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18/10/2023
Secretary
National Consumer Disputes
Redressal Commission
New Delhi-110023

IN THE NATIONAL CONSUMER DISPUTES REDRESSAL
COMMISSION, NEW DELHI

CONSUMER COMPLAINT NO. 2860 OF 2017

Kanika Das W/o Late Himangshu Kumar Das, R/o Sukanata Nagar,
Milon Pally, P.O. & P.S. Sonarpur, District South 24 Parganas, Kolkata-
700150, West Bengal. ... Complainant.

Versus

1. Surya Polyclinic, Sonarpur Bazar, District South 24 Parganas,
Kolkata-700150, West Bengal through its Proprietor.
2. Dr. Kabir Dutta, Kalyani Seba Kendra, C/61, Baghajatin Station
Road, Kolkata-700092, West Bengal. ... Opposite Parties.

BEFORE

HON'BLE MR. JUSTICE RAM SURAT RAM (MAURYA), PRESIDING MEMBER
HON'BLE MR. BHARAT KUMAR PANDYA, MEMBER

For the Complainant : Mr. T. V. George, Advocate,
For Opposite Party-1 : NEMO
For Opposite Party-2 : Mr. Robin Majumdar, Advocate
: Ms. Akansha Shrivastava, Advocate

Pronounced on: 11/10/2023

JUDGEMENT

(PER MR. JUSTICE RAM SURAT RAM (MAURYA), PRESIDING MEMBER)

1. Heard Mr. T. V. George, Advocate, for the complainant and Mr. Robin Majumdar, Advocate, for the opposite party-2. In spite of service of the notice, opposite party did not appear and contested the complaint.
2. Kanika Das has filed above complaint for declaring that the opposite parties had committed deficiency in service in not providing adequate and appropriate treatment to her husband Himangshu Kumar Das, resulting in his death and directing them to (i) pay Rs.17019005/- as compensation in different heads; and (ii) any other relief, which is deemed fit and proper in the facts and circumstances of the case.



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3. The complainant stated that her husband Himangshu Kumar Das (the patient) had suffered from fever, cough and vomiting in middle of the year 2015. The patient consulted Dr. Kabir Dutta (opposite party-2) on 04.06.2015, who prescribed for several tests. After examination of test reports, Dr. Kabir Dutta prescribed the medicines of tuberculosis. The patient took medicines as per instruction of Dr. Kabir Dutta. After taking the medicines for one week continuously, the colour of the body of the patient had become yellow and urine deep dark and his condition had deteriorated considerably. The patient informed Dr. Kabir Dutta about the colour of his body and urine, who told that it was normal effect of the medicines and advised to continue with same medicines. As advised, the patients continued with same medicines. The condition of the patients was worsening day by day and had become serious. The patient was then admitted to KPC Medical College and Hospital, Jadhavpur, Kolkata on 23.09.2015. The doctor of KPC Medical College and Hospital examined the test reports and prescription of the medicines as given by Dr. Kabir Dutta. After going through the reports, the doctor told that the patient was not suffering from tuberculosis and due to prolonge use of the medicines of tuberculosis, his liver was badly affected. Liver Function Test of the patient was conducted on 24.09.2015 and medicines for its treatment were given. The patient remained admitted KPC Medical College and Hospital till 27.09.2015 but his condition was not improved. Then the doctors advised to shift the patient to higher centre NRS Medical College. The patient was then taken to NRS Medical College, who referred the patient to Peerless Hospital and Research Centre, Kolkata, where the patient was admitted on 27.09.2015. After examination the test reports and prescription of the medicines, the doctor of Peerless Hospital and Research Centre also opined that due to prolonged use of the medicines of tuberculosis, his



liver was badly damaged. During treatment, Himangshu Kumar Das passed away on 28.09.2015, in Peerless Hospital and Research Centre. Peerless Hospital and Research Centre issued Death Certificate on 29.09.2015, in which, cause of death has been mentioned as "Sepsis with multi organ failure in a case of anti-tubercular drug induced. Acute fulminant liver failure". Himangshu Kumar Das was 53 years old at the time of his death. He was posted on the post of "Pharmacist" in West Bengal Government and getting salary of Rs.44947/- per month. The family of Himangshu Kumar Das has been deprived for 7 years earning in the form of salary i.e. Rs.4842365/- and Rs.1451640/- from pension. Due to untimely death of Himangshu Kumar Das, his family members have suffered loss of consortium and mental pain and agony. The family incurred Rs.1315000/- in treatment/test reports of Himangshu Kumar Das during this period and Rs.50000/- as funeral and last rites expenses. The complainant was entitled for exemplary damages. Himangshu Kumar Das was a qualified "Pharmacist". He had planned to open his own medical store after retirement. Due to negligent and irresponsible treatment as provided by opposite party-2, the complainant has suffered loss of Rs.17019005/-. The complaint was filed on 25.09.2017.

