(1993) 08 NCDRC CK 0043

In the National Consumer Disputes Redressal Commission

BHAV HANDBHAI MANJIBHAI LAKHANI — APPELLANT

Vs

BHUPENDRA D.SAGAR — RESPONDENT

Date of Decision : 26-08-1993

Acts Referred:

Citation : 1994 1 CPJ 361

Hon'ble Judges : P.M.Chauhan , R.K.Shah J.

Final Decision : Complaint allowed

Judgement

1. THE complainant has claimed the amount of Rs. 1,03,300/- from the opposite party Dr. Bhupendra D. Sagar for negligence in performing the operation of the neck of femur of the complainant on 19.2.91 in the nursing home of the opposite party. THE complainant met with the accident on 18.2.91 and was admitted in the nursing home of the opposite party and on taking X-ray it was found that fracture to left hip was caused by the accident. THE opposite party advised for immediate operation and also promised that the complainant would be completely cured within three months. THE operation was performed on 19.2.91 under general anaesthesia and the total expenses to the complainant for that operation was Rs. 17,000/-. THE complainant was indoor patient for about 10 days and then was discharged with the advice not to make any movement. According to the complainant he was confined to bed upto 1.5.91 and had complained to the opposite party several times about the pain at the place of the operation and the opposite party had given him consolation and stated that some pain will be there but will be cured. On 1.5.91 the complainant was taken to the opposite party and when X-ray was taken, he came to know that operation had failed and that was only because of the negligence of the opposite party. According to the complainant the bone was not properly fixed and was fixed at upper portion and left leg shortened by 2.5 inches. THE opposite party on referring the X-ray admitted that the operation had failed and advised for second operation and assured no such negligence would occur during the second operation and the complainant will be completely cured. As the complainant had lost confidence in the opposite party he consulted another orthopaedic surgeon

Dr. Aditya Upadhyaya who operated him on 7.5.91. Dr. Upadhyaya had examined and had given certificates to the complainant which are produced on the record. THE complainant had incurred the expenditure of Rs. 10,500/- for the second operation. THE complainant could not attend the duty from 18.2.91 to 9.10.91 because of the negligence and defective operation by the opposite party. THE complainant has accordingly claimed Rs. 17,000/- for the operation performed by the opposite party, Rs. 10,500/- for the expenses for the second operation, Rs. 25,800/- for loss of salary, Rs. 30,000/- for pain and suffering and Rs. 20,000/- for mental agony to the complainant and his family and Rs. 500 /- for the cost of the complaint and 18% interest on the amount awarded.

2. THE opposite party by reply (Exh. 8) contended that this Forum has no jurisdiction as services of the doctor cannot be considered to be "service" under the provisions of the Consumer Protection Act, 1986 and that disputed questions of fact and law are involved and, therefore, the complainant should be directed to file civil suit. THE complainant has got Rs. 42,000/- from *New India Assurance Company as personal accident compensation and has also filed motor accident claim petition as he was owner and driver of the scooter involved in accident. Admitting the fact that the complainant was admitted in the nursing home of the opposite party it is stated that on 18.2.91, on X-ray being taken it was diagnosed that the left hip was fractured and the complainant had transcervical fracture neck of femur and was advised operation. According to the opposite party the complainant was explained that because of the critical blood supply to head of femur, as proxinal fracture frgnent was very small, chances of nonunion and avascular necrosis are very high as compared to other fracture. THE complainant was also advised to take rest for long time to heal the fracture after operation and during that period of union muscle-force or movement in bed or premature weight bearing may displace the fracture. THE complainant was also explained that if the fracture did not get united he will require to undergo second surgery. THE complainant then agreed to undergo the operation and signed the consent paper. According to the opposite party 25 to 30% rate non-union, delayed union and avascular necrosis do occur and they are beyond the control of the surgeon. On 19.2.91 the opposite party performed the operation by which after closed reduction of fracture neck femur, 3" sp. nail with 4 hole plate after medical displacement osteotomy was put and boot plaster was given. THE operation was performed according to the standard method and after the operation X-ray was taken which showed fracture was well reduced and implants were in proper position. All these facts are stated in the case papers produced. According to the opposite party, inspite of the post-operative good care, good general condition fracture did not unite even after 6 months, as it had remained unsolved fracture, because of short fragnent. THE complainant was discharged from the clinic on 28.2.91. It is contended by the opposite party that it appeared that the complainant had not taken proper care after the operation and after discharge from the clinic and there was loss of fixation as fracture had not united within 2.5 months as it was the case of delayed union and it had taken atleast 8

