

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 2482 OF 2017

(Against the Order dated 03/11/2017 in Complaint No. 25/2017 of the State Commission
Chhattisgarh)

1. HRIDAYLAL SAHU & 2 ORS.

S/O. HOSHIYAR SINGH(HUSBAND OF DECEASED). R/O.
VILLAGE BHARHA, TEHSIL GURUR.

BALOD

C.G.

2. SOUMYA SAHU.

S/O. HRIDAYLAL SAHU (SON OF THE DECEASED) R/O.
VILLAGE BHARHA, TEHSIL GURUR.

BALOD

C.G.

3. KU. NISHA SAHU.

S/O. HRIDAYLAL SAHU(DAUGHTER OF DECEASED).
R/O. VILLAGE BHARHA, TEHSIL GURUR.

BALOD

C.H.

.....Appellant(s)

Versus

1. DR. ROSHAN UPADHYAY & ANR.

UPADHYAY NURSING HOME AND MATERNITY
CENTRE, NEAR NEW BUS STAND, DHAMTARI.

RAIPUR

C.G.

2. UNITED INDIA INSURANCE COMPANY LIMITED.

M.O. OFFICE 44/2, CHURCH ROAD, BHOGAL, NEAR
LAJPAT NAGAR(SOUTH).

DELHI-110014

.....Respondent(s)

BEFORE:

**HON'BLE AVM J. RAJENDRA, AVSM VSM (Retd.),PRESIDING
MEMBER**

FOR THE APPELLANT :

FOR THE APPELLANTS : MOHD. ANIS UR REHMAN,
ADVOCATE

FOR THE RESPONDENT :

FOR THE RESPONDENTS : MR. VAIBHAV AGNIHOTRI,
ADVOCATE &

MR. HARSHIT KIRAN, ADVOCATE FOR R-1

MR. Z. ORENVUNGO EZUNG, PROXY COUNSEL FOR

MR. AMIT KUMAR SINGH, ADVOCATE FOR R-2

Dated : 11 June 2024

ORDER

1. The Appellants filed the instant Appeal under section 19 of the Consumer Protection Act, 1986, (the Act”), against the Order dated 03.11.2027 passed by the learned State Consumer Disputes Redressal Commission, Chhattisgarh. (“State Commission”) in Consumer Complaint No. 25 of 2017, wherein the State Commission dismissed the Complaint of the Complainants (Appellants herein).

2. For convenience, the parties in the present matter are being referred to as per position held in Consumer Complaint.

3. Brief facts of the case, as per the Complainants, are that Mrs. Jai Shree Sahu, the deceased patient is wife of Complainant No. 1 consulted OP-1 at his Nursing Home & Maternity Centre with the complaint of stiffness and pain in her left breast. Her Thyroid tests for T3, T4, T5, and TSH were conducted and she was admitted on 10.12.2015. A tumor operation was performed on her left breast, during which the portion of the breast containing the tumor was removed. Thereafter, the tumour was sent for a biopsy test. However, OP-1 did not conduct a biopsy test before the operation. Instead of improving, the deceased's condition worsened after the surgery, with increased pain in her breast and waist, and her overall condition deteriorated. When her relatives inquired about her prognosis, OP-1 stated that he had performed a major operation, which was actually a minor procedure involving eight stitches. On 18.12.2015 she was taken to Upadhyay Nursing Home for a check-up. OP-1 mentioned that he had removed half of the breast tumour and that complete removal would cure her. On 30.12.2015, the deceased experienced increased waist pain. OP-1 attributed this to dietary causes and prescribed medication and injections. He also referred her to Dr. Iqbal Pervej, an orthopaedic, who reviewed her sonography and X-ray reports and prescribed medication. Despite this, the deceased found no relief. On 31.12.2015, the biopsy report confirmed that she had cancer. OP-1 advised Complainant No. 1 not to inform the deceased about the cancer immediately and suggested another operation to remove the tumour. By 07.01.2016, her pain had intensified, affecting her ability to stand and sit, with no relief from OP-1's treatment. On 25.01.2016, the deceased was admitted to the hospital, where further pathology tests were conducted, and medications were administered, but there was no improvement. OP-1 then performed multiple tests, including abdominal sonography and X-rays, and on 02.02.2016 she was referred to Sanjeevani Hospital, Raipur to Dr. Yusuf Memon. She and Complainant No. 1 visited Dr. Yusuf Memon on 05.02.2016 and he conducted various tests, including echocardiography, serology, biochemistry, haematology, and thyroid panel tests. A sample for BFC test was sent to Mumbai. The deceased also underwent an MRI at Ramkrishna Care and was admitted to Sanjeevani. On 08.02.2016, the Mumbai test result was received. From 11.02.2016 to 23.02.2016, she underwent radiation therapy and was discharged the same day. The doctors recommended chemotherapy over surgery, as the initial operation without a biopsy had aggravated her condition. To save her life, she sought treatment from Dr. Suresh H. Advani at SL Raheja Hospital, Mumbai on 01.03.2016. She was admitted to Care Angel Hospital and underwent continuous chemotherapy. She required frequent travel to Raipur and Mumbai for chemotherapy sessions, causing significant physical and financial strain. Despite these efforts, the initial negligence in the surgery by OP-1 caused substantial physical and mental suffering. The

