**(2006) 01 NCDRC CK 0029**

**In the National Consumer Disputes Redressal Commission**

CONSUMER EDUCATION AND RESEARCH SOCIETY — APPELLANT

Vs

Prakash R Modi — RESPONDENT

**Date of Decision :** 09-01-2006

**Acts Referred:**

**Citation :** 2006 1 CPJ 537 : 2006 2 CPR 244

**Hon'ble Judges :** M.S.PARIKH , JATIN P.VAIDYA J.

## Judgement

1. COMPLAINANT No. 1 is a renowned consumer organisation, who has proposed the cause of aggrieved complainant Nos. 2 and 3 in this complaint. Anjanaben, since deceased happened to be complainant No. 2s wife and complainant No. 3s mother. She will also be referred to as the patient herein. Brief allegations of facts as contained in the complaint might be stated.

2. AS the 1st son was born in Modi Hospital under the care of first opponent, she was taken up for pregnancy checkup to 1st opponent on 7.2.1996. Opponent No. 3 Dr. M.I. Patel carried out sonography on 8.2.96 under the instructions from opponent No. 1. The blood and urine tests were performed at Santram Laboratory at Nadiad on 16.2.96. Opponent No. 1 diagnosed from the reports that the patient had pregnancy of 8 weeks. The sonography report, however, revealed two possibilities. 1st opponent suggested that if the foetus was to be saved, removal of cyst would be necessary by undertaking surgical process within 15 days as the foetus might be affected and the patients life might be endangered. Accordingly, operation was to be performed on 22.2.96. It has been alleged that opponent No. 1 opined that no blood would be required. It has also been alleged that since the patient never complained of symptoms related with such a huge cyst, opponent ought to have gone for further extensive abdominal sonography and in not doing so opponent No. 1 displayed lack of professional duty and responsibility. At around 6.30 a.m. on 22.2.96 Anjanaben was taken up for surgery to remove cyst. Complainant No. 1s consent was obtained for the operation. After around half an hour (around 7 a.m.) the 1st opponent came out and informed that it was necessary to call a senior surgeon. Complainant No. 2,

 

though insisted, was not allowed to see his wife. Even the relatives present were not allowed to see the patient Anjanaben. Dr. Jitendra Patel, Senior surgeon - opponent No. 2 reached there at the first opponents request and joined in operation. At around 7.45 a.m. 1st opponent informed the complainant that upper portion of the mesenteric cyst was operated but lower portion would be removed later on account of very big size of the cyst. Complainant No. 2 was permitted to remain present in the operation theatre but having gone there, he could not bear the sight of his wife lying unconscious. He, therefore, came out of the operation theatre. At about 9 a.m. 1st opponent came out and showed the cyst saying that the patients condition was normal. She was shifted to the ward at around 9.15 a.m. At about 10.30 a.m. she regained consciousness and started complaining of severe pain in abdomen. She was not able to pass urine. After being called, first opponent attended the patient at around 3 p.m. Injection Lasix was given to the patient. Further amount of Rs. 5,000 was paid for 2nd opponent Dr. Jitendra Patel but no receipt was given. The patient did not pass urine till 5 p.m. despite Lasix injection. Pain in her abdomen continued. At about 5.30 p.m. one injection was given but of no effect even till next day i.e. 23.2.96. So, blood test was carried out at Alpa Laboratory, Petlad. The report showed 65 blood urea, 191 random blood sugar and 3.8 creatinine which were above normal.

3. BECAUSE of the rapidly deteriorating condition of the patient, she was removed to Muljibhai Patel Urological hospital, Nadiad, under the advice of 1st opponent at about 1.30 p.m. on 23.2.1996. All the three opponents accompanied the patient and her relatives to Nadiad in their respective vehicles and got the patient admitted in Muljibhai Patel Urological hospital where she was put under the care of Dr. Rajapurkar, Medical Director of the hospital. He immediately advised for sonography report of 24.2.96 which would show that left renal fossa was empty which was the area operated upon by first two opponents. The foetus was shown alive and of 9 weeks. Dr. Rajapurkar, therefore, pointed out that due to negligence of the opponents the only functional kidney was removed by the operating doctors. The mesenteric cyst which was removed was also brought for examination and its report dated 26.2.96 revealed some diagnosis showing that the segment of ureter was also clearly seen attached with the so -called cyst. The result was that Anjanabens survival was possible by either dialysis or kidney transplantation for which a long drawn trouble and expenditure was undergone by complainant No. 2. Detailed particulars have been given in the complaint. After carrying out dialysis for some time, Dr. Rajapurkar suggested for kidney transplantation which was done with the donation of Anjanabens father Vinodbhais kidney on 26.4.96. The patient passed urine for the first time after admission in the hospital on 23.2.96. Upon her discharge from hospital, the discharge card showed management of End Stage Renal Failure due to Nephectomy of left functional kidney. The right kidney is small ectogenic with dilated PCS and thinned out cortex.

