

**Additional Consumer Disputes Redressal Commission, Rajarhat (New Town)
Kreta Suraksha Bhavan,Rajarhat(New Town),2nd Floor
Premises No. 38-0775, Plot No. AA-IID-31-3, New Town,P.S.-Eco Park,Kolkata - 700161**

Complaint Case No. RBT/CC/116/2019

1. Manika Chakraborty

11/7, Hari Bhushan Moitra Road, P.s- Baranagar,
Kolkata-700090, Dist-24 Pgs (N).

2. NO

NO

.....Complainant(s)

Versus

1. Dr. Amitava Majumder

first Floor 2,1 Narendra nagar P,s- baranagar, Kolkata-56,
(adjacent to L9-A) Bus Terminus, Near Dunlop bridge
Baranagar, North 24 parganas.

2. Sankara Jyoti Eye Institute

Office at 196/5/1, M.S.M. road , Khardah, P.o- B.D
sopan, P.s- Baranagar, Kolkata-7000116, next tp Balaram
Govt, Hospital) Prafulla Cinema Stop, Dist-24 Pgs (N).

.....Opp.Party(s)

BEFORE:

HON'BLE MR. Lakshmi Kanta Das PRESIDENT

HON'BLE MRS. Silpi Majumder MEMBER

PRESENT:

Dated : 23 Nov 2020

Final Order / Judgement

This complaint is filed by the Complainant u/S 12 of the Consumer Protection Act, 1986 alleging deficiency in service as well as unfair trade practice against the OPs as the OPs did not take any step to refund her the amount as incurred by her towards her medical expenses along with cost and compensation till filing of this complaint.

The brief fact of the case of the Complainant is that she has been suffering from cataract problem in her left eye since 2015. On 13.12.2016 along with her husband she visited Dr.Amitava Majumder-OP-1 being the Eye Specialist for necessary consultation and taking advice about her eye problem at his chamber situated at PranabJyoti Eye Clinic, Ankur Apartment, 1st Floor, 1, Narendra Nagar, Kolkata-700 056. After examination and clinical

investigation the Complainant was advised for cataract operation at an early date and prescribed some medicines before such operation. The OP-1 used to attend patient at the OP-2 also. As the OP-1 is attached with the OP-2 the Complainant was suggested by the OP-1 to take admission at the OP-2 for cataract surgery and assured her for better treatment therein. As per the advice of the OP-1 the Complainant got admission at the OP-2 for the cataract surgery in her left eye and deposited a sum of Rs.14,700/- for the said surgery on different counts i.e.

Surgery Charges	Rs.4,000/-
O.T. Charges	Rs.4,000/-
Bed Charges	Rs.1,500/-
Implant Charges (IOL) +Disposable	Rs.3,600/-
Drug Charges	Rs. 900/-
Relevant Tests	Rs. 700/-
Total	Rs.14,700/-

On 17.12.2016 the cataract in the left eye of the Complainant was operated upon by the OP-1 at the OP-2 and the treating surgeon-doctor implanted Intra Ocular Lens, Model no-HFR603SQ, Power-19.50, Optic Q-6.00mm, Over all-12.50mm, type-Posterior Chamber, batch no-1312A034. The Complainant got release on 17.12.2016 after the operation and at the time of release/discharge the OP-2 issued a bill amounting to Rs.14,700/- for the said operation and the bill was duly paid by the Complainant. Immediately after receipt of the said bill it was noticed by the Complainant that the Lens which used and implanted in her left eye by the OP-1 was out of expiry and from the lens sticker it was revealed that the manufacturing and expiry dates of the lens were 2013/12 and 2016/11 respectively, which amounts to gross medical negligence on the part of the OP-1 and after knowing such facts the Complainant became very much shocked and disheartened. After knowing such facts the Complainant intimated the same to the OP-1 and 2 on the self-same day, but the OPs were very much reluctant over the said issue. Being compelled on 24.12.2016 the Complainant called the OP-1 and tried to state the negligence of the OP-1 and 2 and also asking for solution regarding such issue, but the OP-1 flatly refused to provide any medical assistance or relief to the Complainant, caused a great mental pain and agony to the Complainant. Subsequently after realizing their negligence towards the Complainant the OP-1 and 2 called her and demanded the original bills issued by the OP-2. The Complainant accordingly visited the OP-1 and 2 with the original bills and after perusing such bills both the OPs have admitted that the lens was out of expiry date and also confessed their guilt in presence of the husband of the Complainant. The Complainant requested the OP-1 and 2 for further clinical investigation of her left eye and to suggest better medicine for recovery of the said eye, but

