

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 1323 OF 2018

(Against the Order dated 09/05/2018 in Complaint No. 23/2002 of the State Commission Uttar Pradesh)

1. AGARWAL ORTHOPEDIC HOSPITAL & ANR.

JUBILEE ROAD

GORAKHPUR

UTTAR PRADESH

2. DR. R.A. AGARWAL

ORTHOPEDIC & BONE DISEASES SPECIALIST

(SURGEON), AGARWAL ORTHOPEDIC HOSPITAL,

JUBILEE ROAD

GORAKHPUR

UTTAR PRADESH

.....Appellant(s)

Versus

1. SANDEEP ARORA & ANR.

S/O. LATE SHRI SHANTI SWAROOP ARORA, R/O.

20/204, GARULPAR DEORIA, P.O. AND DISTT-
DEORIA

UTTAR PRADESH

2. SMT. SAPNA ARORA

W/O. SANDEEP ARORA, R/O. 20/204, GARULPAR

DEORIA, P.O. & DISTT DEORIA

UTTAR PRADESH

.....Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE R.K. AGRAWAL, PRESIDENT

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

For the Appellant :

For the Respondent :

Dated : 31 Aug 2020

ORDER

Appeared at the time of arguments

Mr. Biraja Mahapatra, Advocate

For Agarwal Orthopedic Hospital & Anr. Mr. Sumit Mishra, Advocate

For Sandeep Arora & Anr.

Mr. Braj Kumar Upadhyay, Advocate

:

Pronounced on: 31st August 2020

ORDER

PER DR. S. M. KANTIKAR, MEMBER

“ Watchful waiting ” is one of the option, also called as related to Masterly Inactivity or Expectant Management is a `hands-off management` philosophy in which certain medical conditions are closely monitored, but treatment is withheld until symptoms either appear or some measurable parameter changes.

1. Both the Appeals have been filed against the Order dated 09.05.2018, passed by the UP State Consumer Disputes Redressal Commission (for short the ‘State Commission’) which allowed the Complaint No. C-2002/23. For convenience, the facts are drawn from FA/1323/2018 and the Parties are placed as represented in the Complaint.

2. Brief facts are that Mr. Sandeep Arora, Complainant No. 1 (for short the ‘patient’) suffered scooter accident on 04.08.2000 and suffered fracture to his left hand. Initially, he consulted Dr. T.N. Gupta at Deoria. X-ray showed fracture of Humerus (arm) and took treatment for 4 days. Thereafter on 09.08.2000 he approached Dr. R. A. Agarwal (hereinafter referred to as the Opposite Party No. 2) at Agarwal Orthopaedic Hospital (hereinafter referred to as the Opposite Party No. 1) at Gorakhpur. The Opposite Party No. 2 examined the patient and advised for surgical correction of fracture and the patient got admitted in the Opposite Party No. 1 Hospital. As the Titanium Rod was to be obtained from Delhi, the operation was fixed for 13.08.2000. The Opposite Party No. 2 operated the patient on 13.08.2000 and fixed the Titanium Closed Interlocking Rod with 4 screws in the fractured Humerus bone. The Complainant alleged that the rod and the screws were oversized and were not fixed properly. It was further alleged that on 14.08.2000, the Opposite Party No. 2 examined the X-ray of patient’s left arm which showed the interlocking rod and screws were oversized and a gap visible between the broken bones. The Complainants were apprehensive and they asked the Opposite Party No. 2 to get another X-ray done on 16.08.2000 to check whether the gap had increased, but the Opposite Party No. 2 advised the patient to continue the medicines as the bone was uniting. The patient was discharged from the Opposite Party No. 1 Hospital on 18.08.2000, though he had pain in his left hand. Thereafter, on 16.01.2001, the patient got himself examined in the District Hospital, Deoria and the fresh X-ray showed the gap was more and the bones were not united. The doctors therein suggested the

patient to undergo another operation. Thereafter, patient went to Mariampur Hospital at Kanpur and got operated on 31.01.2001, wherein the Titanium close interlocking rod was removed and bone grafting with plating was done. The post-operative X-ray showed the bone was united.

Being aggrieved by the alleged negligence during the operation, the Complainants filed the Complaint before the State Commission and prayed compensation for loss of income, mental and physical stress to the patient and his family members.

