NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

CONSUMER CASE NO. 956 OF 2015

1. DR. DEBDAS BISWAS
6103, DETER CT., LIVERMORE,
CA 94550, USA .....Complainant(s)

Versus

1. DR. SOURAV SINHA & ANR.
B B EYE FOUNDATION, 2/5, SARAT BOSE ROAD,
KOLKATA,INDIA
2. B B EYE FOUNDATION,
2/5, SARAT BOSE ROAD,
KOLKATA,INDIA .....Opp.Party(s)

BEFORE:
HON'BLE MR. JUSTICE R.K. AGRAWAL,PRESIDENT
HON'BLE DR. S.M. KANTIKAR,MEMBER

For the Complainant : Appeared at the time of arguments
Mr. Abhinav Hansaria, Advocate

For the Opp.Party : Appeared at the time of arguments
Mr. Sanjoy Kumar Ghosh
and Ms. Rupali Ghosh, Advocates
with Dr. Sourav Sinha, OP-1 in person

Dated : 05 Dec 2022

ORDER

DR. S. M. KANTIKAR, MEMBER

1. The present Consumer Complaint has been filed by Dr. Debdas Biswas the US resident (hereinafter referred to as the Complainant) under section 21(a)(i) of the Consumer Protection Act, 1986 (for short the 'Act') against the Ophthalmologist- Dr. Sourav Sinha (hereinafter referred to as the 'Opposite Party No. 1') and B. B. Eye Foundation (hereinafter referred to as the 'Opposite Party No. 2') for alleged medical negligence due to wrong medical advice and the Complainant suffered permanent and irreversible damage in his left eye.

The facts:-

2. The Complainant, a senior Scientist at Lawrence Livermore National Laboratory, California, USA. Previously he underwent successful cataract surgeries in 2004 and 2006. The Complainant developed retinal tears in his right eye in 2007-08 and underwent laser treatment. In February 2012, he came to India to visit his family members in Kolkata. In India he suffered 'Rhegmatogenous Retinal Detachment' causing blurring of vision in left eye with dark peripheral vision. Therefore, on 13.02.2012, the Complainant consulted the Opposite Party No. 1 - Dr. Sourav Sinha, who advised surgery for retinal detachment. The surgery was performed by the Opposite Party No. 1 and at the completion of the surgery, Opposite Party No. 1 injected a Perflouropropane (C3F8) gas bubble in the left eye to press the retina tightly against the eye wall. It was alleged that the Opposite Party No. 1 gave the prescription as '*fit to fly'* after about 2 weeks of the surgery, knowing well about the complications to travel by Air. Accordingly, the Complainant took a flight on 02.03.2012 for US San Francisco

via Singapore and Seoul. In the flight, he suffered severe pain in his left eye and was unable to see from left eye and the pain further became unbearable. On 03.03.2012, as soon as the Complainant landed in San Francisco, he rushed to the East Bay Retina Consultants Clinic. Dr. Eugene S. Lit (an associate of Dr. Scott S. Lee) examined him. The Complainant attended follow up visits thereafter on 05.03.2012, 15.03.2012, 21.03.2012 and 30.03.2012 for various tests and examinations. On 30.03.2012, recurrent temporal Rhegmatogenous retinal detachment was seen because the gas bubble was reabsorbed to less than 2%. Dr. Scott informed that because of flight travel the Complainant/patient had optic nerve injury and it caused permanent damage to his left eye. Due to flight journey, there was expansion of the gas bubble leading to increased intraocular pressure (IOP) and caused central retinal artery occlusion. The visual activity in the left eye was reduced to fingers counting from two feet. Therefore on 18.04.2012 'Scleral Buckling' procedure was performed by Dr. Scott S Lee at the Eastbay Retina Consultants.

3. The Complainant alleged that due to gross negligence of the Opposite Party No. 1, he developed glaucoma in the left eye. It was evident from the Optical coherence tomography reports done before the surgery (19.01.2012) and one after surgery (15.08.2012). Thereafter, the Complainant and his wife telephonically contacted the Opposite Parties Nos. 1 & 2 and tried to settle the issue but no avail. Thereafter, Complainant issued a legal notice to Opposite Party No. 1 and demanded to pay $100,000 as compensation. Lastly, being aggrieved, the Complainant filed the Consumer Complaint before this Commission and prayed Rs. 8,46,79,000/- as a compensation from the Opposite Parties.

