

**State Consumer Disputes Redressal Commission
U.P., Lucknow.**

Appeal No.1996 of 2010

Indra Pal Sharma aged about 41 years,
S/o Sri Tej Pal Sharma, R/o 61, Nehru Garden,
Khora Colony, Ghaziabad U.P. **...Appellant.**

Versus

- 1- Kumar Nursing Home through its
Proprietor Dr. S. Kumar, R/o C-1,
Sector-58, Noida U.P.
- 2- New India Assurance Co. Ltd.,
A-58, Sector-16, Gautam Buddha Nagar,
Noida U.P. **....Respondents.**

Present:-

- 1- **Hon'ble Sri A.K. Bose, Presiding Member.**
2- **Hon'ble Sri Sanjay Kumar, Member.**

Sri A.K. Misra for the appellant.
Sri S.B. Srivastava for the respondent.

Date 08.2.2016

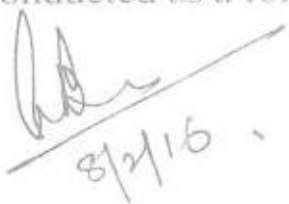
JUDGMENT

Sri A.K. Bose, Member- Aggrieved by the judgment and order dated 11.10.2010, passed by the Ld. DCDRF, Gautam Buddha Nagar (U.P.) in complaint case No.435 of 2008, the appellant Indra Pal Sharma has preferred the instant appeal under Section 15 of the Consumer Protection Act, 1986 (Act 68 of 1986) on the ground that the impugned order is arbitrary, perverse and is bad in the eye of law. It was delivered without proper appreciation of law and/or application of mind on the basis of surmises and conjectures and therefore, it has been prayed that the same be set aside in the interest of justice and he be awarded the reliefs sought by him in the complaint otherwise he will suffer irreparable loss.


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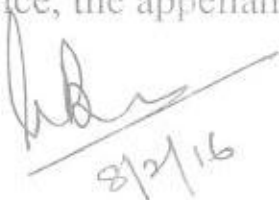
In brief, the factual matrix of the case is that the appellant/complainant Sri Indra Pal Sharma consulted Dr. S. Kumar of **Kumar Nursing Home**, Noida U.P. on **23.5.2008** for acute abdominal pain. After necessary check-ups and pathological tests, he was informed that he was having stones in his kidneys. Upon this, he approached **Guru Teg Bahadur Hospital at New Delhi** on **27.5.2008** where the doctors diagnosed **Renal Calculi** but placed a mark of query (?) on the diagnosis. At the same time, the appellant/complainant was asked to undergo a number of pathological tests so that his ailment could be diagnosed with certainty. Since he was having frequent pain in his abdomen, therefore, he consulted Doctors at **All India Institute of Medical Sciences, New Delhi** as an out-door patient on **11.6.2008**. There also, his problem was diagnosed as **Ureteric Calculi with Bilateral Hydronephrosis (Renal Calculi with B/L HDL)** and he was advised hospitalization. He remained in the hospital for a day as an indoor patient. It has been alleged that since a bed was not available in the Urology Department of the AIIMS, therefore, he left the Hospital (without discharge slip) and went to **Safdarjung Hospital, New Delhi**. However, he failed to get admission at Safdarjung Hospital. Therefore, he went to **Ram Manohar Lohia Hospital, New Delhi**. There also, he was not admitted. Consequently, he came back to **Kumar Nursing Home, Noida** and consulted Dr. S. Kumar again on **14.6.2008** where a number of pathological tests were again conducted as a follow-up treatment as he had been


