

RESERVED

STATE CONSUMER DISPUTES REDRESSAL COMMISSION,  
UTTAR PRADESH, LUCKNOW

COMPLAINT NO. 16 OF 2011

01. Smt. Usha Devi  
W/o Late Avadhesh Chandra Prabhakar
02. Miss. Purnima Prabhakar  
D/o Late Avadhesh Chandra Prabhakar
03. Ashish Chandra Prabhakar  
S/o Late Avadhesh Chandra Prabhakar
04. Navneet Chandra Prabhakar  
S/o Late Avadhesh Chandra Prabhakar
05. Abhishek Chandra Prabhakar  
S/o Late Avadhesh Chandra Prabhakar
06. Avanish Chandra Prabhakar  
S/o Late Avadhesh Chandra Prabhakar
07. Anand Chandra Prabhakar  
S/o Late Avadhesh Chandra Prabhakar

.... Complainants

Versus

01. Sudama Fracture Clinic  
Ravindrapuri Extension, Infront of ICICI-  
ATM Lane, Durgakund, Varanasi.  
Through its owner Dr. Binod Kumar.
02. Dr. Binod Kumar, MBBS, D. Orth.  
Sudama Fracture Clink, Ravindrapuri-  
Extension, Infront of ICICI ATM Lane  
Durgakund, Varanasi.
03. Dr. B K Tiwari (Anesthetics)  
C/o CMO Office, Kabir Nagar  
Varanasi-221005

...Opposite Parties

**BEFORE:**

HON'BLE MR. JUSTICE A. H. KHAN, PRESIDENT  
HON'BLE MR. JITENDRA NATH SINHA, MEMBER  
HON'BLE MRS. BAL KUMARI, MEMBER

For the Complainant : Sri Rajesh Chadha, Advocate.  
For the Opposite Party No.1 & 2 : Sri Vikas Agarwal, Advocate.

Dated : 29-6-2016

**JUDGMENT****PER MR. JUSTICE AKHTAR HUSAIN KHAN, PRESIDENT**

*[Signature]* →

*[Signature]*

In present complaint No. 16/2011 the complainant no.1 Smt. Usha Devi is the wife of deceased Avadhesh Chandra Prabhakar whereas complainant no.2 Miss. Purnima Prabhakar is daughter and complainants no. 3 to 7 Ashish Chandra Prabhakar, Navneet Chandra Prabhakar, Abhishek Chandra Prabhakar, avanish Chandra Prabhakar and Anand Chandra Prabhakar are the sons of deceased Avadhesh Chandra Prabhakar.

Aforesaid complainants have presented this Complaint No. 16 of 2011 against opposite parties Sudama Fracture Clinic, Dr. Binod Kumar and Dr. B K Tiwari (Anaesthetics) under Section-17 of the Consumer Protection Act 1986 with following prayers.

- (a) *By an order of the Hon'ble Commission the opposite parties jointly and/or severally be directed to pay compensation of Rs.30,00,000/- to the applicant no.1 and Rs.10,00,000/- each to applicant no. 2 to 7.*
- (b) *By an order of the Hon'ble Commission the opposite parties jointly and/or severally be directed to pay Rs.5,00,000/- received as fees, medicines, X-ray, pathological tests etc. to the applicants.*
- (c) *By an order of the Hon'ble Commission the opposite parties jointly and/or severally be directed to pay interest on the awarded amount.*
- (d) *By an order of the Hon'ble Commission the opposite parties jointly and/or severally be directed to pay cost of petition.*
- (e) *Such other and further relief in addition to the reliefs claimed.*

