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BIJOY SINHA ROY (D) BY LR.

v.

BISWANATH DAS & ORS.

(Civil Appeal No.4761 of 2009)

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AUGUST 30, 2017

[ADARSH KUMAR GOEL AND UDAY UMESH LALIT, JJ.]

Consumer Protection Act, 1986 – Medical Negligence – Appellant's wife died after undergoing surgery (hysterectomy) at a nursing home – She was suffering from high blood pressure and her hemoglobin was low – Since the nursing home in which she was operated did not have ICU facility, she was shifted to another nursing home and then to a hospital where she died – Appellant filed complaint before the State Commission, which was allowed – Cross appeals by appellant as also the respondent no.1 (the Gynecologist, on whose alleged insistence appellant's wife was operated in the nursing home in question).– National Commission reversed the order of State Commission – Plea of appellant that the decision to perform surgery without first controlling blood pressure and hemoglobin amounted to medical negligence and further having regard to the foreseeable complications, the decision to perform surgery at a nursing home which did not have the ICU for post operative needs, also amounted to medical negligence – On appeal, held: Negligence in the context of medical profession calls for a treatment with a difference – Error of judgment or an accident is not proof of negligence – So long as doctor follows a practice acceptable to the medical profession of the day, he cannot be held liable for negligence merely because a better alternative course was available – Thus, decision to perform surgery may not by itself be held to be medical negligence – However, there was no serious contest to the plea of the appellant that the operation should not have been performed at a nursing home which did not have ICU when it was foreseeable that there was post operative risk to the life of the patient – Since, the matter has been pending for 23 years, instead of remanding it for fresh adjudication on this issue, in the interests of justice, respondent no.1 is directed to pay a sum of Rs.5 lakh to the heirs of the appellant without any interest within 3

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months – If deposit is beyond 3 months, the amount will carry interest @ 12% p.a.. A

Negligence – Medical negligence – Concept of – Different in Civil and Criminal law – Held: What may be negligence in civil law may not be so in criminal – In criminal law, element of mens rea may be required and degree of negligence has to be much higher – Whereas, res ipsa loquitur operates in domain of civil law, but has limited application on a charge of criminal negligence. B

Negligence – What is – Held: Negligence is a breach of duty caused by omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do. C

Negligence – Test of skill – Requirements of – Held: The test of skill expected is not of the highest skilled person – However, a professional may be held liable for negligence if he does not possess the requisite skill which he claims or if he fails to exercise reasonable competence. D

Consumer Protection Act, 1986 – Object of – Held: The object of setting up Consumer Fora was to provide speedy remedy to a consumer.

Code of Civil Procedure, 1908 – s.89 – Alternative Disputes Redressal (ADR)– Applicability of, to consumer fora – Held: The said provision ought to be duly invoked by the consumer fora. E

Consumer Protection Act, 1986 – s.24B – Administrative control of National Commission – Held: National Commission has administrative control over all the State Commissions – Thus, it is competent to introduce monitoring mechanism for speedy disposal – National Commission directed to issue appropriate directions in this regard and formulate an appropriate action plan. F

Jacob Mathew v. State of Punjab (2005) 6 SCC 1: [2005] 2 Suppl. SCR 307 – relied on. G

Martin F.D'Souza v. Mohd. Ishfaq (2009) 3 SCC 1: [2009] 3 SCR 273; V. Krishan Rao v. Nikhil Super Speciality Hospital (2010) 5 SCC 513 : [2010] 5 SCR 1; Nivedita Sharma vs. Cellular Operators Assn. of India (2011) 14 SCC 337; Hussain v. State of U.P. H

- A (2017) 5 SCC 702; *Krishna Veni Nagam v. Harish Nagam* (2017) 4 SCC 150; *Salem Advocate Bar Association, T.N. v. UOI* (2003) 1 SCC 49 : [2002] 3 Suppl. SCR 353; *Salem Advocate Bar Association, T.N. v. UOI* (2005) 6 SCC 344 : [2005] 1 Suppl. SCR 929; *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Company Pvt. Ltd.* (2010) 8 SCC 24: [2010] 8 SCR 1053; *Moti Ram (dead) through Lrs. v. Ashok Kumar* (2011) 1 SCC 466 : [2010] 14 SCR 809; *Vikram Bakshi & Ors. v. Sonia Khosla (Dead) by Legal Representatives* (2014) 15 SCC 80: [2014] 6 SCR 762 – referred to.
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Case Law Reference

