(1999) 03 NCDRC CK 0009

In the National Consumer Disputes Redressal Commission

M.J.JOSEPH — APPELLANT

Vs

P.J.JOHN — RESPONDENT

Date of Decision : 16-03-1999

Acts Referred:

Citation : 2000 2 CPC 454 : 2000 2 CPR 5 : 2001 1 CPJ 409

Hon'ble Judges : L.Manoharan , K.M.Latha J.

Final Decision : Complaint dismissed

Judgement

1. COMPLAINT by the husband, children and in-laws of late Mrs. Annamma. The complainants seek for compensation for the death of Annamma on the allegation of negligence and deficiency of service by the first opposite party-doctor who according to the complainant is an employee of the second opposite party hospital.

2. THE allegations in brief are : That on 13.10.1997 while deceased Annamma was cooking she tasted a piece of meat which got stuck in her throat as a result of which she felt discomfort and pain, and she was taken to the second opposite party hospital whereafter examination by the duty doctor and having taken X-ray, she was examined by the first opposite party, the E.N.T. Surgeon, and oesophaguscopy and removal of foreign body under general anaesthesia was done on the next day, i.e., on 14.10.1997 at about 8.30 a.m. Foreign body was visualised at 38 cms. down, since the meat piece was too large to be negotiated and taken out it was dislodged to the stomach which was 2 cms. lower. THEreafter, she was given antibiotic and anti-inflammatory drugs and was removed to the post operative recovery room where she continued till about 5.30 p.m. THEreafter, she was removed to the room. She was again examined by the first opposite party at 8.45 p.m. and she was attended by him on the 15th, 16th and 17th during his morning rounds. On 17.10.1997 first opposite party discharged Annamma with advice to continue medicines and report back after 5 days. THE allegation is, the discharge was inspite of the fact that Annamma had considerable discomfort and weakness at that time. On reaching home the

discomfort increased and she vomited during night. On the next morning, i.e., on 18.10.1997 she was taken to the Nirmala Hospital, Kambilikandom, where she was examined and advised to be taken to a specialised hospital for expert treatment. Though she was taken to the second opposite party hospital, first opposite party doctor was not available and the call duty physician examined her, but they refused to treat her and, therefore, she was rushed to the Medical Trust Hospital, Ernakulam, where she underwent treatment in the Thorasic Surgery Department and ultimately she expired on 30.10.1997 at 4.30 a.m. THE complainants allege that the death of Annamma was due to the lack of proficiency, expertise, professional incompetence and negligence of the first opposite party which would constitute negligence as well as deficiency of service as per the Consumer Protection Act, 1986 (for short the ''Act''). THE allegation is, the cause of death was oesophagal leak and complications due to the same, there was massive right pleural effussion into the lungs at the time when she was admitted in the Medical Trust Hospital. By introduction of right based intercostal tube 1.600 ml. of purulent fluid was drained from her on 19.10.1997. Inspite of draining process continued unabated, there was no progress and finally she died on 30.10.1997. Perforation in the above context should have been caused by the process of dislodging the meat piece into the stomach by the first opposite party and the first opposite party failed to detect the leak while she was in the second opposite party-hospital. THE first opposite party is not professionally efficient as he held himself out; he is not competent to manage such a situation. THErefore, the complainants claim that they are entitled to compensation on different heads mentioned in the complaint. The opposite parties in their version denied the allegations except that the deceased Mrs. Annamma was brought to the second opposite party-hospital at 9.25 p.m. on 13.10.1997 with a history of difficulty on account of swallowing meat piece, at about 11.30 a.m. X-ray was taken and the first opposite party examined her. No foreign body could be visualised. The X-ray did not show any prevertebral widening and thereupon, the patient and her relatives were advised about the necessity of an oesophaguscopy. Meat piece with bone was visualised at about 38 cms. down from the mouth as it could not be negotiated, the same was dislodged into the stomach with care and caution and the first opposite party carefully examined the oesophagus for perforation which could happen with that type of foreign body but he could not find any symptom of perforation. After operation the patient was continuously monitored and she was fed by Ryle''s tube feeding after 4 p.m. and she was administered antibiotics and anti-inflammatory drugs. There was no problem with the patient while she was in the observation room and thereafter, she was removed to the post operative ward at 5.30 p.m. At 8.45 p.m. she was seen by the first opposite party and watched for vital signs on 15th, 16th and 17th; she was not having any problem for 24 hours even after oral feeding. There was no clinical evidence of any perforation and she was discharged with instructions to take medicines and to report after 5 days for review. On 18.10.1997 at 9.55 p.m. she was again brought to the hospital with complaint of discomfort and cough. She was examined by the duty doctor and

