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RESERVED

STATE CONSUMER DISPUTES REDRESSAL COMMISSION
UTTAR PRADESH LUCKNOW
APPEAL NO. 1730 OF 2013

Dr. Gopal Dutta, son of Sri Satya Pal Dutt, resident of 193-A/9, Bhatnagar Colony, Civil Lines, Bareilly

Appellant/Opposite party

1. Smt. Satyawati wife of Shri Pal, resident Ward no.6, Kakrala Main Bazar, Pargana Usait, Tehsil Dataganj, Thana Alahipur District Badaun
2. Sri Pal son of Chotey Lal, resident of same as above.
3. Navjyoti Hospital, situated at Shahdana Road, Bareilly through Dr. Bharat K. Kalra
4. Dr. Shakeel Masood , presently residing at Oudh Hospital and Heart Center, 9-D Singar Nagar, Kanpur Road, Lucknow
5. Dr. Vipul Tandon, residing at Jag Mohini, 1574/871 Daryabad near Dr. Pandeys Crossing, Allahabad
6. United India Insurance Company Limited, office situated at 149 Civil Lines, Bareilly through its Branch Manager

Respondents/Complainants

BEFORE
HON'BLE MR. JUSTICE VIRENDRA SINGH, PRESIDENT
HON'BLE MR. C.B. SRIVASTAVA, MEMBER
HON'BLE MRS. BAL KUMARI, MEMBER

For the Appellant : Sri Sarvesh Kumar Sharma, Advocate
For Opposite parties 1 & 2 : Sri Deepak Mehrotra, Advocate
For the Opposite party no.6 : Sri Alok Kumar Singh, Advocate

DATED: 21.05.2014

JUDGMENT

MR.JUSTICE VIRENDRA SINGH, PRESIDENT

This appeal has been filed by the appellant/opposite party no. 1, against the judgment and order dated 06.07.13 passed by the District Consumer Forum-II, Bareilly in complaint case no. 110 of 2006 Srimati Satyawati and others Vs Dr. Gopal Dutta and others wherein the appellant has been directed to pay a sum of Rs 2,50,000.00 as compensation and a sum of Rs 10,000.00 as litigation expenses to the complainant being negligent in medical treatment of the complainant Satyawati.

The complaint's case pertains to the negligence of the appellant/doctor in performing the surgery on the respondent/ complainant no. 1. Briefly

stated the facts of the case are that the complainant Satyawati was suffering from irregular and profuse bleeding through vagina, pain in uterus and stomach. The Complainants contacted appellant for treatment at Nav Jyoti Hospital the respondent No. 3. The appellant Doctor after getting the necessary tests done told her that immediate operation of the complainant is necessary and the uterus has to be removed. It was assured to the complainants that after the surgery the condition of the complainant shall be cured. A deposit of Rs.25,000/- was taken which includes charges of anesthesia for which no receipt was given to the complainant. Operation was performed in the Nav Jyoti Hospital by the appellant on 13.4.2004. Despite the surgery performed and uterus removed by the appellant, the condition of the complainant no. 1 did not improve and after one week there was pus and greenish foul smelling discharge and stagnated fluid started coming out through her vagina followed by vomiting and nausea. The appellant assured that there is nothing to worry and the condition shall stable very soon and he discharged the patient on 27.4.2004. Since the condition of the complainant did not improve, subsequently on 1.5.2004 she was re-admitted and prescribed certain medicines. On 2.5.2004 sonography of complainant no. 1 was also performed. Thereafter on 3.5.2004 appellant referred her to Dr. Sushil Tondon and a paper in this regard was handed over to her. Dr. Sushil Tondon performed certain tests and told the complainant that her condition is very serious as she has developed septicemia and advised the complainant to go to SGPGI Lucknow or Shri Ram Murti Smarak Institute of Medical Sciences. Thus the complainant was brought to SRMS College on 3.5.2004 under the treatment of Dr. Shakeel Masood who advised for operation. Dr. Shakeel Masood told the complainant that sepsis has occurred on account of infected, unsterilized instrument, guage/dressing used during surgical intervention by appellant and on account of negligence of appellant thereby puncturing and damaging the organs and peritoneum and on account of infection, sepsis developed at or around the place of operation of which a fistula (canal) has developed and the pus and foul smelling discharge was coming out of vagina due to which the left kidney is also affected. Dr. Masood got admitted the complainant and performed operation on 3.5.14.

