

KERALA STATE CONSUMER DISPUTES REDRESSAL COMMISSION,  
VAZHUTHACAUD, THIRUVANANTHAPURAM

C.C. No. 33/2015

JUDGMENT DATED: 04.10.2023

PRESENT:

**SRI. AJITH KUMAR D.** : **JUDICIAL MEMBER**

**SRI. RADHAKRISHNAN K.R.** : **MEMBER**

COMPLAINANTS:

1. Jayesh J.R., Puthen Vila Veedu, Puthi Road, T.C. 13/78, Kumarapuram, Medical College P.O., Thiruvananthapuram-11.
2. Reshmi Das, W/o Jayesh J.R., Puthen Vila Veedu, Puthi Road, T.C. 13/78, Kumarapuram, Medical College P.O., Thiruvananthapuram-11.

(By Adv. C.S. Rajmohan)

Vs.

OPPOSITE PARTIES:

1. St. Luke Hospital (New Life Fertility Centre), Pathanamthitta-689 645 represented by its Managing Director.
2. Dr. Kenny A. Thomas, New Life Fertility Centre, Pathanamthitta-689 645.
3. Dr. Preetha Biju, New Life Fertility Centre, Pathanamthitta-689 645.

(By Adv. M.C. Suresh)

JUDGMENT

SRI. AJITH KUMAR D. : JUDICIAL MEMBER

This is a complaint filed u/s.12 of the Consumer Protection Act, 1986 by one Jayesh and his wife Resmi Das against St. Lukes Hospital, Pathanamthitta and two doctors attached to it, alleging medical negligence.

2. The case as set out in the complaint in brief is as below:

The complainants were staying abroad and when the second complainant became pregnant she came to the native place and stayed at the home of the husband at Thiruvananthapuram. During the early days of pregnancy she had consultation at the Cosmopolitan Hospital under one Dr. Sheela Shenoy. Scanning done from the above hospital revealed that the second complainant was carrying "single live intrauterine gestation of 10 weeks 6 days". Later the second complainant had shifted her stay to her parental home at Pathanamthitta and from July 2014 onwards she was availing treatment from the hospital cited as the first opposite party. Ultrasound scan was done several times especially after 4 months of pregnancy by the second opposite party and the second complainant was told that she was having a healthy baby and the expected delivery was declared as 28.01.2015. On 10.01.2015 the second complainant was admitted in the hospital and she gave birth to a male child through caesarian. But the complainants were shocked on seeing the baby since the baby was not having the lower limbs and hip. The birth of a baby without limbs and hip resulted as a real curse to the complainants and their family.

3. The second opposite party had conducted the ultrasound scan, but no hint of such a disaster was brought out through the scanning. Anomaly scan, which ought to have been done during the fourth/fifth months was not done properly. If a proper anomaly scan was done as stipulated, any abnormality including congenital diseases to the foetus could have been detected and if the

scanning at the 4<sup>th</sup> month was properly carried out the complainants could have taken precautionary measures. The negligence on the part of the opposite parties made the complainants to become the parents of an invalid baby who is incapable even to move and their life became miserable.

4. The 1<sup>st</sup> complainant had filed a petition before the Pathanamthitta Police Station and on its basis a crime was registered as Crime No.60/2015. Now the baby is undergoing treatment at SAT Medical College Hospital, Thiruvananthapuram. Artificial limbs have to be fixed to the body of the baby and the complainants have no funds to meet the expenses for it. Opposite parties had failed in providing treatment to the second complainant with reasonable degree of skill while conducting the sonogram. The loss and hardships caused to the complainants will subsist till the end of the life of themselves and the child. The complainants would claim Rs. 50 Lakhs as compensation for the hardships caused to them.

