IN THE DELHI STATE CONSUMER DISPUTES REDRESSAL COMMISSION

Date of hearing: 29.04.2022

Date of Decision: 16.08.2022

COMPLAINT CASE NO.-634/2013

IN THE MATTER OF

MRS. RITU RANI,
W/o SH. VIVEK KUMAR,
R.O H. NO. 14/266,
TRILOK PURI, DELHI- 91

…Complainant

(Through: Mr. Shyamla Pal, Advocate)

VERSUS

1. **MAX SUPER SPECIALITY HOSPITAL** *(Wrongly mentioned as Max Super Specially Hospital by the complainant in memo of parties of the present complaint)*
DEPTT. OF OBS AND GYNECOLOGY
108-A, INDRAPRASTHA EXTENSION,
PATPARGANJ, DELHI – 92.

2. **DR. PARINITA KALITA**
C/O MAX SUPER SPECIALITY HOSPITAL
DEPARTMENT OBS AND GYNECOLOGY,
108-A, INDRAPRASTHA EXTENSION,
PATPARGANJ, DELHI – 92

…Opposite Parties

(Through: Mr. Ravindra Mohan Aggarwal, Advocate)

CORAM:
HON'BLE JUSTICE SANGITA DHINGRA SEHGAL, (PRESIDENT)
HON'BLE SH. RAJAN SHARMA, MEMBER (JUDICIAL)

Present: None for the parties.

PER: HON'BLE JUSTICE SANGITA DHINGRA SEHGAL, (PRESIDENT)

JUDGMENT

1. Brief facts necessary for the adjudication of the present complaint are that the complainant during her initial months of pregnancy went to Max Hospital, Patparganj, Delhi. The complainant had a First Level Ultrasound on 20.10.2010 and was informed by the Opposite Party no. 2 that there was nothing to worry and was advised to come for routine check-up after one month.
2. On 23.11.2010, after 2nd Level Ultra Sound was conducted, the Opposite Party No. 2 again assured her that there were no complications and called her for routine check-up. The complainant duly visited the Opposite Party no. 2 on 11.12.2010, 12.01.2011, 30.01.2011, 05.02.2011 and 20.02.2011. However, after the 3rd level Ultrasound with colour Doppler Test on 08.03.2011, the Opposite Party no. 2 informed that there was abnormality in the heart of the child and advised her to get the Fetal Echo test.
3. As advised by the doctors, the complainant got Fetal Echo Test and after perusing the report of the same, the Opposite Party no. 2 informed her that Heart of the child was perfect but there was abnormality in the head of the child in the womb. The Opposite Party no. 2, thereafter, prescribed medicines to the complainant.

4. The Complainant met the Head of Department of Gynaecologist of the Max Hospital, Patparganj, Delhi, Dr. Neera Agarwal on 24.03.2011 and showed all reports to her, to which she was advised to get the tests again from some Ultrasound Specialist. The complainant duly got her Ultra Sound with Colour Doppler done from Dr. Kuldeep (Ultrasound Specialist) on 24.03.2011. Thereafter, after examining the report, Dr. Neera Agarwal informed the complainant that the brain of the child in the womb had not developed properly and advised her to get few more tests. The complainant gave birth to a baby boy on 17.04.2011 and was discharged from the hospital on 20.04.2011.
5. The child became permanently disabled and the complainant, therefore, alleged medical negligence on the part of opposite parties as they failed to examine the complainant properly during her pregnancy, due to which the condition of the child deteriorated day by day.
6. On the aforesaid grounds, the complainant has prayed for following reliefs against the opposite parties: -
    a. *Pay a sum of Rs. 40,00,000/- for expenses incurred on the treatment of the complainant and for causing mental pain, agony to the complainant and her family members.*
    b. *Pass an award of Rs. 22,000/- as litigation expenses in favour of the complainant and against the respondent.*
    c. *Any other relief/ further order, which this Hon'ble Forum may deem fit and proper be also passed in favour of the complainant and against the respondents / Opposite party.*
7. Notice was issued to all the Opposite Parties and the written statement was also duly filed by the Opposite Parties. The counsel for the Opposite Parties submitted that there was no negligence on their part and the present complaint is liable to be dismissed as the

same is frivolous, vexatious, unjustified and an abuse to the process of law.