Again on 18.8.2004 a surgery was performed on her by Dr Shakeel Masood. Complainant remained admitted there for 12 days and she was informed that the infection sepsis and collection of pus and fluid discharge have damaged the kidney and intestine of the complainant. Since Dr. Masood has left the job and joined Avadh Hospital Lucknow the complainant consulted him again on 17.11.2004 and she was advised for skiagraphy test of which report dated 9.12.2004 clearly demonstrated non visualization and non Function of left kidney. After perusing the report Dr. Massod told the complainant that kidney and intestine of the complainant have been badly damaged and he referred him to Dr. Vipul Tondon for further treatment and advice. Complainant thereafter contacted Dr. Vipul Tondon who opined that left kidney and intestine has been damaged on account of the negligence and carelessness of the appellant Doctor and the kidney was functioning only 11 % while 89 % is non-functioning and become useless. He advised for transplantation of the kideny. Subsequently for certain test the complainant went to Delhi and Allahabad and spent more than Rs 10 lac and is in constant treatment of Dr. Vipul Tondon till date. Complainant did not claim any relief against OP no.3 and 4 Dr Masood and Dr. Tondan respectively while a sum of Rs 10 lac as medical expences, 2 lac as mental and physical torture, 1 lac for future treatment and Rs 1 lac for the expences of the attendant to care of the complainant have been claimed by the complainants from OP no. 1/appellant and OPno.2/Navjyoti Hospital through Dr Bharat Kalra.

Appellant Dr. Gopal Dutta as opposite party in the complaint case contested the case and denied the allegation of medical negligence alleged by the complainant pleading thereby that he is a qualified doctor and posses the requisite degree. He was called by Nav Jyoti Hospital to perform the surgery. After explaining the consequences of surgery and thereafter getting the consent of the complainant, the surgery was performed by him. He has never received any amount from the complainant. The complainant was discharged in good condition since the operation was successful and no negligence was committed by him while performing the operation. At the time of discharge, the complainant was duly informed the precautions which

she had to take and the medicines which she had to take regularly. It seems that the complainant herself is guilty of not following the instructions and taking regular medicines. Contrary to instructions the complainant seems to have lifted weight and doing the hard work. Complainant was discharged on her sweet will and at the time of discharge the stitches etc were in good condition. There was no pus etc. and the appellant never refereed the complainant to Dr. Sushil Tondon. Appellant had only removed the uterus of the complainant. If any abnormality was there, that might have been caused on account of the operation performed on her on 3.5.2004 by Dr.Masood.

Respondent no. 5/opposite party no. 4, Dr. Vipul Tondon also contested the complaint case thereby filing written statement and denying the entire allegations made by the complainants. Dr. Tondon specifically stated that he had never informed the complainants that any negligence had been committed by the appellant in performing the surgery of the complainant.

O.P. no. 2, Nav Jyoti Hospital through Dr Bharat K. Kalra did not contest the case before District Consumer Forum and the complaint case against him has been heard ex parte. O.P. no. 3 Dr. Shakeel Masood pleaded in his WS that there is no relief sought against him.

An application dated 27.8.2009 was moved by the appellant/O.P. before the District Consumer Forum praying that since Dr. Bharat Kumar Kalra is the owner of the Nav Jytoti Hospital therefore, the entire treatment record may be summoned from him as the appellant was merely a visiting surgeon in the hospital and went to attend the patient on his call. The Forum vide order dated 11.12.2009 had directed the owner of the Nay Jyoti Hospital, Dr. Bharat Kalra to submit Bed Head Ticket, Consent letter, Case Sheet and the entire test report of the complainant but no such record/papers have been brought on record and the District Forum vide impugned order dated 6.7.2013 thereby applying the principle of res ipsa loquitor held that Dr. Bharat Kalra and the appellant are jointly responsible for treating the complainant negligently. District Forum observed that since there is no record to substantiate the fact that what treatment was given to the