the OPs have refused her request and thereby the Complainant had to suffer monetary loss as well as severe eye problem due to such irresponsible and negligent act of the OPs. As the acute problem in her left eye was not subsided she tried to contact the OP-1 on several occasions over telephone, but the OP-1 only demanded the original bills from her with mal-intention. The OP-1 did not provide her any medical assistance till date, so her eye problem is still continuing. According to the Complainant such action of the OPs has clearly revealed their negligence, deficiency in providing medical service and treatment to the Complainant, for which the Complainant has been suffering till date and due to this reason the OPs are liable to pay compensation to her. As the grievance of the Complainant have not been redressed by the OPs till filing of this complaint, hence finding no other alternative the Complainant has approached before the Ld. DCDRF, Barasat by filing this complaint praying for direction upon the OPs to refund the amount of Rs.14,700/- as incurred towards her medical treatment and surgery along with further medical expenses for Rs.50,000/- and Rs.1,00,000/- as compensation to her.

The petition of complaint have been contested by the OPs by filing conjoint written version contending that The Complainant consulted with the OP-1 for her eye problem on 03.12.2016 and after thorough clinical examination the OP-1 advised for cataract surgery. The Complainant gave consent to such surgery and as the Complainant and her husband asked for an early date, the OP-1 agreed with such suggestion of the Complainant and her husband and was pleased to fix an early date as per their request. After knowing the information that the OP-1 is also attached with the OP-2, then the Complainant selected the OP-2 for her cataract surgery. No false verbal assurance was given to the Complainant by the OP-1 that at the OP-2 better treatment will be provided. As per her own choice the Complainant got admission at the OP-2 and paid the charges for her cataract surgery. The OPs have disputed and denied the Intra Ocular Lens sticker, according to them the photocopies can be manipulated and is not an authentic document. Such IOL sticker was never supplied to the Complainant. Such sticker and IOL are available in the open market. The IOL has no expiry date and it works throughout the life of any patient. The Cataract Surgery was uneventful and for the said surgery the bill for Rs.14,700/- was raised by the OP-2. If the sterilization had expired, the Complainant would have had immediate infection called 'Endophthalmitis' within 24 hours. The Complainant was advised to come again within a very short span, but she did neither turn up to the OPs nor to another doctor, which proves beyond doubt that the IOL was not expired as alleged by the Complainant. The Complainant has no problem in her eyes as in her own handwriting she had written that her operated eye was OK on the very next day of the operation. Hence the Complainant is stopped from raising such false allegation against the OPs. The Complainant did not come or contact the OPs for follow up after the check up on the 7th day. As the Complainant had no problem with her vision when she came for check up and hence the question for providing further medical assistance or relief to her does not arise under any circumstances. The OPs have never called the Complainant and demanded the original bills issued by the OP-2 as alleged. The OPs have never admitted that the lens was out of expiry date and confessed their guilt in presence of the Complainant and her husband. As there is no negligence and deficiency on behalf of these OPs in providing medical treatment and service, question does not arise for monetary loss as alleged by the Complainant. The Complainant has made out a false and concocted story of severe problem only with a view to grab some

money from these OPs through an illegal manner. The Complainant is not suffering from acute problem in her left eye due to implantation of IOL. The Complainant never asked for any medical assistance from these OPs and hence question for clinical assistance does not arise under any circumstances. Till date the Complainant did not lodge any complaint in writing before the OPs regarding implantation of the IOL. The Complainant has failed to substantiate the negligence and deficiency on the part of the OPs by producing any single document. The Complainant is not entitled to get refund of the amount of Rs.14,700/- as paid by her for the medical treatment from the OPs and as there is no deficiency in service as well as any medical negligence of these OPs, the Complainant is also not entitled to get any amount towards compensation as sought for. As the Complainant has made out false allegation against the OPs, the OPs have prayed for dismissal of the complaint with exemplary cost.

