argument that as advised by the attending doctor on 30.03.2017 (between 10 a.m. and 12.10 p.m.) and on 31.03.2017 (at 3.50 a.m.), out of the blood sample drawn from the service recipient a few minutes before 8.35 a.m. of 31.03.2017, the test for Sodium and Potassium was done by one particular machine at around 8.35 a.m., and the test for Calcium, Magnesium, Urea and Creatinine was done in another machine at 12.13 p.m. (Sub-Para 3 of Para 9 of the review petition), still on a bare perusal of the two test reports, being Annexures X-4 and X-5 of this review petition, it is abundantly clear that no test for Hb%, TC, DC, platelet was ever done, despite being specifically advised by the attending doctor. This is of course a deficiency in service, since the advice of the attending doctor was ignored.

(b) Next, we find that although on 31.03.2017 at 3.50 a.m. considering the critical condition of the patient, 'urgent' blood test for Creatinine, Urea, Potassium and Sodium was advised by the attending doctor, but according to the case of the clinical establishment, the blood sample was taken sometime before 8.35 a.m. in the morning of 31.03.2017 (Sub-Para 3 of Para 9 of the

review petition). Therefore, there is a clear gap of 4½ hours in carrying out the advice of the attending doctor for 'urgent' blood test, in a critically ill patient.

Now, from the admitted case of the clinical establishment (Sub-Para 3 of Para 9 of the review petition), we further find for the test of Sodium and Potassium, one part of the sample of blood was loaded in one particular machine at 8.35 a.m. on 31.03.2017 and for the test of Calcium, Magnesium, Creatinine and Urea, the remaining part of the sample was loaded in another particular machine at 12.13 pm at their in-house clinical laboratory. Therefore, in case of second test, i.e. for the test of Calcium, Magnesium, Creatinine and Urea there was not only a gap of 4½ hours between the time when the test was advised and the sample was drawn at the same time, there was also a further gap of more than 3½ hours between the sample drawn and the same was loaded in the machine for test. Therefore, for the first test, there was total delay of 4½ hours and a total delay of 8 hours for the second test in carrying out the advice of the doctor.

In a clinical establishment, which is equipped with in house pathological lab, this inordinate delay in carrying out the advice of the doctor amounts to gross deficiency and more particularly in a case where the patient is critically ill.

(c) We further find from the Bed Head Tickets that on 30.03.2017 between 10am to 12 noon, the attending doctor of the service recipient advised repeating blood test for Hb%, TC, DC, Platelet, Sodium, Potassium, Calcium, Magnesium, Urea, Creatinine and thereafter, on the next morning i.e. on 31.03.2017 at around 3.50am, the doctor advised for urgent blood test for Urea, Creatine, Sodium and Potassium. According to the case of the clinical establishment that the blood sample was drawn on 31.03.2017, only once sometime before 8.35am and out of that sample in two machines, the test for Sodium and Potassium was done at 8.35am report generated at 10.26am, whereas the test for Urea, Creatinine, Calcium and Magnesium was done at 12.30pm and report generated at 13.49pm (Sub-Para 3 of Paragraph 9 of the review petition and annexure X-4 and X-5 thereof). Therefore, facts remain no tests for TC, DC, Hb% and Platelet was done, although advised by the doctor. There is nothing on record that the test for Hb%, TC, DC, and platelet was discarded on medical advice. Non-performing the test for Hb%, TC, DC, and platelet clearly amounts to deficiency in service.

7. In paragraph 6 of its review petition, the clinical establishment purportedly jotted down the allegations made against it by the complainant (the written complaint is filed with the review petition being annexure X-1). We find, although there is specific allegation in the complaint that 7 minutes before her death, blood was collected from the patient but for reasons best known to the clinical establishment, when enumerating the allegations of the complainant, such facts have not been conveniently referred. This amounts to suppression of facts and are misleading. It be noted this was one of the essential consideration, based on medical records, on which the Commission came to its conclusion that the clinical establishment is guilty for indulging unethical trade practice. This issue will be dealt with more elaborately in the latter part of our order.