complainant as no record/papers etc. have been filed by the appellant/OP's, hence they are liable to be held responsible for concealment of record. District Forum held that no consent letter has been brought on record by the appellant. On the strength of judgment of ***Nizam Institute of Medical Science versus Prashant S Dhaka and others reported in II (2009) CPJ 61(SC), Phool Chand Soni versus Maya Pathak and others reported in IV (2011) CPJ 361 (NC), S.Giriraj versus Dr. A.Tulsi reported in IV (2012) CPJ 385 (NC), Damvanti Rewi versus Dr. Indu Arora and others reported in III (2009) CPJ 358 (Raj SC)*** the District Forum drew adverse inference against the appellant and held him guilty of medical negligence and proceeded to observe that on account of the wrong operation on the part of the appellant septicemia was occurred which required another operation. The District Forum thereby allowing the complaint of the complainants awarded Rs.5 Lac towards compensation to the complainants out of which the appellant is required to Pay Rs.2,50,000/- (Rupee Two Lac Fifty Thousand) and further ordered that this amount is to borne by the Insurance Company/respondent no. 6. Rest of the sum of compensation to the tune of Rs.2,50,000/- (Rupees Two Lac Fifty Thousand) is ordered to be paid by Nav Jyoti Hospital.

We have heard Learned Counsel Mr. Sarvesh Kumar Sharma appearing for Dr. Gopal Dutta appellant, Learned Counsel Mr. Alok Kumar Khushwaha appearing on behalf of the respondent no 6 Insurance Company and Learned Counsel Mr. Deepak Mehrotra appearing on behalf of respondents/complaints no. 1 and 2. No one appeared on behalf of respondent nos. 3 to 5 despite notice sent to them.

It is contended on behalf of appellant as well as on behalf of respondent no. 6 the insurer of the appellant that no deficiency in service or negligence has been committed by appellant in performing the surgical operation on the complainant and the Learned Forum while passing the judgment has failed to observe the order dated 11.12.2009 (contained at Annexure No. 6 at page 52 of the appeal) by virtue of which the Nav Jyoti Hospital through Dr. Bharat Kumar Kalra was directed to submit the entire hospital records and the order was not complied with by Nav Jyoti Hospital and the appellant has

been wrongly held for non production of the papers. The argument proceeded that neither there was any such order passed in the complaint case by the District Forum to produce the records of the treatment of the complainant against the appellant nor it was possible for appellant to brought on record such papers being the record of OP no. 3 the Nav Jyoti Hospital where the appellant was merely a Dr. on visit and even then the District Forum wrongly assumed and held responsible the appellant for non production of the treatment records of the complainant. It has been vociferously and strenuously further argued that there is no expert evidence available on record to substantiate the plea of Medical Negligence, rather the case of the complainant that Dr. Vipul Tondon had told them that wrong surgery had been committed by the appellant resulting in sepsis has been denied by Dr. Vipul Tondon thereby filing written statement and affidavit which has been ignored and brushed aside by the Forum. More so there is no evidence and not even pleadings or any affidavit from Dr Shakeel Masood supporting the alleged version of complainant that any negligence on the part of appellant was committed in treatment of the complainant. The appellant reiterates that the duty of care was duly discharged by the appellant and he possessed the requisite qualification and the Forum has wrongly applied the principle of res ipsa loquitor in the instant case.

Learned Counsel for appellant further argued that the complaint case is not maintainable in view of the fact that the a wife has allegedly suffered the loss but the husband is also claiming damages and compensation while the complainant (husband) has no jural nexus and locus to file and maintain the complaint. It has been pressed that the complaint case is not maintainable in view of the fact that the complaint which is filed is a joint and collective complaint while provisions under Section 12 (c) of the Consumer Protection Act, 1986 are not attracted in the instant case. According to the Learned Counsel for the appellant, the filing of the complaint case by husband and wife is a class action mandating prior permission of the District Forum which in the instant case has not been taken and as such the same is not maintainable. It has been further argued that a class action shall not lie in the cases pertaining to damages since the same has to be assessed separately.

Major thrust has been given on Order I Rule 8 of the Civil Procedure Code, 1908 and submitted that for a class/collective action the prior permission of the District Forum is must, to that effect an application seeking permission must be accompanied by the complaint case and since no such application was filed neither the permission was sought hence the complaint case is bad and is not maintainable.