4. In response, the Opposite Parties Nos. 1 and 2 have filed separate written versions and denied the negligence. They raised preliminary objections that the Complaint was barred by limitation. The Complainant took treatment from various hospitals and doctors. Therefore, the Complainant is bad for non-joinder of necessary parties. It was further submitted that the allegations were based on mere narration of events without any corroborative medical evidence. Moreover, no allegation of any medical negligence with respect to the treatment and the Vitrectomy operation of the left eye. As per the medical records, the patient's left eye vision became 20/20. The Complainant has not disclosed about medical insurance or travel insurance for himself and thus, he cannot be compensated twice for medical expenses. As per the Complainant's old reports, in the year 2007 he had suffered retinal tears in his right eye, and he underwent laser treatment. However, he did not follow the doctor's advice in 2007-2008. It is evident from old record that reminder was sent twice, mentioned as "First Recall sent" on 7-6-07 and "Second Recall Sent" on 8-1-07; but he did not attend the doctors. Again the reminder calls for follow-up were repeated in 2009.

5. The Opposite Party No. 1 submitted that on 29.02.2012, he advised the patient to see a retina specialist after 10 days and it was mentioned '*fit to fly*' in the prescription, thus clearly it implied that it was only after the patient got examined by a Retina Specialist. However, the Complainant without consulting Retina Specialist, made his travel plan to San-Francisco for 02.03.2012. The complainant has not produced any evidence to prove that he booked his flight for US after issuance of prescription. The Opposite Party No. 1 further submitted that on bare reading of the letter of Dr. Scott S. Lee to Dr. Todd Severin, it is clear that, he (Dr. Scott) examined the Complainant on 08.01.2015, i.e. nearly 2 years 8 months after the last surgery. He noted the patient's corrected visual acuities 20/20 in both eyes, which was perfect vision of a normal eye. The Opposite Party No. 1 submitted that patient was with residual intraocular gas volume of 0.6 ml, which was approximately 10% of the volume of the eye, it will compensate for the decrease cabin pressure as an airplane ascends without a symptomatic rise in intraocular pressure and without any symptoms.

6. The Opposite Party No. 1 further submitted that the patient was referred to him by Dr. Ajoy De Sarkar, Senior professor of Calcutta Medical College. Therefore, he treated the patient as standard of practice. Though there was no negligence as he was referred by his senior professor, thus as a goodwill gesture, the Opposite Party No. 1 offered to refund the fees charged to the Complainant on compassionate and humanitarian ground. However, the Complainant and his wife were greedy and started threatening the OPs to pay USD 30,000 otherwise they will ruin the reputation of the OPs by filing Complaint and publishing through newspaper. They have sent threatening e-mails and legal notice. The Opposite Party No. 1 submitted that the Complainant is claiming the exemplary compensation of more than Rs. 8 crores without any basis.

7. The Hospital- Opposite Party No. 2, in its written version, submitted that Opposite Party No. 1 was neither employee nor engaged by the hospital. The Complainant had engaged the Opposite Party No. 1 for treating him and the Opposite Party No. 2 has provided operation theater facilities for Vitrectomy operation. Moreover, the Opposite Party No. 1 gave all necessary details for treatment and advice to the patient, but the Complainant filed this mischievous Complaint against the Opposite Party No. 2.

Arguments:

We have heard the arguments from the learned Counsel for both the sides.

There was delay in filing the Complaint. For the reasons stated in the application, the delay is condoned.

