

**IN THE DELHI STATE CONSUMER DISPUTES REDRESSAL
COMMISSION**

Date of Institution: 01.06.2012

Date of Hearing: 05.02.2024

Date of Decision: 25.06.2024

FIRST APPEAL NO.- 486/2012

IN THE MATTER OF

**MR. MADAN LAL VASHIST (DECEASED),
(THROUGH LR'S)**

- 1. MR. VISHAL SHARMA,
S/O LATE SHRI MADAN LAL VASHISHTA,
R/O C-5/11, KRISHNA NAGAR, DELHI-110051.**
- 2. MRS. RACHNA SHARMA,
D/O LATE SHRI MADAN LAL VASHISHTA,
R/O C-5/11, KRISHNA NAGAR, DELHI-110051.**

(Through: Mr. Nishit Kush & Mr. Sanjay K. Sinha, Advocates)

...Appellant

VERSUS

- 1. DR. AJIT SAXENA,
SR. CONSULTANT UROLOGIST & ANTHOLOGIST,
C/O M/S INDRAPRASTHA APPOLLO HOSPITAL,
SARITA VIHAR, DELHI - MATHURA ROAD,
NEW DELHI-110076.**

(Through: Ms. Priya Kumar, Advocate)

- 2. M/S INDRAPRASTHA APPOLLO HOSPITAL,
SARITA VIHAR,
DELHI-MATHURA ROAD,
NEW DELHI-110076.**

(Through: Mr. Hem Chandra Gupta, Advocate)

...Respondents

CORAM:

HON'BLE JUSTICE SANGITA DHINGRA SEHGAL (PRESIDENT)
HON'BLE MS. PINKI, MEMBER (JUDICIAL)

Present: None for the Appellant.
Ms. Priya Kumar & Mr. Kabir Harpalani, counsel for the
Respondent No. 1.
None for the Respondent No. 2.

PER: HON'BLE JUSTICE SANGITA DHINGRA SEHGAL,
PRESIDENT

JUDGMENT

1. The facts of the case as per the District Commission record are as under:

“According to the complainant he is 82 years Sr. Citizen and an old retired teacher living with his family. On 5.6.07 the complainant experienced some difficulty in passing the urine and certain tests, it was revealed that he had an enlarged prostate and was accordingly admitted with the OP2 at the advices of the OPI on 12.6.07. Complainant was operated upon to procedure as TRUP on 13.6.07 by the OP-1 and was discharged on 16.06.07 but during the stay the complainant repeatedly complained to the OP Falcón pain and the burning sensation but the OP-1 informed that it would subside on its own after sometime. However, the same pain and the burning sensation continued and the condition of the complainant deteriorated and on 19.6.07, he was rushed to emergency of OP-2 where the assistant doctor of the OP-1 examined him and prescribed medicines after consulting Dr. Ajit Saxena, OP-1. During this period the complainant also developed heart problem and was admitted to Escorts Hospital, New Delhi where the tests revealed that he was having urine infection and his urea and creatinine level were alarmingly high. The CT scan also showed that the prostate was still enlarged for which the complainant was operated earlier and one stone measuring 1.2 cms was there in the right ureter. The OP-1 after going through tests reports recommended the stone removal