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refused admission by number of reputed Hospitals at Delhi. His **Dialysis** was also done on **20.6.2008**. Thereafter, the appellant/complainant was referred to **Sumitra Hospital** for **Nephrostomy**. From perusal of the complaint, it further transpires that his **Nephrostomy** was done on **20.6.2008** at Sumitra Hospital and stones from his right kidney were removed by **Dr. Pawan Kesarwani** under **Spinal Anesthesia**. He was discharged from the Hospital on **25.6.2008** and was directed to follow medical advice strictly. The **Left Kidney** was not disturbed due to physical condition of the complaint who was not strong enough to bear the pain and agony of operation of both kidneys simultaneously. From perusal of the complaint, it further transpires that on **5.7.2008** another operation was performed by **Dr. Pawan Kesarwani** at Sumitra Hospital for removal of the stones from the left kidney and was discharged from the hospital on **15.7.2008**. It has been alleged that on **4.10.2008**, the appellant/complainant again consulted the Dr. S. Kumar of Kumar Nursing Home for removal of the **catheter**, upon which, he was advised to get fresh Ultrasound and Digital X-ray of the kidneys so that the status of the kidneys could be ascertained. Accordingly, Ultrasound and Digital X-ray were done, upon which, he came to know that the stones in his left kidney were not removed completely by Dr. Pawan Kesarwani although payment of **Rs.80,000.00** was made in advance to Dr. S. Kumar for removal of stones from both kidneys. Feeling aggrieved by this medical negligence, the appellant/complainant filed complaint case


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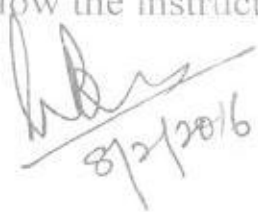
no.435 of 2008 against **Kumar Nursing Home** through its Proprietor Dr. S. Kumar for refund of the entire fees of Rs.75,000.00 which he had paid in advance for the operation. He also claimed a sum of Rs.1 lac for medical negligence, in addition to Rs.1 lac towards mental and physical compensation and Rs.25,000.00 towards financial loss. He also claimed a sum of Rs.20,000.00 towards expenses incurred by him on purchasing medicines and undergoing various tests and a sum of Rs.11,000.00 as cost of litigation.

Written Statement was filed on behalf of the respondent/OP in which medical negligence on the part of the attending surgeon was vehemently denied; and simultaneously the O.P. prayed for initiation of criminal proceedings against the appellant/complainant under Sections 193, 199, 209 and 211 IPC read with Section 195 and 340 of the Cr.P.C. for filing a bogus, sham and shady complaint. It was contended at para 15, 17 and 20 of the WS that the complaint was bad for **Non-joinder of necessary parties** as Dr. Pawan Kesarwani who conducted the surgery at Sumitra Hospital was not made a party. The complainant had consulted doctors at Guru Teg Bahadur Hospital, Delhi, AIIMS, Delhi, Safdarjung Hospital, Delhi, Ram Manohar Lohia Hospital, Delhi and Metro Hospital, Noida for removal of Ureteric Calculi with Bilateral Hydronephrosis but failed to get any relief. The line of treatment given by the answering OP was in consonance with the diagnosis arrived at the


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aforementioned reputed Hospitals and therefore, there was no remiss on the part of the respondent/OP. It was further stated that medical procedure for Dialysis was conducted by **Dr. Sadhwani, Nephrologist** and Nephrostomy was done by **Dr. Pawan Kesarwani, Urologist** and both this Doctors were specialist in their respective fields. **D.J. Stent and Catheter** were fixed during the course of treatment in order to bypass the obstructions in the path of urine. All necessary pathological tests like **B.T./C.T./P.T./P.T.T.** etc. were also conducted before the surgery and only after achieving the optimum level of satisfaction, the surgical procedure was conducted at Sumitra Hospital by Dr. Pawan Kesarwani, Urologist and the stones of the right kidney were successfully removed on 20.6.2008 but while attempting on the left kidney at a subsequent date, the patient, could not bear the pain due to sudden excessive bleeding and therefore, the entire procedure had to be abandoned and removal of the stones from the left kidney had to be postponed; and the patient was "discharged from the Hospital till the time of his complete recovery". In the meantime, he was asked to remain in touch with the Surgeon and undergo post operative care and advise. It has been contended that the appellant/complainant (patient), although visited the Hospital a number of times thereafter, for one reason or the other but did not consult the Surgeon Dr. Pawan Kesarwani for 2½ months, whereas he was asked to report after every two weeks. Therefore, he did not follow the instructions and advice of the Surgeon. It


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was pleaded at para 8 of the W.S. that the appellant/complainant did not pay the balance of the medical bills and filed the complainant in order to earn easy money. It was also pleaded that the opinion given by **Dr. M.M. Bhagati** of Shiv Jee Medical Centre, Delhi cannot be treated as an Expert Opinion as he is neither a Specialist on the subject nor has recorded any remiss in the treatment in his report dated **6.1.2009**. He has only narrated the case history and therefore, the report cannot be treated as an expert opinion. Considering the totality of the circumstances, it was prayed that the complaint be dismissed with special costs.

