STATE CONSUMER DISPUTES REDRESSAL COMMISSION,
MAHARASHTRA, MUMBAI

Appeal No.RBT/A/22/463

(Arising out of order dated 23/01/2006 passed by the D.F.Pune in CC/04/391)

1. GRANT MEDICAL FOUNDATION,
RUBY HALL CLINIC.
Through its Chairman & Managing Trustee,
Dr. K. B. GRANT.
40, Sassoon Road, Post Box No. 70.
Pune 411 001.
2. Dr. S. VHORA, Neuro Surgeon,
Ruby Hall Clinic, 40,
Sassoon Road, Post Box No. 70.
Pune 411 001.
3. Brig. Dr. C.P. BAJPAYEE (Retd.).
Neuro Surgeon,
Ruby Hall Clinic, 40. Sassoon Road.
Post Box No. 70, Pune 411 001. ..... Appellants/org.OP nos.1,3 & 4

Versus

1.Mrs.BABYCHANDA R. SRIVASTAVA
Through her power of attorney holder,
Mr.RABINDRAPRASAD SRIVASTAVA,
GREF Centre, Dighi Camp, Pune 411 015. ……Respondent/Org.complainant

2. Dr. R. S. WADIA, Consulting Neurologist,
Ruby Hall Clinic, 40, Sassoon Road,
Post Box No. 70, Pune 411 001. …Respondent nos.2&3/
org.OP nos.2&5

3. Dr. ASHISH ATRE, Radiologist,
Ruby Hall Clinic, 40, Sassoon Road,
Post Box No.70, Pune 411 001.

BEFORE: Justice S.P.Tavade – President
Vijay C.Premchandani – Member (on V.C.)

PRESENT: Advocate S.R.Nargolkar a/w. Advocate Neeta Patil and Advocate Manjusha Kulkarni are present for appellants. Advocate Anand V. Patwardhan is present for respondent no.1
None present for respondent nos.2 & 3

FINAL ORDER

(Dt.03/10/2025)

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

1. Being aggrieved and dissatisfied with the order passed by the Learned District Consumer Disputes Redressal Commission, Pune dated 23/01/2006, in consumer complaint no.391/2004 the original OP nos.1, 3 & 4 have preferred this appeal. Parties to this appeal shall be herein after called and referred to as per their status in the original consumer complaint.

Facts giving rise to this appeal can be summarized as under:-

2. The complainant- Mrs.Babychanda, had filed the consumer complaint before the Ld.District Consumer Commission through the power of attorney holder - Mr.Rabindraprasad Srivastava, who is her husband. The Opposite Party no.1 is the Hospital run by the Grant Medical Foundation. The Opposite Party no.2- Dr.R.W.Wadia is the Consulting Neurologist and Opposite Party no.5- Dr.Ashis Batra is Radiologist at OP no.1 Hospital. Opposite Party no.3- Dr.S.Vhora is Neuro Surgeon and Opposite Party no.4-Dr.C.P.Bajpayee is Neuro Surgeon, at OP no.1 Hospital, who had performed the operation on the complainant -Mrs.Babychanda. The Learned District Consumer Commission has exonerated the Opposite Party nos.2 & 5 and passed an order against the Opposite Party nos.1, 3 & 4.
3. It was the case of the complainant that she was suffering from persistent headache for long time, and therefore, she consulted the Opposite Party No.2, who is Neurologist working in the Opposite Party No.1 Hospital. He examined her and advised to take MRI (Magnetic Resonance Imaging) of the brain. On 5/7/2003, the Opposite Party No. 5 had carried out MRI of the Complainant's brain. It was revealed that the focal lesion in left CP angle cistern extending into the left internal auditory Meatus, consistent with acoustic schwannoma, measuring 25 X 27 mm., and the same was causing brain stem and IV ventricular compression. On the same day, the Opposite Party No.4

Neurosurgeon, examined the Complainant and advised for surgery. Accordingly, the Complainant was admitted in the Hospital on 07/07/2003. As per the directions, various investigations were carried out by the Complainant and the surgery date was fixed on 13/07/2003. The complainant was provided with an estimate of the surgery. Accordingly, the Complainant deposited Rs.40,000/-, as an advance payment, including surgery expenses of Rs.13,200/-.

