

DISTRICT CONSUMER DISPUTES REDRESSAL COMMISSION, HOOGHLY
CC OF 2021
PETITIONER
VERS
OPPOSITE PARTY

Complaint Case No. CC/199/2015
(Date of Filing : 16 Nov 2015)

1. Sri Babu Bardhan
2, Kapasdanga, Chawkbazar, Chinsurah.
Hooghly
West Bengal

.....Complainant(s)

Versus

1. Dr. Alope Roy Chaudhury
Chandannagar
Hooghly
West Bengal

.....Opp.Party(s)

BEFORE:

HON'BLE MR. JUSTICE Shri Sankar Kr. Ghosh PRESIDENT
HON'BLE MRS. Smt. Devi Sengupta MEMBER
HON'BLE MR. Sri Samaresh Kr. Mitra MEMBER

PRESENT:

Dated : 28 Apr 2021

Final Order / Judgement

This case of the complainant is that his daughter faced with an accident on 30th November, 2013 and due to such accident the left tibia of complainant's daughter was fractured and she became unable to walk and thereafter, she was hurriedly taken to the Imambara Sadar Hospital, Chinsurah, Hooghly on the same date and primary treatment of the minor daughter of the complainant was started before the said Hospital but during that time due to the non satisfactory result from the treatment of the said Hospital and being frustrated the complainant decided for better treatment of her minor daughter by the specialist doctor and being poor the complainant with a great expectation and hope visited with her minor daughter before the opposite party's chamber on 16.12.2013 and due to such inability for weight bear by the daughter of the complainant because the left leg tibia was fractured complainant came before the opposite party with a hope that being specialist doctor the opposite party would provide best care and treatment and service which could quickly cure his minor daughter and after examination of the minor daughter according to the advice of the opposite party the complainant being an illiterate person admitted her minor daughter at the "ANKUR" Bhadreswar Municipal Hospital on 18.12.2013 as because the opposite party was decided/ prescribed for plating and after doing such operation by the opposite party and

discharging the said minor girl of the complainant from the “ANKUR” Bhadreswar Municipal Hospital it would reveal from the discharge certificate of the “ANKUR” Bhadreswar Municipal Hospital which is mentioned in the case summary column as well as from the x-ray plate which reflecting the plating size which was operated by the opposite party was 6x4.5 mm was negligently operated by the opposite party and the said opposite party further decided for another operation and thereafter the complainant further admitted her minor daughter to the said “ANKUR” Bhadreswar Municipal Hospital on 29.12.2013 and subsequently from the discharge certificate it would further reveal that the opposite party operated the said injury of the complainant’s daughter on 30.12.2013 by replanting the plate i.e. 9x4.5 mm instead of 6x4.5 mm according to his own sweet will and after completion of the said operation by the opposite party for replanting on dt. 30.12.2013 and after discharging from the said “ANKUR” Bhadreswar Municipal Hospital on 1.1.2014 after a few days again started to discharge pus from the operated place i.e. the left leg of the minor girl and after giving such information by the complainant to the opposite party regarding the condition of the said minor girl, the opposite party advised to the complainant for weekly dressing of his minor daughter.

The complainant also states that the complainant without disregarding the opposite party’s advice and on good faith upon the opposite party’s diagnosis and treatment the complainant according to the opposite party’s advice brought her minor daughter for dressing to the opposite party’s chamber mentioned in the cause title and the complainant was in a hope and counting days that this time the opposite party’s treatment will be cured his daughter but all the hopes and efforts of the complainant was ended in smoke when the opposite party’s entire treatment process was not responding to cure the injury of the complainant’s minor daughter and when the complainant asked to the opposite party why his treatment is/ was not responding to cure his daughter the opposite party started to give his false pretext avoiding his negligence and during that treatment by the opposite party it was not only enhanced the problem but there was no possibility to come out from such acute problems of the minor girl and moreover, increases the problems day by day which was put the minor daughter in physical and mental injury and the opposite party being a specialist medical person it is expected standard of medical care during the treatment from the opposite party but it is very unfortunate all hopes were in vain when the pus started to discharge as because the prior suture was not proper that’s why pus was discharging from the operated place of the minor daughter but being a destitute father of the minor daughter he helplessly further relies upon the treatment of the opposite party and again admitted his daughter to the said “ANKUR” Bhadreswar Municipal Hospital on 11.02.2014 and the opposite party was further done secondary suture on 12.02.2014 and after such secondary suture/ stitch on 12.02.2014 the opposite party further operated the minor girl on 19.04.2014 and discharged the complainant’s daughter on 21.04.2014 from the said hospital and the complainant asked the opposite party how and when his daughter would be proper and normal and cure from such injury as because his minor daughter could not bear such a physical and mental pain as she is facing several operation done by the opposite party and when the complication of the complainant’s daughter reached to the apex suffering due to pains and further blood was coming from the operated place and the opposite party further advised for admission and accordingly the complainant finding no other option obediently admitted his daughter on 1.05.2014 and be it noted here that after removing the old plates by the opposite party it is seen that infection was spread over the injury/ operated place because there was absolutely absence of proper care and attention from the part of the opposite party and it was expected from the opposite party being a specialist doctor he would provide under the applicable standard of medical care and caution towards the patient and to supervise the medial care but the opposite party doctor breached his duty and standard of care by failing to properly supervise of the complainant’s daughter which resulted was spread over the injury/ operated place and the opposite party did not inform or conceal the said matter (infection) to the

complainant and due to such failure the opposite party referred the complaint on 6.07.2014 and it is very surprising that the opposite party then deliberately avoiding and discharge his liabilities in proper service soon referred the matter to Dr. Rajib Raman for further treatment.

