

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 1098 OF 2018

(Against the Order dated 16/03/2018 in Complaint No. 8/2007 of the State Commission
Bihar)

1. SONI BHARTI

W/O. SRI CHENDAN KUMAR, R/O. FLAT NO 103,
NAGESHWAR TOWER, (MOHIT TOWER) BLOCK-A,
PUNAICHAK, PATNA P.S. SHASTRI NAGAR

PATNA

BIHAR

2. RUKMINI

W/O. RADHEY SHYAM. R/O. A-8, RAILWAY MEN'S
HOUSING SOCIETY, SECTOR-2, VASHI TURBHE,
RAIGARH

NAVI MUMBAI.

MAHARASHTRA-400703

.....Appellant(s)

Versus

1. DR. PRABHA SINHA OF MANAS & ANR.

NURSING HOME IN FRONT OF KANKARBAGH, POLICE
STATION IN CLINIC UNDER NAME AND STYLE MEANS
NURSING HOME BORN INTENSIVE CARE UNIT P.S.
KANKARGAH

PATNA

BIHAR

2. DR. SUNIL KUMAR

C/O. KIDS CARE, KANKARBAGH

PATNA

BIHAR - 20

.....Respondent(s)

BEFORE:

**HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER
HON'BLE DR. SADHNA SHANKER, MEMBER**

FOR THE APPELLANT :

Dated : 10 October 2024

ORDER

**For the Appellant : Mr. Rahul Sharma, Mr.
Kshitij Goel and**

Mr. Rishab Sharama, Advocates

For Respondents : Mr. F. K. Rai and Mr. Gaurav S., Advocates

ORDER

PER SUBHASH CHANDRA

1. This Appeal under Section 19 of the Consumer Protection Act, 1986 (for short, the "Act") assails the order dated 16.03.2018 in Complaint No.08 of 2007 of the Bihar State Consumer Disputes Redressal Commission, Patna (for short, "the State Commission") whereby the State Commission dismissed the Complaint filed by the Appellant/Complainant with the finding that the Appellant has failed to establish medical negligence as alleged against the Opposite Parties on the ground that no expert opinion was brought on record.
2. We have heard learned Counsel for the parties and perused the records.
3. For the reasons stated in IA No.11368 of 2018 seeking condonation of delay, the delay of 57 days was condoned in the interest of justice.
4. The relevant facts of the case, in brief, are that the Appellant had delivered a baby boy on 11.02.2007 in the Nursing Home of the Respondent No.1. The baby was found to be suffering from chest infection and breathing problems and needed consultation of a child specialist. Respondent No.2 was, therefore, called for advice and, thereafter, the baby was admitted to the Hospital of the Respondent No.2 in a Neonatal ICU (NICU) on ventilator on 11.02.2007. After stabilization, the baby was put on intravenous (IV) feed on the 3rd day. On the 6th day, while breastfeeding the child, the Complainant noticed that the left foot of the baby was blue in colour and brought this to the notice of the Respondent No.2. After much persuasion, Respondent No.2 conducted a Doppler test which was sent to Sir Ganga Ram Hospital, Delhi on the 10th day who advised admission in the said Hospital. Thereafter, the new born baby was shifted to Sir Ganga Ram Hospital where, despite treatment for thrombus in descending aorta and treatment for plasminogen activator, the left foot below the knee had to be amputated as it had become gangrenous. The Appellant filed a Complaint before the State Commission alleging medical negligence on the part of the Respondents No.1 and 2 in failing to provide adequate, proper and timely care to the new born baby and prayed for the following reliefs:
 - (i) compensation of ₹50 Lakhs against the Opposite Parties No.1 and 2 on account of physical, mental and monetary suffering on account of the permanent loss of left leg of her child;
 - (ii) litigation costs of ₹10,000/-; and
 - (iii) interest on the compensation @ 10% p.a. from the date of start of treatment.
5. In its order dated 16.03.2018, the State Commission, on contest, held as under:
 11. It is well settled proposition of law in case of medical negligence onus to prove medical negligence lies on the complainant must be proved by adducing expert

evidence or through medical literature stating the doctor concerned was not qualified or not competent to handle the case as also what he did should not have done which resulted injury to patient. **In the present case no medical expert opinion on related issue as to show or suggest that the line of treatment given by OP-2 at material time to baby patient was wrong or used wrong medicine of high power and which caused further increase of infection affected the left leg of baby. Merely on grounds that there was wrong treatment and supply of wrong medicine in heavy dose by treating doctor cannot be a ground for holding negligence in treatment when there is no expert evidence has been led to show what should have been done** by the doctor which was not done or that was done by the doctor which should not have been done by doctor.