4. The Opposite Party nos.3 & 4 performed the operation of the complainant for acoustic neuroma. They claimed that 75% tumor was removed by the operation. After this, the Complainant's CT Scan was carried out on 16/7/2003. She was again advised 10 days hospitalization. It was contended that Opposite Party no.1 had demanded sum of Rs.1,71,200/- towards the expenses of the post-operative treatment. It was contended that one more CT Scan of brain was taken on 18/7/2003. The husband of the Complainant was serving in Central Government (GERF). He raised the issue of exorbitant demand of the bill by the Opposite Party No.1. Accordingly, after deliberation the bill was reduced to Rs.63,485/-. The said amount was paid by the husband of the complainant. It was contended that within a period of two weeks from the date of discharge, the complainant started suffering with side effects. Therefore, she visited Opposite Party no.1 Hospital. One more CT Scan of complainant’s brain was taken. It was noticed that there was solid mass lesion in left CP angle cistern measuring 30 X 20 mm, in size. The Complainant was shocked to learn that size of the tumor remained almost the same, even after operation and she developed partial (L) VII (N) Palsy. Therefore, the Complainant was advised second surgery at the earliest. It was alleged that without removing the tumor in earlier surgery, false claim of removal of 75% tumor was made and thereby, she was cheated. It was also alleged that there was deterioration in the health condition of the complainant. Hence she alleged acute negligence on the part of the Opposite Parties.

5. The complainant went to Mumbai and took advice in "P. D. Hinduja National Hospital". On 01/09/2003, she met Dr.R.D.Nagpal, attached to "Jaslok Hospital". On his advice, she got herself admitted in "Jaslok Hospital" on 08/09/2003. She underwent CT Scan of brain. On 19/09/2003, Dr.R.D. Nagpal, re-operated the Complainant and carried out the analysis of Cerebrospinal fluid on the Complainant. The Jaslok Hospital charged sum of Rs.57,425/- towards the fees of the operation and the hospitalization of the complainant. The Complainant was also asked to take advice of an eye-specialist for her weak eye sight. She was advised to take treatment for improvement. Subsequently, on 14/10/2004, the EMG for assessment of her facial nerve was done. Accordingly, she came for investigation at Jehangir Hospital at Pune on 16/10/2004. The reports investigation suggested left facial nerve involvement and partial right nerve involvement. It was claimed by the complainant that due to negligence on the part of the Opposite Parties No. 1 to 5, she suffered trauma. It was alleged that she was not given proper treatment, which resulted in her dis-figuration and consequential predicament. The surgery was not performed with due care & caution. It was contended that expert opinion was not taken by Opposite Parties Nos.3 & 4. She also alleged that Opposite Party No.1 has raised exorbitant bill. It was also contended that Opposite Parties charged exorbitant fees for an unsuccessful operation and resulted misery in her life. Hence, she filed consumer complaint and claimed compensation of Rs.11,30,910/- from the Opposite Parties.
6. The notice of the complaint was issued to the Opposite Parties. The Opposite Party nos.1, 2, 4 & 5 had filed their written statement and strongly challenged the claim of the complainant. It was contended that the Ld.District Consumer Commission had no jurisdiction to try and entertain the consumer complaint. It was also contended that the complaint was bad for non-joinder of necessary parties as all the Trustees of the Opposite Party no.1 were not made parties to the complaint. It was also contended that the complicated questions of facts and law are involved in the matter. Therefore, the Ld.District Consumer