In complaint it has been alleged by the complainants that above Avadhesh Chandra Prabhakar was a Central Government employee and was working as Chief Booking Clerk at Varanasi Cantt Railway Station drawing salary of Rs.25,907/- per month. He was promoted to the post of Chief Booking Supervisor and was sent to Indian Railways Regional Training Institute, Chandausi for training from 13-09-2010 to 18-09-2010 where he slipped on 15-09-2010 and suffered fracture in the right elbow with injury in right wrist. He was taken to Central Railway Hospital, Chandausi where X-ray of his right elbow and wrist was advised. Thereafter X-ray was conducted by Dr. Vijay Krishna, Bahoj Road near Railway Station, Chandausi on the same day. Again

*Boye*

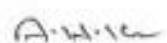
*~*

*A. W. W.*

he was taken to Central Railway Hospital, Chandausi with X-ray plates on 16-09-2010. Doctor gave him primary treatment, dressing and medicines with advice to take further medical treatment at Varanasi as he had to come back to Varanasi after two days. After completion of training he came to Varanasi on 19-09-2010. He was hail and hearty except having injury in right elbow. Thereafter in the morning of 20-09-2010 he visited opposite party no.1 Sudama Fracture Clinic owned by opposite party no.2 Dr. Binod Kumar. The opposite party no.2 Dr. Binod Kumar examined him and perused X-ray reports prepared by Dr. Vijay Krishna, Bahjoi Road, Near Railway Station, Chandausi. Thereafter opposite party no.2 Dr. Binod Kumar advised him that a small operation in his right elbow shall be done followed by plaster. For operation certain tests and medication were also advised by him. Opposite Party No.2 Dr. Binod Kumar again took X-ray of his right elbow and right wrist in his Sudama Fracture Clinic. He conducted ECG test also. In pursuance of advise of opposite party no.2 Dr. Binod Kumar he went to Dinesh Pathology Centre, Lanka, Varanasi and got the requisite test done on 20-09-2010 as recommended by opposite party no.2 Dr. Binod Kumar. Thereafter he again went to opposite party no.2 Dr. Binod Kumar in the evening of 20-09-2010 with all test reports. Opposite party no.2 Dr. Binod Kumar admitted him in the hospital Opposite Party No.1 Fracture Clinic as Indoor Patient and planned for operation on the next day on 21-09-2010. He demanded Rs.10,000/- as his operation fees and Rs.2,000/- for anaesthetic doctor besides room charges and expenses of medication. Avadhesh Chandra Prabhakar paid Rs.12,000/- to him but he did not give any receipt.

It has been further alleged in the complaint that when the above demanded money was paid by Avadhesh Chandra Prabhakar, the staff of opposite parties no.1 and 2 prepared a file in the name of Avadhesh Chandra Prabhakar containing X-ray plates, Pathology Test Report, ECG report etc. together with writings of opposite party no.2 Dr. Binod Kumar but at the same time it was further told by opposite party no.2 Dr. Binod Kumar that similar amount shall be paid again at the time of discharge. Thereafter on demand of receipt for amount paid, opposite party no.2 Dr. Binod Kumar became very annoyed and made arguments with attendants of Avadhesh Chandra Prabhakar. Ultimately on 21-09-2010 at about 2 p.m. Avadhesh Chandra Prabhakar was





taken to operation theatre by opposite party no.2 Dr. Binod Kumar and his attendants. The health and condition of Avadhesh Chandra Prabhakar was stable except fracture in his right elbow. At that time Avadhesh Chandra Prabhakar had no other illness, disease or deformity. Had he any other illness, disease or deformity the opposite party no.2 Dr. Binod Kumar would not have planned for operation.

