

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION,
NEW DELHI**

JUDGEMENT RESERVED ON: 30/09/2025
JUDGEMENT PRONOUNCED ON: 03/11/2025

FIRST APPEAL NO. 84/2022

(Against the Order dated 8th October 2021 in Complaint 2/2011 of the State
Commission Rajasthan)

with

IA/874/2022 (Exemption From Filing The Certified Copy) IA/1411/2022 (Placing
Addl. Documents) IA/875/2022 (Exemption For Filing Official Translation)

1. Geetanjali Medical College & Hospital, Hiran Magari Extension, Eklingpura Chauraha, Udaipur, Rajasthan (Through Chairman and Managing Director)
2. Sr. A.K. Gupta, E.N.T. Specialist, Geetanjali Medical College and Hospital, Hiran Magri Extension, Eklingpura Chauraha, Udaipur, (Rajasthan)

.....Appellant(s)

Versus

1. Kumari Swechha Kothari, D/o Shri Arun Kothari, 200-A Block, Hiran Magri, Sector-14, Udaipur, Rajasthan
2. Shri Arun Kothari S/o Late Shri Mohan Lal Kothari, 200-A Block, Hiran Magri, Sector-14, Udaipur, Rajasthan
3. The Oriental Insurance Corporation Ltd., D.O. 3, Nyay Marg, Outside Delhi Gate, Udaipur, Rajasthan 313001

.....Respondent(s)

FIRST APPEAL NO. 25/2022

(Against the Order dated 8th October 2021 in Complaint 2/2011 of the State Commission
Rajasthan)

with

IA/140/2022 (Condonation Of Delay), IA/139/2022 (Stay)

Oriental Insurance Co. Ltd., Present Address - 88, 1st Floor, Janpath, New Delhi

.....Appellant

Versus

1. Kumari Swechha Kothari, D/o Shri Arun Kothari, 200-A Block, Hiran Magri, Sector-14, Udaipur, Rajasthan-313002
2. Shri Arun Kothari, S/o Late Shri Mohan Kothari, 200-A Block, Hiran Magri, Sector-14, Udaipur, Rajasthan-313002
3. Geetanjali Medical College and Hospital, Hiran Magri Extension, Eklingpura Chauraha, Udaipur, Rajasthan-313001, Through Chairman and Managing Director
4. Dr. A.K. Gupta, E.N.T. Specialist, Geetanjali Medical College and Hospital, Hiran Magri Extension, Eklingpura Chauraha, Udaipur, Rajasthan-313001

.....Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE A.P. SAHI, PRESIDENT

HON'BLE MR. BHARATKUMAR PANDYA, MEMBER

For the Complainants : Mr. J.P. Sharma, Advocate
Mr. Arun Kothari (Father of Swechha Kothari)

For Geetanjali Medical
College & Hospital

: Dr. Manish Singhavi Senior Advocate with
Mr. Arpit Prakash Advocate

For Insurance Company

: Dr. Sushil Kumar Gupta, Advocate
Ms. Sunita Gupta, Advocate

ORDER

PER BHARATKUMAR PANDYA, MEMBER

1. Heard Mr. J.P. Sharma, learned counsel for the Complainants, Dr. Manish Sanghavi, Senior Advocate for Dr. Gupta and for Geetanjali Medical College & Hospital and Dr. Sushil Kumar Gupta, counsel for the insurance company.

2. The brief facts of the case as stated in the complaint filed on 03.05.2010 are, that the complainant No.1, Kumari Swechha Kothari, a young girl, had been suffering from nasal problems, including discharge and obstruction. On 10.04.2008, she visited Geetanjali Medical College & Hospital, Udaipur, where she was examined by Dr. A.K. Gupta, an ENT specialist. After a preliminary examination, Dr. Gupta diagnosed her with nasal polyps and advised surgery. The complainant and her father (Complainant No.2, Shri Arun Kothari) were assured that it was a minor routine operation and that she would recover soon. On 11.04.2008, the complainant underwent endoscopic nasal polyp surgery performed by Dr. A.K. Gupta at Geetanjali Hospital. However, it was alleged that the surgery was done without conducting a CT Scan of the Paranasal Sinuses, which is a mandatory pre-operative investigation to determine the exact extent and location of the nasal polyp. According to the complainants, the hospital record falsely mentioned that "CT Scan PNS advised but patient refused," which was an afterthought and written later in different ink and different handwriting to cover up the doctor's negligence. Immediately after the surgery, the complainant began to suffer from severe headache and continuous pain. A CT Scan performed on 12.04.2008 at the same hospital revealed that she had suffered a Subarachnoid Haemorrhage (SAH) — a serious condition involving bleeding in the brain. Despite this, she was kept in the hospital and treated only with routine medicines. Further CT scans were conducted on 16.04.2008, 18.04.2008, and 21.04.2008, showing no improvement in her condition. As her health continued to deteriorate, her family sought the opinion of another specialist, Dr. A.A. Shafi, a neurologist, who advised an MRI scan. The MRI report dated 23.04.2008 showed that due to a bony defect at the base of the skull, a part of the brain had herniated

into the nasal cavity — a condition known as encephalocele — caused by surgical injury during the nasal operation. The patient/complainant immediately took discharge from Geetanjali Hospital on 24.04.2008 and proceeded to Ahmedabad, where Dr. Deepak Patel performed brain surgery on 26.04.2008 in SAL Hospital. The complainants alleged that because of the negligence of Dr. A.K. Gupta in performing the surgery without a CT scan and without proper care, the complainant suffered permanent brain injury, underwent multiple surgeries, and faced prolonged physical and mental suffering. Her daily life was severely restricted, as she was advised not to drive, not to go near fire or cold water, and to avoid heights and strenuous activity. Complainants claimed that this amounted to gross medical negligence and deficiency in service on the part of the hospital and the doctor. The complainants sought ₹1,84,284/- towards medical expenses incurred during the treatment and ₹27,50,000/- towards mental agony, physical harassment, and loss of normal life-style, along with interest at the rate of 18% per annum from the date of payment of the treatment expenses of Complainant No.1.

2.2 The Opposite Parties No. 1 and 2 — Geetanjali Medical College & Hospital and Dr. A.K. Gupta, the ENT specialist — filed a joint written version denying all allegations of negligence and deficiency in service. The Appellant submitted that there was a delay of over two years in filing the complaint before the State Commission, and no application for condonation of delay with affidavit was filed. Without condoning such delay, the State Commission lacked jurisdiction to entertain and decide the complaint. The Appellant contended that the complainant (patient) availed treatment as part of a free medical camp organized by Respondent No. 3 (Pg. 89) Geetanjali Medical College and Hospital, wherein free registration, consultation, surgery, and medicines were provided. Since no consideration was paid, the Respondent cannot be termed a 'consumer' under the Consumer Protection Act, and thus the complaint was not maintainable before the State Commission. They further contended that the complainant No.1 was properly examined, diagnosed, and treated as per the standard medical procedure. It was asserted that on 10.04.2008, the complainant was advised to undergo a CT Scan of Paranasal Sinuses (PNS) before surgery, but she and her father refused to get the scan done, despite being informed about its importance. This fact, they claimed, was duly recorded in the hospital's treatment notes with the remark "CT PNS advised but patient refused." The Opposite Parties further submitted that the Surgery performed

on 11.04.2008 was conducted with all due care and skill while following established, accepted medical standards and protocols. They maintained that there was no negligence during or after the procedure. According to them, the complainant was operated upon in a free medical camp organized by the hospital, where treatment and surgery were provided at no cost, and therefore the complainants could not be treated as "consumers" under the Consumer Protection Act, 1986. OPs further contended that the Subarachnoid Haemorrhage (SAH) detected later was a rare and known complication of endoscopic nasal surgery, which can occur and be seen as a complication even in the absence of any negligence and such occurrence of complications can not lead to the inference or conclusion of any negligence, particularly when the surgery itself went off uneventfully and successfully. The Opposite Parties claimed that they provided prompt and continuous medical care after the surgery, conducted repeated CT scans, and gave appropriate advise and treatment. The complainant's subsequent treatment at Ahmedabad, according to them, was merely a continuation of the same medical management and not necessitated by any alleged mistake or negligence on their part. OPs also placed reliance on an internal inquiry report dated 30.03.2010 prepared by a team of doctors of the hospital after examining the evidence on record, which allegedly found no medical negligence in the treatment or conduct of or protocol adopted by Dr. A.K. Gupta. Thus, they prayed for dismissal of the complaint as being false, baseless, and motivated, and submitted that there was no deficiency in service or professional negligence on their part. The Opposite Party No. 3, Oriental Insurance Company Ltd., in its separate written version, admitted that the hospital was covered under a valid professional indemnity insurance policy and stated that it would indemnify the insured doctor up to the limit of Sum Assured of ₹5,00,000/-, if any liability was established. However, it denied direct liability towards the complainants and submitted that since no negligence was proved, the question of indemnification did not arise.

