

**STATE CONSUMER DISPUTES REDRESSAL COMMISSION,
MAHARASHTRA, MUMBAI**

APPEAL NO.A/02/430

**(Arisen out of Order dated 31/01/2002 passed in Complaint No.138 of 2001 of
District Consumer Commission, Satara)**

Dr.Anjali Rajesh Phade,
Phade Hospital,
Sanmati Nagar, Phaltan,
District – Satara.

..... Appellant(s)

Versus

1. Shri Vijay Vaman Sawant,
R/at Munjwadi,
Post – Rajuri, Taluka Phaltan,
District – Satara.

2. The Branch Manager,
United India Insurance Co. Ltd.,
Baramati Branch, District Pune.

.....Respondent(s)

BEFORE:

**Justice S.P. Tavade - President
A.Z. Khwaja – Judicial Member**

For the Appellant(s) : Advocate G.S. Baj.

**For the Respondent(s) : Advocate Anu C. Kaladharan a/w
Advocate K.S. Yadav for Respondent No.1
Advocate Smt.Varsha Desai for Respondent No.2.**

**ORDER
(25/08/2023)**

Per Hon'ble Mr.A.Z. Khwaja – Judicial Member:

- (1) Appellant Dr.Anjali Phade has preferred the present appeal u/sec 15 of the Consumer Protection Act, 1986, challenging the order dated 31/01/2002 passed by the District Consumer Disputes Redressal Commission, Satara by which the complaint filed by the Respondent–Vijay Vaman Sawant came to be allowed and appellant herein was directed to pay a sum of Rs.95,000/- by way of compensation to the complainant along with costs of Rs.5,000/-.

(Appellant and Respondents shall be referred herein by their original nomenclature).

- (2) Short facts giving rise to present appeal may be stated as under:

Complainant – Vijay Sawant claims to be resident of Munjvadi, Post Rajuri, Taluka Phaltan, District Satara. Opponent No.1 – Dr.Anjali Phade is Pediatrician, running Phade Hospital at Phaltan, District Satara. On 03/02/2001 complainant Vijay Sawant had visited Phade Hospital owned by the Opponent No.1 along with his Son – Kiran as he was suffering from fever. Opponent No.1 Dr.Anjali Phade examined the son of the complainant and also prescribed medicines for three days and asked to come for follow-up. The Complainant has contended that Dr.Anjali Phade also charged fees for the same. The complainant again visited the hospital of the Opponent No.1 Doctor along with his Son on 07/02/2001. On that day Dr.Anjali Phade again examined his Son – Kiran and also took sample of urine and blood and after due examination prescribed medicines for further three days with

second follow-up. The complainant has contended that on 10/01/2001 he again took his Son to the opponent, but, there was no improvement in the condition of his Son and he was still suffering from ailment of fever. Dr.Anjali Phade prescribed medicines for seven days. The complainant again took his Son Kiran to the opponent No.1 Doctor on 17/02/2001 and also complained that there was no improvement. The opponent again prescribed medicines for 9 to 10 days, but, there was no progress. Complainant had also took his Son to the Hospital of Opponent No.1 Doctor on 24/02/2001 and Dr.Anjali Phade conducted titer test and R.A. test and asked complainant not to worry. The complainant insisted that his Son Kiran be admitted as indoor patient, but, Dr.Anjali Phade refused to do so, stating that there was no necessity. The opponent No.1 Doctor also prescribed some tablets, but, there was no improvement and the fever of Son of the complainant kept on increasing and he ultimately died. The complainant has contended that his Son Kiran was the eldest one and after his birth complainant had done his family planning operation and so there was no chance of further issues. The opponent no.1 had not taken due and proper care and had shown complete negligence resulting into the death of his so Son n – Kiran. The complainant had sustained severe mental pain and agony for which the opponent no.1 was fully responsible. The Opponent No.1 being Doctor had indulged in deficiency in service as well as unfair trade practice. The complainant, therefore, claimed a sum of Rs.2,00,000/- as compensation. The complainant also issued notice but there was no response and so the complainant filed the instant complaint claiming compensation of Rs.2,00,000/-

from the opponent no.1 Dr.Anjali Phade and Opponent No.2 Branch Manager, United India Insurance Co. Ltd.

