
(2012) 05 NCDRC CK 0095

In the National Consumer Disputes Redressal Commission

S. C. Mathur

APPELLANT

Vs

Director, All India Institute of Medical Sciences, Ansari Nagar

RESPONDENT

Date of Decision : 09-05-2012

Acts Referred:

Citation : 2012 0 NCDRC 159 : 2012 2 CPJ 608 : 2012 2 CPR 563

Hon'ble Judges : V.B.Gupta , Vinay Kumar J.

Advocate : Shipra Mathur , S.C.Mathur , Mukul Gupta , Anchit Sharma , Bimla K.Kaul

Judgement

1. IN Consumer Complaint No.CC-268/1995 before the Delhi State Consumer Disputes Redressal Commission allegations of medical negligence have been made in the treatment of Mrs. Asha Mathur, since deceased. The Complainants are the husband, daughter and the son of late Asha Mathur. The All India Institute of Medical Sciences has been arraigned as OP-1 and Dr. Upendra Kaul, the then Prof. of Cardiology, AIIMS as OP-2.

2. THE facts as seen from the record are that angiography was done on the deceased Asha Mathur on 2.2.1994 by OP-2, Dr. Upendra Kaul. On 23.3.1994 she underwent angioplasty at the AIIMS and died the same evening at about 4:30 p.m. For this procedure the Complainants were required to pay a sum of Rs.149430/- to OP-1. Alleging medical negligence, the Complainants claimed a compensation of Rs.15 lakhs for mental shock, agony and loss of companionship. Immediately after the death of Mrs. Asha Mathur, the Complainants were given a certificate by OP-2, which declared that during the PTCA procedure, the patient had developed acute closure of the dilated vessel and was therefore subjected to repeat dilatation, which was not effective. After a stent was put in, she developed cardiac arrest and was put on percutaneous cardio pulmonary bypass support (PCPS). Despite being kept on the support for six hours, her brain function did not revive and she was finally declared dead. The certificate also acknowledged receipt of Rs.60,000/- from the Complainants and required them to pay another Rs.75,000/- towards the cost of all the disposables used in the

procedure performed on her.

As per the affidavit evidence of Sri S.C.Mathur, Complainant No.1, they did not get the angioplasty of the deceased done in February as they had chosen to wait for the return of OP-2 Dr. Kaul from abroad. On 21.3.1994 she was examined by Dr. Kaul and was admitted on his advice on 22.3.1994. It is alleged that the heart and lung machine was not kept in the Cath Lab (where the angioplasty was performed). At about 8:45 a.m. the Complainants saw the doctor running to another room to bring the machine. According to the Complainants the patient was already dead by the time the heart and lung machine was put in use.

3. PER contra, the case of the OPs on the substantive issue of negligence was that before the patient was taken to the Cath Lab for angioplasty (PTCA) the patient and Complainant No.1 were explained the procedure and the risks involved. Their consent was obtained for angioplasty as well as surgical intervention, if required. The patient was subjected to balloon angioplasty by the standard technique, but complained of chest pain. She was subjected to repeat prolonged dilatation. A stent was successfully deployed. At this stage, there was precipitous hypotension and bradycardia, which rapidly led to cardio respiratory arrest. Resuscitation and external massage did not result in any improvement of her condition and she was put on the percutaneous cardiopulmonary support (PCPS). She was observed till 5:30 p.m. but there was no sign of brain stem activity. Therefore, she was declared brain dead at 5:45 p.m. On the use of the PCPS, the OPs denied that the machine is always kept in Cath Lab. It was asserted that in this case, "It was primed when patient suddenly arrested as is always done in cases of Cath Lab crashes. During this period, continuous and constant resuscitatory measures were being performed and she was placed on CPS support as soon as possible."

4. THE State Commission awarded a compensation of Rs.2 lakhs holding that:- "OP AIIMS who runs hospitals for the treatment of patients alone guilty for limited medical negligence that the deceased should have been put to heart and lung device within four minutes whereas the members of the team due to being busy somewhere else in the emergency took more time and as a result, the deceased had suffered damage to brain resulting in her death."

Both parties have appealed against the award of the State Commission. Therefore, both appeals have been taken up together. We have considered the impugned order in full detail with reference to the records of the case. The case of the Appellants/Complainants has been argued by Ms. Shipra Mathur, Complainant No.2 and case of the Respondent-1 and Respondent-2 were argued by their respective counsels, Mr. Mukul Gupta and Mrs . Bimla K. Kaul. The Appeal No. FA 165 of 2008 is filed by All India Institute of Medical Sciences against the three Complainants. In the memo of parties, Dr. Upendra Kaul, OP-2 has been listed as the fourth respondent. This appeal has been filed with delay of 565 days. An application for condonation of this delay has simultaneously been moved by the AIIMS. But, the Respondents/Complainants have opposed this

appeal on the ground that it offends the provision of Section 19 of the Consumer Protection Act. Section 19 lays down that:- "Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed: Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period: [Provided further that, no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited, in the prescribed manner, fifty per cent of the amount or rupees thirty-five thousand, whichever is less.]"

