

(2009) 04 NCDRC CK 0013

In the National Consumer Disputes Redressal Commission

Malka Tarannum

APPELLANT

Vs

Dr. C.P. Gupta And Anr.

RESPONDENT

Date of Decision : 20-04-2009

Acts Referred:

Citation : 2009 3 CPJ 49

Hon'ble Judges : R.K.BATTA , S.K.NAIK J.

Advocate : HUSSAIN KHAN , SANJAY CHAUBEY , RAKESH MISHRA

Judgement

1. THIS revision petition is by the complainant who seeks to challenge the order dated 30.5.2005 passed by the State Consumer Disputes Redressal Commission UP., Lucknow (for short State Commission"), vide which the appeal of the opposite parties (doctors) was accepted and her complaint which had been allowed by the Mirzapur District Forum, was dismissed.

2. THE revision petition arises in the following circumstances - The 3 years old youngest daughter of the complainant, on a fall while playing, fractured her left hand on 3.10.1995. Next day, she took the child for treatment to the Government hospital where she was attended in the OPD by Dr. A.K.Dubey - respondent No. 2 who prescribed some medicines and advised her to come again for hot saline formulation on the hand of the child. An x -ray was advised. No x -ray, however, could be arranged since x -ray plates were not available in the hospital. The complainant thereafter visited the hospital with her daughter on 7.10.1995 when the doctor on duty, Dr. C.P. Gupta -respondent No. 1, on examination advised her to obtain the x -ray report as already asked for by Dr. Dubey on 3.10.1995. The complainant, therefore, arranged for the x -ray from outside the hospital and produced the report before Dr. C.P. Gupta - respondent No. 1 who, thereafter, applied the plaster on the fractured hand of the child. Since, there was no improvement and the pain persisted, she approached the hospital again on 14.10.1995 and the doctor on duty Dr. Dubey - respondent No. 2 on examination on the plastered hand, as per the complainant, stated that the plaster had been wrongly applied. He, therefore, removed the original plaster

and re-plastered the fractured hand for which material was again purchased by the complainant from outside and supplied to the hospital. The child felt quite comfortable after the second plaster. This led the complainant to believe that the respondent/opposite party - Dr. Gupta had initially wrongly applied the plaster which was an act of negligence. Apart from filing a complaint before the District Magistrate against the medical officers and the staff of the hospital, the complainant approached the Consumer District Forum for compensation. Both the doctors resisted the claim. Their explanation before the District Forum that the need to apply the plaster for the second time arose because the earlier application as per normal procedure was only temporary and, therefore, tended to be loose and that the child was properly attended to finally resulting in the fractured limb becoming all right, was not accepted by the District Forum. Other ground such as treatment having been provided free of charge and, therefore, not falling within the definition of a consumer also was rejected. The District Forum, therefore, allowed the complaint and ordered both the doctors to pay a sum of Rs. 45,000 each as compensation to the complainant.

3. AGGRIEVED thereupon, both the doctors/opposite parties filed appeal before the State Commission who vide the order, impugned, allowed the appeal and set aside the order dated 14.9.2001 passed by the District Forum resulting in the dismissal of the complaint. Disappointed and aggrieved with the dismissal of his complaint that this revision petition has been filed by the complainant.

4. THE husband of the complainant who has appeared in person has argued the complainant's case at length. He was given a patient hearing. Learned Counsel for the respondent too has been heard and the records perused.

5. IT has been contended by the husband of the complainant that when his daughter of 3 years old was taken to the hospital on 3.10.1995, the respondent No. 2 -Dr. A.K. Dubey was on duty who first stated that there was no fracture and prescribed some medicine but recommended an x-ray reluctantly on the repeated request of his wife. Since x-ray plates were not available in the hospital, she got x-ray done from the market only on 7.10.1995 and approached respondent No. 1 - Dr. C.P. Gupta who was on duty that day. The doctor is stated to have asked for some "suvidha shulk"/"graft" but on being submitted that her husband was an employee of the health department, the respondent -doctor applied the permanent plaster on the child in a casual manner at 45 degree as against 90 degree. When the pain did not subside, the child was again brought to the hospital on 14.10.1995, when the doctor on duty, respondent No. 2 -Dr. A.K. Dubey examined the child and stated that the plaster applied by respondent No. 1 -Dr. C.P. Gupta was improper and had to be re-done. It was only after the second plaster that the child was relieved of the pain. The husband of the petitioner, therefore, contends that both the doctors were grossly negligent in the treatment of his daughter and District Forum has rightly held them to be so and awarded the compensation which has been erroneously set aside by the State Commission.

6. WITH regard to the finding rendered by the State Commission that the complainant did not fall within the definition of a consumer since he had paid no fee or any charge for the treatment, the husband of the complainant relying upon the order of the Supreme Court in the case of *Laxman Thamappa Kotgiri v. G.M., Central Railway and Ors.*, contended that he was entitled to the treatment of his daughter as part of the terms and conditions of the service and in such a situation as held by the Supreme Court in the judgment (*supra*) "it would not amount to free service and would constitute service under the Consumer Protection Act". He, therefore, submits that, the State Commission has erroneously relied upon *Indian Medical Association v. V.P. Shantha and Ors.*, III (1995) CPJ 1 (SC)=I (1996) CLT 81 (SC)=AIR 1996 SC 550, which has no applicability to the facts of his case. He, therefore, submits that the order passed by the District Forum be restored.