Order I, Rule 8 reads under:

[8. One person may sue or defend on behalf of all in same interest

(1) Where there are numerous persons having the same interest in one suit,--

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not

proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.--For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be.]

The counsel for the appellant submitted that since this provision of the CPC has been made applicable by virtue of Section 13(6) of the Consumer Protection Act, 1986, hence the said provision is applicable in the instant case.

Learned Counsel Mr. Sarvesh Kumar Sharma further more criticized the impugned judgment on various counts and vehemently argued that in the instant case there is absolutely no negligence which could be said to have been committed by the appellant in performing the surgery. It is submitted that the complainant complained of excessive uterine bleeding while Hysterectomy was performed as per the Medical Protocol. In support of his argument he relied on the extract of the Text Book of Berek and Novaks Gynaecology according to which in the case of Dysfunctional Uterine Bleeding case following management is to be done:

"The decision to perform hysterectomy for leiomyomas is usually based on the need to treat symptoms-abnormal uterine bleeding, pelvic pain or pelvic pressure"

"Excessive uterine bleeding is the indication for about 20% of hysterectomies. Dysfunctional uterine bleeding assumes abnormal bleeding without an obvious anatomic cause. Anovulatory uterine bleeding is typically associated with polycystic ovary syndrome (PCOS), a condition in which anovulatory cycles are common"

Relying on the said protocol, the appellant submitted that the complainant approached with the irregular and profuse bleeding through

vagina, pain in uterus and stomach and according to the above literature the remedy was to perform hysterectomy and the appellant possessed with the Degree of Master of Surgery is competent to perform it and there is no error in the decision taken by him. The entire allegations of the complainant that un-sterilized instruments were used while performing the surgery caused sepsis leading to the present condition of the complainant is not correct and is not corroborated and is not established by any medical expert evidence, rather the statement of the complainant that she was informed by Dr. Vipul Tondon that on account of the negligence of the appellant the left kidney and intestine have been damaged, has been specifically denied by Dr. Vipul Tondon in his written statement and by virtue of his affidavit. Thus the complainant could not establish his case of negligence before the District Forum and despite of it the District Forum wrongly awarded compensation against the appellant.

Learned Counsel for appellant further contended that doctrine of res ipsa loquitor (Things speak for itself) although applicable in India but does not apply in cases where direct evidence is available and that can be produced. The doctrine is applicable only where the evidence solely is under the control of the defendant and the accident or negligence is of such a nature which could not be said to have been occurred in ordinary course of nature. Here is not such a case where direct evidence was not available or could have not been filed. The onus of proving medical negligence is on the complainant and it is he who has to bring on record expert evidence, medical literature relating to negligence alleged. In the instant case the complainant did not file any literature in support of his case nor has any expert opinion or report of any expert/doctor been brought on record to substantiate and prove the allegations in the case.

The learned counsel Mr. Deepak Mehrotra contended on behalf of respondents/complainants that the order and judgment passed by the learned District Consumer forum is very much perfect on the facts of the case as well as in the eyes of law based on the medical negligence in medical treatment of the complainant satyawati by the Dr conducting the operation as well as by the Hospital staff in post operation care of the patient. Entire facts

and evidence brought on record by the complainant have been very well discussed by the District Forum in the impugned order and there is no force in the appeal filed by the appellant. The post operation condition of the patient itself says the story of the negligence in treatment of the complainant for which there is no need of any medical expert opinion.

The District Consumer Forum relied on the following judgments.

1. Nizam Institute of Medical Science versus Prashant S Dhaka and others reported in II (2009) CPJ 61(SC) concluding that the burden of proof lies on the complainant to prove the medical negligence but it does shift on the Doctor if it is found that necessary investigations have not been done and consent for operation has not been taken prior to operation
2. Phool Chand Soni versus Maya Pathak and others reported in IV (2011) CPJ 361 (NC) concluding that where sepsis developed after operation that will amount the negligence of the Doctor.
3. S.Giriraj versus Dr. A.Tulsi reported in IV (2012) CPJ 385 (NC), Damvanti Rewi versus Dr. Indu Arora and others reported in III (2009) CPJ 358 (Raj SC) concluding that where the other organs of the body are effected resulting another operation after the operation of Hysterectomy that will amount the negligence of the Doctor.

