

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

REVISION PETITION NO. 2453 OF 2016

(Against the Order dated 05/05/2016 in Appeal No. 316/2013 of the State Commission Punjab)

1. ARTI

W/O. BALWINDER S/O. SATPAL R/O. WARD NO. 12,
TUNGWALI ROAD, NEAR LAKKAR ARA, BHUCHO
MANDI, TEH. NATHANA,
DISTRICT-BATHINDA
PUNJAB

.....Petitioner(s)

Versus

1. DR. GAGANDEEP GOYAL & 3 ORS.

R.GAGAN GASTRO CARE HOSPITAL, 80FT. ROAD,
BALMIKI CHOWK NEAR SPORTS STADIUM,
DISTRICT-BATHINDA
PUNJAB

2. DR. SANJAY GARG,

DELHI NURSING HOME, MULTI SPECIALTY HOSPITAL
AND INSTITUTE OF LAPAROSCOPIC SURGERY, BIBI
WALA ROAD, NEAR OLD BUS STAND,
DISTRICT-BATHINDA
PUNJAB

3. NEW INDIA ASSURANCE CO. LTD.

THROUGH DIVISIONAL BRANCH MANAGER,
DIVISIONAL THE MALL ROAD,
DISTRICT-BATHINDA
PUNJAB

4. UNITED INDIA INSURANCE CO. LTD.

THROUGH ITS SR. BRANCH MANAGER, 54, JANPATH
CONNAUGHT PLACE,
NEW DELHI

.....Respondent(s)

BEFORE:

HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER

FOR THE PETITIONER :

MR RIJU MANI TALUKDAR, (HAVING AUTHORITY
LETTER) ALONG WITH MR BALWINDER, HUSBAND
OF THE PETITIONER

FOR THE RESPONDENT :

FOR RESPONDENT NOS.1 & 2 MR K G SHARMA, ADVOCATE
FOR RESPONDENT NO.3 NONE
FOR RESPONDENT NO.4 MS NANITA SHARMA, ADVOCATE
WITH
MR FEEK UL FAROOQ, ADVOCATE

Dated : 31 August 2023

ORDER

1. This revision petition under section 21 of the Consumer Protection Act, 1986 (in short, the 'Act') assails the order dated 05.05.2016 in First Appeal No. 316 of 2013 of the State Consumer Disputes Redressal Commission, Punjab, Chandigarh (in short, the 'State Commission') allowing the appeal and dismissing order dated 28.01.2013 of the District Consumer Disputes Redressal Forum, Bhatinda (in short, the 'District Forum') in Consumer Complaint no. 216 of 2012. The impugned order disposed of 3 connected First Appeals (Nos. 316/2013, 323/2013 and 324/2013) arising from the same order of the District Forum.

2. The brief facts of the case, according to the petitioner, are that she was incorrectly diagnosed and wrongly operated upon by the respondents for the removal of gall bladder and insertion of a stent in the central bile duct (CBD) of the liver instead of a perforated appendix which resulted in medical complications requiring repeated hospitalization and resulting in her getting bedridden after incurring huge expenditure of Rs 2,54,000/-. It is stated that on 26.04.2011 she had consulted respondent no 2, Dr Sanjay Garg in Delhi Nursing Home, Bibi Wala Road, Bhatinda for pain in the right side of the abdomen and was advised ultrasound test based on which removal of gall bladder stones through laparoscopy was advised within 3-4 months. As she had an infant child, she again consulted respondent no. 2 on 20.11.2011 and was similarly advised after another ultrasound test. On 11.01.2012 she was advised emergency laparoscopic operation and was admitted under the said Dr Garg/respondent no.2. However, instead of laparoscopic surgery to remove the stones from the gall bladder, the gall bladder was itself removed without the consent of the petitioner or her husband and the petitioner was discharged on 13.01.2012. Due to persistence of pain she again visited the hospital on 15.01.2012 where she was admitted from 15.01.2012 to 25.01.2012. Several tests including another ultrasound test were done on 20.01.2012 and she was referred to respondent no. 1, Dr Gagandeep Goyal for MRI and CT Scan. Respondent no. 1 inserted a stent in the Central Bile Duct (in short, 'the CBD') to close the leakage of bile. She was discharged on 25.01.2012 but states that there was no relief from the pain in the abdomen.