The respondent no.2 **New India Assurance Co. Ltd.** was impleaded as an O.P. during the pendency of the complaint. The Insurance Company took the plea that there was no deficiency in service or medical negligence on the part of Kumar Nursing Home and therefore, the Insurance Company had been wrongly impleaded as a party.

After hearing the parties and on the basis of facts, circumstances and evidence on record, the Ld. Forum below held that the complaint was bad for non-joinder of necessary parties as the Surgeon who performed the surgery was not impleaded as a party. His participation in the matter is neither separable nor ignorable. The Report submitted by Dr. M.M. Bhagati dated 6.1.2009 could be not treated as an Expert Report. It was also held that there was no medical negligence on the part of the


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respondent/OP Kumar Nursing Home. Considering the totality of the circumstances, the Forum below vide its order dated **11.10.2010** dismissed the complaint and at the same time imposed a cost of Rs.2,500.00 on the appellant/complainant under Section 26 of the Act 68 of 1986 for filing a frivolous and vexatious complaint.

Aggrieved by this judgment and order, the instant appeal was preferred. Heard the parties and have gone through the records of the case. The points for determination in this appeal are :

(i) Whether the complaint was bad for non-joinder of the necessary parties ?

(ii) Whether there was any necessity for Expert Opinion in this matter ? If so, whether the report submitted by Dr. M.M. Bhagati of Shiv Jee Medical Centre, Delhi could be treated as an expert report ? and,

(iii) Whether there was any medical negligence on the part of the respondent/OP Kumar Nursing Home in handling the medical procedure conducted on the appellant/complainant ?

As for as the non-joinder of necessary part is concerned, it was argued by the Ld. Counsel for the respondent that the surgery for removal of Ureteric Calculi was performed by Dr. Pawan Kesarwani at Sumitra Hospital, Noida but neither the Doctor who performed the surgery nor the Hospital where the surgery was performed was made a party although this fact was raised at para 15, 17 and 20 of the W.S., therefore, the complaint was bad


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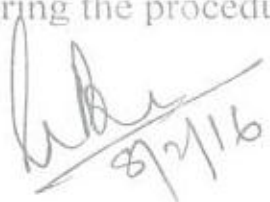


for non-joinder of necessary parties. In the light of aforesaid arguments, we propose to examine whether the complaint suffers from the virus of non-joinder of necessary parties or not ? **Order – I Rule – 3 CPC** provides that "All persons may be joined in one suit as defendants where- (a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and (b) if separate suits were brought against such persons, any common question of law or fact would arise." **Order -1 Rule – 9 of the CPC** provides that "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: [Provided that nothing in this rule shall apply to non-joinder of a necessary party.] (inserted by Amendment Act, 1976)". **Order –I Rule -13 of the CPC** provides that "All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arises, and any such objection not so taken shall be deemed to have been waived." In the instant matter, the respondent/OP raised the objections relating to non-joinder at the first instance, as is clear from perusal of paragraph 15,17 and 20 of the W.S. In spite of this, the appellant/complainant did not implead Dr. Pawan


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Kesarwani who conducted the surgery or Sumitra Hospital where the surgery was conducted. It is true that no complaint can be defeated by reason of misjoinder or non-joinder of parties as provided under Order -1 Rule -9 of the CPC but at the same time the Court is required to deal with the matter in controversy so far as regards the rights and interest of parties actually before it. In the instant matter, the surgery was conducted by Dr. Pawan Kesarwani at Sumitra Hospital, Noida and the plea of non-joinder was raised at the initial stage. Since the matter relates to medical negligence, therefore, non-joinder of the Surgeon cannot be ignored. The surgery was conducted by a different Surgeon at a different Hospital, therefore, it is not possible to fix tortuous liabilities on another Surgeon of another Hospital without affording an opportunity of hearing to all concerned, as in matters relating to **joint tortfeasor**, apportionment of liabilities cannot be fixed or ascertained without hearing all concerned. The respondent/OP took the plea of non-joinder at the initial stage yet the appellant/complainant did not bother to implead the Surgeon who performed the surgery or Hospital where the surgery was performed. Hence, the complaint prima-facie, suffered from virus of non-joinder of necessary parties. The remiss alleged against Kumar Nursing Home and the alleged Surgical Procedure done by Dr. Pawan Kesarwani at Sumitra Hospital are inseparable and a finding on medical negligence committed by Kumar Nursing Home, if any cannot be arrived at without considering the procedure under taken by Dr. Pawan


