

DISTRICT CONSUMER DISPUTES REDRESSAL FORUM-III: WEST
GOVT. OF NCT OF DELHI
C-BLOCK, COMMUNITY CENTRE, PANKHA ROAD, JANAK PURI
NEW DELHI

Complaint Case No. 335/2012

In the matter of:

1. UMESH CHAND SHARMA
2. RACHNA SHARMA
W/O UMESH CHAND SHARMA
R/O 240 PKT -8 SEC – 12
DWARKA, NEW DELHI

.....complainant

Versus

DR. MANIKA KHANNA
A-41 CHANDER NAGAR
NEAR JANAKPURI WEST METRO STATION
JANAK PURI NEW DELHI 110058

.....Opposite Party

DATE OF INSTITUTION: 31.05.2012
JUDGMENT RESERVED ON: 04.08.2023
DATE OF DECISION: 08.08.2023

Ms. Sonica Mehrotra, President
Ms. Richa Jindal, Member (Female)
Mr. Anil Kumar Koushal, Member (General)

Order passed by Ms. Sonica Mehrotra, President

ORDER

1. Facts in brief in the present complaint as that complainant 1 and 2 are husband and wife who had visited OP on 02.04.2010 for treatment of infertility as the couple was unable to conceive. Complainant 2 (wife) was put on medication and was advised few tests by OP which she underwent and was in regular treatment of OP from mid 2010 till early 2011. She was advised to undergo IVF treatment for which the complainants paid Rs. 2.70 lacs to OP between November- December 2010 apart from consultation fees and lab test etc. On 26.11.2010 Embryo Transplant (ET) procedure was conducted by OP on the complainant's wife but pregnancy test conducted on 10.12.2011 came negative. Surrogacy attempt also failed. Thereafter when complainant next went to OP on 12.04.2011, she was examined and put on Anti-Tuberculosis Therapy (ATT) which created complications in complainant's wife for which she then consulted doctors in AIIMS on 25-05-2011 who advised her to stop taking TB medication immediately. The complainants have alleged that the medication prescribed by OP to complainant's wife for Embryo Transfer and TB resulted in causing abnormal fibroids, irregular bleeding and irregular menstruation cycle in complainant's wife and her chances of becoming mother were further reduced. She was advised by doctors at Jaipur to undergo operation due to IVF caused complications in her body as also doctors of Max Hospital

Delhi in February, 2012 who advised her to undergo surgery for removal of fibroids in her uterus which as per complainants were normal before ET (as revealed by USG 31-08-2010) and abnormal post procedure (as revealed by USG 06-01-2012). The complainant had to undergo operation at Max Hospital in February, 2012 for which she had to additionally incur expenditure of Rs. 72,000/-. Therefore alleging medical negligence against OP for improper ET and causing complication in her body for wrong medication etc., the present complaint has been filed praying for relief by way of refund of Rs. 2.7 lacs plus Rs. 3,000/- (visit and consultation charges) with interest @ 12% p.a. along with Rs. 5,000/- spent on test, visit to Delhi for IVF consultation etc. and Rs. 72,000/- for operation undergone at Max Hospital and Rs. 2 Lacs for mental agony and harassment.

2. Complainant has attached copy of prescriptions of OP, copy of payment receipts of Rs. 2.70 lacs paid by complainant to OP for IVF treatment, copy of receipts of visit charges, copy of prescriptions, copy of blood test, urine test report, Copy of bills of Star Imaging and Path Labs, copy of OPD card of Balaji Action Medical Hospital, copy of OPD card of AIIMS Hospital, Copy of Consultation taken from Delhi IVF Fertility Research Centre, Dr. Swarnakar Fertility Centre, Jaipur Fertility and Microsurgery Research Centre, Copy of ultrasounds reports dated 30.07.2010,

31.08.2010, 07.01.2012, copy of prescriptions and consultation at Max Hospital, Copy of discharge summary from Max Hospital dated 16.02.2012 for surgery of uterine fibroid with In-patient bills and biopsy investigation report dated 17.02.2012.

3. Notice was issued to OP on 31-05-2012 for appearance of 13.09.2012. OP entered appearance and filed her Written Statement raising preliminary objection that without any substantial conclusive evidence to establish negligence, it is not possible or permissible to hold a medical practitioner liable and urged that she had started all necessary treatment and medication for complainant wife with bonafide intention keeping her medical condition in mind. In her preliminary submission, OP submitted that she is renowned gynaecologist who had set up Gaudium IVF in 2009 for fertility problems and surrogacy and has won several awards and has helped approximately 5000 infertile couples to conceive in past 3.5 years from 2009 till 2012. She admitted that complainant no. 2 had visited her on 31-08-2010 for fertility counseling and on advice had got USG (lower abdomen) done the same day which revealed bulky uterus with fibroids in myometrium (left and right) and endometrium sandwiched between intramural fibroids. Later when she visited OP on 18.10.2010 for detailed fertility counseling she was diagnosed to be suffering from bilateral tubal blockage apart from