5. On admitting the complaint, notices were issued to the opposite parties who appeared and filed a joint version with the following pleadings:-

The complaint is not maintainable as there was no negligence or deficiency of service on their part. They would admit that the second complainant had availed treatment from their hospital. The second complainant was a primigravida who had her early antenatal check up from Cosmopolitan Hospital, Thiruvananthapuram. She had availed IP management for Hyperemesis and was treated with IV fluids, Doximate, Periset, Haemanatenics

and Calcium. She came to the hospital on 17.07.2014 during her 12<sup>th</sup> week of pregnancy and had regular antenatal consultation with the third opposite party. The second opposite party had done the ultrasound scanning. The scan report issued by the Cosmopolitan hospital dated 06.07.2014 showed single live intrauterine gestation of 10 weeks 6 days with foetal movement and adequate growth and no congenital lower limb deficiency was noticed in the report, but the complainants have no complaint against that hospital. The complainants have not mentioned the manner of precautions to be done if the abnormality was detected during the 4<sup>th</sup> month of pregnancy. The complainant had underwent scanning at the first opposite party hospital at 19 weeks, 27 weeks and 33 weeks of gestation. The scanning done at 27<sup>th</sup> week and 33<sup>rd</sup> week of pregnancy revealed breech presentation of the foetus and hence the second complainant was advised for caesarean. The second opposite party had conducted ultrasound scanning with due diligence and care and there was no negligence on his part in conducting sonological examination. Ultra sound creates a two dimensional image of a three dimensional baby and in prenatal testing, ultrasound results cannot be relied upon as 100% accurate and all congenital anomalies cannot be detected as it depends upon foetal position, liquor volume and several other factors. If the amniotic fluid around the foetus is less and movement of the foetus is decreased, the sensitivity of ultrasound diagnosis of any foetal anomaly will also be compromised. During the scanning no indication of any abnormality was noticed by the Cosmopolitan hospital. Non detection of

congenital anomaly of bilateral lower limb deficiency on scanning cannot be due to any fault or failure on the part of the opposite parties since ultra sound is not a perfect depiction of the foetus and the scan result cannot be relied as 100% conclusive. The scanning were done as per the standard and protocol and if there is indication or suspicion a detailed anomaly scanning is usually suggested. As per the clinical examination there were no signs of abnormality. There was no negligence or lack of care on the part of the opposite parties. The second opposite party is having qualification of MD, DGO with 32 years experience in gynaecology and doing ultrasound scanning since 1992 and the third opposite party is having MBBS, DGO with 10 years experience as a consultant gynaecologist. The first opposite party is a well known hospital with specialist doctors and experienced medical staff with modern facilities, also famous for infertility treatment. The opposite parties would seek for dismissal of the complaint.

6. The evidence consists of the testimonies of PWs 1 & 2. Exts A1, A2, A3 series & A4 to A8 for the complainants. Opposite party No. 2 gave oral evidence as DW1. Another expert was examined as DW2. The treatment records were produced and a copy of the same is marked as Ext. X1.

7. Heard the counsels appearing for the complainants and the opposite parties. Perused the records.

8. Now the following points arise for determination.

(i) Is there any negligence or lack of care in rendering the required medical treatment to the second complainant?

(ii) Is there any deficiency of service or unfair trade practice on the side of the opposite parties?

(iii) Reliefs and costs?

9. Point Nos. (i) &(ii):- These points are considered together as the facts are interlinked. The second complainant spoke before the Commission as PW1 in support of the complaint. The fact that the second complainant had availed treatment from the first opposite party hospital and that sonographic examination was carried out by the second opposite party and failure in detecting the absence of two lower limbs to the baby before delivery have been admitted. Initially the second complainant had availed treatment from the Cosmopolitan Hospitals (P) Ltd, Thiruvananthapuram. Ext. A1 is the Imaging report issued by the Department of Radiology dated 06.07.2014 by Dr. Suresh Babu, Consultant Radiologist attached to the Cosmopolitan Hospitals in respect of the examination conducted which shows the following result:

“LMP:22/4/14	GA by LMP:10W5D	EDD by LMP: 27/1/15
	GA by USG :10W6D	EDD by USG: 26/1/15
Uterus is bicornuate and shows a gestational sac with a foetal pole right horn.		
Cardiac activity and foetal movements present.		
CRL measures 39 mm-10 weeks 6 days.		
No focal lesion seen in the uterus.		
Subchorionic collection of 10x8 mm seen superior to the sac.		
Placenta has not localized.		

