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BEFORE THE CONSUMER DISPUTES REDRESSAL COMMISSION
GUJARAT STATE, AHMEDABAD.

COURT NO: 04
Appeal No. 1055 of 2013

Pravinbhai Naranbhai Sonara,
Village Chandisar, Ta. Dholka,
Dist. Ahmedabad. ...Appellant.

V/s.

Kesar SAL Hospital,
Through its Chairman,
Block No. 254-255, Opp. Science City,
Sola-Kalol Road, Bhadaj,
Ta. Dascroi, Ahmedabad. ... Respondent.

BEFORE: Dr. J.G. Mecwan, Presiding Member.

APPEARANCE: Mr. R.P. Patel, L.A. for the appellant.
Mr. M.J. Parikh, L.A. for the respondent.

ORDER BY DR. J.G. MECWAN, PRESIDING MEMBER.

JUDGMENT

1. Being aggrieved by and dissatisfied with the judgment and order rendered by the learned District Consumer Disputes Redressal Commission, Ahmedabad (Rural) on 09.04.2012 in Complaint No. 388 of 2011, the original complainant has filed the present Appeal under Section 15 of the Consumer Protection Act, 1986 before this Commission. For the sake of the convenience, parties are hereinafter referred to by their original nomenclature.

2. To dispose of this Appeal, few relevant facts are required to be mentioned: It is the case of the complainant that owing to severe pain of appendix complainant was admitted in the opponent Hospital on 20.12.2008 as indoor patient and on 21.12.2008 operation of appendix was performed on him and thereafter he was discharged on 24.12.2008 from the opponent Hospital. It is further submitted by complainant that

despite continuing the medication and treatment as instructed by the opponent, the complainant's pain did not subside and therefore he again consulted opponent on 06.01.2009 and opponent Hospital had cleaned the pus by operating the patient and he was discharged on 13.01.2009. As there was no relief in pain, he was again consulted the hospital on 13.02.2009 and opponent hospital inserted a tube into his abdomen and examined where the pus comes from? After taking necessary X-ray and on reducing the pus he was discharged on 23.02.2009. It is further submitted by the complainant that after 10 days i.e. on 14.04.2009 he again consulted the opponent hospital with compliant of pain on the operated part and admitted as an outdoor patient and at that time he underwent Sonography and was diagnosed with normal pain. It is further submitted by complainant that as there was no improvement in his condition, complainant had consulted Dr. Vinay Bharwad at Vasana and on the basis of Sonography report Dr. Bharwad advised him for operation and thereafter on 12.08.2009 operation was performed at Shrey Hospital, Navrangpura. It is further submitted by complainant that it was revealed by such operation that the root cause of the pain was a mop/piece of cloth trapped in the large intestine and thereafter he was discharged on 21.08.2009 from the hospital of Dr. Bharwad. It is further alleged by complainant that due to negligence of the doctor of Kesar Hospital, a mop/piece of cloth remained left in his abdomen during the operation and on account of such medical negligence the complainant had to suffer unbearable pain and therefore for such medical negligence complainant has filed

Consumer Complaint before the learned District Commission Ahmedabad (Rural).

3. Being dissatisfied with the gross medical negligence of the opponent, complainant has filed Consumer Complaint before the ld. District Commission Ahmedabad (Rural) and prayed for the compensation of Rs. 15,00,000/- along with Rs. 10,000/- for cost of Complaint.

4. After hearing learned advocates for both the parties and after considering the documents and evidences, the learned District Commission dismissed the Complaint of the complainant.

5. Being aggrieved by the impugned order of the learned District Commission, Ahmedabad (Rural) the original complainant has filed the present Appeal against the original opponent before this Commission on the ground stated in the appeal memo.

6. Heard learned Advocate Mr. R.P. Patel for the appellant and ld. Adv. Mr. Darshil Parikh on behalf of ld. Adv. Mr. M.J. Parikh for the respondent at length. Perused the record, judgments submitted by both the sides, brief note submitted by respondent and order of the learned District Commission.