The crucial and important question involved in this appeal is as to what constitute medical negligence and as to what is the methodology of the disposal of the cases pertaining to Medical Negligence. Medical Profession like any other profession is to be distinguished from occupation in as much as the profession is endowed and is service to humanity. In this respect clause 1.2.1 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 clearly provides that the principal objective of the Medical Profession is to render service to humanity with full respect and dignity of profession. Clause 1.3.1 further mandates that every physician shall maintain the medical records pertaining to his/her indoor patients for a period of 3 years from the date of commencement of the treatment. The principle of Negligence has been dealt with in Halsbury's Laws of England (33) Fourth Edition Reissue as under:

"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amount to negligence depends of each particular case. It may consist in omission to do something which ought to be done or in doing something which ought to be done either in different manner or not at all."

It has been further provided as to on whom the burden of proof lies for medical negligence:

"662. Proving Negligence. The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in Law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and the injury to the plaintiff between which and the breach of duty a causal connection must be established."

As regard the doctrine of Res Ipsa Loquitur the same is described as under:

664. Interference of defendant's Negligence: Under the doctrine res ipsa loquitur a plaintiff establishes a prima facia case of negligence where:
(1) it is not possible for him to prove precisely what was relevant act or omission which set in train the events leading to the accident and
(2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plantiff's safety.

What actually medical negligence is and what are its ingredients' have been laid down as early as on April 26, 1957 in the celebrated case of ***Bolam versus Friern Hospital Management Committee*** in which it has been held:

"That a doctor who acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique"

Hon'ble Supreme Court of India in ***Dr. Laxman Balkrishna Joshi versus Trimbak Bapu Godbole reported in (1969) 1 SCR 206*** has held that what are the duties of the doctor who make himself ready to provide treatment to the patient:

"11. The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties viz. a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires (cf. Halsbury's Laws of England 3rd Edn. Vol. 26 p. 17). The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency."

The Hon'ble Supreme Court in the Landmark Judgment of ***Indian Medical Association versus V.P.Shantha and others reported in (1995) 6 SCC at page 651*** was occasioned with a question whether the services rendered by the Medical Practitioner is amenable to the jurisdiction of the Consumer Forums and what are its implication. The Hon'ble Supreme Court upheld the principles of law laid down in bolam case (supra) and distinguished in between profession and occupation and held:

"26. We are, therefore, unable to subscribe to the view that merely because medical practitioners belong to the medical profession they are outside the purview of the provisions of the Act and the services rendered by medical practitioners are not covered by Section 2(1)(o) of the Act.

The Hon'ble Supreme court in the case of Nizam's Institute of Medical Sciences Vs. Prasanth S. Dhananka & Ors., 2009 Vol 6 SCC 1 has held that:

"In a case involving medical negligence, once the initial burden has been discharged by the complainant by making out a case of negligence on the part of the hospital or the doctor concerned, the onus then shifts on to the hospital or to the attending doctors and it is for the hospital to satisfy the Court that there was no lack of care or diligence."

In the case of **Kusum Sharma & Ors Vs. Batra Hospital and Medical Research Centre & Ors, (2010) 3 SCC 480** Hon'ble Supreme court has held that:

"While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:-

1- "Negligence is the breach of duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

2- Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

3- The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

4- A medical practitioner would be liable only if his conduct fell below that of the standards of a reasonable competent practitioner in his field.

5- In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

6- The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as proving greater chances of success for the patient rather than a procedure

involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

7- Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

8- It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

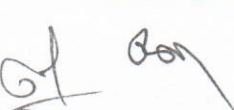
9- It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

10- The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

11- The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals."