Commission should have referred the complaint to the proper Court. It was contended that there was no negligence on the part of the Opposite Parties in consultation, admission and operation of the complainant. It was denied that the Opposite Party no.1 charged exorbitant bill for the treatment of the complainant. It was contended that initially the bill was approximately issued and the final bill was restricted to the amount of Rs.63,485/-, which was fully paid by the husband of the complainant. It was contended that the Opposite Party nos.3 & 4 carried out very complicated operation which lasted for 5½ hours and all the instruments used in the operation were clinically tested and those were modern in nature. It was contended that prior to surgery, the complainant and her husband were explained including the risk factor. It was contended that the operation was successful and the tumor to the extent of 75% was removed but due to the risk factor, removal of the remaining part of surgery was abandoned. Accordingly, the noting was made in the surgical report. It was contended that the tumor was old, large and adherent to brain stem. It could not be removed completely. They justified their action to avoid life threat to the patient. Therefore, the operation was abandoned. It was contended that to preserve the nerves and vessels of the patient, so as to avoid further complications, the surgery was abandoned. It was contended that the claim of the complainant was baseless as well as the claim of levying exorbitant charges by the Opposite Parties is also baseless and they prayed for dismissal of the complaint.

7. The Opposite Party no.3 has adopted the written statement filed by the Opposite Party nos.1, 2, 4 & 5 and passed pursis to that effect.
8. Husband of the complainant filed affidavit of evidence and number of treatment papers. Husband of the complainant also filed rejoinder-cum-affidavit, wherein he falsified the defence of the Opposite Parties. He alleged that there was medical negligence and denied allegations of the Opposite Parties regarding the prior consent for operation with specific understanding & knowledge of the consequences. Mrs. Kulkarni Law Officer of the Opposite

Party No.1, advanced oral arguments on behalf of the Opposite Parties. Similarly, the argument on behalf of the complainant was also heard.

9. On going through the evidence and the documents on record, the Ld.District Consumer Commission has allowed the consumer complaint and directed the the Opposite Party nos.1, 3 & 4 to pay a sum of Rs.3,20,910/- to the complainant jointly and severally within a period of two months from the date of receipt of the order. The complaint against the Opposite Party nos.2 & 5 was dismissed and no appeal to that effect was filed by the complainant.

10. Heard learned counsel for the parties. The opposite parties have contended that the surgery was abandoned to save the life of the complainant and accordingly, the noting was made in the operation notes. It was also contended that there was no negligence on the part of the Opposite Party nos.3 & 4. They made every effort to save the life of the complainant and also removed the tumor to the extent of 75%. It was contended that there was cavity after removal of tumor, which was filled in with surgicel to stop the haemorrhage.

11. It was also contended that as the encored cavity was filled with “surgicel” , therefore, the size of the tumor was not seen to be reduced in the subsequent CT scan. It was contended that the tissue of the tumour was shown to the Complainant and her husband after the surgery. They themselves inspected it before it was sent for biopsy. Therefore, the Complainant’s allegation that the tissue was not provided to them or that she was unaware of it is absurd and ridiculous and factually incorrect. It was also contended that after the surgery, the complainant was advised to return for a reassessment after the initial procedure. This assessment was made under challenging conditions, as the cerebrum was significantly swollen at that time. At the most, this could be considered an error of judgment, which does not constitute negligence, as it caused no harm to the patient’s life. It was not a deliberate or reckless act on the part of the surgeon.

12. It was contended that since the surgery had to be repeated again to remove the tumour, the Complainant was asked to come back after the surgery for a

reassessment. The opinion of the doctor performing surgery that the tumour was removed 75% was an *estimation* based on visual sight, after the surgery by the concerned surgeon and that too when the entire cerebrum was swollen and at the most be considered as an error of judgment, which does not cause any harm to the life of the patient, and not a deliberate act of negligence on the part of the surgeon performing the surgery.

13. The learned advocate for the opposite parties has heavily relied on the ratio laid down ***Kusum Sharma and others v/s. Batra Hospital and Medical Research Centre and others reported in (2010)3 Supreme Court Cases 480,*** wherein the Hon'ble Apex Court has relied on various landmark judgements. We will consider the same at appropriate time. It was also argued that the complainant did not lead any expert evidence to establish the so called act of negligence on the part of the surgeons i.e. Opposite Party nos.3 & 4. It is also contended that the complainant has simply relied on the subsequent CT scan, which shows the size of the tumor as 30 x 20 mm. after the operation and she was of the opinion that operation of removal of tumor was carried out but the facts are otherwise. It is also contended that the operation lasted for 5½ hours but looking to the swelling of the cerebellar, the surgeons abandoned the surgery, otherwise the (L) cerebellum would have to be sacrificed leading to either death of the patient on the operation table or the patient would have become severely disabled or invalid and she would not have been able to sit or walk independently.

