

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 383 OF 2013

(Against the Order dated 22/02/2013 in Complaint No. 10/2005 of the State Commission Kerala)

1. VALSAMMA CHACKO

PROFESSOR OF OBSTRICS & GYNAECOLOGY. DR.
S.M.C.S.I MEDICAL COLLEGE, KARAKONAM,
TRIVANDRUM,

.....Appellant(s)

Versus

1. LEELAMMA JOSEPH & 3 ORS.

W/O. MR. JOSEPH. J., RESIDING AT SAROYA, LINK
VALLEY, KUSUMAGIRI P.O. EDACHIRA ROAD,
KAKKANAND,
KOCHI-682030

2. G.G. HOSPITAL

M/S. G.G. HOSPITAL M/S. G.G. HOSPITAL Through its chief
Medical Officer, Dr. G. Velaydhan kumarapuram,
Thiruvananthapuram-11 Kerala

3. DR. SASIKUMAR

SENIOR UROLOGIST, G.G. HOSPITAL,
THIRUVANATHAPURAM-11
KERALA

4. DR. VIKRAMAN

K.R. UROLOGIST, KIMS HOSPITAL,
TRIVANDURUM-29
KERALA

5. DR. N.P. SASIKUMAR

-Respondent(s)

BEFORE:

**HON'BLE DR. S.M. KANTIKAR, PRESIDING MEMBER
HON'BLE MR. BINOY KUMAR, MEMBER**

For the Appellant :

For the Respondent :

Dated : 27 Mar 2023

ORDER

Appeared at the time of arguments:

For the Appellant : Mr. Rajshekhar Rao, Sr. Advocate
Ms. Gauri Puri, Advocate
with Petitioner in-person

For the Respondent : Mr. Shyam Padman, Advocate
Mr. Jaimon Andrews, Advocate
Mr. Piyo Harold Jaimon, Advocate for R-1

Mr. Jogy Scaria, Advocate
Mr. Keerthipriyan, Advocate for R-2

Mr. Arvind Kumar, Advocate for R-3
with R-3 in person

R-4 deleted vide Order dated 04.09.2013

Pronounced on: 27th March 2023

ORDER

Dr. S. M. KANTIKAR, PRESIDING MEMBER

1. The instant Appeal has been filed under section 19 of the Consumer Protection Act 1986 by the Appellant against the order of State Commission Kerala in Consumer Complaint No. 10/2005 whereby the State Commission allowed the complaint filed by the Complainant and awarded a sum of Rs.22,00,000/-.
2. For the convenience, the parties in this Appeal are being referred to as mentioned in the Original Complainant filed before the State Commission.
3. Brief facts are that on 18.09.2003, the Complainant Leela Joseph (for short, the 'patient') underwent laparoscopic assisted vaginal hysterectomy (LAVH) in G.G. Hospital (OP-1) at Thiruvananthapuram. It was performed by Dr. Valsamma Chacko (Appellant / OP-2). It was alleged that on the same day at 3pm, the OP-2 informed the patient about the injury to the urinary bladder because of complicated surgery since the bladder and uterus were fused together. She tried to repair it and then kept the patient in the ICU. It was noted at 6pm that the urine output was stopped. The OP-2 informed the patient about need of second surgery. Therefore, the Senior Urologist Dr. Sasi Kumar (OP-3) was called and performed corrective operation. However, the patient was shifted to KIMS hospital on the next day (19.09.2003) at 9:00 am. At KIMS, the doctors could not manage the bladder injury efficiently, therefore she was taken to Jaslok hospital in Mumbai and after operation, the urinary leakage was rectified. As she was discharged from Jaslok Hospital and was taken to Dr. Raj Maheshwari, the Uro-gynecologist in Chennai. There, he placed an implant to control passage of urine, but did not give any assurance about implant's life and functioning. It was further alleged that the LAVH was performed without doing preoperative tests and without taking informed consent. Due to negligence of the OP-2, she suffered substantial damage to her bladder and therefore, she had to undergo few major surgeries within 5 months. Being aggrieved, the Complainant filed Complaint before the State Commission to claim compensation of ₹ 1 crore from the OPs.
4. The G.G.Hospital (OP-1) filed its written version through the CMO and denied negligence or deficiency of service. It was submitted that there was no employer and employee relationship between the

OP-1 & OP-2. The OP-2 in her reply denied negligence during LAVH. She submitted that based on the biopsy report and condition of patient, she advised the complainant that she requires only a Cone-biopsy of cervix and conservative management with regular follow-up. However, the Complainant was adamant to undergo Cone biopsy and also reluctant to undergo abdominal hysterectomy, therefore OP-2 decided to conduct a LAVH. After taking informed consent, she performed the LAVH with the assistance of a senior Gynecologist. It was uneventful though there was some difficulty in separating the uterus from the surrounding tissues including bladder. She further submitted that there was a leakage of blood-stained urine, which was possible due to the bladder injury, as a common complication. The leakage continued despite her best efforts to repair the bladder injury. Therefore, at 11am, the Urologist Dr. Sasi Kumar (OP-3) was called for help, who performed laparotomy and the bladder injury was repaired.