5. IN the application for condonation of delay, the appellant/ All INdia INstitute of Medical Sciences have claimed that a copy of the impugned order of 8.8.2006 was not served upon them. The copy came only when the respondent/ Complainant filed their appeal against the impugned order. But, the application does not mention when exactly it was received. IN the written response of the respondents /Complainants, it is mentioned that their appeal No.496 of 2006 was filed in September, 2006 itself. It is further claimed by the appellant/ AIIMS that the matter was entrusted to their counsels Shir S.K. Dubey, who took no steps in the matter even though all necessary papers had been made available to him. The counsel, Mr. Dubey was removed on 21.8.2008 and the documents could be retrieved from him only towards the end of March, 2008. Thus, it is clear that even to retrieve the papers from their own counsel, the appellant has taken nearly two months, when Section 19 of the Consumer Protection Act, 1986 allows only 30 days for filing the appeal.

6. HOWEVER, the first proviso to this Section permits the National Commission to entertain an appeal filed beyond 30 days, if the Commission is satisfied that there was sufficient cause for the delay. In the case before us, the application for condonation does not even give any idea of the date of knowledge of the impugned order or of the quantum of delay, computed there from. It is not enough for the appellant to merely state that the delay was bona fide and not intentional. We therefore, are of the view that the delay is very large and no sufficient cause has been shown for it. The delay is therefore, not condoned. The main grounds urged in First Appeal 496 of 2006 filed by the Complainants, are as follows-- a) The State Commission has failed to appreciate that the heart and lung machine was the most basic and necessary requirement of this patient. The delay in use of this machine has therefore, wrongly been treated by the State Commission as limited/administrative negligence instead of gross negligence on the part of the OPs. b) The State Commission failed to take into consideration that even in the Government Hospital the responsibility of doctor for medical negligence and his accountability for his team of doctors remains, even if the doctor is not held liable for payment of compensation. On the first ground, which

relates to the delay in use of the heart and lung machine, the State Commission has examined the report of PTCA procedure i.e. the procedure for angioplasty, which took place on 23.3.1994. It is seen from the report that after the stent was deployed and the balloon withdrawn, the patient had developed bradycardia and was not responding to fluid and injections. CTVS Surgeons were consulted. Then the patient was put on PCB bypass. The report says that PCPS was instituted within 30 minutes of cardiac arrest. She was shifted to CCU on PCPS for observation and further evaluation of status.

Per contra, the authorities cited on behalf of the Complainants and accepted by the State Commission show that in cases of cardiac arrest the brain can suffer irreversible damage as a result of unreasonable lapse of time, materially in excess of four minutes. In the instant case, as per the report of the team of three doctors handling the PTCA procedure, the heart and lung machine i.e. the PCPS was instituted "within 30 minutes of cardiac arrest".

7. DURING the course of arguments on behalf of the appellants/Complainants it was stressed that the time taken was too long and therefore, it was too late for the PCPS to be of any benefit to the patient. It was argued that the expression "within 30 minutes" itself indicates that almost 30 minutes time was taken, when medically time in excess of four minutes is known to cause irreversible brain damage. There is nothing on record to show that this position was challenged before the State Commission. Learned counsel for the respondent-1/AIIMS was asked to explain what exactly was meant by the expression "within 30 minutes". He could only state that the heart and lung machine was deployed "within" and not "after" the mentioned period of 30 minutes and that there is nothing on record to show exactly when within these 30 minutes.

8. RESPONDENT No.2 /Dr. Upendra Kaul has stated in his affidavit evidence- "I say that the stent which is a stiff device could not be negotiated across the proximal bend of circumflex artery through the judkins Catheter. An Amplatz guiding Catheter was then used to give a better back up and with this method the stent reached the site of dissection and was deployed. However, the check angio after deploying the stent showed a sluggish flow in the left anterior descending artery and the cause was probably trauma produced by the Amplatz guiding Catheter. I say that this complication is well known to all the interventional cardiologists and is well documented in the literature. Unfortunately, the resulting ischemia was accompanied by precipitous haemodynamic collapse and which progressed to asystole very rapidly leading to cardiac arrest. I state that external cardiac massage, cardiac pacing and ventilatory support was started immediately by the team."

