(2015) 08 NCDRC CK 0010

In the National Consumer Disputes Redressal Commission

Sita Ram Behani — APPELLANT

Vs

Tapas Sinha And Ors. — RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Citation : 2016 1 CPJ 424 : 2016 2 ALD 23

Hon'ble Judges : J.

Final Decision : Petition Dismissed

Judgement

1. REKHA Gupta, Member

2. REVISION petition No. 3136 of 2013 has been filed against the judgment dated 12.06.2013 of the West Bengal State Consumer Disputes Redressal Commission, Kolkata (''the State Commission'') in Appeal No. 153 of 2012. The brief facts of the case as per the petitioner/complainant are that the petitioner, aged about 69 years, visited the dental clinic viz. Smile and Profile at Kolkata with his dental problem in lower 7 molar tooth. The attending doctor of the respondent/opposite party on examination opined that root canal therapy treatment was necessary to protect the tooth. On 19.10.10 Dr. Dadhya started RCT treatment of the lower 7th molar tooth of the petitioner and the petitioner was told that crowning would be completed after three sittings of the treatment and the cost of the package would be Rs. 5,000/ -. But on completion of the 1st sitting a huge infection in the teeth occurred followed by swelling of gum together with severe pain. For this the petitioner visited the clinic of respondents'' several times but no relief was afforded. On 26.10.10 the attending doctor prescribed medicine for remission of pain but he got no substantial relief even after huge expenses by petitioner. Petitioner thought it was the drilling, sealing and x -raying of the tooth that caused the severe damage to his body. The drilling was done in a rough and crude manner that caused severe pain. The petitioner had to remain confined for three weeks to his house and had to cancel the classes in City College being a faculty member due to severe pain. Further, at the time of drilling of his 7th tooth was broken due to rough drilling and the

attending doctor gave irresponsible assurances to cure his problem and debarred him from having treatment from elsewhere to have relief. Subsequently petitioner consulted with Dr. Sourav Ghosh and the Director of the respondent and both of them told the petitioner that the treatment was being done properly. Later on a phone call was made by petitioner for obtaining a date for examination but no response was forthcoming from the respondent''s side. Finding no other alternative petitioner visited Prof (Dr) H.D. Adhikary on 24.01.11 with pain and sensitivity in the tooth for his advice. The doctor on examination of x -ray opined that during the course of drilling there was a bone injury and there was little possibility of the pain subsiding and implantation of crown would be a remedial method. The petitioner was still suffering from pain and sensitivity in his tooth and unable to use the right side of his jaw properly.

3. PETITIONER has prayed that the respondents/opposite parties may be directed to pay the claim being the cost of compensation amounting to Rs. 4,25,000/ - to the petitioner together with the cost of proceeding assessed at Rs. 10,000/ - and the treatment expenses estimated at Rs. 15,000/ - thus making a total of Rs. 4,50,000/ - to the petitioner along with any such further or other orders deemed fit and proper.

4. RESPONDENT /opposite party in their reply before the District Forum have denied all the allegations in the complaint. They have stated that the petitioner attended OPD of respondent No. 1 with the complaint of sensitivity and pain on biting in the lower right side of his jaw. The respondent No. 2 examined him and found dental caries and severe attrition on the surface of lower right second molar tooth. The petitioner gave history of extraction of lower right first molar tooth. The patient was advised to come after getting an x -ray done. Such radiological investigation was done elsewhere and the petitioner came for further treatment. The x -ray report was seen and he was advised for root canal treatment to save the said tooth as the x -ray showed radioloscency approximating the pulp in the concerned tooth. The petitioner showed interest in saving the tooth as the immediate next tooth was missing due to previous extraction which was done elsewhere, and he could not chew properly due to the same. After nearly a month the root canal treatment was started. On the first sitting of the treatment the first step, i.e., access opening of the concerned tooth was done under local anaesthesia. On the following days of the treatment the other steps, i.e., bio -mechanical preparation of the canals of the concerned tooth followed by obturation was completed. Thereafter the patient complained of sensitivity and desired for consultation of an endodontist of the respondent No. 1, clinic. Accordingly, the patient was referred to Dr Sourav Ghosh, the respondent No. 3 for consultation and opinion. The patient visited respondent No. 3 who was briefed by the complainant of the history and treatment log. Respondent No. 3 being a specialist and endodontist of the respondent No. 1 clinic did a basic assessment of the case of the petitioner and advised removal of the obturated material and dressing for that being the basic protocol of treatment in such a complaint. Besides, respondent No. 3 advised respondent