Hon'ble Supreme court in the case of C.P Sreekumar (dr) vs. S.Ramanujam 2009 (7)-SCC 130 (Paragraph :-37) has held :

" Quote :- 37. We find from a reading of the order of the Commission that it proceeded on the basis that whatever had been alleged in the complaint by the respondent was in fact the inviolable truth even though it remained unsupported by any evidence. As already observed in Jacob Mathew case the onus to prove medical negligence lies largely on the claimant and that this onus can be discharged by leading cogent evidence. A



mere averment in a complaint which is denied by the other side can, by no stretch of imagination, be said to be evidence by which the case of the complainant can be said to be proved. It is the oblication of the complainant to provide the facta probanda as well as the facta probantia."

The Hon'ble Supreme Court in ***Jacob Mathew versus State of Punjab and another reported in (2005) 6 SCC at page 1***, has occasion to deal with the extent of the Medical Practitioner liability in criminal and civil law:

"Negligence by professionals

18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person

charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices."

25. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

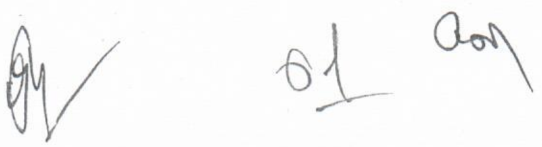
26. No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter-productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur.

28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason — whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society.

30. The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

The Hon'ble Supreme Court in ***Martin F.D'Souza versus Mohd. Ishfaq reported in (2009) 3 SCC at page 1*** has held that judges are not experts in medical science, rather they are layman, the doctors is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable



course of treatment in preference to another, the necessary passage of the judgment of the Hon'ble Supreme Court is being quoted below:

"29. Before dealing with these principles two things have to be kept in mind: (1) Judges are not experts in medical science, rather they are laymen. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges have usually to rely on testimonies of other doctors which may not necessarily in all cases be objective, since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand, particularly in complicated medical matters, for a layman in medical matters like a Judge; and (2) a balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalised, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practise his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation."

38. The higher the acuteness in an emergency and the higher the complication, the more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and has to choose the lesser evil. The doctor is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case but a doctor cannot be penalised if he adopts the former procedure, even if it results in a failure. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in charge of the patient if the patient is not in a position to give consent before adopting a given procedure.

40. Simply because a patient has not favourably responded to a treatment

given by a doctor or a surgery has failed, the doctor cannot be held straightaway liable for medical negligence by applying the doctrine of ***res ipsa loquitur****. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.*

42. when a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalised for losing a case provided he appeared in it and made his submissions.

The Hon'ble National Commission in Sethuraman ***Subramaniam Iyer versusTriveni Nursing Home and another reported in I (1998) CPJ 110 (NC)***, has held that complainant since failed to adduce expert evidence hence his cause of Medical Negligence did not prove hence no case is made out.

"....It appears from the record that the complainant did not requisition the services of any expert to support his allegations. In the absence of any expert evidence on behalf of the complainant, the State Commission was right in relying upon the affidavits filed by the four doctors on behalf of the respondents. In our view, the State Commission was right in holding that there was no negligence on the part of the respondents. The State Commission rightly analysed and appreciated the materials placed on the record. The State Commission arrived at the finding after taking into consideration the totality of the circumstances. No case is made out by the appellant for interference with the order passed by the State Commission."

In another judgment by the Hon'ble National Commission in ***Madan Surgical and Maternity Hospital and another versus Smt. Santosh and another Revision Petition No. 3527 of 2012 decided on 1.4.2014***, it has been held that that 4 D's has to be fulfilled to make out the case of Medical Negligence, namely:

1. **Duty**- A professional owed duty to patient

2. **Deficiency**- Breach of such duty
3. **Direct Causation**- injury caused by the breach (Causa Causans)
4. Resulting **Damages**

