(2024) 11 NCDRC CK 0012

National Consumer Disputes Redressal Commission

Case No: First Appeal No. 258 Of 2018

L. Rajendran	APPELLANT
Vs	
M/s Credence Hospital Institute For Women's Health & Fertility Research & Anr	RESPONDENT

Date of Decision: Nov. 14, 2024

Acts Referred:

- Consumer Protection Act, 1986 - Section 2(1)(d), 19

Hon'ble Judges: Subhash Chandra,Presiding Member; Dr. Sadhna Shanker, Member

Bench: Division Bench

Advocate: M Priya, Jogy Scaria, Siddhartha Jha

Final Decision: Dismissed

Judgement

Subhash Chandra, Presiding Member

1. This appeal under Section 19 the Consumer Protection Act, 1986 (in short, the “Act”) is directed against the order dated 18.08.2015 of the Kerala State Consumer Disputes Redressal Commission, Thiruvananthapuram (in short, the “State Commission”) in Consumer Complaint no. CC 09/2008 dismissing the complaint.

2. We have heard the learned counsel for the parties and perused the records. The delay of 749 days in the filing of the appeal was considered in light of the application seeking condonation of the delay. For the reasons stated therein, the delay was condoned in the interest of justice.

3. The relevant facts of the case, in brief, are that the appellant and his (late) wife had approached the respondent hospital seeking assistance in conception in 2003 after approximately 11 years of marriage. After due counselling and tests, In Vitro

Fertilization (IVF) was mutually decided upon and treatment commenced after 2 ½ years. On the second attempt of IVF, embryo transfer was done on 19.04.2006 as per BETA-HCG blood test prescribed by respondent no. 2 which was stated to be positive on 08.05.2006. After 22 days, on 11.05.2006, during which period complete bed rest was prescribed by the consulting doctor (respondent no.2), the petitioner's wife was administered an oestrogen and progesterone (Progenova) injection. She was also advised to walk and as a result she collapsed soon after and died. The cause of death was held to be "Pulmonary Embolism" in the post-mortem report dated 12.05.2006. It was also held that the deceased was not pregnant at the time of death. Alleging deficiency in service on account of the doctor's negligence in lack of proper care and not advising her properly regarding precautions required, such as higher risk of embolism in women undergoing fertility treatment and of pulmonary embolism after prolonged bed rest and oestrogen and progesterone injections, appellant approached the State Commission in CC 9/2008. As per expert evidence recorded, the patient suffering from Deep Vein Thrombosis (DVT) was also not ruled out. The State Commission dismissed the complaint after hearing both sides holding as under:

20. So the case attempted to be set up by the complainant is that wrong advice of the opposite parties in prescribing bed rest after administering Progenova and the instruction of the staff of the hospital abruptly to walk induced DVT and consequent pulmonary embolism in the patient causing her death. While discussing the oral evidence of PW I we have pointed out that his version in any way does not support this case alleged and attempted to be developed. His evidence clearly indicates that the deceased was never an inpatient in the hospital of the opposite parties. The death occurred while she was at the residence of the complainant and probably, she never took bed rest. Oestrogen which is the component of Progenova is a hormone naturally produced in the ovaries of the female. It is administered only when there is deficit production of oestrogen to regulate the reproductive cycle. Show administration of this medicine is the accepted treatment procedure to correct infertility problems. Not only the opposite parties, any other doctor treating similar problems would have administered only this medicine. Several factors influence the development of DVT and consequent pulmonary embolism including the predisposition of the patient and the evidence is that often silent DVT and silent pulmonary embolism can develop. So, on an appreciation of the entire evidence available we have no hesitation to hold that the complainant has miserably failed to establish that there was any deficiency in service or error in treating the wife of the complainant. So, the complaint should fail. As a consequence, it is unnecessary to consider the quantum of compensation that the complainant is entitled to claim.

In the result the complaint is dismissed but without costs.

