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CONSUMER PROTECTION LAW

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I INTRODUCTION

THE TERM "consumer," in simple term, refers to a person who buys any goods or hires any services for a consideration. However, a person who obtains such goods for resale or commercial purpose is excluded from the purview of the term 'consumer'. Similarly, a person who avails the services for any commercial purpose is outside the scope and ambit of the term 'consumer'.[1] Further, by virtue of the amendments made in the year 2002 under the Consumer Protection Act, 1986 (CP Act), the person who brought the goods for his own use as well as services availed by a person exclusively for the purpose of earning livelihood by means of self-employment is not covered under the term commercial purpose.[2]

During the year 2009, the Supreme Court of India had an occasion to decide about 50 cases under the CP Act. All these cases, related to services availed by individuals and institutions but not a single case related to purchase of goods. From this, it appears that the service sector, the fast growing sector of the Indian economy, does not appear to be taking necessary care in providing satisfactory, adequate or timely services to the consumers which is a real cause of concern and worry. Among the cases pertaining to services before the Supreme Court, maximum cases related to insurance followed by cases pertaining to medical negligence, allotment of plots, banking, education, electricity, telegraph, *etc*.

II INSURANCE

The cases decided on insurance relates to accidents leading to the death of driver, owner of vehicle and passengers. In few cases, due to the failure to possess valid licence at the time of occurrence of accident by the driver/ owner of the vehicles, the consequential relief claimed by the affected parties became a major legal issue for adjudication by the Supreme Court.

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1 S.2(i) (d) of CPA 1986.

2 Explanation to s.2 (1)(d) of CPA, 1986.

The legality of denial of insurance claim by the insurer due to concealment of pre-existing disease and the power of insurance company to cancel the mediclaim policy were also some issues examined by the Supreme Court. The power of the insurance company to appoint surveyors any number of times and its validity were also questioned before the Supreme Court. Further, cases involving limitation period, jurisdictional issues, insurance cover period, damages caused to properties, jeweler block policy, *etc.* also came up before the Supreme Court.

Accident cases

Insurance companies often look into the validity of the driving licence and other related documents in order to oppose a driver's claim and also questioning the eligibility of the driver to drive the vehicle. The insurance companies have resorted to the tactics of proving invalid the driving license as a prime defence to oppose an insurance claim. In *National Insurance Company* v. *Sajjan Kumar Aggarwall*,[3] the complainant-respondent, while traveling in his own maruti car with a valid insurance cover, met with an accident in which the vehicle got badly damaged. On submitting an insurance claim, the appellant-insurance company repudiated the claim on the ground that the driver who was driving the vehicle did not have an effective driving licence at the time of accident. Thereupon a complaint was filed by the complainant-respondent before the district forum which held that the driver had a valid licence. The aforesaid decision of the district forum was upheld by the state consumer disputes redressal commission (SCDRC) and the national consumer disputes redressal commission NCDRC). However, when the matter reached the Supreme Court, it was brought to its notice that a specific investigation carried out by an investigator of the insurance company revealed that the licence was issued not in the name of the driver who was accused of committing the accident, but in the name of some one else. In view of this, the court set aside the orders of all the consumer *fora* and remitted the matter to the district forum with a direction to verify necessary data by calling for records from the licensing authority.

In another similar *National Insurance Company Limited* v. *J. Maheshwaramma*,[4] the Supreme Court clarified that a breach of condition of the policy need to be proved by the insurance company only in matters involving third party claim. The same was not necessary in case of his own death. In this case, the complainant (since deceased) obtained an insurance policy for Rs. 1 lac. from the appellant covering the risk of accidental death. The policy-holder died on 24.11.2005 in a road accident while driving his motorcycle from Gadwal. The complainant's wife, legal heir of deceased, submitted a claim to the appellant which repudiated the claim. On a complaint filed before the district forum, the appellant contested the claim

3 (2009) I CPJ 28 (SC).
4 (2009) I CPJ 89 (SC).

mainly on the ground that the deceased had no valid licence at the time of accident. In other words, the insurance company argued that the policy-holder had got driving licence to drive tractor trailer (transport) but had no licence to drive a motorcycle with gear. The district forum ruled that the burden lies on insurance company to establish that breach of policy condition was on the part of the insured. The district forum while arriving to the abovesaid conclusion relied on two cases decided by the Supreme Court. The first case was the *National Insurance Company Ltd.* v. *Swaran Singh*,[5] wherein it was held that the burden was on the insurer to prove that the insured was guilty for wilful breach of condition of insurance policy in the contract of insurance. The second case was the *United India Insurance Co. Ltd.* v. *Lehru*,[6] wherein it was held that if a person had been given a licence for driving a particular type of vehicle it cannot be said that he had no driving licence. Based on these two decisions, the district forum held that the insurance company had failed to establish valid grounds on which they can repudiate the claim, and accordingly, directed that the complainant, wife of the deceased, was entitled for a sum assured of Rs. 1 lac alongwith interest @ 9 per cent *per annum*, from the date of repudiation of the claim. On an appeal filed by the insurer, both the SCDRC and NCDRC accepted the findings of the district forum. On further appeal before the Supreme Court, it was held that the said decision of the consumer *fora* was applicable only to third party claim cases and that it had no application to own damage cases, for instance, cases of contractual liability. As the present case was not a third party case but a case of contractual liability, the Supreme Court remitted the matter to NCDRC to consider the matter afresh.

In *United Insurance Co. Ltd.* v. *Sukh Deo* Yadav,[7] the Supreme Court held that if any order was passed by a consumer forum without taking into consideration the relevance of entries made in the case diaries and *post-mortem* report in proper perspective, the same shall be remitted back to the appropriate consumer forum for a fresh adjudication. In this case, a vehicle, duly insured, carrying 14 persons met with an accident on 9.6.2004. Four persons including the driver died on the spot. The newspapers which flashed the accident indicated the name of the driver as Amitabh Singh *alias* Munna Singh, aged around 25 years. The insurance claim lodged by the complainant for damage of his vehicle was repudiated by the insurance company on the ground that apart from committing fraud, the complainant violated the terms and conditions of insurance policy. Aggrieved by the said repudiation of claim, the complainant filed a complaint before the district forum claiming the insurance amount of his own damaged vehicle and stated that Amitabh Singh was a cleaner in the vehicle and not the driver as the jeep was being driven by one Sanjeev Kumar. The district forum accepted and directed the

5 (2004) 3 SCC 297.
6 (2003) 3 SCC 338.
7 (2009) III CPJ 13 (SC).

insurance company to pay a sum of Rs. 2,70,000 alongwith interest @ 10 per cent towards compensation. Both the SCDRC and NCDRC affirmed the orders of the district forum. On appeal, the Supreme Court noted that the records including the case diary and *post-mortem* report showed that the vehicle was driven by Munna Singh, who did not have a valid licence. Based on the above, the Supreme Court found that the consumer *fora* did not consider the relevance of entries made in the case diary and *post-mortem* report. Accordingly, the court set aside the order passed by the NCDRC aside and remitted the matter to the district forum for adjudication afresh.

Again, in *New India Assurance Company Ltd.* v. *Suresh Chandra* Aggarwal,[8] the insurance company repudiated the claim on the ground that the driver of the vehicle was not holding an effective valid driving license at the time of accident on 29.2.1992 as his license was valid only upto 25.10.1991 which was renewed from 23.3.1992. The main contention before Supreme Court by the insurance company was that on the date of accident, vehicle in question was being driven by a person who was not holding an effective driving license and merely because the driving license, which had expired on 25.10.1991, *i.e.* four months prior to the date of accident, was renewed subsequently with effect from 23.3.1992, it could not be said that on the date of accident, the driver was holding an effective valid driving licence.

The Supreme Court after elaborately referring to the relevant provisions of the concerned Acts, policy and decided cases held that: (i) as per the proviso to section 15(1) of the Motor Vehicles Act, 1988, when an application for renewal is filed more than 30 days after the date of its expiry, the license renewed thereafter shall have effect from the date of its renewal only, meaning thereby, that the intervening period between the date of expiry of the license and the date of its renewal, there is no effective license in existence; (ii) As per section 3 of Motor Vehicles Act, 1988, the deceased driver was not even permitted to drive an insured vehicle in a public place without holding a valid license and, therefore, the claimant not only committed breach of the terms of the policy, but also violated the provisions of section 5 of Act by entrusting the vehicle to a person who did not hold a valid license on the date of accident. The court, accordingly, set aside the order of the NCDRC.

The importance of holding a valid licence by the driver of a vehicle was reiterated by the Supreme Court in *National Insurance Company* v. *Meena* Aggarwal,[9] where the complainant's vehicle with an insurance cover met with an accident and got damaged badly. A claim was submitted to the insurance company for Rs. 2 lacs. This claim was rejected by the insurance company on the grounds that the driver of the vehicle did not possess a valid licence and that the vehicle was being plied against the terms of the insurance policy

8 (2009) IV CPJ 14 (SC).
9 (2009) IV CPJ 25 (SC).

by being used as taxi for carrying marriage parties. The court referring to its decision in *Swaran Singh*[10] held that the owner would be liable for payment of compensation in cases where the driver was not having a valid licence at all and that it was the obligation on the part of owner to take adequate care to see that the driver had an appropriate valid licence to drive the vehicle. Based on the above decision, the court held that the owner of the vehicle cannot contend that he had no liability to verify the fact as to whether the driver of the vehicle possessed a valid licence or not. For this reason, the orders passed by the consumer *fora* were set aside.

Limitation cases

The law of limitation casts a duty upon the courts not to entertain a suit/ appeal/application, if filed after the expiry of the limitation period provided under the relevant law. Thus, the Supreme Court in *Oriental Insurance Company Ltd*. v. *Prem Printing Press,*[11] clarified that when it was expressly provided in the insurance policy that the insurance company shall disclaim liability to the insured for any claim under the policy if the disclaimer failed to prefer the claim for required relief before the appropriate court within three months, the claim shall for all purposes be deemed to have been abandoned and thereafter shall not be recoverable. The relevant date of disclaim refers to the date on which the claim was repudiated and was finally communicated and not the date on which initial repudiation was communicated. Therefore, any complaint filed before the consumer *fora* within three months from the date of final repudiation communicated can be entertained. The argument that the complaint filed was beyond the period of limitation provided under the insurance policy was held to be not acceptable by the court.

In *Kandimalla Raghavaiah* v. *National Insurance*,[12] the Supreme Court clarified that the cause of action cannot be deemed to have been continued till the date of denial of a claim by an insurance company. The firm (Kandimalla Raghavaiah) engaged in the business of tobacco, took a fire policy 'C' with national insurance company in its account with Indian Bank against loss or damage by fire for a period of 4 months from 4.12.1987 to 3.4.1998, for a sum of Rs. 1.35 lacs and paid a premium of Rs. 17,634. The said firm availed a loan from Indian Bank on 8.3.1998 by hypothecating the tobacco, stored in the godowns. As per the firm, a fire broke out in the godowns in the intervening night between 22 and 23 March, 1988, allegedly due to electrical short circuit and the entire stock of tobacco was gutted. Contrary to the above, the bank, on the same day filed an FIR against the firm and its partners alleging that they had intentionally set fire to the tobacco stocks with a view to file a false claim for loss of stocks. The firm

10 *Supra* note 5.
11 (2009) I CPJ 55 (SC).
12 (2009) III CPJ 75 (SC).

reported the matter to the insurance company and the bank on 24.3.1988 and a surveyor was appointed to submit a report on the same. Meanwhile, the bank preferred a claim with the insurance company for a sum of Rs. 1,32,85,760 which it did not pursue. The firm asked for the claim forms from the insurance company on 6.11.1992. On not receiving any such forms, reminders were sent followed by a legal notice. The insurance company finally on 21.3.1996 refused to issue the claim forms on the ground that the claim had become time-barred.

The Supreme Court held that (i) the firm on 6.11.1992 asked for the supply of claim forms in order to prefer a claim but by that time the period of limitation under section 24-A of CP Act had expired (ii) the complaint was filed after 24.10.1997 and hence was clearly barred by time and (iii) the insurance company's reply dated 21.3.1996 to the legal notice issued by the firm on 4.1.1996, declining to issue the forms for preferring a claim after a lapse of more than four years of the date of fire, cannot by any stretch of imagination be construed as resulting in extending the period of limitation for the purpose of section 24-A of the CP Act. The court, accordingly, held that the complaint filed on 24.10.1994 without an application for the condonation of delay was barred by limitation.

