

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 53 OF 2010

(Against the Order dated 09/12/2009 in Complaint No. 57/2001 of the State Commission Orissa)

1. SHYAM SUNDER DASH

Presently Working in IMFA,Thuribali

Rayagada

Orissa

.....Appellant(s)

Versus

1. TATA MEMORIAL HOSPITAL & ORS.

Tata Memorial Hospital,Dr.E. Borges Marg,Parel,

Mumbai

2. The Medical Superintendent

Tata Memorial Hospital,Dr.E.Borges Marg, Parel,

Mumbai

3. Dr.Rajesh Badhwar

C/o Tata Memorial Hospital,Dr.E.Borges Marg, Parel,

Mumbai

4. M/s Howmedica Duchem Laboratories Ltd.

Pfizer Hospital Products Group, 5,Patel Estate,SV

Road,Jogeswari (W)

Mumbai

5. M/s. Christian Hospital

At/PO: Bissam Cuttack,

Rayagada

Orissa

6. M/s.IMFA Hospital

At/PO:Therubali,

Rayagada

Orissa

7. Consumer Assistance & Rural Empowerment (CARE)

At: Plot No. N-4/40,IRC Village,Nayapalli

Bhubaneswar

Orissa

.....Respondent(s)

FIRST APPEAL NO. 115 OF 2010

(Against the Order dated 09/12/2009 in Complaint No. 57/2001 of the State Commission Orissa)

1. TATA MEMORIAL HOSPITAL & ANR.

Dr. E.Borges Marg, Parel

Mumbai
Maharashtra
2. The Medical Superintendent
Tata Memorial Hospital, Dr. E. Borges Marg, Parel
Mumbai
Maharashtra

.....Appellant(s)

Versus

1. CONSUMER ASSISTANCE & RURAL
EMPOWERMENT (CARE) & ANR.

Plot No. N-4/40, IRC Village, Nayaapli

Bhubhaneswas

Orissa

2. Shyam Sunder Dash

S/o.Late Jadumani Dash, IMFA, Thuribail

Rayagada

Orissa

.....Respondent(s)

BEFORE:

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

For the Appellant :

For the Respondent :

Dated : 08 Jan 2021

ORDER

Appeared at the time of arguments

For Tata Memorial Hospital

Mr. Sandeep Narain, Advocate
:

For Shri Shyam Sunder Dash

: Mr. Shibashish Misra, Advocate

Pronounced on: 8th January 2021

ORDER

1. Both the Appeals have been filed against the Final Judgement / Order dated 09.12.2009 passed by the State Consumer Disputes Redressal Commission, Odisha, Cuttack (hereinafter referred to as the Commission”) in Consumer Complaint No. 57 of 2001 wherein the State Commission did not hold the Opposite Parties liable for medical negligence and dismissed the complaint. However it held the Memorial Hospital for functional irregularities and ordered the Opposite Parties Nos. 1 & 2 to compensate the Complainant No. 2 by making a payment of Rs. 1 lakh plus Rs. 10,000/- towards the cost of litigation.
2. For the convenience, the facts are drawn from First Appeal No. 53 of 2010. The Appellant complainants and the Respondents were the Opposite Parties in the complaint and they are accordingly referred in this Order.
3. Brief facts:

