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CONSUMER PROTECTION LAW

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I INTRODUCTION

IN THE year 2010, the cases that came up before the Supreme Court centered around the basic issues pertaining to the ambit of the terms 'consumer', 'goods' and 'services', 'deficiency in service', 'defective goods', 'determination and prominence of cause of action', 'medical negligence', 'exercise of an alternative remedy', *etc*. Unlike the previous year, the Supreme Court this year had the occasion to examine and decide a matter relating to a consumer's rights in case of purchasing defective goods. Further, two interesting cases on the cause of action relating to medical negligence and insurance also come up before the apex court for a verdict, wherein the court clearly laid down the ground rules to be kept in mind while determining the issue of cause of action. Cases wherein deficiency had been claimed in banking services, housing, insurance, educational and health sectors, were scrutinized and resolved by the court.

It has been noted that cases claiming medical negligence continue to flock before the apex court which might be a cause of concern keeping in view the fact that medical attention and service is very essential and crucial for the mankind.

II CONSUMER

In 2010, through *Economic Transport Organization* v. *Charan Spinning Mills (P) Ltd.*,[1] the apex court examined and dissected the term 'consumer' to determine whether a subrogee can take the stand of being a 'consumer'. The respondent company (Charan Spining Mills) in the instant case had insured company's goods with an insurance company. Some goods of the respondent company got damaged during transit in the hands of appellant carrier. Thereafter, the insurance company settled the claim of the respondent company which in turn executed a letter of subrogation-cum-special power of attorney in favour of the insurance company. Subsequently, the respondent

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1 (2010) 4 SCC 114: JT 2010 (2) SC 271.

company and the insurance company filed a compensation claim under the Consumer Protection Act, 1986 (CP Act). Both the district consumer disputes redressal forum (District Forum) as well as the state consumer disputes redressal commission (State Commission), allowed the claim of the respondents, thereby holding deficiency in service on the part of the appellant. A revision petition was filed by the appellants before the national consumer disputes redressal commission (National Commission), which upheld the decisions of the lower foras. On appeal filed before the apex court, the basic issues were**:**

1. Whether the document ceases to be a subrogation and became an assignment, where the letter of subrogation executed by an assured in favour of the insurance company contains, in addition to words referring to 'subrogation', terms which may amount to an 'assignment';
2. Once the amount of loss was paid by the insurance company to the assured, can the insurance company as subrogee, lodge a complaint under the CP Act, either in the name of the respondent company, or in the joint names of the insurer and respondent company as co-complainants; and
3. Whether relief could be granted in a complaint against the carrier/ service provider, in the absence of any proof of negligence.

While dealing with the first issue, the court, examining the concept of subrogation, pointed out the difference between subrogation and assignment. It held that subrogation was an equitable assignment, which was inherent, incidental and collateral to a contract of indemnity which occurs automatically when the insurer settles the claim under the policy, by reimbursing the entire loss suffered by the assured, whereas, in the case of an 'assignment', there was transfer of a right by an instrument for consideration. In case of an absolute assignment, the assignor is left with no title or interest in the property or right, which is the subject-matter of assignment. Applying this demarcation to the instant case, the court held that there had been no complete transfer of right by the respondent company in favour of the insurance company. The appellants made a reference to *Oberai Forwarding Agency* v. *New India Assurance Co. Ltd.*,[2] wherein a distinction was made out between 'assignment' and 'subrogation' and it was held that where there was a subrogation *simpliciter* in favour of the insurer on account of payment of loss and settlement of the claim of the assured, the insurer could maintain an action in the consumer forum in the name of the assured who as consignor was a consumer. It was further held that when there was an assignment of the rights of the assured in favour of the insurer, the insurer, as an assignee, cannot file a complaint under the CP Act as it was not a 'consumer' under the Act. The

2 2002 (2) SCC 407.

court in the instant case partly disagreed to the aforementioned decision and held that the said decision was not correct insofar as it construed a letter of subrogation-cum-assignment as a pure and simple assignment, but to the extent it held that an insurer alone cannot file a complaint under the CP Act, the decision was held to be correct.

With respect to the second issue, the court made it clear that if the complaint was filed by the assured (who is the consumer), or by the assured represented by the insurer as its attorney holder, or by the assured and the insurer jointly as complainants, the complaint will be maintainable, if the presence of insurer is explained as being a subrogee. The court further made it clear that even though in pursuance of a contract of insurance, the respondent company had received the value of the goods lost, either fully or in part from the insurance company, it did not erase or reduce the liability of the wrongdoer responsible for the loss. Therefore, the respondent company, as a consumer, could file a complaint under the CP Act even after the insurer had settled its claim in regard to the loss.

