

Details	DD	MM	YY
Date of disposal	26	07	2021
Date of filing	07	11	2014
Duration	19	08	06

BEFORE THE CONSUMER DISPUTES REDRESSAL COMMISSION
GUJARAT STATE, AHMEDABAD.

COURT NO: 04
Appeal No. 1499 of 2014

Babubhai Laxmanbhai Parmar,
Residing at Bhabhar,
Ta. Bhabhar, Dist. Banaskantha.

... Appellant

V/s.

1. Jivan jyot Charitable Trust,
Janta Hospital, Patan,
Ta. Patan, Dist. Patan,

2. Dr. Bharatbhai Vidhani,
Janta Hospital, Patan,
Ta. Dist. Patan.

...Respondents.

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

APPEARANCE: Mr. J.N. Tadpada, L.A. for the appellant.
Mr. M.M.Desai, L.A. for the respondents.

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, Patan on 09.09.2014 in Complaint No. 57 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. The facts given rise to the present appeal in a nutshell are as under: It is the case of the complainant that on date 01.12.2010 due to sudden abdominal pain of his daughter complainant had consulted Dr. B.J. Prajapati at Bhabhar and thereafter as per his advice; for the better treatment of his daughter complainant had approached Dr. Sunilbhai R. Prajapati at Patan where he has been informed by Dr. Prajapati that an appendix operation will have to be done and the cost will be higher and quite expensive. Therefore being a BPL card holder, complainant has thereafter approached Janta Hospital, Patan where BPL card beneficiary facility was available. It is further case of the complainant that in the Janta Hospital Dr. Bharatbhai Vidhani has examined the daughter of the complainant and said that an appendix operation would have to be done. It is further case of the complainant that after examining she was admitted in the Janta Hospital, Patan and appendix operation was performed by Dr. Bharat Vidhani on date 02.12.2010 the operation was started at 6:00pm and ended at 7:00pm on the same day. After the appendix surgery it has been informed by Dr. Vidhani that the operation was done well and he assured that the patient would regain consciousness in a short time. Even after a long period of time, the daughter of the complainant did not regain consciousness and thereafter at 7:45pm the opponent doctor has declared her dead.

3. It is further the case of the complainant that after all these events police complaint was lodged by the complainant at Patan city, B-division Police Station and also the panchnama has been prepared at 2:00pm on date 03.12.2010. Furthermore as per Inquest Report she was found to have three injuries on her right side of her abdomen and the pus was also found there. It is the submission of the complainant that opponent doctor has forcefully taken the thumb impression of his wife in the consent form though she is able to do sign. It is further submission of the complainant that operation was performed on the basis of the report of Dr. Prajapati and opponent doctor has not made any reports/investigation and resultantly complainant's daughter lost his life and it is the gross medical negligence of the opponent doctor and therefore complainant has filed Consumer Complaint before the learned District Commission, Patan.

4. Being dissatisfied with the gross medical negligence committed on the part of the opponent doctor; complainant has filed Consumer Complaint before the learned District Commission Patan and prayed for total monetary compensation of Rs. 5,00,000/- from the respondent and also Rs. 10,000/- towards mental stress and Rs. 15,000/- towards expenditure of the complaint.

- 5.** 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.
- 6.** Being aggrieved by the impugned order of the learned District Commission, Patan the original complainant has filed the present appeal against the original opponents before this Commission on the ground stated in the appeal memo.
- 7.** Heard learned Advocate Mr. J.N. Tadpada for the appellant and ld. Advocate Mr. Anand Parikh for the respondents at length. Perused the judgments submitted by appellant, record of the case and order of the learned District Commission.
- 8.** First of all learned Advocate for the appellant Mr. Talpada has argued out that this is a case of the Res Ipsa Loquitur and therefore looking to the principle of Res Ipsa Loquitur the order passed by the learned District Commission is not just and proper. It is further argued out by the ld. Advocate Mr. Talpada that in the case of the Res Ipsa Loquitur it is the responsibility of the opponent doctor to prove his innocence that there was no any negligence on his part but in the present case opponent doctor has not submitted any single evidence to defend his side. It is further submission of the learned Advocate for the appellant that the opponent doctor has not produced any medical case papers or any other details regarding the operation performed by him. Moreover, the opponent