The complainant also states that due to such negligent act and despite of several experimental operation by the opposite party the growth of the both bone of the complainant's daughter became slow for healing and after lapse of few days further started to discharge Seropurulous with a small breach in the skin and for which repeated dressings did not help in healing in where the standard of care was more required by the opposite party doctor and finding no other alternative and considering the serious condition of complainant's minor daughter the complainant started to arrange the money by a begging and then finally reached to the Christian Medical College, Vellore 4 and after consultation with the doctors of the Pediatric Orthopedics Unit of the said Christian Medical College, Vellore 4 admitted his daughter on 22.07.2014 and after prolonged tests and treatment the daughter of the complainant was discharged on 25.07.2014 and from the discharge summary of the Christian Medical College, Vellore 4 and from the opinion of the doctors it would be revealed that the said Priti Bardhan was preferred for diagnosis of INFECTED NON UNION LEFT TIBIA and from the history of his said discharge summary which also reflects in such a manner as follows 11 years Priti Bardhan brought by parents complaints of inability to weight bear and no healing unclear over the left leg for last 7months and the Christian Medical College, Vellore 4 provided best medical services towards the complainant's daughter and at the same time of the alleged medical malpractice by the opposite party acting in the scope of that doctor and patient relationship failed to follows the applicable standard of medical care during the treatment of the complainant's daughter which proximately resulted in physical injury to the complainant's minor daughter and said Priti Bardhan still under the treatment/ supervision of the said Christian Medical College, Vellore 4 and as a direct and proximate result of the breach of the applicable standard of medical care by the opposite party the complainant's daughter facing like (i) suffered conscious pain and suffering both in the part and it is expected by her physicians the future (ii) incurred medical expenses in the past and will incur future medical expenses (iii) suffered mental and emotional sorrow and anguish (iv) suffered permanent physical injuries and disfigurement and (v) was required to undergo additional medical procedure and has sustained other damages and all of the injuries and damages sustained by the complainant's daughter were the direct and proximate result of the negligent actions and breaches of the applicable standards of medical care by the opposite party and the cause of action of this case arose on 16.12.2013, 18.12.2013, 29.12.2013, 30.12.2013, 01.01.2014, 12.02.2014, 19.04.2014, 21.04.2014, 01.05.2014, 06.07.2014 and continuously therein.

Complainant filed the complaint petition praying directions upon the opposite party to pay sum of Rs.10,00,000/- which was expensed by the complainant for the treatment of her minor daughter and to pay sum of Rs. 10,000/- for mental agony and harassment and to give any other relief or reliefs as deem fit and proper.

The opposite party contested the case by filing written version denying inter-alia all the material allegations as leveled against him. This opposite party submits that the above named patient was brought to him on 16.12.2013 with a fracture of both bones of her left leg and after examining her and the x-ray he decided this would be treated by operating stabilizing the fracture with a plate and this was explained to the accompanying adults and they agreed and thus she was admitted on 18.12.2013 at "Ankur", Telinipara, Bhadreswar and the procedure was explained to the adult person/ persons present as also the possible complications that may arise and the consent form that was duly explained to the Guardian who has signed therein did also give the necessary information and after going through the relevant tests the operation was performed by him on

19.12.2013 with due care and caution maintaining all sorts of established medical norms and practice and even then, the subsequent X-ray revealed that the position of the plate has shifted and this was duly communicated to her guardians immediately after explaining the pros and cons once more and they were told that a few days should be allowed for the soft tissue to heal and thereafter the fracture needed re-fixing to correct the deformity and the second operation was performed accordingly on 30.12.2013 and her post of recovery was uneventful but the skin healing was incomplete and need a secondary suture, put on 12.02.14 and the wound healed and remained dry and the sutures were removed on 26.03.14 and the wound healed and remained dry. Discharge started after a few days, when she came to the clinic on 04.04.14 and as there was clinical and radiological healing, the implants were removed on 21.04.14 as they were acting as foreign body making the infection difficult to get rid of and this is also a standard method of treatment and it is unfortunate that there was infection at the fracture/operation site but these complications, though rare, do occur at times and in spite of all possible precautions the Standard treatment under this situation too is regular dressing and medications as Necessary and he was away in June but she had regular dressing of the wound but the healing was slow and When he saw her again in July, there was discharge from it again, the wound hadn't healed and the bone ends were protruding from the wound and at this stage, while the expected improvement could not be achieved in spite of his honest effort, there arose a possibility that she will need multi-disciplinary approach and probably Plastic and reconstructive surgery would be needed and I told the patient party that since there is no such help available in the local set up, he would refer her to Medical College, Kolkata where such facilities are available and they agreed and he referred her to Dr. Rajiv Raman, a Consultant Orthopedic Surgeon and he explained the clinical condition briefly to Dr. Raman in his referral Letter dated 06/07/2014 and all the papers and X-Ray Plates were with the patient/relatives and it is thus untrue that due information was not provided and again this was done after explaining properly to the guardians/relatives and with their approval there was no question of hurriedly referring the patient, as is now being alleged now and he believed that she was admitted on the same day under care of Dr. Rajiv Raman in Medical College but he did not have any knowledge regarding her being taken to C.M.C. Vellore and that is why, he would not be able comment anything on the same.

