Date of application for the copy	Date fixed for notifying the requisite number of stamps and folios	Date of delivery of requisite stamps and folios.	Date on which the copy was ready for delivery.	Date of making over to the applicant.
06.02.20	10.02.20	10.02.20	10.02.20	12.02.20

GAHC010018182018

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GAUHATI HIGH COURT * KOHIMA BENCH *

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
KOHIMA BENCH

Case No. : WP(C) 236/2018

1:M
KOHIMA

VERSUS

1:THE NAGA HOSPITAL AUTHORITY KOHIMA(NHAK) AND 7 ORS.
THROUGH ITS MEDICAL SUPERINTENDENT, KOHIMA

2:NAGALAND STATE AIDS CONTROL SOCIETY(NSACS)
DIRECTORATE OF HEALTH AND FAMILY WELFARE
KOHIMA

3:THE NAGALAND MEDICAL COUNCIL
THROUGH ITS PRESIDENT
KOHIMA

4:THE STATE OF NAGALAND
THROUGH ITS SECRETARY
GOVT. OF N/L
NAGALAND CIVIL SECRETARIAT
KOHIMA

5:THE COMMISSIONER AND SECRETARY
DEPT.
OF HEALTH AND FAMILY WELFARE
N/L
DEPT. OF HEALTH AND FAMILY WELFARE
N/L
KOHIMA

6:THE PRINCIPAL DIRECTOR

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DIRECTORATE OF HEALTH AND FAMILY WELFARE
N/L
DIRECTORATE OF HEALTH AND FAMILY WELFARE
N/L
KOHIMA

7:NATIONAL AIDS CONTROL SOCIETY (NACO)
THROUGH ITS ADDITIONAL SECRETARY
THE MINISTRY OF HEALTH AND FAMILY WELFARE
UNION OF INDIA
NIRMAN BHAVAN
NEW DELHI

8:DR. BERNARD AMER
SENIOR SPECIALIST
NHAK
KOHIMA
N/

Advocate for the Petitioner : KEZHASENO KIKHI

Advocate for the Respondent :

Linked Case : I.A.(Civil) 56/2019

1:M
KOHIMA

VERSUS

1:THE NAGA HOSPITAL AUTHORITY KOHIMA(NHAK) AND 6 ORS
THROUGH ITS MEDICAL SUPERINTENDENT
KOHIMA
N/L

2:THE NAGALAND STATE AIDS CONTROL SOCIETY(NSACS)
DIRECTORATE OF HEALTH AND FAMILY WELFARE
N/L
KOHIMA

3:THE NAGALAND MEDICAL COUNCIL
THROUGH ITS PRESIDENT
KOHIMA

THE GAUHATI HIGH COURT KOHIMA BENCH
CANCELLED
COURT FEE STAMP INDIA GOVT. OF NAGALAND FIVE RUPEES

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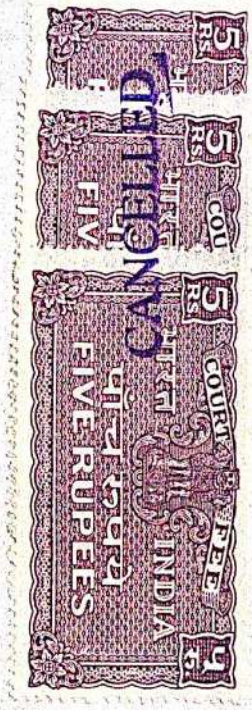
N/L

4:THE STATE OF NAGALAND
THROUGH ITS SECRETARY
GOVT. OF N/L
NAGALAND CIVIL SECRETARIAT
KOHIMA
N/L

5:THE COMMISSIONER AND SECRETARY
DEPT. OF HEALTH AND FAMILY WELFARE
N/L
NAGALAND CIVIL SECRETARIAT
KOHIMA
N/L

6:THE PRINCIPAL DIRECTOR
DIRECTORATE OF HEALTH AND FAMILY WELFARE
N/L
KOHIMA
N/L



7:NATIONAL AIDS CONTROL SOCIETY(NACO)
THROUGH ITS ADDITIONAL SECRETARY
THE MINISTRY OF HEALTH AND FAMILY WELFARE
UNION OF INDIA
NIRMAN BHAWAN
NEW DELHI

