

**BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL  
COMMISSION, MAHARASHTRA, MUMBAI**

**Complaint Case No. CC/02/330**

1. DHNASHRI D. SAVARDEKAR

98/9, ARYA SAMAJ COMPOUND, N.M.JOSHI  
MARG, LOWER PAREL, MUMBAI-13.

.....Complainant(s)

Versus

1. DR. HEMANT KULKARNI

TUSHAR MATERNITY SURGICAL NURSING  
HOME, GOREGAON(E), MUMBAI-63.

.....Opp.Party(s)

**BEFORE:**

**K. B. Gawali PRESIDING MEMBER  
Narendra Kawde MEMBER**

**For the  
Complainant:**

Adv.Karkera

**For the Opp.  
Party:**

Adv.N.D.Jaywant for the opponent no.1.  
Adv.S.B.Prabhawalkar for the opponent  
no.2.

**ORDER**

**Per Mr.Narendra Kawde, Presiding Member**

[1] Consumer complaint is directed against the opponents who are medical professionals for their alleged negligence to remove stones from gall bladder and Common Bile Duct [hereinafter to be referred to as 'C.B.D.'] of the complainant's mother leading to her death, namely, Smt.Geeta Ravindra Mangaonkar [hereinafter to be referred to as 'the patient'].

[2] Complainant's main allegations against the opponents more particularly, opponent no.1, are that :

Conventional surgical operation for removing the stone in the gall bladder and CBD was carried out by the opponent no.1 on failure of removing the stones by the Endoscopic Retrograde Cholangio Pancreatography [E.R.C.P.] method by opponent no.2. Nursing Home and Diagnostic Centre of the opponent no.1 was ill-equipped to deal with removal of stone from C.B.D. as opponent no.1 failed to locate the stone and finally referred the patient in such a condition to KEM Hospital, Mumbai for further operation and management. At KEM Hospital, the patient was operated on 14/11/2001 and 22/11/2001. However, due to deep septicemia, the patient died on 27/11/2001. Father of the complainant too died due to mental shock on 25/11/2001 due to precarious health condition of the patient. The complainant sought directions against the opponents for payment of Rs.15 lacs lum-sum together with costs for alleged negligence leading to the death of the patient.

[3] Opponent no.1 and 2 have resisted complaint by filing written version. It is the version of the opponent no.1 that complainant failed to bring on record any independent expert opinion in support of her claim. It is claimed by the opponent no.1 that he is an experienced General Surgeon from G.S.Medical College of Mumbai and worked as Associate Professor of Surgery and Unit Head of surgery unit at KEM Hospital with sufficient experience to his credit. Repeat sonography report revealed the large stone at lower end of the common bile duct (CBD). Therefore, the patient was advised to undergo Endoscopic Retrograde Cholangio Pancreatography [ERCP]. He managed to refer the patient to the opponent no.2. However, the patient was referred back to him since the stones could not be removed by ERCP method.

[4] Thereupon, he has planned elective surgery for removal of gall bladder after the stone in common bile duct had been dealt with. He had to carry out emergency surgery after having carried investigations as there was obstruction in the common bile duct due to large stone and impacted basket, in the best interest of the patient. It is also the case of this opponent that the patient had tachycardia and there appeared imminent danger of the patient going into septicemia as indicated by clinical parameters and the blood report of the patient. After having obtained the fitness report from physician for general anesthesia, this opponent proceeded to carry out emergency surgery with the full knowledge of the relative of the patient on 08/11/2001. In spite of the best efforts put in, it was not possible to remove the stone from CBD or the impacted basket due to severe inflammation.

[5] He has inserted a 'T' tube to facilitate drainage of bile and prevent cholangitis and worsening of the septicemia to deal with the medical emergency. Post-operative care was duly taken by attending to the leak around the T tube by inserting Ryle's tube in stomach of the patient. Considering the seriousness, the patient was immediately referred to KEM Hospital by prior arrangement with his efforts for further management. There is no remote reference though alleged by the complainant that his nursing home where the patient was operated upon was ill-equipped. According to this opponent, he has taken due care as per standard protocol of the treatment in such complicated cases.

[6] Opponent no.2's version is that on referring patient to him by the opponent no.1 ERCP was carried out for extraction of the stones. Large stone in CBD [of 1.5 cm] was noted. Stone with basket was impacted at ampulla during extraction. Mechanical Lithotripsy with Sohendra Lithotripter in order to break the stone or basket was done. Basket was got broken but stone could not be broken as it was very hard. Hence, he referred the patient back to the opponent no.1 to carry out the open surgery to remove the stones. This opponent has submitted that two types of procedures are available for removal of stones. Those are (a) *endoscopic removal (without surgery)*, if it is not possible alternatively (b) *Open surgery*.