found that air entry on the right side was diminished. Emergency medicines were administered. Being Saturday night, first opposite party was not in Station, and hence the duty doctor John Joseph referred her to the Medical Trust Hospital where there are better facilities. If at all there was any injury or perforation that could have been only on account of swallowing meat piece with bone. When she was in the hospital inspite of thorough examination no perforation could be visualised. The statement that she was having discomfort and weakness at the time of discharge is false and they denied that there was negligence or deficiency of service on their part. They wanted dismissal of the complaint.

On the side of the complainants P.Ws. 1 to 5 were examined and they produced Exts. P1 to P5. On the side of the opposite parties Exts. R1 to R7 were produced and R.Ws. 1 to 3 were examined.

3. THE points that arise for consideration are : (i) Is the alleged negligence and deficiency of service true ? (ii) Whether the perforation and the oesophaguscopy was due to lack of proficiency and expertise, and professional incompetence of the first opposite party in treating the deceased ? (iii) What is the quantum of compensation if any, to which the complainants are entitled to ? Points 1 and 2 : According to the complainants due to the negligence in the treatment given to Mrs. Annamma by the first opposite party perforation to oesophagus occurred which ultimately resulted in her death. Learned Counsel for the complainants sought to maintain that the proved circumstances would attract the application of res ipsa loquitur. According to the learned Counsel there was no probability of herself having perforation to oesophagus when she was admitted in the second opposite party hospital and the perforation could have occurred only during the process of negotiating the foreign body by the first opposite party. He also tried to maintain that the case of the opposite party that she had vomiting which could have resulted in the perforation of oesophagus is not supported by any material. Learned Counsel urged that even assuming that perforation was there when she was admitted in the hospital, it is lack of proficiency, expertise and experience that the first opposite party could not diagnose and detect the perforation and manage it effectively which under law should constitute negligence and deficiency of service. On the other hand, the learned Counsel for the opposite parties maintained that even as per the admitted case of the complainant deceased Annamma was having vomiting, and as per expert evidence perforation could happen because of cough, then it is idle for the complainant to maintain that perforation occurred due to oesophaguscopy or on account of any defect in the treatment imparted by the first opposite party. Instead, relevant records including the case-sheet unambiguously show that careful and efficient treatment was given to her and at the time of discharge she got relief from the discomfort. Therefore, according to the learned Counsel for the opposite parties the case of the complainant in this regard is unworthy of acceptance. It is further maintained that, from the evidence it is impossible to conclude, there is any scope for the application of res ipsa loquitur. In short, according to the learned Counsel, there is no negligence or deficiency of service while she was in the second opposite

party hospital. The learned Counsel stressed that it is important to note that she was discharged from the second opposite party hospital on 17.10.1997 and she was admitted in the Medical Trust Hospital on 18.10.1997 where she underwent treatment and expired only on 30.10.1997 at 4.30 a.m. According to the learned Counsel, there is nothing on record to show, as to what was the type of treatment given to her in the Medical Trust Hospital. In such circumstance, according to the learned Counsel the case of the complainant that it was on account of negligent treatment in the second opposite party hospital she met with death cannot be sustained.

4. WITH due regard to the aforesaid rival contentions it is now necessary to have the sequence of events even after she was admitted in the second opposite party hospital on 13.10.1997 till she was discharged on 17.10.1997. It is also necessary to see as to what was her condition on 18th when she was taken to the Medical Trust Hospital. Paragraph 2 of the complaint states that the first opposite party doctor conducted oesophaguscopy for removal of the foreign body under general anaesthesia on 14.10.1997 at 8.30 a.m. Then she was in the post operative recovery room till 5.30 p.m. Paragrah 2 of the complaint admits that she was seen by the first opposite party doctor at 8.45 p.m. and thereafter during his morning rounds. First opposite party attended her on 15th, 16th and 17th on which day she was discharged. The case of the first opposite party is that all through these days though she was carefully attended to see any symptom of oesophagal perforation, nothing could be noted. The attempt of the learned Counsel for the complainant was to exclude any possibility of her having any perforation at the time when she was admitted to the second opposite party-hospital. Now, it has to be discerned whether the material placed before us by the parties could reveal that there was dereliction on the side of the first opposite party in treating the deceased. It is necessary to advert to the duties of the doctor laid down in the decision of the Supreme Court in Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbol & Anr., AIR 1969 SC 128. Duties of the doctor are dealt with in paragraph 11. It is held therein that : "A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose."