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Kesarwani at Sumitra Hospital. The observations of the Forum below in this regard is based of facts, circumstances and evidence on record and therefore, calls for no interference. It is true that the failure to implead any party does not per-se entail the dismissal of a suit as held in AIR 1976 Alld. 17(19) but it was subsequently, held in AIR 1977 Orissa 139 (142) that necessary parties are those in whose absence, the Court cannot pass an effective decree at all. In the instant matter, no effective order could be passed by the Forum below without impleadment of Dr. Pawan Kesarwani of Sumitra Hospital.

The next point for determination is whether there was any necessity for any expert opinion ? If so whether the Report dated 6.1.2009 submitted by Dr. M.M. Bhagati of Shiv Jee Medical Center could be treated as an Expert Report or not? The report of Dr. M.M. Bhagati, MBBS, MS needs reproduction:

"For Nephrolithotomy under Spiral Anesthesia and after getting done the procedure of D.J. Stenting the patient was discharged on 25.6.2008 and was called for following on 30.6.2008.

Pt. was operated on 5.7.2008 and renal calculi was removed.

On 6.10.2008 pt. got a USG done at City Ultrasound Centre, Delhi which revealed bilateral stent Shadow in Kidneys and a simple 14.6 mm stone on left upper ureter. On 13.11.2008 pt got a repeat USG done at same centre which continued the findings of 6.10.2008. On 14th Nov. USG showed a stone of 15.5 mm.

The operating doctor has agreed that he wanted to operate the patient on both sides to remove both kidney stones and the left kidney stone could not be removed due to massive bleeding.


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There is no finding on record that the left kidney stone extraction was abandoned due to massive bleeding.

If at all there was a massive bleeding the requisition for the blood transfusion should have been sent to the blood bank and at least the blood should have been sent to the blood bank for cross matching. No such request has been found by me on the papers.

However, on seeing the records and the investigations the patient still has a solitary stone of 15 mm in upper ureter on left kidney.

These findings are made without prejudice."

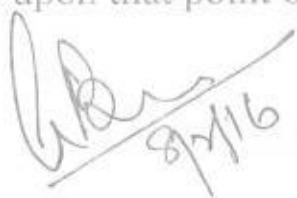
It may be observed here that Dr. M.M. Bhagati is not a Nephrologist or Urologist nor he has given any finding on any medical negligence. His report is in the form of narration of events and is of no use. The appellant/complainant himself considered that there was necessity to have an expert opinion in the matter and therefore, he suo-motu filed the report of Dr. M.M. Bhagati dated 6.1.2009. In the backdrop of the above, it is also required to be seen whether an expert report is necessary in each and every case relating to medical negligence or not? It has been observed by the Hon'ble Apex Court in **Indian Medical Association Vs. V.P. Santha III(1995) CPJ 1 (SC)** at para 37 that "it is no doubt true that sometimes complicated questions requiring recording of evidence of experts may arise in a complaint about deficiency in service based on the ground of negligence in rendering medical services by a medical practitioner; but this would not be so in all complaints about deficiency rendering services by a medical


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practitioner. There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out patient card containing the warning or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. Furthermore, in **B. Krishna Rao Vs. Nikhil Super Speciality Hospital 2010 (V) SCC 513** at para 40 the Hon'ble Apex Court was pleased to hold that it is not necessary to have opinion of the expert in each and every case of medical negligence. The Hon'ble Apex Court was pleased to further hold in **Nizam Institute of Medical Sciences Vs. Prashant S. Dhananka and others 2009 (VI) SCC 1** that "in a case of medical negligence, once initial burden has been discharged by the complainant by making of a case of negligence on the part of the hospital or the doctor concerned, the onus then shifts on 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 this regard, it may be remembered that Section 45 of the **Indian Evidence Act** deals with expert evidence. It reads as under:

Opinion of experts – When the Court has to form an opinion upon point of foreign law, or of science, or art, or as to identity of hand writing or finger-impressions, the opinions upon that point of persons specially skilled in


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such foreign law, science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts. Such person called experts.