7. First of all ld. Adv. Mr. R.P. Patel has appeared on behalf of the appellant and argued out that panel of expert doctor of B.J. Medical college which is Government Institute has opined that the mop was found in the intestine of the appellant and therefore this clearly shows that there was negligence on the part of the respondent hospital in performing operation and also when the appellant was operated at Shrey hospital and operation was being visually recorded and C.D. was also produced before the learned District Commission and if the aforesaid

C.D. would have been seen, it would be crystal clear that there was mop which remained in the intestine while performing operation by the respondent hospital, still the said fact is not considered by the learned District Commission. Furthermore the reason given by the learned District Commission is that since no fees is charged by the respondent hospital and therefore the appellant is not a Consumer and therefore the Consumer Protection Act will not be applicable and hence a Complaint is not maintainable and the aforesaid finding cannot be accepted but in the Trust Deed it has been mentioned that medical help will be granted to the poor and deserving person and therefore as per provision of Consumer Protection Act complainant is a Consumer. Moreover the medical bill shows that the medicine has been purchased from the respondent hospital and therefore on the basis of aforesaid medicine also, the respondent hospital has provided the same and therefore the appellant is the consumer but still the said fact is not considered by the learned District Commission. It is further submitted by ld. Adv. Mr. Patel that complainant has approached opponent hospital after operation with the compliant of severe abdominal pain between 06.01.2009 to14.04.2009 and during that period opponent hospital has also taken Sonography report and opponent hospital would have produced the said Sonography report before the learned District Commission to prove that there was no negligence has been committed on their part.

8. It is further argued out by ld. Adv. Mr. Patel that learned District Commission has rejected the Complaint on merit on the ground that no Sonography report is produced, no biopsy report is done and no affidavit

of Dr. Bharwad is produced and no chance of cross examination given to the respondent hospital and the complainant has not proved his case but operation note of Dr. Bharwad who has performed the said operation, which itself is an expert evidence and when Dr. Bharwad has made statement before the Police authorities then there is no any need of any affidavit and opponent would have examined Dr. Bharwad but opponent has not produced a single application for cross examination before the learned District Commission and therefore the submission of the opponent that they could not cross examine Dr. Bharwad is not sustainable at all and also the mop is itself a piece of cloth and therefore biopsy of mop was not made and police authority has taken it into custody and panchnama was made and therefore the aforesaid finding is de-hors the record of the case, since there was medical opinion given by the government Hospital, videography was carried out which C.D. was produced by the appellant and in punchnama made by the Police authority wherein the Photo Album, Mop and CD are mentioned. Furthermore, police has also taken the statement of Dr. Vinay Bharwad, Dr. Nipam Mistri and Dr. Tejas Shah who had performed the operation and these statements are also on record. It is further contended by ld. Adv. Mr. Patel that learned District Commission has taken divergent view to the effect that the complainant is not a Consumer and on the other hand the complaint came to be dismissed on merit. It is further argued out by ld. Adv. Mr. Patel that it is also required to be considered that the FIR was lodged as stated earlier; charge sheet has been filed against the concerned doctors who had performed operation, therefore also, prima facie it shows the negligence on the part of the respondent

hospital and also the appellant is a Consumer of the respondent hospital and being the Consumer the appellant has every right to avail service of the respondent.

9. Learned Adv. Mr. Patel concluded that the order passed by the ld. District Commission is not just and proper and therefore it should be quashed and set aside by allowing this Appeal. In support of his arguments ld. Adv. Mr. Patel has submitted following judgments:

(i) IV (2014) CPJ 622 (NC)-Major Singh Vs. State of Punjab& ors.
(ii) F.A. no. 93/2006 (NC)-Dr. Ravishankar Vs. Jerry Thomas and Anr.
(iii) F.A. no. 814/2003 (NC)-Dr. K. Ravindra Nath and Anr. Vs. Vitta Veera Surya Prakasam and ors.
(iv) I (2015) CPJ 79 (TN)-R. Lakshmi Vs. Royapettah Govt. Hospital.

