

RESERVED

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

**Complaint Case No.49 of 2007**

Munishwar Prasad Shukla, aged about 54 years,  
S/o Late Sri G.P. Shukla, R/o House No.64,  
MIG Sector-E, Aliganj, Lucknow  
(Sr. Manager Law) U.P. Sahkari  
Gram Vikas Bank Ltd., Prashichan Kendra,  
10, Mall Avenue, Lucknow. .... Complainant.

Versus

1- Dr. P.K. Agarwal, Eye Surgeon,  
R/o B-39, Sector B, Aliganj,  
Lucknow (U.P.) 226020,  
Clinic-9, New Corporation Flats,  
Near IT College Crossing,  
Nirala Nagar, Lucknow-226020

2- Dr. Saurabh Baiswar, Eye Surgeon,  
Saurabh Eye Centre, "Satya Shiv Hospital",  
B-1, H Road, Near Hanuman Mandir,  
Maha Nagar Extension, Lucknow U.P. ...Opp. Parties.

**Present:**

Hon'ble Mr. A.K. Bose, Presiding Member.  
Hon'ble Mrs. Bal Kumari, Member.

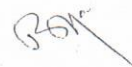
Mr. R.K. Gupta, Ld. counsel for the complainant.  
Mr. Arun Tandan, Ld. counsel for the OPs No.1 & 2.

**Date 01.11.2013**

Per Hon'ble Mr. A.K. Bose, Presiding Member.

JUDGMENT

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



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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, 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 loquitur** is not an universal application and has to be applied with extreme





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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. Yet, another golden principle of law has been laid down by the Hon'ble Apex Court in **Indian Medical Association Vs. V.P. Santha's 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 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, it has been observed in **Malay Kumar Ganguli's case (AIR 2010 SC 1162)** that "charge of professional negligence on a medical person is a serious one as it affects his professional status



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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 also cannot 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 Doctor is guilty of any tortious act of negligence/battery amounting to deficiency in conducting a surgery in the **right eye** and not properly attending the **left eye** of the complainant and consequently, liable to pay damages for pre-mature permanent loss of right eye sight due to failure in surgery and deteriorating condition of the left eye.

**The Factual Matrix:**

In the backdrop of the aforesaid observations and principles for determination of the facts in issue, we now propose to proceed with the factual matrix of the case.

The complainant Munishwar Prasad Shukla aged about aged about 54 years, s/o Late Sri G.P. Shukla, r/o House No. 64, MIG, Sector-E, Aliganj, Lucknow has filed the instant case under Section 17 of the Consumer Protection Act (Act No.68 of 1986) on **29.8.2007** against the OP No. 1 Dr. P.K. Agarwal, Eye Surgeon, r/o B-39, Sector B, Aliganj, Lucknow having Clinic at No. 9, New Corporation Flats, Near IT College Crossing, Nirala

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Nagar, Lucknow and OP No. 2 Dr. Saurabh Baiswar, Eye Surgeon, Saurabh Eye Centre, "Satya Shiv Hospital", B-1, H Road, Near Hanuman Mandir, Maha Nagar Extension, Lucknow alleging medical negligence, concealment of facts and lack of reasonable care, caution and proper attention in conducting ECCE with PCIOL in the right eye of the complainant which ultimately resulted in failure, causing total permanent loss of right eye sight and also for causing damage to the left eye due to lack of attention for which a sum of Rs.20 lakhs has been claimed, apart from Rs.2 lakhs for physical pain, agonies, discomfort, trauma and permanent disability and Rs.11,000.00 towards cost of litigation, totalling to Rs.22,11,000.00 (Rs. Twenty Two Lakhs Eleven Thousands only).

The facts, as narrated in the legal notice dated 6.7.2007 and also in the body of the complaint is that the complainant Munishwar Prasad Shukla met with an accident in the year 2001 and had undergone treatment at Neera Nursing Home, Aliganj, Lucknow. During the course of treatment, he was informed that he had developed cataract in his right eye which required removal by surgery. Accordingly, he consulted Dr. P.K. Agarwal and Dr. Saurabh Baiswar for cure of his poor vision. It has further been alleged that after obtaining various pathological and ultrasound reports, Dr. P.K. Agarwal informed him on 14.2.2002 that he had developed cataract in his right eye whereas other parameters were normal. He was also informed that he needs a cataract surgery and implantation of IOL Lens. Consequently, the aforesaid

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surgeon with assistance of OP No.2 Dr. Saurabh Baiswar performed ECCE with IOL of his right eye on 23.2.2002 at Satya Shiv Hospital, Lucknow. However, he did not get the desired relief and consequently, he made a complaint of the same to the attending surgeons, whereupon another surgery was performed by them and he was advised to take follow up medical treatment. In pursuance thereof, he took treatment as advised till mid 2006 but did not get any positive result. Consequently, he consulted Dr. Rajat Dhesi, Medical Director of Prakash Netra Kendra, Gomti Nagar, Lucknow, whereupon, he was informed that he had permanently lost complete vision of the right eye which was no longer curable with advanced field loss in the left eye. Thereafter, he consulted Dr. Manjula Hansraj of Mansarowar Eye Hospital, Vidhan Sabha Marg, Lucknow on 5.6.2007 whereupon he was again informed that he had lost vision of the right eye due to failure of cataract operation. He had also developed Glaucoma in the left eye and had advanced field loss as well. Upon this, he gave legal notices to the OP No.1 Dr. P.K. Agarwal and OP No.2 Dr. Saurabh Baiswar claiming damages for medical negligence and deficiency in service. The OP No.1 received notice, but the notice sent to his associate Dr. Saurabh Baiswar was returned unserved with the remark that he was out of station whereas, he attended his clinic during those days regularly which indicates that he had avoided to receive the same. The complainant claimed a sum of Rs.10 lakhs for loss of his right eye sight and a sum of Rs.10 lakhs for causing damage to his left





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eye as a consequential side effect totalling to Rs.20 lakhs, apart from Rs.2 lakhs for physical pain, discomfort, disability and mental agonies and Rs.11,000.00 for cost of litigation totalling to Rs.22,11,000.00.

**The Written Statements:**

The OP No.1 Dr. P.K. Agarwal submitted his Written Statement in which he stated that he is a highly qualified and well experienced doctor. He holds degrees of MBBS of the year 1958 and MS of the year 1962 from KGMC, Lucknow. He was awarded Ph.D. in Experimental Medicines (Ophthalmology) in the year 1967.

It has further been stated that the complainant is hopelessly **barred by limitation** as the surgery was performed on **23.2.2002** whereas the instant complaint has been filed on **29.8.2007**.

He has admitted that the complainant Sri Munishwar Prasad Shukla visited him on 14.2.2002 with complaints of diminution of vision after receiving head injury in an accident on 10.7.2001. It has also been contended that the complainant is a chronic alcoholic and on examination on that date, it was found that he had visual acuity of PL+ and PR full in right eye and **6/5 in left eye**. It was also found that he had traumatic cataract in the right eye with no view of Fundus/retina. The patient had informed him that he had earlier consulted other doctors and had shown him prescriptions and other related papers of Sitapur Eye Hospital and of Professor Dr. K.C. Garg/Dr. V.K. Garg. Dr. K.C. Garg had advised Phaco with IOL in his right eye. It has also been mentioned in his Written Statement





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that the patient was informed that he would be performing ECCE with IOL and not Phaco surgery as advised by Professor Dr. K.C. Garg as he does not perform Phaco surgery. Accordingly, the complainant gave his consent for the procedure of ECCE with IOL. It has further been stated that since the patient had traumatic cataract, therefore, he was explained about the complication which might occur after the surgery. Thereafter, all pre-operative examinations and tests were conducted and the answering OPs performed ECCE with ECIOL in the right eye of the complainant on 23.2.2002 at Saurabh Eye Centre, Mahanagar, Lucknow. The surgery was performed by him alone and the **OP No.2 was only present in the O.T. for assistance.** The surgery was successful and the patch was removed on the next date. Thereafter, the patient was advised to follow certain post-operative instructions. He was also advised to avoid alcohol as the same was detrimental to the eyes. It has further been stated at para 12 that the complainant visited his clinic again on 11.3.2002 and informed him that he had fallen in a party after consuming alcohol about a couple of days back and had thereby injured his right eye. On examination, it was found that there was massive iris prolapse in the right eye. Accordingly, an emergency surgery was performed and suturing was done. It has been contended that the complainant has deliberately withheld all records relating to this surgery for the best reasons known to him. He was again advised to follow appropriate line of treatment. He





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consulted him till 10.10.2005 and thereafter, he never turned up for further consultation.

