

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 193 OF 2012

(Against the Order dated 07/01/2012 in Complaint No. 16/2001 of the State Commission Kerala)

1. DR. SUNNY VARGHESE

M.S. E.N.T. Surgeon, V.S.M. Hospital,
Mavelikkara
Kerala-690103

.....Appellant(s)

Versus

1. SATHYAPRABHA SUJATHAN & ANR.

Mulavana House, Karuvattumkuzhi, Kareelakkulangara
P.O.,
Alappuzha District
Kerala

2. VENNIYIL DR. SUKUMARA PILLAI

Rep. By the Manager. Memorial Hospital,
Thattarambalam,
Mavelikkara-
Kerala-690103

.....Respondent(s)

FIRST APPEAL NO. 310 OF 2013

(Against the Order dated 07/01/2012 in Complaint No. 16/2001 of the State Commission Kerala)

1. SATYAPRABHA SUJATHAN

W/o Late Sujathan, Residing at: Mulvana
House, Karuvattum Kuzhi, Kareelakulangara, P.o:
Alappuzha,
Kerela

.....Appellant(s)

Versus

1. DR. SUNNY VERGHESE & ANR.

E.N.T.Surgeon, V.S.M. Hospital, Mavelikkara,
Kerela-690 103

2. Venniyil Dr. Sukumara Pillai Memorial Hospital

Represented by its Manager, Thattarambalam,
Kerela-690 103

.....Respondent(s)

BEFORE:

**HON'BLE DR. S.M. KANTIKAR, PRESIDING MEMBER
HON'BLE MR. DINESH SINGH, MEMBER**

For the Appellant :

For the Respondent :

Dated : 11 Dec 2020

ORDER

APPEARED AT THE TIME OF ARGUMENTS

For Dr. Sunny Varghese : Mr. S. Gopakumaran Nair, Sr. Advocate
: with Ms. Priya Balakrishnan, Advocate

For Sathyaprabha Sujathan : Mr. Venkita Subramoniam T.R., Advocate
: Mr. Varun Mudgal, Advocate

For Venniyil Dr. Sukumara Pillai Memorial Hospital : Ms. Usha Nandini, Advocate

Pronounced on: 11th December 2020

ORDER

PER DR. S.M. KANTIKAR, PRESIDING MEMBER

1. These two Appeals arise out of order of the State Consumer Disputes Redressal Commission, Kerala (for short the "State Commission") dated 07.01.2012 in CC/16/2001 whereby the State Commission held Contributory negligence and the compensation was awarded partly to the complainant for medical negligence, resulting in the death of her husband Mr. Sujathan (the deceased -patient).

2. For the convenience the facts are drawn from the FA 193 of 2012. The parties are referred as similar in the Complaint before the State Commission. The Appellant No. 1, Dr. Sunny Varghese is the Opposite Party No. 2, the Appellant No. 2 Venniyil Dr. Sukumara Pillai Memorial Hospital as the Opposite Party No. 1 and the Respondent is the Complainant is Ms. Sathyaprabha Sujathan, the wife of deceased.

3. Brief facts of the case are that on 05.02.2000 the complainant's husband Mr. Sujathan (hereinafter referred to as the 'patient') was taken to the Opposite Party No. 1 Hospital with the complaint of pain in throat with blood in the saliva while spitting, as a consequence of having fish curry for dinner on 02.02.2000. The Opposite Party No. 2, the ENT Surgeon examined the patient and X- ray of neck was done. The X-ray showed a fish bone piercing in the left tonsil. The patient was advised for Tonsillectomy which was performed by Opposite Party No. 2 on 06.02.2000 at Opposite Party No. 1 hospital. Thereafter, in spite of the Tonsillectomy surgery, the patient suffered uncontrolled bleeding, therefore on 07.02.2000 he was referred to Medical College Hospital at Kottayam. The patient got admitted there and took treatment till 11.02.2000. Thereafter, patient was referred back to the Opposite Party No. 1, but the re-admission was refused by Opposite Party No. 1. The patient was again re-admitted on 12.02.2000 to the Medical College Hospital, Kottayam. The condition of the patient started deteriorating therefore he was referred to Little Flower Hospital, Angamally wherein the diagnosis of Hemophilia-A was made. However, during treatment the patient succumbed due to Acute Respiratory Distress Syndrome (ARDS) on 01.03.2000. Being aggrieved the complainant (wife of the deceased patient) filed a complaint in the State Commission alleging deficiency in service and medical negligence of the Opposite Parties Nos. 1 and 2 for not diagnosing the bleeding disorder before the Tonsillectomy surgery.

