

G. Bala Krishna Pai Versus Sree Narayana Medical Mission General Hospital 930a

CMCL 930a

**NATIONAL CONSUMER DISPUTES
REDRESSAL COMMISSION, NEW DELHI**

HON'BLE MR. JUSTICE S.N. KAPOOR, PRESIDING MEMBER
AND MR. B.K. TAIMNI, MEMBER

G. Bala Krishna Pai & Anr. -Appellants

Versus

Sree Narayana Medical Mission General Hospital And T.B. Clinic & Ors.
-Respondents

First Appeal No. 317 of 1996

[From the order dated 12.3.1996 in Complaint No. 103/1996 of the State
Commission, Kerala]

Decided on 9.1.2008

Consumer Law—Medical Negligence—Claim for compensation—Appreciation of evidence—Delivery of child—No doctor or Gynaecologist present—Labour pain injunction given after delivery of child—No facility of Oxygen—No proper treatment given—No medical record maintained—Child suffered from asphyxia—Consideration of—Held—Hospital failed to take due care—Clear deficiency in service—Awarded 3 lacs as compensation with cost and interest. [Para—33 to 38, 42 and 43]

Consumer Law—Indian Evidence Act, 1872—Section 106—Medical Negligence—Burden of proof—Held—Every material information within special knowledge of concerned doctor hence concerned doctor, and hospitals supposed to prove that due care and caution has been taken while giving treatment. [Para—30]

Case Referred :

1. *Gopal Krishnaji Ketkar v. Mahomed Haji Latif & Ors., (1968) 3 S.C.R*

Counsel :

Mr. Gireesh Kumar for Appellants

Mr. C.N. Sree Kumar and Mr. Roy Abraham for Respondents

ORDER

Mr. Justice S.N. Kapoor, Presiding Member: The above named two complainants feeling aggrieved by the order of dismissal of their complaint in OP No. 103 of 1996 dated 12.3.1996, have filed this appeal claiming Rs. 4,21,000 as compensation for medical negligence in treating appellant No. 2 and her child.

2. The case of the appellant/complainant is that during the period of her second pregnancy K. Vandana the second complainant, wife of the first complainant used to consult Dr. Mrs. Soji Kurien a Gynaecologist in Sree Narayana Medical Mission General Hospital during the relevant time. As advised by Dr. Mrs. Soji Kurien, she went to the hospital in the morning of 18th July, 1993. Since Dr. Kurien was on leave, check up was done by another doctor. The attending doctor said to her that delivery was likely to take place the very same day. As no room was available, she was advised to go home

and return when labour pain would start. By 7.40 p.m. on 18th July, 1993, she noticed discharge and reached hospital along with her husband and reported to the duty nurse. She was examined by the Duty Doctor M.D. Balachandran and Dr. G.S. Venkitesan, the Chief Medical Officer. As advised by them, drip was started. Thereafter, she was left in the care of nurses. Just before delivery Dr. Indira Kaimal visited the ante-room to attend an ailing infant also examined her at the request of the nurse with reluctance saying that she will send the surgeon. The complainant delivered a female baby at 10.30 p.m. in absence of any doctor. The episiotomy was conducted by a nurse.

3. The baby did not cry after the delivery. The complainant heard lapping of hands and then only the second opposite party Dr. M.D. Balachandran came to the labour room. He sent one-sweeper woman to fetch Dr. Indira Kaimal, Paediatrician. She came and directed to administer oxygen to the baby. But, since oxygen cylinder was not available, the child began to cry. The Doctor left after handing over the baby to the bystanders and cousin of Vandana. Thereafter, the child was not examined by any doctor till the next morning. When the child was taken to Dr. Indira Kaimal the next day at 9 a.m., brushing aside the request to examine the child, she did not examine the child nor gave any opinion regarding the condition of the child nor she took any precaution though the baby was showing restlessness and uneasiness. The child cried for sometime on 20th July, 1993 and suddenly fell silent after 9.30 a.m. The colour of the baby became bluish. It was immediately taken to the duty room and there the child was examined by Dr. Balachandran and Dr. Indira Kaimal. The doctors prescribed glucose orally. After some time the discolouration repeated. It was again taken to the duty room. Some medicines were prescribed but the condition of the baby did not improve.

4. Dr. H.G. Suresh of Alleppey District Hospital was contacted who after ascertaining the facts opined that the symptoms could have been caused due to lack of oxygen supply to the brain. Dr. Suresh visited the child at about 9 p.m. Dr. M.D. Balachandran and Dr. Indira Kaimal did not cooperate. Dr. Suresh came for the purpose of discussion and left after advising to take the child to the Alleppey Medical College Hospital if the condition did not improve. The condition of the child deteriorated thereafter. The child had continuous fits though attempt was made to control by medicine. At about 3 p.m. on 21st July, 1989, the child was taken to Alleppey Medical College Hospital. On examination, the child was found to be suffering from extensive brain damage. The puss formation was developed in the part of the body of the baby where needles for the intravenous injections were injected. It needed prolonged treatment. The child developed incurable abnormalities including mental retardation and affected physical and mental development of the child as well as caused deformity in right leg. The complications arose only because of callous negligence and deficiency in service caused during the confinement and at the time of delivery of the child in the respondent hospital.

5. The complainant/respondent had claimed Rs. 4,49,457.27 as compensation, (Rs. 28,457.70 ps, the amount had already been spent for treatment and upkeep of the child along with Rs. 21,000 to be spent on surgery for setting right deformity the right leg), jointly and severally from the above named respondents along with cost of Rs. 5,000.

6. The hospital contested the matter, *inter alia*, on the ground that the allegations did not constitute a consumer dispute. However, the admission of the second complainant in the Hospital for delivery and delivery of female baby has not been disputed. All other allegations were denied. It was denied that the complainant was not treated with proper attention and care. The patient was examined by the duty Doctor, Dr. M.D. Balachandran

and by Dr. D.S. Venkatesan, respondent No. 4. Dr. M.D. Balachandran was present throughout and was attending the second complainant at the time of delivery. The delivery was normal but the child was asphyxiated. Immediately by about 10.45 p.m. Dr. Mrs. Indira Kaimal, paediatrician was summoned who reached and attended to the child within minutes by administering the necessary medicines. Even before her arrival oxygen was administered and all necessary steps were taken as found necessary and proper care and attentions bestowed on the mother and the child. Dr. Indira Kaimal attended the baby on 19th and 20th July, 1993 also. Every possible treatment was given to stabilise the condition of the child who had developed cyanosis and attacks of fits. Necessary injections were given by Dr. R. Lakshmi. Doctors and nurses were attending the baby without any fail. When abnormalities were noticed proper medicines were administered and utmost care as was available in the Hospital was given to the child. As per para 5 of the version of Dr. G.S. Venkatesan, the labour room was provided with oxygen cylinders. In para 3, it was claimed that the abnormality and deformities said to have been noticed were not caused by the deficiency in service or negligence of the opposite parties. By about noon on 21.7.1989 its condition had been stabilised. On 20.7.1989 at about 9 p.m. Dr. Suresh, a reputed paediatrician attached to the District Hospital, Alleppey visited the baby and at his direction as requested by the complainant the child was discharged to be treated at the Medical College, Alleppey. The compensation claimed is imaginary and exorbitant.

7. Dr. M.D. Balachandran, respondent No. 2 claimed that when the second complainant arrived, he was present and attended. On conducting episiotomy the child did not cry on birth. Necessary attention including administration of oxygen was immediately given. The respondent No. 3 the Paediatrician was sent for and she reached within minutes and attended to the baby. The allegation that the baby developed complaints due to prolonged labour and due to his failure to attend is denied.

8. The third respondent/opposite party Dr. Indira Kaimal claimed that the complaint was frivolous, vague, and speculative and lacked merit. She further claimed that the matter was not covered under the Consumer Protection Act. She was called to the labour room at about 11 p.m. on 13.7.1989 and found that oxygen was being administered to the baby. Suction was done. Injection of soda bicarbonate along with betnasol was given to the baby by the duty doctor and the nurse. On examination of the baby it was noticed that it had already commenced gasping type of breathing and immediately resuscitation was done. She ventilated the baby till spontaneous respiration was established. Immediately the baby started crying. Thereafter immediate supportiveline of treatment by administering oxygen, injection, Vitamin K, and ampicillin were administered and to keep the body temperature steady hot water bottles were placed near the baby. Instructions were given to the duty staff nurses to watch for cyanosis and fits. The mother and the child were kept under close observation after the delivery. She left the labour room only after the condition of the baby became stable. The Doctor again examined the baby on 19th morning when jitteriness was noticed. The baby was given 25% glucose through ryles tube and anticipating fits, phenobarbitone was also administered. In the evening, she examined the baby once again. Medicine was repeated. In the morning of 20th July the Doctor again examined the baby and the condition was noticed as "generally stable". But later on the child developed cyanosis and the third opposite party immediately examined the baby and oxygen was administered. Duty nurse was directed to take the baby to the sister room for close observation and monitoring the treatment. Baby became stable and another antibiotic gentamycin was also started. In the evening the child had an attack

of fits and the third opposite party was called and she immediately came and attended on the baby. Calmpose and I.V. 10% glucose were given along with the medicine prescribed earlier. The fits was fully controlled and after the condition of the baby became stable, child was left in the sister's room for close monitoring.

9. It was also claimed that about 9 p.m. on 20th July, 1989, Dr. E.G. Suresh, Paediatrician, Govt. Hospital Alappuzha came to the house of the opposite party No. 3 - Dr. (Mrs.) Indira Kaimal and discussed the case. Dr. Suresh expressed satisfaction and it was denied that she did not cooperate with Dr. Suresh. Dr. Suresh requested Dr. (Mrs.) Indira Kaimal to direct the baby to the Medical College Hospital, Alappuzha if the condition of the baby would not improve. The baby had fits again in the night of 20th July, 1989 and in the morning of 21st July, 1989. The medicines were repeated and in addition. Mannitol, Decadron, Oral glycerine and Epiwal were also administered. The baby became stable and as per the advice of Dr. E.G. Suresh and as requested by the complainants, the child was referred to Medical College Hospital, Alappuzha at 2 p.m. on 21.7.1989.

10. Dr. G.S. Venkatesan, Chief Medical Officer - opposite party No. 4 claimed that he was not directly concerned with Gynaecology and Paediatric cases for he was concerned with general supervision of the above Departments. However, he claimed that during his rounds in the hospital on the night of 18th July, 1989, the second complainant had occasion to examine Smt. Vandana before her delivery. He was satisfied that her condition as well as that of the child to be born was normal. He gave necessary instructions to the nursing staff on duty and to the duty doctor. The delivery was normal attended by 3rd opposite party, Dr. M.D. Balachandran. The labour room had sufficient number of oxygen cylinders. Dr. Indira Kaimal, the Paediatrician immediately arrived and gave necessary treatment and medicines. Ultimately, it was stated that there was no deficiency in service on the part of either of the opposite parties.

11. From the side of the complainant only the complainant Smt. Vandana Devi was examined as a witness in addition to filing of certain documents. From the other side, Dr. Balachandran and Dr. Indira Kaimal were examined as witness in addition to filing numerous documents.

12. During the course of proceedings, an application has been moved by the complainant for deleting the name of the opposite party No. 4 from the array of the opposite parties, in absence of any specific allegation against him and the claim being mainly against Sree Narayana Medical Mission, Dr. M.D. Balachandran, opposite party No. 2, and Dr. Indira Kaimal, Paediatrician, opposite party No. 3. In view of this prayer, the appeal has been dismissed against opposite party No. 4.

13. The State Commission after considering the material on record raised the following issues:

- (i) Whether the dispute comes under the Consumer Protection Act?
- (ii) Whether there was any negligence or deficiency in the medical service rendered by the opposite parties?

Issue No. 1 :

On the basis of material on record, the State Commission held that the complainant was a consumer for consideration was paid for service rendered by the hospital.

Issue No.2 :

In so far as deficiency in rendering service by the hospital is concerned, the State Commission held that the complainant had failed to establish any deficiency in service on the part of the opposit party/respondent and as such, the complainant was not entitled to any relief and the complaint was dismissed.

14. There is no denial of the fact that earlier the complainant was treated by Dr. Soji Kurian, Gynaecologist in the same hospital. On 18th July, 1989, the duty Dr. Lakshmi examined her as Dr. Soji Kurian was not available. She opined that delivery might take place on that day or the next day and since no room was vacant there, the complainant went home. On that day itself in the evening at about 7.30, there was minor discharge. She proceeded to the hospital in a car and reported to the general duty room. Nurse came there and took her to the Ante Labour room and made her to lie there. Later, Dr. Balachandran examined her by using stethoscope and later came out. After 10 minutes. Dr. Venkitesh came and examined her and directed the nurse to start the drip and advised the patient to sleep. Medicine was given through drip. Some pain was felt by her. Muscular injection was also given. By that time, she was experiencing severe pain. No doctor was there. However, Dr. Indira Kaimal came there to attend a baby. Nurse requested her to examine the patient. Though it was not her duty, Dr. Indira Kaimal examined her and she directed the nurse to call the Duty Doctor as there was rapid contraction and she told the nurse for surgery and then she went out. There was severe pain and contraction to the patient. The patient was taken to the adjacent room by the nurse with the help of sweeper woman. Till then, the Duty Doctor had not reached. Hence, the nurse herself did Episiotomy, Delivery was effected. The newly born baby was not crying. The child was taken by holding on the legs with head downward. At that time, Dr. Balachandran reached there. He directed the nurse to bring oxygen. Dr. Balachandran gently patted the back portion of the child. The patient heard that sound. She also heard somebody saying that there was no oxygen in the oxygen cylinder. Dr. Balachandran directed the nurse to call the paediatrician. Dr. Indira Kaimal reached there. The oxygen cylinder was brought from the adjacent room which was in use for another newborn baby and administered to the baby. In the meanwhile, 10 minutes had elapsed. Thereafter, the baby began to cry. Dr. Balachandran came and after doing the stitches he went out. After half an hour the patient was taken to Ante Labour room. Afterwards, she was shifted to the ward. Her cousin sister was also there, was carrying the child. The baby was continuously crying.

15. On 19th morning, the next day, the patient was informed by the nurse that her baby was to be taken to the paediatrician. But, the baby was returned back as the baby was examined on the previous day and the baby was crying continuously. Jitteriness was noticed.

16. On 20th morning when the baby was crying, a bluish colour was noticed to the baby. Baby was taken to the duty room by the cousin sister of the complainant. The baby was treated by the doctor and after 15 minutes the baby was taken back to her mother. The bluish colour disappeared. Again on 20th itself the bluish colour was noticed on the baby while crying. The baby was again taken to the duty room by the nurse. Thereafter the baby was not given to the complainant. On that day at noon, the complainant was taken to the duty room for breast-feeding the child. The baby was in deep sleep and was not sucking properly. Later on, the complainant was informed that the disease of the baby intensified. Dr. Suresh, Paediatrician had examined the baby.

17. The next day, the baby was taken to the Medical College, Alleppey. After the

baby was brought to her, she noticed a big wound on the right leg where the drip was applied and the wound was deep and pus forming stage. The left ankle portion was found "loose". As per her statement, the child was aged four years; there was no proper mental and physical growth. There was brain damage to the child due to lack of proper treatment at the time of delivery and thereafter.

18. She was put to a lengthy cross-examination. In cross-examination when a suggestion was put on behalf of Dr. Balachandran that episiotomy was done by the second opposite party *i.e.* Dr. Balachandran, she categorically stated that as the doctor failed to reach in time Nurse done Episiotomy. This is done for quick delivery. .

19. Some another questions were put to her as under :

Q. It is put to you that Episiotomy was done by 2nd O.P. to your delivery and artificial breathing by mouth was given to your baby?

A. Doctor was not there. I do not know the details after the baby was taken from there.

Q. Whether you have any blood relation with your husband before marriage?

A. No.

PW2-Dr. G. Balakrishna Pai is the husband of the complainant No. 2.

