(2010) 04 NCDRC CK 0008

In the National Consumer Disputes Redressal Commission

V K Garg — APPELLANT

Vs

Master Anas — RESPONDENT

Date of Decision : 15-04-2010

Acts Referred:

Citation : 2010 0 CTJ 1041 : 2010 3 CPJ 327 : 2010 3 CPR 28

Hon'ble Judges : B.N.P.Singh , S.K.Naik J.

Advocate : Rakesh Srivastava , A.K.Raina , Shakil Ahmed Syed , Moonis Abbasi

Judgement

1. AS Master Anas suffered injury in his left eye on 5.10.2003 by explosion of cracker in the wake of burning of effigy of ''Ravan'' on occasion of Dussehra festival, services of petitioner No. 1 - doctor who runs Garg Ophthalmic Centre - respondent No. 2 was availed by parents taking Master Anas to him on 6.10.2003. After Mr. Anas was examined by petitioner No. 1, it was noticed that patient suffered chemosis of conjunctiva, corneal limbal wound with prolapsed of iris and anterior chamber full of blood. Accordingly, patient was advised urgent surgical repair. That day itself, i.e. on 6.10.2003, petitioner No. 1 - doctor operated left eye of Master Anas, allegedly repaired cornea and washed anterior chamber of left eye under general anesthesia. During surgery, prolapsed iris was excised, nylon suture was applied to the wound and anterior chamber was washed of all haemorrhage. Intra Vitreal injection of Fortum and Vancomycin were administered and eye was bandaged. Patient was discharged on 9.10.2003 with instructions to clean the eye, use drops and oral antibiotic and anti-inflammatory and was further required to visit on 10.10.2003. However, it was noticed on that day that since there was blood in anterior chamber, oral steroid was added and again patient was called back on 17.10.2003 when ultrasonography of left eye was done so that posterior segment of eye could be assessed. Ultrasonography report issued by Dr. Hansraj of Mansarovar Eye Hospital, Lucknow showed soft eye with vitreous haemorrhage, though retina was unaffected. Though patient turned up on 27.10.2003 for follow-up action, for non-cooperation of child, he was further called to visit so that proper examination could be done under general anesthesia. It was on 28.10.2003 that

with no view of retina, due to vitreous haemorrhage that patient was advised to undergo parasplama vitrectomy coupled with cataract extraction with silicon oil injection. Allegedly, all this was advised by petitioner No. 1 - doctor in view of left eye having become soft and non-functional and there being possibility of vision of other eye too getting lost for sympathetic ophthalmia which usually develops in normal eye when opposite eye develops phthisis. However, patient did not follow instructions and did not visit clinic thereafter.

2. PARENTS of child in view of latter losing vision, availed services of Dr. A.K. Paul on 3.11.2003 when injections of dexamathasone were administered in left eye. Patient was subsequently examined by Dr. Paul on 22.11.2003 under general anesthesia and after operation removed an elongated metallic wire, a foreign body from left eye. Patient was further examined by Dr. Paul on subsequent dates when stitches were removed and parents were told that infection that developed in eye was due to metallic wire remaining inside the eye for a long time and consequently vision was lost.

3. ALLEGING medical negligence attributed to petitioners, a consumer complaint came to be filed with District Forum which was resisted by petitioners. District Forum, however, having overruled contentions raised by petitioners, holding petitioners negligent in services provided to Master Anas, awarded compensation of Rs. 6,10,000 to complainants payable by them within a period of two months with a default clause in the order that in case of failure to pay award, within a period of two months, basic award would carry interest @ 10% p.a. Litigation cost of Rs. 2,000 too was awarded in the order. State Commission too, in appeal, having considered pleadings of parties and also reasonings assigned by District Forum in the order under challenge, while affirming basic award, dismissed appeal with cost. Petitioners are now in revision.

4. MANIFOLD contentions were raised on behalf of petitioners and we can notice some of them which are relevant for consideration. Contentions are sought to be raised that though Fora below had based their finding about medical negligence on part of petitioners basically on finding of Dr. A.K. Paul about removal of metallic wire from left eye which remained lodged in eye for a longer period and allegedly remaining unnoticed by petitioners, ultrasonography report issued by Dr. S. Hansraj of Mansarovar Eye Hospital, Lucknow, it was urged, would strongly militate against aforesaid observations made by Dr. Paul. Learned Counsel for petitioners would draw our attention to ultrasonography report issued by Mansarovar Eye Hospital on 18.10.2003 and with all stress has urged that had there been foreign body lodged in left eye, it was most unlikely that it would not have been shown in ultrasonography report. It was canvassed that since ultrasound report did not mention about any foreign body, credibility of observations made by Dr. Paul was completely lost.

5. LEARNED Counsel also took strong exception to observations made by State Commission which are in following terms: "..... The treatment by petitioner No. 1 shows that the consideration has been taken and the patient has been

pathetically and indifferently treated and no sincere efforts were shown to identify the complaints of opposite party No. 1 and even after complaints no attempt whatsoever was made by petitioner No. 1 to remove wire-piece as a result of which vision of opposite party No. 1 was lost.....".