It has also been stated that the medical certificate issued by Dr. (Mrs.) Manjula Hansraj of Mansarowar Eye Hospital, Lucknow is misconceived, irrelevant and bogus in nature as the patient was examined by her after a gap of 5 years from the date of surgery. Dr. (Mrs.) Manjula Hansraj is a Diploma holder in Ophthalmology with very little experience and she was not competent to issue certificate dated 5.6.2007. The certificate does not indicate the basis of observation made therein and the same does not contain signature of the patient. Therefore, the answering OP submitted that authenticity of the cause of loss of vision in both the eyes should be confirmed by referring the case to the **Medical Board of Eye Specialist**.

It was empathetically stated that there was no deficiency in service or medical negligence on his part. He had followed all standard diagnostic protocol before and during and after performing the surgery. He discharged his duties with all reasonable care and skill. The complaint of medical negligence and deficiency in service is, therefore, totally misconceived both factually and legally, and hence liable to be dismissed.

The OP No.1 also submitted **parawise reply** and stated that the eye of the patient was operated under microscope. Only one surgeon can use the same at a time only and, therefore, it is wrong to claim that the operation was conducted with the assistance to Dr. Saurabh Baiswar.



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It may be noted here that the answering OP No.1 has, however, admitted in his affidavit that Dr. Baiswar was present all through in the O.T. at the time of the surgery and was in attendance. A perusal of the record shows that he issued prescriptions also. This matter will be taken up at the appropriate stage. It has also been stated that the surgery was successful and there was no question of causing any injury to the right eye while repairing the alleged iris prolapse.. There was no question of damaging the Retina by use of needle as no injection was given for emergency repair of iris prolapse and suturing as the same was done under surface anaesthesia. Retina is the inner most layer of the eye and is well protected. The blood filled eye of the complainant was due to trauma which he had sustained and the same had to be drained out. He has, however not explained as to how the blood could be drained out from the cup without use of niddle. It has further been alleged that the prescription dated 10.10.2005 will show that the vision of the complainant at that time was 6/9 which indicate that he had gained normal vision with glasses in the right eye after the second surgery dated 11.3.2002. It has further been stated that the complainant has not filed any prescription of Prakash Netra Kendra. He filed a field chart of left eye dated 11.12.2006 which indicates that he had advanced field loss in left eye due to Glaucoma which was also previously diagnosed by Professor Dr. K.C. Garg. It may be noted here that the complainant filed a certificate dated 30.6.2006 of Dr. Rajat Dhesi, Medical Director of Prakash Netra Kendra,





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Lucknow alongwith his affidavit dated 22.10.2008. The certificate indicates that he had no vision in the right eye and that had gross field defect in the left eye with 6/9 central vision and advanced Glaucoma damage. The answering OP No.1, however admitted in para 27 of the WS that the patient lastly consulted him on 10.10.2005. At that time his vision of right eye was 6/9 P with glasses and 6/5 in left eye. He finally contended that the case has been filed after a lapse of 5 years in order to extract easy money. Thus, he has prayed that the complaint be dismissed with costs.

The OP No.2 Dr. Saurabh Baiswar filed his Written Statement in time in which he stated that he has done his MBBS and thereafter, MS in Ophthalmology and is successfully running Saurabh Eye Centre, Satya Shiv Hospital at Mahanagar Extention, Lucknow. The OP No.1 Dr. P.K. Agarwal uses the infrastructure of the aforesaid Eye Centre for carrying out various procedures on his patients. The Eye Centre is having all modern and adequate eye-care infrastructure. The complainant came to the Centre on 22.2.2002 for cataract surgery. Consequently, after taking all pre-operative measures to the best interest of the patient, his ECCE with PCIOL on right eye was conducted by Dr. P.K. Agarwal on 23.2.2002. Since the cataract surgery was done under microscope which can only be operated by a Surgeon at a time, therefore, it is incorrect to say that the answering OP also assisted in conducting the surgery. The patient was discharged on 24.2.2002 and only a sum of Rs.1,200.00





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was received by the answering OP towards Hospital and Medicines charges. He also admitted that again on 11.3.2002 an emergency operation for massive iris prolapse and suturing was done on the complainant as he had badly injured his operated right eye under influence of alcohol. He has further stated that the complainant did not visit the Eye Centre after 11.3.2002 and, therefore, the answering respondent has no knowledge about any subsequent facts. In para 10 of his Written Statement, he adopted the defence taken by the OP No.1 in totality. It may be noted here that the OP No.1 admitted in his WS that the OP No.2 was all along present in the OT and remained in attendance during the operation.

**The Evidence:**

The complainant Sri Munishwar Prasad Shukla has filed his affidavit in support of the contention made in the complaint and reiterated all the facts narrated in the complaint. In support of his contention, he has filed Discharge Ticket (Annexure 1) issued by Neera Nursing Home dated 17.7.2001 which indicates that he had undergone treatment there in the year 2001. Annexure '2' is the receipt of Neera Nursing Home. Annexure '3' is a prescription of Sitapur Eye Hospital, Sitapur dated 22.1.2002 in which the patient was advised ECCE with PCIOL. Annexure '4' is a prescription of Dr. V.K. Garg, MS Fellow Shankar Netrayaya, Chennai in which the **patient was advised PE with IOL (RE)**. Annexure 5 to 8 are the pathological reports. A perusal of the pathological report (Annexure 8) indicates that Conjunctival Smears

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were negative for pathogenic organism and pus cells. The report was submitted by Dr. Chitra Kohli on 10.2.2002. Annexure '9' is the initial prescription of Dr. P.K. Agarwal in which the patient was advised ultrasound to ascertain the condition of the Retina of the right eye. The prescription indicates that the patient had trauma and cataract in right eye. Annexure '10' is the **Sonographic findings** in which the Sonologist Dr. P.K. Srivastava observed that "**both eyes are well visualised. They are normal in size and shape. Echo texture is normal. Rt eyes measures 20x22 mm in size. Lens is thickened and opaque. It is 3 mm in thickness. Posterior segment of the eye is free. No intragel pathology is seen. No retinal detachment is seen. Retrobulbar area is free. The left eye is normal in size & shape. Echo texture is normal. The eye measures 21x23 mm is size. Lens is normal in thickness. Posterior segment of the eye is free. No intragel pathology is seen. No retinal detachment is seen. Retrobulbar area is free.**" The inference made by the Sonologist was that thickened opaque lens in right eye suggestive of traumatic cataract with normal posterior segment and left eye study. The Sonologist advised for **further evaluation**. Annexure '11' is the Conjunctival Smear Report given by Nivaran Pathology & Diagnostic Centre. Annexure '12' is the Conjunctival Culture Report which indicates that the Culture was **negative for Pathogenic Organism**. Annexure '13' is a prescription issued by the OP No.2 **Dr. Saurabh Baiswar** of Satya Shiv Hospital. Annexure '14' is pre-operative order and