4. On behalf of the appellant it was argued that respondent no. 2 who was the Chief Physician in respondent no. 1 hospital and respondent no.1 had been negligent in not administering the medicines in a proper manner and maintaining post medical care which caused the death of the appellant's wife. It was contended that the medicines, Estrogen and Progesterone should have been immediately stopped as the pregnancy was negative as per the BETA-HCG test. The respondents' failure to discontinue the injection when the BETA-HCG test was found to be negative was evidence of medical negligence. The absence of pregnancy had also been established by the post-mortem report. It was also alleged that it was due to the lack of proper medical advice regarding the dos and don'ts while under treatment of the respondents that his late wife was made to abruptly walk after the injections which led to a Pulmonary Embolism and which was the cause of her death. It was contended that fertility treatment increases the risk of blood clots in women and in the present case it was a consequence of the IVF treatment that was being provided to his wife. It was also alleged that no medication to dissolve the blood clot was given to the patient. Respondent no. 2 had also failed to examine the patient even once after the embryo transfer on 19.04.2006. The State Commission's order was argued to be flawed as it did not appreciate the facts and the liability of respondent no. 2, considering the fact that she had been the treating doctor for nearly 2 ½ years. It was also contended that the State Commission relied upon the written statement of respondent no. 2 and concluded that there was no medical negligence but negligence on part of the patient and that death was due to DVT whereas the post-mortem report stated clearly that it was due to pulmonary embolism. Even if DVT was to be accepted as the cause, it was contended that it was due to the doctor's instructions to continue with the medication after pregnancy failed. It also failed to note the negligence of the respondents on the basis of the post-mortem report which revealed that the deceased was not pregnant. As per this report, it was clear that embryo transfer was a failure. The claim for compensation of Rs 50,00,000/- was therefore pressed.

5. Per contra, the contention of the respondents is that on the date of the death of the respondent's wife, she was not admitted in the respondent no. 1 hospital. The respondent had also admitted before the State Commission that he had rushed his late wife to the hospital when she showed signs of weakness where she was declared 'brought dead'. It was contended that the present appeal was a speculative attempt to seek compensation. It was denied that the pros and cons of the IVF treatment were not explained to the petitioner and his wife as they had undergone multiple rounds of counselling and were also provided an information brochure for couples opting for IVF-ICSI-ET treatment which provided details of the procedures and the associated risks. Respondents contended that as per the established protocol and standard of care for IVF involving intra cytoplasmic injection technique Oestrogen hormone through Progynova tablets and natural sterone through Gestone 100 mg tablets) were

prescribed. BETA- HCG test was prescribed after 14 days. The same protocol had been followed in March 2005 with no adverse effects. According to the respondents, BETA HCG results on 05.05.2006 was 60 and on 08.05.2006 was 300. A scan to establish pregnancy was required to be prescribed only after 4 to 5 weeks of the embryo transfer. However, the deceased was not an in-patient with respondent no 1 as alleged since there was no in-patient facility in respondent no.1 hospital till the end of 2006. The appellant had also admitted that the injection was administered by a third party, Upasana Clinic, Pettah on the day the death of the patient occurred. It was argued that the contention that the deceased was admitted in the respondent hospital was incorrect. As per the death certificate issued by the Municipal Corporation, Thiruvananthapuram the place of death was stated to be the house of the appellant. It was argued that the BETA HCG hormone of a pregnant woman doubles every day. The post-mortem indicated the cause of death to be pulmonary embolism while the evidence of PW2 and PW3 indicated that there needed to be pre-conditions for DVT which leads to pulmonary embolism. While admitting that pregnant women could develop it, respondent argued that pulmonary embolism was linked to medical symptoms. The incidence of pulmonary embolism was very low, of about 2 to 3 cases per 10,000 IVF cases. However, DVT was rare and could occur without symptoms for which the protocol does not prescribe daily scans. Respondents submitted that the “reasonable” duty of care expected was provided by them and hence the order of the State Commission was in order.

6. From the foregoing it is manifest that the petitioner has set up a case of medical negligence against the respondents for the death of his wife. It has been alleged that the standard of care owed to the patient was not provided and that the prescribed protocol for IVF patients was not adhered to. The State Commission is alleged to have erred in not appreciating the facts and evidence in arriving at its finding to dismiss the complaint.