It has been further alleged by complainants in complaint that complainants no. 1 and 2 alongwith other relatives were waiting outside operation theatre. In the meantime between 4.00 p.m. to 4.30 p.m. opposite party no.2 Dr. Binod Kumar came out of the operation theatre alongwith his associates and informed complainants no.1 and 2 that the condition of Avadhesh Chandra Prabhakar has become serious during operation and he had to be taken immediately for further advance treatment at Sir Sundar Lal Hospital, BHU. In this context, he gave a reference slip also. Thereafter opposite party no.2 Dr. Binod Kumar himself with the help of staff took Avadhesh Chandra Prabhakar to ambulance by stretcher and carried him to Sir Sundar Lal Hospital, BHU but on reaching emergency ward of Sir Sundar Lal Hospital, BHU opposite party no.2 Dr. Binod Kumar and his staff without uttering a word sat in the ambulance and ran away from that place. Whereas attending doctor of emergency ward of Sir Sundar Lal Hospital, BHU declared Avadhesh Chandra Prabhakar dead and informed that he has been brought dead. Thereafter complainants no.1 and 2 and their relatives brought dead body of Avadhesh Chandra Prabhakar to hospital of opposite party no.2. After receiving information the other family members of complainants also came to the hospital of opposite party no.2 but Dr. Binod Kumar opposite party no.2 did not come out and his staff did not reply the queries made by complainants and their relatives. They did not gave the case file and treatment records also except provisional death certificate of Avadhesh Chandra Prabhakar.

It has been further alleged in the complaint that Sri Narayan Prasad a relative of deceased Avadhesh Chandra Prabhakar lodged FIR in P.S. Bhelupur, Varanasi where Crime No. 319/2010 under Section 304A of IPC was registered against opposite party no.2 Dr. Binod Kumar and the police took possession of dead body of Avadhesh Chandra Prabhakar. Thereafter police

prepared Panchnama and sent the dead body for post-mortem whereupon post-mortem of dead body of Avadhesh Chandra Prabhakar was conducted on 22-09-2010. The post-mortem report revealed cause of death Traumatic Asphyxia as a result of closed chest injury with evidence of sub dural and sub arehnoid haemorrhage due to head injury.

It has been alleged in the complaint by complainants that the injuries in internal parts of head and chest of Avadhesh Chandra Prabhakar reported in post-mortem report were sustained while Avadhesh Chandra Prabhakar was in operation theatre and opposite party no.2 Dr. Binod Kumar did not apply reasonable degree of skill and care while treating the patient in the operation theatre. He did not apply professional skills that he possessed on the patient with reasonable competence and he could not explain as to under what circumstances the patient Avadhesh Chandra Prabhakar while in operation theatre sustained head and chest injuries.

Opposite parties no. 1 and 2 have filed joint written statement. In their written statement it has been admitted that on 20-09-2010 Avadhesh Chandra Prabhakar visited opposite party no.1 Fracture Clinic where opposite party no.2 Dr. Binod Kumar examined him and advised him for small operation in right elbow followed by plaster. After taking consent of patient he prescribed test and fresh X-ray of right elbow and right wrist.

In written statement filed by opposite parties no.1 and 2 it has been further admitted that on 20-09-2010 in evening test report of Avadhesh Chandra Prabhakar was examined and patient and his relatives were consulted. In all parameters of the pathological report patient was normal in all range as such opposite party no.2 planned his operation on 21-09-2010 and admitted him in hospital opposite party no.1.

It has been further stated in written statement by said opposite parties that on 21-09-2010 complainant no.1 gave her written consent for operation. Thereafter opposite party no.2 called the visiting anaesthetic Dr. B K Tiwari for administering anaesthesia and at 2.00 p.m. on the same day the patient Avadhesh Chandra Prabhaka was brought in operation threatre. Thereafter he was shifted to operation table. The operation theatre was well equipped with all

Boj

—

A. U. M.

required modern facilities. After putting A.V. monitoring device and making sure all the vital parameters are satisfactory Dr. B K Tiwari administered anaesthesia. After approval of Dr. B K Tiwari, opposite party no.2 started procedure called as Olicarenan process for tension band wiring of the right elbow but during the midway of surgery there developed respiratory problem "Hyper Responsive Airways Response", frothing and bronco spasm for which Dr. B K Tiwari tried his best to manage the problem and opposite party no.2 stopped process of operation. The complication developed was due to complication of anaesthesia and not due to operation being conducted by opposite party no.2.