3. On again consulting respondent no 1 on 31.01.2012, she was referred to Pioneer Imaging & Diagnostics, Street No. 3, Bibi Wala Road, Bhatinda and for tests in Dr Monika's Lab. Thereafter, she was referred to PGI, Chandigarh. On 02.02.2012 the petitioner was admitted to Daya Nand Medical College (DMC) & Hospital, Ludhiana under Dr Satpal Singh Virk, a Gastroenterology Surgeon who diagnosed her with post Cholecystectomy Biliary Stricture with symptoms of pain and distension in abdomen, vomiting and fever, swollen small gut, free fluid in pelvis and ERCP stunting active leak of bile near clip site. On 04.02.2012 the said Dr Virk operated upon her to drain the pus and for correction of bile leakage. The petitioner was discharged on 11.02.2012 and consulted DMC, Ludhiana on 4 occasions between 17.02.2012 and 10.03.2012. She was again operated on 13.03.2012 for pain in the abdomen and remained admitted till 17.03.2012. Thereafter, she consulted with doctors in DMC, Ludhiana on 4 more occasions.

4. The petitioner contends that respondents 1 and 2 were negligent in diagnosing her and operating on her and that there was negligence in the treatment provided including the surgery which caused an expenditure of Rs 2,54,000/- on medicines, tests, doctors, diet, etc. and she had to be referred to DMC, Ludhiana. The initial wrong diagnosis and treatment caused her to undergo protracted treatment and has left her unable to move and do normal activities. She, therefore, claimed compensation of Rs 15 lakhs for loss of physical health, mental tension and permanent disability apart from other amounts such as fees charged by respondents 1 & 2.

5. The District Forum which she approached by way of a consumer complaint vide order dated 28.01.2013, allowed the complaint against opposite parties 2 and 4 with cost of Rs.15,000/- and dismissed *qua* opposite parties 1 and 3 and directed opposite parties 2 and 4 to pay Rs.3,00,000/- as compensation due to the negligence of opposite party no.2. This order was challenged by her before the State Commission. The impugned order of the State Commission has held that the District Forum erred in holding OP No. 2/respondent no. 2 herein to be medically negligent since post operative complications do occur and cannot be ascribed to doctors. This order is assailed by way of this revision petition.

6. I have heard the learned counsel for both the parties and perused the records on file carefully. Both sides also filed their written synopsis of arguments. However, written synopsis has not been filed by respondent nos. 3 and 4.

7. The order of the District Forum held that the complaint was accepted against opposite party no. 2 and 4 and dismissed *qua* opposite party nos. 1 & 3. Costs of Rs 3 lakhs were imposed on opposite party nos. 2 & 4. The order notes the affidavit of Dr. Satpal Singh Virk, Professor and Head, Surgical Gastroenterology Department, DMC & Hospital, Ludhiana that perforated appendix is a different disease which has no link with gall bladder surgery and that in a small number of cases of laproscopic cholecystectomy, biliary leak can occur for which treatment is ERCP and CBD stenting which requires post operative care. The order reads as under:

...As per Consumer Protection Act and Medical Profession by M.K. Balachandran, Department of Consumer Affairs, Government of India, in association with Indian Institute of Public Administration, New Delhi, the duties of a doctor are:

Doctors generally have certain duties towards their patients. Some of the important duties are:

- to exercise a reasonable degree of skill and knowledge and a reasonable degree of care;
- to exercise reasonable care in deciding whether to undertake the case and also in deciding what treatment to give and how to administer that treatment;
- to extend his service with due expertise for protecting the life of the patient and to stabilize his condition in emergency situations;

- to attend to his patient when required and not to withdraw his services without giving him sufficient notice;
- to study symptoms and complaint of the patient carefully and to administer standard treatment;
- to carry out necessary investigations through appropriate laboratory tests wherever required to arrive at a proper diagnosis;
- to advise and assist the patient to get a second opinion and call a specialist if necessary;
- to obtain informed consent from the patient for procedures with inherent risk of life;
- to take appropriate precautionary measures before administering injections and medicines and to meet emergency situations;
- to inform the patient or his relatives the relevant facts about his illness;
- to keep secret the confidential information received from the patient in the course of his professional engagement;
- to notify the appropriate authorities of dangerous and communicable disease;

