

**STATE CONSUMER DISPUTES REDRESSAL COMMISSION,
MAHARASHTRA, MUMBAI**

Appeal No.A/20/614

**(Arisen out of order dated 22/09/2020 in Complaint No.410 of 2014 passed by
the District Consumer Commission Mumbai Suburban)**

Dr.Shrikant Badwe,
B K. Kidney & GI Centre,
Jaykar Smruti, Aarey Road,
Goregaon (W), Mumbai - 400 062.

..... Appellant(s)

Versus

Sandhya Deshpande,
F-101, Shree Shankeshwar Nagar,
Ashokvan Shiv Vallabh Road,
Dahisar (E), Mumbai 400 068.

.....Respondent(s)

BEFORE:

**Justice S.P.Tavade – President
Poonam V. Maharshi – Member**

For the Appellant(s) : Advocate Rui Rodrigues.

For the Respondent(s): Respondent along with Advocate W.V. Gaikwad.

ORDER
(27/06/2024)

Per Hon'ble Mr. Justice S.P. Tavade – President

- (1) Being aggrieved and dissatisfied by the order dated 22/09/2020 passed by the District Consumer Disputes Redressal Commission, Mumbai Suburban, in ComplaintNo.410 of 2014, the original

opponent has preferred this appeal. Parties to this appeal shall be called and referred as per their status in the complaint.

- (2) The complainant (respondent) is wife of deceased Ashok Deshpande. Said Deshpande was suffering from chronic kidney disease. He was advised to undergo for dialysis frequently. He was also advised to undergo operation of AVF fistula in the hospital of the opponent. Accordingly, on 27/12/2013 deceased Ashok Deshpande went to the hospital of the opponent. Opponent had examined him and fixed date for operation i.e. on 31/12/2013. Accordingly, operation was performed. The opponent asked deceased Ashok Deshpande to visit the hospital ten days after the operation for removal of stitches but he visited on 13/01/2014. The opponent had asked deceased Ashok Deshpande to have physical exercise as there were swelling on the fingers and hand. The creatine and other parameters were high, therefore, the opponent asked deceased Ashok Deshpande to undergo dialysis immediately.
- (3) Deceased - Ashok Deshpande got admitted in Navneet Hospital for dialysis on 02/01/2014. He was discharged from the said hospital on 07/01/2014. It was contended that at the time of discharge on 31/12/2013 the opponent had not performed sugar test on deceased Ashok Deshpande wherein sugar level was high. It was contended that at the time of examination on 27/12/2013 the opponent did not record history of deceased Ashok Deshpande in the case papers. Similarly, did not asked Ashok Deshpande to undergo tests, namely sugar etc. It was contended that it was mandatory on the part of the opponent to check the sugar level of

deceased Ashok Deshpande prior to operation on 31/12/2013. But, no sugar test was performed by the opponent and carried out AVF Fistula operation.

- (4) It was contended that on 13/01/2014 deceased Ashok Deshpande went to the hospital of the opponent for removal of stitches. The opponent on examination declared that Fistula operation carried out on deceased Ashok Deshpande was failed but his wife deferred her opinion and called Dr.Amish Mhatre, who is Vascular surgeon who confirmed that Fistula operation was not failed and there were blood clots on the hand but opponent could not diagnose it as a gangrene. It was contended that on the said day deceased Ashok Deshpande was referred to Dr.Umesh Khanna, the Nephrologist for dialysis. On 14/01/2014 Dr.Khanna found WBC count 23000 in blood and the hand of deceased Ashok Deshpande was turned blue. The said fact was noticed by Dr.Khanna and Dr.Amish Mhatre. Dr.Amit Khanna again called Dr.Amish Mhatre. Thereafter Dr.Maniar performed colour doppler test on deceased Ashok Deshpande. It was contended that Dr.Amish Mhatre had noticed that blood flow/circulation was stopped and there was development of gangrene. Hence, the deceased was admitted in Holy Family Hospital, Bandra. Dr.Ravindra Bhatnagar checked deceased Ashok Deshpande and informed that it was too late and the gangrene was developed. Dr.Bhatnagar also informed that due to negligence in primary examination before Fistula operation the development of gangrene started. It was also informed by Dr.Bhatnagar that Fistula operation hardly develops gangrene and the development of gangrene was as a result of preoperative negligence. It was

contended that on 15/01/2014 Dr.Pankaj Patel performed operation of grafting a vein in the hand in order to improve the blood flow in hand of deceased Ashok Deshpande. Said operation was lasted for 5 ½ hours. The said operation was failed. The antibiotics could not be administered to the deceased Ashok Deshpande due to kidney disease and dialysis was required to be done every alternate day. It was contended that the complainant spent huge amount for medical treatment of deceased Ashok Deshpande. It was contended that due to financial crunch the complainant shifted deceased Ashok Deshpande to Dahisar and ultimately deceased Ashok Deshpande died on 19/02/2014.

- (5) It was contended that the complainant started investigating the papers of preoperative test and found that though deceased Ashok Deshpande was diabetic, no sugar test was performed by opponent before fistula operation. It was contended that after the operation sugar level of deceased Ashok Deshpande was very high on 01/01/2014. It was contended that on the day of surgery deceased was having high sugar level and the operation was performed in high sugar level, due to which deceased suffered gangrene. It was contended that the complainant sought copies of preoperative tests and the case papers but one or the other ground the opponent avoided to provide the said papers. Ultimately, the Complainant approached Grahak Panhayat who wrote letter to opponent and ultimately the opponent gave hand written notes dated 31/12/2013. The said notes were prepared after the incident. The said notes were not provided to the complainant immediately. It is contended that due to negligence of the

opponent while performing AV Fistula operation the deceased suffered gangrene and ultimately died. Hence, the complaint came to be filed against the opponent claimed reimbursement of medical expenses , compensation and costs.