7. PER contra, learned Counsel for the respondent has contended that there has been absolutely no negligence in the treatment of the child. While she suffered the fall and fractured her hand on 2.10.1995, she was brought to the hospital only on the next day, when respondent No. 2 was on duty but after examination, he clearly advised for an x -ray as could be seen from the OPD slip. However, the x -ray was produced only on 7.10.1995 and respondent No. 1 applied temporary plaster as is the procedure in such cases. He had given clear instructions to the petitioner regarding approaching him again in case of any pain but the petitioner/complainant approached the hospital after a week only on 14.10.1995 when respondent No. 2 was on duty. The first plaster applied was in the nature of temporary plaster which tends to become loose and it is incorrect to say that any permanent plaster had been fixed at the first instance. The second plaster was necessary in the normal course of the treatment and, therefore, it is incorrect to say that any wrong method/treatment was given to the child. As per the admission of the complainant, the pain, thereafter subsided and the hand of the child fully recovered from the injury/fracture.

8. IT has been further contended by the learned Counsel for the respondent that the husband of the complainant is in the habit of intimidating the various staff of the hospital for unjustified and unwarranted reasons and the present complaint has been filed on his behest to harass the doctors. He has produced no expert evidence nor any opinion from any other specialist doctor about the treatment given to the child. The State Commission has, therefore, rightly dismissed the complaint and the same needs no interference.

9. WE have perused the records and considered the matter carefully.

10. INSOFAR as whether there has been any negligence in the treatment given to the child is concerned, we find that the complainant has made wild allegation that respondent No. 2, during her first visit, did not attend the child properly or that he reluctantly recommended for the x -ray on her persistence. This is totally contrary to the facts even as pointed out by the District Forum wherein it has been stated that "on the slip Dr. A.K. Dubey has prescribed two medicines for the

daughter of the complainant -Simmi and has advised for the x -ray of the elbow". The need for applying the plaster for the second time cannot be said to be an act of negligence since application of POP slab which is also known as temporary cast of the plaster is the normal procedure adopted at the first instance whenever there is swelling at the site of the injury. This is not only medically advised but also a normal procedure so as to cater to the change in case of any increase/decrease in the swelling. It has been denied that permanent plaster was ever applied in the first instance. The need for applying the plaster slab on the permanent basis arose because the initial plaster, as stated, was only temporary in nature. The contention that the plaster was applied at 45 degree as against 90 degree has been denied by the respondents/doctors. It has been contended that depending on the level of injury/swelling, etc., a correct decision to apply the plaster at 90 degree had been taken. The complainant is making a big issue out of a professional decision just to harass the respondents. According to them, the photographs have been taken in a manner so as to distort the real picture. The fact that the hand of the child has been fully treated and fracture has fully joined goes to show that there was no negligence whatsoever. We find that respondent No. 1 -Dr. C.P. Gupta is a Senior Orthopaedic Specialist with considerable experience and his professional decision being questioned by the complainant without any expert evidence, should not have been taken as the sole ground by the District Forum. From the records and the medical literature produced, we find that there has been no deviation from the practices accepted as proper by a responsible body of medical men skilled in this discipline.

11. BY now it is very well settled that in a case of alleged medical negligence what is required to be seen is whether the doctor concerned charged with negligence has acted in accord with the general and approved practice and if it is proved that he has followed such practice then it is enough to clear him of any charge of negligence. The Supreme Court in the case of Jacob Mathew v. State of Punjab and Anr., III (2005) CPJ 9 (SC)=122 (2005) DLT 83 (SC)=VI (2005) SLT 1=III (2005) CCR 9 (SC)=(2005) 6 SCC 1, held that it is not necessary for every professional to possess the highest level of expertise in that branch which he practices.

12. REFERRING to the Halsbury's Laws of England (4th Edn., Vol. 30, para 35), it has been held as under: "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."

13. IN the case in hand the doctors who treated and applied the plaster on the fracture are fully qualified and experienced whose professional judgment is being questioned not by way of any expert evidence but on mere allegations. We are, therefore, of the view that medical negligence is not proved in this case.

14. ONCE , we hold that medical negligence does not stand proved, the other contention of the petitioner that the State Commission has wrongly held him not to be a consumer does not require detailed discussions. Suffice it to say that the complainant at no stage has produced any evidence to prove that it was part of the terms and conditions of his service to receive free medical treatment. No such plea even has been taken before the Fora below. Reliance on the judgment of Laxman Thamappa Kotgiri v. G.M., Central Railway and Ors. (supra), appears only to be an afterthought and in the absence of any such plea before the Fora below, it would not help him.

15. UNDER the circumstances, there being no merit in the revision petition, the same is dismissed, however, with no order as to cost. R.P. dismissed.