3. After hearing the submissions of both parties and carefully examining the evidence and record, the State Commission held that the Opposite Party No.2, Dr. A.K. Gupta, was negligent in performing the nasal polyp surgery on the complainant without conducting a mandatory CT Scan of the Paranasal Sinuses (PNS) prior to the operation. The Commission observed that the note stating "CT PNS advised but patient refused" in the progress notes of hospital appeared to have been written and

inserted later in a different ink and handwriting, thereby casting serious doubt on its authenticity. It concluded that the doctor had failed to exercise due care and caution expected of a qualified ENT specialist, and that such omission directly led to the complications suffered by the complainant, including Subarachnoid Haemorrhage and subsequent neurological damage. The Commission further held that the hospital, Geetanjali Medical College & Hospital, was vicariously liable for the negligent act of its doctor, and that both Opposite Parties Nos. 1 and 2 were guilty of medical negligence and deficiency in service. The order of State Commission is reproduced herein below:

"10. In the case in hand, the factual position has become clear that the Respondent No. 2 doctor has done the nasal polyp surgery of complainant No. 1 on 11/04/2008 without getting the CT scan done in the Respondent No. 1 hospital. Regarding this, though the Respondents have tried to state that they had advised to get the city scan and PNS done before doing the operation, but the complainant No. 2 refused. In this regard, he has submitted a document titled Routine Investigation Available, in which details of the investigations that were advised on the date 10/04/2008 and hospitalization was advised in this. The doctor has written X ray PNS, blood test and urine test, it is not advised to do CT scan, it is mentioned that after being admitted to the hospital, the patient should be sent to the operation theatre on the second day at 9:30 AM.

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12.

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We have observed the above judgments with respect. In all these judicial illustrations, it has been mainly told that if the doctor is experienced, qualified and he can perform his duties with due care, he shall not be held guilty of medical negligence, even if the result of the treatment is contrary. All the above judgments are not applicable to the case in hand, because in this case the Respondent No.2 nose, ear, throat specialist has not conducted CT scan of complaint No.1 before performing the Nasal Polyp surgery and because of this reason complainant No.1 has got Subarachnoid haemorrhage (SAH), which means that the Respondent No.2 has not discharged his duties with due care. The above judgments do not accrue any benefit to the Respondents in the present case.

15. According to the above discussion, on the basis of the documents available on the complaint and the medical literature mentioned above, it is concluded that the Respondent No.2 nose, ear, throat specialist, Dr AK Gupta of Respondent no. 1 hospital, has performed the Nasal Polyp surgery of Complainant No.1 on 11/04/2008 without doing CT scan, due to which SAH has happened, as a result of which complaint No.1 had to go to Ahmedabad for brain operation and doctor of Ahmedabad Dr Deepak Patel had advised her not to drive vehicle, to avoid going near fire and cold water and has also given instructions to refrain herself from going near heights etc., due to which the complainant No.1 cannot lead his normal life, because he has to keep all these precautions in mind continuously. Respondent No.2, doctor without performing CT scan has conducted Nasal Polyp surgery. It is because of this that complaint no.1 has got subarachnoid haemorrhage (SAH). Thus, it is proved that Respondent No. 2 Nose, Ear, Throat Specialist Dr. AK Gupta has operated negligently in Respondent No. 1 Hospital and has caused medical negligence. After the operation a CT scan was conducted on 12/4/2008, which shows Subarachnoid haemorrhage and despite the knowledge of the SAH after the city scan, the complainant No.1 has been kept in his hospital, due to this reason the Respondent No.2 as well as the Respondent No.1 are liable for medical negligence. There has also been medical negligence on the part of the hospital. Further, Opponent No. 1 is Vicariously liable for medical negligence on part of Respondent No. 2.

16. Now let us see how much amount should be given to the complainant. In their complaint, the complainants have incurred expenses in Respondent No. 1 Hospital and in

Ahmadabad Hospital, giving disclosure details in the expenses of coming to Ahmedabad, etc., an amount of Rs.184284/- has been sought, which is worth getting. Doctor Deepak Patel of Ahmedabad has advised to take treatment for the next 3 years and the complainant has submitted documents related to going to Ahmedabad for treatment even after the above operation. Therefore, the cost of treatment for the next 3 years is also justified. In these 3 years, expenditure has also been incurred on the nutritious food etc. of complainant No.1 and the cost of traveling to Ahmedabad has also been incurred. Therefore, after the operation in Ahmedabad, although the complainants have demanded a total of Rs.9,00,000/- for the next three years, we consider it appropriate to get an amount of Rs 3,00,000/- for the same. As discussed above, due to the negligence of Respondent No. 1 and 2, the complainants have suffered mental and physical suffering. The complainant No. one has been deprived of leading a normal life. In the complaint, the complainant has made a demand of Rs.10,00,000 for mental and physical agony and Rs.7,00,000 for being deprived of living a normal life. But we consider it appropriate to get an amount of Rs.12,00,000/-. The complainants have demanded one and a half lakh rupees towards advocate fee and complaint expenses, but we consider it appropriate to get an amount of Rs 50,000/-. Thus, in our opinion, in the case in hand, the complainants are found entitled to receive compensation amount of Rs 1,84,284 + 3,00,000/- + 12,00,000/- + 50,000/- = 17,34,284 ₹ (Rs seventeen lakh Thirty-Four Thousand Two Hundred Eighty-Four only) from the Respondent No. 1 and 2.

17. Respondent No.2, Dr AK Gupta has insured up to ₹ 500000 for medical negligence from the Respondent No.3 insurance company, therefore, for the amount up to ₹500000, the Respondent No. 2 and 3 will be jointly and severally liable. Therefore, the complaint letter of the complainant is acceptable in the same way as against the Respondent No.1 and 3.

Order

The complaint presented by the complainant against the Respondents is accepted and the compensation order has been passed as follows: -

1. The Respondent No.1 & 2 will pay Rs.1,84,284/- (Rs. one lakh eighty-four thousand two hundred eighty four only) to the complainants including the cost of medical treatment in Udaipur and Ahmedabad travelling expenses in going to Ahmedabad.
2. Respondent No.1 and 2 will pay compensation of Rs.12,00,000/-(Rs twelve Lakh Only) to the complainants for mental and physical agony and for depriving the complainant No.1 of leading a normal life.
3. Respondent No. 1 and 2, will pay the complainants, a total amount of Rs.3,00,000(Rs Three lakh only) for their expenses for the next 3 years after the operation, for the treatment expenses, nutritious food and traveling expenses etc. to Ahmedabad.
4. Respondent No.1 and 2 will pay Rs 50,000/- (Rs Fifty Thousand only) towards advocate fees and Litigation expenses to the complainants.
5. As above, the complainants will pay the Respondent No.1 and 2 jointly and severally, a total of Rs 17,34,284 (Rs seventeen lakh Thirty-Four Thousand Two Hundred Eighty-Four only), Out of which Respondent No. 2 and Respondent No. 3, Insurance Company will be jointly and severally liable to pay for the amount of Rs 5,00,000/- (Rs Five Lakh only).
6. The complainants will also be entitled to receive interest at the rate of 9% per annum from the date of submission of complaint dated 03/05/2010, on the decretal amount of Rs 17,34,284/- (Rs seventeen lakh Thirty-Four Thousand Two Hundred Eighty-Four only)."