- (3) After receipt of notice opponent No.1 appeared and resisted the complaint by filing written version. The opponent no.1 has admitted that she had given treatment to the Son of the complainant. Opponent no.1 has categorically denied that there was any negligence much less medical negligence or there was any lack of any proper treatment. Opponent no.1 had properly examined the Son of the complainant and had prescribed medicines from time to time as were necessary. The opponent no.1 has denied that she had not admitted the Son of the complainant. On the contrary, the opponent No.1 has contended that the complainant himself refused to admit his Son. On 17/02/2001 when the Son of the complainant was brought to the Hospital of the Opponent no.1 he had no complaint except pain in the legs and had asked for medicines which were already given. The opponent no.1 has contended that even on 24/02/2001 when the Son of the complainant was brought to the opponent no.1 hospital he was advised to get his son admitted, but, complainant himself refused to do so. Opponent no.1 then prescribed tablets, viz. Lasix 40 mg and tablets Enderal 10 mg. The opponent no.1 has contended that she was working as child specialist with well known hospitals and her treatment was not only proper but on correct line. She had taken every possible care and had made her use of knowledge and skills. There was no negligence. The complaint was malicious and so not maintainable in law and it be dismissed.

- (4) Opponent No.2 also appeared and filed written version denying the claim of the complainant. Opponent no.2 has contended that the complainant no.1 Dr.Anjali Phade had obtained Professional Indemnity Policy for the period 28/09/2000 to 27/09/2001. But, it was not applicable and opponent no.2 – United India Insurance Co. Ltd., cannot be made a party. Complaint filed by the complainant was not tenable in law and deserves to be dismissed.
- (5) Learned District Consumer Commission, Satara, thereafter recorded the evidence led by the Complainant – Vijay Sawant as well as went through the documents including notes of arguments. Learned District Consumer Commission, Satara went through the evidence led by the Opponent Dr.Anjali Phade as well as the affidavits and documents on record. After appreciating the documentary evidence on record the learned District Consumer Commission, Satara reached the conclusion that there was medical negligence on the part of Dr.Anjali Phade and the same amounted to deficiency in service. Learned District Consumer Commission also reached to the conclusion that the complainant was entitled for compensation and so, the Leanred District Consumer Commission allowed the complaint and directed the opponent Nos.1 and 2 to pay a sum of Rs.95,000/- by way of compensation and costs of Rs.5,000/- by judgment and order dated 31/01/20002. Against this judgment and order dated 31/01/2002 passed by the District Consumer Commission, Satara, the present appellant has come up in the present appeal.

- (6) We have heard learned Advocate for the Appellant and learned advocates for the respondents. We have also gone through the record and proceeding.
- (7) On the basis of the facts stated the only point that arises for our determination is as under with findings recorded against the same and reasons thereafter:

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether the judgment and order dated 31/01/2002 passed by the District Consumer Commission, Satara, suffers from any illegality, infirmity and/or needs any interference?	Yes
2.	What order?	As per final order.

REASONS AND FINDINGS:

- (8) Appellant – Dr.anjali Phade has challenged the judgment and order passed by the District Consumer Commission, Satara on various grounds and they have been set out in appeal. We have also heard learned Advocate for the Appellant. Learned Advocate for the Respondent/Complainant Vijay Sawant has rebutted the allegations as well as the contentions by filing written notes of arguments. We have perused the same. The appellant has also relied upon written notes of arguments in addition to oral submissions. But, before dealing with the grounds raised in the

appeal it will be relevant and pertinent to deal with certain undisputed facts which emerged on record.

- (9) There is no dispute that the appellant Dr. Anjali Phade was a pediatrician and was running Phade Hospital at Phaltan, District Satara. There is also no dispute that the Complainant Vijay Sawant was the resident of Munjwadi, Post Rajuri, Taluka Phaltan, District Satara. There is also no dispute that on 03/02/2001 the complainant had gone to the hospital of Dr. Anjali Phade along with his Son Kiran who was having complaint of fever and he was also examined by the appellant Dr. Anjali Phade. Appellant Dr. Anjali Phade then gave necessary medicines for fever and also tablet Cefadur (250 mg) as antibiotic and complainant was asked to come again along with his Son. There is also no dispute that the complainant took his Son Kiran to the hospital on 07/02/2001 and thereafter on 10/02/2001. On 10/02/2001 the appellant Dr. Phade found that the patient Kiran was not having any fever and his liver, spleen, kidney was found normal and so, he continued Ciplox 250 mg tablet which was given earlier. The complainant thereafter again took his Son Kiran to the hospital on 17/02/2001 with a complaint of leg pain, but, there was no fever and his liver, heart and abdomen were found normal. On that day also medicine was given by Dr. Anjali Phade. It is the case of the complainant that there was no improvement in the condition of his Son Kiran and so, he took him again on 24/02/2001 at about 03.00 p.m. to the hospital of Appellant no.1, but, Kiran was not having fever and leg pain. Complainant has himself come with the specific case that he had taken his Son to the Hospital on 24/02/2001. The Appellant Dr. Phade did not provide any proper treatment despite the fact that

the fever of his son was increasing and the same resulted into the death. It is further the case of the complainant that the appellant Dr.Phade had not properly diagnosed the condition of his Son Kiran and therefore, had not admitted him as indoor patient nor had provided necessary and adequate medical treatment and therefore, there was medical negligence on the part of the appellant which resulted into unfortunate death of his Son Kiran. In order to understand and appreciate these contentions and allegations levelled by the Complainant it is necessary to deal with the incident which took place on 24/02/2001 when the patient Kiran was last examined by the Appellant.