4. The Opposite Parties contested the complaint by filing written versions. Their plea was that the Opposite Party No. 2 was a surgeon having 15 years of experience. According to the Opposite Party No. 2 the patient was brought to the casualty department on 05.02.2000 at 7:45 p.m. and the patient stated the history of accidental fish bone injury while taking food a week back. He did not state family history of bleeding tendency. On examination, there was left tonsillar fossa bleeding but no infection. All necessary blood investigations including Bleeding Time (BT), Clotting Time (CT) and Platelet Count were done. The test reports were within normal limits. Thereafter, under general anesthesia the patient was examined and no fish bone was found. Since, the conservative method to stop the bleeding failed, tonsillectomy and cauterization of the left tonsillar fossa was done. Two days after the surgery, the patient developed bleeding from the left tonsillar fossa, thus suspected some bleeding disorder and the patient was referred to the Medical College Hospital, Kottayam. As per the discharge summary of Medical College Hospital, Kottayam clearly mentioned that on repeated interrogation only, the patient revealed about the family history of bleeding disorder. Thus, the patient was treated as per accepted medical protocols. The patient and his wife (the complainant) have concealed the history of bleeding disorder in the family. If it would have been disclosed, treatment would have taken a different mode. Thus, the diagnosis was not a negligent diagnosis. The Opposite Party No. 2 further contended that the denial of the patient for re-admission was false.

5. The State Commission, after hearing the parties and appraisal of evidence, the medical records held that it was a case of contributory negligence and awarded compensation. Relevant observations of State Commission are reproduced below:

15. ... we find that there is contributory negligence on the part of the patient as well as on the part of the bystanders including the complainant. As the evidence of PW2 the Surgeon of MCH and the statement in Ext. A20 discharge summary from MCH mentions that on 2nd admission at MCH on repeated interrogation the patient revealed family history of bleeding disorder (brother, sister's son ? his children also) . It is the case of the complainant that the deceased was a highly qualified person who had worked abroad. Still he concealed the family history of bleeding disorder. Although PW1, the complainant has testified that there is no such family history and that his children and the relatives were subsequently tested regarding the bleeding disorder and found to be having no such disorder the complainant has not produced any evidence in this regard. The evidence of PW2 , the Professor of ENT in this regard has also not been questioned in the cross – examination. Hence we find that after being aware of the family history of bleeding disorder the patient and the complainant ought to have intimated the same to the treating doctor/ ENT Surgeon/ DW 1. We find that there is contributory negligence on the part of the patient and the complainant in this regard. We assess the contribution of negligence as 50 %.

16. ...xxxx....

17. All the same we find that no objective evidence as to the employment and salary drawn has been furnishing. In the circumstances we find that it would be reasonable to treat his income at the time at Rs. 10,000/- per month. After deducting 1/3rd (one third) for the personal expenses, the balance contribution to the family is taken as Rs. 6667/- . The multiplier can taken as 8 also in view of the fact that he was suffering from hemophilia- A. Hence the total contribution would work out to RS. 6,40,032/- . A sum of Rs. 10,000/- is awarded towards the pain and sufferings undergone and RS. 10,000/- towards the loss of love and affection of the minor children 3 in number , which is not disputed. A sum of Rs.10,000/- is awarded for loss of consortium of the complainant. A sum of Rs. 10,000/- is awarded for treatment and ancillary expenses. A sum of Rs. 5000/- is awarded for funeral etc expenses. Altogether the amount would workout to Rs. 6,85,032/- . With regard to the contributory negligence on the part of the complainant and the deceased 50 % of the above sum is reduced. Hence the complainant will be entitled for Rs. 3,42,516/-. The complaint was pending before this Commission for more than 10 years. The delay was on account of the lapses on the part of both sides and of the system. Hence we are confining the interest to be paid to 5 years. The complainant will be entitled for interest at 7 % for 5 years on the sum of Rs. 3,42,516/- . The complainant will also be entitled for cost of Rs. 5000/-. The opposite parties would be jointly and severally liable to make the payment. The payment would be made within 3 months from the date of receipt of this order failing which the complainant will be entitled for interest at 12 % from 7.1.2012, the date of this order.

