NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

CONSUMER CASE NO. 361 OF 2001

1. SMT. MAMTA AGARWAL & ORS.
R/O. NEAR JAWAHAR GATE
AMRAWATI
MAHARASHTRA ....Complainant(s)

Versus

1. BOMBAY HOSPITAL MEDICAL RESEARCH CENTRE & ORS.
THROUGH ITS DIRECTOR, BOMBAY HOSPITAL TRUST,
MARINE LINES,MUMBAI-400020
2. NATIONAL INSURANCE CO. LTD.
- ....Opp.Party(s)

BEFORE:

HON'BLE DR. S.M. KANTIKAR,PRESIDING MEMBER
HON'BLE MR. BINOY KUMAR,MEMBER

For the Complainant :
For the Opp.Party :

Dated : 22 Dec 2022

ORDER

APPEARED AT THE TIME OF ARGUMENTS

For Complainants : Mr. Abhinav Kumar Mishra, Advocate

Mr. Sanjeev Mahajan, Advocate with

Ms. Seema Sundd, Advocate

Ms. Shweta Priyadarshini, Advocate

Mr. Drovhn Garg, Advocate for OP-1

For Opposite Parties : Mr. Raja Thakare, Sr. Advocate with

Mr. Akash K., Advocate for OP-2

Mr. S.B. Prabhavlkar, Advocate for OP-3

Ms. Aakriti Goel, Advocate for OP-4

Pronounced on: 22nd December 2022

ORDER

DR. S.M. KANTIKAR, PRESIDING MEMBER

Facts:

1. On 28.10.1998, Mr. Vijay Kumar (hereinafter referred to as the 'patient'), fell down from the ladder in Amravati and sustained minor injuries to his left forearm. After initial treatment, he was referred to Dr. M.R. Thatte (OP-2) at Mumbai to undergo microvascular repairs and plastic surgery for removal of skin defect. The OP-2, after examination, advised flap surgery for removal the skin defects and microscopic repair to ulnar nerves.

2. Accordingly, on 01.11.1998, the patient was admitted to Bombay Hospital Medical Research Centre (OP-1- 'Bombay Hospital') and on the next day the OP-2 performed 'Posterior Introsseous Skin Flap Surgery'. Again on 04.11.1998 patient was taken to the operation theatre for revision and checking of the flap surgery. For this purpose, patient was administered general anaesthesia. Post-Surgery. The OP-2, informed the patient's wife (Complainant No. 1) that everything was fine. It was alleged that the patient was awake after the surgery and suddenly gone into respiratory arrest. As a result, the patient was shifted to the Intensive Care Unit (ICU) for ventilator support. It was further alleged that the Nurses Report shows that the patient was "DROWSY" and he was still under the influence of General Anaesthesia. However, the OP No. 3 mentioned in the notes that patient was awake. It was contradictory to the report submitted by the receiving nurse of the recovery room. The OPs have totally failed to take proper care after the completion of the operation. The patient was totally neglected by the hospital staff. The patient's brain had already suffered 'HYPOXIC' damage (due to lack of oxygen supply) due to substantial gap. Subsequently, the patient went into coma and died on 06.08.2000 at Amrawati. It was stated that the patient was not suffering from any kind of neurologic ailment prior to 6.11.98. However, permanent damage was caused after the surgery.

3. Being aggrieved, the Complainants filed the Consumer Compliant under section 21 of the Consumer Protection Act, 1986 before this Commission against the Bombay Hospital (OP-1) and the treating doctors (OPs-2 and 3) for medical negligence and deficiency in service. The Complainants prayed for total compensation of Rs. 40,50,000/- under different heads.

Defence:

The Opposite Parties filed their respective Written Versions and denied the allegations of medical negligence.

4. The **OP-1 - Bombay Hospital Medical Research Centre** submitted that the Complaint is not maintainable as the Bombay Hospital is maintained by a charitable trust. The treating doctors are not it's employees. The hospital provides infrastructural facility and back-up to the prominent doctors, who are the honorary consultants. Therefore they are responsible for treating the patients in their individual capacity. As per the agreement signed between the Hospital and 'the Consultants , the Opposite Party No. 1 is responsible only for providing the basic paramedical and administrative facilities.

