



2024:DHC:6193-DB



\$~37

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **LPA 771/2024 & C.M.Nos.45754-45756/2024**

DR. KUMUD SHARMA & ANR.Appellants

Through: **Mr.O.P.Gupta, Advocate.**

versus

EMPLOYEES STATE INSURANCE CORPORATION

.....Respondent

Through: **Mr.Sankalp Sharma, Advocate.**

%

Date of Decision: 13th August, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

1. Present appeal has been filed challenging the impugned order dated 04th August, 2023 passed by the learned Single Judge in W.P.(C) 16092/2022, whereby the writ petition filed by the Appellants seeking reimbursement of medical charges amounting to Rs.5,83,11/- for bilateral total knee replacement with patelloplasty operation of the Appellant No. 2, from the Respondent-ESIC was dismissed on the ground of operation being a non-emergency surgery in terms of the Office Memorandum dated 13th January, 2006 issued by the Respondent-ESIC.



2. Learned counsel for the Appellants states that learned Single Judge erroneously dismissed the writ petition filed by the Appellants on the sole ground that the knee replacement operation was not an emergency surgery ignoring the judgment of the Apex Court in ***Shiv Kant Jha vs. Union of India, (2018) 16 SCC 187*** wherein it has been held that “*the real test must be factum of treatment. Before any medical claim is honoured, the authorities are bound to ensure as to whether the claimant had actually taken treatment and the factum of treatment is supported by records duly certified by Doctors/Hospital concerned. Once, it is established the claim cannot be denied on technical grounds*”.

3. It is pertinent to mention that the Memorandum dated 13th January, 2006 extends medical facilities to ESIC pensioners through the ESIC Medical Pensioner’s Medical Scheme, 2006. As per the said OM, an ESIC pensioner is entitled to get treatment from an ESIC Hospital or Dispensary located within eight kilometers of the residence of the pensioner. If no such hospital/dispensary is so located within the said radius of the pensioner’s residence, then in that case, treatment can be availed at any other approved hospital/dispensary nearest to the residence of the pensioner. Further, if a certain treatment is not available or being provided at the nearest ESI hospital/dispensary, then the said nearest hospital/dispensary can refer the pensioner to any recognized hospital where the said treatment is available. It also stipulates that if a pensioner takes treatment from a hospital which is not recognized in non-emergent circumstances, no reimbursement shall be made and the entire expenditure will be borne by the pensioner.

4. In the present case, on 19th January, 2019, the Appellant No.2 visited OPD of the ESIC Hospital, Basai Darapur, New Delhi for consultation with



regard to pain in both knees, whereby he was advised to undergo knee surgery on 22nd March, 2019 being the proposed/provisional date of surgery. The fact that the surgery was scheduled after a period of two months reflected the opinion of the attending doctor that the knee surgery was not required to be immediately undertaken. However, without any reference from ESI Hospital, Basai Darapur and without there being an emergency position, the very next day i.e. on 20th January, 2019, the Appellant No.2 went to a private hospital for undertaking the knee replacement surgery of both the knees.

5. In fact, the admitted position is that the bilateral total knee replacement operation was not an emergency surgery. Even the discharge summary of the private hospital dated 21st January, 2019 does not reflect that the surgery was an emergency surgery.

6. Further, the ***Shiv Kant Jha*** (supra) judgment relied upon by the Appellants is not applicable to the facts of the present case as the said judgment deals with medical reimbursement claim under the Central Government Health Scheme in an emergency and life-threatening situation on account of absence of any other hospital at the relevant time. It has been held by the Division Bench of this Court in ***Union of India & Anr. vs. Shri Joginder Singh, W.P.(C) 10684/2022 decided on 10th May, 2023*** that “*the medical claim for treatment undertaken in emergency should not be denied for reimbursement merely because the hospital is not empanelled. The test remains whether the claimant had actually undertaken the treatment in emergent condition as advised and if the same is supported by record.*”

7. Consequently, as it is not even the Appellants’ claim that the surgery was an ‘emergency’ one, the Appellant is not entitled to any reimbursement



2024:DHC:6193-DB



in terms of Office Memorandum dated 13th January, 2006. Accordingly, the present appeal being bereft of merit is dismissed along with the applications.

ACTING CHIEF JUSTICE

TUSHAR RAO GEDELA, J

AUGUST 13, 2024
KA