[7] According to this opponent, the patient opted for endoscopic removal of stones. Prior to carrying out endoscopy procedure, limitation of this procedure were fully explained to the patient with failure if any, the patient was required to go for open surgery. Complications of procedure of ERCP have been explained by this opponent stating that while retrieving the large stone of 1.5 cm with dormia basket got impacted at ampulla. Size of stone in CBD was 1.5 cm could not be broken; therefore he did not succeed to remove stones. In such a situation, he has used the instrument called Sohendra Lithotripter is used for breaking stone and the basket in order to release the endoscope from the patient. In case of this patient, basket became useless. Therefore, he referred patient to opponent no.1 for open surgery. which costs around Rs.18,000/- to Rs.20,000/-.

[8] The case was lying in sine-die list for quite a long time which was taken on board for hearing and early disposal. We have heard at length Mr.S.S.Karkera for the complainant, Mr.N.D.Jaywant for the opponent no.1 and Mr.S.B.Prabhawalkar, the learned advocates of the parties. We have carefully perused the record placed before us and documents relied upon by the parties.

[9] Mr.Karkera appearing for the complainant submitted that the opponent no.1 though referred the patient to the opponent no.2 for endoscopic surgery for removal of stone in gall bladder and CBD, yet the opponent no.2 could not succeed. The dormia basket too was broken and the stones could not be removed. Thereupon, patient was referred back to the opponent no.1 for carrying out conventional open surgery to remove the stones. He too failed to do so. The case was complicated which was required to be referred the KEM Hospital for further management. Due to deep septicaemia, the patient died on 27/11/2001 as per the post-mortem report. As pleaded in the complaint, opponent no.1 could not manage to remove CBD stone as planned by open surgery as he failed to trace the location of the stone in the operative process. Opponent no.1 was knowing that the case was complicated and his nursing home was not equipped to deal with such a medical emergency, he would have referred the patient for further operation and treatment to KEM Hospital instead of taking risk to carry out open surgery at his own in his private nursing home. According to Mr.Karkera, opponent no.2 even failed to remove the stones by ERCP and his procedure resulted into complications in to breakage of dormia basket which got stuck up.

[10] Mr.N.D.Jaywant submitted that with full consent of patient and her relatives patient was referred to the opponent no.2 for E.R.C.P.procedure. Mr.Jaywant denied that on referring back the patient to opponent no.1 (after unsuccessful attempt to remove the stones by opponent no.2) that private nursing home of the opponent no.1 was ill-equipped to deal with patient's case. Opponent no.1 has followed with vast experience and expertise and followed standard protocol of the treatment. However, though attempt have been made to remove broken basket and CBD stone Opponent no.1 could not succeed as the location of the stone was such that it was difficult to remove the same.

[11] Adv.S.B.Prabhawalkar appearing for the opponent no.1 invited our attention to the limited pleading against the opponent no.2 appearing in para 8 of the complaint about the failure of opponent no.2 to remove the stones by ERCP procedure. Mr.Prabhawalkar also referred to the provisions of Sec.13(4) of the Consumer Protection Act, 1986 which specify for production of evidence on affidavit to support the pleadings raised in the consumer complaint. Though the opponents have filed affidavit in lieu of evidence under the said procedure yet the complainant failed to bring on record her affidavit in lieu of evidence to support her case though opportunity was available to the complainant to do so when the matter was taken out from sine-die list for hearing and disposal. Since there is no affidavit of the complainant, the State Commission is refrained from considering the case of the complainant for holding deficiency against the opponent and to award any compensation under the provisions of Sec.14(1) of the Consumer Protection Act, 1986.

[12] While we agree with Mr.Prabhawalkar for the limited allegations against opponent no.2, however for the lapse on the part of advocate, complainant should not be subjected to suffer for not bringing on record affidavit in lieu of evidence. Pleadings as appearing in the complaint are supported by complainant's affidavit and the documents available in the complaint compilation would suffice for us to arrive at a correct conclusion instead of harping on technicalities.

[13] We have carefully peruse the pleadings and the hospital case papers available on the record relied by all the parties. It is abundantly clear and admitted position on the record that patient was fit to undergo the ERCP procedure at opponent no.2's clinic. Complications arose on failure of opponent no.2 to successfully carry out ERCP procedure for removal of stones and instead the dormia basket with the help of which the stone was to be crushed got stuck up in broken condition. The patient was referred back for open surgery to the opponent no.1 in such a condition. Opponent no.1 was well acquainted with the medical condition of the patient on referring back from opponent no.2. Going through his written version and affidavit evidence, he had taken decision to carry out open surgery for removal of the stones on 08/11/2001 with the attending physicians pre-operative opinion as reported in the written version which reads as:-

**“Patient can be taken for emergency cholecystectomy with due risk.”**

In spite of this opinion on record, opponent no.1 chose to go ahead with open surgery for removal of the stones and ultimately failed to achieve objective due to severe inflammation. All his efforts to prevent cholangitis and worsening of septicaemia failed in the process as admitted by the opponent no.1. Due to medical emergency leading to serious condition of patient opponent no.1 was finally compelled to refer the patient to the KEM Hospital for further management. At KEM Hospital, the patient was operated in emergency condition for removal of the stones on 14/11/2001 and 22/11/2001. However, the case papers of the KEM Hospital reveal that the patient died on 27/11/2011 at 11.40 a.m. and post-mortem carried out indicates probable cause of death as septicaemia.

