DISTRICT CONSUMER DISPUTES REDRESSAL FORUM, HOOGHLY
CC OF 2013
PETITIONER
VERS
OPPO

Complaint Case No. CC/86/2017
(Date of Filing : 17 Mar 2017)

1. Smt. Madhumita Paul
Halder Bagan, Palpara, Chinsurah
Hooghly
West Bengal .....Complainant(s)

Versus

1. Dr. Prakash samanta & Ors.
Hospital Rd., Chinsurah
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 Jan 2021

Final Order / Judgement

Samaresh Kumar Mitra , Presiding Member.

This case has been filed U/s.12 of the Consumer Protection Act, 1986 by the complainant that she felt discomfort due to pain in her stomach on 24.1.2017 and went to Imambara Sadar Hospital at Chinsurah, Hooghly and she went to the outdoor facility of the Hospital and was check up by the attending doctor who advised USG examination and the date for USG at the above mentioned hospital was only available on 31.3.2017 and as such she had her USG test done on 25.1.2017 from Bharati Diagonostic Centre and in the evening of 25.1.2017 she went to the chamber of the opposite party no.1 and showed him the report and the opposite party no.1 opined that it is only a case of enlargement of appendix and there is no other problem and the opposite party no.1 suggested removal of appendix by way of operation and suggested her test.

The complainant also states that the opposite party no.1 suggested microsurgery stating that the complainant would recover in a short time and on 26.1.2017 she took tests as suggested by the opposite party no. 1 and in the evening met the opposite party no.1 in his chamber and the

opposite party no. 1 suggested and advised her to get herself admitted at opposite party no. 2 Nursing home at 6:30 a.m. on 28.1.2017 and on 28.1.2017 at 6:48 a.m. she got admitted with the facilities of opposite party no. 2 and subsequently she was taken to the operation theatre and after 30 minutes the opposite party no. 1 came out of the operation theater and stated that a blood clot had been in the stomach of her and as such open surgery has to be conducted on her instead of micro surgery and after sometime the opposite party no. 1 came out of the operation theatre and showed the appendix and ovary and said that the ovary was burst so he removed the same.

The complainant also states that the USG conducted on 25.1.2017 suggested tiny right ovarian cysts and cystic left ovary which a quiet normal problem with today's women and her state of the ovary as on 25.1.2017 do not suggest nor subsequent tests or physical stature of her even on 28.1.2017 prior to the operation could lead to the conclusion that the condition of the ovaries of her was such that it can be said to have burst as on 28.1.2017 prior to operation and she suffered no external injuries on her body which would lead to bursting of her ovaries and the ovary was ruptured during the course of operation because of negligence on the part of opposite party no. 1.

Complainant filed the complaint petition praying directions upon the opposite parties to pay a sum of Rs. 16,756/- for expenses incurred by her and to pay a sum of Rs.19,83,240/- as compensation to be paid jointly or individually and to pay cost of litigation and to pay any other relief fit and proper in law and equity.

The opposite party No.1 contested the case by filing written version denying inter-alia all the material allegations as leveled against him. This opposite party submits that one female patient attended to him at his clinic on 25.1.2017 with a complain of pain at right iliac fossa x 4 days with H/O nausea and she came with a USG report dt. 25.1.2017 and an anechoic cyst in the right ovary and few tiny anechoic cysts in the left ovary and probe tenderness elicited over the right iliac fossa which is suggestive of Appendicular Pathology and after complete examination it was diagnosed to be a case of recurrent appendicitis and blood reports and E.C.G. were normal and party opted for the same procedure at nursing home on 28.1.2017 and on 28.1.2017 morning she was taken up for surgery under general anesthesia in supine position after antiseptic draping as per standard approach and the abdomen was insufflated with carbon dioxide gas through supraumbilical port through veeres needle after sufficient abdominal distention and supraumbilical 10 mm. port made through 10 mm Trochar with Canula and Telescopic camera introduced through this port and on placing the camera inside the abdomen, there was dark colour blood was found at right paracolic gutter and at right side of pelvic cavity and two other ports placed under direct vision of the camera to avoid any injury during placement of the ports and all laparoscopic surgeons inflate the abdomen sufficiently before placing the camera port through veeres needle for safe entry of the first port so that no injury could happen.

