IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8830 OF 2013

Dr. Jaydeep Arun Date … Petitioner

vs.

Medical Council of India and others … Respondents

WITH

CIVIL APPLICATION NO. 306 OF 2020

IN

WRIT PETITION NO. 8830 OF 2013

AND

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 87 OF 2014

Dr. Munir Sufi Mhaskar … Petitioner

vs.

Medical Council of India and others … Respondents

WITH

NOTICE OF MOTION NO. 291 OF 2019

WITH

NOTICE OF MOTION NO. 96 OF 2015

IN

WRIT PETITION NO. 87 OF 2014

Mr. Girish Godbole, Senior Advocate, a/w. Mr. Ishwar Nankani, Mr. Huzefa Khokhawala and Mr. Kartik Gupta, i/b. M/s. Nankani & Associates for petitioner in WP/8830/2013.

Mr. Mihir Desai, Senior Advocate, a/w. Mr. Rui Rodrigues and Mr. Jainendra Sheth, i/b. Ms. Yogita Ramhulas Singh for petitioner in WP/87/2014.

Mr. Ganesh Gole a/w. Mr. Viraj Shelatkar, Mr. Kunjan Makwana and Mr. Ateet Shirodkar for respondent No.1 – MCI in both petitions.

Ms. Amruta Nerlekar, i/b. Mr. Rahul Nerlekar for respondent No.2 – MMC in both petitions.

Mr. Mayuresh Modgi for respondent No.3 - complainant in both petitions.

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CORAM : MANISH PITALE &
SHREERAM V. SHIRSAT, JJ

Reserved on : 29th JULY, 2026
Pronounced on : 22nd SEPTEMBER, 2026

JUDGEMENT: (Per Manish Pitale, J):

. The petitioners are doctors aggrieved by an order dated 24.08.2013 passed by the respondent No.1 – Medical Council of India (hereinafter referred to as MCI), whereby an appeal filed by the respondent (complainant) was allowed, order of the respondent No.2 – Maharashtra Medical Council (hereinafter referred to as MMC) was effectively set aside and name of Dr. Jaydeep Date (petitioner in Writ Petition No.8830 of 2013) was directed to be removed from Indian Medical Register / State Medical Register for a period of six months and registration of Dr. Munir Sufi Mhaskar (petitioner in Writ Petition No.87 of 2014) was directed to be removed from the said register for a period of three years. The petitioners are hereinafter being referred to by their respective names.

2. Rule was granted in both the petitions and by way of interim relief, the effect of the impugned order remained stayed during the pendency of these petitions. The petitions were taken up for final hearing.

3. Complainant – Murad Hasan Mulla, who is respondent No.3 in both the petitions, submitted a complaint before the respondent – MMC, alleging medical negligence on the part of the petitioners – doctors, resulting in suffering for the said complainant. The complainant appears to have suffered from narrowing of urinary tract for some time and he was facing persistent problem with urination and in that context, he had consulted a number of doctors.

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4. The petitioner – Dr. Mhaskar claims that the complainant had been consulting him and other doctors intermittently since the year 1991, with history of stone and urine related problems. On the basis of documents placed on record, the petitioner – Dr. Mhaskar has asserted that the complainant approached him in March 2005, complaining of pain and intermittent urination. He had approached with an ultrasonography report, showing a calculus in the left ureter for which he was admitted in the said petitioner's hospital. Complainant underwent procedure for removal of left ureteric stone. The petitioner – Dr. Mhaskar decided to remove the stone and in the process, found that the complainant had a defect of urinary bladder neck obstruction.

5. The said petitioner claims that upon orally informing complainant's family, consent was obtained for bladder neck incision and catheter was placed, which was later removed on the fifth day after procedure. It was found that after removal of catheter, the complainant was unable to pass urine and therefore, the catheter was reintroduced and another ultrasonography was conducted to confirm whether the ureteric stone had passed off.

6. According to the petitioner – Dr. Mhaskar, by way of abundant precaution, a cystoscopy was performed to ensure that the stone was not stuck in the urethra. The cystoscopy revealed that there was no obstructing prostatic urethral stone and therefore, the complainant was discharged on 03.04.2005. Eventually, the catheter was removed on 08.04.2005 and according to the petitioner – Dr. Mhaskar, the complainant had good urine stream thereafter.

7. In October 2005, the complainant approached the said petitioner – Dr. Mhaskar, again complaining of decreased stream of urine and ultrasonography revealed that a new small stone had

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developed in the prostatic urethra. On 09.11.2005, the complainant again consulted the petitioner – Dr. Mhaskar, complaining of acute urinary retention, due to which the petitioner performed emergency urethrocystoscopy, which revealed a stricture in bulbus urethra.

8. According to the petitioner – Dr. Mhaskar, the said stricture was opened and dilated by using an appropriate medical technique, as stated in the petition. It is claimed that the calculus was retrieved and a catheter was inserted for discharge of urine. According to the petitioner – Dr. Mhaskar, these were the procedures he performed on the complainant, for which according to him, he was medically qualified and trained. The complainant seriously disputes the said assertion. The petitioner – Dr. Mhaskar has stated that he was shocked to receive a notice dated 14.01.2010, regarding complaint dated 16.12.2009 submitted by the complainant before the respondent – MMC regarding alleged medical negligence on his part.

9. As regards petitioner – Dr. Date, it is asserted by him in his petition that after the complainant had undergone medical surgeries in the year 2005 in Ratnagiri, he visited the said petitioner – Dr. Date in the year 2006. It is stated that the complainant was admitted in a hospital at Pune for surgery on 06.02.2006. A consent form was signed by the complainant. According to the petitioner – Dr. Date, the complainant had high bulbomembranous stricture. The said petitioner – Dr. Date claims that considering the location of the said stricture, he took the decision that the appropriate treatment would be to put a graft/flap intraoperational to enlarge the blocked urinary passage by using midline scrotal skin flap. The petitioner – Dr. Date claims that this was an established surgical procedure for such condition of the complainant.

10. Thereafter, the complainant approached the petitioner –

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Dr.Date in March 2007 with various complaints. According to the said petitioner, one of the known complications of the said condition is that the urethral stricture recurs. The grievance of the complainant continued and he complained of complete urethral narrowing due to which the petitioner – Dr. Date had to operate upon him on 02.10.2007 using 'Buccal Mucosa dorsal onlay urethroplasty'. The complainant had signed the consent form for undergoing the said surgical treatment. But, when he persisted with his complaints, the petitioner – Dr. Date claims that he had referred the complainant to one Dr. Sanjay Kulkarni, said to be a world renowned expert in stricture urethra surgery, for further advice, who even offered to give consultation and perform surgery *pro bono*, if needed. But, for reasons best known to the complainant, he did not take any treatment from the said Dr. Kulkarni.

