REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2641 OF 2010
(Arising out of SLP(C) No.15084/2009)

V. Kishan Rao ..Appellant(s)

Versus

Nikhil Super Speciality Hospital & Another ..Respondent(s)

J U D G M E N T

GANGULY, J.

1. Leave granted.

2. This appeal has been filed challenging the judgment and order dated 19.02.2009 of the National Consumer Disputes Redressal Commission, New Delhi (hereinafter, 'National Commission') which upheld the finding of the State Consumer Forum. The order of the National Commission runs as follows:

> "Heard. The State Commission after elaborate discussion has come to the conclusion that there was no negligence on the part of the respondent doctor. All possible care was taken by the respondent in treating the petitioner. The State Commission has also recorded a finding that no expert opinion was produced by the petitioner to prove that the line of treatment adopted by the respondent hospital was wrong or was due to negligence of respondent doctor. Dismissed".

3. The appellant, who happens to be the original complainant, is an officer in the Malaria department and he got his wife admitted in the Respondent No. 1 hospital on 20.07.02 as his wife was suffering from fever which was intermittent in nature and was complaining of chill.

4. In the complaint, the appellant further alleged that his wife was subjected to certain tests by the respondent No.1 but the test did not show that she was suffering from malaria. It was also alleged that his wife was not responding to the medicine given by the opposite party No.1 and on 22nd July, 2002 while she was kept admitted by respondent No.1. Saline was given to her and the complainant had seen some particles in the saline bottle. This was brought to

the notice of the authorities of the respondent No.1 but to no effect. Then on 23rd July 2002 complainant's wife was complaining of respiratory trouble and the complainant also brought it to the notice of the authorities of the respondent No.1 who gave artificial oxygen to the patient. According to the complainant at that stage artificial oxygen was not necessary but without ascertaining the actual necessity of the patient, the same was given. According to the complainant his wife was not responding to the medicines and thus her condition was deteriorating day by day. The patient was finally shifted to Yashoda Hospital from the respondent No.1.

5. At the time of admission in Yashoda Hospital the following conditions were noticed:

> "INVESTIGATIONS
> Smear for MP-Positive-ring forms & Gametocytes of P. Falciparam seen
> Positive index-2-3/100RBCS
> LFT-TB-1.5
> DB-1.0
> IB-0.5
>
> WIDAL test-Negative
> HIV & HBsAG-Negative
> PT-TEST-22 sec
> CONTROL-13 sec
> APTT-TEST-92 sec
> CONTROL-38 sec
> CBP-HB-3.8% gms
> TLC-30.900/cumm

RBC-1.2/cumm
HRP II-Positive
B urea-38 mg/dl
S Creatinine-1.3 mb/dl
S Electrolytes-NA/K/CL-148/5.2/103 mEq/L
C X R – s/o ARDS

CASE DISCUSSION

45 yrs old of patient admitted in AMC with H/o fever-8 days admitted 5 days back in NIKHIL HOSPITAL & given INJ MONOCEF, INJ CIFRAN, INJ CHOLROQUINE because of dysnoea today suddenly shifted to Y.S.S.H. for further management. Upon arrival in AMC, patient unconscious, no pulse, no BP, pupils dilated. Immediately patient intubated & ambu bagging AMC & connected to ventilator. Inj. Atropine, inj. Adhenoline, inj. Sodabicarb given, DC shock also given. Rhyth restored at 1.35 PM At 10.45 pm, patient developed brady cardia & inspite of repeated Altropine & Adhenolin. HR-'O' DC shock given. External Cardiac massage given. In spite of all the resuscitative measure patient could not be revived & declared dead at 11.30pm on 24.7.2002".

6. In the affidavit, which was filed by one Dr. Venkateswar Rao who is a Medical Practitioner and the Managing Director of the respondent No.1 before the District Forum, it was admitted that patient was removed from respondent No.1 to the Yashoda Hospital being accompanied by the doctor of the respondent No.1. From the particulars noted at the time of admission of the patient in Yashoda Hospital it is clear that the patient was sent to Yashoda Hospital

in a very precarious condition and was virtually, clinically dead.