12. In view of above settled law in case of medical negligence in absence of evidence, the allegations as leveled against the OP No.1 and OP No.2 are not proved and cannot be held negligent in rendering medical services.

(Emphasis supplied)

6. This order is impugned before us praying that the Appeal be allowed.

7. The contention of the Appellant is that it was an admitted position, based on the record, that neither at the time of birth of the baby nor subsequently, any Pediatrician or Neonatologist was present at the Hospital of the Respondent No.1 and therefore, the baby was required to be moved by Respondent No.1 to the Nursing Home of the Respondent No.2. It is contended that due to heavy doses of medication, inappropriate treatment and inordinate delay in treatment by Respondent No.2 and medical negligence of the Respondents, the left leg of the baby was required to be amputated. It was argued that in his reply, Respondent No.1 admits that at the time of birth of the child, no qualified Neonatologist or Pediatrician were present and since the newborn started having breathing problems within a few minutes of birth, Respondent No.2 was required to be called. It is also stated that despite the observance of the blue coloration of the left foot on the 6th day when it was noticed by the mother of the child and immediately reported, Respondent No.2 failed to take appropriate steps immediately and conducted the Doppler test only on the 8th day whereafter the report was sent to Sir Ganga Ram Hospital, New Delhi. It was also contended that even at this stage Respondent No.2 was consulting a pediatrician and Cardiovascular Surgeon and that it was only after much persuasion that Respondent No.2 agreed to discharge the child. It is contended that the submission of Respondent No.2 that the blue coloration of the left leg was noticed on 8th day of admission in the Hospital was incorrect and contrary to the Treatment–Cum–Progress Chart which was the record of the hospital itself. The conclusion that the child had developed thromboembolism is also contended by the Appellant to be incorrect since, from the record, it was evident that on the 8th day at around 10 p.m. Peripheral Cyanosis has been recorded in the treatment chart. The averment of Respondent No.2 that on the 9th day the Doctors had recorded discoloration was therefore incorrect, according to the Appellant.

8. Thus, while Respondent No.2 has admitted that on the 9th day of admission of the child in the Nursing Home the Doctors had recorded the finding of the Peripheral Cyanosis and

also recorded the color pink, it is contended by the Appellant that as per the Treatment–Cum–Progress Chart on record, even after recording of the medical condition of the Peripheral Cyanosis, nothing has been recorded in the daily report on the 10th day with regard to any medical treatment for the same. On 21.02.2007 at 4:30 p.m. an opinion has been recorded on the basis of the change in the color of the left leg that the opinion of a Pediatrician be taken. Therefore, it is contended that the Respondent No.2 failed to provide requisite medical care and attention since the condition of Peripheral Cyanosis is a probable consequence of a lung/heart condition.

9. It was contended by the Respondent that even as per the Discharge Summary issued by Sir Ganga Ram Hospital, New Delhi it had been recorded that after being treated for respiratory distress and being on ventilator for three days and being on IV fluids and antibiotics, the patient (child) had started to accept feeds by 6th day (17.02.2017). Therefore, the line of treatment is contended to have been correct. It was only on the 8th day, the parents had reported the discoloration of the left leg.

