

**IN THE DELHI STATE CONSUMER DISPUTES REDRESSAL
COMMISSION**

Date of Institution: 09.10.2017

Date of Hearing: 08.01.2024

Date of Decision: 22.08.2024

FIRST APPEAL NO. - 36/2017

IN THE MATTER OF

- 1. M/S GARG HOSPITAL,**
- 2. DR. VISHAL GARG, EYE SPECIALIST,**

BOTH WORKING AT:

**M/S GARG HOSPITAL, 8-9/ AGCR ENCLAVE,
DELHI-110092.**

(Through: Mr. Farnish Kumar Rai, Advocate)

...Appellant

VERSUS

**MS. JAIVANTI DEVI,
RESIDING AT,
B-1/342, NAND NAGRI,
DELHI-110092.**

(Through: Mr. Ram Lal, Advocate)

...Respondent

CORAM:**HON'BLE JUSTICE SANGITA DHINGRA SEHGAL (PRESIDENT)****HON'BLE MS. PINKI, MEMBER (JUDICIAL)****HON'BLE MR. J.P. AGRAWAL, MEMBER (GENERAL)**

Present: Mr. Farnish Kumar Rai, counsel for the Appellant.

None 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:

"...Complainant, an aged lady of 67 years had history of gradual diminution of vision in her both eyes for the last 6-7 months, so visited OP1 hospital/ Garg Hospital, for checkup. She was examined by OP2 doctor/Dr. Vishal Garg-DOMS (Diploma in Ophthalmology), an eye specialist, in OPD of OP1 on 19/08/2011. She was told that after some lab investigations, her right eye operation would be done by OP2. After getting lab reports, she was diagnosed as "Immature Scale Cataract RT Eye and would require operation. OP2 assured for good vision after surgery.

On 07/10/2011, she was operated at OPI hospital by OP2. Foldable intra Ocular Lens implantation was done and discharged in the evening. Operation & hospital bill of a sum of Rs 15,511/- was paid through cheque to OP1 on 18/10/2011.

On her follow up visit to OP2 on next day, she was reexamined by OP2 and her bandage was changed. Soon after her bandage was removed, she told OP2 that there was no improvement in her at eye vision and had severe pain also. She told that OP2 did not examine properly and advised some medicines and asked her to follow the advice as given at the time of discharge. OP2 further told that the operation was successful

and there was no need to worry. But complainant had very severe pain continuously.

On 19/10/2011, complainant went to GTB hospital and was examined by the doctors at Eye Clinic in Ophthalmology Department.

After examination at GTB hospital, she was told that implanted lens had subluxated towards left in operated eye and at this stage, no subsequent operation was advisable, so medicines were prescribed.

As complainant had severe pain and watering eye continuously and was unable to perform her routine work which had caused immense mental harassment and financial loss, filed this complaint and claimed compensation for loss of vision due to faulty operation for a sum of Rs 5 lacs with litigation charges Rs 11,000/-.

After scrutinizing all the facts and annexure, notices were served. OP1 and OP2 put their appearance and submitted written statement, OPs denied all the allegations of complainant and prayed for the dismissal of this complaint OP1 submitted that their hospital had all the required infrastructures and good equipped Operation Theater to combat all the types of emergency. This hospital was also registered under the Director Health of Delhi Govt. All the staff and attending doctors were of experienced and qualified, hence there was no deficiency in the said operation. They had also stated that no expert opinion was taken to prove the deficiency or negligence in the case according to OPI proprietor, Dr SC Garg, under his affidavit.

OPI admitted that the said complainant was treated in his hospital and no Rt Eye Immature Senile Cataract and after operation, she was discharged in the same day in satisfactory condition. He stated that the post operated complication as Subluxation/Decantation of IOL" could be correctable by any eye surgeon, but here the complainant did not come for follow up after single visit. OPI also submitted that the hospital bill paid by

the complainant through cheque was not presented in their account in bank and was lying with them as complainant one day would come and pay the amount in cash and take away the cheque OP1 had also stated that GTB Hospital Eye clinic remark was incomplete as they had not written any detail finding about the subluxation of lens. So OP1 were not aware of any complication ever arisen. Hence the present complain be dismissed with cost.

OP2 submitted their detail facts as the treating doctor /OP2 had admitted that he treated her for Rt Eye Cataract and had done surgery after proper investigation, it was also admitted that complainant came for follow up on next day when bandage was changed. Or that day, she did not have any complication thereafter, site did not come to their GPD for follow up. OP2 submitted that Subluxation of implanted lens was a known complication and was not negligence. In some cases, correction of lens is required in Decentration cases. Hence, this condition was a correctable. OPs had submitted medical literature pertaining to their field, which were on record.

OP2 further submitted that both the OPs were insured from United India Insurance Co. and had valid policy till date. As complainant had not disclosed her detail facts and did not follow the advice of UPS, this complaint be dismissed.”