4. THE patient was again admitted in the hospital on 2.8.96 due to fever and she remained there for a week. She was again admitted on 2.10.96 for further

 

treatment and remained there till 21.12.96 when she died. Live foetus also died. Thus, on account of negligence of the opponents, two lives were lost causing economic loss as well as great hardship and suffering to complainant Nos. 2 and 3 and the patients father who donated his kidney. In above view of the facts alleged against the opponents and having set out details and particulars of expenses incurred and suffering caused to them, complainants have prayed for compensation as per following reliefs - ''(a) to reimburse complainant No. 3 the amount of Rs. 2,23,115.54 towards the expenses incurred on the treatment (as per the details given on page 26) of his wife Anjanaben; (b) to pay complainant No. 2 Rs. 1,00,000 for mental tension, pain and agony suffered by him; (c) to pay Rs. 50,000 to complainant No. 2 for loss of mother to complainant No. 3 at the tender age. (d) to pay Rs. 6,00,000 to complainant No. 2 as damages/ compensation for gross negligence resulting in the death of Anjanaben. (e) to pay Rs. 2,00,000 as exemplary/punitive cost to complainant No. 2. (f) to pay to complainant No. 1 Rs. 20,000 as cost of this complaint''.

5. AT page 146 appears written statement of opponent No. 1. While denying the allegations made against him by the complainants he has asserted that the patient Anjanabens family was known to him for the past five years. Her mothers abdominal hysterectomy was performed by the 1st opponent before past five years and the patient Anjanaben had also gone for her first delivery before past three years. Her cousin sister and sister -in -law were under his treatment. The patient Anjanaben, on the occasion in question, first visited on 7.2.96 from Nadiad with history of one month and 21 days amenorrhoea. 1st opponent found that on abdominal palpation, uterine size was up to umbilicus i.e., corresponding to 24 weeks size, foetal heart sound was absent. As the weeks were not corresponding to last menstrual period, he advised ultrasonography so as to reach final diagnosis. The patient had undergone ultra sonography from opponent No. 3 Dr. M.I. Patel on 8.2.96. The report clearly showed 8 weeks of viable pregnancy and a huge cyst over uterus extending around umbilicus. As per the sonologist, these were the possibilities: (i) ovarian cyst and (ii) Mesenteric cyst. Complainant No. 2 and the relatives were clearly explained about both the probabilities.

6. WITH a view to reach to a complete diagnosis, further radiological evaluations were required, but as radiation can be hazardous for pregnancy and as complainant No. 2 refused for X -ray investigations saying that this pregnancy was precious to them as they had planned to give this baby to the patients sister -in -law who had no issue. The first opponent also explained to them that there was no urgency in removing the cyst. However, as the size was huge it would require a surgical removal since there could be complication due to the portion of cyst and even abortion. These aspects were explained to the complainant No. 2 and his relatives. The complainant No. 2 accordingly took decision for operation to be performed on 21.2.96 i.e., 15 days after the above incident. During these 15 days the complainant No. 2 had also shown the ultra sonography report at Nadiad and consulted a Gynaecologist at Nadiad who also advised for the

 

