IN THE DELHI STATE CONSUMER DISPUTES REDRESSAL COMMISSION

Date of Institution: 27.02.2013

Date of hearing: 12.09.2022

Date of Decision: 01.05.2023

FIRST APPEAL NO.-238/2013

IN THE MATTER OF

MS. DIVYA CHAUHAN,
D/o MR. F.S. CHAUHAN,
R/o 22C, POCKET-A, HIG SFS FLATS,
MAYUR VIHAR-III, DELHI-110096,

(Through: Mr. F.S. Chauhan, Advocate)

…Appellant

VERSUS

DR. S.P. AGGARWAL,
R/o P-8, GREEN PARK EXTENSION,
NEW DELHI-110016.

(Through: Mr. Jagmohan Sharma, Advocate)

…Respondent

CORAM:

HON'BLE JUSTICE SANGITA DHINGRA SEHGAL (PRESIDENT)
HON'BLE MS. PINKI, MEMBER (JUDICIAL)

Present: Mr. F.S. Chauhan, counsel for the Appellant.
Mr. Jagmohan Sharma, counsel for the Respondent.

PER: HON'BLE JUSTICE SANGITA DHINGRA SEHGAL, PRESIDENT

JUDGMENT

1. The facts of the case as per the District Commission record are as under:

> *"1. 0n 30.09.2000, the Complainant alongwith her parents went to OP's clinic with a complaint of pain in one of her teeth. But the OP, after examining her tooth also observed that the front upper teeth of the Complainant protruding outward. The parents of the Complainant also disclosed that she was having a history of polyp (growth in nose) and the history of its complication causing recurrent cold and mouth breathing. Whereupon, OP offered to provide an orthodontic treatment to the Complainant and according to the OP that treatment would correct the protruding of her teeth and improve her jaw /teeth lying etc. and would also improved overall her facial look. OP offered the said treatment for a consideration of Rs.19,000/- payable in installment and other expenses payable extra. OP however, avoided giving the detail of the treatment in writing. However, the Complainant agreed to take such treatment and whereupon, OP instructed one of his assistant Doctors to do the filing of the tooth of Complainant and to give a quotation of his fee, plan of payments, terms and other expenses for such treatment. Whereupon, the said Assistant Doctors done the treatment of the filling and also furnished the quotation of the fee/expenses and other terms of treatment, as mentioned in Para No.2 of the complaint (and annexed as Annexure-1). On January, 2001 the Complainant paid a sum of Rs.10,000/- in cash but OP again refused to issue any proper receipt for it. However, OP admitted the receipt of payment by making writing in a symbolic manner in his own hand writing, on a photocopy of the prescription*

(Annexure-2). Thereafter, the OP started her orthodontic treatment. Her teeth, jaw etc. was fully examined. A clay impression of her upper and lower jaws was taken so as to keep a record of the pretreatment impression of it and also to prepare its braces etc. The concerned staff issued an appointment card to the Complainant but, retained the impression on the pretext that the same would be returned to the Complainant on completion of her treatment. It is further stated that throughout the period of her such treatment, the Complainant did not suffer from any polyp growth or from any of its complication like recurrent cold or mouth breathing and religiously followed all the instructions of the OP including instructions of breathing exercise etc. But the said treatment could not make any improvement in her jaw/teeth lining or to her facial look. Rather, it distorted her teeth/jaw lining which also led to a distortion of her facial bone and worsening of facial look. In as much as, her upper and lower jaw started striking at each other and one of her two front teeth again started protruding outward and her efforts to keep her mouth close led to a pain in her upper teeth. Thereafter, OP stopped recording her visits to his clinic on the appointment card and also did not return the mould of her, taken on 02.01.2001. However, she continued his further treatment by advising her to put up on her teeth/gums the plate designed by him. In December, 2003, OP advised her for wearing of said plate continuously for 24 hours a day. But it also did not help her in anyway and rather, led her to other complication. Whereupon, the OP started avoiding Complainant on one pretext or the other and left her to be attended only by his assistant and did not give any record of the treatment prescribed.

