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**BEFORE THE CONSUMER DISPUTES REDRESSAL COMMISSION**  
**GUJARAT STATE, AHMEDABAD.**

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**COURT NO: 04**  
**Appeal No. 1457 of 2013**

The Secretary,  
K.M.G. General Hospital,  
Nr. Saliyavadi Darwaja  
At & Post: Balasionor,  
Dist. Kheda.

... Appellant

**V/s.**

1. Legal heirs of deceased  
Devendrabhai K. Raval,  
Minaben D. Raval,  
At & Post, Village: Vanghroli,  
Ta: Thasra, Dist: Kheda.

2. The Medical Officer,  
Shivubhai N. Patel,  
K.M.G. General Hospital,  
Nr. Saliyavadi Darwaja,  
At & Post Ta: Balasionor,  
Dist. Kheda.

**...ABATED (VIDE ORDER DATED 23.09.2021 IN A/13/1469)**

3. United India Ins. Co. Ltd.  
Santosh Building,  
Santram Road, Nadiad.

...Respondents.

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

**APPEARANCE:** Mr. M.K. Joshi, L.A. for the appellants,  
Mr. V.K. Bhatt, L.A. for the respondent no. 01,  
Mr. M.K. Joshi, L.A. for the respondent no. 02,  
Mr. V.P. Nanavaty, L.A. for the respondent no. 03.

**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, Nadiad on 27.08.2012 in Complaint No. 59 of 2012 the original opponent no. 02 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. The facts given rise to the present appeal in a nutshell are as under:  
It is the case of the complainant that present appellant is a general hospital run by a charitable trust and Dr. Shivubhai Patel is working as a Medical officer/surgeon at the K.M.G. General Hospital. It is further the case of the complainant that the husband of the complainant deceased Mr. Devendrabhai approached opponent with the complaint of back pain and difficulty in urination in the K.G.M. hospital on 24/5/2011 and thereafter the Surgeon, - Dr. S.N. Patel examined him and advised for USG. It is further the case of the complainant that the report of the USG came on 24/8/2011 and it was revealed that his Left kidney was maltreated with 14 mm stone and therefore he was advised to go to some higher center for operation but as complainant was unable to go there due to his financial condition, necessary medicines were prescribed by opponent Doctor. Thereafter, complainant has visited the opponent

hospital on 3/8/2011, 24/8/2011, 26/8/2011, 29/8/2011 and 2/9/2011 with unbearable pain and therefore, a special investigation I.V.P. (Intravenous Pyelography) was done and the report was suggestive of 14 mm stone with obstruction at P.U.J. (Pyelo-ureteric Junction) in left kidney and the right kidney was looking normal. It is further the case of the complainant that after necessary investigations he was taken for operation on 3/9/2011. It is further submitted by the complainant that the operation was performed for removal of the stone from the kidney but instead of stone, the Kidney was removed by Dr. Patel without any consent of her husband. It is further the case of the complainant that after the operation during post-operative period patient was not able to pass urine and therefore patient was taken to Dr. Shukla - a kidney specialist at Ahmedabad on 4/9/2011 by Dr. Patel. It is further the case of the complainant that Dr. Shukla advised for dialysis and as there was no facility of dialysis at his hospital, the patient was discharged and he was brought back to K.M.G. hospital. Thereafter, the patient and his relatives were explained to go to the kidney hospital at Nadiad. The patient was shifted in ambulance to Nadiad on 6/9/2011 but even there her husband's condition did not improve and therefore he was taken to H.L. Trivedi Hospital at Ahmedabad but during the period of treatment he eventually died on 8/1/2012 and therefore the complainant has filed Consumer

Complaint against the opponent for gross medical negligence and deficiency in service before the learned District Commission Nadiad.

- 3.** Being dissatisfied with the deficiency in service by the opponent, complainant has filed Consumer Complaint before the ld. District Commission Nadiad and prayed for Rs. 20,00,000/- with 12% interest including Rs. 3,00,000/- towards mental torture along with Rs. 10,000/- for cost of the complaint.
- 4.** After hearing learned advocates for both the parties and after considering the documents and evidences, the ld. District Commission partly allowed the complaint of the complainant.
- 5.** Being aggrieved by the impugned order of the ld. District Commission, Nadiad the original opponent no. 02 has filed the present appeal against the original complainant before this Commission on the ground stated in the appeal memo.
- 6.** Heard ld. Adv. Mr. M.K. Joshi for the appellant, ld. Adv. Mr. V.K. Bhatt for the respondent no. 01, ld. Adv. Mr. M.K. Joshi for respondent no. 02 and ld. Adv. Mr. Darshil Parikh on behalf of ld. Adv. Mr. V.P. Nanavaty for respondent no. 03 at length. Perused the record of the case, judgments submitted by respondent no. 01 and order of the ld. District Commission.
- 7.** First of all learned Advocate Mr. M.K. Joshi has appeared on behalf of the appellant and argued out that the learned District Commission ought to have appreciated that Dr. S.N. Patel had