The opposite party no.1 also states that every laparoscopic surgeon on placing the camera see a panoramic view of the abdomen when one see the intestine and other organs fully covered with omentum down to the sub-hepatic area till the pelvis where the pelvic organs fully covered by the parts of the gut on which the omentum lies, the ovaries are placed at the bony ovarian fossa of the pelvis and during laparoscopic appendectomy, if surgeon wants to see the right ovary, he has first tilt the position of the table to opposite site; then to displace the omentum, intestine and the uterus to have a glimpse of the ovary; no laparoscopic instrument can directly reach the right ovary without damaging all the structures overlying it, which can be shown through video clips, if needed and after standard placement of the three ports and placing the other hand instruments displacing the omentum, intestine, there was dark colored old blood at right paracolic gutter and at the right side of the pelvis was seen after proper examination, it was also found that the right

ovary was ruptured and probably the preexisting cysts within the right ovary (USG report) was ruptured with fresh active bleed from the ruptured margin and Appendix was found to be pathological, retrocaecal, ileocaecal junction was normal. No Meckel's diverticulam/ retroperitoneal lymphadenopathy and it was detected then that cut margins of the ovary was highly friable, repair could not be done, overline omentum/ intestine were normal, uterus and left ovary and the left fallopian tube were normal, right fallopian tube was also normal and at this stage the opposite party no.1 contacted with other senior and experienced gynecologists of Chinsurah and explained the whole operative findings and both the gynecologists were engaged then outside and so advised him to try to repair ovary, if repair is not possible; go for right Oophoerectomy as left ovary was found to be normal for the safety of the patient and then as per their advice he performed right Oophoerectomy and Appendicectomy was done as per standard technique and operation was completed with right Oophoerectomy + Appendectomy + Abdominal toileting and photograph of the specimen of Appendix, right ovary and blood clot were taken and Appendix and Ovary was given to the patient party for histo-pathological examination.

The opposite party no. 1 further states that post operative period was very much uneventful and intra venous fluids were omitted at the next morning and the patient was allowed normal diet and was mobilized out of the bed and patient had a normal menstruation during her stay at the Nursing Home and she was discharged on 1.2.2017 morning and on post operative cheek up and she was found to be all right and thereafter histopathological examination was done from SERUM Analysis Centre (P) Ltd. and the report of the same has been filed by the complainant before the Ld. Forum and the relevant portion of the said report dt. 7.2.2017 was found as follows:-

Histopathological Report

Microscopic Examination:

- Section from Appendix shows intact mucosa, lymphoid hyperplasia, submucosal fibrosis & fat infiltration. There was no evidence of Malignancy.
- Section from right ovary shows features of haemorrhagic corpus leuteal cyst. There was no evidence of Malignancy.
-
- Appendix: Non Specific inflammation.
- Haemorrhagic corpus lacteal cyst.

The opposite party no. 1 also states that from the histopathological report, it is clearly evident that there was pre-existing haemorrhage within the corpus leauteal cyst which caused rapture of the cyst wall leading to the bleed and USG Report was prepared on 25.1.2017 and the patient was taken up for the surgery on 28.1.2017, so rapture of the ovary happened between 25.1.2017 to 28.1.2017, before the surgical procedure and the patient was presented with pain lower abdomen more at right iliac fossa and probably the patient could not realize or feel extra problem due to the rapture of small cyst which usually do not produce much pain superseding the preexisting pain of Appendicitis and that's why the patient probably did not complain extra pain prior to taking up for the surgery which ultimately confirmed on the operation table after the camera placement and no question should arise of injuring the ovary during the surgical procedure for a senior lap and he had followed all the standard norms of the procedure of safety in this case also like the other to avoid any inadvertent injury.

The opposite party no. 1 also states that the complainant's husband lodged a complaint before the Chinsurah P.S. regarding the self same matter and the Chinsurah Police duly investigated the matter and in course of such investigation they approached the C.M.O.H., Hooghly and on the basis of such approach the C.M.O.H., Hooghly set up a Medical Board for enquiring into the matter and as per their direction he has submitted the photograph of the executed ovary, Appendix and blood clot which was also circulated at the media and an enquiry report was duly prepared by the said committee as was set up by the C.M.O.H., Hooghly consisting of the specialist doctors and he has sought for a copy of such report from C.M.O.H., Hooghly through R.T.I. but no response was made there from on the plea of some technical ground.