20. He supported her wife. He also stated that after delivery Dr. Indira Kaimal along with a nursing student came out of the labour room. On inquiry, the nursing student told him that his wife had pain and she was going to call the doctor. Later on another nurse told him that Vandana had delivered and messenger had gone to call the doctor. Then, Dr. Balachandran reached and went to the labour room. Immediately a sweeper woman came out of the labour room and went to the Doctors' Quarters and came back along with Dr. Mrs. Indira Kaimal and went to the labour room. He also stated that his wife told him that there were complications during the delivery and no doctor was present at that time and the baby did not cry immediately after birth. He consoled her wife and came out of the ward.

21. On 20th morning when the baby was crying, suddenly the cry stopped and a bluish colour began all over the body of the baby. The baby was immediately taken to the duty nurse. Dr. Indira Kaimal reached there and advised to bring oral glucose, saying that it was due to hunger. After some time, the baby was kept on the bed beside the mother and advised to feed the ret of the glucose to the baby orally. Again the baby developed bluish colour on the body. Baby was taken to the duty nurse. The nurse kept the baby in the duty room. Dr. Indira Kaimal reached there and administered oxygen to the baby. On inquiry of the complainant, the duty nurse informed him that oxygen was being given to the baby and baby had bluish colour on the hands and legs and on the face off and on. Even in the afternoon also he enquired again to the duty nurse. She told that the baby was still developing bluish colour. He felt that the body had some serious complications; he consulted Dr. Suresh, Paediatrician of Alleppey District Hospital over the telephone. Dr. Suresh, told the complainant that these symptoms were present in the baby when is brain did not get oxygen to the complications during the delivery and if there were any constraints in that hospital to treat the baby. He advised to take the baby to Alleppey District Hospital. He informed this matter to Dr. Indira Kaimal who told him that it was not advisable to transport the baby because it had Cynosis. He again informed Dr. Suresh the details. Dr. Suresh told him that he would be coming to the

hospital and see the baby as he was to come to Cherthala (Sherthalai) in the evening. The duty nurse told that the baby had fits one or two times when Dr. Indira Kaimal came to examine the baby asked to buy Glucose, I.V. Set and Gardinal tablet.

22. Dr. Suresh reached the hospital at 9 O'clock. Since Dr. Indira Kaimal did not reach the hospital, he examined the baby with the permission of Dr. Indira Kaimal. Dr. Suresh and the complainant went to the residence of Dr. Indira Kaimal. Dr. Suresh opined that the baby had jitteriness, and baby was dehydrated. Since the baby had fits, opined to give feeds through nasal tube and to start drips. Dr. Suresh also advised him to take the baby to the M.C.H as the baby required good care at that stage which the baby was not getting at the hospital and went. During night also the baby had continuous fits. Nothing was done materially to control the fits. Next day morning the baby had fits again. He informed the details to Dr. Suresh at 6.45 morning. He advised him to take the baby to M.C.H. The complainant told this to Dr. Indira Kaimal who advised him to take the baby after the fits were controlled. Then the medicines Zodium Valporate, IV Set, Oral Glycerine, were bought and given in the duty room, as prescribed by her. Baby had fits even after that.

23. In the afternoon at 2.15 the duty nurse gave him a referral letter and asked him to take the baby to the M.C.H. At 3 p.m. on that very day the baby was brought to M.C.H. The baby was examined by Duty M.O. In the ticket he wrote that the baby had I.C.H. (Intra Cranial Haemorrhage), Moro absent, History of asphyxia, complaints of Cyanosis, Convulsions from day before. Dr. M.L. Thomas examined the baby. He told him that if the babies develop Neuro Genic fits, there was no purpose in their life even if they survive.

24. He also told that on the right leg at the sight where the drip was given from the Hospital at Cherthala began to form pus. This wound became a large one. They diagnosed Hypoxic Ischemic Encephalopathy. Gradually, paralysis was affected to the left leg. Right hand of the baby also found paralysed. When the baby taken for check up in the M.C.H. they were told all these occurred due to the brain damage and further complications could be seen only by follow up. Dr. P.G. Chandrasekharan Nair at M.C.H., Alleppey started Physiotherapy for the contracture developed on the right leg which was carried out upto 9.3.1990. On 20.10.1993, Dr. V. Ramananda Pai, Paediatric Surgeon, M.C.H., Alleppey carried out the operation. The baby remained in M.C.H. from 18.10.1993 to 30.10.1993. The baby was examined at the Department of Paediatric Neurology at M.C.H. It was certified the baby had mental retardation. The baby was now 5 years old. The baby had mental age of 3 years only. He further stated that no gynaecologist was present at the time of delivery. The baby did not cry after the delivery. The baby got any treatment only after the development of Cyanosis on the 20th. All this happened due to negligence of the opposite party, hospital. Baby had no congenital malformation or developmental defects. The child could not be admitted even in LKG.

25. On 7.9.1990, the complainant requested for the case sheet from the hospital, but he did not get any reply. Only after notice was given through Consumer Protection Council, photocopies of the case sheet were sent to them by the hospital. Baby is a female one and cannot survive without depending on others throughout her life. If the baby would have been given proper treatment at the time of delivery and thereafter, such situation might not have arisen.

26. From the side of the opposite party/ respondent, the most crucial evidence is that of Dr. Balachandran. Of course, he supported his own version and claimed that

he was present but he definitely admitted that Dr. Soji Kurian, the Gynaecologist and Dr. Lakshmi, Assistant Gynaecologist were not present at the time of delivery. There is no explanation whatsoever as to why at the time of delivery, no Gynaecologist was present.

27. There is yet another aspect, relating to genuineness of the case sheet. It would be worthwhile to re-produce the questions put to Dr. Balachandran and his answers :

Q. Details of Doctors Examination is not seen in the case sheet?

A. Used to write if there is Abnormal finding.

Q. Is it (all details) not written usually all details even if there is no abnormality?

A. The entries in the page 2 of the case sheet is in my hand writing. F.H.S. will be noted periodically. Such a practice is there in M.C.H. Here there is no such practice.

Q. There was "some delay upto Sodium bicarbonate is written" on the side margin on 19.7.1989?

A. Written on 18.7.1989 itself. Written in the Margin. B.P. also noted in the Margin. Separately noted is due to given to the Baby. The writings below 19.7.1989 is not in my handwriting. Written in the margin is my handwriting.

Medicines seen in the nurses daily records is given by my instructions. 5-2 item time recorded is not correct. 9.55 p.m. written is wrong. "Injection Methergin" is given after delivery.

Q. It is recorded in the Nurses Daily record that "Injection Methergin", Injection Bethnesol is given at 9.55?

A. That also recorded time wrongly. I have not given instruction for Bethnesol. Methergin is to contract the uterus after delivery.

The case details of the baby is written through Mother's case sheet.

Bethnesol is given to the baby.

Injection Methergine is to be given when the Placenta expels.

He denied that according to him the baby took breath after 3-4 minutes but it was not recorded in diary. Delay in breathing was recorded. He also denied the following suggestion:

Q. It is put to you that the baby had Asphyxia due to the rapid contraction caused by the effect of the medicines administered before the delivery and also due to absence of the doctors during the delivery period to assist?

A. Not correct.

Re. The time 9.55 noted in page 9 of P17 is may be 10.55.

Interest will be taken to care the patients affairs first and recorded later.

While there may not be any dispute about the interest of the patient but the hospital was also supposed that a Gynaecologist or at least a Assistant Gynaecologist should be available at the time of delivery and the matter should not have been left to duty nurses/staff when the services of a Gynaecologist are sought.

Some specific questions were put to Dr. Indira Kaimal which are as under:

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Q. In the case sheet of 18.7.1989, it was written by me "Cyanosed cold clammy limbs" at 10.45 is as per instructions of the Duty Doctor. Cold clammy means "very cold"

In the case sheet dated 18.7.1989 and 19.7.1989 of the baby, the doctors' record and nurses daily record are in my handwriting. In the signature column of nurses daily record, the writing 'pt' is not in my handwriting.

28. In order to verify whether the medicines were given according to my instruction can be seen from the nurses daily record.

Q. In this case it seems that medicines not given. Anything to say?

A. It is not seen in this case sheet. If verification is needed there is another nurses record in the hospital.

Q. It is put to you that seeing this case sheet medicines you cannot affirmatively say that medicines are given?

A. No, it is given,

Q. How can affirmatively say?

A. For verification Nurses daily record is in the hospital. It can be taken.

Q. It is seen in the case sheet that many medicines prescribed by you on 20th were not given to the baby?

A. One sheet is missing from the nurses daily record of the case sheet.

Q. Can it be taken that the Asphyxiated baby became normal after it has cried?

A. The baby can be said normal when it cries, only on examination and found on examination the other vital functions are normal.

Other vital functions means Heart, Temperature, Nutrition, etc. including Respiration.

Q. There is no such record of examination of the vital functions seen in the case sheet?

A. Not used to record completely.

I also agree that the textbook of Paediatrics by Nelson is any authority. Nelson's Text Book of Paediatrician 4th Edition (1969) Page No. 458, Paragraph Heading "Hypoxia and Ischemia" shown to the Doctor (RW2) and asked whether she agrees with Ethology *i.e.*, what is said about Ethology in that particular paragraph?

A. Yes, I agree.

Q. Do you agree with the suggestion that uterine contractions result in Postnatal Hypoxia in delivery room?

A. No. If it happens all the babies born will have Birth Asphyxia?

Q. Will rapid contraction of uterus result in perinatal Hypoxia?

A. Need not be. It may or may not occur.

Q. Do you concur with the details given in page 458 of Nelson's book (table 9) regarding "Effects of Asphyxia"?

- A. According to the textbook maybe, but I have not come across any of these cases. I have seen and treated babies having severe Birth Asphyxia than this but they do not have any of the neurological or any of the complications mentioned in the text book. Even in this also I never suspected any complications.

29. There is no reason for the two complainants to falsely allege either against the hospital or the doctors in whose hands they left her body and soul unless something is wrong with the hospital or the concerned doctor(s).

30. One could be not oblivious to the fact that for our purposes question of medical negligence has to be decided in the light of preponderance probabilities and the case of the complainants could not be thrown out on the specious plea that the specific pleas were not taken or on the point of onus proof, for onus of proof loses its sharpness, when both the parties enter into evidence, and both are required to produce the best evidence available. One has to see the evidence in these matters in the light of the fact that a man on the street is pitted against an expert, he depends upon doctor's special knowledge about the medicines they administer. They are supposed to maintain accurate record of treatment as well medicines administered. However, in these cases where virtually every material information is within special knowledge of the concerned doctor, in terms of Section 106 of the Evidence Act then the concerned doctor and the hospital are supposed to prove that due care and caution was taken while giving treatment. Section 106 reads as under :

"106. Burden of proving fact especially with in knowledge—When any fact is specially within the knowledge of any person, the burden of proving that intention is upon him."

Illustration

- "(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him."

31. In this regard it may be appropriate to refer to the observations of the Hon'ble Supreme Court in the case of *Gopal Krishnaji Ketkar v. Mahomed Haji Latif & Ors.*, (1968) 3 S.C.R. The relevant observations are stated herein below :

*"Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withhold important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai v. Manichavasaka Pandara*, Lord Shaw observed as follows:*

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Court the best material for its decision. With regard to third parties, this may be right enough—they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This passage was cited with approval by this Court in a recent decision *Biltu Ram & Ors. v. Jainandan Prasad & Ors.* In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in *Bilas Kunwar v. Desraj Ranjait Singh & Ors.* :

“But, it is open to a litigant to refrain from producing any document that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents.”

But Shah, J., speaking for the Court, stated :

“The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of document and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with illustration (g) of Section 114 of the Evidence Act, and also an impressive body of authority.”

32. Medical ethics for registered medical practitioners, provides that every physician was and is supposed to maintain the medical records pertaining to his/her in-door patients for a period of 3 years from the date of commencement of the treatment. Besides, physician or a hospital is free to choose whom he/the hospital will serve. They should, however, respond to any request for his assistance in an emergency under Hippocratic oath. Once having undertaken a case, the physician should not neglect the patient, nor should he withdraw from the case without giving adequate notice to the patient and his family. They are also not supposed to wilfully commit an act of negligence that may deprive his patient or patients from necessary medical care.

33. From the statement of the complainant, it is evident that the services of Gynaecologist were not made available to the patient. Dr. Balachandran who is an ordinary MBBS and not a Gynaecologist though claimed to have delivered the child but circumstances indicate and corroborate the complainants that even he was not there at the time of delivery. Had he been there at that time then they would not have stated about his absence. The way she stated virtually giving nearly all the details about treatment, which she got, were either at the hands of Dr. Balachandran or Dr. Venkitesh, or Dr. Indira Kaimal before the delivery would indicate that there is a ring of truth in her statement.

34. It may be noted that the baby was delivered at 10.45 p.m. and according to Dr. Balachandran, injection Methergin was given after delivery but his cross-examination would indicate that injection Methergin was given at 9.55 p.m. though he claimed that the time was not correctly recorded. If the nurse would have recorded the correct time or if the injection Methergin would not have administered at 9.55 p.m., such a mistake would have never occurred. Seeing in this light, one finds it difficult to rely on the testimony of Dr. Balachandran and to reject the testimony of the two complainants indicating that he was not present at the time of delivery.

35. The nurse who had prepared that record would only indicate that the correct time of delivery and administration of injection Methergin is mentioned in the case diary. Supposing Dr. Balachandran was present at the time of operation but undisputedly Dr. Mrs. Soji Kurien or any other Gynaecologist were not present as had been admitted. If

the services of any Gynaecologist or Asstt. Gynaecologist were not made available at the time of delivery, this would certainly amount to deficiency in service on the part of the hospital.

36. Similarly, the fact that injection Methergin was given prior to the delivery at 9.55 p.m. as mentioned in Nurses record while this should have been given only after the delivery by the nurse, would confirm the inference that due care was not taken. This could not have happened if Dr. Balachandran was present. As stated by the complainant, Dr. Indira Kaimal, Paediatrics had noticed that there was rapid contraction and she told that she would send the surgeon though this fact was denied by Dr. Indira Kaimal in her cross-examination for obvious reasons-would again indicate absence of Dr. Balachandran.

37. Thus, there are reasons to believe that Dr. Balachandran was not present at the time of delivery; that oxygen cylinder was not available and time of about 10 minutes elapsed in bringing the oxygen cylinder from the adjacent room while that oxygen cylinder was being used for another newly born child. One could also not be oblivious to the fact that though Dr. Indira Kaimal directed the nurse to call the Duty Doctor as there was rapid contraction and agreed to send the surgeon. But, neither the Duty Doctor, nor the surgeon turned up in time. The patient was made to suffer severe pain and contraction, causing lack of oxygen for the child during the labour pains. The child did not cry despite patting, oxygen was required to be given but the oxygen was not readily available in the room and it had to be arranged by depriving oxygen to another child in another room would indicate that evidently there was highly improper arrangement to provide medical services of a Gynaecologist along with necessary infrastructure like oxygen, etc.

38. In the light of above discussions, following deficiencies in rendering medical service have been noticed :

1. Injection Methergin was given at 9.55 p.m. as per nurses daily record register which led to contraction and increased labour pains causing suffocation and lack of oxygen to the child before delivery.
2. At the time of delivery, no Gynaecologist was present. Even Dr. M.D. Balachandran was not present and the delivery of the child took place with the assistance of the duty nurse.
3. Even the oxygen was not provided in time. Several minutes elapsed before Dr. Balachandran reached, patted the child, sent the nurse for obtaining oxygen cylinder from the adjoining room when it was found that the oxygen cylinder in the delivery room was empty and about 10 minutes or so would have been allowed to elapse in this process. One would irresistibly infer about deficiency in rendering medical service much more evident due to improper infrastructure in the hospital.
4. The medicines prescribed by Dr. Indira Kaimal were not given for Dr. Indira Kaimal answered that "it has not seen in case sheet", and that "one sheet is missing from the nurses daily record of the case sheet".
5. Medical record had not been kept properly. Further from cross-examination of Dr. Indira Kaimal the asphyxiated baby could be said to be normal when it cried, only on examination and found on examination the other vital functions were normal. There was no such record of examining function of vital organs in the case sheet, for Dr. Indira Kaimal answered in this regard "Not used to record completely".

