

(2012) 07 NCDRC CK 0102

In the National Consumer Disputes Redressal Commission

M Perumal S/O Muthu Karuppan

APPELLANT

Vs

Salem Poly Clinic Rep By K N Rao

RESPONDENT

Date of Decision : 18-07-2012

Acts Referred:

Citation : 2012 0 NCDRC 378 : 2012 3 CPJ 337

Hon'ble Judges : J.M.Malik , Vinay Kumar J.

Advocate : Krishna Dev

Judgement

1. THE complainant-petitioner has filed a complaint on the ground of medical negligence. On 3.4.2006, Karuppusami since deceased S/o Shri M. Perumal had stomach pain, therefore, he was taken to Salem Poly Clinic-respondent. The doctor, who checked the son of the complainant found that he was suffering from appendicitis and the same was to be removed by an operation. The complainant paid a sum of Rs.5,000/- to the respondent-hospital towards fees and expenses and on the same day, Scan was done. The complainant was asked to come again on the next date i.e. 4.4.2006. On that day, Scan was again done and the deceased was taken to the operation theatre immediately where the surgery was performed for four hours from 9.00 am to 1.00 p.m. During the operation, the deceased regained his consciousness and the doctor gave him further anaesthesia, exceeding the limit, which alone caused his death though he was hale and healthy otherwise.

2. THE complaint was filed and the District Forum accepted the complaint and granted Rs.15 lakh compensation for the medical negligence, deficiency in service on the part of the respondent. It further ordered that Rs. 4 lakh towards mental agony, stress and the cost of the complaint be also paid to the complainant. It also made the respondent the Indian Medical Association-respondent No. 2 jointly and severally liable alongwith the hospital. Respondent No. 2 was proceeded against ex parte. However, when the matter went to the State Commission, it reversed the order passed by the District Forum.

3. WE have heard the learned counsel for the petitioner at the stage of

admission. He made the following submissions. It was argued that Rs.5,000/- was given as fees yet the operation was postponed to 4th April, 2006 as the deceased could not arrange the expenses for the operation. It was also argued that the negligence is writ large on the part of the hospital. On the one hand, it was pleaded that the complainant could not arrange the expenses for operation on 3.4.2006. On the other hand, it was stated that the consent was not given or it was given improperly. Thirdly, due to the excess anaesthesia given to the deceased, he died. It was also argued that the scan was unclear and the second scan was done on the next day which further caused delay.

4. ALL these arguments leave no impact upon this Commission. It is difficult to fathom as to why the second opposite party was made jointly and severally liable. It had no role to play. Negligence cannot be attributed to it. Secondly, attempt was made to file a police report against the hospital but the investigative agency felt that no case punishable under IPC was made out.

5. MOREOVER, the petitioner has failed to prove the medical negligence on the part of the respondent No. 1. No evidence was led to prove all these facts. There is no evidence which may go to show that the doctor who had given anaesthesia had further given chloroform to the complainant's son in excess which caused his death. It must be borne in mind that it is the complainant and nobody else, who has to carry the ball in proving the initial negligence on the part of the hospital. The State Commission has rightly placed reliance on "Laxman Balkrishna Joshi v. Trimbak Bapu Godbole (1969) 1 SCR 206.

6. IN Jacob Mathew Versus State of Punjab and another (2005) 6 SCC 1, it was held that :- "18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the

requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. In *Michael Hyde and Associates v. J.D. Williams & Co. Ltd.*, said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. 21. The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England "The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men. Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care." The abovesaid three tests have also been stated as determinative of negligence in professional practice by Charlesworth & Percy in their celebrated work on Negligence. In the opinion of Lord Denning, as expressed in *Hucks v. Cole*, a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. 6. The Apex court in another authority in *Kusum Sharma and others Vs. Batra Hospital and Medical Research Centre and others* 2010 (3) SCC 480 has held:- "On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:- I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. III. The medical professional is expected to bring a reasonable degree

of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

7. RESPONDENT No. 1 is a private hospital. Payment of amount in private hospital is a condition precedent. Asking the patient to deposit the money before hand is quite normal. There lies no rub. Anaesthetist who had given anaesthesia before surgery was not impleaded as a party. There is neither any inkling in post mortem certificate nor in the analyst's report, which would reveal that cause of death was due to excess of anaesthesia or chloroform. The inquest report shows that the complainant's son died due to negligent surgery but the investigating agency did not find the same to be true.

8. ON the contrary, the cause of death was shown as "died of effects of inborn intestinal pathology and renal disease". It is thus clear that son of the complainant was having kidney problem since birth. It also transpired that the complainant had snatched away the case record, and preferred a police complaint. The complaint filed by the complainant did not ring the bell.

9. REVISION petition has no force and the same deserves to be dismissed. There is delay of 50 days in filing the revision petition. It is stated that the counsel based in Delhi was to get the translation of documents from Madras counsel and therefore, the delay was caused. This is not a sufficient ground. Delhi is a cosmopolitan city and one cannot face any difficulty in getting the documents translated into English language. It is therefore barred by time as well.

10. THE revision petition is accordingly dismissed.