7. On the complaint of the appellant that his wife was not given proper treatment and the respondent No.1 was negligent in treating the patient the District Forum, on a detailed examination of the facts, came to a finding that there was negligence on the part of the respondent No.1 and as such the District Forum ordered that the complainant is entitled for refund of Rs.10,000/- and compensation of Rs.2 lakhs and also entitled to costs of Rs.2,000/-.

8. The District Forum relied on the evidence of Dr. Venkateswar Rao who was examined on behalf of the respondent No.1. Dr. Rao categorically deposed "I have not treated the case for malaria fever". The District Forum found that the same is a clear admission on the part of the respondent No.1 that the patient was not treated for malaria. But the death certificate given by the Yashoda Hospital disclosed that the patient died due to "cardio respiratory arrest and malaria". In view of the aforesaid finding the District Forum came to the conclusion that the

patient was subjected to wrong treatment and awarded compensation of Rs.2 lakhs and other directions as mentioned above in favour of the appellant. The District Forum also noted when the patient was admitted in a very critical condition in Yoshoda Hospital the copy of the Haematology report dated 24.7.2002 disclosed blood smear for malaria parasite whereas Widal test showed negative. The District Forum also noted that the case sheet also does not show that any treatment was given for Malaria. The Forum also noted that the respondent-authorities, despite the order of the Forum to file the case sheet, delayed its filing and there were over writings on the case sheet. Under these circumstances the District Forum noted that case records go to show that wrong treatment for Typhoid was given to the complainant's wife. As a result of such treatment the condition of the complainant's wife became serious and in a very precarious condition she was shifted to Yashoda Hospital where the record shows that the patient suffered from malaria but was not treated for malaria. Before the District Forum, on behalf of the respondent No.1, it was argued that the complaint sought to prove Yashoda Hospital record without

following the provisions of Sections 61, 64, 74 and 75 of Evidence Act. The Forum overruled the objection, and in our view rightly, that complaints before consumer are tried summarily and Evidence Act in terms does not apply. This Court held in the case of **Malay Kumar Ganguly** vs. **Dr. Sukumar Mukherjee and others** reported in (2009) 9 SCC 221 that provisions of Evidence Act are not applicable and the Fora under the Act are to follow principles of natural justice (See paragraph 43, page 252 of the report).

9. Aggrieved by the order of the District Forum respondent No. 1 preferred an appeal to the State Consumer Disputes Redressal Commission (FA No. 89 of 2005) and the insurance company, which is respondent no. 2 before this Court, preferred another appeal (FA no. 1066 of 2005). The State Forum vide its order dated 31.10.2008 allowed the appeals.

10. In doing so the State Commission relied on a decision in **Tarun Thakore** vs. **Dr. Noshir M. Shroff** (O.P. No. 215/2000 dated 24.9.2002) wherein the National Commission made some observations about the duties of doctor towards his patient. From those observations

it is clear that one of the duties of the doctor towards his patient is a duty of care in deciding what treatment is to be given and also a duty to take care in the administration of the treatment. A breach of any of those duties may lead to an action for negligence by the patient. The State Forum also relied on a decision of this Court in **Indian Medical Association** vs. **V.P. Shantha & others** – (1995) 6 SCC 651.

11. Relying on the aforesaid two decisions, the State Forum found that in the facts and circumstances of the case, the complainant failed to establish any negligence on the part of the hospital authorities and the findings of the District Forum were overturned by the State Commission. In the order of the State Commission there is a casual reference to the effect that "there is also no expert opinion to state that the line of treatment adopted by the appellant/opposite party No.1 Hospital is wrong or is negligent".

12. In this case the State Forum has not held that complicated issues relating to medical treatment have

been raised. It is not a case of complicated surgery or a case of transplant of limbs and organs in human body. It is a case of wrong treatment in as much as the patient was not treated for malaria when the complaint is of intermittent fever and chill. Instead the respondent No.1 treated the patient for Typhoid and as a result of which the condition of the patient deteriorated. When the condition became very very critical the patient was removed to Yashoda Hospital but patient could not be revived.