Advocate for the Petitioner : NEITEO KOZA
Advocate for the Respondent :

Linked Case : I.A.(Civil) 164/2018

1:M
KOHIMA

VERSUS

1:THE NAGA HOSPITAL AUTHORITY KOHIMA(NHAK) AND 6 ORS

2:NAGALAND STATE AIDS CONTROL SOCIETY(NSACS)
DIRECTORATE OF HEALTH AND FAMILY WELFARE
N/L
KOHIMA

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3:THE NAGALAND MEDICAL COUNCIL
THROUGH ITS PRESIDENT
N/L
KOHIMA

4:THE STATE OF NAGALAND
THROUGH ITS SECRETARY
GOVT. OF N/L
NAGALAND CIVIL SECRETARIAT
KOHIMA
N/L

5:THE COMMISSIONER AND SECRETARY
DEPT. OF HEALTH AND FAMILY WELFARE
N/L
DEPT. OF HEALTH AND FAMILY WELFARE
N/L
KOHIMA

6:THE PRINCIPAL DIRECTOR
DIRECTORATE OF HEALTH AND FAMILY WELFARE
N/L
KOHIMA

7:NATIONAL AIDS CONTROL SOCIETY (NACO)
THROUGH ITS ADDITIONAL SECRETARY
THE MINISTRY OF HEALTH AND FAMILY WELFARE
UNION OF INDIA
NIRMAN BHAVAN
NEW DELHI

Advocate for the Petitioner : KEZHASENO KIKHI
Advocate for the Respondent : GOVT ADV NL

BEFORE
HON'BLE MR. JUSTICE NELSON SAILO

JUDGMENT & ORDER (CAV)

Date : 06-02-2020

Heard Ms. Neiteo Koza, learned counsel for the petitioner and Mr. Limawapang, learned counsel for the respondent No.1. Also heard Mr. N. Mozhui, learned Standing Counsel for respondent Nos. 2 and 7, Mr. V. Zhimomi, learned

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counsel for respondent No. 4 to 6 and Ms. Neise Liegise, learned counsel for respondent No. 3 and Mr. C.T Jamir, learned senior counsel assisted by Ms. Nukshinaro, learned counsel for respondent No. 8.

2. The grievance of the petitioner in brief is that the Surgeon Doctor working in the Naga Hospital Authority, Kohima (NHAK, in short), who was supposed to operate her on 04.07.2017 declined to do so only due to her HIV status. The petitioner's grievance is that due to the discrimination meted out to her by the said Surgeon Doctor, the petitioner had to go to another hospital and have her surgery done. Accordingly, the petitioner prays for reimbursement of the cost of surgery done in the other hospital and also for payment of damages due to the trauma and pain caused to her.

3. Ms. Neiteo Koza, the learned counsel submits that the petitioner is an HIV+, who has been undergoing Anti Retroviral Therapy (ART) since October, 2013. The petitioner has been undergoing ART in NHAK since inception and periodically going to the said hospital for her treatment and medical check-ups. As the petitioner was suffering from some abdominal pain, she went to NHAK on 28.04.2017 for a medical check-up. The petitioner was asked to undergo an Ultrasonographic test on 28.04.2017 and the result of the same, which was issued on 08.05.2017 was to the effect that besides there being a left ovarian cyst (40.6x42mm), there was a small gallbladder polyp. A subsequent Ultrasonographic test done on the petitioner showed that the small gallbladder polyp measured 3.6mm, as per the NHAK Department of Radio Diagnosis Certificate dated 21.06.2017. Thereafter, the petitioner was directed to undergo various tests, including Blood Test as the operation for removal of the polyp had been fixed by the concerned Surgeon Doctor of NHAK on 04.07.2017. The petitioner was to meet the Doctor on 03.07.2017 and be admitted on 03.07.2017 in the NHAK in preparation for the operation to be held by way of keyhole surgery on 03.04.2017. However, when the petitioner met the Doctor on 03.04.2017, the Doctor on coming to know that the petitioner was HIV+, he informed the petitioner that considering the size of the polyp, she should follow up with the Surgery Department about the size of the polyp after every 6 (six) months. The learned counsel submits that the Surgeon Doctor already having

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decided to remove the polyp, which could turn cancerous, by way of keyhole surgery on 04.07.2017, the Doctor could not have changed his opinion with regard to how the polyp should be treated, only due to the petitioner being an HIV patient, which was in violation of Article 14 and 21 of the Constitution.

