

STATE CONSUMER DISPUTES REDRESSAL COMMISSION UTTARAKHAND
DEHRADUN

FIRST APPEAL NO. 11 / 2022

Dr. Santosh Gaydhankar S/o Sh. Shravan B. Gaydhankar
R/o B-410, Karnik Nagar, North Solapur
Maharashtra, India

..... Appellant / Opposite Party No. 2

Versus

1. Sh. Sandeep Kumar, Advocate S/o Sh. Nathiram
R/o Village Kamalpur Saini, Post Daulatpur
P.S. Bahadrabad, District Haridwar

..... Respondent No. 1 / Complainant

2. Manager, Jaya Maxwell Hospital
NH-58, Bahadrabad Bypass Road
Atmalpur Bongla, Bahadrabad
District Haridwar, Uttarakhand

..... Respondent No. 2 / Opposite Party No. 1

Sh. Parveen Kumar, Learned Counsel for the Appellant
None for Respondent No. 1

Sh. Saurabh Rana, Learned Counsel for Respondent No. 2

Coram: Hon'ble Mr. Justice D.S. Tripathi, President
Mr. Udai Singh Tolia, Member-II

Dated: 08/08/2023

ORDER

(Per: Justice D.S. Tripathi, President):

This appeal under Section 41 of the Consumer Protection Act, 2019 has been preferred against the impugned judgment and order dated 30.12.2021 passed by the District Consumer Disputes Redressal Commission, Haridwar (in short "The District Commission") in consumer complaint No. 179 of 2020; Sh. Sandeep Kumar, Advocate Vs. Manager, Jaya Maxwell Hospital and another, whereby the consumer complaint was allowed ex-parte and the appellant and respondent No. 2, who were opposite parties to the

consumer complaint before the District Commission, were directed to refund sum of Rs. 600/- (charges of ultrasound report) to respondent No. 1 – complainant, besides to pay Rs. 5,00,000/- towards mental & physical agony and Rs. 10,000/- towards counsel fee & litigation expenses. In addition to above, the appellant and respondent No. 2 were also directed to pay an amount of Rs. 20,00,000/- each to respondent No. 1 – complainant towards special compensation.

2. The facts of the case, in brief, as stated in the consumer complaint, are that Smt. Neetu, wife of respondent No. 1 – complainant (Sh. Sandeep Kumar, Advocate), was carrying four months' pregnancy. The complainant's wife was issued Mother and Child Protection Card (मातृ बाल सुरक्षा कार्ड) by Department of Medical Health and Family Welfare, Government of Uttarakhand and she had undergone vaccination at different point of time. On 18.08.2020, the complainant along with his wife visited Community Health Centre, Bahadrabad for medical examination of complainant's wife, where she was advised for ultrasound test. For getting his wife's ultrasound done, the complainant approached respondent No. 2 – Jaya Maxwell Hospital (opposite party No. 1 before the District Commission), where the ultrasound of complainant's wife was conducted by the appellant – Dr. Santosh Gaydhankar (opposite party No. 2 before the District Commission) and amount of Rs. 600/- was charged by the appellant. The ultrasound report was prepared by the appellant. In the ultrasound report, it was mentioned that there is single live intrauterine gestation of 30 weeks' 6 days' in cephalic presentation and the fetal weight was 1641 gms., whereas the complainant's wife was four months' pregnant. The ultrasound report so prepared, appeared to be incorrect, as such, on 25.08.2020, the complainant's got his wife's ultrasound done at Dr. Shiromani Hospital, Roorkee, where after ultrasound test, report was prepared.

The contents of the ultrasound report of Dr. Shiromani Hospital match with Mother and Child Protection Card issued by Department of Medical Health and Family Welfare, Government of Uttarakhand. On account of incorrect ultrasound report issued by the appellant and respondent No. 2, the complainant as well as his wife have undergone mental & physical agony, on account of which, complainant's wife could have died. With the above allegations, consumer complaint was set in motion before the District Commission.

3. The District Commission issued notice to the appellant (opposite party No. 2 before the District Commission), but the appellant did not turn up before the District Commission and consequently, the District Commission vide order dated 11.01.2021, closed the opportunity of filing written statement by the appellant and vide subsequent order 24.09.2021, opportunity of filing evidence by the appellant was closed by the District Commission.

4. The District Commission also issued notice to respondent No. 2 (opposite party No. 1 before the District Commission), but the said respondent also did not turn up before the District Commission and consequently, the District Commission vide order dated 31.03.2021, closed the opportunity of filing written statement by respondent No. 2. However, the respondent No. 2 filed evidence by way of affidavit before the District Commission.

5. After hearing learned counsel for respondents herein, i.e., complainant and opposite party No. 1 to the consumer complaint, the District Commission went on to allow the consumer complaint vide impugned judgment and order dated 30.12.2021 in the above terms. Feeling aggrieved, the appellant has come up in this appeal.

6. We have heard arguments advanced by learned counsel for the appellant & respondent No. 2 and also perused the record. None appeared on behalf of respondent No. 1 – complainant, although he has appeared in person before the Commission on 09.11.2022.