2. However, on 04.09.2004, on the insistence of the Complainant, OP lifted a piece of small plain paper and forced her to recall and write what was advised her. But the Complainant could not record the same and whereupon, OP himself scribeled the treatment which is given in Para No.17 of the complaint. OP also scribeled few lines on the slip of a plain paper when the Complainant went for revise of her treatment, which is given in para No. 18 of the complaint. When the Complainant could not find any help in wearing the plate as of and on her teeth and on every twelve hours, so she asked for the return of the mould so

that they she approach any other orthodontist for her further treatment. And, whereupon the OP returned the initial impression /mould of her jaws.

3. The Complainant alleged that she had paid more than Rs.2,10,000/- and made more than 50 visit to the clinic of the OP for having such treatment but it could not improve anything rather caused irreparable damages and injury to her teeth and jaw lining and, therefore, OP was guilty of unfair trade practice and professional misconduct. Hence, she brought this complaint before this Forum seeking direction against the OP to return the amount of Rs.19,000/- paid by her alongwith a compensation of Rs.15,21,000/-."

2. The District Commission after taking into consideration the material available on record passed the order dated **11.01.2013**, whereby it held as under:

"6. OP has taken a very serious objection of maintainability of the complaint being hopelessly time barred. He contented that the Complainant had taken treatment in question from his clinic for the period from 02.01.2001 to 18.05.2002 whereas, this complaint was filed on 11.09.2006 i.e. after more than four years and the explanation furnished by the Complainant for delay in filing of complaint is that the Complainant was getting the regular treatment from the OP and this averment of the Complainant does not find any support from any documentary evidence.

7. Whereas, the Ld. Counsel for Complainant contented that after 18.05.2000, OP did not mention next date of treatment on the appointment card whereas, the Complainant continued to take the treatment from him which is annexed as Annexure P-4. which shows that even in the December, 2003 the treatment was taken whereby she was advised to keep the braces for 24 hours. On 04.09.2004. She was asked to wear the same off and on after the gap of twelve hours. Even on 15.09.2004, she got the treatment from OP and, therefore, last date of cause of action was 15.09.2004 and this complaint was filed on 11.09.2006 within the period of two year and, hence, it cannot be said that it was a time barred complaint.

8. After giving our thoughtful consideration to the arguments advanced by the Ld. Counsel for the parties, we are of the opinion that the complaint had actually taken treatment in question from the OP's clinic for the period from 02.01.2001 to 18.05.2002, as recorded in Appointment Card (Annexure 3).Even, if the version of the Complainant is believed that she took treatment in 2003 and 2004 also, as shown in Annexure-4, there is no explanation as to why she did not make any complaint for not having the satisfactory treatment. The writing made in Annexure-4 shows that the Complainant was not serious for her treatment and this document (Annexure-4) was managed in order to bring this complaint within limitation. As per OP, the last treatment was taken on 18.05.2002. After, 18.05.2002 the Complainant went to the clinic of the OP in December, 2003 i.e. after about-seven months. Similarly, after December, 2003 the Complainant took treatment on 04.09.2004 i.e. after about nine months and in between no such treatment was given or taken. Such facts and circumstances give rise and support the contention of the OP that the Complainant after taking treatment from 02.01.2002 to 18.05.2002 never made any such complaint that there was no improvement in her condition or that her parents were not satisfied about the same. If she had any complaint then she should have come back to OP after 18.05.2002, as frequently as needed. But she never came even for her regular follow up treatment and neither made any complaint of any problem, after 18.05.2002 despite the fact that it was clearly written in Annexure-3 that Complainant was to come/consult on telephone about her condition, after 4/6 weeks. Thus, the Complainant did not make any complaint nor did she take any treatment after 18.05.2002. All such circumstances, shows that there was an improvement in the condition of Complainant. Moreover, if any complication arose later on that could have been due to negligence /carelessness of the Complainant who might have not been adhering to the advice /instructions given by the OP.

9. So far as, returning of the clay models are concerned, we agree to the contentions of the Ld. Counsel for OP that such models are taken and retained by the treating hospital to show pretreatment condition of the disease and these are not to be given to the Complainant rather kept, as a record by the doctor

> *to see the changes from time to time during the treatment. Hence, this complaint is not maintainable.*
> *10. In view our discussion, we are of the view that there was no negligence or lapse, amounting to deficiency in service on the part of the OP and, hence, having no merit in the complaint, we are constrained to dismiss the same."*