10. Upon service of the notice ld. Adv. Mr. Darshil Parikh has appeared on behalf of the respondent and vehemently argued out that the complainant had consulted Kesar Sal Hospital on 16.12.2008 due to severe pain in abdomen since last 3 days and after investigation when it was diagnosed that it was a case of perforated appendix, the complainant was advice for surgery. Under the circumstances when the complainant was ready to undergo surgery, he was admitted in the hospital on 20.12.2008 and after performing all the necessary tests and investigation he was operated and appendicectomy was done. Ld. Adv. Mr. Parikh further submitted that during the follow-up treatment whenever the complainant had made any complaint the in-charge doctor of the hospital had immediately given necessary treatment to the complainant and during the follow up treatment as the complainant had developed infective abscess which is a known complication of this type of surgery and there was pus and the complainant was immediately investigated by the hospital and thereafter, he was given necessary

antibiotics and other required medicines. It is further submitted by ld. Adv. Mr. Parikh that during the follow-up treatment x-ray and sonography were also done and the complainant was informed to visit the hospital regularly and he responding well to the known complications of the surgery, all of a sudden, the complainant stopped visiting the hospital for the reasons best known to him and therefore there was absolutely no negligence or carelessness on the part of the opponent hospital in treating the complainant. It is further argued out by ld. Adv. Mr. Parikh that the question of using piece of cloth at the time of surgery does not arise at all by the opponent hospital. Furthermore since the complainant was having post operative complication only because of large infected appendix, adhesion of intestine, etc. it cannot be said or even presumed that the complainant was having pain, in abdomen due to so called piece of cloth left in large intestine and the use of such type of so-called piece of cloth and that too in the large intestine is also not possible in any case and in any circumstances.

11. It is contended by ld. Adv. Mr. Parikh that Dr. Mitul G. Choksi had filed an affidavit before the Learned Forum wherein he had stated that no mop was used during the surgery and therefore there was no question of having left a mop inside the complainant's body and also the complainant has not challenged the affidavit of Dr. Mitul G. Choksi and therefore contents thereof are not denied. Moreover after the surgery was performed by Dr. Choksi and the complainant was discharged, the complainant had admitted himself twice in the opponent hospital and x-ray and sonography was performed, however, no such mop was detected

or found. Furthermore complainant has approached Dr. Bharwad after around 6 months of the surgery performed at the opponent hospital and on carrying out the sonography it was advised by Dr. Bharwad that there was mop inside the body. It is pertinent to note that the said sonography report on the basis of which the complainant was operated by Dr. Bharwad was not produced by the complainant before the Learned Forum to establish that there was a piece of mop inside the complainant's body. It is further argued out by ld. Adv. Mr. Parikh that the complainant had failed to produce the biopsy report of the said mop to establish that the mop was found from the complainant's body and it is significant to consider that Dr. Bharwad, who had allegedly removed the mop, had not filed any affidavit in support of his observations and therefore his observations were not proved. Moreover, the opponent didn't get any chance to cross examine Dr. Bharwad in order to establish the true and correct facts.

12. It is further submitted by ld. Adv. Mr. Parikh that the complainant had produced certain documents at the time of final hearing of the complaint, however, the said documents were produced without any supporting affidavit and the opponent didn't get the chance to verify and rebut the contents of the said documents and the said documents were tampered with and therefore the said documents were not to be looked into. It is further urged by ld. Adv. Mr. Parikh that it clearly transpires that just to extract money and just to malign the image of Kesar Sal Hospital the complainant has come out with totally false, frivolous and vexatious allegation against the opponent in the complaint. Moreover the appellant has produced certain additional documents on record

before this Commission by way of an application under Order 41 Rule 27 of the Civil Procedure Code and also the complainant has failed to establish the documents produced therewith. Furthermore, the appellant has failed to prove the relevance of the said documents with the grounds of appeal and the pleadings of the complaint. It is further contended by ld. Adv. Mr. Parikh that the appellant has produced a one page print out of containing details of Kesar Sal Medical College & Research Institute, Ahmedabad, and has alleged that it had no permission to operate upon the complainant but this allegation is baseless and vague and there is no such pleading in the complaint and also the said document doesn't prove or establish that the institute had no permission to operate patients. It is further submitted by ld. Adv. Mr. Parikh that it is not established that whether the said website shows the updated details and therefore the complainant has failed to prove that the opponent was deficient for its services or had carried out unfair trade practices and thereby failed to substantiate that the order passed by the Learned Forum was not just and reasonable and therefore the appeal is liable to be dismissed with costs.