The opposite party also states that it is surprising on his part to note one comment in Discharge Summary of C.M.C. Vellore to the effect that "she was made to walk without support" and he do not know where did the doctor get that information from he did never advise her to do so and in fact every time he saw her in the clinic she was carried into and was placed on the examination couch and if she did walk without support, it was not with his consent/permission and it was reported to Vellore as a medical advice on his part then it was plainly a false reporting and in this situation, there can be no question of his being negligent and he treated her with all due care and these complications as he have said before are rare but not unheard of and at all stages he kept the guardians/relatives properly and adequately informed and he firmly state that the allegations of negligence are unjust and untrue and in support of his above statement regarding incidence of infection he quote, from information in the interest as published by Medscape and also to mention the possible risk factor and acceptable line of treatment he quote from Ortho Info-Patient Information Literature by asso.org and one more point requires to be mentioned here that he had always kept it in his mind that the financial condition of the family was not sound and he had always taken this into consideration and that was a reason to refer the patient to the Medical College, Kolkata and not to any private medical set up, though it is not easy to find a bed in Medical Colleges and that is why he had to take some trouble to facilitate this and furthermore, though this he have on many occasions waived his professional fees to ease off their financial burden and thus the medial services rendered by him towards the Complainant should not be

termed, at any rate, with any negligence on his part on the contrary he observed his task with sufficient reasonable possible degree of skill, knowledge and experience on his part with the best possible degree of care and caution maintaining all sorts of medical ethics and from the facts and from the facts and circumstances involved in this case as have been submitted in detail herein before and he hope that it would surely be realized by the learned Forum that the misfortune happened to the Complainant never resulted by any negligence, deficiency in service or any sort of inefficient performance on his part and in spite of the aforesaid position the Complainant however served a Legal Notice dated 03/09/2015 upon him through his learned Advocate and on receipt of the same he had to give a proper reply to the same through his learned advocate and therefore a fit case on the part of the complainant or the Ld. Forum (if so think) requiring the assistance of opinion of any expert Orthopedic Surgeon or any Medical authority to ascertain the position as to whether there was actually ever any sort of deficiency in service or negligence on his part as have been alleged and he prays for dismissal of the present case.

The complainant filed evidence on affidavit which is nothing but replica of complaint petition and supports the averments of the complainant in the complaint petition and denial of the written version of the opposite parties.

The complainant filed interrogatories and the opposite party filed reply.

The answering opposite parties filed evidence on affidavit which transpires the averments of the written version.

Complainant and opposite parties filed written notes of argument. The evidence on affidavit, interrogatories followed by reply and written notes of argument of both sides are taken into consideration for passing final order.

Argument as advanced by the agents of the complainant and the opposite parties heard in full.

From the discussion herein above, we find the following issues/points for consideration.

ISSUES/POINTS FOR CONSIDERATION

- 1). Whether the Complainant Sri Babu Bardhan is a 'Consumer' of the opposite party?
- 2). Whether this Forum has territorial/pecuniary jurisdiction to entertain and try the case?
- 3). Whether the opposite parties carried on unfair trade practice/rendered any deficiency in service towards the Complainant?
- 4). Whether the complainant proved his case against the opposite party, as alleged and whether the opposite party is liable for compensation to him?

DECISION WITH REASONS

In the light of discussions here in above we find that the issues/points should be decided based on the above perspectives.

(1).Whether the Complainant Babu Bardhan is a ‘Consumer’ of the opposite party?

From the materials on record it is transparent that the Complainant is a “Consumer” as provided by the spirit of section 2(1)(d)(ii) of the Consumer Protection Act,1986. The complainant herein is the consumer of the opposite party, as the complainant being the guardian of the patient of the opposite party doctor approached for treatment by paying fees and received treatment by taking admission before the Nursing Home prescribed by the opposite party, so he is entitled to get service from the opposite party as a beneficiary.

(2).Whether this Forum has territorial/pecuniary jurisdiction to entertain and try the case?

Both the complainant and opposite parties are residents/having office address within the district of Hooghly. The complaint valued Rs.10,00,000/- as complainant prayed for a direction upon the opposite party Rs.10,00,000/- as compensation and a direction upon opposite party to pay a sum of Rs.10,000/- for expenses incurred as cost of litigation and any other reliefs ad valorem which is within Rs.20,00,000/-limit of this Forum. So, this Forum has territorial/pecuniary jurisdiction to entertain and try the case.