Then as to the duty of the doctor, the same para states : "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 : (ef. Halsbury''s Laws of England. 3rd Edition Volume 26 page 17). The doctor no doubt has a discretion in choosing treatment which, he proposes to give to the patient and such discretion is relatively ampler in cases of emergency."

The same view the Supreme Court has reiterated in the decision reported in Achutracharibhau Khodwa & Ors. v. State of Maharashtra & Ors., 1996 (2) Supreme Court Cases 634, wherein the Supreme Court held : "A mistake by a

medical practitioner which no reasonably competent and careful practitioner would have committed is a negligent one."

Then in paragraph 14 of the said judgment the Supreme Court observed : "The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of the doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence."

The evidence in this regard against the first opposite party has to be appreciated in the context of the aforesaid law laid down by the Supreme Court. Of course, R.W. 2 the first opposite party has sworn in support of what is averred in the version. According to him since foreign material was visualised 38 cms. low and since the same could not be negotiated, it was dislodged to stomach, 2 cms. down. So the foreign body was just 2 cms. above the stomach. That was done as inspite of his best effort the same could not be negotiated into scope, and hence was discharged into stomach. The first question to be addressed is, whether this procedure adopted by the doctor is the procedure to be followed in the given situation. P.W. 5 the expert said : "If on oesophaguscopy the foreign body is visualised it can usually be removed either by grapsing it with a special forceps and pulling it out through the mouth or if it is lodged very low (lower third region) it can be pushed down to the stomach."

As has already been noticed, foreign body was noticed 38 cms. down, in the context of R.W. 2''s effort to take it into the scope failed he pushed it to the stomach; the same is the medically accepted process as per the evidence of P.W. 5. Thus the method adopted by the first opposite party in negotiating the foreign body cannot be faulted. R.W. 1 the expert examination on the side of the opposite parties also stated in her evidence that it is the normal process to be adopted. The follow-up by the first opposite party after that also is relevant in judging whether he managed it with due care and caution as is expected of a surgeon. There also, the complaint, paragraph 2 admits that, after the oesophaguscopy she was in the post operative recovery room till 5.30 p.m. and on her removing to the room she was examined by the first opposite party once again at 8.45 p.m. and from 15th to 17th he attended her during his morning rounds. Alongwith that Ext. R5 case-sheet prescribes monitoring vital signs and also makes direction to give injection Cipan 200 mg. IUBD. What is significant is, instruction was given to monitor vital sign and to give necessary medicines to manage such situation. The precaution taken by the doctor has to be evaluated in the context of Ext. P5; then one cannot say that enough care was not taken by

R.W. 2.

5. NOW it is necessary to note what are the vital signs that would lead to an inference of perforation. Exts. R2(a) and R2(d) are pages 1311 to 1320 of diseases of the nose, throat, ear, head and neck by John Jacob Ballenger, Fourteenth Edition. It is stated therein : "Perforation of the oesophagus usually manifests within 24 hours after oesophaguscopy. It is prudent to keep the patient from taking anything by mouth and maintain him on intravenous fluids until one is fairly sure that perforation has not occurred. Perforation of the cervical oesophagus and hypopharynx is characterised by steady pain and tenderness in the neck. Swelling and subcutaneous crepitus can be palpated."

Ext. R2(b) reads : "Perforation of the thoracic oesophagus are more serious and are characterised by high fever, tachycardia, hypotension, pain in the chest radiating to the back, tenderness on sternal pressure, and subcutaneous emphysema in the neck."