13. In the opinion of this Court, before forming an opinion that expert evidence is necessary, the Fora under the Act must come to a conclusion that the case is complicated enough to require the opinion of an expert or that the facts of the case are such that it cannot be resolved by the members of the Fora without the assistance of expert opinion. This Court makes it clear that in these matters no mechanical approach can be followed by these Fora. Each case has to be judged on its own facts. If a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence, in that event the efficacy of the remedy provided under this Act will

be unnecessarily burdened and in many cases such remedy would be illusory.

14. In the instant case, RW-1 has admitted in his evidence that the patient was not treated for malaria. Of course evidence shows that of the several injections given to the patient, only one was of Lariago. Apart from Lariago, several other injections were also administered on the patient. Lariago may be one injection for treating malaria but the finding of Yashoda Hospital which has been extracted above shows that smear for malarial parasite was positive. There is thus a definite indication of malaria, but so far as Widal test was conducted for Typhoid it was found negative. Even in such a situation the patient was treated for Typhoid and not for malaria and when the condition of the patient worsened critically, she was sent to Yashoda Hospital in a very critical condition with no pulse, no BP and in an unconscious state with pupils dilated. As a result of which the patient had to be put on a ventilator.

15. We do not think that in this case, expert evidence was necessary to prove medical negligence.

16. The test of medical negligence which was laid down in **Bolam** vs. **Friern Hospital Management Committee** reported in 1957 (2) All England Law Reports 118, has been accepted by this Court as laying down correct tests in cases of medical negligence.

17. Bolam was suffering from mental illness of the depressive type and was advised by the Doctor attached to the defendants' Hospital to undergo electro-convulsive therapy. Prior to the treatment Bolam signed a form of consent to the treatment but was not warned of the risk of fracture involved. Even though the risk was very small and on the first occasion when the treatment was given Bolam did not sustain any fracture but when the treatment was repeated for the second time he sustained fractures. No relaxant drugs or manual control were used except that a male nurse stood on each side of the treatment couch throughout the treatment. About this treatment there were two bodies of opinion, one of which favoured the use of relaxant drugs or manual control

as a general practice, and the other opinion was for the use of drug that was attended by mortality risks and confined the use of relaxant drugs only to cases where there are particular reasons for their use and Bolam case was not under that category. On these facts the expert opinion of Dr. J.de Bastarrechea, consultant psychiatrist attached to the Hospital was taken. Ultimately the Court held the Doctors were not negligent. In this context the following principles have been laid down:

> "A Doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art"…(See page 122 placitum 'B' of the report)

18. It is also held that in the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and a doctor is not negligent merely because his conclusion differs from that of other professional men. It was also made clear that the true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with

ordinary care (See page 122, placitum 'A' of the report).

19. Even though Bolam test was accepted by this Court as providing the standard norms in cases of medical negligence, in the country of its origin, it is questioned on various grounds. It has been found that the inherent danger in Bolam test is that if the Courts defer too readily to expert evidence medical standards would obviously decline. Michael Jones in his treaties on *Medical Negligence (Sweet & Maxwell), Fourth Edition, 2008* criticized the Bolam test as it opts for the lowest common denominator. The learned author noted that opinion was gaining ground in England that Bolam test should be restricted to those cases where an adverse result follows a course of treatment which has been intentional and has been shown to benefit other patients previously. This should not be extended to certain types of medical accident merely on the basis of how common they are. It is felt "to do this would set us on the slippery slope of excusing carelessness when it happens often enough" (See *Michael Jones* on *Medical Negligence* paragraph 3-039 at page 246).

