2024 INSC 1035

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. OF 2024
(ARISING OUT OF SLP (C.) NOS.11716-11717 OF 2019)

BHERULAL BHIMAJI OSWAL(D) BY LRs. ...APPELLANT

VERSUS

MADHUSUDAN N.KUMBHARE ...RESPONDENT

J U D G M E N T

VIKRAM NATH, J.

1. Leave granted.

2. The instant appeals have been preferred against the judgment dated 20.11.2018 passed by the National Consumer Disputes Redressal Commission[1] in Revision Petition No. 768 of 2016 filed by the respondent herein along with Revision Petition No. 2443 of 2016 filed by the appellant herein, whereby NCDRC allowed the respondent's revision petition, dismissed the appellant's revision, set aside the order of the State

[1] "NCDRC", hereinafter

Commission and consequently dismissed the complaint.

3. It would be relevant to state that during the pendency of this appeal, the complainant-appellant had died and the appeal is being prosecuted by his legal heirs who have been brought on record.

4. Brief facts of the matter are that the instant appellant is the original complainant/patient, a resident of Lonavala, who had developed cataract in his right eye and had approached the respondent i.e. the Opposite Party[2], who is an eye surgeon, at his clinic in Pune on 11.01.1999. The respondent, after examination, advised an operation for removal of cataract in the right eye. The cataract operation was accordingly performed by the respondent at 8.00 pm on 19.01.1999 in Sushrut Hospital and the patient was discharged on the same night itself.

5. The patient stayed in Pune overnight and on the very next day, i.e. on 20.01.1999, visited the respondent-doctor with complaint of severe pain in the operated eye and headache. The respondent changed

[2] "OP", hereinafter

the bandage of the operated eye, prescribed medicines along with eye drops and gave black glasses. The appellant was called back again on 23.01.1999 for checkup when the appellant, on his visit, complained to the respondent of intense pain in his operated eye. When the respondent-doctor removed the bandage and examined the right eye, the appellant could not even open his eye because of sticky fluid oozing out of his eye. The respondent-doctor replaced the bandages, assured the appellant that the operation was successful and prescribed certain pain killers and eye drops. At this stage, the appellant was also assured that his pain would subside and vision would be restored, and he was called for further checkup on 25.01.1999.

6. However, in the meanwhile, on 24.01.1999, the appellant was undergoing severe pain and headache and finally rushed to the respondent on 25.01.1999 wherein again certain medicines and painkiller tablets were prescribed by the respondent-doctor. As per the complainant, the condition of his eye worsened and the pain became unbearable, as a result of which he went to the respondent-doctor again on 26.01.1999 along

with his wife and son. On the said date, the respondent again, after checking the eye, told the appellant that the eye was in good condition and called the appellant on the next day. On 27.01.1999, the respondent cleaned the appellant's eye with cotton and when the appellant complained that he was unable to see anything, he was reassured by the respondent that his vision will be restored to normal in a few days. It was on the same day that the respondent, for the first time, advised the appellant to conduct the Blood Sugar Level test, which came out to be normal.

7. Even after taking the medicines prescribed by the respondent, the appellant continued to suffer from severe pain in the eye and headache which was getting progressively worse for his bearing. The complainant, on 27.01.1999 itself due to unbearable pain, contacted one Dr. Tasliwal, an eye surgeon from Yerawada, who further referred the appellant to another eye specialist named Dr. Chitra Khare. Dr. Khare checked the appellant's eye and opinionated that the operated eye was completely damaged and if it is not removed in time, it may lead to further damage to the brain.

Shocked on receiving such a medical opinion for the first time in previous couple of days, the appellant and his family hastened to seek a third medical opinion on the matter and contacted Dr. Nitin Prabhudesai, an eye specialist from Pune. After checking the appellant's eye, Dr. Prabhudesai opined that there was a septic infection in the operated eye which has led to a complete damage and has to be removed.

8. Thereafter, the appellant, along with his relatives, ran from post to pillar for surgical removal of the infected eye and was finally admitted at the Military Hospital at Wanawadi on 29.01.1999 wherein he was diagnosed with endophthalmitis. Thereafter, an operation was performed for removal of partially extruded IOL through limbal section. As a result, doctors from military hospital succeeded in retaining the eyeball for cosmetic purposes but the appellant lost his complete vision from the right eye.

