

Medical negligence by doctor and hospital in anomaly scan during pregnancy: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION NEW DELHI

NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY

...Appellant

NOIDA MANAGEMENT SYSTEM PVT. LTD.

...Respondent

Case No: FIRST APPEAL NO. 388 OF 2013

Date of Judgement: 03 January 2024

Judges:

A. P. SAHI – PRESIDENT

For Appellant: MR. ABHAY KUMAR TAYAL, MR. DEEPAK AGARWAL, ADVOCATES

For Respondent: MR. GAURAV BHATIA, MR. UTKARSH JAISWAL, MR. VIKAS TIWARI, ADVOCATES

Facts:

Paragraphs 1-11

Complainants Manju and Jithesh, husband and wife employed abroad, consulted Dr. Paili at Mother Hospital for pregnancy after previous abortion history. Manju underwent preliminary ultrasound scan on 02.09.2005 by Dr. Ambady Ramakrishnan at 9 weeks 5 days pregnancy which showed normal parameters. Advised follow up. As per hospital, Manju underwent exams abroad on 02.09.2005 and 10.11.2005 which showed no abnormalities. Manju denies this. Manju underwent anomaly scan by Dr. Ambady on 28.12.2005 at 26-27 weeks which reported breech position

but normal limbs and no abnormalities. Another scan on 11.03.2006 also showed no abnormalities. Baby born on 27.03.2006 with missing lower limbs and right hand deformity.

Arguments by Hospital and Doctor:

Paragraphs 12-17

Manju did not undergo advised anomaly scan between 18-20 weeks, which is ideal time for detecting abnormalities. Scan on 28.12.2005 was not to detect anomalies since past ideal time. Amniotic fluid was also reduced, further reducing visibility. As per medical literature, limb anomalies difficult to detect in late pregnancy due to bone ossification and positioning. Accuracy rates also only 45-55%. All anomalies cannot be necessarily detected. Failure of Manju to follow advice cannot implicate Hospital/Doctor.

Arguments by Complainants:

Paragraphs 18-23

28.12.2005 scan report mentions adequate amniotic fluid, so visibility contention incorrect. Medical literature shows some anomalies can be detected after 20 weeks. Expert said anomaly scan done carefully. Report on 28.12.2005 categorically states normal limbs. Subsequent reports also confirm no anomalies. Cannot now claim limbs not visible. Unlikely machine error caused wrong report. Likely doctor's negligence in scan and preparation of report.

Court's Reasoning:

Paragraphs 24-39

Manju did not follow advice for 18-20 week scan. Mitigating factor for hospital/doctor. Manju could not have legally aborted after 20 weeks in any case. Hospital/Doctor persistently reported normal limbs in 28.12.2005 and subsequent scans. Categorical recording without doubt. Expert said anomalies can sometimes be detected even after 20 weeks. 28.12.2005 was anomaly scan. If limbs were normal on 28.12.2005, unlikely to get deformed by delivery on 27.03.2006. Clear negligence by doctor. Defence of invisibility negated by positive reporting of normal limbs. Did doctor himself scan adequately? Fate of child not due to negligence but negligence in scan reporting established. Compensation of Rs. 75,000 awarded by State Commission a pittance

considering lifelong implications. Enhanced to Rs. 7,50,000 each on hospital and doctor.

Cases cited:

Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee (2009) 9 SCC 221

Balram Prasad Vs. Kunal Saha And Ors. (2014) 1 SCC 384

Conclusion:

Paragraphs 40-41

Appeals by hospital and doctor rejected. Complainants appeal allowed and compensation enhanced to Rs. 7,50,000 each on hospital and doctor while affirming negligence finding.

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Court

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Full Text of Judgment:

1. The Appeal arises out of an Order dated 04.04.2013 passed during execution in Execution Petition No.12/2012 arising out of Complaint No.20/2010 decided by the State Consumer Disputes Redressal Commission, U.P. on 27.09.2011.

2. A development took place immediately thereafter. The file was processed by the Appellant Authority and a proposal was made to prefer an Appeal against the Order of the State Commission. On 12th of December, 2011, the Complainant moved an application before the Appellant Authority that since the allotted plot could not be delivered as the encroachment had not been removed, hence an alternative equivalent plot be allotted. In that event, the Complainant offered to waive off the demand of 18% interest and the damages of Rs.10 lacs as awarded by the State Commission. The said letter dated 12.12.2011 as translated by the Appellant is extracted hereunder:

“To,
Hon’ble Chief Executive Officer,
NOIDA

Sub: Consent letter for allotment of another plot equal to Industrial

Plot No. B-7, Sector-68.