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|---|--------------------------------------------------------------|-------------|---------|
| | [2005] 2 Suppl. SCR 307 | relied on | Para 11 |
| | [2009] 3 SCR 273 | referred to | Para 13 |
| D | [2010] 5 SCR 1 | referred to | Para 13 |
| | (2011) 14 SCC 337 | referred to | Para 16 |
| | (2017) 5 SCC 702 | referred to | Para 18 |
| | (2017) 4 SCC 150 | referred to | Para 18 |
| | [2002] 3 Suppl. SCR 353 | referred to | Para 19 |
| E | [2005] 1 Suppl. SCR 929 | referred to | Para 19 |
| | [2010] 8 SCR 1053 | referred to | Para 19 |
| | [2010] 14 SCR 809 | referred to | Para 19 |
| | [2014] 6 SCR 762 | referred to | Para 19 |
| F | CIVIL APPELLATE JURISDICTION : Civil Appeal No.4761 of 2009. | | |

From the final Judgment and Order dated 12.09.2007 passed by the National Consumer Disputes Redressal Commission, New Delhi in First Appeal No. 44 of 2006.

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WITH

Civil Appeal Nos. 4762-4763 of 2009.

P. N. Mishra, Sr. Adv., Suchit Mohanty, Anupam Lal Das, Advs. for the Appellant.

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Vikram Jeet Banerjee, Sr. Adv., Senthil Jagadeesan, A
Ms. Madhumita Bhattacharjee, Sanjay K. Ghosh, Ms. Rupali S. Ghosh,
Avijit Bhattacharjee, Advs. for the Respondents.

The following Order of the Court was passed:

ORDER

1. These appeals arise out of order of the National Consumer Disputes Redressal Commission (NCDRC) dated 12.09.2007 in First Appeal Nos.44 of 2006, 462 of 2005 and 463 of 2005 dismissing the complaint of the appellant (now represented by legal heirs) by reversing the order of the State Commission whereby compensation was awarded to him for medical negligence, resulting in death of his wife Bijoy Sinha Roy. ('the deceased').

2. The deceased had some menstrual problem in June, 1993. She consulted Dr. Bishwanath Das, respondent No.1, a Gynecologist on advise of her family physician, Dr. Pransankar Shah. It was found that she had multiple fibroids of varying sizes in uterus. She was advised to undergo Hysterectomy. After about five months, she had severe bleeding and was advised emergency Hysterectomy at Ashutosh Nursing Home. She was also suffering from high blood pressure and her hemoglobin was around 7 gm% which indicated that she was anemic. The treatment was given for the said problems but without much success. Finally, operation was conducted on 01.12.1993 at about 8.45 A.M. She did not regain consciousness and since the Nursing Home did not have the ICU facility, she was shifted at 2.15 PM to Repose Nursing Home and thereafter to SSKM Hospital where she died on 17th January, 1994.

3. The appellant filed a complaint before the State Commission on 16th June, 1994. The appellant's case was two fold. Firstly, the decision to perform surgery without first controlling blood pressure and hemoglobin amounted to medical negligence. The surgery was not an emergency but a planned one and conducted six months after the disease first surfaced. Secondly, having regard to the forceable complications, the decision to perform surgery at a nursing home which did not have the ICU for post operative needs also amounted to medical negligence.

4. The opposite parties contested the complaint. Their plea was that in the given situation, the surgeon was entitled to make a choice and to take the risk. If it was not possible to stop the bleeding without performing the surgery, the surgeon rightly decided to do so. This decision

A cannot be held to be medical negligence. As regards the forcibility of risk in performing surgery at a nursing home which did not have ICU even when better places were available nearby, no specific reply was given.