5. Thereafter, on the same day, in the evening, she developed 'anuria' (Cessation of urine). As the OP-3 was not available in the station, the Senior Consultant Urologist Dr. K. R. Vikraman was called from KIMS. After examination, he advised to wait till next day and restrict IV fluids. Dr. Vimla, the HOD of Nephrology from Medical College was also called, who after examination expressed requirement of dialysis and suggested the patient to shift the patient to KIMS. On the next day morning, with the consent patient was shifted to KIMS Hospital. She was operated there and kept in the ICU for 5 days. However, no effective control of urinary leakage seen, therefore an indwelling urinary catheter was put and the patient was discharged on 6.10.2003 with the advice of come back after two weeks. During the follow-up review the senior Gynecologist examined her and suggested to see Dr. Roy Chaly, an eminent Urologist at Kozhikkode, but the patient was not willing. Thereafter, OP-2 had no information regarding the whereabouts of the patient. The OP-2 denied negligence and submitted that the LAVH and the complications were treated promptly with due diligence. Therefore, there was no negligence or deficiency in service from her.

6. The State Commission on hearing the parties partly allowed the compliant and directed the OP-1 and 2 to pay compensation of Rs. 22 Lakhs jointly and severally to the Complainant. The relevant observation of State Commission is reproduced as below:

In this case the complainant had to undergo major surgeries at various hospitals apart from the 2 major surgeries undergone by her in the Opposite Party No.1 hospital. She had to be in the hospital for 140 days at various spells and continues to be under strong medications.

The sufferings of the complainant/ patient are very terrible experience due to the carelessness and deficiency of service of the OP no. 2 doctor. Due to her negligence the complainant was not in a position to pass the urine till the culmination of next day's surgery. The real reason for block is that the OP. No. 2 mistakenly and carelessly sutured the entire bladder with ureters of the complainant/patient and thereafter gave Lasix which aggravated her misery. In such circumstances she has been suffering intolerable pain and sufferings due to this wrongful act of the opposite parties. Further the urine leak could not be curbed. After all she is a human being. We direct that the OP No. 1 and 2 are jointly and severally liable to pay the amount to the complainant.

7. Being aggrieved by the Order of the State Commission the OP-2 filed the instant First Appeal.

8. We have heard the learned Counsel for the parties. The learned Counsel on both the sides have reiterated their respective evidence. Dr.Valasamma (OP-2) the Appellant was present during argument. She was also allowed to argue.

9. The learned Counsel for the Complainant submitted that the OP-2 was not competent to perform LAVH and when the surgery went out of the control with irreparable bladder injury, the OP-2 failed to refer the patient to higher centre. The operation was performed without investigations and informed consent. He reiterated the remaining facts. The learned Counsel for the OP-2 was present with Dr. Valsamma (OP-2) in person. She argued the matter and reiterated her submissions as made in affidavit. She submitted that after noticing bladder injury, she called the Urologist to repair the bladder injury and thereafter, promptly shifted the patient to KIMS. She acted as per the reasonable standard of practice. The Counsel further argued that the bladder injury during hysterectomy is always accidental and an accepted complication because of very close relationship of the bladder to the uterus and vagina especially when there is scarring. The bladder injury usually repaired by the gynaecologist.

10. We gave our thoughtful consideration to the arguments and perused the material on record, *inter alia*, the Order of State Commission.

11. It is to note that it was the elective surgery, however, from the medical record; it is evident that the OP-2 failed to perform the relevant pre-operative investigations, the fitness for anaesthesia. Nothing was on record about the insistence of the patient to perform LAVH.

12. The affidavit of Dr. K. R. Vikraman, Senior Consultant Urologist, KIMS submitted that he was called to GG Hospital in the night on 19.09.2003 as the regular Urologist – Dr. Sasi Kumar (OP) was out of station. Dr. K. R. Vikraman stated that the patient sustained bladder injury which was first repaired by the OP-2, but as the leak of urine persisted, the Urologist of GG Hospital Dr. Sasi Kumar was called who opened the abdomen and repaired the bladder injury. Since post operatively, there was no urine output and as Dr. Sasi Kumar was going out of station, he was called to GG Hospital to see the patient. On examination, he found the patient was stable, but very low urine output (50 ml). As the bladder injury was already repaired by Dr. Sasi Kumar, he advised to monitor the patient in the ICU till next day to see if the urine output improves with support. Since urine output did not improve for 18 hours even after Lasix injection, the USG revealed dilated ureters due to obstruction, therefore, the patient was shifted to KIMS for emergency re-exploration to relieve the ureteric obstruction. He performed re-exploration surgery on 19.09.2003. He observed transverse cut 3" x 3" in the Trigone and already lateral wall of the bladder was stitched and which included the lower ends of both ureters. Ureters were tense and dilated. Bladder wall was oedematous. Since the lower end of both ureters was merged in the stitches and the same could not be released. He dissected the ureters and re-implanted them into the bladder with 5 French ureteric stent. The bladder wound was closed with vicryl 2-0; bladder closed in two layers and placed the supra-pubic catheter and urethral catheter. Abdomen was closed and kept the pelvic and supra-pubic drain. The patient was shifted to surgical ICU and monitored for 5 days then shifted to room. The patient was recovered completely, but on 10th post-operative day, she developed minimal urinary leak through the vagina indicating non-healing of bladder wound. Supra-pubic catheter was removed and she was discharged with urethral catheter and with medication and advised to come for review after 2 weeks. On 14.10.2003, during follow-up, it was confirmed that she had developed a Vesico Vaginal Fistula (VVF). She was advised for continuous bladder drainage and suggested VVF repair after 3 months, but the patient never turned for repair of VVF.