The opposite party No. 2 contested the case by filing written version denying inter-alia all the material allegations as leveled against him. This opposite party submits that an amount of Rs.3,810/- only paid on her behalf of the opposite party no.2, nursing home as clinical charges vide Bill no.1876 dt. 1.2.2017 plus an amount of Rs.1,059.51 paisa only vide receipt no.3387 dt. 31.1.2017 towards purchase of medicine vide cash memo no. 3387 dt. 31.1.2017 and in addition to that a sum of Rs. 6,500/- only vide money receipt no. 307 was paid on her behalf as fees for the opposite party no. 1 Doctor inclusive of fees for the anesthetist doctor.

Complainant in his evidence on affidavit assailed that she felt discomfort due to pain in her stomach on 24.1.2017 and went to Imambara Sadar Hospital at Chinsurah, Hooghly and availed of outdoor facility of Hospital and after check up the attending Doctor advised her for USG examination. She did her USG test on 25.1.2017 from Bharati Diagnostic Centre, Hospital Road, Chinsurah. That on 25.2.2017 she went to the chamber of opposite no. 1 Doctor. Opposite party no. 1 opined that it is a case of enlargement of appendix and there is no other problem and suggested her to remove appendix by way of operation. Opposite Party no. 1 also suggested that she will recover in a short time by micro surgery than open surgery and she and her husband opted to undergo micro surgery. That on 26.1.2017 she conducted test as suggested by opposite party no. 1 and met the opposite party no. 1 doctor in his chamber in the evening. As per advice of opposite party no. 1 she took admission at opposite party no. 2 Nursing Home on 28.1.2017. After a lapse of 30 minutes the opposite party no. 1 doctor came out of the operation theatre and stated to her husband that a blood clot had been in the stomach of her as such open surgery has to be conducted instead of micro surgery and hurriedly went inside the operation theatre. After conducting the operation the Opposite Party no. 1 came out of the operation theater and showed the appendix and ovary of her and stated that the ovary was blast so he had no other option but to remove the same. She also stated that she is the mother of the child and she did not suffer from any gynecological problem at the relevant point of time. The USG dt. 25.1.2017 suggested tiny right ovarian cyst and cystic left ovary. The state of her neither ovary as on 25.1.2017 do not suggest nor subsequent test of physical stature even on 28.1.2017 prior to the operation could lead to the conclusion that the condition of her ovaries was such that it can be said to have burst as on 28.1.2017. She also submitted that she suffered no external injuries on her body which would lead to bursting of her ovaries. According to the complainant opposite party no. 1 is not a gynecological expert and has no special expertise in gynecology and he never call for any gynecologist during the period of operation and he rash and negligently whimsically operated. She further stated that her ovary was ruptured during the course of operation because of highest degree of negligence on the part of the opposite party no. 1 and to camouflage the negligence of himself stated her family member that there was blood clot and prior rupture/ burst of her ovary. If the opposite party no. 1 normally careful or approached the lap appendicectomy in a routine or normal manner it would have been successful and only because of negligence on the part of the opposite party no. 1 in the procedure lead to rupture of the ovary and bleeding and finally damage of the ovary and removable of the

same. According to the complainant she is young wife and she and her husband had plan for a second issue which can no way succeed because of negligence on the part of opposite party no. 1. Opposite party no. 1 doctor received fees for treatment and operation. So, she is the customer of opposite party nos. 1 and 2. She further stated that opposite party nos. 1 and 2 received a sum of Rs. 16,756/- and still incurring for the mal treatment of the opposite party no. 1 and she became disable in her physic for no fault of herself but for the fault of opposite party no. 1. It is also averred that the opposite party no. 2 nursing home always tried to cover up the negligence of the opposite party no. 1 and always tried to huss up the whole matter and never answered the questions of patient party properly. As a result, opposite party no. 2 is also liable for negligence for the present state of physical disability of the complainant. So, the complainant is entitled to recover the money for her treatment to the tune of Rs. 16,753/- and a compensation of Rs. 19,83,240/- from the opposite party nos. 1 and 2.

In his evidence the opposite party no. 1 submitted that he elaborately stated in his written version regarding the allegations leveled against him and on the basis of documents filed by the complainant i.e. the USG report dt. 25.1.2017 issued by Bharati Diagnostic Centre and the histopathology report dt. 7.2.2017 issued by Serum Analysis centre and the discharge report of Chinsurah Medicare Nursing Home prepared by him. In addition to he can show by a C.D. the manner of established procedure adopted by a laparoscopic surgeon in every case by placing the camera to see the panoramic view of the abdomen. Opposite party no. 1 also submitted that on the same incident a G.D. entry lodged by Shri Dipankar Paul, the husband of the present complainant before the Chinsurah Police Station being G.D. entry no.2124 dt. 28.1.2017 and in course of investigation the said police station approached the C.M.O.H., Hooghly and in response to that the medical board comprising of several eminent medical personalities was set up. After hearing the opposite party no. 1 and going through the CD an enquiry report prepared by the said committee and prayed to call for the said report for proper adjudication of the case.