20. With the coming into effect of Human Rights Act, 1988 from 2nd October, 2009 in England, the State's obligations under the European Convention on Human Rights (ECHR) are justiciable in the domestic courts of England. Article 2 of the Human Rights Act 1998 reads as under:-

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

21. Even though Bolam test 'has not been uprooted' it has come under some criticism as has been noted in *Jackson & Powell* on *Professional Negligence (Sweet & Maxwell), Fifth Edition, 2002*. The learned authors have noted (See paragraph 7-047 at page 200 in Jackson & Powell) that there is an argument to the effect that Bolam test is inconsistent with the right to life unless the domestic courts construe that the requirement to take reasonable care is equivalent with the requirement of making adequate provision for medical care. In the context of such jurisprudential thinking in England, time has come for this Court also to reconsider the parameters set down in Bolam

test as a guide to decide cases on medical negligence and specially in view of Article 21 of our Constitution which encompasses within its guarantee, a right to medical treatment and medical care. In England, Bolam test is now considered merely a 'rule of practice or of evidence. It is not a rule of law' (See paragraph 1.60 in *Clinical Negligence* by *Michael Powers QC, Nigel Harris and Anthony Barton, 4th Edition, Tottel Publishing)*. However as in the larger Bench of this Court in **Jacob Mathew** vs. **State of Punjab and another** – (2005) 6 SCC 1, Chief Justice Lahoti has accepted Bolam test as correctly laying down the standards for judging cases of medical negligence, we follow the same and refuse to depart from it.

22. The question of medical negligence came up before this Court in a decision in **Mathew** (supra), in the context of Section 304-A of Indian Penal Code.

23. Chief Justice Lahoti, speaking for the unanimous three-Judge Bench in **Mathew** (supra), made a clear distinction between degree of negligence in criminal law and civil law where normally liability for

damages is fastened. His Lordship held that to constitute negligence in criminal law the essential ingredient of '*mens rea*' cannot be excluded and in doing so, His Lordship relied in the speech of Lord Diplock in **R.** vs. **Lawrence**, [(1981) 1 All ER 974]. The learned Chief Justice further opined that in order to pronounce on criminal negligence it has to be established that the rashness was of such a degree as to amount to taking a hazard in which injury was most likely imminent. The neat formulation by Lord Atkin in **Andrews** v. **Director of Public Prosecutions**, [(1937) 2 All ER 552 (HL) at page 556] wherein the learned Law Lord delineated the concept of negligence in civil and criminal law differently was accepted by this Court.

24. Lord Atkin explained the shades of distinction between the two very elegantly and which is excerpted below:-

> "Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established."

25. Chief Justice Lahoti also relied on the speech of Lord Porter in **Riddell** vs. **Reid** [(1943) AC 1 (HL)] to

further identify the difference between the two concepts and which I quote:-

> "A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability."
>
> [This has been quoted in the treatise on Negligence by Charlesworth and Percy (para 1.13)]

26. In the concluding part of the judgment in **Mathew** (supra) in paragraph 48, sub-paras (5) and (6) the learned Chief Justice summed up as follows:-

> "(*5*) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.
>
> (*6*) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly"."

27. After laying down the law, as above, the learned Chief Justice opined that in cases of criminal negligence where a private complaint of negligence

against a doctor is filed and before the investigating officer proceeds against the doctor accused of rash and negligent act, the investigating officer must obtain an independent and competent medical opinion preferably from a doctor in Government service, qualified in that branch of medical practice. Such a doctor is expected to give an impartial and unbiased opinion applying the primary test to the facts collected in the course of investigation. Hon'ble Chief Justice suggested that some statutory rules and statutory instructions incorporating certain guidelines should be issued by the Government of India or the State Government in consultation with the Medical Council of India in this regard. Till that is done, the aforesaid course should be followed. But those directions in paragraph 52 of **Mathew** (supra) were certainly not given in respect of complaints filed before the Consumer Fora under the said Act where medical negligence is treated as civil liability for payment of damages.

28. This fundamental distinction pointed out by the learned Chief Justice in the unanimous three-Judge Bench decision in **Mathew** (supra) was unfortunately

not followed in the subsequent two-Judge Bench of this Court in **Martin F. D'souza** v. **Mohd. Ishfaq**, reported in 2009 (3) SCC 1. From the facts noted in paragraphs 17 and 18 of the judgment in **D'souza** (supra), it is clear that in **D'souza** (supra) complaint was filed before the National Consumer Disputes Redressal Commission and no criminal complaint was filed. The Bench in **D'souza** (supra) noted the previous three-Judge Bench judgment in **Mathew** (supra) [paragraph 41 at pages 17-18 of the report] but in paragraph 106 of its judgment, **D'souza** (supra) equated a criminal complaint against a doctor or hospital with a complaint against a doctor before the Consumer Fora and gave the following directions covering cases before both. Those directions are set out below:-

"We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or

harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew case*, otherwise the policemen will themselves have to face legal action."