The Complainant, the OP-1 and the OP-1 have adduced their respective evidences. The Complainant was cross-examined by the OP-1 and 2 by way of written questionnaire and the Complainant has accordingly filed the replies to the said questionnaire. The OPs were also cross-examined by the Complainant by way of written questionnaire by the Complainant and the OPs have filed replies to the said questionnaire conjointly. The Complainant and the OPs have submitted the brief notes of argument with a copy to the other side. After filing the BNA the Ld. Counsel for the Complainant did not advance any oral argument. It is submitted by the Ld. Counsel for the Complainant that the BNA being the argument of the Complainant, no further oral argument is required on behalf of the Complainant. After closure of the argument by the Ld. Counsel for the OPs, inspite of giving chance to argue on the law points, if any, but no argument on law point is also forthcoming on behalf of the Complainant. The Ld. Counsel for the OPs has advanced argument orally inspite of submitting the BNA.

We have carefully perused the entire record, documents, considered the BNA filed by the both parties and heard argument at length advanced by the Ld. Counsel for the OPs. In our view the following points are required to be discussed i.e.

:POINTS FOR DETERMINATION:

1. Whether the Complainant can be termed as Consumer?
2. Whether this complaint is maintainable before this Ld. Commission?
3. Whether there is any medical negligence and/or deficiency in service on behalf of the OPs?
4. Whether the Complainant is entitled to get any relief?

Before discussion on merit we are to mention that the Complainant had adduced evidence on 11.09.2017, but unfortunately the evidence is not supported by any affidavit. So the evidence does not bear any evidentiary value. For cross-examination the OPs have put some questionnaire to the Complainant and the Complainant also filed the replies to the said questionnaire, but not supported by any affidavit. Therefore we are not in a position to accept the said reply in view of the judgment passed by the Hon'ble Supreme Court in the case of Dr. J. J. Merchant (supra). As the Complainant has failed to abide by the Law of this Land we cannot consider the replies filed by the Complainant as also the evidence of the Complainant.

It is pertinent to mention that the record reveals that on 31.01.2018 direction was given for filing reply by the Complainant on affidavit. Date was fixed on 21.05.2018. On the said date an adjournment was sought for by the Complainant for filing reply. After considering the prayer next date was given to the Complainant for filing reply on 02.11.2018 on affidavit. On 02.11.2018 though the Complainant was intended to submit the reply to the questionnaire, but as the reply was not supported by any affidavit, further opportunity was given to the Complainant for filing the reply on affidavit on 26.02.2019 in the interest of justice. On scrutiny of the record it is seen by us that inspite of the said specific order dated 02.11.2018, the Complainant had filed the reply not supported by any affidavit on 02.11.2018. Therefore the evidence as well as the reply of the Complainant cannot be accepted as per settled legal proposition. So it is clear that in the instant complaint there is no evidence on behalf of the Complainant.

: DECISION WITH REASONS:

1. This complaint is related with the allegation of medical negligence. The Complainant being the patient had approached before the OP-1 for necessary treatment as the Complainant was suffering from her left eye problem. Upon examining her the OP-1 advised her for cataract surgery in her left eye. It was settled that the surgery will be done at the OP-2. Accordingly the Complainant got admission at the OP-2 for her left eye cataract surgery and for such surgery she had to pay a sum of Rs.14,700/- to the OP-2 as the bill was raised by the OP-2. The OP-1 is attached with the OP-2. Therefore it is crystal clear that the Complainant had availed of the medical treatment and service from the OPs by making due consideration amount. Therefore the Complainant can easily be termed as 'Consumer' and the OPs are the 'Service Providers' within the purview of the definition of CONSUMER and the SERVICE PROVIDER as enumerated in the Section 2(1) (d) (ii) of the Consumer Protection Act, 1986. Thus the point no-1 is decided in favour of the Complainant.