4. The learned counsel for the petitioner referring to the Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (Prevention and Control) Act, 2017 (Act of 2017), particularly Section 3 (c) submits that as per the said provision, no person shall discriminate against the protected person on any ground including the denial or discontinuation or unfair treatment in health care services. In the instant case, the Doctor concerned, upon coming to learn that the petitioner was an HIV positive affected person, refused to perform the surgery and instead, advised her to have a follow-up after every 6 (six) months. Therefore, the action of the Doctor concerned is clearly in violation of the provision of Section 3 (c) of the Act of 2017 and in violation of the Fundamental Rights of the petitioner, guaranteed under Article 14 & 21 of the Constitution of India.

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5. The learned counsel for the petitioner further submits that pursuant to the representation filed by the petitioner, an enquiry was conducted by the Nagaland Medical Council. During the course of the enquiry, the concerned Doctor was summoned before the Executive Committee on 28.03.2019 for clarification. The Doctor concerned gave his written clarification on 28.03.2019 and thereafter, the Executive Committee upon considering the complaint as well as the clarification passed an order on 03.04.2019, whereby it was concluded that even though no discriminatory action was evidenced, there were definitely some lapses in communication between the medical practitioner and the patient, which led to many complications. That under the provisions of the Medical Council of India Code of Ethics 2(3) & 2(4) and the Nagaland Medical Council Act, 2014, the Doctor was warned that if he was found violating the Medical Council of India Code of Ethics again, the same will invite action such as removal of name from the State Medical Registry temporarily/permanently.

6. The learned counsel submits that as per clause 2.3 of the Indian

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Medical Council (Professional conduct Etiquette and Ethics) Regulations, 2002 (2002 Regulations), the physician should neither exaggerate not minimize the gravity of a patient's condition. He should ensure himself that the patient, his relatives or his responsible friends have such knowledge of the patient's condition as will serve the best interests of the patient and the family. Clause 2.4 further provides that a physician is free to choose whom he will serve. He should, however, respond to any request for his assistance in an emergency. Once having undertaken a case, the physician should not neglect the patient, nor should he withdraw from the case without giving adequate notice to the patient and his family. Further, provisionally or fully registered medical practitioner should not willfully commit an act of negligence that may deprive his patient or patients from necessary medical care. In the instant case, the petitioner was asked to get herself admitted for operation for removal of the polyp in her gallbladder on 03.07.2017 and was to be operated on 04.07.2017. However, when the petitioner approached the Doctor concerned on 03.07.2017, the Doctor upon coming to learn that the petitioner was an HIV positive patient, he declined to perform operation upon her. Therefore, the conduct of the Doctor concerned is clearly in violation of the clause 2.3 and 2.4 of the 2002 Regulations and the same being the finding of the Nagaland Medical Council, the case of the petitioner that a discriminatory treatment has been meted out to her is clearly established. The learned counsel therefore submits that appropriate direction may be passed by this Court.

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7. Mr. Limawapang, the learned counsel for the respondent No. 1 referring to the affidavit-in-opposition of the respondent No. 1 filed on 12.04.2019 submits that the petitioner initially was treated in NHAK hospital by the Gynaecology Department. The said department conducted USG in her abdomen and detected a polyp (a small tumor) in her gallbladder measuring 3.6 mm. Accordingly, on 21.06.2017 she was referred to the Department of Surgery. On 22.06.2017, the Surgery Department, after examining the USG report, advised her to follow-up every 6 (six) months to assess the size of the polyp as the presence of the polyp in her gallbladder does not merit operation, as per the guidelines for management and follow-up of gallbladder polyp. But the petitioner insisted to remove the polyp and

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therefore, the Surgery Department agreed to remove her polyp and advised her to undergo various blood tests and report to the Surgical Out-Patient Department on 03.07.2017 alongwith the prescribed blood test reports to be admitted on 03.07.2017 and get operated on 04.07.2017.