(3).Whether the opposite party carried on Unfair Trade Practice/rendered any deficiency in service towards the Complainant?

The complainant in his argument averred that on 30.11.2013 his daughter Priti Bardhan met with an accident and she was taken to Imambara Sadar Hospital at Chinsurah and the treating doctor advised her for x-ray which transpires that Priti Bardhan severally injured with left leg tibia and fibula fracture. Subsequently, the complainant for the better treatment for her minor daughter approached the opposite party doctor at “Amantran”, Pal Para road, Chandannagore, Hooghly. According to this complainant, the opposite party is a specialist, knowledgeable and experienced doctor. Opposite party doctor on his turn advised for operation of the said injury for implantation or fixing of foreign body into the said fracture bone. Accordingly, the complainant admitted her minor daughter at “Ankur”, Bhadreswar Municipal Hospital on 18.12.2013 as per advice of the opposite party doctor. The aforesaid operation was done by the opposite party doctor on 19.12.2013. From the discharge summary it revealed that 8 whole metal 6x4.5 mm AO Screw was

operated into the said fracture and the patient was discharged on 22.12.2013. According to this complainant the opposite party doctor failed to perform his duty as the said implantation or fixing metal body was improper and negligently done and there was absolutely absent of proper degree of care and precautionary measures by opposite party doctor. After that the opposite party doctor advised the patient to admit on 29.12.2013 and further operated on 30.12.2013. In the second operation the opposite party doctor implanted another plate measuring about 8 whole 7x4.5 mm replacing the previous plate. Thereafter as per advice of the opposite party doctor visited the opposite party on 4.1.2014, 6.1.2014, 10.1.2014, 17.1.2014, 20.1.2014 and 27.1.2014. The complainant was disappointed and anxious when he heard that opposite party doctor further advised for admission of her minor daughter before the said hospital. It is clearly mentioned secondary suture clearly uncovered that truth of negligence for not to provide proper degree of care by opposite party doctor during the time of operation on 19.12.2013 and on 26.3.2014. Then the opposite party doctor advised the complainant to bring his daughter after 2 months later and during that time the complainant's daughter reached to the apex suffering from pains and further blood was oozing from operated place. Then the complainant hurriedly contacted with opposite party doctor and further advised the complainant for admission before the Ankur Hospital, Bhadreswar. The opposite party Doctor further operated and removed the foreign body fixed before the left leg tibia due to infection started to spread over the entire left leg and daughter of the complainant was completely unable to walk. The opposite party doctor had not removed the said plate rather on 23.4.2014 further blood was started to come out and the complainant further informed the opposite party doctor and the doctor methodically advised to admit before the Ankur Hospital, Bhadreswar. As per discharge certificate the opposite party doctor finally removed the old plate i.e. left tibia due to infection started to spread throughout the left leg on 4.5.2014. After removing the old plate by the opposite party, the infection spread over the injury/ operated place as because repeated operation on wounded place increased risk factor. Later on the complainant asked the opposite party doctor about his daughter's recovery and also informed his financial condition but no satisfactory answer was given by the opposite party doctor. According to this complainant, due to negligent act of the opposite party doctor and due to several experimental operation the growth of the both bone became slow for healing and after a lapse of a few days started to discharge Seropurulous with a small breach in the scheme and formal and insincere repeated dressings by the opposite party doctor was not helped for healing the scars and needless to say that there was absolute standard care and precautions were required. In the circumstances the opposite party doctor went abroad and after a lapse of 2 months returning from abroad the complainant met with the opposite party doctor and stated about his daughter regarding non healing scars and pain. At that time the opposite party doctor dramatically wrote a letter to doctor Raman on 6.7.2014 in which the opposite party doctor admitted his failure of treatment. The said Dr. Raman being a specialist of plastic surgery after observing the scars of complainants daughter refused to treat his daughter and advised to search for better set up .

Finding no other alternative and considering the serious condition of complainant's minor daughter finally reached to the Christian Medical College, Vellore 4 and after consultation with the doctors of the Pediatric Orthopedics Unit of the said Christian Medical College, Vellore 4 admitted his daughter on 22.07.2014 and after prolonged tests and treatment the daughter of the complainant was discharged on 25.07.2014 and from the discharge summary of the Christian Medical College, Vellore 4 and from the opinion of the doctors it would be revealed that the said Priti Bardhan was preferred for diagnosis of INFECTED NON UNION LEFT TIBIA and from the history of his said discharge summary which also reflects in such a manner as follows 11 years Priti Bardhan brought by parents complaints of inability to weight bear and no healing unclear over the left leg for last 7 months and the Christian Medical College, Vellore 4 provided best medical services towards the complainant's daughter and at the same time of the alleged medical

malpractice by the opposite party acting in the scope of that doctor and patient relationship failed to follow the applicable standard of medical care during the treatment of the complainant's daughter which proximately resulted in physical injury to the complainant's minor daughter and said Priti Bardhan still under the treatment/ supervision of the said Christian Medical College, Vellore and as a direct and proximate result of the breach of the applicable standard of medical care by the opposite party the complainant's daughter facing like (i) suffered conscious pain and suffering both in the past and it is expected by her physicians the future (ii) incurred medical expenses in the past and will incur future medical expenses (iii) suffered mental and emotional sorrow and anguish (iv) suffered permanent physical injuries and disfigurement and (v) was required to undergo additional medical procedure and has sustained other damages and all of the injuries and damages sustained by the complainant's daughter were the direct and proximate result of the negligent actions and breaches of the applicable standards of medical care by the opposite party.