11. It is in this backdrop that the complainant filed the aforesaid complaint dated 16.12.2009 before the respondent – MMC against both the petitioners – doctors, alleging medical negligence. Upon receiving notice from the respondent – MMC, the petitioners appeared and placed their versions on record.

12. On 29.10.2012, the respondent – MMC passed its order, rendering findings in favour of the petitioners. It was recorded that complainant's problem regarding narrowing of urethra, was chronic for which the petitioners – doctors gave the appropriate treatment and they never assured the complainant about 100% success rate. On this basis, it was held that the petitioners – doctors did not violate the code of medical ethics and hence, the respondent – MMC exonerated the petitioners – doctors from the allegations made by the complainant.

13. Aggrieved by the aforesaid order of the respondent – MMC, the

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respondent – complainant filed an appeal before the respondent – MCI. The Ethics Committee of the respondent – MCI issued notice to the petitioners – doctors on the appeal filed by the complainant. The petitioners – doctors claimed that they received only the notice, without copy of appeal and the documents filed therewith. Nonetheless, they responded to the notice by placing their replies on record, in order to demonstrate that the allegations of medical negligence made by the complainant, were not justified. The petitioner – Dr. Date even annexed a letter from the said Dr.Kulkarni addressed to the respondent – MMC, when the matter was pending before the said authority, stating that upon reviewing the records of the treatment given by Dr. Date to the complainant, it was found that the case was investigated and managed as per current practice guidelines and Dr. Kulkarni also offered that he could give his opinion in person, if required.

14. The aforesaid notice called upon the petitioners – doctors to remain present for hearing on 23.03.2013. Accordingly, it appears that the petitioners were present on the said date before the respondent – MCI. Subsequently, the petitioners were communicated the impugned order dated 24.08.2013 passed by the respondent – MCI, allowing complainant's appeal and inflicting the aforesaid punishment of removal of name of petitioner – Dr. Date from the Indian Medical Register / State Medical Register for a period of six months from the date of the order and removal of name of petitioner – Dr. Mhaskar from the said register for a period of three years.

15. The said order communicated that the Board of Governors of the respondent – MCI, in the meetings held on 06.08.2013 and 07.08.2013, had approved the recommendations of the Ethics Committee, based on the meetings of the Ethics Committee held on

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23.03.2013, 24.05.2013 and 25.05.2013. The petitioners – doctors claimed that the said order suffers from violation of principles of natural justice, as they were not heard, except for their presence on 23.03.2013 before the Ethics Committee and that therefore, the findings rendered against them were behind their back.

16. Aggrieved by the said impugned order dated 24.08.2013 passed by the respondent – MCI, the petitioner – Dr. Date filed Writ Petition No.8830 of 2013. On 25.09.2013, a learned Single Judge of this Court granted Rule in the writ petition and after recording reasons and finding that a *prima facie* case was made out by the said petitioner, granted interim stay to the said impugned order.

17. The petitioner – Dr. Mhaskar filed Writ Petition No.87 of 2014, wherein on 24.09.2013, a Division Bench of this Court granted stay to the impugned order, pending admission of the petition. Thereafter, notice was issued and interim order was continued. On 19.01.2015, a Division Bench of this Court granted Rule in the petition and interim relief was continued. The said writ petition was directed to be tagged with Writ Petition No.8830 of 2013. The interim relief has continued to operate during the pendency of these petitions.

18. Mr. Godbole, learned senior counsel appearing for the petitioner – Dr. Date in Writ Petition No.8830 of 2013, submitted that the impugned order passed by the respondent – MCI suffers from violation of principles of natural justice, for the reason that the petitioner was served only with the notice, and the copy of appeal and documents filed with the appeal were never served upon the said petitioner. It was further submitted that the petitioner could remain present before the Ethics Committee of the respondent – MCI only on 23.03.2013. No notice was given with regard to the meetings held on 24.05.2013 and 25.05.2013, although the impugned order refers to

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the meetings of the Ethics Committee held on the said two dates also, which culminated in the recommendations against the petitioner.

19. It was further submitted that the Board of Governors of the respondent – MCI, in its meetings held on 06.08.2013 and 07.08.2013, deliberated upon and approved the recommendations of the Ethics Committee. At this stage also, no hearing was afforded to the petitioner and the drastic order of removing his name from the register for a period of six months, was passed against him. It was specifically submitted that in the writ petition, a ground was raised that the Ethics Committee did not have a member/doctor, specializing in the field of urology. It was necessary that a specialist in the said field was in the Ethics Committee for reaching the conclusion as to whether the treatment given by the said petitioner, was as per the current medical practice or not.

20. On this basis, it was submitted that there was flagrant violation of the principles of natural justice. The procedure followed by the Ethics Committee and the Board of Governors of the respondent – MCI, deprived the said petitioner of a fair opportunity to defend himself and on this ground alone, the impugned order deserved to be set aside.

21. It was submitted that the respondent – MCI is now replaced by the National Medical Commission (NMC), upon enactment of National Medical Commission Act, 2019 (hereinafter referred to as the NMC Act, 2019). It was submitted that upon enactment of the NMC Act, 2019, the Indian Medical Council Act, 1956 (hereinafter referred to as the IMC Act, 1956), under which the respondent – MCI was established, was repealed and therefore now, the matter cannot be remanded to the Ethics Committee of respondent – MCI for

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reconsideration.

22. It was further submitted that the entire regime of seeking redressal and for disciplinary action against medical practitioners, has undergone change as per NMC Act, 2019. Under Section 30 thereof, only a medical practitioner or professional, aggrieved by action taken by the State Medical Council, can prefer an appeal before the Ethics Committee and Medical Registration Board, constituted under the NMC Act, 2019, with a further appeal before the National Medical Council itself. There is no provision for an aggrieved complainant to file appeal against an order of the State Medical Council. Therefore, the option of remanding the matter back for reconsideration, is not available with passage of time.

23. On this basis, the learned senior counsel appearing for the the petitioner – Dr. Date submitted that in the light of the law clarified by the Supreme Court in the context of medical negligence, this Court itself, while exercising writ jurisdiction, can consider as to whether the impugned order passed by the respondent – MCI can be sustained or not.