No adnexal mass seen.  
 No fluid in pouch of Douglas.  
 Impression:-Single live intrauterine gestation of 10 weeks 6 days”

The second complainant had subsequently availed treatment from the first opposite party hospital. Ext. A2 is the copy of the medical record evidencing the treatment availed by PW1. Ext. A2 would show that the Second complainant had availed treatment from the first opposite party from 17.07.2014 till delivery. After availing treatment from the first opposite party on three occasions the second complainant was subjected to sonographic obstetric study by the second opposite party. The sonogram report dated 8.9.14 issued by the second opposite party contains the following data:-

“U.S abdomen shows single foetus in unstable presentation  
 BPD measures 4.56 cm corresponding to 19weeks 6 days of gestation.  
 Abdominal Circumference measures 13.73 cm corresponding to 19 weeks of gestation.  
 Femur measures 3.03 cm corresponding to 19 weeks gestation.  
 Foetal cardiac pulsation : +  
 Foetal movts : +  
 Foetal Weight : 288 gms  
 Sonologically detected abnormality : Not detected  
 Placental position : Fundal  
 Doppler Study : —  
 Liquor : —  
 U.S. Expected Date : 28.1.15  
 IMP single foetus of 19 weeks of gestation in breech Presentation.  
 Date 8.9.14 Doctor in charge”

The sonogram report dated 12.11.14 contains the following details:

“U.S abdomen shows single foetus in Breech presentation	
BPD measures 7.02 cm corresponding to 28w + 1 weeks of gestation.	
Abdominal Circumference measures 22.74 cm corresponding to 27 weeks of gestation.	
Femur measures 5.09 cm corresponding to 27 weeks of gestation.	
Foetal cardiac pulsation	: +
Foetal movts	: +
Foetal Weight	: 1050 gm +/- 154 gm
Sonologically detected abnormality	: Not detected
Placental position	: Fundal position
Doppler Study	:
Liquor	: Adequate
U.S. Expected Date	: 10.2.15
IMP single foetus 27 weeks of gestation in Breech Presentation.	
Date 12/11/14	Doctor in charge”

The sonogram report dated 27.12.2014 contains the following details:

“U.S abdomen shows single foetus in Breach presentation	
BPD measures 8.82 cm corresponding to 34 weeks of gestation.	
Abdominal Circumference measures 29 weeks 5 days cm corresponding to ..... weeks of gestation.	
Femur measures 6.42cm corresponding to 33w + 1 weeks of gestation.	
Foetal cardiac pulsation	: +
Foetal movts	: +
Foetal Weight	: 2310 gm +/- 300 gm
Sonologically detected abnormality	: Not detected



Placental position	: Fundal position
Doppler Study	: Nil
Liquor	: Adequate
U.S. Expected Date	: 10.2.15
IMP single foetus 33 w +2 weeks of gestation in Breech Presentation.	
Date 27/12/14	Doctor in charge”

Ext. A4 is the copy of the medical record issued to the second complainant on 10.1.15 regarding the treatment and the details of the new born baby that the baby was not having both lower limbs. Criminal prosecution was initiated against the opposite parties by the Pathanamthitta Police as Crime No. 60/2015.

Ext. A5 is the copy of the FIR. Exts. A6 & A7 are the medical records with respect to the treatment given to the new born baby. Ext. A8 is the photograph of the unfortunate baby which reveals its pathetic condition. Admission of the medical records was objected to by the opposite party, but the objection does not sustain as those records form part of the medical records brought before the Commission by the opposite parties as X1.

