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RESERVED

**STATE CONSUMER DISPUTES REDRESSAL COMMISSION,
UTTAR PRADESH, LUCKNOW**

APPEAL NO.2017 OF 2006

(Against the judgment/order dated 29-07-2006 in Complaint
Case No.194/2003 of the District Consumer Forum, Mainpuri)

Dr. P K. Pathak, Surgeon
Maharaj Tej Singh District Government Hospital
Mainpuri

...Appellant/Opposite Party

Vs.

01. Nafisa Begum W/o Shabuddin

...Respondent/Complainant No.01

02. Sahabuddin S/o Munir Khan
both R/o Gali No.1, Raja Ka Bagh
District Mainpuri (U.P.)

...Respondent/Complainant No.02

03. New India Assurance Co. Ltd.
½, Awas Vikas, Rajaraman Road
Mainpuri (U.P.)

...Respondent(New added)

BEFORE:

**HON'BLE MR. JUSTICE VIRENDRA SINGH, PRESIDENT
HON'BLE MR. CHANDRA BHAL SRIVASTAVA, MEMBER**

For the Appellant : Sri Sushil Kumar Sharma, Advocate.

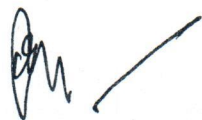
For the Respondent : Sri Sanjay Kumar Verma, Advocate.

Dated : 02.07.2014

JUDGMENT

PER MR. JUSTICE VIRENDRA SINGH, PRESIDENT

This appeal has been filed by Dr. P. K. Pathak, the
appellant/opposite party against the judgment and order dated 29-07-
2006 passed by District Consumer Forum, Mainpuri in Complaint Case
No. 194/2003.



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We have heard Sri Sushil Kumar Sharma, learned Counsel for the appellant and Sri Sanjay Kumar Verma, learned Counsel for the respondent/complainant and perused the entire record.

As per complainants' case the vasectomy operation was got done by Smt. Nafisa Begum Complainant No.1 on 13-06-2002 by Dr. P. K. Pathak, the appellant on a payment of Rs.500/- privately paid to him while he was working as a doctor in government hospital. Due to negligence of the doctor on operation of Smt. Nafisa Begum she was conceived and delivered a child even after the vasectomy operation conducted by the opposite party, for which the complainant is entitled for compensation from the opposite party.

The appellant/opposite party accepted the fact of vasectomy operation conducted by him on an incentive given to the tune of Rs.100/- by the Government to the complainant who was inspired for vasectomy by the Nurse Smt. Shakuntala. It is denied that the operation was conducted privately and any payment in this regard was charged by the appellant. The operation was conducted with due diligence by the opposite party for which the complainant is not entitled to get any compensation.

The learned District Consumer Forum thereby relying the affidavit of the complainant pertaining to payment of Rs.500/- as fees privately paid to the doctor, found that due to failure of vasectomy and the factum of birth of a child after the operation is sufficient to award compensation to the complainant and the complaint was partly allowed by the District Consumer Forum thereby awarding a sum of Rs.75,000/- pertaining to the deficiency in service of the doctor and a sum of Rs.2,50,000/- for



maintenance of the child born and a sum of Rs.2,000/- as litigation expenses alongwith 9% interest per annum to be paid by the opposite party to the complainant.

It is contended before us by the learned Counsel for the appellant that the District Consumer Forum erred in not considering the fact that the respondent no.1/complainant no.1 got her vasectomy operation done in the District Government Hospital, Mainpuri by Dr. P. K. Pathak, the appellant who had been the surgeon in the Government Hospital at Mainpuri. The doctor of a Government Hospital is outside the purview of the Consumer Protection Act 1986. There was no question of the said vasectomy operation done by the appellant doctor privately at his residence or elsewhere, while the respondent no.1/complainant no.1 was receiving a sum of Rs.100/- as incentive from the government for getting the said operation done in the government hospital. The learned District Consumer Forum wrongly relied upon the payment of Rs.500/- as fees to the doctor merely on the basis of the affidavit filed while if any fees was chargeable in this regard that had to be paid under a receipt to be issued to the complainant from the opposite party. It is also contended on behalf of the appellant that there had always been some chance of failure of vasectomy operation and that is why the respondent no.1/complainant no.1 was advised not to indulge in sexual intercourse atleast for 15 days which seems not to have been followed by the respondent.

The learned Counsel for the respondent contended that being the admitted case of vasectomy operation and the factum of birth of a child, it is sufficient to accept the case of the complainant for compensation which is very much evident pertaining to the failure of the operation and



the medical negligence of the appellant and the District Consumer Forum committed no error thereby allowing the complaint and awarding the compensation to the complainant against which this appeal is liable to be dismissed.