29. We are of the view that aforesaid directions are not consistent with the law laid down by the larger Bench in **Mathew** (supra). In **Mathew** (supra), the direction for consulting the opinion of another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the Consumer Fora. The reason why the larger Bench in **Mathew** (supra) did not equate the two is obvious in view of the jurisprudential and conceptual difference between cases of negligence in civil and criminal matter. This has been elaborately discussed in **Mathew** (supra). This distinction has been accepted in the judgment of this Court in **Malay Kumar Ganguly** (supra) (See paras 133 and 180 at pages 274 and 284 of the report).

30. Therefore, the general directions in paragraph 106 in **D'souza** (supra), quoted above are, with great respect, inconsistent with the directions given in

paragraph 52 in **Mathew** (supra) which is a larger Bench decision.

31. Those directions in **D'souza** (supra) are also inconsistent with the principles laid down in another three-Judge Bench of this Court rendered in **Indian Medical Association** (supra) wherein a three-Judge Bench of this Court, on an exhaustive analysis of the various provisions of the Act, held that the definition of 'service' under Section 2(1)(o) of the Act has to be understood on broad parameters and it cannot exclude service rendered by a medical practitioner.

32. About the requirement of expert evidence, this Court made it clear in **Indian Medical Association** (supra) that before the Fora under the Act both simple and complicated cases may come. In complicated cases which require recording of evidence of expert, the complainant may be asked to approach the civil court for appropriate relief. This Court opined that Section 3 of the Act provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being

in force. Thus the Act preserves the right of the consumer to approach the civil court in complicated cases of medical negligence for necessary relief. But this Court held that cases in which complicated questions do not arise the Forum can give redressal to an aggrieved consumer on the basis of a summary trial on affidavits. The relevant observations of this Court are:

"...There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out-patient card containing the warning [as in *Chin Keow* v. *Govt. of Malaysia*, 1967 (1) WLR 813(PC)] or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. One often reads about such incidents in the newspapers. The issues arising in the complaints in such cases can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies and there is no reason why complaints regarding deficiency in service in such cases should not be adjudicated by the Agencies under the Act. In complaints involving complicated issues requiring recording of evidence of experts, the complainant can be asked to approach the civil court for appropriate relief. Section 3 of the Act which prescribes that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, preserves the right of

the consumer to approach the civil court for necessary relief..."

33. A careful reading of the aforesaid principles laid down by this Court in **Indian Medical Association** (supra) makes the following position clear:-

(a) There may be simple cases of medical negligence where expert evidence is not required.

(b) Those cases should be decided by the Fora under the said Act on the basis of the procedure which has been prescribed under the said Act.

(c) In complicated cases where expert evidence is required the parties have a right to go to the Civil Court.

(d) That right of the parties to go to Civil Court is preserved under Section 3 of the Act.

34. The decision in **Indian Medical Association** (supra) has been further explained and reiterated in another three judge Bench decision in **Dr. J.**

J. Merchant and others vs. **Shrinath Chaturvedi** reported in (2002) 6 SCC 635.

35. The three Judge Bench in **Dr. J. J. Merchant** (supra) accepted the position that it has to be left to the discretion of Commission "to examine experts if required in an appropriate matter. It is equally true that in cases where it is deemed fit to examine experts, recording of evidence before a Commission may consume time. The Act specifically empowers the Consumer Forums to follow the procedure which may not require more time or delay the proceedings. The only caution required is to follow the said procedure strictly." [para 19, page 645 of the report]

[Emphasis supplied]

36. It is, therefore, clear that the larger Bench in **Dr. J. J. Merchant** (supra) held that only in appropriate cases examination of expert may be made and the matter is left to the discretion of Commission. Therefore, the general direction given in para 106 in **D'Souza** (Supra) to have

expert evidence in all cases of medical negligence is not consistent with the principle laid down by the larger bench in paragraph 19 in **Dr. J. J. Merchant** (supra).