4. **FA/84/2022** has been filed by the original Opposite Parties No. 1 and 2 (hereinafter referred to as "Appellants") i.e the Hospital and Dr. Gupta, with a delay of 85 days. The Appellants submit that the delay in filing the appeal was neither deliberate nor willful, but caused due to difficulties in obtaining the certified copy of the impugned order, which was essential to frame the grounds of appeal and ensure proper documentation for filing. The appellants further submit that the copy of the order was received late, and extensive legal and factual verification was required

before filing the appeal. Appellants submitted that the delay is bona fide, and in the interest of justice, the same may be condoned, and the appeal may be admitted for adjudication on merits. The Appellants undertake that no prejudice will be caused to the Respondents by condonation of the delay, and the appeal raises substantial questions of law and fact requiring the intervention by this Commission. The Appellants, therefore, pray that the delay of 85 days in filing the appeal may kindly be condoned, and the appeal may be heard on merits. This Commission, being satisfied about the sufficiency and validity of the reasons stated for the delay, condone the same and admit the appeal for consideration on merits. The Appellants have challenged the State Commission's order on the following grounds with prayer for setting aside the impugned order dated 08.10.2021.

1. Pre-operative CT Scan was advised but refused in writing by the patient's father, duly recorded in the bed head ticket.
2. Even when conducted, the CT Scan showed fracture on the opposite side (right), whereas surgery was on the left; hence, no significant adverse impact due to non-availability of the CT Scan report on the surgery or consequent complications is possible and hence no injury or damage has been suffered by the patient and hence no negligence can be attributed.
3. CT Scan is not routinely required for nasal polypectomy; the procedure was correctly performed as per standard medical practice.
4. The Respondent No.1 was under regular observation, and post-operative complications were managed properly, including consultation with neurologists and neurosurgeons with requisite medical management after such consultations.
5. Three independent Medical Committees (Hospital, Rajasthan Government, and Rajasthan Medical Council) concluded no gross negligence on the part of the treating doctors or hospital.
6. The complainants failed to produce any expert medical evidence or authoritative literature proving or supporting medical negligence.
7. Awarded compensation lacks any factual basis, as no evidence was produced regarding post-operative complications, expenses, or mental and physical suffering, and hence, without prejudice to the above, the compensation and costs granted by the State Commission is excessive and unreasonable. Respondents failed to prove actual medical expenses, post-operative complications, or loss of normal life. Compensation awarded is arbitrary and excessive.
8. The State Commission erroneously interpreted a mere advisory warning by Medical Council to the doctor to be more vigilant as evidence of negligence.
9. Surgery performed was nasal polypectomy, not Functional Endoscopic Sinus Surgery (FESS); mandatory pre-operative CT Scan is required only for FESS, which was not performed.
10. As per *Dr. Subramanyam & Anr. vs. Dr. B. Krishna Rao & Anr., II* (1996) CPJ 233 (NC), negligence must be proved by expert medical evidence; an error of judgment alone is insufficient to establish negligence and liability.

5. Dr. Singhvi, on behalf of the appellants hospital and Dr. Gupta, after appraising the broad facts, submitted that the the Ld. State Commission, while holding the appellants guilty of negligence, ignored the expert findings and reports of multiple independent medical committees, all of which categorically concluded no medical negligence on the part of the treating doctor Dr. A.K. Gupta (IA/1411/2022).

These committees are:

1. Enquiry Committee of three doctors at RNT Medical College, Udaipur
2. Enquiry Committee of five doctors at GMCH, Udaipur
3. Seven-member Committee constituted by the Registrar, Rajasthan Medical Council, Jaipur

All these reports unanimously opined that the patient was properly managed, all clinical signs and symptoms supported the diagnosis of nasal polyp, and no negligence was attributable to the treating team or doctor. It was argued that the operation was conducted only after proper diagnostic tests and after obtaining written consent. (Pg. 71). The records themselves show that the patient's father repeatedly refused several pre-operative and post-operative tests, including the CT Scan, as specifically noted in the enquiry committee reports. Therefore, any alleged lapse regarding not obtaining the CT Scan report before surgery cannot be attributed to the treating doctor. CT Scan and MRI Findings Support Proper Treatment (Pg. 98). The CT Scan (Head) reports of the patient showed:

1. Subarachnoid Hemorrhage (SAH) with no bony injury defect of the cribriform plate or sphenoid sinus;
2. Normal brain parenchyma, cerebellum, brain stem, and ventricular system;
3. Impression: "Known case of SAH – near total resolution of hemorrhage."

6. The orbital fracture was found to be due to old trauma and was on the right side, whereas the surgery was performed on the left side, hence it was irrelevant to the current condition. The MRI report dated 23.04.2008 (pg 77) showed no cerebrospinal fluid (CSF) leakage, indicating that the operation was properly performed and that the small defect observed in the cribriform plate was old/congenital or due to prior trauma, and not caused by the surgery in question. The opinion of Dr. Sheel Acharya, a Neuro-physician, was completely ignored by the State Commission. Dr. Acharya, after reviewing the treatment administered, confirmed that the treatment was appropriate and in accordance with medical

standards, and no negligence could be attributed to the treating doctor. The impugned order dated 08.10.2021 was passed without proper appreciation of the evidence and by ignoring the settled law that unless the medical professional is shown to have failed in exercising the due care and skill as expected of an average and ordinary expert in the field or to have failed in following the established protocol, the liability for medical negligence cannot be attached. The findings of the Ld. State Commission are based on conjectures, presumptions, and surmises, ignoring the material on record. Dr. Singhvi for the appellants emphasized the detailed enquiry report of the committee of RNT Hospital dated 30.03.2010 (pg 121-125) and highlighted the detailed investigations, care and treatment as noted therein and the conclusions arrived at to contend that there is no evidence of any deviation from established protocols. SAH is a known complication of the polyp endoscopy and the progress of the SAH, which has self-resolving tendency, was monitored through repeated CT Scans and neuro-consultations, managed through medications and the patient was shifted to ICU also for better management, thus rendering the best care and service as considered necessary in the circumstances as per the best medical judgment of the professional incharge, Head of the ENT department, having experience of more than 24 years. Similarly, referring to the report of the internal investigations of the Hospital (pg 136), it is further emphasized by Dr. Singhvi that as noted therein, the SAH without CSF Rhinorrhea commonly occurs due to rupture of small aneurism, which is a known complication of polyp surgery, resolves normally on its own within 15 days, hence, mere conservative medical management with regular monitoring under neuro-advice with repeated CT Scans was opted in ICU. There was no evidence of CSF leak. Both these reports positively rendered opinion of absence of any negligence or lack of care during treatment. Referring to the report of the Rajasthan Medical Council dated 21.02.2011, it is reiterated that finding of absence of gross medical negligence is recorded in this brief report as well.