After hearing of both the parties and perusal of the entire facts and circumstances on record and the law in this regard, we are of this view that this appeal deserves to be allowed and the complaint case of the complainant deserves to be dismissed thereby setting aside the impugned order because there is no evidence on record to show as to whether the vasectomy operation was conducted by the doctor after receiving any fees and, therefore, we do not find that the complainant is not a consumer as is defined in the Consumer Protection Act which reads as follows:-

“Section 2(d)(ii) – [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person [but does not include a person who avails of such services for any commercial purpose]”

After perusal of the aforesaid definition of consumer, we are of this view that the complainant had not hired the services of the appellant doctor for a consideration either on payment or promised to pay or part payment and partly promised or under any system of deferred payment rather the complainant had herself received an incentive of Rs.100/- for getting done her vasectomy operation in the National Scheme of Family Planning. In such circumstances, it cannot be said that any payment of Rs.500/- was paid by the complainant to the doctor which itself is not



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proved by any receipt of such payment.

The learned Counsel for the respondent took recourse of law laid down by Mizoram State Consumer Disputes Redressal Commission Tuikhuahtlang, Aizawl in Appeal No. 13 of 2009 Director of Health Services, Health & Family Welfare, Deptt. of Govt. of Mizoram V/s Lalramliana wherein it is held that it is not acceptable that even in case of free services a person can be a consumer under Section 2(1)(o) of the Consumer Protection Act but sterilization for the purpose of family control is a welfare scheme and in the light of the law laid down by Hon'ble Supreme Court in the case of State of Haryana V/s Smt. Santra reported in AIR 2000 S.C. 1888 holding thereby that unwanted child born after sterilization was an added burden created due to negligence of the doctor, the complainant is entitled to claim full damage from the State Government. With due regard to the law laid down by the Hon'ble Supreme Court in the case of State of Haryana V/s Smt. Santra (supra) we are of this view that the law laid down by Mizoram State Consumer Disputes Redressal Commission is not acceptable as in the instant case before us the complainant could not prove to be a consumer. We are not agreed with the view expressed by Mizoram State Consumer Disputes Redressal Commission even in this state of affairs that the Commission was not agreed with the finding of the District Consumer Forum that even in case of free services a person can be a consumer but despite this finding the failure of sterilization in a government hospital is held by that Commission accountable for the purpose of damages under Consumer Protection Act. In our view, unless the person is held to be a consumer, the Fora under Consumer Protection Act has no authority to entertain the



case or to award the compensation.

So far as the question of law laid down by the Hon'ble Supreme Court in the case of State of Haryana V/s Smt. Santra is concerned, we are of this view that since that case is based on the Law of Tort in a case filed before the Court as a suit, the benefit of that law cannot be extended to the complainant/respondent in this case before us which is a decision under the provisions of the Consumer Protection Act and for which the person/complainant should be a consumer which is a condition precedent to proceed under the provisions of Consumer Protection Act.

The Hon'ble Supreme Court in the case of Indian Medical Association V/s V P Shantha and others reported in III (1995) CPJ 1(SC) as is referred by the learned Counsel for the appellant, has held that there is no direct nexus between the payment of the salary to the Medical Officer by hospital administration and the person to whom service is rendered. The salary that is paid by the hospital administration to the employee Medical Officer cannot be regarded as payment made on behalf of the person availing the service or for his benefit so as to make the person availing the service a 'consumer' under Section 2(1)(d) in respect of service rendered to him. The service rendered by the employee, Medical Officer to such person would, therefore, continue to be service rendered free of charge and would be outside the purview of Section 2(1)(o).

Tamil Nadu State Consumer Disputes Redressal Commission, Chennai in the case of Government Primary Health Centre and others V/s Prince reported in IV (2010) CPJ 31 has taken the similar view as is the view of ours in this case that where the free service was rendered by the

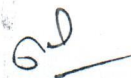


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opposite party to the complainant and others in camp of sterilization, that service will not be attracted by Consumer Protection Act for alleged medical negligence by the doctor being the government doctor and Fora has no jurisdiction to fix culpability. In that case too it is held that in the case of State of Haryana V/s Smt. Santra (supra), a suit was filed before the Civil Court, which was reached up to apex body and that case was not under the Consumer Protection Act. Under the common law, when the government has committed any mistake, though they rendered the service free of charge, the liability can be fixed and that principle cannot be extended as such, to the Consumer Forum since the Consumer Forum has inherent jurisdiction, based upon hiring of service by a person, who is a consumer, as per the definition available in the Consumer Protection Act. As we have held that there is no case of payment of the fees to the doctor is made out in this case before us; rather the case of incentive of Rs.100/- is made out to the complainant herself for getting done her vasectomy operation under the National Scheme of Family Planning, the service provided by the appellant was fully and totally free of charge and if a service was performed, totally free of charge by Government Hospital, that will not be attracted by the provisions of the Consumer Protection Act is also a dictum of the Apex Court in the case of Indian Medical Association V/s V P Shantha and others. Hence we are of this view that the District Consumer Forum committed error thereby allowing the complaint. Therefore, this appeal deserves to be allowed and the impugned order deserves to be set aside.

ORDER

The aforesaid appeal is hereby allowed. The impugned order dated



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29-07-2006 is hereby set aside. The complaint of the complainant shall be deemed to have been dismissed. The statutory deposit, if any, made by the appellant shall be refunded to the appellant.



07.07.14

(JUSTICE VIRENDRA SINGH)
PRESIDENT



(CHANDRA BHAL SRIVASTAVA)
MEMBER

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