(2005) 03 NCDRC CK 0010

In the National Consumer Disputes Redressal Commission

G Rajavathani — APPELLANT

Vs

B Krishna Rau — RESPONDENT

Date of Decision : 14-03-2005

Acts Referred:

Citation : 2005 4 CPJ 379 : 2006 1 CLT 252 : 2006 2 CPR 17

Hon'ble Judges : A.RAMAN , R.VANAROJA J.

Judgement

1. THE complainants case is as follows : The complainants husband Gunasekaran was admitted in the Hospital of the 1st opposite party on 30.8.1995. The complainant paid a sum of Rs. 4,150 towards consultation and scopy charges. The complainant was asked to pay a sum of Rs. 1,87,500 as advance to meet the cost of further treatment. It was informed that the complainants husband was suffering from jaundice and, therefore, he had to be operated upon. Accordingly he was operated upon by the 1st opposite party on 5.9.1995. Again, another operation was done on 8.9.1995. A third operation wad done on 29.9.1995. The complainants husband died on 2.10.1995. There was imperfection, inadequacy in quality, nature and manner of performance. The complainants husband died due to deficiency in service. Something went wrong with the operation on 5.9.1995 and, therefore, the second operation had to be performed on 8.9.1995. At the time of the second operation, the 1st opposite party was not available and he had gone to Calcutta. Due to the sheer negligence on the part of the opposite parties in treating the complainants husband he died. Proper case was not taken. Therefore, the complaint is laid claiming compensation in a sum of Rs. 9 lakhs on the ground that there was deficiency in service on the part of the opposite parties in treating the complainants husband.

2. IN the version filed by the opposite parties, it is contended as follows : The 2nd opposite party is a well -equipped hospital with specialized medical facilities. The complainants husband was first seen by the 1st opposite party on 8.8.1995 at 11.40 a.m. It was at that time diagnosed that he was affected with jaundice which was about 2 1/2 months old. The complainants husband was also proven

to have cancer of the head of the pancreas and also was Hepatitis B +ve. The 1st opposite party explained the consequences and suggested surgery which is the internationally accepted mode of treatment for cancer head of the pancreas. The surgery was performed on 5.9.1995 after following the procedure for a major surgery. In spite of the best treatment given to the patient, he developed complication which was the expected risk in this kind of surgery. The patient died on 2.10.1995 after the third surgery was performed. The 1st opposite party saw the patient on 8.8.1995. The complainant was also informed that her husband was suffering from jaundice. The complainant was made aware of the nature of the illness and the seriousness and the consequences thereof. There was no deficiency in service in the performance of their duties by the opposite parties. There was no imperfection or inaccuracy or negligence either medically or in the performance of the operation. The surgery was done on 5.9.1995 by the 1st opposite party. The 1st opposite party had to go away to Calcutta on 7th and 8th of September, 1995. When he left the hospital on the 6th evening the patient was in ICU and was placed under the care of Dr. V. Ramachandran and Dr. Salem J. Thomas. Dr. V. Ramachandran is a leading Vascular Surgeon and Dr. Salem J. Thomas is a Surgical Oncologist. They are part and parcel of the 1st opposite partys surgical team. Necessary care and caution was taken in treating the complainants husband. During the absence of the 1st opposite party the complainants husband was looked after by two eminent and qualified persons along with Dr. Mathiazhagan, MD, Medical Registrar and Dr. Jyothinathan, MS, Surgical Registrar. At the time of admission itself, the patient was HBV positive and also had cancer head of the Pancreas besides Lymph nodes along the Hepatic Artery and Mesentric Lymph Nodes were also positives indicating a very poor prognosis. Studies show that the survival rate is between 15% and 17%. In India, the survival rate is much less. The mean survival of post operative cancer head of the pancreas is between 10 months and 36 months. When no surgery is undertaken, the life expectancy is less than 3 months. It is not true to say that the complainants husband died due to the negligent act of the opposite parties. There is no deficiency in service. The points for determination are : (1) Whether there is deficiency in service? (2) whether the complainant is entitled to compensation? (3) To what amount?