2. This complaint is filed by the Complainant u/S 12 of the Consumer Protection Act, 1986. The Complainant had to incur medical expenses for the cataract surgery to the tune of Rs.14,700/- and the Complainant has also prayed for direction to the OPs for further payment of Rs.50,000/- to her on account of medical expenses as also compensation payable by the OPs for Rs.1,00,000/-. Therefore the total amount as prayed for by the Complainant is Rs.1,64,700/-, which falls within the pecuniary limit of the District Consumer Forum. So from the point of pecuniary jurisdiction, this complaint is well maintainable. From the point of its territorial jurisdiction we are to say that primarily this complaint was filed by the Complainant before the Ld. DCDRF, Barasat. After establishment of the Additional Consumer Disputes Redressal Forum this case record has been transferred from the Ld. DCDRF, Barasat to this Ld. Forum in view of the order passed by the Hon'ble SCDRC. After amendment of the Consumer protection Act, 2019 with effect from 20.07.2020 this Ld. Forum became the Commission. So in the judgment it is written as District Commission. As the addresses of the OPs fall within the territorial jurisdiction of this Ld. District Commission, hence the instant complaint is very well maintainable before this Commission from the point of its territorial jurisdiction. Thus the point no-2 is decided in favour of the Complainant.
3. Now we are to adjudicate the most vital point as to whether there is any medical negligence and/or deficiency in service on behalf of the OPs in rendering medical treatment to the Complainant or not. It is the case of the Complainant that as the Complainant has been suffering from cataract problem in her left eye since 2015, she visited the OP-1, being the Eye Specialist, along with her husband on 03.12.2016 for necessary consultation and also for taking advice. Upon clinical examination the OP-1 advised for cataract operation and also prescribed some medicines which were required to be taken prior to operation. Admittedly the Complainant visited the OP-1 at PranabJyoti Eye Clinic situated at Ankur Apartment, 1st Floor, 1, Narendra Nagar, Kolkata-700 056, but the OP-1 is also attached with the OP-2, where the cataract surgery of the Complainant's left eye was done by the OP-1. It is alleged by the Complainant that the OP-1 has suggested her to take admission at the OP-2 for the said surgery and also assured that better treatment will be provided therein, but in the reply to the questionnaire no-5 on affidavit the OP-1 and 2 have replied that on being asked by the Complainant and her husband to give the name of the Hospital/Nursing Home where the OP-1 is attached to and after knowing the name of the Hospital the Complainant got admission for the cataract surgery at the OP-2. Moreover in respect of such allegation no documentary evidence is adduced by the Complainant. Furthermore there is no evidence/documents that the OP-1 had allured the Complainant to take admission at the OP-2 for earning more profit and also no case has been made out by the Complainant that the OP-2 was not well equipped for cataract surgery of the Complainant. Accordingly the Complainant got admission at the OP-2 for the cataract surgery in her left eye and paid a sum of Rs.14,700/-towards the expenses for the said surgery in view of the bill raised by the OP-2. On 17.12.2016 cataract in the left eye was operated upon and IOL (Intra Ocular Lens) was implanted by the OP-1. The Complainant has alleged that after getting the aforementioned bill it was noticed by her from the sticker of the said Lens that the Lens, implanted in her left eye had lost its validity. According to the Complainant the manufacturing and expiry dates of the lens were mentioned as 2013/12 and 2016/11 respectively. Further allegation of the Complainant is that as the OP-1 had implanted the expired/invalid