Illustrations


- (a) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the person by which A is supposed to have died, are relevant.
- (b) The question is whether A, at the time doing a certain act, was by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or knowing that what they do is either wrong or contrary to law, are relevant.

- (c) The question is, whether a certain document was written by A. Another documents is produced which is proved or admitted to have been written by A.

The opinion of experts on the question whether the two documents were written by the same person or by different persons are relevant."

It was held by Hon'ble Apex Court in **Malay Kumar Ganguly vs. Sukumar Mukherji (Dr.) and Ors., III (1009) CPJ 17 (SC)** that Court is not bound by the

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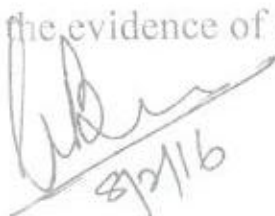


evidence of the experts which is to a large extent advisory in nature. The Court must derive its own conclusion upon considering the opinion of the experts which may be adduced by both sides, cautiously, and upon taking into consideration the authorities on the point on which he deposes.

Medical science is a difficult one. The Court for the purpose of arriving at a decision on the basis of the opinions of experts must take into consideration the difference between an 'expert witness' and an 'ordinary witness'. The opinion must be based on a person having special skill or knowledge in medical science. It could be admitted or denied. Whether such an evidence could be admitted or how much weight should be given thereto, lies within the domain of the Court. The evidence of an expert should, however, be interpreted like any other evidence.

45. The Court in **State of H.P. v. Jai Lal and others**, VII (1996) SLT 620 = III (1999) CCR 245 (SC) = (1999) 7 SCC 280, held as under":

17. Section 45 of the Evidence Act which makes opinion of experts admissible lays down that when the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an

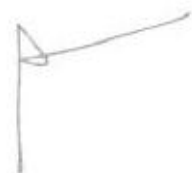

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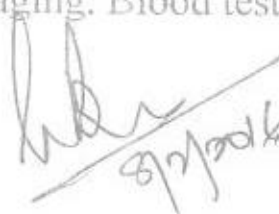
expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

18. An expert is not a witness of fact. His evidence is really on an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished within form the basis of his conclusions.
19. The expert submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross-examination. This Court in the case of **Hazi Mohammad Ekramul Haq v. State of W.B.** concerned with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons."


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In view of the aforesaid discussions, we are of the considered opinion that in the matter which related to **Ureteric Calculi with Bilateral Hydronephrosis (Renal Calculi with B/L HDL)** where the appellant/complainant consulted even doctors of the Guru Teg Bahadur Hospital, Delhi, AIIMS, Delhi, Safdarjung Hospital, Delhi, Ram Manohar Lohia Hospital, Delhi and Metro Hospital, Noida, an expert opinion was **necessary** regarding remiss, if any, committed by the Surgeon who performed the surgery at Sumitra Hospital, Noida. A **kidney stone**, also known as a renal **calculus** or **nephrolith**, is a solid piece of material which is formed in the kidneys from minerals in urine. Kidney stones typically leave the body in the urine stream, and a small stone may pass without causing symptoms. If stones grow to sufficient size (usually at least 3 millimeters (0.1)) they can cause blockage of the ureter. This leads to pain, most commonly beginning in the flank or lower back and often radiating to the groin. This pain is often known as renal colic and typically comes in waves lasting 20 to 60 minutes. Other associated symptoms include: nausea, vomiting, fever, blood in the urine, pus in the urine, and painful urination. Blockage of the ureter can cause decreased kidney function and dilation of the kidney. Most stones form due to a combination of genetics and environmental factor. Risk factors include being overweight, certain foods, some medications, and not drinking enough fluids. The diagnosis is usually based on symptoms, urine testing, and medical imaging. Blood tests may also be useful. Urinary


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stones are typically classified by their location in the kidney (nephrolithiasis), ureter (ureterolithiasis), of bladder (cystolithiasis), or by their chemical composition (calcium-containing, struvite, uric acid, or other compounds). The Report of Dr. M.M. Bhagati dated 6.1.2009 is a **narration of case history** and he has not given any finding on any medical negligence. Therefore, his report cannot be treated as expert opinion. The Forum below on the basis of facts, circumstances and evidence on record, held that an expert opinion was necessary in this case as to whether it was necessary to abandon the surgery of the left kidney in between due to excessive bleeding in order to save the life of the patient or not. The report of Dr. M.M. Bhagati was not concerned as an expert opinion and consequently, the complaint was treated bad in the absence of expert opinion. No interference is required in the aforesaid observation.

