(2013) 04 NCDRC CK 0044

In the National Consumer Disputes Redressal Commission

GOPAL DASS , Laxmi Devi W/O Late Shri Gopal Dass , Sunil S/O Late Shri Gopal Dass , Manish S/O Late Shri Gopal Dass , Renu D/O Late Shri Gopal Dass — APPELLANT

Vs

S.P. Mandal , Sir Ganga Ram Hospital Old Rajender Nagar New Delhi — RESPONDENT

Date of Decision : 30-04-2013

Acts Referred:

Citation : 2013 0 NCDRC 321 : 2013 3 CPJ 480

Hon'ble Judges : ASHOK BHAN , VINEETA RAI J.

Advocate : SOUMYAJIT PANI , RAJENDRA , BALAKRISHNAN , ANJUM JAVED , M.S.ROHILLA

Judgement

1. BEING aggrieved by the order of the Delhi State Consumer Disputes Redressal Commission (hereinafter referred to as the State Commission) in Complaint No. C-80/2003, two cross appeals have been filed. First Appeal No. 201 of 2008 has been filed by Gopal Dass, Original Complainant and First Appeal No. 284 of 2008 has been filed by Dr. S.P. Mandal, Opposite Party No.1. Since the facts and the parties in both appeals are common/similar arising out of the same consumer complaint, it is proposed to dispose of these appeals by a common order by taking the facts from First Appeal No. 284 of 2008. The parties will be referred to in the manner in which they were referred to in the complaint i.e. Shri Gopal Dass as Complainant, Dr. S.P. Mandal as Opposite Party No.1 and Sir Ganga Ram Hospital as Opposite Party No.2.

2. IN his complaint before the State Commission, Complainant contended that in 1998 he suddenly developed pain in his right foot while walking and there was also appearance of some black spots. He, therefore, visited OP-2/Hospital, where he consulted OP-1 who is an Orthopedic Surgeon. After medical examination, he was advised surgery since his right toe was enlarged. He was given medicines by OP-1 for one week and was asked to make up his mind whether to undergo the surgery. Since Complainant got no relief from his pain despite taking the prescribed medicines, he again went to OP-2/Hospital, wherein he was informed

by OP-1 that the surgery would cost Rs.20,000/- but if he got it operated from a private clinic being run under the name of Ram Lal Kundan Lal Orthopedics Hospital, he would have to pay half the amount. Complainant, therefore, accepted the advice for the surgery in the private nursing home and got admitted there on 05.07.1998. The surgery was performed on 06.07.1998 during which OP-1 wrongly cut a part of the enlarged bone. As per the certificate given by the Ram Lal Kundan Lal Orthopedic Hospital, during the course of this surgery, OP-1 also fixed a pointed wire joining the great toe and 3 fingers of Complainant ''s right foot but the said pointed wire kept touching the 4th small toe of the right foot causing a wound in the small toe of that foot. Complainant informed OP-1, who noticing the fault asked his staff to remove the same after 10 days while in fact it was to be removed after 21 days. When the said wire was removed, it was noted that there was a hole that had developed in the toe of the right foot. However, no dressing or treatment was given for the same, as a result of which the big toe of the right foot became septic. After some time it became numb (dead). It was stated that negligence was there at every stage of the treatment and surgery so much so that even in the discharge certificate it was stated in the column ''diagnosis '' that the Complainant was operated on the left foot whereas in fact the surgery was performed on the right foot. It was further stated that for the Buerger ''s disease with the Complainant which had been later diagnosed by OP-1, no surgery was required and treatment for this disease following the Doppler test is an Angiography (i.e. Ballooning) whereby the obstruction in the artery/vein is removed. Thus, OP-1 committed gross medical negligence and blunder in performing a non-required surgery as there was no enlarged bone of the toe and in fact there was only obstruction in the vein of the right foot which required angiography. Complainant had to be later taken to the emergency in OP-2/Hospital where he remained admitted from 16.09.1998 to 26.09.1998, during which period gangrene developed in the right foot and he had to undergo two surgeries which required amputation of the foot and thereafter the leg upto the knee. As a result of this, Complainant suffered disability of 80% as confirmed by the certificate issued by Safdarjung Hospital. Being aggrieved because of the utter neglect and deficiency in conducting a surgery based on the wrong diagnosis which led to amputation of his leg below the knee and 80% disability, Complainant filed a complaint before the State Commission seeking total compensation of Rs.30,00,000/- for the mental agony, torture and business loss suffered by him on account of the actions of the OPs. Ops on being served filed a written rejoinder vehemently denying the allegation that there was any medical negligence. It was stated that the Complainant had attended the free OPD of OP-2/Hospital and was examined by several doctors. Complainant had Post-Polio Residual Palsy (PPRP), because of which he had difficulty in walking. He had come to the Ops for correction of the deformity and he had concealed this fact in order to mislead the State Commission. He was thoroughly examined by OP-1, who is a famous and Senior Orthopedic Surgeon with 35 years of experience and since he could not afford to pay Rs.20,000/- and there was a long waiting list in the free general bed in OP-2/Hospital, he was given treatment at concessional

