(2014) 03 NCDRC CK 0024

In the National Consumer Disputes Redressal Commission

Vishwanath Shivling Birajdar (Dr.) APPELLANT

Vs

Gangadhar Sangram Mitkari and Ors. RESPONDENT

Date of Decision : 07-03-2014

Acts Referred:

Citation : 2014 0 NCDRC 384 : 2014 2 CPJ 184

Hon'ble Judges : S.M.Kantikar J.

Final Decision : Petition dismissed

Judgement

1. THE Petitioner preferred the present Revision Petition against the common impugned order dated 29.9.2011 passed by the Maharashtra State Consumer Disputes Redressal Commission, (in short, ''State Commission'') Mumbai, Circuit Bench at Aurangabad in First Appeal Nos. 2567/2005, 2613/2005 and 101/2006 wherein the State Commission partly allowed the appeal filed by the Petitioner and directed him to pay Rs. 50,000 with 9% interest to the Complainant from 23.7.2004 till its realization. Facts in brief: Ganesh, son of Complainants Sh. Gangadhar Mitkari and Smt. Kamblabai Mitkari who was suffering from piles was operated on 5.6.2003, by the petitioner/OP -1 Dr. Birajdar, at his Sanjivini Hospital, Udgir. It was alleged that OP -1, prescribed Injection Voveron for the pain, which was given by an untrained compounder. Thereafter, at 2.00 p.m. Ganesh complained about non -urination. At 6.00 p.m., as there was no movement of Ganesh, the OP -1 was called, but he did not attend. Again, at 11.00 p.m., Complainant called the OP -1 and his compounder but no avail. On 6.6.2003, early in the morning, at 6.00 a.m., the OP -1 referred the patient to Vivekanand Hospital (OP -2) at Latur. It was alleged that, prior to the operation, the pathological tests were not conducted by OP -1. It was also alleged that immediately after the operation, the patient complained of pain and suffered from convulsion and vomiting and non -urinal, but OP -1 did not examine the patient, did not take proper precautions and that there was a delay in referring the patient to OP -2. The OP -1 instead of referring the case to Nero Surgeon, the operation was carried out by M.S. Surgeon at Vivekanand Hospital (OP -2). The Complainant contended that the deceased was a strong and healthy young

boy, who has received a call for recruitment in police force. He was running a grocery shop and Complainants were dependent on him. Therefore, both OP -1, Dr. Birajdar and OP -2 Vivekanand Hospital are liable for medical negligence and deficiency in service.

2. HENCE , a complaint was filed before the District Consumer Disputes Redressal Forum (in short, ''District Forum'') and claimed compensation of Rs. 10,00,000 with 12% interest, from the date of complaint, and Rs. 50,000 for mental agony. The District Forum directed OP No. 1 and 3 to pay Rs. 50,000 + Rs. 29,457 with 9% p.a. interest from the date of complaint i.e. 23.7.2004, till its realization. District Forum also directed the Opponent Nos. 1 and 3 to pay Rs. 2,000 towards the cost of the complaint. Opponent No. 2 was exonerated by the order.

3. DISSATISFIED with order of District Forum, the Complainants filed an appeal (FA/2567/2005) before State Commission for enhancement of compensation, Opponent Nos. 1 and 3 filed the appeals for quashing and setting aside the order of District Forum.

4. THE State Commission dismissed the appeal filed by the Complainant and the appeal filed by OP -1 was partly allowed and the appeal No. 101/2006 filed by Insurance Co. (OP -3) was allowed. We have heard the Counsel for both the parties and perused the records. The Counsel for the petitioner vehemently argued and denied any negligence in performing piles operation. The OP -1 performed Surgery for piles on 5.6.2003 and kept the patient Ganesh under observation. On the same evening, patient had developed signs of convulsions and vomiting, which was diagnosed as a Cerebro -Vascular Accident (CVA), hence the OP -1 advised to shift the patient to Vivekanand Hospital (OP -2) at Latur, for further management of CVA, but the complainant delayed in shifting to 6.6.2003. At OP -2 hospital, the patient was admitted in ICU and after MRI study, the patient was diagnosed as "Hyper -acute Cerebral Infarction at Left Frontopertaining to Left ICA territory with cerebral edema with occlusion of Left ICA. On emergency basis, doctors at OP -2 conducted operation for Decompression hemi -craniotomy, kept the patient under observation in ICU, who died on 9.6.2003. The Counsel for OP -1 contended that there was no nexus between operation for piles and CVA. There was no expert opinion to prove that the said clot was due to surgery of Hemorrhoids (piles) and there was negligence in the treatment.