Now, we propose to deal with the matter relating to medical negligence. Before we proceed, we deem it necessary to keep in mind the various principles that govern and determine such negligence. It is now well settled principle that the complexity of the human body and the uncertainty involved in the medical procedure are of such great magnitude that it is impossible for a Doctor to guarantee a successful result; and the only assurance that he can give, or can be understood to have given by implication is that he is possessed of requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him,


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he would be exercising his skills with reasonable competence. An ordinary physician or surgeon is not expected to be either a clodhopper or feckless practitioner of profession, as much as, he is not expected to be a paragon, combining qualities of polymath or prophet as in the realm of diagnosis and treatment, there is ample scope for genuine difference of opinion; and a Doctor cannot be treated as negligent merely because his conclusion differs from that of other persons in the profession, or because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care. Furthermore, a golden principle of law has been laid down by the Hon'ble Apex Court in **Jacob Mathew Vs. State of Punjab**, (AIR 2005 SC 3180) that 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 loquitor* is not an 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 loquitor*.


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Furthermore, it has been observed in **Malay Kumar Ganguli vs. Sukumar Mukherjee (Dr.) (AIR 2010 SC 1162)** that "charge of professional negligence on a medical person is a serious one as it affects his professional status and reputation and as such, the burden of proof would be more onerous. A doctor cannot be held negligent only because something has gone wrong. He cannot also be held liable for mischance or misadventure or for an error in judgment in making a choice when two options are available. The mistake in diagnosis is not necessarily a negligent diagnosis."

In the instant matter, thus, a simple test, in the light of aforesaid observations, needs to be conducted in order to ascertain whether the Surgeon is guilty of any tortuous act of negligence/battery amounting to deficiency in abandoning the surgical procedure on the left kidney due to sudden and excessive bleeding and consequently, liable to pay damages. Admittedly the appellant/ complainant consulted Dr. S. Kumar of Kumar Nursing Home on 23.5.2008 for acute abdominal pain. After necessary check-ups and pathological tests the patient was informed that he was having stones in his both kidneys. There is no remiss till that stage. However, the records indicates that after obtaining the aforesaid opinion of Kumar Nursing Home, the appellant/complainant approached the Doctor of Guru Teg Bahadur Hospital, Delhi on 27.5.2008. There also his problem was diagnosed as Renal Calculi. Thereafter, the appellant/complainant approached AIIMS, Delhi on 11.6.2008 where his problem was also diagnosed



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as Ureteric Calculi with Bilateral Hydronephrosis (Renal Calculi with B/L HDL) and he was advised hospitalization. However, instead of undergoing treatment at AIIMS, the appellant/complainant approached Safdarjung Hospital, Delhi and thereafter, Ram Manohar Lohia Hospital, Delhi where his ailment was diagnosed as above. Thus, there was no remiss on the part of the Kumar Nursing Home in diagnosis. From the records, it further transpires that the appellant/complainant again consulted Kailash Hospital on 14.6.2008 and agreed to undergo the medical procedure for removal of his kidney stones voluntary. Before initiating the treatment, a number of pathological tests were conducted and considering the condition of the patient, dialysis was also performed on 20.6.2008. We find no irregularity or inappropriateness till that stage nor any such inappropriateness has been alleged. Thereafter, the patient was referred to Sumitra Hospital for Nephrostomy where he was admitted on reference of Kumar Nursing Home as would be clear from perusal of the Admit Card. A **nephrostomy** is an artificial opening created between the kidney and the skin which allows for the urinary diversion directly from the upper part of the urinary system (renal pelvis). A nephrostomy is performed whenever a blockage keeps urine from passing from the kidneys, through the ureter and into the urinary bladder. Without another way for urine to drain, pressure would rise within the urinary system and the kidneys would be damaged. The most common cause of blockage necessitating a nephrostomy is cancer, especially ovarian,