Sir,

It is requested that the Applicant was allotted Industrial Plot No B-7, Sector 68, area 4000square meter for I. T. Project on 08.01.2007, the lease deed of which on 30.5.2008executing in favour of the Allottee on 05.06.2008 possession letter had been given. Onthe plot on the dispute of physical possession the Applicant had filed Complaint No.30/2010 M/s Noida Management System Pvt. Ltd. versus NOIDA before the StateConsumer Forum, Lucknow. By the Order dated 27/09/2011 the State Forum had orderedto remove the encroachment from the said plot within 30 days handed over thepossession. In case of the encroachment is not removed order was passed in thealternative equal plot was directed to be given on the amount deposited by the Applicantagainst the said plot be given 18% interest per annum along with rupees ten lakhs asdamages..

The Applicant from 2007 is harassed in the above case. The Applicant actually wants toimplement the Project. If the Authority in place of above plot equivalent other alternativeplot is allotting then the Applicant in the context of Order passed by the StateConsumer Forum will not make demand of 18% interest per annum and thedamages of rupees ten lakhs and would be bound by the said statement. Besides thiswill not make demand of any other kind of damages/amount.

On the basis of the above facts allowing the Application of the Applicant may kindly beallotted another alternative plot. The Applicant will always remain obliged.

Applicant

Sd/- illegible

M/s Noida Management System Pvt. Ltd.

B-07, Sector -68, Noida."

The said letter was accompanied by an Affidavit swearing the same paragraphs which is onrecord as Annexure-4.

3. The fact of the aforesaid application/letter and Affidavit was also noticed by the Executing Court in the impugned Order dated 04.04.2013

but it was held that such an undertaking reflectson the negligent and deficient attitude of the Authority that resulted in the harassment of theComplaint. Accordingly, the Execution Application was allowed and the Authority was calledupon to submit the calculation as per the final Order dated 27.09.2011 within a fortnight and inthe absence of any compliance, process would be undertaken under Section-25 r/w Section-27of the Consumer Protection Act, 1986.

4. Pursuant to the aforesaid offer, the same was accepted by the Authority vide letter dated19.12.2011, the translation whereof as on record is extracted hereunder:

“Chief Executive Officer
Chief Administrative Bhawan,
Sector-6, Noida, Gautambuddh Nagar.
Letter No. Noida/M.Pr(I)/2011/6226

Dated 19-12-2011

M/s Noida Management System Pvt Ltd.
B-107, Sector-68, Noida.

Sub: In respect of allotment another plot equivalent to Industrial Plot No. B-7, Sector-68, Noida.,

Sir,

Kindly refer to your letter dated 12.12.2011 by which you in respect of the equivalent plotunder reference in respect of the Complaint No. 20/10 filed by you before the Hon. StateConsumer Forum, Lucknow in compliance with the Order passed on 27.09.2011 on the basis of mutual compromise outside the Court equivalent plot has made to be given onthis condition that the Allottee actually wants to implement the Project. Therefore if theAuthority in place of above plot equivalent any other plot is allotting then the Allottee inthe context of Order dated 27.09.2011 passed in Complaint No. 20/2010 passed by StateConsumer Forum, Lucknow against the plot on the amount deposited interest at the rateof 18% per annum and rupees ten lakhs as damages and the amount of expenditureincurred on stamp duty/registration fees on the execution/registration of the Lease Deed will not demand and

would be binding. Besides this in respect of the said plot any kind of demand of damages/amount from the Authority/ Hon. Court will also not make nor in this respect will file any suit in any Court.

In this respect it has to be informed that the Authority in compliance of the Order of Hon.Court/your Application in Industrial Area Phase III a plot of 4000 square meter in case not being available two plot Nos. J-48 and J-49 of 2220 square meters each in Sector-63 Noida total area 4440 square meter is being allotted as an alternative plot on the following conditions:

1. The allotment of alternative plot will be in accordance with the terms and conditions and rates mentioned in the original allotment letter of plot dated 08.01.2007.

2. In the item of original plot deposited amount in favour of alternative plot to be adjusted, in surrendering the original allotted plot and for the execution of Lease Deed of alternative plot will have to be borne by the Allottee himself.

3. The premium of increased 440 square meters area (along with local benefits) and in one installment land rent payment would have to be done on the present prevalent rate.

4. The Allottee will be bound by the conditions mentioned in the Affidavit submitted along with application dated 12.12.2011. Rs. 33,72,600/ land rent in one installment along with local benefits fees of Rs. 9,27,466/- within 30 days of the issuance of the letter would deposit and the copy of the Challan will submit in the office and will surrender the Lease Deed of original plot and will kindly execute the Lease Deed of alternative allotted plot. The conditions of Lease Deed and allotment will be same.

