

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 112 OF 2011

(Against the Order dated 20/12/2010 in Complaint No. 34/2001 of the State Commission Kerala)

1. M/S. LOURDES HOSPITAL & ANR.

panchalam, erankulam,

Kochi -682012

kerela

2. Dr.P.Y.Johan

ENT Surgeon and Consultant, Lourdes Hospital ,

Panchalam, Ernakulam ,

Thrissur

Kerela

.....Appellant(s)

Versus

1. DAVIS V.C.

S/o :Chackappan, Velliyath House, Cheryvaloor, P.O.

Koratty(VIA)

Thissur

kerela

.....Respondent(s)

BEFORE:

HON'BLE DR. S.M. KANTIKAR,PRESIDING MEMBER

HON'BLE MR. BINOY KUMAR,MEMBER

For the Appellant : Appeared at the time of arguments through video conferencing

For Lourdes Hospital : Ms. Aanchal Tikmani, Advocate

For the Respondent : Appeared at the time of arguments through video conferencing

For Davis V. C. : Mr. Abdullah Naseeh, Advocate

Dated : 26 May 2022

ORDER

Pronounced on: 26th May, 2022

ORDER

DR. S. M. KANTIKAR, PRESIDING MEMBER

This Order shall decide both the Appeals filed under Section 21(a)(ii) of the Consumer Protection Act, 1986 against the Order passed by the Kerala State Consumer Disputes Redressal Commission, Thiruvananthapuram (hereinafter referred to as the 'State Commission'), which directed the Opposite Parties to pay a compensation of Rs.3,00,000/- to the Complainant.

1. Brief facts that on 29-11-1997 the Complainant Mr. Davis V.C. (hereinafter referred to as the 'Patient') underwent a Functional Endoscopic Sinus Surgery (hereinafter referred to as 'FESS') on his right sinus at Lissie Hospital, Emakulam. Thereafter, in year 2000, he suffered sinusitis of left side and on 14-06-2006, he underwent FESS at M/s. Lourdes Hospital, Ernakulum ((hereinafter referred to as the 'OP-1').It was performed by an ENT surgeon Dr. P. Y. Johan (hereinafter referred to as the 'OP-2'). He was discharged on 19-06-2000. Thereafter, he developed severe headache and fever. It was alleged that the patient developed symptoms of intracranial injury. On 26-06-2000, the OP-2 told him that the head ache was due to the left side nasal packing. On 03-07-2000 the nasal packing on the left side was removed, but headache did not stop. He was again admitted in OP-1 hospital on 06-07-2000, and investigated. He was given higher antibiotics but headache persisted. He had vomiting on 09-07-2000 and the physician examined and then referred him to the Neuro Physician on 12-07-2000. CT Scan brain was done, which revealed regional odoema with partial effacement and elevation of left frontal horn and a small hyper-dense opacity in the inferior part of left frontal lobe about 1.2 cm above the ciiaphragma sellae. It was alleged to be a bony fragment measuring 5-6mm. Again another CT Scan was done on 17-07-2000 at OP-1 hospital, which showed same findings. The patient was discharged on 22-07-2000. It was further alleged that in order to conceal the negligence the OP-2 delayed to refer patient to a Neurosurgeon. It was also alleged that the medical records manipulated. He was then taken to Christian Medical College, Vellore (CMC). The CT Scan was performed and it confirmed Intracranial extension and frontal cerebritis along with abscess formation. He was advised to continue higher antibiotics for a further period of 6 weeks. After the above period, he again consulted the doctors at CMC, Vellore on 12-09-2000. The repeated CT Scan showed considerable improvement in the abscess and cerebritis, but the presence of displaced bony fragment was seen. Being aggrieved due to alleged medical negligence the Complainant filed the Complaint before the State Commission and claimed a sum of Rs. 13,00,000/- as compensation.

2. The Opposite Parties filed the joint written version and denied entire allegations. It was submitted that there was no surgical accident during the FESS and no surgery was done on fontal sinus. It was done in the maxillary and ethmoid sinuses and he was advised to continue medicines.

3. On hearing the parties and evidence on record, the State Commission partly allowed the Complaint and directed the Opposite Parties to pay a compensation of Rs.3,00,000/- to the Complainant.