37. In view of the aforesaid clear formulation of principles on the requirement of expert evidence only in complicated cases, and where in its discretion, the Consumer Fora feels it is required the direction in paragraph 106, quoted above in **D'souza** (supra) for referring all cases of medical negligence to a competent doctor or committee of doctors specialized in the field is a direction which is contrary to the principles laid down by larger Bench of this Court on this point. In **D'souza** (supra) the earlier larger Bench decision in **Dr. J. J. Merchant** (supra) has not been noticed.

38. Apart from being contrary to the aforesaid two judgments by larger Bench, the directions in paragraph 106 in **D'souza** (supra) is also contrary

to the provisions of the said Act and the Rules which is the governing statute.

39. Those directions are also contrary to the avowed purposes of the Act. In this connection we must remember that the Act was brought about in the background of worldwide movement for consumer protection. The Secretary General, United Nations submitted draft guidelines for consumer protection to the Economic and Social Council in 1983. Thereupon on an extensive discussions and negotiations among various countries on the scope and content of such impending legislation certain guidelines were arrived at. Those guidelines are:-

> "Taking into account the interests and needs of consumers in all countries, particularly those in developing countries, recognizing that consumers often face imbalances in economic terms, educational level and bargaining power, and bearing in mind that consumer should have the right of access to non-hazardous products, as well as importance of promoting just, equitable and sustainable economic and social development, these guidelines for consumer protection have the following objectives:-
>
> To assist countries in achieving or maintaining adequate protection for their population as consumers.

To facilitate production and distribution patterns responsive to the needs and desires of consumers.

To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers.

To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers.

To facilitate the development of independent consumer groups.

To further international cooperation in the field of consumer protection.

To encourage the development of market conditions which provide consumers with greater choice at lower prices."

40. A three-Judge Bench of this Court in **State of Karnataka** v. **Vishwabharathi House Building Coop. Society & Others**, (2003) 2 SCC 412, referred to those guidelines in paragraph 6. This Court further noted that the framework of the Act was provided by a resolution dated 9.4.1985 of the General Assembly of the United Nations Organization known as Consumer Protection Resolution No. 39/248, to which India was a signatory.

41. After treating the genesis and history of the Act, this Court held that that it seeks to provide for greater protection of the interest of the consumers by providing a Fora for quick and speedy disposal of the grievances of the consumers. These aspect of the

matter was also considered and highlighted by this Court in **Lucknow Development Authority** v. **M.K. Gupta**, [(1994) 1 SCC 243], in **Charan Singh** v. **Healing Touch Hospital** [(2000) 7 SCC 668] as also in the case of **Spring Meadows Hospital** v. **Harjol Ahluwalia** [(1998) 4 SCC 39] and in the case of **India Photographic Co. Ltd.** v. **H.D. Shourie** [(1999) 6 SCC 428].

42. It is clear from the statement of objects and reasons of the Act that it is to provide a forum for speedy and simple redressal of consumer disputes. Such avowed legislative purpose cannot be either defeated or diluted by superimposing a requirement of having expert evidence in all cases of medical negligence regardless of factual requirement of the case. If that is done the efficacy of remedy under the Act will be substantially curtailed and in many cases the remedy will become illusory to the common man.

43. In **Spring Meadows** (supra) this Court was dealing with the case of medical negligence and held that in cases of gross medical negligence the principle of *res ipsa loquitur* can be applied. In paragraph 10, this Court gave certain illustrations on medical negligence

where the principle of *res ipsa loquitur* can be applied.

44. In **Postgraduate Institute of Medial Education and Research, Chandigarh** v. **Jaspal Singh and others**, (2009) 7 SCC 330, also the Court held that mismatch in transfusion of blood resulting in death of the patient, after 40 days, is a case of medical negligence. Though the learned Judges have not used the expression *res ipsa loquitur* but a case of mismatch blood transfusion is one of the illustrations given in various textbooks on medical negligence to indicate the application of *res ipsa loquitur*.