17. The opposite party no.2 has not complied with aforesaid duties first of all he did not carry out necessary investigations prior to giving treatment to the complainant and thereafter he failed to advise and assist the patient to get a second opinion and call a specialist. The version of the opposite party no.2 that he referred her to PGI Chandigarh, on her request whereas when the complainant did not feel any relief from the pain despite treatment given by opposite party no.2 for about 11.12 days, it was the duty of opposite party no.2 that he should have himself referred the complainant to higher institute immediately or have taken the second opinion to diagnose the disease of the complainant but he did not take care of the patient. The opposite party no.2 has deposed in paragraph no.3 of his affidavit Ex R 3 that the complainant was complaining about pain, the replying deponent did not find any problem with the stent so the patient was advised for re-evaluation of symptoms with the opposite party no.1 who did the surgery. If the tests would have been conducted, the appendicular disease must have come forward. Hence, due to negligence of opposite party no.2 the treatment of the complainant was delayed and she suffered a lot physically as well as financially.

18. The objection taken by the learned counsel for the opposite parties that this forum has taken cognizance of the complainant against the doctor in gross violation of the directions of the Hon'ble Supreme Court of India in *Martin F D Souza vs Mohd Isfaq*

wherein all the Consumer Forums and the Courts have been directed to first establish prima facie case of medical negligence against the hospital/ doctor by referring the matter to an expert is devoid of merit in view of the law laid down by Hon'ble Supreme Court in the case titled ***Kishan Rao vs Nikhil Super Speciality Hospital and Anr.*** Civil Appeal no. 2641 of 2010 (Arising out of SLP (C) no. 15084 /2009) D/d 08.03.2010 RCR (2) 2010 wherein has been held:

(a) Consumer Protection Act, 1986, Section 23 and 3 –

Medical negligence – claim of petitioners cannot be rejected only on the ground that expert witness was not examined to prove negligence of doctor. It is not required to have expert evidence in all cases of medical negligence.

(H) (i) An expert witness in a given case normally discharges two functions – The first duty of the expert is to explain the technical issues as clearly as possible so that it can be understood by a common man – the other function is to assist the *fora* in deciding whether the acts or omissions of the medical practitioners or the hospital constitute negligence.

(H) (ii) In most of the cases the question whether a medical practitioner or the hospital is negligence or not is a mixed question of act and law and the *fora* is not bound in every case to accept the opinion of the expert witness (1988) 2 SCC 602, (1990) 3 SCC 682 relied.

19. Hence, keeping in view the facts, circumstances and the evidence placed on file by the parties, this Forum is of the considered opinion that no negligence has been proved on file against opposite party no.1 as he performed the procedure of Laproscopic Cholecystectomy on 11.01.2012 and proper investigations and thereafter discharged the patient on 15.01.2012 in satisfactory condition after getting scan done on 13.01.2012 and when she visited him again due to pain in abdomen, her further scan was done on 19.01.2012 and thereafter she was referred to opposite party no.2. The opposite party no.2 did not get any investigations done prior to treatment and thereafter he kept on sitting and showed carelessness in giving treatment to the complainant by taking it guaranteed that the problem does not relate to stent. When the complainant was under his treatment at that particular time, he was duty bound to get the second opinion and immediately refer her to higher institute if she was suffering from abdomen pain even after the operation done by opposite party no.2. Due to delay in referring the patient, her problem exaggerated for which she has undergone for two operations at DMC Ludhiana and still under treatment of that hospital. Thus, due to this act of opposite party no.2, the complainant suffered physical pains and financial loss which amounts to negligence on his part. The support can be sought by the law laid down by the Hon'ble Supreme Court in the case titled 2009 (30 RCR (Civil) page 174 ***Nizam Institute of Medical Sciences vs Prasanth S Dhananka and Ors*** wherein it has been held:

Evidence Act, Section 101, 102, 103 – Medical Negligence Onus to prove – held :-

In a case involving medical negligence, once the initial burden has been discharged by the complainant by making out a case of negligence on the part of the hospital or to the attending doctor concerned the onus then shifts on to the hospital to satisfy the Court that there was no lack of care of diligence 2004 (4) RCR (Civil) 512 (SC).