The Supreme Court in *E.I.C.M. Exports Ltd* v. *South Indian Corpn. (Agencies)*,[13] again examined the issue regarding the application of limitation period provided under two enactments, namely, the CP Act and the Indian Carriage of Goods by Sea Act, 1925 (Act of 1925), while dealing with a dispute over delayed shipment of goods to US by a corporation. The main allegation, in this case, was that although the goods, booked by the EICM Export Ltd. for carrying through South India Corporation to New York, had already reached New York as per the schedule, the same were not delivered to the consignee in New York. Instead, the goods were kept in the custom's bonded ware house in New York for want of payment of US $ 5,000 as demurrage. As the foreign buyer refused to accept the consignment due to delayed shipment, the complainant export company filed a complaint before the NCDRC for a claim of Rs.39,81,351 along with interest @ 24 per cent *per annum* due to negligence on the part of corporation. The NCDRC dismissed the complaint as barred by limitation, by applying the limitation period of one year as provided under article III, clause 6 of the Indian Carriage of Goods by Sea Act, 1925.

The main contention raised before the Supreme Court by the export company was that the limitation period of one year provided under the Act of 1925 was not at all applicable to the facts of this case, instead, the limitation period of two years provided under section 24-A of the CP Act should be made applicable. The Supreme Court, after dealing with limitation period, under both the Acts held that: (i) The limitation period of one year provided under the Act of 1925, was applicable only to suits filed but not

13 (2009) III CPJ 73 (SC).

to complaints filed under the CP Act; (ii) The complaint before the consumer forum was not a suit and hence, the provision of limitation provided under the Act of 1925 was not applicable to the facts of this case but limitation period provided under the CP Act alone would be applicable. The court accordingly remanded the case to NCDRC to decide on the merits (including condonation of delay under the CP Act).

In *Krishna Singh* v. *L.I.C. of India, Mumbai,*[14] the insured died in 1988 and the complaint was filed on 31.10.2001. In the application seeking condonation of delay, no sufficient cause was mentioned as to why there was a delay of over 12 years. On behalf of the complainant, it was argued before Supreme Court that the NCDRC should have waited for the outcome of the CBI inquiry, which was in progress. But the Supreme Court did not accept the said argument and held that the NCDRC had the jurisdiction to consider the complaint as well as condone the delay in filing the application and the NCDRC had given good reasons to reject the complaint on the basis of towering delay of 12 years. Accordingly, the appeal was dismissed.

Mediclaim policy

The Supreme Court through a catena of cases had the occasion to analyse the aspect of concealment of pertinent facts while making a claim under a mediclaim policy. The issue was considered in *New India Assurance Co. Ltd.* v. *Satpal Singh* Muchal,[15] where a pre-existing disease was concealed. In this case, the complainant-respondent, had taken a mediclaim policy in January, 1999, which was lastly renewed on 22.1.2002, for the period of one year, *i.e.* till 21.1.2003. The complainant, suffering from kidney trouble informed the same to the insurance company. The insurance company, on receipt of this information terminated the policy on 18.6.2003 w.e.f 17.2.2002 as per the terms of the policy (i.e the insurance company may at any time cancel this policy by sending the insured 30 days notice and refund the insured a *pro-rata* premium for unexpired period of the insurance) on the ground that the complainant had concealed the pre-existing disease. Accordingly, the complainant was refunded a *pro-rata* rate of premium of Rs. 2,782. The request of the complainant for renewal of policy was also not considered for the said reason. When the matter was moved before the Supreme Court, it was brought to the knowledge of the court that the insured himself admitted the pre-existing disease by his letter dated 24.6.2009 addressed to the insured. In view of the said admission by the insured complainant and power of the insurer to cancel the policy as per clause 5.9, the court remitted the matter to the district forum for consideration afresh taking into account the consequences owing to concealment of fact and the applicability of the relevant terms of the

14 MANU/SC/0094/2009.
15 (2009) III CPJ 15 (SC).

insurance policy (with respect to termination by insurer) to the facts of this case.

Satwant Kaur Sandhu v. *New India Assurance Company*[16] was yet another case where material facts were alleged to have been suppressed before taking a mediclaim policy. In this case, the husband of the complainant (since deceased), an advocate by profession, after completing necessary formalities insured himself under a mediclaim policy with the respondent for the period 7.5.1990 to 6.5.1991 by paying an annual premium of Rs. 15,000/-. The policy-holder fell ill and was admitted in Dayanand Medical College and Hospital, Ludhiana on 11.9.1990 and shifted to Vijaya Health Centre, Chennai on 7.12.1990 where his condition deteriorated and ultimately he died on 26.12.1990. The complainant (wife of deceased policy holder) filed a claim for Rs. 23,217.80 towards reimbursement of expenses incurred on hospitalization. The insurance company repudiated the claim based on the certificate issued by the Vijaya Health Centre stating that the diseased was a known case of "chronic renal failure/nephropathy for a period of sixteen years" and this material fact had been suppressed at the time of taking the mediclaim policy. Being aggrieved, the appellant filed a complaint before the district consumer disputes redressal forum (the district forum). The district forum directed the respondent to pay the claimed amount with interest at 12 per cent from 1.4.1991, *i.e.* 3 months after the death of the insured till date of actual payment. The respondent was also required to pay Rs. 1,000/- as cost of litigation. Against this order, the respondent insurance company preferred an appeal before the state commission which allowed the appeal and set aside the order of the district forum. Being aggrieved by the order of the state commission, the appellant filed a revision petition before the national commission which dismissed the revision petition. Against this order, a special leave petition (SLP) was filed before the Supreme Court.

The Supreme Court after examining relevant provisions of law, the proposal form and other documents held that: (i) Section 45 of the Insurance Act, 1938 had no application to the present case as it was not applicable to mediclaim policy. (ii) When an information was asked for in the proposal form, an assured was under a solemn obligation to make a true and full disclosure of the information on the subject which was within his knowledge. This obligation to disclose extended only to facts which were known to the applicant and not to what he ought to have known. (iii) The term 'material facts' was not defined in the Act. Any fact which went to the root of the contract of insurance and had a bearing on the risk involved would be 'material.' (iv) The statement made by the insured in the proposal form (at No. 10: details of illness and no. 11 (details of treatment surgical) as to the state of the health as 'nil' (despite being chronic diabetic for 16

16 (2009) IV CPJ 8 (SC); (2009) 8 SCC 316.

years) was palpably untrue to his knowledge and (v) There was clear suppression of material facts in regard to the health of the insured and hence, the insurance company was fully justified in repudiating the insurance claim. The Supreme Court, accordingly, dismissed the appeal.

Surveyor's report

The significance of a surveyor's report in assessing the damage claimed by an insured and the extent to which such reports are allowed to influence the settlement of a claim was examined in the following cases. In *Venkateswara Syndicate* v. *Oriental Insurance Company Ltd*,[17] the prime issue raised before the Supreme Court was whether an insurance company was entitled to appoint and re-appoint surveyors one after another for assessing the loss/damages in a particular insurance claim. The firm, Venketeswara Syndicate, had taken a cotton ginning mill on lease, wherein cotton stocks were stored and insured for a sum of Rs. 1.98 crores through seven policies. The firm claimed that an accidental fire took place in the godown on the early hours of 24.8.1999 causing an estimated loss of Rs. 1.90 crores and hence submitted a claim for the said amount. The insurance company appointed a licenced surveyor for preliminary investigation, who submitted a report with an estimated loss of stock at Rs. 1,73,92,301. However, the report also stated that the number of bales and borahs lying in the godown and the actual quantity of lint damaged, needs to be confirmed from the accounts of the insured. Thereafter, the insurer appointed joint surveyors (as per section 64 UM (2) of the Insurance Act, 1938) who estimated the loss of stock at Rs.1,67,80,925. The insurer, being of the view that the report was perfunctory, appointed yet another surveyor who confirmed the quantification made by the joint surveyors. The insurer, not satisfied with the said report, again appointed a chartered accountant to give a fresh report who estimated the loss of stock at Rs. 1,05,00,817. When the insurer placed the said report before the joint surveyors for their opinion, they refused to agree with the findings, on the ground that the report did not fully cover the complete period till the date of fire accident. It is in this background that the firm filed a complaint before the national commission alleging deficiency in service on the part of insurer due to inordinate delay in settling the claim under the fire insurance policy and, hence, claimed a sum of Rs. 1,67,80,925 being the value of loss assessed by the joint surveyors along with interest @ 18 per cent from the date of fire accident till its realization.

The Supreme Court after analysing the provisions of section 64 UM (2) of the Insurance Act and the reports submitted by all the surveyors appointed by the insurer, came to the following conclusions:

17 (2009) III CPJ 81 (SC).

(i) There is no prohibition in the Insurance Act, 1938 for appointment of second surveyor by the insurance company, but while doing so, the insurance company has to give satisfactory reasons for not accepting the report of the first surveyor and the need to appoint second surveyor.

(ii) The Insurance Act only mandates that while settling a claim, assistance of a surveyor should be taken but it does not go further and say that the insurer would be bound whatever the surveyor has assessed or quantified.

(iii) If for any reason, the insurer is of the view that certain material facts ought to have been taken into consideration while framing a report by the surveyor and if has been not done, it can certainly depute another surveyor for the purpose of conducting a fresh survey to estimate the loss suffered by the insured.

(iv) The insurer has stated why the appointment of second surveyor was necessitated and also has given valid reasons for appointing second surveyor and assigned valid reasons for not accepting the report of joint surveyors.

(v) The option to accept or not to accept the report is with the insurer. If the rejection of the report is arbitrary and based on non acceptable reasons, the courts or other forums can definitely step in and correct the error committed by the insurer while repudiating the claim of the insured.

The court, following some of its earlier decisions,[18] partly allowed the appeal by directing the insurer to pay a sum of Rs. 1,05,00,817 with interest @ 9 per cent as compensation.

In *New India Assurance Co. Ltd* v. *Pradeep Kumar*,[19] the Supreme Court made it clear that although the assessment of loss by an approved surveyor was a pre-requisite for payment or settlement of a claim by the insurer, such a surveyor's report was neither the last and final word, nor so sacrosanct that it cannot be departed, as it is not conclusive. In the instant case the complainant was the owner of a heavy motor vehicle. It was insured for the period 8.11.1997 to 7.11.1998. The said vehicle loaded with potatoes, met with an accident on 29.9.1998 in Garhwal. The vehicle fell down into *khud*, 300 feet deep below the road. As a result of the accident, driver of the truck died. The complainant claimed the expenses incurred by him for repair of the truck from the insurance company and the interest paid by him to the State Bank of India, Uttarkashi from where he obtained loan for repair of the truck. On an appeal by special leave before Supreme Court,

18 *Secretary Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy* (1992) 1 SCC 508; *Ghaziabad Development Authority* v. *Balbir Singh* (2004) 5 SCC 65; *Kaushnuma Begum* v. *New India Assurance Co. Ltd.* (2001) 2 SCC 9.

19 (2009) IV CPJ 46 (SC).

the insurance company, heavily relying upon section 64-UM (2) of the Insurance Act, 1938, made three contentions, namely (i) the loss assessed by the approved surveyors appointed in view of the provisions of Section 64-UM was binding, and more so, in the absence of any evidence on record to establish that the loss assessed by the approved surveyors was not correct and justified; (ii) as per the scheme of the insurance, the loss caused to the vehicle had to be first assessed by approved surveyor and only thereafter the vehicle could have been repaired by the owner; (iii) the complainant failed to make out any case as to why the surveyor's report should be rejected; and (iv) the insurance company was not liable to indemnify for new parts.

The Supreme Court rejected the above contentions of the insurance company and dismissed the appeal observing as follows:

(i) The approved surveyors in their reports have recorded their satisfaction that the damages specified, to the said vehicle would have occurred in that mishap and also noted that the damages on the said vehicle were in conformity with the description of the accident mentioned in the claim forum and details of damages noted by the spot surveyor.
(ii) The vehicle was taken to the workshop by the complainant only after the survey was conducted by approved surveyor nominated by the insurance company for spot survey.
(iii) As per section 64-UM (2) of the Act, 1938 where the claim in respect of loss required to be paid by the insurer is Rs. 20,000/- or more, the loss must first be assessed by an approved Surveyor (or Loss Assessor) before it is admitted for payment or settlement by the insurer. However, as per the proviso to the said section, an insurer may settle the claim for the loss suffered by insured at any amount or pay to the insured, any amount different from the amount assessed by the approved Surveyor (or loss Assessor). In other words, although the assessment of loss by the approved Surveyor is a pre-requisite for payment or settlement of claim of twenty thousand rupees or more by the insurer, but Surveyor's report is not the last and final word, nor it is sacrosanct that it cannot be departed from, as it is not conclusive.