No. 2 to put the patient under observation. After some days the petitioner came to the respondent No. 1 clinic and complained of discomfort followed by re - consultation with respondent No. 3 who directed the patient to complete the treatment with respondent No. 2. However, the petitioner entered into the chamber of the respondent No. 3 on his own without any prior appointment. Respondent No. 3 had a discussion with him regarding his situation of the concerned tooth. Respondent No. 3 also told him to get his dressing changed by the attending doctor (respondent No. 2) but the patient insisted that OP 3 to do so. As such respondent No. 3 changed the cotton dressing and put a fresh dressing and asked him to report to the clinic for further continuation of the treatment. Respondent No. 3 also asked him to resume his normal duty as he was physically fit to do that with advice to report only if his pain aggravates and if it does not then to complete his treatment (root canal) in the clinic. After some days the patient reported to the clinic and wanted to meet Dr Tapas Sinha, the Director of the Clinic. Accordingly, Dr T Sinha met the petitioner in the presence of respondent No. 2 and as per the advice of the respondent No. 3, the endodontist and under the supervision of Dr Tapas Sinha undertook re - obturation of the said tooth with optimum reduction of the occlusal surface. The petitioner/patient was then given an appointment for crown preparation after fifteen days but thereafter he never turned up for any further treatment. The case of the petitioner was normal. It was a case of post endosensitivity, which was one of the common results after an endodontic treatment. In such cases one of the parameter for treatment was to refill the canals and while doing so if the pain does not aggravate then immediate closure was advised or else the chances of infection increase and that was why in such cases it was usually advised for reobturation of the tooth. It was not always expected that all the teeth treated would respond to the treatment in the same way. The respondent No. 1 clinic was really a standard centre for dental cases being fully equipped with modern and latest treatment methodology and with associated experts.

5. THE opposite parties stated that from the aforesaid facts it could safely be concluded that there was no lapse in the treatment and they had rendered their services with due and reasonable care and caution, as such, there was no negligence or deficiency of service on the part of the respondents.

6. DISTRICT Consumer Disputes Redressal Forum, Unit - 1, Kolkata ("the District Forum'') vide order dated 20.02.2012 while allowing the complaint observed as under: "We have considered the entire materials on record and having due regards to the observation made above and keeping an eye that the complainant is an educated senior citizen and professor by profession on oath cannot be expected to distort facts and we find no reason to disbelieve the statement made by the complainant on oath.

In view of the above findings we are of the view that the o.ps. had sufficient negligencies in the matter of taking care in course of treatment of the complainant of his teeth being a service provider to its consumer/complainant

and complainant is entitled to relief.

Hence, ordered that the petition of complaint is allowed on contest against the opposite parties. with cost. O.Ps. are jointly and/or severally directed to pay the treatment expenses of Rs. 10,000/ - (Rupees ten thousand) only and compensation of Rs. 75,000/ - (Rupees seventy five thousand) only for harassment and mental agony and litigation cost of Rs. 5,000/ - (Rupees five thousand) only to the complainant within 45 days from the date of communication of this order, i.e., an interest @ 9% p.a. shall accrue over the entire sum due to the credit of the complainant till full realization".