5. IN our view, the main crux in this case is, whether, there was negligence on behalf of OP -1 or OP -2 or by both, in the treatment of deceased Ganesh. We have perused the evidence on record. The District Forum sought an opinion from Dr. Dattaprasanna B. Katikar, a Neuro Surgeon from Solapur, who was examined as a Commissioner. He clearly opined that there was no possibility of formation of clot in the carotid artery, during surgery for piles. The operation for Decompression hemi -craniotomy at Vivekanand Hospital (OP -2) performed on Ganesh, was as a lifesaving and an emergency procedure. It was a standard

practice in such cases. Therefore, it was not a negligence committed either by Dr. Birajdar or at Vivekanand Hospital in conducting their respective surgeries.

6. THE Counsel for the complainant vehemently argued that an unqualified compounder administered injection to Ganesh, prior to operation, necessary tests were not performed and the piles operation was conducted, without an Anesthetist. We have referred to standard medical books on the subject of "Operative Surgery, Surgical Management of Hemorrhoids, Practice of Surgery for the Colon, Rectum, and Anus," by Philip H. Gordon, Santhat Nivatvongs. Accordingly, an operation for piles can be performed under local anesthesia. Surgeons can administer local anesthesia. The need for calling an Anesthetist, is not a must. This view is supported by the opinion of the Govt. surgeon (Ex. 3/24) and opinion of the Board of Doctors at Ambajogai (Ex. 3/25). Dr. Sudhir was an Anesthetic expert and in his cross -examination (Ex. 48) he has mentioned that local anesthetia can be given for the piles operation. However, experts have mentioned that the compounder should be a trained one. Employing untrained compounder and administering injection to the deceased through him, was a deficiency in service on the part of the OP -1. In furtherance, we do not find any merit in arguments advanced by Counsel for complainant, about the delay on the part of the OP -1, to refer the patient to OP -2, and that OP -1 had obtained signatures on blank forms by pressurizing. There are four basic elements to a medical negligence/malpractice case. The four legal elements (4 D''s) must be proven by complainant to succeed in a medical negligence case. (1) Duty - -a professional duty owed to the patient;

(2) Deficiency - -Breach of such Duty;

(3) Direct Causation - -injury caused by the breach (Causa Causans)

(4) Resulting Damages.

Causation means that the medical professional''s breach of the standard of care caused or contributed to causing some harm to the patient. In this case, even if the untrained compounder has given pain killer injection Voveron to Ganesh, it did not cause any damage to the patient. Hence, we refrain ourselves to consider this issue, as a medical negligence.

7. WE have relied upon several judgments of Hon''ble Supreme Court and this Commission on medical negligence. In Jacob Mathew v. State of Punjab & Anr., : III (2005) CPJ 9 (SC) : VI (2005) SLT 1 : 122 (2005) DLT 83 (SC) : III (2005) CCR 9 (SC), was concluded that,

a professional may be held liable on one of two findings: either he was not possessed of requisite skill which he professed to have possessed, or, he did not exercise reasonable competence in given case, the skill which he did possess.

8. ALSO , we like to refer to the Bolam test, in this context. In the Bolam''s case Bolam v. Frien Hospital Management Committee,, (1957) 1 WLR 582, it was also held that a doctor is not negligent, if he is acting in accordance with standard

practice merely because there is a body of opinion who would take a contrary view. Applying the above principles in the instant case, we do not find any medical negligence on the part of OP -1 and OP -2, who have used their best professional judgment and took due care during surgery and during unexpected CVA to the deceased Ganesh. Since, the present case is based upon an allegation of deviation from ordinary professional practice, it is worth to refer Lord President Clyde in Scottish case Hunter v. Hanley,, 1955 SC 200, wherein it has laid down the following requirements to be established by the patient to fasten liability in case of negligence committed by a doctor: To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course, the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on the pursuer to establish these three facts, and without all three, his case will fail.

9. BASED on the discussion above, we do not find any negligence caused by OP -1 and OP -2, in the surgical treatment of the deceased. Consequently, we set aside the order passed by the State Commission.

10. DESPITE this, we take serious view against the OP -1, who took services of an Unqualified Compounder, which amounts to deficiency in service. It is a breach of duty "per se actionable" as per the Core Law. A Medical Professional, like OP -1, should not to be allowed scot free and to take undue advantage of such situation. We can''t ignore the fact that, OP -1 is a Doctor and he is expected to treat the prospective patients, who will approach him in future. Hence, he should not be allowed to be unpunished because of deficiency in service. Therefore, we hold OP -1 liable for the deficiency in service. It is, as well, a lapse on the enforcing health agencies. It is also aimed that the concerned enforcing authorities for medical establishment should take remedial measures to avoid such lapses. We feel it necessary to circulate the copy of this order to the Professional Regulatory Bodies like, MCI, DO, IMA, etc., to educate the medical professionals in this aspect of health law. Therefore, on entirety of our discussion, we direct the OP -1 to pay Rs. 25,000 compensation to the Complainant, within 90 days, otherwise it will carry interest @ 9% p.a. till its realisation. There is no order as to costs.