3. Aggrieved by the aforesaid Judgment of the District Commission, the Appellant has preferred the present appeal, contending that the District Commission has failed to consider the negligence or deficiency on the part of Respondent and decided the complaint case on the sole point of limitation. The counsel further submitted that the complaint before the District Commission was filed within six days from the date when the last cause of action arose. The counsel lastly submitted that the District Commission has erred in dismissing the bonafide complaint of the Appellant. Pressing the aforesaid contentions, the Appellant prayed for setting aside of impugned judgment passed by the District Commission.
4. Respondent, on the other hand had filed the reply to the present Appeal whereby, denying all the allegations made by the Appellant and submitted that there is no error in the impugned judgment as the entire material available on record was properly considered by the District Commission before passing the said judgment.
5. We have perused the material available on record and heard the counsel appeared on behalf of both the parties.
6. The ***first question*** for consideration before us is ***whether the District Commission has failed to dealt the consumer complaint on merits and decide it solely upon the ground of limitation.***
7. To answer this issue, we have thoroughly perused the impugned judgment and find that the District Commission has primarily dealt with the question

of limitation as it goes to the roots of the case and affects the maintainability of the case filed before any court or tribunal. Further, on perusal, we find that the District Commission while dealing with the question of limitation has gone through the documents available on record and hold that *"Even on 15.09.2004, she got the treatment from OP and, therefore, last date of cause of action was 15.09.2004 and this complaint was filed on 11.09.2006 within the period of two year and, hence, it cannot be said that it was a time barred complaint."* Therefore, it is clear from the findings of District Commission that the Complaint filed before it was not barred by Limitation Period. Further, in regard to the submission of the Appellant that the Complaint before the District Commission was filed within six days when the cause of action lastly arose, we find that the Appellant has failed to show any evidence or document in this regard. Therefore, the said submission of the Appellants holds no merit. However, even if we consider the date on which the Appellant lastly approached the clinic of the Respondent, it is clear that the cause of action in the present case lastly arose on 15.09.2004 and the Complaint before the District Commission was filed on 11.09.2006 i.e. within the period of two years from the date when the cause of action arose as prescribed in the Consumer Protection Act, 1986. Therefore, we are of the view that the District Commission was right in holding that the Complaint before the District Commission was not barred by Limitation Period.

8. The ***next question*** for consideration before us is ***whether the District Commission erred in not establishing the deficiency of service on the part of Respondent and wrongly dismissed the bonafide complaint of the Appellant.***

9. On perusal of record, we find that the Appellant approached the Respondent's clinic with a complaint regarding the pain in one of her tooth and the Respondent doctor after examining her tooth, observed that the front upper teeth of the Complainant was protruding outward. The Respondent after entire examination suggested an orthodontic treatment to the Appellant which was agreed upon by the Appellant and thereafter a clay impression of upper and lower jaws was taken so as to keep a record of the pretreatment impression and the braces were applied according to the procedure. The Appellant followed the treatment as prescribed by the Respondent but could not get any improvement in her jaws/teeth lining. Therefore, alleging deficiency of service on the part of Respondent, the complaint was filed before the District Commission, wherein, vide order dated 11.01.2013, the District Commission dismissed the Complaint of Appellant by holding that there was no negligence or lapse on the part of Respondent has been established.

10. To resolve the issue as to whether there exists any medical negligence on the part of Respondent in the present case, we deem it appropriate to refer to the case of this Commission wherein, this Commission has in detail discussed the scope and extent of Negligence with respect to Medical Professionals in ***CC- 324/2013***, titled ***Seema Garg & Anr. vs. Superintendent, Manohar Lohia Hospital & Anr.*** decided on ***31.01.2022***, wherein one of us (Justice Sangita Dhingra Sehgal, President) was a member. The relevant portion has been reproduced as below:

> *"9…….The Hon'ble Apex Court, after taking into consideration its previous decisions on Medical Negligence, has consolidated the law in* ***Kusum Sharma and Ors. vs. Batra Hospital and Medical Research Centre and Ors.*** *reported at* ***(2010) 3 SCC 480****, wherein, it has been held as under:*

"94. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but

higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

95. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have

> *performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind."*
>
> *10. In cases wherein the allegations are levelled against the Medical Professionals, negligence is an essential ingredient for the offence, which is basically the breach of a duty exercised by omission to do something which a reasonable man would do or would abstain from doing. However, negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence and they are entitled to protection so long as they follow the same."*
>
> *(emphasis supplied)*