- (10) It is argued on behalf of the appellant that the learned District Consumer Commission Satara had not at all appreciated the evidence in proper perspective and it erroneously relied upon the evidence of the complainant which was without any expert evidence. If we turn to the evidence on this aspect relating to the incident dated 24/02/2001 it is amply clear that on that day also Son Kiran was examined and that he was not suffering from fever. His heart rate was 130 per minute, which was more than normal. The Appellant therefore carried out ASO titer and RA factor test and also x-ray of the chest was taken. But, all these tests were found to be negative. Appellant/opponent thereafter prescribed Tablet Lasix (40 mg) to decrease rate of the heart. The appellant/opponent also prescribed Tablet Enderal (10 mg) to bring down heart rate. The appellant Doctor also advised the complainant for admission of his Son Kiran as an Indoor Patient, but, the complainant himself refused the same. In order to support these contentions, the appellant/opponent Doctor has mainly relied

upon the case papers, the copies of which are on record and the same clearly shows that on 24/02/2001 Son Kiran was examined and several tests were performed. Case papers also show that the Son Kiran was directed to be admitted. Learned Advocate for the appellant has also contended that this aspect was not seriously scrutinized by the learned District Consumer Commission. Secondly, it is argued by the learned Advocate for the appellant that the learned District Consumer Commission had also not taken into consideration the affidavits of two experts, namely Dr.Madhav Abaji Pol and Dr.Sukumar Surchand Vora. Copies of both these affidavits are also placed on record. If we go through both these affidavits of Dr.Pol and Dr.Vora, both were medical practitioners and both have clearly stated that the Appellant/opponent had properly investigated Kiran and patient was also advised admission for observation and the diagnosis and treatment given was also proper. Further, the affidavit also mentions that, though the death of Son Kiran had taken place the Post Mortem Report was not filed on record so as to know the exact cause of death. It is admitted fact that the complainant has come with allegations that his Son Kiran died on 24/02/2001, but, he has not filed any Post Mortem Report nor filed any other medical papers so as to show the exact cause of death of his son Kiran.

- (11) It is vehemently submitted by the learned advocate for the appellant that although the complainant has come with a specific case that no proper diagnosis was done of his Son Kiran and also the fact that no adequate care and attention was paid as a medical practitioner, but, the complainant has not led any positive evidence on this aspect. On the other hand, the appellant had placed on record

expert evidence of two medical practitioners along with affidavits to show that due and proper care was bestowed on the patient and proper and necessary medicines were also given. We have also referred to the treatment given by the appellant/opponent on 17/02/2001 and 24/02/2001. Admittedly, in the present case the Complainant has not placed on record any expert evidence to show that there was lack of proper care and medical attention or that appellant Dr.Phade had not discharged her duties as Doctor with due diligence. If we go through the evidence led by the Complainant, the complainant has only relied upon evidence of two affidavits of Dattatraya Baburao Thanake and Lalasaheb Randive. If we go through the affidavit of witness Lalasaheb Randive he has stated that he had gone along with Complainant and his son on 24/02/2001 to the hospital of Dr.Phade. He has further stated that on 24/02/2001 in his presence Complainant asked the Opponent to admit his Son Kiran as Indoor patient as his condition was deteriorated. But, the Appellant told him that she was going out of town and asked complainant not to worry. Witness Lalasaheb Randive has stated that on the same day the son of the complainant was suffering from high fever and he died in the same night.

- (12) Another witness, namely Dattatraya Baburao Thanake has also deposed on the same lines and there is no difference in the contents of his affidavit. But, the testimony of these two witnesses is clearly falsified by the medical papers maintained by appellant/opponent hospital and the same clearly shows that on 24/02/2001 the appellant had advised admission and the same is clearly written in the medical papers. Copy of which is on record. It is significant to note that the complainant has not given any explanation as to why

he had not taken his Son Kiran to any other hospital on 24/02/2001 when his condition deteriorated and he was suffering from high fever. There is also no evidence to show that the complainant had gone to any other doctor in the same night and the complainant has also not filed on record any document including Post Mortem Report so as to know the exact cause of death of his Son Kiran. On the other hand, we find that the appellant/opponent has placed reliance upon the affidavits of two medical practitioners, namely Dr.Madhav Pol and Dr.Sukumar Vora, wherein they have clearly stated that Son Kiran was given proper medicines after proper diagnosis. They have also stated that the treatment given to Kiran was also most appropriate and best suited for the condition of the patient. If that was so, then it was the duty of the complainant to adduce positive evidence to show that the line of treatment given or the medicines prescribed were not adequate or proper for the condition of his Son Kiran and the same amounted to medical negligence. But no such evidence is led by the Complainant.