45. In the treaties on Medical Negligence by Michael Jones, the learned author has explained the principle of *res ipsa loquitur* as essentially an evidential principle and the learned author opined that the said principle is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred. The principle has been explained in the case of **Scott** v. **London & St.**

Katherine Docks Co. [reported in (1865) 3 H & C. 596], by Chief Justice Erle in the following manner:-

> "...where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care".

46. The learned author at page 314, para 3-146 of the book gave illustrations where the principles of *res ipsa loquitur* have been made applicable in the case of medical negligence. All the illustrations which were given by the learned author were based on decided cases. The illustrations are set out below:-

- "Where a patient sustained a burn from a high frequency electrical current used for "electric coagulation" of the blood [See Clarke v. Warboys, The Times, March 18, 1952, CA];

- Where gangrene developed in the claimant's arm following an intramuscular injection [See Cavan v. Wilcox (1973) 44 D.L.R. (3d) 42];

- When a patient underwent a radical mastoidectomy and suffered partial facial

paralysis [See Eady v. Tenderenda (1974) 51 D.L.R. (3d) 79, SCC];

- Where the defendant failed to diagnose a known complication of surgery on the patient's hand for Paget's disease[See Rietz v. Bruser (No.2) (1979) 1 W.W.R. 31, Man QB.];

- Where there was a delay of 50 minutes in obtaining expert obstetric assistance at the birth of twins when the medical evidence was that at the most no more than 20 minutes should elapse between the birth of the first and the second twin [See Bull v. Devon Area Health Authority (1989), (1993) 4 Med. L.R. 117 at 131.];

- Where, following an operation under general anaesthetic, a patient in the recovery ward sustained brain damage caused by bypoxia for a period of four to five minutes [See Coyne v. Wigan Health Authority {1991) 2 Med. L.R. 301, QBD];

- Where, following a routine appendisectomy under general anaesthetic, an otherwise fit and healthy girl suffered a fit and went into a permanent coma [See Lindsey v. Mid-Western Health Board (1993) 2 I.R. 147 at 181];

- When a needle broke in the patient's buttock while he was being given an injection [See Brazier v. Ministry of Defence (1965) 1 Ll. Law Rep. 26 at 30];

- Where a spinal anaesthetic became contaminated with disinfectant as a result of the manner in which it was stored causing paralysis to the patient [See Roe v. Minister of Health (1954) 2 Q.B. 66. See also Brown v. Merton, Sutton and Wandsworth Area Health Authority (1982) 1 All E.R. 650];

- Where an infection following surgery in a "well-staffed and modern hospital" remained undiagnosed until the patient sustained crippling injury [See Hajgato v. London Health Association (1982) 36 O.R. (2d) 669 at 682]; and

- Where an explosion occurred during the course of administering anaesthetic to the patient when the technique had frequently been used without any mishap [Crits v. Sylvester (1956) 1 D.L.R. (2d) 502]."

47. In a case where negligence is evident, the principle of *res ipsa loquitur* operates and the complainant does not have to prove anything as the thing (*res*) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence.

48. If the general directions in paragraph 106 in **D'souza** (supra) are to be followed then the doctrine of *res ipsa loquitur* which is applied in cases of medical negligence by this Court and also by Courts in England would be redundant.

49. In view of the discussions aforesaid, this Court is constrained to take the view that the general direction given in paragraph 106 in **D'souza** (supra) cannot be treated as a binding precedent and those directions must be confined to the particular facts of that case.

