

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 48 OF 2014

(Against the Order dated 16/12/2013 in Complaint No. 221/2007 of the State Commission Delhi)

1. SGT CHAMAN LAL & ANR.

S/O. SHRI GIRIRAJ SINGH, R/O. Qtr. No. 972/2, Visawa
Complex, Air Force Station, Viman Nagar,
Pune

2. SMT. ARCHANA SHARMA

W/O. MR. CHAMAN LAL, R/O. V & PO: SHEKHPUR,
DISTT: GHAZIABAD
UTTAR PRADESH

.....Appellant(s)

Versus

1. UNION OF INDIA & 3 ORS.

THROUGH DEF SECRETARY & ORS SOUTH BLOCK,
NEW DELHI-110016

2. DIRECTOR GENERAL MEDICAL SERVICES (AIR)

HQ (R.K. PURAM), WEST BLOCK,
NEW DELHI-110066

3. COL M GANGULY (MR-4141) (NOW RET'D)

SENIOR ADVISOR SURGICAL ONCOLOGY, ARMY
HOSPITAL RESEARCH & REFERRAL, DELHI CANTT-10
NOW C/O. ARMY HQs

4. BRIG BIKRAM KUMAR SINGH, SM, VSM (MR-3240)
(NOW RET'D)

A-116 JALVAYU TOWERS, SECTOR-56,
GURGAON-122011

.....Respondent(s)

BEFORE:

**HON'BLE MR. JUSTICE R.K. AGRAWAL, PRESIDENT
HON'BLE DR. S.M. KANTIKAR, MEMBER**

For the Appellant :

Appeared at the time of arguments:
For Appellants : In Person

For the Respondent :

Appeared at the time of arguments:
For Respondents : Mr. Praveen Kr. Jain, Advocate
with Lt. Col. Sandip Singh &
Wing CDR. Abhijeet Sri Kumar

Dated : 23 Jun 2022

ORDER

Pronounced on: 23rd June 2022

ORDER

DR. S. M. KANTIKAR, MEMBER

1. The instant Appeal is preferred by the Appellants under Section 19(a) of the Consumer Protection Act, 1986 (for short 'the Act') against the impugned Order dated 16.12.2013, passed by the Delhi State Consumer Disputes Redressal Commission (hereinafter referred to as the 'State Commission'), wherein the Complaint was dismissed.

Brief facts:

2. The appellant / Complainant Mr. Chaman Lal joined the Indian Air Force as an airman in Clerk General Duties (CGD) trade on 12.10.1987. He was promoted from time to time and became Sergeant in 1998 and according to him, he has unblemished service record of 15 years. Due to health issues, he was reported sick several times at the Air Force Station, New Delhi. In March, 2001, he had symptoms of pain (off & on) in the upper end of Rt. Tibia. He was treated by the Air Force doctors and specialists of Base Hospital Delhi Cantt., but got temporary relief by painkillers. The Appellant got MRI Scan for his right leg at Max Medical Centre at his own expense on 26.08.2001. That revealed some abnormality with right tibia bone as sign of malignancy in the right knee. He was, thereafter, on 31.08.2001, admitted in the Army Hospital Research and Referral Delhi Cantt. (AHRR), Delhi Cantt10. The CECT chest revealed 3 x 3x 20 mm opacity (nodule) in right lung lower lobe (RLL). It was alleged that the Opposite Parties have not done biopsy/Fine Needle Aspiration Cytology (hereinafter called as 'FNAC') of lung nodule to confirm Tuberculosis. Also, other tests like PCR, Mantoux, Pus the Culture AFB, Bronchoscopy or CT guided FNAC etc. were not done. He was detained in Hospital for 34 days without any treatment. Under local anaesthesia, Surg Cdr B. Fanthome took a True cut Biopsy from the upper part of Tibia (HPE B/2691/01), which was reported as Fibro-muscular tissue only. Thereafter, a bone open cut Biopsy (B/2809/01) was taken on 13.09.2001, which showed Round Cell Tumor (**Ewings**). As advised by the medical Oncologist, 4 CHOP chemotherapies were given between 03.10.2001 to 06.12.2001. The chest lesion became clear. He was further given Radiotherapy from 18.12.2001 to 25.01.2002 to his right leg bone (area 18x12.5 cms) and 2 cycles of chemotherapies from 26.01.2002 to 16.02.2002. The X-ray of leg was taken and MRI was conducted on 06.03.2002. The Radiation Oncologist gave fitness for Knee replacement surgery and the he was discharged with advice to come after 3 months. On 02.05.2002, he reported to the Surgical Oncologist. After investigations and MRI (08.05.2002), he got admitted in Joint Replacement Centre Ward at AHRR for removal of the right tibial bone and some part of the knee joint. It was alleged that without conducting any proper medical tests, he was operated on 03.06.2002 and 7 inches of long bone with knee joint was removed. The Histopathology (HPE) study of the whole resected bone and specimens was done by the Oncopathologist - Lt. Col. R. Lakhtakia, who reported on 11.06.2002, as "no evidence of Non-Hodgkin's Lymphoma (NHL)". The Appellant alleged that he was ill-advised by the treating doctors for removal of affected 7 inches by cancer (NHL) and its replacement. Besides that, he was given extra-large size knee prosthesis. Therefore, the prosthesis got infected since its fitting. Despite pus discharge from the operative site, he was discharged from hospital with low medical category with instructions to report after three months. He did not recover fully, but again fell down in the verandah of AFCC office (AF Comm. Centre), suffered contusion of Rt. Leg. In August 2006, at Apollo Hospital, the pus discharge was diagnosed as due to tuberculosis. In the same condition, he was transferred to Pune on 01.07.2007. The Air Force Authorities did not provide him any attendant facility.