lens in her left eye, the said eye got damage and such action of the OPs is an example of unfair trade practice as well as deficient medical service to her. It is stated by the Complainant that after knowing such information the Complainant became shocked and disheartened. The OPs have denied such averment of the Complainant in the written version, evidence and reply filed supported by an affidavit. In connection with such allegation we are to say that the Complainant did not take any step for bringing any Expert's opinion from the Department of Ophthalmology for coming to the conclusive conclusion as to whether the validity of the said Lens was at all expired or not. Until and unless any opinion is forthcoming we are not in a position to come to the conclusion that the questioned lens had lost its validity for implantation. Though the Complainant has claimed that immediately after knowing the same she informed the matter to the OP-1 and 2, but they were very much reluctant over the said issue. In our view such allegation has no basis at all until documentary evidence is forthcoming from the end of the Complainant in this context. There is no iota of evidence on the part of the Complainant that the OPs were informed about the expiry of the lens by the Complainant in writing. If actually the lens was out of its validity, then what prompted the Complainant or her husband not to make any written correspondence with the OPs? It is alleged by the Complainant that due to implant of the expired lens her left eye got damage and she is still suffering from problem in the operated eye. In this respect we are of the view that within the four corners of this record there is no document that due to the alleged problem she visited the treating surgeon after the cataract surgery. From the Annexure no-'D' it is revealed that the Complainant was advised to come on 18.12.2016 for check up, but as to whether she visited the OP-1 on the scheduled date or not, it is not possible for us to peruse as the Complainant did not submit any prescription of the OP-1 dated 18.12.2016. Not only that she did not file any prescription of any Ophthalmologist from where it can be gathered that being compelled she approached to another doctor for recovery. Therefore the allegation of damage of her left eye due to implantation of expiry lens has no legs to stand upon. The Complainant has alleged that on 24.12.2016 she called the OP-1 and tried to state about the negligence and desperateness of the treating surgeon and the OP-2 and also asked for solution regarding such issue, but the OPs have flatly refused her request as also to provide further medical assistance or relief to her, caused great mental pain and agony. In respect of such allegation we are of the view that without any corroborative evidence such allegation cannot lie. The Complainant has stated that the OPs realizing their negligence called her and demanded the original bills issued by the OP-2. Subsequently when she visited the OPs along with the original bills then the OPs have admitted that the lens was out of expiry date and confessed their guilt in presence of her husband. In this context no documentary evidence is adduced by the Complainant in support of her contention, so this allegation also does not stand. The Complainant has made allegation that though she requested the OPs for further clinical investigation of her operated eye and suggest some better medicine for recovery, but both the OPs have flatly denied such request and thereby the Complainant had to face monetary loss as well as severe eye problem due to irresponsible and negligent act of the OPs. No evidence is forthcoming from the end of the Complainant in respect of such allegation. We are to say that when the Complainant felt problem in the operated eye why she did not approach before any eye specialist being refused by the present OPs for recovery of her discomfort/problem? No prescription is filed by the Complainant of any doctor apart

from the OP-1 from where it is not evident that the Complainant was suffering from severe problem in the operated eye inspite of cataract surgery by the OP-1. So in absence of any documentary evidence we cannot draw adverse presumption against the OPs that the operation was faulty and due to this reason the Complainant has been suffering problem in the operated eye. The Complainant has miserably failed to prove negligence and deficient medical service of the OPs by adducing cogent document. The Complainant has prayed for Rs.50,000/- from the OPs towards the medical expenses, but in respect of such claim no document is forthcoming from the end of the Complainant that due to medical negligence she had to approach before another doctor and for this reason she had to incur further Rs.50,000/-. Due to absence of any such document, we are not in a position to allow the prayer of the Complainant for making direction to the OPs to pay a sum of Rs.50,000/- or any amount to her. From the above-mentioned we are of the opinion that there is no medical negligence on behalf of the OPs as the Complainant has failed to prove the same. It is the settled law that onus lies to prove the complaint who asserts the same and if the Complainant proves the case by adducing cogent evidence, then only onus shifts on the shoulder of the OP/s. But in the case in hand as the Complainants has failed to prove her case, then the complaint has no legs to stand upon. Thus the point no-3 is decided against the Complainant.

4. As the Complainant has failed to prove any medical negligence or deficiency in rendering medical service to her by adducing corroborative evidence, in our view the Complainant is not entitled to get any relief as sought for in the prayer portion of this complaint.

Going by the foregoing discussion hence it is ordered that the Consumer Complaint being no-RBT/CC/116/2019 is hereby dismissed on contest. However considering the facts and circumstances of the complaint there is no order as to cost.

Let a plain copy of this judgment be given to the parties free of cost as per the Consumer Protection Regulation.

Dictated by Hon'ble Member

(Mrs. Silpi Majumder)

[HON'BLE MR. Lakshmi Kanta Das]
PRESIDENT

[HON'BLE MRS. Silpi Majumder]
MEMBER