8. On 03.07.2017, the petitioner came with the blood test reports as prescribed except the HIV test report. On further enquiry regarding HIV test report, she revealed that she was under medication for HIV infection which she did not disclose to the Surgery Department on 22.06.2017 that the Surgery Department by 03.07.2017 had already allotted 7 (seven) other patients to be operated on 04.07.2017. He further submits that after operating on HIV positive cases, thorough sterilization of surgical instruments and operation theatre through fumigation is necessary so that the next patient to be operated will not be infected. Moreover, there is only one set of keyhole surgery equipment in the Surgical Department. Therefore, considering the circumstances, the petitioner was informed that keyhole surgery was not possible on her in such short notice. The Surgery Department, however, informed her that they can perform open incision surgery but that will be too morbid to be undertaken for a small polyp, without any symptoms.

9. Considering the presence of the polyp, the Surgery Department advised her to follow-up every 6 (six) months with USG abdomen to assess the size of polyp and to decide whether to operate depending on the growth of the polyp. The learned counsel thus submits that had the petitioner disclosed about her HIV positive status to the Surgeon on her first meeting, the Surgeon would have made necessary arrangement not to coincide with other patients and fix an appropriate day to operate upon her through keyhole surgery. She was to be operated on 04.07.2017 but it was only on 03.07.2017 that she revealed about her HIV positive status, which led the surgeon to decide that her operation was not possible in such a short notice. Hence, denial of medical facilities to the petitioner by the hospital authority does not arise.

10. The respondent No. 3 i.e., the Nagaland Medical Council (the Council) represented by its President has filed an affidavit on 22.05.2019 wherein it is stated

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that the Nagaland Medical Council has examined the complaint of the petitioner in detail. The Council has constituted Ethical Committee to look into all matters relating to the ethics and conduct of Medical Practitioner. Accordingly, the case was referred to the Ethical Committee and the Ethical Committee made recommendations to the President of the Council vide Communication dated 28.01.2019. The recommendation may be abstracted below:-

"(i) that NMC may write to NHAK to clarify why surgery was avoided and whether the statement of only one Instrument for keyhole surgery was correct at that time?

(ii) that the concerned Doctor having declined to undertake surgery was reasonable and valid.

(iii) that a strict notification be served to all Government hospitals as well as private hospitals to avoid discrimination towards any kind of patients including HIV/AIDS cases."

11. The recommendation of the Ethical Committee was examined jointly by the Executive Committee of the Council as well as the Ethical Committee on 13.02.2019 but as some clarifications was required, the council wrote to the Medical Superintendant of NHAK for clarification vide Letter dated 18.02.2019. Thereafter, the Executive Committee of the Council after considering the report of the Ethical Committee and the clarification given by the Medical Superintendant of NHAK in its meeting held on 14.03.2019 observed that a few lapses had been committed. The lapses observed may be abstracted below:-

"(a) The patient was directed to come to Surgical OPD for operation on 03.07.2017. The operation date was fixed without checking the investigation report.

(b) Why laparoscopic operation of HIV cases could not be done with the same laparoscopic instrument used for general

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operations.

(c) Why open surgery was advised when this case was not for open surgical removal of gallbladder polyp."

12. With the lapses observed as above, the Executive Committee decided to summon the Medical Practitioner (Respondent No. 8) on 23.03.2019 for clarification. The respondent No. 8 on 28.03.2019 submitted his response on the lapses that was found on his part through a written explanation addressed to the President of the Council. The Council upon examining the explanation, passed the Order dated 03.04.2019 by issuing a warning to the respondent No. 8 as already stated herein above. Be it stated herein that this Court, vide Order dated 25.07.2019 was of the view that the Medical Practitioner against whom the allegation was made should also be heard while considering the grievance of the petitioner and therefore, he was impleaded as respondent No. 8. Consequent upon his impleadment, the respondent No. 8 filed his affidavit-in-opposition on 30.08.2019.