5. The **OP-2 - Dr. M.R. Thatte,** in his written version, raised the preliminary objection on maintainability of Complaint as barred by limitation, it was was filed after 350 days delay on 3.10.2001, no Application for condonation was filed. The alleged cause of action for filing the complaint was on 06.11.1998, therefore the complaint ought to have been filed on or before 5.11.2000. Though Complaint No. 83 of 2000 was filed during lifetime of the deceased however, the said complaint was withdrawn on 27.09.2000 on the ground of death of patient. The said complaint was allowed to be withdrawn without granting a specific leave to file fresh complaint. Admittedly the present complaint was filed on 03.10.2001,

thus there was unexplained delay of 350 days. Hence, in view of Section 24-A of the Consumer Protection Act the Complaint is liable to be dismissed.

6. On merit, the OP-2 submitted that, the patient was operated for re-adjustment of local skin flap to cover the patient's skin defect. It was done under GA. After the operation the patient had recovered from the Anaesthesia as understood in medical terminology and then in his presence the patient was transferred to the recovery room. He also spoke the patient and ascertained his consciousness. As far as the remark "AWAKE" made by the Anaesthesiologist in his report, this remark was with regard to the patient's medical parameters and it should not be interpreted as in the dictionary sense. The Complainants are trying twist the remark "DROWSY" written in the Nurses report. Since the report has not been annexed to the Complaint and hence he was unable to verify about its truthfulness. In any event, the perception of the Anaesthetist as 'level of consciousness' in the recovery room, differs to a great extent from the layman or paramedic's evaluation. Though, the patient went into a coma it was not due to any negligence or carelessness of any doctor. The Anaesthetist continued with the patient and the Anaesthetist had certified the patient's good condition before he went to his room.

7. The **OP-3 - Dr. Madhav Sathe,** the Anaesthetist, submitted that the surgery went uneventful. From his operative notes, the patient was awake while shifting to recovery room and the complications were developed on or after 5.10 p.m. on the same day. As a routine practice he remain in the operation theatre at least 45 minutes to one hour to offer emergency treatment, if any, required post-operatively Therefore, it was false allegation that there was delay of 20 minutes to attend the patient. He further submitted that his professional colleagues Dr. Pradhan (Orthopaedic Surgeon) and Dr. Datar (Anaesthetist) were also much present with him. The affidavits of Dr. Datar and Dr. Pradhan were filed.

Arguments:

We have heard the arguments from both the sides. The learned counsel reiterated their evidence.

From the Complainant:

8. The learned Counsel for the Complainants vehemently argued that the Hospital acted in a negligent manner which failed to keep necessary lifesaving equipment and trained personnel to handle care of such situations. The OP-2 has surprisingly described the whole incident as an 'Act of God', without explaining as to how the deceased could have slipped into coma suddenly, ultimately resulting in death. The contradiction in the noting of the nurse and the OP-3 was glaring lapse without sufficient explanation. The OP-3 was aware that cerebral hypoxia is a common complication, thus the hospital was required to keep all remedial measures ready, so that the deceased could be revived from the complication of cerebral hypoxia. The learned Counsel further argued that, this is a clear case of *res ipsa loquitur*. In fact, the OPs- 2 and 3 have admitted in their pleadings that they are unable to explain what happened and to cover up their negligence and failure of care, they are harping on terms like "inexplicable" "Act of God" etc. The learned Counsel for the Complainants relied on;

i. *Achutrao Haribhau Khodwa v. State of Maharashtra*[1]
ii. *Spring Meadow Hospital Vs Harzoli Ahluwalia*[2]
iii. *Charan Singh Vs. Healing Touch Hospital*[3]
iv. *Jacob Mathew Vs. State of Punjab*[4]

Arguments from the Opposite Parties:

Argument from OP No. 1:

9. The learned Counsel for the Opposite Party No. 1 argued that the Patient suffered injury over his left forearm and initially was operated by Dr. Rathi at his clinic at Amrawati. He was thereafter referred OP1 hospital on 01.11.1998 and operated upon on 02.11.1998. The 2nd surgery was done on 04.11.1998. The revision surgery to check the flap done on 06.11.1998 under general anesthesia. The Patient started on coughing and it was managed through injections. At 5:10 pm the patient could not breathe, and his BP was dropping. At this stage Patient was intubated. The patient stayed in the OP No.1 hospital for a short period of

time and at the request of the family members he was discharged from the hospital. After several months, the patient passed away on 06.08.2000.