Another significant case involving a surveyor's report, which, on the contrary, was not accepted by the insurer, was *Oriental Insurance Company* v. *Ozma Shipping Company Ltd*.[20] In this case, the Ozma Shipping Company, owner of a sailing vessel, insured the vessel for a sum of Rs. 21.50 lacs by paying quarterly (14.12.1989 to 13.3.1988) premium of Rs. 40,832.50 and

20 (2009) IV CPJ 1 (SC).

further extended the insurance cover for a quarter (14.3.1988 to 13.6.1988) by paying a premium of Rs. 30,383. The vessel while sailing from Beypore to Kavarati, sank with loaded cargo on 23.4.1988. When the shipping company lodged a claim, the insurance company deputed a surveyor to carry out the spot survey. On a report from the surveyor, the insurance company agreed to settle the claim at Rs. 15 lacs. Against this, the shipping company raised the contention that they were entitled to receive the entire insured amount of Rs. 21.50 lacs with interest @ 18 per cent. The insurance company on the contrary argued that the valuation report of the surveyor of the shipping company was not correct as the value of the vessel was not more than Rs. 15 lacs and further that the insurance coverage was obtained for a higher sum insured than the actual cost by deliberately concealing the material facts. Dealing with the contentions of both the parties, the Supreme Court while dismissing the appeal, observed:

(i) When the valuation of the vessel had been carried out by the surveyor of the insurance company, who came to the conclusion that the value of the vessel would be Rs. 21.50 lacs then the insurance company should not hesitate to pay the amount which is legitimately due to the complainant, hence, the National Commission is fully justified in directing the insurance company to pay the value of the vessel at Rs. 21.50 lacs with interest @ 12 per cent per annum.

(ii) The insurance companies, in genuine and *bona fide* claims of the insurers should not adopt the attitude of avoiding the payments on one pretext or the other.

(iii) The insurance companies would be able to save enormous litigations costs and the interest liability if they adopt honest approach and attitude.

Jurisdictional issues

In *Sigma Diagnostics Ltd.* v. *United India Insurance*,[21] the apex court decided the issue whether the national commission was competent to decide a dispute on merit and to determine the quantum of compensation. In this case, an appeal was filed before the national commission, seeking a direction for enhancement of compensation awarded by the state commission at the rate of 50 per cent of the price of an equipment, along with the customs duty of the newly purchased equipment and such other amount admissible under the insurance policy with an interest @ 9 per cent and cost of Rs. 5,000/-. The national commission dismissed the appeal on the ground that it cannot entertain a matter relating to quantum of compensation claimed, and further suggested that the complainant may

21 (2009) III CPJ 75 (SC).

approach civil court for enhancement of compensation, in case the parties fail to take steps for arbitration within six weeks. When the matter came up before the Supreme Court, it was held that when the national commission disposed of the complaint on merit, it also had a duty to decide the appeal on merit as well. Accordingly, the matter was remanded to the national commission for disposal on merit as per law.

Interpretation of statute/document

In *Vikram Greentech (I) Ltd.* v. *New India Assurance Co. Ltd.*,[22] while dealing with interpretation of an insurance contract, the court clarified that a court's endeavor towards such interpretation should not venture into extra-liberalism resulting in re-writing the contract/substituting the terms not intended by the parties.

In this case, the appellant insured company submitted a proposal to the insurance company on 18.1.1996 for a comprehensive floriculture insurance of poly-house for cultivation and harvesting of flowers. The insurance company issued a comprehensive floriculture insurance policy on 23.1.1996 for the period from 18.1.1996 to 17.1.1997. On 23.5.1996, according to the insured, there was a severe storm/cyclone, which caused damage to the floriculture extensively and to the roofs and walls of the poly-houses substantially. The floriculture project of the insured and the poly-clothes and the roofs as well as walls of the poly-houses were extensively damaged in another storm/cyclone that occurred on June 18/19, 1996, including collapse of certain poly-houses completely. A claim for Rs. 31,17,140/- and Rs. 38,97,906/- was submitted by the insured with the insurance company towards loss suffered due to first and second storm/ cyclone, respectively. The surveyors appointed by the insurance company assessed the loss suffered at Rs. 28,85,243 and Rs. 34,81,214 in respect of the first storm and second storm/cyclone, respectively. Based on the factual error pointed by the insurance company, (poly-houses covered under the policy is 1 to 6 only against 9 poly-houses considered by surveyors) the surveyors submitted revised reports and reduced the assessment of loss to Rs. 4,77,355/- and Rs. 95,443/-, respectively. Based on the above, the insured alleged deficiency of service by the insurance company in not settling the claim and sought a direction to the insurance company to settle claims in full and pay interest on due amount. The insurance company, on the other hand, argued that the claim due to damages to poly-houses 7, 8A and 8B was not admissible, as these poly-houses were not in existence at the time of taking insurance policy. However, it admitted that the policy covered poly-houses 1 to 6. Based on the contentions made by both parties, the Supreme Court ruled that: (i) The insured cannot claim anything more than what is covered by the insurance policy; (ii) Document like proposal form is a commercial document and being an integral part of policy,

22 (2009) II CPJ 24 (SC).

reference to proposal form may not only be appropriate but rather essential; (iii) The surveyors report cannot be taken aid of nor can it furnish the basis for construction of a policy; (iv) The submission made by the insured that all poly-houses including 7, 8A and 8B were covered under the policy as they were in existence at the time of calamity that occurred on 23.5.1996 and 18-19 June, 1996. The court accordingly dismissed the complaint with regard to claim for loss to poly-houses.

In *New India Assurance Co. Ltd.* v. *Zuari Industries Co. Ltd.*,[23] the Supreme Court in a landmark judgment observed that the court cannot add words to a statute/document. The complainant, respondent had taken two insurance policies from the appellant, one of which one was a fire policy and the other was consequential loss due to fire policy. On 8.1.1999, there was a short circuit in the main switch board installed in the sub-station receiving electricity from the state electricity board, which resulted in a flashover producing over-currents. As a result, the entire electric supply to the plant was stopped and due to the stoppage of electric supply, the supply of water/steam to the waste heat boiler by the flue gases at high temperature continued to be fed into the boiler, which resulted in damage to the boiler. The claims submitted by the respondent were rejected by the appellant insurance company. The appellant contended that the loss to boiler and other equipments was not caused by fire but by the stoppage of electric supply due to the short circuiting in the switch board and that the proximate cause has to be seen for settling an insurance claim, which in the present case, was the thermal shock caused due to stoppage of electricity. Since the national commission allowed the said claims, an appeal was preferred before the Supreme Court. The Supreme Court after elaborately referring to the surveyor's report, the provisions of the insurance policy, the documents submitted by insurance company and a series of international judgments and judgment of the Indian courts, determined the meaning of the term 'proximate cause' and arrived at the following conclusions while dismissing the appeal:[24]

(i) The insurance company admitted before the National Commission that it was the flashover/ fire which started the chain of events which resulted in the damage.

23 (2009) IV CPJ 19 (SC).

24 See *Lynn Gas and Electric Company* v. *Meriden Fire Insurance Company,* 158 Mass 570 : 33 NE 690 : 1893 Mass LEXIS 345; *Krenie C. Frontis et al.* v. *Milwaukee Insurance Company,* 156 Conn. 492 : 242 A.2d 749 : 1968 Conn. LEXIS 629; *Farmers Union Mutual Insurance Company* v. *Blankenship,* 231 Ark. 127 : 328 S.W. 2d 360 : 1959 Ark. LEXIS 474 : 76 ALR 2d 1133; *Leyland Shipping Company Limited* v. *Norwich Union Fire Insurance Society Limited* (1917) 1 KB 873; *Yorkshire Dale Steamship Company Ltd.* v. *Minister of War Transport (The Coxwold) (*1942) AC 691 : (1942) 2 All ER 6; Lancashire and Yorkshire Accident Insurance Company [1909] 1 KB 591; *General Assurance Society Ltd*. v. *Chandmull Jain,* AIR 1966 SC 644.

(ii) There is no direct decision of the Supreme Court on this point, as to the meaning of the proximate cause, but the prominent view among the decisions of foreign courts appears to be that the proximate cause is not the cause which is nearest in time or place but the active and efficient cause that sets in motion a train or chain of events which brings about the ultimate result without the intervention of any other force working from an independent source.

(iii) Furthermore, the duration of the fire was not relevant. As long as there was a fire which caused the damage the claim is maintainable, even if the fire was for a fraction of a second.

(iv) The term 'fire' in clause (1) of the fire policy 'C' is not qualified by the word 'sustained.' Hence, "the court cannot add words to statute or to a document" and must read it as it is.

(v) A perusal of fire policy revealed that the word used therein is 'fire' and not 'sustained fire' and hence, the stand of the insurance company is not acceptable.

Insurance cover period

In *Deokar Exports Pvt. Ltd.* v. *New India Assurance Company Ltd.*,[25] the effective period of an insurance cover in view of the date of receipt of premium was determined by the Supreme Court. In this case, the complainant, Deokar Exports Pvt. Ltd., imported a de-hydration machine financed by Maharashtra state finance corporation (MSFC). The machine was insured by the complainant with the New India assurance company, the insurer, through MSFC, against the risk of fire for the period 12.9.1986 to 11.3.1998. Nearly six months after the expiry of the policy on 25.8.1988, MSFC sent a cheque for Rs. 3,135 on behalf of the complainant for renewal of the policy. A formal stamped receipt was issued by the insurer confirming the receipt of the cheque on 26.8.1988. The insurer through its letter dated 7.4.1989 informed the complainant that it had received the premium amount from MSFC, but without the mandatory standard form, and hence expressed its inability to issue the fire insurance policy. A standard proposal form was also thereby issued to the complainant along with the aforementioned letter. The said form duly filled and signed was delivered to the insurer on 16.6.1989 with a request to provide the insurance cover for the period 12.3.1988 to 12.9.1989. But the insurer instead issued an insurance policy dated 30.6.1989 extending the insurance cover for a period of one year, beginning from 26.8.1988 to 25.8.1989 as against the insurance cover period demanded. The insurer sent the insurance policy to MSFC which, on receipt of the same, neither raised any objection about the period of cover nor renewed the policy beyond 25.8.1989. Nearly five

25 (2009) I CPJ 6 (SC).

months after the expiry of the policy, the machine was damaged in a fire accident on 10.2.1990. The complainant filed a claim for Rs. 26,91,139 with the insurer on 17.2.1990, with regard to the said damage. The insurer rejected the claim on the ground that there was no insurance cover in existence on 10.2.1990. The complainant's application before the national commission was dismissed on the ground that the complaint involved decision on complex issues of fact and hence appropriate remedy was by way of suit. Accordingly, a suit was filed claiming Rs. 26,91,130 towards damages to the machine before the trial court which upheld the contention of the complainant that the insurance cover could only be prospective, *i.e.* for a period of one year from the date of issue of the policy 30.6.1989 and, therefore, the machine must be deemed to have been insured on 10.2.1990, the day when the fire accident occurred.

On appeal to the Supreme Court, a reference to section 64VB of the Insurance Act, 1938 which provides that no risk can be assumed unless premium is received in advance. The court having regard to the bar contained in section 64-VB of the Act, observed that the insurer could not accept the request of the complainant to grant insurance cover with retrospective effect from a date prior to 26.8.1988 when it received the premium. The Supreme Court further observed that the insurer adopted the standard, logical and obvious course of issuing the insurance policy with effect from the date on which it received the premium amount by cheque, *i.e.* with effect from 26.8.1988. It was also pointed out that the premium paid was for one year and the standard term of fire policy was also one year, hence the policy was issued assuming risk for the period 26.8.1988 to 25.8.1989. It was also noted that when the policy was sent by the insurer to MSFC, neither did it protest or object to the policy being issued for a wrong period nor did it return the policy to the insurer with a request to make it prospective from the date of the policy period. The Supreme Court, therefore, held that the insurer cannot be made liable for the loss which occurred on account of a fire accident on 10.2.1990. It further held that the complainant cannot have the choice of propounding a concluded contract with a modification neither proposed nor agreed to by either party. In view of this, the Supreme Court declined to interfere with the judgment of the Bombay High Court.

Jeweller block policy

The apex court in *New India Assurance Co. Ltd.* v. *Abhilash Jewellery*[26] had the opportunity to determine the scope of term "employee" used in the contract of insurance and, in particular, to decide whether it would also include an apprentice. In this case, the respondent had a business establishment in the state of Kerala. It took a jeweller's block policy for Rs. 1,15,00,000. During the currency of the said policy, the respondent filed a

26 (2009) III CPJ 2 (SC).

claim with the appellant inurer for the loss of some gold ornaments weighing 587.870 grams. As per section 11(a) of the insurance policy, the property was insured while in the custody of the insured, his partner or his employees. Hence, the claim was repudiated by the insurance company on the ground that the loss of gold was occasioned as it was in the custody of an apprentice, who was not an employee. On a complaint filed by respondent, the national commission going by definition of the term 'employee' as under the Kerala Shops and Commercial Establishment Act, the Employees' State Insurance Act and a few other enactments, held that an apprentice was an "employee." Against the said order of the national commission, an appeal was filed before the Supreme Court which, setting aside the decision of the national commission, observed as under:

(i) The present case falls solely under the contract of insurance which undoubtedly uses the word employee. However it does not say that the word 'employee' in the contract of insurance will have the same meaning as referred to in the Kerala Shops and Commercial Establishments Act or the Employees State Insurance Act or any other enactment.
(ii) The term 'employee' as defined under various enactments indisputably includes an apprentice but that is only an extension of the word 'employee.'
(iii) Since the contract of insurance in the instant case is silent on the term employee, one has to give it the meaning which it has in common parlance. Therefore an apprentice is a trainee and not an employee. So even if he is given a stipend that does not mean that there is a master- servant relationship between the firm and the apprentice.