We have gone through the entire facts and circumstances on record and perused the impugned judgment and order dated 6.7.2013 passed by the District Consumer Forum. There is no dispute of the fact that Smt. Satyawati was suffering from irregular and profuse bleeding through vagina, pain in uterus and stomach, for which she was admitted in Navjyoti Hospital alleged to have been managed and run by Dr. Bharat Kalra as the Hospital is arrayed as party through Dr Bharat Kalra as per complainant's case. The appellant was called in the said Hospital to perform the surgery as is stated by the appellant and there is no proof that the Hospital is owned/run by the complainant. Since the condition of the patient was such in which surgical intervention was only option and accordingly hysterectomy was performed by the appellant and to this event even the complainant also had no grudge. The complainant, it seems contacted Dr. Shakeel Masood for treatment and alleged that by him the treatment was done for sepsis which was developed on account of un-sterilized instruments used by the appellant during surgery. Dr. Sakeel Masood was arrayed as opposite party in the complaint case but neither he appeared nor he pleaded such facts nor filed his affidavit and not even submitted any opinion in support of the allegations of the complainant. However since the District Forum had directed the Navjyoti Hospital through Dr. Bharat Kalra to produce Bed Head Ticket, Letter of Consent, Case Sheet and all the test reports of the complainant Smt. Satyawati and since the direction seems to have not been complied by Dr. Bharat Kalra therefore the Consumer Forum has drawn adverse inference on this conduct of Dr. Bharat Kalra. May it be correct or not in the context of Dr. Bhart kalra and the Hospital concerned with no comments by us in this regard, we are of this view that adverse view in this regard could have not been taken against the appellant who was a visiting doctor in the Hospital and was not the owner or in charge of the said Hospital. The District Forum wrongly concluded that there was an impediment on the part of the surgeon not to

have consulted a gynecologist in view of the fact that appellant is a Doctor having Master Degree of Surgery and is competent to treat and perform the surgery. There is not an iota of allegation to this effect in the complaint case that the appellant is not competent to treat and operate the patient. The own admission of the complainant and the medical literature on record mandates that the only course available in such circumstances is Hysterectomy. Moreover there is no allegation in the complaint case that no consent of the surgery was taken from the complainant prior to the surgery.

It has been the case of the complainant that the surgery was performed with un-sterilized instruments leading to sepsis and which infected her vital organs for which till date she is under the treatment. As per aforementioned principles of Law it is explicit that the cases of Medical Negligence stood on entirely different footings as compared to other cases pertaining to service under the Consumer Protection Act, 1986. In cases of Medical Negligence, burden of proof is on the complainant to establish the prime facie case of negligence and then only the onus is shifted on the service provider to rebut that no negligence has been committed. It is a bounded duty of the Consumer Forum to scrutinize the evidence available on record before making the mind pertaining to the negligence in treatment that prime facie case of Medical Negligence is made out. Merely the treatment not resulted in a desired result will not automatically be treated as a case of Medical Negligence. The bolam test (supra) stated by the Hon'ble Supreme Court is to be taken into consideration while deciding the case pertaining to Medical Negligence that there is failure to some act which a reasonable man in the circumstances would do and such act or omission which a prudent and reasonable man in the similar circumstances shall never do. The test depends on fact to fact of each case and has to be judged on the basis of Medical Literature and Medical Norms laid down in given circumstances. Since like other Sciences Medical field is also a branch of Science and is based upon research and studies. So it becomes imperative for the Consumer Forum to appreciate the Medical Protocol while weighing the negligence of the doctor in treating the patients. Presumption of innocence rests in favour of Treating

Doctor until the onus is discharged by the complainant that the doctor is negligent in rendering treatment.

So far the question of doctrine of res ipsa loquitor as is applicable in India is concerned, it is suffice to say that the doctrine is a last available resort when there is no direct evidence available and that is what has been cautioned by the Hon'ble Apex Court in Martin F.D'Souza (supra), the onus and initial burden rests on the complainant to establish negligence on the part of doctor and the doctrine is applicable when there is apparent negligence on the face of record, as for example leaving a mop inside stomach after surgical intervention, no expert opinion or Medical Literature is required in such cases, however still the principle of 4 D's are to be weighted while awarding damages and compensation, all the ingredients of 4 D's requires to be present in the case to establish a claim of damages.

