

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE N. NAGARESH

THURSDAY, THE 10TH DAY OF FEBRUARY 2022/21ST MAGHA, 1943

WP(C) NO. 970 OF 2022

PETITIONERS:

- 1 DR. VIJIL,
AGED 55 YEARS
VARAM EYE CLINIC, VARAM,
KANNUR, PIN-670 594.
- 2 DR. SONIA,
SM HOSPITAL, THANA,
KANNUR, PIN-670 012.
- 3 DR. B. V. BHAT, M/S. ASHOKA HOSPITAL,
SOUTH BAZAAR, KANNUR, PIN-670 002.
- 4 DR. ASHOK RAJ,
JYOTHIS HOSPITAL, PALLIKUNNU,
KANNUR-670 004.
- 5 DR. VEENA,
JYOTHIS HOSPITAL, PALLIKUNNU,
KANNUR-670 004.
- 6 DR. SUCHITHARA BHAT,
ASHOKA HOSPITAL, SOUTH BAZAR,
KANNUR-670 002.

BY ADVS.
S. GOPAKUMARAN NAIR (SR.)
SOORAJ T. ELENJICKAL
RENOY VINCENT
ARUN ROY
HELEN P. A.
SHAHIR SHOWKATH ALI

RESPONDENTS :

- 1 AMBUJAKSHI .T.P. ,
 W/O.JANARDHANAN, CHANDROTH HOUSE,
 MUNDAYAD P.O., CHOVVA, KANNUR-670 594.

- 2 UNION OF INDIA,
 REPRESENTED BY THE STATUTORY TO GOVERNMENT OF
 INDIA, DEPARTMENT OF CONSUMER PROTECTION AND
 AFFAIRS, NEW DELHI-110 001.

SRI.MANU S, ASGI
SRI.V.GIREESH KUMAR, CGC

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 10.02.2022, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

[CR]

N. NAGARESH, J.

.....
W.P.(C) No.970 of 2022
.....

Dated this the 10th day of February, 2022

J U D G M E N T

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The petitioners, who are Doctors practicing Modern Medicine in Kannur, have filed this writ petition seeking to quash Exts.P4 and P6 orders of the District and State Consumer Disputes Redressal Commissions, as sans jurisdiction and hence illegal. The petitioners also pray to declare that the Consumer Fora under the Consumer Protection Act, 2019 do not have jurisdiction to take cognizance of complaints in respect of medical negligence and deficiency in medical service, as medical profession and practice do not come within the purview of the term 'service' defined under Section 2(42) of the Consumer Protection Act, 2019.

2. The petitioners state that C.C. No.202/2020 was filed in the District Consumer Disputes Redressal Commission, Kannur alleging that the complainant therein consulted the 1st petitioner, who diagnosed cataract in her left eye. There was no relief. The complainant was sent to other opposite parties. After the treatment by the opposite parties, the complainant lost the sight of her left eye. The complainant alleged that loss of eye sight was due to medical negligence and sought for a compensation of ₹32,52,000/-.

3. On receipt of notice, the petitioners filed Ext.P2 I.A. No.92/2020 challenging the maintainability of C.C. No.202/2020 as medical service will not fall within the ambit of Section 2(42) of the Act, 2019. The District Commission dismissed the I.A. as per Ext.P4 order dated 10.03.2021. Ext.P5 Revision Petition filed by the petitioners challenging Ext.P4 was dismissed by the State Consumer Disputes Redressal Commission as per Ext.P6 judgment dated 25.08.2021.

4. The Senior Counsel assisted by the counsel for the petitioners argued that the medical service/practice is not included in the illustrations in the inclusive definition of the term 'service' under Section 2(42) of the Consumer Protection Act, 2019 and hence the intention of the Parliament is clear that the Parliament did not want to include medical services/profession within the purview of the term 'service'. The learned Senior Counsel pointed out that the Draft Bill of the new Consumer Protection Act, 2019 had included health sector among the illustrations of facilities that are treated as 'service' in Section 2(42) of the new Act. However, the health sector was removed from among the illustrations under Section 2(42). The obvious reason is that the lawmakers intended to exclude medical service/profession from the purview of the new Act.

5. The learned Senior Counsel argued that in ***Indian Medical Association v. V.P. Shantha and others*** [(1995) 6 SCC 651], the Hon'ble Apex Court declared the law and held that the medical practice/profession would also come within

the purview of the definition of the term 'service' under Section 2(1)(o) of the Act, 1986. In view of the law laid down by the Hon'ble Apex Court in the context of Act, 1986, the Parliament should have specifically excluded the term 'medical profession/practice' from the purview of Section 2(42) of the new Act, 2019.

6. The fact that 'medical profession/practice' has been omitted by the Parliament from the list of facilities like banking, financing, insurance, etc. from the illustrations of the term 'service' under Section 2(42) of the Act, 2019 despite the declaration of law by the Hon'ble Apex Court clearly discloses the intention of the Parliament not to include 'medical profession/practice' within the definition of 'service' as defined under the new Act, 2019.

