

STATE CONSUMER DISPUTES REDRESSAL COMMISSION,
UTTAR PRADESH, LUCKNOW
APPEAL NO.326 OF 2008

(Against the judgment/order dated 21-08-2007 in Complaint
Case No.394/2006 of the District Consumer Forum,Kushinagar)

01. Medical Officer Incharge
Primary Health Centre, Taryasujan,
Post Taryasujan, Tehsil Tamkuhiraj,
District Kushinagar

02. Chief Medical Officer
Kushinagar. Ravindranagar Dhoos
Padrauna, District Kushinagar.

.....Appellants

Vs.

01. Dhananjai Kumar minor
S/o Harendra Tiwary
through mother Smt. Mala Devi
W/o Harendra Tiwari
R/o Village Pakadiya Purab Patti
Tappa-Baag Jogini, Pargana Sidhuba Jobna
Tehsil Tamkuhiraj, District Kushinagar

02. Government of U.P.
Through District Magistrate
Kushinagar

.....Respondents

AND

APPEAL NO. 334/SC/2008

Dhananjai Kumar minor
S/o Harendra Tiwary
through mother Smt. Mala Devi
W/o Harendra Tiwari
R/o Village Pakadiya Purab Patti
Tappa-Baag Jogini, Pargana Sidhuba Jobna
Tehsil Tamkuhiraj, District Kushinagar

.....Appellant

V/s

01. Chief Medical Officer
Kushinagar, Padrouna.
02. Medical Officer Incharge,
Primary Health Centre, Tarya Sujan.
03. State of Uttar Pradesh
Through District Magistrate
Kushinagar

.....Respondents

BEFORE:

HON'BLE MR. JUSTICE BHANWAR SINGH, PRESIDENT
HON'BLE MRS. RACHNA, MEMBER

For the Doctors : Sri B K Upadhyaya, Advocate.

For the Complainant : Sri Harendra Tiwari

Dated : 2.3.10

JUDGMENT

PER MR. JUSTICE BHANWAR SINGH, PRESIDENT

These two appeals having arisen out of the same judgment dated 21-08-2007 have been taken up together for decision.

Whereas Appeal No.334/2008 has been filed by Sri Dhananjai Kumar minor through his mother Smt. Mala Devi for enhancement of the compensation, the other Appeal No. 326/2008 has been preferred by the Chief Medical Officer, Kushinagar and Medical Officer Incharge, Primary Health Centre, Tariya Sujan, Kushinagar for setting aside of the judgment. By means of this judgment in appeal a compensation of Rs.1,00,000/- was awarded by the District Consumer Forum, Kushinagar as against the appellants of Appeal No. 326/2008.

Before we proceed further we consider it necessary to mention that after the judgment was pronounced on 21-08-2007, the Medical Officer Incharge, Tariya Sujan, District Kushinagar filed a restoration application with the allegation that he had never been served with a notice of the complaint of the complainant and thus had no opportunity to defend him in that case. He, therefore, prayed for setting aside of the exparte judgment as against him and requested for restoration of the complaint so as to enable him to file his written statement and contest the case. His restoration application, however, was dismissed on 18-01-2008 on the ground of the restoration application being not maintainable. This dismissal order too has been subjected to criticism in the appeal of the Medical Officer and the Chief Medical Officer.

Adverting to the complainant's case, it may be stated in brief that Master Dhananjai Kumar aged 8 years filed his complaint no. 394/2006 through his natural guardian Smt. Mala Devi with the allegations that the appellants had arranged a camp in the village on 17-05-2006 to provide

preventive Japanese encephalitis vaccination to the villagers. Smt. Mala Devi had also taken her son Dhananjai Kumar to the 'Preventive Japanese Encephalitis Camp' and got him vaccinated but barely a few hours after, Dhananjai's left hand and left leg suffered paralytic attack and the following day i.e. on 18-05-2006 he also suffered a mental stroke resulting in mental deformity. The complainant got her son admitted in Gorakhpur Medical College on 18-08-2006 where he was found to have been suffering from the disease of Japanese encephalitis. She filed the complaint with the allegations that the mental and physical deformity, Master Dhananjai had suffered was the result of the faulty vaccination by the appellants/opposite parties. She, therefore, filed the complaint praying for recovery of Rs.4,35,000/- as compensation for the mental and physical sufferings of her son, besides expenditures on his treatment.

The Chief Medical Officer, Kushinagar filed his written statement with the allegation that there might be one percent chance of failures of Japanese encephalitis vaccination and there could also be a possibility of the child having suffered from the said disease prior to being vaccinated. If the vaccination is administered to a patient of encephalitis and the patient conceals the fact of his suffering from such disease, it may not yield favourable result.