7. Contending that medically well-recognised complications consequent to a surgery cannot be equated with or branded as Negligence of the treating doctor and relying on *Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1, it is submitted that a medical practitioner cannot, and is not expected to, guarantee a specific and positive outcome of a surgery or treatment, nor can he completely avoid complications or side effects arising from the treatment or surgery. The occurrence of a Subarachnoid Hemorrhage (SAH) post-surgery was a known and documented complication, which

was managed effectively and responsibly by the treating doctor and the hospital. The expert committee report categorically observed that "*The subsequent complication of SAH is well known but rare complication, documented in the literature, unintentional, and was managed in the best possible manner.*" Two other expert reports also exonerated the Appellant doctor, confirming that there was no negligence in the diagnosis or management of the patient's condition. The State Commission erred in holding the Appellant guilty of medical negligence merely for not conducting a pre-operative CT scan. The Appellant doctor had repeatedly advised the patient's father to get a CT scan, but he refused. Moreover, Dr. Rajiv Saxena, an independent ENT specialist, had earlier diagnosed the same condition- allergic nasal polyp- on 15.03.2008, corroborating the Appellant's diagnosis. The medical committee's report (Page 132) also confirmed that a preoperative CT scan would not have altered the line of treatment or the technique of surgery or the need for surgery itself as any of the CT Scans even of post-operative period showed encephalocele or any defect in the cribriform plate or any CSF leak. The post-operative CT scan further showed that the fracture of the right orbital roof was due to past trauma, while the surgery was performed on the left nasal cavity, thus ruling out any negligence by Dr. Gupta in the surgery or the inference of the need of subsequent surgery at Ahmedabad to have been on account of the alleged negligence of Dr. Gupta. In subsequent reports also, the cribriform plate was found normal, with no evidence of surgery-related fracture. The Appellants contend that the State Commission erroneously relied on an unverified online medical blog as a basis to conclude negligence. Such non-authenticated sources cannot in law be a substitute for expert medical opinion or peer-reviewed literature based on empirical data, more so when the expert committees constituted to examine the culpability of the doctor have, after examining the case details and medical records have rendered a finding of absence of any negligence. The State Commission also confused Nasal Polypectomy with Functional Endoscopic Sinus Surgery (FESS), which two entirely different procedures, thus showing a fundamental misunderstanding of medical procedures, and thus rendering the findings unsustainable in law. The Complainant has failed to discharge the initial burden of proof to establish medical negligence. The State Commission ignored this well-settled principle of law (*Postgraduate Institute of Medical Education & Research v. Jaspal Singh*, (2009) 7 SCC 330) that negligence cannot be presumed merely from an adverse outcome, though there is no "adverse"

outcome in the present case at all but there is a mere manifestation of a pre-existing condition which got exposed/detected in subsequent MRI and for which there was no error or negligence of the surgeon . The complainant neither produced any medical expert evidence nor demonstrated that the Appellant's actions were contrary to accepted medical standards, protocols or current body of knowledge and expertise. The treatment provided was consistent with the standard practices recognized by a responsible body of medical professionals. The Appellants further submitted that three separate expert medical committees were constituted to investigate and report on the issue of alleged negligence, all of which in their reports duly exonerated Dr. A.K. Gupta of any lapse. These findings were completely ignored by the State Commission. Reliance is placed on the following judgments of the Hon'ble Supreme Court which emphasize and lay down the law that courts and consumer fora should not substitute their opinions for expert medical opinion, and due weight must be given to expert reports:

1. *Martin F. D'Souza v. Mohd. Ishfaq*, (2009) 3 SCC 1
2. *Harish Kumar Khurana v. Joginder Singh*, (2021) 10 SCC 291
3. *SS Cold Storage (India) Pvt. Ltd. v. National Insurance Co. Ltd.*, 2023 SCC OnLine SC 944

7.1. The State Commission's failure to consider these expert reports, and in erroneously accepting the unsubstantiated allegations of the complainant bereft of any substantiating material renders its finding perverse and unsustainable. Further, higher threshold of proof in medical negligence matters as mandated by *Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1 and *Kunal Saha v. Sukumar Mukherjee*, (2011) 13 SCC 98 has not at all been met by the complainant or the State Commission, and as such, there is no credible evidence at all on record establishing any act of omission or commission or deviation from any medical protocol brought on record. The Appellants further contend that in cases of alleged medical negligence, the threshold of proof required is high. A doctor can only be held liable if he fails to exercise reasonable skill and care expected of an ordinary competent professional. A mere error of judgment or an unfortunate result cannot constitute negligence. The treatment given by Dr. Gupta was endorsed by three expert committees and there is no categorical evidence or medical opinion of any deviation from any established medical protocol or practice. Arbitrarily imputing liability without any positively established act of omission or commission would undermine the confidence of

doctors and medical fraternity and be contrary to the principles laid down by the Apex Court in this behalf. The Appellants further contend that the compensation awarded by the State Commission lacks any rational basis. The Respondent patient failed to produce credible proof of damage, medical expenditure, or post-surgery complications and consequent expenses if any. There is no evidence of expenditure incurred in Ahmedabad hospital, and the claim that the complainant had to travel outside Udaipur due to lack of medical facilities is false and unsubstantiated. The Appellants' hospital is well-equipped with modern facilities. In the absence of proof of both pecuniary and non-pecuniary loss or damage, the award of huge compensation of nearly 16.5 lacs is arbitrary and contrary to law. As a matter of fact, apart from the fact of treatment and surgery at Ahmedabad, there is no evidence or even literature on record to even indicate firstly that the said surgery at Ahmedabad was necessitated due to any so-called negligence of Dr. Gupta, and further that the alleged adverse consequences of mental agony, restrictions and loss of life-style were to last for and did last for 3 years as presumed by the State Commission. As such, no evidence of the alleged adverse impact resulting into mental agony or loss of normal life has been placed on record. The complainants cannot and should not be unduly enriched at the cost of medical professional on mere unsubstantiated averments of agony and loss of life-style without requisite evidence on record. Without prejudice to the contention of absence of any negligence, it is submitted that the compensation granted, in any case, need to be substantially scaled down. Reliance is placed on the following decisions laying down that the compensation must be fair, reasonable, equitable, and proportionate to the established loss or injury, which is not demonstrated in the present case.

1. *Postgraduate Institute of Medical Education & Research v. Jaspal Singh*, (2009) 7 SCC 330
2. *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka*, (2009) 6 SCC 1
3. *HUDA v. Shakuntla Devi*, (2017) 2 SCC 301,

8. The internal enquiry report on the complaint by Mr. Arjun Kothari was conducted under the supervision of Dr. F. S. Mehta, Professor and Head of the Department of Surgery; Dr. Tarun Gupta, Professor of Neurosurgery; and Dr. H. S. Bhuie, Associate Professor in the Department of ENT.

"After going through all records following is the case summary.

The patient Miss Shweta Kothari had a watery discharge from nose on 10-03-08, for which she consulted Dr. Rajiv Saxena, E.N.T. specialist, M.B. Hospital Udaipur on 15-03-08, for

which he prescribed some medicine and by which this nasal discharge was stopped. Patient was able to carry out her day to day activity and appeared for her class Tenth exam. On 10-04-08, she consulted Dr A.K.Gupta, Professor and Head, Department of E.N.T., GMCH, in a free camp held at GMCH, Udaipur, with the complaints of nasal obstruction unilateral on left side 5-6 years, nasal discharge (Allergic rhinitis) 15-20 days, mouth breathing. After examine her he diagnosed as a case of nasal polyp and advised her surgery.

She got admitted on the same day, routine investigations of blood and urine were done and was posted for endoscopic excision of nasal polyp on 11-04-10.

On 11-04-08, she was operated under GA, and excision of nasal polyp was done endoscopically, around 11AM she was shifted to the ward. The excised tissue was sent for HPE at GMCH pathology department, which was commented as "nasal fibrillary astrocytosis".

At around 12 PM, after surgery she complained of headache initially for which no medicine was given. Around 4PM she again complained of headache, and this time more in severity for which she was given Inj. Voveran by she was relieved of headache.