Both sides files evidence on affidavit, questionnaire followed by reply and written notes of argument which are taken into consideration while passing final order.

ISSUES/POINTS FOR CONSIDERATION

1). Whether the Complainant Smt. Madhumita Paul is a ‘Consumer’ of the opposite party?

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

3).Whether the O.Ps carried on unfair trade practice/rendered any deficiency in service towards the Complainant?

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

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 Smt. Madhumita Paul 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 patient of the opposite party No.1 doctor approached for treatment by paying fees and received treatment by taking admission before the opposite party 2, so she is entitled to get service from the opposite party as a consumer.

(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.19,99,996/- as complainant prayed for a direction upon the opposite party Rs.19,83,240/- as compensation and a direction upon opposite party no.1&2 to pay a sum of Rs.16,756/- for expenses incurred for her and 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 case of the Complainant is that she felt discomfort due to pain in her stomach on 24.1.2017 and went to Imambara Sadar Hospital at Chinsurah, Hooghly and availed of outdoor facility of Hospital and after check up the attending Doctor advised her for USG examination. She did her USG test on 25.1.2017 from Bharati Diagnostic Centre, Hospital Road, Chinsurah. That on 25.2.2017 she went to the chamber of opposite no.1 doctor. Opposite party no. 1 opined that it is a case of enlargement of appendix and there is no other problem and suggested her to remove appendix by way of operation. Opposite Party no. 1 also suggested that she will recover in a short time by micro surgery than open surgery and she and her husband opted to undergo micro surgery. That on 26.1.2017 she conducted test as suggested by opposite party no. 1 and met the opposite party no. 1 doctor in his chamber in the evening. As per advice of opposite party no. 1 she took admission at opposite party no. 2 Nursing Home on 28.1.2017. After a lapse of 30 minutes the opposite party no. 1 doctor came out of the operation theatre and stated to her husband that a blood clot had been in the stomach of her as such open surgery has to be conducted instead of micro surgery and hurriedly went inside the operation theatre. After conducting the operation the

Opposite Party no. 1 came out of the operation theater and showed the appendix and ovary of her and stated that the ovary was blast so he had no other option but to remove the same. She also stated that she is the mother of the child and she did not suffer from any gynecological problem at the relevant point of time. The USG dt. 25.1.2017 suggested tiny right ovarian cyst and cystic left ovary. The state of her neither ovary as on 25.1.2017 do not suggest nor subsequent test of physical stature even on 28.1.2017 prior to the operation could lead to the conclusion that the condition of her ovaries was such that it can be said to have burst as on 28.1.2017. She suffered no external injuries on her body which would lead to bursting of her ovaries. According to the complainant opposite party no. 1 is not a gynecological expert and has no special expertise in gynecology and he never call for any gynecologist during the period of operation and he rash and negligently whimsically operated. She further stated that her ovary was ruptured during the course of operation because of highest degree of negligence on the part of the opposite party no. 1 and to camouflage the negligence of himself stated her family member that there was blood clot and prior rupture/ burst of her ovary. If the opposite party no.1 normally careful or approached the lap appendicectomy in a routine or normal manner it would have been successful and only because of negligence on the part of the opposite party no. 1 in the procedure lead to rupture of the ovary and bleeding and finally damage of the ovary and removable of the same. According to the complainant she is young wife and she and her husband had plan for a second issue which can no way succeed because of negligence on the part of opposite party no. 1. She further stated that opposite party nos. 1 and 2 received a sum of Rs.16,756/- and still incurring for the mal treatment of the opposite party no. 1 and she became disable in her physic for no fault of herself but for the fault of opposite party no. 1. It is also averred that the opposite party no. 2 nursing home always tried to cover up the negligence of the opposite party no.1 and always tried to huss up the whole matter and never answered the questions of patient party properly. As a result, opposite party no. 2 is also liable for negligence for the present state of physical disability of the complainant. So, the complainant is entitled to recover the money for her treatment to the tune of Rs.16,753/- and a compensation of Rs. 19,83,240/- from the opposite party nos. 1 and 2.