10. The State Commission in the impugned order has held that the Appellants had failed to bring on record any expert medical opinion to establish that the doctors had been negligent in attending to the patient. The Appellant contends that this order is erroneous since the case conforms to the principle of *res ipsa loquitur* since the facts speak for themselves in the instant matter and therefore there was no need for any expert opinion to be brought on record. It is the contention of the Appellant that the State Commission erred in dismissing the Complaint without appreciating that there had been medical negligence on the part of the Respondent No.1 in not arranging for a Pediatrician or Neonatologist to be present in the Hospital at the time of the delivery of the baby. It was for this reason that the new born baby had to be shifted to the Nursing Home of the Respondent No.2 on account of respiratory distress resulting in being placed on ventilator in the Neonatal ICU (NICU). It is also the case of the Appellant that the child had developed Peripheral Cyanosis by the 6th day and the same had been brought to the notice of Respondent No.2 who did not take any corrective action. The Doppler test was conducted as per their medical reports, on or after 10 days of life after much delay whereafter the report was sent by the husband of the Appellant to Sir Ganga Ram Hospital, New Delhi for opinion. It is also stated that the Respondent No.2 consulted, Pediatrician and Cardiovascular Surgeon on 21.02.2007 and it was much later that the child was agreed to be discharged. It is, therefore, the case of the Appellant that in view of the lack of medical care being provided by Respondent No.2 in his Nursing Home and in treating the case casually, the treatment for Peripheral Cyanosis of the child was delayed resulting in complications which could not be addressed even after admitting the child in Sir Ganga Ram Hospital where the left leg of the new born baby had to be amputated in order to save his life.

11. The Appellant further contends that the State Commission's order erred in holding that no medical opinion had been brought on record since in view of the settled position of law, based on the principle of *res ipsa loquitur*, there was no necessity to bring on record any expert opinion. The Appellant has relied upon the judgment of the Hon'ble Supreme Court in ***Ashish Kumar Mazumdar vs. Aishi Ram Batra Charitable Hospital Trust And Ors.***, MANU/SC/0338/2014 dated 22.04.2014 which had held that the principal function of the maxim of *res ipsa loquitur* is to protect injustice which would result if the Plaintiff was

invariably required to prove the precise cause of the accident when the relevant facts are unknown to him but are within the knowledge of the Defendant. Reliance was also placed on the judgment of the Hon'ble Supreme Court in ***Dr. J. J. Merchant & Ors. Vs. S. N. Chaturvedi & Anr.***, (2002) (6) SCC 635 wherein it had been observed that it is the discretion of the Commission to examine experts if required. Reliance was also placed on this Commission's judgments in ***Masih Hospital And Ors. Vs. Kuldeep And Ors.*** in RP No.685 of 2013 dated 01.04.20213 had held that when facts speak for themselves, there is no need to call for expert evidence and in ***Prem Prakash Rajagara vs. Nagarmal Modi Sewasadan & Ors.***, Consumer Case No.170 of 1999 decided on 06.02.2013 which had held, based on the Hon'ble Supreme Court in ***Nizam Institute of Medical Sciences vs. Prasanth S. Dhananka & Ors.***, (2009) 6 SCC 1, that once the initial burden had been discharged by the Complainant by making out a case of medical negligence on the part of the Hospital or the doctor concerned, the onus then shifts on to the Hospital and attending doctor to satisfy that there was no lack of care or diligence. It was, therefore, contended that the Appeal be allowed since negligence of the Respondent stood established in view of the doctrine of *res ipsa loquitur* in the facts and circumstances of the case.

12. It is, therefore, contended that medical negligence as a consequence of breach of duty to take care resulting in damage to person was established in the instant case and hence, it is prayed to allow the Appeal setting aside the impugned order and to grant the relief sought in the Complaint.

13. *Per contra*, it was contended by the Respondents that Respondent No.1 was a qualified and competent Gynaecologist and that Respondent No.2 was a qualified Pediatrician Surgeon. It was submitted that the new born baby delivered in Respondent No.1 Hospital Manas Nursing Home on 11.02.2007 through normal procedure had been found to be suffering from breathing problems and therefore, Respondent No.2 had been called with due consent of the attendants of the Appellant for consultation. On the advice of the Respondent No.2, the child was admitted the same day in the NICU under the care and treatment of Respondent No.2 in the best interest of the child. Thereafter, the child was in the care of the Respondent No.2 and hence, no medical negligence can be attributed against Respondent No.1.