7. Learned counsel for the appellant submitted that the impugned judgment and order was passed ex-parte by the District Commission and the appellant did not get opportunity to file the written statement to rebut the averments made in the consumer complaint. His further submission is that the appeal should be allowed and the matter should be remanded back to the District Commission for decision afresh on merit, after providing proper opportunity of hearing to both the parties. Learned counsel also submitted that the appellant did not receive any summons / notice from the District Commission in regard to the consumer complaint in question, as such, had no opportunity to submit his defence. Learned counsel further submitted that respondent No. 2 – opposite party No. 1 submitted an application dated 10.12.2021, certified copy whereof is Paper No. 81, before the District Commission, stating therein that the appellant – doctor had left the hospital after working for few days and his present address was mentioned in the application, with a prayer to direct the complainant to amend the address of the appellant. Learned counsel also submitted that the aforesaid application (Paper No. 19) was wrongly rejected by the District Commission vide order dated 24.12.2021, thereby fixing 30.12.2021 for pronouncement of judgment.

8. We find substance in the arguments advanced by learned counsel for the appellant. When the aforesaid application was rejected by the District Commission, there was no occasion of mentioning the present address of the appellant in the impugned

judgment and order, particularly when no summons / notice was sent to the appellant on the said address, as also mentioned by the appellant in the memo of appeal. However, irrespective of above, we find from record that impugned judgment and order has been passed by the District Commission ex-parte against the appellant. The appellant did not get opportunity to file written statement before the District Commission against the consumer complaint filed by respondent No. 1 – complainant. It is settled principle of law that all the parties involved in the matter in question should get proper opportunity of being heard. It is further settled principle of law that substantial justice should prevail over technical one. It would not be out of place to mention here that at no stage of the proceedings of the consumer complaint before the District Commission, the District Commission passed an order to proceed the consumer complaint ex-parte against the appellant. The District Commission also did not held the service of notice upon the appellant as sufficient and inspite of all that, closed the opportunity of filing the written statement by the appellant per order dated 11.01.2021, against the settled preposition of law.

9. We have noticed that the appellant could not file written statement before the District Commission and the appellant did not get opportunity for adducing evidence on affidavit. Appellant was deprived from getting opportunity of hearing. In the case of **Topline Shoes Ltd. Vs. Corporation Bank** reported in **II (2002) CPJ 7 (SC)**, Hon'ble Apex Court has observed that "it is for the Forum or the Commission to consider all facts and circumstances along with the provisions of the Act providing time frame to file reply, as a guideline, and then to exercise its discretion as best it may serve the ends of justice and achieve the object of speedy disposal of such cases keeping in mind the principle of natural justice as well."

10. We have also examined the matter on merit and after carefully going through the record, we can safely say that the consumer complaint filed by respondent No. 1 – complainant was not at all maintainable. Admittedly, Smt. Neetu, the complainant's wife had undergone ultrasound test performed by the appellant and report prepared by the appellant. The issue raised in the consumer complaint is that the aforesaid ultrasound report issued is incorrect. Thus, the consumer complaint, if any, ought to have been filed by Smt. Neetu and not the complainant in his individual capacity. There is nothing on record to show that Smt. Neetu was incapacitated or she has given any authority letter to the complainant, to file the consumer complaint on her behalf, hence the complainant can not be treated as consumer. In this regard, we may advantageously refer to the law laid down by Hon'ble National Commission in the case of **Amita Sharma Vs. B.H.E.L. and others** reported in **II (2013) CPJ 505 (NC)**. Relevant portion of paragraph No. 15 of the said judgment is reproduced below:

“There is nothing on record to show that petitioner's husband had been incapacitated in any manner or was prevented in any manner whatsoever, from filing the complaint. Moreover, in the complaint it is nowhere pleaded that petitioner had been authorised by her husband to file complaint on his behalf. Thus, Ms. Amita Sharma is not a consumer as per provisions of the Act. Hence, complaint filed by her before the District Forum is not maintainable and present revision is liable to be dismissed on this short ground alone.”

11. Considering the law laid down by Hon'ble National Commission in the aforesaid case of **Amita Sharma** (supra), we are of the view that respondent No. 1 – complainant is not consumer

under the provisions of the Consumer Protection Act, 2019 and he was not authorised to present the consumer complaint in his sole capacity before the District Commission. This being the legal position, we need not divulge upon merit of the case and the impugned judgment and order is liable to be set aside on this ground alone and the consumer complaint warrants dismissal.

12. For the reasons aforesaid, we are of the considered opinion that the impugned judgment and order passed by learned District Commission suffers from material illegality, warranting interference by this Commission. Consequently, the appeal deserves to be allowed and the impugned judgment and order passed by learned District Commission is liable to be set aside.

13. Appeal is allowed. Impugned judgment and order dated 30.12.2021 passed by the District Commission is set aside and consumer complaint No. 179 of 2020 is dismissed. No order as to costs. The amount deposited by the appellant with this Commission, be released in his favour.

14. A copy of this Order be provided to all the parties free of cost as mandated by the Consumer Protection Act, 1986 / 2019. The Order be uploaded forthwith on the website of the Commission for the perusal of the parties.

(U.S. TOLIA)
Member-II

(JUSTICE D.S. TRIPATHI)
President

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