rates at Ram Lal Kundal Lal Orthopedics Hospital, which is also a well reputed charitable hospital registered with Delhi Government. Complainant paid a total sum of Rs.4900/- for the surgery, during which a wire was inserted from outside so as to maintain the deformed toe in corrective position. This wire was removed after the stipulated period. It was further stated that in the discharge certificate because of a clerical error it was stated that the surgery was done in the left foot. However, this did not impinge on the merits of the case. Complainant was a chain-smoker but he had concealed this fact in his complaint before the State Commission. OP-1 came to know about this only after the surgery and before his discharge on the same day when Complainant was found to be repeatedly smoking despite being asked not to do so. It was under these circumstances that a noting was made in the discharge certificate that there was a suspicion of Buerger ''s disease. Had OP-1 known prior to the surgery that Complainant was a chain-smoker, he would have got the necessary tests conducted for confirming Buerger ''s disease. Complainant ''s surgery to correct the Poliomyetic deformity was conducted as per standard procedure wherein a K-wire was inserted to keep the big toe in place. There was no complication following the surgery and no blackening of toes etc. even after one month. Ops further stated that Buerger ''s disease was not caused by any problems due to the first surgery but because of the Complainant ''s prolonged smoking. After the Complainant was detected with Buerger ''s disease, he and his relatives were informed that the limb may require amputation and they agreed to the same. It was under these circumstances that the amputation was done since it was the only remedy for such a disease where circulation did not improve with conservative treatment. Thus, there was no medical negligence or deficiency in service on the part of Ops. In fact, it is the Complainant who being a chain-smoker developed Buerger ''s disease and despite being advised to quit smoking he failed to do so causing further damage to his system. Ops also stated that there was no defect with the first surgery and they were not responsible for the subsequent gangrene.

3. THE State Commission after hearing the parties and on the basis of evidence produced before it, partly allowed the complaint by observing as follows : "22. The real problem of the complainant was pain in right lower leg. He went to the OP Hospital where he was admitted. As per documents on the very day of admission there was a suspicion of buerger ''s disease. Instead of ruling out the buerger ''s disease by conducting Doppler tests etc. OP went for putting K-wire presumably for the reason that the patient could not walk because of post polio deformity in spite of the fact that existence of buerger diseases was given a question mark. To say putting of K-wire was not a simple process merely because it did not involve cutting of toe is not that simple particularly in view of suspected buerger ''s disease. Any cut or wound was difficult to be healed, as the blood supply at the toe zone is the minimal.

23. K-wire was inserted by making 8 " long cut. This K-wire continued for 12 days and created wound in the right foot of the complainant and when septic occurred in the right foot of the complainant, his toe was weakened because he

was suffering from buerger ''s disease, which was confirmed after a month when angiography was done. By then it was too late. Initially amputation of toe was done and thereafter, right foot got completely blackened. The toe being of the body where the flow of the blood is minimal and perhaps K-wire did not yield result because of buerger ''s disease. In the process right foot had to be amputated to save the life of the patient. 24. Thus in our view medical negligence was only to the extent that before putting K-wire, the existence of buerger ''s should have been confirmed particularly when suspicion about such disease was expressed on the very day of admission. It was not with malafide intention that K-wire was inserted. It was inserted to relieve the patient of the pain and make him walk because of post-polio deformity. Unfortunately this little lapse resulted firstly in amputation of toe and subsequently in amputation of right foot. "

4. THE State Commission in view of the above facts deemed that a lump-sum compensation of Rs.50,000/- for mental agony and other sufferings arising from amputation of right foot, besides Rs.5000/- as cost of litigation, would meet the ends of justice. Hence, the present two appeals by OPs and Complainant, the latter seeking enhancement of compensation awarded by the State Commission.