The opposite party in his written notes of argument stated that the patient Priti Bardhan was brought to the opposite party on 16.12.2013 with fracture of both bones of her leg. After examining the patient and the x-ray the opposite party decided that the left tibia should be treated by operation, stabilizing the fracture with a plate and admitted the patient on 18.12.2013 at Ankur at Telenipara, Bhadreswar. The procedure was explained to the adult persons present, as also the possible complications that may arise. The concerned form was duly explained to the guardian who has signed therein. Operation was performed by the opposite party on 19.12.2013 with due care and caution mentioning all sorts of established medical norms after going through the relevant tests. Subsequent x-ray revealed that the position of the plate has shifted and it was communicated to the guardians and also told that second operation would be necessary and a few days should be allowed for the soft tissue to heal and thereafter the fracture would be refixed to correct the deformity. Second operation was performed on 30.12.2013 the post operative recovery was uneventful. But the skin healing was incomplete and needed a secondary suture which was put on 12.2.2014. The wound heal and remain dry. The sutures were removed on 26.3.2014 and the wound heal. Discharge started after a few days when she came to opposite party's clinic on 4.4.2014. As there clinical and radiological healing the implants were removed on 21.4.2014 as they were acting as foreign body making the infection difficult to get rid of. It is unfortunate that there was infection at the fracture/ operation site but these complications though rare occur at time and inspite of all possible precautions. The standard treatment under the situation is regular dressing and medications as necessary. She had regular dressing of the wound. But the healing was slow. When the opposite party saw her again in July there was discharge from it again. The wound had not heal and the bone ends were protruding the wounds. The opposite party also averred that at this stage while the expected improvement could not be achieved inspite of opposite party's honest effort there arose up possibility that she will need multidisciplinary approach. Probably plastic and reconstructive surgery would be needed. The opposite party told the patient party that since there is no such help available in the local set up so she was referred to Medical College Kolkata where such facilities are available. As the patient party agreed so the opposite party referred her to Dr. Rajib Raman, a consultant orthopedic surgeon. The opposite party explained the clinical condition briefly to Dr. Raman in his referral letter dt.6.7.2014. All the papers and x-ray plates were with the patient/relatives. It was believed that she was admitted on the same day under care of Dr. Rajib Raman in medical college but opposite party had no information to the same. Opposite Party claims that he treated the patient with best of his knowledge and ability. At no point he was never negligent and careless as have been alleged by the complainant. There is no example/evidence of any negligence on his part in any of the records of the treatment. The opposite party was surprised to note one comment in the discharge summary of CMC Vellore to that effect that "she was made to walk without support". The opposite party

has failed to understand as to where did the Doctor of CMC, Vellore get that information. Opposite Party never advised her to do so. In fact, every time the opposite party seen her in the clinic, she was carried into and was placed on the examination couch. The opposite party has quoted and submitted an information from internet as published by Medscape and also mentioned the possible risk factor and acceptable line of treatment from ortho info-patient information literature by AAOS.org. The opposite party further stated that considering the financial condition of patient's family the opposite party referred the patient to the medical college, Kolkata and not to any private medical set up. Thus, the medical services rendered by the opposite party towards the complainant should not be termed at any rate with any negligence on his part. On the contrary the opposite party has observed his task with sufficient reasonable possible degree of skill, knowledge and experience with the best possible degree of care and caution maintaining all sorts of medical ethics. In response to Advocate letter dt. 3.9.2015 the opposite party replied in details by his Ld. Advocate Binota Roy. The opposite party doctor also assailed that there can never be question of any sweet will of the opposite party doctor in making any sort of operation as alleged but the operation had to be done for the need of betterment of the patient's condition and that was also discussed with the parent of the patient in details. Rather the opposite party denied the allegations leveled against him that due to negligent act and several experimental operation done by the opposite party but the operation was done neither as per standard mode of treatment nor as experimental. The patient was admitted at Medical College, Vellore on 22.7.2014 and discharged on 25.7.2014, the question is whether the said authority has ever confirmed about any negligence on the part of the opposite party doctor within the four corners of any document. But the answer is "no". The discharge summary of Christian Medical College and from opinion of doctors revealed that he preferred for diagnosis of infected non union of left tibia - no healing for last seven months. The petition of complaint to the effect that due to lack of applicable standard medical care, resulting in physical injury to the daughter the question is that whether any point of time any of the medical practitioner who saw/ treated the patient has/ have ever suggested about any sort of negligence on the part of the present opposite party doctor ? The answer is again "no". The opposite party further alleged that to establish the allegation by the complainant he has simply filed his evidence in chief but he has failed to requisition for any expert medical opinion inspite of making a suggestion on the part of the opposite party. The opposite party also stated that before forming an opinion expert evidence is necessary, the fora under the Act must come to a conclusion that the case is complicated enough to require the opinion of an expert for that the facts of the case are such that it cannot be resolved by the members of the fora without the assistance of expert opinion. By referring the judgment the opposite party averred that, it is also held that in the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and a doctor is not negligent merely because his conclusion differs from that of other professional men. It was also made clear that the true test for establishing negligence in diagnosis of treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty if acting with ordinary care.