10. The complainants had examined PW2, the head of the Department of Radio Diagnosis Govt. Medical College Hospital, Trivandrum. He gave evidence that the first scan is intended to ascertain as to whether the foetus is in the uterus or in the tube, the possibility of abortion, the number of foetuses as single or more etc. The abnormalities could be assessed in the scan to be taken in the 18<sup>th</sup> week of gestation which is called as anomaly scan and the disability,

if any, could be ascertained only at this stage. If the foetus has no limbs it could be seen in this scan. In the anomaly scan the doctor has to report the fact as to whether the foetus bears 12 bones or not and also to report if the foetus has got any defects to the heart which is intended to enable the parents to decide as to whether the pregnancy could be continued or terminated. This witness, after perusing Ext. A3 series opined that there is also vicarious liability to the hospital on account of the failure to note the disability of the baby in Ext. A3 series. This witness had given convincing evidence regarding the fault in the sonogram reports issued by the second opposite party. On the basis of the above evidence the complainants would submit that the negligence on the part of the opposite parties in not detecting the absence of lower limbs is a grave dereliction in providing medical treatment which made the life of the complainants and the unfortunate baby miserable.

11. The second opposite party gave oral evidence as DW1 to the effect that the sonological reports can never be construed as foolproof since there is possibility of mistakes in the reports due to various factors such as lesser quantity of fluid around the foetus, obesity of the mother and decreased foetal movements. DW1 gave evidence that anomaly scan has to be taken after 18<sup>th</sup> weeks of gestation. This witness never gave evidence that in this case anomaly scan was done to the second complainant.

12. Apart from the evidence of DW1 the opposite parties had examined DW2, an expert to support their case. DW2 is a post graduate in

Radiodiagnosis who had worked in various medical colleges in Kerala and abroad. He gave evidence that there were instances that disability or the absence of lower limbs were unnoticed in the sonogram reports. According to this witness by reaching the 11<sup>th</sup> week of pregnancy the lower limbs of the foetus will be visible. He added that the sonographic study is not 100% foolproof as Obesity and abdominal wall thickness of the mother would adversely affect the report. Though this witness gave evidence regarding the limitations he was definite that Ext. A3 series are not “anomaly” scan. He was also definite that “anomaly” scan had to be taken to assess as to whether there were any abnormalities to the baby.

13. The evidence on record would prove that the second opposite party did not conduct the anomaly scan which is intended to find out as to whether the foetus had any abnormalities. It is also significant that the second opposite party is not a Radiologist and hence he is not competent to conduct anomaly scan. The learned counsel for the opposite party would argue that the gynecologists are competent to conduct radiological examination. But here it is significant to note that the opposite parties had no case that the second complainant was subjected to anomaly scan which is intended to find out anomalies if any to the foetus. In the reports the second opposite party had furnished the length of the femur of the foetus and periodic increase in the femur size is seen noted in all the three reports marked as Ext. A3 series. As argued by the defense lawyer, if there was shortage of fluid around the foetus, it

ought to have been noted in the scanning report. Such a note is not seen in any of the reports. No adverse comment is seen made about the movement of the foetus, instead the movement is categorized in + sign in all reports. So it could only be presumed that there were no adverse circumstances in the uterus of the second complainant preventing the doctor who carried out scan on her to detect the absence of limbs and hip of the foetus. On examining these reports only two possibilities could be presumed. One is that the reports were issued without actual examination and the other, the second opposite party was carelessness in conducting the examination. Much reliance is placed on the earlier sonographic examination done from Cosmopolitan hospital that no abnormality was detected in that report. It is a report at the age of 10 weeks and 6 days to the foetus. As per the evidence on record development of the limbs could be seen only after 11 weeks of gestation. So no negligence could be attributed to the Cosmopolitan Hospital. After the scanning in that hospital multiple scans were carried out in the opposite party hospital, that too in the advanced stages of pregnancy. So, it is not worth to contend that the anomaly should have been detected by the Cosmopolitan hospital.

14. The learned counsel for the opposite party would submit that the sonological examination is not a conclusive test so as to fix the liability on the opposite party. He placed reliance upon the following precedents to support his contention.