In respect of the third issue, the court analysed the applicability of 'presumption of negligence' under section 9 of the Carriers Act, 1865 to consumer protection cases. Section 14(1)(d) of the CP Act provides that the payment of compensation to the consumer could only be provided for any loss or injury suffered by the consumer due to negligence of the opposite party. Treading on these lines, it was contended by the appellants that it was mandatory for the respondent company to establish negligence on the part of the appellant carrier. Refuting this contention, the respondent made a reference to section 9 of the Carriers Act, which provides that in any suit brought against a common carrier for the loss, damage or non-delivery of the goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery of goods was owing to the negligence or criminal act of the carrier, his servants or agents. Refuting this contention, the appellant submitted that the presumption of negligence under section 9 of the Carriers Act was applicable only to a civil suit, and not to a complaint under the CP Act which specifically contemplates the establishment of negligence by evidence. The court, however, held that presumption under section 9 of the Carriers Act was available not only in suits filed before civil courts but to other civil proceedings under other Acts as well.

III GOODS AND SERVICES

In *Birla Technologies Ltd.* v. *Neutral Glass and Allied Industries Ltd.*,[3] the basic issue examined by the court was whether a purchaser of a computer software for commercial purpose can be considered as a 'consumer' under the CP Act. The instant case involved the purchase of certain computer software developed by the appellant (Birla Technologies) for the respondent

3 (2011) 1 SCC 525.

specifically for taking care of the respondent company's financial accounting, production, marketing, purchase, pay roll and personnel system, *etc*. However, after a point of time, the respondent started complaining about the working of various modules of the software. Finally, the respondent filed a complaint against the appellant before the State Commission which accepted the appellant's preliminary objection that the respondent was not a 'consumer' as per the CP Act and dismissed the complaint. On an appeal before the National Commission, the order of the State Commission was reversed and it was held that though the respondent was not a 'consumer' as per the CP Act, as the goods sold were for commercial purpose, the respondent was still entitled to maintain a complaint under the CP Act with respect to deficiency in service during the one year warranty period with respect to the said goods. It further held that since the complaint was filed on 1.8.2000, *i.e.* prior to the amendment of section 2(1)(d)(ii) by the Amendment Act, 2002, a person hiring or availing of any services for a consideration was not excluded even though the services were availed for a commercial purpose. In that view, it proceeded to hold that if there was any deficiency in service during the warranty period, the complaint could be maintained before the consumer forum. However, during the trial, it was proved, without any rebuttal, that the complaint was in fact filed on 26.6.2003, *i.e*. much after the amendment to section 2(1)(d)(ii), by which the following words were added:

> [B]ut does not include a person who avails of such services for any commercial purpose.

Making a note of the findings of the National Commission and the arguments submitted by the counsel for the parties, the court was of the view that if the goods were purchased for commercial purpose of earning more profits, there could be no dispute that even the services offered which were hired or availed had to be for the commercial purpose. The court also made it clear that the whole error had crept in because of the wrong factual observation that the complaint was filed on 1.8.2000. On these lines, it was held that the complaint itself was not maintainable, *firstly*, on the count that under section 2(1)(d)(i) of the Act, the goods had been purchased for commercial purposes and, *secondly,* that the services were for commercial purposes.

IV DEFICIENCY IN SERVICE

Banking service

In *Managing Director, Maharashtra State Financial Corporation* v. *Sanjay Shankarsa Mamarde*,[4] the court was confronted with the issue as to whether the failure of the corporation to render 'service' could be held to give rise to a claim for recovery of any amount under the CP Act. In this case, the

4 AIR 2010 SC 3534.

complainant approached the corporation for sanction of loan for his hotel project at Amravati. The complainant's loan proposal was approved by the executive committee of the corporation on 27 May 1992, sanctioning a term loan of Rs. 30 lakhs. Additionally, it was also agreed that the loan amount would be disbursed depending on the progress of the work in accordance with a set time schedule. The progress of the construction work was required to be evaluated by the valuer approved by the corporation. According to the corporation, since they had learnt that there was a proposal for laying a railway line in Amravati which was likely to affect the hotel project and also that the complainant had defaulted in payment of the interests despite repeated requests by them, they did not release further installments of the loan sanctioned to the complainant. Having failed to get any favourable response from the corporation, the complainant filed a complaint with the National Commission. During the pendency of the complaint before the Commission, the corporation retraced their steps and proposed to renew the loan on certain conditions which were not acceptable to the complainant. The Commission had by then accepted the complaint and concluded that having sanctioned the loan and then stopping its disbursement without any cause amounted to deficiency in service on the part of the corporation.

It was contended by the corporation before the court that the Commission had exceeded its jurisdiction in examining the administrative decision of the corporation to recall the loan as it felt that having regard to the past conduct of the complainant it was not in the interest of the corporation to disburse the balance amount of loan to him. To corroborate this argument, reliance was placed on *U.P. Financial Corporation* v. *Naini Oxygen and Acetylene Gas Ltd.*,[5] wherein it was held that, unless the action of the corporation was held to be *mala fide*, even a wrong decision taken by it was not open to challenge as it was not for the courts or a third party to substitute its decision, however more prudent, commercial or business like it may be, for the decision of the corporation.

The court, after examining the materials on record and the factual scenario on that basis held that there was no shortcoming or inadequacy in the service on the part of the corporation in performing its duty or discharging its obligations under the loan agreement. It also held that fairness cannot be a one-way street. It further opined that where the borrower had no genuine intention to repay the loan and adopts pretexts and ploys to avoid payment like in the present case, it cannot make the grievance that the corporation was not acting fairly, even if requisite procedures had been followed.