To make clear of the matter in question without having any ambiguity the Hon'ble Apex Court has been kind enough to give the glaring examples of cases where no expert's opinion need be taken. Lastly, the opposite party stated that at any rate it may further be drawn the notice of the Ld. Forum that whether allegation has made by the complainant against the opposite party Dr. Alok Roy Choudhury the same should have been supported by any medical expert's report but the complainant has failed to substantiate his allegation by inviting any such opinion from any authority or concern by way of producing any evidence or production of any medical journal.

It appears from the letter dated 06.07.2014 of the opposite party that the opposite party doctor through the impugned letter referred the patient to doctor Raman stating that the poor girl is

suffering from mid December, 2013 and she sustained a fracture Tibia which he had to fix with a plate on 19.12.2013. Unfortunately, the placement changed/ was not ideal and had a re-do on 30.12.2013. There was incomplete skin healing; secondary suture was put in on 12.2.2014. The wound healed and remain dry, sutures were removed on 26.3.2014. Implants were removed on 21.4.2014. The wound was healing albeit rather slowly. But after about two weeks she had some oozing from the wound which responded to regular dressings. Again in about two weeks she started having Seropurulous discharge with a small breach in the skin. Repeated dressings did not help healing. He was away in the month of June but she had regular change of dressings as needed and the wound was dry on his return he saw her and now she has a bony end projecting through the small gap in the skin. He also stated that he is afraid of the health of the skin is low and might need some form of skin cover, this will not be available in the set up here. The families much constrained financially, he did help her as far as he could but as there is probable necessity of plastic/ reconstructive surgery it would be very difficult here. So, he hopes that he will be able to take her in under his care and do the needful.

The Advocate letter dt. 25.09.2015 of Advocate Binota Roy on behalf of the opposite party speaks that it is unfortunate that infection had occurred at the fracture/ operation site despite due diligence, care and caution and also stated that the decision to remove the plate and the screws was taken by her client (the doctor) since the attempt to control the infection failed. She also stated that the expected improvement could not be achieved inspite of honest effort of her client. Probably plastic and reconstructive surgery would be needed so the opposite party doctor referred the patient to medical college, Kolkata where such facilities are available. Her client (opposite party doctor) referred the patient to Dr. Rajiv Raman a consultant orthopedic surgeon and communicated to the guardians/ relatives of the patient. It is also stated in the said letter that the opposite party doctor referred the patient to Dr. Rajib Raman a consultant orthopedic surgeon after explaining properly to the guardians/ relatives of the patient and also explained the clinical condition briefly in the letter addressed to Dr. Rajib Raman and it is pertinent to mention that all the papers and x-ray plates were with the patient/ relatives and it is also stated that the opposites party doctor has no knowledge as regards the patient being taken to Christian Medical College, Vellore as the patient party did not contact any further to the opposite party. It is also stated in the said letter that the patient herein was receiving proper medical treatment as per the standard protocol until when she had suffered from complication post surgery, a situation beyond control of treating doctor.

It appears from the discharge summary dt. 25.07.2014 of CMC Vellore in the column diagnosis it is written INFECTED NON UNION LEFT TIBIA and in the column history it is also stated that 11 years Priti Bardhan brought by parent's complaints of inability to weight bear and no healing ulcer over the left leg for last seven months. She gives history of closed fracture left tibia following RTA 7 months ago. She was printed with POP for 15 days after which she underwent ORIF with plate. Post op 15 day there was wound gaping and pus discharge for which re-suturing was done and regular dressing was done for 1 month. At 3rd month implant exist was done and made to walk without support from then she develop persistent pass discharge and non healing sinus. No other medical co morbidities. The medical report (annexure-x) of CMC Vellore speaks that 14 years Priti Bardhan is an operated follow up case of infected non union left tibia, she sustained a closed fature left tibia following RTA 4 years back; underwent ORIF with plate which got infected. In CMC Vellore she underwent excision of non union left tibia and Ilizarov ring application on 23.7.2014. Left proximal tibial corticotomy done on 31.7.2014 and bone transport was done. The Ilizarov frame was removed on 2.7.2015. The investigation states that x-ray left leg show completely united tibia with no evidence of active infection.