8. On merits, it has been contended by the counsel on behalf of the Opposite Parties:
   a. that no abnormality was diagnosed in child till 2nd Trimester Ultrasound of the complainant;
   b. that no medicine was administered to the complainant during her pregnancy, which was responsible or caused any side effect or caused any kind of abnormality to the child;
   c. that Microcephaly *(Microcephaly is a condition in which a baby's head is smaller than average. The baby is either born with a smaller head, or the condition develops as the baby gets older)*, may not be detected most of the times until late pregnancy or later in infancy as the head circumference is difficult to measure by this stage, especially when the head is well down in the maternal pelvis *(the bones that form a bowl-shaped structure in the area below the waist at the top of the legs, and to which the leg bones and spine are joined);*
   d. that Microcephaly may happen at the time of birth of the child or during the first few years of child's life and therefore, the permanent disability of the child was inborn or natural and not due to the acts of the Opposite Parties;
9. The Complainant has filed rejoinder to the Written Statement filed on behalf of Opposite Parties and has even filed the Evidence by Way of Affidavit. The Opposite Parties have also filed their Evidence by way of Affidavit.
10. The complainant and Opposite Party no. 1 have also filed their Written Arguments. The Opposite Party no. 2 failed to file her written arguments despite specific direction vide order dated

29.04.2022. The case was finally heard on 29.04.2022, when the judgment was reserved. The counsel for the Opposite Parties appeared on 29.04.2022, however, none chose to appear on behalf of the complainant.

11. We have heard the Counsel for the Opposite Parties and perused through the material on record including the Written Arguments filed by the complainant and Opposite party no. 1.

12. Before delving into the merits of the case, we deem it appropriate to refer to the law on the cause. This Commission, has, in detail discussed the scope and extent of Negligence with respect to Medical Professionals in **CC- 324/2013**, titled **Seema Garg & Anr. vs. Superintendent, Ram Manohar Lohia Hospital & Anr.** decided on 31.01.2022, wherein one of us (Justice Sangita Dhingra Sehgal, President) was a member. The relevant portion has been reproduced as below:

> *"9……The Hon'ble Apex Court, after taking into consideration its previous decisions on Medical Negligence, has consolidated the law in* ***Kusum Sharma and Ors. vs. Batra Hospital and Medical Research Centre and Ors.*** *reported at* ***(2010) 3 SCC 480****, wherein, it has been held as under:*
>
> *"94. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:*
>
> *I. Negligence is the breach of a duty exercised 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.*
>
> *II. Negligence is an essential ingredient of the offence. The negligence to be established by the*

prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they

can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

95. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind."

10. In cases wherein the allegations are levelled against the Medical Professionals, negligence is an essential ingredient for the offence, which is basically the breach of a duty exercised by omission to do something which a reasonable man would do or would abstain from doing. However, negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence and they are entitled to protection so long as they follow the same."

(emphasis supplied)

13. In the present case also, it will have to be ascertained whether there was any lack of skill and competence on the part of the operating doctor and/or any omission to do what was actually required in the present facts and circumstances.

14. It is not the case of the Complainant that the doctors operating upon her were not having the requisite skill or competence or were not qualified to operate upon the patient, hence, the first part of the aforesaid para stands answered, that there was no lack of competence on the part of the Opposite Parties.

15. So far as the question of *omission to do any act which was actually required is concerned,* the Complainant alleged medical negligence on the part of opposite parties as they failed to diagnose Microcephaly during initial days of her pregnancy, due to which doctors failed to guide her properly, which if would have been done by the opposite parties could save the child from the said permanent abnormality.

16. It is appropriate to refer to the dicta of the Hon'ble Apex Court, in **Harish Kumar Khurana vs. Joginder Singh and Ors.** reported at **AIR 2021 SC 4690**, being the latest pronouncement on the cause, wherein, the Hon'ble Supreme Court, while taking into consideration its previous pronouncements in **Jacob Mathew v. State of Punjab and Anr.** reported at **(2005) 6 SCC 1**, and **Martin F. D'Souza v. Mohd. Ishfaq** reported at **(2009) 3 SCC 1,** has held as under:

> *"14. Having noted the decisions relied upon by the learned Counsel for the parties, it is clear that in every case where the treatment is not successful or the patient dies during surgery, it cannot be automatically assumed that the medical professional was negligent. To indicate negligence there should be material available on record or else appropriate medical evidence should be tendered. The negligence alleged should be so glaring, in which event the principle of res ipsa loquitur could be made applicable and not based on perception."*

17. From the aforesaid dicta of the Hon'ble Apex Court, it is clear that only the failure of the treatment is not prima facie a ground for

Medical Negligence and in order to attract the *principle of res ipsa loquitur,* Negligence *i.e. the breach of a duty exercised 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,* should be clearly evident from the record.