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this report does not indicate that the patient was **chronic alcoholic**. No advice with either given to him to avoid the same, although small things like taking light breakfast or use of shampoo before the operation were indicated in the same. Annexure '15' is a receipt of Saurabh Eye Centre **under signature of Dr. Saurabh Baiswar** in which a sum of Rs.8,000.00 was received by him from the complainant. A perusal of the receipt shows that the Surgeon Incharge of the surgery was Dr. P.K. Agarwal and the amount was received by Dr. Saurabh Baiswar under various heads. Annexure 16, 17 & 18 are prescriptions of Dr. P.K. Agarwal dated 25.2.2002, 31.3.2002 and 3.4.2003. Annexure 19 to 30 are the receipts of purchase of medicines by the complainant. Annexure 31 to 33 are prescriptions dated 20.1.2004, 6.9.2004 and 10.10.2005 of Dr. P.K. Agarwal. Thus, it is established that the patient underwent treatment from the OP No.1 till at least **10.10.2005**. Annexure '34' is a cash memo issued by Baijal Opticians, Kaiserbagh, Lucknow. Annexure '35' is a receipt of Prakash Netra Kendra, a perusal of which indicates that the field charting was made of left eye only which is suggestive of the fact that the complainant had no vision in his right eye. Annexure 36 & 36 A are Single Field Analysis of left eye of the complainant done at Prakash Netra Kendra. Annexure 37 to 42 are receipts of various medicines, purchased by the complainant from time to time and also receipts of payment of consultation fees. Annexure 43 to 44 field analysis. Annexure 45 is a certificate given by **Dr. (Mrs.) Manjula Hansraj** of



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Mansarowar Eye Hospital. Annexure 46 is another report of Dr. Rajat Dhesi, M.S., Medical Director of Prakash Netra Kendra. Its supports the report by Dr. Manjula Hansraj dated 5.6.2007, which is as under:-

"This is to certify that Patient Mr. M.P. Shukla age about 55 years/Male (MRD No.18199) R/o 64 MIG, Sector-E, Aliganj, Lucknow was seen at this hospital on 5<sup>th</sup> June, 2007. Patient gave a history of head injury and previous right eye operation in 'Sayutam Shivam Hospital Near New Hanuman Mandir, Mahanagar Extension, Lucknow by Dr. P.K. Agarwal & Dr. Saurabh Baiswar. Due to operation he lost the vision in right.

On examination, it was revealed that due to operation, patient has no vision in right eye with advanced Glaucoma damaged in left eye.

Right eye ..... No vision & left eye 6/6 P Gross field defect with central vision. More than 95% permanent disability in right eye which is not curable.

There is advanced field loss in the LE making him extensively prone to accidents, patients is not to undertake strenuous work, travels at night and advised to visit hospital at regular intervals for follow-ups."

Dr. Rajat Dhesi, MS, Medical Director, Prakash Netra Kendra examined the complainant on 30.12.2006 and reported that "on examination, it was revealed that the patient had no vision in right eye with advanced Glaucoma damage in left eye. The left eye had gross field defect with 6/9 central vision. He had more than 95 per cent disability

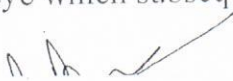



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in right eye which was not cureable. He has advanced field loss in the left eye making him extensively prone to accident and, therefore, he was advised not to take strenuous work, travels at night. He was also advised to visit hospital at regular interval for follow ups."

Annexure 47 and 48 are prescriptions of Prakash Netra Kendra and Annexure 49 is a copy of legal notice dated 6.7.2007 given to the OPs.

The OP No.1 Dr. P.K. Agarwal has filed his affidavit in support of the contention made in his WS in which he has claimed that there was no remiss on his part. The cataract surgery was done by him on 23.2.2002 under microscope. Dr. Saurabh Baiswar did not assist him. He was simply present in the operation theatre to follow the instructions. The surgery was uneventful and the right eye was patched. The patch was removed on 24.2.2002 and he was discharged on the same date. At the time of discharge the patient informed him for the first time that he was a chronic alcoholic and it was not possible for him to avoid the same. Thereafter, on 11.3.2002 he visited him again and informed him he had fallen down in a party about a couple of days back after consuming alcohol due to which he has injured his right eye. On examination, it was found that there was a massive iris prolapse which was repaired on the same date in emergency and suturing was done free of cost. The patient categorically informed that the end result of this surgery may not be successful. After this surgery, he recovered with a vision of 6/12 with glasses in the operated eye which subsequently improved to 6/6 P



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with glasses on 1.5.2002. There was no question of damaging retina as no injection was given for repair of iris prolapse and suturing which was done in tropical (Surface) anaesthesia.

It has, however, been admitted that at the time of performing the emergency surgery, his right eye was full of blood due to trauma which he had sustained and, therefore, blood had to be drained out. He has further stated that he did not charge any fees from the complainant for this surgery but has not given any reason for this benevolent. He has further stated that loss of vision in left eye is due to Glaucoma and not due to surgery in the right eye. The loss of vision of the right eye was also due to Glaucoma and nor due to surgery. The patient was given medicine for post operative care of right eye including Betagan Eye Drop **for the left eye**. He did not hide anything from the patient and changed the glass numbers from time to time. The patient last visited him on 10.10.2005. At that time, he had no problem with his left eye yet he was advised to use Betagan Eye Drop for whole life in his left eye. It was also submitted that the patient was advised to use Betagan Eye Drop regularly in the left eye by Professor Dr. K.C. Garg and Dr. V.K. Garg also on 1.2.2002 but he deliberately withheld that part of the prescription. However, the OP did explain the basis of the above observation relating to withholding of the prescription of Dr. Garg and as to how he derived knowledge of the same.



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He further contended at para 14 of his affidavit that there was inordinate delay in consultation from time to time which indicates that the patient had no difficulty with his vision after the surgery. His eyes were damaged due to Glaucoma. Thus, he has claimed that the complainant is not entitled for the relief sought by him.

**Point for determination:-**

On the basis if the averments of the parties and documents available on record, the following question arises for our determination.

**Whether the OPs are guilty of tortuous act of medical negligence/ battery amounting to deficiency in service in conducting ECCE with IOL in the right eye and not properly attending the left eye of the complainant which ultimately resulted in total loss of vision at the right eye and gross field loss in the left eye and consequently, are liable to pay damages to the complainant as claimed ?**

A perusal of the records would reveal that the Ld. Counsel for the OPs have raised certain **preliminary/legal objections** which need to be addressed at the very beginning.

The OP No.2 Dr. Saurabh Baiswar has stated that he has nothing to do with the surgery which was done by Dr. P.K. Agarwal single handedly and yet, he has unnecessarily been made a party to the complaint. Therefore, the instant complaint suffers **from misjoinder of parties**. The OP No.1 Dr. P.K. Agarwal has stated in his WS at para 3 that the complaint is **barred by limitation** as the surgery was conducted on 11.3.2002 but

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the complaint has been filed on 29.8.2007 whereas the period of limitation under Section 24(a) of the Consumer Protection Act is only two years from the date on which the cause of action arose. Thus, the complaint is barred by period of limitation. The OP No.1 has also raised objection on the report of Dr. Manjula Hansraj which has been placed by the complainant as a "**Report of Expert**". It has been argued that the authenticity of the cause of loss of vision in both the eyes of the complainant should be confirmed by referring the case to a **Medical Board of Eye Specialists**. Thus, the above three objections relate to period of limitation, misjoinder of parties and absence of expert report. We now propose to take up these preliminary objections one by one for disposal.

**Preliminary objection (i) Misjoinder of parties:-**

It has been contended on behalf of the OP No.2 Dr. Saurabh Baiswar that the surgery was conducted by Dr. P.K. Agarwal single handedly and yet he has unnecessarily been made a party and, therefore, the complaint suffers from misjoinder of parties. On the other hand, Ld. Counsel for the complainant argued that the surgery was conducted by Dr. P.K. Agarwal and Dr. Saurabh Baiswar jointly at Saurabh Eye Center of Satya Shiv Hospital, Mahanagar Extension, Lucknow which is run by Dr. Saurabh Baiswar and, therefore, he is a necessary party and the complaint does not suffer from any misjoinder. We have perused the records in the light of the arguments made by the parties.