So far the question of this argument of appellant is concerned that Order I Rule 8 which mandates seeking of prior permission before filing collective complaint has not been followed in the case as the case has been filed by husband and wife both and since the treatment has been taken by the wife and negligence if any has been committed on the wife and thus the husband has no right to file a case and is not a consumer, the complaint case being not in accordance with the Section 12 (c) of the Act and the same is liable to be dismissed, Learned Counsel for the appellant in support of his argument relied on the judgment of the Hon'ble National Commission in ***M/s Anil Textorium Pvt. Ltd. versus Rajiv Niranjanbhai Mehta reported in III (1997) CPJ 31 (NC)***, wherein it has been held that no representative action lies where the sole relief sought is damages because they have to be proved separately in each case, we are of this view that the argument at the very threshold is misconceived as the provision of Section 12 (c) governs the class action and not the instant case where the husband and wife are filing the case. The concept of Order I, Rule 8 CPC is for class action and deals in the field of representative cases. The aforementioned case law cited by the counsel for the appellant also does not support him because the case before the Hon'ble National Commission was for consideration of the members of

the society who had filed collective complaint case and not by the husband and wife.

The learned counsel for the Insurance Company in addition to arguments adopting on the same footing as is advanced by the learned counsel tried to argue that the company is not liable to indemnify the entire wrongs or action committed by the doctor under the Doctor Medical Indemnification Policy since the policy contains the exclusion clause but since the company has failed to place the entire policy on record containing the terms and conditions duly informed to the Doctor, the question raised cannot be appreciated in the instant case.

After considering the entire facts and circumstances, law and evidence on record the question, whether in the instant case any case has been established by the complainant pertaining to Medical Negligence seems to be answered in negative as the complainant herself admitted that she was suffering from irregular and profuse bleeding through vagina, pain in uterus and stomach and according to the Medical Literature Hysterectomy was to be performed by the appellant which has been performed. The complainant's case that after the surgery the condition of the patient became worse and she was referred to Dr. Sushil Tondon who advised her to go to SGPGI Lucknow and for which it has been stated by the complainant that Dr. Sakeel Masood told her that sepsis was developed on account of the infected instruments used during surgery by the appellant and which too was affirmed by Dr. Vipul Tondon has not been proved. Order dated 11.12.2009 which is also on record displays that the Learned District Forum had directed Dr. Bharat Kalra to produce the entire treatment record pertaining to the complainant before the proceedings of the complaint case. It is also borne from the record that Dr. Bharat Kalra did not complied the said order of the Forum. Since Dr. Vipul Tondon denied the allegations of the complainant, therefore the allegations of the complainant that the vital organs were infected on account of the use of the unsterilized instruments by the appellant during surgery do not stand proved against the Dr Appellant conducting the operation. Dr. Vipul Tondon who according to the complainant's own case was treating her subsequent to the Hysterectomy

performed by the appellant did not support the case of the complainant. Thus admittedly there is no material evidence available on record to prove and establish the fact that the appellant has committed any Medical Negligence, rather the complainant's own doctor on whom she relied denied her allegations. Therefore the fact is that neither there is any expert evidence nor any Medical Literature to establish a case of Medical Negligence against the appellant. Hence we are of the view that no Medical Negligence has been committed by the appellant in performing the Hysterectomy on the complainant.

So far as the question of the finding of the District Forum that no record has been placed which itself proves deficiency in service on the part of the appellant is concerned, it is wrong to conclude and the District Forum failed to appreciate its own order dated 11.12.2009 by which the record was summoned from Dr Bharat Kalra and wrongly concluded thereby drawing inference of medical negligence against the appellant Doctor conducting the operation. Apparently such type of post operative carelessness or the deficiency in service could have not been said to be committed by the Dr. conducting the operation. It may be said to have been committed or not by the Nav Jyoti Hospital through Dr. Bharat Kalra from where the record pertaining to the treatment given to the complainant in the hospital and who was supposed to have been brought the record before the Forum as is contended by appellant, we need not to comment on this issue as the Navjyoti Hospital nor Dr Bharat Kalra is the appellant before us. Again it is noteworthy that a perusal of the complaint case and the allegations contained in it nowhere shows that at any point of time Medical Record was claimed/summoned by the complainant from the appellant Dr conducting operation.

It is noteworthy that it has never been pleaded in the complaint case that consent for performing Hysterectomy was not taken from the complainant. The Learned Forum without there being such allegation in the complainant case to that effect concluded that no consent has been taken from the appellant for performing Hysterectomy. The same being not an issue in the proceedings of the case, the finding to that effect is not sustainable. Interestingly the complainant himself arrayed Navjyoti Hospital through Dr