14. It is also submitted that there is no report on record to show that the surgeons have not removed the tumor. It is also contended that the complainant took further treatment in the Jaslok Hospital. We find that there is report of surgeon that in earlier surgery some part of the tumor was removed. The said fact is overlooked by the Ld.District Consumer Commission.

15. On the other hand, learned advocate for the complainant submits that the order passed by the Ld.District Consumer Commission is proper and correct. There is no evidence on record to show that the Opposite Party nos.3 & 4 have not carried out operation properly and they abandoned the surgery without removing the

entire tumor. It is also contended that the Opposite Party no.1-Hospital has charged exorbitantly for further treatment, which amounts to an unfair trade practice.

16. On going through the submissions of both the parties, one has to see the definition of negligence. ***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.*

17. 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.

18. The complainant came with a specific case that the Opposite Party nos.3 & 4 have not carried out the operation and they have not obtained the expert opinion to avoid untoward incident. No medical literature is put forth to support the theory of the Opposite Party nos.3 & 4. They claimed operation or removal of tumor to the extent of 75% but no progress is seen in the health of the complainant. So it can be said that even after the alleged operation, the health of the complainant was not improved. Therefore, she suspected that no operation was carried out. The complainant herself has produced on record the medical papers, operation notes, wherein it is mentioned that as the cerebellar swelling was increased to such an extent that the surgeons had to abandon the surgery, otherwise the (L) cerebellum would have to be sacrificed leading to either death of the patient on the operation table or the patient would have become severely disabled or invalid and she would not have been able to sit or walk independently. So there was cause for abandonment of surgery. The surgeons have realized the position of the patient during the operation, which lasted for 5½ hours and they abandoned the same. It is mentioned in the operation notes that the tumor was partially removed but subsequently, the Opposite Party nos.3 & 4 claimed that they have removed the tumor to the extent

of 75% and they filled the cavity. They have mentioned that tumor was vascular and firm. It was encored and the cavity was filled with surgicels to stop the hemorrhage. The said fact is objected by the complainant and complainant came with the story that tumor was not removed entirely or partially. The complainant has produced on record the note of surgeons made after the second operation at Jaslok Hospital, wherein there is specific mention in the note dated 01/09/2003 that the complainant was operated on 14/07/2003 by the Opposite Party no.4. It was also mentioned that the tumor was partially removed. Reason for partial excision not known? (odema) post operatively in ICU for 7 days. Then imbalance, left sided facial weakness, left deafness and hoarse voice noted. No difficulty in swallowing, CT scan of 13/08/2003 shows about 60-70% residue contrast enhancement of tentorium seen. Some cerebellar contusion was seen.

19. On going through the said note, it can be said that the surgeon of the Jaslok Hospital has categorically mentioned that the tumor was partially removed but he was not aware of the reason for not removal of the entire tumor. So the contention of the complainant that there was no removal of tumor cannot be accepted. Similarly, there is no opinion of surgeon of Jaslok Hospital that the earlier surgery was not done properly or other was some lacuna in the procedure adopted by the surgeons of the Opposite Party no.1 Hospital. In fact, there should have been expert opinion as to whether the procedure/surgery carried out by the Opposite Party nos.3 & 4 was not proper or was not done properly, but no such evidence is led by the complainant. The complainant is a layman. It appears that the complainant disbelieved the Opposite Party no.3 on going through the subsequent CT scan, which shows that the size of the tumor was 30 x 20 mm. Therefore, it was alleged by the complainant that there was no reduction of tumor even after the surgery, therefore, the Opposite Party nos.3 & 4 have not removed the tumor. But it can be said that when the complainant had taken treatment at Jaslok Hospital, the CT scan was taken on 09/09/2003. The size of the tumor was shown as 2.8 x 1.9 cm., on perusal of first CT scan, it can be seen that the size of the tumor was 25 x 27 mm. After the operation, CT scan

was taken, wherein the size of the tumor was shown as 30 x 20 mm. Therefore, complainant formed the opinion that there was no removal of Tumor done by the Opposite Party nos.3 & 4. In fact, the Opposite Party no.3 has categorically mentioned in the report that during the operation there was swelling of cerebellar, which forced them to abandon the surgery. So it cannot be said that the Opposite Party nos.3 & 4 have not carried out the operation at all.