Sd/-

Manager – Industrial

Copy

1. Accounts Officer (I)

Sd/- illegible Manager – Industrial”

5. Consequent to the said acceptance, the Complainant was called upon

for submitting of the formalities for the execution of the Lease Deed.
The said letter dated 25.01.2012 is extracted hereunder:

“Industrial Department

Letter No. Noida/M.Pr.(1)/2012/6754

Dated 25/1/2012

To

General Manager,

District Industry Centre,

District Gautam Buddha Nagar

Sub: In respect of exemption of duty in execution of Lease Deed of
Industrial Plot No. J-48, J-49 Sector 63 Noida.

Sir,

Kindly it has to be informed that in favour of M/s Noida Management System (P) Ltd. the Authority on 08.01.2007 had allotted Plot No. B-07, Sector-68 area 4000 sq. M. On the plot being the encroachment physical possession the Authority could not give. In compliance with the Order passed by the Hon. State Consumer Forum, Lucknow on the basis of previous conditions for the Project of IT/ITES alternative Plot No. J-48 and 49 Sector-63 area 4440 square meter has been allotted by the Authority letter dated 19.12.11.

In the case of Plot No. B-07 Sector-68 of previously allotted plot for the execution of legal document according to Government U.P. Notification No. to K.M. 05-305/11-2002-500(136)/2003 Lucknow dated 19.01.2005, 19.12.2005 and 30.12.2005 and 702/77-06-07-15 dated 28-06-2007 had been exempted from payment of stamp duty. Therefore in compliance with the Orders of the Hon. State Consumer Forum, Lucknow on the previous conditions allotted alternative plot No. J-48 and 49 Sector-63, area 4440 square meter for the execution of legal documents stamp free and for registration at your level also after necessary inquiry is being sent to you for putting signature as a witness.

Enclosed as above

Sd/- illegible
General Manager –I”

The Lease Deed was executed thereafter on 25.01.2012 which is on record.

6. Learned Counsel for the Appellant submits that with the full and final settlement in the terms offered by the Complainant and his waiver of the 18% amount of the interest as well as compensation of Rs.10 lacs, the decree of the State Commission stood satisfied finally for all intents and purposes. Consequently, the filing of the Execution Application was totally misconceived and impermissible in law.

7. He further invites the attention of the Bench to the provisions of Section-13 of the procedure applicable to Complaints and also the powers conferred for the purposes of execution of the Orders and decrees under the Consumer Protection Act, 1986. He submits that once the parties have acted upon the offer made by the Complainant and the same has crystallized into the acceptance thereof and consequential execution of a Lease Deed, there is no occasion for the Executing Court to travel behind the said finalization of the proceedings thereby acting contrary to the intention of the parties that had finally settled the dispute.

8. It is assailing this Order dated 04.04.2013 that the present Appeal has been filed contending that the Executing Court could not have travelled beyond the satisfaction of the decree which intervened and became final between the parties with the acceptance of the offer before the filing of the Execution Application. It is submitted that the Execution Application ought not to have been entertained and should have been dismissed outright.

9. Learned Counsel for the Appellant has also urged that the Complainant/Respondent does not fall within the definition of the word 'Consumer', hence, the decree on its behalf is inexecutable.

10. Learned Senior Counsel for the Respondent Mr. Bhatia has vehemently opposed the Appeal contending that the Executing Court cannot go behind the decree of the State Consumer Forum as it has become final in terms of Section-24 of the 1986 Act which is extracted hereinunder:

“24. Finality of orders.—Every order of a District Forum, the State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final.”

He submits that there is no waiver on the part of the Complainant and he cites the judgment in the case of Karnataka

Housing Board vs. K.A. Nagamani (2019) 6 Supreme Court Cases 424

to contend that the execution proceedings are not a continuation of the suit. It is undisputed that no Appeal has been filed by the Appellant against the original Order of the Commission dated 27.09.2011. In view of this, it is the Appellant who is estopped from raising any plea to dilute the final Order of the State Commission which as stated above has attained finality in terms of Section-24 of the Consumer Protection Act, 1986.

11. He further submits that there was no intentional relinquishment of any right or advantage that had statutorily and legally accrued to the Complainant under the final Order of the State Commission. The Appellant waited for more than 30 days and in effect were compelling the Complainant to make an offer in order to avoid their liability which had already been adjudicated upon and settled by the State Commission under the final Order referred to above. He, therefore, submits that any such consent which is an outcome of undue influence cannot take away the right of the Complainant to receive interest on a huge amount of money that was unjustifiably retained by the Appellant authority for a fairly long time. He has cited judgments in the case of Central Inland Water Transport Corpn. vs. Brojo Nath Ganguly (1986) 3 SCC 156 and

National Insurance Co. Ltd. vs. Boghara Poly fab (P) Ltd. (2009) 1 SCC 267 to substantiate his submission.

12. He has further rebutted the contention of the Appellant that the Complainant was not a 'Consumer' and this issue was not even raised before the State Commission. Hence, it cannot be a ground of challenge. He, however, cites the Apex Court decision in the case of Lucknow Development Authority vs. M.K. Gupta (1994) 1 SCC 243 in support of his submissions. He has then requested for an award of just

compensation keeping in view of the judgment of the Apex Court in GDA vs. Balbir Singh (2004) 5 SCC 65.