13. Mr. C.T Jamir, learned senior counsel appearing for the respondent No. 8 and relying upon the affidavit filed by him submits that the respondent No. 8 has been posted in NHAK since the year 2014. In so far as his role is concerned on the complaint submitted by the petitioner, the same starts from 21.06.2017, when the petitioner came to be referred to the Surgical Out-Patient Department (SOPD) by the Department of Gynaecology. He submits that the petitioner was first treated by the concerned Doctor in the Department of Gynaecology under the OPD Registration No. OPD 17/032783 dated 21.06.2017. The said Department conducted USG on the petitioner and subsequently, referred her to the SOPD because of presence of gallbladder polyp (small tumor measuring about 3.6mm). The respondent No. 8 was the Senior Specialist in the SOPD during the period. On 21.06.2017, the petitioner came to the SODP and on examining her case, the respondent No. 8 found the size of the polyp to be too small for operation. He explained to the petitioner that the presence of the said polyp will not cause any problem unless the size was more than 10mm. However, the writ petitioner insisted that she wanted to get the polyp

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removed and as such, for the psychological benefit of the petitioner, he advised her to attend SOPD on 03.07.2017 with various blood test to review the reports of laboratory investigation so as to further decide and finalize whether to get her operated or not.

14. The learned senior counsel submits that on 03.07.2017, the petitioner came with all the blood test reports except the HIV test report. However, the concerned Department for HIV treatment had written in the registration form that she was on ART i.e. she was under medication for HIV infection. Therefore, the respondent No. 8 as an experienced, Senior Specialist took the decision not to remove the polyp immediately on the petitioner since polyp whose size is less than 10mm is not advisable for surgery but to follow-up with ultrasound every 6 (six) months as per the guidelines for management and the follow-up of gallbladder polyp. Therefore, the respondent No. 8 explained to the petitioner that the presence of polyp does not indicate any future factor of turning into cancer and does not require surgery unless the size of the polyp is more than 10mm. Accordingly, he advised her to follow-up every 6 (six) months with USG to assess the growth and size of the polyp.

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15. Mr. C.T Jamir, the learned senior counsel further submits that for a HIV patient, the risk of post operative complications are more possible. Therefore, to conduct surgery in case of high risk patients like HIV infection, Diabetic and high BP, if the patient is not in a life threatening condition, the weighing of risk and benefit requires to be considered first. In case of the petitioner, it was found that the risk clearly outweighed the benefits. Further, the writ petitioner disclosed about her status of HIV only on 03.07.2017 and by that time, Surgical Department had already allotted 7 (seven) cases to be operated on 04.07.2017. Normally, thorough sterilization of surgical instruments and fumigation of operation theatre are necessary following operation on HIV positive patients in order to avoid infection to others. It was, therefore, difficult to include the petitioner in the operation list on 04.07.2017 due to time constraint as well. The learned senior counsel submits that it is not HIV patients alone who are subjected to last minute changes in decision as to whether operation is to be carried out or not. There are instances of patients who are found to have increase in blood sugar or if the electro-cardiogram (ECG) finding

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suggests heart problem. Even in such cases, surgery gets postponed. The learned counsel has also referred to the guidelines for management in follow-up of gallbladder polyp, which is annexed as Annexure-2 to the affidavit-n-opposition to substantiate his submission that polyp less than 6mm only requires follow-up by ultrasound, after 6 (six) months and thereafter, on yearly basis. He therefore submits that under the facts and circumstances, the respondent No. 8 has not committed any discrimination by not performing the surgery upon the petitioner. In fact, he has only given her a proper and sound medical advice i.e., to follow-up the polyp with USG to assess the growth and size of the polyp after every 6 (six) months. He thus submits that the writ petition being without any merit, the same should be dismissed.