After perusing the written version, evidence on affidavit, interrogatories followed by reply and written notes of argument it appears that the daughter of the complainant met with an accident and her leg was severely injured as a result she received treatment from the opposite party doctor. The treating doctor i.e. the opposite party twice operated left tibia of the patient & implanted plates but the healing of the patient was not satisfactory. The opposite party doctor also removed the plate to prevent the infection. But could not control the infection as pass was oozing out from the infected portion. Then the opposite party referred the patient to a plastic surgeon namely Dr. Raman who on his turn refused to treat the patient. Getting no alternative the patient was admitted to CMC, Vellore after getting the treatment of CMC, Vellore the patient recovered from her injury. The discharge summary of Christian Medical College and from opinion of doctors revealed that he preferred for diagnosis of infected non union of left tibia - no healing for last seven months. Then the guardian of the patient approached the Forum alleging that the opposite party doctor was negligent in treating the patient as a result the patient suffered a lot and preferred the recourse of this Forum praying directions as incorporated in the prayer portion of the complainant petition. During the period of argument the Ld. Advocate of the opposite party assailed that for the proper adjudication of the complainant case the complainant should invoke the expert opinion. But the complainant failed to invoke the report of expert opinion in course of treatment. However this commission after perusing the documents and hearing the argument is in the view that opposite party doctor failed to take appropriate post operative measure for which the union of the left tibia is not complete. And after removing the plate the fractured portion became bend so the patient could not stand after a considerable period of operation. The infection persists for more than 7 months from the date of operation. It is the common phenomena to look after the orthopedic patient in post operative period cautiously as there is every possibility to arise many complications at that stage. Non union of Tibia after operating twice is a rare case. The opposite party doctor admitted the non union of Tibia, prevailing infection and healing is not satisfactory in his written version, forwarding letter and advocate reply. Now it is to be adjudicated by this commission whether the opposite party doctor performed the impugned operation successfully or negligently. From the above discussion this commission is in the view that the opposite party doctor could not perform the said operations successfully rather his act or omission caused tremendous suffering of the patient. Chiefly the opposite party doctor failed to provide post operative care/guidance for which the daughter of the complainant suffered a lot. As the opposite party doctor failed to provide appropriate treatment so the complainant has to seek the treatment from CMC Vellore to cure his ailing daughter. Apart from the report of expert opinion it is crystal clear that the daughter of the complainant i.e. the patient Priti Bardhan suffered at the behest of negligence on the part of opposite party doctor. So we may safely conclude that the opposite party committed medical negligence for which the daughter of the complainant suffered immense pain and suffering for a prolonged period.

Hon'ble Apex Court in civil appeal no. 2641 of 2010 between V. Kishan Rao –vs- Nikhil Super Specialty Hospital & another, it has been observed in para 13 of the judgement that “in the opinion of the court, before forming an opinion that expert evidence is necessary, the Fora under the Act must come to a conclusion that the case is complicated enough to require the opinion of an expert or that the facts of the case are such that it cannot be resolved by the members of the Fora without the assistance of expert opinion. This Court makes it clear that in these matters no mechanical approach can be followed by this Fora. Each case has to be judged on its own facts. If a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence in that event the efficacy of the remedy provided under this Act will be unnecessarily

burden and in many cases such remedy could be illusory.” In para 18 of the above judgement it is also held that in the realm of diagnosis and treatment there is ample scope of genuine difference of opinion and a doctor is not negligence merely because his conclusion differs from that of other professional men. It is also made clear that the true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care. Hon’ble Apex Court in the said judgement observed that; there may be cases which do not raise some complicated questions and the deficiency in service may be due to obvious false which can be easily established. Such as:- removal of wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out-patient card containing the warning or use of wrong gas during the course of an anesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. The issues arising in the complaints in such cases can be speedily disposed off by the procedure i.e. being followed by the Consumer Disputes Redressal Agencies.

From the case record it is clear that no expert opinion called for or received by this Forum in respect of treatment adopted by the opposite party doctor. For proper adjudication of medical negligence case it is very much essential to get the report of expert opinion held by the Hon’ble Apex court and other Forums. Hon’ble Supreme court of India in Malay Kumar Ganguly’s case,(2009) 9 SCC 221, underlying that the medical science is a complex subject and assistance of expert in appreciating the course of treatment is most warranted. A professional may held liable for negligence on one of the two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence. *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to the negligence. Thus for civil liability it may be enough for the complainant to prove that the doctor did not exercise reasonable care in accordance with the principles mentioned above.

It is well known that a doctor owes a duty of care to his patient. This duty can neither be contractual duty or duty arising out of tort law. In some cases, however, though a doctor patient relationship is not established the courts have imposed a duty upon the doctor. In the words of the Supreme Court every doctor at the government hospital or elsewhere, has a professional obligation to extend his services with due expertise for protecting life (Parmanand Kataria vs. Union of India).