III MEDICAL NEGLIGENCE

The Supreme Court during the year under survey had occasion to decide several important cases involving medical negligence. The cases covered in this survey, *inter alia* include (a) death related cases wherein negligence stood proved as well as not proved and (b) allegation of improper handling of, and treatment to, the patients by the doctors, hospitals and nursing homes, *etc*. The important issues raised before Supreme Court, *inter alia*, included (i) admissibility of medical opinion in criminal trial vs. proceedings before the national commission, (ii) status of expert evidence, (iii) civil liability under tort law *vis-à-vis* consumer protection law, (iv) right of patient to be informed about the nature of disease and the kind of treatment to be provided, (v) individual liability of doctor, (vi) the duty and responsibility of doctors and hospitals on the one hand and the cooperative attitude and nature of patient and family members on the other, (vii) death caused to patient due to wrong (mis-matched) blood transfusion, (viii) method of calculation for award of compensation covering, *inter-alia*, cost

required for future treatment owing to irreparable damage caused to patient due to negligence of doctors, *etc.*

Cases where negligence proved

In *Post-Graduate Institute of Medical Education and Research, Chandigarh* v. *Jaspal Singh*,[27] Harjit Kaur, wife of the complainant, received accidental burns on March 1996, due to which she was admitted in PGI, Chandigarh. A senior resident doctor, department of plastic surgery attended to her. The condition of the patient started improving at PGI. On 15.5.1996, she was transfused A+ blood which was her blood group. However, on 20.5.1996, the patient was transfused B+ blood group which was against her blood group of A+. On the same night, the urine of the patient was reddish like blood and the attendant nurse was informed accordingly. The next day again one more bottle of B+ blood group was transfused to the patient. Because of transfusion of mismatched blood, the condition of the patient became serious; her haemoglobin levels fell, urea level went very high, and the kidney and liver of the patient got deranged. The condition of the patient started deteriorating day by day and ultimately she died on 1.7.1996.

The PGI's contention before the Supreme Court was that the cause of death of Harjit Kaur was septicemia and not mismatched blood transfusion. The PGI relied upon two of its earlier decisions, namely *Jacob Mathew* v. *State of Punjab*[28] and *Martin F. D'Souza* v. *Mohd. Ishfaq*.[29] Dealing with the contention the Supreme Court held that: (i) The available material placed before the state commission showed that at the time of her admission, Harjit Kaur was taking medicine orally and passing urine; 75 percent of eschar was removed by 1.5.1996; (ii) The condition of the patient had substantially improved at PGI before 20.5.1996 and she had no signs of septicemia; (iii) It was only after mismatched blood transfusion B+ on two consecutive days, *i.e.* 20th and 21st May, 1996, that the patient became anemic (her hemoglobin level was reduced to 5 per gram) and her kidney and liver were deranged; (iv) It was true that the patient's hemoglobin was brought up in few days but her condition otherwise got deteriorated; (v) Although she survived for about 40 days after mismatched blood transfusion but from that it could not be said that there was no causal link between the mismatched transfusion of blood and her death; (vi) Wrong blood transfusion was an error which no hospital/doctor exercising ordinary care would have made. Such an error was not an error of professional judgment but in the very nature of things, a sure instance of medical negligence; (vii) The hospital's breach of duty in mismatched blood transfusion contributed to her death, if not wholly, but surely, materially; (viii) Mismatched blood

27 (2009) II CPJ 92 (SC).
28 (2005) III CPJ 9 (SC).
29 (2009) I CPJ 32 (SC).

transfusion to a patient having sustained 50 percent burns by itself speaks of negligence.

In view of above, the Supreme Court concluded that the death of Harjit Kaur was caused by the breach of duty on the part of the hospital and its attending staff. It accordingly dismissed the appeal filed by PGI along with the award of cost of litigation.

Again, the Supreme Court in *B. Jagdish* v. *State of A.P.*,[30] while examining the basic issue of medical negligence, held that when two conflicting opinions are expressed, one in favour of the affected patient (deceased) and another in favour of the doctor who treated the patient, which one would prevail, is a question to be determined by the trial judge considering the evidence advanced by the parties in the entirety. In this case, a seven year old child vomited while in school and taken to a child specialist doctor, running a private hospital. A blood test conducted twice disclosed abnormal increase in white blood cells. The child specialist diagnosed the disease as tuberculosis and prescribed the medicines accordingly. However, the child continued vomiting more frequently and developed high fever too. On consultation, the child specialist advised to continue the same line of treatment as given earlier. Thereafter, the child was taken to the hospital on many occasions but the child specialist doctor on each occasion informed that there was nothing to worry. Finally, when the condition of the child deteriorated, another specialist doctor was called by the child specialist. The new specialist diagnosed that the child was suffering from leukemia which was in an advanced stage and that her liver was enlarged. Hence, he advised the girl to be taken to apollo hospital wherein the diagnosis of the new specialist was confirmed and it was also informed that the chance of survival of the girl was bleak. She finally breathed her last on 10.11.2000. A complaint was filed against the doctor alleging deficiency in service before the Andhra Pradesh state commission. He also filed a private complaint under section 200 of the Cr PC. The state commission found the appellant to be negligent in performance of the professional services to the deceased child and, therefore, awarded damages of Rs.4,00,000/-. The appellant then filed an application for quashing of order issuing summons to him in the criminal matter before the High Court. The court dismissed the petition. The appellant then filed an appeal before the Supreme Court. On appeal, the Supreme Court, made a reference to two of its earlier decisions, namely *Suresh Gupta (Dr.)* v. *Govt. of NCT of Delhi*[31] and *Jacob Mathew* v. *State of Punjab*.[32] Based on the facts and evidence adduced, the Supreme Court, dismissing the appeal, made the following observation:

30 (2009) I CPJ 18 (SC).
31 (2004) III CCR 69 SC; (2004) 6 SCC 422.
32 (2005) III CPJ 9 (SC); (2005) 6 SCC 1.

(i) The civil liability of the doctor and others having been determined, it may not be relevant to consider the charges of criminal negligence on their part on the touchstone of standard of proof required for proving a case of criminal negligence as the same would fall for consideration at the hands of the Trial Court at an appropriate stage.

(ii) It is now a well settled principle of law that at the stage of quashing of an order taking cognizance, an accused cannot be permitted to use the material which would be available to him only as his defence. In his defence, the Court would be left to consider and weigh materials brought on record by the parties for the purpose of marshalling and appreciating the evidence.

(iii) The jurisdiction of the Courts, in this case is limited as whether a case of reckless, gross negligence has been made out or not which will depend upon the facts of each case.

(iv) It cannot be said that the materials brought on record by the complainant, even if given face value and taken to be correct in their entirety, do not disclose an offence. The reason for forming such an opinion is due to two opinions expressed one in favour of the complainant patient and another in favour of doctors.

Cases where negligence not proved

The Supreme Court in *Martin F. Dsouza* v. *Mohd Ishfaq*[33] laid down the broad principles to be followed whenever a complaint was received against a doctor or hospital from consumer *fora* or criminal courts alleging medical negligence. The court further warned the police officials not to arrest or harass doctors unless the facts clearly fell within the parameters laid down in *Jacob Mathew* case, otherwise, the policemen themselves have to face legal action.

Mohd. Ishfaq, the complainant, who was suffering from chronic renal failure, was referred by the director, health services, to Nanavati hospital, Mumbai, for kidney transplantation. At that stage, the complainant was undergoing haemodialysis twice a week on account of chronic renal failure. Initially, the complainant, suffering from high fever, refused to get admitted to the hospital despite repeated requests made by the doctors. However, later on he agreed and got admitted. The complainant was investigated for renal package, ESR and urine analysis. The report on renal package showed high levels of creatinine and blood urea. ESR was expectedly high in view of renal failure and aneamia infection. The urine culture reports showed severe urinary tract infection. After examining the blood culture report, which showed a serious infection of the blood stream, the complainant was administered Amikacin injection for three days, since the urinary infection was sensitive to Amikacin. Thereafter, cap. augmentin was administered

33 (2009) I CPJ 32 (SC).

three times a day for blood infection and the complainant was transfused one unit of blood during dialysis. Despite an advice to the contrary, the complainant got discharged from hospital with suggested injections twice a day. On a complaint made at hamodialysis unit by the complainant that he had slight tinnitus ringing in the ear, he was advised to stop taking the Amikacin and Augmentin. However, the complainant continued with the Amikacin. The complainant thereafter was not under the treatment of Nanavati hospital. However, on his own accord, he took treatment for transplantation with Prince Aly Khan hospital. It is worth mentioning that the complainant did not complain of deafness while under treatment at the said hospital and dialysis unit. The complainant, after the said treatment, filed a complaint against the doctor and Nanavati hospital claiming compensation of Rs. 12 lacs for his hearing having been affected.

After referring to the application of medical principles and decisions relating to medical negligence, the Supreme Court, on the one hand, clarified that doctors and nursing homes/hospitals need not be unduly worried about the performance of their functions and, at the same time, cautioned that every doctor should, in his interest, carefully read the aforesaid code of medical ethics which is part of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 issued by Medical Council of India. In the light of the aforesaid principles of medical negligence and the landmark decisions substantiating the same, the court concluded that the order passed by the national commission was not sustainable for the following reasons:

(i) The complainant already had high Blood Creatinine, Blood Urea and low Haemoglobin before the injection of *Amikacin*. He also had high fever which was on account of serious blood and urinary tract infection. The doctor was of the view that the complainant's infection could only be treated by injection of *Amikacin*, as *Methenamine Mandelate* could not be used due to his chronic renal failure.

(ii) On the complainant complaining of slight tinnitus or ringing in the ear, the doctor immediately reviewed the treatment and asked the complainant to stop injection *Amikacin* and *Cap. Augmentin*. However going against the directions from the doctor, the complainant continued taking the forbided injection *Amikacin* on his own.

(iii) On a complaint received over phone stating that complainant was once again running high fever, the doctor had immediately advised him urgent admission to the said hospital, which again the complainant refused to comply with and said that he would go elsewhere.

(iv) From the above facts it was evident that the doctor was not to be blamed in any way and it was the non-cooperative attitude of the complainant and his continuing with the *Amikacin* injection inspite

of the advice of the doctor to stop it which was the cause of his ailment, *i.e.* the impairment of his hearing. A patient who does not listen to his doctor's advice often has to face the adverse consequences.

(v) The complainant was already seriously ill before he met the doctor. There was no evidence to prove that the doctor was in any way negligent, rather it appeared that the doctor did his best to give good treatment to the complainant to save his life but the complainant himself did not cooperate.

(vi) Furthermore as per the opinion of the expert doctor from the All India Institute of Medical Sciences, (AIIMS) the Doctor was not guilty of medical negligence and rather wanted to save the life of the complainant.

(vii) While the complainant stated that he became deaf (in June 1991), most of the doctors who filed affidavits before the Commission have stated that they freely conversed with him in several meetings much after the said complaint was made. Merely because there was impairment in the hearing of the complainant that does not mean that the doctor was negligent. The doctor was desperately trying to save the life of the complainant, which he succeeded in doing. Life is surely more important than side effects.

(viii) The National Commission, which consists of laymen in the field of medicine, had sought to substitute its own view over that of medical experts, and had practically acted as super-specialists in medicine. Moreover, it had practically brushed aside the evidence of expert from AIIMS whose opinion was sought on the commission's own direction, as well as the affidavits of several other doctors (referred to above) who have stated that the doctor acted correctly in the situation he was faced.

(ix) The courts and consumer fora are not experts in medical science, and must not substitute their own views over that of specialists. It is true that the medical profession has to an extent become commercialized and there are many doctors who depart from their Hippocratic oath for their selfish ends of making money. However, the entire medical fraternity cannot be blamed or branded as lacking in integrity or competence just because of some bad apples.