5. LEARNED Counsel for parties made oral submissions.

6. COUNSEL for OP-1 while reiterating the facts of the case as stated by him in his written submissions stated that the Complainant was admitted in Ram Lal Kundan Lal Orthopedics Hospital with a diagnosis of PPRP and he was operated on 06.07.1998 by a team of highly qualified Orthopedic Surgeons headed by OP-1 after conducting all the tests required for this type of surgery, including ECG, Hemoglobin and other tests to confirm that the Complainant was not diabetic or hypertensive. The surgery was conducted under spinal anesthesia and the standard medical procedure called Jone ''s Procedure was adopted. The toe was stabilized with a 0.045 " (0.14 cms.) Kirschner wire (K-wire) and the Complainant was discharged on the same day evening i.e. on 06.07.1998. At the time of discharge, the Doctors had observed that there was a possibility of Buerger ''s disease because it was noted by the Duty Doctors and Nurses that even though smoking was not allowed in the hospital, Complainant could not resist smoking. Buerger ''s disease is a not a common disease and it is generally found in heavy smokers. Complainant was strongly advised to stop smoking and was called for follow-up after 3 weeks for removal of the K-wire. The post-operative period was uneventful. When Complainant visited the hospital for removal of wire, it was noted that he had a non-healing wound on the big toe of the right foot and, therefore, he remained admitted for observation till 06.08.1998 and during the stay he continued to smoke incessantly. The pulse oxymeter revealed poor circulation in the limbs and, therefore, the Complainant was advised Doppler test to check whether he was having Buerger ''s disease but he refused the same citing his inability due to financial condition. Complainant was discharged from the hospital the same day with an advice to consult

vascular surgeons at OP-2/Hospital to diagnose and treat the Buerger ''s disease. When Complainant visited OP-2 on 10.08.1998 various investigations were conducted, including angiography, which was done free of cost and Buerger ''s disease was confirmed which was apparently caused because of prolonged chain smoking. After Buerger ''s disease was confirmed and the problem could not be redressed through conservative treatment, the vascular surgeon in OP-2/Hospital opined that amputation of the right limb was the only course of action to save his life and it was under these circumstances that amputation of the limb had to be carried out. It was emphasized that the surgery for reformation of PPRP was successful and the subsequent amputation was not because of any defect or negligence in conducting that surgery or any other deficiency but because the Complainant had contracted Buerger ''s disease being a chain smoker. It was specifically stated that prior to the PPRP surgery, there was no evidence that the Complainant had Buerger ''s disease. The observation to this effect made in the discharge certificate following the surgery was tentative with question-mark because it was noted that the Complainant was smoking heavily. Counsel for OP-1 brought to our attention medical literature on the subject indicating that Buerger ''s disease can be mimicked by a wide variety of other diseases and essentially only one treatment is known to be effective i.e. complete stopping of smoking. In the instant case, since prior to the surgery, there was no indication that the Complainant was a heavy smoker, a fact which became known after the surgery, there was no negligence or deficiency in service in not carrying out the necessary tests to diagnose the same prior to the surgery. Counsel for OP-1 also stated that apart from the merits of the case, since the Complainant had died during the pendency of the proceedings before this Commission, the personal action died with the death of the Complainant and the case, therefore, abates. Counsel for OP-2/Sir Ganga Ram Hospital contended that the State Commission erred in holding it guilty of limited medical negligence since the first surgery did not take place there and negligence of its Doctor, if any, was that of the individual and not of OP2. Counsel for the Complainant stated that from the evidence on record, it was clear that OP-1 was fully aware that Complainant had Buerger ''s disease as recorded in the case history at Annexure P-4. He challenged the OP-1 ''s contention that a tentative diagnosis of Buerger ''s disease was made only after the surgery and not prior to it. The certificate on record (Annexure P-4), wherein it has been clearly recorded under the caption ''diagnosis '' that the Complainant had Buerger ''s disease, nowhere indicates that the diagnosis was made after the surgery. Once a diagnosis was made, even if it was a tentative diagnosis it was necessary for OP-1 to have conducted at least the Allen ''s test, which is a simple test to check the blood flow through arteries and which is indicative of the health of the arteries, and thereafter an Angiography. By not doing so and instead undertaking a surgery of the big toe which was not required and which led to further problems because of the non-healing of the first surgery, OP-1 was clearly guilty of total medical negligence and not of limited negligence as ruled by the State Commission. In view of these facts and because as a consequence Complainant suffered 80% disability, which

also hastened his untimely death, there was a strong case to enhance the compensation awarded by the State Commission.