3. He further alleged that due to negligence of the Opposite Parties, he suffered permanent disability attributable to the doctors in the AHRR. He further alleged that he was not given the relevant papers of the Medical Board and therefore he could not file an Appeal before the competent authority. As a result, his medical category was illegally changed from BEE (P) to CEE (P) by the Medical Board. It was illegal and contrary to the opinion of the Oncologist. Thus he suffered more physical pain and mental agony.

Being aggrieved due to the gross negligence of the Opposite Parties, the Appellant filed Consumer Complaint before the State Commission, Delhi. Simultaneously, he filed Writ Petitions before the Hon'ble High Court of Delhi for his promotions and service matters.

4. The Opposite Parties / Respondents stoutly refuted the allegations of medical negligence and any deficiency in service from them during treatment. The Respondents contended that the Appellant was unsuccessful before the Hon'ble High Court.

5. The State Commission dismissed the Complaint being devoid of merits.

6. Being aggrieved, the Appellant filed this Appeal.

7. We have heard the Appellant in person and the learned Counsel for the Opposite Parties. Both have reiterated their evidence filed before the State Commission. Perused the material on record *inter-alia* the medical record and literature on bone tumours, NHL treatment etc .

8. The Appellant argued in person. He vehemently submitted that during his treatment, glaring errors and omissions were made by the treating doctors at AHRR. The principle of *res ipsa loquitur* is squarely applicable in the instant case. The Respondents wrongly diagnosed NHL and kept him under wrong treatment for more than six months (From Mar -Sep 2001). Secondly, after 6 cycles of therapies [Chemo-4/radio-2], the Knee Replacement surgery was performed without carrying out prior investigations like Positron Emission Tomography (PET) scan, Fine Needle Aspiration Cytology (FNAC) or a true cut biopsy. The entire resected specimen HPE was reported as no evidence of cancer (NHL). The Appellant was only 32 years old and at that age, knee replacement was contraindicated when other options like fusion of fibula plus Arthrodesis etc. available. Though there was no cancer, unnecessary excessive doses of the Chemo & Radio radiotherapies were given. He further argued that the Artificial Knee with Prosthesis was defective therefore, his Rt. leg developed signs of cellulitis and it got infected. Later on, it was diagnosed to be Tuberculosis (TB) instead of NHL (Cancer). Therefore, due to negligence of Respondents, he became crippled for life (on crutches) and thus only possible treatment for him remained was above knee amputation of the leg. He further submitted that more than 17 years, he is under such pathetic condition. He further argued that his promotion had been denied despite his legal fight up to Hon'ble Supreme Court. In support of his arguments, he filed relevant medical texts from the text book of Harrison's Principles of Internal Medicine and the Short Text Book of Surgery by Love and Bailey.