4. Dr. Kabir Dutta (opposite party-2) filed his written version on 14.03.2018 and contested the complaint. Dr. Kabir Dutta stated that the patient, who was 53 years old, came to his clinic on 04.06.2015, complaining of cough, expectoration and fever. On clinical examination, he was of the opinion that the patient was suffering from lower respiratory tract infection of the right side of the chest and prescribed the medicines Coamoxyclav and Moxifloxacin. The patient again visited to his clinic on 13.06.2015 for follow up and complained of nausea as well as continuing cough. Then he prescribed Cefuroxime. The patient again



visited to his clinic on 19.06.2015. He found that there was no improvement, as such he advised for Montoux test. The patient again visited to his clinic on 23.06.2015 and complained constipation and weakness. Test Report of Montoux was negative. He prescribed Vitamins and Laxatives. The patient again visited to his clinic on 14.07.2015. As there was no improvement, he advised for USG whole abdomen, Serum Amylase and Liver Function Test. LFT Report was almost normal. USG showed SOL and fatty liver. Then he advised for CT Scan of whole abdomen on 06.08.2015. CT Scan showed haemangioma of liver with right sided pleural effusion. Mycobacterium Tuberculosis PCR Mycosure Test. HRCT chest showed right pleural effusion with fibrotic densities of right lung with bronchiectasis in upper lobe with mediastinal lymph nodes. The report also suggested suspected tubercular ethology. Then he prescribed Anti-tubercular as therapeutic trial and started three drug regime with least hepatotoxic drug, from 26.08.2015 on premises (i) India is still a country of endemic tuberculosis; (ii) In long medical carrier, he had seen many sputum negative, Mantoux negative tuberculosis, where only clinical suspicion and intuition yielded the desired recovery; and (iii) The Patient LFT was almost normal. The patient came back on 05.09.2015 and complained high coloured urine. He clinically suspected that it would be due to Rifampin induced urine discolouration and advised to continue same medicines. Thereafter, the patient did not contact him. He always examined the patient as an outpatient. It is quite unusual to develop hepatotoxicity due to Rifampin and INH within seven days. There may be some other factors which require consideration. He did not commit any negligence and treated the patient honestly with his experience of over 30 years and ability as per best medical practice standard and ethics. He was MBBS (1982), MD (Cardiology) and working as Consultant



Physician and Cardiologist at Kalyani Seba Kendra, Bghajatin Station Road, Kolkata. The patient was in treatment of KPC Medical College and Hospital, Jadhavpur, Kolkata from 23.09.2015 to 27.09.2015, NRS Medical College and Peerless Hospital and Research Centre, Kolkata, where the patient was admitted on 27.09.2015 and died on 28.09.2015. These hospital and the doctors who had attended the patient are necessary party in this complaint. The complaint is liable to be dismissed for non-joinder of necessary party. The complainant has not adduced any Expert Opinion to prove that he had committed any negligence in treatment of the patient. The complaint is liable to be dismissed.

5. The complainant filed Rejoinder Reply, Affidavit of Evidence of Kanika Das and documentary evidence. The opposite party filed Affidavit of Evidence of Dr. Kabir Dutta and documentary evidence. Both the parties have filed written synopsis.

6. We have considered the arguments of the counsel for the parties and examined the record. Relying upon judgment of Supreme Court in **Bombay Hospital & Medical Research Centre Vs. Asha Jaiswal, AIR 2022 SC 204**, the counsel for the opposite party submitted that in the absence of any expert evidence of medical negligence, the doctor cannot be held for committing negligence.

So far as expert report is concerned, it is not a substantive evidence to prove or disprove any fact. It is an expert opinion in respect of the evidence on record. It helps the court to form an opinion in respect of the evidence on record and relevant under Section 45 of Evidence Act, 1872 as held in **Maharaja Agrasen Hospital Vs. Master Rishabh Sharma, (2020) 6 SCC 501**. It is duty of the court to form its opinion on the basis of evidence on record and record its finding as held by Supreme Court in **Sunita Vs. Rajasthan SRTC, (2020) 13 SCC 486**. In **V. Kishan Rao Vs. Nikhil Super Speciality Hospital, (2010) 5 SCC**



513, wherein it has been held that if a consumer is burdened with expert evidence in all the cases of medical negligence, then efficacy of the remedy as provided under Consumer Protection Act will become illusory.