8. (a) It was alleged in paragraph 8 that on 22.09.2017, the complainant was represented by one Tapan Kumar Set who intimated the complainant Chandan Kumar Set had expired and he being the brother of Chandan Kumar Set, his name be substituted in place of his deceased brother as the complainant. Such oral prayer was allowed. No copy of any formal application for any substitution has been received by the petitioner.

In this regard the relevant portion of the order passed on 22.09.2017 is reproduced below.

“Mr. Tapan Kr. Set on behalf of the complainant and Dr. Shamit Samanta Dy. Medical Supdt. & Dr. Ranabir Bhowmick, consultant under whose care the patient was treated are present.

Following the death of service recipient Mrs. Annapurna Set during her treatment at Kothari Medical Centre, a complaint alleging medical negligence has been filed before this Commission by her son Mr. Chandan Kr. Set.

Today Mr. Tapan Kr. Set, brother of Mr. Chandan Kr. Set and son of service recipient (Annapurna Set) filed an application communicating that his brother, complainant Chandan Kr. Set has expired on August 7, 2017 and he be permitted to pursue the case treating him as the complainant otherwise there will be a serious prejudice. His application was accompanied with the death certificate of Chandan Kumar Set. Both be taken on record.

The representative of the clinical establishment DrShamitSamanta, Deputy Medical Superintendent, who is present before the Commission, has been duly apprised of such facts and the prayer of MrTapan Kr. Set. He took note of both the application and the death certificate and did not resist the prayer for substitution and raised no objection. We are of the opinion the prayer of the complainant be allowed for ends of justice.

The office is directed to take necessary steps in this regard.....”

(b) It may be that no copy of the application of Tapan Kumar Set, the son of the service recipient and the brother of the original complainant Chandan Kumar Set, intimating the Commission that Chandan Kumar Set expired on 7th August, 2017 with a prayer that he be permitted to pursue the case treating him as the complainant, was served upon the clinical establishment. But it is not correct that on mere oral prayer substitution was allowed. Not only the copy of the application of Tapan Kumar Set but also the death certificate of Chandan Kumar Set were very much with the records when the prayer for substitution was allowed. The contemporaneous record, the order by which substitution was allowed, clearly reflects that the Dy. Medical Superintendent, Dr. Shamit Samanta, who was very much present before the Commission, at the time of hearing, was duly apprised of the content of the said application and he neither resisted nor objected to the prayer. The said application for substitution was filed well within the prescribed period of limitation of 90 days from the date of death of Chandan Kumar Set. While Chandan Kumar Set expired on August 7, 2017, the application for substitution was moved and allowed on September 22, 2017. The fact that Dr. Shamit Samanta was aware about the nature of the prayer and such prayer has been allowed with his full knowledge, would be evident from the averment made in Paragraph No.8 of the review petition. It be added after September 22, 2017 the matter was heard on November 3, 2017 and November 10, 2017 and on both the day Dr. Shamit Samanta, Dr Rajesh Chattopadhyay and Mr. Rajesh Waghmare, CEO of the clinical establishment attended the hearing but at no point of time any dispute was raised over this issue. Furthermore, after September 22, 2017, on behalf of the clinical establishment an affidavit has been filed by Dr Rajesh Kumar Chattopadhyay and the same was affirmed on November 2, 2017. The affidavit was completely silent about the

case of the clinical establishment, now made out in this review application that the prayer for substitution was allowed on oral prayer and no formal application was served. In any event, the prayer for substitution was allowed for ends of justice and in accordance with law and no prejudice can be said to have been caused to the clinical establishment.

(c) According to the provisions of the West Bengal Clinical Establishment (Registration, Regulation & Transparency) Act, 2017, the Commission is to be guided by the principles of natural justice and it shall not be bound by the procedures laid down by the Code of Civil Procedure, 1908 and for the purpose of discharging its functions under the said Act, is vested with the same powers as that of the civil courts, under the Code of Civil Procedure, 1908, more specifically delineated in sub-section (2) of section 44 of the said Act.