Similar is what P.W. 5 says in this regard. He states that - "in case of perforation of oesophagus the symptoms are much more severe. The patient becomes rapidly restless and if left undetected he may go into shock with fall as blood pressure, high fever and toxiema". R.W. 1 another expert also swears as stated by P.W. 5. Therefore, if as a matter of fact there was perforation to the oesophagus there should be vital signs which could develop within 24 hours, and during the relevant period, the patient was being attended by the first opposite party in the morning rounds and enough instructions were given in the case sheet to watch for any such vital sign. The main thrust of the argument of the learned Counsel for the complainant is that, the doctor in such circumstances should have adopted contrast test and failure to do contrast test would amount to negligence. Having noted that the doctor has taken so much caution for monitoring vital signs and if there was any indication of the same then he was bound to go in for contrast test. In the given situation the argument that since the doctor did not take contrast test, negligence must be found cannot be accepted in the context of the measures taken by R.W. 2. This is particularly so, feeding for the relevant period was through Ryle''s tube. The expert also agrees that oral feeding at that stage is not advisable. There also the doctor has taken enough care, and one cannot accuse him of having any blemish in the procedure adopted by him.

6. THE learned Counsel in this context referred us to the decision of the National Commission reported in Dr. (Mrs.) Rashmib Fadnavis & Anr. v. Mumbai Grahak Panchayat & Ors., III (1998) CPJ 21 (NC), in support of his argument that in the given situation it has to be found that the first opposite party was negligent. THE said decision on facts is distinguishable. THEre, the appellant doctor failed to take minimum care by not keeping any adequate quantity of blood in the theatre before they started the operation knowing that the patient was having a rare blood group. THEy also failed to take normal care and diligence by not providing for a mechanically operated artificial respirator and an adequately long needle for

an inter cardiac injection knowing fully well that the patient was obese. In the said circumstance, it was a case of potential risk, for meeting the situation the doctors did not take enough care. From the discussion, it is impossible to agree with the learned Counsel that, the said decision could have application to the facts of this case. It should be found that the first opposite party did not fail to take enough precaution to meet the situation. It was argued by the learned Counsel that on the basis of the evidence of P.W. 5, since the foreign body was difficult to be taken out the first opposite party should have anticipated perforation to the oesophagus particularly when the said foreign body was pushed out after his attempt to negotiate it to take it out through the mouth. Learned Counsel sought to maintain that, as there was hardly any chance for the perforation to oesophagus after discharge the perforation could have occurred only while she was in the 2nd opposite party-hospital. This argument has no persuasive value.

Learned Counsel made reliance on paragraph 2 of the version wherein it is stated that she had no history of breathing difficulty and the air entry was quite adequate on both sides. There was no pooling of saliva in the pyriform fossa. Therefore, according to the learned Counsel, from the very averment in the version it cannot be inferred that, she could have had perforation at the time of her admission. Then the learned Counsel sought to maintain that the chance of perforation on account of vomiting also cannot be supported, as according to the learned Counsel, P.W. 5 the expert doctor who treated her at the Medical Trust Hospital does not say that she had complaint of vomiting. In Ext. P3 treatment summary since it does not mention of any such complication of vomiting and since R.W. 2 the first opposite party himself has stated that no vomiting was recorded, theory of vomiting and the resultant perforation to the oesophagus cannot be expected. But this argument crumples down because of the admission in the complaint itself. In paragraph 2 of the complaint it is admitted : "....Reaching home, the discomfort of Annamma increased and aggravated and she vomited during night". P.W. 1, the husband of the deceased in his cross-examination admitted that, during the journey from the hospital the deceased vomited several times. Thus, now it cannot be maintained that, she had no complaint of vomiting. Though P.W. 1 would maintain that on her way to house she vomited, in the complaint it is alleged that after discharge also she vomited. There is no acceptable evidence to show that, while she was in the hospital she had perforation. It is true that as per the version itself she had no breathing difficulty when she was taken to the second opposite party hospital. But what is seen from the material is, after her discharge from the hospital she vomited. From the evidence of P.W. 1 as well as Ext. R5 case sheet, there could have been inflammation to the oesophagus on account of the process of dislodging the foreign body, coupled with the fact that there was vomiting when she reached home, furnishes strong possibility of perforation to the oesophagus on account of vomiting; oesophagus since had inflammation, the pressure on the oesophagus on account of vomiting could result in perforation to oesophagus. This is more so,

as her discharge no vital sign justifying perforation was noticed till she was discharged from the second opposite party-hospital.