18. The official website of World Health Organisation (WHO) (https://www.who.int/news-room/fact-sheets/detail/microcephaly#:~:text=Early%20diagnosis%20of%20microcephaly%20can,or%20at%20a%20later%20stage), show some light on the *'Microcephaly'*. Under the head 'Diagnosis of Microcephaly', it has been stated that *'Early diagnosis of microcephaly can sometimes be made by fetal ultrasound. Ultrasounds have the best diagnosis possibility if they are made at the end of the second trimester, around 28 weeks, or in the third trimester of pregnancy. Often diagnosis is made at birth or at a later stage.'*

19. The aforesaid website also under the head 'Causes of Microcephaly', stated that *there are many potential causes of microcephaly, but often the cause remains unknown. The most common causes include:*

- *infections during pregnancy: toxoplasmosis (caused by a parasite found in undercooked meat), Campylobacter pylori, rubella, herpes, syphilis, cytomegalovirus, HIV and Zika;*
- *exposure to toxic chemicals: maternal exposure to heavy metals like arsenic and mercury, alcohol, radiation, and smoking;*
- *pre- and perinatal injuries to the developing brain (hypoxia-ischemia, trauma);*
- *genetic abnormalities such as Down syndrome; and*
- *severe malnutrition during fetal life.*

20. From the aforesaid Medical Literature, it is evident that Microcephaly may sometimes be diagnosed through Ultrasounds and the best diagnosis possibility are at the end of the second trimester, around 28 weeks, or in the third trimester of pregnancy. It is further noted that diagnosis of microcephaly is often made at birth or at a later stage.

21. Returning to the facts of the present case, it is noted that 1st and 2nd Level Ultrasound did not show any kind of abnormality in relation to the condition of the child. Also, the report of 3rd Level Ultrasound and Fetal Echo-Doppler Test had not shown any abnormality in the child of the complainant. Since the Ultrasound and Doppler test report failed to diagnose the Microcephaly, the question of advising the complainant properly with respect to the same does not arise as the opposite parties were themselves not aware of the said abnormality.

24. It is further noted that delivery of the child has been done by LSCS (Lower Segment Caesaran Section) on 17.04.2011, which was uneventful. It is a further clear from the medical literature that the Microcephaly is often diagnosed at the time of birth or at later stage. There exists no evidence which would substantiate the claim of the Complainant that the diagnosis of Microcephaly could not be done earlier due to the negligent acts of the opposite parties or the treatment given to the complainant by the Opposite Parties was not acceptable or was not used generally at the time of pregnancy. The Complainant has even failed to establish that there was a lack of due care and caution on the part of the Opposite Parties either by oral or by documentary evidence, which are basically the essential

requirements/ingredients for constituting a case of Medical Negligence covered under the Consumer Protection Act, 1986.

25. We further deem it appropriate to refer to the dicta of the Hon'ble Apex Court in **C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam** reported at **(2009) 7 SCC 130**, wherein, it has been held as under:

> *"37. We find from a reading of the order of the Commission that it proceeded on the basis that whatever had been alleged in the complaint by the respondent was in fact the inviolable truth even though it remained unsupported by any evidence. As already observed in Jacob Mathew case [(2005) 6 SCC 1: 2005 SCC (Cri) 1369] the onus to prove medical negligence lies largely on the claimant and that this onus can be discharged by leading cogent evidence. A mere averment in a complaint which is denied by the other side can, by no stretch of imagination, be said to be evidence by which the case of the complainant can be said to be proved. It is the obligation of the complainant to provide the facta probanda as well as the facta probantia."*

26. Perusal of the above settled law reflects that the onus to prove medical negligence is on the complainant and the same can be discharged by leading cogent evidence. It is noted that the complainant has failed to adduce any evidence which shows us that it was due to the acts of opposite parties that the child of the complainant had suffered from Microcephaly. There is no proof of any medicine being administered to the complainant during her pregnancy, which had caused the said abnormality in the child.

27. Even the website of WHO mentioned above shows that *there is no specific treatment for microcephaly*. Therefore, it is clear that the opposite parties could not cure the child from the said disease through any treatment. It is clear from the record that the opposite parties had taken due care and caution in treating the complainant and the abnormality in the child born to the complainant has no relation to the acts of the opposite parties.
28. Consequently, we are of the view that there exists no Negligence on the part of the Opposite Parties, hence, the Complaint stands dismissed, with no order as to costs.
29. Applications pending, if any, stand disposed of in terms of the aforesaid judgment.
30. A copy of this judgment be provided to all the parties free of cost as mandated by the Consumer Protection Rules. The judgment be uploaded forthwith on the website of the commission for the perusal of the parties.
31. File be consigned to record room along with a copy of this Judgment.

(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT

(RAJAN SHARMA)
MEMBER (JUDICIAL)

Pronounced On:
16.08.2022