5. Since the second aspect has been pressed more seriously, it may be appropriate to quote the pleadings in this regard :

C *"That Dr. Biswanath Das arranged and selected Ashutosh Nursing Home (Manimala Matri Mandir) as the place of operation of the complainant's wife and thereby directed the complainant to make necessary arrangements at the Ashutosh Nursing Home for operating on the wife of the complainant, knowing fully well that the Ashutosh Nursing Home (Manimala Matri Mandir) did not have the proper facilities to cope with the post operative emergency situation of a patient. On 1st December, 1993, the condition of the wife of the complainant deteriorated to such an extent that there was urgent need to transfer her to the Intensive Unit and keep her under observation. But when the complainant requested Dr. P.K. Mukherjee, the proprietor of Ashutosh Nursing Home (Manimala Matri Mandir) to transfer the wife of the complainant to the Intensive Therapy Unit he was shocked to learn that there was no ITU facilities because at the time of admission Dr. Mukherjee had categorically stated to the complainant that all the best medical facilities would be provided which in fact was not so.*

F *Wherefore the aforesaid act on the part of Dr. Biswanath Das in insisting on and selecting Ashutosh Nursing Home (Manimala Matri Mandir) for operating on the complainant's wife is a sheer act of professional and monetary greed in order to procure his commission from the Proprietor of the said Nursing Home in lieu of admitting patients. This fact also aggravates the willful, rash, negligence and deliberate act on the part of Dr. Biswanath Das which is also one of the causes of the untimely death of the complainant's wife inasmuch as if the said Nursing Home had an ITU the wife of the complainant could have been removed to the said Unit at the earliest possible opportunity and at least an attempt could have been made to save her life.*

Dr. Biswanath Das did not bother to take initiative to get himself involved in transferring the case to the Repose Nursing Home when the patient's (i.e. the wife of the Complainant) condition was critical. Dr. Biswanath Das also did not meet the relative of the wife of the complainant to inform the progress of the patient which is unethical to the Medical Profession."

6: In reply to the above averments, the stand of OP No.1 was as follows:

"With reference to the allegations made in paragraph 27 of the said show cause notice I crave leave to make my submissions at the time of hearing."

7. The State Commission, vide order dated 19th September, 2005, held that there was medical negligence as surgery was conducted without controlling the blood pressure and hemoglobin. The State Commission held :-

"We fail to understand what prompted these two doctors the OP No.1 and 2 to be so doggedly persistent in holding the operation immediately and for that purpose to apply anaesthesia. We fail to understand what prevented them from stopping the drive for the time being and halting the operation for little time and pausing for a while, pondering over what was happening to the system of the patient and trying to restore her haemoglobin and reduce her blood pressure to the permissible limit. Heaven would not fall if they postponed the operation for some time. The Ops. Have not been able to make out any cause that the operation was extra urgent and it did not brook any further delay. Their plea that operation was urgent in order to give a go-by to the source of bleeding has not been put in writing anywhere in the prescription or any other medical paper, nor it has been shown that the surgeon or the anaesthetist discussed this aspect with the patient party or made them aware of such an emergent need. Admittedly there was no malignancy in the Fibroid tumors in question (vide the Biopsy report). It is therefore not understood exactly what was driving these doctors to hold the operation then and there with all their vehemence. The patient had been admitted only on the previous date. They had the opportunity to watch the Blood Pressure and Haemoglobin chart only for few

- A hours. What would have been the wrong if they deferred the operation for the time being to observe the condition of the patient for some time more.”

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- B “In the result it is, ordered, that the complaint be allowed on contest against O.P.No.1 and 2 with litigation cost of Rs. 10,000/- (rupees ten thousand) only to be paid by these two Ops. The O.P.No. 1 shall pay a sum of Rs.3 (three) Lakhs and O.P. No.2 shall pay a sum of Rs. 2 (two) lakhs to the complainant as compensation. All the payments shall be made within 60(sixty)
- C days from the date of service of copy of this order failing which the amount shall carry interest at the rate of 8% per annum for the period of default.”