The duty owed by a doctor towards his patient, in the words of the Supreme Court is to bring to his task a reasonable degree of skill and knowledge and to exercise a reasonable degree of care (Laxman vs. Trimback).The doctor in other words does not have to adhere to the highest or sink to the lowest degree of care and competence in the light of the circumstance. A doctor therefore does not have to ensure that every patient who comes to him is cured. He has to only ensure that he confers a reasonable degree of care and competence. Reasonable degree of care and skill means that the degree of care and competence that an ordinary competent member of the profession who professes to have skills would exercise in the circumstance in question. At this stage it may be necessary to note the distinction between the standard of care and the degree of

care. The standard of care is a constant and remains the same in all cases. It is the requirement that the conduct of the doctor be reasonable and need not necessarily conform to the highest degree of care or the lowest degree of care possible. The degree of care is variable and depends on the circumstance.

The liability of a doctor arises not when the patient has suffered any injury, but when the injury has resulted due to the conduct of the doctor which has been fallen below that of reasonable care. In other words the doctor is not liable for every injury suffered by a patient. He is liable for only those that are a consequence of a breach of his duty. Hence once the existence of a duty has been established the plaintiff/petitioner must still prove the breach of duty and the causation. In case there is no breach or the breach did not cause the damage the doctor will not be liable. In order to show the breach of duty, the burden on the plaintiff would be to first show what is considered as reasonable under those circumstances and then that the conduct of the doctor was below this degree. Normally the liability arises only when the plaintiff/petitioner is able to discharge the burden on him of proving negligence. However in some cases like a swab left over the abdomen of a patient or the leg amputated instead of being put in a cast to treat the fracture, the principle of 'res ipsa loquitur' (meaning thereby the thing speaks for itself) might come into play. The necessary conditions of the principle are: 1. Complete control rests with the doctor. 2. It is the general experience of mankind that the accident in question does not happen without negligence. This principle is often misunderstood as a rule of evidence which is not. It is a principle in the law of torts. When this principle is applied the burden is on the doctor/defendant to explain how the incident could have occurred without negligence.

According to the Supreme Court, cases both civil and criminal as well as Consumer forum are often filed against medical practitioners and hospitals complaining of medical negligence against doctors, hospitals or nursing homes, hence the latter would naturally like to know about their liability. The general principles on this subject have been lucidly and elaborately explained in the three Judge bench decisions of this court in *Jacob Mathews vs. State of Punjab and Anr.* (2005) 6 SCC 1. However difficulties arise in the application of those general principles to specific cases. For instance in para 41 of the decision it was observed that, "The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence is what the law requires". Now what is reasonable and what is unreasonable is a matter on which even experts may disagree. Also they may disagree on what is a high level of care and what is a low level of care.

The law like medicines is an inexact science. One cannot predict with certainty an outcome in many cases. It depends on the particular facts and circumstances of the case and also the personal notions of the judge who is hearing the case. However the broad and general legal principles relating to medical negligence need to be understood. Before dealing with these principles two things have to be kept in mind. Judges are not experts in medical science, rather they are laymen. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover judges usually have to rely on the testimonies of other doctors, which may not be objective in all cases. Since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand for a judge, particularly in complicated medical matters and a balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgement but if they are punished for this no doctor

can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and are no good for society. They inhibit the free exercise of judgment by a professional in a particular situation.

From the above discussion we may hold that the opposite party failed to provide appropriate treatment to the impugned patient i.e. the daughter of the complainant as a result the complainant suffered pain, injury for a prolonged period at the cause of opposite party. The complainant visited several times to the opposite party doctor for curing the illness of his daughter but due to negligence on the part of the opposite party the complainant suffered a lot and lastly she saved her life by the treatment of CMC Vellore for which he is entitled to get compensation along with money expended for the treatment of her daughter and litigation cost.

4). Whether the complainant proved his case against the opposite party, as alleged and whether the opposite party is liable for compensation to him?

The discussion made herein before, we have no hesitation to come in a conclusion that the Complainant abled to prove the medical negligence of the opposite party doctor in respect of treatment of the daughter of the complainant so the complaint petition is deserved to be allowed with cost and compensation.

ORDER

Hence, **ordered** that the complaint case being No.199/2015 be and the same is allowed on contest against the opposite party with a litigation cost of Rs.10,000/- to be paid by the opposite party.

The Opposite Party is directed to pay a sum of Rs.1,50,000/- as expensed for the treatment of the daughter of the complainant for medical negligence in favor of the complainant within 45 days from the date of passing this order.

The Opposite Party is further directed to pay compensation amounting to Rs.7,50,000/- to the complainant for harassment, humiliation, tolerance of pain within the time framed.

At the event of failure to comply with the order the Opposite Party shall pay cost @ Rs.100/- for each day's delay, if caused, on expiry of the aforesaid 45 days by depositing the accrued amount, if any, in the Consumer Legal Aid Account.

Let a plain copy of this order be supplied free of cost to the parties/their Ld. Advocates/Agents on record by hand under proper acknowledgement/ sent by ordinary post for information & necessary action.

**[HON'BLE MR. JUSTICE Shri Sankar Kr. Ghosh]
PRESIDENT**

[HON'BLE MRS. Smt. Devi Sengupta]
MEMBER

[HON'BLE MR. Sri Samaresh Kr. Mitra]
MEMBER