39. An expert witness Dr. E. G. Suresh was examined from the side of the complainant and Dr. G. Venkatesan from the side of the opposite party. From the statement of Dr. Suresh, Paediatrician, Superintendent, working in Distt. Hospital, Alappuzha it is evident that the child did suffer from asphyxia. According to him, hypoxic ischaemic Encephalopathy meant that the brain had suffered lack of oxygen sometime before the baby was seen and diagnosed as having HIE. He also stated that once brain damage was caused to a tender baby, it would not be possible in all cases to reverse brain damage by a doctor however efficient or experienced he or she may be (Not in all cases). However, he stated that he could not say the exact cause of asphyxia of the child of the complainant. He also stated that he was not an expert in neurological matters.

40. The above points do establish that there was medical negligence in providing medical services and facilities at various stages and in all probability, the lack of oxygen led to asphyxia in treatment.

41. In so far as the statement of Dr. Venkatesan is concerned, for he stated that he examined at a very initial stage when the complainant was brought in the hospital hours before delivery. No specific complaint was made against him. Reproduction of his statement could be taken at the best as a doctor of the hospital who is interested in saving its reputation.

42. It is apparent that the hospital administration had failed to take due care of the patient and the complainant at the time of delivery and neglected them as aforesaid at various stages and thus Shree Narayana Medical Mission General Hospital and T.B. Clinic was deficient in rendering medical services.

43. In this light, we feel it appropriate to award compensation of Rs. 3.00 lakh in favour of the parents of child *i.e.* two complainants for the benefit of the child and against Shree Narayana Medical Mission General Hospital and T.B. Clinic with interest @ 6% p.a. from the date of complaint and cost of Rs. 5,000. They are directed to pay this amount within a period of two months from the date of receipt of this order. The appeal is allowed accordingly.

Appeal Allowed.

CMCL 930m

NATIONAL CONSUMER DISPUTES

REDRESSAL COMMISSION, NEW DEHI

HON'BLE MR. JUSTICE M.B. SHAH, PRESIDENT, MRS. RAJYALAKSHMI RAO,
MEMBER AND DR. P.D. SHENOY, MEMBER

M/s. Mono Industries

-Petitioner

versus

New India Assurance Co. Ltd.

-Respondent

Revision Petition No. 3049 of 2005

(From the order dated 29.9.2005 passed in Appeal No. A-01/2001 by the State
Commission, Delhi)

930n

Cases & Materials on Consumer Law

New India Assurance Co. Ltd.

-Petitioner

Versus

M/s. Mono Industries

-Respondent

Revision Petition No. 251 of 2006

(From the order dated 29.9.2005 passed in Appeal No. A-01/2001 by the State Commission, Delhi)

Decided on 10.3.2008

Consumer Law—Insurance Claim—Assessment of "Burglary"—Held—Burglary from premises by "forcible and violent" means of entry the word "violent" was to be construed according to its ordinary meaning and meant entry by the use of any force which was accentuated or accompanied by a physical act—Word "violent" accordingly referred to physical character of means of entry and not merely to its unlawful character. [Para—13 and 14]

Consumer Law—Insurance Claim—Grant of Interest—Held—If the amount is withheld by insurance company for years together a lumpsum award as compensation covering both interest and costs would not suffice—Insurance company is directed to pay interest at the rate of 10% P.A. [Para—31]

Case Referred :

1. *United India Insurance Co. Ltd. Vs. Harichand Rai Chandanlal, (2004) 8 SCC 644*
2. *George and Goldsmiths and General Burglary Insurance Assn. Ltd. (1989) 1 All ER 422 : (1989) 1 Lloyd's Rep 379 (CA)*

Counsel :

Mr. H.C. Goel, for Petitioner

Mr. P.K. Seth for Respondent

ORDER

M.B. SHAH, J. : President :

The issue that came up for consideration in this case is, whether the loss of goods sustained by the insured, fall within the meaning of 'burglary' as stated in the insurance policy?

It appears that the judgment rendered by the Apex Court in the case of United India Insurance Co. Ltd. vs. Harichand Rai Chandan Lal - (2004) 8 SCC 644 is misunderstood by the Insurance Company. In the said case, it has been held that 'theft from the premises by forceful and violently' would mean entry by use of any force, however slight it may be. As such, an entry obtained by picking the lock or forcing back the catch by means of an instrument involves the use of violence. Whether it is burglary or not, depends upon the facts and circumstances of each case. In the present case, entry by the culprits was by removal of roof sheet which cannot be done without use of force. Hence, it would be a case of violent entry for committing theft/burglary.

Facts:

It is the say of the Complainant that the Complainant is engaged in manufacturing

of Polythene rolls, bags and tubes. It had obtained an insurance policy from the New India Assurance Co. Ltd. for a sum of Rs. 4 lakhs, for the period from 10.4.1992 to 9.4.1993 on payment of Rs. 1,140/- towards the premium. On the intervening night of 31st August and the 1st September, 1992, a burglary took place in the insured premises and information to that effect was given to the Police and the Insurance Company. As the claim was not settled, the Complainant filed Case No. TC/826/98 before the District Forum, New Delhi, claiming a sum of Rs. 2,37,500/- towards the value of the goods stolen; and, Rs. 2,00,000/- towards compensation, with interest at the rate of 18% p.a. and costs.

The stand taken by the Insurance Company before the District Forum was that : (i) on survey being conducted, it was found that there was no burglary, but that it was only a case of theft, which was not covered under the insurance policy; and, (ii) the Complainant did not furnish any proof of burglary, and hence the claim of the Complainant was not tenable.

The District Forum after hearing both the parties and taking into consideration that the Complainant had shown to the investigator the broken roofing sheet which might have been removed by the miscreant to enter the premises, directed the Insurance Company to pay to the Complainant the value of the stolen goods to the tune of Rs. 2,37,500/- with interest at the rate of 18% p.a. from 1.9.1992, i.e. the date of the occurrence of the loss, till the date of payment. Rs. 2,000/- was also awarded by way of costs.

Feeling aggrieved, the Insurance Company went in appeal to the State Commission, Delhi, by filing Appeal No. A-01/2001. The State Commission vide its order dated 29.9.2005, while upholding the order of the District Forum, modified the order to the limited extent of deleting the direction of payment of interest, and, instead, awarded a lump sum of Rs. 25,000/- towards compensation and costs.

Against that order, both the parties have filed revision petitions before us.

The Insurance Company filed Revision Petition No. 251 of 2006 for dismissal of the complaint and setting aside the order of the District Forum.

Revision Petition No. 3049 of 2005 is filed by the Complainant praying that interest on the amount as awarded by the District Forum requires to be confirmed.

As both the revision petitions arise out of the same judgment and order of the State Commission, we dispose of both of them by a common order.

In the revision petition filed by the Insurance Company, the learned Counsel Mr. Seth contended that :

(i) no burglary occurred in the premises of the Complainant, hence, the loss or damage caused to the Complainant is not covered by the policy, as it is only a case of theft as registered by the Police under Sec. 380 IPC;

(ii) there is no evidence on record to establish that the Complainant suffered loss of Rs. 2,37,500/-;

Findings:

I. Whether it is a case of burglary or theft?

The learned Counsel Mr. Seth appearing on behalf of the Insurance Company heavily relied upon the decision of the Apex Court in the case of *United India Insurance Co. Ltd. Vs. Harichand Rai Chandanlal*, (2004) 8 SCC 644 and contended that in case of theft Insurance Company is not liable to reimburse.

In our view, the aforesaid judgment is misunderstood by the Insurance Company.

In the aforesaid case it is clearly held that if the entry is effected by exercise of any force, however slight, it was sufficient to constitute an entry within the meaning of the policy. Such entry can be described as violent in nature and character. For this purpose, the Court referred to Queen's Bench decision in the case of *George and Goldsmiths and General Burglary Insurance Assn. Ltd. (1989) 1 All ER 422 : (1989) 1 Lloyd's Rep 379 (CA)*, wherein it has been held as under :

"In the context of a policy of insurance against theft from premises by 'forcible and violent' means of entry, the word 'violent' was to be construed according to its ordinary meaning and meant entry by the use of any force which was accentuated or accompanied by a physical act which could properly be described as violent in nature and character. In the context of such a policy the word 'violent' accordingly referred to the physical character of the means of entry and not merely to its unlawful character."

In the same context, the Court also referred to the passage from the Halsbury's Laws of England, 4th Edn., para 646 wherein it has been observed that an entry obtained by picking the lock or forcing back the catch by means of an instrument involves the use of violence and is therefore covered.

Thereafter, the Court held that :

"The determination of what constitutes visible marks or visible evidence within the meaning of such a provision, and of where such marks or evidence must be located in order to satisfy the policy requirement, is to a great extent dependent upon the particular facts involved in relation to the specific requirements imposed by the policy. Where, for example, a burglary or theft policy requires that there must be visible marks of force or violence 'at the place of entry' into the premises, this requirement has been held complied with if the visible marks are only on one of the outer doors to the insured's premises, which the burglars or thieves must have used to accomplish their deed."

Keeping the aforesaid principle in back ground we would first refer to the finding recorded by the State Commission on the basis of the evidence of the Complainant.

The State Commission after appreciating the evidence which was brought on record arrived at the conclusion that it was a clear case of burglary. For this purpose, the State Commission relied upon the version of the Complainant that at about 7.00 pm the office Supervisor of the factory locked the godown from inside and kept the key in the office. On the next day morning at about 9.30 a.m., the Operator, Mr. Jaganath, informed the Complainant on telephone that plastic granules lying in the godown had been stolen. On receipt of the said information at about 10.15 am, the Complainant came to the factory and found that the plastic items weighing 4,750 kgs had been stolen. For this purpose, undisputedly, an FIR was lodged with the Police. The Police registered the case under Section 380 of the IPC. It is also pointed out that for entering the godown premises a skilled person removed the plastic sheet from the ceiling of the roof, and, thereby entered into the premises, opened the door and took away large quantity of the granules.

Further, with regard to cause of incident, the surveyor appointed by the Insurance Company also stated to the same effect in the interim survey report dated 19.7.1993, which is as under:

"During our Survey, following are our observations:

1. The main gate/entry, made of steel shutters were duly locked and intact with no breakages at all either in the locks, shutters or their Kundas etc.

2. There is a small door entering in the godown from inside the shed which was opened by the culprits after using the key in the lock but it was not tampered at all.

3. After entering this godown, the culprits broke the Kundas of the steel door/gate with locks intact in the hooks and thus opened it and through which the insured's raw material packed in bags were taken out from this godown and were loaded on a truck just waiting outside on the main road on exit of this broken door/godown as claimed by the insured.

4. On enquiring the matter and how the culprits in the above circumstance entered the factory, the insured replies that he exactly does not know but there is possibility that the culprits must have entered after removing the roofing sheet of the shed. During our survey the sheet was already placed in its original position as per statement of the insured and before our arrival at the insured factory. Reason given by the insured is that for further security and to stop water coming inside the shed during the rainy day which was already on during that period.

In the circumstances, as stated above the forcible entry inside the shed premises is yet to be established and it is under our investigations."

This would mean that even the Surveyor has considered it to be probable that entry of the culprits must be by removing the sheet of the roof.

It is also to be stated that by letter dated 1.2.1996 the Complainant informed the Grievance Officer of the Insurance Company as under:

"This is further to our letter dated 8.8.1994. We write with much regret that no reply has been received from you. We contacted you personally and explained in detail the entire case.

Recently, we have been contacted by Police Inspector of Samaipur Badli, Police Station, regarding the burglary occurred at our factory on 31st August, 1992. We have been informed that a gang was caught by them, who were indulged in theft of plastic-raw-material. They took away the material from many factories/godowns in Delhi. The Police Inspector brought the person from that gang with him, who admitted that he along with many people broken the locks of our factory-godown and took the raw-material bags in Nishan truck on 31.8.1992 and confirmed the quantity too. The Police Inspector confirmed that they have complete reports at Samaipur Badli Police Station, and given phone number for any details if, required.

Now it has been proved that the burglary took place at our factory/godown on 31.8.92. Therefore, we request you once again to kindly look into the matter carefully and settle our claim at the earliest."

Despite this, the Insurance Company never bothered to verify from the Police Officers with regard to the incident.

In the light of the aforesaid evidence, the finding recorded by the District Forum and the State Commission that burglary as contemplated by the terms of the policy has taken place. The entry of the culprit was by removal of roof sheet and exit was by breaking of locks. This would amount to forceful entry and forceful exit.

II. Assessment of loss:

The next question is with regard to assessment of loss.

Admittedly, the Insurance Company had appointed a surveyor. Thereafter, the Chartered Accountant appointed by the surveyor examined the records and arrived at the conclusion that the total value of the stock was Rs. 15,54,820/-. However, as stock was kept in two godowns, they arrived at the conclusion that it was not possible to work out the closing stock just before the occurrence of the loss at the factory premises where the burglary had occurred, with the records available with the insured.

As against this, it is to be stated that as per the policy which is produced on record, the sum insured is Rs. 4 lakh on stock used in manufacturing of polythene sheets/bags, whilst stored and/or lying in the insured's factory at the address mentioned therein, i.e. at the place where the burglary took place. It is also to be stated that to avoid any further complications, in appeal, the State Commission by order dated 24.1.2005 directed that as there was no dispute as to the price of the goods lying in the factory and as the surveyor appointed by the Insurance Company has not assessed the loss on the ground that it was because of theft which was not covered by the policy and that he was not in a position to assess the loss for want of documents which were to be furnished by the Complainant, directed the Insurance Company to call upon the Complainant within a period of one week from the date of the order to furnish the requisite documents on the basis of the claim preferred by the Complainant. Despite this specific order, assessment was not made by the surveyor/or the Insurance Company.

It is to be stated that the Divisional Manager wrote a letter to the Legal Department on 27th November, 2007 to the following effect:

"As already informed to you that the assessment of the above loss was not done by the Surveyor, Mr. A.K. Gupta who had only issued the Interim Report in regard to the loss. The undersigned had personally discussed the matter with the Surveyor over telephone who has informed that since he is going to Dubai and will not be able to proceed further in the matter only after he comes back after 10 days.

In these circumstances, we request you to advise us whether we should satisfy the Award given by the consumer Court amounting to Rs. 2,37,500/- + interest @ 18% p.a. from the date of loss, i.e. 1-1-92 till the date of payment or we may get the loss assessed by the Surveyor on the basis of the adequacy of the sum insured since the amount of Rs. 2,37,500/- is the estimated loss of the insured."

Further, it is to be stated that by letter dated 18th March, 1984 the Branch Manager of the Insurance Company informed the surveyors to submit their report immediately by stating as under :

"Please refer our letter dated 15.3.94. We have received a copy of our letter of the insured dated 9.11.93 photocopy attached herewith for your records. As reported by the bankers of the insured that all your requirements had been completed by the insured but till date we have not received the report. Further, we would like to inform you that all the required documents are available with the insured's banker. You may contact them also if required."

The surveyor has not complied with this. It is not the fault of the Complainant if the Surveyor fails to assess the loss for the reasons best known to him, despite necessary records furnished by the Complainant, then the complainant should not suffer.

Further, even in the stock statement dated 7.10.1992 which is produced on record before this Commission, the Dena Bank has specifically deducted a sum of Rs. 2,37,500/-. This would indicate that immediately after the burglary even the Bank has accepted

Bombay Hospital & Medical Research Centre Versus Sharifabai Ismail Syed 930s
the said amount as the loss suffered by the Complainant for the loss of goods weighing 4,750kgs.