Complainant No. 1 had spent Rs.50,00,000 on treatment. She continued to endure financial hardship, mental anguish, and physical suffering. If OP-1 had initially conducted a biopsy, she would not have faced such severe issues. OP-1, not being a cancer specialist, should have referred her to a higher cancer hospital after conducting biopsy. This failure constitutes medical negligence. The Complainants filed a Consumer Complaint and sought compensation of Rs.75,10,000 for medical expenses, mental agony, financial losses, and litigation costs.

4. In their reply, before the State Commission, OP-1 asserted that the deceased initially sought treatment from another doctor and found no relief. This led her to consult OP-1. She initially presented the symptoms of stiffness and pain in her left breast, and a tumour was detected during the preliminary examination. Given this finding, an excisional biopsy was performed to remove the tumour, which was sent to Dr. Aamir Hussain, a pathologist in Raipur, for a histopathological test. This was to aid in her further treatment after receiving the biopsy report. The deceased was admitted to the hospital on 10.12.2015, for the excisional biopsy, discharged on 12.12.2015, and the biopsy was performed during this period. On 31.12.2015, the excisional biopsy report confirmed that she had breast cancer. When she complained of waist pain on 30.12.2015, OP-1 appropriately referred her to Dr. Iqbal Pervez, an Orthopaedic. The biopsy report's confirmation of breast cancer was promptly communicated to her relatives, and OP-1 advised them not to inform the deceased immediately to prevent distress. The family was advised to take her to a cancer specialist in Raipur and OP-1 referred her to Sanjeevani Cancer Hospital at Raipur, where Dr. Yusuf Memon confirmed the cancer diagnosis and noted that it had spread to the bone. OP-1 further contended that the excisional biopsy was crucial in diagnosing the cancer. Without this procedure, the presence of breast cancer would not be confirmed. Prior to consulting OP-1, she was under another doctor's care, who failed to diagnose the cancer. OP-1 emphasized that he provided high-standard, quality services and promptly referred her to the appropriate cancer treatment centre after the biopsy confirmed the diagnosis. She herself acknowledged in her complaint that OP No. 1 referred her to Sanjeevani Hospital following the biopsy report. OP-1 further contended that there was no medical negligence in his treatment. The biopsy was essential in diagnosing the cancer, leading to necessary referrals and subsequent treatment. There is no ground for compensation as OP-1 acted according to medical principles and standards. The period from 10.12.2015, to 11.12.2015, did not give rise to any cause of action against OP-1. Additionally, no cause of action arose on 14.11.2016. Moreover, OP-1 is covered under a Professional Indemnity Policy (No.0423822715P105027455) issued by United India Insurance Co. Ltd., effective from 01.08.2015, to 31.07.2016. Therefore, any liability for loss or damages should be borne by the insurance company, making it a necessary party.