cancer and colon cancer. Nephrostomies may also be required to treat pyonephrosis, hydronephrosis and kidney stones. Mere reference to a specialist does not become a medical negligence in itself. From the records, it transpires that Nephrostomy was done by Dr. Pawan Kesarwani (Urologist) at Sumitra Hospital on 20.6.2008 under Spinal Anaesthesia and the stones from his right kidney were removed. There is no complaint in this regard. The Attending Surgeon did not perform surgery on both kidneys on the same date due to physical condition of the appellant/complainant who was not strong enough to bear the operation of both kidneys simultaneously. Thus, we find no remiss in this regard. From perusal of the records, it transpires that the second operation was conducted by Dr. Pawan Kesarwani at Sumitra Hospital on 5.7.2008 for removal of the stones from the left kidney of the appellant/complainant. The surgery had to be abandoned in between due to excessive bleeding and the patient was asked to remain in touch with the surgeon fortnightly and to undergo post operative care and instruction. The Surgeon possessed the requisite skill to deal with the matter and was the best person at the Operation Theatre to decide whether the surgery could be continued or not. His decision can not be question. Thus, we find no remiss in it. It may be noted here that the appellant/complainant did not bother to meet the Surgeon for 2½ months thereafter which prima-facie is indicative of his own carelessness. He consulted Dr. S. Kumar at Kumar Nursing Home on 4.10.2008 for removal of the catheter. He was advised to


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get a fresh Ultrasound and Digital X-ray of the kidneys. The Ultrasound Report indicated the existence of stones in the left kidney and therefore, without bothering to undergo follow-up treatment, the complaint case was filed for recovery of the entire amount paid for surgery in addition to various other reliefs.

It may be observed here that the respondent/OP offered vide application dated 17.12.2008 (before the Forum below) to complete the remaining surgical procedure but the offer was considered by the appellant/complainant as in the meantime, he had undergone surgery elsewhere without knowledge of Dr. S. Kumar or Dr. Pawan Kesarwani. He has not disclosed as to where and when he had undergone the surgery and has withheld all documents relating to that surgery for the best reasons known to him. Had these documents been filed, it would have been easier for us to ascertain the status of the left kidney at the time of subsequent surgery. Thus, we find the actual remiss lies with the appellant/complainant and not with the attending Surgeon. No surgery was performed at Kumar Nursing Home. The doctors of Kumar Nursing Home had referred the patient to a specialist Surgeon at Sumitra Hospital. The entire procedure was done there by Dr. Pawan Kesarwani. Therefore, we fail to read any medical negligence on the part of Kumar Nursing Home. Infact, the entire documentary evidence would reveal that Doctor at Kumar Nursing Home handled the surgery successfully although the patient had failed to get any


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relief from Guru Teg Bahadur Hospital, Delhi, AIIMS, Delhi, Safdarjung Hospital, Delhi, Ram Manohar Lohia Hospital, Delhi and Metro Hospital. Thus, on the basis of facts, circumstances and evidence available on record, we find that the matter in hand is not a case of medical **negligence** but is infact a case of medical **diligence**. The Forum below took all facts into considering before dismissing the complaint. There is no irregularity or illegality in the finding and, therefore, we are not inclined to interfere in the same.

From perusal of the operative portion of the judgment, we find that a sum of Rs.2,500.00 was imposed as cost on the appellant/complainant. However, no reason in writing was recorded for imposing the cost which is mandatory under Section 26 of the Consumer Protection Act, 1986. Section 26 of the Act provides that "where a complaint instituted before the District Forum, the State Commission or, as the case may be, the National Commission is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees, as may be specified in the order." In the instant matter, no finding relating to frivolous or vexatious nature of complaint was recorded by the Forum below. It has not given any reason for imposing the cost of Rs.2,500.00. The complaint case was decided on merit. Hence, this part of the operative portion of the order



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suffers from irregularity and therefore, cannot be allowed to sustain. Consequently, the appeal deserves to be partly allowed and the cost imposed upon the appellant/complainant is liable to be set aside.

ORDER

The appeal is partly allowed and the cost of Rs.2,500.00 imposed on the appellant/complainant under Section 26 of the Act 68 of 1986 is set aside. Remaining part of the judgment and order of the Forum below is confirmed. No order as to costs. Certified copy of the judgment be provided to the parties in accordance with rules.


(A.K. Bose)

Presiding Member

Jafri PA-II
Court No.3


(Sanjay Kumar)
Member