Dr. Saurabh Baiswar has admitted in para 1 of his





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WS that he has been successfully running Saurabh Eye Centre, Satya Shiv Hospital at Mahanagar Extension, Lucknow since several years. The centre is well equipped having all necessary infrastructure and the OP No.1 Dr. P.K. Agarwal carries out various procedures on his patients in the aforesaid Eye Centre. Annexure '15' is an estimate **under the signature** of Dr. Saurabh Baiswar which categorically indicates that Dr. P.K. Agarwal was the Surgeon Incharge and a sum of Rs.8,000.00 was received by Dr. Saurabh Baiswar on 24.2.2002 towards various expenses for conducting the surgery. Annexure '13' is a **prescription** dated 22.2.2002 prescribed by Dr. Saurabh Baiswar. These documents categorically prove that Dr. Saurabh Baiswar was intimately connected before and after surgery. He had also examined both the eyes of the complainant on 22.2.2002, as is established from Annexure '13'. Thus, a nexus between the two answering Ophthalmologists is established. It has been contended that the complainant had advanced Glaucoma in his left eye at the time he visited the clinic for the first time for cataract operation. Had it been so, then it was the duty of the answering OPs to administer proper treatment for the same but the various prescriptions available on record indicate that no such step was taken by them and, therefore, his inclusion as OP No.2 cannot be treated as misjoinder in the light of the aforesaid documentary evidences and admissions on the part of the OP No.2 in his WS. Furthermore, the OP No.1 Dr. P.K. Agarwal in his affidavit has admitted that Dr. Baiswar was in attendance

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all through in the OT during the surgery on 23.2.2002. Thus, it cannot be said that he has been unnecessarily made a party to the complaint. Accordingly, the objections raised relating to misjoinder of parties is found to be misconceived. In view of the aforesaid observations, we are of the considered view that Dr. P.K. Agarwal and Dr. Saurabh Baiswar are jointly and severally responsible for the tortuous act of negligence/battery amounting to deficiency in service in conducting the surgery in the right eye and not properly attending the left eye of the complainant and consequently, they need to be tried together for damages for pre-mature permanent loss of right eye sight due to failure of ECCE with IOL and deteriorating condition of the left eye of the complainant.

**Preliminary Objection (ii) On Limitation:-**



The OP No.1 Dr. P.K. Agarwal has stated at para 3 of his WS that the complaint is barred by limitation. His contention is that the first surgery was conducted on 23.2.2002 which was performed without any complication and the patch was removed on the next date. Thereafter, the complainant visited him again on 11.3.2002 and informed him that he had fallen in a party after consuming alcohol a couple of days back, and thereby injured his right eye. On examination, it was found that there was a massive iris prolapse in the right eye and accordingly, an emergency surgery was conducted on the same day i.e. on 11.3.2002. There is, however, no documentary evidence on record which may indicate that the complainant is a chronic alcoholic and that he fell down in a party after



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consuming liquor about a couple of days prior to conducting the second surgery. It has been contended that the complaint has been filed on 29.8.2007 and, therefore, the complaint is barred by limitation in view of provisions contained under Section 24(A) of the Consumer Protection Act. In support of his contention, he has filed a ruling laid down by the Hon'ble Supreme Court in **Haryana Urban Development Authority Vs. B.K. Sood (2006 I SCC 164** in which the Hon'ble Court was pleased to hold that Section 24(A) debars any Fora set up under the Act to admit a complaint unless the complaint is filed within two years from the date on which the cause of action has arisen. Section 24(A) of the Consumer Protection Act, 1986 (Act 68 of 1986) provides that "(1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen. (2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay."

  
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We have gone through the record carefully in order to ascertain whether the complaint is barred by limitation or not. Admittedly, Professor Dr. K.C. Garg/V.K. Garg had advised for Phaco with IOL in the right eye of the complainant. This fact has been admitted in para 8 of the Written Statement by the OP No.1. It has been stated in para 10 that he had informed the complainant that he would be performing ECCE with IOL implantation and not Phaco surgery as advised by Professor Dr. K.C. Garg/V.K. Garg. However, no consent letter has been filed by the answering OP in support of this contention. It has also been admitted that he had performed an emergency surgery for iris prolapse and suturing was done on 11.3.2002. No documentary evidence or prescription has been filed in support of the aforesaid contention. He has however contended that the complainant did not file these papers deliberately. This defence has no basis as the documents relating to the surgery and consent letter are always kept by the attending surgeons or by the Hospital authorities. Besides this, the complainant did not disclose the date of the second operation anywhere in his complaint and yet, the answering OP mentioned a specific date of second emergency surgery in this Written Statement which was not possible to specify without documents. Thus, wilful suppression of documents by the answering OPs cannot be ruled out. Furthermore, the OP No.1 has admitted at para 13 that the patient last consulted him on 10.10.2005 whereafter he never returned for further treatment. He has not, however, explained as to what made

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the patient to visit him again and again relating to the surgery which is indicative of failure of the same. It may be observed here that till that date, the OP did not inform him in writing that the surgery was a failure and there was no scope for regaining vision of the right eye. Thus, it is a **clear-cut case of concealment of fact**. Such conduct of surgeons has been depreciated in the strongest terms in **Malay Kumar Ganguli's case (AIR 2010 SC 1162)**. The records further reveal that the patient did not get the desired result and he visited Prakash Netra Kendra, Gomtinagar, Lucknow for treatment where on the basis of field charting, he was told on **11.12.2006** that he had no scope of regaining vision in the right eye. Ultimately, on the basis of field charting, the complainant was finally informed on **30.6.2006** by Dr. Rajat Dhesi and thereafter, on **5.6.2007** by Dr. Manjula Hansraj that due to previous surgery on the right eye, the complainant had lost his vision permanently. The certificate dated 30.6.2006 given by Dr. Rajat Dhesi, Medical Director, Prakash Netra Kendra indicates that **the complainant had lost vision in his right eye after surgery. He had advanced Glaucoma damage with advanced field loss in his left eye.** Although, the OP No.1 has refused to accept the contents of the certificate dated 5.6.2007 issued by Dr. (Mrs.) Manjula Hansraj of Mansarowar Eye Hospital but **he has not challenged** the Medical Certificate issued by Dr. Rajat Dhesi, Medical Director, Prakash Netra Kendra, Lucknow. Needless to mention that the contents of the certificate issued by Dr. Rajat Dhesi and Dr. (Mrs.) Manjula Hansraj





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are in consonance with each other and, therefore, the certificate of Dr.(Mrs.) Manjula Hansraj cannot be ignored, being totally incorrect, misconceived and bogus as alleged by OP No.1 in para 14 of his WS.

Thus, from the perusal of the aforesaid documents, it is revealed that the cause of action started on 23.2.2002 when the ECCE with IOL was performed in the right eye of the complainant. It continued upto 11.3.2002 when an emergency surgery of alleged iris prolapse and suturing was performed under surface anaesthesia. It further continued till **10.10.2005** when admittedly (in para 13 of WS), the patient last consulted Dr. P.K. Agarwal for redressal of his eye problem. Till that date he was kept in dark regarding permanent loss of vision of the right eye, as is revealed from perusal of annexure 16, 17, 18, 31, 32 and 33. Thus, the cause of action continued till at least 10.10.2005. The instant complaint has been filed on 29.8.2007 i.e. within a period of two years and, therefore, this complaint cannot be treated as barred by limitation. Furthermore, it has been held by the Hon'ble Apex Court in **Collector Land Acquisition, Anantnag Vs. Katiji AIR 1987 SC 1353** that "the expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves ends of justice that being the life purpose for the existence of the institution of courts." It has further been held that refusal to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated ..... when substantial

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justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. It has further been held by the Hon'ble Apex Court in **Indra Nand Mishra Vs. State of Bihar and Ors."** (2009) 9 SCC 94 that "power to condone delay in approaching the court has been conferred upon courts to enable them to do substantial justice to parties by disposing of matters on merit." Admittedly, Section 24(A) of the Act normally bars Consumer Fora from admitting complaint after a lapse of two years from the date on which the cause of action arose. **The matter was dealt with at length in III(2008) CPJ 75 (SC) and II(2009) CPJ 65 (NC).**

In the instant matter, the patient was admittedly last attended by Dr. P.K. Agarwal on 10.10.2005 and the complaint was filed on 29.8.2007. Thus, it has been filed within a period of two years and, therefore, the complaint is not barred by limitation.