14. It is also submitted that a line of treatment was commenced on 11.02.2007 in Respondent No.2 NICU by putting the child on oxygen and IV fluids and monitoring of heart rate on continuous basis. While the condition of the patient improved on the 2nd day of treatment, on the 10th day he developed thrombosis of aorta causing change of color of left foot. A color Doppler test was done which revealed arterial blockage due to large thrombosis in aorta of abdomen and low level of protein C in respiratory distress syndrome. As per Respondent No.2, this could not be predicted either clinically or through any laboratory investigation in advance. It is submitted that as per opinion of Respondent No.2, the baby required better treatment and was, therefore, referred to a higher centre for treatment at Sir Ganga Ram Hospital, New Delhi where the child was taken and admitted on 22.02.2007 after persuading the attendants. At Sir Ganga Ram Hospital, thrombolysis was done with tissue plasminogen activator which did not succeed and therefore, the left foot of the child below the knee had to be amputated. It was contended that no treating doctor at Sir Ganga Ram

Hospital, New Delhi had found any medical negligence on the part of Respondent No.2 as was evident from the discharge summary on record.

15. According to Respondent No.2, treatment was provided prudently and diligently with due care and caution for respiratory distress and cardio- respiratory failure with sepsis as per line of treatment accepted under medical science. It is also contended that at the request of the attendants of the patient, one Pediatrician and Cardiovascular Surgeon was also consulted who endorsed the line of treatment adopted by the Respondent No.2. According to Respondent No. 2, the diagnosis of doctors at Sir Ganga Ram Hospital, New Delhi was that the patient suffered from aortic embolism and that treatment for the same at the Hospital failed. It is also submitted by Respondent No. 2 that he has brought on record the expert opinion of five eminent Doctors and Pediatrician as expert medical opinion to establish that the treatment provided by him was in line with medical practice. It was submitted that the Hon'ble Supreme Court and this Commission had held in a catena of decisions that in case of medical negligence, peers are the best judge as regards the diagnosis or line of treatment adopted. No medical opinion, according to the Respondent has been brought on record by the Appellant suffering any medical negligence.

16. It was argued that it was settled medical proposition that medical negligence cannot be assumed but a direct connection between the injuries suffered, and treatment given was necessary to be established which was not the case herein. It was contended that the order of the State Commission had rightly adjudicated the factual matrix in light of the material available on record and held that the Respondents could not be held negligent in rendering medical services in the instant case.

17. The issue which falls for consideration is whether Respondent No.2 breached the duty of care while the patient was in his care in the conduct of the Doppler Test and in diagnosis requiring higher medical attention timely which would have prevented amputation of the left leg below the knee.

18. In matters where an allegation of medical negligence is made against a doctor or hospital (or both), it is settled proposition of law that the definition of 'service' under Section 2(1)(d) of the act has to be understood on broad parameters and it cannot exclude service rendered by a medical practitioner. It has also been well laid down that the jurisprudential concept of negligence differs in civil and criminal law. The law relating to what constitutes medical negligence has been laid down in the Hon'ble Supreme Court's judgment in **Jacob Mathew Vs. State of Punjab & Anr.**, in Criminal Appeal Nos. 144-45 of 2004 decided on 05.08.2005, (2005) 6 SCC 1 which has been relied upon by the State Commission. It is based on the **Bolam Test** (1957) 2 A11 ER 118. The test for medical negligence is based on the deviation from normal medical practice and it has been held that establishment of negligence would involve consideration of issues regarding:

- (1) *state of knowledge* by which standard of care is to be determined,
- (2) *standard of care* in case of a charge of failure to (a) use some particular equipment, or (b) to take some precaution,

(3) *enquiry to be made* when alleged negligence is (a) due to an accident, or (b) due to an error of judgment in choice of a procedure or its execution. For negligence to be actionable it has been held that the professional either (1) professed to have the requisite skill which he did not possess, or (2) did not exercise, with reasonable competence, the skill which he did possess, the standard for this being the skill of an ordinary competent person exercising ordinary skill in the profession.