11. In the present case also, it will have to be ascertained whether there was any lack of skill and competence on the part of the operating doctor and/or any omission to do what was actually required in the present facts and circumstances.
12. On perusal of record, we find the Appellant has not challenged the competency of the operating doctor i.e. Respondent, hence, the first part of the aforesaid para stands answered, that there was no lack of competence on the part of the Respondent.
13. So far as the question of omission to do any act which was actually required is concerned, the Appellant has contended that the Respondent has committed negligence while treating her due to which the Appellant could not get any improvement in the jaw/teeth lining.
14. We deem it appropriate to refer to the dicta of the ***Hon'ble Apex Court***, in ***Harish Kumar Khurana vs. Joginder Singh and Ors.*** reported at ***AIR 2021 SC 4690***, being the latest pronouncement on the cause, wherein, the Hon'ble Supreme Court, while taking into consideration its previous pronouncements in **Jacob Mathew v. State of Punjab and Anr.** reported at **(2005) 6 SCC 1**,

and **Martin F. D'Souza v. Mohd. Ishfaq** reported at **(2009) 3 SCC 1,** has held as under:

> *"14. Having noted the decisions relied upon by the learned Counsel for the parties, it is clear 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. To indicate negligence there should be material available on record or else appropriate medical evidence should be tendered. The negligence alleged should be so glaring, in which event the principle of res ipsa loquitur could be made applicable and not based on perception."*

15. From the aforesaid dicta of the Hon'ble Apex Court, it is clear that only the failure of the treatment is not prima facie a ground for Medical Negligence and in order to attract the *principle of res ipsa loquitur*, Negligence i.e. *the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,* should be clearly evident from the record.

16. In the present case, the Appellant has vaguely alleged that the Respondent has committed negligence in operating/treating the Appellant, due to which she does not get any improvement in her jaw/teeth lining and also failed to get the desired results. However, this alone cannot be a ground for holding the Respondent liable for Medical Negligence since sometimes despite the best efforts, the patient may not favourably respond to a treatment given by doctor, due to which the treatment of a doctor may fail. It is further noted that the Appellant failed to establish that there was breach of a duty exercised by omission to do something which a reasonable man would do or would abstain from doing or that the treatment which was given to the

Appellant was not acceptable to the Medical Profession at that specific time period.

17. This Commission cannot presume that the allegations in the Appeal are inviolable truth even though they remained unsupported by any evidence. Our findings to this effect are substantiated by the dicta of the Hon'ble Apex Court in **C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam** reported at **(2009) 7 SCC 130**, wherein, it has been held as under:

> *"37. We find from a reading of the order of the Commission that it proceeded on the basis that whatever had been alleged in the complaint by the respondent was in fact the inviolable truth even though it remained unsupported by any evidence. As already observed in Jacob Mathew case [(2005) 6 SCC 1: 2005 SCC (Cri) 1369] the onus to prove medical negligence lies largely on the claimant and that this onus can be discharged by leading cogent evidence. A mere averment in a complaint which is denied by the other side can, by no stretch of imagination, be said to be evidence by which the case of the complainant can be said to be proved. It is the obligation of the complainant to provide the facta probanda as well as the facta probantia."*

18. Since the Appellant failed to show any evidence before the District Commission as well as before this Commission to substantiate the submission made by her, ***we are of the view that the Appellant has failed to establish any negligence on part of the Respondent in the present case***.

19. In view of the forgoing, we are in agreement with the reasons given by the District Commission and fail to find any cause or reason to reverse the findings of the District Commission. Consequently, we uphold the Judgment dated 11.01.2013 passed by the District Consumer Disputes Redressal Commission-II, Udyog Sadan, C-22 & 23, Qutub Institutional Area, (Behind Qutub Hotel), New Delhi-110016. Consequently, the present Appeal stands dismissed with no order as to costs.

20. Application(s) pending, if any, stand disposed of in terms of the aforesaid judgment.
21. A copy of this Judgment be provided to all the parties free of cost as mandated by the Consumer Protection Regulations, 2005. The Judgment be uploaded forthwith on the website of the Commission for the perusal of the parties.
22. File be consigned to record room along with a copy of this Judgment.

(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT

(PINKI)
MEMBER (JUDICIAL)

Pronounced On:
01.05.2023