7. We have considered the contentions in considerable detail. In matters where an allegation of medical negligence is made against a doctor or hospital (or both), it is the settled proposition of law that the definition of ‘service’ under Section 2(1)(d) of the Act has to be understood on broad parameters and it cannot exclude service rendered by a medical practitioner. It has also been well laid down that the jurisprudential concept of negligence differs in civil and criminal law. The law relating to what constitutes medical negligence has been laid down in the Hon’ble Supreme Court’s judgment in Jacob Mathew Vs. State of Punjab & Anr., III 205 CPJ 9 (SC). It is based on the Bolam Test (1957) 2 A11 ER 118. The test for medical negligence is based on the deviation from normal medical practice and it has been held that establishment of negligence would involve consideration of issues regarding:

(1) **state of knowledge** by which standard of care is to be determined,

(2) **standard of care** in case of a charge of failure to (a) use some particular equipment, or (b) to take some precaution,

(3) **enquiry to be made** when alleged negligence is (a) due to an accident, or (b) due to an error of judgment in choice of a procedure or its execution. For negligence to be actionable it has been held that the professional either (1) professed to have the requisite skill which he did not possess, or (2) did not exercise, with reasonable competence, the skill which he did possess, the standard for this being the skill of an ordinary competent person exercising ordinary skill in the profession.

8. In a claim of medical negligence, it was essential to establish that the standard of care and skill was not that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. For negligence to be actionable, it was held that it has to be attributable and the three essential components of "duty", "breach" and "resulting damage" need to be met, i.e. (i) the existence of a duty to take care, which is owed by the defendant to the complainant; (ii) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and (iii) damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant. "Negligence" is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or, doing something which a prudent and reasonable man would not do. "Negligence" becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence, as recognized, are three: existence of a duty to take care, which is owed by the defendant to the complainant; failure to attain that standard of care, thereby committing a breach of such duty; and "resulting damage", which is both casually connected with such breach and has been suffered by the complainant. If these three ingredients are made out on the basis of evidence, the defendant should be held liable in negligence.

9. However, the Hon'ble Supreme Court has also held, in **V. Kishan Rao Vs. Nikhil Super Speciality Hospital & Anr.,** (2010) 5 SCC 513 decided on 08.03.2010, that the principle of res ipsa loquitur would also apply to cases of medical negligence. It has held the principle of res ipsa loquitur, which is essentially an evidential principle, is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred. The Apex Court has held that **"In a case where negligence is evident, the principle of res ipsa loquitur operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence**." It was also held that as regards adducing of expert evidence, it would have to be judged on the facts of each case and there cannot be a mechanical or strait jacket approach since each case must stand on its own legs.

Courts have consistently held that the onus would shift to the defendant once res ipsa loquitur is established.

10. In **Indian Medical Association vs V.P. Shantha & Ors**., 1995 SCC (6) 651 decided on 13.11.1995, the Hon'ble Supreme Court held that in cases before consumer fora both simple and complicated cases may come and that only in complicated cases the recording of evidence of an expert may be required for which the complainant may be asked to approach a civil court for appropriate relief. It was also held by the Hon'ble Supreme Court in **Dr. J.J. Merchant & Ors vs Shrinath Chaturvedi**, 2002, (6) SCC 635 decided on 12.08.2002 that it has to be left to the discretion of the Commission whether or not to examine experts in appropriate matters.

11. The doctrine of res ipsa loquitur ("the thing speaks for itself") is based on an inference of negligence based on the nature of injury or damage even if there is no direct evidence of the defendant's actions. In medical negligence, the doctrine shifts the burden of proof to the medical professional to explain how the damage occurred. In **V. Kishan Rao** (supra), the Hon'ble Supreme Court had held that the doctrine of res ipsa loquitur could apply to cases of medical negligence also. It was held that negligence could be inferred from the facts when the defendant medical professional and hospital had exclusive control over the situation in which the patient was and the nature of the damage suffered suggests that it would not have occurred without negligence.

12. In the instant case, however, the petitioner has been unable to establish medical negligence due to the breach of duty of care or negligence attributable to the doctrine of res ipsa loquitur. It is evident that the deceased wife of the petitioner was not admitted in respondent no.1 hospital at the time of death. There is no evidence to establish that the hospital or its personnel were in any way liable for the demise of his wife. The patient was also administered the injection by a third party according to the respondent which was not denied by the petitioner. While the report of the post-mortem states that the cause of death was "pulmonary embolism" it has not been established through evidence to be attributable to any act of commission or omission on part of the respondents. Therefore, the contentions of the petitioner cannot be sustained.

13. In view of the foregoing, we find no grounds that warrant our interference to disturb the finding of the State Commission and consequently hold that this first appeal is liable to fail. Accordingly, the appeal is dismissed and the order of the State Commission is affirmed with no order as to costs.

9. Pending IAs, if any, stand disposed of with this order.