As stated earlier the Medical Officer Incharge, Primary Health Centre, Tariya Sujana did not file any written statement and he has stated in the memorandum of appeal that he was not served with any notice nor he had any knowledge about pendency of the complaint.

However, the District Consumer Forum below considered the two medical certificates – one issued by the Medical College, Gorakhpur which in fact is a discharge card and the other is issued by the Chief Medical Officer, Kushinagar on 12-12-2006, recorded a finding of medical negligence and deficiency in service and also awarded Rs.1,00,000/- as compensation. The discharge card appears to show that he was suffering from viral encephalitis and remained admitted in the hospital from 08-08-2006 to 18-08-2006. The other certificate indicates that Master Dhananjai is a physically handicapped boy and the percentage of his deformity is 40. The District Consumer Forum

held that the Medical Officer and other doctors who had provided the immunization against Japanese encephalitis should have conducted a test prior to vaccination to ascertain as to whether the boy was or was not suffering from Japanese encephalitis and since no such pre-test was conducted, the doctors were guilty of medical negligence and deficiency in service.

The important issue which has been raised before us on behalf of the doctors is as to whether the act of vaccination could have given a cause of action to the complainant? In this context, it may be observed that according to the Chief Medical Officer the facility of vaccination for immunization against the Japanese encephalitis disease was provided to all the villagers including the respondent/complainant free of cost and since no fees was charged as consideration for rendering the service on behalf of the State Government, the provisions of Consumer Protection Act are not attracted. The submission of the learned Counsel for the Chief Medical Officer that the complaint under the Consumer Protection Act was not maintainable seems to carry weight. The complainant has not been able to establish that he or his legal guardian or anyone else on his behalf paid any fees for obtaining the facility of vaccination, nor there is anything on record to sustain that the vaccination facility extended to the villagers was provided in lieu of some consideration. Both the doctors have pleaded that neither any fees was charged from the complainant, nor the policy for providing vaccination had any financial liability upon its beneficiaries. The Chief Medical Officer while submitting his written statement on 15-02-2007 before the Forum below specifically pleaded in para-2 of the special plea of the said written statement that the complainant was vaccinated against Japanese encephalitis without charging any fees, under the National Scheme of immunization. The respondent/complainant has not rebutted this averment; nor there is any proof for payment of any fees. We are, therefore, of the opinion that the appellants doctors would not fall in the category of 'service' as defined in Section 2(1)(o) of the Consumer Protection Act. The Apex Court has held in, "Indian Medical Association V/s V P Shantha and others" III(1995) CPJ-1(SC) that the service rendered free of charge by a medical

practitioner attached to a hospital/nursing home or a medical officer employed in a hospital/nursing home where such services are rendered free of charge to everybody, would not be a service as defined in Section 2(1)(o) of the Act.

The Hon'ble National Consumer Disputes Redressal Commission also held in, "Haryana State and another V/s Guddi" I(2006) CPJ-71(NC)"- that awarding compensation against a doctor without recording a finding as to whether service provided by the doctor fell into the category of 'service' is a grievous error and the District Consumer Forum should not have jumped to the conclusion of medical negligence on the part of the doctor.

In the case in hand also similar error, as happened in the case of Guddi (Supra), appears to have been committed by the District Consumer Forum, Kushinagar. We have carefully examined the judgment which does not have any discussion or finding on the important aspect of the matter i.e. as to whether the vaccination provided by the government doctors was on payment of some consideration or the said facility was extended free of cost. Neither the District Consumer Forum examined this issue; nor scrutinized the facts and law as to whether the act of vaccination fell into the category of 'service' as defined under Section 2(1)(o) of the Consumer Protection Act. We may, therefore, hold that the District Consumer Forum committed a grievous error by jumping to the conclusion of holding the doctors guilty of medical negligence without entering upon the relevant issues as discussed above.

If we examine the two fold issue from the legal angle, we may hold that the facility of vaccination extended to the complainant free of cost under the National Scheme was not a 'service' under the act; nor medical negligence has been established. In the result, we are of the decisive opinion that the doctors cannot be held guilty of medical negligence as they have not realized any fees for providing immunization against Japanese encephalitis.