This claim of OP-2/Dr Kaul is contradicted by the PTCA report of the team of doctors headed by him, which has recorded that the PCPS i.e. ventilator support was started "within 30 minutes of cardiac arrest". The PTCA report also shows that at the time of institution of the PCPS pupils of the deceased were dilated, not reacting and there was no gag reflex. In the reply affidavit of Dr. Kaul filed

before this Commission, it is again averred that the external cardiac pacing and ventilatory support were started immediately by the team of which respondent No.2 was all through the primary operator. It is also stated that the CPB was in the Cath Lab itself and was placed by the side of the patient and was primed. This response shows that the heart and lung machine was eventually used but gives no idea of exactly how "immediately" it was put to use. In spite of categorical finding of the State Commission that there was critical delay in deploying the heart and lung machine and the record of "within 30 minutes" in the documentation of PTCA procedure, no attempt has been made by respondent No.2/Dr. Kaul to give the idea of time taken in putting the heart and lung machine to use on the patient.

9. WE therefore, agree with the view of the State Commission that "The only medical negligence that emerges from the medical record, particularly PTCA procedure report prepared by Dr. Rajeev Aggarwal, is the loss of valuable time in institution of shawl kit and the PCPS.

10. THE case of the appellants/Complainants before us is that it was wrong on the part of the State Commission to call it "limited medical negligence in the nature of administrative negligence and hold OP-1/AIIMS alone guilty for the delay in putting the patient on the heart and lung machine. In the impugned order, no responsibility has been fixed on OP-2/Dr. Upendra Kaul then Prof. of Cardiology, AIIMS. This is apparently on the basis of an assumption that "the doctors of the team concerned were busy in some other emergency cases as is usual in Government Hospital and institutions like AIIMS where there is constant flow of patients almost from all part of the country. This presumption has been questioned on behalf of the complainants, pointing out that there is no material on record to support this assumption. We find substance in this objection.

On the subject of the responsibility of the treating hospital and the doctors, in a case of medical negligence, the law has been clearly enunciated in the decision of the Apex Court in Indian Medical Association Vs. V.P. Shantha and ors. (1995) 6 SCC 651 in the following terms:- "55. On the basis of the above discussion, we arrive at the following conclusions: (1) Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of "service" as defined in Section 2(1) (o) of the Act. (2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act. (3) A "contract of personal service" has to be distinguished from a contract for personal services". In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered under a "contract of personal service". Such

service is service rendered under a "contract for personal services" and is not covered by exclusionary clause of the definition of "service" contained in Section 2 (1) (o) of the Act. (4) The expression "contract of personal service" in Section 2(1) (o) of the Act cannot be confined to contracts for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of "service" as defined in Section 2(1) (o) of the Act. (5) Service rendered free of charge by a medical practitioner attached to a hospital/nursing home or a medical officer employed in a hospital/nursing home where such services are rendered free of charge to everybody, would not be "service" as defined in Section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position. (6) Service rendered at a non-government hospital/nursing home where no charge whatsoever is made from any person availing of the service and all patient (rich and poor) are given free service- is outside the purview of the expression "service" as defined in Section 2 (1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position. (7) Service rendered at a non-government hospital/nursing home where charges are required to be paid by the persons availing of such services falls within the purview of the expression "service" as defined in Section 2(1) (o) of the Act. (8) Service rendered at a non-government hospital/nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression "service" as defined in Section 2(1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be "service" and the recipient a "consumer" under the Act. (9) Service rendered at a government hospital/health center/dispensary where no charge whatsoever is made from any persons availing of the services and all patients (rich and poor) are given free service- is outside the purview of the expression "service" as defined in Section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position. (10) Service rendered at a government hospital/health center/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing of such services would fall within the ambit of the expression "service" as defined in Section 2(1) (o) of the Act, irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be "service" and the recipient a "consumer" under the Act. (11) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing of the service has taken an insurance policy for medical care where under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of "service" as defined in Section 2(1) (o) of the Act. (12) Similarly,

where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute "service" under Section 2 (1) (o) of the Act."

In the case before us, the appellant/Complainants were admittedly charged a sum of Rs.149430/- for the treatment of deceased Asha Mathur. In the written response before the State Commission it was also stated that accounts showing the cost of disposables used in the PTCA procedure had also been rendered to the Complainants. It is thus, a case in which, under the above decision of the Apex Court, services rendered to the Complainants at the All India Institute of Sciences would fall within the ambit of the expression "service" as defined in Section (2)(1)(o) of the Consumer Protection Act 1986.

11. IN view of the details examined above, the two appeals are disposed of in the following manner" First Appeal No.165 of 2008 filed by the All India INstitute of Medical Sciences, is dismissed on the ground of limitation. The appellant has failed to establish that there was sufficient cause for not filing the appeal within a period of 30 days from the date of the impugned order. First Appeal No.496 of 2006 is partially allowed, modifying the order of the Delhi State Consumer Disputes Redressal Commission in CC No.268 of 1995 in the following terms-- a) Respondent No.1/All INdia INstitute of Medical Sciences and Respondent No.2/Dr. Upendera Kaul are held liable, jointly and severally, to pay the amount awarded by the State Commission. b) The amount shall also carry interest at 9% per annum with effect from the date of the complaint and shall be paid within a period of three months. Delay, if any, will carry interest at 10% for the period of delay.