5. In reply, OP-2 contended that the complaint filed against both OP-1 Dr. Roshan Upadhyay, and OP-2 was premature and should be dismissed against OP-2. The deceased, Smt. Jaishri Sahu, did not pay any premium to OP-2 nor obtain insurance coverage, leading to the absence of privity of an insurance contract between the deceased and OP-2. Consequently, she is not a consumer of OP-2, rendering the complaint against OP-2 non-maintainable. She failed to mention or substantiate any deficiency in service on the part of OP-2. Thus, there are no grounds to maintain the complaint against OP-2. Neither the

Complainants nor the deceased lodged any claims with OP-2, nor has any dispute arisen between the parties that would provide the basis for the complaint. OP-2 neither accepted nor rejected any claim from Complainants, thereby absolving it of any fault, and rendering it ineligible for a claim. While the complaint alleged medical negligence by OP-1, the Complainants have not established that OP-1 is insured with OP-2. Consequently, OP-2 cannot be held liable to compensate the Complainants for any mistakes made by OP-1.

6. The learned State Commission vide order on 03.11.2017 dismissed the complaint with the following observations:

“35. The complainants have not obtained any expert opinion from the Medical Board, therefore, the mere allegations of the complainants are not sufficient to prove that the O.P. No.1 conducted medical negligence while conducting treatment of the deceased Smt. Jaishri Sahu.

36. The complainants have not been able to prove that the O.P. No.1 committed any medical negligence, therefore, the complainants are not entitled to get any compensation from the OPs.

37. Therefore, the complaint filed by the complainants against the OPs, is liable to be dismissed, hence the same is dismissed. Parties shall bear their own costs.”

7. Being aggrieved by the impugned order dated 03.11.2017, the Complainants (Appellants herein) filed this Appeal seeking:

“It is, therefore, most respectfully prayed to this Hon'ble Commission that the order dated 03.11.2017 passed by the learned Chhattisgarh State Commission at Raipur in Complaint Case No. CC/2017/25 be set aside and Appeal of the Appellant/Complainant be allowed.

The Hon'ble Commission may also be pleased to pass any other order as may be deemed fit and proper in favour of the Appellant/ Complainant.”

8. In the grounds of the instant appeal, the Appellants and mainly contended the following regarding the alleged negligence and inadequate treatment provided by the Respondent Doctor:

- a. The State Commission failed to note that OP-1 performed surgery on her without conducting pre-operative analysis and procedures. It is evident from the lack of tests

conducted prior to the surgery on 10.12.2015. OP-1 diagnosed her with a breast tumour without conducting any tests when she presented with stiffness and pain in her left breast at Upadhyay Nursing Home, Dhamtari. This indicates negligence on the part of OP-1, advising treatment without proper diagnosis and analysis.

- b. The State Commission grossly erred in ignoring that OP-1 was not a surgeon and lacked the competence and authorization to perform the surgery. Despite this, OP-1 conducted surgery on 10.12.2015, which is negligence and deficiency in service.
- c. The State Commission overlooked that the consent obtained by OP-1 from them before surgery on 10.12.2015 was inadequate and not informed consent. It is the duty of OP-2 to diagnose properly and explain her state, available treatments, risks involved and procedures adequately.
- d. The State Commission failed to recognize gross negligence of OP-1 in performing the surgery, resulting in the spread of cancer to other body parts. Even after diagnosing cancer, OP-1 delayed referring her to a cancer specialist, leading to spread of cancer. This is extreme negligence by OP-1 and directly contributed to the worsening condition of the deceased.
- e. The State Commission overlooked that treatment of OP-1 did not alleviate her condition. She sought treatment at Sanjeevan Cancer Hospital, Raipur. Various pathology and biopsy tests confirmed the breast cancer. OP-1 conducted operation on 10.12.2015 negligently, leading to physical problems and mental anguish for the deceased. Had the surgery been conducted after a biopsy test, she would not have suffered such problems.

