
(2018) 03 NCDRC CK 0141

In the National Consumer Disputes Redressal Commission

Case No : Consumer Case No. 194 Of 2009

Abdul Rasheed Shaik

APPELLANT

Vs

Dr. Vikram Mathews & Ors.

RESPONDENT

Date of Decision : 19-03-2018

Acts Referred:

Citation : (2018) 03 NCDRC CK 0141

Hon'ble Judges : Dr. S.M. Kantikar, J

Bench : Single Bench

Advocate : Surekha Raman, Rashmi Virmani, Ashish Kothari

Final Decision : Dismissed

Judgement

DR. S. M., J.

The Complaint:

1. Mulla Abdul (for short â??the patientâ?), the teacher by profession fell sick in June, 2007 and admitted in Simhadri Hospital at Vishakhapatnam.

He was diagnosed as a case of Myelodysplastic Syndrome (MDS) and for further management he was referred to Christian Medical College, Vellore

(CMC). His father, Abdul Rashid Shaik, the complainant took his son to CMC on 11-10-2007 and got him admitted in the emergency ward. The

doctors from Hematology Department had examined the patient, performed relevant investigations but, exact diagnosis was not arrived. On the same

day evening patient was shifted to cancer ward and the doctor started cancer treatment without confirmed diagnosis. He was administered powerful

injections for the treatment of cancer, which resulted into serious side effects like, swelling of both legs, below the waist, ankles and also in both

wrists. The treating doctors were informed about the side effects, but there was

no avail. The doctors were still under confusion about the exact diagnosis, and suspecting Tuberculosis also. The patient's sputum was sent for testing but, the cancer treatment was continued.

The Bone Marrow Biopsy was performed and it was diagnosed as Refractory Anemia with Cancer Blast (RAEB, Type II). The OP-1 suggested for

Bone Marrow Transplant (BMT) as one of the best treatment for RAEB Type II. The OP-1 did not explain side effects of BMT, but he informed the

complainant about expenses towards BMT i.e. around Rs.10,00,000/-, and in the event of any complications it might go upto Rs.20,00,000/-. The

complainant due to financial constraints could manage to arrange Rs.6,00,000/- prior to BMT and requested OP-1 to perform BMT. On 15-11-2007,

Allogenic BMT was performed. Even after BMT the swelling of patient's both legs and hands was not cured, same was brought to the notice of

treating doctors, but no convincing explanation received from them. The complainant requested the doctors not to discharge the patient so early, but

the request was turned down stating that, few patients are in a queue after depositing lacs of rupees.

Ultimately, the patient was discharged from CMC on 12-12-2007, though he was not improved. Thereafter, for follow up at CMC, the patient stayed

in Vellore for three months and then returned to Vishakhapatnam. Patient was normal for one year, blood investigations were normal but, he had

severe bony pain in both the legs, there was no swelling. The OP-1 did not make attention to pain during follow up. In January, 2009, for the severe

pain at the shin of left leg, the complainant telephonically contacted the OP-1, who advised to consult local Orthopedic Surgeon at Vishakhapatnam.

Accordingly on 10-02-2009, the complainant took his son to Dr. N. V. Shastry, the Orthopaedic Surgeon. After examination and conducting x-ray,

blood tests, Dr. N. V. Shastry informed the complainant that the pus had formed in the left knee, and prescribed antibiotics. Thereafter, on 23-03-

2009, Dr. N. V. Shastry performed minor surgery and removed pus from left knee. Even then patient had fever and developed a slightly painful

swelling on the shin of left leg. The swelling was increasing in size day by day, therefore, he had difficulty during walking and even to stand up.

Therefore, on 07-03-2009, Dr. N. V. Shastry referred the patient for medical management to a Physician, Dr. J. Raghunath, who further referred the

patient to CMC for further follow up. On 09-03-2009 the complainant took his son to CMC; but OP-1 did not give immediate appointment.