6. Being aggrieved by the order of the State Commission the appeal FA 193 of 2012 filed by the Opposite Party No. 2 for dismissal of complaint and the appeal FA 310 of 2013 filed by the complainant for enhancement of compensation.

7. We have heard the parties and perused the material on record.

8. The learned counsel for the Complaint reiterated the evidence filed before the State Commission. He further submitted that the State Commission wrongly held Contributory negligence. The complainant deserves enhancement of compensation.

9. The learned counsel for the Opposite Parties submitted that at the initial stage of examination there was no suspicion that the patient had a hereditary bleeding disorder. Firstly, the patient and his attendants gave the history of bleeding from mouth due to fish bone injury in the throat. There was no profuse bleeding and during the clinical examination the patient and his attendants did not reveal any family history of congenital bleeding. At the relevant time i.e. in the year 2000, based on the reported history, clinical examination and tests undertaken, the tonsillectomy surgery was the standard medical practice, as principle settled in **Bolam's case** [1957] 1 WLR 582. In the instant case after tonsillectomy the bleeding completely stopped till the evening of next day (07.02.2000), but the bleeding restarted and became profuse due to the Haemophilia A. It was then suspected that the patient might be suffering from some congenital bleeding disorder and he was immediately referred by the Opposite Party No. 2 to the nearby Medical College at Kottayam. The Professor and Head of the Department of ENT - Dr. Prathapan Nair (PW3) also opined that the tonsillectomy is the standard treatment in such situation. The learned Counsel relied upon the principles laid down in the decision of the Apex Court reported as, **S. K. Jhunjunwala Vs. Dhanwati Kaur and Anr.** (2019) 2 SCC 282 are squarely applicable to the instant case.

In para 41 of the Judgment, it was held that:

“no medical evidence of any expert was adduced by the Respondent to prove any specific kind of negligence on the part of the Appellant in performing the surgery and also was required to prove that any subsequent ailments were suffered by her only due to improper performance of the conventional surgery. There has to be a direct nexus with these two factors to sue a doctor for negligence”.

10. We have perused the medical record and the relevant medical literature on the subject.

11. In the instant case the evidence of two doctors (PW2 and PW3) gains importance, who were examined by the Complainant. The PW2 in his evidence stated that the patient was suffering from Haemophilia and there was no doctor (Haematologist) available in Kerala to diagnose Haemophilia except in Little Flower Hospital, Angamali. At the relevant time there was no facility for treatment in the Little Flower Hospital and usually Haemophilia patients were referred to Madras (Chennai). The PW-3 Dr. Prathapan Nair from Medical College, Kottayam, in his evidence stated about no facility to treat Haemophilia there. The patient and his attendants had informed about having fish curry for dinner at the time of admission. Had it been that the patient had informed about his bleeding history at the time of the clinical examination on admission, the Opposite Party No. 2 doctor could have avoided the surgery and referred the patient to Madras. When the patient suffered uncontrolled bleeding after the Tonsillectomy surgery, the Opposite Party No. 2 referred the patient to the higher centre for further treatment and to rule out congenital bleeding disorder. We find that the referral was made immediately on occasion to suspect congenital bleeding disorder.

12. The X-Ray did not show fish bone in the throat, therefore exploratory surgery was decided to find out the real cause of the profuse bleeding from the patients mouth. We further note that even the senior faculty doctors at the Kottayam Medical College did not suspect initially the congenital bleeding disorder. It only came to knowledge during the 2nd visit of the patient, and after prolonged questioning by the doctors at the medical college for family history of bleeding disorders. The patient was treated in medical college hospital from 07.02.2000 to 23.02.2000.