Housing

In *Chandigarh Housing Board* v. *Avtar Singh,*[6] the court examined three widely mooted issues with respect to (i) housing societies, (ii) statutory bodies

5 (1995) 2 SCC 754.
6 JT 2010 (10) SC 360.

like housing boards and, (iii) the jurisdiction of the consumer forums to try such cases. The facts that led to this dispute are as follows. With a view to promote private housing and optimum utilization of the land in Chandigarh by constructing multi-storied structures, the Chandigarh administration invited applications to conduct survey to assess the demand as per a scheme (the 1991 scheme) from housing societies along with 25 per cent of the premium of land to be applied for as earnest money and proof that the society had sufficient funds and resources to pay the balance of premium of land and to undertake construction work on the land if allotted to them through the Chandigarh housing board. It was also made clear in the terms and conditions that the earnest money shall be refunded to the society, if any society cancels its demand before the allotment of land. Thereafter, the societies complied with the board's directive and deposited the amount after collecting the same from their members. Although the members of the societies paid the balance earnest money and 18 per cent interest, the board did not take effective steps for allotment of land to the societies. This naturally gave rise to an apprehension in their mind that they may have to wait indefinitely for getting the flats. Therefore, some of them including respondent no. 1 applied through their respective societies for refund of the amount paid by them by clearly indicating that they were no longer interested in the flats. The chief accounts officer of the board remitted the amount of earnest money to the societies after deducting 10 per cent in accordance with the instructions issued by the finance secretary. The members of the societies, who felt aggrieved by the action of the board to forfeit 10 per cent earnest money and of non-refunding the 18 per cent interest paid by them, filed complaints before the District Forum, which awarded refund of the earnest money to the complainants. This was subsequently upheld by State Commission and National Commission. Hence, an appeal was moved before the Supreme Court. The three major issues examined in this case were:

1. Whether the CP Act can be invoked in case of houses built by the housing boards;
2. Whether the members of the housing societies, are consumers within the meaning of the CP Act; and
3. Whether the forums can entertain a complaint in the matter of allotment of plot or construction of a flat by statutory authorities.

With respect to the first issue, the Supreme Court opined that when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or contractor. Therefore, any defect or deficiency in service would amount to be unfair trade practice as defined in the CP Act. Consequently, the court held that in case of any dispute regarding rendering of services as to the matter of construction of houses by the housing board, the CP Act can be invoked. The court further opined that the members of the societies had every right to complain against illegal, arbitrary and unjustified forfeiture of 10 per cent earnest money and non-refund of 18 per cent interest, since as per the 1991 scheme, they were

entitled to a refund of the earnest money without any deduction if it were to cancel the demand before allotment of land.

In regard to the second issue, the court made it clear that any beneficiary of the services hired or availed for consideration which has been paid or promised or partly paid and partly promised, is a consumer. Putting in plain words, the CP Act defines 'service' as service of any description which is made available to potential users and includes the provision of facilities in relation to banking, financing, insurance, transport, processing, supply of electrical and other energy, boarding or lodging, housing construction, entertainment, amusement, *etc*. Therefore, on these lines, the court observed that by making applications for allotment of land, the societies were deemed to have hired or availed the services of the Chandigarh administration and the housing board in relation to housing construction. And that if the scheme had been faithfully implemented and land had been allotted to the societies, their members would have been the actual and real beneficiaries. Therefore, the members were certainly covered by the definition of 'consumer' under the CP Act.

Moving on to the third issue, the court held that if a service was defective (*sic*) or it was not what was represented then it would be unfair trade practice as defined in the Act. It was further opined that such disputes or claims were not in respect of immoveable property but deficiency in rendering of service of a particular standard, quality or grade. Accordingly, if such authority undertakes to construct building or allot houses or building sites to citizens of the state either as amenity or as benefit, it amounts to rendering of service and will be covered in the expression 'service made available to potential users'. Therefore, the court observed that the consumer forums were competent to take up a complaint in the matter of allotment of plot or construction of a flat by statutory authorities.

Payment of compensation

Moving to the aspect of compensation, in cases where there is deficiency of service, the court in *The Chairman-cum-Managing Director, Rajasthan Financial Corporation* v. *Commander S.C. Jain (Retd.)*,[7] had the occasion to examine the issue as to whether compensation can be granted even in cases where no deficiency in rendering the service to a consumer, had been proved. In this case, the appellant corporation cancelled the loan availed by the respondent due to repeated failures on part of the respondent to submit details of correct bills. The appellant corporation had repeatedly requested the respondent to submit the correct bills of the purchase of the machinery in order to disburse the amount sanctioned for the machinery but the respondent repeatedly acted fraudulently in providing the bills and receipts to the appellant corporation. The District Forum and State Commission dismissed the

7 AIR 2010 SC 1604.

claim of the respondent holding that there had been no deficiency in service on the part of the corporation as it was wrong on the part of respondent to present wrong bills. On a revision petition filed before the National Commission, it was held that appellant corporation was not deficient in rendering services as per the loan agreement. However, it went on to award compensation with interest to the respondent due to the loss suffered by them in their business. On an appeal, the Supreme Court clarifying the issue held that compensation under the CP Act can be awarded only when the consumer forum is satisfied that there is 'deficiency' in service provided or defect in the goods sold.