When Dr A.K.Gupta came for the round on 12-04-08, in morning, she again complained of headache after which Dr Gupta removed nasal pack there was neither watery discharge nor any blood. Then after examining her, he advised her for CT scan head, after initial reluctance by relatives, The CT scan head was done around 1.30 PM. This CT scan head showed following features.

- a) Gross subarachnoid hemorrhage with no bony defect of cribriform plate and sphenoid sinus.
- b) Brain parenchyma normal.

After seeing the CT Scan Report, urgent neurosurgical opinion was taken. After seeing this scan, Dr Sanjay Gupta, Neurosurgeon, at GMCH, advised urgent CT angiogram brain to rule out any possibility of aneurysm or AVM bleed. After initial hitch by relatives, CT angio brain was done which was reported as normal. After CT angio brain patient was shifted to ICU for better management.

Subsequent CT scan head were done on 14, 16 & 18 April to see the progress of SAH.

On 16-04-10, on request of Patients attendants, the patient was shown to neurologist Dr Sheel Acharya who advised them to continue the same treatment.

On 22-04-10, attendant showed all investigation reports to Dr A.A.Saifee Professor & Head, department of Neurology, M.B.Hospital, Udaipur. Who advised them for MRI Brain, which was done at Vardhman imaging centre M.B.Hospital, Udaipur, on 23-04-2008, report of which came as follow.

- (1) A bony defect at the base of the anterior cranial fossa on the left side of the midline with the herniation of the cerebral parenchyma through it into the superior aspect of the left side of the nasal cavity suggestive of a nasal encephalocele. No evidence of CSF leakage present.
- (2) SAH along the anterior interhemispheric fissure.

On 24-04-08, Patient's relatives took the discharge from GMCH, and took the patient to Ahmedabad.

Our observation from various documents including bed head ticket given by GMC hospital and Mr. Arun Kothari, are as follows-

- (1) Patient was diagnosed as a case of nasal polyp on following clinical ground.
 - (a) As per clinical record of GMC Hospital, Pt was admitted with the complaints of nasal obstruction on left side for 5-6 years,
 - (b) Nasal discharge (allergic rhinitis) 15-20 days.
 - (c) As per her personal history patient was allergic to various allergens.
 - (d) Patient never gave any past history of any watery nasal discharge, Or any associations of nasal discharge with change in posture. There was no past history

of any prolong fever suggesting meningitis. There was no significant past history of any kind of head injury. Since the head injury is the commonest cause of CSF rhinorrhea.

- (e) On local examination of nose a polyp with DNS on left side, was diagnosed.
- (f) Patient took treatment for nasal discharge from ENT specialist of M.B.Hospital, Udaipur, who gave her most probably some anti allergic drug to which the patient responded in three days. He also advised X-ray (PNS) which showed haziness. At the time of consultation with Prof Dr A.K.Gupta, on 10-04-10, there was no nasal discharge.
- (g) Nasal polyps are usually allergic in origin and is one of the common cause of nasal discharge and nasal obstruction.
- (h) The nasal encephalocele presents with hypertelorism, increase in the nose size and often with nasal discharge, which were absent in this patient. (i) Looking to the past clinical experience of Prof A.K.Gupta (24 years as Prof & Head of the ENT department of different medical colleges in Rajasthan) there was no way to suggest a different diagnosis on clinical ground.
- (i) Therefore it was normally performed routine endoscopic surgery.
- (2) The biopsy of excised tissue was "Nasal fibrillary astrocytosis" Astrocytosis is the term which is often used for non functional glial tissue. The Differential diagnosis of the nasal polyps are nasal encephalocele and astrocytoma as per literature provided by Dr A.K.Gupta.
- (3) Post operatively patient developed intractable headache not responding to the drugs, prompted Dr A.K.Gupta for CT SCAN head to rule out any intracranial postoperative complication. The scan showed SAH, for which patient was immediately referred to Dr Sanjay Gupta, Neurosurgeon GMC Hospital, who after seeing the CT scan advised for the CT angiogram to rule out any aneurysm or AVM, since they are one of the common causes of SAH.
- (4) Repeated Scans were done to see the progress of SAH, which was resolving slowly.
- (5) The following drugs were used in the treatment, with the rationale,
 - (a) Nimodipine. This is the drug of choice to prevent the vasospasm in SAH.
 - (b) Mannitol. To reduce the cerebral edema.
 - (c) Phenytoin Na (Epsoline) to prevent the seizures.
 - (d) Antibiotic for prevention of infection, in this case only ceftriaxone.
- (6) Committee is of the opinion that these drugs were necessary and were used judiciously.
- (7) On the advice of Prof Dr A.A.Saifee MRI of the brain was done which showed-
 - (a) A bony defect at the base of the anterior cranial fossa on the Left side of the midline with herniation the cerebral parenchyma through it into the superior aspect of the left side of the nasal cavity suggestive of a nasal encephalocele.
 - (b) No evidence of CSF leakage.
- (8) There was requisite expertise available in the form of ENT surgeon Dr A.K.Gupta, Neurosurgeon Dr Sanjay Gupta, to deal effectively with this condition, but patient's relative took her to Ahmedabad.

Conclusion

After going through all these facts, the committee feels that there was No negligence or breach of the duty on the part of treating doctors at GMC Hospital. The subsequent complication of SAH is well known and is very much documented in the literature, was unintentional, and was managed in best possible manner.

All clinical signs and symptoms were in favor of nasal polyp.

Without going into the controversy of whether the doctor had advised CT scan head preoperatively or not the committee feels that line of approach would have remained the

same, as none of the post operative CT scan of head showed encephalocele or any defect in the cribriform plate or any CSF leak.

The main post operative complication was SAH, which with the time was absorbed and patient was relieved of headache. All along postoperative period patient never complained of any nasal discharge suggestive of rhinoceros. Even the patient never had a fever or any other kind of nasal discharge suggesting of infection and the antibiotic used was only Ceftriaxone."

9. Order dated 21.02.2011 issued by the Registrar, Rajasthan Medical Council, Jaipur.

ORDER

"Sh. Arun Kothari, lodged a complaint against Geetanjali Medical College & Hospital, Udaipur and mainly against Dr. A.K. Gupta, Prof. & Head, Deptt. Of E.N.T. for negligence in the operation & treatment of his daughter Kumari Sweccha Kothari. On the complaint, explanation of Dr. A.K. Gupta was called and the case was kept for discussion & examining the alleged complaint, before the Penal & Ethical Committee. The Committee gone through the complaint, explanation submitted by Dr. A.K. Gupta, the letter of Principal & controller of Geetanjali Medical College & Hospital and report of enquiry Committee constituted by Geetanjali Medical College & Hospital, Udaipur. The Penal & Ethical Committee's opinion is as follows: -

"On going through record, there appears no gross Medical negligence on the part of Medical Team, but while doing surgery doctor should be more carefull & vigilant."

The Council is of the view that warning be issued to Dr. A.K. Gupta to be more vigilant while doing Surgery.

Dr. A.K. Gupta, is hereby warned to be more vigilant in future while doing Surgery."

10. The report dated 30.03.2010 by committee of Mr. G. L. Dad, Medical Superintendent; Dr. Sunil Garg, In-charge of the ICU; and Dr. Sanjay Gupta, Neurosurgeon:

"Enquiry Committee Report

The Enquiry Committee has gone through the relevant reports of Ms. Swecha Kothari. As per record available, Ms. Sweta Kothari, D/o Mr. Arun Kothari aged 16 yrs. resident of 200/A, Sector-14, Hiran Magri, Udaipur, was admitted at Geetanjali Hospital on 10.4.2008 in ENT ward through a charitable camp organized jointly by Geetanjali Hospital and Rotary Club of Udaipur as a case of Nasal Polyp (left side) LP.No.1354 and GMCH Regn no.29049. Before admission in this hospital, the patient was already examined by Dr. Rajeew Saxena, ENT Surgeon, M.B. Hospital, Udaipur on 15.3.2008 with the same diagnosis i.e. nasal polyp.