**Preliminary objection (iii) On Expert Opinion:-**

It was argued by the Ld. Counsel for the complainant that the report of Dr. (Mrs.) Manjula Hansraj dated 5.6.2007 is an expert report and it clearly shows that due to operation performed on the right eye, the complainant lost his vision of the same and an advanced Glaucoma damage with advanced filed loss in the left eye and, therefore, on the basis of this report the OPs should be held guilty of remiss for not treating the patient as per standard diagnostic protocol. This report supports the

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certificate dated 30.6.2006 of Dr. Rajat Dhesi, M.S., Medical Director, Prakash Netra Kendra, Lucknow.

On the other hand, it has been argued by the Ld. Counsel for the OPs that the report submitted by Dr. (Mrs.) Manjula Hansraj can not be considered as an expert report as she is a Diploma holder in Ophthalmology with very little experience of working in good hospital. It has also been argued that the contents of the certificate are totally incorrect, misconceived, bogus and have been given without any basis or perusal of previous records. The report does not contain the signature of the patient. It has also been stated that no doctor can claim that vision in right eye was lost due to the surgeries performed on 23.2.2002 and 11.3.2002; and that loss of vision of the left eye is related to cataract surgery of the right eye. The OPs, therefore, claimed that the authenticity of the cause of loss of vision in both eyes should be confirmed by referring the matter to any to Medical Board of Eye Specialist. It has also been argued that in the absence of expert report, the matter cannot be adjudicated properly.

It may be noted here that although the answering OPS challenged the report of Dr. Manjula Hansraj dated 5.6.2007, yet they did not utter anything regarding the report dated 30.6.2006 given by Dr. Rajat Dhesi, M.S., Medical Director of Prakash Netra Kendra, Lucknow. There is no contradiction in these two reports.

We have given due consideration on the arguments put forward by the parties. Admittedly, the OP No.1 Dr. P.K. Agarwal possesses a Degree of Master of Surgery in

Ophthalmology and subsequently, he obtained Ph.D. in Experimental Medicines (Ophthalmology) from All India Institute of Medical Sciences. The OP No.2 Dr. Saurabh Baiswar also possesses Master's degree in Ophthalmology whereas Dr. (Mrs.) Manjula Hansraj is only a Diploma holder in the subject and, therefore, her opinion cannot be treated as expert opinion. Besides this, she was not directed by any Court to submit the report. Her report dated 5.6.2007 was given prior to filing of the case. She has, however, not claimed herself to be an expert. Therefore, the report dated 5.6.2007 cannot be accepted as an expert report.

Now, it is required to be seen whether an **expert report** is actually required in this case for proper adjudication or not? Admittedly, Professor Dr. K.C. Garg recommended for **PE with IOL** of the right eye, as is clear from annexure '4'. The Sonologist in his report (annexure '10') observed that both eyes were well visualised and were normal in size and shape and echo texture. The lens of the right eye was thickened and opaque. Posterior segment of the eye was free. No intragel pathology or retinal detachment was seen and Retrobulbar area was free. However, the Sonologist advised for **further evaluation** but the OPs neither obtain any further evaluation nor performed the PE with IOL (Phaco-surgery) as advised. No consent letter has been filed. Thus, it is a clear case of medical remiss. The OP No.1 has admitted that the patient visited him again on 11.3.2002 and on that date an emergency surgery for iris prolapse



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was performed. The OPs have not submitted any documents, prescription or consent letter relating to the second surgery either. The OP No.1 has, however, admitted that even after performing the second surgery, the complainant did not get the desired relief and kept on visiting him repeatedly till 10.10.2005. Thereafter, the record reveals that the patient visited Prakash Netra Kendra and Mansarowar Hospital for further treatment where he was informed that he had lost vision in the right eye completely and there was no hope of regaining the same. There was advanced field loss in the left eye as well. Thus, it is clear that the answering OPs did not attend his left eye in time. Proper and timely treatment could have checked the Advance Field Loss of the **left eye** of the complainant. It may be observed here that when the patient visits an Ophthalmologist for treatment and exploration of his vision, he normally does so for his both eyes. Otherwise also, it is primary duty of an Ophthalmologist to check both the eyes during such exploration. The answering opposite parties, therefore, cannot get away by saying that they had treated the right eye only. **The responsibilities of the surgeons increased manifold to treat and save the left eye after total loss of vision in the right eye due to failure of ECCE with IOL.** If they failed to discharge the above responsibilities or notice the total loss of vision in the right eye, then they are to be blamed for this gross remiss and deficiency. The aforesaid act of Commission and Omission falls under the category of negligence and deficiency in service. Beside

this, the prescription issued before and after the surgery dated 23.2.3002 clearly show that both the eyes were checked and treated by the OPs. Thus, it is an open and shut case. Under the given circumstances, there seems to be no necessity for any expert report. The parties did not even make a request for any expert report during hearing of the complaint.

Now, it is 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 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**

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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 owner 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 the instant case, the complainant on the basis of documentary evidence has discharged his initial burden of making case of negligence and remiss on the part of the OPs. Therefore, we are of the considered view that in the instant case, there is no requirement of any expert opinion.

**Findings On Consent:**

From perusal of the records, it transpires that Dr. V.K. Garg, MS, Fellow Shankar Netralaya, Chennai at annexure '4' had advised the complainant for PE with IOL of right eye but the Opposite Parties conducted ECCE with IOL on 23.2.2002. Thus, the surgery conducted by the OPs was not as per the advice given by Dr. V.K. Garg. The OP No.1 Dr. P.K. Agarwal at para 10 of his WS submitted that he had categorically informed the complainant that he would be performing ECCE with IOL implantation instead of PE with IOL of the right eye (Phaco Surgery) as advised by Dr. K.C. Garg/Dr. V.K.

Garg as he does not perform Phaco procedure. He further submitted that he had obtained consent from the complainant before performing ECCE with IOL implantation. He has, however, not filed any consent letter either for the first surgery dated 23.2.2002 or for the subsequent surgery dated 11.3.2002. We have given due consideration on the point of consent. **Notification No. MCI-211(2)2001 dated 11-03-2002 of Medical Council of India. Para 7:16** of the notification reads as follows:-

"Before performing an operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of minor, or the patient himself as the case may be. In an operation which may result in sterility the consent of both husband and wife is needed."

It may also be observed here that the matter of consent was discussed at length by the Hon'ble Supreme Court in **Samira Kohli V/s Prabha Manchanda (Dr.) & Anr. I(2008) CPJ 56 (SC)**. The principles relating to consent was formulated in the case which are as under:-

1. A doctor has to seek and secure the consent of the patient before commencing a 'treatment' (the term 'treatment' includes surgery also). The consent so obtained should be real and valid, which means that: the patient should have the capacity and competence to consent; his consent should be voluntary; and his consent should be on the basis of adequate information concerning the nature of the treatment



2. The 'adequate information' to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the Doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. But there is no need to explain remote or theoretical risks involved, which may frighten or confuse a patient and result in refusal of consent for the necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusal to take treatment which may persuade a patient to undergo a fanciful or unnecessary treatment. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.
3. Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The fact that the unauthorized additional surgery is beneficial to the patient, or that it would save considerable time and

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expense to the patient, or would relieve the patient from pain and suffering in future, are not grounds of defence in an action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure though unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision.