- (6) Notice of complaint was served upon the opponent. The opponent appeared and filed his written version. He denied allegations made in the complaint. It was admitted that the deceased Ashok Deshpande had visited the clinic of opponent on 27/12/2013. It was admitted that the opponent examined him and fixed date of AV operation on 31/12/2013. It was also admitted that after operation the deceased was asked to visit hospital of opponent for removal of stitches ten days after the operation. But he visited the hospital on 13/01/2014. It was denied that the opponent had not taken blood test of deceased Ashok Deshpande prior to the operation. It was contended that the blood test of deceased Ashok Deshpande was done prior to the operation and his blood sugar was 188 which was proper for carrying out the operation of AV fistula.
- (7) It was contended that deceased Ashok Deshpande was discharged from the hospital of opponent on 01/01/2014. It was contended that deceased Ashok Deshpande was admitted in three medical hospitals, namely Navneet Hospital, Bal Hanuman Hospital and Holy Family Hospital, where deceased was medically treated but the complainant has deliberately not filed the treatment papers of said hospitals along with the complaint. It was contended that the opponent had demanded the indoor case papers/medical record of deceased Ashok Deshpande from Navneet Hospital, Bal

Hanuman Hospital and Holy Family Hospital, but neither complainant nor hospitals provided the said papers to the opponent. It was also contended that the said papers were collected by complainant but deliberately not filed with the complaint. It was contended that the complainant had simply produced discharge summary of the said hospitals.

- (8) It was contended that the opponent is specialised in the field of urology and andrology, particular in the surgical creation of AV fistula. The opponent contended that in his 29 years of practice he has done more than 3000 AV fistula surgeries alone. It was also contended that the opponent had done AV fistula operations on patients requiring dialysis at various hospitals including Jeevan Vikan Kendra, Andheri, Holy Spirit Hospital, Mahakali, Suvarna General Hospital, Nanavati hospital. It was contended that the opponent was known to have one of the track records given the utmost care and diligence exercised by him at all times in respect of his patients. It was contended that the opponent is one of the senior most and experienced Urologists and Andrologists in the City of Mumbai. It was contended that the opponent is also fellow of the International College of Surgeons (F.I.C.S).
- (9) It was contended that deceased Ashok Deshpande was referred to opponent for creation of AV fistula operation on 27/12/2013 by Dr.Umesh Khanna, Nephrologist, attached with Navneet Hospital, so that the patient could start dialysis as soon as possible. The procedure of AV fistula involves connecting a vein and an artery, usually in the forearm, to allow access to the vascular system for haemodialysis. The said doctor was treating the patient for his

Chronic Kidney Disease for one year, and who had advised the patient to go for dialysis and for which the procedure of AV fistula had to be performed. It was contended that deceased Ashok Deshpande had history of CKD and complications related to it. He was chronic diabetic patient and he had suffered from Cerebro Vascular Accident in the past and also had multiple pre-surgery issues including Hypertension (High Blood Pressure) and Ischaemic Heart Disease (Compromised blood supply to heart) and for which he was on multiple medication. It was contended that the opponent had examined the patient clinically apart from thoroughly checking the reports of the patient before surgery. It was contended that on 31/12/2013 the procedure of AV fistula was performed of the deceased Ashok Deshpande by opponent at BK Kidney & GI Centre after checking the patient's case files/medical records, the opponent examined the patient clinically and only after substantiating that the patient was operable for the said procedure. It was contended that after examining both hands of the patient for ensuring appropriate and most favourable site for performing the said procedure of AV Fistula, the opponent performed the procedure at left Cubital Fossa as the forearm vessels, both artery and vein, were of poor quality, which is generally the case in diabetic patients. The said surgery was carried out successfully under aseptic precautions under Local Anaesthesia and the patient tolerated the procedure well. It was contended that post operative care was properly explained to the patient and the relatives. It was contended that the opponent was aware that the patient was diabetic and out of standard operating procedure checked blood sugar of the deceased

by performing a HGT – Haemo Gluco Test preoperatively before said procedure was performed. It was contended that it has been noted in the nurse's order book that the deceased was having blood sugar of 188mg% prior to the operation. It was contended that the notes were furnished to the complainant as well as to the District Commission. It was contended that the opponent had performed the operation as per standard protocol followed in such cases.

- (10) It was contended that after surgery of AV fistula, swelling of the hand occurs in majority of the patients post operatively and more so in case of brachial (elbow) A.V. fistula as compared to Radial AV fistula in wrist. It was contended that some amount of swelling developed on the fingers and hand, as is known to occur in majority cases following AV fistula. It was contended that patient was advised to do certain finger exercises to promote circulation of blood through the A.V. fistula as part of the routine post operative treatment. It was contended that a Nephrologist Dr.Nitin Sonavane was also called to treat and review condition of deceased Ashok Deshpande on 01/01/2014 who advised early initiation of haemodialysis to the patient. Thereafter, deceased Ashok Deshpande was discharged on 01/01/2014 after advising him to report to his Nephrologist Dr.Umesh Khanna for further instructions regarding dialysis and medical management. It was contended that deceased Ashok Deshpande was advised to report opponent if any problem/SOS qua the AV fistula. It was contended that deceased Ashok Deshpande was advised to follow-up for stitches removal after a period of ten days apart

from initiating dialysis at the earliest. The discharge card summary clearly indicates that W.B.C. count of the patient on 01/01/2014 was 7,300 per cmm which is much within the normal range. It was contended that Nurses Order Book page indicating sugar level of deceased Ashok Deshpande prior to procedure was 188 mg. It was contended that said sugar was appropriate to undertake AV fistula procedure. The sugar level in such chronic diabetic patients are known to fluctuate and therefore, the said test was performed pre-operatively to ascertain the current status at the relevant level. It was contended that deceased Ashok Deshpande was admitted in Navneet Hospital on 2nd January, 2014. He took treatment in the said hospital till 07/01/2014. During said period deceased Ashok Deshpande underwent haemodialysis thrice in the I.C.U. of Navneet Hospital. During that period neither deceased Ashok Deshpande nor the relatives approached the opponent for any issues related to A.V. fistula. It was contended that after discharge from Navneet Hospital deceased Ashok Deshpande had visited the OPD of Dr.Umesh Khanna on 09/01/2014 with complaints of headache, backache, giddiness and fever with chills, which are symptoms of developing infection. It was also observed from the notes of Dr.Umesh Khanna 09/01/2014 that A.V. fistula did not show any abnormalities. Instead Dr.Umesh Khanna had advised the patient for taking a Neurologist's opinion. It was contended that on 08/01/2014 W.B.C. count of deceased Ashok Deshpande was 13,000 per cmm which was just borderline high and whereas his W.B.C. count on 01/01/2014 i.e. on the date of discharge was 7,300 per cmm. Thus, the W.B.C. count of deceased Ashok

Deshpande prominently increased subsequently to his discharge from Navneet Hospital which is clearly indicative of the patient developing infection. It was contended that the allegation of negligence on the part of the opponent is baseless and categorically denied. It was contended that Dr.Umesh Khanna had also changed therapy to higher antibiotics viz.Inj.Vancomycin and Inj.Mikacin for his multiple medical problems and which did not seem to control his infection.