6. CONTENTIONS are raised that though blood clots were removed from left eye, since eye appeared soft, with no view of retina due to vitreous haemorrhage, patient was advised to undergo parasplama vitrectomy coupled with cataract extraction with silicon oil injection but that was not followed by parents of patient. Strongly taking exceptions to observations made by Dr. A.K. Paul, this too is also stressed by Counsel for petitioners that there was no evidence about Dr. Paul ever carrying out surgical operation on left eye of Master Anas and that too, without anesthesia which is beyond comprehension and that apart, the entire line of treatment adopted by Dr. A.K. Paul of Sitapur Eye Hospital was akin to diagnosis, management and treatment, as advised by petitioners. However, this argument did not find support from the line of treatment adopted by Dr. Paul as on 10.11.2003 when Dr. Paul examined the patient, he had stopped Dexamethasone which was taken by patient as prescribed by Dr. Garg.

7. DR. Paul during pendency of proceeding before District Forum was also examined on oath and he reiterates the extraction of metallic wire from the left eye of Anas. Though the Doctor was cross-examined by petitioner, no dent was couched to his credibility.

8. SINCE ultrasound of left eye on advice of petitioners was done in Mansarovar Hospital on 18.10.2003 and the report that was placed on record issued by Dr. S. Hansraj on 30.4.2004, State Commission found this piece of evidence unworthy of credence, more so, in view of the fact that such negative report was unsolicited. Though register allegedly maintained in OP petitioner No. 2 was also placed on record, rightly, in view of irregularity in maintenance of Diary in which some extra entries were made and some pages were missing, State Commission did not consider them to be credible. We entirely concur with reasonings assigned by State Commission for giving no credence to ultrasound report given by Dr. S. Hansraj after lapse of about five months and also that being an unsolicited report. Other contentions too raised on behalf of petitioners about Dr. Paul extracting metallic wire from left eye without general anesthesia is negated from treatment papers issued by Regional Institute of Ophthalmology Eye Hospital, Sitapur which shows following features: "- Patient examined by Dr. A.K. Paul, CMO - Under GA (on 22.11.2003) (L/E) . Perforated injury at 9 O''clock position . One metallic elongated FB removed from conjunctiva piercing into the vitreous . Complicated cataract . Tension very low . Suspected endophthalmitis Rx . E/D Nugen (2 hour) . E/D Dexcin (4 time) . Syr. Ibujesic (1/2 tea spoon after food if necessary)."

9. PLETHORA of decisions of Hon''ble Apex Court and also of National Commission were placed before us for appreciation of ratio laid down therein. In case of Jacob Mathew v. State of Punjab and Anr., III (2005) CPJ 9 (SC)=VI

(2005) SLT 1=122 (2005) DLT 83 (SC)=III (2005) CCR 9 (SC)=(2005) 6 SCC 1, what was under consideration of Hon''ble Apex Court was a matter of criminal negligence, as, after a patient died following respiratory problem for want of oxygen to be supplied to him, a criminal case under Section 304A along with other allied Sections of IPC was registered attributing negligence against treating doctors and others. As was observed by Hon''ble Apex Court, the term "negligence" is used for the purpose of fastening the defendant with liability under the civil law and, at times, under the criminal law. In both these jurisdictions, it was contended that no distinction can be drawn with negligence under ''civil law'' and negligence under ''criminal law''. Hon''ble Apex Court having noticed observations made in a case decided by Supreme Court reiterated that "simple lack of care such as will constitute civil liability is not enough, for purposes of the criminal law. There are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established". It was further observed that the criminal law has invariably placed medical professions on a pedestal different from ordinary mortals. Further observations were made that jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in ''civil law'' may not necessarily be negligence in ''criminal law''. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution. The observations made by Hon''ble Apex Court in this context is that even ''simple lack of care'' may constitute ''civil liability'' which was not enough for purposes of ''criminal law''. Hon''ble Apex Court observed that: "at least three weighty considerations can be pointed out which any Forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are : (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation, the person holding the ''smoking gun''. The essential components of negligence, as recognized are three : "duty", "breach" and "resulting damage", that is to say: (1) the existence of a duty to take care, which is owed by the defendant to the complainant; (2) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and (3) damage, which is both casually connected with such breach and recognized by the law, has been suffered by the complainant.

10. WE are not oblivious that a ''simple lack of care'' or an ''error of judgment'' or an ''accident'' is not proof of negligence on part of medical professional and also a medical professional cannot be held liable because a better alternative course of treatment was available and the doctor has not chosen to follow or resort to that practice. We do not mean to say even that only because something went wrong in choosing one reasonable course of treatment in preference to another, the medical professional would be liable for negligence, but if

circumstances are quite eloquent to show that surgical operation carried out by the doctor went eventful, fortified by subsequent events, it is pointer to the negligence.