- (13) It is further submitted by the learned advocate for the appellant that there was no absolute material to show that there was error in diagnosis or that there was negligence on the part of the appellant/opponent in performing her duty thereafter. It is also submitted on behalf of the appellant that in order to establish medical negligence the complainant is under bounden duty to adduce expert evidence so as to show that the Doctor had acted in negligence manner. It is submitted on behalf of the appellant that on 24/02/2001 when the patient was examined, he was not having any fever and there was no leg pain. But, still the appellant carried out ASO titer and RA factor test and x-ray of the chest was also

taken. These aspects are already on record by way of evidence as well as medical papers. It is also argued on behalf of the appellant that the appellant had suggested to the Complainant that if he cannot admit his Son Kiran in the hospital then he could choose a Doctor of his choice, but, no steps were taken by the complainant. It is contended that, besides the appellant there are more than 10 pediatric surgeons practicing at Phaltan, District Satara but the complainant had not taken his son to any other hospital.

- (14) We have also gone through the written notes of arguments filed by the Respondent No.1 and Respondent no.1 has rebutted all these contentions.
- (15) From the evidence and material placed on record it is very much clear that the Son of the complainant died on 24/02/2001, after he was taken back from the hospital of the appellant. Complainant has alleged that his Son was suffering from high fever and leg pain and thereafter he collapsed, but, surprisingly, the complainant has not placed on record any papers which could show the exact cause of death of the Son of the complainant. But the medical papers filed by the appellant show that on 24/02/2001 the appellant had given all the necessary medicines and had also conducted the tests taking into consideration the health of the patient. There is also no material to show that the death of the patient had taken place due to consumption of the said tablets prescribed by the appellant in wrong manner.
- (16) Coming now to the position of law, it is well settled principle of law that wrong diagnosis or error cannot amount to medical

negligence. It is well settled that to establish liability on the medical practitioner it must be shown by positive evidence that the medical practitioner had not exercised necessary skill and caution as required by the medical practitioner.

- (17) It is also observed in the landmark case of *Jacob Mathew Vs. State of Punjab & Anr.*, reported in 2005(3) CPR 70 (SC) that a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way. It is also observed by the Hon'ble Supreme Court that a mere deviation from normal professional practice is not necessary evidence of negligence. It is observed by the Hon'ble Supreme Court in para 29 as under:

“A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. 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. Which course is more appropriate to follow, would depend on the facts and circumstances of a given

case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person incharge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.”

- (18) During the course of arguments, the learned advocate for the appellant has also placed reliance upon one judgment of the Hon’ble Supreme Court in the case of *Vinod Jain Vs. Santokba Durlabhji Memorial Hospital & Anr., Civil Appeal No.2024 of 2019, decided on 25th February,2019*. In that case also similar observations were made.
- (19) Here in the present case the Complainant has made allegations relating to medical negligence on the part of the appellant Dr.Anjali Phade stating that the appellant had not at all given proper medical treatment to his Son Kiran and the same amounted to deficiency in service. But, as discussed earlier the Complainant has not adduced any independent positive evidence of any medical expert to show that the treatment given by the appellant Dr.Anjali Phade was not on proper lines or was wrong or that the treatment given by the appellant led to a cause of death of his Son Kiran. There is no material to connect the death of Kiran with the treatment given by the appellant. At this stage it is also necessary to mention that even the learned District Consumer Commission has also not made any

efforts to call for any independent report of any independent body like medical board. However, in absence of such positive evidence, the learned District Consumer Commission has arrived at findings of medical negligence on the basis of evidence of two witnesses and has also given findings that there was an error in the diagnosis by the appellant Dr.Anjali Phade. After going through the evidence, we are of the view that the findings given by the learned District Consumer Commission Satara in the order dated 31/01/2002 will have to be set aside and so, we pass the following order:

ORDER

- (i) Appeal is hereby allowed.
- (ii) Order dated 31/01/2002 passed by the District Consumer Disputes Redressal Commission, Satara, is hereby set aside and complaint filed by the complainant is hereby dismissed.
- (iii) Parties to bear their own costs.

[Justice S.P. Tavade]
President

[A.Z. Khwaja]
Judicial Member

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