7. There are other factors that influenced the Union and the Parliament to exclude 'medical profession/practice' from the purview of the Act, 2019, contended the Senior Counsel. Section 34 of the new Act has fixed the territorial jurisdiction of the consumer fora vis-a-vis the cause of action

to be applied to the medical profession. Compelling the Doctors to leave their place of practice to defend consumer complaints at distant places where complainants ordinarily reside, would adversely affect medical services as a whole. The lawmakers were convinced about the unfairness and injustice of adjudicating the complicated disputes relating to medical negligence/deficiency of medical services in summary proceedings under the Consumer Protection Act. The Consumer Protection Courts do not have medical experts as Members, except in the National Commission. Therefore, when the intention of the Legislature is clear, District and State Commissions should have upheld the arguments of the petitioners, urged the Senior Counsel.

8. I have heard the learned Senior Counsel Sri. S. Gopakumaran Nair assisted by the counsel for the petitioners and Sri.V.Gireeshkumar, the Central Government Counsel representing the 2nd respondent-Union of India.

9. The argument of the petitioners is that a complaint in respect of medical negligence or deficiency in medical

service is not maintainable before the District or State Consumer Disputes Redressal Commission for the reason that Section 2(42) of the Consumer Protection Act, 2019 does not take within its ambit the medical profession/medical services. The question whether medical negligence/deficiency in medical services would fall within the ambit of 'service' came up for consideration before the Hon'ble Apex Court, in **V.P. Shantha** (supra).

10. In **V.P. Shantha** (supra), the issue was considered in the context of Section 2(1)(o) of the Consumer Protection Act, 1986. Section 2(1)(o) reads as follows:

2(1)(o) "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

The Hon'ble Apex Court held that services rendered to a patient by a medical practitioner by way of consultation,

diagnosis and treatment, both medical and surgical, would fall within the ambit of 'service' as defined under Section 2(1)(o) of the Act, 1986.

11. The Act, 1986 was substituted by the Consumer Protection Act, 2019, wherein the term 'service' is defined under Section 2(42), which reads as follows:

2(42) "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

Both, Section 2(42) of the Act, 2019 and Section 2(1)(o) of the Act, 1986, more or less have the same meaning and implications. The difference in the definition clauses is that Section 2(42) of the Act, 2019 is more descriptive and takes specifically in the banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction,

entertainment, amusement or the purveying of news or other information.

12. A reading of the inclusive part in Section 2(42) would show that the Parliament intended to specifically underline that certain services like Banking, Financing, Insurance, Transport, etc., which are in the nature of public utility services, would come within the purview of 'services'. The definition is inclusive and not exhaustive. Therefore, all services which are made available to potential users would fall under Section 2(42), except those services rendered free of charge or under a contract of personal service. The words "but not limited to" appearing in Section 2(42) clarifies the intention of the Parliament. The medical services therefore would indeed fall within the ambit of Section 2(42), unless of course the service is free of charge or is under a contract of personal service.

13. The petitioners would contend that the Draft Bill of the new Consumer Protection Act of 2019 originally included the 'Health Sector' among the illustrations of facilities that are

treated as 'service' in Section 2(42) and since the 'Health Sector' was excluded in the Act, 2019, it should be held that the Parliament wanted to exclude the Health Sector from the purview of the Consumer Protection Act, 2019. The argument, though looks attractive, is unsustainable in view of the well settled principles of interpretation of statutes. External aid like Draft Bill can be taken for interpreting a statutory provision only when there is ambiguity in the express provisions of the statute. In the case of Section 2(42), the definition is clear and devoid of any ambiguity whatsoever. Furthermore, the Hon'ble Apex Court has already interpreted the identical provision in the Act, 1986 and has held that the Act would take in Medical Services also. The argument based on Draft Bill is therefore only to be rejected.

14. The District Commission considered the issue of maintainability of the complaint and noted that there is no difference to the meaning of 'service' in the old Act and the new Act. The words "Medical Service" were not expressly

included in the definition of 'service' in both the Acts. Therefore, the District Commission rejected the objections as to the maintainability of the complaint relying on the judgment of the Apex Court in **V.P. Shantha** (supra).

15. The State Commission also held that since no conscious change in the definition of "service" was made in the new Act, the contention of the petitioners that Health Sector has been deliberately excluded by the Parliament while enacting the new law, cannot be accepted. This Court finds that there is no reason to interfere with Ext.P4 order or Ext.P6 judgment impugned in the writ petition.

The writ petition therefore is dismissed.

Sd/-
N. NAGARESH, JUDGE

APPENDIX OF WP(C) 970/2022

PETITIONER'S EXHIBITS

- Exhibit P1 TRUE COPY OF THE COMPLAINT.
- Exhibit P2 TRUE COPY OF THE IA NO.92/2020 IN CC NO.202/2020.
- Exhibit P3 TRUE COPY OF THE COUNTER/OBJECTION FILED BY THE COMPLAINANT.
- Exhibit P4 TRUE COPY OF THE ORDER DATED 10.03.2021 OF THE DISTRICT CONSUMER FORUM.
- Exhibit P5 TRUE COPY OF THE REVISION PETITION NO.16/2021 BEFORE THE KERALA STATE CONSUMER DISPUTES REDRESSAL COMMISSION UNDER SECTION 47(1) (B) OF THE CONSUMER PROTECTION ACT, 2019.
- Exhibit P6 TRUE COPY OF THE JUDGMENT OF THE STATE COMMISSION DATED 25.08.2021.