In the argument the opposite party no.1 averred that one female patient namely Mrs. Madumita Paul aged about 25 years of Pearabagan, Chinsurah, Hooghly attended him at his clinic on 25.01.2017 with a complain of pain at right iliac fossa for 4 days with a history of nausea. She came with a U.S.G report dated 25.01.2017 from Bharati Diagonostic Centre of Chinsurah which shows that i) An anechoic cyst in the right ovary, few tiny anechoic cysts in the left ovary. ii) Probe tenderness elicited over the Right Illiac Fossa, which is suggestive of Appendicular Pathology. After complete examination it was diagnosed to be case of recurrence Appendicitis. Blood report and the E.C.G were normal. Party opted for an early Laparoscopic Appendicectomy. So the patient was posted for the same procedure at Medicare Nursing Home, the opposite party No.2 on 28.01.2017. Proper consent Form was taken from the Patient and her husband in which it was clearly explained that at the time of need the Lap Procedure might be converted to open operation and the operative procedure will follow as per need of the operative findings and the then situation. That on 28.01.2017 she was taken up for surgery under general Anesthesia in supine position after antiseptic draping as per standard approach. The abdomen was insufflated with carbon dioxide gas through supraumbilical port, through veeres needle after sufficient abdominal distention. Supraumbilical 10 mm port made through 10 mm trochar with canula. Telescope introduced through this port. On placing the camera inside the abdomen there was dark color blood (old blood) was found at right paracolic gutter at right side of pelvic cavity. Two other ports placed under darked vision of camera to avoid any injury during placement of the ports. All laparoscopic surgeons inflect the abdomen sufficiently before placing the camera port through veers needle for safe entry of the first port. So, that no injury can happen. In his case he also safe guarded after proper insufflations of the abdomen after placing the camera. Every laparoscopic

surgeon on placing the camera see panoramic view of the abdomen when one see the intestine and other organs fully covered with omentum down to the sub hepatic area till the pelvis where the pelvic organs fully covered by the parts of the gut on which the omentum lies, the ovaries are placed at the bony ovarian fossa of the pelvis. During laparoscopic appendectomy if surgeon wants to see the right ovary he has first tilt the position of the table to opposite side. Then, to displace the omentum, intestine and the uterus to have a glimpse of the ovary. No laparoscopic instrument can directly reach the right ovary without damaging all the structures overlying it which can be show through video clips. After standard placement of the three ports and placing the other hand instruments displacing the omentum, intestine, there was dark colored old blood at Right Paracholic Gutter and at the right side of the pelvis was seen after proper examination, it was also found that the right ovary was ruptured probably the pre existing cysts within the right ovary was ruptured with fresh active bleed from the ruptured margin. Appendix was found to be pathological, retrocaecal, ileocaecal junction was normal, no meckels diverticulam, retroperitoneal lymphadenopathy. It was also explained that open surgical procedure will be better for the safety of the patient. It was also explained that if repaired of the bleeding margin of the ovary is not possible then the right Oophoerectomy /Ovarectomy to be done with Appendectomy. The party concentrated verbally to proceed with procedure which the doctor would think better for the patient. The aforesaid situation was duly noted down in writing by the opposite party no.1 doctor on the same date in the letter head pad of opposite party no.2, nursing home as well as in the discharge certificate under the heading operative finding which has been filed by the complainant herself. It was detected that cut margins of the ovary was highly friable, repair could not be done, over line omentum/ intestine were normal, uterus and left ovary and the left fallopian tube were normal, right fallopian tube was also normal. At the stage, he contacted with Dr. Mihir Banerjee and Dr.U.P.Mondal, senior gynecologist of Chinsurah and explain the whole operative findings. Both the gynecologist were engaged then outside and so advised him to try to repair ovary, if repair is not possible, go for right Oophoerectomy as left ovary was found to be normal for the safety of the patient. Then as per their advice he performed right Oophoerectomy. Appendectomy was done as per standard technique. Operation was completed with right Oophoerectomy + appendectomy + abdominal toilet in photograph of specimen of appendix, right ovary and blood clot were taken. Appendix and ovary was given to the patient party for histopathological examination. Post operative period was very much uneventful. Intravenous fluids were omitted at the next morning and the patient was allowed normal diet and was mobilized out of the bed. Patient had a normal menstruation during her stay at the nursing home. She was discharged on 1.2.2017 morning. On post operative checkup she was found to be alright. Thereafter histopathological examination was done from Serum Analysis Centre (p) limited. The relevant portion of the report dt. 7.2.2017 was found as

- Section from Appendix shows intact mucosa, lymphoid hyperplasia, submucosal fibrosis & fat infiltration. There was no evidence of Malignancy.
- Section from right ovary shows features of haemorrhagic corpus leuteal cyst. There was no evidence of Malignancy.
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- Appendix: Non Specific inflammation.
- Haemorrhagic corpus lacteal cyst.