9. The learned Counsel for opposite parties during argument reiterated the treatment given to the Appellant by the team of doctors as per standard protocol. There was no negligence or deficiency on their part. He brought our attention to the HPR reports, the CT and other radiological findings on NHL and its treatment.

Observations and Discussion:

10. The Appellant prayed following reliefs (relevant paragraphs):

1. To set aside the impugned Order of State Commission and prayed to award Rs. 99,99,000/- as a compensation from the OPs for the loss of the limb and thereby losing the earning capacity permanently as well as for keeping an attendant for his looking after .

2. To call for the Original Record from Opposite Parties along with Complainant's Bone and Slides (B/2809/01 dated 19.09.01/02.10.2001 and B/1872/02 (1-6) dated 11 Jun 02 and for Re-Examination, Expert's Opinion including Forensic Lab Test of X-Ray dated 08 May 02 (2652)/Removed Bone along with other requisite records filed by Opposite Parties as Annexure R-1 at page 18 of Written Statement In the present case and also to take necessary action against OPs for deposing wrong particulars on affidavit and misleading the court in accordance with law.

3. To award further cost for future treatments, mental agony and harassment caused to the complainant and all members of his family as Appellant is the only bread winner.

4. To award *pendite lite* and future interest @ 24 % per annum on the amount spent by complainant and other losses caused/suffered by him including loss of married and family life due to the negligent act of Opposite Parties.

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11. The grouse of Appellant/ Complainant is that due to negligence of Respondents, he became handicapped. Though, he was granted extension of service period but he was denied promotion to the next higher rank of Junior Warrant Officer (JWO) with effect from 01.07.2007, whereas his junior counterparts have already been promoted w.e.f. same date. It is pertinent to note that on 25.07.2017, the Hon'ble Supreme Court in the Civil Appeal No. 8834 of 2015, filed by the Appellant herein, has already decided the issue of his promotion. It was held as below:

“The appellant, therefore, after exchanging correspondence with the department, filed a writ petition before the Delhi High Court bearing Writ Petition No.3712/2003, praying for an enquiry against the concerned doctors, to retain him in service and to grant him promotion as usual or to compensate him for causing permanent disability attributable at par with battle causality. That petition was disposed of with liberty to the appellant to make representation to the authorities and with a direction to the authorities to consider the same expeditiously. Pursuant to such representation, the appellant was granted extension of service of six years up to 31st October 2013 and again for another six years till 31st October 2019, as a result of which the appellant continues to hold the post of sergeant.”

Therefore, we are not inclined to make any observation on the issue of promotion and his service matters.

12. Whether Appellant was a ‘Consumer’ or not under Section 2 (1) (d) of the Act, 1986?

The Appellant relied upon the decisions of Hon’ble Supreme Court in **Laxman Thamappa Kotgiri vs. GM Central Railways & Ors.**[1]; **Indian Medical Association vs. V. P. Shantha**[2]; **Sarita Garg vs. Director National Heart Institute**[3] and upon the decision of this Commission in **Union of India vs. Wg Cdr KK Choudhury (Retd.)**[4], decided on 08.04.2008. Therefore, relying upon the law laid down from the above cited judgments, in our view, the Appellant was a ‘Consumer’.

13. In the instant case, on 26.08.2001, the patient got done MRI at Max Med Centre which a "variegated lesion in the proximal tibial epimetaphysis, causing associated cortical break, soft tissue: extension along with minimal joint effusion. It gave differential diagnosis as mitotic pathology such as Osteogenic Sarcoma. Thereafter, he underwent true cut biopsy at AHRR– the HPE final diagnosis was **NHL** and admittedly Appellant underwent 6 cycles of Chemo-Radio therapies. FNAC/Biopsy the lung nodule was not mandatory to determine the spread of the cancer. After 4 cycles the patient responded well and the lung nodule disappeared. Thus in our view, it was neither wrong diagnosis nor wrong treatment.