From aforesaid cases, it is clear that an expert report is not a substantive evidence rather an opinion in respect of the evidence on the record and merely helps in appreciating the evidence and not conclusive. A court is required to form its opinion on the basis of evidence on record.

7. Dr. Kabir Dutta admits that Himangshu Kumar Das, the patient, who was 53 years old, came to his clinic on 04.06.2015, complaining of cough, expectoration and fever. He preliminary diagnosed "respiratory tract infection" and prescribed medicines for that. When there was no improvement, on his advice various tests were done. Montoux Test Report dated 19.06.2016 showed Induration-Nil. USG Report dated 04.08.2015 showed SOL and fatty liver. CT Scan Report dated 13.08.2015 showed Fatty liver, SOL in liver-haemangioma with right sided pleural effusion. Mycobacterium Tuberculosis PCR Mycosure Report dated 14.08.2015 showed that mycobacteria was not detected. Liver Function Test report dated 22.08.2015 showed everything almost normal. High Resolution Computed Tomography Thorax Report dated 25.08.2015 showed right pleural effusion with fibrotic densities of right lung with bronchiectasis in upper lobe with mediastinal lymph nodes. In spite of the reports being negative for tuberculosis, Dr Kabir Dutta started Anti-tubercular as therapeutic trial and three drug regimes with least hepatotoxic drug, from 26.08.2015 on his clinical suspicion and prescribed Rifampicin + Isoniazid. The patient came back on 05.09.2015 with yellowish discolouration of the whole body and complained high coloured urine. He again clinically suspected that it would be due to Rifampicin induced urine discolouration and advised to continue same



medicines. According to him, in his long medical carrier over 30 years, he had seen many sputum negative, Mantoux negative tuberculosis, where only clinical suspicion and intuition yielded the desired recovery, as such he prescribed these Anti-tubercular drugs. The patient took these medicines till 23.09.2015 and his condition became critical.

8. Liver Function Test report dated 22.08.2015 showed everything normal. When the patient was admitted in KPC Medical College & Hospital, Jadavpur, his repeat USG whole abdomen, UCT abdomen and Blood Test for LFT were done on 24.09.2015. In Blood Test Report dated Billirubin total-19.4, Billirubin Conjugate 15.2, SGOT/ALT-19 and ALK Phosphatase 189 was found. His liver was totally damaged. KPC Medical College & Hospital, Jadavpur diagnosed as "ATD Induced Hepatic, Hematorenal Syndrome". In Discharge Summary this hospital noted that the patient was admitted with yellowish discoloration of whole body with swelling of abdomen & Bipedal Oedema. Final diagnosis Hepatic Encephalopathy, B/I Choroidal Lymphoma, PTB, Liver SOL, Rt Sided Plerual Efusion, Lower respiratory Tract Infection. On reference, the patient was admitted in Peerless Hospital and Research Centre, Kolkata, on 27.09.2015 and where he passed away on 28.09.2015 at 23:15 hours. Peerless Hospital and Research Centre issued Death Summary on 29.09.2015, in which, cause of death has been mentioned as "Sepsis with multi organ failure in a case of acute fulminant liver failure (anti-tubercular drug induced).

Medical literatures show that Rifampicin has common side effects of gastrointestinal, anorexia, nausea, vomiting, abdominal pain, hepatitis, reduced effectiveness of oral contraceptive pill and rare side effects of renal failure, shock or thrombocytoperia, skin rash, 'flu syndrome', colitis, pseudo adrenal crisis ostemalacia, haemolytic anaemia. Isoniazid has common side effects of Peripheral neuropathy,



hepatitis, if age is above 40 years, sleepiness/lethargy and rare side effects of Convulsions, pellagra, joint pains, agranulocytosis, lipoid reaction, skin rash, acute psychosis. From the above evidence, it is proved that the patient, whose liver was normal on 22.08.2015, was found totally damaged in Liver Function Test Report dated 24.09.2015, due to continuous consumption of Rifampicin + Isoniazid from 26.08.2015.