9. Aggrieved by the loss of vision, money spent on doctor visits and operation and the hardship caused in the entire series of unfortunate events, the appellant sent a legal notice, through his Counsel, to the

Respondent for willful medical negligence and claimed compensation to the tune of Rs. 10,00,000/- (Rupees Ten lakhs only). Subsequently, the appellant preferred Complaint No. 11 of 2000 before the District Consumer Forum, Pune *inter alia* contending medical negligence and praying for compensation of Rs. 3,50,000/- (Rupees Three lakh fifty thousand only) for loss of his vision along with special damages and interest on the amount.

10. The District Consumer Forum, *vide* order dated 19.10.2005, dismissed the appellant's complaint mainly on the ground that the appellant has not filed any expert evidence or affidavit of Doctors of Military Hospital and has, thus, failed to prove that the respondent was negligent while performing the operation of the right eye.

11. Aggrieved by the said order, the appellant preferred an appeal before the State Consumer Commission of Maharashtra[3], being Appeal No. 2337 of 2005 wherein during the course of the proceedings in the appeal, the appellant's Counsel had called for the

[3] State Commission

opinion of Dr. Bivash Kumar Das, an ophthalmologist and his written opinion was placed on record before the State Commission and has been produced before us as well.

12. The State Commission, *vide* order dated 26.11.2015, partly allowed the appellant's appeal and set aside the District Forum's order. The State Commission observed that the respondent-doctor filed his reply dated 22.10.2002 without any case papers and the said case papers were filed only at the appellate stage, to corroborate the written version, along with an affidavit dated 15.04.2006. Further, it was specifically noted by the State Commission that though the case papers are prepared after filing the written version, there are contradictions in the written version and the alleged original case papers as there was no entry of trauma which is alleged in the written version by the respondent.

13. Further, the State Commission perused discharge summary of the appellant provided by the Military Hospital wherein the appellant was stated to be suffering from endophthalmitis. While placing reliance

on the medical literature that was submitted by the complainant from reference book "Basic Ophthalmology', the State Commission held that the respondent had miserably failed to treat the complainant post-operatively. It was concluded that the complainant had developed infection after the operation of cataract and the respondent miserably failed to diagnose it and take correct steps, which pointed out a clear-cut case of medical negligence on the part of the respondent in post-operative treatment. As such, the respondent was directed to pay a compensation of Rs. 3,50,000/-(Rupees Three lakh fifty thousand only) to the complainant within a period of two months, failing which the amount shall carry an interest @12% per annum from the date of order till its realization.

14. Aggrieved by the order of the State Commission, the respondent preferred Revision Petition No. 768 of 2016 before the NCDRC. The appellant also felt aggrieved by the fact that the State Commission had not allowed the claim for special damages for the sufferings and mental agony which he had to undergo due to respondent's negligence in operation as well as pre and

post treatment also preferred Revision Petition No. 2443 of 2016 claiming special damages and medical expenses in addition to Rs. 3,50,000/- (Rupees Three lakh fifty thousand only) already awarded. Both the Revision Petitions were heard together by the NCDRC and disposed of by the common impugned order dated 20.11.2018.

15. NCDRC has based its decision on the specific finding that on 23.01.1999, i.e. within three days of the operation, the appellant had approached the respondent-doctor with a new dressing and pad which was not put when the complaint was sent back on 20.01.1999 and there was no explanation provided by the appellant as to why and from where he had applied the new pad and dressing. NCDRC came to the conclusion that the patient had on his own changed the dressing of operated eye which caused the displacement of lens and the infection appears to be traumatic in nature. Therefore, it was held that the development of endophthalmitis was due to traumatic injury and cannot be attributed to any fault or deficiency on the part of the respondent during the cataract surgery.

16. Accordingly, the NCDRC allowed the revision filed by the respondent and, accordingly, the appellant's complaint was dismissed, against which the instant appeal has been preferred. Further, the revision filed by the appellant for enhancement was dismissed.

17. We have heard the learned Counsel for the appellant and perused the material on record. However, despite service of notice, nobody has put in appearance on behalf of the respondent-doctor and we are accordingly proceeding with the matter *ex-parte*.