In this set of circumstances, the consistent version given by the Complainant with regard to the loss suffered by him was accepted by the State Commission as well as the District Forum. As per the facts and circumstances of the case, the finding recorded by the District Forum and the State Commission cannot be said to be in any way illegal or irregular which would call for interference.

III. Whether the Complainant is entitled to any interest?

The next question which requires consideration is whether the order passed by the District Forum directing the Insurance Company to pay the amount with interest at the rate of 18% p.a. requires to be restored or not?

The learned Counsel for the Complainant submitted that there was no justifiable reason for the State Commission in not awarding the interest on the amount of loss suffered by the Complainant and in awarding only Rs.25,000/- in lump sum.

In our view, the aforesaid submission is also justifiable. Because, the incident of burglary took place on the intervening night of 31st August and 1st September, 1992. And, if the amount is withheld by the Insurance Company for years together, lump sum award of Rs.25,000/- as compensation, covering both interest and costs, would not suffice. Hence, just compensation is required to be awarded. Just compensation would mean award of reasonable rate of interest in case of loss suffered in terms of Rupees. In other words, proper measure or yardstick for granting compensation would be award of appropriate rate of interest on the amount which Complainant would have received, had the claim been settled at the right time. Hence, the Insurance Company is directed to pay the aforesaid amount with interest at the rate of 10% p.a.

Revision Petition No.251 of 2006 :

In view of the aforesaid discussion, the Revision Petition No. 251 of 2006 filed by the Insurance Company is dismissed.

Revision Petition No.3049 of 2005 :

In the result, the Revision Petition No.3049 of 2005, filed by the Complainant is partly allowed. The Insurance Company is directed to pay the sum of Rs.2,37,500/- with interest at the rate of 10% from 1st March, 1993, i.e., after 6 months from the date of the occurrence of the incident, till the date of payment.

CMCL 930s

NATIONAL CONSUMER DISPUTES

REDRESSAL COMMISSION, NEW DELHI

HON'BLE MR. JUSTICE M.B. SHAH, PRESIDENT, DR. P.D. SHENOY, MEMBER

Bombay Hospital & Medical Research Centre

-Appellant

Versus

Sharifabai Ismail Syed & 3 Others

-Respondents

First Appeal No. 625 of 2006

Decided on 25.2.2008

Consumer Law—Medical Negligence—Claim for compensation—Allowed—Validity of—Appreciation of evidence—MRI scanning conducted by senior Reagent—Report prepared by consultant doctor—Operation done but not found and tumour—Second scanning conducted and found exact position of tumour and conducted operation again—Consideration of—Held—Hospital is responsible for providing infrastructure service—Consultant radiologist is thereafter responsible for viewing the completed scan and interpreting the films presented to him—While senior regident committed blunder therefore hospital and doctor would be jointly and severally liable to pay compensation. [Para—27, 28 and 34]

Counsel :

Mr. Chitale J.M., and Mr. S. De for Appellant

Mr. Syed for Respondent No.1

Mr. S.B. Prabhawalkar for Respondent No.3

ORDER

M.B. Shah, J., President: Can a consulting doctor (radiologist) defend an apparent mistake in noticing a tumor on the basis of MRI film by contending that MRI was taken by a senior resident doctor, despite the fact that the said report is endorsed by the consulting doctor by mentioning that the tumor was at D10-11 position outside the spinal cord?

2. In our view, such defence cannot be accepted. The consulting radiologist who signs the report is responsible for misreading or not reading/looking at the MRI film correctly. In such a case, this would be gross negligence. It is the duty of the consulting doctor to correct such errors.

Brief facts :

3. This appeal is filed by the Bombay Hospital & Research Medical Centre, Mumbai, against the judgment and order dated 17.12.1997 passed by the State Consumer Disputes Redressal Commission, Maharashtra, in complaint No.89/94 directing the hospital only to pay a sum of Rs.1,30,000/- as compensation and Rs.5,000/- by way of costs to the Complainants 1 and 2. Complaint against Dr.(Ms.) Meher Dadachaji and Dr. Keki Turel, Neuro Surgeon, was dismissed.

4. In this appeal it is the contention of the Hospital that only the Radiologist would be liable to pay the compensation because of negligence on her part. With regard to Neurologist, it is contended that he is no more.

5. It was contended that Complainant No.1, Ms. Sharifabi Ismail Sayed, developed suspected tumor in her back outside the spinal cord and was having difficulty in walking, but could sit comfortably. For that, she was admitted to one Masina Hospital under Dr. Modi. But, thereafter, Dr. Modi referred her to Bombay Hospital for diagnosis and treatment, as that hospital was having reputation for sophisticated diagnostic methods and surgical expertise. MRI (Magnetic Resonance Imaging) Scan was carried out on 20.5.1993. Scanned film was examined by Dr. (Miss) Mehar Dadachanji, Respondent No.3, in this appeal, and in her report she had indicated presence of tumor at D10-11 position, outside the spinal cord. She referred the MRI film to Respondent No.4, Dr. Turel, who is a Neuro Surgeon. On the basis of the MRI report, the Complainant, Ms. Sharifabi Ismail Sayed, was taken for operation for removal of tumor at the side D-10-11 on 24.5.1993. No tumor was found at D-10-11 as noted in the MRI film. Dr. Turel also sent a portion of the issue for pathological testing and it was found to be benign. Dr. Turel informed Dr.

Dadachanji that no tumor was found at D-10-11 side and that surgical adventure was of no utility for the patient.

6. On account of this, on 3.6.1993, under the supervision of Dr. Dadachanji, another MRI was carried out and as per the report tumor was noted at D-7-8 position. Hence, on 4.6.1993 second operation 'laminectomy' was performed which lasted for about 6 hours, and, according to Dr. Turel the tumor was removed. For this purpose, the Complainant was required to stay in the hospital from 21.5.1993 to 28.6.1993 and was required to incur heavy expenditure for medical treatment.

7. On the basis of the aforesaid facts, it was contended that there was gross negligence on the part of the hospital and the doctors in performing the uncalled for operation. Hence, Complaint No. 89 of 1994 was filed before the Maharashtra State Consumer Disputes Redressal Commission, claiming a sum of Rs. 5,83,888/-.

8. That complaint was partly allowed and the Appellant, Bombay Hospital, was directed to pay a sum of Rs. 1,30,000/- as compensation to the Complainant with Rs. 5,000/- as costs.

9. Against that order, the Bombay Hospital has preferred this appeal, mainly contending that the hospital was not liable for the deficiency in service rendered by the doctors, namely, Dr. Dadachanji and Dr. Turel. Learned counsel for the Appellant Hospitals submitted that if Dr. Dadachanji has committed the error in interpreting the MRI film she would be responsible for the deficiency in service and not the hospital. He further contended that as per Rule 14 of the Rules and Regulations framed by the hospital, the entire responsibility of the treatment of the patient lies exclusively with the consultant under whom the patient is admitted, in case of proven mal-practices, negligence or mis-management.

10. As against this, Complainant No.2 who is appearing in person submitted that not only the hospital but the doctors are equally responsible for the deficiency in service. He heavily relied upon the second MRI report which is produced on record stating that tumor was at D-7-8 of the spinal cord. He also contended that it was the duty of the Neuro Surgeon to scan the MRI film before proceeding with the operation.

11. As against this, learned counsel for Dr. Dadachanji submitted that there was no mistake on her part because there was a standard protocol by which the Senior Resident Doctor, on duty, was to carry out the scan. The scan was actually performed by a technologist and the entire procedure was supervised by the Senior Resident Doctor.

12. The attending Consultant, namely, Dr. Dadachanji was not required to routinely monitor the scan as she has to attend other duties in the hospital. The consultant relies on the Senior Resident Doctor who is a qualified Radiologist to perform a complete and accurate scan of the patient. The consultant is mainly concerned with making the report on the scan taken and the duty of the consultant is purely confined to preparation of reports on test carried out by others. It is pointed out that the consultant neither carries out the test nor identifies the pathological levels nor supervises the same and she is not the administrative head. It is contended that when the final films are documented from the computer monitor, only detailed views of the spine are provided, and, these are presumed to be correctly labelled by qualified Radiologist, i.e. the Senior Resident Doctor. These are, therefore, placed before the Consultant and the Consultant makes report on the basis of the final labelled film put up before him/her by the Senior Resident Doctor. It is contended by the learned counsel for Dr. Dadachanji that because of the wrong labelling by the technicians, the mistake occurred, and, therefore, she is not at all responsible.

13. On behalf of the Neuro Surgeon, Respondent No.4, before the State Commission, it is contended that he performed the operation on the basis of the MRI scan report to remove the tumor.

14. In appeal, on behalf of Dr.Dadachanji an affidavit has been filed on 8th May, 2007, wherein it is contended that :

- (1) With a mala fide intention and ulterior motive to disown its liability vis-à-vis the acts of para-medical staff of the hospital, bald, baseless, and frivolous allegations appeared to have been made against her in the grounds of appeal on behalf of the hospital without substantiating the same;
- (2) The hospital appointed her as a specialist in MRI to interpret the MRI scan, placed before her by the technicians and doctors employed by the hospital;
- (3) It is the technician's job to perform and reveal the scan correctly;
- (4) She was expected to ensure a daily output of at least 20 to 25 cases; and,
- (5) Appellant hospital more often than not employ technicians not technically qualified who did not even hold a basic science degree.

15. It is further submitted that her contentions are supported by the affidavit filed by Dr.Jimmy Nadershaw Sidhva an eminent Radiologist of international repute.

Findings:

16. At the outset we have to state that the State Commission has rightly observed that the case was to be decided in the back drop of almost all admitted facts.

17. For appreciating the contentions we would first refer to the report dated 20th May 1993 signed by Respondent No.3, Dr.Dadachanjani, which is as under :

“Plain and post contrast MRI of the dorsal spine was performed using serial sections in sagittal and axial planes. Both T1 and T2 weighted images were obtained.

Inhomogeneous enhancing heterogeneous mass is seen in the dural space on the left side at D-10-11. The mass is iso intense on the T1 weighted images and shows multiple hypointensities within it on the T2 weighted images. These hypointensities probably represent areas of clarification within it.

There is extension of the mass into the left neural foramina at the D-10-11 level. There is no extension beyond the neural foramina.

Conclusion: Inhomogeneous, mixed sigma, intensity intradural mass within the left lateral dural space at D-10-11 which causes significant cord compression. This could either be a meningioma or a neurofibroma, the former being more likely”.

18. Further, on the basis of the complaint, an inquiry was held by the Secretary, Association for Consumer Action on Safety of Health and it submitted its report on 18.5.1996, after recording the statements of the concerned persons.

“I. I have gone through the file and films submitted by you and gather the following facts :

1. Statement made by the Complainants :

Ms.Sharifa Ismail Sayed, aged 67, was suspected, in May, 1993, to have a tumour in the spinal canal and was referred by Dr.D.K.Mody at Masins Hospital to the Bombay

Hospital for investigation and treatment. When she was sent to the Bombay Hospital there was difficulty for her to walk. The first magnetic resonance scan (MR) at the Bombay Hospital was reported to show a meningioma or neurofibroma at D-10-11 on the left side. Mr. Rafique Sayed's note dated 26th June, 1993, addressed to the Medical Director, Bombay Hospital, states that on 25th May, 1993 the first laminectomy (D-10-11) was performed by Dr. Keki Turel. No tumor was found. A small portion of the spinal cord was sent for histology. The second MRI on 3rd June, 1993 (report bears the date 20 May 1993) showed laminectomy defects at D-8, D-9 and D-10 levels along with mild swelling of the spinal cord. A meningioma or neurofibroma was seen just above the superior margin of the laminectomy on the left at D-7-8. This second laminectomy D-7-8 was carried out by Dr. Turel and a tumor was removed. We are told that the physical condition of the patient has worsened after the two operations and that she is bed-ridden, complaining of pain in the back shooting into the legs. The Complainant wonders whether it was necessary to open the spinal cord, especially when consent for doing so was not taken, the consent having been given only for the removal of a tumor outside the spinal cord.

2. Statement made by Dr. Meher Dadachanji:

Dr. Dadachanji states that according to protocol in the MR Department, she relies on the senior resident doctor to perform the scan, her role being limited to reporting on the completed scan and consultation. When scans of the spine are carried out, the localization of the level of the disease is made using a large coil. As a routine this image, proving the location of disease, is not provided to the consultant on the final film. The consultant thus makes the report based on the senior resident's identification of the level. During the second scan, however, she was present when the scan was done and found the tumour lying at D-7-8 and not at D-10-11 as reported earlier. She states that the error in the earlier report followed 'incorrect labeling by the resident doctor'.

.....

.....

Queries:

1. "Is it possible to misjudge the level of the tumour on MR?"

Dr. Dadachanji has clearly stated in her report that an error was made in the report on the first MR. This was attributed by her to incorrect labeling by the resident doctor.

2. Is it proper and correct for the Neuro Surgeon to open the spinal cord when the tumour was not found at the expected site?

I have studied the MR scan dated 20th May, 1993 and find the tumour clearly outside the spinal cord. Under such circumstances, I would not have opened the spinal cord but would, instead, have checked two levels above and below the site of exploration. However, we must also lend credence to Dr. Turel's finding of swelling of the spinal cord. Under such a circumstance, it is not wrong to take a small piece for histology to ensure that we are not missing an additional lesion within the cord.

An additional point to be made here is that despite the best efforts of the treating clinician it is not possible to envisage each and every eventuality and seek consent for each and every step that may be necessary. Several additional steps are taken in many operations in good faith and in the best interests of the patient. Were we take consent for each and every such step, the consent form would be several sheets

long and prove meaningless to the patient and relatives. It is also not possible to interrupt an operation to take consent for a particular step made necessary by an unforeseen circumstances.

3. Is it the ethical responsibility of the surgeon to check the correct level of the tumour?

When we demarcated the level of disease using plain x-rays and myelograms, it was also the surgeon's responsibility to check the level. The high-technology CT and MR scanners disallow such a confirmation by the surgeon in each and every case and we often have to abide by the report of the CT or MRI expert.

4. Is failure to judge the correct level is a 'failure to exercise reasonable skill and care'?

This is a matter for the judge to decide. As a neurosurgeon, I consider failure to clearly and correctly demonstrate the level of a tumour within the spinal canal a serious error. Marking the level of the tumour wrongly misleads the surgeon and, as in this case, leads to fruitless operation at a wrong level. A second operation – with all attendant risks – then becomes necessary to remove the tumour.

5. Is the explanation given by the concerned radiologist correct?

I find the system followed at the Bombay Hospital faulty. The hospital places all the responsibility on the consultant in the MR department – in this case Dr. Dadachanji – and washes its hands off the matter. Dr. Dadachanji tells us that the protocol in the MR Department dictates that the consultant will not be present whilst the MR scan is being done. The MR scan is done by a senior resident. Whilst Dr. Dadachanji places the responsibility for correct identification of the level of disease on the senior resident, the hospital rule clearly places the onus on the consultant – in this case Dr. Dadachanji.

I feel that if the responsibility is to be that of the consultant, it is up to the consultant to ensure that there is no mistake. Whilst the senior resident may do the scan, before taking the patient off the scanner, the consultant must be called in to make sure that no error is made.

The protocol followed by the MR Department at the Bombay Hospital lends itself to grave errors.”.

19. From the admission in the aforesaid report as well as the defence taken by Ms. Dadachanji, it is apparent that she was not vigilant in verifying whether the labelling made by the Radiologist, i.e. the Senior Resident Doctor, was correct or not. A senior consultant is not expected only to sign whatever the junior medical staff suggest. If that is so, there is no use of having Consultant in the Hospital.

20. As against this, Respondent No.2 has relied upon the affidavit of Dr. Jimmy Nadershaw Sidhva.

“The hospital is responsible for providing infrastructure services which includes space, machinery and consumables for the purposes of MRI scanning. It is also responsible for providing the technical personnel and the junior medical staff for carrying out the scan procedure including film processing and film labelling which includes correct patient identification, left/right side identification and scan level labelling.