In written statement it has been further stated by opposite parties no. 1 and 2 that to manage the condition of the patient Dr. B K Tiwari gave treatment alongwith oxygen. He gave cardiac massage for reviving the heart beats but the oxygen level of the patient went down. As such on the advice of Dr. B K Tiwari opposite party no.2 referred the patient to BHU for further management at 3.20 p.m. The patient was shifted to BHU by the equipped ambulance with necessary staff and medication of opposite parties no.1 and 2. Reference letter and all prescriptions and hospital records were handed over at the same time to the relatives of patient who accompanied him. After shifting the patient to BHU the ambulance of opposite parties no.1 and 2 returned back. Thereafter at about 4.30 p.m. relatives of the patient brought dead body in the hospital opposite party no.1 and made nuisance and ruined the clinic of opposite party no.1. They forcibly obtained death certificate from opposite party no.2 under threat. Relatives of the patient lodged FIR also on the same day i.e. 21-09-2010. Thereafter dead body was sent for post-mortem by police and post-mortem was conducted on 22-09-2010. In post-mortem report cause of death has been mentioned Traumatic Asphyxia as a result of closed chest injury with evidence of sub dural and sub arehnoid haemorrhage due to head injury.

In written statement filed by opposite parties no.1 and 2 it has been stated that injuries found in post-mortem were sustained when the patient now deceased Avadhesh Chandra Prabhakar slipped on 15-09-2010 and it is not correct to say that the injuries found on his dead body were sustained in the operation theatre due to negligence of opposite parties. In written statement of





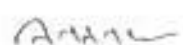
opposite parties no.1 and 2 it has been further stated that in police investigation Dr. Vivek Awasthi who had conducted the post-mortem of the deceased patient has informed the police that the patient was Hypertensive and all injuries were occurred at the time when he slipped right side, as such he sustained all the injuries to the right side of the body. Not only this but a Medical Board was also constituted to determine the cause of death of the deceased patient and on 06-01-2011 panel of four doctors examined the case history of patient alongwith post-mortem report and ruled out that the deceased patient had head injury and chest injury prior to operation and due to head injury the respiratory problems were accrued. The medical board further ruled out that as to revive the patient the CPR (Cardio Pulmonary Resuscitation) therapy was given and in this process the ribs of right side were damaged and Asphyxia was accrued.

In the written statement filed by opposite parties no.1 and 2 it has been further stated that complainants have lodged a complaint before U. P. Medical Council and U. P. Medical Council, Lucknow has convicted opposite party no.2 Dr. Binod Kumar alongwith Dr. B K Tiwari (Anaesthetist) vide order dated 01-08-2011 without affording proper opportunity of hearing to them. Opposite Party No.2 Dr. Binod Kumar has filed appeal before Medical Council of India and his appeal was pending at the time of filing of written statement.

In written statement filed by opposite parties no. 1 and 2 it has been stated that no negligence can be attributed to these opposite parties. Complications developed only after administration of anaesthesia by Dr. B K Tiwari. Therefore, Dr. B K Tiwari is a necessary party but he has not been impleaded in complaint.

In written statement filed by opposite parties no.1 and 2 it has been further stated that these opposite parties were duly insured and have taken indemnity policy through Apex Insurance Consultation Limited. As such the said Insurance Company is also a necessary party of the case but despite full knowledge of this material fact the complainants have not impleaded Insurance Company in the complaint.

In written statement filed by opposite parties no.1 and 2 it has been further stated that the opposite parties no. 1 and 2 have discharged their duties



with reasonable care and skill in accordance with standard medical protocol. They cannot be held guilty of medical negligence. It has been further stated in the written statement that the complainants have availed various remedies against answering opposite parties as such present complaint is liable to be dismissed.