11. MASTER Anas approached petitioners in a critical state of eye, having suffered injury from cracker. He was operated by petitioner doctor and the hospital, which followed complication with the eyes, the child suffered immense pain and he began losing vision. It was only after Dr. A.K. Paul was approached that the metallic wire was removed from the left eye which had suffered damages and as has been the finding of Dr. Paul, the left eye had developed infection. Nobody has a case that Master Anas was treated by other doctor than the petitioners before he was examined by Dr. Paul. The situations are so eloquent and transparent that it would attract doctrine of res ipsa loquitur too, as circumstances themselves speak a volume about gross negligence in treatment of child. When a patient approaches the doctor and his services are availed, it is with the hope to redeem the suffering and not for its aggravation. But what happened with Master Anas is not an indication of redemption of suffering. In view of critical state of eye, the doctor was expected to be more careful in treatment but subsequent happenings totally betrays the expectation from a doctor. In case of Kiran Bala Raut v. Christian Medical College and Hospital and Ors., II (2002) CPJ 131 (NC), National Commission reiterated well settled principle that medical negligence must be established and not presumed. In the absence of expert evidence on behalf of complainant, no negligence for deficiency in service could be found against affidavits filed by doctors.

12. TOUCHSTONE to find negligence on part of treating doctor was also the standard of ordinary skilled man exercising and professing to have that special skill and the man need not possess that expert skill. We may profitably refer to a decision of National Commission in the case of Ganga Ram Hospital v. D.P. Bhandari, II (1992) CPJ 397 (NC), a medical man rendering professional service for consideration is liable if he falls short of the standard of a reasonable skilful medical person in the field. Yet the test would be as to whether the doctor has been proved to be guilty of such failure as no doctor of ordinary skill could be guilty of it acting with the reasonable care. It was reiterated by Hon''ble Apex Court in case of Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole, AIR 1969 SC 128, that, "a breach of any of those duties gives a right of action for negligence to the patient. The petitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care." Even if this ratio is applied that the treating doctor was expected to exercise ordinary skill of an ordinary competent man exercising that particular art, frustrates us as to the degree of care that was taken by petitioner doctors and the hospital as even after surgical operation was carried out the metallic wire which was lodged in the left eye remained lodged causing a number of complications to the child who eventually lost his vision.

13. TRUE it is that there is no such finding of Dr. Paul that the child had lost

vision due to metallic wire remaining lodged in the cavity of left eye for a considerable period, conclusion may be drawn from the events admitted. Surgical operation on left eye of Master Anas was performed by petitioner Doctor on 6.10.2003 when cornea was repaired and anterior chamber of left eye was washed. Record bears testimony to the fact that after parents of Master Anas visited Sitapur Hospital where the child was examined by Dr. Paul, one Dr. Atique too of Sitapur Hospital had examined the child on 29.10.2003 but there is no treatment paper. It was not before 22.11.2003 that Master Anas was examined and by applying General Anesthesia the elongated metallic wire was removed from left eye which evidently suggest that metallic wire remained in the cavity of left eye for more than one-and-half months and the injury which it may cause to the eye which is a soft organ of human body can easily be comprehended. The child eventually lost vision and cosmetic shell were put in the left eye to enable the child to have a look of a eyed person with the aid of artificial eye and this is nobody''s case but case of treating doctor himself who in his affidavit-evidence had narrated the sequence of events with the aid of Annexures A-13, A-14, A-15, A-16 and A-17, some of which have been issued by Doctor of Aligarh where artificial eye was fitted. Profitably we can have a look of affidavit of the father of the ill-fated child also who says in his affidavit having no respite, he also took consultation in All India Institute of Medical Sciences, New Delhi, Mata Chanan Devi Hospital, New Delhi and eventually, there was no other option but to fix cosmetic shell (artificial) in the left eye at Eye Centre, Aligarh for which he had incurred considerable expenditure. Subsequent happenings right from child getting examined by Dr. Paul and lastly in Eye Hospital, Aligarh would speak a lot about the plight of miseries of the child who eventually lost his vision and was left with no option but to have an artificial eye.

14. STATE Commission had taken pains to consider this issue to come to a finding holding petitioners answerable for negligence which we too, tend to affirm. A child of three years has lost vision of left eye permanently. No compensation or monetary assistance can compensate this irreparable loss of vision caused to the child. Yet, the statute provides for award of compensation to mitigate the suffering of those who suffered for negligence of others. As for compensation, State Commission has affirmed the award of Rs. 6,00,000 awarded by District Forum. In view of plight of miseries faced by the child as well as the kith and kin of the ill-fated child, we too put our seal of approval on the basic finding of State Commission and also for the award of District Forum which was affirmed in appeal by State Commission. Petitioners to honour the award within a period of three months from the date of the order failing which they are liable to pay interest @ 6% p.a. till realization.

15. THOUGH United India Insurance Company Ltd. too was arrayed in the proceeding before State Commission as respondent No. 3, no issue appears to have been raised about the liability of Insurance Company. In revision too, no contentions are raised as per insurance coverage to the treating professional Doctor and, hence I refrain to make any discussion on this score. In case the

treating doctor is covered by professional insurance provided to him by respondent No. 3, it would be appropriate for them to take suitable action for needful.

16. RESULTANTLY, revision petition being divorced of merit, is dismissed but without order as to cost. Revision Petition dismissed.