8. Arguments on behalf of Complainant:

The learned Counsel for the Complainant reiterated the facts and evidence. He submitted that, after "Vitrectomy" surgery, Opposite Party No. 1 injected C3F8 gas bubble into the eye to press tightly the retina against the wall of the eye. As per medical literature when a gas bubble is present inside the eye, then, the patient should avoid travel to high altitudes or flying in airplane. The lower atmospheric pressure at high altitude leads to expansion of the intraocular gas bubble, which may results to increase in IOP and cause central retinal artery occlusion. Even small gas bubbles cause substantial rise in IOP and loss of vision. A C3F8 gas bubble usually lasts for about 6 to 8 weeks. The learned Counsel further argued that in the instant case only after 2 weeks of surgery, knowingly the Opposite Party No. 1 allowed the patient to travel by air and mentioned in the prescription *'fit to fly'* . Therefore, on 2.3.2012, the complainant travelled to San Francisco and suffered severe pain in his left eye, loss of vision and subsequently developed glaucoma in the left eye. It was due to the negligence of the Opposite Party No. 1. The Complainant therefore facing day to day problems with his left eye that he could not read, watch TV, drive or play Golf. He further lost his professional career, job performance and promotion. The glaucoma he suffered is a lifelong disease and needed constant treatment and attention.

9. Argument on behalf of Opposite Parties:

The learned Counsel for the Opposite Parties reiterated their affidavit of evidence. He submitted that he saw the patient on emergency basis, as referred by one senior professor Dr. Ajoy De Sarkar of the Calcutta Medical College. The patient concealed the details of his previous treatment. In the year 2007, he underwent laser treatment for retinal tears in his right eye. The Opposite Party No. 1 did not allow the Complainant to fly to Kathmandu Nepal when he sought permission to fly on 16/02/2012. However, on 29/02/2012, Opposite Party No. 1 upon finding that the Complainant was doing well and his retina was attached, Opposite Party No. 1 advised him to see a retina specialist after 10 days from 29.12.2012 and he was *fit to fly*. The Complainant is trying to twist the treatment protocol in his favour by extracting partial text from the journals and text book about Rhegmatogenous Retinal Detachment. Though, the Complainant unfortunately suffered problems in left eye, he cannot be permitted to make a fortune out of misfortune. The relief sought was imaginary and highly exaggerated.

Discussion:

10. We gave our thoughtful consideration to the arguments of the Parties.

11. We have carefully perused the AIIMS medical board report, which consists of Retina and Glaucoma specialists. The board gave opinion on two main issues:

1. Pertaining to the written noting **"fit to fly" and**

2. Extent of consequences resulting from the flight by the patient concerned

The AIIMS board of experts report is reproduced as below:

Dr. Debdas Biswas, PhD (patient) was operated on 13/02/2012 for Retinal detachment in the left eye. 'Vitrectomy' + TSC + C3F8 Gas under local anaesthesia was performed as per records available. Post-operative notes on 29/02/2012, mention the retina was attached with a small gas bubble. The Surgeon has given a separate letter mentioning He is "fit to fly", the reasons for which are not clear as this is not normal practice. It is unusual for a surgeon to provide such a certificate and any discussions with the patient on this matter are not available for perusal by the experts. "*The fact that the surgeon was aware of restriction of air travel in presence of a gas bubble in the eye is evident from an email provided by the complainant dated 30/10/2014 which clearly mentions that he was declined permission to fly to Kathmandu. It appears that the patient I wanted to fly/intended to fly but the extent to which the risks of flying were discussed before and/or after surgery is not clear from the records".*

The symptoms experienced by the patient on the flight are consistent with expansion of the gas bubble leading to rise in intraocular pressure and central retinal artery occlusion, this may have been transient leading to recovery of vision as mentioned in the notes. The subsequent development of chronic glaucoma from the event is unlikely because the patient had well controlled IOP for a long period after the event. However, the patient has a propensity for glaucoma as has been seen in the other eye.

The Medical Board members noted that the visual acuity L.E. recorded was 20/20 (6/6) on several occasions after the flight as per doctors noting on page no. 14 (03rd March 2012) and 20/30 on page no 18 (30th March 2012) and 20/30 on page no 23 (18th April 2012) and again 20/20 on page no 29 (08th January 2015) as per complainant summary provided.