From the histopathological report it is clearly evident that there was preexisting haemorrage within the corpus leauteal cyst which caused rupture of the cyst wall leading to the bleed.

USG report was prepared on 25.1.2017 and the patient was taken up for the surgery on 28.1.2017. So, the rupture of the ovary happened between 25.1.2017 to 28.1.2017 before the surgical procedure. The patient was presented with pain in lower abdomen more at right iliac fossa. Probably the patient could not realize or feel extra problem due to the rupture of small cyst which usually do not produce much pain superseding the preexisting pain of appendicitis. That's why, the patient probably did not complain extra pain prior to taking up for the surgery, which ultimately confirmed on the operation table after the camera placement. So, no question should arise of injuring the ovary during the surgical procedure for a senior lab. Being a senior surgeon he is doing laparoscopic surgery at Chinsurah for more than 15 years following all the standard norms of safety procedure to avoid any inadvertent injury. Opposite party no. 1, Doctor also stated that the husband of the complainant lodged a complaint before Chinsurah P.S. and on the basis of that complaint the investigating officer approached C.M.O.H, Hooghly, who on his turn set up a medical board to enquire the matter. The enquiry committee consisting of specialist doctors namely, Dr. Arup Laha (gynecologist), Dr. Samir Ray (surgeon) and Deputy C.M.O.H., Hooghly constituted by the C.M.O.H., Hooghly prepared and submitted a report. Hon'ble Forum called for the said report which speaks that the situation under which the right ovary of the patient had to be operated and finally opined that, "thus the committee comes to the conclusion that the Dr. Prakash Samanta had judiciously, without negligence in the interest of her health performed the operation on Mrs. Madhumita Pal". Opposite party no. 1 also assailed that the complainant neither challenge the enquiry committee report before any higher medical authority nor has submitted any other medical opinion to ascertain the position as to whether there was actually any sort of deficiency in services or medical negligence on the part of opposite party no. 1, doctor. He also referred the judgement of Hon'ble Apex Court passed 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 For a 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 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 taste 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.

After perusing te interrogatories followed by reply it appears that in reply to the question no.16 i.e. Beside USG report did you have any other investigation to confirm the appendicitis? The opposite party no. 1 answered that, no, as it was not needed. The diagnosis was evident from clinical history, examination finding and from the USG report. In answer to question no. 18 i.e. Cyst was ruptured then what types of bodily abnormality show? In reply it is stated that question is meaningless. However, if it is a question as to what will happen to the patient if an ovarian cyst ruptures? Then the answer is possibility of aggravation of symptoms. However, it depends on the amount of blood loss. Usually blood loss of 100-200 ml does not produce any symptoms. In this case the blood loss was less than 200 ml. In answer to question no. 21 i.e. when Anechonic cyst was ruptured? In reply it is stated that, there is no terms as Anechonic. The correct term is Anechoic. However, he stated that it is not possible to state the exact time of rupture. However, as it was not picked up by the USG report. The rupture happens sometimes after the USG report. There was active bleeding from the margins of the ruptured cyst which was detected at the time of surgery with old dark colored clots of blood. It can be told that probably the cyst was ruptured within one to two days prior to the surgery. In question no.22 i.e. in USG report you can find any abnormality in Rt. Ovary? In reply it is stated that, when the Sonologist pressed the area, there was tenderness elicited over the Rt. Iliac Fossa region on Transducer (USG Probe) compression which goes in favour of appendicular pathology, as Sonologist press the area specifically seeing the appendix during the sonograpical examination, so the Sonologist can tell more precisely about the appendicular pathology than the doctor examining at the clinic. In question no. 32 i.e. the C.D. Mentioned in your evidence it created after the rt ovary was ruptured? In reply it is stated that, in fact, I have referred about the “C.D” which never meant to have been done in respect of this particular procedure but I have mentioned that if it was needed to explain as to how a lap appendisectomy is done it can be shown through CD of a ‘standard lap procedure’ of appendisectomy.