performed the operation with informed consent and did Nephrectomy instead of Pyelolithotomy as in given circumstances it was in the best interest of the patient with the standard of reasonable medical care and therefore there is not negligence on the part of the surgeon. It is further argued out by learned Advocate Mr. Joshi that the learned District Commission has grossly erred in coming to the conclusion that the burden is upon the opponent Doctor/hospital to prove that he is not negligent in performing its duty. It is further submitted by ld. Adv. Mr. Joshi that the learned District Commission has also grossly erred in coming to the conclusion that the consent was not proper and doctor did not take reasonable medical care while performing the operation. Learned Advocate Mr. Joshi further contended that the learned District Commission ought to have appreciated that the complainant had not produced any expert evidence to prove the negligence of the operating doctor. It is further submitted by ld. Adv. Mr. Joshi that it is settled principle of law that without any expert evidence the negligence of the doctor cannot be proved and it cannot be said that the doctor was negligent without any expert evidence.

- 8.** It is further submitted by ld. Adv. Mr. Joshi that learned District Commission ought to have appreciated that the complainant had not lead any evidence to establish the negligence of the doctor. Learned Advocate Mr. Joshi further argued out that the learned District

Commission also ought to have appreciated that the complainant had not produced any evidence with regards to the compensation. Learned Advocate Mr. Joshi further contended that the learned District Commission erred in observing that the DLA (Deceased Life Assured) was a BPL card holder and there is no any single document has been produced which can establish that his income was Rs. 12,000/- per month and therefore amount of compensation awarded by learned District Commission cannot be sustainable. It is further submitted by learned Advocate Mr. Joshi that after operation, 04 months have been passed and thereafter complainant died on 08.01.2012 and there is no any evidence on record to prove that the DLA has visited the opponent no. 02 – K.M.G. General Hospital for taking dialysis facility.

**9.** Learned Advocate Mr. Joshi concluded that the order passed by the learned District Commission is not just and proper and therefore it should be quashed and set aside by allowing this appeal.

**10.** Upon service of the notice learned Advocate Mr. V.K. Bhatt has appeared on behalf of the respondent no. 01 and vehemently argued out that the DLA was having 14mm stone in his kidney and for that purpose he has admitted in K.M.G. Hospital and operation was performed by Dr. Shivubhai N. Patel but the whole kidney was removed from the body of the DLA instead of removing just the stone. It is further alleged by the learned Advocate Mr. Bhatt that

after operation during the post operative period; as urine flow was stopped to patient and resultantly he did not able to pass the urine, patient was taken to Dr. Shukla – a kidney specialist at Ahmedabad on 05.09.2011 by Dr. S.N. Patel but there was no facility of dialysis at his hospital, the patient was discharged and brought back to K.M.G. Hospital. It is further argued out by Id. Adv. Mr. Bhatt that the consent was taken just for removing of the stone from the kidney but there was no any consent was taken for removing the whole kidney from the body of the DLA.

**11.** It is further contended by Id. Adv. Mr. Bhatt that looking at the report of the K.M.G. hospital dated 02.09.2011, it appears that a stone has been found in the left kidney and the action to be taken on the basis of that report states that – *‘Pyelotithotomy Tomorrow’* and explaining the said word in detail, the Id. Adv. Mr. Bhatt argued out that the meaning of the said word is – *‘THE SURGICAL REMOVAL OF CALCULUS FROM THE PELVIS OF KEDNEY’* according to the Oxford Dictionary and therefore it can be easily presumed and established that the surgery was just for removal of the stone from the kidney but instead of removing the stone, the whole kidney was removed from the body of the DLA. It is further alleged by Id. Adv. Mr. Bhatt that after the operation of the left kidney, the right kidney also stopped working which seemed to be completely healthy according to the previous report and resultantly the urine outcome was totally

stopped due to the failure of the right kidney and subsequently the DLA was died on dated 08.01.2012.

**12.** Learned Advocate Mr. Bhatt concluded that the order passed by the learned District Commission is just and proper and therefore it should be confirmed by dismissing this appeal. In support of his arguments Ld. Adv. Mr. Bhatt has submitted following judgments:

- (I) S.L.P. (Civil) No. 25590/2014 (SC)
- (II) Civil Appeal no. 2641/2010 (SC)
- (III) F.A. No. 655/2003 (NC)

**13.** Upon service of the notice learned Advocate Mr. Darshil Parikh on behalf of ld. Adv. Mr. V.P. Nanavaty has appeared for the respondent no. 03 and vehemently argued out that opponent no. 02 – K.M.G. Hospital has taken policy for only legal liability and in the said policy insurance was covered for indoor and outdoor patients. Learned Advocate Mr. Parikh further argued out that legal liability of insurance is only liable whenever any legal liability arises by any accident occurred to the third party in the hospital but professional indemnity policy was not taken and therefore when complainant has filed compliant for medical negligence against the treating doctor of the said hospital, then opponent Insurance Company cannot be held liable for the payment under the said insurance policy. It is further argued out by learned Advocate Mr. Parikh that in the present case Dr. Ketan Shukla is not joined as a party even though the DLA has taken treatment from him and therefore which types of treatment

was given to the DLA is totally unknown in this case. It is further submitted by learned Advocate Mr. Parikh that the learned District Commission has wrongly awarded the higher side compensation though DLA was earning only Rs. 12000/- per month and he was also a BPL card holder.

