

(2010) 02 NCDRC CK 0009

In the National Consumer Disputes Redressal Commission

Ajay Gautam

APPELLANT

Vs

Amritsar Eye Clinic And 6/6 Lasik Laser Centre

RESPONDENT

Date of Decision : 26-02-2010

Acts Referred:

Citation : 2010 1 CPR 22 : 2010 2 CPJ 225

Hon'ble Judges : R.C.Jain , Anupam Dasgupta J.

Final Decision : Appeal partly allowed

Judgement

1. MR. Justice R.C. Jain, Presiding Member-Agrieved by the order of dismissal of his complaint claiming a total compensation of Rs. 21,25,000 from the opposite party-hospital and the doctor for alleged medical negligence and deficiency in service vide order dated 22.9.2004 by the Uttaranchal State Consumer Disputes Redressal Commission (in short, "the State Commission") in complaint case No. 17/02, the original complainant has filed the present appeal.

2. THE facts and circumstances leading to the filing of the complaint have been amply noted by the State Commission in the impugned order and we do not wish to repeat the same in detail. However, for the purpose of deciding the present appeal, it may be noticed that the appellant, Ajay Gautam after obtaining degree of B.E. (Mechanical Engineering) with distinction in the year 1999 had joined Punj Lloyd Ltd., Delhi as an Engineer. He had high aspirations to join the Indian Air Force, Defence Services, Railways or some big private sector undertakings. His vision of both the eyes was 6/6 but his eyes refractive power was beyond (-3.5D / + 3.5D) which was the prescribed specification for undertaking competitive examinations for entrance to the above service and thus he was ineligible. In the month of October 2000, he came across an advertisement of the opposite party-hospital-6/6 Lasik Laser Center, holding out claims about doing away with the need for spectacles through laser surgery to bring the refractive power to zero (o) without any adverse effect on visual acuity. On 21.10.2000, the complainant-appellant met opposite party No. 2-Dr.Dinesh Sharma for his aforesaid treatment and after examination of his eyes, Dr.

Sharma assured and promised to him (complainant) that through lasik surgery P.R.K., he would bring the refractive power of his eye to zero without any effect on visual acuity and that the problem would not recur. Believing the said assurance and promise of Dr. Sharma, the complainant agreed to undergo P.R.K. surgery on 23.10.2000 and paid a sum of Rs. 6,000 for the procedure. Dr. Sharma conducted the P.R.K. surgery on the left eye of the complainant and discharged him on the same day to take rest upto 28.10.2000. The complainant alleged that after the surgery, his left eye became hypermetropic due to which he could not see the near and distant objects clearly. He met the doctor on 28.10.2000 for check-up and after examination the doctor found that the vision of the complainant was 6/9. The doctor prescribed certain medicines with the assurance that vision would normalize after sometime but despite taking the medicines, there was no improvement and the problem of the complainant increased day-by-day. It is the case of the complainant that even after 16 months of the surgery, the vision of the complainant had not stabilized and complainant's best visual acuity did not improve to 6/6 and continued to be 6/9. Complainant consulted another doctor at Gwalior who advised him that his vision in the left eye would remain 6/9 and he could not attain 6/6 vision by any treatment. Besides, he was also informed that there was dual vision (+) / (-) in the operated eye. The complainant alleged that due to the said post-surgery problem / complication, he had to resign his job with Punj Llyod and had to shift to his native place, Gwalior. He claimed that he was a bachelor aged about 24 years at the time of surgery and that reduced vision in his eye had diminished his future prospects of undertaking competitive examinations for various services as also his marriage prospects. The complainant attributed the said reduction in the vision in his left eye due to the negligence on the part of the doctor in conducting the said procedure.