(d) It is, therefore, not correct that there was no formal application made by Tapan Kumar Set and on his oral submission, prayer for substitution was allowed. On the other hand, not only the copy of the application but also the death certificate of Chandan Kumar Set were very much with the record when substitution was allowed and with due regard to the principle of natural justice, Dr. Shamit Samanta, the Dy. Medical Superintendent of Kothari Medical Centre was duly apprised about the content of the said application and such application was allowed without any objection from his side.

(e) However, some ministerial lapses has been occasioned. After the prayer of Tapan Kumar Set was allowed and he was substituted as the complainant, in place and lieu of his brother Chandan Kumar Set, since deceased, the Commission although directed the office to take necessary steps in that regard but inadvertently the record was not corrected by deleting the name of Chandan Kumar Set as the complainant and incorporating the name of Tapan Kumar Set in his place, as the complainant. Consequently, even after substitution, Chandan Kumar Set was still described as the complainant. It is well settled that no judicial order can said to be vitiated due to ministerial error or lapses in the substitution procedure. However, Commission is of the opinion the above error ought to be rectified and it is directed that the office shall take

necessary steps to correct the records. The name of Chandan Kumar Set (since deceased) be deleted from the records as the complainant and he be substituted by Tapan Kumar Set.

(f) In Paragraph 8, it was also contended Dr. Bhowmick, the treating doctor was examined by the Commission and the Members, who were present at that time put to him several questions. It is true that at the initial stage of hearing Dr. Bhowmick was questioned by the Members regarding the treatment of deceased Annapurna Set. Since complainant, in no uncertain term, stated before the Commission that he has no grievance against Dr. Bhowmick, immediately, the Commission restrained from proceeding any further against him. Even in the letter of the complaint, no allegation has been made against Dr. Bhowmick. Neither the statement of Dr. Bhowmick nor his evidence was recorded. Therefore, the question of reflection of his deposition in the judgment does not at all arise.

9. The most crucial findings on which the clinical establishment was found guilty for indulging in unethical trade practice within the meaning of sub-section (iii) of Section 38 of The West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017 is the finding that though service recipient was clinically declared dead at 12.20pm and at 11.30 am, she was declared on asystole, blood was collected at 12.13pm from her, as is evident from the blood test report annexed to the review petition as Annexure X-5. In addition to that, it was the categorical case in the letter of complaint that about 7 minutes after the blood was collected, the patient was declared dead.

10. Now in 3rd and 4th sub para of Paragraph 9 of the review application, it is contended that the issue could not be appreciated properly by the Commission which is apparent on the face of the record and stated as follows,

It is pertinent to mention that blood was drawn only once between 30.03.2017 and 31.03.2017, sometime before 8.35am Sodium, Potassium test was done out of such blood sample drawn in one particular machine where such blood sample was put to test on 8.35am and report prepared on 10.26am. Out of the same blood sample drawn, a part was put to test for calcium, Magnesium, Urea, and creatinine in another machine at 12.13pm and report was

prepared on 13.49pm. Thus out of the one and the same blood sample drawn before 8.35am on 31.03.2017, a part of it was put to one machine for sodium, potassium test at 8.35am because such test is a common blood test and considerable volume of blood sample is constantly there for such testing, whereas, the other blood test (calcium, Magnesium, Urea and creatinine) conducted out of the same sample drawn was put in another machine at 12.13pm after substantial lot is collected from various patients.

11. The annexure x-4 and x-5 to this review application are two blood test reports in printed form, generated at the in-house pathological laboratory of the clinical establishment. In the said report, four timings are noted, being, "*collected on*", "*received on*", "*reported on*" and "*generated on*". It needs no debate, time noted against "*collected on*" is largely accepted to mean the time when blood sample was drawn from the body of the patient, who was in the hospital bed. Whereas "*received on*" means to say, the timing when blood sample was received at the in-house pathological laboratory of the clinical establishment. Similarly, "*reported on*" and "*generated on*" are the timing when the test result is available and printed copy of the result is obtained from the computer.