3. THE Points : The undisputed facts are that the complainants husband had jaundice from May 1995. Besides, at the time of admission of the complainants husband, it was diagnosed as cancer of the head of the pancreas. He was HB + Ag Positive. A person with such complications was admitted in the hospital of the opposite parties for treatment. The first surgery was performed on 5.9.1995. It was followed by a second surgery on 8.9.1995. The third surgery was done on 29.9.1995. The patient died on 2.10.1995. The allegation made in the complaint is that something went wrong during the first operation and, therefore, another operation was performed on 8.9.1995. The other part of the allegation is that when the 2nd surgery was performed on 8.9.1995 the 1st opposite party who performed first surgery was not there to attend upon the complainants husband

and thus there was want of care and there is negligence on his part. The case of the complainant is that because the 1st opposite party went away leaving the complainants husband the tragedy has occurred, cannot be accepted at all. It is not possible for a Doctor, especially a leading surgeon or physician, to be in the hospital all the 24 hours of the day and all the 30 days in a month. The 1st opposite party has stated that he being the President of the Indian Association of Surgical Gastro -Enterologists, he had to attend a conference at Calcutta which was an already planned one and, therefore, after completing the operation on

4. TH he left for Calcutta leaving the patient under the care of eminent doctors and at the time he left the patient, the patient was not in a dangerous condition. Therefore, from the mere absence of the 1st opposite party during the relevant point of time, one cannot fix any liability upon him or accuse him of deficiency. He has stated that he had made suitable arrangements. He has stated that his assistants viz., two eminent doctors -a vascular surgeon and surgical oncologist - were present to look after the patient besides the Registrar and medical officer of the hospital who were also present and attended upon the patient in his absence. The complainant merely says that because of his absence there was negligence in the manner of performance of the operation. It is generally stated in paragraph 7 that there was deficiency in service and there was imperfection and inaccuracy in quality and nature of performance of the operation which has resulted in the death of the complainants husband. The complainant has not examined any expert to show how and in what manner the 1st opposite party has been negligent, what is the precaution he failed to observe and how there was a violation in the procedure adopted by the 1st opposite party. The decisions of the Supreme Court as well as the National Commission are to the effect that the burden is heavy upon the person accusing the doctors of medical negligence to establish the same. They further go to show that there must be an expert evidence available to support the complainants case in that regard. Mere allegations of negligence and deficiency in service cannot be taken as substitutes for proof. It is incumbent upon the complainant to show how and in what manner there was failure on the part of the 1st opposite party to observe the normal procedure or adopt the standard of practice in treating the patient. Mere usage of expressions such as ''deficiency in service'' and ''imperfection and inaccuracy in the nature and manner'' of performance of the operation, cannot be considered in the absence of any specific proof of negligence. The 1st complainant examined herself in support of the complaint. In her testimony before this Commission what all she has stated is that after her husband died she demanded the 1st opposite party to state the reasons for the death of her husband and that he refused to give her the reasons and, therefore, she gave a complaint. She has stated so in her evidence in chief examination and only narrated the sequence of the operations. She has not stated how and in what manner there is negligence on the part of the opposite parties. Nor she has stated in what manner there was any deviation from the procedure or how she has stated that there was any failure to observe any precaution in that regard. On the other hand, in the course

of cross -examination she has stated that she was never informed that her husband had jaundice and cancer head of pancreas. Such a case is not stated either in the complaint or in the course of chief examination. The Doctor has taken the witness stand. He speaks to the referral letter given by Dr. Badarinarayanan of Tirunelveli who referred the patient. The referral letter is marked as Ex. A -1, which reads as follows: ''I am here with referring Mr. Gunasekaran 46 M, a case of CBD - obstructive pathology for favour of your expert opinion and management please. This gentleman has been treated as HBsHg Positive Hepatitis since 2 months. He continued to have Pruritis and pale stools and came of his own to consult me. O/E. Deep Teterus, Scratch Marks, Intense Pruritis, Palpable G.B., HBs Ag. Positive. The routine LFT shows elevated Alkaline Phosphatase with HBs Ag +. The U/S and C T scan shows obstruction at lower end of CBD.'' The notes of the doctor on the case sheet reads as follows: ''This gentleman for whom PTBD has been done on 10.8.1995, has now come for review and further treatment.'' Therefore, it is clear that prior to 30.8.1995 he had consulted the 1st opposite party. The investigation revealed ''distended gall bladder and dilated CBD. HBS Ag.+ve ERCP is stricture and dilatation of pancreatic duct; stricture lower 5 cms of CBD; Dilatation of proximal CBD and IHBR''. Chongiogram was done by Dr. Jothinathan. The dye did not pass distally even after the head end was raised. The impression was obstruction at the level of CBD. Therefore, from the diagnosis, it is seen that the patient had obstruction at the level of CBD. It can be either due to stricture or cancer of the pancreas which can be determined only after further tests. Further test was done and it was diagnosed as malignant, i.e., cancerous obstructive jaundice and, therefore, was referred to the 1st opposite party for treatment. According to him, ERCP was done, it showed stricture and dilatation of pancreatic duct and dilatation of proximal CBD and IHBR which is known as double barrel sign and it is corroborative of cancer of the head of pancreas. To controvert this evidence of the 1st opposite party, we have no expert evidence forthcoming from the complainant nor any textbooks are quoted to show that the diagnosis or the method of treatment adopted or the course of treatment followed and impression arrived at are erroneous. The 1st opposite party has categorically stated that the indications noted by him and the nature of structure are only indicative of cancer of head of pancreas and in the year 1995 there was no definite treatment for Hepatitis B and there was only supportive treatment. He further states that without opening the abdomen one cannot determine the nature of surgery to be performed and they found out that he was having cancerous head of pancreas and so they had to adopt a particular course of treatment. He further asserts that cancerous pancreas head cannot be cured by chemotherapy or radiotherapy. A suggestion was made to him that he has removed the portion of duodenum which he denied. The doctor further said that there is no such thing as tail of duodenum and that he had removed only the head of pancreas as it was found to be affected with cancer. According to him, they did whipples operation and removed the head of pancreas ''C'' loop of duodenum, lower and of the common bile duct and lymph nodes along free border of omentum and ceoliac axis group