In view of objections raised by opposite parties no.1 and 2 in their written statement regarding non joinder of Dr. B K Tiwari in complaint, the complaint has been amended vide order dated 24-03-2015 passed by this Commission and Dr. B K Tiwari has been impleaded as opposite party no.3 but notice sent to opposite party no.3 Dr. B K Tiwari through registered post has been returned unserved with endorsement of left and his present address is not known to complainants. Since opposite party no.3 had been engaged by opposite parties no.1 and 2 and these two opposite parties are present. Service of notice is held sufficient on opposite party no.3 Dr. B K Tiwari. Opposite Party No.3 Dr. B K Tiwari has not appeared to contest complaint.

In support of their versions both parties have filed affidavits and other documentary evidence.

We have heard learned Counsel for the parties. We have perused the affidavits and documents filed by the parties.

Opposite Parties No. 1 and 2 have filed separate Complaint No. 86/2012 against above Insurance Company in respect of this very incident for reimbursement of damages if opposite parties no. 1 and 2 are held liable for payment of the same and have not pressed issue of non joinder of Insurance Company in this petition.

After having gone through the complaint and written statement filed by opposite parties no. 1 and 2, it is apparent that it is an admitted fact that patient Avadhesh Chandra Prabhakar was admitted in hospital (opposite party no.1) in normal condition by opposite party no.2 Dr. Binod Kumar on 20-09-2010 for small operation of right elbow. There was nothing abnormal in test reports and examination of the patient. It is also an admitted fact that said patient was carried to operation theatre in presence of opposite party no.2 on 21-09-2010 in



normal condition. Thereafter anaesthesia was administered to him by Dr. B K Tiwari opposite party no.3 and process of operation was started by opposite party no.2. It is alleged by opposite parties that during process of operation complication developed and the patient could not be saved.

Admittedly post-mortem of the deceased Avadhesh Chandra Prabhakar has been conducted. Post-mortem report reveals that four Anti Mortem injuries including operated injuries were found on dead body. In post-mortem report cause of death has been recorded as follows:-

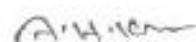
“Died due to Traumatic Asphyxia as a result of closed chest injury with evidence of sub dural and sub arehnoid hemorrhage due to head injury.”

Dr. Vivek Awasthi has conducted post-mortem of deceased Avadhesh Chandra Prabhakar. Copy of his statement recorded by police under Section 161 Cr.P.C. has been annexed with affidavit of opposite party no.2 as Annexure-7 and it has been pointed out by learned Counsel for the opposite parties no.1 and 2 that Dr. Vivek Awasthi has stated in his statement before police investigator that deceased was Hypertensive and all injuries were occurred when he slipped right side. It has further been submitted by learned Counsel for the said opposite parties that Medical Board was also constituted on the request of police investigator and it has submitted its report after examining post-mortem report and other records. Copy of report of Medical Board is Annexure-12 of affidavit of opposite party no.2.

The Medical Board has opined cause of death asphyxia due to head injury and closed chest injury. In report the Medical Board has drawn a conclusion that the patient had injuries in head on right side, in chest on right side and in right hand before operation was started. Learned Counsel for the opposite parties no.1 and 2 has submitted that the report of Medical Board clearly speaks that anti mortem injuries found on the dead body were received by the deceased when he slipped on 15-09-2010.

We have considered the submissions made by learned Counsel for the opposite parties. To examine correctness of opinion given by Dr. Vivek Awasthi as well as by Medical Board, we have to examine post-mortem report.





Post-mortem report reveals that on opening chest wall right side on outer and back aspect contusion was found in area of 9 cm x 7 cm. 7 cm posterior back of axilla on right side. Ribs 2 to 6 were fractured with contusion without any outer apparent injury.

Postmortem report further reveals that 600 ml. Liquid and clotted blood was present in pleura. In post-mortem report with heading walls, ribs, cartilages it has been mentioned, “ # of right side at outer and back aspect from 02-06 ribs with rupture of corresponding pleura.” In post-mortem report condition of right lung has been mentioned as under:-

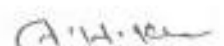
“Contused, punctured at middle lobe and congested.”