It was further held that in a claim of medical negligence, it was essential to establish that the standard of care and skill was not that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. For negligence to be actionable, it was held that it has to be attributable and the three essential components of “duty”, “breach” and “resulting damage” need to be met, i.e. (i) the existence of a duty to take care, which is owed by the defendant to the complainant; (ii) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and (iii) damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant. Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence, as recognized, are three: existence of a duty to take care, which is owed by the defendant to the complainant; failure to attain that standard of care, thereby committing a breach of such duty; and “resulting damage”, which is both casually connected with such breach and has been suffered by the complainant. It was held that if the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence.

19. In ***Indian Medical Association vs V.P. Shantha & Ors.***, 1995 SCC (6) 651 decided on 13.11.1995, the Hon’ble Supreme Court held that in cases before consumer *fora* both simple and complicated cases may come and that only in complicated cases the recording of evidence of an expert may be required for which the complainant may be asked to approach a civil court for appropriate relief. It was also held by the Hon’ble Supreme Court in ***Dr. J.J. Merchant & Ors vs Shrinath Chaturvedi, 2002***, (6) SCC 635 decided on 12.08.2002 that it has to be left to the discretion of the Commission whether or not to examine experts in appropriate matters.

20. However, the Hon’ble Supreme Court has also held, relying upon the treaties on medical negligence by Michael Jones, in ***V. Kishan Rao Vs. Nikhil Super Speciality Hospital & Anr.***, (2010) 5 SCC 513 decided on 08.03.2010, that the principle of *res ipsa loquitur* would also apply to cases of medical negligence. It has held the principle of *res ipsa loquitur*, which is essentially an evidential principle, is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred. The Apex Court has held that “*In a case where negligence is evident, the principle of res ipsa loquitur operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence.*” It was also held that as regards adducing of expert evidence, it would have to be judged on the facts of each case and there cannot be a mechanical or

strait jacket approach since each case must stand on its own legs. It was also held that as regards adducing of expert evidence, it would have to be judged on the facts of each case and there cannot be a mechanical or strait jacket approach since each case must stand on its own legs. Courts have consistently held that the onus would shift to the defendant once negligence is established.

21. In order to consider the contention of Respondent No. 2 that the requisite treatment was provided, it is necessary to analyse the medical records filed by the Appellant which are not contested by the Respondent. As per the Treatment cum Progress Chart of the Kids Care hospital, the 6th day Chart notes at 10 pm “*Pink Peripheral Cyanosis*” and thereafter on 21.12.2007 at 4.30 pm it is recorded “*Change of colour of status of left leg*” and “*Opinion of Pediatric Surgeon and Cardiovascular Surgeon should be taken*” followed by a remark at 10 pm stating “*Left foot pale, cold. Surgical Opinion*”.

22. The patient was discharged on 21.07.2007 and as per the Discharge Slip dated 21.02.2007 issued by “Kids Care” hospital of Respondent No. 2, it is seen that the male baby of the Appellant was admitted on 11.02.2007 and was given treatment including IV fluid, injections and symptomatic care with ventilation for three days. Respiratory distress had settled by 6th day and baby had started sucking mother breast for two days. Investigation done included Colour Doppler of Left Limb which showed ‘*No pulsation of dp and post lipid artery*’. The diagnosis was ‘*RDS with avascular necrosis of right foot fingers*’. Advice on discharge was ‘*Refer to higher center for needful*’.

23. The Discharge Summary dated 06.04.2007 of Sir Ganga Ram Hospital, New Delhi where the patient was admitted on 22.02.2007 recorded as under:

Birth Details: Baby cried immediately after birth developed respiratory distress soon after birth was admitted in nursery required ventilation for three days after which the patient improved. Patient also received iv Fluids and antibiotics after which patient improved and started accepting feeds by day 6 of life. On day 8 of life parents noticed bluish discoloration of left foot and **leg dopplers done there revealed absent flows in posterior tibial artery and dorsalis pedis of the left side.** Baby referred here for further management.