7. WE have heard learned counsel for the parties and have also carefully gone through the evidence on record. Complainant ''s visit to OP-2/Hospital following complaints in the right lower leg and his examination by OP-1 there and later in Ram Lal Kundan Lal Orthopedics Hospital is not in dispute. It is further admitted that prior to the first surgery, various tests were undertaken, which, however, did not include tests to either confirm or rule out Buerger ''s disease such as Doppler test, Allen ''s test and Angiography. OP-1 has contended that these tests were not carried out because a tentative diagnosis of Buerger ''s disease was made only after the surgery when it became known that Complainant was a chain-smoker. In support, OP-1 has relied on the discharge certificate following the surgery. We have perused the said document and are unable to accept this contention. We note that in the first place this document nowhere indicates that it was a discharge certificate. It merely states the date of admission and the date of discharge on the next day. Further, under the column ''diagnosis '', it is clearly stated that a diagnosis of Buerger ''s disease was made on the great toe left (the latter was obviously a clerical error since the problem was in the right toe). It does not indicate that the diagnosis was made after the discharge. Further, we find it difficult to accept OP-1 ''s contention that the Complainant being a chronic smoker became known only after the surgery and not prior to it because he was admitted in the hospital one day before the surgery whereas following the surgery he was discharged within a few hours. We also note from the summary of the case, which is on the next page and is not dated, that it has been clearly recorded that the Complainant who was a known case of PPRP left (sic) is a chronic smoker.

8. IN view of these facts, it was necessary for OP-1 to have conducted the tests required to diagnose Buerger ''s disease before reaching a conclusive diagnosis that this was merely a case of PPRP for which a surgery was undertaken. Unfortunately, the tests and Angiography were undertaken when it was far too late and the Complainant ''s toe had become septic and gangrene had set in, which necessitated the amputation surgeries and Complainant ''s 80% disability. In view of these facts, we find substance in the plea for enhanced compensation. After looking to the facts and circumstances of the case, including the monthly income of the Complainant at that time from his three factories amounting to Rs.16,500/- per month and his disability upto 80%, which seriously impacted on his business and quality of life, we are of the view that it would be reasonable and justified to enhance the amount of Rs.50,000/- awarded by the State Commission to Rs.3,00,000/-. Counsel for OP-2 ''s contention that OP-2 cannot be held responsible for any surgery conducted by OP-1 is not acceptable. This issue has been settled by the Hon ''ble Supreme Court in Achutrao H.Khodwa Vs. State of Maharashtra [AIR 1996 SC 2377], wherein the Hon ''ble Supreme Court has held that the State must be held vicariously liable once it is established that the death was caused due to a negligent act of its employees. Applying the same

principle in this case admittedly since OP-1 was working in OP-2/Hospital and the initial diagnosis in respect of the Complainant was made in that hospital we are of the view that OP-2 alongwith OP-1 cannot be absolved of their liability in this case.

9. REGARDING Counsel for OP-1 ''s contention that the case abates with the death of the Complainant, we note that this Commission had already considered this issue on 04.07.2008 when it allowed the application for bringing on record the legal heirs of the deceased Complainant and carrying out the necessary amendments in the Memo of Appeals.

10. TO sum up, First Appeal No.201 of 2008 filed by OP-1 is dismissed. First Appeal No. 284 of 2008 filed by the Complainant is partly allowed and the order of the State Commission is modified to the extent of enhancement of compensation from Rs.50,000/- to Rs.3,00,000/-. OPs are jointly and severally directed to pay the legal heirs of the deceased Complainant awarded amount with litigation costs of Rs.5000/- within a period of 12 weeks. Both the present first appeal stands disposed of on the above terms.