2. The District Commission after taking into consideration the material available on record passed the order dated **24.09.2016**, whereby it held as under:

“On analyzing one by one, we came to a conclusion on under mentioned points as-

- 1. Whether OP-2 was contempt to perform a very common Cataract operation in ref to ophthalmological literature filled,*
- 2. Whether the detail, general conditions of complaint was noted and examined in detail before cataract operations and*

other required formalities like detail written consent taken with either related tab test were done,

- 3. Whether any opinion was ever taken by OP2 before operation,*
- 4. Whether expert opinion was repulsed in such cases (as per OPs WS)*
- 5. Consequences of such case in refer to Forum's procedure.*

Point no. I-

We have gone through the evidences filed pertaining to his qualification and experience of OP 2 who is an allopathy qualified person (MBBS) and had done Diploma in Ophthalmology (DOMS). He is enrolled with the State Medical Council also and practicing at a State health directorate registered hospital.

But there is no record as how many cataract operations he had done in past in this hospital or elsewhere and had under gone any training programmers conducted under the Ophthalmology Society which can establish his experience. Hence, it looks that O2 was not competent to diagnose and treat post-operative complications, though submitted literatures showed that such complications are manageable under experienced surgeon.

Point 2-

After examining the treatment record filed before us, it was clear that the complainant an old lady of severe hypertension and had diabetic.

There was no findings noted on treatment records whether she was taking any anti-hypertensive and anti-diabetic medicines before the operation. more so, OP2 had prescribed anti-hypertensive medicines of his own. He did not advice for related lab tests like Lipid profile, ECG which were available in the OP1, as per their affidavit. No record was filed to show that Retinal screening was done before cataract operation and status of refraction in both eyes before and after operation. No evidence of written consent available. No detail noting of complaint were

done in follow up visit of complainant, where it was on record that she had swelling and watering eye with severe pain in the operated eye.

Point 3-

It was evident from the evidences filed before us; complainant was an old lady and had severe obesity. Her blood pressure was moderately high and was diabetic also. In such condition, treating doctor has to take opinion from MD Physician, who was available at that time in OP1 hospital. It was for the physician to decide which anti-hypertensive and anti-diabetic medicine would be safe and effective before operation. No record of ECG, Lipid profile and other related test reports were available from OP1. This clearly proves deficiency of OP2.

Point 4-

In reference to Expert opinion as stated in OPs written statement, was not taken. It is to mention that Forum are not bound to take expert medical opinion in every alleged medical negligence cases. Only in complex cases, it may require when Forum cannot make its mind, as per **V Krishnan vs. Nikhil Super Specialty Hospital in CA/2641/2010 in SLP(c) 15084/2009**, decided by Hon'ble Supreme Court on 08/03/2010.

So, taking expert medical opinion does not arise here. We have taken merits of this case and it was clear from the record of GTB hospital, who wrote that complication had arisen in post operated case of Cataract in Rt Eye, but it was not advisable for re-operation or any correction at that time though referring ophthalmologic literatures on record show that such complication does not occur in expert hand. There was no record which could establish OPI's competency in such cases.

Point 5-

We have also perused our procedural record, which showed that OPs were not serious in following the required steps as per on the dates of hearing. They took maximum time for filling their records for which number of times cost were imposed. Also, OPs

submitted an application for Impleading UIAC as a necessary party with their written statement, because both OPs were insured for a sum assured Rs 10 lacs, but they did not press for application.

Even complainant remained absent on many dates of hearing which led the delay in bearing arguments and giving order. Though it was observed by the treatment document of other hospital where complainant was admitted and taking treatment for her medical ailments like Anasarca, Hypertensive complications etc. Here, complainant never asked for expert medical opinion or submitted any literature pertaining to the case.

OPs have cited various citations as-

1) Narain Das vs Govt of MP, AIR1574SC1252 held that "wrong and misleading statements & deliberately and willfully made by a party Litigation with the view to obtain favorable order, it would prejudice or interfere with the due course of judicial proceeding and thus amount at to contempt of court"

Here, in this case, merits were available and does not amount to any contempt of court hence not applicable.

2) Dr B Singh vs Union of India & others, (2004)35CC363, it was decided that bonafide person have locus standing in public interest.

This citation is not applicable in this case.

3) Jacob Mathew vs State of Punjab & others, of Punjab & others, (2005)6 SCC 1.

Here in this case, judgment findings are applicable which states for the professional's skill and knowledge. In this case, OP2 was a diploma holder in Ophthalmology and not submitted any evidence as he was experienced and competent in performing Cataract operation at that time irrespective of having recognized allopathy qualification. Though cataract operation is a very common eye operation and all such qualified persons can

perform, but not recognizing postoperative complications which are known complications to every such doctor, amount incompetency, here.