13. It is further submitted by ld. Adv. Mr. Parikh that under the name of Adarsh Foundation Trust fund was utilized for the object of trust including, (a) relief to the poor, (b) to set up and run schools for spread of education, (c) medical relief and to set up and run hospitals (d) advancement of any other object of general public utility and therefore looking to the object of the Trust, complainant does not fall under the definition of the 'Consumer' as he has not paid any charges to the hospital. However the submission of the complainant that medicine has

been purchased from the respondent hospital and therefore as respondent has provided the same, the appellant is the consumer but this argument of complainant is not sustainable. It is further submission of the ld. Adv. Mr. Parikh that statement given to the Police cannot be used in evidence and to prove any particular fact/facts it should be proved by the affidavit. It is further contended by ld. Adv. Mr. Parikh that witness shall be first examined in chief then cross examine and then re-examine. In support of these arguments ld. Adv. Mr. Parikh has submitted Xerox copy of relevant para of Evidence Act and Cr.PC. Moreover, in the panchnama made before the Police authorities it has been also mentioned about the 'mop' but there was not any biopsy report of the mop is submitted and therefore it cannot be said that it is the same mop that came out from the abdomen of the complainant. Furthermore the photo album, CD etc. which has been mentioned in the panchnama and in the certificate issued by the BJ Medical Collage were not produced before the Consumer Commission. It has been further stated that two Sonography reports were already made by the Sal Hospital but those reports does not reveals the presence of any kind of mop in the abdomen. Moreover the opinion given by B.J. Medical Collage, Surgery Department is not reliable as on the report some endorsement was made and it was deleted thereafter.

14. Learned Adv. Mr. Parikh concluded that the order passed by the ld. District Commission is just and proper and therefore it should be confirmed by dismissing this Appeal. In support of his arguments ld. Adv. Mr. Parikh has submitted following judgments:

(i) III (2007) CPJ 56 (NC)-Dr. Sushma Chawla Vs. Harvinder Kaur and Ors.

(ii) III (2016) CPJ 258 (NC)-Jaya Kumar Jolad Vs. Bhabha Atomic Research Centre Hospital and Ors.
(iii) II (2016) CPJ 1 (NC)-Bhilai Steel Plant & Anr. Vs. Nishantkumar Singh.
(iv) II (2016) CPJ 306 (NC)-Dr. Hema and Ors. Vs. S. Jayan & Ors.
(v) IV (2015) CPJ 619 (NC)-Ranibala & Ors. Vs. Dr. Satya Prakash Bansal.
(vi) IV (2009) CPJ 238 (NC)-Kamalakar Dhyaneshwar Vs. Ranade Hospital Organization & ors.

15. In the present case following issues are required to be decided :-

(A) Whether the complainant is Consumer of the opponent hospital or not?

(B) Whether the statements given by treating Doctors before the Police authority can be considered as an evidence or not?

(C) Whether it is proved that mop was left inside the body of the complainant or not?

(D) Is there any medical negligence has been committed on the part of the treating Doctor of opponent hospital? And what is the liability of the opponent hospital in this context?

16. As far as the very first issue (A) is concerned it is the submission of the ld. Adv. Mr. Parikh for the opponent that the treatment given to the complainant was free of charge and therefore complainant is not a Consumer as per the definition of Consumer Protection Act, 1986 [herein after referred to as 'C.P. Act']. In the C.P. Act definition of the 'Consumer' is mentioned as below:-

Section 2(1)(d) in the Consumer Protection Act, 1986

(d) "Consumer" means any person who,—
(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
(ii) [12] [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [12] [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first

mentioned person [13] [but does not include a person who avails of such services for any commercial purpose]

17. As per record it is an admitted fact that treatment given to the complainant was free of charge. Ld. Adv. Mr. Patel for the complainant has drawn my attention to the copy of Trust Deed which is on record at page no 204 wherein in Section 3 it has been mentioned that,

> *"3. Grant of medical help to the poor and grant of medical help to deserving persons".*

18. On the other hand it is submitted that the opponent hospital being a medical college and research centre it does not charge any amount from the patients for any treatment and therefore services provided by the opponent to complainant was also free of cost and hence complainant is not Consumer of the opponent hospital.