doctor has not even informed that what type of anaesthesia was given to the patient i.e. complainant's daughter. It is further submitted by ld. Advocate Mr. Talpada that as opponent doctor has not provided any medical case papers, complainant has filed application before the learned District Commission for production of the relevant documents and thereafter though the learned District Commission has ordered for the production of the needed medical case papers, opponent doctor has not implemented the same which is clearly shows the deficiency in service on the part of the opponent doctor.

9. It is further submitted by the learned Advocate Mr. Talpada that the learned District Commission has relied upon the judgment of Hon'ble supreme Court in *Martin Desoza Vs. Mohmmad Isfaq* which is not just and reasonable and also the leaned District Commission has ought to have considered the judgment of Hon'ble Supreme Court in *V. Kishan Roa vs. Nikhil Super Speciality Hosptial* which was submitted before the learned District Commission. It is further argued out by the learned Advocate Mr. Talpada that the learned District Commission has distinguished the judgment of Hon'ble Supreme Court in the case of *Marin Disoza* (Supra) but on the other hand the ratio laid down in this case shall not be applicable in the present case and therefore the order passed by the learned District Commission is not just and proper. Learned Advocate Mr. Talpada

further submitted that as per the judgment of Hon'ble Supreme Court in V. Kishan Rao vs. Nikhil Super Speciality Hospital, as far as the principle of Res Ipsa Loquitur is concerned, it is the duty of the opponent doctor to prove that there is no any negligence has been committed on his part.

10. It is further argued out by the learned Advocate Mr. Talpada that as per Post Mortem report it was revealed that though it was a normal appendix operation, there were 03 injuries marked on the stomach which shows the serious medical negligence on the part of the opponent treating doctor but learned District Commission has erred in observing all these things. It is further submitted by the learned Advocate Mr. Talpada that the learned District Commission has also erred in observing that at the time of the operation complainant was present in the hospital and after death of his daughter though his wife is able to make a signature, opponent doctor has taken the thumb impression of his wife on the consent form.

11. Learned advocate for the appellant concluded that the judgment and order passed by learned District Commission Patan on dated 09.09.2014 in C.C. 57/2011 is erroneous, unjustified and also wrongly concluded after appreciation of evidence on record and therefore the said order needs to be quashed and set aside by allowing this appeal with further direction to make and pay cost of

the said appeal to the respondent with direction to pay compensation considering prayer clause and supported evidence. In support of his arguments learned Advocate Mr. Talpada has submitted following judgments wherein the Hon'ble Apex Court has observed as under:-

Civil Appeal No. 2641 of 2010 (SC): when negligence is evident the principle of Res Ipsa Loquitur operates and in such a case it is for respondent who has to prove that he has taken due care and there was no any negligence on his part.

I (2009) CPJ 32 (SC): Medical practitioner would be liable only where his conduct fell below that of standards of reasonably competent practitioner in his field.

12. Upon service of the notice learned Advocate Mr. Anand Parikh appeared for Ld.Adv.M.M.Desai for the respondents and vehemently argued out that the opponent doctor is a MS Surgeon and he has also taken all the needed due care and precaution at the time of performing operation. It is further submitted by learned Advocate Mr. Parikh that there are no any evidence produced by the complainant shows the medical negligence of the treating doctor. Learned Advocate Mr. Parikh further argued out that complainant's daughter died due to septicemia as she has been suffering from the said disease for last so many days and also the complainant had approached other doctors before consulting the treating doctor and till then the condition of the patient had become worsened.

13. Learned Advocate Mr. Parikh for the respondents concluded that the order passed by the learned District Commission is just and proper and it does not required any interference by this Commission and therefore the present appeal should be dismissed with heavy cost.