months to unite the fracture. THE X-ray had showed that fracture had not united which has resulted in loss of fixation. THE complainant had not complained for pain from time to time. It is also stated by the opposite party that X-ray was taken on or about 1.5.91 which showed that there was non-union of the fracture which resulted in the loss of fixation. It is denied that the operation was unsuccessful and that too because of the negligence of the opposite party. It is also stated that due to the improper care at home and after discharge from clinic there was loss of fixation because of the delayed union of fracture. Improper care knowingly or unknowingly weight bearing on the left foot would have caused loss of fixation which in turn would show shortening of the leg. THE opposite party stated that it appears that the complainant had taken further treatment from Dr. Aditya Upadhyaya and got further operation, performed by him. From the admitted fact by the opposite party in the written reply as well as in the evidence it is clear that closed reduction of fracture neck femur was done and nail and plate were fixed but the fracture did not unite and the loss of fixation had also caused. According to the opposite party when the operation was performed the reduction was perfect but subsequently after leaving the clinic the complainant must hot have taken proper care and, therefore, the bones did not unite and loss of fixation also occured. It is admitted that the plaster was done and the complainant was advised rest. The complainant has clearly stated that he was feeling pain at the place of fracture and had complained to the opposite party often but he was only given consolation. It is quite natural that when the fracture had not united and loss of fixation had taken place, the complainant would feel pain and he would consult the opposite party who had performed the operation. As such there is no reason not to accept the evidence of the complainant on this point. When the plate was fixed, it is quite natural that the complainant must have taken proper care as he was practically confined to bed and, therefore, the question of not taking proper care or weight bearing on left leg did not arise. In such circumstances, as such, the complainant would not take any weight even of the body on the left leg. It therefore cannot be accepted that the non-union of the fracture must be because of not taking proper care by the complainant or taking weight on the left leg. The evidence is clear that subsequently, Dr. Upadhyaya performed the operation on 17.5.91 and after that the bones have united and the shortening of the left leg is also reduced. That establishes that there were no other reasons as contended by the opposite party for which the non union of bones had taken place after the operation by the opposite party. If that would have been the position, then the bone would not have united after the operation by Dr. Upadhyaya.

It is required to be considered as to whether the opposite party was; negligent in performing the operation i.e. in fixing the nail and plate screw etc. and that resulted into nonunion of the bones and required second operation. The eveidence of Dr. J.P. Pandit (Exhs. 18) examined by the opposite party as expert is much relevant to ascertain the negligence of the opposite party. Dr. Pandit on verifying the X-ray (Exhs. 15/1 to 15/5) produced by the opposite party and Exh.

14/1 to 14/8 produced by the complainant stated that on seeing the X-ray Exh. 14/6 which was taken after the operation was over, the nail and screw were fixed for fixing the fractured bones and in his opinion the screws were properly fixed and operation was properly done. On referring to X-ray Exh. 14/7 and Exh. 14/8 Dr. Pandit stated that both the X-rays are practically similar and can be seen that both the parts of the fractured bones could be seen separate and such position may not be seen if the X-ray is taken immediately after the operation. In cross examination Dr. Pandit admitted that the screw and nail should be perfectly fixed and if they are loose it could amount to negligence of the doctor. The nail should be slightly shorter than the joint length of femur head and if it is longer then it would cause damage. In X-ray it can be seen that the screw projects outside the bone but according to Dr. Pandit that would not cause any damage. If the patient has taken rest as per the advice of the doctor, X-ray taken after two months should be the same and nail and plate must be in same position they were when the X-ray was taken after the operation. Dr. Pandit admitted that no referring X-ray (Exh. 14/7) the screw is about 1 cm. above the bone and if such fixation is done it is not proper. In his opinion the reason for that may be that the bone has not properly joined. As the fracture did not join it had contracted and because of that the screw must have come out. In his view the possibility of 40% non-union inspite of the operation carried on is without any negligence and with all precautions.

3. THE opposite party Dr. B.D. Sagar admitted that on, 1.5.91 he had advised the complainant and, therefore, the X-ray (Exh. 14/8) was taken at Shreeji X-ray clinic. He admitted that it could be clearly seen that in X-ray (Exh. 14/6) slight distance between the screw and nail is there. He admitted that the position of the nail has changed and that could be seen in X-ray (Exh. 14/7) but according to him that X-ray was also taken after two months after the operation and the position of the nail has changed because of the change in the position of the segment of the bone. He denied that X-ray was taken immediately after the operation but had to admit that the date was not written on that X-ray. He admitted that the X-ray (Exh. 14/6) was taken on the date of the operation but according to him that was not the last X-ray. According to him he had performed the operation properly but the bone has not united because of the subsequent movement of the bone. He also admitted that the complainant was plastered on the feet so that the movement of the leg would not take place. According to him there was possibility of the fractured bone moving because of its slightest movement. According to him X-ray (Exh. 14/7) was taken by him when the complainant went to consult him subsequently and for the purpose of more certainty sent the complainant to the X-ray clinic and X-ray (Exh. 14/8) was taken. From the above discussion and evidence of opposite party Dr. B.D. Sagar and Dr. J.P. Pandit, it is clear that the fracture has not united, head of the screw is above the bone and if such fixation is done, then it will not be proper fixing of the plate. Admittedly, the X-ray (Exh. 14/6) was taken immediately after the operation and in that also the head of the screw can be conveniently seen by