19. Ld. Adv. Mr. Parikh for the opponent put reliance on the judgment of Hon'ble National Commission in II (2016) CPJ 306 (NC) in the case of ***Dr. Hema and ors. Vs. S. Jayan and ors.*** has observed as under:

> *"55(9) Service rendered at a Government hospital/health centre/dispensary where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service – is outside the purview of the expression 'service' as defined in Section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position."*

Hon'ble Supreme Court in the case of ***Indian Medical Association Vs. V.P. Shantha & ors***. has observed as under:

> *"Where services are rendered without any charge whatsoever to every person availing the service would not fall within the ambit of 'Service' under Section 2(1)(o) of the Act."*

20. In light of the above judgments of Hon'ble Supreme Court it is crystal clear that where services are rendered free of charge to everybody then complainant does not fall within the purview of Consumer but in the instant case considering Section 03 of the Trust Deed of the opponent

hospital it becomes clear that in the opponent hospital the services of hospital were provided free of charge to poor and deserving persons and to every other person on payment of charges and hence in the considered opinion of this Commission complainant is fall under the definition of the 'Consumer' under C.P. Act, 1986. Furthermore opponent hospital has not produced any evidence which can prove that opponent hospital was providing treatment free of charge to all their patients.

21. Now as far as the second issue (B) is concerned it is the submission of the ld. Adv. Mr. Parikh that as per Cr.P.C. and Indian Evidence Act the statements of Dr. Bharwad, Dr. Nipam and Dr. Tejas Shah given to the Police authorities are not admissible as an evidence in the C.P. Act. However in C.P. Act, 1986 in Section 13(4) it has been mentioned as under:

> **Section 13(4) in the Consumer Protection Act, 1986**
> (4) For the purposes of this section, the District Forum shall have the same powers as are vested in a civil court under Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—
> (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath,
> (ii) the discovery and production of any document or other material object producible as evidence,
> (iii) the reception of evidence on affidavits,
> (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source,
> (v) issuing of any commission for the examination of any witness, and
> (vi) any other matter which may be prescribed.

22. It is pertinent to note here that the Consumer Protection Act, 1986 is a beneficial legislation to provide speedy, inexpensive and hassle free redressal to the grievance of the consumers. The provisions of the Code of Civil Procedure, except the one, provided under Section 13(4) of the Act, and the Evidence Act **are not applicable** to the Consumer disputes.

The Consumer Commissions are to evolve their own procedure for adjudicating the consumer disputes by resorting to the **principles of natural justice** but are not required to enter into technicalities, with a view to deny the substantial justice to the parties.

23. Hon'ble Supreme Court in the case of *V. Kishan Rao Vs. Nikhil Super Speciality Hospital and Other in* Civil Appeal no. 2641/2010 has observed as under:

> *"The Forum overruled the objection, and in our view rightly, that complaints before consumer are tried summarily and Evidence Act in terms does not apply. This Court held in case of Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and others reported in (2009) 9 SCC 221 that provisions of Evidence Act are not applicable and the Fora under the Act are to follow principles of natural justice"*

Looking to the above observation of the Hon'ble Supreme Court the allegation of the opponent that the statements given before the police authority are not admissible in C.P. Act is not sustained.

24. As far as issue (C) is concerned it is the contention of the ld. Adv. Mr. Parikh for the opponent that complainant is failed to produced the biopsy report of the mop which can prove that it was the same mop that comes out from the abdomen of the complainant.

25. In connection of this allegation, the report prepared by the penal of expert doctors – Dr. P.N. Kantharia, Dr. A.A. Ghasura and Dr. P.V. Mehta of Surgery Department, B.J. Medical Collage is on record at page no. 26 wherein following has been mentioned:

> "The Patient named Pravinbhai Sonara was admitted for suspected case of acute appendicitis and underwent appendicectomy on 20/12/08 at Kesar Sal hospital and discharged on 25/12/08. He was readmitted after 10 days on 6/01/09 for the continuous pain, fever. He was operated for ill defined mass in RIF and possibility of collection of pus and I&D of retroperitoneal psoas abscess was done and discharged on 13/01/09.He was third time admitted on 13/02/09 and discharged on 23/02/09.He was diagnosed post appendicectomy ilico-colic fistula and treated conservatively. Patient went to Dr. Vinay Bharwad and got admitted to Shrey Hospital on 12/06/09 for abdominal pain and distension and operated upon him. Per operative findings are adhesions with peritonitis and a big mop removed from intestinal loop.

REFRENCES:

1. TWO PHOTOGRAPH ALBUMS
2. ONE CD-CURRUPT(NOT WORKING)
3. CASE PAPER RECORD

OPINION

From the evidences given, it is proved that mop was left inside the abdomen during the first surgery by Dr. Mittal Choksi of Kesar Sal Hospital Surgery Department which has created all the consequent surgical complications."