- (11) It was contended that on 13/01/2014 deceased Ashok Deshpande visited at BK Kidney & GI Centre twelve days after AV fistula surgery. It was contended that as there was no communication between deceased Ashok Deshpande and opponent during said period, whatever regarding condition of patient during said period of twelve days. It was contended that on 13/01/2014 opponent examined deceased Ashok Deshpande clinically and found swelling of hand. It was contended that the opponent wanted to rule out any possibility of A.V. fistula being partially blocked due to clot, whereat the opponent palpated the AV fistula to examine the functioning of AV fistula and even though having felt the thrill (an indication of functioning of the AV fistula) which was not too strong wanted to rule out any inadequacy of blood flow through the AV fistula and as an abundant precaution, Dr.Rohini Badwe too examined the patient with stethoscope and could hear a good bruit (a vascular sound), indicating that the A.V. fistula was functioning properly and that blood flow appeared to be present therein. The said fact was confirmed by Dr.Amish Mhatre, a Vascular Surgeon. It was contended that Dr.Amish

Mhatre had also carried out Doppler test and found that A.V. fistula showed good bruit and also the radial and ulnar arteries showed satisfactorily biphasic flow, which indicated that the A.V. fistula was working well, as well as distal circulation was present. It was contended that Dr.Ravindra Bhatnagar has wrongly informed complainant that development of gangrene was due to negligence in preliminary investigation before AV fistula operation. It was contended that affidavit of Dr.Ravindra Bhatnagar was not produced on record to support the case of the complainant. It was contended that the deceased Ashok Deshpande had multiple health problems, similarly, he was undergoing dialysis through central line and deceased Ashok Deshpande being immunocompromised, hence, developed infection. It was contended that development of gangrene was multi-factorial and therefore, opponent cannot be held responsible.

- (12) It was contended that Dr.Pankaj Patel carried out operation of deceased Ashok Deshpande on 15/01/2014. The said operation was for grafting a vein in the hand in order to improve the blood flow in hand which means that there was no stoppage of blood flow at the given time and the operation was done to improve the blood flow. It was contended that the issue of patient having gangrene does not arise as development of gangrene results from complete stoppage of blood flow. Thus, it is clearly indicative that it is not the case of pre-operative negligence by exhibiting utmost diligence on the part of the opponent. It was contended that the statements made by Dr.Amish Mhatre and Dr.Ravindra

Bhatnagar are not accepted by the opponent. It was contended that the complaint is false and filed with ulterior motive. It was contended that the opponent had followed standard SOP while conducting AV fistula. All documents were handed over to the complainant but complainant did not produce treatment papers of deceased Ashok Deshpande from 02/01/2014 till his death. It was contended that there are many other factors for sustaining gangrene. The gangrene could also be caused during hospitalisation of the deceased Ashok Deshpande after AV fistula operation. Hence, the complaint be dismissed with costs.

- (13) The complainant filed her affidavit an brief notes of arguments, viz. Treatment papers, prescriptions, payment receipts and statement of Dr.Manjarekar. After the death of Ashok Deshpande the matter was referred to police. Accordingly, the concerned police station had sent papers to Board of Doctors of J.J. Hospital who filed report. Similarly, the opponent has also filed affidavit of Dr.Ashok Kriplani, Dr.S.S. Joshi, Dr.Lala Manani, Dr.Hemant Pathare. The Opponent has also filed his evidence on affidavit. After considering the evidence on record the District Commission held that the opponent did not take proper precaution prior to AV fistula operation which caused gangrene to deceased Ashok Deshpande. Hence, complaint was allowed and the opponent was directed to refund the amount of Rs.10,00,000/- to the complainant which incurred for AV. Fistula operation, expenses Rs.2,00,000/- incurred for taking treatment in other hospitals, Rs.2,00,000/- towards compensation. The said order is under challenge.

- (14) Heard advocate for the complainant as well the advocate for the opponent. Both of them have filed written notes of arguments along with case-laws.

REASONS:

Professional Negligence:

- (15) In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking

the performance of the task entrusted to him he would be exercising his skill with reasonable competence.

Negligence in respect of Medical Profession:

- (16) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. The classical statement of law in Bolam Case, (1957) 2 ALL ER 118, at P.121 D-F [set out in para 19 herein], has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular, and holds good in its applicability in India. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. It is not necessary for every professional to possess

the highest level of expertise in that branch which he practises. Three things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time (that is, the time of the incident) on which it is suggested as should have been used. Thirdly, when it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

- (17) A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties viz. a duty of care in deciding whether to undertake the case, a duty of care in deciding that treatment to be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. 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, judged in the light of the particular circumstances of each case, is what the law requires. The doctor no doubt has a discretion in choosing the

treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of an emergency.

- (18) At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are: (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation, the person holding the 'smoking gun'.

Negligence as a tort:

- (19) The jurisprudential concept of negligence defies any precise definition. In current forensic speech, negligence has three meanings. They are: (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings.
- (20) 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 recognised, are three: “duty”, “breach” and “resulting damage”, that is to say:

1. the existence of a duty to take care, which is owed by the defendant to the complainant;
2. the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and
3. damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant.

(21) Before proceeding further, let us understand what the Hon’ble Apex Court has found to constitute medical negligence. In *Jacob Mathew vs. State of Punjab*, the Court held:

“48. (1) 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. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Sing), referred to hereinabove, holds good. 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 are three: 'duty', 'breach', and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor additional considerations apply. A case of occupational negligence is different from the one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of the knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence

arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional maybe 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.”

35. Following Jacob Mathew, the Hon’ble Apex Court in Kusum Sharma vs. Batra Hospital laid down the following principles that are to be considered while determining the charge of medical negligence:

“I.) Negligence is the breach of a duty exercised 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. ...

III.) The Medical Professional is expected to bring 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 judged in the light of the particular circumstances of each case is what the law requires.

IV.) A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V.) In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of another professional doctor.

VI.) The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII). Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

IX.) It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.”