The Complainant No. 1 is voluntary Consumer Association and the Complainant No. 2 (Shyam Dash) is the employee of IMFA Ltd. at Therubali (Odisha). His daughter Shrutilekha Dash, about 10 years of age, (since deceased, hereinafter referred to as the “patient”) was taken to IMFA Hospital, Therubali in the month of December 1998 for pain in left leg / knee. She was further referred to the Orthopedic Surgeon Dr. Rama Chandra Rao at District Hospital, Raigad, wherein Biopsy of left knee joint was performed and she was diagnosed as Osteosarcoma of left knee. Thereafter, the IMFA Hospital referred the patient to Memorial Hospital (hereinafter referred to as “TMH”) at Mumbai. On 26.02.1999, the Complainant No. 1 admitted his daughter to TMH. On 29.06.1999, Dr. Rajesh Badhwar (hereinafter referred to as “Opposite party No. 3”) Surgeon, Bone & Soft Tissue Service at TMH examined her and confirmed the diagnosis of Osteosarcoma. She was advised for few cycles of Chemotherapy followed by knee replacement with artificial limb at a later stage. The patient underwent Chemotherapy for more than five weeks. On 29.04.1999 was advised by the attending surgeon for Total Knee Replacement (TKR) with KOTZ 1000 Implant. A total estimate of Rs. 3 lakh was intimated to the Complainant. It was alleged that the cost of the prosthesis (implant) from M/s Howmedica - the Opposite Party No. 4 was delayed because of the internal administration of TMH. The supplier did not supply the required Prosthesis within the stipulated time because TMH did not clear previous dues of the supplier. The prosthesis having different measurements was requisitioned. Though the Prosthesis was available at discounted price with the help of Cancer Society Aid, but TMH refused to accept it. It was further alleged that the patient was admitted in February, 1999, but the surgery was delayed to 15.09.1999, which caused additional expenditure due to increased high cost for prosthesis and the patient had undergone one more dose of Chemotherapy which was harmful to the patient. The Complainant further alleged that both the operative teams i.e. Cancer Surgeon and Orthopedic Surgeon were not present during the surgery which has a norm in such surgical process. The Orthopedic Surgeon too came to the Operation Theatre after two hours of the knee replacement surgery only on an emergency call. He expressed his dissatisfaction for such delay and told that it may cause infective post-operative wound. The plastic surgeon also expressed displeasure that there was no water available in the Operation Theatre for hand scrubbing; therefore he had to go to another Operation Theatre. It was further alleged that the Prosthesis was not implanted properly which caused damage to the blood vessels and resulted in profuse bleeding. It was the carelessness and deficiency in service of treating doctors due to which the patient developed infection at operated site. Thereafter, the doctors at TMH again advised to replace the Prosthesis with free fibula grafting with additional dose of Chemotherapy. It was alleged that the doctors at TMH were aware that further treatment would not yield any positive result, yet, they advised the Complainant No. 2 to deposit additional Rs. 1.5 lakh for Surgery and Rs. 2 lakh for post-operative care.

Chemotherapy. However, the patient's father did not agree and he returned to Therubali. On 08.03.2000 patient got admitted in nearby Christian Hospital, Bischam at Cuttack. The infected Prosthesis was removed on 15.04.2000, however the severe wound infection persisted. It was alleged that after removal of Prosthesis, it came to light that different size of prosthesis was used during surgery at TMH. It was of a different size, did not fit in to the patient, which caused damage to the vessels and caused further complications requiring reconstructive Plastic Surgery. The Prosthesis bears different numbers, and nowhere the name of the manufacturer or the place of its manufacture was mentioned, thus it gave the suspicion that the Prosthesis used was of an inferior quality. As a life saving measure, the Doctors at Christian Hospital, (Opposite Party No. 5) carried out amputation of the leg. She stayed in the Hospital from 08.03.2000 to 20.06.2000 but could not recover from infection and expired on 08.12.2000. Being aggrieved by deficiency of service and medical negligence of the treating doctors, a Consumer Complaint No. 57 was filed against the Opposite Parties Nos. 1 to 4 before the State Commission, claiming compensation of Rs. 19,90,400/- with interest at the rate of 18% p.a. jointly and severally.

4. The Opposite Parties Nos. 1 and 2 jointly filed their Written Version through the Superintendent of TMH and they denied any negligence or deficiency in the treatment of the patient. Opposite Party No. 4 M/s Howmedica Duchem Laboratories Ltd. filed a separate written version stating that it cannot be held liable as the business of the company had already been transferred. The Opposite Party No. 3, Dr. Rajesh Badhwar had expired and accordingly the claim as against him was abated. The Opposite Parties Nos. 5 & 6 are formal parties, against whom no relief had been claimed. The Opposite Parties Nos. 1 & 2 raised preliminary objections that the State Commission neither had the (i) pecuniary jurisdiction nor the (ii) territorial jurisdiction, to entertain and try the present Complaint under the Consumer Protection Act, 1986, as the Complainant prayed for the compensation and costs of Rs. 19,90,400/- along with interest at 18% p.a. i.e. from 15.09.1999 till the date of realization of the amounts; which after calculation exceeds Rs. 20 lakhs which is beyond the pecuniary jurisdiction of the State Commission. The Opposite Parties Nos. 1 & 2 submitted that the State Commission did not have the territorial jurisdiction to entertain the Complaint because both the Opposite Parties are located at Mumbai and do not have any branch or other office in Odisha and/or do not carry on their activities in any other city other than Mumbai.