operation. The opponent No. 1 clearly explained that removal of ovarian cyst (first probability only) could be operated by him as Gynaecologist. He also explained to the complainant No. 2 that diagnostic laparotomy with small incision would be performed and if it is found that it is an ovarian cyst he can complete the operation and in case of second probability it would not be possible for him to operate the patient and he had no alternative but to close the operation. The patient was accordingly admitted for diagnostic laparotomy at 9 a.m. and she was accordingly taken for operation at 6.30 a.m. on the next day Dr. Sunilbhai was the Anaesthetist. Upon inspection of the cyst carried out after the incision of 5 -6 cms., the first opponent came to the conclusion that it was not ovarian cyst as both ovaries were lying normal. Complainant No. 2 was, therefore, called into the operation theatre at 6.50 p.m. showing him both the ovaries. He was also informed that the operation would be closed. However, since the patient was under general anaesthesia, the complainant No. 2 and his relatives wanted expert opinion from a surgeon. So, at the request of complainant No. 2, Dr. Jitendra Patel, opponent No. 2 was called. He came at 7.10 a.m. He had come to the diagnosis of mesenteric cyst. At the request from complainant No. 1 and relatives opponent No. 2 obtained another consent and after explaining details proceeded for the operation as a result of which head size cyst was operated and shown to the complainant No. 2 and the relatives. The patient was then shifted to post -operative room where she was observed after every two hours. As the urine output was 100 cc. after 3 I.V. pints were completed, at around 3.00 p.m, opponent No. 1 contacted opponent No. 2 who suggested to inform after giving 5 pints. At 8 p.m., 5 pints were completed and the urine output was 100 cc. Opponent No. 2, therefore, came to examine the patient and advised to give 2 I.V. pints fast. But the urine output remained 100 cc. Further investigations through blood reports were suggested and after seeing blood reports, opponent No. 2 advised to transfer the patient to Muljibhai Patel Urological Hospital at Nadiad for further treatment. Both the opponents also went there along with operative specimen of cyst at Nadiad. Opponent No. 1 visited the said hospital three times thereafter on account of family relation with the complainant No. 2 and relatives. He remained present also at the renal transplant operation. 1st opponent had denied allegations of charging extra Rs. 5,000 and has asserted that out of relation as aforesaid he assisted complainant No. 2 and relatives.

7. THE allegations with regard to medical negligence and liability regarding compensation have been denied by the 1st opponent who has prayed for dismissal of the complaint.

8. THE opponent Nos. 2 and 3 though served and though having appeared, have failed to file any written statement and/or reply. The complainant No. 2 has filed affidavit in rejoinder in reply to first opponents written statement and affidavit. Oral evidence has also been recorded as between these parties. During the course of submissions being made complainant No. 2 and first opponent negotiated for settlement on the basis of No Fault Liability with a view to see that complainant Nos. 2 and 3 might be compensated at least to the extent of major

 

part of expenses incurred after the dialysis, renal transplantation and other connected treatment of the deceased patient Anjanaben. Ultimately, opponent No. 1 paid Rs. 1,91,000 in full and final discharge of claim against him and the complainants accepted the same as per the purshis Exh. 32 which reads as under: ''The complainant No. 2, Mr. Rakesh Dave hereby gives purshis and declares that in the above numbered complaint, he exonerates Dr. Prakash Modi on payment of Rs. 1,91,000 (Rs. one lac ninety -one thousand only) from the liability that might be arising out of this case. It is also understood between the complainant No. 2 and Dr. Prakash Modi that if this Honble Commission holds the liability of surgeons more than Rs. 1,91,000 and awards higher amount, then the remaining amount will be recovered from the remaining parties and in no case, Dr. Prakash Modi would be made liable for any further amount. It is also understood between the parties that Dr. Prakash Modi may have right to recover the contribution from other doctors if he is entitled under the provisions of any law and complainant will not claim any amount from him from such contribution. The Complainant No. 2 thus limits his claim qua Dr. Prakash Modi to the extent of Rs. 1,91,000 only and hereby exonerates him on payment of aforesaid amount.''

9. IT might be noted from the aforesaid purshis as well as the settlement arrived at between Complainant No. 2 on one side and 1st opponent on the other side that the rights and remedies of 1st opponent against other two opponents for recovery of the amount paid by him would have to be kept open.

10. TAKING then to the merits of the matter, we had an occasion to go through the bulky evidence in the form of various reports, operation notes, bills and vouchers and other documents in the form of xerox copies produced on the record of the complaint right from the inception from the side of the complainants. We have also the occasion to go through the reports and the notes of Muljibhai Urological Hospital and the concerned doctor there. We have gone through the oral evidence which has been recorded as between the complainants on one side and the first opponent on the other side. In spite of bulky record, it would clearly appear from the facts noted hereinabove that for the purpose of performing such an operation as removal of mesenteric cyst, opponent No. 2 was summoned. He is stated to be an experienced general surgeon and he was expected to know the location of the cyst and the location of the kidney. Even after the commencement of the surgery undertaken by him, he was not able to differentiate between a cyst and kidney. The patient was in his hands. He was not under the supervision of the first opponent. It was his sole and independent expertise that was hired by the complainants. It is not in dispute and it cannot be disputed by opponent Nos. 2 and 3 even if they are not present in this complaint that what was removed was the functional kidney and not the cyst. Thus, the principle of res ipsa loquitur would clearly apply to the facts of the present case insofar as opponent No. 2 surgeon is concerned. Same principle would be applicable to the liability of the opponent No. 3. He happened to be the Radiologist who was expected to know the position of the kidney of the patient. It is not the case of even the first opponent that the complainant was in