4. There can be a common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.
5. The nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high degree mentioned in Canterbury but should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of treatment, and the risk and consequences attached to the treatment.



Thus, we are of the considered view that the OPs failed to obtain any consent, much less a valid consent, in

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the instant matter and, therefore, they are certainly responsible for negligence.

It would not be out of place to mention here that “**Consent**” has become an increasingly important risk area for all doctors. Doctors while treating a patient run the risk for civil or criminal prosecution. The consent becomes more important when an intervention of a Surgeon results in permanent interference with the functioning of the body e.g. if the surgeon agrees to perform a surgery without any specific consent, that will be a trespass and an act of negligence. The only available defence will be that it was necessary for the life of the patient to proceed at once. However, there exists no such available defence to the opposite parties in the instant case and thus, definitely they have committed a gross trespass and act of negligence by performing ECCE with IOL without obtaining a consent.

It may not also be out of place here to mention that it is a sanguine duty of a Doctor to disclose information about the potential consequences and risk of proposed medical treatment which is commonly known as '**Bolam Test**'. In India, this Bolam test has broadly been accepted as a general rule as held in **Achutrao Haribhau Khodwa V/s State of Maharashtra, I(1996) CLT532(SC) = 1996(2)SCC 634, Vinitha Ashok V/s Lakshmi Hospital, I(2002) CPJ 4(SC) = VI(2001) SLT 735 = 2001(8) SCC 731 and Indian Medical Association V/s V P Shantha, III(1995)CPJ 1(SC) = 1995(6) SCC 651.**

“The approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services.”

Again, it has been observed in **Malay Kumar Ganguli's case (AIR 2010 SC 1162)** at para 155 that "the patients by and large are ignorant about the disease or adverse effect of a medicines. Ordinarily, the patients are to be informed about the admitted risk, if any. If some medicine has some adverse effect or some reaction is anticipated, he should be informed about it."

The aforesaid guidelines were not followed in the instant case. It has been observed in **Malay Kumar Ganguli's case** at para 157 by the Hon'ble Apex Court that "the law on medical negligence also has to keep up with advances in the Medical Sciences as to treatment as also diagnostic. Doctors increasingly must engage with the patients during treatments specially when the line of treatment is a contested one and hazards are involved. Standard of care in such cases will involve the duty to disclose to the patients about the risk of serious side effects or about alternative treatments. In the time to come litigation may be based on theory of lack of informed consent. A significant number of jurisdictions, however, determine the existence and scope of the doctor's duty to inform based on the information, a reasonable patient would find material in deciding whether or nor to undergo



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the proposed therapy. In this respect, the only reasonable guarantee of a patient's right of bodily integrity and self determination is for courts to apply a stringent standard of disclosure in conjunction with a presumption of proximate cause. At the same time, a reasonable measure of autonomy for the doctor is also pertinent to be safeguarded from unnecessary interference."

From the perusal of the above rulings, it transpires that the **Bolam Test** has been accepted in India as a guideline; and a Doctor will be liable for negligence in respect of diagnosis inspite of a body of professional opinion approving his conduct where it has not been established to the Court's satisfaction that such opinion relied on is reasonable or responsible. If it can be demonstrated that the professional opinion is not capable of withstanding the logical analysis, the Court would be entitled to hold that the body of opinion is not reasonable or responsible. **In Samira Kohli Vs. Prabha Manchanda and Another I(2008)CPJ 56 (SC)**, the Hon'ble Apex Court dealt with at length principles relating to consent and effect of consent not properly given. The Hon'ble Apex Court has also dealt with the principles laid down in Bolam's case relating to valid consent. Thus, it would be seen, as discussed above, that in the instant matter the attending surgeons have miserably failed in clearing the Bolam Test and therefore, they are answerable for the deficiency.

  
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**Medical Negligence in handling the right and left eyes:-**

It was argued that on the part of the answering OPs that they committed no negligence in management of the patient. In fact the ECCE with IOL implantation, performed on 23.2.2002 was a successful one and the patient was discharged from the hospital on the next date. The patient, being a chronic alcoholic, fell down in a party after consuming liquor and was brought to the hospital on 11.3.2002 when an emergency repair of iris prolapse and suturing was done under surface anaesthesia. However, the attending doctors have not filed any prescription or documents or consent letter, relating to this emergency surgery. From perusal of the documents available on record, it transpires that the patient had vision of 2/60 of the right eye and 6/12 of the left eye when he was attended by Regional Institute of Ophthalmology and Eye Hospital, Sitapur on 22.1.2002 (Annexure 3). Dr. V.K. Garg, MS, Fellow to Shankar Netralaya, Chennai attended the patient on 1.2.2002 and advised for PE with IOL implantation in right eye (Annexure 4). The pathological report dated 10.2.2002 indicates that the conjunctival smears were negative for pathogenic organism and pus cells (Annexure 8). The patient had PL + PR + Cataract in right eye and 6/5 vision in the left eye when he was first attended by Dr. P.K. Agarwal on 14.2.2002 (Annexure 9). The Sonographic finding (Annexure 10) categorically states that the size, shape and echo texture of the left eye was normal. Its lens was also normal in thickness. Posterior



segment of the eye was free. No intragel pathology was seen. No retinal detachment was seen. Retrobulbar area was free. Thus, left eye of the patient was normal whereas the lens of the right eye was thickened and opaque. Its thickness was 3 mm. Posterior segment was free. No intragel pathology was seen. No detachment was also seen. Retrobulbar area was free. Both eyes were well visualised. The Ultra Sonologist on **16.2.2002** reiterated "thickened opaque lens in right eye is suggestive of traumatic cataract with normal posterior segment and left eye study. The Sonologist **advised for "further evaluation"**. However, attending doctors at Saurabh Eye Centre of Satya Shiv Hospital neither obtained any further evaluation nor performed PE with IOL as advised by Dr. V.K. Garg; and without obtaining a valid consent in writing, they performed ECCE with IOL implantation on 23.2.2002. Thus, they did not follow the standard diagnostic protocol. Admittedly, another surgery was performed on the right eye of the patient on 11.3.2002 (the specific date was not disclosed by the complainant due to lack of availability of documents but has been disclosed by the attending surgeons). According to them, this surgery was performed for iris prolapse. Thereafter, the patient remained under treatment of the answering OPs till 10.10.2005 and during this period he was totally kept in dark regarding failure of surgery, loss of vision of the right eye and deteriorating condition of the vision of the left eye. In **D H Kumari & others V/s Nizam Institute of Medical Sciences I(2013) CPJn520 (NC)**, where the

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Doctor did not follow the standard diagnostic protocol in conducting the surgery, it was held that he was guilty of medical negligence. In **Deep Nursing Home V/s Manmeet Singh Mattewal & others III(2012) CPJ 154 (NC)**, where standard diagnostic protocol was not followed, it was held to be a case of gross medical negligence in management of patient by the treating Doctors.