After having gone through the descriptions of injuries of deceased Avadhesh Chandra Prabhakar mentioned in post-mortem report, it is apparent that ante mortem injuries found on the dead body of the deceased Avadhesh Chandra Prabhakar have been caused during process of operation. It is incorrect to say that these injuries have been received by deceased when he slipped on 15-09-2010 in Chandausi during training. Presence of liquid and clotted blood in pleura as well as punctured lung clearly indicates that these injuries have been caused at the time of process of operation. If these injuries would have been caused on 15-09-2010 during training at Chandausi, the deceased must have complained of it. The nature of these injuries are such that it cannot be concealed.

After having gone through the post-mortem report in view of discussion made above as well as nature of ante mortem injuries found on the dead body of the deceased Avadhesh Chandra Prabhakar, we are of the view that opinion given by Dr. Vivek Awasthi as well as by medical board is incorrect to the extent that ante mortem injuries found on the dead body of the deceased might have been caused on 15-09-2010. Opinion given by Dr. Vivek Awasthi as well as report prepared by Medical Board to the above effect is not fair. These opinions are biased opinion only to save the doctor opposite party no.2 as well as his clinic.

In para 33 of affidavit filed by opposite party no.2 Dr. Binod Kumar in





evidence it has been accepted that Medical Council of U. P. has convicted opposite party no.2 Dr. Binod Kumar alongwith Dr. B K Tiwari, Anaesthetist opposite party no.3 vide order dated 01-08-2011 and had suspended them from practice with effect from 01-08-2011 to 31-08-2011. Copy of order dated 01-08-2011 passed by U. P. Medical Council has been annexed with the affidavit as Annexure-13. In para 34 of the said affidavit opposite party No.2 Dr. Binod Kumar has admitted that appeal filed against said order dated 01-08-2011 before Medical Council of India has been rejected by Medical Council of India, New Delhi on 12-03-2015 on the ground of delay. Thus, it is apparent that order dated 01-08-2011 passed by Medical Council of U.P. against opposite parties no.2 and 3 is final. Order dated 01-08-2011 has been passed by Medical Council of U.P. on the basis of report and recommendation of Ethical Committee of Medical Council, Annexure-2 of written argument of complaint dated 30-08-2011 supported by supplementary affidavit.

Ethical Committee has submitted report after enquiry on complaint of Smt. Usha Devi against opposite party no.2 Dr. Binod Kumar, Sudama Fracture Clinic. The conclusion drawn by Ethical Committee in its report is extracted below:-

*"Patient shri Avadhesh Chandra Prabhakar was having only fracture of the Olecranon Process and Wrist of the right side. For the injury number one he has taken for the surgery in the Operation Theatre.*

*Patient had no other injury except mentioned above Physician and the Anaesthetist who has Pre Anesthetic Check-up categorically that patient X-ray chest was clear and there was no fracture in the Ribs. Patient has also not reported any other injury on the body. It seems that patient had developed some problem after the anaesthesia was initiated and the CPR has been attempted. Dr. B K Tiwari was manipulating Boyle's Trolley and Dr. Binod Kumar started chest compression from where he was standing. As he was standing to the right side of patient operating right Olecranon process he forcefully compressed chest in order to presume respiration and during the course 2 to 5 Ribs of the right side fractured and the patient might have fell down and sustained injury on the Scalp and right side of shoulder. Postmortem reported intact and this*

*[Signature]*

*[Signature]*

*[Signature]*

*injury reported cause of death was "Mr. Avadhesh Chandra Prabhakar died due to Traumatic Asphyxia as a result of closed chest injury with evidence of sub dural and sub arehnoid hemorrhage due to head injury."*

*Ethical Committee also noted that it is a possible complication of Anaesthesia for which Resusutation has been attempted. Dr. Binod Kumar probably act in haste to provide CPR and due to that patient sustained injury which leads to death."*

Learned Counsel for the opposite parties no. 1 and 2 has referred pronouncement of Hon'ble Apex Court rendered in following cases.