The consultant radiologist is thereafter responsible for viewing the completed scan

and interpreting the films presented to him. The consultant radiologist is not responsible for checking/overseeing the scan procedure (including film processing and labeling). His responsibility/duty begins and ends with correct interpretation of, and reporting on the films / scan images presented to him by the hospital (i.e. the technician and junior medical staff).

21. The aforesaid affidavit clearly reveals that the duty of the consultant begins and ends with correct interpretation of report of the films and scan the images presented to the consultant by the hospital, i.e. technician and junior medical staff. This would mean that the Consultant is required to interpret the MRI film and not to merely sign without referring (reading) the same. Consultant is the expert in the field. If he/she commits mistake or error in interpreting, it is his/her responsibility or liability.

22. Further, there is no dispute with regard to the MRI that was taken for the second time when tumor was found at D-7-8 levels, and hence, the second operation had to be performed.

23. In this view of the matter, it is apparent that the State Commission committed an error apparent on the face of the record in holding that the consultant cannot be held responsible for the error committed, in signing the report, on the basis of noting by the Senior Resident Doctor (Radiologist). In our view, entire responsibility lies with the Respondent No.3, Dr. Dadachanji because she was in-charge of the Radiological Department.

24. At this stage, we would reproduce the observations made by the Apex Court in Spring Meadows Hospital & Anr. Vs. Harjol Ahluwalia & Anr., (1998) 4 SCC 39 at 47, wherein the Apex Court has specifically laid down the principles for holding Doctors responsible in similar situation. The Apex Court held that :

“Gross medical mistake will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of *re-ipsa-loquitur* can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing of his duties properly. We are indicating these principles since in the case in hand certain arguments had been advanced in this regard, which will be dealt with while answering the questions posed by us.”

25. Further, with regard to the responsibility of the hospital, in our view, there is no substance in the contention of the Appellant that in view of the internal rules and regulations framed by the hospital the hospital would not be liable for the deficiency in service rendered by the doctor appointed by it. The reliance upon Rule 14 is of no consequence to the patients who are admitted in the hospital.

26. It is the patient or the Complainant who approaches the hospital for treatment and hence the primary liability in case of deficiency in service is that of the hospital. Doctors working in the hospital are its employees. Further, from the record it is apparent that the Senior Resident Doctor (Radiologist) appointed by the Hospital committed a blunder which resulted in wrong reporting by the Consultant. Therefore, if there is deficiency by the doctor, then, it would be the joint and several liability of the hospital and the Doctor.

27. In this view of the matter, we partly modify the order passed by the State Commission and hold that the hospital as well as Dr. Ms. Dadachanji are jointly and severally liable to pay the compensation and costs as ordered by the State Commission. We also award Rs. 10,000/- as costs to be paid to the Complainant by the appellant—Hospital and Miss Dadachanji - Respondent No. 3 jointly and severally.

The appeal is disposed of accordingly.

CMCL 930z
NATIONAL CONSUMER DISPUTES
REDRESSAL COMMISSION, NEW DELHI

HON'BLE MR. JUSTICE M.B. SHAH, PRESIDENT, MR. S.K. NAIK, MEMBER
AND MR. R.C. JAIN, MEMBER.

Haryana Institute of Fine Arts & Ors. -Petitioners

versus

Rajesh Mani Kaushik & 2 Others -Respondents

Revision Petition No. 384 OF 1999

Decided on 25.2.2008

Consumer Law—Consumer Protection Act, 1986—Section 2(1)(g)—Cultural Fair "Mela"—Negligence—Determination of—Held—Negligence is a failure to observe, for protection of the interest of another person the degree of care, precaution and vigilance which the circumstances justly demand—Organiser of fair would be equally liable to pay compensation. [Para—20]

Counsel :

Mr. Manoj Swarup and Mr. Ajay Gupta for Petitioners

Mr. Parminder Singh for Respondent No. 1

ORDER

M.B. Shah, J., President : Petitioner No. 1, Haryana Institute of Fine Arts (NGO as claimed) took some land on hire of a sum of Rs. 7,500/- for five days from the Haryana Urban Development Authority for organizing a fair (Phulwari Children Bazar) at Karnal from 12th to 16th November, 1996. Petitioner No. 2 was the Project Director of the Children Carnival organised by the Petitioner No. 1.

2. On 15th November, 1996, the Complainant along with his wife and two children visited the carnival. They purchased tickets at the rate of Rs. 10/- per person for boarding merry-go-round from Respondent No. 2, who has installed the electrical swings (Jhoolas). It is contended that Respondent No. 2, Ali Hussain, was the owner of the said electrical swings and Respondent No. 3, Ahmed Ali was the driver of the Jhoola. After the Complainant along with his children boarded the merry-go-round, it started moving around the fulcrum at a high speed. Suddenly, the seat on which the Complainant and his family were seated, got detached and hence they were flung away at a distance of 15 yards on a hard surface, resulting in injuries to them.

3. Hence, complaint No. 210 of 1997 was filed before the District Forum, Karnal, claiming a compensation of Rs. 4 lakhs for the injuries sustained and the expenditure incurred

for treatment, against the Petitioner and the owners of the merry-go-round.

4. The District Forum vide its order dated 17.3.1998 allowed the complaint and directed the Respondent No.2 and 3, i.e. the owner and the Driver of the Jhoola to pay damages of Rs.20,000/- to the Complainant. The complaint against the Petitioner No.1 and the Petitioner No.2, i.e. the Haryana Institute of Fine Arts and the Project Director was dismissed.

5. Against that order the Complainant preferred Appeal No.435 of 1998 against the Haryana Institute of Fine Arts for enhancement of compensation. The owner of the Jhoola, Ali Hussain, has also filed Appeal No.439 of 1998 against the Complainant, before the State Commission. The State Commission allowed the appeal No.435 of 1998 filed by the Complainant and dismissed the Appeal No.439 of 1998 filed by the owner of the Jhoola. While allowing appeal of the Complainant, the State Commission enhanced the amount of compensation from Rs.20,000/- to Rs.1,00,000/-. It also held that Petitioners No.1 and 2, i.e. the HIFA and its Director were also jointly and severally liable to pay the said amount along with Respondent Nos. 2 and 3, i.e. the owner and the driver of the Jhoola.

6. Feeling aggrieved the HIFA and its Director are in revision before us.

Findings:

7. In this Revision Petition, the question which requires consideration is whether the finding recorded by the State Commission that Petitioners No.1 and 2 who organized the carnival were liable to compensate the Complainant for the deficiency in service?

8. In the present case, it is not disputed that the Phulwari Bal Bazar was organized on a piece of open land which was taken on rent by the Petitioner No.1 for a sum of Rs.7,500/- for a period of 5 days from the HUDA. On the said land Petitioners organized number of entertainment programmes for 50,000 school children. The brochure specifically provides, as under :

“Special attraction on ‘Phulwari’ will be the display of traditional art forms of India, stage performances, swings, fountains, fun and food, handicrafts, exhibition-cum-sale of children products, etc., as national highway No.1 is close to the venue, ‘Phulwari’ will attract the travelers and the people from the connecting cities also.”]

.....

“A Promotional Bonanza – Discount Coupon Scheme:

HIFA has designed a unique scheme for the promotion of the children products – “The Discount Coupon Scheme”. Company will provide 50,000 discount coupons of their product which will be distributed among the children. Details is enclosed”

9. It is also not disputed that a number of entertainment sales including sale of food products were installed in the said premises, as per the brochure. The Exhibitors Scopes as under:

- “- All children related products
- Children wear
- Footwear
- Educational toys
- Writing instruments

- Art material
- School equipments
- Children furniture
- Sports goods
- Stationery
- Books
- Gift items
- Clocks & watches
- Radio & Music systems
- Videogames;
- Computer & cellular phones
- Confectionary
- Health beverages
- Milk supplements
- Food products
- Dietary products
- Child care products
- Skin & hair care products
- Eye care products
- Oral hygiene products
- Health care products
- Table & kitchen ware
- Bicycles
- Mopeds/scooters/motorcycles
- Sewing machines
- Leather accessories
- Musical instruments
- Cosmetics
- Handicrafts
- Fitness equipments
- Water & air purifier
- Vacuum cleaner
- Food stall
- Fun stall
- Ice creams
- Cold drinks
- Greeting cards

10. This would mean that the Petitioners got installed number of stalls in the premises by charging various amounts. To that extent it would amount to business.

11. It is not disputed that the Petitioner No.1 had permitted Respondent No.2 to install an electrical swing on the portion of the land by charging a sum of Rs. 10,000/- which includes the cost of electricity. This would indicate that for a small piece of land, for a few days, Petitioners shall receive large amount and that is their profit. It is also not disputed that for taking a seat on the electrical swing Complainant was required to pay a sum of Rs.10/-.

12. It was mainly contended by the learned counsel for the Petitioner No.1 that it has not charged any fee for those persons who are visiting and that they were not having any supervisory authority over running the merry-go-round in question. Hence, the Complainant was not consumer qua the Petitioners.

13. In our view, a person who organizes such a fair or mela, would be liable for the deficiency in service rendered by the owner of the merry-go-round. The reason is it is the organiser's responsibility to take precautions in Phulwari Melathat no such untoward incident occurs and such machines are properly installed.

14. Further, considering the organization of fair (Mela) wherein a number of stalls were to be installed for sale of various items is undoubtedly a business venture undertaken by the Petitioners. The business venture was for sale of various items or for providing various services. One of these services would be electrical swing, namely, merry-go-round for which entrance fee is required to be paid. Therefore, there is no doubt that those who have installed the electrical swing would be liable.

15. The next question is whether the organizers would be liable?

16. In the present case, it is not disputed that the Petitioners have charged a heavy amount of Rs. 10,000/- from the persons who have installed the electrical swings. Recovery of Rs. 10,000/- from Respondent Nos. 2 and 3 by the Petitioner would amount to indirect charging of fee from the Complainants and many other persons who avail the services of the electrical swings. Petitioners have paid only Rs. 7,500/- for 5 days as rent, and, thereafter, recovered various amounts from other persons who have installed stalls for various items as mentioned in the brochure which is quoted above. Therefore, the Petitioners as well as the Respondent No. 2 and 3 are jointly service providers.

17. Further, it was the duty of the Petitioner to supervise such equipments which are installed in the premises taken by them on rent are safe. They were in control of the entire fair - Phulwari Children Bazar. Further, had they taken such care and precaution, such an untoward incident would not have happened. Fortunately, the children of the Complainant were not severely injured. Hence, the Petitioners would be liable for the deficiency in service.

18. Mr. Manoj Swarup, learned counsel appearing for the Petitioners relied upon the decision rendered by the Apex Court, i.e. Municipal Corporation of Greater Bombay Vs. Laxman Iyer & Anr. (2003) SCC 731 and submitted that there was no negligence on the part of the Petitioners. In our view, this judgment is not of help in any way. In the said judgment it has been observed :

“..... Negligence is omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations, who ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstance justly demand,

whereby such other persons suffers injury. The idea of negligence and duty are strictly correlative. Negligence means either subjectively a careless state of mind, or objectively a careless comparative term. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence or lack of it can be infallibly measured in any given case. What constitutes negligence varies under different conditions and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. It is absence of care according to circumstances.....”

19. Further, in the case of *Rajkot Municipal Corporation & Ors. Vs. Manjulben Jayantilal Nakum & Ors.* (1997) 9 SCC 552, the Apex Court, in regard to negligence, held as under :

“28. At the cost of repetition, we may reiterate that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done”.

20. The aforesaid judgments make it clear that the negligence is a failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstance justly demand. Applying the aforesaid test, it was the duty of the Petitioners to take care that equipments which are installed for fun or entertainment are properly managed and are of standard quality so that mishap does not occur. Therefore, in the present case, it is absence of care on the part of the Petitioners which had led to the mishap.

21. Further, the Petitioners have undertaken a business venture may be in the name of cultural fair (Mela) but undoubtedly, it was for a large profit and they were, therefore, expected to regulate affairs in the fair, which a prudent and reasonable man is expected to take so that there is no occurrence of such mishap.

22. The word ‘deficiency’ is defined in Section 2(1)(g) of the Consumer Protection Act, 1986, which reads as under :

Section 2(1)(g) — “deficiency” means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

23. The said definition of the word ‘deficiency’, inter alia, provides that deficiency would mean any imperfection in the manner of performance which is required to be maintained in pursuance of the contract or otherwise in relation to any service. Therefore, who have organized the fair (Mela) on such a large scale were required to take proper care and precautions in seeing that service providers permitted by them take proper care and caution in protecting the consumers who spend amount in getting entertainment. As that is not done, it would amount to deficiency in service by the Petitioners.

24. In this view of the matter, there is no substance in this revision and, therefore, it is dismissed. There shall be no order as to costs.

CMCL 930ae
SUPREME COURT OF INDIA

HON'BLE C.K. THAKKER AND P. SATHASIVAM, JJ.

Tamil Nadu Housing Board and Ors. -Appellants

versus

Sea Shore Apartments Owners Welfare Association -Respondent

Civil Appeal Nos. 7907-7913 of 2003

Decided on 9.1.2008

Consumer Protection Act, 1986 (Amendment Act 50 of 1993)—Section 2(1)(o)—Housing construction—"Service" thereof—Held—Object of Section 2(1)(o) of Act 1993 included "Housing construction" and its service within the scope of section and the commission had jurisdiction to deal the connected disputes. [Para—17, 27 and 30]

Land Acquisition by State—Legality under—Held—When private undertaking are taken over by State or its instrumentalities any attempt to exclude the services offered by such statutory bodies to the common man from the application of the Act 1993 must be discouraged. [Para—20]

Case Referred :

1. *National Commission in Gujarat Housing Board v. Akhil Bhartiya Grahak Panchayat and Ors. (1996) 1 CPJ 103*
2. *Lucknow Development Authority v. M.K. Gupta (1994) 1 SCC 243*
3. *Premji Bhai Parmar v. Delhi Development Authority (1980) 2 SCC 129*
4. *Bareilly Development Authority v. Ajai Pal Singh (1989) 2 SCC 116*
5. *R.D. Shetty v. International Airports Authority (1979) 3 SCC 489*
6. *Chief Administrator, PUDA v. Shabnam Virk (2006) 4 SC 74*

Counsel :

V. Krishnamurthy, Sr. Adv., H. Harish Kumar, Dr. R. Prakash and P.N. Ramalingam, Advs. for Appellants

M.N. Rao, Sr. Adv., K.K. Mani, C.K.R. Linin Shekar and Mayur R. Shah, Advs. for Respondent

JUDGMENT

C.K. Thakker, J. :

1. The present appeals are filed against an order passed by the State Consumer Disputes Redressal Commission, Madras ('State Commission' for short) on July 24, 1995 in Original Petition Nos. 143-149 of 1995 and confirmed by the National Consumer Disputes Redressal Commission, New Delhi ('National Commission' for short) on February 25, 2002 in First Appeal Nos. 500-506 of 1995.