5. It was submitted that, the patient was referred from IMFA Hospital to the TMH on 26.02.1999. The patient was admitted at TMH under the care and supervision of Senior Consultant, Dr. Rajesh Badhwar (hereinafter referred to as the "Opposite Party No. 3"). After investigations, the diagnosis of an aggressive bone tumour - Osteosarcoma of left leg was confirmed. The patient was advised to undergo Chemotherapy sessions, and thereafter, resection of the cancer affected bones i.e. Total Knee Replacement (TKR) Surgery and implant of an Artificial Prosthesis in lieu of the amputated limb. The Chemotherapy for four cycles was completed between March to June, 1999 and on 28.06.1999, Dr. Badhwar examined the patient and suggested that to undergo TKR Surgery within short span of time with Prosthesis of 40mm diameter would require to be implanted. As the patient was running fever, therefore for short period she was discharged from the Hospital and again came back to TMH in August, 1999. As the patient was immuno-compromised and highly prone to the infections, therefore the 5th session of Chemotherapy for September 1999. Accordingly, an Indent Order was placed by TMH on 27.08.1999 to the Opposite Party No. 4 for purchase of Howmedica Modular Prosthesis. The Prosthesis was received by TMH on 31.08.1999.

6. On 15.09.1999, Dr. Rajesh Badhwar and his Orthopaedic team performed TKR- i.e. resection of the cancer affected bones and implanted the Prosthesis (Howmedica Modular Resection System - Modular Femur & Tibia Reconstruction System) while the Plastic Surgery team of TMH successfully carried out the reconstruction of the limb. The patient then attended the OPD of TMH, after three months on 16.12.1999, and complained of pain for which she was taken to Dr. Ajay Puri at TMH, where on examination advised immediate admission and removal of Prosthesis at the earliest. However, the patient

father refused for admission and removal of Prosthesis at TMH. He took the patient to his native V Therubali. Thereafter the patient for on 18.03.2000 got admitted to Christian Hospital at Bisam, Cu 18.03.2000 wherein the Prosthesis was removed on 15.04.2000. Therefore, the patient's father him negligent who did not follow the advice of Dr. Ajay Puri and the removal of Prosthesis was done a months delay.

7. It was submitted by the Opposite Parties Nos. 1 & 2 that the Prosthesis being a foreign sometimes it may not suit every patient and may cause infection, therefore its removal was recommended is a known complication that about 15% of cases show infection on implantation of Prosthesis. A removal of the Prosthesis at Christian Hospital, Cuttack, the Complainant wrote two letters to T 07.06.2000 and 24.07.2000 by which he thanked TMH for the co-operation and treatment of his d He expressed his desire to return the removed Prosthesis to the Hospital and requested to refund the Prosthesis. However, in reply the Medical Superintendent of TMH pointed out by letter dated 04. that the Prosthesis was custom built and once implanted, same cannot be re-used on any other pati patient eventually died on 08.12.2000 due to the aggressive nature of Osteosarcoma as a consequ lung metastasis. There was no deformity.

8. Being aggrieved by the Order passed by the State Commission, the Complainant No. 2 fil Appeal No. 53 of 2010 for enhancement of compensation, whereas the TMH Hospital filed First Ap 115 of 2010. The First Appeal No. 53 of 2010 filed by Complainant for enhancement of compe whereas the Opposite Parties Nos. 1 & 2 filed First Appeal No. 115 of 2010 for the dismissa complaint and to set aside the observations of alleged irregularities State Commission.