20. It is the case of the complainant that the Opposite Party nos.3 & 4 were negligent in performing the operation. But it is again the personal opinion of the complainant. Admittedly, there is no expert opinion on the point of the procedure adopted by the Opposite Party nos.3 & 4. No doubt, such opinion could have been expressed by the surgeon of the Jaslok Hospital, when he treated the complainant after the first operation. But we have already observed that the surgeon of the Jaslok Hospital also noted that the complainant was operated and there was partial removal of the tumor. So we are of the considered opinion that whatever allegations made by the complainant regarding the performance of operation by the Opposite Party nos.3 & 4 are personal in nature and there is no medical evidence to establish the negligence on the part of the Opposite Party nos.3 & 4 while performing the operation.

21. Admittedly, the Opposite Party nos.3 & 4 had decided to abandon the surgery. They gave their opinion that they found cerebellar swelling, which started increasing. Therefore, they abandoned the surgery. Otherwise, there would have been serious danger to the life of the complainant. The said decision was taken at the Operation Theatre and the Opposite Party nos.3 & 4 stopped the operation. The complainant was then admitted in the hospital for a week and then there was improvement in her health and accordingly, the entries are made in the treatment papers. She was discharged and thereafter again she had been to Jaslok Hospital for follow-up treatment. According to the complainant, there was no improvement. Therefore, she consulted the doctor from the P.D.Hinduja Hospital, who referred her for further investigation at Jaslok Hospital. Admittedly, in Jaslok Hospital the complainant was again

operated, but the said papers are not produced on record. There is no whisper in the complaint of the complainant that after the second surgery, she got relief. In fact, the complainant never entered into the witness box. Similarly, her latest position is not brought on record by way of evidence in the complaint. The complainant has simply stated that she underwent second surgery but he has not given detailed information regarding day to day life of the complainant. In fact, that is not material also. But if the complainant would have got complete relief from the second operation, then there was scope to hold that the first operation was failed. Even if it is held that the first operation was not successful, it cannot be called as negligence on the part of the Opposite Party nos.3 & 4. Sometimes there is possibility that the surgeons take decision for operation but in all cases it does not happen that the patient gets complete relief. Sometimes, even after the operation, the patient does not get complete relief. But that does not mean that the surgeons committed any negligence. They cannot assure the positive result of the operation at every time. So we are of the opinion that the complainant has failed to establish the basic case that the Opposite Party nos.3 & 4 were negligent and they have not performed the operation upto the mark. On this point, we are required to consider the case laws relied upon by the parties.

22. The learned counsel for the complainant has relied on the ratio in the case of ***Damodaran Shanmugham Madaliar v/s. Sangita R. Verma and ors.*** The facts of the said case are completely different from the facts of the present case. The said ratio was laid down in the housing dispute case. It was not a medical negligence case. Therefore, the said ratio is not applicable to the facts of the present case.

23. The complainant has also relied on the case of ***Tate Hospital and another v/s. Sushrut Brahmabhatt and ors. decided by the Hon'ble National Commission on 11/11/2021 in First Appeal no.458 of 2015***. It was a case of medical negligence wherein the pregnant lady was not operated immediately. There was delay in carrying out caesarean and thereafter treating doctor

refused to shift the patient to other hospital and he committed delay in shifting the patient, which resulted into the death of the patient. The facts of the said case are also not identical with the facts of the present case. There was negligence on the part of the doctor for not shifting the patient after excessive bleeding. Similarly, the blood was also not provided immediately. Therefore, the said ratio is also not applicable to the facts of the present case.