Applying the aforesaid principle the Supreme Court held that the doctor was not guilty of medical negligence. In addition to the abovementioned conclusion, it also issued the following directions:

a. Whenever a complaint is received against a doctor or hospital from a consumer forum (whether District, State or National) or from a criminal court, then before issuing notice to the doctor or hospital against whom the complaint was made the consumer

forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed to, and only after that doctor or committee reports, that there is a prima facie case of medical negligence should a notice be then issued to the concerned doctor/ hospital.

b. The police officials shall not arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew's* case (*supra*), otherwise the policemen will themselves have to face legal action.

Malay Kumar Ganguly v. *Sukumar Mukherjee*,[34] depicts a well contested case between two highly qualified medical expert groups, one of the expert groups being the victim and affected party and another being a team of medical experts (the medical service providers). Further, the case involves one of the highest compensation claims to the extent of Rs.77,76,73,500 under the Act. In this case, when the patient, Anuradha, a child psychologist by profession from Colombia University, along with her husband, a doctor by profession, engaged in research on HIV/AIDS over 15 years in USA visited Calcutta (India) for a vacation, developed fever along with skin rash. A doctor was contacted, who after examination of the patient assured of a quick recovery and advised her to take rest but did not prescribe any medicine. As the skin rash reappeared more aggressively, the doctor was again contacted who administrated depomedrol injection 80 mg twice daily for three days. As the condition of the patient deteriorated rapidly from bad to worse despite the administration of the said injunction, she was admitted to the advanced medicare research institute (AMRI) wherein it was found by the attending doctors that the patient had been suffering from erithima plus blisters. As the condition of the patient continued to deteriorate further, she was shifted to Breach Candy Hospital wherein she breathed her last after 10 days. The husband of the deceased, apart from filing criminal case and lodging a complaint in the West Bengal Medical Council filed a complaint against the doctor before the Supreme Court. The court laid down the following principles for determination of compensation:

(i) Grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitution in interregnum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong as held in the case of *Livingstone* v. *Rawyards Coal Co.*[35]

34 (2009) 9 SCC 221 : (2009) 3 CPJ 17 (SC).
35 AIR 1880 AC 25.

(ii) When a death occurs the loss accruing to the dependent must be taken into account, the balance of loss and gain to him must be ascertained the position of each dependent in each case may have to be considered separately as held in the case of *Davis* v. *Powell Duffrya Associated Collieries Ltd*[36] and *Gobald Motor Service Ltd., Allahabad* v. *R.M.K. Veluswami.*[37]

(iii) A wife's contribution to the family in terms of money can always be worked out. Every housewife makes contribution to his family. It is capable of being measured on monetary terms although emotional aspect of it cannot be. It depends upon her educational qualification, her own upbringing, status, husband's income etc.

(iv) While fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (a) medical attendance, (b) loss of earning of profit up to the date of trial, (c) other material loss. So far non-pecuniary damages are concerned, they may include (a) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future, (b) damages to compensate for the loss of amenities of life which may include a variety of matters *i.e.* on account of injury the claimant may not be able to walk, run or sit, (c) damages for the loss of expectation of life i.e., on account of injury the normal longevity of the person concerned is shortened and (d) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life. These principles are laid down by Supreme Court in the case of *R.D. Hattangadi* v. *Pest Control India.*[38]

The national commission, therefore, was directed to follow the aforesaid principle for determining the compensation. The Supreme Court finally concluded that the attending doctors at AMRI were negligent but not to the extent of being guilty of commission of an offence under section 304A of the IPC. Accordingly, the court directed the AMRI and Dr. Mukherjee to pay a cost of Rs. 5 lacs and Rs. 1 lac, respectively.

36 AIR 1942 AC 601.
37 AIR 1962 SC 1.
38 AIR 1995 SC 755.

Allegation of improper treatment

In *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhananka,*[39] the complainant, Prasant S. Dhananka, then 20 years of age and a student of engineering who had been suffering from recurring fever, visited Nizam Institute of Medical Sciences (NIMS) on 9.9.1990. He was advised to undergo an ultrasound guided biopsy for neurofibroma, an innocent tumour, when several tests did not show any lesion, the patient was referred to a cardio thoracic surgeon, under whose advice complainant was admitted to the hospital and the tumour was excised after an operation on 23.10.1990. Immediately after the surgery, the complainant developed acute paraplegia with a complete loss of control over the lower limbs, and some other related complications, which led to prolonged hospitalization and he was ultimately discharged from the hospital on 19.5.1991 completely paralyzed with no change in his sensory deficit. The discharge record also showed that the patient required continuous physiotherapy and nursing care on account of infection of the urinary tract and the development of bed-sores, *etc.*

The complainant filed a complaint of negligence before the national commission on the part of the cardio thoracic surgeon making NIMS vicariously liable and made a total claim of Rs. 4,61,31,152 including the amount paid to various hospitals, since he was and is a severely handicapped person and confined to a wheel-chair. The national commission directed NIMS to pay a total compensation of Rs.14 lakhs to the complainant and compensation of Rs.1.5 lakhs to the complainant's parents jointly, within a period of 2 months from the date of receipt of the order failing which interest at the rate of 15 per cent *per annum* shall become payable by opposite party no. 1 until the date of payment. It also imposed costs of Rs. 25,000 on opposite party no. 1. Thereupon, two appeals were filed in the Supreme Court against the order of the national commission by NIMS disowning any liability and by the complainant asking for an enhancement of compensation.

While determining compensation to the complainant and his parents, the Supreme Court referred to *Harjot Ahluwalia (Minor)* v. *Spring Meadows Hospital*[40] wherein it was held that the parents of the child having hired the services of the hospital, were also the consumers within the meaning of section 2(1)(d) of the CP Act, and (ii) that they would also be entitled to the award of compensation due to negligence of doctors and the hospital. The court examined three issues raised under the three broad parameters adopted by the national commission, the alleged negligence before, during and after the operation. The first issue considered was that of diagnosis. The court, after carefully examining as well as independently evaluating the findings of negligence, arrived at by the national commission by duly and

39 (2009) II CPJ 61 (SC).
40 (1998) I CPJ 1 (SC).

exhaustively referring to medical documents, records and articles, had observed as under:

> These observations do undoubtedly justify an excision biopsy but equally support the case of the complainant inasmuch that his case too was that had an MRI been performed, the extent of the tumour and its extension into the spinal cord would have been revealed.

In view of the above, the Supreme Court held that complete investigations prior to the actual operation had not been carried out. The second question as to whether the required consent for the excision of the tumour had been taken from the complainant or his parents, it observed that since in the written submissions which had been filed, a copy of the consent form of NIMS had been appended but not the actual consent taken from the complainant, a presumption was raised against the NIMS and the attending doctors. The Supreme Court further opined that the consent given by the complainant for the excision biopsy could not, by inference, be taken as an implied consent for a surgery save in exceptional cases, as held by the Supreme Court in *Samira Kohli* v**.** *Dr. Prabha Manchanda.*[41] In this case, the following issues were raised before Supreme Court on implied consent by patient:

(i) Whether informed consent of a patient is necessary for surgical procedure involving removal of reproductive organs? If so, what is the nature of such consent?
(ii) When a patient consults a medical practitioner, whether consent given for diagnostic surgery can be construed as consent for performing additional or further surgical procedure - either as conservative treatment or as radical treatment - without the specific consent for such additional or further surgery.

The court answered the issues as under:

a. Consent in the context of a doctor-patient relationship, means the grant of permission by the patient for an act to be carried out by the doctor, such as a diagnostic, surgical or therapeutic procedure. Consent can be implied in some circumstances from the action of the patient. For example, when a patient enters a dentist's clinic and sits in the dental chair, his consent is implied for examination, diagnosis and consultation. Except where consent can be clearly and obviously implied, there should be express consent.

41 (2008) 2 SCC 1.

b. The next question as to whether in an action for negligence/battery for performance of an unauthorized surgical procedure, the doctor can put forth as defence the consent given for a particular operative procedure, as consent for any additional or further operative procedures performed in the interests of the patient.

The Supreme Court noted that any implied consent for the excision of the tumour could not be inferred. It added that the broad principles under which medical negligence as a tort have to be evaluated, have been laid down in the landmark case of *Jacob Mathew*.[42] In this case, it was observed that "the complexity of the human body, and the uncertainty involved in medical procedures is of such great magnitude that it is impossible for a doctor to guarantee a successful result and the only assurance that he can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence." In view of above, the court concluded as follows:

1. Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty," "breach" and "resulting damage."
2. Negligence in the context of the medical profession necessarily calls for a treatment with a difference. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

42 (2005) 6 SCC 1.

3. A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession.

The Supreme Court ruled that in a case involving medical negligence, once the initial burden has been discharged by the complainant by making out a case of negligence on the part of the hospital or the doctor(s) concerned, the onus shifts on to the hospital or to the attending doctor(s) and it is for the hospital to satisfy the court that there was no lack of care or diligence. The court noted that the complainant was a highly qualified individual and was gainfully employed as an IT engineer and that as per his statement he was earning a sum of Rs. 28 lakh per annum though he was about 40 years of age. The very nature of the work of the complainant required him to travel to different locations but as he is confined to a wheel-chair he was unable to do so, on his own. His need for a driver-cum-attendant was, therefore, made out. The complainant had worked out the compensation under this head presuming his working life to be upto the age of 65 years. In the opinion of the court, a period of 30 years from the date of the award of the national commission, would be a reasonable length of time. A sum of Rs. 2,000/- per month for a period of 30 years needs to be capitalized. Accordingly, the court awarded a sum of Rs. 7.2 lakh under this head. The complainant had also sought a sum of Rs. 49,05,800/- towards nursing care, *etc*. as he was unable to perform even his daily ablutions without assistance. The complainant had computed this figure on the basis of the salary of a nurse at Rs. 4375/- per month for 600 months. The court, however granted a sum of Rs. 4,000/- per month to the appellant for a period of 30 years making a total sum of Rs. 14,40,000/-. The complainant had further sought a sum of Rs. 46 lakhs towards physiotherapy, *etc*. at the rate of Rs. 4,000/- per month. The court reduced the claim from Rs. 4,000/- to Rs. 3,000/- per month and award this amount for a period of 30 years making a total sum of Rs. 10,80,000/-. Keeping in view the need for continuous medical aid which would involve expensive medicines and other material, and the loss towards future earnings, *etc*. the court directed a lump sum payment of Rs. 25 lakhs under each of these two heads making a total of Rs. 50 lakhs. In addition, the court directed a payment of Rs. 10 lakh towards the pain and suffering that the complainant had undergone. The total amount thus computed worked out to Rs. 1,00,05,000 which was rounded off to Rs. 1 crore plus interest at 6 per cent from 1.3.1999 to the date of payment, giving due credit for any compensation which might have already been paid.

In *C.P. Sreekumar (Dr.)* v. *S. Ramanujam*[43] the complainant an employee in Indian Overseas Bank, Chennai met with a road accident leading to an injury to his leg and was admitted to the Surya Hospital for treatment. On 31.12.1991, an x-ray of the leg revealed a hairline fracture of the neck of the right femur. The doctor, with a view to immobilize the leg put the patient's leg in a plaster of paris bandage. Another x-ray taken on 8.1.1992, at the insistence of the complainant as a prelude to his discharge, revealed that the simple hairline fracture had developed to a more serious fracture. The doctor after considering various options available, performed an operation on 10.1.1992 on the injured leg, *i.e.* hemiarthroplasty instead of going for the internal fixation procedure, mainly keeping in mind the condition of the patient and bone. When the sutures were removed on 21.1.1992, it was observed that a superficial infection had set in and hence, the patient was made to undergo physiotherapy and was finally discharged on 5.2.1992. A complaint was filed by the complainant alleging medical negligence and deficiency in service as the simple fracture had got displaced to a more complicated one an account of mishandling by the hospital staff as also in the choice and manner of surgery demanding a compensation of Rs. 3 lacs. The doctor on the contrary denied all the allegations and further pointed out that the displacement of the fracture had come about on account of natural causes, *i.e*. muscular spasm and the patient had duly consented to the said hemiarthroplasty treatment after being informed about various lines of treatment available. While the complaint was pending, the complainant underwent a total hip replacement on 24.4.1995 at Tamil Nadu hospital, Chennai and moved an application before state commission for enhancing the compensation upto Rs. 12 lacs. Based on rival claims, the following three issues were taken up for consideration by the Supreme Court for consideration:

(i) Whether the Doctor who gave the treatment had the competence to perform a hemiartheoplasty and whether he had chosen this procedure as he was not qualified for the internal fixation procedure,
(ii) Whether there was negligence on the part of doctor, hospital, ward boy and the labour, who are said to have taken the patient to the x-ray department which aggravated the situation necessitating more radical treatment, and
(iii) Whether hemiartheoplasty was the appropriate one in the light of the fact that the respondent was 42 years of age at the relevant time.

i. There is absolutely no evidence to back the claim as the doctor had about 15 years of experience in the filed of orthopedics, hence, ruled that the first claim that the

43 (2009) II CPJ 48 (SC).

doctor lacked expertise in performing the internal procedure is not acceptable.

ii. The Supreme Court by referring to the *Jacob Mathew's* case ruled that a mere averment in a complaint which is denied by the other side (doctor in this case) can, by no stretch of imagination, be said to be evidence by which the case of complainant can be said to be proved. Accordingly, the second claim was also gone against the complainant for want of evidence to prove the allegations.

iii. After thoroughly examining the issue, extensively referring various relevant texts the court observed that the condition of the patient and of the bone would be the relevant determining factors in the choice which the doctor wishes to make. Accordingly the court ruled that the doctor's decision in choosing hemiartheoplasty with respect to the patient of 42 years of age was not palpably erroneous or unacceptable so as to dub it as a case of professional negligence.