- (22) Now coming to the facts of present case, the Complainant came with a specific story that the opponent did not perform necessary preoperative tests and more importantly the test to confirm sugar level knowing full well that the patient Ashok Deshpande was diabetic. After operation, the deceased had complaint of swelling on fingers, hand and pain in the back as well as breathlessness but the opponent advised the patient to do certain exercises and in spite of pains the deceased was discharged on the same day at midnight. It was contended that on 13/01/2014 the opponent initially declared that the fistula was failed but his wife Dr.Rohini Badwe differed her opinion and so, Dr.Mhatre came with specific case that fistula was working properly. Hence, the opponent had doubt of success of fistula operation. It was contended that on 13/01/2014 there were blood clots on deceased - Ashok

Deshpande's hands, but the opponent referred deceased Ashok Deshpande to Dr.Umesh Khanna for dialysis without performing colour Doppler test.

- (23) It was allegation of the Complainant that no antibiotics were administered to deceased Ashok Deshpande before operation knowing fully well that patient had kidney problem, diabetes and hypertension. It was also alleged that the opponent was not skilled in AV fistula procedure, subsequently allegations was not pressed by the complainant.
- (24) Admittedly, the complainant has not led any evidence in support of his case namely gangrene was developed only because of non-performing necessary pre-operative tests, more particularly, test to confirm sugar level. On this point complainant has specifically alleged and affirmed that on 31/12/2013 the opponent did not perform necessary pre-operative tests, mainly to confirm the sugar level of deceased Ashok Deshpande. On this point opponent pleaded and affirmed that the blood sugar of the deceased Ashok Deshpande was checked prior to the operation and accordingly, the entries are made in the daily extract of nurses which was produced on record and also furnished to the complainant prior to filing of the complaint. According to the complainant the said notes are on plain papers and those were prepared subsequently to serve purpose of the opponent. Advocate for the opponent had vehemently submitted that the nurse's notes are very important document which shows that the blood sugar of deceased Ashok Deshpande was checked and it was found to be 188 mg. The said

sugar level was sufficient to carry out procedure of AV fistula. The advocate for the opponent has invited our attention to the nurse's notes. He also produced on record original nurse's register for perusal of this Commission. On comparing the copies produced on record with the original register it appears that the notes produced on record by the opponent are not prepared subsequently. Those papers are the part of original register. There is specific endorsement in the Nurse's Register dated 31/12/2013 that blood sugar was checked which was found to be 188 mg. So, it cannot be said that the operation was carried without confirming the sugar level of the deceased Ashok Deshpande.

- (25) It appears from the impugned order that that District Commissions has also not paid any attention to the Nurse's notes which had been maintained in the hospital. Original Nurse's order Book is produced on record for inspection of this Commission. The said register started from 23/12/2013 to 12/02/2014. The entire register has many entries and those are verified by Doctors and nurses. The said register is maintained up-to-date from 23/12/2013 to 13/02/2014. The entry in the name of deceased Ashok Deshpande shows that he was given medicines at 04.00 p.m., 7.30 p.m., procedure was started at 10.30 p.m. Prior to that HGT test was carried at 01.00 p.m., so it can be said that immediately after admission of deceased Ashok Deshpande HGT test was done and thereafter tablets of Zill and Dolo were given to him and thereafter at 10.30 p.m. the procedure started. So, we satisfied with the defence of the opponent that he had carried out blood sugar test which found to be 188 mg. and

thereafter procedure for AV fistula was conducted. So, we do not find any merit in the case of complainant that the operation of AV fistula was carried out without prior blood tests.

- (26) As we have already mentioned that complainant has failed to produce expert evidence to establish the negligence of opponent while carrying out the AV fistula procedure but no doubt, the complainant has produced on record declaration issued by Dr. M.R. Mirajkar. It is dated 27/02/2016. The death of Ashok Deshpande occurred on 19/02/2014 whereas the declaration was received after two years from the death of Ashok Deshpande. It is pertinent to note that declaration is running in three pages but it is not signed by Dr.Mirajkar. Dr.Mirajkar has also not given his speciality in the field of medical science. From Letterhead it appears that he has done M.S.(Gen.Surgery) PGD.HR(BOM). It is also not case of the complainant that deceased Ashok Deshpande was patient of Dr.Mirajkar and Dr.Mirajkar had an opportunity to examine deceased Ashok Deshpande prior to AV fistula operation or after AV fistula operation till his death. It appears that Dr.Mirajkar had given opinion on the basis of documents given by complainant. It was expected from Complainant to examine Dr.Mirajkar to support her case. Dr.Mirajkar had neither examined nor his affidavit is produced on record. Similarly, his declaration is not signed by him. So, document produced by complainant in the style as declaration issued by Dr.Mirajkar has no legal sanctity and it cannot be read as piece of evidence. On the other hand, the opponent has produced on record report of expert committee dated 14/06/2016. It appears that the

complainant had filed complaint with police and accordingly, the concerned police had sought opinion of the expert committee from Department of Urology, Grant Government Medical College & Sir J.J. Group of Hospitals, Mumbai. Report is signed by Chairman and Head of Department, Urology. The Committee was consisting of Members, (1) Dr. Shailesh Jadhav, Professor, Department of Medicine, (2) Dr. Ajay Bhandarwar, Professor, Department of Surgery, (3) Dr. Arvind Waland, Professor, Department of Pathology, (4) Dr. Gajanan Chavhan, Asso. Professor, Department of F.M.T, and (5) Dr. Avinash Gutte, Asso. Professor, Department of Radiology. So, it appears that there were five Committee Members and Committee was headed by Dr. M.A.K. Siddiqui, Professor and Head Department, Urology, Grant Government Medical College & Sir J.J. Group of Hospitals, Mumbai, Government of Maharashtra. The expert Committee has opined that:

“We have conducted the expert committee meeting to study the said case.

As per the documents provided related to this case, Mr. Ashok Deshpande was k/e/o Diabetes Mellitus, Chronic renal failure and Ischaemic Heart disease on Maintenance hemodialysis consulted Dr. Shrikant Badwe for A.V. fistula surgery as advised by Nephrologist on 27/12/2013. A.V. fistula surgery was performed on 31/12/13 on next day after checkup patient was advised to follow up after 10 days. Patient came for follow up on 13/1/14 with complaints of weak thrill in fistula Thrill was present as

confirmed on doppler. On 5/02/14 patient developed Left hand gangrene for which patient was admitted in other hospital where patient was advised amputation of left hand for which relatives were not ready and on 19/02/14 patient expired. After studying the case we came to the conclusion that there was no lapse in due care and application of skill from Dr.Shrikant Badwe in this case. This is for your kind information and further necessary action.”