It appears from the enquiry report regarding ref. Vide no. Chinsurah P.S. GDE No. 2124 dt. 28.01.17 against Dr. Prakash Chandra Samanta, Surgeon, District Hospital, Hooghly on 13.02.2017. Dr. Prakash Chandra Samanta gave statement that at the beginning of Laproscopic operation he discovered bleeding from the Rt. ovary along with inflamed appendix. After failing to arrest bleeding from Rt. Ovary Laproscopically he contacted Dr. Mihir Kumar Banerjee and Dr. U.P. Mondal telephonically. Both of them suggested Oophorectomy as the repair was failing to arrest haemorrage. After coming out from the O.T. and explaining the matter to Dipankar Paul he coverted to open surgery. He subsequently completed the open surgery by removing the bleeding Ovary and Appendic. Dr. Samanta asked for 7 days time to submit the written opinion of Dr. Mihir Banerjee and Dr. U.P. Mondal. The committee found in the histopathological of Mrs.Madumita Paul inflamed Appendix and Haemorrhagic corpus leuteal cyst of Rt. Ovary which shows that Rt. Ovary was bleeding at the time of operation.

In continuation to the above report the committee on 3.4.2017 again examined the pending documents provided by on duty Anaesthesist of the case Dr. Mrinal Kanti Bir and two Gyneacologist Dr. Mihir Banerjee & Dr. Umapada Mondal who were contacted on phone by Dr. Prakash Samanta and found that:-

i). That the Rt ovary was bleeding from the start of operation which is supported by histopathological report by Serum Analysis centre (Lab code SUK /90255).

ii). The statement of on duty Anaesthesist Dr. Mrinal Kanti Bir and GNM Sukla Banerjee states the above fact also.

iii). The evidence of three Doctors confirmed that the line of treatment by Dr. Prakash Samanta is not negligent & was in the interest of the patient.

iv). The photographic sample of resected ovary & Appendix shows Haemorrhagic ovary.

The committee come to the conclusion that Dr. Prakash Chandra Samanta had judiciously, without negligence in the interest of her health performed the operation on Mrs. Madhumita Pal.

The doctor namely Dr. Mihir Kr. Banerjee being the member of the enquiry committee vide its letter dated 28.3.2017 informed the impugned committee that on 28.1.2017 suggestion wanted by Dr. Prakash Samanta senior consultant surgeon over telephone while he was busy with his work at different places. It was regarding a female patient admitted at Medicare Nursing Home Chinsurah with uncontrolled bleeding from rupture of Rt. Ovary cyst. He (Dr. Samanta) detected it during procedure of Laproscopic Appendectomy. He suggested repair of Ovary by Oophorectomy if not possible by Laproscopic procedure. In case repair fails to control bleeding from Rt. Ovary. Unilateral Oophorectomy may be done provided other ovary remains healthy in a young lady.

The doctor namely Dr.Umapada Mondal being the member of the enquiry committee vide its letter dated 24.3.2017 informed the impugned committee that on 28.1.2017 he received a phone calls with Dr. Prakash Samanta online when he explained about a female patient he was operating on for Lap Appendicectomy at Medicare Nursing Home & after introduction of ports inside abdomen he found rupture of Rt. Ovary with bleeding from rupture site.

That after knowing details it was agreed to proceed with open procedure for proper examination of Pelvic organs specially the uterus & other tube and ovary which were found healthy. It was further agreed upon to attempt for repair of ruptured ovary with control of bleeding, if bleeding fails to get controlled with repair as happens frequently in such situations, then to proceed with Oopherectomy of right side for effective control of bleeding & thus to save the life of patient.

Duty Anaesthesist Dr. Mrinal Kanti Bir vide its letter dated 24.03.2017 informed the enquiry committee that he used to give Anaesthesia to the cases either open or laproscopic surgical procedures of Dr. Prakash Samanta for many years at Chinsurah, Hooghly. Dr. Samanta is a very senior & experienced laparoscopic surgeon. He performs many Laproscopic surgery including Appendisectomy one patient, Mrs Madumita Pal was posted for Laproscopic Appendisectomy operation on 28.02.2017 at Medicare Nursing Home, Chinsurah. The patient and her husband had given consent that the Laproscopic procedure may be converted to open procedure, if the situation demands. He was called for giving anesthesia in this case. Dr.Samanta uses to see the panoramic view of the abdomen after placing camera through the superaumbilical port. There was no exception in this case. While he was examining the abdomen he found on the TV screen dark colored accumulation of blood around the paracolic gutter, which he shown to him. The assistant and other persons present in the O.T. at that time. After that he placed other two ports under vision. Pelvis was covered with omentum and intestine. After displacing the omentum and intestine Dr. Samanta found that the right ovary is ruptured with few clots and active bleeding from the margins. At this stage he along with nursing staff called the party of the patient near the main gate of the O.T. He explained the whole operating findings till then. He also told that open operative procedure is to be done and if repair of right ovary is not possible then right sided Oophorectomy will be done. This conversation among them was clearly heard by him and others surrounding the O.T. table. Party has given consent. After coming back to O.T. table, Dr. Samanta