16. Although the respondent Nos. 2 & 7 i.e., Nagaland State Aids Control Society have not filed any affidavit-in-opposition, Mr. N. Mozhui, learned counsel who appears for them adopts the argument of the learned counsels for the other respondents including the argument made by Mr. C.T Jamir, learned senior counsel. By drawing the attention of this Court to Annexure 6 & 7 of the affidavit-in-opposition filed by the respondent No. 8, he submits that the petitioner in fact had issued a certificate under the heading "*To whom it may concern*" stating that she would like to withdraw the case filed by Human Rights Law Network and the same was her personal decision. She also wrote to the dealing counsel and Coordinator of Human Rights Law Network, Kohima, Nagaland informing them that she wishes to withdraw the writ petition. However, despite the desire of the petitioner to withdraw the writ petition, the learned counsel for the petitioner, surprisingly, has not withdrawn the writ petition and as proceeded to argue the matter. He also submits that the present writ petition is also not a Public Interest Litigation and therefore, the learned counsel for the petitioner should not press the writ petition against the wish and desire of the petitioner herself.

17. Ms. Neiteo Koza, learned counsel for the petitioner submits that against the affidavits filed by the respondent Nos. 1 & 8, the petitioner has filed a reply affidavit refuting the contention made in the affidavit-in-opposition. She submits that the so called certificate given by the petitioner and the communication

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written to her counsel was not done out of her own free-will but under compulsion and duress. Therefore, the respondents cannot insist upon the petitioner to withdraw the writ petition when she wishes to press the matter. The learned counsel reiterates the stand taken by the petitioner that she approached the hospital and the respondent No. 8 on 03.07.2017 for getting herself admitted for removal of the polyp in her gallbladder through keyhole surgery on 04.07.2017. However, the respondent no. 8 upon coming to learn that she was an HIV positive affected person, refused to perform surgery and instead, advised her for follow-up after every 6(six) months. Therefore, it is clear that discrimination has been meted out to the petitioner by the respondents.

18. I have heard the learned counsels for the rival parties and I have perused the materials available on record.

19. As may be noticed, the issue to be considered and decided is as to whether surgery was in fact not performed for removal of the polyp measueing 3.6mm in the gallbladder of the petitioner on the schedule date i.e., 04.07.2017 on account of her status that she was a HIV positive infected person. The petitioner submitted a complaint before the Council and the matter was looked into by the Ethics Committee as well as the Executive Committee of the Council and the respondent No. 8 was also asked to give certain clarification by asking to be present before the Council in person. The respondent No. 8 accordingly, as was required from him, gave his explanation in writing on 28.03.2019. It may be relevant to abstract the relevant portion of the explanation rendered by the respondent No. 8 on 28.03.2019. The same is abstracted as under:-

" *To*

The President,
Nagaland Medical Council,
Kohima, Nagaland

Sub:- *Ref-Discriminatory denial of Medical Services*

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A BENCH

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by Medical Practitioners at Naga Hospital Authority Kohima (NHAK) in July 2017 to a person living with HIV.

Madam,

On the subject cited above, I pray your kind and esteem office to allow me to explain the entire sequence of events that took place in this case.

On the first day of meeting the said female patient, I was in Surgical Out Patient Department (SODP). She was first seen by a doctor in the department of gynaecology and on the same day, she was referred to us because of the presence of Gall Bladder Polyp (a small tumor). According to the Ultrasound report which she brought, the size of the polyp was 3.6 mm. I explained to her that the presence of the polyp will not cause any problem to her and that, the size is too small which does not merit operation (Annexure 1: Guidelines for management of Gall Bladder Polyp). But she insisted that she want the polyp to be removed. Accordingly, I fixed a date (03.07.17) for her to come to SOPD with various blood tests so that she gets admitted in the hospital on 03.07.2017 and get operated on 04.07.2017. On the first meeting, she did not disclose her HIV positive status.

On 03.07.17, she came with all the blood test reports except HIV test report. Only on further enquiry, she revealed that she was under medication for HIV infection. By this time, I have already fixed another 7 cases to be operated the next day (Annexure 2: Number of operated cases on 04.07.17). Usually thorough sterilization of surgical instruments as well as the operation theatre is necessary after operating on HIV positive cases so that we don't infect the next patient. Moreover, there is only one set of key-hole surgery equipments in our institute. Keeping all these things in mind, I informed her that key-hole surgery is not possible on her in such short

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notice. I further informed her that we can do open incision surgery but that will be too morbid to be undertaken for a small polyp without any symptom.