26. It is the submission of the ld. Adv. Mr. Parikh for the opponent that on the above report some endorsements has been made by someone and it was deleted and therefore this report cannot be considered as an evidence in this case but in the considered opinion of this Commission the expert doctors of penal have signed under the said observation report and the said report has also sent to the Civil Hospital Sola through the Dean of B.J. Medical College and this report was then submitted to Police department and therefore it may be the possibilities that during this transaction of report the said endorsement was made by someone and then it was deleted but this deleted hand written endorsements cannot prove that the said report is suspicious.

27. Moreover the opinion of expert doctors of penal is that, *'From the evidences given, it is proved that* ***mop was left inside the abdomen*** *during the first surgery by Dr. Mittal Choksi of Kesar Sal Hospital Surgery Department which has created all the consequent surgical complications*' and therefore in the opinion of this Commission it is palpably emerged from the above report that mop was left inside the abdomen of the complainant.

It is the allegation of the opponent that biopsy has not been done to that mop which can prove that that is the same mop which came out from the complainant's body but the above report of expert penal doctor has been prepared on the basis of – two Photograph album and case

paper record and therefore in the opinion of this Commission when the report prepared by the expert doctors' penal clearly establish that the mop has left inside the abdomen of the complainant then question of Biopsy does not arises.

It is the submission of the ld. Adv. Mr. Parikh that after operation when complainant approached the hospital, two Sonography reports were made and the said Sonography reports did not reveal that mop was left inside the abdomen. I have gone through both the sonography reports which are on record at page no. 54 and 59 and both the reports were made by opponent hospital itself but ultrasound image of such reports are not produced in this matter and hence in the opinion of this Commission opponent hospital is failed to prove that there was no such mop has been left inside the abdomen.

28. As far as issue at (D) is concerned, it is crystal clear that on the basis of the above report of expert doctors' penal it is establish that the mop was left inside the abdomen and thereafter it has been removed by the operation and therefore it is distinctly appeared the gross medical negligence of the treating doctor of the opponent hospital which indicates that this is a case of Res Ipsa Loquitur and therefore it is the duty of the opponent doctor to prove that he was not negligent.

29. In Res Ipsa Loquitur, it is the duty of the defendant to lead evidence. There are two steps to process the establishing Res Ipsa Loquitur,

A. Whether the accident is the kind that would usually be caused by negligent.

B. Whether or not defendant had exclusively control over the instrumentality that causes an accident.

30. In *M/s. Soni Hospital Vs. Arun Balkrishnan Aiyyar*, Madras High Court has observed that,

> *"In a case were an act was done by doctor which he has otherwise not supposed to do and such an act was done in any negligent manner resulting in a substantial injury to the patient, then he cannot escape from the liability. When doctor who performs a surgery is in the possession of certain facts and the factum of the surgery has not been disputed, coupled with that fact that, the complications have arisen in pursuant to the onus surgery not correctly done then it is on him to prove that negligence is not on his part. When the accident is such that in the ordinary course of action it is not likely to happen if the person in charge has not taken proper care then, consequent liability will be on him."*

31. The principle of Res Ipsa Loquitur has been considered at length by the Hon'ble Apex Court in *V. Krishna Rao Vs. Nikhil Super Speciality Hospital* wherein it has been observed has under:

> ***"45*** *In the treaties on Medical Negligence by Michael Jones, the learned author has explained the principle of res ipsa loquitur as essentially an evidential principle and the learned author opined that the said principle is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred. The principle has been explained in the case of Scott v. London & St. Katherine Docks Co. [reported in (1865) 3 H & C.596], by Chief Justice Erle in the following manner: -*
>
> *"...where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care".*
>
> ***46*** *The learned author at page 314, para 3-146 of the book gave illustrations where the principles of res ipsa loquitur have been made applicable in the case of medical negligence. All the illustrations which were given by the learned author were based on decided cases. The illustrations are set out below: -*
>
> *"Where a patient sustained a burn from a high frequency electrical current used for "electric coagulation" of the blood [See Clarke v. Warboys, The Times, March 18, 1952, CA];*
>
> *Where gangrene developed in the claimant's arm following an intramuscular injection [See Cavan v. Wilcox (1973) 44 D.L.R. (3d) 42];*
>
> *When a patient underwent a radical mastoidectomy and suffered partial facial paralysis [See Eady v. Tenderenda (1974) 51 D.L.R. (3d) 79, SCC];*
>
> *Where the defendant failed to diagnose a known complication of surgery on the patient's hand for Paget's disease[See Rietz v. Bruser (No.2) (1979) 1 W.W.R. 31, Man QB.];*
>
> *Where there was a delay of 50 minutes in obtaining expert obstetric assistance at the birth of twins when the medical evidence was that at the most no more than 20 minutes should elapse between the birth of the first and the second twin [See Bull v. Devon Area Health Authority (1989), (1993) 4 Med. L.R. 117 at 131.];*
>
> *Where, following an operation under general anaesthetic, a patient in the recovery ward sustained brain damage caused by bypoxia for a period of four to five minutes [See Coyne v. Wigan Health Authority {1991) 2 Med. L.R. 301, QBD];*