20. With utmost regard and humility to the authorities cited by the opposite parties, they are distinguishable on facts.

21. In view of what has been discussed above, this complaint is accepted against opposite party nos. 2 and 4 with cost of Rs.15,000/- and dismissed *qua* opposite party nos. 1 and 3. The opposite party nos. 2 and 4 is directed to pay Rs.3,00,000/- as compensation which includes treatment expenses and for physical pains and sufferings which she has suffered due to negligence on the part of opposite party no.2.

22. The compliance of this order be made within 45 days from the date of receipt of copy of this order”.

[Emphasis added]

8. The State Commission relied upon this Commission’s order in ***Tilat Choudhary & Anr. Vs. All India Institute of Medical Sciences & Anr.***, IV (2012) CPJ 610 (NC) dated 09.11.2012 and held that:

11 CBD injury is a well-known complication of laparoscopic cholecystectomy procedure (LCP). It must be presumed that incidence of CBD injury is a well-known risk, when patient undergoes LCP. Same cannot be correlated as the act of negligence or carelessness on part of operating surgeon. Since CBD injury is known complication hence OP no. 1 cannot be said to be medically negligent in this case as OPs no. 1 & 2 were duly qualified and experienced doctors. There is no rebuttal evidence by the complainant that OPs no. 1 & 2 had no requisite experience in above surgery and in putting the stent to prevent the bile leakage respectively. Mere occurrence of some known complication cannot be said to be medical negligence in our opinion. No doctor can assure recovery to any patient. A doctor if qualified and followed the standard medical procedure in treating the patient cannot be said to be medically negligent. The District Forum wrongly held OP no. 2 to be medically negligent simply on account of some complication as known complication do occur in the procedures. If standard medical practice has been followed in the procedure, then doctor cannot be said to be medically negligent. The District Forum has not appreciated the facts of the case in proper perspective. The order of District Forum cannot be sustained in this appeal, being unsustainable and erroneous.

12. As a corollary of our above discussion, we hold that no medical negligence or deficient service on the part of Ops no. 1 and 2 has been established in this case by the complainant. Consequently, we accept appeal no. 316 of 2013 filed by OP no. 2 and also accept First Appeal no. 324 of 2013 filed by OP no. 4 and set aside the order of the District Forum, Bhatinda dated 28.01.2013. We dismiss the first appeal no. 323 of 2013 filed by the complainant for enhancement of amount of compensation resulting into dismissal of the complaint filed before District Forum.

[Emphasis added]

9. Learned counsel for the revision petitioner argued that on 26.04.2011 the petitioner along with her husband went to the hospital of respondent no.2 (Dr Sanjay Garg, Delhi Nursing Home, Bathinda) for check up and treatment for pain in right side of abdomen region. The respondent no.2 advised the petitioner to undergo ultrasound scan done. Respondent no.2 advised for operation of Gall Bladder to remove small stones within 3-4 months and that the stone could be removed by laparoscopic surgery. The petitioner got the ultrasound scan done and the respondent no.2 advised for operation through laparoscopy, but the petitioner was not in a position for the operation of the gall bladder and she was blessed with a child and the child was about 10 months old at that time. Again the petitioner visited the hospital on 11.01.2012, the respondent no.2 advised for emergency operation to remove the stones from gall bladder and the respondent no.2 is an expert in such type of surgeries. The petitioner deposited huge amount of money for the operation and the operation was conducted in an inadequate negligent manner and the gall bladder was removed in the said operation that to without the consent and knowledge of the complainant or her husband and the patient was discharged from the hospital without any relief on 13.01.2012 afternoon after prescribing antibiotic and pain killer medicines. On 15.01.2012, the petitioner again visited the hospital with severe pain in the abdomen and complications. On 20.01.2012 the petitioner was referred by respondent no.2 to respondent no.1 Dr Gagandeep Goyal, Gastroenterology for check-up and treatment and it was assessed that complications developed due to leakage of bile from CBD (Main Liver Duct) as per the CT scan done on 20.01.2012. The respondent no.1 inserted CBD stent for closing the leakage of bile. The patient was discharged on 25.01.2012. The patient again visited the hospital of respondent no.1 on 31.01.2012 due to severe pain in the abdomen. The patient was referred to Pioneer Imaging and Diagnostics for lab test and on 02.02.2012, the respondent no.1, in consultation with respondent no2, referred the patient to PGI, Chandigarh.