Status at Admission: Baby was hemodynamically stable. Cardiovascular and respiratory system examination were WNL. Femoral pulses were feeble bilaterally, blood pressures were not recordable in both lower limbs temp was 32.3 C in RLL and 31.2 LLL. **Left foot was gangrenous with crepitus palpable. Line of demarcation present 2 inches above the left ankle joint. Rt lower limb was also cyanosed.**

Course during Hospital: A complete sepsis workup was taken and baby started on iv antibiotics. Study of lower limbs revealed absent flows in both femoral arteries. **A CT angiography was done which revealed a large occlusive thrombus in the descending aorta and extending in both lower limbs.** Baby was given a trial of tissue plasminogen activator, which failed to show any response. Coagulation profile was normal and **sepsis work up revealed candida paracilosis from blood and urine cultures which was treated with amphotericin B.** Baby had gradual improvement in the perfusion of rt lower limb after which below knee amputation of left leg was done.

Baby developed tachypnea on day 30 of life. A sepsis workup was repeated which did not reveal any organism but chest X ray revealed bronchopneumonia, which responded to iv antibiotics. Repeated dopplers were done regularly which revealed complete resolution of the thrombus after five weeks of iv amphotericin B. A CT angiographic evaluation was done which showed canalization of the aorta and both the iliac and femoral arteries baby accepting feeds gaining weight and discharged in a satisfactory condition.

[Emphasis added]

24. As regards the issue of expert medical opinion, it is evident that the instant case is not a complicated matter of transplant of an organ or surgery. It is essentially whether the newborn child of the complainant/appellant who was under the care of Respondent No. 2 in his Nursing Home, was detected to be suffering from Peripheral Cyanosis in time and whether the Respondent No. 2, after diagnosis either extend the treatment as per prescribed medical protocol or refer him to a higher centre for treatment. The moot issue is whether a duty of care was owed by the Respondent No. 2 as a medical professional and whether this duty was breached resulting in harm to the patient as a result of which he suffered damages.

25. From the facts and circumstances of the case on hand, it is manifest that the patient was in the care of the Respondents ever since birth since the respiratory distress at birth required admission to a NICU which was not available in the Nursing Home of Respondent No. 1. It is evident that Respondent No. 1 was advised by Respondent No. 2 (who was summoned by him) to admit the newborn to the hospital of the latter which had a NICU. It is evident that the child was found to have blue colouration of the left leg on the 6th day after birth and this fact was noted in the patient's case diary on the 21.02.2007 which was the 10th day in NICU. Even thereafter, the Doppler Test was done as per their medical reports on the 10th day. The patient was seen by a specialist doctor on 21.02.2007, i.e. 10th day. It was only on 21.02.2007, i.e., the 10th day that the patient was referred to Sir Ganga Ram Hospital, New Delhi as per Discharge Summary. From the facts of the case, it is patently manifest that the newborn child/patient was in the care of the Respondents and therefore a duty of care was owed by them to him. By delaying the recording of the fact of Peripheral Cyanosis and the conduct of the Doppler Test including consultation with another expert, Dr HK Verma, the duty of care was breached by the Respondent No. 2. This breach caused harm to and led to the damage suffered by the patient. Therefore, the case is eminently covered under the principle of *res ipsa loquitur*. The State Commission has clearly fallen in error in holding that there was no expert opinion produced and, on this ground, dismissed the complaint. It is also evident that the damage/harm occurred due to negligence on part of Respondent No. 2 in failing to act promptly and taking steps when Peripheral Cyanosis was detected since the patient was in his exclusive care at that point of time. The contention of Respondent No. 2 that the patient was found to have had an thrombosis in aorta in the abdomen for which thrombotitis was conducted at Sir Ganga Ram Hospital is essentially to contend that the cause of amputation was not Peripheral Cyanosis which was detected while the patient was in his care. It is, however, clear from the records of Sir Gangaram Hospital that the patient was admitted on 22.07.2007 with a gangrenous with crepitus palpable left foot and right lower limb also cyanosed although haemodynamically stable. Thus, it is apparent that the damage/harm (amputation of the left leg) would not have occurred without negligence of

Respondent No. 2. It is also evident that Respondent Nos. 1 and 2 had exclusive control over the circumstances that led to the damage that was suffered and that there was no contributory negligence on part of the patient/attendants.