Where, following a routine appendisectomy under general anaesthetic, an otherwise fit and healthy girl suffered a fit and went into a permanent coma [See Lindsey v. Mid-Western Health Board (1993) 2 I.R. 147 at 181];

When a needle broke in the patient's buttock while he was being given an injection [See Brazier v. Ministry of Defence (1965) 1 Ll. Law Rep. 26 at 30];

Where a spinal anaesthetic became contaminated with disinfectant as a result of the manner in which it was stored causing paralysis to the patient [See Roe v. Minister of Health (1954) 2 Q.B. 66. See also Brown v. Merton, Sutton and Wandsworth Area Health Authority (1982) 1 All E.R. 650];

Where an infection following surgery in a "well-staffed and modern hospital" remained undiagnosed until the patient sustained crippling injury [See Hajgato v. London Health Association (1982) 36 O.R. (2d) 669 at 682]; and

Where an explosion occurred during the course of administering anaesthetic to the patient when the technique had frequently been used without any mishap [Crits v. Sylvester (1956) 1 D.L.R. (2d) 502]."

***47** In a case where negligence is evident, the principle of res ipsa loquitur operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence.*

***48** If the general directions in paragraph 106 in D'souza (supra) are to be followed then the doctrine of res ipsa loquitur which is applied in cases of medical negligence by this Court and also by Courts in England would be redundant.*

***49**In view of the discussions aforesaid, this Court is constrained to take the view that the general direction given in paragraph 106 in D'souza (supra) cannot be treated as a binding precedent and those directions must be confined to the particular facts of that case."*

32. The principle of medical negligence is now well established in a series of judgments of the Hon'ble Supreme court, including in *Jacob Mathew Vs. State of Punjab & Anr. [(2005) 6 SCC 1]* and *Achutrao H.Khodwa Vs. State of Maharashtra [AIR 1996 SC 2377]*, wherein it has been inter alia observed that ***a medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise reasonable degree of care***. Hon'ble Supreme Court in *Achutrao H. Khodwa (supra)* while discussing this principle in the context of the above case concluded that, ***since a foreign body was left in the system during the surgery, it clearly indicated that reasonable degree of care was not taken and, therefore, it amounted to medical negligence.*** In the same judgment, the Hon'ble Supreme Court has also held that, ***the State must be held***

vicariously liable once it is established that the death was caused due to negligent act of its employees. Following the above two principles in the instant case, it is clear that the opponents are guilty of medical negligence on both counts.

33. In the instant case the report of expert doctors' penal has revealed that it was the result of negligence of treating doctor who has performed operation on the complainant and therefore in the considered opinion of this Commission the report itself proves that it was the gross medical negligence of treating doctor of the opponent Hospital.

34. As far as liability of the Hospital is concerned, Hospital is liable with respect to medical negligence that may be direct liability or vicarious liability which means the liability of an employer for the negligent act of its employees. An employer is responsible not only for his own acts of commission and omission but also for the negligence of its employees, so long as the act occurs within the course and scope of their employment. This liability is according to the principle of 'respondent superior' meaning 'let the master answer'. A hospital can be held vicariously liable on numerous grounds on different occasions. Several Hon'ble High Courts Judgments have held hospitals vicariously liable for damages caused to the patients by negligent act of their staff.