01.Martin F. D'Souza V/s Mohd. Ishafq reported in I(2009) CPJ 32 (SC).

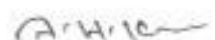
02.Jacob Methew V/s State of Punjab and another reported in III(2005) CPJ 9 (SC).

In the case of Martin F. D'Souza V/s Mohd. Ishafq (Supra) the Hon'ble Supreme Court has held that case of medical negligence should be referred to competent doctor/committee of doctors, specialized in field relating to which medical negligence attributed, and only after that doctor or committee report if there is a prima facie case of medical negligence notice should be issued to the concerned doctor/hospital.

In the case of Jacob Methew V/s State of Punjab and another (Supra) the Hon'ble Supreme Court has held that doctors have to be protected from frivolous complaints of medical negligence.

In the case of V. Kishan Rao V/s Nikhil Super Speciality Hospital, III(2010) CPJ 1 (SC) = (2010) 5 SCC 513 Hon'ble Apex Court has held that in a case where negligence is evident, the principle of res ipsa loquitur operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence.

In the case of Dr. Monica Singla and others V/s Tej Bhan Taneja and



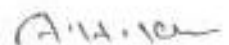
others reported in I (2016) CPJ 588 (NC) the Hon'ble National Commission has also considered the principle of res ipsa loquitur and has held that there is two following step process to establish res ipsa loquitur –

- (1) whether the accident is the kind that would usually be caused by negligence?
- (2) Whether or not the defendant had exclusive control over the instrumentality that caused the accident?

Even the admitted facts mentioned above shows that the patient Avadhesh Chandra Prabhakar was carried in operation theatre by opposite party no.2 Dr. Binod Kumar in normal condition for small operation of right elbow and he was administered anaesthesia by Dr. B K Tiwari opposite party no.3. The process of operation has been conducted by Dr. Binod Kumar opposite party no.2 and opposite party no.3 Dr. B K Tiwari has administered anaesthesia. Except these two doctors there is none to interfere with the patient. There is sufficient ground to infer that the injuries of head and chest found on dead body of deceased Avadhesh Chandra Prabhakar in post-mortem have been sustained by deceased after he was brought to operation theatre. Thus, it is apparent that when the patient suffered these injuries, he was in exclusive control and custody of Dr. Binod Kumar and his associate Dr. B K Tiwari. Therefore, in view of principle laid down by Hon'ble Apex court in the case of V. Kishan Rao V/s Nikhil Super Speciality Hospital (Supra) the burden lies on opposite parties to explain as to how the patient had suffered these injuries but the explanation given by opposite parties about injuries of deceased is not acceptable in view of discussion made above as well as materials on record. At this juncture, it is relevant to note that in the written statement filed by opposite parties no.1 and 2 it has been accepted that Dr. B K Tiwari administered anaesthesia. Thereafter with the approval of Dr. B K Tiwari, Dr. Binod Kumar started procedure of operation and during midway of surgery there developed respiratory problem 'Hyper Responsive Airways Response', frothing and bronco spasm for which Dr. B K Tiwari tried his best to manage the problem and in continuation of said effort he gave cardiac massage for reviving the heart beats. Forcefull massage given for reviving the heart may be an apparent cause







of fracture of ribs and injury of lungs.

After having gone through the affidavits of parties as well as materials on record in view of discussion made above, we are of the view that the case of medical negligence has been fully established.

Above case laws referred by learned Counsel for the opposite parties no.1 and 2 are not helpful to opposite parties on the facts of the case.

In para 16 of the affidavit dated 08-02-2016 opposite party no.2 Dr. Binod Kumar has admitted that Dr. B K Tiwari Anaesthetist opposite party no.3 was visiting doctor of hospital opposite party no.1 and on 21-09-2010 he was called by opposite party no.2 Dr. Binod Kumar for administering anaesthesia to patient Avadhesh Chandra Prabhakar at the time of operation. Thus, it is apparent that Dr. B K Tiwari was engaged in the process of operation by opposite parties no.1 and 2. As such opposite parties no. 1 and 2 are responsible for the acts of opposite party no.3 Dr. B K Tiwari also.