3. THE complaint was resisted by the doctor not denying the facts about he having conducted the P.R.K. surgery on the left eye of the complainant but it is denied that he committed any negligence or deficiency in service in doing so. It was denied that before surgery, vision of both the eyes of the complainant with or without the aid of glasses was 6/6 and it was sought to be explained that since number was 4.5 diopters spherical with minus one cylindrical, his vision without glasses was less than 6/60. It was further sought to be explained that the vision of both the eyes of the complainant without spectacles was less than 6/60 and after the surgery performed, the vision improved to 6/9. It is not denied that the advertisement was published by the opposite party-hospital but it is denied that such an advertisement was misleading in any way. It is also denied that any assurance or guarantee was given to the complainant that his vision after the operation shall be 6/6 without glasses. It is claimed that after the complainant gave his voluntary consent and understood the implication of the procedure, the surgery was performed. It is stated that on examination on 28.10.2000, it was found that vision in the eye of the complainant had improved to 6/9 without aid of glasses as he could read 6 lines as per Snellen's Chart, i.e.,

the standard chart whereas prior to the surgery, he could not read any line without glasses. It is denied that there was any negligence in conducting the PRK surgery on the left eye of the complainant and it is maintained that the requisite medical protocol was maintained in that behalf. Doctor claimed that he is an expert in conducting the P.R.K. procedure and had conducted innumerable operations during last 20 years of his practice. Insurance Company also resisted the claim but admitted that doctor had taken insurance to the tune of Rs. 5,00,000 and liability, if any fixed on the doctor, the liability of the Insurance Company will be limited only to Rs. 5,00,000.

4. IN support of their respective pleas, parties filed their own supporting affidavits and the opposite party - doctor also filed the affidavit of Dr. S. Bharti with whom the complainant had consultation subsequent to P.R.K. procedure performed by the doctor. The State Commission, going by the respective pleas and material brought on record and bearing in mind the settled legal position as to when a doctor or hospital can be said to be medically negligent or deficient in service, held that the complainant failed to establish any negligence or deficiency in service on the part of the opposite party-doctor and, consequently, dismissed the complaint.

5. WE have heard Mr. Ajay K. Sharma, Advocate, learned Counsel for the appellant and Mr. Aditya Narain, Advocate learned Counsel representing respondent Nos. 1 and 2 and Mr. Kundan Kumar Lal, Advocate, learned Counsel representing respondent No. 3 and have given our thoughtful consideration to their respective submissions. After making arguments at length, Counsel for the parties suggested to the Commission that in order to resolve the controversy effectively, opinion of an independent expert/body of experts may be obtained as no expert opinion was produced by the appellant-complainant before the State Commission. Accepting the said suggestion of the Counsel, the Commission requested the Director, Rajendra Prasad Centre for Ophthalmic Sciences (All India Institute of Medical Sciences), New Delhi to constitute a Board of doctors of the relevant disciplines in order to examine the medical record of patient and give its opinion on the following points: 1. Whether the PRK surgery was advisable in this case, according to the standard medical? 2. Whether the PRK procedure was conducted in this case according to the standard medical protocol in this regard? 3. Whether the post-operative care given in this case was also regarding to the standard requirement in this behalf? 4. Whether the post PRK vision of 6/9 (without glasses) in the left eye of the patient and the inability of this vision to be further corrected even with glasses was on account of the PRK procedure and, if so, whether this was indicative of any deficiency in the PRK procedure?

6. PURSUANT to the said directions of the Commission, Dr. Supriya Ghose, Professor of Ophthalmology, Rajendra Prasad Centre for Ophthalmic Sciences, AIIMS has submitted a report dated 23.10.2009 answering, the specific queries raised by the Commission in the following manner: "A1. Yes, PRK surgery is one