14. I have perused the record of this case. As per an averment of the complainant his daughter suffered from stomach pain on dated 01.12.2010 and opponent doctor has performed operation on date 02.12.2010 at 6:00pm and therefore nothing on the record which shows that she has been suffering from abdominal/stomach pain from last 07 days as alleged by the opponent doctor. Furthermore, the laboratory report and U.S.G. report of complainant's daughter dated 02.12.2010 is on record and both the reports were made as per the advice of Dr. Prajapati but as per record there is no any reports which were made by the opponent doctor before performing operation.

15. In the instant case it is the observation of the learned District Commission that complainant has not produced any evidence which shows that opponent doctor has committed negligence on his part and he has not performed his duty carefully. On the other hand, it is the submission of the appellant 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.

16. 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.

17. In M/s. Soni Hospital Vs. Arun Balkrishnan Aiyar, Madras High Court has observed that,

“In a case where 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 pursuance 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.”

18. 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 as under:

“45 *In the treatise 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 hypoxia 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."*

19. The operation note/case paper of the operating Dr. Bharat Vidhani and Anaesthetist Dr. Sanjay Rathod is on record wherein nothing mentioned that what happened in operation theatre at the time of performing operation. Furthermore, the medical history of the complainant's daughter written in both the papers are quite different from each other and the difference is spotted as under:

Pre operation

<u>Dr. Bharat Vidhani</u>	<u>Dr. Sanjay Rathod</u>
History of abdominal pain, compliant of vomiting, compliant of fever with chills = <u>03</u> days	History of abdominal pain, compliant of vomiting, compliant of fever with chills = <u>07</u> days.
Pulse <u>108</u> /min	Pulse <u>110</u> /min
BP : <u>90/60</u>	BP : <u>90/60</u>
SPO2 : <u>80%</u> without oxygen	SPO2 : <u>90%</u> without oxygen
Temperature : ↑	Temperature: <u>104°C</u>

Post operation

<u>Dr. Bharat Vidhani</u>	<u>Dr. Sanjay Rathod</u>
Pulse <u>110</u> /min	Pulse <u>120</u> /min
BP : <u>80/60</u>	BP : <u>80/50</u>
SPO2 : <u>80%</u> without oxygen	SPO2 : <u>90%</u> without oxygen

Furthermore, in the Anaesthetist note some irrelevant facts are also mentioned that is, "*Previously patient is asymptomatic before 07 days then patient have complaints of nausea, vomiting, abdominal pain then patient want to private hospital then after treatment patient go back to home. Before two days, patient drowsy severe abdominal pain with high grade fever with chill and rigor when patient came to Janta Hospital on examination, pts*

semiconscious ××× *respond to deep painful stimulus*". Normally this type of statement not mentioned in anaesthesia note/operating note but above statement of Anaesthetist note clearly established that the doctor is trying to escape from his liability.

20. In the instant case age of complainant's daughter is just 16 years and when complainant's daughter taken on operation table, at that time she was quite healthy. As noted in operation note/case paper of opponent hospital when she was admitted in the hospital, she felt vomiting and fever with chills and as noted, no past history of the similar abdominal pain has founded and as noted in case paper appendix was ruptured.

21. As per medical literature available on the website www.everydayhealth.com, the information about - **What Is a Ruptured Appendix? Causes, Treatment, and Complications** it has been stated as under:

"In most cases of peritonitis, a surgeon will remove your appendix immediately and clean the inside of your abdomen to prevent infection. Doctors sometimes try to treat the abscess or peritonitis with antibiotics and drainage before conducting an appendectomy. When an abscess is present, there's a higher complication rate with surgery, so your doctor may try to resolve the abscess first if possible. Treatments usually involve draining any pus from the abdomen and fighting the infection with strong antibiotics for several weeks. But some research suggests that immediately removing the ruptured appendix results in quicker recovery and fewer postoperative complications, particularly in children"

22. Looking to the above literature it is crystal clear that in the case of surgery of ruptured appendix it is the duty of the operating doctor to remove/drain pus from the abdomen area but in the instant case as per the inquest panchnama; pus is found at the right side of the stomach and therefore if operation was successfully completed then why pus is found at the right side of the stomach? that is a big question in this case.