The court accordingly dismissed the appeal.

In *Ramesh Chandra Agrawal* v. *Regency Hospital*,[43a] the complainant, a teacher by profession, on approaching Regency hospital for check-up was diagnosed as a patient of T.B. infection that had spread till his vertebra. After an operation was carried out on the spinal cord as per the advice of the doctors, the condition of the complainant deteriorated further and it was revealed from MRI scan that the operation was not successful as it was not done at the right level. Even the second and third operation carried out did not give the complainant required relief and the treatment left him handicapped due to his legs being rendered useless and loss of control over his bladder movement. The complainant alleged negligence and carelessness on the part of hospital's treating him and claimed a sum of Rs. 22 lacs with interest @ 24 per cent towards compensation. The main contention raised before Supreme Court by complainant was that the registry of national commission had not sent the documents furnished by the complainant to the expert and, therefore, the expert could not offer his opinion. As a result, the complainant was denied the benefit of having an opinion of expert which would have proved his case before the commission. The court, made a specific note of the expert opinion, which was based on the original records furnished by assistant registrar, national commission. The court, thereafter, through examination of the case and relevant provisions of Indian Evidence Act, 1872 (section 45) dealing with expert opinion, held that the principles of natural justice required that a fair opportunity should be given to the

43a (2009) 9 SCC 709.

complainant affected by medical treatment to prove his claim based on the report of expert opinion of doctor based on treatment of all related records. The Supreme Court allowed the appeal and directed the registrar of the national commission to forward all records of treatment filed by complainant to the same expert doctor for his expert opinion on the basis of records of treatment and affidavit filed by both the parties within two months from the date the records were made available to him. Additionally, the national commission was requested to pass fresh order as per law on receipt of the expert opinion.

IV PROPERTY RELATED CASES

The cases covered in this survey with respect to property disputes broadly related to (a) allotment and auction of properties and (b) re-allotment of plots/alternate allotments. The cases that came up before the Supreme Court involved issues like (i) non-delivery of plot to the allottee, (ii) status of treatment of old allottees *vis-à-vis* re-allottees, (iii) failure to communicate the acceptance of allotment of plot/flat and the effect thereof, (iv) government's indulgence in unnecessary litigation in cases where negligence/wrongs by government officials had been proved beyond doubt, (v) legality of interest awarded in favour of allottee on account of non-development and non-delivery of plot.

Allotment/auction of property

In *Raj Dulari* v. *State of* Haryana,[44] one Raj Dulari, an employee of Haryana government, made applications for allotment of a plot under the government employee's quota as well as under the general category. The Haryana urban development authority (HUDA) selected her for allotment of plot under the general category in the draw of lots as well as under the government employees' quota. As per rule, a person cannot have allotment of more than one plot, hence, she opted to retain the allotment of plot under the general category, and accordingly, requested for cancellation of allotment of plot under the government employees quota. The HUDA, cancelled the general category allotment of plot and refunded the sum deposited as earnest money for the plot. The appellant accepted the cancellation of the allotment of plot under the impression that she will get under the government employees quota. One of the requirements of confirmation of allotment of plots under the government employees quota was production of an integrity certificate from the employer within 90 days from the date of allotment. As a criminal case was pending against her, she could not get the certificate within 90 days, however, she obtained the same after the conclusion of the criminal proceedings and submitted the same to HUDA. The allotment of plot in her favour was not confirmed even

44 (2009) I CPJ 23 (SC).

thereafter, and hence, she approached the High Court for relief after expiry of 90 days. The High Court dismissed the writ petition filed by the petitioner on the ground that the petitioner not having produced the integrity certificate within 90 days from the date of allotment was not entitled to the plot. The order of High Court was challenged before Supreme Court in an appeal by special leave. While dealing with the case, the Supreme Court held:

(i) The cancellation of allotment of plot under general category was on the assumption that the petitioner was allotted plot under government employees quota. If the petitioner was not entitled to an allotment under government employees quota, she was entitled for the same under the general category, hence that could not have been cancelled.
(ii) In the present case, it may not be just and proper to deny the plot to the petitioner, in spite of having been allotted plots, both under the general category as well as government employees quota.
(iii) The HUDA should accept the belated production of Integrity Certificate and confirm the allotment of plot to the appellant.
(iv) In view of the delay on the part of the petitioner in production of Integrity Certificate, HUDA will be entitled to charge for the plot, the price prevailing on 21.8. 2000 (the date of production of such Certificate) instead of the allotment price applicable in 1994-95.

Accordingly, the Supreme Court allowed the appeal and directed the HUDA to allot plot under the government employees quota subject to payment by petitioner on the price applicable as on 21.8.2000.

The Supreme Court in *U.T. Chandigarh Administration* v. *Amarjeet Singh*,[45] *inter alia* clarified that in cases where an existing site is placed under public auction for selling or for lease, any such purchaser/lessee shall not be termed as a 'consumer' and also the owner of the said site cannot be referred to as a trader or service provider. The court also made it clear that any grievance by such a purchaser/lessee would not give rise to a complaint or consumer dispute under the CP Act.

In the instant case, the UT Administration, Chandigarh filed an appeal before Supreme Court on the ground that the procedure of auction of sites involved neither sale of goods nor rendering of any service and, therefore, neither the successful bidder can be termed as a consumer nor can the UT Administration, Chandigarh be termed as a 'service provider.' The Supreme Court in approval with UT Administration, Chandigarh, held that in cases where existing sites are put up for sale or lease by public auction by the owner, and the sale/lease is confirmed in favour of the highest bidder, the

45 (2009) II CPJ 1 (SC).

resultant contract relates to sale or lease of immovable property. The court further held that neither there is hiring or availing of services by the person biding at the auction, nor is the seller or lessor, a trader who sells or distributes goods. It was also opined that the sale price or lease premium paid by the successful bidder of a site is the consideration for the sale or lease, and not consideration for any service or for provision of any amenity or for sale of any goods. The court further held that once, with open eyes, a person participates in an auction, he cannot thereafter be heard to say that he would not pay the balance of the price/premium or the stipulated interest on the delayed payment, or the ground rent, on the ground that the site suffers from certain disadvantages or on the ground that amenities are not provided. The court, accordingly, allowed the appeal preferred by the UT Administration, Chandigarh.

The question as to whether non-delivery of a plot by a trust, in lieu of another plot decreed against the trust to the complainant cooperative society, amounts to "unfair trade practice" within the meaning of section 2(r) of CP Act was the issue in dispute in *Ludhiana Improvement Trust, Ludhiana* v. *Shakti Co-operative House Building Society Ltd.*[46] In the year 1970, the Ludhiana improvement trust, formulated model town extension scheme part-II and initiated proceedings for acquisition of land in certain villages. The land owned by shakti co-operative housing society (complainant) was notified as part of land proposed to be acquired. Based on representations made to the trust as well as the government, seeking exemption of their land from acquisition, the complainant society and others were granted exemption from acquisition. The request made by the complainant to the trust to allot plots to their members was turned down on the ground that, the complainant remained owner of their land due to the said exemption granted and the trust was not under any obligation to allot plots. However, the process for allotment of plots gained momentum after a new chairman took charge in the year, 1990. In the case of complainant society, as per condition of exemption, it could carve out plots in the area admeasuring upto 23,000 sq. yds., but the trust carved out 154 plots in 23,800 sq. yds. Out of these, 123 plots were given to the complainant society, including 25 plots in the land belonging to other societies and 3 plots on trust's land. The complainant society was not satisfied with this allotment, due to the fact that the trust had taken over the land of complainant society by acquisition and had promised to allot about 151 plots. Out of 151 plots, the possession of one plot was not given by the trust to complainant society on the ground that a suit, in respect of the private land, (plot no. 32) had been filed. The civil suit was decreed against the trust, hence, the complainant society requested the trust to allot alternative plot to them in lieu of plot no. 32. The trust, however, did not respond to this request. An appeal was moved before the Supreme Court alleging that

46 (2009) II CPJ 40 (SC).

the act of the trust amounted to an "unfair trade practice." Rejecting the contention, the court on the basis of the relevant provisions under Monopolies and Restrictive Trade Practices Act, 1969, observed that the exemption granted to the complainant did not contemplate that the trust was to allot plots to the members of complainant society whose land had been exempted from acquisition under the said notification. The court further held that in the instant case, the only obligation on trust was to ensure that the colony of the complainant comes up in consonance with the overall layout plan of the scheme. The court finally held that the non-delivery of plot no. 32 or an alternative plot did not amount to "unfair trade practice" on the part of the trust.

Can the development authority cancel an allotment of land if an allottee fails to comply with the requirements of an allotment letter specifically requiring communication of the acceptance of allotment along with payment of amount specified therein? This issue was raised before the Supreme Court in *Chaman Lal Singhal* v. *Haryana Urban Development Authority*.[47] The request by the complainant for allotment of residential plot was accepted by the HUDA by passing an allotment order for a plot in Gurgaon, measuring 135 sq.mt. at the rate of Rs.4843.8 per sq. mt. Alongwith this order, a request to send the acceptance letter was also sent to the complainant. Further, a sum of Rs.1,14,436 was requested to be remitted within 30 days and the remaining amount was requested to be paid on a *lump sum* basis without interest within 60 days or in six annual installments with interest at the rate of 15 per cent *per annum*. As the complainant neither sent the acceptance letter nor paid the required amount within the stipulated period, the HUDA cancelled the allotment made in the favour of the complainant and also forfeited the earnest money of 10 per cent as per the terms of allotment letter. The appeal preferred by the complainant before the chief administrator, HUDA and the revision petition, filed before revisional authority, government of Haryana, was dismissed. Furthermore, a representation made to the chairman, HUDA, as per the provisions of law, to condone the delay in depositing 15 per cent of the amount upto 150 days, was also rejected by the estate officer though not by the chairman, HUDA on the ground that the appeals has already been rejected by the authorities specified above. A writ petition was thereafter filed before the High Court of Punjab and Haryana, which was also dismissed. On appeal, the Supreme Court, upheld the cancellation of allotment letter and forfeiture of earnest money by HUDA for the reasons specified earlier. However, the Supreme Court was of the opinion that the disposal of representation before the chairman, HUDA, for condonation of delay beyond 150 days, by the estate officer was not proper. Based on the above facts, the Supreme Court set aside the order of the High Court and remanded the matter to the chairman,

47 (2009) I CPJ 59 (SC).

HUDA for expeditious consideration of the said representation in accordance with law.

Re- allotment/alternate allotment

In the case of *Ghaziabad Development Authority* v. *Ramesh Chandra Pandiya*,[48] the Supreme Court clarified that where a beneficiary agrees to pay the prevailing allotment price for allotment of a plot against the earlier demand to pay the original price allotment, the allotment authority should accept the same. In this case the Ghaziabad Development Authority (GDA) allotted a plot at Nehru Nagar for Rs.37,842 to the complainant, Ramesh Chandra Pandiya, but later cancelled the same on the ground that the latter had failed to take possession. The allotment of plot, however, was restored based on a request made by complainant but subject to payment of restoration fee and a condition that the complainant will not seek change of plot. The complainant, however, applied for allotment of an alternate plot on the ground that the municipal authorities had laid a sewer line on the plot allotted to him and also that some part of the said plot was encroached. Based on the request, an alternative plot was allotted at *Vaishali* at a price of Rs. 3,39,179, after adjustment of earlier payment of Rs. 56,820 at the rate of Rs. 1400 per sq. mt. The complainant filed a complaint against this order of GDA seeking a direction to GDA to deliver the *Vaishali* plot at the original price of allotment which comes to Rs. 226 per sq. mt. and also for payment of an interest by the GDA on the amount deposited earlier by the complainant for the Nehru Nagar plot towards damages. The complaint was allowed by the state commission. However, the court reversed the direction of the state commission and held that the complainant was entitled to retain the *Vaisali* plot only at the rate of Rs. 1400 per sq.mt. less the amount already deposited for *Nehru Nagar* plot. Further, the court directed the complainant to refund the interest amount of Rs. 1,09,160 received by him from the GDA as per directions from the state commission.