4) Marlin F D'Souza vs Mohd Ishfaq, (2009)15700391, held that "If a patient has no favorable responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of res ipsa loquitor.

Here, known complication was subluxation of IOL occurred in post-operative eye surgery, whose symptoms and signs were narrated by the complainant, but treating doctor could not recognize and survived routine prescription, hence the said doctrine of res ipsa loquitor was not applicable.

5) Kusum Sharma vs. Batra Hospital, (2010) 35CC.

It was held that negligence cannot be attributed to a doctor as long as the performs his duty with reasonable skill and competency.

Here, we have noted that not recognizing post-operative procedure and not advising accordingly, was against this citation. Hence, above citations are not applicable, so reference cannot be taken.

In this case, no party perused their case properly, where medical negligence in the field of Ophthalmology where cataract operation was alleged by the complainant by taking merit on facts and evidences, we allow this complaint and pass the Following order-

We award a lump sum compensation of a sum of Rs one lac to be paid by OPs Jointly and severely within 30 days after receiving this order, failing which, interest of 9% will be applicable till realized.

OPs may recover this award from their Insurance Co. if they were insured at that time, as per the law. There shall be no other compensation in this case."

3. Aggrieved by the aforesaid order of the District Commission, the Appellants/Opposite Party no. 1 & 2 have preferred the present Appeal, and have raised the preliminary objection that the District Commission failed to consider that the Respondent does not fall within the definition of 'consumer' under section 2(1)(d) of the Consumer Protection Act, 1986 and further contended that the District Commission erred in establishing the deficiency on the part of the Appellants.
4. Furthermore, the Appellants submitted that the District Commission failed to appreciate that Appellant No. 2 was a competent doctor and had 18 years of experience in handling operations pertaining to eye and allied complications. Secondly, it is submitted that the burden of proof pertaining to the wrong allegations lies on the Respondent and that the Respondent has not placed on record an iota of evidence to substantiate the averments raised. Thirdly, it is submitted that upon examination of surgery of the Respondent that no subluxation of the implanted lens was noticed or complained. The counsel for the Appellants also submitted that the Respondent did not make any effort to either approach or seek consultation from the Appellants during the postoperative period subsequent to the first follow-up dated 08.10.2011. Furthermore, it is submitted that the surgery performed by the Appellants was successful since there exists no report of vision loss by GTB hospital upon diagnosis of the Respondent. Pressing the aforesaid contention and submissions, the Appellants prayed for setting aside the impugned order.
5. During the course of proceedings, the Respondent was directed to file the reply to the present Appeal. However, despite giving multiple opportunities, the Respondents have failed to file the reply to the present Appeal till date.


6. Further, the Appellant and Respondent were directed to file their respective written submissions along with the judgments, if any being relied by them. However, the same has not been filed by the either party till date.
7. We have perused the material available on record and heard the counsel appearing on behalf of the Appellant.
8. **The primary question for consideration before us is whether the Respondent falls in the category of ‘Consumer’ as defined under the Consumer Protection Act, 1986?**
9. To resolve this issue, we primarily deem it appropriate to refer to section 2 of the Consumer Protection Act, 1986 which reads as follows:

“2. (d) “consumer” means any person who, —

 - (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or*
 - (ii) [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person [but does not include a person who avails of such services for any commercial purpose].”*
10. The aforesaid statutory provision makes it clear that any person who avails any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment falls within the

category of Consumer as defined under Section 2(1)(d) of the Consumer Protection Act, 1986. On a perusal of record, we find that the Respondent has paid an amount of Rs. 15,511/- on 18.10.2011 for the alleged surgery, in lieu of which the Appellants also generated a receipt dated 18.10.2011. The said receipt is reproduced herein under as:

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GARG HOSPITAL
A UNIT OF GARG HEART CENTRE & NURSING HOME (PVT.) LTD.
8-9 A.G.C.R. Enclave (opp. Karkardooma Crossing) Delhi - 110 092
Ph. : 43274444 Fax 22377855
E-mail : garg.hospital@yahoo.com

IPD Receipt

Name	: Mrs. JAIWANTI DEVI/184715/DP	Contact No.	: 9818560226
Age/Sex	: 65 YRS /	Date/Time	: 18-Oct-2011 04:56PM
Reg. No.	: LCSHHI22630	Receipt No :	: FRT/11-12/00017308
R No	: ISHHI1398	Sponsored	Delhi Police
Address	: -B-1/342 NAND NAGRI DELHI-93	By	
Doctor	: DR. VISHAL GARG		
Bed No	: / GR-FLOOR		

Particulars		Amount (Rs.)
FINAL BILL SETTLEMENT		15511.00
Total:		15511.00

by CHEQUE : 15511.00)
Received with thanks from Mrs. JAIWANTI DEVI/184715/DP (Rupees) Fifteen Thousand Five Hundred even Only

3-Oct-2011 04:56PM
SATYENDRA KUMAR

Prepared By : Mr. SATYENDRA KUMAR

Signature
Printed By : Mr.