The expert opinion in this case review is that there was an element of individual discretion of the treating surgeon involved in the opinion given regarding fitness to fly. Regarding the question raised by the Hon'ble presiding member dated 20/02/2017 it seems that the treatment provided for retinal detachment by the surgeon (Vitrectomy + TSC + C3F8 Gas under local anaesthesia) was as per standard norms,

Thus, the AIIMS report (supra) clearly stated (paras 2 and 3) that the surgeon was conscious about restriction to travel by air after such operation, and already once he declined the patient to fly to Kathmandu. The report further held that "*the subsequent development of chronic glaucoma from the event is unlikely because the patient had well controlled IOP for a long period after the event. However, the patient has a propensity for glaucoma as has been seen in the other eye".*

12. From the medical record it is evident that, during retinal examination follow-up, the patient visited Dr. Scott S Lee, on 18.4.2012, who recorded the findings as:

• The visual activities were 20/20 in right eye and 20/30 in left eye.

• Intraocular pressure were 19mmHg in the right eye and 13 mm Hg in the left eye on Lumigari OU qhs, Cosopt OS b.i.d, and Alphagan OS b.i.d

• The retina was totally reattached and was confirming well to 360 degree encircling scleral buckle.

• The gas bubble was reabsorbed.-

• The Complainant could still see gaps in the central vision of the left eye and the reason for the same was due to the residual effect of the central retinal artery occlusion in the left eye.

13. On bare reading of the letter of Dr. Scott S. Lee to Dr. Todd Severin, it reveals that nearly after 2 years 8 months of the laser surgery, on 08.01.2015 Dr. Scott examined the Complainant, and found the corrected visual acuity 20/20 in both eyes. It was the perfect vision of a normal eye. In our view the Complainant deliberately suppressed the report of routine check-up dated done on 08.01.2015 by Dr. Scott S. Lee.

14. We further note that the legal notice was sent by the Complainant dated October 30, 2014, the relevant part of the same is as below:

> "You knew fully well the danger of flying at such a high altitude, which result into loss of eyesight due to the high pressure of the altitude. If you recollect you did not allow Mr. Biswas to fly to even Kathmandu, Nepal when Mr. Biswas sought your permission to fly to Kathmandu on February, 16, 2013 to got to his mother-in-law's house. So Mr. Biswas had to cancel his flight to Kathmandu on February 16, 2013".

15. **References from Medical Literature:**

We have perused few research articles on the effects of a gas bubble in the eye namely *i) The procedure of Vitrectomy in cases Rhegmatogenous Retinal Detachment by Heinrich Heiman and Bernd Kirchh ii) The procedure of Vitrectomy Michael Engelbert and Stanley Chang iii) The effects of intraocular gases; by Stanley Chang (annex.3,4 & 5)* .

The literature revealed that, as per medical studies, while a gas bubble is present inside the eye, patients should avoid traveling to high altitudes and flying in airplanes. The lower atmospheric pressure at high altitudes leads to expansion of the intraocular gas bubble in the closed globe, which can result in extremely elevated intraocular pressure and central retinal artery occlusion. Even small gas bubbles can result in substantial intraocular pressure rise and loss of vision. A C3F8 gas bubble usually lasts for about 6 to 8 weeks and thus it is highly recommended that patients with an intraocular gas bubble should not travel by air for at least a period of 6 to 8 weeks.

> Central Retinal Artery Occlusion is a, disease of the eye where the flow of blood through the central retinal artery is blocked (occluded).A scleral buckle is a piece of silicone sponge, rubber, or semi hard plastic that the doctor places on the outside of the eye. The material is sewn to the eye to keep it in place. The buckling element is usually left in place permanently. The element pushes in, or "buckles," the sclera toward the middle of the eye. This buckling effect on the sclera relieves the pull (traction) on the retina, allowing the retinal tear to settle against the wall of the eye. The buckle effect may cover only the area behind the detachment, or it may encircle the eyeball like a ring. By itself, the buckle does not prevent a retinal break from opening again. Usually extreme cold (cryopexy) or, less commonly, heat (diathermy) or light (laser photocoagulation) is used to scar the retina and hold it in place until a seal forms between the retina and the layer beneath it. The seal holds the layers of the eye together and keeps fluid from getting between them.

In the instant case, on 21.04.2015, the Complainant was diagnosed to be suffering from Glaucoma at the Mission Valley Surgery Centre, Fremont, California.