**14.** Learned Advocate Mr. Parikh concluded that the order passed by the learned District Commission is not just and proper and therefore it should be quashed and set aside by allowing this appeal.

**15.** In the present case original opponent no. 01/respondent no. 02 – Dr. Shivubhai N. Patel has died on dated 17.08.2014 and therefore he was abated vide order dated 23.09.2021 in Appeal no. 1469 of 2013 and accordingly shown abated in this Appeal.

**16.** In the instant case it is the main contention of the complainant that opponent Doctor has removed kidney instead of removing stone from the kidney. A copy of consent letter is on record at page no. 42 wherein it has been mentioned that consent was given for the operation of “ପଥରୀକାଠି ଡିସନି”.

**17.** Learned Advocate Mr. Bhatt for the respondent no. 01 has drawn my attention to the report of Balasinor Hospital dated 02.09.2011 which is on record at page no. 43 wherein it appears that a stone has been found in the left kidney and on the basis of that report it has been decided that – ‘*Pyelotithotomy Tomorrow*’ and the meaning of the said word is – ‘*THE SURGICAL REMOVAL OF CALCULUS FROM*

*THE PELVIS OF KEDNEY* according to the Oxford Dictionary and therefore it can be easily presumed and established that the surgery was just for removal of the stone from the kidney and therefore report of the Balasinor Hospital it is clearly shows that the consent was only taken for the removal of the stone from the kidney and hence it is proved that without consent of patient/complainant kidney was removed by the opponent Doctor and therefore it is a clear case of medical negligence on the part of the opponent no. 01 Doctor and opponent no. 02 Hospital.

**18.** It is an averment of the opponent on. 03 – Insurance Company that the opponent no. 02 Hospital has taken insurance policy for the legal liability and therefore opponent no. 03 – Insurance Company is not at all liable for the payment of the medical negligence for the opponent Doctor i.e. employee of the opponent no. 02 Hospital.

**19.** I have carefully gone through the policy schedule which is on record at page no. 71 to 90 in Appeal no. 3296/2012 wherein it has been specifically shown that the policy was taken for legal liability for the indoor patients and outdoor patients of the hospital and therefore in the opinion of this Commission when policy was taken for the legal liability of the indoor and outdoor patients and not taken for professional Indemnity then medical negligence for the opponent no. 01 doctor i.e. employee of the opponent no. 02 – Hospital, Insurance Company cannot be held liable to make payment.

**20.**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.

**21.**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.”*

**22.**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.”*

**23.** 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.*

**24.** In view of the above observation of Hon'ble Apex Courts, in the instant case also when opponent no. 01 – Doctor is liable for the act of the medical negligence then opponent no. 02 - Hospital is also

vicariously liable for the act of opponent no. 01 – Doctor and therefore in the opinion of this Commission the order passed by the learned District Commission is not just and proper and it is required to be modified and hence following final order is passed.

### **ORDER**

**1.** The present Appeal is hereby dismissed and order passed by learned District Commission, Nadiad in C.C. no. 59/2012 on dated 27.08.2012 is modified.

**2.** In the order of learned District Commission, Nadiad in C.C. no. 59/2012 on dated 27.08.2012, Para-I of the final order is modified as under:

*“Opponent No. 02 – K.M.G. General Hospital is hereby ordered to pay Rs. 11,23,000/- (Rupees Eleven Lac Twenty Three Thousand Only), to the complainant with interest at the rate of 7.5% from the date of filing of the compliant till its realization and also ordered to pay Rs. 5000/- (Rupees Five Thousand Only) towards mental agony and cost of the complaint.”*

**3.** The rest of the order passed by the learned District Commission Nadiad in Para-II is hereby confirmed.

**4.** Opponent shall comply with this order within 60 days from the date of this order.

**5.** No order as to cost.

**6.** Appellant is directed to apply to the Account Department of the State Commission with all details of Appeal No.

1457/2013 and CMA no. 277/2013, Xerox copy of the receipt to withdraw the amount deposited in the State Commission. The office is hereby ordered to pay deposited amount with accrued interest on proper verification to the appellant by Account payee cheque and the cheque be handed over to the learned advocate for the appellant after obtaining receipt.

**7.** Registry is hereby instructed to send a copy of this order in PDF format by E-mail to learned District Commission Nadiad for taking necessary action.

**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 7<sup>th</sup> October, 2021.

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