Education

Controller, Vinayak Mission Den.Col. v. *Geetika Khare*[8] was yet another case involving the claim of deficiency in service. The respondent in this case had secured admission to a BDS college which was established and run by the appellant but had to withdraw from the same on account of lack of recognition of the said college and also other deficiencies, which as per the respondent's contentions, not only caused inconvenience and mental harassment but also resulted in the loss of an academic year. Therefore, the respondent filed a complaint against the appellant alleging deficiency in service and seeking not only refund of fee paid for the course but also a compensation for the loss of an academic year and mental harassment, *etc*. The State Commission allowing the complaint passed an *ex parte* order in favour of the respondent. Aggrieved, the appellant approached the National Commission, which partly allowed the appeal and reduced the compensation.

On appeal, the Supreme Court noted that during the pendency of the appeal before the National Commission, the appellant as per directions from the Commission had deposited the amount received by it, towards fee from the respondent with interest and the respondent had withdrawn the same. So the only issue that remained for consideration was whether any further amount was payable to the respondent. The appellant contended that the impugned order of the State Commission was an *ex parte* order and that there was no evidence on record to suggest that the respondent had suffered any prejudice or inconvenience on account of her having taken admission in the dental college of the appellant. After considering the submissions and the materials on record, the court was of the opinion that since the fee amount was already paid to the respondent, no further amount was required to be awarded to the respondent.

8 (2010) 2 SCR 779.

V MANUFACTURING DEFECT

In *C.N. Anantharam* v. *Fiat India Ltd.,*[9] the court had the occasion to decide a claim by a consumer for replacement of a vehicle purchased and refund of the cost of the same. In this case, immediately after registration of the vehicle, the petitioner had taken the new vehicle out for a drive when certain defects, particularly in the engine, began to manifest. The same day, the petitioner left the vehicle with the dealer for removing the defects. On the very same day, the respondent dealer/agent wrote back to the petitioner stating that the vehicle was in good condition and the noise was on account of the operational characteristics of the engine. Thereafter, on several occasions, the petitioner left the vehicle with the agent and various parts, including the engine itself, were completely replaced. The petitioner, however, was not satisfied with the performance of the vehicle and came to the conclusion that the vehicle had inherent defects and could not be repaired. He, accordingly, insisted that the vehicle be replaced with a new vehicle or the amount paid by him as sale price be refunded, together with expenses incurred in trying to rectify the defects in the vehicle. On filing a complaint before the National Commission, the respondents were directed to deliver the vehicle to the petitioner after having the same properly checked by an independent technical expert who would have to certify that the vehicle was free from any defect when it was delivered. Not satisfied with this order, the petitioner filed an appeal before the apex court.

The basic issue before the court was whether the respondents (manufacturing company and by extension dealer/agent) were under any compulsion to replace the vehicle itself when the engine of vehicle, from which certain noises were allegedly emanating had been replaced. Alleging deficiency of service, on the part of the respondents, the petitioner placed reliance on the decision rendered in *Indochem Electronic* v. *Addl. Collector of Customs*[10] wherein it was held that when the deficiency began to manifest themselves, it was the duty of the suppliers to attend to such deficiencies immediately and if the supplier was unable to attend to the deficiencies and malfunctioning of the system soon after installation, it would amount to "deficiency of service". The respondents, in the instant case, refuting this contention, submitted that the manufacturer company went to the extent of even replacing the engine and parts of the gear box to give the petitioner complete satisfaction. It was further contended by the respondent that an agent of a vehicle manufacturer cannot be made liable for the defects, if any, in the vehicle.

Having considered various submissions and after examining the facts and records, the court observed that, except for mere 800 kilometers, petitioner had

9 AIR 2011 SC 523.
10 (2006) 3 SCC 721.

not used vehicle after it was delivered and had made several complaints in an attempt to prove that there were manufacturing defects in vehicle. Further, apart from complaint relating to noise from engine and gear box, there was no other major defect which made the vehicle incapable of operation, particularly when the engine was replaced with new one. On this ground, the court held that if the independent technical expert was of opinion that there were inherent manufacturing defects in the vehicle, the petitioner will be entitled to refund of price of vehicle and lifetime tax and EMI along with interest @ 12 per cent per *annum*.

VI ACCRUAL OF CAUSE OF ACTION

Medical negligence

The *Dr. V.N. Shrikhande* v. *Mrs. Anita Sena Fernandes*,[11] though a case of medical negligence, raised the basic question of cause of action. In this case, the petitioner claimed compensation for medical negligence committed by a doctor nine years prior to the filing of the complaint. Through this case, the court put forth the significance of determining the cause of action in medical negligence cases and also had the occasion to examine the application of the *discovery rule*.