24. In this context, he placed reliance on the judgement of the Supreme Court in the case of *Jacob Mathew vs. State of Punjab and another*, (2005) 6 SCC 1. Reliance was placed on various paragraphs of the said judgement and it was submitted that so long as the aforesaid petitioner had given one of the recognized treatments for the ailment of the complainant, merely because he chose one line of treatment in preference over the other, could not be a ground to hold that the said petitioner was guilty of negligence. It was submitted that the said petitioner had taken a considered decision as a professional and therefore, he could not be held guilty of negligence.

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25. The Supreme Court, in the aforesaid judgement, had gone to the extent of holding that an error of judgement would not constitute medical negligence. Reliance was placed on the Bolam test applied by the Supreme Court in the said judgement, to contend that the said petitioner could not be charged with medical negligence.

26. Reliance was also placed on the judgement of the Supreme Court in the case of *Martin F. D'souza vs. Mohd. Ishfaq*, **(2009) 3 SCC 1**, on the ground that since the said petitioner had shown reasonable degree of skill and knowledge, he could not be charged with medical negligence, merely because another professional having greater skill and knowledge, would have prescribed different treatment or would have operated in a different way.

27. The learned senior counsel for the said petitioner then relied upon a series of judgements of the Supreme Court on the same lines, including judgements in the cases of *Kusum Sharma and others vs. Batra Hospital and Medical Research Centre and others*, **(2010) 3 SCC 480**, *Arun Kumar Manglik vs. Chirayu Healthcare and Medicare Private Limited and another*, **(2019) 7 SCC 401**, *Bombay Hospital and Medical Research Centre vs. Asha Jaiswal and others*, **(2021) 19 SCC 1** and *Dr. Neeraj Sud and another vs. Jaswinder Singh and another*, **2024 SCC OnLine SC 3069**.

28. On the basis of the aforesaid submissions, it was contended that the writ petition deserved to be allowed and the impugned order passed by the respondent – MCI ought to be set aside.

29. Mr. Desai, learned senior counsel appearing for the petitioner – Dr. Mhaskar submitted that he was adopting the contentions raised on behalf of the petitioner – Dr. Date, as regards violation of principles of natural justice, as the petitioner – Dr. Mhaskar also

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received only notice from the respondent – MCI for hearing on 23.03.2013. The said petitioner was also not provided with copies of appeal and documents filed therewith by the complainant. Yet, the said petitioner appeared before the said authority and tried to defend himself as best as he could. The other grounds raised on behalf of petitioner – Dr. Date were adopted for demonstrating the violation of principles of natural justice. In this regard, reliance was also placed on the Medical Council of India Regulations, 2000 and Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

30. At the outset, the learned senior counsel appearing for petitioner – Dr. Mhaskar, submitted that the complainant wrongly alleged that the said petitioner had conducted surgery, which only a qualified urologist could have conducted. It was emphasized that the said petitioner, as a general surgeon, had performed the procedure of cystoscopy with the complainant's consent, as there was thickening of urinary bladder of the complainant for which orifices was required to be widened.

31. For the said purpose, the said petitioner had used a ureteroscope, which he was qualified to use. This had helped the complainant avoid urine retention and after the said investigative techniques were applied by the said petitioner, the complainant did have relief with normal urine flow. It was submitted that the condition that the complainant suffered from i.e. urethral strictures, was a condition known to have recurrence. After the condition had recurred and the complainant was treated by the said petitioner on the second occasion, he was advised to go to a specialist.

32. In this context, the learned senior counsel for the said petitioner referred to a number of documents on record, showing the

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curriculum of Master of Surgery (General Surgery) at the time when the said petitioner had acquired the qualification. By referring to various documents on record, it was submitted that the said petitioner had his postings in the Department of Uroloy, where he had undergone training for various urological disorders. It was emphasized that during the said posting, he had been trained in the technique of urethral dilatation. He relied upon information received under Right to Information Act, 2005, from the institution where he had undergone training, which stated that during the period when the said petitioner trained for the qualification of MS (General Surgery), general surgeons also conducted urological procedures.

33. Reliance was placed on the information supplied under the said Act by the District Government Hospital, Ratnagiri, wherein it was stated that the doctors having qualification of MS (General Surgery) indeed treated patients for urinary ailments like urinary stones, bladder neck obstructions, urethral strictures, etc. On this basis, it was submitted that the actual techniques and procedures performed by the said petitioner on the complainant, were well within his qualification and training. It was further submitted that therefore, the respondent – MCI, in the impugned order, was not justified in imposing the drastic punishment of removal from the Register for a period of three years, on the ground that the said petitioner was not qualified for the treatment that he gave to the complainant.

34. It was emphasized that even in the appeal filed by the complainant, no such ground was taken and yet, the said authority, in its impugned order, in a cryptic manner and without any reasons, imposed the drastic punishment upon the said petitioner. On this basis, it was submitted that the impugned order deserved to be set

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aside.

35. The learned senior counsel appearing for the petitioner Dr.Mhaskar further referred to a diagram of the urinary system tendered for the purpose of explaining the procedure performed by the said petitioner on the respondent complainant. It was emphasized that a cystoscope or ureteroscope was used for diagnosis to enter into the urinary bladder and for dilating the bladder neck and to further explore the ureteric stone observed in the bladder. It was submitted that the said procedure was well within the training and competence of the aforesaid petitioner and it was not the act of performing a surgery as claimed by the complainant. By referring to the copies of documents placed on record with the petition, it was emphasized that such cystoscopy was performed on patients in the hospital of the said petitioner Dr. Mhaskar for a considerable period of time before the said procedure was performed on the complainant. As a general surgeon, the petitioner was qualified to perform such a procedure and that he had sufficient experience to do so in the cases of similarly situated patients. Reliance was also placed on other documents showing the fact that the said petitioner had been an observer in various hospitals and institutes undertaking urological procedures such as ureteroscopy and other such procedures. On this basis, it was submitted that the respondent – MCI, in the impugned order, committed a grave error in reaching the conclusion that the said petitioner did not possess necessary skills for performing the said procedure. The said conclusion was reached in a cryptic manner without assigning any reasons, while setting aside the order of the respondent – MMC.

36. The learned senior counsel for the petitioner Dr. Mhaskar relied upon judgement of the Supreme Court in the case of *Vinod*

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Jain Vs. Santokba Durlabhji Memorial Hospital, (2019) 12 SCC 229, wherein the Court quoted with approval the observation in the case of *Hucks Vs. Cole*, (1968) 118 New LJ 469, stating that a medical practitioner is not to be held liable because things go wrong from mischance or misadventure or through an error of judgement in choosing one reasonable course of treatment in preference of another. The Supreme Court also affirmed the test in such cases of medical negligence to the effect that an adverse conclusion could be drawn against the professional only if he adopted a course which no professional person of ordinary skill would have adopted, had such a person acted with ordinary care. It was submitted that applying the said test, it would be evident that the impugned order is unsustainable and that it deserves to be set aside.