- (27) The expert Committee of Department of Urology, Grant Government Medical College & Sir J.J. Group of Hospitals, Mumbai opined that there was no lapse in due care and application of skill from opponent Doctor namely Shrikant Badwe in the case of deceased Ashok Deshpande. The said opinion is not disturbed by any other opinion given by Expert in the said field. Therefore, we have no hesitation to accept the report of expert Committee Department of Urology, Grant Government Medical College & Sir J.J. Group of Hospitals, Mumbai and said report is not controverted by the complainant by producing any other opinion of expert.
- (28) In addition to the report of Department of Urology, Grant Government Medical College & Sir J.J. Group of Hospitals, Mumbai, the opponent has produced on record affidavits of experts in the field of disease connected with renal failure or chronic kidney failure. The said experts are Dr.Ashok L. Kirpalani, Dr.S.S. Joshi, Dr.J.G. Lal Malani and Dr.Hemant Pathare.

- (29) Dr.Ashok Kirpalani had obtained Degree in Internal Medicines and later Fellowship in Nephrology and MNAMS Degree in Nephrology. He has served as Professor of Nephrology in the JJ Hospital and Grant Medical College between 1981 and 1990. He is also Professor at the Bombay Hospital Institute of Medical Sciences from 1991 till date. His speciality is in the subject of Nephrology which deals with the disease, Chronic Kidney Disease or Chronic Renal Failure. He performed and assisted in performing Kidney Transplants from the year 1977 uptill the date of more than 2000 patients. He has also performed haemodialysis as part of his medical treatment to patients of Chronic Kidney Disease in the stage V. He has also claimed that he has teaching experience in Nephrology for 43 years. He was President of Indian Society of Nephrology and Indian Society of Organ Transplantation (ISOT). Dr.Kirplani has opined that the need for very tight lowering of blood glucose in patients who are suffering from CKD stage V, i.e., patients of CKD who are in need of dialysis or who are in need of dialysis or immunity on the verge of needing dialysis, it is not advisable to maintain tight blood glucose control. He further opined that glucose control is measured over a period of time either by repeated blood glucose estimation or by a test called Blood HbA1c i.e. around normal HbA1c which is between 5 and 6% (which is 80 to 140 mg% of blood sugar) are in much greater risk of getting severe complications such as heart attack and brain strokes. The survival rate of those patients who have HbA1c 7 or 8 (160 to 200 mg% average Blood Sugar in 3 months) is superior to those who have HbA1c between 5 and 6. He stated that it is incorrect to state that

in this patient it was mandatory to have a blood glucose level brought down to “normal” before the surgery. The patient had random Blood Sugar at 188mg% is very much acceptable. He is contradicted the opinion given by Dr.Mirajkar.

- (30) The complainant has produced on record the declaration of Dr.Mirajkar who has opined that blood glucose of 140 mg% was mandatory and bringing the blood level to that level was essential prior to surgery. On his opinion Dr.Kirplani has opined that there is absolutely no need to try and achieve normalcy in patients of CKD who are undergoing or will soon be needing dialysis because in an attempt to reach normalcy more often than not, the patient is sent into low blood glucose levels and can cause the patient, cardiovascular or cerebrovascular damage. Dr.Kirplani has also referred the opinion of Mark Williams, a renowned authority and researcher of glycaemic control in ESRD due to diabetes. Williams has opined that *“sustained extremes of glycaemia are associated with increased mortality risk in diabetic ESRD patients”*. Dr.Kirplani has opined that deceased Ashok Deshpande was patient with CKD stage V and in urgent need of dialysis. He also opined that site of fistula noted that the patient received a brachial (also known as “high”) fistula. He also opined that same is a routine practice for the surgeon to assess the vessels clinically by palpation and other clinical techniques and tests to ascertain the force of blood flow in the arteries and the patency of the veins that are to be anastomosed. He also opined that in the clinical assessment, the surgeon is satisfied of the site to be selected, he may proceed without any other mechanical evaluation

such as Sonography or Doppler Sonography. He also opined that it is only necessary to do sonography if clinical judgment is equivocal i.e. the surgeon is not sure of his clinical assessment. It is further opined that it is wrong to say that every case must be subjected to Doppler Sonography prior to surgery.

- (31) Dr. Kirplani has given his opinion on oath. He was not called for cross-examination by the complainant.
- (32) The opponent has given credentials of Dr.Ashok Kriplani by producing his Bio-data. Those facts are not specifically denied by the complainant. So, it can be said that Dr.Ashok Kirpalani is expert in the field of Nephrology who gave opinion by contradicting the declaration given by Dr.Mirajkar.
- (33) Opponent has also relied on the affidavit of Dr.S.S. Joshi, who is also expert in A.V. Fistula surgery. He gave his qualification as well as experience. According to him he has vast experience in performing AV fistula surgeries. He is consulting urologist at Jaslok Hospital, Pediatric Urologist at Global Hospital, visiting pediatric urologist to Muljibhai Patel Urology Hospital Nadiad and Emeritus urologist at Bhatia General Hospital. It is also affirmed by Dr.Joshi that he was President of Urological Society of India (USI) and a former President of Nephrology Urology Transplant Society of SAARC countries. He has also been conferred upon Hon.Membership of British Association of Urological Surgeons (BAUS) for his distinguished contribution to

urology. He is recipient of urology “GOLD MEDAL” from West Zone Chapter of USI.

- (34) He has affirmed that he has gone through the opinion tender by Dr.Mirajkar. He opined that opponent Doctor Badwe cannot be said to be at fault and negligent in the treatment and final outcome of patient since the choice of Brachail A.V. fistula is preferred in elderly, diabetic, chronic kidney disease and I H D patients. He also opined that AV fistula cannot be used immediately upon creation. It takes some considerable amount of time for AV fistulas to become active and ready for use. He also opined that AV fistulas have to be ‘matured’ which takes about 4 to 8 weeks after arterializations of the veins in adequate. He also relied on the opinion given in Rutherfords Vascular Surgery 8th Edition which is referred by all the Vascular Surgeons and urologists who perform A.V. Fistula. He also opined that blocked AV fistula will not give a thrill, good bruit or biphasic flow on Doppler study which was seen on 13th January, 2014 by Doppler test of deceased Ashok Deshpande. Clinically good functioning AV fistula does not require Doppler Study. Clinically malfunctioning AV fistula requires further investigations. Post discharge patient was admitted in a hospital under care of a competent Nephrologist Dr.Umesh Khanna. Therefore, the objection of improper follow up is not correct. He opined that the papers submitted to him for his opinion do not have details of the last operation but he has opined that opponent cannot be blamed for negligence in the treatment and final outcome of the AV fistula surgery done on deceased Ashok Deshpande.