Uterine fibroids and was therefore advised surrogacy instead of IVF but she insisted on both procedures i.e. IVF for herself as well as for surrogacy. Though the cost of surrogacy of treatment package of OP then was Rs. 12 lacs with 4 lacs for Embryo Transfer but on persistent request by complainants, OP gave a subsidized rates of Rs. 3.20 lacs upto ET. The IVF treatment on complainant was done on 11.11.2010, on 22.11.2010 last injectable was given to her and on 26.11.2010 ET was performed on complainant wife and on the surrogate on 27.11.2010. However, both embryo transfer failed after which the complainant did not come back to OP for any follow-up investigation. On 11.04.2011, when complainants visited OP at Balaji Action Medical Institute and requested for the test to be done, they were informed by OP that any such investigation was to be conducted immediately after the process of IVF was done & not belately. The OP further contented that the complainant had a history of uterine TB proven by DNA PCR test of endometrium from the history sheet of AIIMS vide registration number 25/89/11 for which reason OP prescribed Quantiferon Gold test for TB for complainant no. 2 which showed high positive value of 8.36 vide report dated 12.04.11. She was asked to visit OP for follow-up of TB treatment, if it is to be continued but she never came to OP for follow-up. OP has further stated that complainant wife was suffering from

uterine fibroids even before she started consultation with OP as evident from her ultrasound report dated 30.07.2010, 31.08.2010 and even later report dated 07.01.2012. In fact these reports reveals the size of fibroid started reducing after medication given to her wife by OP i.e. GnHR analogues used during IVF. On merits, OP controverted the allegation of the complainant by stating that the complainant had come to her on 02.04.2010, 18.10.2010, 25.10.2010 for IVF treatment as the wife was unable to conceive due to tubal blockage and uterine fibroid. For this reason she was advised surrogacy and not IVF but complainant insisted on both and therefore both were attempted by OP. OP denied any assurance of 100% confirmed pregnancy after these processes and even the consent form signed by both complainants clearly stated no guarantee of success. OP admitted that she has received Rs. 3 lakhs from complainant as against Rs. 3.20 lacs quoted as subsidized offer though contented that Rs. 20,000/- is still outstanding. OP admitted to have done ET on complainant on 26.11.2010 and also the failure of pregnancy when test was done on 10.12.2010. As far as the alleged TB condition of complainant is concerned, OP stated in defence that in AIIMS prescription dated 25.11.2011 which says "no sign of active TB", it is well known that quantiferon gold test for TB does not differentiate between latent and active TB. Therefore urging no deficiency on her

part, OP prayed for dismissal of this complainant. OP has attached copy of ultrasound report dated 31.08.2010, copy of the table of fees and consent forms, copy of the flow sheet of Gaudium, copy of quantiferon gold test report dated 12.04.2011 showing a high positive value of 8.36, Copy of ultrasound reports dated 30.07.2010, 31.08.2010 and 07.01.2012, copy of the medical literature article titled as 'GnRH analogues in the treatment of uterine fibroids'.

4. Rejoinder was filed by complainant in rebutted to defence taken by OPs in her WS vide which complainant urged that it was OP who insisted that complainant should go for both IVF and Surrogacy to have certainty of having a child but surrogacy was never initiated by OP though she charged complainants for the same. Complainant denied any charges of Rs. 12 lakhs quoted for any treatment by OP and alleged that their signatures were taken on certain papers on account of formalities. Complainants while admitting that some treatment was carried out by OP on 11.11.2010 and 22.11.2010 and 26.11.2010 by way of ET, denied any surrogacy procedure performed by OP and alleged that instead TB treatment was started on the complainant wife by OP who had put her on ATT medication which when made complainant wife uncomfortable, she had to consult doctor in AIIMS by which time her fibroids in uterus had increased abnormally minimizing her chances of conceiving even

further. OP called her for second cycle of IVF to extract more money and contrary to her allegation none of the reports of complainant reveals tubal blockage. Complainant therefore prayed for reliefs sought.

5. Evidence by way of affidavit was filed by both complainants.
6. Evidence by way of affidavit was filed by OP.
7. Written arguments were filed by both parties in reassertion/reiteration of their respective grievances/defence.
8. We have heard the rival contention of both sides and have given our anxious consideration to their respective pleadings and documents placed on record. Undisputedly the complainant couple had consulted OP and underwent IFV treatment for infertility problem in 2010 but failed to conceive as revealed by records/reports. The complainant number 2 aged 38 years was suffering from uterine fibroids and thick endometrium as her USG reports date 30.07.2010 and 31.08.2010 reveal. On close scrutiny of USG report and medical history of complainant number 2, we further observed that she had bulky uterus because of these growths. She underwent IVF by way of ET on 26.11.2010 post treatment/medication given by OP but failed to conceive as her report of pregnancy came negative in December 2010. She was also diagnosed with bilateral tubal blockage and a history of Genital Koch's/TB (latent as per quantiferon test report dated