opened abdomen through extended Meburneys incision then examined first the left ovary with …..(not readable) and the uterus. He then tried to repair the right ovary but it was friable and cutting through. He ultimately had done right Oophorectomy and then Appendectomy. Abdomen was closed in layers. Post operative recovery of patient was uneventful. Patient was transferred to ward with necessary advice.

From the case record it is clear that no exert opinion called for or received by this Forum in respect of treatment adopted by the opposite party No.1 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.

Hon'ble Supreme court in Martin F. D'Souza V. Md Ishfaq (2009) 3 SCC I held that when a patient dies or suffers some mishap, there is tendency to blame the doctor for this. Things have gone wrong and, therefore somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions.

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 confirm to the highest degree of

care or the lowest degree of care possible. The degree of care is variable and depends on the circumstance.

We have until now examined the duty of a doctor in so far as treating a patient is concerned or in diagnosing the ailment. Doctors are however imposed with a duty to take consent of a person/patient before performing acts like surgical operations and in some cases treatment as well. As per the judicial pronouncements, this duty is to disclose all such information as would be relevant or necessary for the patient to make a decision.

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.

The Apex court and the National commission has held that the skill of a Medical practitioner differs from doctor to doctor and it is an incumbent upon the complainant to prove that the appellant was negligent in the line of treatment that resulted the complainant became handicapped and suffered a lot of pain. A judge can find a doctor guilty only when it is proved that he has fallen short of a standard of reasonable medical care.

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.

After perusing the case record, documents and hearing the arguments it appears that the complainant filed the instant complaint before this Forum alleging that the opposite party no.1 during the course of operation of Appendix through microsurgery ruptured the cyst of Rt.Ovary and subsequently done Appendisectomy & Oophorectomy through open surgery as a result the complainant lost her vital organ as well as hope of another child. It is the allegation of the complainant that due to negligence of the opposite party No.1 she suffered a lot for which she prayed directions upon the opposite party as incorporated in the prayer portions of the complaint petition. From the face of the case record it is transparent that the opposite party No.1 doctor tried his best in choosing the course of treatment prior to discussion with other doctors after getting the consent of patient party. The doctors with whom the treating doctors discussed the course of treatment also recognised his course of action and advised to do the needful. The reports of the doctors before the enquiry committee have evidentiary value before the court/forum of law. So this Commission/Forum hold that the opposite party no.1 doctor cannot be blamed for rupturing the cyst of Rt. Ovary during the course of Appendisectomy. On the other hand when the doctor found that only the Appendisectomy may not sufficient for the patient then he discussed with other doctors regarding the history of rupture of Ovary and after getting the consent of patient party done Oophorectomy to cure the patient. Having regard to the facts and circumstances of the case and for the reasons mentioned herein above as also applying the well settled principles of law enumerated in the preceding paragraphs this commission finds that even all the averments made in the complaint are taken to be true on their face value no case of rashness and negligence is made out as against the opposite party no.1 doctor.

The complainant did not lead any expert evidence to support the contention that there was medical negligence on the part of opposite party doctor while treating the patient. In absence of any expert evidence to that effect, the contention of the complainant that there was negligence on the part of the opposite party doctor in treating the patient cannot be accepted.

The complainant failed to prove her case by adducing evidence that the opposite party doctor was negligent in treating her for which she suffered consequential damages. We do not find any negligence or deficiency of service on the part of treating doctor in the instant case. So the complaint petition filed by the complainant has no leg to stand and deserved to be dismissed.

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

The discussion made herein before, we have no hesitation to come in a conclusion that the Complainant failed to prove the medical negligence of the opposite party No.1 doctor in respect of treatment of this complainant so there is no question of paying compensation..

ORDER

Hence, ordered that the complaint case being No.86/2017 be and the same is dismissed on contest against the opposite party.

The opposite party no.1&2 are exonerated from this proceeding.

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