9. I have heard the learned counsel for both the sides.

10. The learned Counsel for the Complainant reiterated the facts and their affidavit of eviden learned Counsel for the Complainant submitted that vide Order dated 29.08.2017 of this Commiss Opposite Parties Nos. 5 to 7 are formal parties against whom no relief is sought, therefore, the no not issued. He further submitted that since the Opposite Party No. 3 had expired, no cause o survived qua the Opposite Party No. 3. The name of the Opposite Party No. 3 was deleted vide Ord 17.07.2015.

11. The learned Counsel for the Opposite Parties Nos. 1 & 2 vehemently argued and reiter submissions made in affidavit of evidence. On the preliminary objection the learned counsel argued State Commission did not have Pecuniary Jurisdiction in view of the judgment of **Ambrish Kumar Vs Ferrous Infrastructure (P) Ltd.**, 2016 SCC Online NCDRC 1117 and **Anil Textorium (P) I Rajiv Niranjnabhai Mehta**, III (1997) CPJ 31 (NC), and further argued that the compensation cla the Complainant exceeds Rs. 20 lakh which was more than the jurisdiction of the State Commiss further argued that the State Commission, did not have the territorial jurisdiction to entertain the Complaint against the Opposite Parties. The cause of action, if any, for the alleged deficien negligence averred against the Opposite Parties Nos. 1 & 2 had admittedly arisen at Mumbai and r action arisen partly or wholly in Odisha. He relied upon the Judgments of the Hon'ble Supreme Cou case **National Textile Corporation & Ors. Vs Haribox Swalram & Ors.** (2004) 9 SCC 786 and **Ingots & Alloys Ltd. Vs Union Of India & Ors.** (2004) 6 SCC 254. Thus the complaint was lia dismissed by the State Commission.

12. On merit; the learned counsel for the Opposite Parties argued that the patient suffered aggressive bone cancer. The doctors at TMH treated the patient as per standards. The learned further argued that Osteosarcoma is a highly aggressive bone tumour affecting mostly children

adolescent group and prognosis is bad due to lung metastasis with chances of survival up to
Therefore even after best possible treatment, the death of a patient cannot be attributed to any negligence by the treating doctors or the hospital. He further submitted that based on the evidence of medical experts (one expert was appointed by State Commission), the State Commission observed that the functioning of the Hospital was not “free from irregularities” which may have contributed to the sufferings of the deceased Srutilekha Dash and without discussing the reasons, awarded Rs. 1 lakh as compensation. Complainant No. 2.

13. I gave thoughtful consideration to the arguments advanced by the learned counsel of both sides. I perused the Medical Record, the literature and the Order of the State Commission.

14. The incident happened in the year 1999 and we are now in the year 2020. Almost two decades have elapsed. The State Commission has already dealt with the preliminary objections on maintainability of the complaint (territorial and pecuniary jurisdiction). Therefore, I proceed to decide the matter on merits. The Complainant's grouse was that the patient was admitted to TMH in February, 1999, but the surgery was conducted after 6 months delay in September 1999. As per standard medical literature and text books, it is pertinent to note that the Osteosarcoma is a highly aggressive malignant tumour. Before the surgery, the patient needs to stabilize with the few cycles of Chemotherapy. Depending upon the patient's clinical response the treating doctor decides the Chemotherapy schedule for “pre” (neoadjuvant) and post-operative (adjuvant) operative stages. Generally, pre-operative cycles range from 3 to 5 sessions of chemotherapy. In the instant case it was decided to give five cycles of neoadjuvant Chemotherapy between February and August, 1999. Thus, the allegation of Complainant is not sustainable that surgery could have been performed after 4 cycles of Chemotherapy and the unwanted 5th cycle of Chemotherapy which delayed the surgery was not required. During the treatment, nothing prevented the Complainant No. 2 to seek a 2nd opinion from any institution of his choice or any competent doctor, which he failed to do.