2. Shortly stated the facts are that the Tamil Nadu Housing Board (hereinafter referred to as 'the Board') was constituted under the Tamil Nadu Housing Board Act, 1961 (Act 17 of 1961). The primary object of creation of the Housing Board was to acquire land in the neighbourhood areas of developed cities at a reasonable price and to construct tenements, houses and flats thereon for providing residential accommodation to needy people of different income groups and categories. In the year 1982, vast piece of land admeasuring about 28 acres of Thiruvamiyer, Chennai was acquired by the State of Tamil Nadu under the Land Acquisition Act, 1894 for a public purpose, viz. for the development of the area known as South Madras Neighbourhood Scheme. On February 27, 1991 the Board approved a proposal to construct seven different types of flats. It proposed to construct 102 flats under its High Income Group Scheme ('HIG Scheme' for short). In order to assess demand from public, an advertisement was issued by the Board on March 21, 1991 inviting applications for registration under the title 'Avail a chance of owning your own flat' in Thiruvanmiyur Extension, Madras. Seven types of flats were mentioned in the said advertisement along with plinth area, tentative price, initial deposit, monthly instalment, repayment period, amount of deposit for registration, etc. It was stated that pursuant to the said advertisement applications were

made by interested persons. There was overwhelming demand and several persons applied. The record reflects that finally instead of seven types of flats, fifteen types of flats were constructed under HIG Scheme. The Board issued letters on August 13, 1993 to the applicants asking them whether they were willing to purchase flats. Necessary details of the type, design, plinth area, tentative selling price and other particulars were supplied. Draw was conducted on October 15, 1993 and provisional allotment letters were issued on October 19, 1993. Tentative cost was specified in the letter which was to be paid within a period of 21 days. Final allotment order was made on August 9, 1994 wherein final cost of the flat was mentioned. An agreement was entered into between the Housing Board and allottees on August 22, 1994. In the said agreement, it was mentioned that it was agreed between the parties that the ultimate cost of the total construction of the flat was subject to the outcome in the award of compensation in land acquisition proceedings pending adjudication and the final amount will be fixed on that basis which will be paid by the members. Thereafter possession of flats was given to all allottees. The members were then asked to pay additional amount. The respondent-Sea Shore Apartments Owners Welfare Association ['Association' for short] felt that the demand made and amount recovered by the Housing Board was neither legal nor proper. It could not have demanded more amount. The amount which was fixed earlier was already paid and the members of the Association were not treated fairly. It, therefore, made representation on December 26, 1994 against the additional amount. In the said representation, the Association asked the Board to give reasons for enhancement of price of flats as also for reduction of period of payment of instalments from 15 years to 13 years. The Board, however, did not reply to the said letter. Even subsequent letter was not responded. Seven complaints were, therefore, filed by the allottees before the State Commission on May 26, 1995 under Section 12 of the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act'). Prayers were made in the complaints to direct the Board and its officers to return the escalation amount paid by the members of the Association with interest thereon; to restrain the Board and its officers from insisting on payment of excess amount as demanded; to direct the Board to collect the instalments in 15 years as per the order of allotment issued earlier; to pay compensation of rupees one lakh for the loss sustained and mental agony suffered by the members of the Association and to pay costs of the complaints. It was also stated that the complainants had claimed relief for those members also whose names had been given in the Annexure to the complaints.

3. A reply was filed by the Board controverting averments made and allegations levelled in the complaints. It was stated that under the Demand Assessment Scheme, the price mentioned in the advertisement was only 'tentative'. Originally, the proposal was for construction of seven types of flats but because of great demand, it was finalized into fifteen types of flats. It was also stated that the construction cost was increased because of increase in ground area, plinth area and also because of payment of excess compensation to the land owners whose lands had been acquired for the purpose of construction of flats. It was contended that if the allottees were really aggrieved over the increase in cost, they could have well surrendered the flats. But they did not do so. They accepted the increase in price and took over possession of property. It was also contended that the Consumer Forum had no jurisdiction to deal with and decide the matters relating to fixation of price of flats and on that ground also, the complaints were not maintainable. It was submitted that the demand of price could not be said to be illegal, fanciful or otherwise unreasonable and the complaints were liable to be dismissed.

4. The State Commission considered the rival contentions of the parties and held that there had been 'deficiency in service' on the part of Board inasmuch as there was illegal demand by the Board of additional amount which was neither legal nor proper. The Commission observed that when the possession was sought to be given to the allottees, they had no option, but to take possession of the flats and that is how pos-

session was taken over by the members and the said circumstance could not go against them. According to the State Commission, the complaint of the complainant- Association that escalation was unjust, unwarranted and illegal was well founded and ought to be upheld. According to the State Commission, 'three-fold defence' put forward by the Board had no basis whatsoever. In the opinion of the State Commission, the defences as to (i) increase in the plinth area, (ii) increase in the area of land, and (iii) payment of excess amount of compensation to the land owners were vague and no particulars were furnished. No details were supplied as to excess payment of compensation. It was also not clear whether the entire excess amount of compensation paid to the land owners was in respect of land on which flats were constructed by the Board and allotted to the members of the Association. It was not open to the Board, commented the State Commission, to demand from members of the Association, the entire amount which it had paid to the land owners towards enhanced compensation. The State Commission also held that the Board had no right to reduce the period of recovery of amount by instalments from 15 years to 13 years and the said action was illegal. Accordingly, all the complaints were allowed and the demand made by the Board was quashed and set aside. Refund of amount was also ordered.

5. Being aggrieved by the order passed by the State Commission, the Board approached the National Commission. The National Commission by a short order dated February 25, 2002 dismissed all the appeals observing inter alia that the State Commission recorded that 'not a scrap of paper has been filed by the opposite party to show that there was any land acquisition proceedings before any court in respect of the lands in question'. According to the National Commission, the action of the Board in increasing price was on non existing grounds and hence the demand was not legal. The appeals were accordingly dismissed.

6. The Board has challenged these decisions by filing present appeals. On November 25, 2002, notice was issued. On September 15, 2003, leave was granted after hearing the parties. Operation of the impugned order was also stayed subject to the appellants depositing the disputed amount in the Court within a period of four weeks from the date of the order. The Registry was directed to invest the said amount. The matters were thereafter ordered to be posted for hearing. That is how the matters are before us.

7. We have heard the learned counsel for the parties.

8. The learned counsel for the Board strenuously urged that the Commissions were clearly in error in invoking the provisions of the Act and in observing that there was 'deficiency in service'. According to the learned counsel, dispute in the instant case related to fixation and determination of price of flats. Such dispute cannot be resolved under the Act. Consumer Commission has no power, authority or jurisdiction to inquire into, deal with and decide such questions. Even otherwise, in view of allegations and counter-allegations and assertions and retractions, only civil court can enter into disputed questions of fact on the basis of evidence adduced by the parties and Commissions exercising summary power were in error in encroaching the jurisdiction of civil court which could not have been done.

9. It was also submitted that from the facts it was clearly established that in 1991 what was done by the Board was to formulate a scheme and tentative price was fixed. In view of overwhelmed response, the scheme was changed from seven types to fifteen types flats. There was increase in plinth area, in ground area as also payment of excess compensation to land owners. It was, therefore, clearly stated in 1993 to all the applicants whose names had been registered in 1991 about the revised price, the period within which the amount was to be paid and the reasons for fixation of higher price. It was also stated that at the time of registration in 1991, it was clearly indicted that for those who opted to make payment in instalments, the period of repayment was 13 years. In 1993, however, when applications for allotment were called for, the period was indicated as 15 years. The said mistake was rectified at the time of final allotment. With

an open eye, it was accepted by the allottees and agreements were signed by them giving undertakings. It was thereafter not open to the allottees to challenge fixation of price of flats by the Board. They were estopped from doing so under the doctrine of promissory estoppel. It was also submitted that when complaints were filed before the State Forum, a counter-affidavit was filed on behalf of the Board wherein it was asserted that there were three-fold reasons for increase of price; viz., (i) increase in plinth area, (ii) increase in ground area, and (iii) payment of enhanced compensation to land owners. In view of the above pleas and defences, the State Commission ought to have dismissed the complaints. The State Commission, however, failed to do so. But even otherwise, the State Commission did not consider all the defences in their proper perspective and held that the Board was not entitled to claim additional amount and issued certain directions including refund of amount with interest. Obviously, the Board was aggrieved and it approached the National Commission. But the National Commission also, without considering the points raised by the Board confirmed the order passed by the State Commission and dismissed the appeals. Both the orders, therefore, are not in consonance with law and are liable to be set aside.

10. The learned counsel for the complainants supported the order passed by the State Commission and confirmed by the National Commission. He submitted that the State Commission has considered all the contentions raised by the Board and after perusing the materials placed before it, recorded a finding that none of the three defences raised by the Board was well-founded and hence could not be upheld. It was a pure finding of fact based on evidence. The National Commission affirmed the order passed by the State Commission observing that the findings recorded by the State Commission were findings of fact and they did not call for interference. Such order cannot be said to be illegal or otherwise unreasonable which can be interfered with in exercise of discretionary jurisdiction of this Court under Article 136 of the Constitution and the appeals may be dismissed.

11. Having heard the learned counsel for the parties, in our opinion, all the appeals should be allowed. From the record, it is clear that in 1982, a huge land admeasuring about 28 acres at Thiruvanmiyur Extension, Chennai was acquired by the State under the Land Acquisition Act for public purpose, namely, for the purpose of development of area known as South Madras Neighbourhood Scheme. Amount of compensation was paid to the land-owners as per the award but it was enhanced in reference proceedings. The Board came up to this Court, but the enhanced compensation was confirmed. It is also clear from the Scheme initially prepared, i.e. seven types scheme and fifteen types scheme which was subsequently finalized, there was difference in plinth area as also ground area. So far as price is concerned, in 1991, when the names of applicants were registered, it was clarified that the price indicated was 'tentative price' and it was subject to 'final price' being fixed by the Board. In any case when the scheme was altered from seven types to fifteen types flats, it was stated that the amount shown was merely 'tentative selling price'. The intending purchasers, therefore, were aware of the fact that the final price was to be fixed by the Board. In fact an agreement to that effect was executed by all prospective allottees wherein they agreed that they would pay the amount which would be finally fixed by the Board.

12. Clause 18 of the agreement entered into between the parties and signed by all allottees is extremely important and reads thus;

"It is expressly agreed between both the parties that after the finalization of the total cost of construction of flat and the value of the land in accordance with the award of compensation declared by the Tribunals and Courts the Purchaser shall pay to the Vendor on demand before the registration of the Sale Deed the difference between the amount already paid by the purchaser as per Clause 2 above and the price amount finally fixed by the Chairman the Vendor."

13. In the circumstances, it cannot be said that the allottees were not aware of the above condition and they were compelled to make payment and thus were treated

unfairly or unreasonably by the Board.

14. The State Commission in the impugned order observed that it was the case of the Board that excess amount of compensation was awarded to the land owners. It proceeded to state that the excess compensation had been awarded in respect of lands covered by other schemes in the neighbourhood and the Board attempted to shift the burden of the excess amount on the allottees of Thiruvanmiyur Extension Scheme. It also stated that no evidence was produced by the Board to show that there was any land acquisition proceeding before any court in respect of land covered by HIG Scheme No. 102 (though Clause 18 of the agreement extracted hereinabove expressly refers to such proceedings). It also observed that an affidavit was filed by the Secretary of the Complainant-Association that HIG Scheme No. 102 was not involved in any land acquisition proceedings before any court and the said averment has not been rebutted by the Board. (It may, however, be stated that in the reply filed by the Board before the State Commission, it was asserted that one of the reasons for increase in cost was due to excess amount of compensation allowed to the land-owners). The State Commission observed that all the three defences raised by the Board were 'delectably vague', without any particulars as to how much escalation was due to plinth area, how much was due to increase in the land area and how much was due to payment of enhanced compensation to land owners. It went on to state that the cost of enhanced compensation and increased area 'must also have been taken into consideration in fixing the tentative selling price'. The action of the Board, in the opinion of the State Commission was, therefore, unjust and arbitrary.

15. It was also held that reduction of period of payment of balance amount from 15 years to 13 years by monthly instalments amounted to 'deficiency in service' and that part was, therefore, illegal. Accordingly, the following directions were issued by the State Commission;

- "1. It is declared that the opposite parties are entitled to claim from the members of the complainant Association for the flats allotted to them under No. 102 HIG Scheme at Thiruvanmiyur Extension only the selling price mentioned in Ex.A2 (a) containing the particulars of this Scheme.
2. The opposite parties are directed to refund to the members of the complainant Association who have made full payment, the excess amount collected with interest thereon at 12% from the date of collection till payment.
3. In respect of the Members of the Complainant Association who have opted for payment in instalments, the opposite parties are directed to re-schedule the balance of payment as per Ex.A2 (a) in monthly instalments for 15 years instead of 13 years and adjust the excess payment made if any, towards future instalments.
4. The opposite parties are also directed to pay a consolidated sum of Rs.7,000/- as costs to the Complainant Association at the rate of Rs.1,000/- per complaint.

16. The National Commission, without discussing the evidence on record as also contentions raised by the Board, conclusions arrived at and reasons weighed with the State Commission, confirmed the findings by a brief order.

17. As observed earlier, it was contended by the Board before the State Commission and National Commission that fixation of price of flats cannot fall within the purview of the commission. It is, no doubt, true that 'housing Construction' had been included in the definition of 'service' in Clause (o) of Section 2(1) of the Act by the Consumer Protection (Amendment) Act, 1993 [Act 50 of 1993]. But it was submitted that the 'fixation of price' cannot be made subject matter of dispute and Consumer Commission could not deal with the question as to adequacy of price. A specific contention was raised by the Board before the State Commission and National Commission, but it was decided against the Board though according to the Board, the point was covered by earlier decisions of the National Commission itself.

18. The learned counsel for the Board referred to a decision of the *National Commission in Gujarat Housing Board v. Akhil Bhartiya Grahak Panchayat and Ors.* (1996) 1 CPJ 103. Considering the provisions of the Act, the National Commission held that the Consumer Commission had no jurisdiction to go into the question of pricing of houses and plots, sold or allotted on hire purchase system by the Development Authority or Housing Board. The Commission relied upon its earlier decision in *Gujarat Housing Board v. Datania Amritlal Fulchand and Ors.* (1993) 3 CPJ 351.

19. True it is that in *Lucknow Development Authority v. M.K. Gupta* (1994) 1 SCC 243, this Court stated;

When private undertakings are taken over by the government or corporations are created to discharge what is otherwise State's function, one of the inherent objectives of such social welfare measures is to provide better, efficient and the cheaper services to the people. Any attempt, therefore, to exclude services offered by statutory or official bodies to the common man would be against the provisions of the Act and spirit behind it. It is indeed unfortunate that since enforcement of the Act there is a demand and even political pressure is built up to exclude one or the other class from operation of the Act. How ironical it is that official or semi-official bodies which insist on numerous benefits, which are otherwise available in private sector, succeed in bargaining for it on threat of strike mainly because of larger income accruing due to rise in number of consumers and not due to better and efficient functioning claim exclusion when it comes to accountability from operation of the Act. The spirit of consumerism is so feeble and dormant that no association, public or private spirited, raises any finger on regular hike in prices not because it is necessary but either because it has not been done for sometime or because the operational cost has gone up irrespective of the efficiency without any regard to its impact on the common man. In our opinion, the entire argument found on being statutory does not appear to have any substance. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service. Truly speaking it would be a service to the society if such bodies instead of claiming exclusion subject themselves to the Act and let their acts and omissions scrutinized as public accountability is necessary for healthy growth of society."

20. The above observations make it clear that when private undertakings are taken over by the State or its Instrumentalities, any attempt to exclude the services offered by such statutory bodies to the common-man from the application of the Act must be discouraged. It would be against the spirit behind the benevolent legislation. At the same time, however, it cannot be overlooked that 'price fixation' depends on several factors. Normally, therefore, it would not be appropriate to enter into adequacy of price.

21. It may be profitable at this stage to refer to a decision of this Court in *Premji Bhai Parmar and Ors. v. Delhi Development Authority and Anr.* (1980) 2 SCC 129. The petitioner in that case purchased a plot offered by the respondent-Authority and after payment of price took possession thereof. Subsequently, however, he filed a petition under Article 32 in this Court contending that the surcharge collected by the authority was illegal and violative of Article 14. Dismissing the petition, this Court held that the remedy sought by the petitioner to reopen the concluded contract with a view to getting back a part of the purchase price paid and benefit taken was not proper.