26. In light of the foregoing discussion and analysis, we are of the considered opinion that the State Commission acted erroneously in requiring for an expert opinion when the matter was not a complex one warranting expert evidence but was rather one of adjudicating whether the conduct of the Doppler Test and reference to a higher centre for further treatment was done timely as per the duty of care imposed upon Respondent No. 2. From the medical records of treatment in the hospital of Respondent No. 2 it is apparent that the patient's discolouration of the left leg had indeed come on the daily Treatment-cum-Progress Chart. A Dopplers Test was done which revealed "arterial blockage due to thrombosis in aorta of abdomen and low level of protein in respiratory distress syndrome" as per the Respondents themselves. The contention of the Respondents is that the diagnosis of Sir Ganga Ram Hospital, New Delhi, where the patient was referred on 21.02.2007, was also that the patient required thrombolysis with tissue plasminogen and due to the failure of this treatment the left leg was required to be amputated below the knee. However, from the records it is clear that at the time of admission to Sir Ganga Ram Hospital, the condition of the patient was noted as under:

Left foot was gangrenous with crepitus palpable. Line of demarcation present 2 inches above the left ankle joint. Rt lower limb was also cyanosed.

[Emphasis added]

The contention of the Respondents that the patient was diagnosed correctly and on the correct line of treatment while under the care of Respondent No. 2 therefore cannot be accepted. There is no reference to any sepsis or gangrene in the Discharge Slip dated 21.02.2007 issued by Kids Care hospital. It is also evident that the Doppler Test was done after 10th day of the patient's left foot condition having been noted in the Treatment-Cum-Progress Chart. From the record, it is manifest that the instant case is covered by the principle of *res ipsa loquitur*. Accordingly, we hold Respondents 1 and 2 jointly and severally liable for medical negligence and deficiency in service in the treatment of the patient (newborn child of Appellant). For the aforesaid reasons, the First Appeal is liable to succeed and is accordingly upheld and allowed.

27. In so far as the quantum of compensation claimed is concerned, the Appellant has claimed Rs 50 lakhs as damages with interest @10% from the date of institution of the complaint with litigation costs of Rs 10,000/-. In *Nizam's Institute of Medical Sciences Vs Prasantha S Dhananka & Ors.*, (2009) 6 SCC 1 decided on 14.05.2009, the Hon'ble Supreme Court has held that the compensation claimed for loss should be considered by striking a balance as under:

The court has to strike a balance between the inflated and unreasonable demands of a victim and the equally untenable claim of the opposite party saying that nothing is payable. Sympathy for the victim does not, and should not, come in the way of making a correct assessment, but if a case is made out, the court must not be chary of awarding adequate compensation.

In *Malay Kumar Ganguly Vs Dr Sukumar Mukherjee and Ors.*, (2009) 9 SCC 221 decided on 07.08.2009 the Hon'ble Supreme Court had held that:

Grant of compensation involving an accident is within the realm of law of Torts. It is based on the principle of *restitutio in integrum*. The principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. When death occurs, the loss occurring to dependent must be taken into account and gain to him must be ascertained; the position of each dependent in each case may have to be considered separately.

28. In the instant case, in view of the fact that the patient who suffered damages of amputation of his left leg within days of birth, quantification of the monetary claim on any available criteria such as loss of income is not possible. For a lifetime of existence as a handicapped person, the claim of Rs 50 lakhs cannot, however, be considered as exorbitant or for undue gain, as it would entail various costs for treatment including prosthetics, education and subsequent employment for livelihood. In any case, there is no claim for penal/exemplary or other costs of treatment, etc and a lumpsum claim has been sought as compensation. However, the claim of interest thereon is not considered justifiable.

29. In view of the discussion above, the First Appeal is allowed holding the Respondents jointly and severally liable for medical negligence and therefore deficiency in service and disposed of with the following directions:

- (i) Respondent Nos. 1 & 2 are directed to pay the appellant a sum of ₹50 lakhs within 8 weeks of the receipt of this order;
- (ii) In case the amount is not paid within the period of 8 weeks, the same shall be paid with simple interest @ 9% p.a. till realization;
- (iii) Litigation costs of ₹50,000/- shall be paid by the Respondents to the Appellant along with the compensation directed above.

Pending IAs, if any, stand disposed of with this order.

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**SUBHASH CHANDRA
PRESIDING MEMBER**

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**DR. SADHNA SHANKER
MEMBER**