3. The Opposite Parties filed their written statement and denied the allegations of the wrong treatment. The patient was admitted in the Opposite Party No. 1 Hospital on 09.08.2000. He brought the X-ray and prescription of Dr. T.N. Singh dated 04.08.2000. X-ray showed a fracture shaft of left Humerus. The operation of Titanium closed interlocking rod was done on 13.08.2000, as per standard procedure. The X-ray taken on 16.8.2000 showed proper position of rod and there was no gap between the fractured area. The Opposite Party No. 1 denied the penetration of screws and rod into the muscles, which was not possible for such a long period. The patient did not follow the instructions for physiotherapy. He was in good condition when the stitches were removed. The Opposite Parties further submitted that the patient, over phone, informed Opposite Party No. 2 that he fell down from his bed and suffering from pain in his left hand. The patient was called on 11.11.2000, the X-ray of his hand showed that the screws were loose with a minor gap. However, the rod was in correct place and the fractured bone showed proper alignment with new bone formation. Patient was advised to wait as the minor gap would be covered by the new formation of bone. The patient, thereafter, did not turn up to the Opposite Party No. 1 hospital.

4. The State Commission, on hearing the parties, passed the following Order:

Order

The Complaint is allowed. The OPs are severally and jointly directed to pay Rs. 96,686.00 and further a sum of Rs. 1 lakh as compensation and Rs. 10,000/- as cost to the Complainant No. 1 within a month otherwise the OPs shall be liable to pay interest @ 10% p.a. on the entire awarded amount.

5. Being aggrieved, both the Parties have filed two cross Appeals before this Commission. The Complainants filed First Appeal No 760 of 2019 for enhancement of compensation whereas the Opposite Parties filed First Appeal No. 1323 of 2018 to set aside the order of the State Commission.

6. Heard the arguments of the learned Counsel for both sides and perused the material on record *inter alia* the Original Record from the State Commission.

7. The short delay of two days in filing First Appeal No. 1323 of 2018 is condoned. However, there is a delay of 320 days in filing First Appeal No. 760 of 2019. In the interest of justice, to provide fair opportunity to the Complainants and to decide the case on merit, the self-admitted delay of 320 days is condoned.

8. The learned Counsel for the Complainants submitted that the Opposite Party No. 2 has committed deficiency in service while conducting operation on 13.08.2000 because the Titanium interlocking rod was put in on the basis of old X-ray done on 04.08.2000. The Opposite Party No. 2 got X-ray done on 14.08.2000 which revealed gap of 1mm to 2mm and another X-ray was again

taken on 16.08.2000 which also showed same gap. He further submitted that an oversized Titanium interlocking rod and screws were fixed whereby the patient was getting pain. The patient went to the Opposite Party No. 2 on 11.11.2000, the X-ray revealed more gap between bones and the screws were protruding through the flesh but the Opposite Party No. 2 ignored it and asked the patient to come after 2 months, but his condition worsened further. The bones did not unite and therefore on 31.01.2001 the patient finally underwent another operation at Mariampur Hospital at Kanpur whereby the Titanium Rod was taken out and bone grafting was done. Thus, it was the negligence in the duty of care from the Opposite Party No. 2 doctor.

9. Learned Counsel for the Opposite Parties submitted that the Opposite Party No. 2 is an experienced Orthopaedic Surgeon. He performed the operation under C-Arm vision screen and there was no chance of procedural mistake. The X-rays were examined before and after the operation. There was no gap after the operation. The Opposite Party No. 2 neither used oversized Titanium interlocking rod nor the oversized screws. The union of bone was not guaranteed and the gap seen may be due to various reasons such as pressure, fall, cohabitation, any hit / trauma to the fractured bone and due to non-formation of callous in normal manner.

10. We gave our thoughtful consideration to the arguments from both sides. Perused the material on record *inter alia* the Medical Record of Opposite Party No. 1 Hospital and the medical text on long bone fractures from Campbell's Operative Orthopaedics (14th Edition).

11. We note the patient was operated on 13.08.2000. The post-operative X-rays dated 14.08.2000 and 16.08.2000 revealed minimal gap. The Complainant approached the Opposite Party No. 1 Hospital after about 3 months on 11.11.2000. According to the patient the X-ray done on 11.11.2000 revealed the gap was widened and the Opposite Party No. 2 should have taken necessary steps to correct the gap but the patient after two months. It is pertinent to note that the patient did not follow the medical advice for exercise and the physiotherapy. Moreover he fell down from the bed and sustained external trauma / pressure on his left hand which caused increase in the gap between the fractured bones. However, it is evident from X-ray dated 11.11.2000 there was proper bone alignment and the rod in proper shape. We do not find any cogent evidence produced by the Complainant that the rod or screws used during surgery were oversized. It is further noted from the medical record of Mariampur Hospital that Dr. P. M. Gadre operated the patient on 31.01.2001. He did not comment on the size/extent of gap at the fractured site and any negligence from the Opposite Party No. 2 during previous operation caused either non-union or mal-union of bones.