9. Upon notice on the memo of appeal, the Respondents / OPs filed their respective written submissions.

10. In his arguments, the learned counsel for the Appellants/ Complainants reiterated the case facts and specifically addressed the grounds of the Appeal. He emphasized that the observation made by the learned State Commission in Paragraph 35 of the impugned order concerning the medical board as incorrect. The documents presented by the Appellants before the State Commission clearly demonstrated medical negligence by OP-1. Further, the Complainants case was substantiated by these documents and evidence presented. Thus, the finding of the State Commission is not in accordance with the law.

11. The learned Counsel for Respondents/OP-1 doctor reiterated the facts of the case, reply and the affidavit of evidence filed before the State Commission and asserted that the Appellant failed to prove or establish what actions were taken by OP-1 that should not have been done, or failed to do that should have been done. Thus, there is no deficiency or negligence on the part of OP-1 established by the Appellant. The patient and her relatives were thoroughly explained and assisted at every step, both before and after the diagnosis of cancer, while the patient was under treatment by OP-1 and thus OP-1 cannot be held liable for any actions. Further, no sooner OP-1 became aware that she had cancer, she was referred

to a hospital specializing in cancer treatment. Therefore, there is no professional misconduct or breach of trust on the part of OP-1. They took all reasonable and medically appropriate procedures and thus, OP-1 cannot be accused of deficiency of service solely on the ground of the unfortunate demise of the patient. In any case, the patient did not die while under the treatment of OP-1, and there is no finding from any subsequent doctor who treated the patient indicating that her demise was due to negligence by OP-1. Her treatment was conducted with proper diligence and in accordance with ordinary medical practice. To support these arguments, he relied on the judgment of the Hon'ble Supreme Court in ***Chanda Rani Akhouri v. M.A. Methusethupathi, 2022 SCC OnLine SC 481.***

12. Learned Counsel for OP-2 Insurer argued that the judgment in M/s Aster Eye Hospital & Anr vs. Master Ankit, in RP No. 44 of 2021, decided on 06.06.2023, by this Commission is applicable. It highlighted that the involvement of an insurer as a "necessary" or "proper" party in medical negligence cases under the Act is unnecessary. It emphasizes that the determination of medical negligence on behalf of a doctor or hospital relies on evaluating the standard of care provided, adhering to established protocols for diagnosis, even if alternative lines of treatment are available. Importantly, the discharge of these functions does not involve the insurer, regardless of whether the doctor or hospital holds a professional indemnity policy. The learned Counsel further argued that in the present case, the deceased did not pay any premiums to OP-2 and did not obtain insurance coverage. Consequently, there is no privity of contract between the deceased and Respondent Insurance Company. Additionally, the fulfilment of obligations does not implicate OP-2, irrespective of whether the doctor or hospital possesses a Professional Indemnity policy. This policy is subject to specific terms and conditions, with the liability of OP-2 is limited to the indemnity specified in the Schedule for any one Act. Therefore, he urged for dismissal of this Appeal against OP-2.

13. I have examined the pleadings and associated documents placed on record and rendered thoughtful consideration to the arguments advanced by the learned Counsels for both the Parties.

14. The main issue to be determined in the case is whether there was any negligence or deficiency in service on the part of the OP-1 in providing medical treatment and surgery to Ms Jai Shree Sahu? If so, what is the compensation OP-1 is liable to pay the Complainants?

15. It is a matter of record that OP-1 did not perform any surgery on the deceased. He only conducted procedure for taking out a sample for biopsy purpose. Abdominal Sonography Report dated 02.02.2016 revealed that the patient was referred for Sonography by OP-1. Dr. Ramesh Khandelwal conducted sonography and Skiagram Chest PA view on 02.02.2016. Of Pelvis with both HIP, and LS Spine AP & LAX was also done by Dr. Khandelwal on 03.12.2015. The Complainants filed her treatment records at Sanjeevani CBCC USA Cancer Hospital and New Patient Evaluation Form revealing that she was referred by OP-1 with symptoms of "Lump in Left Breast". Biopsy was done. The MRI and CECT Thorax Reports both dated 05.02.2016 are also part of record. The Discharge Summary by Sanjeevani