Another significant issue which would crop up for our determination is as to whether the mental and physical deformity suffered by the respondent/complainant was resultant to the vaccination provided

by the government doctors. Before we discuss this important aspect of the matter, it is relevant to observe that Smt. Kaushailya Devi had arranged for vaccination of the villagers including the complainant but she has not been impleaded as a party to the complaint. Be that as it may, a question arises as to whether vaccination against the disease of encephalitis provided to the complainant is responsible for the Japanese encephalitis he suffered from, about three months after. Although it was pleaded in the complaint that the complainant suffered paralytic attack a few hours after he was vaccinated and the other day he sustained a mental deformity, yet there is no evidence in support of this averment. The boy was vaccinated on May 17, 2006 and out of the two certificates on record one (page-13) (Appeal No. 326/SC/2008) relating to his hospitalization in Nehru Hospital, B R D Medical College, Gorkahpur, shows that he was suffering from viral encephalitis and he developed fever three days before he was admitted to the hospital on 08-08-2006. He was, however, discharged on 18-08-2006. This certificate does not indicate that the complainant had suffered from the attack of encephalitis either a few hours or days after he was vaccinated; nor there is any other prescription or documentary evidence on record to support the complainant's version that his vaccination on 18-05-2006 resulted in his suffering from encephalitis. To elaborate it may be observed that there was a long gap between the complainant's vaccination and the date on which he suffered from viral fever indicating symptoms of encephalitis. The Nehru Hospital certificate referred to above leads to an inference that the boy developed viral fever of encephalitis on or around 05-08-2006 but there is no connection between the two dates i.e. the date of vaccination and the date of the boy having developed encephalitis fever on 05-08-2006. Apparently there was a gap of two and a half months between the two relevant dates and there is nothing on record to show that during this period of two and a half months the boy suffered from any kind of mental and physical deformity. Also there is no expert opinion on record to prove that the complainant's vaccination on 18-05-2006 had resulted in his subsequent suffering from Japanese encephalitis in the month of August, 2006. In the absence of any expert opinion or

necessary documentary evidence it is extremely difficult for us to connect the facility of vaccination to the subsequent event of the complainant's suffering from viral encephalitis. If there was some substance in the complainant's version that the boy suffered from paralytic attack a few hours or days after his vaccination, he could have been taken to some hospital or a doctor for examination but there is no prescription of any doctor to fill-up this gap.

Learned Counsel appearing on behalf of the doctors has, with reference to the National Scheme of Immunization, contended that the efficacy of vaccination is 99% and there is no side effect of such immunization. In a very rare case, as submitted further, there could be possibility of severe reaction but in the case in hand such rare possibility does not seem to have resulted. May be that vaccination of the complainant was not effective so as to prevent the attack of encephalitis from which the complainant subsequently suffered but this failure of the vaccination cannot tantamount to medical negligence of the doctors so as to held them guilty for deficiency in service.

It is unfortunate that a boy of tender age has suffered the stroke of serious disease but for no fault of the doctors. The Chief Medical Officer merely submitted that if someone is suffering from encephalitis and he or she is vaccinated during the period of disease, vaccination of such a patient may result into encephalitis sufferings but in the case in hand the said possibility does not seem to have had happened. If at all such an eventuality had to happen, it could have been within a reasonable time from the date of vaccination but as mentioned earlier the boy was absolutely alright during the period of two and a half months and his mother's allegation that he suffered mental and physical deformity a few hours after he was vaccinated does not find support from any quarter. And, no inference can be drawn that the boy had serious side effect of vaccination because he was suffering from the same disease prior to his immunization. There is vast difference between the 'possibility' and 'happening'. Whereas the term possibility is based upon assumption, happening is to be founded on material proof. Therefore, we cannot draw a presumption that the doctors were guilty of medical negligence by

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providing vaccination to the complainant, already suffering from the viral encephalitis.

Having regard to the discussions made above, we are of the decisive opinion that no medical negligence can be attributed to the doctors who had vaccinated the complainant of Japanese encephalitis on 18-05-2006. Also we hold that the service of providing vaccination to the complainant was free of charge as such the complainant's complaint was not maintainable under the Consumer Protection Act.

In the result, the appeal of the doctors succeeds and that of the complainant fails. Accordingly the impugned judgment is hereby set aside and the complaint giving rise to these appeals, is hereby dismissed. The parties shall bear their own costs.

Before parting, however, we may observe that the boy may seek such financial aid from the Government or from the Non Governmental Organization (NGO) or such authority as he may deem fit.

This judgment shall be placed on the record of Appeal No.326/2008 with its copy to be laid on the record of Appeal No. 334/2008.


(JUSTICE BHANWAR SINGH)
PRESIDENT


(SMT. RACHNA)
MEMBER

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