In the instant case, the respondent, a nurse by profession, complained of pain in abdomen. She was advised by a pathologist to consult the appellant. After examining the report of the pathologist, which revealed that the respondent had stones in her gall bladder, the appellant performed 'Open Cholecystectomy' on 26.11.1993. The respondent was discharged from the appellant's hospital on 30.11.1993. For the next about 9 years, the respondent neither contacted the appellant nor consulted any other doctor, despite the fact that after the surgery she was having pain in her abdomen, off and on, for which she was taking painkillers and she had to remain on leave at regular intervals. In September, 2002, the respondent was admitted in the hospital and C.T. scan of her abdomen was done on 23.9.2002, which revealed a well-defined rounded mass showing predominantly peripheral enhancement in the left lobe of liver. On being advised by the doctors, the respondent got herself admitted in the hospital and was operated by one Dr. P. Jagannath on 25.10.2002. After the operation, Dr. P. Jagannath submitted a report stating that "Several gauze pieces aggregating to 5.5x5.2cms are also received alongside and adherent gauze pieces are also present embedded within the mass…. DIAGNOSIS: GAUZE PIECES WITHIN A MASS IN EPIGASTRIC REGION ADHERENT TO LIVER - FOREIGN BODY REACTION." After receiving report of the histopathology, the respondent wrote letters to the appellant and demanded compensation by alleging that due to his negligence gauze was left in her abdomen at the time of surgery done in November, 1993, for the removal of

11 AIR 2011 SC 212.

which she had to undergo surgery by spending substantial amount and that she and her family had to undergo mental and physical stress. The appellant sympathysized with the respondent but denied the allegation of negligence. He further claimed that at the time of discharge, every patient was given instruction that in case of any problem, he/she should meet him or write a letter or at least contact on phone but the respondent never apprised him of her problem though she was sending season's greetings. The appellant also made a grievance that despite his request, the respondent had not made available the papers relating to the investigation and treatment from November, 1993 to September, 2002.

The respondent filed a complaint before the State Commission which dismissed the complaint as barred by time on the ground that the cause of action for filing the complaint had accrued to the respondent on the date of her discharge from the appellant's hospital, *i.e.* 30.11.1993 and the complaint could have been filed within next 2 years. The National Commission reversed that order and held that though the cause of action had arisen for the first time in November, 1993 when operation was performed on her gall bladder, it continued and subsisted throughout the period because she had constant pain in the abdomen and lastly it arose on 25.10.2002 when she was operated for the second time at Lilavati Hospital and the gauze allegedly left by the appellant, at the time of first surgery, was found.

On an appeal before the Supreme Court, the appellant placing reliance on a cathena of cases[12] contended that the discovery of gauze pieces from the mass taken out of the abdomen of the respondent in September, 2002 did not give her fresh cause to file complaint after a time gap of 9 years. The respondent placed reliance on the *discovery rule* which was adopted in *Ayers* v. *Morgan*,[13] wherein it was held that the statute of limitation did not begin to run until years later when the presence of the sponge in the patient's body was discovered. This rule was further applied in *Morgan* v. *Grace Hospital Inc*.,[14] wherein the court had rejected the objection of limitation and observed:

> It simply places an undue strain upon common sense, reality, logic and simple justice to say that a cause of action had 'accrued' to the plaintiff until the X-ray examination disclosed a foreign object within her abdomen and until she had reasonable basis for believing or reasonable means of ascertaining that the foreign object was within her abdomen as a consequence of the negligent performance of the hysterectomy.

12 *Abdulla Mahomed Jabli* v. *Abdulla Mahomed Zulaikhi,* AIR 1924 Bom. 290; *Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan*, AIR 1959 SC 798.

13 397 Pa. 282, 154A.2d.

14 149 W.Va.783, 144 S.E.2d 156.

Treading on these lines, the court in the instant case emphatically held that where a foreign object had negligently been left in the patient's body, the statute of limitations will not begin to run until the patient could have reasonably discovered the malpractice.

In the light of the above, the court examined whether the cause of action accrued to the respondent on 26.11.1993, *i.e*. the date on which the appellant performed 'Open Cholecystectomy' and the piece of gauze is said to have been left in her abdomen or in November, 2002 when she received Histopathology report from Lilavati Hospital. The court pointed out that if the respondent had not suffered pain, restlessness or any other discomfort till September, 2002, it could have been said that the cause of action accrued to her only on discovery of the pieces of gauze which were found embedded in the mass taken out of her abdomen as a result of surgery performed by Dr. P. Jagannath on 25.10.2002. In that case, the court pointed out the complaint filed by the respondent on 19.10.2004 would have been within limitation. The court perusing through the complaint filed by the respondent highlighted that she had categorically averred that after discharge from the appellant's hospital, she suffered pain off and on and it was giving unrest to her at home and at work place for almost nine years.

Taking these facts into account, the court finally concluded that since the respondent was an experienced nurse, it was reasonably expected of her to have contacted the appellant and apprised him about her pain and agony and sought his advice. That would have been the natural conduct of any other patient. However, on the contrary, after the surgery, the respondent never informed the appellant about her off and on pain in the abdomen and that she was having restless and sleepless nights. Neither did she consult any other doctor including those who were working in the government hospital where she was employed. The court, therefore, allowing the appeal held that the long silence on her part militates against the *bonafides* of the respondent's claim for compensation and that the *discovery rule* cannot be invoked for recording a finding that the cause of action accrued to her in November, 2002.