The blood tests on 11-03-2009 were found to be normal. Then the patient was referred to Dr. Kaushik (OP-2) at Orthopaedic Department; who after

long wait examined the patient's left leg. The OP-2 explained that the swelling is harmless, which will subside during the course of time. The OP-

2 also assured the complainant that there should not be any fear about it. Thus, it is clear that, OP-1 being a Hematologist had knowingly suppressed

the BMT related serious side effects and simply misled that it was an Orthopedic problem. The OP-1 failed to advise the MRI or the shin bone biopsy

to avoid such side effects. Thereafter, the patient returned to Vishakhapatnam and consulted another Orthopedic Surgeon, Dr. B. Shivreddy on 17-03-

2009. MRI scan was performed on same day, and it was reported on 23-03-2009. Dr. Shivreddy suspected the life threatening BMT related cancer in

the bone. He had suggested need for immediate biopsy confirmation and further management. Accordingly, he gave a referral letter to the patient for

CMC hospital. On 25-03-2009, the complainant again took his son to OP-1 at CMC, who after perusing the MRI report referred the patient to OP-2

for biopsy. The biopsy from swelling on the shin was performed on 28-03-2009 and it was diagnosed as Low Grade Sarcoma without any metastasis

in the body. The complainant alleged that it was a clear case of BMT related secondary cancer.

2. Till then, complainant had already spent huge amount about Rs.12,00,000/- towards the treatment of his son. The OP-1 despite knowing the

seriousness of disease, did not admit the patient in CMC hospital for the treatment of Sarcoma. On return to Vishakhapatnam, condition of

patient's left leg further deteriorated, became critical and got admitted in Queen NRI Hospital at Vishakhapatnam and ultimately patient was

expired on 11-07-2009. Therefore, the complainant alleged recklessness and negligence on the part of OP-1, Dr. Vikram Mahews and OP-2, Dr.

Kaushik, Orthopaedic Surgeon. It was alleged that severe deficiency in the medical services from the Hematology Orthopaedic Department at CMC.

Therefore, the complainant filed a complaint before this Commission for the relief of Rs.5,00,00,000/-.

DEFENSE :

3. The opposite parties resisted the complaint by filing their written version. OPs denied about the delay in diagnosis or wrong treatment. OPs

submitted that, the patient was treated properly as per standard protocol. The OPs submitted that, the present complaint involves complicated question

of facts which needs detailed evidence and expert opinion, thus, it could not be adjudicated in summary manner under the Consumer Protection Act,

1986. Therefore, the complainant should be directed to seek redressal, if any, through Civil Court. The patient was suffering from fever for one month

after evaluation.

4. Defense by Dr.Vikram Mathew (OP-1) and the Director, CMC(OP-3)

The OP-1 submitted that the patient was brought to CMC for the first time on 11-10-2007, was suffering from fever for one month and difficulty in

breathing since few days. On initial evaluation, there was massive pericardial and pleural effusion. The blood investigations revealed anemia,

thrombocytopenia and circulating Blasts in his peripheral blood. The patient was immediately sent for an emergency Pericardiocentesis (a procedure

where fluid is removed from the pericardium (the sac enveloping the heart) and 750 ml. of fluid was drained out from the Pericardial space.

Therefore, condition of the patient was improved significantly after the Pericardiocentesis. On the same day, patient was then admitted to the ward.

He was diagnosed to have Myelodysplastic Syndrome "Refractory Anemia with Excess Blasts Type II (14% blasts on marrow smear) (hereinafter

referred to as "MDS-RAEB Type II") . Further, cytogenic study was performed, it revealed complex karyotypes, which was the sign of poor

prognosis.