12. We further note that the Opposite Party No. 2, who is a qualified and experienced Orthopedician followed the accepted standard method to treat the fracture Humerus with use of C-Arm during the procedure. The new bone (callus) formation at fractured site takes long period and thus the patient was advised to wait and do regular exercise and physiotherapy. In our considered view, it was the act i.e. "Watchful waiting" from the Opposite Party No. 2. It is also called as related to Masterly Inactivity or Expectant Management is a `hands-off management` philosophy in which certain conditions are closely monitored, but treatment is withheld until symptoms either appear or some measurable parameter changes. (Ref: Segen's Medical Dictionary. © 2012 Farlex, Inc.). Thus, watchful expectancy or masterly inactivity is despite whatever appears to a patient, is NOT, and we reiterate is NOT neglect or negligence, as the layperson might be tempted to believe - it simply means acting with necessary patience, using good sense, experience coupled with prudence, as the situation dictates in circumstances in which, there is no pressing action or no qualified need for urgent or emergent intervention. Therefore, we

are unable to understand that within short span of time i.e. 3 months the patient underwent the second surgery at Mariampur Hospital, Kanpur. It was hurried intervention which is not advisable.

13. Technically, a Non-union is defined as, `A fracture that is a minimum of 9 months post occurrence and is not healed and has not shown radiographic progression for 3 months` (FDA 1986). In the instant case, it is indeed documented by the first Surgeon that 3 months after first surgery there was evidence of early callus formation and thus he recommended watchful expectancy for fracture healing. Merely because a second intervention was executed and has led to bone union, it does not automatically imply that the first intervention would have necessarily failed wherein the Surgeon was keeping a vigilant eye on the progress of the healing and was ready to, if necessary, intervene.

14. Further, literature suggests that `an apparent gap` despite internal fixation is often seen on post-operative radiographs. These gaps are not physical gaps but merely zones of decalcified bone at the site of the opposing fracture surfaces. It is all too easy to point out these gaps to a layperson that in his vulnerable state, panics and starts doubting the original intervention performed.

15. It should be borne in mind that an `Active monitoring` is a well-accepted form of any on-going` treatment. Patients are led to believe, albeit in many cases by secondary service providers that great and hurried intervention is always required or vital in their case and thus the original Surgeon who has shown patience, supported by literature and yet, is ready for `further intervention if need be` does not always qualify as negligent or neglectful by any stretch of imagination. Indeed, history is testimony that many surgical disasters could also have been avoided by preventing overenthusiastic and interventions whereas watchful expectancy would have sufficed.

16. What may appears as a heroic `early second intervention` which has palpably caused a positive impression on the patients mind cannot be used as a weapon to castigate the original surgeon or his methods who was following a well-accepted treatment plan including `watchful expectancy`. Such an assumption based on `what could have been...` is too presumptuous, simplistic and thus, untenable. It has become all too common for some medical personnel to present a `one up` view of their own practice to impress or convince a patient of additional treatments or alternative remedy, which may be in essence unrequired at that point of time. Such a patient intent on blaming someone for their misfortune and possibly arisen to a combination of his injury mechanism or complex pattern, his existing co-morbidities, in combination with slower biology by many other variables, is now all too ready to blame the original Surgeon and thereby cause injustice to the actually prudent practitioner of medicine.

17. The doctor is not liable for negligence if he performs his duty with reasonableness and with due care. The mode of treatment and skill differ from doctor to doctor. We would like to rely upon the law laid down by Hon'ble Supreme Court in the case - **Achutrao Haribhau Khodwa and others versus State of Maharashtra & Ors.**, (1996) 2 SCC 634, wherein it was held that;

“The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties 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 the Court finds that he has attended on the patient with due care skill 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.”

In the instant case, the Opposite Party No. 2 treated the patient as per the standards. There was no negligence while performing the fracture operation and fixing the Titanium interlocking rod and screws to the Humerus.

18. On the basis of the examination made above, deficiency / medical negligence is not established. We set aside the Order passed by the State Commission and dismiss the Complaint. Parties to bear their own cost.

.....J

R.K. AGRAWAL
PRESIDENT

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DR. S.M. KANTIKAR
MEMBER