Aggrieved by the order of the District Forum the respondents filed an appeal before the State Commission. The State Commission vide order dated 12.06.2013 while allowing the appeal held that: "We have carefully gone through the materials on record including the impugned judgment and find that the Ld. District Forum has heavily banked upon the prescription and report of Dr. H.D. Adhikari, stated to be a specialist doctor of a Government Dental College. But, unfortunately, neither the said Dr. Adhikari was not examined on behalf of the complainant nor the Appellants/OPs were given a chance to cross -examine the said doctor on the point of medical negligence on the part of the OPs so alleged by the complainant. In this connection, we are of the considered opinion that by mere production of a medical prescription will not ipso facto render the same to be a medical expert''s opinion and if that be the case, we think that the Ld. District Forum was not justified in relying upon this aspect of the complainant/ Respondent''s case and pass the impugned judgment. Besides that, we are also not in a position to accept the observation so made by the Ld. District Forum so far as it relates to accepting the case of the complainant to be a gospel truth as because the complainant is a senior citizen and also a professor by profession of an educational institution. We have duly considered the decisions so relied upon by the Appellants and find that in the decision reported in National Consumer Disputes Redressal Commission, New Delhi, First Appeal No. 426 of 2006 - Tagore Heart Care and Research Centre Pvt. Ltd. and another v. Mrs. Kanta, the Hon''ble National Commission has held, "Still, however, where the complexities of the medical treatment as well surgical procedures are required to be examined. It is desirable to have the expert''s opinion. Mere fact that the patient suffers some adverse effect during or after the surgery is not enough to take a frog - leap and say that it is a case of "Res Ipsa Loquitur." For example, in surgical operation of fractured tibia -fibula, as a result of an accident, there may sometimes take place complication due to fat embolism. That may prove to be fatal. However, it may not be prevented even though the operating surgeon is an expert and well experienced orthopedician." We have also considered the decision of the Supreme Court of India, Case No. Appeal (civil) 8701 of 1997 - Ravneet Singh Bagga v. KLM Royal Dutch Airlines and another, wherein the Hon''ble Supreme Court has held, "The burden of proving the deficiency in service is upon the person who alleges it. The complainant has, on facts, been found to have not established any willful fault, imperfection, shortcoming or

inadequacy in the service of the respondent. The deficiency in service has to be distinguished from the tortuous acts of the respondent". In the present case, the complainant has failed to produce any expert opinion. Besides that, it is an established proposition of law that the complainant must prove his case independently. If that be the position, we are of considered opinion that the principles laid down in the above -mentioned decisions are very much applicable to the instant case. Accordingly, we hold that the Complainant/Respondent having failed to prove his case, as made out in the petition of complaint, he is not entitled to the reliefs as prayed for.

Having considered the present Appeal in the light of above discussions we find that there is merit in the present Appeal, which, in our opinion, should be allowed. In the result, the Appeal succeeds.

Hence, it is ordered that the Appeal stands allowed on contest but without any order as to costs. The impugned judgment stands set aside. Consequently, the petition of complaint stands dismissed".

7. HENCE , the present revision petition.

8. WE have heard the learned counsels for the petitioner and have carefully gone through the record. Learned counsel for the petitioner contended that the order of the State Commission cannot be sustained as it has failed to exercise its jurisdiction vested by law and has acted with material irregularity/illegality. Learned counsel for the petitioner insisted that it is apparent from the record of treatment as also the prescription of Prof (Dr) H D Adhikari, that the root canal procedure was done in a negligent manner, resulting in a fracture as a result of which the tooth continues to be very sensitive and painful.

9. WE have carefully gone through the record. On 21.09.2010 the petitioner had gone to the clinic of the respondents where the concerned tooth was diagnosed as a carious tooth and was advised root canal treatment with metal crown with sealing of two teeth and x -ray of tooth No. 4. Root canal treatment (RCT) was started on 19.10.2010 by respondent No. 2 and he was given medicine for pain and acidity as also gel paint for the gums. On 25.11.2010 obturation was done but as he suffered pain, obturation was removed and he was given open dressing and medicine to enable healing. Thereafter the dressing was changed from time to time. On 28.12.2010, looking at the condition of the patient, it was advised that, after prior proper sterilization of root canal obturation should be completed and followed by fixing the metal crown. On 30.10.2010 respondents completed the obturation and he was called after two weeks for check -up. No further record of treatment has been placed on record after 30.12.2010 by the petitioner. This would support the contention of the opposite party that re -obturation of the said tooth with optimum reduction of the occlusal surface was done by the respondents and the petitioner was given appointment for crown preparation after two weeks but he never turned up either for fixing crown or for further consultation..