It has also been argued by the Ld. Counsel for the answering OPs that they did not perform any surgery on the left eye of the complainant and, therefore, they cannot be held guilty for deteriorating condition of his left eye. This argument prima-facie has not force for the simple reason that **the complainant remained under their treatment on payment for more than three years and being post graduates in Ophthalmology, it was their primary duty to treat and save the vision of both the eyes.** Admittedly, the eyes have an intimate co-relationship between them and they mostly act together and, therefore, loss of vision of one eye certainly causes loss of stereoscopic binocular vision and reduction in its peripheral field often to the extent of 25% or more. Hence, the answering OPs are certainly responsible for causing loss of his stereoscopic binocular vision and reduction in its peripheral field. The report of Sitapur Eye Hospital dated 22.1.2002 indicates that the complainant had 6/12 vision in his left eye. The high resolution sonographic report dated 16.2.2002 indicates that the size, shape and





echo texture of the left eye was normal. The lens was also normal in thickness. The posterior segment of the eye was free with no integral pathology. No retinal detachment was seen and the retrobulbar area was free. Thereafter, the complainant remained under the treatment of the answering OPs for more than three years and ultimately, the report dated 30.12.2006 of Dr. Rajat Dhesi indicates that there was **gross field defect** with 6/9 central vision apart from there was advance field loss in the left eye making him extensively prone to accident. The report further indicates that there was advanced Glaucoma developed in the left eye. The report of Dr. Manjula Hansrao also indicates that there was advanced Glaucoma damage in the left eye with advanced field loss. **The answering OPs did not properly attend the left eye during the entire period of three years when the patient was under their treatment.** They did not follow the standard diagnostic protocol either vis-à-vis this eye as well. This negligence amounts to deficiency in service. Apart from this, the permanent loss of vision in the right eye and advanced field loss in the left eye must have caused great emotional, psychological and physical disturbance altogether with loss of self-stream and self-confidence. It is not a matter of dispute with the answering OPs who performed ECCE with IOL in the right eye on 23.2.2002 and thereafter, they performed another surgery on the same eye on 11.3.2002. The OPs claimed that the subsequent surgery was for repairing iris prolapse. They have not, however, filed any consent letter,

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case history, BHT or any other relevant paper (which presumably were in their possession) in support of their aforesaid contention and, therefore, in the absence of aforesaid documentary evidence, it is difficult for us to ascertain the true nature of subsequent surgery dated 11.3.2002. **Withholding all these important documents does not seem to be inadvertent.** However, a perusal of the documents available on records, indicates that the ECCE with IOL was ultimately a total failure and consequently, the complainant permanently lost vision of his right eye. He also suffered field loss in the left eye due to improper treatment. The complainant was under treatment of the answering OPs admittedly upto 10.10.2005 and during this period he was totally kept in dark regarding the seriousness of his ocular problem. The prescriptions of Dr. P.K. Agarwal dated 31.3.2002, 3.4.2003, 20.1.2004, 6.9.2004 and 10.10.2005 do not indicate that the ECCE with IOL was a failure and that the vision of his right was permanently lost and the vision of the left eye was deteriorating day by day. A perusal of the documents further indicates that there was a vast difference in ocular acuity before and after the period he was under the treatment of the answering OPs. The complainant was informed about the permanent total loss of vision of the right eye and advanced field loss in the left eye for the first time when he was attended by Dr. Rajat Dhesi, Medical Director, Prakash Netra Kendra on 30.6.2006. Thus, it is found that it is a clear case of loss of faculty of vision due to failure of surgery and improper

attending doctors, they did not follow standard diagnostic protocol in attending the eyes of the patient, although they had sufficient time and opportunity to do so. There is apparent concealment of facts relating to the status of eyes in addition to lack of reasonable care, caution and attention on the part of the answering OPs. Thus, it amounts to medical negligent and gross deficiency in service. The following remisses were apparently committed by the answering OPs:-

- Remiss No.1** The patient was recommended for PE with IOL of right eye by Dr. V.K. Garg, MS, Fellow Shankar Netralaya, Chennai (Annexure 4) but the answering OPs performed ECCE with IOL.
- Remiss No.2** The Ultrasonologist advised for further Evaluation (Annexure 10) but the attending doctors ignored the advice and performed surgery for the best reasons known to him.
- Remiss No.3** The answering OPs did not take consent of the patient in writing (as no such consent has been filed) before performing the ECCE with IOL on 23.2.2002 and subsequent emergency surgery on 11.3.2002.
- Remiss No.4** The answering OPs did not maintain or file case history, BHT or other relevant documents relating to the surgery dated 23.2.2002 and 11.3.2002.
- Remiss No.5** The did not refer the patient to any higher Centre when they initially failed to achieve any positive result in saving the visionary faculty of the complainant.

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**Remiss No.6** The kept him in dark till at least 10.10.2005 regarding the status of the eyes for the best reasons known to them.

**Remiss No.7** The answering OPs did not follow the standard diagnostic protocol for controlling the damage that took place after failure of ECCE with IOL of RE and for maintaining the faculty of vision by taking appropriate steps for controlling deteriorating condition of the left eye.

The faculty of vision could have been saved had the answering OPs shown some desired level of concern. Instead of showing concern or attempting to prevent the deterioration, they levelled unsubstantiated allegation that the complainant was a chronic alcoholic and that he damaged his right eye due to fall after consuming liquor in a party.

We have given due consideration on observations made by the Hon'ble NCDRC and Hon'ble Apex Court from time to time relating to fixation of responsibility on the attending doctors. In **Baburao Sattappa Vs. KLE Society's Hospital & Research Centre & another IV(2006) CPJ 71 (NC)**, it was held that conducting a surgery is justified only where it was the only option. In **M A Ganesh Rao Vs. Dr. T.M.A. Pai Rotary Hospital and other I(2007) CPJ 338 (NC)**, it was held that the doctors cannot be held liable for anything in the absence of any specific negligence on their part. In **Upasana Hospital & another Vs. S Farook II(2007) CPJ 235(NC)**, where the patient was discharged on 24.4.1996 and he never

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approached any physician for treatment until 1.8.1996 and where no expert opinion was adduced, it was held by the Hon'ble National Commission that the onus lies upon the complainant to prove negligence on the part of the attending Doctors. In **Ajay Gupta Vs. Pradeep Agarwal (Dr.) and other, IV (2007)CPJ 64 (NC)**, where established medical procedure was adopted by the opposite parties and the treatment given was not against the established medical norms, it was held that there was no negligence on the part of the Doctors. In **Sanjeev Manktala (Dr.) Vs. Ajit Sood (Dr.)'s case**, it was held that one professional doctor is not negligent merely because his conclusion differs from that of another professional doctor where due care and skill was exercised in conducting clinical and other diagnosis/tests. In **Kusum Sharma and Other Vs. Batra Hospital and Medical Research Centre and Other ((2010) CPJ 29 (SC)**, the doctor was not held guilty of medical negligence as he obtained consent for surgery on the basis of pre-operative evaluation. In **Dr. C P Sreekumar Vs. Ramanujam, 2009 (4) Supreme 573**, it was held that too much suspicion about the negligence of attending Doctors and frequent interference by Courts could be a very dangerous proposition. The onus to prove medical negligence lies with the claimant. Merely because there was some divergence of opinion as to the proper procedure to be adopted, it cannot be said with certainty that the attending Doctor was vastly remiss in going in for a particular line



of treatment. In **Orthonova Institute of Advanced Surgery & Research and Others Vs. Nipendra Kumar Thakur (First Appeal No.33 of 2007)**, the Hon'ble Apex Court discussed at length as to what constitute **medical negligence** and was pleased to apply the following three principles which constitute medical negligence: **(1)** Whether the Doctor in question possessed the medical skills expected of an ordinary skilled practitioner in the field at that point of time? **(2)** Whether the doctor adopted the practice (of clinical observation diagnosis – including diagnostic tests and treatment) in the case that would be adopted by such a doctor of ordinary skill in accord with (at least) one of the responsible bodies of opinion of professional practitioners in the field? and **(3)** whether the standards of skills/knowledge expected of the Doctor, according to the said body of medical opinion, were of the time when the events leading to the allegation of medical negligence occurred and not of the time when the dispute was being adjudicated.

It has further been held in **Malay Kumar Ganguli's case (supra)** that for establishing medical negligence or deficiency in service, the courts would determine the following:-

- 1- No guarantee is given by any doctor or surgeon that the patient would be cured.
- 2- The doctor, however, must undertake a fair, responsible and competent degree of skill which may not be of highest skill.

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- 3- Adoption of one of the modes of treatment, if there are many, and treating the patient with due care and caution would not constitute any negligence.
- 4- Failure to act in accordance with standard, reasonable, competent medical means at the time would not constitute a negligence. However, a medical practitioner must exercised the reasonable degree of care and skill and knowledge which he possesses. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence, and
- 5- In a complicated case, the court would be slow in contributing negligence on the part of the doctor, if he is performing his duties to the best of his ability.