The patient's treatment was started by Hydroxyurea which showed gradual improvement for the next two weeks. The MDS-RAEB Type II is a

pre-leukemic condition which, without treatment, rapidly progresses into an Acute Myeloid Leukemia (AML) and ultimately results into death. It was

a high risk disease because of complex karyotype. To support his contention, OP-1 relied upon the copy of clinical practice guidelines titled Acute

myeloblastic leukaemias and myelodysplastic syndromes in adult patients: ESMS Clinical Practice Guidelines for diagnosis, treatment and follow-up

published in "Annals of Oncology 21(Supplement 5): v158-v161, 2010. In the case of MDS-RAEB Type II one can opt to directly proceed for

BMT without undergoing chemotherapy. The nature of disease and options of therapy were discussed in detail with the patient and his father. On

further evaluation, it was noted that he had Human Leucocyte Antigen (HLA matched sibling) which was a need for a successful BMT. Accordingly,

allogenic bone marrow transplant was decided, which is an internationally accepted standard of care in such patients.

Thus, the allegation of the complainant that he was not explained the effects of BMT is not sustainable. The patient was explained the procedure of

allogenic BMT and informed consent of the patient was taken before the BMT procedure. The combination of chemotherapy/radiation is known as

Conditioning Regime to prepare the patient's body for transplant was started from 09-11-2007. Patient was administered Fludarabine-Melphalan,

which is a standard Conditioning Regime for allogenic BMT, adequate Stem Cell doses from the donor were infused on 15-11-2007. The OP1 relied

upon the article titled "Fludarabine-Melphalan Conditioning for AML and MDS: Alemtuzumab Reduces Acute and Chronic GVHD without

Affecting Long Term Outcomes" published in "Biol Blood Marrow Transplant 15: 610-617 (2009)". During post BMT period the patient was

continued with antibiotics and antifungal, RBC and platelet transfusions. The condition of patient was improved steadily and his normal WBC count

was + 17 and the Platelet count, + 23 post BMT. As the patient, during post BMT period, was given 12 units of Packed Cells and 69 units of Platelets.

He was also administered antibiotics and antifungal 37 days after BMT. Patient showed signs of improvement and on 21 st day onwards, a Chemirism

study revealed 100% of blood cells of the patient were of donor origin, thus, it was a successful BMT. The patient was discharged on 12-12-2007 with

the advice for regular follow up in BMT clinic for every three months.

5. The OP hospital further submitted that on behalf of complainant, some applications were made by OP-3 to organize aid from Prime Minister Fund,

Chief Minister Fund and Ratan Tata Trust. The sum of Rs.6,25,000/- was raised for the treatment of the patient. Out of the said amount, Rs.5,20,709/-

was refunded to the complainant against production of original receipts of payment made. The complainant through his letter dated 28-04-2008 had

acknowledged and appreciated the efforts made by OP-3 for fund raising. The allogenic BMT is an expensive procedure and usually done at private

ward rates. But, CMC hospital, in view of the young age of the patient and financial constraints of the complainant, performed BMT at C rates

(General Ward rate) which was done only in exceptional circumstances. In February, 2009 i.e. after 14 months of discharge from CMC, the patient

had developed pain in the left knee joint with swelling on the shin of the same side.

The patient was initially treated in a local hospital, at Vishakhapatnam with antibiotics for suspected infection. Dr. N. V. Shastry performed Incision

and Drainage (I & D) and removed the pus; but there was no improvement. Thereafter, he was referred to CMC in March, 2009, wherein, on 28-03-

2009, OP-2 performed biopsy from the lesion in the shin. It was reported as â?? Granulocytic Sarcomaâ?, which is essentially Myeloid Leukemia. It

appears as a tumor. It was the only manifestation of the recurrence of MDS RAEB Type II, but not a secondary malignancy, which was explained to

the complainant and his family before the BMT. Even though BMT was the best option, but it does not guarantee cure. In fact, only in 40-50% cases

patients suffering from Myelodysplastic Syndrome (MDS) are reported to be cured. In majority of the cases, recurrence of the cancer was seen. The

counsel submitted that, the post BMT treatment of Granulocytic Sarcoma consists of systemic chemotherapy and palliative therapy, but the success

rate is very low. The OP relied upon two medical articles titled â??Myeloid Sarcoma-Extramedullary Manifestation of Myeloid Disordersâ? and

â??Clinical manifestations, pathologic features and diagnosis of acute myeloid leukemiaâ?.