[14] No explanation coming forth on behalf of the opponent no.1 as to why as a prudent medical professional why he tried to risk the life of patient by carrying out open surgery for removal of stones and the broken basket when he was unable to trace the location of the stone in CBD. Had he taken the decision to refer the patient to KEM Hospital instead of carrying out operation at his own Nursing Home which was not capable of dealing with complications as the one in case of the complainant. On carefully going through the case papers of his Nursing Home, we do not even find the USG report to indicate presence of stones in gall bladder and in the CBD except the notes appearing in the nursing home case papers to that effect. We are not in agreement with Mr.Jaywant that opponent tno.1 exercised due care and caution to deal with patient. No authentic text material is on record to establish that opponent no.1 has followed standard protocol of treatment.

[15] Though the opponent no.2 relied upon elective procedure for ERCP in the first instance, however, we are unable to trace any documentary evidence in the form of such a consent. However, there is printed consent form in English and Hindi signed by patient's husband which meet well laid down guidelines for three valid and informed consent as ruled by Hon.Apex Court in the matter of **Samira Kohli vs. Dr.Prabha Manchanda & Anr.** , (2008) 2 SCC 1. There is also nothing on record to show that on failure to remove stone in CBD the opponent no.1 followed the standard protocol of treatment by putting in use papillotomy and mechanical lithotripsy as to demonstrate the standard treatment protocol relied upon by the opponent no.2 - **Guidelines on the Management of Common Bile Duct Stones** – authored by E.J.Willianms & ors. In view of this, no negligence as alleged can be attributed to the opponent no.2.

[16] On careful scrutiny, we find that printed consent form signed by the complainant herself with thumb impression [probably of the patient] for carrying out open surgical procedure in the maternity nursing home of the opponent no.1 on 08/11/2001 is available. Therefore, the question

as raised in argument on behalf of the complainant about obtaining free, valid and informed consent to explain to the patient/relatives the nature and procedure, alternatives and effects is not sustainable as against the opponent no.1. Opponent no.1 was fully aware of medical emergent condition of patient with his physical opinion in hand about due risk involved in open surgery, yet he ventured to proceed and finally ended up in failure as he could not trace the location of stone in CBD in the process of surgery which amounts to deficiency in service, per se. Therefore, no independent expert evidence required to be brought on record by the complainant. According to his admission on record, pre-operatively the patient had tachycardia with imminent danger of going into septicaemia as indicated by clinical parameters and blood reports yet without there any emergent management system in his private nursing home proceeded for open surgery. In the best interest of the patient, opponent would have exercised due diligence after assessing the medical condition of the patient to refer to higher facility which he did only when he failed to deal with the patient's condition. Opponent no.1 failed to observe the law laid down by the Hon'ble Apex Court in the matter of - Laxman Balakrishna Joshi vs. Trimbak Babu Godbole & ors. - AIR 1969 SC 128 – regarding medical negligence.

[17] Complainant relied on authority of Hon.Supreme Court in the matter of Kusum Sharma and others vs. Batra Hospital and Medical Research Centre and others , (2010) 3 Supreme Court Cases 480 - where it was held that ***the doctor must have a reasonable degree of skill and knowledge – He must also exercise care of a reasonable degree, neither highest nor very low, in the light of the particular circumstances of the case*** . In this patient' case, opponent no.1 failed to assess and deal with the case with limited resource to his credit. Therefore, negligence has to be attributed to the opponent no.1. Patient finally referred by himself to KEM Hospital in critical condition and though operated there but later on died on 27/11/2001 with probale cause of death as 'septicaemia'.

[18] On the basis of available record of the opponent no.1 Nursing Home and KEM Hospital, we are of the opinion that opponent no.1 failed to exercise due diligence in dealing with the patient leading to medical negligence on his part and therefore no independent expert evidence on behalf the complainant is required to establish. We have considered this case in its entirety and arrived at a conclusion that opponent no.1 is negligent to deal with as ruled in judicial pronouncements referred to in para 16 and 17, supra. Complainant has discharged initial burden by proving negligence of the opponent no.1 on the basis of documents available. We are, therefore, inclined to allow the consumer complaint with award of compensation sought for limited to Rs.10 lacs in lump sum with reasonable rate of interest against the opponent no.1 only. Hence, the order.

## **ORDER**

1. Consumer complaint is partly allowed with costs quantifid to Rs.25,000/- [Rs.Twenty Five Thousand only] to be paid to the complainant by the opponent no.1.
2. Opponent no.1 is directed to pay Rs.10 lacs [Rs.Ten Lacs only] to the complainant with interest @9% p.a. from the date of filing consumer complaint i.e.10/10/2002 within a period of 60 days, failing with enhanced rate of 12% p.a. shall be payable on the amount ordered to be paid till realisation.
3. One set of the complaint compilation be retained and rest of the sets be returned to the complainant.
4. Copies of the order be furnished to the parties free of cost forthwith.

**Pronounced**

**Dated 14<sup>th</sup> August, 2015.**

**[ K. B. Gawali]  
PRESIDING MEMBER**

**[ Narendra Kawde]  
MEMBER**