- (35) Dr. Joshi has given his opinion on oath. He was not called for cross-examination by the complainant. The opponent has given credentials of Dr.S.S. Joshi by producing his Bio-data. He took MBBS degree from University of Mumbai in October 1961, MS from University of Mumbai in April, 1966 and FRCS from Royal College of Surgeons, England in November, 1970. At present he is Consultant Urologist, Jaslok Hospital & Research Centre, Mumbai, Emeritus Consultant Urologist, Bhatia General Hospital, Tardeo, Mumbai, Consultant Urologist & Paediatric Urologist, Global Hospital, Parel, and Visiting Paediatric Urologist, Muljibhai Patel Urology Hospital, Nadiad, Gujarat.
- (36) The opponent has also relied on the evidence of Dr.J.G. Lal Malani. He has also affirmed that he had gone through the opinion given by Dr.Mirajkar and accordingly, he gave his opinion. According to him he is regularly performing the A.V. fistula creation surgery at various hospitals and he is attached to Jaslok, Saifee, Bhatia, Breach Candy, Elizabeth Nursing Home etc. He opined that the patients of ESRD have a lot of co-morbidities such as diabetes, hypertension, increased Cholesterol, peripheral vascular disease etc. and these can cause complications despite all precautions and care and technical correctness of the surgery. He also opined that all patients suffering from ESRD are on multiple drugs and many such patients are already on dialysis. Aforesaid situation is likely to cause hypertension, which leads to thrombosis of the fistula with embolization and/or/sepsis. He further opined that because of other reasons the immunity in such

patients is very low and due to which there are chances of development of sepsis in them. He also opined that the opponent Dr.Badwe has done his work diligently, blood sugars below 200 mg% is safe as patients of C.K.D. are more prone to severe and irreversible hypoglycemia which is difficult to treat, it is preferred to maintain blood sugar at higher level in CKD patients reasonably safe especially as patients of ESRD are more prone to severe and irreversible hypoglycemia. He further opined that after operation Dr.Badwe saw patient on 13/01/2014 and Doppler test performed by Dr.Mhatre at that time showed no thrombosis meaning thereby that the AV fistula performed by Dr.Badwe was working well. According to him Opponent Dr.Badwe followed the standard protocols in such cases and exercised due care and diligence which was expected of from him. He has also affirmed that he was not aware Dr.Mirajkar's credentials as an expert of any sort as far as vascular disease or AV fistulas are concerned. He further observed that he would have been aware if Dr.Mirajkar was performing AV fistulas in the city as the specialist community of urologist and vascular surgeons is performing AV fistula surgery is miniscule. He further observed that he can vouch that Dr.Mirajkar is not an expert on AV fistula and therefore in his perception which respectfully placed for the consideration of this Hon'ble Hon'ble Forum, his comments ought not to be considered as expert opinion. He also observed that from an ethical view point and against the prescribed code of ethics any medico not specialized as afore described ought not to venture into tendering such an opinion, only for the sake of opinion. These observations are also not challenged by the

complainant. Dr.J.G. Lal Malani has also further himself expressed his willingness to testify before the Commission but he was not called for cross-examination by the complainant. Dr.J.G. Lal Malani has also given his Bio-data and credentials in it are not disputed by the complainant.

- (37) The opponent has also relied on the affidavit of Dr.Hemant Pathare who has done super specialization M.Ch in Cardiovascular and Thoracic surgery from University of Mumbai. He is attached to Nanavati Super Speciality Hospital, Fortis Hospital, Hinduja Hospital at Khar and Kohinoor Hospital. He has always preferred end to side for radial artery wrist fistulas and side to side anastomosis for brachial artery fistula. He also observed that Dr.Badwe had done side to side anastomosis which is standard procedure for brachial A.V. fistula. He has also opined that Dr.Badwe has excellent professional track record of creating A.V. fistulas for over 30 years. On perusing papers Dr.Pathare observed that after fistula surgery patient was admitted in Navneet Hospital for further care under Dr.Umesh Khanna where he received 3 sessions of hemodialysis. He also opined that if the fistula had stopped working then Dr.Khanna would surely have had informed Dr.Badwe. He also opined that patient was asked to visit hospital 10 days after the surgery but he appeared on 13th day. He further affirmed that on 13th day when doppler test was carried out by Dr.Amish Mhatre in order to ascertain the proper functioning of A.V. fistula, the Doppler test showed working of fistula. Thereafter patient was advised to undergo Doppler test. Said Doppler test was earlier performed by

Dr.Maniar indicated No Thrombosis. Thereafter patient got transferred to Holy Family Hospital but the treatment papers of the same were not produced before him. Dr.Pathare has also given clean chit to opponent contending that there was no negligence on the part of the opponent while carrying out AV fistula operation. Affidavit of Dr.Hemant Pathare speaks that immediately after AV fistula operation, the patient was admitted in Navneet Hospital where he received 3 sessions of haemodialysis. Thereafter on 13th day of the operation of the operation doppler test was carried out wherein it was shown that AV fistula was working. So, at that point of time there was no signs of gangrene. Therefore, Dr.Pathare has given clean chit to the opponent. Dr.Pathare has also produced on record his credentials and his experience in the field of surgeries. His credentials are also not disputed by the complainant. Similarly, Dr.Pathare was also not called for examination

- (38) The evidence of experts is considered by the Hon'ble Supreme Court in the case of J.J. Merchant and Ors. Vs.Shrinath Chaturvedi, reported in (2002) 6 SCC 635 wherein it was held that *"it is true that it is discretion of the Commission to examine the experts if required in appropriate matter. It is equally true that in cases where it is deemed fit to examine expert, recording of evidence before a Commission may consume time. The Act specifically empowers the Consumer Forums to follow the procedure which may not required more time or delay the proceedings. The only caution required is to follow the said procedure strictly. In view of Section 13(4)(iii) the Commission*

can also follow the procedure postulated by Order 18 Rule 4 CPC. Hence, it cannot be said that there is any scope of delay in examination or cross-examination of the witnesses. The affidavits of the experts including the doctors can be taken as evidence. Thereafter, if cross-examination is sought for by the other side and the Commission finds it proper, it can easily evolve a procedure permitting the party who intends to cross-examine by putting certain questions in writing and those questions also could be replied by such experts including doctors on affidavits. In case where stakes are very high and still party intends to cross-examine such doctors or experts, there can be video conferences or asking questions by arranging telephone conference and at the initial stage this cost should be borne by the person who claims such video conference. In present case, the expert witnesses had offered them for cross-examination but the complainant did not call them for cross-examination, so their evidence gone on record unchallenged.