(1) *111(2011) CPJ 54 (SC) in “Senthil Scan Centre Vs Shanthi Sridhan & Another”*. In this case no expert evidence was adduced by the complainant to controvert the evidence that the doctor was highly qualified and that the ultrasound scanning was done with care and caution. It was a case where the absence of forearm could not be detected in the scanning. This ruling is not applicable to this case on the reason that the opposite parties had never done the mandatory anomaly scanning to find out as to whether there were any abnormalities to the foetus. There is also no satisfactory evidence adduced by the second opposite party that he was competent to do the anomaly scan. Therefore this ruling does not help the opposite parties.

(2) *AIR 2005 SC 3180 in “Jacob Mathew V State of Punjab and another”* is cited to canvas a position that a mere deviation from the normal practice is not necessarily evidence of negligence and an error of judgment by a professional per se is not sufficient to infer negligence. This precedent is in respect of a criminal prosecution and it is not applicable to this case.

Two orders of the National Commission reported in *11 (2023) CPJ 396(NC) in “Lavesh Sehgal V CEO Rockland Hospital & Others”* and *11(2023) CPJ 306(NC) in “Dr. Hulesh Mandle, MD.Gagan Diagnostic and Medical Research Centre (P) Ltd V Neeraj kumar”* were relied upon by the opposite parties. These were cases in which the failure to notice the stone in the kidney and the cardiac anomaly were dealt with which matter is not relevant in the instant case. Here the facts that the third opposite party, the doctor who treated

the patient never prescribed to conduct anomaly scan and the failure on the part of the second opposite party in furnishing the length of the femur bone in all the three sonographic reports with corresponding increase in length would only lead to a conclusion that either there was gross carelessness or without conducting tests the reports were issued.

The complainants placed reliance upon an order of the National Commission dated 22.05.2022 in "*Udayan & Others V M/S Imaging point and others*". It was a case where a child was born with agenesis of fingers, right leg below knee and left foot below ankle joint whereas the USG reports showed no abnormalities. The National Commission placed reliance upon 2010 (3) SCC 480 in "*Kusum Sharma and others V Batra Hospital and Medical Research Centre and Others*" to assess the standard of proof required for reaching a conclusion regarding negligence and observed that the breach of expected duty of care from the doctor, if not rendered appropriately, would amount to negligence.

*AIR 1969 SC 128 in "Dr Lxman Blakrishna Joshi V Dr.Trimbak Babu Godbole & Another* and *AIR 1989 SC 1570 in "A.S.Mittal v State of UP"*. The interpretation given by the Apex Court in these two rulings is that the doctor owes a duty of care in deciding whether to undertake the case and a duty of care in deciding what treatment to give and also a duty of care in the administration of that treatment. A breach of any of these duties may give rise to a cause of action for negligence.

15. On considering the evidence on record it could be seen that the third opposite party, the gynaecologist was negligent in not prescribing for anomaly scan and there was utter carelessness on the part of the second opposite party in issuing reports with measurements of the length of the femur of the foetus which actually had no lower limbs.

16. Medical science has advanced much and the parents are now having the chance to prevent the birth of babies with inherent health issues. Admittedly the second complainant had started her treatment with the opposite parties before completion of twenty weeks of her pregnancy and if the inherent defect of the foetus was detected by the opposite parties through scanning they could have saved themselves and the poor baby from lifelong miseries. The act of the opposite parties in making the complainants believe that the baby to be born to them is healthy amounts to deficiency of service.

17. So we have no hesitation to come to a conclusion that the opposite parties were negligent in rendering treatment to the second complainant which made the life of the complainants a misery. The opposite parties are jointly and severally liable to compensate the complainants and their unfortunate child by paying the compensation as deficiency of service is proved. These points are found in favour of the complainants.

18. Point No.(iii):- While fixing the quantum of compensation the Commission has to consider various aspects since a duty is cast upon us to compensate the victim through a monetary award. Compensation is a must for

non economic damages such as pain and suffering and also loss of enjoyment of life. If the abnormality occurred to the foetus was brought to the notice of the complainants before 20 weeks of gestation they could have terminated the pregnancy and saved themselves and their baby from the misery. The intensity of the trauma now being faced by the complainants cannot be assessed at this stage as the child has now reached only a tender age. As the child grows up so many complications would arise. Survival of a child without both lower limbs and hip might be very difficult and he may need artificial legs. It is not possible at this stage to assess the actual compensation to meet his requirements.