operation by observing "Patient required right URS + Contact lithotripsy + stenting for right upper ureter calculus". On 27.7.07 the complainant was admitted in Apollo Hospital, New Delhi on 30.7.07, the OP-1 operated him for the stone removal. The complainant and his family members repeatedly requested to show them the stones but the same were not shown to them even after the operation, the complainant suffered from fever, pain and acute weakness. Despite the aforesaid complications the OP discharged the complainant on 8.8.07. The complainant was again admitted in Escorts hospital where on 20.8.07 another CT scan done at EHRIC showed at the presence of the stone at the right ureter and that Dr. Ajit Saxena has not removed the stone for which he was operated upon on 30.07.07 When Dr. Ajit Singh was asked about the stone, he kept silent and advised in writing "Drainage of abscess (multicoated) of RT Kidney". Why he advised only drainage of abscess when the CT scan showed that stone was still there. The stone measuring 1.2 cms could not recur in just 22 days. The complainant was even charged for ureterscopic removal by the OP for a job which they never performed. On 23.8.07 the complainant was shifted to RG Stone Urological Research Institute and the kidney function test was done on 24.8.07 which revealed that the Rt Kidney had almost stopped functioning. The puss was taken out from the kidney to revive it but all in vain and ultimately the kidney of the complainant had to be removed on 30.8.07. That non removal of the stone by the OP and its concealment from the complainant led to all the subsequent complications and the ultimate removal of the kidney. The complainant has undergone lot of pains and sufferings and huge expenses including the inconvenience to other family members of the complainant. As such there is a clear deficiency in the services of the OP not treating the complainant properly. There was no problem with regard to the kidney of the complainant and occurred solely after the so called alleged operation of the removal of the stone. The OPs were in active collusion with each other to fleece the complainant

and were clearly negligent in the performance of their respective duties. Hence the complainant filed the present complaint against the OPs and demanded Rs. 25 lakhs compensation for the damage of the kidney, Rs. 5 lakhs for the pain and agony, for the loss of amenities Rs 2 lakh total 32 lakhs with interest 12% w.e.f. 30.8.07.”

2. The District Commission after taking into consideration the material available on record passed the order dated **03.10.2011**, whereby it held as under:

“The records show that the grievance of the complainant is that during the treatment it was discovered that the complainant had 1.2 cm stone in his right upper ureter. The OP-1 prescribed URS + Contact Lithotripsy and Stenting if required for the right upper ureteric calculi and also insisted to get prior approval for stone removal procedure and its payment from Government of NCT of Delhi. On 27.7.07 the complainant was admitted at the OP-2 for stone removal. On 30.7.07 the OP-1 operated the complainant for stone removal after taking his consent for right ureterorenoscopy and stone removal procedure. But unfortunately the right kidney of the complainant had to be removed a consequence of treatment, negligence and concealment of facts by the OP-1. During the procedure the OP-1 could not find the stone in the ureter, because he had operated the complainant on the basis of 24 days old report and in the mean time stone had flown into the kidney because such stones have very strong tendency to float between kidney and ureter, particularly when it is in the upper portion of the ureter as in the case of the complainant. Hence there is negligence on the part of OP-1 that he could not find the stone in the right ureter of the complainant, he put JJ stent in the ureter as an alternate to Lithotripsy but by all standards stenting is not an alternative to lithotripsy Even though by this procedure OP-1 did not place the stent at right place to widen the ureter and the ureter remained block which damaged the kidney tissues and will result in

permanent failure but even this OP-1 left the useless stent in the ureter hoping that god would help the complainant. At the same time the OP neither told this fact to the complainant nor mentioned in the discharge summary. Instead the OP-1 told the family of the complainant that he had flushed out the stone and result is that numerous complications damage the complainant kidney and it stopped functioning permanently. Failure of the complainant kidney was the direct result of the deficiency in the treatment of OP-1 which resulted ultimately removal of the right kidney of the complainant due to negligent treatment of the OP-1. But it is denied by the OP-I and he contended that stone measuring 1.2 cm was in the right ureter. On being consulted OP-I admittedly prescribed stenting/ lithotripsy. Admittedly advice of OP-1 was “contact lithotripsy+- DJ stenting lithotripsy is the procedure by which the stone is dissolved and for this the fine-tube inserted in the ureter has to reach the stone to dissolve it. In case, it is not possible to reach the stone then a stent can be placed in the ureter to ease the flow of urine. Therefore, the advice of Lithotripsy +- DJ Stenting which was reasonable. OP-1 operated the complainant and inserted a stent which is mentioned even in the discharged summary. In case of the complainant the stone was placed in a position where an intrusive procedure i.e contact lithotripsy had the possibility of causing damage specially due to the advanced age of 80 years of the complainant and therefore the OP-1 as a specialist took the decision of only inserting the stent to ease the flow of urine. The complainant was discharged in a stable condition. Complainant again admitted in Escorts Hospital with complaints of asthma and heart problem. The allegations of the complainant are that he was admitted for urological complaints only. There is no explanation as to why do the complainant in that case did not come to Apollo Hospital the OP-2. Since the OP-1 was a consultant even at Escorts Hospital, he was consulted and OP-1 admittedly advised drainage of abscess of right kidney. The advice was given while the complainant was still admitted in Escorts Hospital. Despite the advice of the