ARGUMENTS AND FINDINGS

6. I have heard the arguments from the learned counsel for both the parties. The learned Amicus curiae, Ms. Surekha Raman, vehemently argued and

reiterated the submissions made in the pleadings and evidence. She further submitted that at CMC, patient was diagnosed as Myelodysplastic

Syndrome (MDS) but it was not a cancer, but risk of conversion to leukemia was predicted by International Prognostic Scoring System (IPSS). OP1

had not assessed IPSS staging, for the risk of leukemia, but from date of admission, the patient was put on Hydroxy Urea therapy along with blood

components and Antibiotic support. The patient suffered serious side effects, swelling in both hands, legs, ankles and shoulders, etc., alongwith severe

bony pain. OP1 ignored the entire side effects, but repeatedly asked the patient to undergo BMT, as a best option to cure his son. The other senior

doctors did not approve BMT because leukemia was not confirmed. The possibility of Tuberculosis (TB) was also suspected, despite that powerful

cancer drugs were administered, even it was not cancer. OP-1&2 have administered unapproved chemotherapy drugs meant for Leukemia, Chronic

Lymphocytic Leukemia and Multiple Myeloma instead of approved drugs like Azacitidine, Decitabine.

After BMT, patient was taking out door treatment at CMC. The blood report was normal on 29-01-2009, but he had severe pain in left shin (leg bone)

extending to his knee. The OP-doctors totally neglected the patient, the patient developed secondary cancer i.e. Low Grade Sarcoma, there was no

metastasis. Therefore, OP-2 could have operated it and could have treated by combined efforts of surgeon, medical oncologist and radiologist.

Counsel also submitted that it could have treated with newly discovered drug Emetinib. In fact, the drug should have been administered as pre and

post BMT, but OP1 failed to do so. Thus, clearly, OP1 had deliberately suppressed the BMT related secondary cancer and denied to admit the patient

to the hospital for treatment of Low Grade Sarcoma. The counsel brought my attention to the book titled "Fighting Cancer with Knowledge and

Hope authored by Richard C. Frank". She also produced the paper clipping of the Hindu Daily English Newspaper dated 03-03-2010 stating one

article that Dr. Patel acted in haste in the cancer treatment.

7. According to the counsel for OP-1 & 2 the patient was properly investigated and treated properly as per the standard protocol for RAEB Type II.

He further submitted that at the time of admission at CMC the patient had massive Pericardial and Pleural Effusion, it was emergency and drained by

Pericardiocentesis. Patient showed improvement in his condition. After haematological investigation patient was diagnosed to as MDR RAEB Type

II; further cytogenic studies were also performed which revealed Complex Karyotypes. Therefore, IPPS categorization was not necessary. Such

condition without treatment will rapidly progress to AML. The high risk nature of the disease and its treatment aspects was informed to the

complainant. As an exceptional case at CMC, BMT was performed under the General Ward Rates instead of Private Ward Rates. Moreover, the OP

hospital authorities had also assisted the complainant to get financial assistance by submitting necessary application to Prime Minister's Fund,

Chief Minister's Fund and Ratan Tata Trust.

The fund at the tune of Rs.6,25,100/- was raised out of which Rs.5,20,709/- was refunded to the complainant on production of original receipts of the

payments. On 15-11-2007 the BMT was successfully performed after prior administration of Conditioning Regime. The patient was discharged on 12-

12-2007 with an advice for regular follow up at CMC. The counsel further submitted that the complainant through his letter dated 28-04-2008

appreciated and acknowledged the efforts of CMC for giving best treatment to his son and for giving financial aid from various donors. Thereafter, the

patient had suffered pain in his left knee joint alongwith swelling on the shin of the same leg after 14 months and he was treated at local hospital.

However, when his condition failed to improve he was again brought to CMC in March, 2009 wherein he was diagnosed as suffering from

Granulocytic Sarcoma. The counsel also relied upon the expert board opinion received from Tata Memorial Hospital, Mumbai (TMH) which has

opined that the diagnosis and treatment given to the patient was in accordance with prescribed medical protocol.