Hospital reveals that the Diagnosis as "Carcinoma Breast (Post Lumpectomy) with Bona Met; Treatment: Palliative radiotherapy done; At presentation: Patient is a case of Ca. Breast post lumpectomy with Bone met/cord compression, diagnosed and evaluated at our hospital. Now admitted for palliative radiotherapy." They also filed treatment records of Dr. SH Advani. In Discharge Summary dated 13.04.2016, it is diagnosed that she was suffering Breast Cancer (Left). OP-1 also diagnosed the same and filed a copy of Admission Chart in which it is mentioned that she was treated as Smart Card Holder. In investigation, it was found that there was swelling over (L) Breast with dull aching pain with slow growth etc. The treatment advised was excisional biopsy of lump and plan for further treatment after Biopsy Report.

16. Therefore, OP-1 had performed only Excisional Biopsy to confirm cancer, which is a prescribed method to diagnose Cancer. The Complainants failed to reasonably establish that the surgery by OP-1 was without obtaining Biopsy Report. Whereas, OP-1 had done only Excisional Biopsy of the deceased, which does not come within purview of surgery. In any case, before conducting the said Excisional Biopsy, OP-1 obtained Consent Letter from her and Complainant No.1 on 10.12.2015. It is also part of the OT Notes for Breast Mass Excision dated 10.12.2015 that the Lump was separated from skin and breast and the same was sent for Histopathological test. There is also no expert opinion obtained from the competent Medical Board.

17. As regards appreciation of medical negligence matters, Hon'ble Supreme Court in *Chanda Rani Akhouri (Supra)* has observed that:-

27. 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. In the practice of medicine, there could be varying approaches of treatment. There could be a genuine difference of opinion. However, while adopting a course of treatment, the duty cast upon the medical practitioner is that he must ensure that the medical protocol being followed by him is to the best of his skill and with competence at his command. At the given time, medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

28. The term "negligence" has no defined boundaries and if any medical negligence is there, whether it is pre or post-operative medical care or in the follow-up care, at any point of time by the treating doctors or anyone else, it is always open to be considered by the Courts/Commission taking note of the exposition of law laid down by this Court of which a detailed reference has been made and each case has to be examined on its own merits in accordance with law.

18. The Hon'ble Supreme Court laid down certain duties of the doctor. In the case of **Dr. Laxman Balkrishan Joshi Vs. Dr. Trimbak Bapu Godbole and Anr.**, AIR 1969 SC 128 it was held that:

"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.

19. Hon'ble Supreme Court in **Jacob Mathew v. State of Punjab**, (2005) SSC (CrI) 1369 followed the Bolam's principles and observed:-

“When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions.”

"25.....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 in-charge 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."

20. In a recent case, the Hon'ble Supreme Court in **Devarakonda Suryasesha Mani v Care Hospital, Institute of Medical Sciences IV** (2022) CPJ 7 (SC) has held as below:

“..2. Unless the appellants are able to establish before this Court any specific course of conduct suggesting a lack of due medical attention and care, it would not be possible for the Court to second-guess the medical judgment of the doctors on the line of medical treatment which was administered to the spouse of the first appellant. In the absence of any such material disclosing medical negligence, we find no justification to form a view at variance with the view which was taken by the NCDRC. **Every death in an institutionalized environment of a hospital does not necessarily amount to medical negligence on a hypothetical assumption of lack of due medical care.**”

21. Considering the aforesaid discussions, there is no evidence on record to suggest any negligence or deficiency in service on the part of OP-1 Doctor in the treatment of the deceased. I do not find any reason to interfere with the well reasoned findings of learned State Commission in dated 03.11.2017.

22. In view of the foregoing, the instant First Appeal No. 2482 of 2017 is dismissed.

23. There shall be no order as to costs. All pending Applications, if any, also stand disposed of accordingly.

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AVM J. RAJENDRA, AVSM VSM (Retd.)
PRESIDING MEMBER