

**DISTRICT CONSUMER DISPUTES REDRESSAL COMMISSION-II UDYOG SADAN C
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QUTUB INSTITUTIONAL AREA BEHIND QUTUB HOTEL NEW DELHI 110016**

**Complaint Case No. CC/258/2009
(Date of Filing : 20 Mar 2009)**

1. SHRI PANKAJ KUMAR
49 MANDIR WALI GALI YUSUF SARAI NEW
DELHI 110016

.....Complainant(s)

Versus

1. MAX SUPER SPECIALITY HOSPITAL
1 PRESS ENCLAVE ROAD, SAKET NEW DELHI
11048

.....Opp.Party(s)

BEFORE:

**MONIKA A. SRIVASTAVA PRESIDENT
KIRAN KAUSHAL MEMBER
UMESH KUMAR TYAGI MEMBER**

PRESENT: None

.....for the Complainant

None

.....for the Opp. Party

Dated : 30 Mar 2022

Final Order / Judgement

DISTRICT CONSUMER DISPUTES REDRESSAL COMMISSION-II

Udyog Sadan, C-22 & 23, Qutub Institutional Area

(Behind Qutub Hotel), New Delhi- 110016

Case No.258/2009

Shri Pankaj Kumar

S/o Sh. Dhan Singh

R/o 49, Mandir Wali Gali,

Yusuf Sarai, New Delhi- 110016

....Complainant

Versus

OP-1, Max Super Speciality Hospital

Dr. Gaurav Sharma

Assistant Medical Superintendent

1, Press Enclave Road, Saket, New Delhi

OP-2, Dr. A. N. Jha

Director Neurosurgery

S/o Late Dr. B.N. Jha

R/o E-24, Defence Colony

New Delhi

OP-3, Dr. Sandeep Vaishya

Sr. Consultant Spinal & Neurological Surgery

S/o Sh. Narottam Das Vaishya

R/o 243, S.F., Western Marg, Saidulajab,

New Delhi

OP-4, Dr. Vikas Gupta

Surgeon

S/o Sh. Uttam Kumar

R/o E-74 B, Gangotri Enclave, Alaknanda,

New Delhi

OP-5, Dr. Rajesh Tandon

MD, Consultant Histopathology

S/o Sh. S.N. Tandon,

R/o 119-B, Pocket- C, Siddharth Extension,

New Delhi

OP-6, Dr. Rajiv Tangri

Consultant Histopathology

S/o Dr. Ravinder Singh Tangri

R/o B- 5/15, Rajouri Garder, New Delhi

....Opposite Parties

Date of Institution : 20.03.2009

Date of Order : 30.03.2022

Coram:

Ms. Monika A Srivastava, President

Ms. Kiran Kaushal, Member

Sh. U.K. Tyagi, Member

ORDER

President: Ms. Monika A Srivastava

Complainant has filed the present complaint seeking an amount of Rs.10,00,000/- as compensation for harassment, litigation, mental shock, agony, loss of reputation, unbearable pain, deficiency of service against the OP-1 i.e Max Super speciality hospital, OP No. 2 i.e. Dr A.N

J h a , O P N o . 3
Dr. Sandeep Vaishya, OP-4 Dr. Vikas Gupta, OP-5 Dr. Rajesh Tandon and OP No. 6 Dr. Rajiv Tangri.

The complainant states that in the second week of August 2008, the complainant had pain in his head and therefore he visited the hospital of OP No.1 where in he was advised test including city scan and MRI. The report of the CT scan and MRI disclosed that there was grade II tumor and operation was a must. The said report is annexed as annexure C-1. The complainant was directed to deposit Rs. 1,49,000/- as operational expenses besides other medicine expenses. Operation of the complainant was conducted on 18.08.2008 by the OP No.3 & 4. The complainant was discharged from the hospital on 21.08.2008. The discharge slip is annexed as Annexure C-4. It is further stated by the complainant that after 3 days of discharge from the hospital, the complainant again felt pain in the head therefore; the complainant along with his family members visited the hospital and told the OP No.3 & 4. Necessary check-up of the complainant was done and he was told that there was nothing to be worried about. On the advice of the doctors, the complainant came back to his house.

Since the pain of the complainant was increasing he approached AIIMS for his treatment. The complainant was asked to bring the record/ slide of MRI and specimen taken by the pathology department of OP No.1. On perusal of the slide, it was found by the doctors that no tumour was seen in the sections examined. The report of AIIMS is enclosed as annexure C-5. The laboratory investigation report of the complainant is annexed as Annexure C-6 which showed that the complainant was suffering from grade II tumour. It is further alleged by the complainant that on 22.10.2008 an operation was conducted on the complainant by the doctors at AIIMS and it was found that no operation of any kind was conducted on the complainant but the head of the complainant was opened in the name of operation. The tumour was not removed by the OPs. During the course of operation, cotton was found inside the head of the complainant which was left by the OPs during their operation. This cotton was removed by the doctors at AIIMS during the operation of the complainant on 20.10.2008. This, as per the complainant, is a deficiency in service on the part of the OP and case of medical negligence. After sometime, the complainant died on 05.05.2009.