19. In this connection the ruling reported in *2011 (13) SCC 306 in "National Insurance Company Ltd V Kusuma"* appears to be beneficial. The child is now aged 7 years old. The parents of a disabled child will have to suffer perpetual agony and embarrassment. The social stigma and severe depression the complainants may suffer in the society on account of the birth of a disabled child can be imagined. The child will need the attendance of a helper throughout his life. He might not be in a position to have a decent life. He will not be able to lead a matrimonial life. So at present we are not able to quantify the actual amount needed for the decent survival of the minor child. While fixing the quantum of compensation an intelligent guess work is inevitable. Having due regard to the pitiable condition of the minor child it is found that an amount of Rs. 30 Lakhs is needed as compensation for his future as well as the present needs and the said sum shall be deposited in a Nationalized bank in the



name of the minor till he attains majority with liberty to the complainants to receive the accruing interest to meet the requirements of the minor child.

20. The complainants had to undergo the trauma on account of the birth of the disabled minor child. One of the parents has to attend the minor at all points of time as the child might not be able to do anything without the support of a third person. So it is absolutely necessary to engage an assistant to fulfill the needs of the child. The hardship to the parents consequent to the birth of a disabled baby cannot be compensated in terms of money. But the only possible way is to award an adequate amount so as to compensate them as practical as possible. The future of the complainants became dark as they have to engage themselves to assist the child throughout their life and the fate of their helpless child after their death also may be a nightmare for them. On consideration of their trauma it is found that the complainants are entitled to get a sum of Rs. 20 Lakhs as compensation. They are also entitled to get a sum of Rs. 10,000/-, as costs of the litigation. Point is found accordingly.

In the result, the complaint is allowed as follows:

- a) The opposite parties are found jointly and severally liable to pay compensation of Rs. 50,00,000/- (Rupees Fifty Lakhs only) to the complainants which has to be apportioned as Rs. 30,00,000/- for the minor child and Rs. 20,00,000/- for the complainants. The opposite parties are directed to pay the said amount along with interest @ 8% per annum from the date of filing the complaint i.e; on 17.03.2015.

- b) Opposite parties are directed to deposit the sum of Rs. 30 Lakhs in the name of the minor child in a Nationalized bank till the child attains majority with leave to the complainants to receive the interest accrued for the day today needs of the minor.
- c) The opposite parties shall pay a sum of Rs. 20 Lakhs as compensation to the complainants.
- d) The opposite parties shall pay the complainants a sum of Rs. 10,000/- as costs of the litigation.
- e) The opposite parties shall pay the entire amount awarded as per this order within 30 days from the date of receipt of the copy of this judgment failing which the opposite parties shall pay interest @ 9% per annum till the date of actual payment in respect of the entire amount.

**AJITH KUMAR D. : JUDICIAL MEMBER**

**RADHAKRISHNAN K.R. : MEMBER**

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APPENDIX

I COMPLAINANT'S WITNESS :

- PW1 - Reshmi Jayesh
- PW2 - Dr. N. Roy

II COMPLAINANT'S DOCUMENTS :

- A1 - Copy of investigation report and Imaging report
- A2 - Copy of medical record

- A3 - Copy of sonogram reports ( 3 Nos.) series
- A4 - Copy of medical record issued on 10.01.2015
- A5 - Copy of FIR
- A6 - Copy of medical record
- A7 - Copy of Out Patient Record.
- A8 - Photograph of the baby

III OPPOSITE PARTY'S WITNESS :

- DW1 - Kenny A. Thomas
- DW2 - Alex K. Ittyavirah

IV OPPOSITE PARTY'S DOCUMENTS :

NIL

V COURT EXHIBIT :

- X1 - Copy of treatment record

**AJITH KUMAR D. : JUDICIAL MEMBER**

**RADHAKRISHNAN K.R. : MEMBER**

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