In *Haryana Urban Development Authority* v. *Raje Ram*,[49] the district forum directed payment of interest by the development authority on the amount deposited with them towards allotment and also directed handing over of possession of plot in respect of re-allottees on the basis that the original allottees were paid interest for the same. On an appeal, the Supreme Court ruled that the cases of re-allottees cannot be compared with cases of original allottees who were made to wait for a decade or more for delivery and thus put to mental agony and harassment. In this case, three allottees who had deposited 25 per cent of the cost of the plot in the year 1986 were allotted one plot each by the HUDA. Subsequently, HUDA revised the price upward and gave an option to them to either accept the revised price or receive back the initial price with interest at the rate of 10 per cent *per*

48 (2009) I CPJ 53 (SC).
49 (2009) I CPJ 56 (SC).

annum. All the three allottees sought for transfer of plot to the name of other party(ies). These requests were accepted and plots were re-allotted subject to the payment of extension fee. The possession of the plots allotted, however, were not delivered, hence, three complaints were filed before district forum which directed the HUDA to pay interest at the rate of 18 percent, 15 percent and 18 percent, respectively, on the amounts deposited from the date of deposit till the date of offer of possession. On an appeal, the national commission, based on its decision rendered in *HUDA* v. *Darsh Kumar*,[50] upheld the award of interest at the rate of 18 percent in similar circumstances. It is in this background that the present cases came up before Supreme Court by way of appeals. The common issue raised in all these cases was whether interest could be awarded against HUDA, and if so, whether the rate of interest levied was excessive. The court did not accept the said rulings of the national commission and observed that:

> (W)here possession is given at the old rate, the party has got the benefit of escalation in price of land, therefore, there cannot and should not be award of interest on the amounts paid by the allottee on the ground of delay in allotment.

The court based on its own rulings in *Ghaziabad Development Authority* v. *Balbir Singh*,[51] and *Bangalore Development Authority* v. *Syndicate Bank*[52] opined that the award of interest was neither warranted nor justified in the present appeal. The Supreme Court accordingly held that the interest, if any, paid by HUDA to the re-allottees based on the direction of state commission is recoverable from the said re-allottees.

The Supreme Court through the case of *Urban Improvement Trust, Bikaner* v. *Mohan Lal*[53] sent a strong message to the government, its departments and functionaries that it should sensitise its officers to serve the public rather than justify their dictatorial acts and thereby avoid unnecessary litigation by becoming responsible litigants. In the instant case, the Bikaner urban improvement trust (Trust) allotted a plot (A-303) measuring 450 sq. ft. under its *Karni Nagar Scheme* to the complainant, in the year 1991, who paid the allotment price (lease premium) of Rs.3,443 in 1992 and took possession in 1997. In the year 1998, the trust allotted and delivered possession of the adjacent strip measuring 150 ft to the complainant. The trust, without notice to the complainant or resorting to any acquisition proceedings, laid a road in the said plot. The layout map was prepared and made available by the trust in the year 2002 without showing the existence of plot A-303 or its adjoining strip. The complainant filed a complaint praying for restoration of the plot or for allotment of an alternative site and award of damages of Rs. 2,00,000. When the matter was

50 (2004) III CPJ 34 (SC).
51 (2004) II CPJ 12 (SC).
52 (2007) II CPJ 17 (SC).
53 (2009) IV CPJ 42 (SC).

appealed in the court, serious concern was expressed upon the said act of the trust. The court observed:

(i) The statutory authorities exist to discharge statutory functions in public interest.
(ii) They cannot resort to unjust encroachment like in this case.
(iii) They are expected to show remorse or regret when their officers act negligently or in an overbearing manner.
(iv) When glaring wrong acts by their officers is brought to their notice, for which there is no explanation or excuse, the least that is expected is restitution/ restoration to the extent possible with appropriate compensation.
(v) The governments and statutory authorities should be model or ideal litigants and should not put forth false, frivolous, vexatious, technical (but unjust) contentions to obstruct the path of justice.

The Supreme Court referred to some of its earlier decisions, wherein the government or government departments and functionaries acted against the interest of citizens.[54] The Supreme Court finally refused to provide the required relief to the trust on the ground that it was trying to brazen out its illegal act by contending that the allottee should have protested when it illegally laid the road in his plot. The persistent, unreasonable and unjust stand by indulging in unnecessary litigation by approaching the national commission and to the Supreme Court was also condemned by the Supreme Court.

V JURISDICTIONAL MATTERS

Subject matter jurisdiction

The basic issue of jurisdictional competency of consumer *fora* to entertain a dispute pertaining to telephone disconnection and re-connection was raised before Supreme Court in *General Manager, Telecom* v. *M. Krishnan.*[55] In this case, the telephone connection provided to the complainant was disconnected due to non-payment of telephone bill. The Supreme Court, after examining the facts of the case, reiterated its view taken in *Chairman, Thiruvalluvar Transport Corporation* v. *Consumer Protection Council*,[56] that the national commission had no jurisdiction to adjudicate upon claims for compensation arising out of motor vehicles accidents and, therefore, allowed the appeal for the following reasons:

54 Reliance was placed on the decisions rendered in *Dilbagh Rai Jaxry* v. *Union of India* (1973) 3 SCC 554; *Madras Port Trust* v. *Hymanshu International by its proprietor* v. *Venkatadri (Dead) by L.Rs.* (1979) 4 SCC 17*; Bhag Sing* v. *Union Territory of Chandigarh though LAC, Chandigarh* (1985) 3 SCC 737.
55 (2009) III CPJ 71.
56 (1995) 2 SCC 479.

(i) When there is a special remedy provided under Section 7-B of the Indian Telegraph Act, 1885 regarding disputes in respect of telephone bills, then the remedy under the Consumer Protection Act by implication is barred.

(ii) It is well settled that the special law overrides the general law, hence, the High Court was not correct in its approach.

Territorial jurisdiction

The contentious issue connected with the amendment made under the CP Act with regard to territorial jurisdiction which came into force in the year, 2003 was examined in *Sonic Surgical* v. *National Insurance Company Ltd*.[57] The court also examined whether the said amendment could be made applicable to a case filed in the year 2000 whose cause of action arose in the year 1999. In the present case, the fire broke out in the godown of the complainant company at Ambala. The insurance policy was also taken at Ambala and the claim for compensation was also made at Ambala. Thus, no part of the cause of action arose at Chandigarh. While making their contentions, the company brought to the notice of the Supreme Court that the amendment made in section 17(2) of the CP Act in the year 2003, enabled filing of complaints before state commission, *inter alia,* in cases where the cause of action arises within its jurisdiction. The Supreme Court, after examining the facts, observed that the expression 'cause of action' means that bundle of facts which gives rise to a right or liability. The Supreme Court, in concurrence with the view taken by the Calcutta High Court in *IFB Automotive Seating and Systems Ltd*. v. *Union of India*[58] and placing reliance on its decision in *Union of India* v. *Adani Exports Ltd*.,[59] held that no cause of action arose at Chandigarh. The court, after analysing the pros and cons of the amendment, held that the amended section which came into force in the year 2003 did not apply to the present case as the aforesaid amendment came into force w.e.f. 15.3.2003 whereas the complaint in the present case had been filed in the year 2000 and the cause of action had arisen in the year 1999. It was observed thus:

i. If the contention of the company is accepted, it will mean that even if a cause of action has arisen in Ambala, then too the complainant can file a claim petition even in Tamil Nadu or Guahati or anywhere in India where a branch office of the Insurance Company is situated.

ii. The expression 'branch office' in the amended section 17(2) would mean the branch office where the cause of action has arisen.

57 (2009) IV CPJ 40 (SC).
58 AIR 2003 Cal. 80.
59 AIR 2002 SC 126.

The court also held that since the cause of action in this case arose at Ambala, the state commission, Haryana alone will have jurisdiction to entertain the complaint, and not the state commission, Chandigarh.

Jurisdiction under CP Act *vis-à-vis co*-operative societies Acts

In *M.D., Orissa Co-operative Housing Corporation Ltd.* v. *K.S. Sudarshan*; and *Chief Executive, Capital Cooperative Housing Ltd.* v. *Surendranath Sethee*,[60] the issue related to the jurisdiction of the consumer *fora* to entertain and try complaints under the CP Act when there was a bar to the jurisdiction of the civil courts under the co-operative societies Act to entertain any dispute between the co-operative society and its members. In this case, the complainant, K.S. Sudarshan had deposited a sum of Rs. 1,03,215/- with the Orissa cooperative housing corporation ltd (OCHC) but the possession of the plot, for which the said amount had been paid, was not delivered to him. Thereupon, the complainant approached the district consumer forum, wherein it was held that since the OCHC had abandoned the development work, there was deficiency in service by them. On appeal filed before the Supreme Court, it was held that there was no merit in the appeal and therefore dismissed the same. With regard to the question of jurisdiction of the consumer *fora* to entertain and try complaints under the CP Act when there was a bar under the co-operative societies Act to the jurisdiction of the civil courts to entertain any dispute between the co-operative society and its members, the Supreme Court placed reliance on its earlier judgment given in *Secretary, Thirumurugan Cooperative Agricultural Credit Society* v. *M. Lalitha (deceased) through L. Rs.*,[61] wherein the court, while dealing with a similar issue with reference to section 90 of the Tamil Nadu Co-operative Societies Act *vis-à-vis* the jurisdiction of the consumer forum under the Act, held that the remedy available to an aggrieved party under the CP Act being much wider in its scope, section 90 of the Tamil Nadu Co-operative Societies Act did not oust the jurisdiction of the consumer forum to adjudicate upon disputes between the members and the co-operative society under the said Act.

VI INTERPRETATION OF THE TERM 'CONSUMER' AND 'SERVICE PROVIDER'

Highest bidder in an auction sale is consumer

In *Madan Kumar Singh* v. *District Megistrate* Sultanpur,[62] the ambit of the term "consumer" under the CP Act was examined by the Supreme Court. The complainant, being the highest bidder in an auction sale of a truck for a sum of Rs. 70,000/- despite depositing the amount in two stages as per the terms and conditions of the bid, could get the physical possession of the

60 MANU/SC/1076/2009.
61 AIR 2004 SC 448.
62 (2009) IV CPJ 3 (SC).

truck only after six months and the related documents after a lapse of more than five years from the date of confirmation of the sale. The complaint filed before district forum was dismissed on the ground that he was not a consumer. The state commission confirmed the order. The national commission partly allowed the appeal by awarding damages to the extent of Rs. 25,000 along with cost of Rs.5,000/- in favour of the complainant. The Supreme Court, on appeal, after referring to the relevant provisions and examining facts was of the opinion that the complainant would fall within the category of 'consumer' as he had bought the truck for a consideration paid by him. The court further held that the buyers of goods or commodities for "self consumption" in economic activities in which they were engaged would also be 'consumers' as defined in section 2(1)(d) of the CP Act. Therefore, in the instant case, the purchase of the truck by the complainant would also be covered under the explanation to section 2(1)(d), *i.e*. "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment. In the said process, even if the complainant was to employ a driver for running the aforesaid truck, he will still be a 'consumer' under the Act as the said engagement of driver would not have changed the matter in any case and also the consumer would have contributed to earn his livelihood from it, of course, by means of self-employment.

Trader in shares is a 'consumer'

The term 'consumer' was again dissected by the Supreme Court in *Unit Trust of India* v. *Sri Shankar Das*.[63] to determine whether a trader in shares can be treated as 'consumer' within the meaning of section 2(1)(d) of the CP Act The complainant had applied for 750 units of master shares and remitted the money to unit trust of India. It appears that the master share units were not allotted in favour of the complainant and hence, he demanded refund of money alongwith interest. As the required relief was not granted, the complainant filed a complaint before state commission. The unit trust of India resisted the claim on the ground that the complainant being a trader in shares, cannot be treated as a 'consumer' within the meaning of section 2(1)(d). It further argued that the complainant wanted to acquire shares only with a view to sell them for profit, which, being a commercial transaction, is out of the purview of the Act. The Supreme Court pointed out that the word "trade" means an activity or occupation carried on continuously and regularly for the purpose of profit. A mere investment in shares for the purpose of earning dividends and for that matter earning profit on their sale as a solitary transaction cannot by any standard amount to "trading" in the commercial sense, as contemplated in section of the Act. Therefore, such trader in shares can be termed a 'consumer.'