naked eye above the bone. It is also clear that the nail and screw are fixed in such a way that the head of the sere w can be seen above the bone. The head of the nail also could be seen above the bone and nail and the screw are see above the bone and nail and screw are in such a position that the ends are practically adjacent to each other and the position of the nail is land. That establishes the negligent manner in which the nail and screw were fixed which resulted into non-union of the bone and consequently the suffering to the complainant. The say of the opposite party that the X-ray (Exh. 14/6) even though taken by him on the date of the operation was not final cannot be accepted as it is clear that the position of the nail and screw are practically similar as seen in the X-ray (Exhs. 14/7 and 14/ 8). Irrespective of the evidence of the complainant, the facts discussed establish the negligence of the opposite party. The evidence of the complainant also clearly leads to the same conclusion and rules out the possibility of any weight bearing on the left foot or movement which might have disturbed the segments. His evidence is that after the operation he stayed in the clinic for about 10 days and then was discharged and was confined to the bed for about two months. As he was not cured, he then consulted the opposite party on 1.5.91. Dr. Sagar then instructed him to get the X-ray by Radiologist and, therefore, he got the X-ray from the Radiologist having clinic nearby the clinic of Dr. Sagar. That X-ray was shown to the opposite party and after seeing the X-ray he told that the leg had shortened by 1" and the bone had not united. Dr. Sagar also told that he would be required to be operated again and he will also consult another doctor and steel bowl will have to be fixed. After two days he again consulted the opposite party Dr. Sagar and at that time he advised for operation and told that his fees will be about Rs. 5,000/- but that would be settled subsequently. As he suspected Dr. Sagar, he ultimately consulted Dr. Deepak Bhatt and Dr. Upadhyaya. Dr. Upadhyaya told him that bowl not required to be fixed but operation would be necessary for femur as the bone which was fixed by Dr. Sagar was at higher level and it was defective. Dr. Upadhyaya had also seen the X-ray which were taken by Dr. Sagar at the time of operation and on verifying those X-rays also he stated that the plate was not properly fixed as the screws were not fixed right and the ends of the nails and screw had touched each other at the inner portion and it meets with each other and because of that the adjustment of both the bones was not proper and have not united. The complainant specifically stated that he had followed all the instructions issued by the opposite party and he had never fallen down or was not even getting up for any cause. In cross examination by learned Advocate for the opposite party also he stated that Dr. Upadhyaya had told him that the operation was not properly performed by the opposite party. He denied that Dr. Sagar had not told him that the operation has failed. Producing all the X-rays which were given to him by Dr. Sagar he stated that Dr. Sagar had told him that it may take some time for re-union of bones and because of the movements or lifting the weight union of the bones may get separated. He denied that he had not taken proper care at the time of operation. As such there is no reason to disbelieve the evidence of the complainant. His evidence also has been corroborated by other evidence and

specifically the fact that the bone has not united and after subsequent operation, the bones united and he is practically cured.

4. HAVING considered all the evidence as discussed-, we are of the view that the operation failed because of the negligent manner in which the operation was performed by the opposite party. The complainant therefore should be compensated. Even though it was contended in the pleadings that the services of the doctor are not covered within the provisions of the Consumer Protection Act and, therefore, this Commission has no jurisdiction, that contention is not asserted at the time of argument and rightly in view of the judgment by honourable National Commission that the services of the doctor are also covered and the complaint can be filed against the medical practitioner for the compensation for negligence. The complainant has admitted in his rejoinder that he has received Rs. 31,000/- for the expenses of the operation and medicines etc. under the group insurance taken by the mill where he is serving. The complainant should not be awarded double benefit for the expenses incurred for operation and medicines. For both the operations and medicines the expenses were not more than Rs. 31,000/- and, therefore, the complainant is not entitled to any amount for operations and medical expenses. The complainant should however be awarded for pain and suffering and strain and mental agony he had to undergo because of the negligence of Dr. Sagar. The complainant has claimed Rs. 30,000/- for himself and Rs. 20,000/- for the family members who had to undergo mental strain and agony. The complainant should not be awarded for the mental agony etc. for family members. The complainant should be awarded Rs. 20,000 /- for pain,. suffering, mental agony etc. as he has to undergo certain operation and had to confine to bed. The complainant has claimed Rs. 25,800/- for loss of the pay as he could not attend duty from 18.2.91 to 9.10.91. As such even if the first operation would have been successful, the complainant would not have attended the duty for about atleast 5 months. The amount of Rs. 9,675/- therefore should be awarded for the loss of pay for three months at the rate of Rs.3,225/- per month. The complainant therefore should be awarded Rs. 29,676 /- with 12% interest from the date of the order. The opposite party should pay Rs. 3,000/- for the cost of the complaint. We, therefore, pass the following order. ORDER The opposite party to pay Rs. 29,675/- to the complainant with running interest @ 12% from the date of the order till realisation and Rs. 3,000/- for the cost within one month from the date of receipt of the order and shall bear its own cost. Complaint allowed. _____