37. On the other hand, Mr. Modgi, learned counsel appearing for respondent complainant in both the writ petitions vehemently opposed the submissions made on behalf of the petitioners. It was submitted that the petitioner Dr. Mhaskar was obviously guilty of medical negligence, for the reason that when he undertook the procedure of cystoscopy, the complainant had given consent only for removal of ureteric stone and there was no written consent authorizing him to give a bladder neck incision or to treat bladder neck obstruction. By doing so without the consent of the complainant, the petitioner Dr. Mhaskar was guilty of negligence and therefore, the impugned order was justified. It was submitted that informed consent of the complainant ought to have been taken before proceeding to perform such a procedure. Therefore, the impugned order correctly recorded that even the diagnosis by the petitioner Dr. Mhaskar was wrong, which led to unnecessary complications and suffering for the complainant. The learned counsel for the respondent complainant placed reliance on judgement of the

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Supreme Court in the case of *Samira Kohli Vs. Dr. Prabha Manchanda*, (2008) 2 SCC 1.

38. While relying upon the said judgement, it was emphasized that when the procedure was undertaken by the petitioner Dr. Mhaskar, it was not an emergency situation and that an elective procedure was being performed, thereby further demonstrating that the said petitioner was guilty of medical negligence and that, he did not have the skill to perform the procedure on the complainant.

39. On the question of violation of principles of natural justice, it was submitted that the said petitioner was granted opportunity of hearing and after considering the response to the appeal filed by the complainant, the Ethics Committee of respondent – MCI deliberated upon the same to render adverse findings against the said petitioner. It was submitted that the said petitioner failed to demonstrate actual prejudice caused to him due to alleged non-supply of the appeal memorandum. The said petitioner had sufficient opportunity to produce material in his defence, which he did produce, thereby indicating that the ground pertaining to violation of principles of natural justice is without any substance. There is no question of remanding the matter for re-consideration, as such a step would be an empty formality. In this context, reliance was placed on judgement of the Supreme Court in the case of *State Bank of Patiala and others Vs. S. K. Sharma*, (1996) 3 SCC 364.

40. As regards the contentions raised on behalf of the petitioner Dr. Date, it was submitted that the said petitioner was clearly guilty of medical negligence as he chose to use scrotal skin to bypass urethral stricture and subsequently, used mucosal graft. Therefore, the said petitioner used the last option first and when complications occurred, he chose to use the first choice procedure. This in itself

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amounts to gross negligence on the part of the petitioner Dr. Date and he cannot escape liability. It was submitted that due to the aforesaid procedure performed negligently, the complainant had suffered continuously, thereby indicating that no interference is warranted in the impugned order.

41. As regards the allegations pertaining to the violation of principles of natural justice, the contentions recorded hereinabove in the context of the petitioner Dr. Mhaskar, were repeated and reiterated. It was submitted that no prejudice was suffered by the petitioner Dr. Date, considering the manner in which personal hearing was granted by the respondent – MCI before passing the impugned order. On this basis, it was submitted that both the writ petitions deserve to be dismissed.

42. Mr. Gole, learned counsel appearing for the respondent – MCI submitted that if the statute presently holding the field i.e. NMC Act, 2019 is taken into consideration, it is evident that the whole regime of challenge to orders passed in disciplinary proceedings by State Medical Councils has undergone change. As on today, under Section 30 of the NMC Act, 2019 a patient or a complainant does not have the option of filing an appeal against an order of the State Medical Council. Only an aggrieved medical practitioner or professional has the opportunity of filing such an appeal. Therefore, even if this Court were to hold that principles of natural justice were violated when the impugned order was passed, under the NMC Act, 2019, no forum would be available to the respondent complainant to pursue his appeal.

43. In this context, attention of this Court was invited to Section 60 of the NMC Act, 2019 pertaining to repeal and savings. It was submitted that on a proper application of the said provision, the

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remedy of appeal before the Ethics Committee of the then MCI could be made available. It was indicated that certain pending and old cases that were initiated and remained pending when the IMC Act, 1956 was repealed and NMC Act, 2019 came into force, are still continuing. Therefore, this could be one option if the Court is of the opinion that the proceedings need to be remanded in the light of violation of principles of natural justice. It was submitted that the petitioners would first have to make out the case of violation of principles of natural justice as the record indicates that the Ethics Committee of respondent – MCI did grant personal hearing to the petitioners and they had sufficient opportunity to place their version along with documents on record. The petitioners were certainly aware about the issues raised by the respondent complainant against them.

44. Mr. Nerlekar, learned counsel appearing for the respondent – MMC submitted that this Court may pass appropriate orders in the petitions. He informed this Court that the respondent complainant had also filed a complaint before the National Consumer Disputes Redressal Commission (NCDRC) bearing Consumer Case No.161 of 2014. Copy of an order dated 12.03.2019 was tendered wherein the NCDRC, on the complainant agreeing, directed that the proceedings in the said consumer complaint before the NCDRC would remain stayed till disposal of these writ petitions. The proceedings were adjourned *sine die* till disposal of the instant writ petitions.

45. In this backdrop, we have considered the rival submissions. In the light of the said submissions, two aspects arise for consideration. Firstly, the allegations pertaining to violation of principles of natural justice raised on behalf of the petitioners and secondly, the specific contention raised on behalf of the petitioners that the settled position

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of law with regard to medical negligence laid down by the Supreme Court in numerous judgements was ignored by the respondent – MCI while passing the impugned order. It was submitted that ignoring such settled position of law and passing an order in the teeth of the same is sufficient ground for setting aside the impugned order while exercising writ jurisdiction.

46. In order to appreciate the rival submissions in the context of the question of violation of principles of natural justice, this Court finds that the procedure adopted by the respondent - MCI while hearing and disposing of the appeals filed by the complainant needs to be considered.