15. In the instant case, the Complainant neither led any expert evidence nor produced any literature to prove medical negligence. However, the State Commission obtained opinion of an Independent Expert Doctor – Dr. Rabin C. Mishra, Professor of Surgery & HOD, Acharya Harihar Regional Hospital, Cuttack. The affidavit of evidence dated 18.10.2006 from Dr. Ajay Puri, Associate Professor (Orthopaedics & Soft Tissue Unit) of TMH is on record. The combined reading of both the expert opinions does not establish any lapses or failure of duty of care at TMH and does not corroborate the allegation of medical negligence raised by the Complainant No. 2. Thus, the State Commission rightly held that there was no medical negligence from the Opposite Parties.

16. Regarding the procurement of Prosthesis, the Complainant alleged that it was delayed by the Hospital. It is apparent from the prescriptions that after the 4th cycle of Chemotherapy on 28.06.1999, Dr. Puri wrote the prescription that “patient would require Prosthesis of appx. 9 mm diameter”. It was noted that Dr. Badhwar noted the clinical findings and his advice. In my view, the Complainant misconceived the treatment aspects. The said prescription was neither an “Indent” for placing an order to procure Prosthesis nor suggestive of detailed specifications of the size of Prosthesis.

17. After administration of the 5th cycle of Chemotherapy in August, 1999, the patient was taken for operation at the end of September, 1999. It is apparent from the challan of the supplier Howmedica (Opposite Party No. 4) that on 27.08.1999 the Indent/Purchase Order for HMRS KOTZ Modular Prosthesis was placed by the TMH. The Prosthesis with all its parts of different configurations was received by the Hospital on 31.08.1999. Thus, an allegation of complainant that there was delay in procurement of the Prosthesis because of non-payment of earlier dues by TMH is unsustainable.

18. The KOTZ Modular Knee Prosthesis is a set of several different components including St Extension PC, Femoral Joint, Proximal Tibial Fixation Plate, Bearings, Wedges, Clips, Bone Scr These components come in different sizes /configurations. The sizes may usually vary with measu taken on a clinical examination and the exact size can only be determined on the Operating Tabl operating surgeon. In the instant case on 28.06.1999, Dr. Badhwar on a clinical examination of the asked for the diameter of the main Prosthesis to be approximately 9 mm. However, the exact measu taken during operation on the Operating Table indicated that the patient required Prosthesis of diameter. Therefore, the Complainant's allegation about Prosthesis of a different size than that pr earlier was used which resulted in pain to the patient which had to be ultimately removed is not sust It is pertinent to note that this was not a case where the Prosthesis with 9 mm diameter was not ava the time of operation. However, the operating Surgeon – Dr. Badhwar during surgery decided t Prosthesis with 10mm diameter. It was the wrong presumption of the Complainant that “ov Prosthesis would have caused pain to the patient.

19. The Complainant alleged that the Prosthesis procured in the name of Srutilekha Dash implanted while a used prosthesis originally implanted in another patient – Ritika Naik had been imp In my view , it was a baseless allegation that the Batch Codes of the Prosthesis procured for Sr Dash also did not tally and match with the Batch Codes of the Prosthesis which were later remov Srutilekha Dash at Christian Hospital, Cuttack. It is evident from the Manual / Literature publi Howmedica that the numbers inscribed on the different parts of the Prosthesis are generic in nat reflect the Code Number of every part as 6465 -...-. The handwritten challan of Howmedica i various parts of different sizes of the Prosthesis required during the surgery of Srutilekha Dash : Howmedica prosthesis Code No. was 6465-0-020. The contention of the Complainant in this r just imaginary.

20. The allegation of the Complainant about complete mismanagement during the Surgery Operation Theatre as both the Orthopaedic Surgeon and the Plastic Surgeon were not present at t time is also not sustainable. It should be borne in mind that the instant surgery was a major surger to be performed in two stages by the two separate teams of doctors, each headed by the Senior Su The first part of the surgery is performed by the team of Orthopaedic Surgeons who do excisio diseased bones and implantation of the Prosthesis, then the reconstruction of the tissues around the c area is to be done by the second Team of Plastic Surgery. Therefore, there was no need of Plastic i to be present during 1st part of surgery. The Plastic surgeon is called once the resection of tissue is after the job is completed by the Orthopaedic Surgeon. Such allegation of the Complainant is b conjectures and surmises; and is therefore vague.