of nodes. The case diary also shows the diagram which explains the nature of operation they decided to perform. He asserts that when he left for Calcutta, the patient was in the care of stable and there was no problem, which is also borne out by the entry in the case sheet. According to him, there was no way of knowing the condition of the sutures inside. The normal suturing technique is to use silk in the outer layer and vicrual in the inner layer. On 8th, the second operation became necessary because one of the sutures had given way resulting in intestinal contents draining. Therefore, the 2nd operation was performed. He has also stated that seepage was noted on 16/9 and 17/9 and there was yellow colour leakage from the main wound and there was mild leakage on 19.9.95 and there was a minimal leakage. Soiling was noted on 24.9.95 and leakage was also noted from the wound area, and on 28.9.95 the wound was explored and there was leak from the anastanotic side. According to the doctor, though his general condition was improving there was an indication that intestinal contents were coming out of drainage tube, therefore, it required another operation to be performed. As the intestinal contents were coming out they had to close it so that there was no spillage. The 3rd operation was performed on the part of pancreatic resection. The remaining part of pancreas and spleen was removed and the leak was sutured. He has denied the suggestion that the entire pancreas was in an affected condition even at the time of admission. 5. Thus, from a reading of the evidence of the doctor and from the records, we find that there is no material adduced to accuse the opposite parties of any deficiency in service. On the other hand, what had happened was an inevitable complication. The patient was suffering from jaundice for a period of 5 months prior to the operation. Further he was also having Hepatitis B. Added to that was the fact that the head of pancreas had become cancerous with lymph nodes. Therefore, on a person who was having so much complications, if a surgery is performed, one cannot be sure of the result. The 2nd operation was necessary because of the sutures giving way and the intestinal contents spilling out. The 3rd operation also became necessary because there was seepage and spillage and, therefore, the entire spleen and pancreas had to be removed. Therefore, these three operations became necessary because of the condition of the complainants husband. We have no material to attribute the cause of death to any act of omission or commission on the part of the opposite parties. There is nothing to show that there was any absence of prudent care. From the records we find that the necessary skill and expertise that is expected of the opposite parties were exercised by them. As stated by the 1st opposite party, the survival rate is quite low in such cases. The post -operative complications are not due to any act of omission or commission on the part of the opposite parties. They are complications inherent to the nature of operation performed on the complainants husband. After perusing the case sheet, we are of the opinion that much care was taken and the necessary treatment was given with the standard of care in carrying out the operation. We do not find any reason to hold that there is any deficiency in service. What had happened because of the nature of illness the complainants husband had which is the risk in the operation. It is not a fallout of

any deficiency. The operations had been performed only in accordance with the accepted procedure. The case sheet shows that the necessary preand postoperative precautions were observed and medication was properly given. Hence, in fine we have to hold that there is no deficiency in service. Consequently, there is no liability upon the opposite parties to compensate the complainant.

5. IN the result, we hold that the complaint is liable to be dismissed and the same is accordingly is dismissed. But in the circumstances, we direct both the parties to bear their own costs. Complaint dismissed. ==========
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