47. The petitioners have specifically asserted that they received only the notice pertaining to hearing scheduled on 23.03.2013 before the Ethics Committee of MCI on the appeals filed by the complainant. It is specifically asserted on their behalf that the memorandum of appeals and documents filed therewith were never served upon them. This has not been denied by the respondents. The respondent – MCI has not produced any material on record to show that copies of the appeals and documents filed therewith were ever served upon the petitioners. Instead a contention is raised on behalf of the respondent complainant that even if that was the position on facts, no prejudice was caused to the petitioners. We find that in the absence of service of the copies of the appeals and documents filed therewith, the petitioners were certainly handicapped in responding to the same. It is a different matter that since the petitioners had contested the issues raised by the respondent complainant before the MMC, they were broadly aware about the issues that could be raised by the complainant. It also appears that the petitioners did produce their own material before the respondent – MCI on 23.03.2013 when

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they were called for personal hearing. But, it cannot be denied that the petitioners were certainly handicapped in effectively responding to the contentions that were raised in the appeals filed by the complainant against them.

48. The petitioner Dr. Date specifically raised a ground in the writ petition that none of the members of the Ethics Committee, which heard the appeals, had any specialist from the field of Urology. This is also not denied by the respondents. Therefore, we find that not a single member of the doctors in the Ethics Committee was a urologist and this is a significant aspect of the matter. If allegations pertaining to procedures performed by the petitioners in the backdrop of medical negligence were to be analyzed and decided, at least one member of the Ethics Committee ought to have been an Urologist in consonance with the principles of natural justice. Doctors not having special knowledge of the field of Urology were perhaps not equipped to consider the allegations and defences raised by the rival parties. This position on facts also indicates violation of principles of natural justice.

49. Apart from this, we find that the impugned order dated 24.08.2013 shows that the Ethics Committee conducted meetings on 23.03.2013, 24.05.2013 and 25.05.2013, followed by recommendations placed for approval before the Board of Governors of the respondent – MCI. The petitioners were put to notice with regard to the meeting or hearing conducted only on 23.03.2013 and the meetings dated 24.05.2013 and 25.05.2013 were held behind the back of the petitioners. This situation is sought to be explained by the respondents by contending that since number of appeals were placed for consideration before the Ethics Committee of the MCI, the appeals pertaining to the petitioners were taken up only on

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23.03.2013 and that other appeals were taken up for consideration in the meetings held on 24.05.2013 and 25.05.2013.

50. We have perused the entire minutes of the meetings of the Ethics Committee pertaining to all the appeals that were considered and decided. The minutes of the meeting clearly show that all the appeals were taken up on 23.03.2013 and findings were rendered in these appeals on that very date. The entire minutes of meeting covering all the appeals, including those concerning petitioners, pertained to 23.03.2013. Therefore, the meetings held on 24.05.2013 and 25.05.2013 were clearly behind the back of the petitioners, although recommendations were placed by the Ethics Committee before the Board of Governors of the MCI based on proceedings in all the three meetings dated 23.03.2013, 24.05.2013 and 25.05.2013. In this backdrop, we are not satisfied with the explanation given on behalf of the respondents and it can be said that the subsequent two meetings were held behind the back of the petitioners, thereby further showing violation of the principles of natural justice. At this stage, it would be appropriate to reproduce the entire impugned order dated 24.08.2013 to analyze as to the manner in which the Ethics Committee of respondent – MCI rendered findings in the cases of the petitioners and as to how the Board of Governors of MCI approved the same. The relevant portion of the impugned order dated 24.08.2013 passed by the respondent – MCI reads as follows:-

> "**Subject:-** **Appeal dated 29.12.2012 filed Mr. Murad Hasan Mulla against Dr. Muneer Sufi Mhaskar and Dr. Jaydeep Date.**
>
> Sir,
>
> I am directed to inform you that the above matter was considered by the Ethics Committee, Medical Council of India, New Delhi at its meetings held on 23.03.2013 & 24th & 25th May, 2013 and the following recommendation of the

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Ethics Committee was approved by the Board of Governors at their meeting held on 6th & 7th August, 2013:-

'The Ethics Committee considered the appeal filed by Mr. Murad Hasan Mulla against Order dated 29.10.2012 passed by Maharashtra Medical Council. The Appellant Mr. Murad Hasan Mulla had complained that he was suffering from urethral narrowing and initially seen by Dr. Munner Sufi Mhaskar and later on operated by Dr. Jaydeep Date. In spite of assurance that he will be cured, he has not been cured and problem has become worse.

The Ethics Committee noted that both the parties i.e. Mr. Murad Hasan Mulla, Appellant and Dr. Munner Sufi Mhaskar and Dr. Jaydeep Date, Respondents have appeared before the Ethics Committee for personal hearing. The Ethics Committee heard the deposition of both the parties in detail and after going through all the relevant record/documents, made following observations:-

1. Dr. Muneer Sufi Mhaskar

(i) Dr. Muneer Sufi Mhaskar had not made proper diagnosis of the patient prior to the surgery,

(ii) He did the surgery without relevant investigation and skills required for surgery which resulted in complication of urethral stricture.

(iii) It was not a case of emergency but was an elective surgery case which could have referred to urologist.

It constitutes gross professional misconduct on the part of Dr. Muneer Sufi Mhaskar.

2. Dr. Jaydeep Date

Dr. Jaydeep Date used scrotal skin to bye-pass urethral stricture without explaining to the patient about the complications of hair growth, which is a known complication, Subsequently, he used mucosal graft which should have been his first choice. This act of commission professional misconduct on the part of Dr. Jaydeep Date.

Decision

After detailed deliberation, the Ethics Committee was of the view that treatment provided by both the doctors constituted gross professional misconduct and medical negligence and,

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therefore, the Ethics Committee decided to remove the name of Dr. Muneer Sufi Mhaskar for a period of THREE YEARS and the name of Dr. Jaydeep Date for a period of SIX MONTHS from the Indian Medical Register/State Medical Register from the date of issue of the order of punishment by concerned Council.

Accordingly, the appeal is disposed off.'

In compliance to above decision, you are requested to remove the names of Dr. Muneer Sufi Mhaskar (MMC-Reg. No. 51291) for a period of **THREE YEARS** and the name of Dr. Jaydeep Date (MMC-Reg. No. 57282) for a period of **SIX MONTHS** from the State Medical Register under intimation to this Council."

51. A bare perusal of the above-quoted impugned order shows the cryptic manner in which the Ethics Committee reached findings against both the petitioners. It is simply recorded that the Ethics Committee heard the deposition of parties and after going through the relevant record, the findings were rendered. Although we are conscious of the fact that the Ethics Committee of the respondent – MCI was not expected to render a judgment or order as if a court or a tribunal was considering an appeal, but the least that was expected from the Ethics Committee was recording of reasons why it reached certain conclusions and findings against the petitioners. Although the findings are adverse to the petitioners and drastic punishment of removal of names from the Register for different periods has been imposed on them, no reasons have been recorded for the same. This is all the more crucial when the Ethics Committee of the respondent – MCI allowed the appeals and reversed the findings that were rendered in favour of the petitioners by the State Medical Council i.e. the respondent MMC. While passing an order of reversal, the Ethics Committee was all the more required to record reasons for reaching findings. In that light, we find substance in the contentions raised on behalf of the petitioners that the hearing on 23.03.2013 was

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conducted in a perfunctory and hurried manner, resulting in the cryptic impugned order, thereby further showing violation of principles of natural justice.