22. The Court stated;

"Conceding for this submission that the Authority has the trappings of a State or would be comprehended in 'other authority' for the purpose of Article 12, while determining price of flats constructed by it, it acts purely in its executive capacity and "is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into the exercise of its constitutional powers. But after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the Constitutional provisions but by the legally valid contract which determines rights and obligations of the parties

inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract. "

23. The Court went on to state;

"The principal contention canvassed on behalf of the petitioners is that the treatment meted to them by the Authority is discriminatory inasmuch as no surcharge was levied on flats in MIG scheme constructed and allotted prior to November 1976 and after January 1977. MIG flats involved in these petitions were constructed and were available for allotment in November 1976 and the lots were drawn in January 1977. There is one more MIG scheme at Munirka where the allotment took place at or about the same time but in which case no surcharge was levied. The contention is that once for the purpose of eligibility to acquire a flat, the criterion is grounded in income brackets, MIG, LIG, et et. those in the same income bracket form one class even for the purpose of determining disposal price of flat allotable to them irrespective of situation, location or other relevant determinants which enter into price calculation and therefore, in the same income group there cannot be differentiation by levying of surcharge in some cases and charging only the cost price in other cases and that the discrimination is thus writ large on the face of the record because by levying surcharge in case of petitioners they have been treated unequally and with an evil eye. It is difficult to appreciate how Article 14 can be attracted in the circumstances hereinabove mentioned. Cost price of a property offered for sale is determined according to the volition of the owner who has constructed the property unless it is shown that he is under any statutory obligation to determine cost price according to certain statutory formula. Except the submission that the Authority has a proclaimed policy of constructing and offering flats on 'no profit no loss' basis which according to Mr. Nariman has a statutory flavour in the regulations enacted under the Act, the Authority is under no statutory obligation about its pricing policy of the flats constructed by it. When the flats were offered to the petitioners the price in round figure in respect of each flat was mentioned and surcharge was not separately set out and this price has been accepted by the petitioners. The obligation that regulations are binding on the Authority and have provided for a statutory price fixation formula on 'no profit no loss' basis will be presently examined but save this the Authority is under no obligation to fix price of different flats in different schemes albeit in the same income group at the same level or by any particular statutory or binding formula. The Authority having the trappings of a State might be covered by the expression 'other authority' in Article 12 and would certainly be precluded from according discriminatory treatment to persons offering to purchase flats in the same scheme. Those who opt to take flats in a particular income-wise area-wise scheme in which all flats came up together as one project, may form a class and any discriminatory treatment in the same class may attract Article 14. But to say that throughout its course of existence the Authority would be bound to offer flats income- group-wise according to the same price formula is to expect the Authority to ignore time, situation, location and other relevant factors which all enter the price structure. In price fixation executive has a wide discretion and is only answerable provided there is any statutory control over its policy of price fixation and it is not the function of the Court to sit in judgment over such matters of economic policy as must be necessarily left to the Government of the day to decide. The experts alone can work out the mechanics of price determination; Court can certainly not be expected to decide without; the assistance of the experts.

24. Again, in *Bareilly Development Authority v. Ajai Pal Singh (1989) 2 SCC 116* the Authority (BDA) constructed plots for persons belonging to different income groups.

The terms and conditions contained in the brochure empowered the BDA to revise the cost of price and to enhance the rate of flats. The petitioners got themselves registered for allotment of flats. Notices were issued by the BDA intimating the petitioners regarding the costs of flats and the rate of instalments. The said action was challenged under Article 226 of the Constitution. The High Court of Allahabad, placing reliance on *R.D. Shetty v. International Airports Authority (1979) 3 SCC 489* held that the BDA acted arbitrarily and unreasonably in unilaterally enhancing the cost of flats and the rate of instalments and directed the BDA to redetermine the issue. The BDA approached this Court.

25. Allowing the appeal, setting aside the judgment of the High Court and distinguishing *International Airports Authority*, this Court observed;

"Even conceding that the BDA has the trappings of a State or would be comprehended in 'other authority' for the purpose of Article 12 of the Constitution, while determining price of the houses/flats constructed by it and the rate of monthly instalments to be paid, the 'authority' or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter-se. ***In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field.***"

(emphasis supplied)

26. Recently, in *Chief Administrator, PUDA v. Shabnam Virk (2006) 4 SC 74*, the allottee had filed an affidavit clearly indicating that she would undertake to abide by all the terms and conditions of allotment letter and the amount indicated therein for allotment of a house. There was nothing to show that the increase was possible only when there was increase in the cost of construction. It was held by this Court that the allottee was liable to pay amount as stipulated in the allotment letter. It was observed;

"It is to be noted that the respondent herself had accepted in the undertaking that she accepted the allotment of the house and undertook to abide by all the terms and conditions of the allotment letter. It is not in dispute that in the allotment letter the figure as demanded has been reflected. That being so the respondent was liable to pay the amount as stipulated in the allotment letter.

As there is no dispute that the respondent had in fact filed an affidavit clearly indicating that she undertook to abide by all the terms and conditions of the allotment letter, the amount indicated in the allotment letter was the amount in respect of the allotment of the house. We find nothing in the quoted clause to show that the increase was possible only when there was an increase in the cost of construction. The clause quoted above does not reflect any such intention of the parties.

27. In our considered opinion, the State Commission as well as National Commission ought to have considered all these aspects. Even if they were of the view that after the amendment of the Act in 1993 and in the light of inclusion of 'housing construction' within the meaning of 'service' in Clause (o) of Section 2(1), the Commission had jurisdiction to deal with and decide disputes relating to deficiency in service under the Act which included the issues raised, it was obligatory on them to consider whether the controversy raised in the proceedings with regard to fixation of price would be justiciable on the facts and in the circumstances of the case, particularly in the light of the contentions raised by the Board that there was increase in plinth area, ground area and payment of enhanced compensation to land owners. They were also required to consider that the Board does not have land of its own and the land was acquired under the Land Acquisition Act by paying compensation as determined in accordance with the provisions of that law. The Commissions also could not ignore the fact that when the advertisement was issued for the purpose of registration of intending purchasers of flats, they were clearly intimated that the price shown was merely a 'tentative price'.

Again, when the scheme was altered the intending purchasers were informed that the price was tentative and they would have to pay price finally determined by the Board. They consented and entered into an agreement by giving an undertaking that they would pay the price determined by the Board. When the question of giving possession of flats came up, the Board informed them to pay the remaining amount so that possession could be delivered to them. They made such payment and obtained possession. It was, therefore, contended by the Board that the allottees were estopped from raising the contention that additional amount could not have been recovered from them. It was open to the allottees not to pay the additional amount demanded by the Board and not to take possession. By agreeing to pay the amount and by paying such amount and taking possession, now they want to go behind the concluded contract between the parties. In our considered opinion, all these questions were required to be gone into by the State Commission as also by the National Commission. The orders passed by both the Fora are, therefore, liable to be set aside.

28. Before we part with the matter, we may refer to one more aspect. After the Board approached this court and notice was issued, the respondent-Association filed a counter- affidavit in this court through Secretary of the Association. In the said affidavit, the orders passed by the State Commission and affirmed by the National Commission were sought to be supported. One may appreciate allottees taking such stand supporting the orders which were passed in their favour. But while doing so, certain averments and remarks have been made which were not necessary for determining the question. For instance in paragraph 12 of the affidavit-in-reply, it was stated; "A public undertaking like the Housing Board has not only to act fairly, but also openly it cannot suppress vital documents and play the game of hide and seek. We have given to ourselves a democratic Constitution. Accountability and transparency are the pillars of democracy. There must be sun shine in the corridors of power. It is lamentable that the bureaucrats of the Housing Board are still living in the atmosphere of British Raj and accountability and transparency are anaethima to them."

29. In paragraph 16 of the counter, similar allegations have been leveled. It was stated that an instrumentality of State is expected to conduct its affairs in transparent manner, but the Board failed to do so. At another place, it was said that service oriented body like the Housing Board cannot act like private bodies and take a 'Shylockean attitude'. In our opinion, all those observations could have been easily avoided. Since we are setting aside both the orders and remitting the cases to the State Commission for deciding afresh in accordance with law, it would not be appropriate to say anything more on this. Let the matter rest there.

30. For the foregoing reasons, all the appeals are allowed. The order passed by the State Commission and confirmed by the National Commission is set aside. All the complaints are remitted to the State Commission to decide them in accordance with law after hearing the parties. On the facts and in the circumstances of the case, there shall be no order as to costs. Amount if any, deposited by the appellant-Board in this Court may be refunded to the Board with accrued interest thereon. Since the original complaints were filed in 1995, the State Commission will give priority to the cases and decide them as expeditiously as possible preferably before June 30, 2008.

31. At this stage, we may clarify that we should not be understood to have expressed any opinion one way or the other on the controversy raised by the parties. All the observations made by us hereinabove are limited for the purpose of holding that the State Commission as also National Commission ought to have dealt with and decided the contentions raised by the Housing Board. Therefore, as and when the complaints will be placed for hearing before the Commissions, they will be decided strictly on their own merits without being inhibited by those observations.

32. Ordered accordingly.

CMCL 930am
SUPREME COURT OF INDIA

HON'BLE ARIJIT PASAYAT AND P. SATHASIVAM, JJ.

Oriental Insurance Co. Limited

-Appellant

versus

Prithvi Raj

-Respondent

Civil Appeal No. 648 of 2008 (Arising out of S.L.P. (C) No. 12607 of 2005)

Decided on 24.1.2008

**Consumer Protection Act, 1986—Section 17—Motor Vehicle Act, 1988—
Section 149 and 173(2)—Driving licence—Admissibility of—Held—Restrictions relating to appeal interms of Section 173(2) M.V. Act does not apply to own damage cases—Once the licence is a fake one the renewal cannot take away the effect of fake licence. [Para—37(26) and 38]**

Case Referred :

1. *United India Insurance Co. Limited v. Lehu and Ors.* 2003 (3) SCC 338
2. *Lal Chand v. Oriental Insurance Co. Ltd.* 2006 (8) Scale 531
3. *National Insurance Co. Ltd. v. Swaran Singh and Ors.* 2004 (3) SCC 297
4. *National Insurance Co. Ltd. v. Laxmi Narain Dhut* 2007 (3) SCR 579
5. *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal* 2004(8)SCC 644
6. *Polymat India (P) Ltd. v. National Insurance Company Ltd.* 2005 (9) SCC 174
7. *Complete Insulations (P) Ltd. v. New India Assurance Co. Ltd.* 1996(1)SCC 221
8. *New India Assurance Co., Shimla v. Kamla and Ors.* 2001 (4) SCC 342

Counsel :

Kishore Rawat and M.K. Dua, Advs. for Appellant

J.S. Attri. Adv. for Respondents

JUDGMENT

Dr. Arijit Pasayat, J. :

1. Heard learned counsel for the parties.
2. Leave granted.
3. Challenge in this appeal is to the order passed by the National Consumer Disputes Redressal Commission, New Delhi (in short 'the Commission') allowing the First Appeal filed by the appellant before it (the respondent herein). He is hereinafter referred to as the complainant. Before the Himachal Pradesh State Consumer Disputes Redressal Commission (in short the State Commission), the complainant had filed a complaint alleging that a Mini Bus owned by the complainant met with an accident during the period when the Insurance Cover/policy issued by the appellant-Insurance Company was in currency. The incident was reported to the Insurance Company but the claim was not settled on the ground that the Driver of the offending vehicle did not have a valid and operating driving license. The complainant took the stand that there was a renewal of the driving license which was valid and legal and, therefore, the claim could not have been repudiated by the Insurance Company. The State Commission rejected the plea, categorically holding that there was no valid license issued by the R.T.A, Hyderabad, as claimed by the Driver.
4. In appeal by the impugned order, a contrary view was taken and it was held that it was accepted, as rightly noted by the State Commission, that the licensing authority at Hyderabad had not issued any license as claimed. Yet, in view of the fact that there was a renewal at Tinsukhia, the claim could not have been refused by the insurance company. Reliance was placed on a decision of this Court in *United India Insurance Co. Limited v. Lehu and Ors.* 2003 (3) SCC 338 in support of the view.
5. Learned Counsel for the appellant-insurance company submitted that Lehu's case (supra) related to a third party claim and not an own damage claim.
6. Learned Counsel for the respondent, on the other hand, relied on a decision of this Court in *Lal Chand v. Oriental Insurance Co. Ltd.* 2006 (8) Scale 531 to contend that the view taken by the National Commission was correct. Reliance has also been

placed on a decision of this Court in *National Insurance Co. Ltd. v. Swaran Singh and Ors. 2004 (3) SCC 297*.

7. It is to be noted that Swaran Singh's case (supra) was rendered in the background of Section 149 of the Motor Vehicles Act, 1988 (in short the 'Act').

8. This Court had occasion to deal with a similar issue in *National Insurance Co. Ltd. v. Laxmi Narain Dhut 2007 (3) SCR 579*. It was inter alia held as follows :

"8. Section 149 of the Act relates to duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. The language of the provision is clear that it only relates to third party risk. The corresponding provision in the Old Act is Section 96. Section 166 of the Act relates to application for compensation. The same corresponds to Section 110-A of the Old Act. Section 168 of the Act relates to award of the Claims Tribunal which corresponds to Section 110-B of the Old Act. Section 170 deals with impleadment of the insurer in certain cases. Section 149 of the Act needs to be noted in full. The same reads as follows :

"149. Duty of Insurers to satisfy judgments and awards against persons insured in respect of third party risks- (1) If, after a certificate of insurance has been issued under Sub-section (3) of Section 147, in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163-A) is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoid or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. (2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :

- (a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:
 - (i) a condition excluding the use of the vehicle-
 - (a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or
 - (b) for organized racing and speed testing, or
 - (c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or
 - (d) without side-car being attached where the vehicle is a motor cycle; or
 - (ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of dis-qualification; or
 - (iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or (b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.
- (3) Where any such judgment as is referred to in Sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908 (5

of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in Sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in Sub-section (2).

- (4) Where a certificate of insurance has been issued under Sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in Clause (b) of Sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147, be of no effect :

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this Sub-section shall be recoverable by the insurer from that person.

- (5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.
- (6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.
- (7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in Sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

Explanation: For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under Section 165 and "award" means an award made by that Tribunal under Section 168."

"9. In Swaran Singh's case (supra) on which learned Counsel for the parties have placed reliance undisputedly related to a case under Section 149 of the Act. This Court elaborately dealt with the scope and ambit of Sections 147 and 149 of the Act and after tracing the history of compulsory insurance and the rights of the third parties, held that the concerned cases were mainly concerned with third party rights under the policy. It was held in that context that any condition in the policy whereby the right of the third party is taken away would be void, as noted in para 23 of the judgment.

10. In paras 69 and 70 the principles were culled out in the following terms:
"The Insurance Company is required to prove the breach of the condition of the contract of insurance by cogent evidence. In the event the Insurance Company fails

to prove that there has been breach of conditions of the policy on the part of the insured, the Insurance Company cannot be absolved of its liability. This Court did not lay down a degree of proof, but held that the parties alleging the breach must be held to have succeeded in establishing the breach of the condition of the contract of insurance, on the part of the Insurance Company by discharging its burden of proof. The Tribunal, must arrive at a finding on the basis of the materials available on the records."

11. In para 110 also the summary of the findings were recorded which reads as follows :

- (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.
- (ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.
- (iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.
- (iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefore would be on them.
- (v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.
- (vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.
- (vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.
- (viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.
- (ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor

vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured.

- (x) The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.
- (x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by Sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.
- (xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

12. At this juncture, it would be necessary to test the logic behind Section 149 of the Act. The conditions under the said provision relate only to third party risks and claims.

17. Section 149 is part of Chapter XI which is titled "Insurance of Motor Vehicles against Third Parties". A significant factor which needs to be noticed is that there is no contractual relation between the insurance company and the third party. The liabilities and the obligations relating to third parties are created only by fiction of Sections 147 and 149 of the Act.

18. It is also to be noted that the terms of the policy have to be construed as it is and there is no scope for adding or subtracting something. However liberally the policy may be construed, such liberalism cannot be extended to permit substitution of words which are not intended. (See *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal* 2004 (8) SCC 644 and *Polymat India (P) Ltd. v. National Insurance Company Ltd. and Ors.* 2005 (9) SCC 174.

