Applicability to Doctors under Consumer Protection Act, 1986 and the Rules

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Abstract

In 1995, the Supreme Court in Indian Medical Association Vs V.P Shantha included the medical profession under consumer protection act. This historical judgment made havoc in the medical profession it created apprehensions in the mind of doctors that, it will lead to huge medical expenditure on insurance as well as tremendous increase in defensive medicine .The article deals with the applicability of the Consumer Protection Act 1996 and rules regarding it .Supreme court not only settled the question of coverage but also dealt with the question of medical negligence in elaborate manner.

Key words: - CPA, Negligence, tort.

Introduction

The famous words of Justice Cardazo, a celebrarel justice and former chief justice of USA "Law is a living growth and not a changeless code .The existing rules can give us our present location, our bearings or latitude and longitude; but the inn that shelters the night is not journey end. The law, like traveller must be ready for the tomorrow. It must have principle of growth. (1)

The question of applicability of the consumer protection act, 1986 to the medical profession was decided and was made applicable by the Supreme Court for the first time in the case of Indian medical association versus V.P Shantha. The question for consideration and decision before the supreme court was "whether" the medical practitioners and hospitals/nursing homes can be regarded as rendering "service" within the meaning of section 2(1)(0) of the consumer protection act, 1986.On consideration of the provision of the said act and nature of medical profession the supreme court held that the "service" rendered by a doctor by way of consultation, diagnosis and treatment, both medical and surgical is covered by "service" within the meaning of section 2(1)(0) (2)

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Discussion

The Supreme Court has carved exception to the said decision that such services rendered free of charge by a doctor or under a contract of personal service are not covered by the consumer protection act. In other words, even if a doctor renders the free services to a patient they are not covered by the consumer protection act since they are free of charge or covered by a contract of personal service. There is no difficulty in the manner of determining the question "whether the services are rendered by a doctor to a patient are free or charge or not". However, the difficulty is how to find out that the services rendered by a doctor are covered by a contract of personal service (3).

The supreme court itself has provided the distinction features." Contract of personal service" is distinguished from "contract for personal services". To constitute "contract of personal service", the Supreme Court held, it is necessary to show that there exists a relationship of master and servant. For example, employment of the medical officer for the purpose of rendering medical service to the employer is covered under a contract of employment and therefore, outside the purview of "service" within the meaning of section 2(1) (0) of the act. In all other cases, the services are, therefore, of the nature of contract for personal services covered by the Consumer

Protection Act. Coming to the services rendered free of charge and not covered by the Consumer Protection Act, are stated above there is no difficulty in finding out such services.(4)

However, the Supreme Court has gone a step further and held that even if a "free of charge service" rendered to a patient and therefore, beyond the scope of the consumer protection act. Thus the doctors working in the government hospitals/health centre/dispensary are given immunity from application of the Consumer Protection Act. However, again an exception is carved out to the same by the Supreme Court saying that the services rendered in a government hospital both on payment of charges and also free of charge are covered by the Act and in case of such a hospital even payment of token amount of registration would not alter the position. (5)

Thus, two categories of hospitals are made by the supreme court i.e. one of the hospitals rendering free of charge services to one and all the patients and another of the hospitals rendering services on payment of charges and also free of charge. The first category is given completely immunity from application of the act, whereas, the second category is held to be covered by the act. Similarly, it is held that even free of charge service rendered in a non government hospital/nursing home is out side the scope of the act. It is for this reason that Rajasthan state consumer disputes Redressal commission, Jaipur, in its decision reported in 2005-2- Consumer Protection Journals 268 (Bhunesh Kumar Bhatnagar and another versus DhapaDevi) held that the relationship was granting compensation against the doctors were set aside. However, in union of India versus A.P.Mathur(1997(3) CPJ 424 -Delhi) it was held that a person entitled to the benefit of the central Government Health Services Scheme is not a "consumer" and therefore, the Consumer Forum has no Jurisdiction to entertain a complaint. Such a patient can file a civil suit. (6)

In a recent case, the patent took the treatment in the ESI dispensary a government hospital. The service rendered in the said hospital was free. However, a reference to the provisions of ESI ACT to hold that medical facility provided to the employees in ESI hospitals is part of their service condition and therefore, it is not a free service. For this purpose, Karnataka State Consumer disputes Redressal Commission (2006(2) Cpr 86_ Rajendra sharma versus ESI Hospital and Ors) has relied on the observation of the National Commission IN para 10 of its judgement in Jagdish Kumar Bajpai's case (2005(4) Cpj197) (7).