52. Having reached the aforesaid findings, one option before this Court was to set aside the impugned order only on the said ground and to remand the proceedings for re-consideration. But, we find that during pendency of these writ petitions, for about 13 years before this Court, the IMC Act, 1956 was repealed under which the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 were framed and the NMC Act, 2019 came into force. Section 30 of the NMC Act, 2019 provides for remedy of appeal only to the aggrieved medical practitioner or professional, who may be aggrieved by an order of the State Medical Council and it does not provide for such a remedy for the aggrieved complainant / patient. Therefore, the proceedings can certainly not be remanded to the Ethics and Medical Registration Board constituted under the NMC Act, 2019 as it does not have any jurisdiction to entertain an appeal at the behest of an aggrieved complainant / patient. In such a situation, the respondent complainant may perhaps have to challenge the original order of the respondent MMC i.e. the State Medical Council in writ jurisdiction before this Court.

53. It was suggested by the learned counsel appearing for respondent – MCI that by taking recourse to Section 60 of the NMC Act, 2019 pertaining to repeal and savings, this Court would perhaps hold that since the present writ petitions can be treated as proceedings in continuity with the appeals, that were disposed of by the Ethics Committee of the then MCI, a direction could be issued for remanding the matter to the Ethics Committee under Section 60(2)

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(d) of the NMC Act, 2019. The said option could perhaps be exercised. But, the petitioners as well as the respondent complainant insisted that the writ petitions be decided on merits.

54. As a matter of fact, the learned counsel for the respondent complainant submitted that the petitioners had failed to demonstrate any prejudice caused to them, as mere procedural violations ought not to justify an order of remand. A reference to the judgement of the Supreme Court in the case of **State Bank of Patiala and others Vs. S. K. Sharma** *(supra)* upon which the complainant placed reliance, shows that in some cases, invalidating an order on the basis of violation of principles of natural justice may amount to negation of justice. In cases of failure of justice, the impugned order could be set aside. In the present case, although we have found hereinabove that the petitioners have indeed raised substantial grounds to demonstrate violation of principles of natural justice, they themselves have insisted that this Court in writ jurisdiction may consider the rival submissions on merits, as a long period of time has passed during the pendency of these petitions. The petitioners assert that the findings rendered by the respondent MCI in the impugned order are wholly unsustainable in the light of the settled law with regard to the question of medical negligence and therefore, this Court may decide the writ petitions on merits.

55. In the light of the rival submissions made in this regard, we are considering the validity of the impugned order on merits. In order to do so, it would be appropriate to refer to the position of law as clarified by the Supreme Court on the question of medical negligence.

56. In the case of **Jacob Mathew vs. State of Punjab and another** *(supra)*, the Supreme Court elaborately discussed the law pertaining

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to medical negligence and referred to various aspects of the matter, including the Bolam test. This test was formulated in the case of *Bolam Vs. Friern Hospital Management Committee*, **(1957) 1 W.L.R. 582**. It was held in the said case that it would be sufficient if a professional exercises ordinary skill of an ordinary competent person exercising that particular art. The aforesaid test and other such tests formulated in a series of judgements were noted in the aforesaid judgement of the Supreme Court to lay down the law in respect of medical negligence. The relevant portion of the said judgement reads as follows:-

> "18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person

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charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practises. In Michael Hyde and Associates v. J.D. Williams & Co. Ltd. [2001 PNLR 233 (CA)] Sedley, L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (Charlesworth & Percy, ibid., para 8.03.)

19. An oftquoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair, J. in Bolam v. Friern Hospital Management Committee [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] , WLR at p. 586 in the following words: (All ER p. 121 D-F)

> '[W]here you get a situation which involves the use of some special skill or competence, then the test as to 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 the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill … It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.' (Charlesworth & Percy, ibid., para 8.02)

20. The water of Bolam [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and a well-condensed one. After a review of various authorities Bingham, L.J. in his speech in Eckersley v. Binnie [(1988) 18 Con LR 1] summarised the Bolam [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] test in the following words: (Con LR p. 79)

> 'From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his

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> profession in the knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.' (Charlesworth & Percy, ibid., para 8.04)

21. The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England (4th Edn., Vol. 30, para 35):

> '35. 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.'
>
> The abovesaid three tests have also been stated as

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determinative of negligence in professional practice by Charlesworth & Percy in their celebrated work on Negligence (ibid., para 8.110).

22. In the opinion of Lord Denning, as expressed in Hucks v. Cole [(1968) 118 New LJ 469] a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

* * * * *

24. The classical statement of law in Bolam case [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

25. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves

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> higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure."

57. The aforesaid judgement of the Supreme Court has been followed subsequently in a number of judgements. In the case of **Martin F. D'souza vs. Mohd. Ishfaq** *(supra)*, the Supreme Court was concerned with a case wherein the doctor, against whom allegation of medical negligence was made, had chosen a particular line of treatment in preference over the other. In that context, the Supreme Court considered a cross-section of judgements on the question of medical negligence, including the aforesaid judgement in the case of **Jacob Mathew vs. State of Punjab and another** *(supra)*. Thereupon, it was held as follows:-

> "32. In Halsbury's Laws of England [Ed. : 4th Edn., Vol. 30, para 35.], the degree of skill and care required by a medical practitioner is stated as follows:
>
> > "35. Degree of skill and care required.—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

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> 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."
>
> (emphasis supplied)

33. Eckersley v. Binnie [(1988) 18 Con LR 1 (CA)] summarised the Bolam [(1957) 1 WLR 582 : (1957) 2 All ER 118] test in the following words:

> "From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of a polymath and prophet."

34. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent

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practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation, vide Achutrao Haribhau Khodwa v. State of Maharashtra [(1996) 2 SCC 634 : AIR 1996 SC 2377] or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.

35. There is a tendency to confuse a reasonable person with an error-free person. An error of judgment may or may not be negligent. It depends on the nature of the error."

58. Thereafter, in the case of **Kusum Sharma and others vs. Batra Hospital and Medical Research Centre and others** *(supra)*, another Bench of the Supreme Court deliberated upon the question of medical negligence and its various aspects. In that light, in the said judgement, it was held as follows:-

"89. On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well-known principles must be kept in view:

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring 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.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

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V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals."