10. IT is also seen from the medical record on file that the x -ray examination of the right lower 2 and 3 molar area was carried out at Southern X ray clinic on 15.09.2010. The said X -ray shows small mesial proximal caries in the crown of 2 molar tooth with periapical infection around its roots and alveolar erosion in this area. Repeated x -ray done on 03.02.2011 after root canal treatment shows the root canal filling in partially broken 2 molar tooth is in -situ and no significant residual perapical lesion. However, alveolar erosion was seen in this area. Prof (Dr) Adhikari has also noted in his prescription dated 24.01.2011 that the tooth was restored with filling material and it was tender on percussion. Some part broken due to carrious enamel. Petitioner was advised to get the x -ray done, on 03.02.2011 which as mentioned above was done. Thereafter on 04.02.2011 he was duly prescribed Tab Calpol as SOS and on 15.03.2011 he was advised ointment to be used on his gums. From the record it is evident that the petitioner had caries of the tooth. Dental Caries is also known as tooth decay and cavities. Caries is a breakdown of teeth due to activities of bacteria. Symptoms may include pain and difficulty in eating. Complications may include inflammation of the tissue around the tooth, tooth loss and infection or abscess formation. Prof (Dr.) Adhikari in his prescription has stated that some part was broken due to caries in enamel of the tooth and not due to RCT. Further, the report of the first x -ray done on 15.09.2010 prior to the start of root canal treatment on 19.10.2010 clearly indicates that the proximal surface of the said tooth suffered from mesial caries in the crown, with periapical infection around its roots and alveolar erosion. It is also an admitted fact that RCT includes drilling and sealing X -ray of the concerned tooth is done to establish whether drilling and sealing have been properly done. The time taken is in the interest of the patient to ensure that there is no infection or inflammation before the root canals and teeth are filled and affixed with a crown.

11. FROM the record, it would appear that the petitioner had opted not to go back to the OPs after 30.12.2010 for affixing the crown. The petitioner has failed to establish that the RCT was responsible for bone injury or breaking the enamel for as per the X -ray report of 15.09.2010 this condition existed prior to the commencement of the root canaling treatment. He has also failed to produce any expert opinion to this effect.

12. THE Hon''ble Supreme Court in Mrs. Rubi (Chandra) Dutta v. M/s. United India Insurance Co. Ltd., : 2011 (3) Scale 654 has observed: "Also, it is to be noted that the revisional powers of the National Commission are derived from Section 21 (b) of the Act, under which the said power can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside. In our considered opinion there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to have taken a different view than what was taken by the two Forums. The decision of the National Commission rests not on the basis of some legal principle that was ignored by the Courts below, but on a different (and in our opinion, an erroneous) interpretation of the same set of facts. This is

not the manner in which revisional powers should be invoked. In this view of the matter, we are of the considered opinion that the jurisdiction conferred on the National Commission under Section 21(b) of the Act has been transgressed. It was not a case where such a view could have been taken by setting aside the concurrent findings of two fora."

In view of the above, we find that the State Commission has given a detailed and well -reasoned order for accepting the appeal of the respondent and dismissing the complaint.

13. THUS , we find that no jurisdictional or legal error has been shown to us in the impugned order to call for interference in the exercise of powers under Section 21(b) of Act. The order of the State Commission does not call for any interference nor does it suffer from any infirmity or erroneous exercise of jurisdiction or material irregularity. Thus, the present revision petition is hereby, dismissed.