All necessary routine investigations were done before the operation. CT scan, PNS, was also advised prior to surgery, but, attendant (father) of the patient refused.

Consent for surgery was taken and she underwent surgery on 11.4.08 under general anaesthesia. A single polyp was originating from Posterior Ethmoid cells in left nasal cavity which was excised. The specimen was sent for histopathological examination. The histopathology showed nasal fibrillary astrocytoma which is an extremely rare tumour.

Post operatively on 12.04.08, the patient was complaining of headache. So, urgent CT scan was advised, but, father of the patient refused for this also. In spite of this, CT scan was done in the best interest of the patient on the same day (12.4.08) which showed subarachnoid haemorrhage. No bony defect of cribriform plate and sphenoid sinus was visualised. Brain parenchyma was normal.

Further, the patient was shifted to MICU for close observation and management and opinion of neuro surgeon was also taken.

Since SAH without CSF Rhinorrhea commonly occurs due to rupture of small aneurism, on the advice of Neuro Surgeon CT Angiography was done on 14.4.08 and neither there was aneurism or A.V. malformation anomalies detected in the cracramaly nor any defect in cribriform plate was observed.

Since it takes out about 2 weeks for SAH to resolve, the patient was planned for conservative management where she was regularly checked up by Intensivist, ENT Surgeon and Neuro Surgeon. On the request of the attendant of the patient, opinion of Neuropsychician, Dr.Sheel Acharya was also taken and he advised to carry out same treatment. The patient was also advised MRI Brain twice, but her father refused. Serial CT Scan showed almost complete resolution of SAH (Sub arachnoid haemorrhage), no evidence of CSF rhinorrhoea or bony defect in bone of skull.

On 18.4.08 report of CT scan was handed over to the patient's attendant on their request.

On 23.4.08, the patient got a MRI done in Govt. Hospital, Udaipur on the advice of Dr.A.Saifee which showed a small defect in cribriform plate with evidence of encephalocoele with resolving SAH, but there was no evidence CSF leak. Various options of surgical closure of the cribriform defect after complete resolution of SAH were discussed with the patient but her father wanted discharge of the patient. Hence, the patient was discharged on request from ICU on 24.4.08.

In conclusion, in our opinion, there was no negligence on the part of treating Doctors and the patient was very well managed in the Hospital."

11. Mr. Sharma for the complainants has emphasized and supported the findings of the State Commission and urged that the elementary requirement of pre-operative CT Scan Head, as is well supported in medical literature duly produced on record, was missed and avoided by Dr. Gupta. Further, the State Commission has rendered a factual finding that the noting of "refusal of CT Scan by the patient" in the medical records is a palpable manipulative subsequent insertion by the hospital which is in different ink and different handwriting. It is evident, as noted by the State Commission, that no such advice for investigation is noted in "advice on admission" (page 75, 75H of appeal file) dated 10.04.2008 where other investigative advices are noted excluding advice for any CT Scan. Such insertion would mean that the hospital and Dr. Gupta, having sensed the lapse, clearly attempted to cover up in the records. It is the further submission that the State Commission rightly found no merit in the feeble defense raised by the appellants that the pre-operative CT Scan would have made no difference to the line of treatment or of surgery. As such, the patient developed sever headache from the very day of the surgery. Even the next day post-operative CT Scan clearly disclosed non-dispaced fracture in orbital roof (pg. 76) which, if pre-existing, would have been divulged in the CT Scan, and on the other hand, the absence of same in the pre-operative Scan, if so, would have established the injury caused during the negligent surgery. The State Commission is

therefore right in concluding that there is clear lack of due care and caution in hurriedly undertaking the non-emergency surgery without ensuring and awaiting the CT Scan Report. The patient/relative have never refused any CT Scan or any advice from the doctors. As stated, there is also no merit in the submission of the appellants that the post-operative medical management was satisfactory. Even after the CT scan of 12.04.2008, the neuro-consultation obtained by the hospital was not immediate and was obtained belatedly after 10 days on 23.04.2008. The MRI as late as on 23rd April (77D) revealed SAH and bony defect and herniation of cerebral parenchyma. Thus, even after the continued complaints of sever headache immediately after the surgery, the related investigations and specialist consultation was negligently delayed which continuously deteriorated the general condition of the patient requiring the relatives to move the patient to Ahmedabad where SAL hospital performed an immediate neuro-surgery. The appellants are therefore absolutely wrong that even after pre-operative CT Scan the surgery/treatment would not have changed. If doctors were aware about the bony defect, or encephalocele, the joint surgery or more careful surgery would have occurred in the presence of the neuro-surgeon, and more comprehensive and immediate post-operative medical management would have taken place. Referring to medical literature relied upon by the State Commission, it is submitted that the appellants have not been able to shake, dislodge or castigate the scientific foundation of the literature, nor have they produced any contrary literature to show that the pre-operative CT scan in polypectomy and condition of encephalocele, and the pre-knowledge of the condition would have made no material difference to the treatment. SAL Hospital at Ahmedabad in its discharge summary dated 03.05.2008 (filed alongwith Written Arguments) noted that the MRI revealed "bony defect at the base of anterior crania fossa with herniation of cerebral parenchyma suggestive of encephalocele with resolved interhem spheric bleeding which was corrected through neuro surgery of Bilateral Coronal Scalp Flap Left Frontal Craniotomy" on 28.04.2008. Thus, dual negligence of firstly not conducting the pre-operative CT scan and then delayed neuro-consultation and botched up and belated medical-management post surgery are not only established on record, but even the State Medical Council in its report dated 21.02.2011 has found it appropriate to warn Dr. Gupta to be "more vigilant while doing surgery", implying that the bony defect presumably developed due to faulty and negligent surgery conducted without pre-operative CT Scan. Referring to

two other committee reports on record, Mr. Sharma pointed out that both these reports fundamentally proceed on the erroneous premise that the patient had refused the pre-operative CT Scan, while the State Commission has factually found such refusal as recorded in the Hospital records to be self-contradictory *qua* the investigations prescribed and held the same to be inserted subsequently, and hence the third and statutory report of the State Medical Council has to be preferred which is in consonance with the finding of negligence rendered by the State Commission. It has been particularly highlighted by Mr. Sharma that the State Medical Council, while observing that there is no "gross" negligence on the part of Dr. Gupta and medical team, it still thought it appropriate to warn Dr. Gupta to be "more vigilant while doing surgery", thus clearly opining that that Dr. Gupta has been negligent and lacking in due care and caution in performing this particular surgery, though the team is not "grossly" negligent. This expert opinion cannot and should not be overlooked. Further, even post-surgery, the neuro-opinion was belatedly obtained and only conservative treatment without due investigations through MRI and corrective further surgery as performed in SAL hospital was undertaken thus establishing further negligence in treatment. When admittedly the SAH is a known complication of polyp surgery, the corresponding higher degree of caution and urgency in investigating the cause of constant headache was not undertaken, which was part of the negligence indicated in the State Medical Council's order dated 21.02.2011.

11.1 With regard to the quantum of compensation, while the Hospital, Doctor and the insurer in FA/25/2022 have pleaded that the grant of compensation is excessive and unfounded, it has been urged, for the complainants, that the same is based on evidence on record and the advise as recorded in the discharge Summary of SAL Hospital. The patient not only suffered a second surgery at a young age of 16 at constant and unnecessarily prolonged hospitalisation at appellant's hospital and also at Ahmedabad SAL Hospital, she and the family suffered obvious severe mental agony also due the negligence of the appellants. The patient also suffered from SAH and consequent disabilities and restrictions which hampered the normal living and life-style of the young patient. The patient was advised, and was deprived of, for avoiding driving, heights, deep waters and the like for more than three years as was advised by SAL Hospital. Hence, compensation is not at all unfounded, unreasonable and excessive.