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59. In the context of the present writ petitions, clause V, VI and VII of the above-quoted paragraph assume particular significance. It is relevant to note that the said case also pertained to an allegation that the concerned surgeon had adopted an 'anterior' approach to the surgery, as opposed to a 'posterior' approach for removal of a tumor. The Supreme Court held that the surgeon / doctor choosing one approach over the other could not be the basis for alleging medical negligence, so long as both the approaches could be said to be recognized approaches. The said position of law was subsequently followed in the judgements in the cases of **Arun Kumar Manglik vs. Chirayu Healthcare and Medicare Private Limited and another** *(supra)*, **Bombay Hospital and Medical Research Centre vs. Asha Jaiswal and others** *(supra)* and **Dr. Neeraj Sud and another vs. Jaswinder Singh and another** *(supra)*. The judgement in the case of **Vinod Jain Vs. Santokba Durlabhji Memorial Hospital** *(supra)* is also on the same lines.

60. As regards judgement in the case of **Samira Kohli Vs. Dr. Prabha Manchanda** *(supra)* relied upon by the learned counsel appearing for the respondent complainant, we find that in the said case, the concerned medical professional / surgeon ended up removing uterus in the guise of removing ovaries / fallopian tubes due to wrong diagnosis. It was also found that the said act of the surgeon was well beyond the consent given by the patient and it amounted to unauthorized surgery. We are of the opinion that the said judgement would not apply to the facts of the present case in respect of both the petitioners. The reasons for reaching the said conclusion are being recorded hereinbelow.

61. As regards the petitioner Dr. Mhaskar, the principal allegation against him and the findings rendered in the impugned order also

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pertain to his lack of qualification and skills to perform the procedure that he did upon the complainant and that, he made an improper diagnosis. It was also alleged that the procedure performed by him was beyond the consent given by the complainant.

62. In order to properly appreciate the rival contentions in this regard, it would be appropriate to first consider as to what was the nature of the procedure performed by the petitioner Dr. Mhaskar. The documents on record show that the said petitioner conducted the procedure of cystoscopy in the light of the history of stones and urine related ailments of the complainant. The documents on record show that the respondent complainant was suffering from such ailments from the year 1997 onwards and that he was consulting various doctors and he consulted the petitioner Dr. Mhaskar in that regard. It is in this backdrop that the complainant was admitted in the hospital of the said petitioner in March 2005, complaining of pain and intermittency of urine. The said petitioner proceeded to undertake the procedure of cystoscopy for removal of ureteric stone. During the performance of the said procedure, the said petitioner found that there was a defect of obstruction in the neck of the urinary bladder and accordingly, he performed a bladder neck incision.

63. Thereafter, the complainant again suffered from decreased stream of urine and it was found that a further stone had developed by October 2005. The petitioner Dr. Mhaskar undertook further procedure in October - November 2005 as the complainant was suffering from urinary retention and the procedure of urethrocystoscopy was performed.

64. The respondent complainant has raised a grievance that when consent was given only for cystoscopy in order to remove the stone, the procedure of bladder neck incision could not have been

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unauthorizedly performed by the petitioner Dr. Mhaskar. It is alleged that the said petitioner virtually performed surgery, although the same could have been undertaken only by a Urologist / Specialist and not a general surgeon like the petitioner Dr. Mhaskar.

65. In this regard, we have considered the contentions raised on behalf of the petitioner Dr. Mhaskar that cystoscopy is a procedure performed by general surgeons and that during the training imparted for the Post Graduate Course of Master of Surgery, the posting in the Urology Department facilitates training for undertaking such procedures like cystoscopy. It is asserted that in order to perform such procedures that can be said to be diagnostic and for treatment also, a specialist surgeon or urologist is not required. We have perused the documents placed on record on behalf of the petitioner Dr. Mhaskar in this regard.

66. We find that the concerned medical college has certified that urology was part of MS General Surgery course during the period between 1984 and 1989 when the petitioner Dr. Mhaskar had taken the said course. The curriculum of the same was placed on record, which stated that during the posting in the Department of Urology, the students of MS General Surgery course undertook training for diagnostic cystoscopy, urethral dilatation and other such techniques. This becomes significant in the light of the fact that the authorities of the concerned medical college, where the petitioner Dr. Mhaskar completed his MS General Surgery course, stated that the said curriculum presently in vogue was the same as the curriculum when the aforesaid petitioner had completed his MS General Surgery Course. Thus, there is sufficient material on record to indicate that MS General Surgery qualified general surgeons are given training for conducting the procedure of cystoscopy and urethral dilatation. It is

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also relevant to note that the District Government Hospital of Ratnagiri has further certified that doctors having qualifications of MS General Surgery regularly treat patients of urinary stones, bladder neck obstructions and urethral strictures in the Civil Hospital at Ratnagiri.

67. Apart from this, the said petitioner has also placed on record documents showing a number of patients treated in his hospital between years 2000 and 2004, underwent cystoscopy as part of diagnosis / treatment. Documents have been placed on record to show that in the year 2004, the said petitioner was an observer in a post-graduate institute in Coimbatore for urological procedures such as urethrocystoscopy etc. We are of the opinion that the said petitioner Dr. Mhaskar has placed on record sufficient material to indicate that the procedure undertaken by him was well within his qualification, training and skill set as a general surgeon having qualification of MS General Surgery. It is evident that the said petitioner Dr. Mhaskar did not perform surgery but he undertook the procedure of cystoscopy and ureteroscopy for the purpose of treatment of stone. In the process, when the said petitioner came across the constriction in the bladder of the complainant, he proceeded to perform bladder neck incision for smooth flow of urine. We are of the opinion that during the course of performing the procedure of cystoscopy for the stone in the urinary bladder when the petitioner Dr. Mhaskar proceeded to perform bladder neck incision, it was a professional decision taken by him within the parameters of his qualification, training and skill set for the benefit of the patient i.e. the complainant.

68. In such a situation, we do not find substance in the grievance raised on behalf of the complainant that the said petitioner

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unauthorizedly performed the bladder neck incision and that consent should have been taken again by waiting for the complainant to come out of the effect of anesthesia. Applying the aforementioned tests recognized by the Supreme Court in the judgements referred to hereinabove, we find that adverse findings could not have been rendered against the petitioner Dr. Mhaskar in the facts and circumstances of the present case.