The OPs have filed their reply where in it is stated that the complaint is based on misconceived presumptions, assumptions, unfounded notions and as such is not maintainable. It is stated that the negligence is only make believe and does not constitute any deficiency in service or mental agony. It is also stated that since the complainant has died, the right to sue does not survive on the LRs of the complainant. It was also stated that the complaint has been filed after the expiry of limitation.

On merits, it is stated that the complainant was admitted with OP No.1 on 15.08.2008 with history of severe headache for the last 10 days increase in severity of headache for the last 2 days, vomiting since 3 days and eye pain. Contrast MRI brain was done which confirmed enhancing and necrotic left thalamic tumour reaching up to the brainstem. After clinical radiological correlation and written informed consent of patient /complainant he was operated (left parietal occipital carionotomy and decompression). Frozen section during surgery revealed it to be low grade glioma. After surgery, the complainant did well and did not complain of any headache or pain and was discharged on 21.08.2008 as conscious and oriented with no complaints of headache etc. (Discharge summary is annexed as annexure B).

It is also stated that the present case relates to a medical issue and therefore cannot be opened in the absence of a medical opinion. It is also stated that the complainant was informed after the MRI

which is annexed as annexure C that his reports showed left thalamic tumour but grade II was never mentioned as the same status can be commented upon only after the histopathological report. It is further stated that the histopathological examination consisted of multiple fragments altogether measuring 0.6 x 0.5 x 0.4 centimetre in size. Microscopically, it showed a low grade glial tumor along with areas of uninvolved brain parenchyma. No features of grade IV tumour such as necrosis or multi vasculature proliferation was seen in the submitted tissue. It is well established fact that the regional heterogeneity of glioblastoma tumour remarkable and compromises diagnosis and grading obtained on tissue biopsies as per WHO classification of tumours of central nervous system and Stephan S Sternberg's diagnostic surgical pathology. It is also stated that towards providing best medical care and a goodwill gesture OP No1, sought opinion from Sir Ganga Ram hospital and sent the relevant slide- H & E Stain slide number FS 137/08 and S 4665 /084 for review. The report of Sir Ganga Ram hospital revealed presence suggestive of low grade Astrocytoma (Grade II). The said report affirms the stand of answering OPs. Expert opinion report of Sir Ganga Ram hospital dated 20.03.2013 is annexed as Annexure E.

The contention of the complainant of the cotton being found in the head was denied by the OP and it was stated that count of cotton swabs used in any surgery are kept and counted pre as well as post- surgery, the same was done in the present case also and the cotton count at pre operational stage and at the time of closure was tallied and found complete.

The rejoinder filed by the Complainant primarily denies all the contentions of the OPs and reiterates what has been stated by the complaint. The parties have filed their evidences as well as written submissions. Oral arguments are heard wherein both the parties have primarily relied on their written submissions.

We have carefully gone through the pleadings and documents filed by the parties. As stated earlier, during the pendency of the complaint, the complainant died on 05.05.2009. The LRs of the complainant i.e his father and mother were brought on record and allowed to be impleaded vide order dated 01.02.2010.

The objection raised by the OPs is that complaint is not maintainable by the LRs as 'right to sue' does not survive in them and to support this contention the OPs have relied on judgements of the Hon'ble NCDRC in *Malnad Hospital and Institute of Oncology vs H C Eranna* and Hon'ble Supreme Court in *Mukesh Kumari (Minor and dead) by LRs vs M. Lal Oswal Cancer Treatment and Research Foundation and anr.*

This Commission is of the view that the judgment of the Hon'ble SC in *Mukesh Kumari's* case is squarely applicable to this case and therefore the right to sue would survive in cases where compensation is sought on grounds of medical negligence. Even otherwise, the application to bring the LRs on record was allowed by this Commission as far back as 01.02.2010, this order has not been challenged by the OPs since then and therefore has assumed finality. Therefore we hold that the LRs of the complainant have the 'right to sue' in the present case.

The next issue relates to the complaint being time barred. This contention is not sustainable as the cause of action for the complainant (since expired) arose in 2008 and the present complaint was filed on 20.03.2009, therefore the complaint was filed within time.

We now deal with the main contention of the LRs of the Complainant now, i.e there has been medical negligence on the part of the OPs. The Commission has carefully gone through the entire material on record including the MRI reports and other reports.

The first MRI of the Complainant was taken done on 16.08.2008 at OP1 hospital wherein it was stated:

“Necrotic multiobulated peripherally enhancing mass lesion in left thalamus with surrounding Mass Effect and ventricular compression with mild hydrocephalus. Findings suggestive of aggressive high grade tumour.”

This report clearly suggests that the complainant was suffering from a high grade tumor.

In the discharge summary of OP-1 dated 21.08.2008 which is annexed as annexure B along with the reply

Diagnosis: *‘left thalamic glioma’* . It also states that

‘the CT done at Safdarjung hospital was suggestive of SOL in left thalamus with central necrosis in causing compression and displacement of 3rd ventricle.’