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- D 8. The complainant as well as the opposite parties preferred appeals. The National Commission reversed the above finding as follows:-

- E “Aforementioned medical literature submitted by OP Nos. 1 and 2 which was also before the State Commission, would show that the surgical procedure could be done on a patient with diastolic blood pressure of not more than 110 mm Hg and hemoglobin concentration of even up to 6 g/dl. However, the opinion given in medical literature submitted on behalf of complainant contradicts that statement. To be only noted that on 30.11.1993 and before start of procedure on 1.12.1993 the BP of the deceased was 180/100. In view of the statement made in Halsbury’s Laws of
- F England (para 21) and the decisions referred to in para No.23 in Jacob Mathew’s case the OP Nos. 1 and 2 who acted in accordance with the practice accepted as proper by the authors of aforesaid books relief on their behalf cannot be held guilty of negligence. Judge’s preference of the opinion expressed in the books cited on behalf of OP Nos. 1 and 2 would not be sufficient
- G to establish negligence against OP Nos. 1 and 2. Obviously, the approach of the State Commission, extracted above, in discarding the said medical literature filed on behalf of the Ops and in declining to accept the evidence of Dr. S.M.Basu, Expert, is erroneous. In the criminal Case, the opposite parties have been acquitted and the opinion as to cause of death of Mrs. Bani Sinha Roy
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given by Dr. Apurba Nady was not accepted by the criminal Court. Both the Ops are highly qualified. It may be stated that according to OP No. 1, the procedure performed was not elective as the deceased was having severe bleeding. Finding returned by the State Commission holding OP Nos. 1 and 2 to be negligent cannot be legally sustained.”

9. We have heard learned counsel for the parties.

10. Question for consideration is whether the National Commission applied the right test for holding that there was no medical negligence in the decision of the surgeon to perform surgery. Further question is whether the choice of nursing home to perform surgery amounted to negligence as requirement of ICU was a clear forcibility and centres with ICU were available nearby.

Test to determine medical negligence

11. Negligence is breach of duty caused by omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do. Negligence in the context of medical profession calls for a treatment with a difference. Error of judgment or an accident is not proof of negligence. So long as doctor follows a practice acceptable to the medical profession of the day, he cannot be held liable for negligence merely because a better alternative course was available. A professional may be held liable for negligence if he does not possess the requisite skill which he claims or if he fails to exercise reasonable competence. Every professional may not have highest skill. The test of skill expected is not of the highest skilled person. Concept of negligence differs in civil and criminal law. What may be negligence in civil law may not be so in criminal. In criminal law, element of *mens rea* may be required. Degree of negligence has to be much higher. *Res ipsa loquitur* operates in domain of civil law but has limited application on a charge of criminal negligence¹.

12. These principles have been laid down by a Bench of three-Judges and continue to hold the field. This Court has also held that safeguards were necessary against initiation of criminal proceedings against medical professionals and till such safeguards are incorporated by the State, direction of this Court will operate to the effect that the private complaint will not be entertained unless credible opinion of another

¹ Jacob Mathew versus State of Punjab (2005) 6 SCC 1, para 48

A competent doctor in support of the charge of rashness was produced. The Investigating Officer must obtain independent and competent medical opinion preferably from a doctor in Government service, qualified in the concerned field in the light of judgment in *Jacob Mathew (supra)*. A medical professional may not be arrested in a routine manner².

B 13. In *Martin F.D Souza versus Mohd. Ishfaq*³, this Court observed that uncalled for proceedings for medical negligence can have adverse impact on access to health. While action for negligence can certainly be maintained, there should be no harassment of doctors merely because their treatment was unsuccessful. This Court directed that the consumer fora must proceed with any complaint only after another competent doctor or Committee of doctors refers that there was a *prima facie* case. In *V. Krishan Rao versus Nikhil Super Speciality Hospital*⁴, this direction was however, held to be inconsistent with the binding judgment in *Jacob Mathew (supra)*. It was held that there was obvious jurisprudential and conceptual differences between the cases of negligence of civil and criminal matters. Protection of the medical professionals on the one hand and protection of the consumer on the other are required to be balanced.

E 14. In view of the legal position discussed above, we are of the view that the National Commission was justified in holding that decision to perform surgery may not by itself be held to be medical negligence.