24. The opponents have relied on the ratio laid down by the Hon'ble Supreme Court of India in the case of ***Kusum Sharma and others v/s. Batra Hospital and Medical Research Centre and others reported in (2010)3 Supreme Court Cases 480,*** wherein the Hon'ble Apex Court has considered may landmark judgments on the point of medical negligence and laid down the principles as under:-

> *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.*
>
> *II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.*
>
> *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 circum-stances 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 other 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 de-sired 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.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

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.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

25. In the present case, the complainant has alleged negligence on the part of the Opposite Party nos.3 & 4. The Opposite Party nos.3 & 4 have specifically mentioned in the operation notes that due to increase in cerebellar swelling, they felt it proper to abandon the surgery and that decision cannot be called as negligence.

26. The probability of a tumour increasing or recurring even after an operation depends on several medical factors, such as:

1.**Type of Tumour, Benign (non-cancerous):-** Usually, if completely removed, recurrence is very low (less than 5–10%).

Example: Lipoma, Fibroma, Meningioma (benign). If a small part is left behind, it can regrow locally.

Malignant (cancerous): Probability of recurrence is higher, ranging from 10% to 70%, depending on type and stage.

Example: Breast cancer: 10–20% chance of local recurrence.

Brain tumour (glioblastoma): recurrence rate over 80%.

Colon or lung cancer: varies from 20–50% depending on stage and treatment.

2. **Margins and Completeness of Surgery** :- If the entire tumour and surrounding margins are removed and biopsy confirms "clear margins," recurrence chances are much lower. Incomplete removal or microscopic residual disease increases the chance of regrowth.

3. **Post-Surgical Treatment**

If chemotherapy, radiotherapy, or targeted therapy is given after surgery, recurrence probability decreases significantly for malignant tumours.

4. **Stage and Grade-** Early-stage tumours have lower recurrence rates.

High-grade or advanced-stage cancers tend to recur more often.

5. **Patient Factors-** Age, general health, immunity, and genetic factors also influence recurrence. In medical practice, the operating surgeon is the best and final judge to decide how far an operation should proceed, especially when: Vital organs or major blood vessels are involved, Removing the entire tumour could cause life-threatening complications, or the patient's general condition, age, or stability during surgery becomes critical.

Medical reasoning:

According to medical ethics and surgical norms: "The primary duty of the surgeon is to preserve the life and safety of the patient. Complete removal of a tumour must not endanger the patient's survival."

Hence, if during surgery the doctor finds that: The tumour is adhering to vital structures (like brain stem, heart, or major arteries), or Further dissection may cause massive bleeding or organ failure, then the surgeon may partially remove the tumour or take only a biopsy, and stop the operation in the patient's best interest.

Ethical and legal principle:

Under medical law and ethics, the doctrine of "Primum non nocere" (Latin: first, do no harm) applies.

Thus, saving life takes priority over complete tumour removal, and this decision lies within the professional discretion of the surgeon.

27. Mere abandonment of surgery cannot be called as negligence. Similarly, it is established on record that the Opposite Party nos.3 & 4 have removed the tumor by encoring the cavity, which was filled with surgicel. Therefore, it cannot be said that there was no removal of tumor. As we have already observed that the surgeons felt that continuation of surgery would create a severe trouble to the complainant, therefore, they have not removed entire tumor. They have also made it clear that the complainant was required to undergo further surgery for removal of entire tumor. The said surgery was carried out in the Jaslok Hospital but the result of the same is not produced on record. There is nothing on record to show that the Opposite Party nos.3 & 4

have not used reasonable degree of skill and knowledge while performing the operation. There is nothing on record to show that they have not exercised reasonable degree of care. Similarly, 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. In the present case, the complainant has not led any expert opinion to establish that the Opposite Party nos.3 & 4 have not taken proper care and caution while carrying out the surgery. Whatever allegations made by the complainants are their personal opinion without leading sufficient and cogent evidence of expert, said allegations cannot be considered to establish the negligence on the part of the Opposite Party nos.3 & 4.