10. The patient was got admitted on 02.02.2012 at Daya Nand Medical College and Hospital, Ludhiana for further treatment of complications borne out due to the wrong surgery and incorrectly inserted CBD stent. The patient remained admitted in hospital as an indoor patient till 11.02.2012. A scan was conducted on the patient and after going through the scan on

04.02.2012, a major operation of the petitioner was done by Dr Satap Singh Virk, M S (surgery) was removed the pus, and the fluid which had overflowed and collected in the abdomen and due to bile leakage. The petitioner was discharged on 11.02.2012. The petitioner again went for check-up on 10.03.2012 at DMC Ludhiana due to pain in the abdomen. The petitioner was again operated at DMC Ludhiana on 13.03.2012 and remained in the hospital upto 17.03.2012 and thereafter the petitioner visited the DMC hospital on numerous occasions.

11. Learned counsel for the petitioner submits that respondent no.2 Dr Sanjay Garg is not a laparoscopic surgeon and is not competent to conduct such laparoscopic surgery. He further submits that the respondent no. 2 failed to produce any requisite documents regarding his qualification and experience in laparoscopic surgery in modern technique and he is only a M S of General Surgery. Counsel for the petitioner further submits that respondent no.1 Dr Gagandeep Goyal does not hold any M CH Degree and experience in Gastroenterology Laparoscopy Surgery and he has only produced the certificate of MBBS and MD in Medicine. The learned counsel further submits that the laparoscopic surgery was done without any tests such as BT, CT, TLC, DLC, SGOT, SGPT, Blood Sugar, Blood Urea and without any requisite x ray and ultra sound on the day of operation. Learned counsel further submits that the petitioner has already spent an amount of Rs.5,00,000/- on medicines, diet, fees of the doctors.

12. *Per contra*, learned counsel for respondent argued that on 26.04.2011, when the petitioner herein visited Dr Sanjay Garg, respondent no.2 with complaint of pain in the abdomen, ultrasound was got done which indicated stones in the gall bladder. The petitioner was diagnosed as a case of Acute Cholecystitis with Cholelithiasis. Learned counsel further states that the petitioner again consulted the respondent no.2 on 11.01.2012 and was examined and tests were done. Her Electrocardiogram (ECG) report was normal and she was advised to undergo laparoscopic surgery for removal of stones from gall bladder and the surgery for cholecystectomy was performed by respondent no.2 on 11.01.2012 under anaesthesia and the patient was discharged in a stable condition on 13.01.2012. The petitioner's claim that respondent no.2, Dr Sanjay Garg, was not competent to perform laparoscopic surgeries is refuted as he has conducted more than 5000 laparoscopic and he had worked as a Laparoscopic Surgeon for three years at the Ganga Ram Hospital, New Delhi and was a pioneer member of IAGES.

13. It is evident from the above and the record that

(i) the petitioner who consulted Dr Sanjay Garg/respondent no. 2 on 26.04.2011 for abdominal pain was diagnosed by him for gall bladder stones on the basis of tests prescribed by him and also advised laparoscopic surgery for removal of the stones. This advice was reiterated on 20.11.2011 and 11.01.2012 as well;

(ii) However, on 11.01.2012 the gall bladder was removed by way of an operation;

(iii) In view of the patient not getting any relief from the said surgery, the patient was referred to respondent no. 1/ Dr Gagandeep Goyal by respondent no. 2 on

20.01.2012 and was thereafter, following tests prescribed by him, operated upon for CBD stenting on 20.01.2012;

(iv) The petitioner was not briefed about the removal of the gall bladder nor her consent taken which was against medical ethics and procedures;

(v) As the pain and discomfort still continued, the petitioner again consulted respondent no.1/Dr Goyal and was referred to a specialized hospital such as PGI, Chandigarh whereupon she went to the Daya Nand Medical College & Hospital, Ludhiana and consulted Dr Satpal Singh Virk, a Gastroenterology Surgeon who diagnosed her for a perforated appendix which was operated upon followed by another operation to drain the pus, bile and accumulated fluids in the abdomen on 04.02.2012.