It is now to be seen as to whether there was any deficiency in service or medical negligence on the part of the answering OPs or not. The term "**Deficiency**" has been defined in Section 2(1)(g) of the Consumer Protection Act, 1986. It means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. Admittedly, there cannot be any medical negligence, if doctors perform their duties and exercise ordinary degree of professional skill and competence. A mere deviation from normal professional practice is not necessarily an

evidence of negligence as held in **Kusum Sharma and others Vs. Batra Hospital and Medical Research Centre and others (I(2010) CPJ 29(SC))**. A doctor can be held guilty of medical negligence only where his or her conduct falls short below the standard of a reasonably competent doctor in the concerned field as held in **Puskar Dutta Vs. Christian Medical College and Hospital, Ludhiana and others, I(2010) CPJ I(NC)**. It may be observed here that the Hon'ble Apex Court has been pleased to lay down broad principles under which medical negligence can be evaluated as a **tort** under the law. In **Jacob Mathew V/s State of Punjab and others, III(2005) CPJ-9(SC)**, it has been held that

1. Negligence is the breach of a duty caused 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 in the context of medical profession necessarily calls for a treatment with a deficiency. A case of occupational negligence is different from professional negligence. So long a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure.



3. A professional may be held liable for negligence on one of the two findings: (a) either he was not possessed of requisite skill which he professed to have possessed, or (b) 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 doctor is guilty of negligence or not would be that of an ordinary competent person exercising ordinary skill in that profession.
4. The test for determining medical negligence as laid down in **BOLAM CASE (1957) 2 AU ER 118 (QBD)** hold good in its applicability in India.

The Hon'ble Apex Court was further pleased to lay down certain parameters for establishing medical negligence in **Kusum Sharma's case** (supra) which are as under:-

- I. Negligence is the breach of a 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.
- II. 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.

  
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- III. 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.
- IV. A medical practitioner would be liable only if his conduct fell below that of the standards of a reasonably competent practitioner in his field.
- V. 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.
- VI. 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. 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.
- VII. 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.

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

In view of the discussions made herein above and rulings laid down by the Hon'ble Appellate Courts, we are of the considered opinion that in the instant case there is gross remiss on the part of the answering OPs in conducting ECCE with IOL of the right eye and also for not paying due attention to save the deteriorating condition of the left eye of the complainant and consequently they are guilty of medical negligence and deficiency in service.



**Amount of Compensation:-**

Admittedly, no amount of money or sympathy can compensate for the loss of vision of a person due to utter medical negligence and total deficiency in service. The complainants has claimed a sum of Rs.20,00,000.00 (Rupees Twenty Lakhs) for permanent total loss of vision in the **right eye** due to failure of ECCE with IOL and for advanced field loss in the **left eye** due to negligent handling of the case by the answering OPs. He has also claimed a sum or Rs.2,00,000.00 (Rs. Two Lakhs) for physical and mental agonies apart from a sum of Rs. 11,000.00 (Rupees Eleven Thousand) towards legal and other expenses. He has not claimed any amount towards expenses incurred for purchasing medicines etc. as the same was reimbursed by the Department in which he serves. On the other, hand the OPs claim that nothing is payable to him as there was no remiss on their part.

We have given due consideration on this issue. Now, we have to determine the amount of compensation which the complainant is actually entitled to receive. **While determining the amount, we have to strike a balance between inflated and unjustified demands on the part of the complainant on one hand, and equally untenable claim of the opposite parties that nothing is payable. Sympathy for anyone does not and should not come in the way of making a correct assessment.** We have considered all aspects of the case. It is also to be remembered that no amount of money can compensate the

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loss of eye sight of a person and fill the emotional trauma and pain being faced by him and his family. The trauma caused to the complainant due to remiss on the part of the answering OPs cannot be measured by a simple yard-stick.

We have also kept in mind the guidelines laid down by the Hon'ble Apex Court in **Nizam Institute of Medical Sciences Vs. Prasanth S. Dhananka and others, II(2009) CPJ, 61 (SC)** and **Charan Singh Vs. Healing Touch Hospital and others III(2000) CPJ I (SC)** while calculating the damage. In **Charan Singh's** case (supra) it was held that "while quantifying damages, Consumer Forums are required to make an attempt to serve ends of justice so that compensation is awarded, in an established case, which not only serves the purpose of recompensing the individual, but also, at the same time, aims to bring about a qualitative change in the attitude of the service provider. Indeed, calculation of damages depends on the facts and circumstances of each case. No hard and fast rule can be laid down for universal application. While awarding compensation, a Consumer Forum has to take into account all relevant factors, and assess compensation on the basis of accepted legal principles, on moderation. It is for the Consumer Forum to grant compensation to the extent it finds it reasonable, fair and proper in the facts and circumstances of a given case according to established judicial standards where the claimant is able to establish his charge. It is not merely the alleged harm or mental pain, agony or physical discomfort, loss of salary and





emoluments etc. suffered by the appellant which is in issue, it is also the quality of conduct committed by the respondents upon which attention is required to be founded in a case of proven negligence." As discussed above, it is a case of proven negligence. We have given due consideration on the quality of conduct committed by the attending surgeons and also on all other relevant factors required for assessing compensation on the basis of accepted legal principles. Calculation of damages has been arrived at after taking into consideration all facts, circumstances and evidence on record. The amount of compensation claimed by the complainant seems to be **very moderate** and hence, we fail to notice any malice or ill-motive on his part in claiming the same as alleged by the answering Opposite Parties. From evidence on record, we are of the considered view that he did not come to the court to seek compensation to make a fortune out of the misfortune suffered by him. While calculating the amount of compensation, the ruling laid down by the **Hon'ble Apex Court in Dr. Balram Prasad Vs. Dr. Kunal Saha and Others, Civil Appeal No.2867 of 2012** has been followed. Considering the totality of the circumstances, we are of the opinion that the complainant is entitled to receive a sum of Rs.10,00,000.00 (Rupees Ten Lakhs) jointly or severally from the answering OPs viz. Dr. P.K. Agarwal and Dr. Saurabh Baiswar for causing permanent total loss of vision of the right eye due to failed surgery conducted on 23.2.2002. He is further entitled to receive a



sum of Rs.10,00,000/- (Rupees Ten Lakhs) jointly and severally from the answering OPs, named above, for causing damage to his left eye due to utter negligence and lack of required medical attention, totalling to Rs.20,00,000/- (Rupees Twenty Lakhs). He is further entitled to receive a sum of Rs.2,00,000/- (Rupees Two lakhs) as prayed jointly or severally from the OPs named above for mental pain, trauma, agony and physical discomfort due to the visionary loss and a sum of Rs.11,000.00 (Rus. Eleven Thousands) towards cost of litigation.

**ORDER**

The complaint is allowed on the above terms.

The OP No.1 Dr. P.K. Agarwal and OP No.2 Dr. Saurabh Baiswar are directed to pay jointly or severally a sum of Rs.22,11,000/- (Rupees Twenty Two Lakhs Eleven Thousands) towards medical negligence and deficiency in service on their part and also for causing mental pain, agony, trauma and physical discomfort to the complainant Sri Munishwar Prasad Shukla, within a period of thirty days from the date of this order. In default, the OPs named above shall be liable to pay simple interest per annum at the prevailing Bank rate fixed by the RBI from time to time.

  
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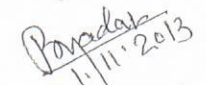
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There is no separate order as to costs as the above amount of compensation is inclusive of all legal and other expenses.

Let a copy of this order be given to the parties free of costs as required under Regulation 21(1) of the Consumer Protection Regulations, 2005.

  
11/11/2013

(A.K. Bose)  
Presiding Member

  
11/11/2013  
(Bal Kumari)  
Member

Jafri  
ST G-1  
Court No.3