12.04.2011) and hypothyroidism. She admittedly paid RS. 3 lakhs to OP for both procedure of IVF and surrogacy which OP too had admitted have been received albeit a subsidized rate. Complainant has alleged during the course of arguments that surrogacy procedure was never performed by the OP. Per contra OP has drawn our attention during the course of oral arguments that out of 8 fertilized eggs, four were implanted in the complainants wife by way of ET on 26.11.2010 and the remaining four were implanted in the surrogate on 27.11.2010 as per the Flow Sheet attached as annexure 3 with her Written statement. OP also placed on record the surrogacy failure report dated 13.12.2010 of one Firoza who was the surrogate and has highlighted form number 4.7 Agreement for Surrogacy signed by surrogate Firoza with counter signature of OP and both complainants in support of her contention that the surrogacy procedure was performed as well. OP has also admitted to have put complainant on ATT medication due to her past history of genital TB when she came again to OP after four months of failed IVF in 2011. The complainant has vehemently put forth the counter argument that the Quantiferon TB gold test (QFT) does not differentiate between latent and active TB and should not be used as the sole determinant for diagnosis and initiation of ante tubercular therapy as is clearly mentioned in the foot note of the said report dated

12.04.2011 by Star Imaging And Path Lab New Delhi. The IVF procedure admittedly failed and thereafter the records revealed that complainant went to AllIMs in May 2011 and several other hospitals IVF Fertility Research Center, Doctor Swarnakar Fertility Center And Jaipur Fertility And Microsurgery Research Center, Jaipur In January 2012 during which period she was diagnosed with multiple uterine fibroids and ovarian cyst and was advised myomectomy and was referred to Max Hospital under Dr. Vivek Marwah in whole treatment under whom she underwent laparoscopic myomectomy with adhesiolysis with operative hysteroscopy with resection of endometrial polyp on 14.02.2012 and was discharged on 16.02.2012. Since the allegations of the complainant is failed IVF and wrong diagnosis/medication for TB against the OP. Let us firstly examine the nature and success rate of IVF.

“IVF as an alternate/artificial fertile procedure does not have 100% success rate especially in women 35 years age and above as quality of Eggs also starts declining as menstrual age progresses. The consent form, payment schedule condition placed on record by OP all have disclaimers on their put note saying that there is no certainty that a pregnancy will occur/ result from these procedure and no assurance is given that any pregnancy will result in the delivery of a normal living child. All the documents placed on record by OP are signed by both complainants from documents 4.1 to 4.7.

OP has relied upon medical literature pertaining to GnHR analogues in treatment of uterine fibroid in justification of the drug she had put her on complainant during IVF procedure which reduced the size of fibroid in uterus, secondly genital tuberculosis is known to cause infertility in 43% to 74 % of women of child bearing age group and in India the percentage is 19% and DNA-PCR Test result and empirical treatment accordingly gives an excellent chance of early spontaneous conception in justification to the act of the OP to put the complainant on ATT in April 2011 post failure of IVF attempt in November 2010 as the complainant wife was known to have had a history of genital tuberculosis". The Hon'ble National Commission in landmark judgement **M Kocher vs Ispita Seal I (2018) CPJ 41 (NC)** decided on 12.12.2017 observed that IVF procedure is highly technical and success rate is low in the cases of females above 35 years. In any given cycle, chance of IVF success vary depending on age and personal health circumstances and held that no cure/success in not negligence and allowed the appeal of the doctor against order of Hon'ble State Commission Delhi which had allowed the complaint. As per the settled law in medical cases, it has been held in catena of judgment that no relief or success in procedure does not imply medical negligence. After thorough appreciation of documentary evidence placed on record before us by both side, we observe that the complainant was suffering from bulky uterus with

multiple fibroid, thick endometrium, myometous polyp, ovarian cyst and tubal blockage and had a history of genital tuberculosis all of which apparently had been responsible collectively for her infertility and inability to conceive. She had therefore approached OP for conception through IVF and surrogacy but both were unsuccessful. Her prolonged complication in uterus, we have noted from records 2010 onwards till Feb 2012 when she firstly underwent surgery at Max Hospital and before that had consulted various fertility centers in January 2011 where such diagnosis have repeated been reflected in the prescription. The success rate of fertility measure like IVF, IUI & ICSI are not very high and failure to conceive through such artificial modes is not considered as medical negligence as no 100 % success rate or assurance of conception can be made for such procedures. The success rate of IVF/ET as per international standards is 13.4 per cent in women less than 35 of age and 3.6% in women above 35 years. According to several medical literatures, a woman's age is most important factor that influences the success rate of IVF being highest for women between age 24 and 34 years being 32.2 per cent and 20.8 per cent for women aged between 38 to 39 years. Therefore, we are of the considered view that fastening the liability upon the treating doctor for IVF failure or ATT given to complainant no. 2 is not justified. We accordingly

find the complaint devoid of merit and dismiss the same as no medical negligence has been made out against OP on any account.

9. Let the copy of this order be made available to the parties on application for free certified copy under the name of President of this Commission as per guidelines of Hon'ble SCDRC.

10. Announced on 08.08.2023.

11. File be consigned to record room

Richa Jindal
(Member)

Anil Kumar Koushal
(Member)

Sonica Mehrotra
(President)