12. We have heard the learned counsel for the parties including the insurer-appellant in FA/84/2022 at length and carefully gone through the pleadings, medical records, expert opinions, and the impugned order dated 08.10.2021 passed by the Ld. State Commission. The first and foremost, we find no merit in the contention on behalf of the Appellants that the complaint was barred by limitation. The treatment of complainant continued till 03.05.2008 and the complaint before the State Commission was filed on 03.05.2010. Therefore as explained in the Written Arguments of the Complainants, the complaint is filed within time. It is also noted that admittedly the complainant has paid more than Rs.15,000/- towards treatment at Geetanjali Hospital and therefore the defence taken by the Appellant before the State Commission that the complainant is not a consumer rightly failed.

12.1 The Respondents alleged that due to improper pre-operative care and failure to conduct a CT scan prior to surgery, and due to negligent surgery, the patient developed post-operative avoidable complications including subarachnoid hemorrhage and nasal encephalocele. The State Commission, accepting the complaint partly, held the doctor negligent and awarded a compensation of ₹17,34,284/- with litigation cost. The Appellants, on the other hand, have assailed the impugned order on the ground that there was no evidence of negligence, that all standard medical procedures were duly followed, that mere outcome of post-surgery complications cannot be branded negligence without evidence of failure to follow the standard protocols, and that the compensation granted was excessive and without proper justification. It was further submitted that reports of three medical boards had examined the case and found no professional negligence on the part of the Appellants. Upon perusal of the record, we find that the patient had a history of nasal obstruction and was diagnosed with nasal polyp. The surgical procedure performed, as per the appellants, was a *nasal polypectomy* as distinguished from a *Functional Endoscopic Sinus Surgery (FESS)*. The literature detailing the mandatory nature of pre-operative CT Scan produced on record by the complainant and relied upon by the State Commission does not seem to be with regard to "nasal polypectomy". to indicate that a pre-operative CT scan is mandatorily required unless there is a specific indication of skull base defect or extensive sinus involvement. It appears from the medical records that the surgical procedure was completed without there being any evidence of immediate intra-operative complication, though, it does appear that the patient developed severe continued headache immediately after the

surgery which was managed only conservatively through pain-killers. The post-operative subarachnoid hemorrhage detected subsequently in CT Scan dated 12.04.2008 is stated to be a recognized though rare complication, but not necessarily attributable to any act of medical negligence. The attending doctor promptly sought a neurosurgical consultation, and continued monitoring the patient through repeated imaging. The State Commission, while appreciating these facts, nonetheless concluded that the doctor was negligent because a CT scan was not done prior to surgery and post-operative avoidable complication of SAH not only occurred but was not promptly and effectively managed. However, it is urged, relying on *Jacob Mathew vs. State of Punjab (2005) 6 SCC 1* and *Kusum Sharma vs. Batra Hospital (2010) 3 SCC 480*, that a medical practitioner cannot be held negligent simply because a mishap or adverse result or a complication has ensued.

12.2 The State Commission in para 6 to 9 has, with the help of literature, detailed what is polyp and polypectomy and how the same, and the nature and extent of the same, may be diagnosed and treated, its likely complications, and also the nature and causes of SAH. It is clearly mentioned therein that CT Scan would be deployed to determine the location and size of the polyp and also to determine whether they are coming out from the nose or from sinuses. It is also stated that if the polyp is seen only on one side, the CT Scan should be done to rule out more serious nature of the growth. In most cases, the surgery is an "out-patient surgery". Detailing the SAH, the literature explains that the SAH is bleeding in subarachnoid space, i.e. space between brain and the tissues that cover the brain. The bleeding or hemorrhage in this space can cause serious consequences of coma, paralysis or death. In para 10 the State Commission has recorded a factual finding, as rightly submitted by the complainant, that the refusal for CT scan as recorded in the hospital documents is inserted in the records by way of manipulation and such pre-operative test was never prescribed and never refused by the patient or relatives. It is admitted to the appellants that SAH is a known and serious though rare complication of the polyp endoscopic surgery. In that scenario, after relying on the literature referred to in the complaint itself, the State Commission came to a factual finding that the CT Scan should have been insisted and report obtained before conducting the surgery and that surgery without such report, based merely on clinical examination, is an instance of medical negligence. The State Commission, as per the appellants, erred in equating FESS, for which only the literature mandates

pre-surgery CT Scan, with nasal polypectomy, for which there is no such mandatory requirement. However, though the appellants have insisted that the literature relied upon is from a medical blog and is unauthenticated, the appellants have not shown through any contrary reliable material to establish that the said literature is false or that the same is contrary to any authenticated material. The content of the literature, even though from a medical blog, has remained uncontradicted. In our opinion, after considering the essence of the literature relied upon by the State Commission, though the names of the surgery are different, and to that extent there is inaccuracy in the State Commission's observations, there is no scientific or technical material brought on record by the appellants to establish that the two procedures are so materially different that the caution to be exercised through pre-operative CT Scan is avoidable or is superfluous, in polypectomy, more so, when indisputably the surgery is not only on a 16 year old young child, but is also at or about a spot very near and adjacent to the brain's periphery. After considering the totality of facts and circumstances, we are of the considered opinion that the State Commission's findings, which are echoed by the State Medical Council's order dated 21.02.2011, are well-founded. We are inclined to agree with the State Commission therefore that the delicate and precision surgery of polypectomy, which admittedly has likely, though rare, serious complications of SAH, brain herniation and consequent coma, paralysis or even death, required equally higher degree of caution, care and fore-sight in ensuring pre-operative CT Scan, which would certainly have ensured better pre-comprehension of condition of polyp, pre-existing conditions of undisplaced fracture if any and patient-safety including preparedness for and avoidance of complications. There was admittedly no emergency condition also requiring the surgery without CT Scan. The attempt at manipulation of records itself, which we agree with the state commission to have been so evidenced on records, in our opinion, is a serious infraction of ethical medical conduct of the Hospital which is resorted to only to riggle out from the findings of medical negligence in not ensuring the pre-operative CT Scan. Apart from this, such attempt is also an evidence of realisation of the hospital/doctor of lapse of not obtaining the pre-operative CT scan report and hurriedly conducting the surgery which is not shown to be such an emergency requirement. We otherwise also find that once the CT scan was considered necessary and prescribed as contended by the hospital/doctor, the hospital/doctor could not and should not have proceeded for the surgery which was

having likelihood of complications of SAH, and the avoidance of which substantially could have depended on the result of the CT Scan on a 16 year old young child patient. In that scenario, the doctor had the option of explaining the need of the CT Scan and insisting as was done on 12.04.2008. We also find no merit in the contentions on behalf of the hospital that the literature relied upon by the complainant and by the State Commission is unauthenticated because no substantive contrary medical literature was placed on record by the hospital/doctor. The State Commission rendered a factual finding that the pre-operative CT scan could have guided the surgeon in duly estimating the degree of the growth and absence of such knowledge due to absence of CT Scan report only led to SAH necessitating further neuro-surgery. We also find that the State Commission validly relied on the findings of the State Medical Council dated 21.02.2011. While we do note that the reports of the Committee of RNT Medical College dated 30.03.2010 and of the Internal Enquiry Committee of the appellant hospital have found no medical negligence, and further, that the RNT Medical College committee has also concluded that the pre-operative scan would have made no difference to the surgery or further line of treatment, we still find merit in the contention of the complainant-respondent that only after considering these "detailed" reports, the Rajasthan Medical Council has deemed it appropriate to issue a warning to Dr. A.K. Gupta to be "more careful and vigilant while doing surgery". We are of the opinion that no error can be found in the order of the State Commission in placing reliance on the order of the Rajasthan Medical Council. While we agree with the principle in contention raised on behalf of the appellants that every unfortunate outcome of a surgery, procedure or treatment cannot in itself be considered to be an instance of any medical negligence, but based on the medical literature, evidence on record and the findings of the State Commission, and after perusing the decisions relied upon by the appellants, we are still in agreement with the State Commission that the failure in, or negligent avoidance of, conducting the pre-operative CT scan is a violation of the normally expected care and caution and exercise of skill in conducting the type of surgery i.e. polypectomy which was undertaken by Dr. Gupta. After perusing the MRI report dated 23.04.2008, which records the impression that 'a bony defect at the base of anterior cranial fossa on the *left side* of the midline' and the record of hospital (page 70) which show "nasal polyp Lt side", we also agree with the State Commission that there is no merit in the contention of the appellants that the