69. The impugned order passed by the respondent MCI does not record any consideration, analysis or reasoning for reaching findings against the petitioner Dr. Mhaskar. It is simply stated that the said petitioner did not make a proper diagnosis. He performed 'surgery' without relevant investigations / skills and he should have referred the case of the complainant to a urologist, as this was a case of elective surgery and not emergency. We are of the opinion that the petitioner Dr. Mhaskar was not granted sufficient opportunity to defend himself and in any case, the aforesaid material with regard to his qualification, competence and skill set was not at all considered while reaching adverse findings against him.

70. This is to be appreciated in the light of the material placed on record, which could not be denied by the respondents, that the aforesaid urinary ailment of the complainant pertaining to urethral strictures has a high rate of recurrence. Hence, adverse finding could not have been rendered against the petitioner Dr. Mhaskar, only because there was a recurrence of the said condition despite the procedures undertaken by him on the complainant. It is to be noted that the respondent – MMC had categorically held that the petitioner Dr. Mhaskar did not violate any of the medical ethics and also specifically noted the fact that the complainant was a chronic patient of urethral stricture disease since 1997. In this situation, we find that

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the impugned order passed by the respondent – MCI against the petitioner Dr. Mhaskar cannot be sustained, as it is in the teeth of the position of law clarified by the Supreme Court, specifically noted hereinabove. If the tests recognized and approved by the Supreme Court are applied, we find that the finding of medical negligence cannot be rendered against the petitioner Dr. Mhaskar and the impugned order is in the teeth of the settled position of law. In writ jurisdiction, this can certainly be a ground to interfere with the impugned order.

71. As regards petitioner – Dr. Date, we find that the main grievance of the complainant is that the said petitioner chose to use scrotal skin to bypass the urethral stricture, although the said procedure is the last choice procedure in such cases. Thereafter, the said petitioner chose to use the mucosal graft, when complications arose, which is always the first choice procedure. This is the basis for alleging that the petitioner – Dr. Date was guilty of medical negligence. In the impugned order also the respondent – MCI has held against the said petitioner, on the said ground.

72. In the above quoted judgments of the Supreme Court, starting from **Jacob Mathew vs. State of Punjab and another** (*supra*), it has been laid down and reiterated that a Doctor cannot be held guilty of medical negligence only because he chooses one course of action in preference over another, so long as he performs his duty with reasonable skill and competence. In the present case, the thrust of the allegation regarding medical negligence against petitioner – Dr. Date is in respect of his choice of one procedure in preference over another. It is not even the case of the complainant that the procedure first chosen by the said petitioner was not even a recognized procedure for treatment of urethral stricture. The petitioner has

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produced medical literature recording that the aforesaid procedure that he undertook as the first choice procedure is well recognized and that it has advantages, while the complainant has produced medical literature recording that the said procedure could be said to be the last option. Either way, it cannot be denied that the procedure adopted by the petitioner – Dr. Date, while performing surgery on the complainant as the first choice procedure, is indeed a well recognized surgical procedure for treating urethral strictures. We are of the opinion that in such a situation, in terms of the law laid down by the Supreme Court in the aforementioned cases, the petitioner – Dr. Date cannot be held guilty of medical negligence. It is relevant to note that in the case of **Kusum Sharma and others vs. Batra Hospital and Medical Research Centre and others** (*supra*) in clauses V, VI and VII of paragraph 89, it is categorically held that a professional Doctor is not negligent merely because his conclusion differs from that of another professional Doctor, or that he honestly believes a particular procedure to have greater chances of success and in any case, such a Doctor cannot be held guilty of negligence merely because he chooses one course of action in preference to another course of action.

73. In the case of **Martin F. D'souza vs. Mohd. Ishfaq** (*supra*), the Supreme Court went to the extent of holding that a Doctor is not liable to be held negligent, simply because things go wrong from mischance or misadventure or through an error of judgement or that, the Doctor chooses one reasonable course of treatment in preference to another. In the case of **Jacob Mathew vs. State of Punjab and another** (*supra*), the Supreme Court in the above quoted paragraphs of the said judgment, discussed in detail the tests and standards to be applied while considering the allegation of medical negligence. It was held therein that a finding of negligence could be rendered

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against a Doctor only if he either did not possess the requisite skill which he professed to have possessed or such a Doctor did not exercise the skill with reasonable competence and while judging so, the standard to be applied is that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in the branch that he practices. In the said judgment, it was also emphasized that the question as to which of the available courses of action would be more appropriate in a given set of facts and circumstances has to be left to the judgment of the Doctor and so long as he performs his duty with reasonable competence, the finding of medical negligence cannot be rendered.

74. We are of the opinion that applying the said settled position of law to the facts of the present case, petitioner – Dr. Date could not be held guilty of medical negligence. Respondent – MMC being the State Medical Council had rendered findings in favour fo the said petitioner. By the impugned order, the respondent – MCI reversed the findings. As noted hereinabove, the impugned order does not record detailed reasons at all for reaching the findings, which are cryptic in nature. In any case, a perusal of the impugned order shows that the only ground on which the adverse finding is rendered and it is held that petitioner – Dr. Date indulged in professional misconduct, is that he chose the procedure of using scrotal skin to bypass urethral strictures rather than using mucosal graft, which should have been his first choice. We find that the said cryptic reasoning is in the teeth of the settled position of law and this indeed is a good ground to exercise writ jurisdiction to interfere with the impugned order.

75. It is also a matter of record that both the petitioners i.e. Dr. Mhaskar and Dr. Date, while performing procedures on the

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complainant had taken his consent. The material on record belies the findings rendered by the respondent – MCI in the impugned order. Therefore, we are inclined to exercise writ jurisdiction to interfere with the impugned order. We are conscious of the fact that in writ jurisdiction, this Court cannot go into the merits of the findings rendered by specialized bodies like the Ethics Committee of the respondent – MCI, which has been approved by the Board of Governors, but when clear procedural irregularity is demonstrated and it is also demonstrated before this Court that the cryptic reasoning adopted in the impugned order violates the settled position of law, as noted hereinabove, writ jurisdiction can certainly be exercised in favour of the petitioners to interfere with the impugned order.

76. In view of the above, writ petitions are allowed. Consequently, the impugned order dated 24.08.2013 passed by respondent – MCI is quashed and set aside.

77. Rule is made absolute in these terms.

78. Pending civil applications and notices of motion also stand disposed of.

(SHREERAM V. SHIRSAT, J.) **(MANISH PITALE, J.)**

MINAL SANDIP PARAB Digitally signed by MINAL SANDIP PARAB Date: 2026.09.22 15:20:55 +0530

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