13. Having considered the submissions raised what appears to be the main bone of contention is as to whether the intervening offer made by the Complainant after the final Order of the State Commission, that came to be accepted by the Authority and the Lease Deed was actually executed, should be a factor amounting to the final satisfaction of the decree and the impact thereof. It is undisputed that the possession has also been handed over to the Complainant on 05.03.2012.

14. In this regard, the pleadings in the Execution Application and the Reply filed by the Appellant have to be considered. The Execution Application No.12 of 2012 is on record as Annexure-9. In Para-4 of the said Application, it has been averred that the Chief Executive Officer of the Appellant informed the representative of the Complainant that if the Complainant wanted to get an alternative plot, he would be required to forego the other claims. In Para-6, it is averred that if any delay is committed by the Complainant in either accepting or refusing to accept the offer, the Authority would not be responsible for the same and they would contest the matter to the highest Court. The Application further recites that the Appellant Authority succeeded in their arbitrary bargain and they exercised undue influence and coercion, that compelled the Complainant to accept the said offer who was left with no other option.

15. The details of the offer and the Affidavit of the Complainant have been disclosed in Para-10 of the said Execution Application and it is alleged in Para-12 that it was done in compelling circumstances. Hence, the Executing Court was requested to issue Orders for the execution of the final Order dated 27.09.2011 by taking action in terms of Section-25 of the Consumer Protection Act, 1986 and also further steps, if necessary, under Section-27 of this Act.

16. The aforesaid averments contained in the Execution Application have been denied in Para-2 of the Counter-Affidavit and it has been urged by the Appellant that there is no deviation and the Order and the Decree of the State Commission, subject to the offer made by

the Complainant and accepted by the Appellant, has been entirely satisfied. The allegations made in the Execution Application about undue influence and coercion have all been denied, specifically in the said Affidavit which is on record.

17. The question as to whether the said arrangement was brought about on the voluntary consent of the Complainant, no evidence was either discussed nor the aforesaid averments contained in the Execution Application or the Reply filed by the Opposite Party denying the same have been either analyzed or appropriately adjudicated upon. An inference has been drawn of the harassment of the Complainant without coming to any convincing conclusion about the allegation of coercion, undue influence or any pressure being exercised by the Authority and its denial by it.

18. It is true that the Order of the State Commission dated 27.09.2011 attained finality in terms of Section-24 and was never subjected to any Appeal by either of the parties. Thus, the Order dated 27.09.2011 passed by the State Commission is for all intents and purposes final.

19. However, the issue is that before filing of the Execution Petition, an offer was made by the Complainant/Decree Holder himself offering waiver of interest and compensation amount as awarded by the State Commission. This has been disputed by the Complainant himself by saying that the same was an outcome of pressure that the Complainant was facing and there was no option left but to first take possession of the plot.

20. It is, therefore, evident that the possession of the alternate plot was accepted by the Complainant in terms of the satisfaction of the decree pursuant to the final order dated 27.09.2011. The decree, therefore, stood substantially satisfied with the delivery of the plot in terms of the final Order on the offer of the Applicant Complainant and accepted by the Appellant. The Lease Deed was executed in compliance and satisfaction thereof.

21. It is these circumstances as to whether there was any compulsion and that the offer was made under compulsion does not seem to have

been examined or assessed by the State Commission, and straight away an inference has been drawn of harassment of the Complainant. This conclusion in the opinion of this Commission has been drawn by the State Commission without dealing with the allegations and Counter-defence regarding the fact of any undue influence and conclusion.

22. As noted above, the Complainant in the Execution Application had alleged about undue influence being exercised and which was categorically denied in the Affidavit of the Appellant/Opposite Party. The Executing Court did not choose to investigate these allegations or attempt to record any finding of coercion, undue influence or pressure being exercised by the Appellants. In the absence of any such findings which ought to have been indicated about the impact of the subsequent settlement made between the parties through the offer of the Complainant and its acceptance by the Appellant, the impugned Order cannot be sustained. In the absence of any such analysis, discussion or conclusion thereafter on reasons to be recorded, the inference of harassment by the Executing Court is unsustainable.

23. The State Commission has also not assessed the impact of the settlement, which also would be necessary even if found that it was arrived at voluntarily and not under coercion.

24. The said issue, therefore, having not been resolved as observed herein above by adopting the appropriate procedure for analyzing the stand of the Complainant as well as of the Appellant/Opposite Party, the impugned Order of the State Commission in Execution No.12/2012 dated 04.04.2013 cannot be sustained. It is hereby set aside and the matter is remitted back to the State Commission to examine the matter in the light of the observations made herein above and then render its opinion.