63 MANU/SC/1074/2009.

School Educational Board is not a 'service provider'

In *Bihar School Examination Board* v. *Suresh Prasad Sinha*,[64] the relation between a school and its students was scrutinized so as to determine whether it would be the same as that of a 'service provider' and a 'consumer'. In the instant case, a student, Rajesh Kumar, appeared in the Bihar secondary school examination in 1998. He and another student Sunil Kumar Singh were allotted the same roll no. 496. Hence, the centre superintendent allotted to Rajesh Kumar Roll No. 496A and this was communicated to the board office at Patna. The result of Rajesh Kumar was not published inspite of several letters written by him. Hence, he had to re-appear the board examination in the following year, thereby losing one year, allegedly due to the fault of the board. Hence, the complainant prayed for compensation for the alleged loss of one year. The board resisted the complaint on the ground that the complainant was not a consumer and the consumer *fora* lacked jurisdiction on the subject matter. The Supreme Court, after referring to the definitions of 'service' and 'deficiency' under section 2(o) and section 2(g) of the CP Act, respectively, came to the conclusion that the following category of service availors will not be consumers: (a) Persons who avail any service for any commercial purpose; (b) Persons who avail any free service, and (c) Persons who avail any service under any contract of service. The court further held that a consumer was entitled to file a complaint under the Act if there was any deficiency in service provided or rendered by the service-provider. In this case, the board was a statutory authority established under the Bihar School Examination Board Act, 1952. The function of the board was to conduct school examinations which, *inter alia*, involved holding periodical examinations, evaluating the answer scripts, declaring results and issuing certificates. The process of holding examinations, evaluating answer scripts, declaring results and issuing certificates were different stages of a single statutory non-commercial function. It is not possible to divide this function as partly statutory and partly administrative. When the examination board conducts an examination in discharge of its statutory function, it neither offers its "service" to any candidate nor does a student, who participates in the examination conducted by the board, hires or avails of any service from the board for a consideration. The examination fee paid by the student is not the consideration for availing any service, but the charge paid for the privilege of participation in the examination. The Supreme Court further observed that the Act does not intend to cover discharge of a statutory function of examining whether a candidate is fit to be declared as having successfully completed a course by passing the examination. The fact that in the course of conduct of the examination, or evaluation of answer-scripts, or furnishing of mark-sheets or certificates, there may be some negligence, omission or deficiency, the same does not convert the board into a service-provider for

64 (2009) IV CPJ 34 (SC).

a consideration, nor convert the examinee into a consumer who can make a complaint under the Act. The Supreme Court accordingly held that the board was not a 'service provider' and a student who takes an examination is not a 'consumer' and consequently, complaint under the Act was not maintainable against the board in this case.

VII MATTERS RELATING TO LIMITATION PERIOD

The aspect of limitation period was examined by the Supreme Court in *State Bank of India* v. *B.S. Agricultural Industries.*[65] The complainant, B.S. Agricultural Industries, filed a complaint against state bank of India on 5.5.1997 claiming a sum of Rs. 2,47,154 towards litigation expenses and compensation along with interest at the rate of 12 per cent *per annum* for deficiency in service. The basis for the claim was that the complainant, carrying on the business of manufacturing and supply of engines and pump sets all over India, had sent seven bills worth Rs. 2,47,154 to the bank. The said bills were sent along with GRs of transporters for collection of payment and remittance of proceeds with a clear cut instruction to the bank to deliver the bills and GRs against payment to the drawee M/s Unique Agro Service and also charge interest at the rate of 24 per cent from 22.5.1994 if the documents are not retired by the drawee from the bank within 30 days of the presentation of the bills. The bank was further instructed to return the bills and GRs if the drawee did not retire the bills by 7.6.1994. Inspite of repeated requests from 15.3.1995 to 20.3.1997 and furnishing of legal notice dated 3.04.1997, the bank neither sent the said amount nor returned the above mentioned bills and GRs. Having no option left, the complainant filed a complaint to claim the amount as abovementioned. The bank resisted the claim mainly on the grounds that the complaint was clearly time-barred and beyond the period of limitation. The Supreme Court clarified the position of section 24-A of the CP Act, which prescribes limitation period, as under:

> The consumer forum must deal with the complaint on merits only if the complaint has been filed within two years from the date of accrual of cause of action and if beyond the said period, the sufficient cause has been shown and delay condoned for the reasons recorded in writing.

The Supreme Court after elaborately referring to some landmark decisions rendered with respect to the aspect of limitation period, *i.e.* section 24A of the Act, noticed that the bank raised the plea that the case

65 (2009) II CPJ 29 (SC).

was time-barred at the earliest opportunity.[66] As per the letter written by the complainant to the bank, the bank was instructed to return the documents if not honoured by drawee by 7.6.1994. Therefore, evidently the cause of action arose in favour of the complainant on 7.6.1994 when it did not receive the required relief, *i.e.* demand draft for Rs.2,47,157 and the documents. Accordingly, the complaint ought to have been filed two years therefrom, *i.e.* on or before 6.6.1996. The complaint was, however, filed much later, on 5.5.1997. Consequently, the court held the complaint to be clearly time-barred. The reply sent by the bank on 11.3.1997 to the complainant's letter dated 1.3.1997 asking the bank to send a copy of the complainant letter dated 4.5.1996 for necessary action cannot by any stretch of imagination be construed as acknowledgment of liability of the bank and accordingly limitation came to be extended by the said bank's reply dated 11.3.1997. The court, based on the above facts and circumstances, came to the findings that the complaint was time-barred and hence liable to be dismissed.

In *Mahesh Builders* v. *Sacheeta Co-op. Housing Society Ltd*,[67] the dispute cropped up when a decision was rendered by the national commission without hearing the affected party declaring the appeal as time-barred and thereby deciding it purely on the merits of the case was in the interest of justice. The national commission, without hearing the affected party's counsel on merit, passed the order holding that the appeal was barred by limitation by 240 days. The complainant contended that the office report had indicated that the first appeal was barred by 62 days, but in the body of the order the appeal had been held to be barred by 240 days. The Supreme Court, however, observed that it found nothing to indicate as to how the figure was arrived at by the national commission despite the office report. The court further observed that the matter was liable to be remanded back to national commission for disposal of appeal afresh on merits.

VIII DEFICIENCY IN BANKING SERVICES

In *Federal Bank Ltd.* v. *N.S. Sabastian*,[68] the Supreme Court was invited to determine whether losing of a cheque in transit by a bank would amount to a deficiency in service on the part of the bank, even in cases where a cheque is issued by an account holder without maintaining adequate balance in his account. In the instant case, the complainant working as a clerk in a bank, had introduced one M.P. Anil Kumar for opening a saving bank account. Later, the complainant presented a cheque drawn in his favour by

66 *Union of India* v. *British India Corporation* (2003) 9 SCC 50; *Haryana Urban Development Authority* v. *B.K. Sood* (2005) IV CPJ 1 (SC) : (2006) 1 SCC 164; *Gannmani Anasuya* v. *Parvatini Amarendra Chowdhary* (2007) 10 SCC 296.

67 2009) 1 CPJ 15 (SC).

68 (2009) III CPJ 3 (SC).

Anil Kumar for a sum of Rs. 9.85 lacs in the same branch of the bank for collection and crediting the same amount in his account. The cheque, sent for collection to bank branch, through M/s. Professional Couriers, was lost in transit. The manager of the bank informed the complainant that the cheque was lost in transit, and advised him to get a duplicate in lieu of the lost instrument. The complainant, instead of taking steps for obtaining the same, filed a complaint before the state commission, claiming Rs 9.85 lacs with interest @ 18 per cent *per annum*. The state commisssion, though declaining the claim of Rs 9.85 lacs, directed the bank to pay the interest @ 18 per cent *per annum* on the cheque amount. The order was further confirmed by the national commission. Through an appeal before the court, the *bona fides* of the complainant was questioned by the bank by alleging that on the date of issue of the cheque, the drawer had negligible amount of Rs. 112 in his account. The court, after perusing the facts of the case, allowed the appeal filed the bank and observed that since no amount was deposited by the drawer even after the issuance of cheque so as to honour the cheque, it was impossible for the complainant to get the amount credited in his account. Therefore, even if the cheque had not been lost in transit, the same would have been dishonoured due to insufficiency of funds. Further, on being informed that the drawer's account had a sum of less than Rs. 200 at the relevant time, the complainant neither resorted to the Negotiable Instruments Act nor did he take any action for recovery of Rs. 9.85 lacs, against Anil Kumar.

IX CONSUMER CLAIMS AGAINST EDUCATIONAL INSTITUTIONS

Quite apart from the *Bihar School* case[69] discussed above, *Buddhist Mission Dental College & Hospital* v. *Bhupesh Khurana*[70] is yet another landmark judgment wherein the Supreme Court laid down that the educational institutions offering courses by making false promise and assurance to prospective students through advertisement and prospectus regarding their affiliation with recognized universities and status of recognition shall have to pay huge compensation to the affected students if it was proved at a later stage that the said assurance and promise were falsely made. In this case, the *Buddhist Mission Dental College & Hospital (BMDCH)* invited applications for admission in the degree course of bachelor of dental surgery (BDS) by an advertisement in a national daily with a claim that it is a premier dental college of Bihar established and managed by the *Vishwa Buddha Parishad* under article 30 of the Constitution of India and also that the institution is under Magadh University, Bodh Gaya and recognized by the Dental Council of India, New

69 *Supra* note 64.
70 (2009) I CPJ 25 (SC).

Delhi and Patna. Believing the information incorporated in the said advertisement to be true, the complainants applied for admission in the academic session 1992-93. Despite the claim made in the advertisement that "no capitation fee" will be levied, the college took Rs. 1,00,000/- in cash from each of the complainant students at the time of admission. It further declined to issue receipts for the said amount paid by them. In addition to the above, the complainants had paid a substantial amount under various heads, *viz*. admission fee, tuition fee, development charges, *etc*. After several months, the complainants came to know that the institution was neither affiliated to the Magadh University nor it was recognized by the Dental Council of India. The complainants, after realizing the fact that there was no perceptible improvement on the above mentioned aspects despite all sorts of assurances made by BMDCH, filed a complaint against BMDCH. When the matter was placed before the court, BMDCH contended that the institute was not an industry and so the service rendered by it did not amount to deficiency in service within the meaning of section 2(1)(g) of the CP Act. They further contended that the students' allegation of unfair trade practice within the meaning of section 2(1)(r) against the institute was without any merit as imparting education cannot amount to trade and, therefore, the consumer forum lacks jurisdiction to deal with the complaint. The court, after considering rival contentions of both the parties, observed that it was an admitted position that BMDCH was neither affiliated with the Magdha University nor recognized by the Dental Council of India and without obtaining the affiliation, the BMDCH could not have started admissions in the four years degree course of BDS. The court held:

(i) Education is a service provided to the community, hence the University is an industry.
(ii) The complainant hired the services of the BMDCH for consideration and hence they are covered under the definition of 'consumer' under the Consumer Protection Act 1986.
(iii) This was a case of total misrepresentation on behalf of the institute which tantamount to unfair trade practice.
(iv) On payment of an amount as consideration the complainants were admitted to the BDS Course by BMDCH, which was neither affiliated nor recognized for imparting education. Therefore, such an act falls within the purview of 'deficiency' as defined in the Consumer Protection Act, 1986.

The court strongly felt that the BMDCH had virtually ruined the career of the students, who had thereby lost two of their valuable academic years. Therefore, court issued the following directions:

(i) The complainants' students would be entitled to compensation as directed by the National Commission.
(ii) In addition, BMDCH should:

a. Additionally pay compensation of Rs. 1 lakh to each of the complainant students.
b. Pay cost of litigation at Rs.1 lakh to each of the complainant students.
c. Pay the amount of compensation and costs within a period of two months.

X CONCLUSION

Even though the Supreme Court responded to the various needs for a balanced approach in cases of medical negligence, insurance, education, *etc.* but, as mentioned earlier, the number of insurance cases before the Supreme Court during this year was comparatively higher than those in the other areas. This is so inspite of setting up of the insurance regulatory development authority to handle insurance related matters. This is a cause of concern as this is not in line with the popular expectation that the burden on the Supreme Court should be reduced considerably in insurance related matters. The court also had the occasion to throw further light on medical negligence by bringing about a basic distinction between professional and medical negligence. The court clarified that though professional negligence may be pardoned, medical negligence is absolutely unpardonable. Further, the court deprecated the attitude of the government and its functionaries with regard to filing of unwanted litigation. The court directed that government and its functionaries should be ideal and model litigants so as to save the valuable time of the courts, in view of the high level pendency of cases in the courts. Finally, explaining whether the CP Act could be applied to solve disputes between students and universities, the apex court was of the opinion that when a school examination board conducts an examination in discharge of its statutory function, it neither offers any "service" to its students nor do the examinees hire or avail any service from such board in return for a paltry fee paid.