Insurance

In *New India Assurance Co. Ltd.* v. *Protection Manufacturers Pvt. Ltd*.,[15] the dispute related to the issue of cause of action in an accident which took place in a factory. There was a devastating fire in the factory of the respondent. Due to the severity of the fire, inspite of the action taken by the fire brigade, the fire continued to flicker for almost four days. Since the fire insurance policy covering the factory premises of the respondent was in force when the accident took place, the respondent made its claim to the insurance company amounting to Rs. 2,85,50,000/- on account of damage and loss suffered to the building, plant and machinery, stocks and stock-in-process and the transformer. On the very same day when the fire broke out, the insurance

15 AIR 2010 SC 3035.

company appointed one Asthana to conduct a preliminary spot survey. Asthana submitted his preliminary report but did not specify the cause of fire. Thereafter, one Bhaskar Joshi was appointed as joint surveyor to conduct a final survey along with Asthana. The joint surveyors prepared a draft assessment report and estimated the loss suffered by the respondent/ complainant to be Rs. 2,37,09,372.12 paise. The joint assessment report further clearly submitted that the exact cause of fire was not known though it could be due to a short circuit.

Thereafter, the insurance company appointed M/s. J. Basheer & Associates as investigator to conduct an investigation into the cause of fire and to assess the loss. According to report submitted by M/s. J. Basheer & Associates, the net amount of loss suffered by the respondent company on account of the fire would be Rs. 1,10,57,034/-, which tallied almost exactly with the assessment made by the insurance company amounting to Rs. 1,10,67,230/-. The report, however, provided nothing definite as to the cause of fire, except for a reference to the reply sent by the fire officer, Cuttack, to the insurance company, stating that the cause of fire was "short circuit" in the raw material section. Thereafter, the appellant insurance company, requested Joshi to make his observations on the report submitted by M/s. J. Basheer & Associates**.** Joshi severely criticized the report filed by M/s. J. Basheer & Associates and expressed the view that the report seemed tailor-made in order to fit the loss assessed by the insurance company. The appellant insurance company thereafter decided to obtain the views of Y.V. Chandrachud, former Chief Justice of India, on the question as to the cause of fire. In his report, Chandrachud J arrived at the conclusion that the report of M/s. J. Basheer & Associates was unfounded and speculative while that of the joint surveyors contained a careful analysis of the events. Y.V. Chandrachud J was further of the view that he had no doubt that the fire was accidental and could not by any reasonable norm or standard be characterized as an act of arson.

Thereafter, as the claim of the respondent company was not being settled by the appellant insurance company, a complaint was filed by the respondent company before the National Commission which directed the appellant insurance company to pay to the respondent company a sum of Rs. 2,26,36,179 with interest alongwith a sum of Rs. 1 lakh by way of compensation. Aggrieved by this order, an appeal was preferred before the Supreme Court wherein the insurance company contended that the joint report submitted by the Asthana and Joshi and the views expressed by Chandrachud J was only an opinion and hence not admissible in evidence. They also contended that the fire certificate issued by the fire officer, Cuttack, indicating that the fire was the result of an electrical short circuit was a bald statement and, therefore, not an evidence to corroborate such opinion. Thus, the basic issues that remained for consideration were:

(i) Whether there was any cause of fire which broke out in factory premises of assured and

(ii) Whether compensation was rightly granted to respondent.

With regard to the first issue, the court was of the opinion that inspite of the report of joint surveyor and the certificate from the fire officer, Cuttack that the cause of fire could be due to a short circuit, M/s. J. Basheer & Associates ultimately observed that the fire could reasonably be attributed to an act of "arson" by vested interests, without any factual basis for the same. The court further opined that apart from the aforesaid observation made at the end of the report, no foundation had been laid down in the report for such an observation which literally appears out of the blues. The court also held that one cannot ignore the views obtained by the insurance company from Y.V. Chandrachud J since the said opinion from Chandrachud J was based on an analysis of the materials placed before him by the insurance company, including the reports submitted by the joint surveyors and M/s. J. Basheer & Associates. With respect to the applicability of the theory of arson, in the instant case, the court pointed out that without any material to support the theory of arson projected by M/s. J. Basheer & Associates and sufficient material to hold otherwise, it would be entirely unjust and inequitable to accept such a theory without any evidence whatsoever in support thereof. On the basis of these facts and records, the court upheld the decision rendered by the National Commission.

With reference to the issue of compensation, the court was of the opinion that the amount calculated by the M/s. J. Basheer & Associates and the whole investigation carried out by it can be aptly described as "tailor-made". Supporting the findings of the joint surveyors, the court observed that the amount of loss suffered by the respondent company on account of the fire had been calculated by the joint surveyors on the basis of the amount mentioned by the respondent company and the computer data available in support thereof and also upon cross-checking with the accounts of suppliers and vendors of raw materials to the respondent company. In view of the above, the court upheld the decision rendered by the National Commission.