13. The literature "Ethical issues in laparoscopic hysterectomy" document that laparoscopic hysterectomy is not ideal in certain conditions like severe pelvic adhesions, very large uterine fibroids and adnexal masses. The rate of major complications is more in laparoscopic surgery than laparotomy (abdominal open surgery). We have gone through the contraindications and risk factors in "A Guide to Laparoscopic surgery" by Black Well science edition. An untrained or inexperienced Surgeon, there is a risk of bleeding, which obscures the laparoscopic view because it absorbs light. There will be poor view from excessive scarring and dense adhesions. Admittedly in the instant patient there was scarring and the bladder injury occurred due to dense adhesions between vagina and bladder.

14. The OP-2 had initially decided cone biopsy and follow the conservative treatment. The consent was obtained only for **total abdominal hysterectomy** with bilateral salpingo-oophorectomy (TAH / BSO). It is also apparent that the pre-operative check-ups were done only for TAH / BSO. The consent form is devoid of ingredients of informed consent. In our view, it was just signatures on dotted lines on a printed form. Nothing could be made out whether LAVH was decided by OP-2 and the Complainant had consented for LAVH.

15. The OP-2 herself admitted that she relied on the test reports produced by the complainant that were done some time back in Mumbai. On perusal, we note the lab investigations were done in Mumbai, but there was need to do basic investigation pre-operatively. Thus the OP-2 failed in her duty of care. It was deficiency in service. The learned Counsel for the Complainant argued that while doing the operation, the OP-2 made 3" x 3" substantial cut in the bladder and also that both the ureters were stitched in trigonal area. Dr. Sasi Kumar was called to assist her, who noted that the posterior wall of the bladder was already stitched. He stitched the anterior wall and the lateral walls. It has also to be noted that the LAVH surgery was done violating the consent which was taken only for TAH / BSO. The patient developed anuria due to suture of both ureters and trigon of the bladder. As noted, admittedly, the patient underwent major repair surgery in KIMS for about 7 hours and the ureters were released with placing the stent for urine output.

According to OP-3, he did not put stitches over the posterior wall of bladder, where the ureters are attached. Therefore, conclusion can be drawn that OP-2 has stitched the ureters with posterior wall of bladder.

16. In our view, it was a fit case to apply principle of '*res ipsa loquitur*' and the evidence of the opposite parties itself proves negligence and deficiency in service.

17. The Hon'ble Supreme Court laid down certain duties of the doctor. In the cases, **Dr. Laxman Balakrishna Joshi vs. Dr. Trimbak Babu Godbole & Anr.** and **A.S. Mittal vs. State of U.P.**, it was observed that the doctor owes to his patient certain duties which are:

- (a) a duty of care in deciding whether to undertake the case;
- (b) a duty of care in deciding what treatment to give; and
- (c) a duty of care in the administration of that treatment.

Further in another case of **Spring Meadows Hospital v Harjot Ahluwalia**, it was observed as below:

“Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the skill of a reasonably competent doctor...”

Thus, in our considered view, in the instant case OP-2 failed in all the counts as discussed in LB Josh's case (*supra*). It was not even bonafide mistake, but a therapeutic misadventure. The Consent was also defective.

18. Adverting to the compensation and vicarious liability. The G.G.Hospital (OP-1) in its reply submitted that there was no employer and employee relationship between the OP-1 & OP-2. It is a common notion that the doctors or hospitals during proceedings will try to show that the negligent or incompetent employee did not actually work as an “employee” of the facility. The hospital will try to distance itself from the negligent acts of the doctor by claiming the he or she was an independent contractor or that their work was not affiliated with the facility. The Hon'ble Supreme Court in the **Maharaja Agrasen Hospital & Ors vs. Master Rishabh Sharma & Ors**^[1] held that the Hospital is vicariously liable for acts of doctors engaged by it. If the hospital fails to discharge their duties through their doctors, being employed on job basis or employed on contract basis, it is hospital which has to justify the acts of Commission or Omission on half of their doctors. Therefore, based on the principles of vicarious liability, in the instant case the G.G.Hospital is vicariously liable for the act of OP-2 Dr. Valsamma Chacko.

19. To conclude, in the entirety, we do not find any need to interfere with the reasoned order of State Commission, same is affirmed.

The instant Appeal is devoid of merit, it is dismissed.

There shall be no Order as to costs.

[1] I (2020) CPJ 3 (SC)

.....
DR. S.M. KANTIKAR
PRESIDING MEMBER

.....
BINOY KUMAR
MEMBER