Therefore, I advised her to do Ultrasound examination of abdomen after 6 months in order to assess the size and growth of the polyp and decide whether it is necessary to operate on her or not.

With all these facts, the question of denying medical services to her does not arise. First of all, she did not disclose her HIV positive status in our first meeting leading to giving an appointment for admission where so many other operative cases were already alloted. Secondly, she was advised an ultrasound examination of abdomen after 6 months so that if the tumour shows some signs of growth, we will operate on her.

However, I do agree that there must have been some lapses in the communication between me and my patient. I also agree that, whatever I communicated to her could not be documented in the OPD ticket due to lack of time.

Therefore, it is regretted that such an incident took place between me and my patient at NHAK but allow me to state that it was without any ill intension towards her. Also allow me to state that, her wellbeing as well as the rest of the patients were topmost priority as a doctor.

Thank you.

Yours Sincerely

(Dr. Bernard Amer)
Senior Specialist
NHAK"

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KOHIMA BENCH

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20. From the above abstract, it may be seen that according to the respondent No. 8, the petitioner was referred to the SOPD from the Gynaecology Department. Although he found the size of the polyp to be 3.6mm and explained to the petitioner that the same was too small to merit operation as per the relevant guidelines but as the petitioner insisted for the surgery, he fixed 03.07.2017 as the date for the petitioner to come to the SOPD with various blood test, so that she can admit herself in the hospital on that day and get operated on 04.07.2017. The respondent No. 8 also has explained that the petitioner did not disclose to him about her HIV positive status in the 1st meeting i.e., on 21.06.2017. It may however be seen from the OPD card of the petitioner annexed to the affidavit-in-opposition of the respondent No. 8 as Annexure-1 that there is a written remark that the petitioner is an ART patient. The respondent No. 8 further contends that the petitioner came with the test reports of her blood except HIV test report when she came to the hospital again on 03.07.2017. The same cannot however be accepted for the simple reason that the OPD card dated 21.06.2017, as stated herein above, clearly has a remark that the petitioner is an ART patient. The respondent No. 8, who is a Senior Surgeon in the NHAK cannot be said to have no knowledge that HIV infected persons are given ART treatment. However, in spite of such remark in the OPD card of the petitioner, the respondent No. 8 advised her to come again on 03.07.2017 to get herself admitted for operation the next date i.e., 04.07.2017. As such, if there was any failure on the part of the respondent No. 8 not to notice the remark on the OPD card of the petitioner even for bonafide reasons, the same would only amount to serious lapses, inasmuch as, there were 7 (seven) patients to be operated on 04.07.2017, as contended by the respondent No. 8 as well as the hospital authorities. Had the petitioner been operated upon on 04.07.2017 without detecting that she is a patient on ART, the other 7 (seven) patients schedule to be operated on 04.07.2017 would have been affected. Therefore, it is seen that there is serious lapses on the part of the Doctor concerned as well as the hospital.

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MA BENCH

21. Now coming to the enquiry made by the Council on the complaint submitted by the petitioner, it may be seen that the Council firstly had referred the matter to the Ethics Committee and the Ethics Committee gave certain recommendations as already highlighted herein above. On the basis of the said

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recommendation, a clarification was sought from the Medical Superintendant, NIHAK and on getting a reply, the matter was again examined by the Ethics Committee and the Executive Committee of the Council on 14.03.2019. The outcome of the meeting was that a few lapses were found such as, why the patient was directed to come to SOPD for operation on 03.07.2017 and as to why the operation date was fixed without checking the investigation report. Besides this, why open surgery was advised when the case was not fit for open surgical removal. Following the meeting, the respondent No. 8 was summoned on 28.03.2019 and he gave his written explanation. Upon examining the explanation, the Council passed the Order dated 03.04.2019. The operative portion of the same may be abstracted below:-