12. Now having regards to annexure x-5, the blood test report, where the timing is noted against "*collected on*", we considered the same to be the time when the blood was actually drawn from the person of the patient and the same was 12.13 hours (31.03.2017). Whereas according to the clinical notes, at 11am, the patient was found on gradual onset of Bradycardia (abnormally slow heart action) and CPR (Cardio Pulmonary Resuscitation) was started according to ACLS (advanced cardiac life support) protocol. The clinical finding at 11.15 am was PEA (pulseless electrical activity) and CPR was advised to continue. At 11.30am, the clinical findings was Asystole (a cardiac arrest rhythm in which there is no discernible electrical activity on the ECG monitor), and CPR was advised to continue. Besides above, on all the occasions Adrenaline and other lifesaving medicines were advised to be injected forthwith. Finally, at 12.20pm, the patient was declared clinically dead.

Therefore, it was the finding of the commission, when the blood was drawn for test of Calcium, Magnesium, Urea and Creatinine, the patient was virtually dead and such approach of the clinical establishment amounts to unethical trade practice. It be noted that it was vehemently argued before us even at the stage when a patient was declared on asystole, any attempt to resuscitate the patient is always justified. There is no controversy that all avenues of treatment ought to be exhausted for the purpose of resuscitating a critically ill patient, but under the garb and guise of attempting to resuscitate a critically ill patient nothing to be done for any material gain. It would be worth noting, that in the case in hand, test for Urea and Creatinine was advised together with the test for Sodium and Potassium on the same day (31.03.2017) at 3.50a.m. in the morning and although test for Sodium and Potassium was done but Urea and Creatinine was left out. Similarly, the test for Calcium and Magnesium was advised on 30.03.2017 between 10am to 12 noon. It is also noteworthy, no test for Urea, Creatinine, Magnesium and Calcium was advised after the patient was found onset of Bradycardia. Therefore it is highly preposterous, irrational and illogical to suggest that the blood tests, which were advised as 'urgent' at 3.50 a.m. in the morning and those were advised on the previous day, without doing earlier in time, felt necessary to be done 7 minutes before the death of the patient at 12.13 p.m. This clearly shows that test was not done for the purpose as urged from the side of the clinical establishment.

In any event, the similar was the argument advanced from the side of the clinical establishment at the time of hearing of the main matter. Those arguments were well considered by the Commission and negated by well-reasoned order. Therefore, those overruled arguments now cannot be advanced under the garb of review, for reopening the concluded adjudication.

Furthermore, on consideration of the additional points, the Commission is of unhesitating view that not only no case is made out for review but those additional points manifestly bring out fresh instances of deficiency in patient care service. No review is therefore maintainable.

13. It was urged that provisions of section 44(2) of the said Act has not been followed without giving due attention to the provisions of sub-section (1) of section 44, which categorically states that the Commission shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, and rather, it shall be guided by the principles of natural justice and it shall have the power to regulate its own procedure.

14. All the materials on record were well considered by the Commission at the time of main hearing and the case of the clinical establishment was negated. Now, therefore, reconsideration of the same afresh in this review petition is not legally permissible. No review is maintainable under the guise of appeal.

15. The question is not whether the advice of the doctor for blood test was justified or not. But the issue is whether the advice of the doctor was followed and carried out without any delay and that amounts to deficiency in patient care service. To avoid any repetition, we propose to refer to our findings in paragraph no. 6 of this order.

The Commission awarded compensation not on billing issues or considering the quantum of wrongful gain or unfair advantage, enjoyed by the clinical establishment. But the compensation was allowed and quantified considering the nature of unethical trade practice indulged by the clinical establishment coupled with the deficiency in service committed by it. The quantum of compensation awarded is fully justified.