 

knowledge of the fact that only one kidney of the patient was functional and there was no other kidney. This could have been spotted out by opponent No. 3 Sonologist inasmuch as he happened to be an expert in the branch of radiology and sonography. He clearly appears to have missed this vital aspect of the rendition of his expert service. His report clearly appears to have misdirected the first opponent in reaching the conclusion. Yet, the 1st opponent clearly appears to have expressed for further radiology examination but it was quite natural and obvious for the complainants not to go for such examination since it would have been harmful and/or risky for the live foetus. All these circumstances clearly led to pain and suffering of the patient herself and pain, shock and hardship of complainant No. 2 as well as relatives. The facts with regard to what transpired after the operation in question are also not disputed and can hardly be disputed.

11. BEARING in mind all these facts and circumstances of the case, we have no hesitation to come to the conclusion that opponent Nos. 2 and 3 were primarily responsible for the loss of life of patient Anjanaben and for that matter the foetus she carried.

12. TAKING ourselves to the quantum of compensation, it would clearly appear that the patient Anjanaben as also Complainant No. 2 and relatives were in the midst of long drawn battle for survival of patient Anjanaben. Over and above the medical management and treatment, she was required to be taken for dialysis quite frequently. Finally, renal transplantation was also required to be undergone and the patients father had donated his kidney for that purpose. All the available bills and vouchers have been placed on record as stated above. We do not find the claim of expenses preferred by the complainant Nos. 2 and 3 in the sum of around Rs. 2,20,000 as submitted by the learned representative for the complainants to be on higher side. In fact, the claim of Rs. 2,20,000 clearly appears to be quite fair and reasonable and needs to be awarded. Bearing in mind the facts of the case and the sufferings of all concerned as stated above and bearing in mind the loss sustained by the minor child and also complainant No. 2 who happened to be husband of patient Anjanaben, we find that lumpsum amount of Rs. 4,00,000 by way of general compensation would serve the ends of justice. In our considered opinion, therefore, the complainant Nos. 2 and 3 would be entitled to total compensation of Rs. 6,20,000 [which would also include Rs. 1,91,000 already paid by 1st opponent]. We also award cost of Rs. 10,000 to each of the complainants No. 1 and complainant Nos. 2 and 3 together.

13. IN view of what is stated above and in the facts and circumstances of the case, following order is passed: ORDER Opponent Nos. 2 and 3 are directed to pay jointly and severally to the complainant Nos. 2 and 3 Rs. 6,20,000 with interest @ 6% p.a. from the date of complaint till payment and cost quantified at Rs. 10,000 to be paid to complainant No. 1 and Rs. 10,000 to be paid to complainant Nos. 2 and 3 together. In case, the complainants are able to recover the whole of this amount, they will reimburse Rs. 1,91,000 to the 1st opponent. In case the first opponent is not in position to have reimbursement in view of

 

inability of the complainant Nos. 2 and 3 to recover the whole amount that would make up the reimbursement amount of Rs. 1,91,000, opponent No. 1 will be entitled to have his remedy against opponent Nos. 2 and 3 for recovery of that amount from the said opponents.

[2] Opponent Nos. 2 and 3 are directed to comply with the aforesaid order within 8 weeks from the date of receipt of true copy of this order by them. It is clarified that the complainant Nos. 2 and 3 will not be entitled to recover any amount from the 1st opponent as his liability stood discharged in view of the aforesaid settlement.

[3] As and when recovery is effected from the opponent Nos. 2 and 3, a sum of Rs. 3,00,000 shall be invested for the benefit and welfare of minor complainant No. 3 in State Bank of India or any nationalised bank or by way of Relief Bonds with a rider that the interest received therefrom shall be utilised by complainant No. 2 for the benefit and welfare of minor complainant No. 3.

This complaint will accordingly stand disposed of accordingly.

 