> *"...After examining all the matters, the Nagaland Medical Council came to the conclusion that even though no discriminatory action was evidenced there were definitely some lapses in communication between the Medical Practitioner and the patient party which led to may complications.*
>
> *.... And under the provision of Medical Council of India code of Ethics 2(3) and 2(4) and Nagaland Medical Council Act 2014, Dr. Bernard Amer, Regd. No. NMC/R-15/00661, is warned that if found violating the MCI code of Ethics again, will invite action such as removal of name from State Medical Registry temporarily/permanently."*

22. From the above abstract, it may be seen that although Council did not see discriminatory action but it found some lapses in the communication between the respondent No. 8 and the petitioner. Resultantly, the respondent No. 8 was given a warning which was to the effect that if found violating the MCI code of Ethics again, it would invite removal of his name from State Medical Registry temporarily/permanently. The conclusion of the Council in the Order dated 03.04.2019, in my considered view, clearly implicates the respondent No. 8 for negligence and discrimination. Clause 2.3 and 2.4 of the 2002 Regulations, as already mentioned herein above, broadly speaks about the negligence not to be

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caused to the patients. Therefore, although the Council has been very mild in making its observation, it nevertheless gave a warning to the respondent No. 8. Therefore, upon considering the facts and circumstances in its entirety, I find that the action or inaction on the part of the respondent No. 8 and the NHAK shows lapses which cannot be ignored.

23. The Apex Court in the case of ***Harbanlal Sahnia & Anr. vs Indian Oil Corporation Limited & Ors., (2003) 2 SCC 107*** has held that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In appropriate cases, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction for enforcement of any of the Fundamental Rights, failure of principals of natural justice or when the orders of proceedings are wholly without jurisdiction or the vires of an act is challenged. In ***Pt. Parmanand Katara vs. Union of India & Ors., (1989) 4 SCC 286***, the Apex Court has held that Article 21 of the Constitution casts the obligation of the State to preserve life. A Doctor at the Government hospital positioned to meet the State obligation is duty bound to extent the medical assistance for preserving life. No law or State action can intervene to avoid/delay the discharged of paramount obligation casts upon the members of the medical profession. The Right to Life guaranteed under Article 21 insofar as getting equal opportunity for treatment in Government hospitals again had been reiterated by the Apex Curt in ***Paschim Banga Khet Mazdoorsamity vs. State of West Bengal & Anr., (1996) 4 SCC 37***. The Apex Court having found that the person concerned was denied immediate medical attention fixed an amount of Rs. 25,000/- as compensation.

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24. Under the facts and circumstances, for the lapses on the part of the respondents concerned, I am of the considered view that the petitioner must be compensated and for which an amount of Rs. 40,000/- (Rupees forty thousand) only is fixed. The respondent No. 8 being an employee of the respondent No. 1, and the respondent No. 1 being the Government Hospital under the aegis of a Government of Nagaland Health & Family Welfare Department, the liability of paying the amount will be shared between the respondent No. 8 and the State Government in the

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Health & Family Welfare Department equally i.e. 50:50. The entire amount shall be deposited by the Govt. of Nagaland, Health & Family Welfare Department through its Commissioner and Secretary (Respondent No. 5) or the Principal Director, Directorate of Health & Family Welfare (Respondent No. 6) in the Registry of this Court, within a period of 1 (one) months from the date of receipt of a certified copy of this order failing to which, the amount shall carry interest at the rate of 9% per annum till final payment.

25. Further, 50% of the deposited amount shall be recovered from the salary of the respondent No. 8. It is however made clear that if there is any delay in depositing the amount and for which, interest will have to be paid, the same will have to be paid by the State Government alone. On the amount being deposited, the petitioner will be at liberty to withdraw the same on proper identification.

26. Writ petition is accordingly stands disposed of.

Sd/-

JUDGE

THE GAUHATI HIGH COURT KOHIMA BENCH

Comparing Assistant

Certified to be true Copy
10/02/2020
Deputy Registrar (Judl.)
Gauhati High Court
Kohima Bench
Authorised U/S 76 ACT 1 of 1872

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