It is also noted *‘contrast MRI brain was done which confirmed enhancing and necrotic left thalamic tumor reaching up to the brain stem. Frozen section during surgery revealed it to be low grade glioma.’*

The histopathology report of AIIMS where the complaint was undergoing treatment for the second time dated 03.09.2008 states

‘Received one H/E stained slides and paraffin block from brain for review the slide examine shows multiple fragments of cortical tissue occasional fragments of white matter is seen. No definite tumor is seen in the sections examined’

The histopathology report of AIIMS dated 29.09.2008 is as under:

‘The slides examined show tiny fragments of cortical tissue and white matter. No tumor is seen in the sections examined.’

However, the discharge summary of AIIMS dated 27.10.2008 wherein date of operation is recorded as 22.10.2008 states as under:

‘CT scan date 1: 16.10.2008 heterogeneous hypodense mass lesion in Lt thalamus with extension into suprasellar cistern mild hydrocephalus present.

CT scan date 2: 19.08.2008 post op changes present residual tumor seen. EVD in the op cavity +ve.

Previous changes of surgery present gliosis at previous cortisectomy site present, cottonoid present at operative site, sent for biopsy, soft suckable grace sub ependymal moderately vascular mass with no well defined margin from normal brain present. Frozen high grade glioma.'

Further, the histopathology report of AIIMS dated 03.11.2008 after the second surgery of the complainant confirms as under:

' Specimen sent as left thalamic SOL shows histomorphological features of glioblastoma multiforme (Who grade IV) the tumor cells are immuno positive for P 53 MIB I label in index is 18% in highest proliferating area. Specimens separately as cotton received from the opening show foreign body material.

OP has placed on record the report of Sir Ganga Ram Hospital dated 20.03.2013 in the support of their contention which states as under:

'Section shows multiple small fragments of brain tissue, some showing sparsely cellular astrocytic tumor showing mild nuclear pleomorphism with no mitosis. no necrosis or microvascular proliferation is seen.' 'suggestive of low grade astrocytoma (grade II), please correlate with MRI findings'.

Expert medical advice was sought by this Commission from a duly constituted board of Safdarjung Hospital on 16.11.2010 and the same was received on 23.01.2012. Expert medical opinion from Safdarjung Hospital dated 01.03.2011 corroborated with that of AIIMS Hospital and it was stated as under:

' thalamic tumours or deep seated tumours and distinction between normal brain tissue and tumour issue is difficult to make intra operatively. Reactive gliosis surrounding the tumor may at times be difficult to differentiate from low grade glial tumour.

There was no complication like infection due to cottonoid as evident from operation notes.'

The Hon'ble Supreme Court in Jacob Mathew vs. State of Punjab and Ors. (05.08.2005 – SC) has held that

“(1) Negligence is the breach of a duty caused 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. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) 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.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582 holds good in its applicability in India.....”

Considering the judgment of the Hon'ble Supreme Court in Jacob Matthew's case specially point 3 above, 'A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess

The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

Therefore though the OPs cannot be held liable on account that they did not possess the highest level of expertise or skill however when the test of an ordinary competent person exercising ordinary skill in that profession is applied the OPs are guilty for negligence as mere presence of a foreign material at the site of the surgery after the surgery was completed is itself indicative of lack of care taken by the surgeon during the surgery and therefore we conclude that OPs are guilty of medical negligence. This Commission has also placed reliance on *Achutrao Haribhau Khodwa vs State Of Maharashtra 1996 SCC (2) 634* wherein the following cases were discussed

“Dr. Laxman Balkrishan Joshi v. Dr. Trimbak Bapu Godbole [1969]1 SCR 206, the Supreme Court observed as follows :

The duties which a doctor owes to his patient are clear, A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding whether treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task 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.

13. The above principle was again applied by this court in the case of A.S. Mittal and Ors. v. State of U.P. [1989]3SCR241.

The Court further quoted Street on Torts (1983) (7th Edn.) wherein it was stated that the doctrine of res ipsa loquitur was attracted : "...Where an unexplained accident occurs from a thing under the control of the defendant, and medical or other expert evidence shows that accidents would not happen if proper care were used, there is at least evidence of negligence for a jury."

The latest case to which reference can be made is that of Indian Medical Association v. V.P. Shantha and Ors. AIR 1996 SC 550 . The Court also approved a passage from Jackson & Powell on Professions Negligence and held that "the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services."

The OPs No. 1, 3 and 4 are held guilty of negligence and cannot shy away from their duty to take care. The OPs are directed to jointly and severally pay a sum of Rs. 5,00,000/- within a period of three months from the date of this order failing which the OPs shall be liable to pay the said amount of Rs.5,00,000/- @ 7% p.a from the date of surgery with OP till realisation.

File be consigned to the record room after giving copy of the order to the parties. Order be uploaded on the website.

**[MONIKA A. SRIVASTAVA]
PRESIDENT**

**[KIRAN KAUSHAL]
MEMBER**

[UMESH KUMAR TYAGI]

MEMBER