19. The primary stand of the insurance company is that the person driving the vehicle did not have a valid driving license. In Swaran Singh's case (supra) the following situations were noted :

- (i) the driver had a license but it was fake;
- (ii) the driver had no license at all;
- (iii) the driver originally had a valid license but it had expired as on the date of the accident and had not been renewed;

- (iv) the license was for a class of vehicles other than that which was the insured vehicle;
- (v) the license was a learner's license.

Category (i) may cover two types of situations. First, the license itself was fake and the second is where originally that license is fake but there has been a renewal subsequently in accordance with law.

20. Chapter II contains Sections 3, 4 and 5 of the Act relating to licensing of drivers driving the motor vehicles.

24. In the background of the statutory provisions, one thing is crystal clear i.e. the statute is beneficial one qua the third party. But that benefit cannot be extended to the owner of the offending vehicle. The logic of fake license has to be considered differently in respect of third party and in respect of own damage claims.

25. It would be appropriate to take note of what was stated in *Complete Insulations (P) Ltd. v. New India Assurance Co. Ltd.* 1996 (1) SCC 221. In paras 9 and 10 it was observed as follows :

"9. Section 157 appears in Chapter XI entitled "Insurance of Motor vehicles against Third Party Risks" and comprises Sections 145 to 164. Section 145 defines certain expressions used in the various provisions of that Chapter. The expression "Certificate of Insurance" means a certificate issued by the authorised insurer under Section 147(3). "Policy of Insurance" includes a certificate of insurance. Section 146(1) posits that "no person shall use except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this chapter". Of course this provision does not apply to vehicles owned by the Central or State Government and used for Government purposes not connected with any commercial enterprise. This provision corresponds to Section 94 of the old Act. Section 147 provides that the policy of insurance to be issued by the authorized insurer must insure the specified person or classes of persons against any liability incurred in respect of death of or bodily injury to any person or damage to any property of a third party as well as against the death of or bodily injury caused to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. This provision is akin to Section 95 of the old Act. It will be seen that the liability extends to damage to any property of a third party and not damage to the property of the owner of the vehicle, i.e., the insured. Sub-section (2) stipulates the extent of liability and in the case of property of a third party the limit of liability is Rupees six thousand only. The proviso to that Sub-section continues the liability fixed under the policy for four months or till the date of its actual expiry, whichever is earlier, Sub-section (3) next provides that the policy of insurance shall be of no effect unless and until the insurer has issued a certificate of insurance in the prescribed form. The next important provision which we may notice is Section 156 which sets out the effect of the certificate of insurance. It says that when the insurer issues the certificate of insurance, then even if the policy of insurance has not as yet been issued the insurer shall, as between himself and any other person except the insured be deemed to have issued to the insured a policy of insurance conforming in all respects with the description and particulars stated in the certificate. It is obvious on a plain reading of this provision that the legislature was anxious to protect third-party interest. Then comes Section 157 which we extracted earlier. This provision lays down that when the owner vehicle in relation whereto a certificate of insurance is issued transfers to another person the ownership of the motor vehicle, the certificate of insurance together with the policy described therein shall be deemed to have been transferred in favour of the new owner of the vehicle with effect from the date of transfer. Sub-section (2) requires the transferee to apply within fourteen days from the date of transfer to the insurer for making necessary changes in the certificate of insurance and the

policy described therein in his favour. These are the relevant provisions of Chapter XI which have a bearing on the question of insurer's liability in the present case. 10. There can be no doubt that the said chapter provides for compulsory insurance of vehicles to cover third-party risks. Section 146 forbids the use of a vehicle in a public place unless there is in force in relation to the use of that vehicle a policy of insurance complying with the requirements of that chapter. Any breach of this provision may attract penal action. In the case of property, the coverage extends to property of a third party i.e. a person other than the insured. This is clear from Section 147(1)(b)(i) which clearly refers to "damage to any property of a third party" and not damage to the property of the 'insured' himself. And the limit of liability fixed for damage to property of a third party is Rupees six thousand only as pointed out earlier. That is why even the Claims Tribunal constituted under Section 165 is invested with jurisdiction to adjudicate upon claims for compensation in respect of accidents involving death of or bodily injury to persons arising out of the use of motor vehicles, or damage to any property of a third party so arising, or both. Here also it is restricted to damage to third-party property and not the property of the insured.

26. The restrictions relating to appeal in terms of Section 173(2) does not apply to own damage cases.

38. The inevitable conclusion therefore is that the decision in Swaran Singh's case (supra) has no application to own damage cases. The effect of fake license has to be considered in the light of what has been stated by this Court in *New India Assurance Co., Shimla v. Kamla and Ors. 2001 (4) SCC 342*. Once the license is a fake one the renewal cannot take away the effect of fake license. It was observed in *Kamla's case* (supra) as follows :

"12. As a point of law we have no manner of doubt that a fake licence cannot get its forgery outfit stripped off merely on account of some officer renewing the same with or without knowing it to be forged. Section 15 of the Act only empowers any Licensing Authority to "renew a driving licence issued under the provisions of this Act with effect from the date of its expiry". No Licensing Authority has the power to renew a fake licence and, therefore, a renewal if at all made cannot transform a fake licence as genuine. Any counterfeit document showing that it contains a purported order of a statutory authority would ever remain counterfeit albeit the fact that other persons including some statutory authorities would have acted on the document unwittingly on the assumption that it is genuine.

39. As noted above, the conceptual difference between third party right and own damage cases has to be kept in view. Initially, the burden is on the insurer to prove that the license was a fake one. Once it is established the natural consequences have to flow.

9. The above aspects were highlighted recently in *Laxmi Narain Dhut case* (supra).

10. In the instant case, the State Commission has categorically found that the evidence on record clearly established that the licensing authority had not issued any license, as was claimed by the Driver and the respondent. The evidence of Shri A.V.V. Rajan, Junior Assistant of the Office of the Jt. Commissioner & Secretary, RTA, Hyderabad who produced the official records clearly established that no driving license was issued to Shri Ravinder Kumar or Ravinder Singh in order to enable and legally permit him to drive a motor vehicle. There was no cross examination of the said witness. The National Commission also found that there was no defect in the finding recorded by the State Commission in this regard.

11. It appears that pursuant to the orders dated 14.07.2005 passed by this Court, the entire amount awarded was deposited in this Court. Since, we have held that the appellant-Insurance Company has no liability, the amount deposited be returned to the appellant-Insurance Company with accrued interest, if any.

12. The appeal is allowed. No costs.

- Consumer Law**—Cultural Fair “Mela”—Negligence—Held—Negligence is a failure to observe, for protection of the interest of another person the degree of care, precaution and vigilance which the circumstances justly demand—Organiser of fair would be equally liable to pay compensation. *Haryana Institute of Fine Arts vs Rajesh Mani Kaushik [NC]* 930aa
- Consumer Law**—Car insurance—New car stolen—Held—No Registration number is not a ground for repudiation of claim. *National Insurance Co. vs Pawan Kr. [St. Comm. Utt.]* 331
- Consumer Law**—Claim—Settlement of—On non-standard basis—Loss assessed by surveyor and fire brigade officials—Stock verified by the Bank—Held—In the light of all these evidence claim of complainant should not be settled on non-standard basis. *National Electricals versus National Insurance Co. Ltd. [St. Comm. Utt.]* 310
- Consumer Law**—Compensation—Complainant has met heavy expenses—But unless negligence of doctor is proved—She is not entitled to get compensation. *Smt. Vimlesh Dixit versus Dr. R. K. Singhal [St. Comm. Utt.]* 570
- Consumer Law**—Compensation—When interest awarded compensation can't be given. *M/s National Electricals versus National Insurance Co. Ltd. [St. Comm. Utt.]* 310
- Consumer Law**—Consumer—Electricity connection for flour mill/*Aata Chakki*—Held—Complainant not consumer. *U.P.S.E.R. versus Sh. Umaid Singh [St. Comm. Utt.]* 470
- Consumer Law**—Contractor—Out of his *theka* money TDS reduced for income tax but certificate not issued—Claim for refund—Held—It is not a consumer dispute. *Project Officer (Agriculture) versus Sh. Kripa Ram [St. Comm. Utt.]* 464
- Consumer Law**—Defective shoe—If complainant choose his remedy as return of price—It should have been return to him with cost. *Pradhuman Bisht versus Bata Shoe Company [St. Comm. Utt.]* 549
- Consumer Law**—Disconnection of electricity—Refund of deposited amount wilfully—Amount was not due against him—Held—Because there being no deficiency in service that is not a consumer dispute—He can go to Civil Court or Prescribed Authority to recover the said amount. *Sh. Sayeed versus Executive Engineer, UPCL [St. Comm. Utt.]* 316
- Consumer Law**—Driving licence—Held—Restrictions relating to appeal interms of Section 173(2) M.V. Act does not apply to own damage cases—Once the licence is a fake one the renewal cannot take away the effect of fake licence. *Oriental Insurance Co. Limited versus Prithvi Raj [SC]* 930am
- Consumer Law**—Electricity dispute—Disconnection—Held—Legal and justified—If dues were against complainant. *U.P.S.E.R. versus Umaid Singh [St. Comm. Utt.]* 470
- Consumer Law**—Housing—“Service”—Held—Object of Section 2(1)(o) of Act 1993 included “Housing construction” and its service within the scope of section and the commission had jurisdiction to deal the connected disputes. *Tamil Nadu Housing Board and Ors. versus Sea Shore Apartments Owners Welfare Association [SC]* 930ae
- Consumer Law**—Housing—Delivery not on time—Refund of deposit ordered with interest. *M.D.D.A. versus Sh. Amitabh Kukreti [St. Comm. Utt.]* 475
- Consumer Law**—Insurance Claim—Assessment of “Burglary”—Held—Burglary from premises by “forcible and violent” means of entry the word “violent” was to be construed according to its or dinary meaning and meant entry by the use of any force which was accentuated or accompanied by a physical at—Word “violent accordingly referred to physical character of means of entry and not merely to its unlawful character. *M/s. Mono Industries versus New India Assurance Co. Ltd. [NC]* 930n
- Consumer Law**—Insurance Claim—Held—If the amount is with held by insurance company for years together a lumpsum award as compensation covering both interest and costs would not suffice—Insurance company is directed to pay interest at the rate of 10% P.A. *Mono Industries versus New India Assurance Co. Ltd. [NC]* 930n
- Consumer Law**—Insurance—Held—Appropriate amount of award is on basis of report of surveyor. *New India Assurance Co. Ltd. vs Neelam Saluja [St. Comm. Utt.]* 557
- Consumer Law**—Insurance—Driver did not possess valid driving licence—Claim settled on non-standard basis—Because insurance company unnecessarily refused the claim therefore interest also directed. *Luxmi Devi vs United India Insurance Co. Ltd. [St. Comm. Utt.]* 303
- Consumer Law**—Insurance—Engine and body of accidental bus were repaired—Order for compensation of Rs. 65,000/- —Appeal against insurance company—Dismissed. *Oriental Insurance Co. Ltd. versus Jagmohan Singh Parmar [St. Comm. Utt.]* 516
- Consumer Law**—Insurance—Claim of Rs. 1,00,000/- —Compensation for filing of complaint etc. Rs. 10,000/- is sufficient—When appellant already had taken the amount of claim. *Lt. Col. Pradeep Goyal versus United India Ins. Co. Ltd. [St. Comm. Utt.]* 771
- Consumer Law**—Insurance—Insured died out of accident—Held—Non-mentioning of alleged

- disease is no ground for repudiation of claim. *Life Insurance Corporation of India versus Smt. Laxmi Karnatka [St. Comm. Utt.]* 485
- Consumer Law**—Insurance—It is not open to insurance company to say to the insured to bring the insured article to place of their choice. *Sh. Y. S. Sengar versus United India Insurance Co. Ltd. [St. Comm. Utt.]* 531
- Consumer Law**—Insurance—Loss due to fire also to be indemnified by insurance company—The place of fire is not relevant. *New India Assurance Co. Ltd. versus Sh. Deepak Goyal [St. Comm. Utt.]* 481
- Consumer Law**—Insurance—Mediclaim—No evidence that complainant was suffering from a disease earlier before submission of proposal form—Claim allowed. *Oriental Insurance Co. Ltd. versus Sh. Ratinderbir Singh [St. Comm. Utt.]* 858
- Consumer Law**—Insurance—No document was produced by complainant surveyor's report was ex-parte—Released loan was Rs. 31,500/-—Held—Complainant was not entitled for a sum more than 10,000/- Rupees. *New India Insurance Co. Ltd. versus Smt. Shanti Devi [St. Comm. Utt.]* 567
- Consumer Law**—Insurance—Owner of insured car used it as taxi—Insurance claimed—Allowed. *Pradeep Kumar Bhatia versus National Insurance Co. [St. Comm. Utt.]* 823
- Consumer Law**—Insurance—Policy consumed for 8 months—Amount of compensation 10% deduced. *New India Ass. Co. Ltd. versus Deepak Goyal [St. Comm. Utt.]* 481
- Consumer Law**—Insurance—Repairs could have been done at Haridwar too and estimate could also have been prepared at Haridwar—Held—No necessity to take machine to Delhi. *Sh. Y. S. Sengar versus United India Insurance Co. Ltd. [St. Comm. Utt.]* 531
- Consumer Law**—Interest rate—No provision of any penal interest that if it is not paid within 15 days—It should pay @ 18% instead of 14%. *Oriental Insurance Co. versus Sh. Vijay Kumar [St. Comm. Utt.]* 501
- Consumer Law**—Judgment—Complaint allowed by two members of District Forum—Judgment not signed or pronounced by the President—Held—Judgment is not a judgment in the eye of law—Matter remanded back. *New India Assurance Co. Ltd. versus Balak Ram & Others [St. Comm. Utt.]* 560
- Consumer Law**—Jurisdiction of consumer forum—Expelling the ward from the school—Held—Not a consumer dispute. *John J. Sookias vs Balwinder Singh Chauhan [St. Comm. Utt.]* 500
- Consumer Law**—Jurisdiction of—Powers of Civil Court are vide enough to decide the cases pending before the consumer forums—But its vis-a-vis is not correct. *Dr. Girish Chandra Tripathi versus Up-Dakpal & Others [St. Comm. Utt.]* 510
- Consumer Law**—Limitation—Electricity connection—Complainant produced bill dated 26.7.2000—Held—Complaint not barred by time. *Sh. Sayeed vs Executive Engineer, UPCL [St. Comm. Utt.]* 316
- Consumer Law**—Limitation—Insurance matters—Limitation shall run from date of repudiation of claim—Not from the date of accident. *Sh. Govind Singh Kathet versus Oriental Insurance Co. [St. Comm. Utt.]* 491
- Consumer Law**—Medical Negligence—Claim for compensation—Appreciation of evidence—Delivery of child—No doctor or Gynaecologist present—Labour pain injunction given after delivery of child—No facility of Oxgen—No proper treatment given—No medical record maintained—Child suffered form asphyxia—Consideration of—Held—Hospital failed to take due care—Clear deficiency in service—Awarded 3 lacs as compensation with cost and interest. *G. Bala Krishna Pai & Anr. Versus Sree Narayana Medical Mission General Hospital And T.B. Clinic & Ors. [NC]* 930a
- Consumer Law**—Medical Negligence—Claim for compensation—MRI scanning conducted by senior Reagent—Operation done but not found and tumour—Held—Hospital is responsible for providing infrastructure service—Consultant radiologist is thereafter responsible for viewing the completed scan and interpreting the films presented to him—While senior resident committed blunder therefore hospital and doctor would be jointly and severally liable to pay compensation. *Bombay Hospital & Medical Research Centre Versus Sharifabai Ismail Syed & 3 Others [NC]* 930t
- Consumer Law**—Medical Negligence—Held—Every material information within special knowledge of concerned doctor hence concerned doctor, and hospital supposed to prove that due care and caution has been taken while giving treatment. *G. Bala Krishna Pai Vs Sree Narayana Medical Mission General Hospital & T.B. Clinic [NC]* 930a