4. Being aggrieved, the Complainant filed First Appeal No. 379 of 2011 for enhancement of compensation and the OPs filed First Appeal No. 112 of 2011 for dismissal of Complaint on merit.

5. We have heard the learned counsel on both the sides, perused the CT reports, medical record of OP-1 and the CMC, Vellore.

6. The case of the Complainant is that after FESS, a bony fragment was found in the frontal region of the skull which was the cause for infection and neurologic symptoms. It is pertinent to note the FESS was done on maxillary and ethmoid sinuses, which is away from frontal sinus. Thus possibility of injury to the frontal bone is very remote. The reports revealed the patient had mild infection at the displaced bone in the frontal sinus. The OP-2 treated the patient with higher antibiotics which showed improvements. Also it should be borne in mind that if the complication arose from FESS, there will be CSF leak.

7. We have carefully perused the CT Scan reports. The first report dated 12.05.2000, revealed mucosal thickening and opacification. After CT Scan dated 12.07.2000 done after FESS revealed focal cerebritis of left frontal lobe with abscess formation and it was suspected as ? displaced bony fragment in frontal region. It is pertinent to note that on 17.07.2000, limited plain axial CT of frontal region was performed and it revealed the size of focal lesion and oedema remain the same. It was diagnosed as ? bony fragment ?? Calcification in the sinus wall. Thus, it was no definitive diagnosis of presence of bony fragment.

8. After two months another CT Scan was done on 27-11-2000 at Little Flower Hospital revealed significant improvement of the edema but the existence of a bony fragment having the size of 8 X 4, mm in the left cranial fossa with a corresponding bony gap of 3 mm size. There was minimal edema around the bony fragment. According to the complainant it was perforation of the lower bony wall of the frontal lobe and the presence of bony fragment would cause repeated infections of the brain. As per literature, due to error of judgment there are chances of injury to the thin bone at the base of frontal sinus; however such displacement of bony fragment in frontal sinus is not possible during FESS performed on maxillary and ethmoid sinuses. The CT scan report before surgery also shows thickening of mucosa due to chronic process. Further, the patient was referred to Neurologist for further assessment. The allegation of loss of memory and headache due to FESS is not sustainable. The patient also consulted at Christian Medical College Hospital, Vellore for his problems of persistent headache. Dr. Ari G. Chacko examined the patient advised to take antibiotics for 6 weeks. The patient showed considerable improvement. Thus, considering radiological findings in its entirety admittedly there was suspected tiny bony fragment. It was not confirmed diagnosis. As per the medical literature the Functional Endoscopic Sinus Surgery (FESS) is an easy, fast and effective surgical procedure for treating rhinosinusitis that is not responsive to medical therapy. There are no major post-FESS complications. As discussed above in the instant case the suspected bony fragment was due to an error of judgment during FESS. The CT findings are also confirmatory because of chronic inflammatory changes and thickening of mucosa. There was significant improvement after taking antibiotics. Thus negligence cannot be attributed to the FESS performed by OP-2 doctor.

9. It would be apt to rely upon the recent judgment of Hon'ble Supreme Court in *Chanda Rani Akhouri vs. M. S. Methusethupathi* [1], decided on 20th April, 2022, wherein it was held that Simple lack of care, an **error of judgement** or an accident, is **not** a proof of **negligence** on the part of a medical professional. It further cited *Jacob Mathew vs. State of Punjab and Anr.* [2] to find that “*simple lack of care, an error of judgement or an accident, is not a proof of negligence on the part of a medical professional.*” The Court further explained the true import of the term negligence and observed thus:

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.

10. Based on the discussion above, FA/112/2011 is allowed and FA/379/2011 is dismissed. Consequently, the Complaint is dismissed.

We note that the State Commission awarded Rs.3 lakh, therefore in case, if the Complainant had received any amount from the State Commission, the Opposite Parties now at this stage, shall not seek its refund from the Complainant.

[1] Appeal (Civil) No. 6507 of 2009

[2] (2005) 6 SSC 1

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DR. S.M. KANTIKAR
PRESIDING MEMBER

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BINOY KUMAR
MEMBER