18. It has been submitted by the appellant that he had made five visits to the treating doctor before he took a second opinion and, on each visit, he was reassured that his operation was successful. However, a perusal of all the opinions by other eye specialists corroborate the fact that the appellant suffered from endophthalmitis which is an infection caused due to contaminated instruments. Further, it was submitted that when negligence was apparent on the face of it, there was no need of any expert evidence or testimony and the principle of *res ipsa loquitor* would become applicable.

19. The appellant has also submitted that even though NCDRC erroneously held that medical negligence is not visible from the record as the appellant had changed his own bandage while ignoring the fact that the records submitted by the respondent were ante dated, an observation clearly inferred by the State Commission. It was lastly submitted that the State Commission was absolutely correct in its finding that the appellant developed infection and abscess after the operation of cataract which the respondent-doctor failed to diagnose and also further failed to take corrective steps, thereby amounting to medical negligence.

20. Even though the respondent has not entered appearance before us, the main defence adopted by him across the three forums basically hinge on the contention that the appellant-patient has himself failed to follow post-operation care instructions. Instead, it was submitted in the respondent's reply before the District Forum that, on 23.01.1999, the appellant visited him with a new dressing and pad which was not put by him and the appellant failed to provide any

explanation as to where it came from, post which the respondent prescribed him treatment for trauma. Therefore, the moment since when the appellant adopted any outside treatment and put on the new dressing and pad which caused trauma, the respondent is discharged of his liability and cannot be held guilty.

21. However, it must be noted that at this stage before the District Forum, the respondent had not produced any case papers or prescription details to corroborate his written version, as has been rightly observed by the State Commission. Rather, it was only at the appellate stage before the State Commission that the respondent produced such case papers for the first time. Even then, a bare perusal of prescription dated 23.01.1999 makes no specific mention of any trauma that has been observed by the respondent-doctor on the said date. The said fact has not been taken note of by NCDRC in the impugned order. In these circumstances, no credible reliance can be put on the respondent's written version which was not supported by enough evidence to discharge him of his liability to exercise due care or to shift the said liability on the appellant. Therefore, in the

absence of corroborating documentary proof, the said argument is of no avail to the respondent-doctor.

22. Before moving further, we would like to take a note of the medical opinion rendered before the State Commission by Dr. Bivash Kumar Das, an ophthalmologist, which was produced as Annexure P-28 before us. In the said medical opinion, it has been clearly stated that oozing of pus after operation is not a usual occurrence and, in cases where there is small amount of white discharge from the eye post-operation, it usually disappears within 48 hours. It was further opined that oozing of pus after a cataract operation indicates presence of infection in the operated eye which needs to be treated aggressively, both locally and systematically, to prevent further spread of infection. With regard to the diagnosis of endophthalmitis after a cataract surgery, pain in the operated eye and no regaining of vision following operation were considered to be the two most important symptoms – a complaint that was consistently made by the appellant herein in his multiple visits to the respondent post-operation.

23. Given the medical opinion reproduced above and the fact that the appellant made five visits to the respondent-doctor in a week's period while consistently complaining of immense pain in the operated eye, headache and lack of vision while the respondent kept reassuring him that the operation was successful and he would recover his vision eventually, whereas all the three other doctors who the appellant visited on 27.01.1999 opined that the appellant was suffering from endophthalmitis which has led to complete damage of the eye, it becomes evident that the respondent-doctor was negligent in his diagnosing the respondent's eye. It becomes clear that the respondent failed to detect the infection and clear the same in time despite several complaints by the appellant. The said infection was diagnosed by the three doctors, namely Dr. Chitra Khare, Dr. Nitin Prabhudesai and doctors at the Military Hospital, but it was too late by then and the appellant had to undergo evisceration of his right eye leading to loss of vision. It was a blatant result of medical negligence by the respondent in post-operative care wherein corrective steps could have been taken, if

the most reasonable and basic skills which were expected from the respondent-doctor, were applied.

24. Therefore, in the facts and circumstances of the case, we deem it appropriate to restore the findings and order passed by the State Commission.

25. Accordingly, the appeals are allowed. The impugned order is set aside and the respondent is directed to pay compensation of Rs. 3,50,000/- (Rupees Three lakh fifty thousand only) to the appellants within a period of 2 months, failing which the amount shall carry an interest @12% per annum from the date of judgment till its realization.

.....J.
(VIKRAM NATH)

.....J.
(PRASANNA B. VARALE)

NEW DELHI
DECEMBER 19, 2024