According to complaint Rs.12,000/- was paid to opposite party no.2 for operation of Avadhesh Chandra Prabhakar but no receipt was given by him and he demanded same amount to be paid again at the time of discharge, while it is the case of opposite parties no.1 and 2 that no advance was paid by patient or his relatives. Only they assured that entire bill shall be paid at the time of discharge of patient. In any case it is apparent that operation of patient Avadhesh Chandra Prabhakar was for consideration. Therefore deceased Avadhesh Chandra Prabhakar was a consumer of opposite parties no.1 and 2 and his legal representative s have right to move complaint under the Consumer Protection Act 1986.

The deceased Avadhesh Chandra Prabhakar was 46 year old and he was serving in Indian Railways earning monthly salary of Rs.25,907/-. Thus, the annual salary of deceased Avadhesh Chandra Prabhakar goes to Rs.3,10,884/-. The deceased has 14 years of service at the time of his death before retirement. Thus, the total loss of salary goes to Rs.43,52,376/-.

Considering the principle of deduction contained in second schedule of Motor Vehicles Act 1988 we are of the view that 1/3<sup>rd</sup> of above salaried

income should be deducted as amount to be spent by deceased on himself. Thus, the salary of deceased Avadhesh Chandra Prabhakar payable to complainants should be fixed Rs.29,00,000/- .

As mentioned above the deceased has still 14 years of service to retire. In this period he must have earned increments. His pay scale may also be revised in revision of pay scales. Therefore, we are of the view that an additional amount of Rs.2,00,000/- should be awarded in the head of future prospects.

The complainant no.1 Smt. Usha Devi is wife of deceased Avadhesh Chandra Prabhakar, complainant no.2 is the daughter and complainants no. 3 to 7 are sons of deceased Avadhesh Chandra Prabhakar. They must have suffered mental pain and agony due to untimely death of deceased Avadhesh Chandra Prabhakar. Therefore, we are of the view that a compensation of Rs.2,00,000/- should be awarded in the head of mental pain and agony also.

In view of discussion made above, we are of the view that complaint should be allowed and opposite parties should be ordered to pay compensation of Rs.33,00,000/- to the complainants within three months failing which interest should be given to complainants on the said amount from the date of judgment till actual payment @ 9% per annum.

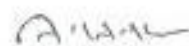
In complaint the complainants have made prayer to pay Rs.30,00,000/- to complainant no.1 out of prayed amount of Rs.40,00,000/-.

In view of this prayer of complaint we are of the view that out of above compensation of Rs.33,00,000/-, Rs.20,00,000/- should be given to complainant no.1 and in remaining amount the complainants no. 2 to 7 should be given equal share.

The complaint is liable to be allowed as above.

ORDER

The complaint is allowed. Opposite parties no.1 to 3 are ordered



jointly and severally to pay Rs.33,00,000/- as compensation to the complainants within three months from the date of this judgment. If the said amount is not paid within this prescribed time the complainants shall be entitled to get interest on the said amount @ 9% per annum from the date of judgment to the date of actual payment.

Out of above amount of Rs.33,00,000/- complainant no.1 shall be paid Rs.20,00,000/- and in remaining amount of Rs.13,00,000/- each of the complainant shall get equal share.

The opposite parties shall further pay Rs.5,000/- as cost of the case to the complainants.

Let copy of this order be made available to the parties positively within 15 days as per rules.

*A. H. Khan* 29-6-2016  
(JUSTICE A H KHAN)  
PRESIDENT

*J N Sinha*  
(J N SINHA)  
MEMBER

*Bal Kumari*  
(SMT. BAL KUMARI)  
MEMBER