The Haematologist was available at the Little Flower Hospital, therefore the patient was referred to him from the medical college. The expert witnesses on behalf of the Complainant, who are the Haematologist in the Little Flower Hospital and the Professor and Head of the Department in the Medical College, Kottayam, categorically stated that tonsillectomy was the standard procedure to be accepted in the given circumstances of the case and that there is no medical negligence of Opposite Party No. 2 in treating the patient. As per the literature on Haematology, the Haemophilia affected person will not show any symptoms or external signs. Haemophilia patient bleeding can occur even by a small trauma. By the conventional testing diagnosis of Haemophilia is difficult. The Haematologists are competent to detect the bleeding disorders and at the relevant time Dr. Prathapan Nair (PW-2) was the only Haematologist available in Kerala. It is evident from the medical record that the patient suppressed the history of previous incidents of bleeding disorder. It is noted that the patient was educated aware person. In the instant case when the X ray did not show (retention of) fish bone in the throat, but still there was active bleeding from the left tonsillar fossa persisted, ENT surgeon was duty bound to find out the cause of the bleeding and to stop the same by removing the tonsil (as per the then standard practice). In fact, initially on 6.2.2000 after the left tonsillectomy, the bleeding stopped till the next day evening.

13. On perusal of medical certificate issued by the Little Flower Hospital the patient was diagnosed as Haemophilia and multiple blood transfusions were given. The death of patient was due to ARDS. The Medical Certificate is reproduced as below:

LITTLE FLOWER HOSPITAL & RESEARCH CENTRE

P. B. NO. 23

ANGAMALY, 683 572, KERALA SOUTH INDIA

Dr. Baboos Peter, MD

Date: 15-03-2000

MEDICAL CERTIFICATE

Mr. Sujathan aged 41 years was brought here with bleeding and hypotension following Tonsillectomy for having accidentally followed a fish bone which resulted in bleeding from the throat. The patient's bleeding continued for which he was referred to the L.F. Hospital Angamaly, for unstopable bleeding. Here he was diagnosed as a case of Haemophilia A. He was given all supportive treatment as well as factor replacement and multiple transfusion yet finally succumbed due to acquired respiratory disasters syndrome which is a complication of recurrent and prolonged hypotension.

Dr. Baboos Peter M.D.

Physician and Haemotologist

14. Thus, in the instant case, congenital bleeding disorder was already existing ailment in the patient, it was not disclosed by the patient or his attendants at the time of the clinical examination during admission or at any time before the Tonsillectomy surgery, the surgery itself was conducted properly, referral for further treatment and specialised tests to rule out bleeding

disorders was made immediately on occasion of suspecting some bleeding disorder etc. Non-disclosure of past history of bleeding disorder by an educated aware patient, while disclosing the incident of fish curry, at the time of admission, non-disclosure of bleeding disorder by the patient before the Tonsillectomy surgery, cannot be held to construe negligence on the part of the Opposite Party No. 2 doctor. The Opposite Party No. 2 doctor could not have been expected to anyhow suspect Haemophilia unless some indication was given by an adult educated aware patient or his attendants. In the instant case, the Opposite Party No. 2 doctor exercised the due diligence to suspect bleeding disorder and to make referral to a higher centre equipped therefor when the bleeding recurred a day after the Tonsillectomy surgery. The diagnosis of Haemophilia needs preferably a Haematologist and a good laboratory set up. However, investigations for Haemophilia (bleeding disorders) at the stage the patient was in the Opposite Party No. 1 hospital was not warranted and also the wherewithal therefor was not available in the Opposite Party No. 1 hospital and in the proximal area. The Opposite Party No. 2 doctor performed the basic haematological investigations before the Tonsillectomy surgery including BT, CT and Platelet Count. At that relevant time (2000), it was not a failure in duty of care and the Opposite Party No. 2 doctor treated the patient as per the standard medical practice.

15. ‘Contributory negligence on the part of the patient’, as held by the State Commission, *ipso facto* implies negligence on the part of the doctor / hospital. In our considered opinion, the State Commission has erred in holding negligence (*per se* or due to contribution by the patient) on the part of the Opposite Party No. 2 doctor / Opposite Party No. 1 hospital.

16. Based on the discussion above, it is not feasible to determine medical negligence in this case. The FA No. 193 of 2012 is allowed and the FA No. 310 of 2013 is dismissed. Resultantly the Consumer Complaint is dismissed.

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DR. S.M. KANTIKAR
PRESIDING MEMBER

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DINESH SINGH
MEMBER