Not only the consumer protection act was made applicable to the medical profession treating it as rendering "services" to the patients, the Supreme Court has gone a step further. In M/s spring Meadows Hospitals and another versus Harjot Ahluwalia (1998(@) BOM. C.R (*Consumer) (Supreme court) , it was held by the Supreme court that if the parents of the children hired the services of the hospital for the treatment of minor child, both will be entitled to compensation if the doctor is found negligent. This was so held on the premises that even if there was no privity of contract the minor as also the parents have suffered agony and therefore, entitled to compensation. In Support of its conclusion that "minor child" is also a consumer the Supreme court has taken aid of the definition contained in clause (2) to mean " a person who hires or avails of any services and includes any beneficiary of such services other than the person who hires or avails of the services. The parents are included in the first part of the definition "consumer" since they have hired or avails of the services, whereas, "minor child" is also treated as "consumer" since he is a beneficiary of such services hired or availed of by the parents. Thus, the scope of "consumer" and "services" within the meaning of the Consumer Protection Act is widened and liability of the doctors is increased.(8)

A. Deficiency in service and the Medical Profession

The principles determining "negligence" on the part of the medical professionals are referred to above in detail. However, in a recent judgment the National Consumer Disputes Redressal Commission has adopted a very positive approach in the matter of determining "deficiency in service". It is well known case of Dr. Kunal Saha claiming huge compensation of rs.77,76.73,500/- against renowned doctors. DR. Kunal Saha had also filed criminal complaint under section 304A of the Indian Penal Code and also complained to the west Bengal medical council. The National Commission has held that the courts should not

sit in appeal over the decision of doctors in relation to administration of a particular dose of medicine and the jurisdiction of the consumer for a is limited to apparent in prescribing dose of medicine. Following the principle that the courts would be slow in attributing negligence on the part of doctor if he has performed his work to the best of his ability with care and caution, the National Commission has laid down salutary principles to judge such negligence.(9)

In a recent judgment, Rajasthan State Consumer Dispute Redressal Commission has gone to the extent of holding that even failure to issue medical certificate constitutes "deficiency in service" (vide 2005(2) CPJ 223 Janger Singh versus Kochar Hospital and Research Centre private Limited). To the same effect is the decision of Tamil Nadu State Consumer Disputes Redressal Commission that failure of the constitutes "deficiency in service" since the complainant could not file a claim petition before the Accident Claims Tribunal (2005(3) CPJ 169 Shanmuga Hospitals versus B.Jagadesan).(10)

B. Reference to civil court

In V.P. Shantha's case (cited above) the supreme court held that even if the doctors are subject to disciplinary control of the medical council of India or the State Medical council the service rendered by them as medical professionals would not be excluded from the application of the consumer protection act. For this purpose, reference to the powers of civil court conferred on Consumer Forum under section 13(4) of the act and the fact that the President of Forum is a person having judicial or legal experience. However, in a subsequent judgement the Supreme Court has that a consumer has held that a consumer complaint involving complicated issues requiring evidence of experts is liable to be referred to the Civil Court (11).

Suggestion

Such an expert is not possessed even by the persons having legal or judicial experience and that is the reasons as to why the Supreme Court has now required the police and the court to obtain expert before prosecuting a doctor on the charge "gross negligence" within the meaning of section 304A of the Indian penal code. The suggestion is why not refer to all complains of negligence on the part of the doctors first to the expert body of medical council and if it is found that there is negligence same may be referred to the appropriate forums for determination of appropriate relies depending on the nature of negligence. All this would help the patients, the doctors and even the courts of law (12).

In fact, while analyzing the aftermath of the latest judgment of the Supreme Court in Jacob Mathew's case has shown that the medical science is a too complex subject. In addition to the complexity of medical science, human body and its working is also a complex and complicated subject. To understand complexities of medical science and human body Vis-à-vis the complaint of deficiency of service on the part of the doctors requires only expert knowledge of the same subject (13).

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