VII MEDICAL NEGLIGENCE

In *V. Kishan Rao* v. *Nikhil Super Specialty Hospital*,[16] the court, apart from scrutinizing the importance of an expert opinion in cases of medical negligence, also noted that the general directions laid down in the well known case of *Martin D'Souza*,[17] which is contrary to the landmark three-judge bench judgment in *Jacob Mathew*[18] case.

In the instant case, the appellant, an officer in the malaria department, admitted his wife in the respondent hospital as she was suffering from fever which was intermittent in nature and she was complaining of chill. In the complaint, the appellant further alleged that his wife was subjected to certain tests by the respondent but the tests did not show that she was suffering from

16 (2010) 5 SCC 513.
17 *Martin F. D'souza* v. *Mohd. Ishfaq*, 2009 (3) SCC 1.
18 *Jacob Mathew* v. *State of Punjab,* (2005) 6 SCC 1.

malaria. It was also alleged that his wife was not responding to the medicine given by the respondent. Thereafter, the complainant's wife complained of respiratory trouble which the complainant brought to the notice of the respondent who gave artificial oxygen to the patient. According to the complainant, at that stage artificial oxygen was not necessary but without ascertaining the actual necessity of the patient, the same was given. Further, he complained that his wife was not responding to the medicines and her condition was deteriorating day by day. The patient was finally shifted to another hospital where she was declared dead. From the particulars noted at the time of admission of the patient in the other hospital, it was clear that the patient was sent to the other hospital in a very precarious condition and was virtually, clinically dead.

When the matter came before the District Forum, the crucial facts that came to the forefront were that a wrong treatment for typhoid was given to the complainant's wife as a result of which the condition of the complainant's wife became serious and in a very precarious condition she was shifted to the other hospital where the record showed that the patient suffered from malaria but was not treated for malaria. The District Forum made a note of the evidence provided by the managing director of the respondent hospital who categorically deposed that he had not treated the case for malaria fever. It also made a note of the death certificate issued by the other hospital that disclosed that the patient died due to "cardio respiratory arrest and malaria". Relying on these two pieces of evidence, the District Forum concluded that there was negligence on the part of the respondent hospital and allowed the complaint of the appellant and passed orders for compensation.

Aggrieved by the order of the District Forum, the respondent hospital preferred an appeal to the State Commission which allowed the appeal. In doing so, the State Commission relied on the decision in *Tarun Thakore* v. *Dr. Noshir M. Shroff*,[19] wherein the National Commission had observed that one of the duties of the doctor towards his patient was a duty of care in deciding what treatment was to be given and also a duty to take care in the administration of the treatment. A breach of any of those duties may lead to an action for negligence by the patient. Reliance was placed on the decision rendered in *Indian Medical Association* v. *V.P. Shantha*,[20] wherein a similar judgment was delivered by the Supreme Court. Relying on the aforesaid two decisions, the State Commission observed that the appellant had failed to establish any negligence on the part of the respondent hospital. Finally, while passing the orders, the State Commission also casually made a reference that "there is also no expert opinion to state that the line of treatment adopted by the Appellant/opposite party no. 1 Hospital is wrong or is negligent." The appeal before the National Commission was also dismissed on similar grounds.

On appeal, the apex court opined that before forming an opinion that expert

19 2003 (1) CLD 62 (NCDRC).
20 (1995) 6 SCC 651.

evidence was necessary, the forum under the CP Act must come to a conclusion that the case was complicated enough to require the opinion of an expert or that the facts of the case were such that it cannot be resolved by the members of the forum without the assistance of an expert opinion. The court also made it clear that in these matters no mechanical approach can be followed by consumer forums. Each case has to be judged on its own facts. The court further held that in all cases medical negligence has to be proved on the basis of expert evidence, in that event the efficacy of the remedy provided under the CP Act will be unnecessarily burdened and in many cases such remedy would be illusory.

Referring to the facts of the instant case, the court observed that among the several injections given to the patient, the only one was of lariago, which may be one injection for treating malaria but the finding of the other hospital clearly showed that smear for malarial parasite was positive. There was thus a definite indication of malaria, but so far as widal test was conducted for typhoid it was found negative. Even in such a situation, the patient was treated for typhoid and not for malaria and when the condition of the patient worsened critically, she was sent to the other hospital in a very critical condition with no pulse, no BP and in an unconscious state with pupils dilated. In view of these facts, the court came to the conclusion that expert evidence was not necessary to prove medical negligence. The court then affirmed its view by making a reference to the landmark case of *Bolam* v. *Friern Hospital Management Committee*,[21] wherein it was held that a doctor was not guilty of negligence if he had acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

The court then moved on to examining and analyzing the prominent cases such as *Jacob Mathew*[22] and *Martin F. D'souza*[23] and was of the view that the directions rendered in *Martin F. D'souza* were not consistent with the law laid down by the larger bench in *Jacob Mathew*. Further clarifying this point, the court observed that the court in *Jacob Mathew* had held that the direction for consulting the opinion of another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the consumer fora. It was further observed that the reason why the larger bench in *Mathew* did not equate the two is obvious in view of the jurisprudential and conceptual difference between cases of negligence in civil and criminal matters.