drainage of abscess, the complainant without consulting the OP-1 left the Escorts Hospital against medical advice of drainage of abscess commonly termed as "Left Against Medical Advice". This fact is admitted by the complainant in his affidavit dated 27.7.08 Despite of specific advice in the discharge summary dated 8.8.07, that there should be review with Dr. Ajit Saxena in the OPD in respect of operation for stenting and in case of any new pain or any other complaint there should be Immediate consultation with the OPs, the complainant did not come back to Apollo Hospital for post operative review. The complainant even not admitted the advice of OP-1 at Escorts Hospital and got himself admitted to RG Stone Urological Research Institute. The new doctors at RG Stone Urological Research Institute took the decision of removal of right kidney of the complainant. The removal of the kidney was done without consulting the OP-1 and with no involvement of OP-L. In such circumstances the OP-1 cannot comment on why the kidney was removed or whether it is required to be removed. Even after the kidney was removed and the treatment was given by R G Stone Urological Research Institute, the complainant again admitted on 25.9.07 and was retained in hospital till 18.10.07 with complaint of fever and was treated for drainage of puss by the said hospital. Therefore, this clearly shows that the complainant was suffering from medical problems and these complaints can occur after surgeries without any negligence.

Considering the contentions of both complainant as well as OP it appears that OP-1 has committed the negligence only that he has operated for removal of stone of the complainant without taking the immediate Xray but believed on the Xray report of 24 days back. Though the nature of stone floated to another place, therefore it was not possible to locate the exact place of the stone when the OP-1 operated the complainant for removal of the stone and that is why stone was not removed by the OP-1 and thereafter OP-1 tried to remove the stone by adopting the other

methods either to dissolve the same or to remove the same by other means. Doing this process the OP-1 experimented the method of removal of the stone by one way or the other way and he was not assured about the exact process for removal of the stone as he is an expert urologist. But in spite of this fact we cant held guilty of negligence regarding the damage of the kidney of the complainant and removal of the same because when the complainant admitted in Escorts Hospital for asthma and heart problem, OP-1 was again consulted for his treatment and he advised drainage of abscess of right kidney in the Escorts Hospital but this advice was ignored by the complainant and left against medical advice and many days has been passed due to carelessness of the complainant. The removal of the kidney was done without consulting the OP-1 and with no involvement of OP-1. The age of the complainant was 80+ at the time of operation done by the OP-1 and he was also ailing of prostate disease, therefore the damage of kidney may be with slow process and may not be with the immediate process of operation conducted by the OP-1. Therefore in these circumstances the OP-1 can be held guilty only for negligence of removal of stone and not for the damage of right kidney of the complainant. As such there is some force in the complaint which may be allowed partly.

As far as liability of the OP-2 concerned, he is not liable for any negligent act of OP-1 because he has provided all the facilities to the OP-1 in the treatment of the complainant. He has not committed any negligence towards the treatment of the complainant as such OP-2 is not liable to pay any compensation to the complainant.

We direct the OP-1 to pay Rs. One lakh compensation to the complainant for negligence committed by him towards the operation of removal of stone of the complainant along with Rs. 5000/- cost of litigation.”

3. Aggrieved by the aforesaid order of the District Commission, the Appellant has preferred the present appeal for enhancement of the

compensation whereby submitting that the District Commission has failed to establish deficiency on the part of Respondent no. 2. He further submitted that no substantial reason was given by the District Commission for awarding such meagre amount and also failed to award any compensation for pain and agony undergone by the Appellant.