Arguments from OP No. 2:

10. The learned counsel for OP No. 2 reiterated the evidence and stressed upon the instant complaint was the time barred. He further argued that it is settled law that in cases of medical negligence specific act of negligence must be alleged and then proved as also to show how that amounts to negligence. He relied upon following authorities:

(i) Martin F. D'Souza v. Mohd. Ishfaq[5]

(ii) Kusum Sharma and Ors. v. Batra Hospital and Medical Research Centre and Ors.[6]

11. The OP-2 in his support he filed an affidavit of an expert Dr. Sanjay Wagle. The opinion given by Dr. Wagle has gone unchallenged despite opportunity to cross examination was given to the complainant.

Arguments from OP-3:

12. The learned counsel for opposite party no. 3 reiterated the evidence and further submitted that in support of OP-3 he has filed independent expert's evidence of Dr V M Divekar. He also relied upon the affidavit of Dr Satish R Gupte dated 05.03.2002 and Affidavit of Dr. Wagle dated 30.3.2002 placed on record. The Complainants have not filed any independent experts' evidence and /or medical literature to substantiate its contention on allegations made in the complaint. The report submitted by Maulana Azad Hospital clearly supports the case of the opposite party.

Observations and Conclusion:

13. On the quest of limitation, we have perused the previous Orders of this Commission. The Original Complaint No. 83/2000 was filed before this Commission on in September, 2000, however during the pendency of the complaint the patient - Vijay Kumar Agarwal expired. The Commission vide Order dated 27.09.2000, recalled the order of notice and granted liberty to the Complainants to amend the complaint. Therefore, this present amended Complaint was filed by Smt. Mamta Aggarwal & Ors. for act of alleged medical negligence causing death of the husband. Therefore, question of limitation at this stage does not arise.

14. On careful perusal of facts, main allegations of the Complainants are that OPs-2 & 3 did not monitor the patient during post-operative recovery period, therefore the patient suffered permanent irreversible brain damage and he went in coma and died. The OPs failed to take proper remedial measures to treat cerebral hypoxia. The Patient was shifted to the ICU at 7:45 pm, after a delay of 2 hours 45 mins and despite emergency calls OP no 2 and 3 went to see the patient after a gap of 20 minutes and no neurologist was present at the time of the operation or post-operative procedures, no EEG (electro encephalogram) or CT scan was done on 02.11.1998.

15. We have carefully perused the medical record. On 06.11.1998 the surgery was finished at 4:00 pm and the patient was stable by 4:15 pm. In the recovery room there were signs of spontaneous muscular activity, and the patient was attempting to breathe. Patient's spontaneous coughing was also taken care of and it was reversed by administering injections. The patient responded to muscular activity as well as verbal commands. After checking the vital parameters, the doctors decided to shift the patient to recovery room at 4:30 pm. At 5:00 pm the doctors and the nurses again visited the patient to check his vitals and found everything to be normal. However, suddenly at around 5:10 pm the patient had breathing difficulty and his BP started to drop. The OP No.3 along with Dr. Pradhan and Dr. Datar rushed to the recovery room. Patient was intubated and patient was given Adrenaline 1 ml in 100000 inj Mephetin 30 mg inj. Decadron inj. Efcolin 100 mg and Inj Mannitol intravenously. At that stage patients heart rate became 140/ minute, BP 150/90 and O_2 saturation was 100% but patient was not responding. The patient started spontaneous breathing at 5.45pm, reacting Pupils to light and then at 6 pm he started responding to painful stimulus. At 7:15pm patient developed some jerky movements for which injection eptoin was given. At 8 pm, he was shifted to ICCU for further management.

16. We don't accept that there was delay conducting EEG and CT/MRI. The attending doctor's prime duty was to stabilize the patient. The CT/MRI was necessary for the hypoxic patient unless stroke, bleeding or trauma is suspected, but it not in the in the instant case. As there was no evidence of any focal neurological deficit, in our view the CT scan would not be helpful to change the mode of patient's management. Moreover, under such condition, it was risky to carry patient for CT scan department.