8. The learned counsel for OPs 1 & 2 argued that after doing all the necessary investigations the patient was treated properly as per the standard

protocol for RAEB Type II. He further submitted that at the time of admission to CMC the patient had massive Pericardial and Pleural Effusion and

the same was drained on emergency basis by performing Pericardiocentesis which showed improvement in the condition of the patient. As the patient

was diagnosed to be MDR RAEB Type II, further cytogenic studies were also performed which revealed complex Karyotypes. Such condition

without treatment will rapidly progress to AML. Considering those findings the IPPS categorization was not necessary.

The patient and complainant was informed about the high risk nature of the disease and its treatment aspects also. The OP hospital considered the

case of complainant as exceptional case and performed BMT under the General Ward Rates instead of Private Ward Rates. Moreover, the OP

hospital has also assisted the complainant to get financial assistance by submitting necessary application to Prime Minister's Fund, Chief

Minister's Fund and Ratan Tata Trust. The funds at the tune of Rs.6,25,100/- was raised out of which Rs.5,20,709/- was refunded to the

complainant on production of original receipts of the payments. On 15-11-2007 the BMT was successfully performed after prior administration of conditioning regime.

The patient was discharged on 12-12-2007 with an advice for regular follow up at CMC. The counsel further submitted that the complainant through

his letter dated 28-04-2008 appreciated and acknowledged the efforts of CMC for giving best treatment to his son and for giving financial aid from

various donors. Thereafter, the patient had suffered pain in his left knee joint alongwith swelling on the shin of the same leg after 14 months and he

was treated at local hospital. However, when his condition failed to improve he was again brought to CMC in March, 2009 wherein he was diagnosed

as suffering from Granulocytic Sarcoma. The counsel also relied upon the expert board opinion received from Tata Memorial Hospital, Mumbai

(TMH) which has opined that the diagnosis and treatment given to the patient was in accordance with prescribed medical protocol.

9. I have perused the entire medical record of the patient and gave thoughtful consideration to the arguments advanced by both the parties. It is an

admitted fact that the patient was diagnosed as MDR RAEB Type II in October, 2007 and he underwent BMT in November, 2007 and was under

regular follow up after discharge. In March, 2009 because of swelling and pain in the left shin (leg) he visited the CMC and consulted OPs 1 & 2.

After examination it was provisionally diagnosed as Extra Medullary Relapse and also the differential diagnosis of tuberculosis was considered. The

true cut biopsy of the swelling was performed and it was histopathologically confirmed as Granulocytic Sarcoma. Thereafter, the treatment

aspects were discussed with the patient and the relatives and, accordingly, the patient was recommended for Cap. Hydroxyurea 500 mg twice daily

and Folic Acid 250 mg once a day.

The patient was advised for follow up with regular blood counts. I have perused the report of Board of Experts from TMH, Mumbai which revealed

that the Board was comprised of the senior consultant in the relevant fields of Medical Oncology and Pathology. The Board opined that the diagnosis

and the treatment offered by OPs was correct as per standard norms. In my

view, the TMH is one of the renowned institute in India and known for research, education and treatment for cancer; the opinion was correct. The opinion was supported by several medical literatures also. The learned counsel for OP relied upon the case law in Ajay Kumar Singh Vs. Lt. Col. Dr. B. P. Singh, III (2010) CPJ 37 (NC), Johnson Thomas & Ors. Vs. Bishop Vayalil Medical Centre & Ors. , III (2010) CPJ 164 (NC), H. R. Megh Vs. Dr. Jasjit Chhachhi Nursing Home & Ors. , III (2011) CPJ 152 (NC), Baby Seema and Anr Vs. State (Govt. of NCT of Delhi) & Ors. , 149 (2008) DLT 132 (DB).