23. As per record after completion of the operation complainant's daughter was found dead and therefore in the instant case the opponent doctor who has performed operation only knows that what was happened in the operation theatre because complainant is totally unaware about the facts which took place in the operation theatre.

24. In view of the aforesaid discussion this is a case of Res Ipsa Loquitur and therefore looking to the principle of Res Ipsa Loquitur and as observed by the Hon'ble Apex Court in various judgments it is the responsibility of the opponent doctor to prove his innocence that there was no any negligence on his part but in the present case opponent doctor has not submitted any single evidence to defend his side and therefore in the opinion of this Commission it is the gross medical negligence on the part of the opponent doctor.

25. As per record of this case complainant's daughter was just 16 years old at the time of death and she was studying in 10th

standard; and she had a whole future to look forward in life with all normal human aspirations. She died prematurely before she could start to understand the beauty and joys of life with all its ups and downs. The loss of human life ultimately at childhood can never be measured in terms of loss in earning or monetary loss alone. The emotional attachments involved to the loss of the child can have a devastating effect on the family which needs to be visualized and understood and therefore in the opinion of this Commission compensation must be granted with regard to future prospects.

26. Hon'ble Supreme Court in the case of *R.K. Malik vs. Kiran Pal* (2009) 14 SCC 1, considering grant of future prospects for the deceased child aged about 10 years and it was observed as follows:

"32. A forceful submission has been made by the learned counsel appearing for the appellant claimants that both the Tribunal as well as the High Court failed to consider the claims of the appellants with regard to the future prospects of the children. It has been submitted that the evidence with regard to the same has been ignored by the courts below.

33. On perusal of the evidence on record, we find merit in such submission that the courts below have overlooked that aspect of the matter while granting compensation. It is well-settled legal principle that in addition to awarding compensation for pecuniary losses, compensation must also be granted with regard to the future prospects of the children. It is incumbent upon the courts to consider the said aspect while awarding compensation..."

27. Hon'ble Supreme Court in the case of *New India Assurance Co. Ltd. Vs. Satender (2006) 13 SCC 60*, the uncertainties of a young life were noticed in the following terms :

"12. In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation."

28. Considering the above observation of the Hon'ble Apex Court in the opinion of this Commission if compensation of Rs. 4,00,000/- awarded to the complainant for the loss occurred to the family of the complainant due to death of his daughter then it would meet end of justice and hence the following final order is passed.

ORDER

- 1.** The present appeal is hereby partly allowed.
- 2.** The order passed by the learned District Commission, Patan dated 09.09.2014 rendered in C.C No. 57 of 2011 is hereby quashed and set aside.

- 3.** Opponent no. 01 & 02 are jointly and severally hereby ordered to pay compensation of Rs. 4,00,000/- (Rupees Four lakh only) to the complainant for showing gross medical negligence in performing operation with interest at the rate of 9% from the date of filing of the compliant till its realization.
- 4.** The opponent no. 01 & 02 are jointly and severally also ordered to pay Rs. 10,000/- (Rupees ten thousand only) to the present appellant/original complainant as costs of the complaint/appeal and shall bear its own cost if any.
- 5.** Opponent no. 01 & 02 are jointly and severally shall comply with this order within 60 days from the date of this order.
- 6.** Registry is hereby instructed to send a copy of this order in PDF format by E-mail to learned District Commission Patan for necessary action.
- 7.** Office is directed to forward a free of cost certified copy of this judgment and order to the respective parties.

Pronounce in the open Court today on 26th July, 2021.

[Dr. J.G.Mecwan]
Presiding Member