28. The principles laid down by the Hon'ble Apex Court in the case of ***Kusum Sharma and others v/s. Batra Hospital and Medical Research Centre and others*** are useful to decide the present complaint, as we have held that no negligence is proved by the complainant. Similarly, the Opposite Party nos.3 & 4 have taken reasonable degree of skill and knowledge to perform the operation. There was no material on record to establish that the procedure adopted by the Opposite Party nos.3 & 4 was not proper and correct. In fact, they followed the proper procedure but due to unforeseen facts and circumstances, they abandoned the surgery, which cannot be termed as negligence on their part. It is held that the 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.

29. As we have observed that no expert opinion is brought on record to establish that the procedure adopted and the course of action taken by the Opposite Party nos.3 & 4 was not proper and correct and acceptable to the medical profession, hence we are of the opinion that the complainant has failed to

establish the negligence on the part of the Opposite Party nos.3 & 4 while conducting surgical procedure.

30. The complainant has also alleged that the Opposite Party no.1 has charged exorbitant bill and issued a bill of Rs.1,71,200/- but after negotiation it was reduced to Rs.63,485/-. It is vehemently submitted by the learned advocate for the complainant that CGHS has fixed the rate of operation, which was performed on the complainant by the Opposite Parties. It is contended that CGHS has quantified charges of operation but the Opposite Party no.1 has issued exorbitant bill. We are not inclined to accept the said submission. The Central Government has Schedule of Charges for different operations. But those are not the fees of the Hospital. The said amounts are quantified for refund of the amount spent by the employee. Therefore, it cannot be said that the CGHS has fixed the rate of operation. The said rates are for reimbursement of the amount. In the present case, learned Adv for the complainant submits that the complainant underwent second operation, for which she spent a sum of Rs.57,425/-. But the complainant was admitted in General Ward in Jaslok Hospital for 7 days and the complainant was admitted in the Opposite Party no.1 Hospital from 13/07/2003 to 21/07/2003. The period of admission was more than the period of admission in Jaslok Hospital. Similarly, the complainant was admitted in A.C. room in the Hospital of Opposite Party no.1. Therefore, there is difference in the charges and initially the bill was issued to the extent of Rs.1,71,200/-, but after negotiation the same was reduced to Rs.63,485/-. Therefore, it cannot be said that the complainant was charged exorbitantly. The Opposite Party no.1 had given the estimate of charges at the time of admission. Therefore, it cannot be said that the Opposite Party no.1 has played an unfair trade practice by charging exorbitantly to the complainant. We are of the opinion that on both the counts the complainant has failed to establish the deficiency in service on the part of the Opposite Parties and alleged unfair trade practice for issuing exorbitant medical bill.

31. The Learned District Consumer Commission has simply relied on the version of the complainant and has not considered the plea of the Opposite Parties on the point of negligence. The Learned District Consumer Commission has not called upon the complainant to file any expert evidence to prove the negligence on the part of the Opposite Party nos.3 & 4. Similarly, the Learned District Consumer Commission has held that the Opposite Parties have charged exorbitantly to the complainant. But in fact the complainant has paid the charges as per the negotiation and Schedule of Charges of CGHS. The findings arrived at by the Learned District Consumer Commission are not proper and correct. It appears that the Learned District Consumer Commission has not considered the defence of the Opposite Parties in proper perspective and came to an incorrect conclusion, which requires to be set aside. Hence, we pass the following order:-

ORDER

1. The present appeal filed by the Opposite Party nos.1, 3 & 4 is allowed.
2. The consumer complaint no.391/2004 filed by Mrs.Babychanda Rabindraprasad Srivastava through power of attorney stands dismissed.
3. The amount of compensation deposited by the Opposite Parties at the time of filing of appeal shall be refunded to them after the appeal period is over. And if any appeal is preferred, then after the decision of appeal.
4. No order as to costs.
5. Copies of the order be furnished to the parties free of cost.

[Justice S.P. Tavade]
President

[Vijay C. Premchandani]
Member

MS