10. I would like to rely upon the decision on Medical Negligence of several judgments of Honâ??ble Supreme Court and this commission. The

Honâ??ble Supreme Court held in C. P. Sreekumar (Dr.) vs. S. Ramanujam, (2009) 7 SCC 130, case as follows:-

â?? the onus to prove medical negligence lies largely on the claimant and that this onus can be discharged by leading cogent evidence. A mere

averment in a complaint which is denied by the other side can, by no stretch of imagination be said to be proved. It is the obligation of Complainant

â??to provide the facta probanda as well as the facta probantiaâ??

In the case Supriya Gupta vs. Trustees of Beach Candy Hospital & Research Centre, IV (2005) CPJ 261 (NC) , it was held by this commission that

â?? hospital cannot be blamed by theories based on probabilities.â??

Thus, in the instant complaint, the complainant had not proved his case. It was his imagination about the tumor in shin of leg due to complication of

RAEB Type II. Also the complainantâ??s imagination was Tuberculosis which in my view appears to be wrong presumption.

11. In Catena of judgments of Honâ??ble Supreme Court and this Commission the principles for judging whether there was Medical Negligence in

the treatment of patient have been enunciated. In Kusum Sharma & Others vs Batra Hospital & Medical Research Centre and others , (2010) 3 SCC

480, the court observed that,

â??50. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is

attended by risks. We cannot take the 25benefits without taking risks. Every advancement in technique is also attended by risks.

51. In Roe and Woolley v. Minister of Health (1954) 2 QB 66, Lord Justice

Denning said

: 'It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought to be on our guard against it,

especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind but these benefits are attended by

unavoidable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is

also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way.

12. In another case *Achutrao Haribhau Khodwa and others versus State of Maharashtra and others* (1996) 2 SCC 634 Hon^{ble} Supreme Court

has made the following observations:

â??The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course

of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has

performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken

by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession, and the Court finds that he has

attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to

hold the doctor to be guilty of negligence.â??

13. In the case of *Dr. Laxman Balkrishna Joshi vs . Dr. Trimbark Babu Godbole and Anr.*, AIR 1969 SC 128 and *A.S.Mittal v. State of U.P .*, AIR

1989 SC 1570, it was laid down that certain duties of doctor which are: (a) duty of care in deciding whether to undertake the case, (b) duty of care in

deciding what treatment to give, and (c) duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of

action for negligence and the patient may on that basis recover damages from his doctor.

14. Bearing in mind those principles, in my opinion OP-1 and OP-2 had followed and treated the MDS RAEB Type II patient as per Standard

Protocol. I do not find any breach of their duty of care. In my view, the patient was suffering from high risk disease and the BMT was post suited

treatment which was given by OPs. It is known fact that only 52% cases suffering from MDS are cured while in majority of cases recurrence is

seen. In the instant case, there was a relapse of myeloid leukemia after 14 months of BMT. Therefore, chances of cure with chemotherapy were

unlikely, thus, only palliative treatment was suggested.

Thus, there was no negligence or deficiency in service on the part of the OPs. It is also proved from the expert opinion from TMH that the treatment

given by OP is in accordance with the established medical protocols. The doctors have performed their duties and exercised ordinary degree of care

and skill. Thus, I do not think they are liable for any medical negligence. I would like to mention that due to financial constraints the OP hospital

performed BMT at general ward rates as an exceptional case and also availed aid from PM fund, Chief Minister fund and Ratan Tata Trust. CMC

assisted the complainant and raised sum of Rs.6,25,000/-. Thus, the complainant's allegation regarding refusal of OPs in giving concession in the

rate of treatment and harassment of the complainant is false and baseless.

15. Based on the discussion above I do not find any merit in the instant complaint. Therefore, the same is hereby dismissed. However, there shall be

no order as to cost. I appreciate the efforts of learned amicus curiae for the arguments on the medical negligence case. Since this complaint took

almost one decade I feel proper to grant Rs.10,000/- to the learned amicus curiae as additional fees. The Registry is directed to pay Rs.10,000/- to the

learned amicus curiae within a week from today.