7. AS indicated early, first opposite party has taken all precautions to find out whether there is any vital sign justifying an inference that there was perforation in the oesophagus. There is no challenge against Ext. R5 case-sheet. In such circumstance, a mere statement in Ext. P3, the discharge summary prepared by the Medical Trust Hospital that oesophagal perforation was confirmed by Methyline blue test which was positive by itself cannot show that the perforation occurred during the process of dislodging the foreign body to the stomach or while she was in the second opposite party-hospital. This is particularly so as already noticed, it is admitted by the complainants themselves that she had cough while she was at her house. The patient while was in the second opposite party hospital she was watched for vital signs which could indicate that there was oesophagus perforation. The learned Counsel for the complainant urged that, the discharge of the deceased was against her wish as she was at that stage weak and was not in a position to take care of her own needs. Reliance was made on the evidence of the by-stander P.W. 2. But it is necessary to note that, Ext. R1 is the complaint filed by the first complainant before the Udumbanchola Consumer Co-ordination Committee. There is no statement in Ext. R1 to the effect that her condition was such that she was not fit for discharge at the time when she was discharged from the second opposite party-hospital. In such circumstance, it is difficult to accept the argument of the learned Counsel for the complainant on the basis of the evidence of P.W. 2 that, she was not in a position to take care herself. Apart from the same Ext. R5 case sheet also does not justify the conclusion as is desired by the learned Counsel for the complainant.

8. NOW the only question that remains for consideration is, whether in the facts and circumstances, the principle of res ipsa loquitur can have application. The learned Counsel sought to maintain that, since at the time of admission of the deceased in the second opposite party-hospital, she did not have any ailment except discomfort because of the foreign body stuck in her throat and since persuant to the treatment she had in the hospital she met with her death, itself would speak for itself and consequently, the principle of res ipsa loquitur would apply. In support of the said argument learned Counsel relied on the decision of the Supreme Court reported in Syad Akbar v. State of Karnataka, AIR 1979 Supreme Court 1848. That dealt with therein is a case under Section 304 of the Indian Penal Code. Res ipsa loquitur, under law, means on the object itself speaks. In this case, as has already noticed, the death took place while she was under treatment in the Medical Trust Hospital, she was taken to that hospital on 18.10.1997 and died on 30th October, 1997. From the evidence to which advertance has already been made, it is not possible to come confirm that the death was due to anything that happened while she was under the treatment of the first opposite party in the second opposite party-hospital. She was not in the custody of the opposite parties when she died. Unless there is evidence to show that, the treatment given by the first opposite party has nexus with the cause of

death, the principle of res ipsa loquitur cannot be invoked. Learned Counsel also relied on the decision reported in Indian Airlines Corporation v. Smt. Madhuri Chowdhuri & Ors., AIR 1965 Calcutta 252. The question that arose under the Fatal Accidents Act. In paragraph 62(a) of the said judgment, it is observed : "Res ipsa loquitur means the things speak for itself. If the accident is such that it speaks for itself then in that case it applies to air accident just as much as it does in other cases."

The said decision proceed to hold that : "If the accident is such that the thing does not speak for itself then it does not apply." Learned Counsel made particular reference to the decision of the Supreme Court reported in 1996 (III) Supreme Court Cases 634 (supra) referred to early. The very facts of the case are different from the case in hand. In paragraph 16 of the said judgment the principle of res ipsa loquitur is made applicable in the context of the fact that the patient therein had sterilisation operation. Complication arose thereafter which resulted in a second operation being performed and she died of peritonitis and the cause of the same was due to the negligence of the respondent No. 2 therein as a mop (towel) was left inside the peritoneal cavity. When a towel is found in abdomen it will speak for itself. The facts of the case is distinguishable and cannot be said to be applicable to the facts of this case. The learned Counsel also relied on a decision reported in Master P.M. Ashwin & Ors. v. M/s. Manipal Hospital, Bangalore, 1997 (1) CPR 393. The facts of the case therein also is distinguishable. During the course of surgery for inguinal hernia, the patient suffered burns on both legs; the nurse kept extremely hot water bag under legs while patient was under anaesthesia. That was a case when inference was possible as the burns could not have occurred but for the negligence of the opposite parties therein. The said decision has no application in this case. Thus in our considered view the facts and circumstances of this case is such that there is no scope for application of res ipsa loquitur. In view of the aforesaid discussion on these points are found against the complainant. Point No. 3 : This point concerns adjudication of compensation. Since, we have found point Nos. 1 and 2 against the complainants, this point does not arise for consideration. Point found accordingly. In the result, the complaint fails and the same is accordingly dismissed. In the circumstances, there will be no order as to costs. Complaint dismissed.