11. From the aforesaid receipt, we are of the view that the Respondent has paid a consideration amount for availing the service of the Appellants, therefore, in the present case, the Respondent squarely falls within the definition of 'consumer' as defined under the Consumer Protection Act, 1986.
12. **The main question for adjudication before us is whether the conduct of the Appellant no. 1 & 2 amounts to medical negligence?**
13. From the chronology of events, we find that the Respondent upon experiencing gradual diminution of vision in both the eyes, went to Appellant's hospital and was examined by Appellant no. 2 on 19.08.2011. Upon examination "Immature

Seline Cataract RT Eye” was diagnosed and the Respondent was advised for the surgery. Thereafter, the Respondent was operated on 07.10.2011 by Appellant no. 2 and was discharged on satisfactory grounds. Further, the Respondent visited the Appellant’s hospital on the next day for re-examination and for removal of bandage and informed the Appellant no. 2 regarding the poor improvement in her vision and also experiencing severe pain in her eyes. Furthermore, without thorough examination of the root cause of the pain, Appellant no. 2 prescribed some medicines and asked her to follow the post-operative advice given at the time of discharge and affirmed her of a successful operation. However, owing to the constant pain and discomfort, the Respondent went to Guru Teg Bahadur Hospital on 19.10.2011, where her operated right eye was examined and was subsequently informed about the subluxation of her lens to the left side in the operated eye.

14. Further perusal of records divulges that the Respondent went to the Appellant no. 1 hospital for post operation follow up i.e. on 07.10.2011 and informed the Appellant no. 2 about her deteriorating condition. However, the Appellant no.2 paid no attention towards it and advised her to follow the medications prescribed earlier without any further examination. Reverting to the facts at hand, the Appellants has failed to place any substantial evidence before the District Commission as well as before this Commission to support their averments that no anomaly was noted in the eyes of the Respondent during the post operative period. Thus, we find that not only the Appellants failed in diagnosing the subluxation of the lens but also ignored the need for a proper re-examination of the right eye of the Respondent. As a result, the aforementioned facts establish the prima facie gross medical negligence on the part of Appellants.

15. At this point, we deem it necessary to refer to the relevant paragraph of the report published by ‘*American Academy of Ophthalmology*’ accessible at <https://www.aao.org>, which states as follows:

“With relation to cataract surgery, IOL dislocation may be categorized based on the timing of its presentation – early if it occurs within three months of IOL placement, and late if it occurs three months after IOL placement. Early dislocation of the lens may occur with poor fixation of the IOL or capsular and/or zonular rupture during cataract surgery.”

16. Additionally, it is evident that the operating doctor i.e. Appellant no. 2 was negligent in performing the surgery as the intraocular lens (IOL) got subluxated within a day of surgery and even after reporting the symptoms by the Respondent, the Appellant no. 2 failed to diagnose the subluxation of the intraocular lens in the right operated eye of the Respondent.
17. Therefore, combined analysis of the abovementioned shortcomings during the treatment and the negligence culled out by the District Commission through the impugned judgment, we are of the opinion that such recurrent negligent conduct is against medical ethics and is intolerable in light of the casual attitude of the treating doctors towards the patient.
18. Another sub-issue raised by the Appellants relates to the contention that certain extraneous findings have been carved out by the District Commission which were not pleaded in the Complaint. For instance, the Appellant has assailed the observation as being extraneous to the complaint that relates to the competency of the operating doctor. Here it is pertinent to remark that the Commission is not bound by the pleadings of the parties to make observations in any regard. The Commission is empowered to take note of any irregularities and make observations in that regard, which is well within the domain of the Commission, adjudicating the matter. Furthermore, the observations made by the District

Commission in the present matter are consequential and relate to the conduct of the operating doctor which is of prime importance in deciding the negligence on the part of Appellants. Therefore, we opine that the impugned order does not suffer any infirmity.

19. Consequently, we find no reason to reverse the finding of the District Commission and *uphold the order dated 24.09.2016, passed by the District Consumer Disputes Redressal Commission (East), Govt. of NCT of Delhi, Convenient Shopping Centre, 1st Floor, Saini Enclave, Delhi-110092. Resultantly, 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. FDR, if any be released in favour of the Respondent.
22. The Judgment be uploaded forthwith on the website of the Commission for the perusal of the parties.
23. File be consigned to record room along with a copy of this Judgment.

**(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT**

**(PINKI)
MEMBER (JUDICIAL)**

**(J.P. AGRAWAL)
MEMBER (GENERAL)**

Pronounced On: **22.08.2024**

LR-AJ