14. After 6 cycles, his condition was reviewed by the Oncology team. The MRI conducted on 08.05.02 revealed that "the marrow of Right Tibial tuberosity and proximal 1/3 of the tibia was replaced by tumour, it was extending up to sub-articular region with involvement of the joint space and there was antero-medial breach of the Cortex indicative of a fracture in the affected bone with involvement of medial Patellar retinaculum. Therefore on the basis of radiological findings, it was mandatory to operate and remove (excision) the residual lesion and extension of tumour in proximal Rt. Tibia. In June 2002, at AHRR surgery for excision of proximal right tibia and replacement with tumor prosthesis was performed. The surgery was not done forcibly, but it was done after obtaining the informed consent of the Appellant. It is pertinent to note that the Respondents have used the advanced technology. The affected Tibial bone was removed and replaced with imported, expensive and customize HMRS titanium prosthesis at the cost of Rs. 5 Lakh (borne by Govt.). It prevented the future complication like complete displaced fracture and above knee amputation of his Rt. Leg. After limb salvage surgery the entire specimen was sent for Histopathology examination (HPE). It was reported by an Onco-pathologist Lt. Gol R Lakhtakia that the cut margin of the bone and marrow are free of tumor. In our view, the limb salvage surgery was performed in the interest of patient. It was the due diligence of team treating doctors at AHRR, which avoided amputation of Rt. Leg. The Appellant, thereafter, could walk on his own feet rather than with an artificial Rt. foot.

15. We note that as the Appellant has been posted to Pune at his own request where all high quality medical facilities were available. The Complainant subsequently developed infection at surgical site which was managed conservatively with antibiotics and local wound care. He was found positive for Tuberculosis (TB) and was **given ATT from Aug 06 to Oct 07**. At Command Hospital Southern Command Pune, an Orthopedic Surgeon Gp Capt PK Agarwal of AFMC/CH(SC) opined that it was Septic loosening of joint and need to undergo Revision Surgery. However, patient had continuous discharge from sinuses in front of the right leg. On 25.08.2015, Brig Yogesh Sharma, Prof & HOD Ortho at AFMC Pune had examined the Appellant and noted the chronic discharging sinuses in leg.

16. Let us examine whether diagnosis of NHL was wrong. We have perused the HPE reports - the first biopsy (B/2809/01 dtd. 19/09/2001) and another report the 2nd excision biopsy (tumor) (B/1872/02 dtd. 11/06/2002) done after treatment. Both the HPE reports are reproduced as below:

(i) The histopathology report: **B/2809/01 dtd. 19/09/2001***Gross Examination*

Specimen I: Bone cortex specimen are three bony tissue bits largest measures 1x0.8x0.5 cms, Smallest measure 0.3 cms submitted entirely.

Specimen II: True Cut are two small grey brown tissues bits largest measures 0.8 cms entirely.

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Differential Diagnosis: Small cell osteosarcoma or non Hodgkin's lymphoma?

02 October 2001- Cell is LCA Positive & Mic – 2 Negative, consistent with

Non Hodgkin's Lymphoma

(ii) The histopathology report: **B/1872/02 dtd. 11/06/2002** reported by Lt Gol R Lakhtakia, Oncopathologist :*Gross Examination*

Specimen I: Marrow from the distal end of Tibia – Bony specimen 0.6 ml in total volume.

Specimen II: Skin Biopsy – single tissue bit lines by skin measures 9x1x0.6 cm.

Specimen III: Tibia upper 1/3rd Specimen of upper 1/3rd of tibia measures 12x6x5 cms.

Microscopic Examination:

- *Skin Biopsy specimen 2 (2,3) is unrevealth except for mild inflammation.*
- *Multiple sections of the tibia – cortex and medulla (specimen 3) (4,5,6) and marrow from the distal end of tibia (Specimen) received separately show normal bone and medulla.*

“There is no evidence of NHL in these specimen.”

It is an admitted fact that on 03.06.2002, the residual knee bone was removed, and its HPE report dated 11.06.2002 revealed “No Cancer (NHL)” and later on the Appellant developed discharging pus sinuses, which was diagnosed as “TB” by Indraprastha Apollo Hospital, New Delhi in August 2006. Therefore, in our view, after span of years, the development of TB can't be attributed to the diagnosis/ treatment of NHL. It is known that after cancer treatment by chemo/radiotherapy, due to immunosuppression, the patient may develop several infections even TB also. It was neither negligence nor deficiency in service of the Opposite Parties. Both the reports clearly show confirmed diagnosis of NHL of upper end of the Rt Tibia with a nodule in lung. The HPE study from residual tissue was free from tumour and shall not be misinterpreted as ‘no cancer’.