16. In the present matter, the cause of action arose on 29.02.2012, when the Opposite Party No. 1 gave the alleged wrong medical prescription declaring the Complainant as *"fit to fly*". Though through email communications on 11.03.2013, 08.04.2013, 27.05.2013 and 17.07.2013, the Opposite Party No. 1 admitted the act of negligence and agreed to pay compensation to the Complainant. Thereafter, on 31.10.204 issued a legal notice dated 31.10.2014 to the OPs. In our view mere writing letters or emails do not extend the limitation / cause of action. Thus in the instant case, it was not the continuous cause of action. Moreover, the Complainant's prayer for compensation appears to be imaginary and unjustified.

17. On careful perusal of the Complainant's replies to interrogatories questions No. 8 and 12 of Opposite Party, we are not convinced. Those replies are reproduced as below:

> Q.No.8: Why did you not stop your journey after the first flight from Kolkata to Singapore if there was tremendous pain and you could not see anything in the left eye? May I know when did you report the same to the air hostess and the flight captain for such purported problem?

Answer: In response to the corresponding question, I say that I had pain in my eye after some time of the start of the flight. Upon reporting the problem to the air hostess, she gave me ice to put on my eye. After I reached San Francisco airport, I went directly to see a retina doctor. I was told that with the amount of gas bubble in my left eye, the eye was irreversibly damaged after 90 minutes of flying. My first part of the flight was 4 hours long and damage was already done.

Q.No-12 When admittedly the Opposite party number 1 did not allow you to travel even to Kathmandu by air, which even your attorney Mr. Mahesh Bajoria PC has confirmed in his letter dated October 30th 2014. How could it be possible for you to ventilate such a purported grievance of allowing you air travel from here to San Francisco after a complete somersault from opposite party number 1's strict restriction? Do you not think this is a complete misadventure on your part?

Answer: When I was told not to fly to Kathmandu, I complied with the doctor's advice. So when the doctor told me and gave me written permission to fly to USA, I thought my air bubble was almost gone and that is why I could fly. I had no idea how much air bubble was still left in my eye. Only when I reached USA, my US doctor told me I had significant air bubble in my eye that completely damaged my eye, then I realized that my Indian doctor was completely negligent.

18. The allegations need to be proved with cogent evidence. We would like to rely upon the recent judgment passed by the Hon'ble Supreme Court in ***Bombay Hospital & Medical Research Centre vs. Asha Jaiswal & Ors***.[1], whereby it was held in paragraphs 32 and 34 of judgment as below:-

32. In **C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam**[2], this Court held that the Commission ought not to presume that the allegations in the complaint are inviolable truth even though they remained unsupported by any evidence. This Court 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."

34. Recently, this Court in a judgment reported as **Dr. Harish Kumar Khurana v. Joginder Singh & Others**[3] held that hospital and the doctors are required to exercise sufficient care in treating the patient in all circumstances. However, in an unfortunate case, death may occur. It is necessary that sufficient material or medical evidence should be available before the adjudicating authority to arrive at the conclusion that death is due to medical negligence.

19. The Hon'ble Supreme Court in **Jacob Mathews V State of Punjab**[4] and **S. K. Jhunjhunwala vs. Dhanwanti Kaur and Another**[5] held 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. Recently in the case of **Dr. (Mrs.) Chanda Rani Akhouri & Ors. Vs Dr. MA Methusethupathi & Ors.**[6] It was observed that:

> it clearly emerges from the exposition of law that a medical practitioner is not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another.

20. Based on the entirety, putting the reliance on the AIIMS expert medical board's report, the medical record and the literature on the subject, the Complainant failed to prove his case. It is not feasible to conclusively attribute non-adherence to duty of care and standard of practice from the treating doctor and the hospital.

21. The Complaint is dismissed.

The Parties shall bear their own costs.

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[1] 2021 SCC OnLine SC 1149

[2] (2009) 7 SCC 130

[3] (2021) SCC Online SC 673

[4] (2005) 6 SCC 1

[5] (2019) 2 SCC 282

[6] 2022 LiveLaw (SC) 391

.....J
R.K. AGRAWAL
PRESIDENT

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DR. S.M. KANTIKAR
MEMBER