of the standard techniques for correction of refractive errors and was advisable as per standard medical protocol in this case as per the records made available. A.2 PRK by excimer laser is largely an automated procedure in which the refractive error of the patient is fed into the laser machine, after which the laser is aimed at the eye of the patient to automatically correct the refractive error as per set-up parameters of the machine. This is the standard protocol which is used for this procedure worldwide, and must have been followed here also with the imported machinery being used in our country. A3. Yes, post-operative treatment after PRK uniformly consists of topical antibiotics and steroids, which is the standard protocol, and was followed in this case as per the records. A4. PRK corrects the refractive error and results can vary depending upon the healing response of the cornea in individual patients and eyes. Unaided 6/6 vision cannot be guaranteed to any patient irrespective of the actual surgical technique used, as there is often a minor refractive error remaining after the procedure, and there is also some risk of overcorrection. Unaided 6/9 vision is not an uncommon occurrence after PRK and does not indicate any deficiency as such in the procedure-however visual acuity, if not acceptably correctable with glasses post-PRK, may be further improvable with contact lenses or re-surgery. The patient may be referred/suggested for consultation [for retesting spectacle/contact lenses or possibility of further laser surgery] to any suitable recognized tertiary refractive eye surgery centre, where best possible efforts would surely be made to alleviate the visual and other difficulties/ complaints of the patients, and also to treat the fellow eye for better binocular unaided vision/BCVA. Professor Dr. Supriya Ghose after answering the queries summarized his opinion and gave suggestion as under: "In summary, it appears that the attending doctor/s followed standard medical protocol according to the patient's condition. However, most unfortunately, the patient had a slightly untoward outcome from his perspective. As the records made available suggest, there is no evidence of any wilful negligence on the part of the doctor/s or any medical negligence, but a known biological aberration of the effect of the laser procedure. Though we empathize with the high expectations of the patient about the precise perfection in the surgical outcome of the procedure (on one eye), such marginal variations are well documented in a significant percentage of such procedures and would not amount to culpable negligence."

7. SINCE it was alleged on behalf of the appellant that no consent of the complainant was obtained by the doctor before conducting the PRK surgery, we called upon the opposite party-doctor to produce the consent form which he claimed to have got signed from the complainant before undertaking the procedure. However, respondent-doctor reported that the said consent form obtained from the complainant was not available in his records but still he could file photocopies of consent form obtained from other patients who had undertaken PRK surgery at his hospital in order to show that he had been obtaining valid consent from the patients before performing the surgery.

8. MR. Sharma, learned Counsel for the appellant would assail the finding and

impugned order of the State Commission as erroneous and not based on correct appreciation of the facts and circumstances of the case and the evidence and material produced on record in reaching the conclusion that complainant has failed to establish any medical negligence on the part of the doctor and hospital. In this connection, he pointed out that not only the doctor failed to correct the refractive power which he assured to do by performing P.R.K. surgery but the said procedure had led to the reduction in the vision of his operated eye from 6/6 to 6/9. On the other hand, Mr. Aditya Narain, Counsel for the respondent hospital and doctor supported the finding of the State Commission and placed heavy reliance on the opinion expressed by Dr. Supriya Ghose on this aspect. In response to query No. 4 of this Commission, the above named expert has clarified the position by observing that "unaided 6/6 vision cannot be guaranteed to any patient irrespective of the actual surgical technique used, as there is often a minor refractive error remaining after the procedure, and there is also some risk of overcorrection. Unaided 6/9 vision is not an uncommon occurrence after PRK and does not indicate any deficiency in the procedure". We have no reason to discard this opinion which has ruled out any deficiency in the procedure. We, therefore, reject the contention of the learned Counsel of the appellant that there was any deficiency in conducting the PRK surgery on the left eye of the complainant, as a result of which the unaided vision has settled at 6/9.

9. NOW, we come to the next contention of the Counsel of the appellant that the respondent-doctor and hospital are guilty of adopting unfair trade practice by publishing a misleading advertisement in the newspapers. It is not disputed that the respondent was a qualified Ophthalmic surgeon having specialty and expertise in conducting PRK surgeries. This is apparent from the copies of the degrees and certificates produced on record which we have no reason to disbelieve. However, the important question is as to whether despite possessing such qualification, expertise and experience, the opposite party-doctor could have published the advertisement making the kind of claims in the said advertisement. Copies of the advertisements published in local daily Amar Ujala have been placed on record which is reproduced below: ("Advertisement in Hindi omitted")