F 15. We however, find that neither the State Commission nor the National Commission have examined the plea of the appellant that the operation should not have been performed at a nursing home which did not have the ICU when it could be reasonably foreseen that without ICU there was post operative risk to the life of the patient. There was no serious contest to this claim by the opposite parties. Having regard to the fact that the matter has been pending for the last 23 years, instead of remanding the matter for fresh adjudication on this issue, we consider it appropriate in the interests of justice to direct the opposite party No.1 to pay a sum of Rs.5 lakh to the heirs of the appellant without any interest.

G The amount be deposited with the State Commission within 3 months for being disbursed to the appellants. If deposit is beyond 3 months, the amount will carry interest @ 12% p.a.

² Para 50 ibid

³ (2009) 3 SCC 1

H ⁴(2010) 5 SCC 513, para 33

16. Before parting with this order, it is necessary to refer to another important aspect relating to administration of justice by the Consumer Fora. A person coming to a consumer Court with a grievance of deficiency in service needs immediate relief. The very object of setting up Consumer Fora was to provide speedy remedy to a consumer. The Consumer Protection Act, 1986 (the Act) was brought about in the background of world wide movement for consumer protection. Framework of the Act is based on Resolution dated 9th April, 1985 of the General Assembly of the UN to which India was a signatory⁵. The Act provided for protection of interests of consumers in the form of quick and speedy redressal of grievances. The provisions of the Act are in addition to and not in derogation of any other law. Thus, the Act provides for additional remedies. The authorities under the Act exercise quasi-judicial powers. The award of damages is aimed at bringing about qualitative change in the attitude of service provider⁶.

17. In the light of above scheme and object of the Act, following issues have emerged during the hearing with regard to functioning of Consumer Fora :

(i) Need to monitor speedy resolution of disputes;

(ii) Need to avail of ADR mechanism which is now regarded as part of access to justice.

18. To achieve the object of providing speedy remedy to a consumer steps can be taken under Section 24B of the Act. The National Commission has administrative control over all the State Commissions. Thus, the National Commission is competent to introduce monitoring mechanism for speedy disposal. It is well known that matters are pending at different levels for sufficiently long period which defeats the very object and purpose of the Act. We request the National Commission to consider this aspect and formulate an appropriate action plan. In this regard, we may refer to a recent decision in *Hussain versus State of U.P.*⁷ by which directions for action plans have been issued. The National Commission may also consider use of video conferencing facility for examining expert witnesses wherever necessary⁸.

⁵ V. Krishna Rao (supra) Para 43

⁶ Nivedita Sharma versus Cellular Operators Assn. of India (2011) 14 SCC 337, paras 18 to 21

⁷ (2017) 5 SCC 702, para 22

⁸ See observations in Krishna Veni (2017) 4 SCC 150, para 14

- A 19. The other aspect relates to use of ADR. By Act 46 of 1999, Section 89 has been added to CPC laying down mechanism for settlement of disputes outside the Court. Even though strictly speaking, the said provision is applicable only to civil courts, there is no reason to exclude its applicability to Consumer Fora having regard to the object of the said provision and the object of the consumer protection law. Accordingly, we are of the view that the said provision ought to be duly invoked by the Consumer Fora. We request the National Commission to issue appropriate directions in this regard⁹.
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- C 20. It will be open to the National Commission and the State Commission to coordinate with the National Legal Services Authority and the State Legal Services Authorities under the Legal Services Authority Act, 1987.

21. The appeals are disposed of accordingly.

Divya Pandey

Appeals disposed of.

⁹ See observations of this Court on the issue of remedy of mediation in Salem Advocate Bar Association, T.N. versus UOI (2003) 1 SCC 49, para 9-10; Salem Advocate Bar Association, T.N. versus UOI (2005) 6 SCC 344, para 53; Afcons Infrastructure Ltd. v. Cherian Varkey Construction Company Pvt. Ltd. (2010) 8 SCC 23, para 28, 43-45; Moti Ram (dead) through Lrs. vs. Ashok Kumar (2011) 1 SCC 466; Vikram Bakshi & Ors. versus Sonia Khosla (Dead) by Legal Representatives (2014) 15 SCC 80, para 16-20