50. With great respect to the Bench which decided **D'souza** (supra) this Court is of the opinion that the directions in **D'souza** (supra) are contrary to (a) the law laid down in paragraph 37 of **Indian Medical Association** (supra), (b) and paragraph 19 in Dr. **J.J. Merchant** (supra), (c) those directions in paragraph 106 of **D'souza** (supra) equate medical negligence in criminal trial and negligence fastening civil liability whereas the earlier larger Bench in **Mathew** (supra) elaborately differentiated between the two concepts, (d) Those directions in **D'souza** (supra) are contrary to the said Act which is the governing statute, (d) those directions are also contrary to the avowed purpose of the Act, which is to provide a speedy and efficacious remedy to the consumer. If those general directions are followed then in many cases the remedy under the said Act will become

illusory, (f) those directions run contrary to principle of '*Res ipsa loquitur*' which has matured into a rule of law in some cases of medical negligence where negligence is evident and obvious.

51. When a judgment is rendered by ignoring the provisions of the governing statute and earlier larger Bench decision on the point such decisions are rendered '*Per incuriam*'. This concept of '*Per incuriam*' has been explained in many decisions of this Court. Justice Sabyasachi Mukharji (as his Lordship then was) speaking for the majority in the case of **A.R. Antulay** vs. **R.S. Nayak and another** reported in (1988) 2 SCC 602 explained the concept in paragraph 42 at page 652 of the report in following words:-

> "*Per incuriam*" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.

52. Subsequently also in the Constitution Bench judgment of this Court in **Punjab Land Development**

and Reclamation Corporation Ltd., Chandigarh vs. **Presiding Officer, Labour Court, Chandigarh and others** reported in (1990) 3 SCC 682, similar views were expressed in paragraph 40 at page 705 of the report.

53. The two-Judge Bench in **D'souza** has taken note of the decisions in **Indian Medical Association** and **Mathew**, but even after taking note of those two decisions, **D'souza** (supra) gave those general directions in paragraph 106 which are contrary to the principles laid down in both those larger Bench decisions. The larger Bench decision in **Dr. J.J. Merchant** (supra) has not been noted in **D'souza** (supra). Apart from that, the directions in paragraph 106 in **D'souza** (supra) are contrary to the provisions of the governing statute. That is why this Court cannot accept those directions as constituting a binding precedent in cases of medical negligence before consumer Fora. Those directions are also inconsistent with the avowed purpose of the said Act.

54. This Court however makes it clear that before the consumer Fora if any of the parties wants to adduce expert evidence, the members of the Fora by applying their mind to the facts and circumstances of the case and the materials on record can allow the parties to adduce such evidence if it is appropriate to do so in the facts of the case. The discretion in this matter is left to the members of Fora especially when retired judges of Supreme Court and High Court are appointed to head National Commission and the State Commission respectively. Therefore, these questions are to be judged on the facts of each case and there cannot be a mechanical or strait jacket approach that each and every case must be referred to experts for evidence. When the Fora finds that expert evidence is required, the Fora must keep in mind that an expert witness in a given case normally discharges two functions. The first duty of the expert is to explain the technical issues as clearly as possible so that it can be understood by a common man. The other function is to assist the Fora in deciding whether the acts or omissions of the medical practitioners or the hospital constitute negligence. In doing so, the expert can throw considerable light on the current

state of knowledge in medical science at the time when the patient was treated. In most of the cases the question whether a medical practitioner or the hospital is negligent or not is a mixed question of fact and law and the Fora is not bound in every case to accept the opinion of the expert witness. Although, in many cases the opinion of the expert witness may assist the Fora to decide the controversy one way or the other.

55. For the reasons discussed above, this Court holds that it is not bound by the general direction given in paragraph 106 in **D'souza** (supra). This Court further holds that in the facts and circumstances of the case expert evidence is not required and District Forum rightly did not ask the appellant to adduce expert evidence. Both State Commission and the National Commission fell into an error by opining to the contrary. This Court is constrained to set aside the orders passed by the State Commission and the National Commission and restores the order passed by the District Forum. The respondent no.1 is directed to pay the appellant the amount granted in his favour by the District Forum within ten weeks from date.

56. The appeal is thus allowed with costs assessed at Rs.10,000/- to be paid by the respondent No.1 to the appellant within ten weeks.

.....J.
(G.S. SINGHVI)

.....J.
(ASOK KUMAR GANGULY)

New Delhi
March 8, 2010