16. It was also vehemently urged from the side of the clinical establishment that the critical condition of the patient was always communicated to the family members of the service recipient from time to time till she took her last breath on 31.03.2017. In this regard, the attention of the Commission was drawn to the following materials, Annexure B-1, page 35, B-2, page 36, C, page 37, D, page 38, page 42, 44, 47 and 48 of the review petition, read with visitors' register at page 70-81.

Annexure B-1 at page 35, is a document by which the condition of the patient and the necessity of ventilator support was communicated to one Sovan Kumar Set, the son of the service recipient on 24.03.2017 on the day of her admission. The Annexure B-2 is also a

document communicating the same thing to the son of the service recipient that also on 24.03.2017, i.e. on the date of her admission. The next two documents are notes on the bed head ticket. The notes show that the condition of the service recipient was communicated to her relations, but those were on 24.03.2017 and on 26.03.2017. The document on page no. 42 of the review petition is another document, which has already been annexed as Annexure C in the said review petition. The page 44 of the said document is a part of the treatment sheet (25.03.2017), where it is noted 'the grave prognosis to be explained to the patient party'. But there is nothing on record to show on that day, i.e. on 25.03.2017, the direction of the attending doctor was followed and the patient party was communicated. The documents bearing page nos. 47 and 48 are also the part of the treatment sheets and those relate to communication made on 26.03.2017. Admittedly, the documents at page nos. 70 to 81 are the part of the visitors' register. The said documents are the part of the visiting register and what has been noted there is a routine communication to the patient parties about the status of the patient at the visiting hours. The said documents never substantiate that the critical condition of the patient was from time to time communicate to the complainant or to any patient party by the clinical establishment. Although until 26th of March, 2017, such communication as to the status of the patient was noted in the bed head ticket and the same were authenticated by the patient's relations, but after 26th March, 2017, there is no such record although the critical condition of the patient started gradually aggravated in every hour. But there is no record of communication to the patient party about the status of patient, except what has been noted on the visitor register, which is merely a routine affairs in case of all patient, critical or not critical.

17. Now, examining the case of the clinical establishment and materials on record, in the light of the decision of the Hon'ble Apex Court in the case of *Kamlesh Verma* (supra), we do not find that the clinical establishment has been able to bring its case within the category of cases where review is maintainable. Only old and overruled arguments, which have already been considered and negated by the Commission, have been repeated once again, and in the guise of review, the Commission has been approached by the clinical establishment, to exercise such jurisdiction which is only vested on an appellate forum.

It will not be out of place to mention that the additional ground has not only failed to make out a case of review but simultaneously, bring out fresh instances of deficiency in patient care services.

This review application has no merit and stands dismissed.

The clinical establishment shall forthwith to comply with our order passed on December 15, 2017.

18. The office shall take immediate steps to rectify the records in connection with the instant case and substitute the name of Mr Tapan Kumar Set, as the complainant in place and lieu of Mr. Chandan Kumar Set, since deceased, as directed earlier.

19. Before parting with this review application, it be noted that on March 16, 2018, the day the review petition was lastly heard, Mr Tapan Kumar Set, the complainant on substitution in writing communicated to the Commission that the amount of compensation after realization from the clinical establishment be donated to any charitable organization like Ramkrishna Mission Seva Pratishthan for spending the said amount for the treatment of poor patients.

In this regard, no order is needed to be passed by the Commission and it is for the complainant to take appropriate steps in due time.

Sd/-

Justice Ashim Kumar Roy
Chairperson.

Sd/-

Dr. Sukumar Mukherjee, Member.

Sd/-

Dr. Gopal Krishna Dhali, Member.

Sd/-

Dr. Makhan Lal Saha, Member.

Sd/-

Dr. Madhusudan Banerjee, Member.

Authenticated


Secretary
West Bengal Clinical Establishm
Regulatory Commission