21. The vague allegation that no water was available for the Plastic Surgeon for scrubbing. I usually the Operation Theatre Complex consists of number of operation theatres and had never a pro water. The scrubbing areas for several adjacent Operation Theatres are common. I do not think th have materially affected the surgery of the instant patient. I further note that as per the Operation the resection of the diseased bone, implantation of the Prosthesis and reconstruction surger successfully done and uneventful i.e., without any complications.

22. The treating doctors at TMH have attempted it for limb salvage which in the interest of Sr Dash a young girl of 16 years of age. If infection occurs, then the better option would be that the Pr be removed. On 16.12.1999 the patient was evaluated at TMH and advised immediate admis removal of Prosthesis. However, patient's father instead of admission went back home and after a

months, in April, 2000 at Christian Hospital, Cuttack got the Prosthesis removed and the left amputated. The amputation of leg shall not be construed as a result of “irregularities” in the function of the OP Hospital.

23. It should be borne in mind that simply proving the suffering of ailment by the patient after the surgery does not amount to medical negligence. The Hon’ble Supreme Court has recently held in the case of **Jhunjhunwala Vs. Dhanwati Kaur and Anr.**, (2019) 2 SCC 282 that a doctor or surgeon cannot be held liable for negligence unless it is proved that the outcome of any surgery would be beneficial. The court held that a professional might be held liable for negligence either if they do not possess the requisite skills that they claimed to have, or they do not exercise the skill which they have. While referring to the judgements, the court said that the human body is like a highly complex machine and a doctor could not assure full recovery of a patient. The only assurance that such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of the profession which they are practising and while undertaking the performance of the task entrusted to them, they would be exercising their skill with reasonable competence. The court added. In other case **Achutrao Harbhau Khodwa Vs. State of Maharashtra**, 1996 Vol 2 Hon’ble Supreme Court has held

“The skill of medical practitioner differs from doctor to doctor. The nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. It would indeed be slow in attributing negligence on the part of a doctor if he has performed his duty to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and a court finds that he has attended on the patient with due care and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.”

24. To conclude, the doctors at TMH have made correct diagnosis of Osteosarcoma. There was no deviation from the duty of care as the cancer specialist / operating surgeon to decide the time of operation after appropriate chemotherapy cycles and use of proper implant during surgery. Thus the treatment was correct as per standard of practice. The cancer surgery consumes hours and needs a team of surgeons including plastic surgeon whose role starts only after the removal of cancerous lesion and thus, there is no need for plastic surgeon to remain personally present throughout the surgery. It is pertinent to note that the patient died after eight months of the surgery and it was not due to any infection or any deficiency in the duty of care of the treating doctor. The patient died due to metastasis in the lungs which is known to be a feature of Osteosarcoma – the aggressive malignant tumour. The expert opinion did not comment on any deviation in the treatment or negligence by the doctors at TMH.

25. Based on the above discussion, it cannot be attributed to medical negligence of the treating doctors at the TMH. The impugned order to the extent it is directed against Opposite Parties No. 1 and 2 cannot be sustained and is accordingly set aside. Resultantly, F.A. No. 115 of 2010 filed by the O.P.s is allowed and F.A. No. 53 of 2010 filed by the Complainant is dismissed. Consequently the Consumer Commission is also dismissed.

26. Considering the sufferings of 16 years young girl who died of highly aggressive bone cancer (Osteosarcoma) and the loss & agony of the bereaved parents who spent two decades in the litigation, my sympathies for the parents of deceased, let Tata Memorial Hospital extend its charity and do the amount deposited before this commission along with accrued interest to the Complainant No.2.

However, it shall not be construed as a precedent in any manner.

The Registry is directed to disburse the amount to the Complainant No. 2 as stated above, within 4 w

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DR. S.M. KANTIKAR
PRESIDING MEMBER