14. The conclusion of the State Commission is that medical negligence would not apply to the instant case since cases of laparoscopic cholecystectomy procedure (LCP) do have instances of damage to the LBD as per medical literature. Hence, medical negligence cannot be alleged in such cases when the concerned doctors followed due procedure as per medical ethics. It has also been held that experts' opinion had been obtained in the matter by the District Forum in reaching its conclusions.

15. In the instant case, however, the cause of the abdominal pain appears to have been due to perforation of the appendix as diagnosed by Dr Virk at the DMC, Ludhiana. Despite the prescription of various tests and investigations by respondent no. 2 and subsequently by respondent no 1, which the petitioner complied with, and admission in the hospital on different occasions, the diagnosis was of stones in the gall bladder and the appreciation of the medical condition on the basis of various ultrasound, MRI and CT Scan tests prescribed and conducted in laboratories where the patient was referred, turned out to be incorrect when it was interpreted by the specialist in the DMC, Ludhiana. It is an admitted fact that instead of laparoscopic surgery to remove the gall bladder stones, as prescribed, the removal of the gall bladder itself was done by the respondent no,2/Dr Garg. From the record no surgery for gall bladder removal was advised on the basis of the tests prior to the surgery. The only advice was for laparoscopic surgery to remove the stones.

16. From the foregoing it appears that the removal of the gall bladder instead of conducting laparoscopic surgery to remove the stones in the gall bladder without the consent of the complainant was incorrect and against medical ethics. No case has been made out that the surgery was essential in a life threatening situation in the written statement of the respondent nor are there any medical records brought on record to substantiate such a course of action which would have justified the removal of the gall bladder even without the consent of the petitioner of her attendant/husband. The conclusion of the State Commission that there was no medical negligence and that *“CBD injury is a well-known complication of laparoscopic cholecystectomy procedure (LCP). It must be presumed that incidence of CBD injury is a well-known risk, when patient undergoes LCP. Same cannot be correlated as the act of negligence or carelessness on part of operating surgeon. Since CBD injury is known complication hence OP*

no. 1 cannot be said to be medically negligent in this case as OPs no. 1 & 2 were duly qualified and experienced doctors” is a conclusion that cannot be countenanced. The diagnosis of the perforated appendix was not done by respondents 1 and 2, despite various tests The State Commission has failed to return a finding on this aspect.

17. The respondents have averred that there is no case of deficiency or medical negligence that is made out against respondents. The State Commission has concluded that the order of the District Forum has not appreciated the facts of the case in its proper perspective *qua* respondent no.1 since (a) no doctor can assure recovery of any patient; (b) a qualified doctor following standard medical procedure in treating a patient cannot be said to be medically negligent; (c) the District Forum erred in holding OP no. 2 to be medically negligent despite the accepted position that complications do occur in the procedures; and (d) a doctor cannot be said to be medically negligent if standard medical practice has been followed.

18. The order of the District Forum has concluded that respondent no. 2 failed to refer the petitioner to a specialised hospital and that no second opinion was sought. District Forum’s order also relies upon *Kishan Rao* (supra) to countenance the respondent’s contention that the report of an Expert was not relied upon. In the facts of this case, the diagnosis of Dr Virk itself is one such opinion.

19. Considering the aforementioned discussion, the revision petition is found to have merits and liable to succeed. It is accordingly partly allowed. The impugned order of the State Commission is set aside and that of the District Forum affirmed. Pending IAs, if any, stand disposed of with this order.

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SUBHASH CHANDRA
PRESIDING MEMBER