- (39) On going through the report of Department of Urology, Committee of Grant Government Medical College & Sir J.J. Group of Hospitals, Mumbai, as well as affidavits of four Doctors it is established by the opponent that he was not negligence while carrying out pre-operative investigation as well as post-operative treatment. It is not the case of the complainant that the opponent is not expert in the field of AV fistula surgeries. No evidence is led to that effect. On the contrary, the affidavit of Opponent has coupled with the affidavits of Expert Doctors and Medical

Professions, it is established that the opponent is expert in AV fistula surgeries.

- (40) We have already observed that the pre-operative blood test was done by the opponent. Accordingly, entry was made in the Nurse's book. Said book is produced on record. On inspection it is established that entry is made in the said book that the blood test was done prior to the procedure. Copies of the said Nurses book was given to the complainant but it was not accepted by the Commission on the ground that genuineness of the same was doubtful. The District Commission ought to have asked the opponent to produce the original register. Said Register is produced before this Commission and we verified the same register. So, there is no scope for any tampering of the same. It was also case of the complainant that on 13/01/2014 there were blood clots on patient's hand but opponent referred the patient to Dr.Khanna for dialysis without performing Colour Doppler but said allegations are not proved by the complainant because Dr.Mhatre had taken Doppler Test which showed that AV fistula was working. Hence, deceased Ashok Deshpande was referred to Dr.Khanna for dialysis. Similarly, Dr.Khanna, Nephrologist, was treating deceased Ashok Deshpande about an year for renal failure, so, he had knowledge about the physical condition of deceased Ashok Deshpande. Dr. Khanna would have made entry in the treatment paper regarding failure of Fistula but no such document is produced on record. In fact, from 13/01/2014 till 19/02/2014 deceased Ashok Deshpande was under treatment of Dr.Khanna and other Doctors at various hospitals, namely,

Navneet Hospital, Bal Hanuman and Holy Family Hospital. So, deceased Ashok Deshpande was also under treatment of various doctors who had seen site - AV fistula and its condition. But no evidence of said Doctors is led in the case contending that due to failure of fistula operation, gangrene had taken place. Similarly, it was important to note that all the treatment was given by treating doctors of deceased Ashok Deshpande at various hospitals who had also given treatment to him on gangrene. It is admitted fact that gangrene can happen for various reasons. It was noticed that deceased Ashok Deshpande had infection on 13/01/2014 as his WBC count increased to 13000, so, the treating Doctor must have given him some treatment to reduce WBC count but those treatment papers are not produced on record. It was grievance of the opponent since filing of the written version, no treatment papers of deceased Ashok Deshpande from 02/01/2014 till his death were produced on record. It must be mentioned here that the complainant has only produced Discharge Summary of Navneet Hospital, Bal Hanuman Hospital and Holy Family Hospital. In all discharge summaries it is mentioned that treatment case papers were returned to complainant but in spite of having possession of the said treatment papers those were not produced by the complainant for perusal of District commission as well as this Commission. Therefore, it appears that the complainant has withheld or concealed the treatment case papers of deceased Ashok Deshpande, which could have thrown some light as to how gangrene was developed.

- (41) On perusal of Discharge Card of Holy Family Hospital it appears that there is entry that, “*On admission patient had gangrenous left hand with radial. Pulse not palpable*”. But, deceased Ashok Deshpande was admitted in Hospital on 14/01/2014 and discharged on 05/02/2014. He was constantly under the treatment of Dr.Pankaj Patel, Dr.Umesh Khanna and Dr.Jadwani. Thereafter, deceased Ashok Deshpande was shifted to Navneet Hospital under the treatment of Dr.Khanna. So, it can be said that though there is entry showing that on admission patient had gangrene, the stage of gangrene was not explained in the discharge card. The said fact would have been notice in the treatment papers as to how gangrene was increased. It is also allegation of complainant that opponent knowing well that patient had kidney problem, diabetes and heart patient no antibiotics were given to him before operation. In fact, there is no evidence on record that said antibiotics were required to be administered to deceased Ashok Deshpande. There is no opinion either of Dr.Khanna or other treating Doctor that antibiotics were required and those were not given to deceased Ashok Deshpande. It is mere guess of complainant that due to non-providing of antibiotics, condition of deceased Ashok Deshpande was worsening. In fact, the deceased Ashok Deshpande was admitted in Navneet Hospital immediately after the surgery, so, the subsequent treating doctor might have taken care by giving antibiotics to the deceased. As we have already observed that there is no material on record that the antibiotics were just required before the operation so we do not find any material in the

allegation that opponent has failed in its duty by not providing antibiotics to deceased Ashok Deshpande before operation.

- (42) On factual aspects, the complainant made allegations against the opponent that he was negligent in performing AV fistula surgery but the said allegations are not proved by way of expert evidence. No doubt, the complainant has tried her level best to produce declaration of Dr.Mirajkar but the said declaration is not signed by Dr.Mirajkar. It was case of the complainant that Dr.Mhatre and Dr.Bhatnagar had informed her that the deceased suffered gangrene due to pre-operative negligence of the opponent. But to our surprise the complainant has not produced affidavit of said Dr.Mhatre and Dr.Bhatnagar. Thus, it can be said that, except the bare words of the complainant there is no evidence on record to prove negligence of the opponent. On the other hand, the opponent has produced on record report of Expert Committee headed by Dr.M.A.K. Siddiqui. The said Committee was established at the request of police department whereby the Committee had come to the conclusion that there was no lapse in due care and application of skill from Opponent Doctor and the said Committee gave clean chit to the opponent.

- (43) The opponent/appellant has relied upon the following judgments:

- (A) Hon'ble National Commission in the case of *N.T. Subramanyam and Ors. Vs. B. Krishna Rao and Ors.*, decided on 21/06/1996, reported in 1996(2) CPR NC 247. In this case the Hon'ble National Commission has held that, "*The principles*

regarding medical negligence are well-settled. A doctor can be held guilty of medical negligence only when he falls short of the standard of reasonable medical care. A doctor cannot be found negligent merely because in a matter of opinion he made an error of judgment. It is also well-settled that when there are genuinely two responsible schools of thought about management of a clinical situation the Court could do no greater disservice to the community or the advancement of medical science than to place the hallmark of legality upon one form or treatment.”