17. As per standard of practice initially patient was treated by the Oncology team with Chemo / Radiotherapy. Still there was evidence of residual disease in his affected leg after the 6 cycles of treatment. It was confirmed by MRI (6.3.2002) and by radiological findings. The subsequent MRI dated 2.5.2002 showed cortical break possibly due to tumour or its extension into the knee joint. The Appellant still had pain and tenderness in his leg and he was unable to walk with weight bearing on his affected leg. If the condition remains untreated further, it could result in to complete fracture and may end up with amputation of the leg or a recurrence of residual NHL to fatal stage. Thus, in our view, the decision of the Oncology team to perform excision of entire affected part of knee bone was accepted procedure. It was not a deviation of

standard of practice. We do not see any fault wherein, the Complainant was operated on 3.6.2002 and was discharged from the hospital after complete healing of the complainant's wound on 26.7.2002.

18. We further note that since the complainant approached Hon'ble High Court of Delhi by way of Writ Petition No. 3712/2003 on the ground that he could not bear the kind of treatment meted out to him. The Hon'ble Court, vide order dated 24.02.2004, directed the Opposite Parties to arrange for treatment of Complainant at AIIMS. On 06.12.2004, the Ortho Surgeons at AIIMS had diagnosed it as infection with cellulites and Proximal Migration of Patelia-Tendon and advised re-attachment. It was not done as the Opposite Parties did not deposit the money at AIIMS.

19. The Opposite Parties stated that even before operation the Appellant was not a fit soldier and was unable to walk with weight bearing on his affected Right Leg. His prayer (claim) is highly unreasonable, arbitrary. It is interesting to note that the Appellant was drawing salary of Rs.10,000/- per month, but he wants claim of Rs.10,000/- per month to keep an attendant.

20. We further note that on 02.06.2006, the Hon'ble High Court of Delhi permitted Appellant to get himself treated at Indraprastha Apollo Hospital. After passage of time, wound discharge was confirmed to be Tuberculosis, which was possible due to immunosuppression in the patient after undergoing cancer therapy. In the instant case, primarily it was NHL, not TB.

21. Regarding mode of treatment, we would like to rely upon case of **Achutrao Haribhau Khodwa and Ors. v. State of Maharashtra and Ors**[5], wherein the Hon'ble Supreme Court held that **in the very nature of medical profession, skills differs from doctor to doctor and more than one alternative course of treatment are available, all admissible.**

In **Jacob Mathew's case**[6], it reads as under:

“When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions.”

22. To conclude, it is pertinent to note that during proceedings before the State Commission, it took an expert medical board opinion from Maulana Azad Medical College (MAMC), which ruled out negligence in this case. The HPE diagnosis of true cut biopsy as NHL/Small cell tumour was correct. The treatment by six cycles of Chemotherapy and radiotherapy was responded well. Pulmonary nodule (? Metastatic) disappeared after the 4 cycles of chemotherapy. However, there was radiological & MRI evidence of residual tumour at the affected leg; the team of doctors of Oncology, Joint replacement surgery and Radiotherapy took a joint decision to save the Complainant's limb which could avoid amputation of leg so that he can walk on his own natural feet rather than an artificial foot. It was the specialized surgery, available at AHRR and very few advanced Centers in India. The affected diseased bone was removed and replaced with an imported customized HMRS Titanium Prosthesis at a cost of 5 lacs to the Government. The treatment was totally done by AHRR as voluntarily in nature. Thus, Complainant's limb was saved. In our considered view the team of doctors at AHRR has treated the patient as per the reasonable standards and care. There was neither medical negligence nor deficiency during treatment from the Opposite Parties.

23. Though, we appreciate the pain of the Appellant, but then, that by itself cannot be a cause for awarding damages for his sufferings. We do not find merit in the case. The instant First Appeal is, therefore, dismissed.

The Parties to bear their own costs.

[1] (2007) 4 SCC 596

[2] (1995) 8 SCC 655

[3] (2004) SCC 56

[4] FA No. 259 of 2007

[5] (1996) 2 SCC 634

[6] (2005) SSC (CrI) 1369

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R.K. AGRAWAL

PRESIDENT

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DR. S.M. KANTIKAR

MEMBER