10. NOW, it is to be seen if the opposite party-doctor was entitled to publish such an advertisement or whether it was unethical on his part to do so. In this context, we may notice the injunction of the Medical Council of India under Regulation No. 6.1 of the Code of Ethics Regulations 2002, which reads as under: "Chapter 6 6. UNETHICAL ACTS: A physician shall not aid or abet or commit any of the following acts, which shall be construed as unethical- 6.1 Advertising: 6.1.1 Soliciting of patients directly or indirectly, by a physician, by a group of physicians or by institutions or organisations is unethical. A physician shall not make use of him/her (or his/her name) as subject of any form or manner of advertising or publicity through any mode either alone or in conjunction with others which is of such a character as to invite attention to him or to his professional position, skill, qualification, achievements, attain-ments, specialties,

appointments, associations, affiliations or honours and/or of such character as would ordinarily result in his self-aggrandizement. A physician shall not give to any person, whether for compensation or otherwise, any approval, recommendation, endorsement, certificate, report or statement with respect of any drug, medicine, nostrum remedy, surgical, or therapeutic article, apparatus or appliance or any commercial product or article with respect of any property, quality or use thereof or any test, demonstration or trial thereof, for use in connection with his name, signature, or photograph in any form or manner of advertising through any mode nor shall he boast of cases, operations, cures or remedies or permit the publication of report thereof through any mode. A medical practitioner is however permitted to make a formal announcement in press regarding the following: 1. On starting practice. 2. On change of type of practice. 3. On changing address. 4. On temporary absence from duty. 5. On resumption of another practice. 6. On succeeding to another practice. 7. Public declaration of charges. 6.1.2 Printing of self-photograph, or any such material of publicity in the letterhead or on sign board of the consulting room or any such clinical establishment shall be regarded as acts of self-advertisement and unethical conduct on the part of the physician. However, printing of sketches, diagrams, picture of human system shall not be treated as unethical." Clearly the doctor violated the above mentioned Regulation which by itself was unethical conduct and hence constitute deficiency in service. Moreover, the contents of the advertisement appear to be prima facie misleading to the reader inasmuch as it gives an impression that any defective vision could be corrected to the normal vision of 6/6 at respondent No. 1-hospital by the use of the excimer laser machine acquired by the respondent Nos. 1 and 2. The complainant states that having come across such a misleading advertisement, he contacted respondent No. 2-doctor who also gave assurance and promised that defect in his eye would be fully corrected and cured and only thereafter he agreed to undergo the PRK surgery at the hands of the respondent-doctor. The respondent-doctor denies that he had given any such assurance / promise. The expert medical opinion received from the Rajendra Prasad Centre for Ophthalmic Sciences would clearly show that such a claim as was published in the above mentioned advertisement was untenable altogether and, therefore, amounted to representation by the respondent-doctor which could not have been fulfilled. The respondent-doctor also claimed that he had explained the implications of such a surgery and had obtained the consent of the complainant. As noticed above, the doctor and the hospital have failed to produce the consent form which the complainant had purportedly signed before undergoing the PRK surgery. However, reliance is placed on the format of other consent forms obtained from other patients which contain some admissions on the part of the patients that they had been explained the implications of the procedure.

11. HAVING considered the matter in its entirety, we are of the opinion that the finding of the State Commission that the complainant has failed to establish any negligence/deficiency in service on the part of the respondent-doctor and

hospital in giving him the treatment by way of PRK surgery is justified on record and needs no interference. However, it has also been established on record that the doctor and the hospital are guilty of adopting unfair trade practice within the meaning of Section 2(1)(r) of the Consumer Protection Act, 1986 as well as violating the Code of Ethics Regulations (Regulation No. 6.1) by publishing misleading advertisement. They are also held guilty of not having been able to produce / maintain the record, i.e., consent form said to have been signed by the complainant before undertaking PRK surgery. The complainant is entitled to some reasonable compensation on these two counts.

12. IN our view, it would meet the ends of justice if respondent Nos. 1 and 2 are called upon to pay lump sum compensation of Rs. 1,00,000 to the complainant on these counts and a direction is given to respondent No. 1 and the doctor to forthwith withdraw any such advertisement in electronic, print or any other media and desist from doing so in future.

13. IN the result appeal is partly allowed and respondent Nos. 1 and 2 i.e. hospital and doctor are hereby directed to pay lump sum compensation of Rs. 1,00,000 to the complainant and also to give an undertaking before this Commission that he will not publish any such advertisement in future within a period of four weeks from the date of receipt of order. However, in case the amount is not paid within the prescribed period, it will carry interest @ 12% p.a. Appeal partly allowed.