9. In spite of test reports being negative for tuberculosis, Dr Kabir Dutta started anti-tubercular as therapeutic trial on his clinical suspicion. Based on clinical suspicion, the doctor has right to use expansive diagnostic test and procedure, which are necessary to reach appropriate diagnosis of the suspected disease. But the opposite party, instead of coming to a conclusion about the disease, started anti-tubercular as therapeutic trial ignoring test reports of negative tuberculosis. The counsel for Dr. Kabir Dutta relied upon the judgment of Supreme Court in **Kusum Sharma Vs. Batra Hospital and Medical Research Centre, (2010) 3 SCC 480**, holding that adopting higher risk procedure by the doctor is not negligence.

In this case, Supreme Court observed that so long as the procedure which was adopted was one which was acceptable to medical science as on date. This case has no application in the present case as in medical science, clinical suspicion permits the doctor to use expansive diagnostic test and procedure, to diagnose the suspected disease only.

10. Dr Kabir Dutta was MBBS (1982), MD (Cardiology) and working as Consultant Physician and Cardiologist for over 30 years. He preliminarily diagnosed "respiratory tract infection" on 04.06.2015, which was also confirmed in High Resolution Computed Tomography Thorax Report dated 25.08.2015. If the medicines prescribed by him were not



giving required result, he would have referred the patient to pulmonologist, instead of prescribing anti-tubercular as therapeutic trial on clinical suspicion, which only permit for expansive diagnostic test. When the patient reported to him on 05.09.2015 with yellowish discolouration of the whole body and complained high coloured urine, then again he committed negligence in visualising side of effects of anti-tubercular drugs and asked the patient to continue with same medicines, instead of stopping these medicines. From above evidence, it is proved that Dr Kabir Dutta had committed gross negligence in treating the patient, which resulted in his death.

11. Supreme Court in **Jacob Mathew v. State of Punjab (2005) 6 SCC 1**, held that 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". Negligence in the context of the 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. These principles were consistently applied in **Kusum Sharma Vs. Batra Hospital & Medical Reserch Centre, (2010) 3 SCC 480, Arun Kumar Manglik Vs. Chirau Health & Medicare Private Ltd., (2019) 7 SCC 401, Maharaja Agrasen Hospital Vs. Master Rishabh Sharma (2020) 6 SCC 501 and Harish Kumar Khurana Vs. Joginder Singh, (2021) 10 SCC 291.**

12. The complainant has not made any allegation against Surya Polyclinic (opposite party-1), in the complaint. Similarly, the complainant has not made any allegation against KPC Medical College and Hospital, NRS Medical College and Peerless Hospital and Research Centre, Kolkata, as such these hospital are neither necessary nor proper party.

13. Constitution Bench of Supreme Court in **National Insurance Company Limited Vs. Pranay Sethi, (2017) 16 SCC 680**, held that the compensation would be just and fair. In **Maharaja Agrasen Hospital Vs. Master Rishabh Sharma (2020) 6 SCC 501**, it has been held that it is based on *restitutio in integrum* meaning thereby restoration of an injured party to the situation which would have been prevailed, had no injury been sustained. The complainant has filed 'salary slip' of the patient of the month of August, 2015, showing that Rs.30306/- was paid



after deductions of Rs.12000/- toward provident fund and other statutory deduction. Loss of salary has been calculated on the basis 65 months balance service period. Total loss of income of the patient from salary is Rs.2749890/-. The complaint did not disclose total members in her family and the amount of family pension, which she might be getting. The personal expenses of the patient and amount of pension have to be deducted in assessing loss of income. In the absence of number of family members and amount of the family pension, we deduct 2/3 part from total income. After adding 15% for future income, as per **Pranay Sethi's** case (supra), total loss of income is assessed to Rs.977740/-. Rs.1315000/- has been claimed as medical expenses, for which bills/vouchers and receipts have been filed. For loss of estate, loss of consortium and funeral and last rite expenses, we are adding total Rs.200000/-. We round of the total compensation to Rs.2500000/-.

ORDER

In view of the aforesaid discussion, the complaint is partly allowed with cost of Rs.50000/-. Dr Kabir Dutta (opposite party-2) is directed to pay Rs.2500000/- with interest @6% per annum from December, 2017 till the date of payment, within a period of three months from the date of this judgment.

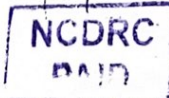
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Sd/-
(**RAM SURAT RAM (MAURYA), J.**)
PRESIDING MEMBER

Sd/-

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MEMBER



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