- (B) Bihar State consumer Disputes Redressal Commission, Patna, in the case of *Miss Soni Kumari (Minor) Vs. Dr. Nagendra Narain Bhagat* decided on 18/11/2002, reported in 1(2003) CPJ 196. In this case it is held that “burden of proof lies on complainant. Absence of proof to prove negligence and complainant not entitled to compensation.”
- (C) Hon’ble National Commission in the case of *Inderjeet Singh Vs. Dr. Jagdeep Singh*, decided on 19/02/2004, reported in 2004(2) CPR 45 (NC) it is held that “in absence of expert evidence complaint allegedly medical negligence without succeed.”
- (D) Hon’ble Supreme Court in the case of *Ins. Malhotra Vs. A. Kriplani and Ors.*, decided on 24/03/2009, reported in (2009) 4 SCC 705, wherein it was held that on facts, all the doctors who treated patient were skilled and duly qualified specialist in their respective fields and tried their best to save the patient’s life.”

(E) Hon'ble Supreme Court in the case of *C.P. Sreekumar (Dr), MS (Ortho) Vs S. Ramanujam*, decided on 01/05/2009, reported in (2009) 7 SCC 130. The Hon'ble National Commission had held that bold statement cannot be accepted producing country evidence nor rebutting doctor's version. It was held that aggravation was due to muscular spasms.

(F) Hon'ble Supreme Court, in the case of *V.Kishan Rao Vs. Nikhil Super Speciality Hospital and Ors.*, decided on 08/03/2010 reported in (2010) 5 SCC 513. In this case it is held that "Expert opinion of prima facie negligence, if a precondition for Consumer Forum to proceed with a case – No rule of general application, held, can be laid down in this regard, expert opinion is required only when a case is complicated enough warranting expert opinion, or facts of a case are such that Forum cannot resolve an issue without expert's assistance."

(G) Hon'ble Supreme Court in the case of *S.K. Jhunjhunwala Vs. Dhanwanti Kaur and Ors.*, decided on 01/10/2018, reported in (2019) 2 SCC 282. In this case it is held that "Principles of law on above issue as stated by Supreme Court in *Jacob Mathew*, (2005) 6 SCC 1 after extensively referring to *Bolam Case* and *Eckersley case*, reiterated.:"

(H) Hon'ble Supreme Court in the case of *Vinod Jain Vs. Santokba Durlabhji Memorial Hospital and Ors.*, decided on

25/02/2019, reported in (2019) 12 SCC 229. It is held that “A fundamental aspect, which has to be kept in mind is that a doctor cannot be said to be negligent if he is acting in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view. The test of negligence cannot be the test of the man on the top of a Clapham omnibus. In cases of medical negligence, where a special skill or competence is attributed to a doctor, a doctor need not possess the highest expert skill, at the risk of being found negligent, and it would suffice if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”

(I) Hon’ble Supreme Court in the case of *M.A. Biviji Vs. Sunita and Ors., Civil Appeal No.3975 of 2018 decided on 19/10/2023 reported in 2023 INSC 938*. In this case, it has been held that *“In this particular case, the patient was treated and underwent different procedures at multiple hospitals. She underwent the ‘TT’ procedure at Gondia Hospital in an emergency situation. Subsequently, she was attended to by multiple medical experts at Suretech Hospital. Therefore, there is a possibility that these medical complications could have arisen at any of these hospitals or places where the patient underwent treatment.”*

(44) Complainant/respondent has relied upon following judgments:

- (A) Hon'ble Supreme Court in the case of *Dr. Balram Prasad V/s. Dr. Kunal Saha & Ors.*, in Civil Appeal No.2867 of 2012, decided on 24/10/2013, reported in AIR ONLINE 2013 SC 528.
- (B) Hon'ble National Commission in the case of *Pankaj R. Toprani & Ors. Vs. Bombay Hospital And Medical Research Centre*, decided on 04/07/2019.
- (C) Hon'ble National Commission in the case of *Pushpa Bhatnagar & 2 Ors. Vs. M/s. Varun Hospital & 2 Ors.*, decided on 17/05/2016, it is held that "A doctor has a legal duty to take care of his patient. Whenever a patient visits a doctor for treatment there is a contract by implication that the doctor will take reasonable care to treat him. If there is a breach of that duty and if it results in injury or damage, the doctor will be held liable. The doctor must exercise a reasonable degree of care and skill in his treatment; but at the same time he does not and cannot guarantee cure."
- (45) We have considered the judgments cited by both sides and also considered factual aspects of the case. In view of the above discussion we have come to the conclusion that the complainant has failed to establish negligence on the part of the opponent in performing AV fistula operation. There is no evidence on record to establish that the opponent was failed to take care and duty while carrying out AV fistula surgery. The opponent cannot be held responsible for the gangrene suffered by deceased Ashok

Deshpande. Therefore, we are inclined to dismiss the complaint in toto.

- (46) The District Commission has not considered the report of Department of Urology, Grant Medical College, J.J. Group of Hospitals, Surgery. The District Commission has also not considered the affidavits of Expert Doctors. The District Commission has casually overlooked the evidence of expert doctors on the ground that they belonged to the professions of the opponent. The said observation is not proper and correct. The due weightage ought to have been given to the report of the expert Committee as well as expert medical professionals. Therefore, we are inclined to set aside the judgment and order of the District Commission. Hence, we pass the following order:

ORDER

- (i) Appeal preferred by Appellant/Original Complainant is hereby allowed.
- (ii) The order passed by Consumer Disputes Redressal Commission, Mumbai Suburban District in Complaint No.410 of 2014 dated 22/09/2020 is hereby set aside. Consumer Complaint is dismissed.
- (iii) The amount deposited by the appellant/opponent in the District Commission be refunded to him along with interest accrued thereon after expiry of appeal period.

- (iv) No order as to costs.
- (v) Copies of the order be furnished to the parties.
- (vi) This order is pronounced on Video Conferencing as Member – Ms.Poonam V. Maharshi is having sitting at Nashik Circuit Bench.

[Justice S.P. Tavade]
President

[Poonam Maharshi]
Member

emp