17. We have perused an affidavit of medical expert Dr. Mrs. Vasumathi M Divekar in support of OPs. She opined as under:

> (i) The procedure adopted for induction and maintenance of anesthesia was according to international standards.
>
> (ii) That the entire anesthesia management was uneventful.
>
> (iii) That at the end of the procedure the patient was awake to commands and fit for transfer to recovery area with stable parameters with oxygen saturation of 99% on the pulse oximeter.
>
> (iv) That the patient was shifted personally by Dr. Sathe to the recovery area with instruction to the recovery staff nurse as is the standard practice.
>
> (v) That on a call for difficulty in breathing the patient was immediately intubated and ventilated as is the usual procedure.
>
> (vi) It is a well-known medical and scientific fact that sudden untoward incidents can occur at any stage and in this instance Dr. Sathe has immediately attended to it.
>
> (vii) Unforeseeable abnormal reactions to the many drugs necessary for anesthesia are not unknown.
>
> In my considered opinion, in the present case, the case has been conducted properly and there has been no negligence on part of the anesthetist at any stage.

18. In the instant case the complainant has not filed any expert opinion or medical literature to support the allegations. Therefore, as a caution and in the interest of justice this Commission vide order 12.12.2019 sought an opinion from the committee of experts of Maulana Azad Medical College, New Delhi. The expert opinion dated 12.12.2020 to the effect that **"as per the available records, the Patient was managed as per the standard protocol"** Thus, in our considered view the OP-2 and 3 the post-operative care was as per the standard procedures. The hypoxic event could be managed by the Anesthetist and we don't think any neurologist to be present at that time. Thus even the independent body of doctors found that there was no negligence on the part of the hospital or the doctors.

19. We don't see any significant relevance to the remark 'awake' made by the Anesthesiologist in his notes. The doctor especially Anesthetists would not fail to distinguish between "Awake" and "Drowsy". It was used in medical parlance and should not viewed as in the dictionary sense.

20. We do not find any deficiencies from the Hospital about the infrastructure and in the patient care. There was no negligence in performing the operation. The post-operative respiratory complications were efficiently managed by the attending doctors and the ICU team. On the request of the family members of the patient, he was discharged on 13.02.1999 and after several months, the patient passed away on 06.08.2000. Therefore, no negligence is attributable to the OPs.

21. As long as doctor follows practice acceptable to the medical profession of that day he cannot be liable for negligence. The Hon'ble Supreme Court in the ***Jacob Mathew Vs State of Punjab***[7] held as under:-

> *"Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative*

course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.."

22. The Hon'ble Supreme Court in the case **S. K. Jhunjhunwala vs. Dhanwanti Kaur and Another[8]** held that in every case where the treatment is not successful or the patient dies during surgery, it cannot be automatically assumed that the medical professional was negligent. Recently in the case of **Dr. (Mrs.) Chanda Rani Akhouri & Ors. Vs Dr. MA Methusethupathi & Ors.[9].** It was observed that:

> it clearly emerges from the exposition of law that a medical practitioner is not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another.

23. Based on the afore discussion the undisputed facts that, the patient was operated by OP No. 2 in three steps and all the time it was done under general anesthesia and were uneventful. The post-operative hypoxic event was managed efficiently as per the reasonable standards. The affidavits of Dr. V. M. Divekar, Dr. Satish R. Gupte and Dr. Wagle in support of OPs have gone unchallenged. The expert opinion of Maulana Azad Medical College did not point out negligence of the OPs. Thus, the Complainant failed to prove conclusively his case of alleged medical negligence.

The Complaint is dismissed.

The parties to bear their own costs.

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[1] (1996) 2 SCC 634

[2] (1998) 4 SCC 39

[3] (2000) 7 SCC 668

[4] (2005) 6 SCC 1

[5] (Civil Appeal No. 3541 of 2002 decided on 17.02.2009) duly reported in 2009(3)SCC1

[6] (Civil Appeal No. 1385/2001 decided on 10.02.2010) reported in RLW 2010 (1) SC 722

[7]AIR 2005 SC 3180

[8] (2019) 2 SCC 282

[9] 2022 LiveLaw (SC) 391

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DR. S.M. KANTIKAR
PRESIDING MEMBER

....
BINOY KUMAR

MEMBER