polyectomy was done on the left side while the bony defect was discovered on the right hand side. Though we agree in principle with the contention on behalf of the appellants that no shortcoming or negligence on the part of the treating doctor can be found for mere error of judgment in diagnosis or for choosing one of the multiple possible lines of treatment, we find no merit on facts on the basis of this principle in the contention raised by the appellants. Conducting surgery without a critical diagnostic and safety-enhancing test like CT scan is neither an error of judgment nor is one of the many established options of treatment, but is an instance of casual, careless and negligent approach of the surgeon, reflective of absence of due care and caution, to a surgery which involved very serious likely complications. Thus, and therefore, in view of the aforesaid, we concur with the findings of the State Commission *qua* the medical negligence of Dr. A.K. Gupta and of the hospital vicariously. The appeal on this ground, therefore, fails.

13. At the same time, however,, after considering the evidence on record, we also agree with the contention that the compensation granted is on the higher side. The only evidence relied upon by the State Commission in its order is the bill of SAL Hospital Ahmedabad and the advice to the patient to avoid certain activities as recorded in the discharge summary. While we agree that the treatment expenses at the SAL hospital would qualify as the damage/injury, we certainly also find that the injury/damage required to be compensated on account of mental agony, loss of life-style due to constraints and future treatment cost totaling to Rs.15 lakhs as granted by the State Commission are on the higher side for which there is no evidentiary foundation. There is absolutely no evidence on record to establish the treatment, if at all and if any, subsequent to that in SAL Hospital, nor is there any evidence of prolonged inability or restraint or limitation of the patient in pursuing normal life style. Moreover, it is also a fact as pleaded by the appellants in para 11 of their Written Statement filed before State Commission, that there is no exploitative or commercial intent of the Doctor/Hospital in as much as for the whole treatment for 11 days during 12.04.2008 to 23.04.2008, including the surgery charges and charges for stay in the ICU, charges levied is only Rs.15,500/- which in a commercial Hospital would not be less than Rs.1 lakh. As was intimated to the Rajasthan State Medical Council vide letter dated 06.08.2010 (page 95 of FA/25), the Hospital is charging substantially nominal amounts and even providing free of cost treatment to the BPL families. Considering these totality of facts and circumstances and following the law

laid down by the Supreme Court in *HUDA v. Shakuntla Devi*, (2017) 2 SCC 301 as extracted herein below, we, agreeing with the contention of the Appellants, hold that the compensation granted by the State Commission is excessive and unreasonable and is not wholly based on the evidence on record and therefore needs to be scaled down.

"13. The sine qua non for entitlement of compensation is proof of loss or injury suffered by the consumer due to the negligence of the opposite party. Once the said conditions are satisfied, the Consumer Forum would have to decide the quantum of compensation to which the consumer is entitled. There cannot be any dispute that the computation of compensation has to be fair, reasonable and commensurate to the loss or injury. There is a duty cast on the Consumer Forum to take into account all relevant factors for arriving at the compensation to be paid.

14. In Charan Singh v. Healing Touch Hospital [Charan Singh v. Healing Touch Hospital, (2000) 7 SCC 668 : 2000 SCC (Cri) 1444] , this Court held as follows : (SCC p. 673, para 12)

"12. ... 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 the established judicial standards where the claimant is able to establish his charge."

13.1 Though there would always be some subjectivity in quantification of the amounts of compensation, the lack of evidence brought on record by the complainant in establishing the actual financial loss/injury and the period of alleged mental agony and life-style loss, and the reasons therefore, have necessarily to be a relevant factor while considering and deciding the quantum of damages to be awarded. There is no evidence on record to establish either the continued medical condition or treatment, if any, or the continued mental agony or loss of normal life style or the basis and reason of such continued alleged mental agony and such loss of normal life style. What exactly was suffered by the patient and the relative after the surgery at SAL Hospital has not been evidenced on record. The hospital admission was in the year 2008, the complaint was filed in May, 2010 and the complaint was decided on 08.10.2021. It was open to the complainant to have, in the mean time, brought on record the conclusive evidence of such expenses, agony and consequences of alleged restrained lifestyle which was not done and therefore also, the quantum of compensation to the tune of nearly Rs.16.84 lakhs as granted by the State Commission appears to be unfounded, one-sided, conjectural and unjustified. The same could not have been so estimated merely on the basis of the

discharge-prescription of SAL hospital and the advice rendered therein. We are therefore of the considered opinion that the same needs to be scaled down. In our considered opinion, all-inclusive compensation of no more than Rs.10 lakhs in place of nearly Rs.16.84 lakhs awarded by the State Commission would adequately balance the scale and would meet the ends of justice.

14. FA/25/2022 has been filed by the insurer- Oriental Insurance Company. It is undisputed that Dr. A.K. Gupta has obtained a professional indemnity policy from the appellant-insurer for a sum assured of Rs.5 lakhs which indisputably covers the incident on 11.04.2008 to the extent of Rs.5 lakhs. The appeal filed by the insurance company is, therefore, more formal in nature and essentially gets subsumed into the appeal filed by Dr. A.K. Gupta. The State Commission has, after holding the hospital and Dr. A.K. Gupta to be jointly liable, directed the Oriental Insurance Co. to pay Rs.5 lakhs while the balance liability is directed to be met jointly by Geetanjali Medical College and Hospital and Dr. A.K. Gupta. After hearing Dr. Sushil Kr. Gupta for the insurer, and after perusing the appeal memo, we, having held Dr. A.K. Gupta to be primarily and Geetanjali Hospital to be vicariously liable, therefore, find no error in the directions of the State Commission *qua* the Oriental Insurance Co. to the extent of payment of Rs.5 lakhs by the Insurance company. We, therefore, find no merit in the appeal and accordingly dismiss the same.

15. In view of the above, we partly modify the directions in the State Commission's order. The total joint liability of Dr. A.K. Gupta and Geetanjali Medical College and Hospital is quantified at Rs.10 lakhs with 9% simple interest from the date of filing of the complaint i.e. 03.05.2010 till the date of payment. Out of this amount of joint liability, Oriental Insurance Company shall pay Rs.5 lakhs with 9% interest for the period 03.05.2010 till the date of payment, within two months from the date of this order. The balance amount of Rs.5 lakhs with 9% interest, and the cost of Rs.50,000/-, shall be paid by jointly by Dr. A.K. Gupta and the Geetanjali Medical College and Hospital jointly within a period of two months from the date of this order. The failure to make requisite payments on or before the due date shall entail enhanced rate of interest of 12% in place of 9% starting from the date next following the due date as directed under this order. The impugned order is modified to the extent indicated hereinabove.

16. Accordingly, FA No. 84 of 2022 is partly allowed and FA No. 25 of 2022 is dismissed. The directions issued by the State Commission are modified to the extent indicated above.

Sd/-

.....
(A.P. SAHI, J.)
PRESIDENT

Sd/-

.....
(BHARATKUMAR PANDYA)
MEMBER

pawan/aj