35. Hon'ble Kerala High Court in the case of ***Joseph @ Pappachan v. Dr. George Moonjerly*** [1994 (1) KLJ 782 (Ker. HC)], has observed as under:

> *"Persons who run hospital are in law under the same duty as the humblest doctor: whenever they accept a patient for treatment, they must use reasonable care and skill to ease him of his ailment. The hospital authorities cannot, of course, do it by themselves; they have no ears to listen to the stethoscope, and no hands to hold the surgeon's scalpel. They must do it by the staff which they employ; and if their staffs are negligent in giving treatment, they are just as liable for that negligence as anyone else who employs other to do his duties for him."*

36. Hon'ble Madras High Court in the case of ***Aparna Dutta v. Apollo Hospitals Enterprises Ltd.*** [2002 ACJ 954 (Mad. HC)], has observed as under:

> *"It was the hospital that was offering the medical services. The terms under which the hospital employs the doctors and surgeons are between them but because of this it cannot be stated that the hospital cannot be held liable so far as third party patients are concerned. It is expected from the hospital, to provide such a medical service and in case where there is deficiency of service or in cases, where the operation has been done negligently without bestowing normal care and caution, the hospital also must be held liable and it cannot be allowed to escape from the liability by stating that there is no master-servant relationship between the hospital, and the surgeon who performed the operation. The hospital is liable in case of established negligence and it is no more a defense to say that the surgeon is not a servant employed by the hospital, etc."*

37. Hon'ble National Commission in case of ***Smt. Rekha Gupta v. Bombay Hospital Trust &Anr.***[2003 (2) CPJ 160 (NCDRC)], has observed as under:

> "*The hospital who employed all of them whatever the rules were, has to own up for the conduct of its employees. It cannot escape liability by mere statement that it only provided infrastructural facilities, services of nursing staff, supporting staff and technicians and that it cannot suo moto perform or recommend any operation/ amputation. Any bill including consultant doctor's consultation fees are raised by the hospital on the patient and it deducts 20% commission while remitting fees to the consultant. Whatever be the outcome of the case, hospital cannot disown their responsibility on these superficial grounds. The hospital authorities are not only responsible for their nursing and other staff, doctors, etc. but also for the anesthetists and surgeons, who practice independently but admit/ operate a case. It does not matter whether they are permanent or temporary, resident or visiting consultants, whole or part time. The hospital authorities are usually held liable for the negligence occurring at the level of any of such personnel. Where an operation is being performed in a hospital by a consultant surgeon who was not in employment of the hospital and negligence occurred, it has been held that it was the hospital that was offering medical services.*

38. In view of the above observation of Hon'ble Apex Courts, in the instant case also when treating Doctor of the opponent hospital is liable for the act of the medical negligence then opponent Hospital is vicariously liable for the act of its treating doctor and therefore this Commission come to the conclusion that the order passed by the learned District Commission is not just and proper and it is required to be set aside and hence in the opinion of this Commission complainant is entitled to get compensation for the expenses incurred for second operation to remove mop from the abdomen, for the mental and physical anguish which he has suffered and for loss of income during the medical treatment. Therefore in the considered

opinion of this Commission if opponent hospital pay compensation amounting to Rs. 8,00,000/- to the complainant then it would meet ends of justice and hence following final order is passed.

O R D E R

1. The present Appeal is hereby partly allowed.

2. The order passed by the learned District Commission, Ahmedabad (Rural) dated 09.04.2012 rendered in C.C No. 338 of 2011 is hereby quashed and set aside.

3. Opponent hospital is hereby ordered to pay Rs. 8,00,000/- (Rupees eight lacs only) to the present appellant/original complainant for the compensation for medical expenses, mental and physical anguish and loss of income during the medical treatment.

4. Opponent hospital also ordered to pay Rs. 10,000/- (Rupees ten thousand only) to the present appellant/original complainant towards cost of the Complaint/Appeal and shall bear its own cost if any.

5. Opponent shall comply with this order within 60 days from the date of this order otherwise the above amounts will carry interest at the rate of 9% p.a. till its realization.

6. Registry is hereby instructed to send a copy of this order in PDF format by E-mail to learned District Commission Ahmedabad (Rural) for necessary action.

7. Registry is further directed to send back the record of learned District commission which was brought earlier before this Commission during the proceeding of this matter.

8. Office is directed to forward a free of cost certified copy of this judgment and order to the respective parties.

Pronounced in the open Court today on 31st December, 2021.

[Dr. J.G.Mecwan**]**
Presiding Member