4. The Respondent no. 1, on the other hand, filed the reply to the present Appeal as well as filed a cross Appeal bearing no. 115 of 2012, whereby denied all the averments of the Appellant and submitted that the District Commission has erred in establishing the deficiency of service on the part of Respondent no. 1.
5. The Respondent no. 2 has also filed the reply to the present Appeal, whereby denied all the allegations of the Appellant and submitted that there is no error in the impugned order as the entire material available on record was properly scrutinized before passing the said order.
6. We have perused the material available on record and heard the counsel appeared on behalf of the parties.
7. A perusal of record reflects that the District Commission awarded a sum of Rs. 1,00,000/- in lump sum for mental and physical agony suffered by the Appellant and Rs. 5,000/- as litigation cost vide order dated 03.10.2011. The Appellant filed the case against the Respondents in the year 2008 and the impugned order was pronounced in the year 2011 i.e. after three years from the date of institution of the complaint.
8. At the outset, we deem it appropriate to refer to the dicta of the *Hon'ble Supreme Court* in the case titled *Charan Singh v. Healing Touch Hospital & Ors.* reported in (2000) 7 SCC 668 which has been relied by the *Hon'ble National Commission* in case titled *AIR France Vs. O.P. Srivastava*, decided on 22.03.2018 wherein it has been held as under:

“While quantifying damages, Consumer Forums are required to make an attempt to serve the ends of justice so that

compensation is awarded, in an established case, which not only serves the purpose of recompensing the individual, but which also at the same time, aims to bring about a qualitative change in the attitude of the service provider. Indeed, calculation of damages depends on the facts and circumstances of each case. No hard and fast rule can be laid down for universal application. While awarding compensation, a Consumer Forum has to take into account all relevant factors and assess compensation on the basis of accepted legal principles, on moderation. It is for the Consumer Forum to grant compensation to the extent it finds it reasonable, fair and proper in the facts and circumstances of a given case according to the established judicial standards where the claimant is able to establish his charge."

9. The purpose of the Consumer Protection Act, 1986 was to protect the interest of the consumers from unfair trade practice adopted by the service providers.
10. On perusal of the impugned order dated 03.10.2011 and the judgment dated 25.06.2024 passed by this Commission in the cross appeal no. 115 of 2012, we find that in the present case, the liability of the Respondent no. 1 is established before the District Commission whereby vide order dated 03.10.2011, it observed that *"Therefore in these circumstances the OP-1 can be held guilty only for negligence of removal of stone and not for the damage of right kidney of the complainant."*
11. Further, in the cross appeal no. 115 of 2012, we find that the deficiency on the part of Respondent no. 1 is to the extent that prior to the purported surgery, he failed to advise the patient to undergo a fresh CT scan in order to accurately determine the exact position of the ureteric calculus., which is crucial for planning any intervention or surgery.
12. Therefore, in our considered view, the District Commission had taken into consideration all the facts and circumstances of the case and awarded

sufficient compensation along with litigation cost in accordance with the facts of the case.

13. In these circumstances, we find no infirmity in the order dated 03.10.2011. Consequently, we are in agreement with the reasons given by the District Commission and fail to find any cause or reasons to reverse the findings of the District Commission. Therefore, we uphold the order dated 03.10.2011 passed by the District Consumer Disputes Redressal Commission VII, Sheikh Sarai, New Delhi-110017.
14. *Resultantly, the present Appeal stands dismissed with no order as to costs.*
15. Application(s) pending, if any, stand disposed of in terms of the aforesaid judgment.
16. FDR, if any, be released in favour of the Appellants.
17. The Judgment be uploaded forthwith on the website of the Commission for the perusal of the parties.
18. File be consigned to record room along with a copy of this Judgment.

(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT

(PINKI)
MEMBER (JUDICIAL)

Pronounced On:
25.06.2024

LR-AJ