Thereafter, relying on a catena of decisions,[24] the court took the view that if any of the parties wanted to adduce expert evidence, the members of the

21 1957 (2) All ELR 118.
22 *Supra* note 18.
23 *Supra* note 17.
24 *Indian Medical Association* v. *V.P. Shantha* (1995) 6 SCC 651; *Dr. J.J. Merchant* v. *Shrinath Chaturvedi* (2002) 6 SCC 635; *Charan Singh* v. *Healing Touch Hospital* (2000) 7 SCC 668; *Spring Meadows Hospital* v. *Harjol Ahluwalia* (1998) 4 SCC 39.

forum by applying their mind to the facts and circumstances of the case and the materials on record can allow the parties to adduce such evidence if it is appropriate to do so in the facts of the case.

In *Minor Marghesh K. Parikh* v. *Dr. Mayur H. Mehta*,[25] the apex court was once again confronted with the question regarding deficiency of service on the part of a doctor or a hospital leading to a case of medical negligence. In this case, the appellant was admitted in the hospital of the respondent with the complaint of loose motion. After some laboratory tests, the respondent put him on medication and also injected glucose saline through his right shoulder. This did not improve the condition of the appellant, who started vomiting and having loose motions frequently. Thereafter, the respondent is said to have administered glucose saline through the left foot of the appellant. In the evening, the parents of the appellant noticed a swelling in the toe of his left foot which was turning black. This was brought to the notice of the respondent, who stopped the glucose. On the next day, the parents of the appellant pointed out to the respondent that blackish discoloration had spread. Thereupon, the appellant was sent to one Dr. Chudasama, who was known to the respondent. Dr. Chudasama applied a small cut, removed black coloured fluid from the left toe of the appellant and gave some medicines. After some time, it was noticed that the left leg of the appellant had become totally black up to the knee. Thereupon, he was taken to Vadodara. Dr. Bhamar, who examined the appellant at Vadodara suspected that he had developed gangrene in his left leg and advised his admission in Bhailal Amin Hospital. The appellant was operated in that hospital and his left leg was amputated below the knee.

Thereafter, the appellant filed a complaint claiming compensation and alleging negligence on the part of the respondent. According to the appellant, though the swelling of the toe and blackening of the leg was brought to the notice of the respondent, he did not bother to get the appellant examined through an expert, which could have saved his leg. Denying this allegation of negligence, the respondent contended that the treatment was given to the appellant keeping in view the laboratory reports and further pleaded that he had taken every possible care in treating the appellant and even got him examined by Dr. Chudasama despite the fact that his hospital was closed on account of holidays.

These contentions of the respondent, however, were not accepted by the State Commission which noted that the case papers were produced by the respondent after a time gap of 6 years and that too after cross-examination of the complainant's father and Dr. Bhamar, who was produced as an expert. The State Commission further noted that the respondent had not filed the affidavit of Dr. Chudasama, to whom the appellant is said to have been taken for further treatment. Thereafter, the State Commission concluded that the respondent

25 2010 (10) UJ 4872 (SC): AIR 2011 SC 249.

had not exercised reasonable care while treating the appellant and awarded compensation to the appellant. An appeal by the respondent before the National Commission was allowed on the ground that in his cross-examination, Dr. Bhamar admitted that there could be ten other reasons for gangrene. Aggrieved by this order, the appellant moved the Supreme Court.

Taking into account the nature of the case, the court found it necessary first to have a look at the landmark decisions rendered in the arena of medical negligence, before moving on to the merits of this case. The pertinent case of *Jacob Mathew*[26] was then referred, which highlighted the jurisprudential distinction between civil and criminal liability in cases of medical negligence, and also considering the various facets of negligence by professionals, laid down several propositions. One among the said propositions, it explained that 'negligence', in the context of the medical profession, necessarily calls for a treatment with a difference. The decision in that case also makes it clear that to infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which in the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

The court, in the instant case, then moved on to refer to the landmark decision rendered in *Martin F. D'Souza*,[27] wherein it was observed that whenever a complaint was received against a doctor or hospital by the consumer fora (whether district, state or national) or by a criminal court, before issuing notice to the doctor or hospital against whom the complaint was made, the consumer forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence was attributed, and only after that doctor or committee reports that there is a *prima facie* case of medical negligence should notice be then issued to the doctor/hospital concerned.

Moving to the instant case, the court found that two basic issues that needed to be resolved were: *firstly*, whether the finding recorded by the State Commission that the respondent did not exercise due diligence and skill in treating the appellant was correct and, *secondly*, whether the National Commission committed an error by setting aside the order of the State Commission. On a perusal of the order of the State Commission, the court noted that the State Commission did not accept the respondent's version that the appellant had been brought to his hospital in a serious condition and that he was suffering from gastro-enteritis, dehydration acidosis and septicemia shock and mal-nutrition and anemia. This was evident from the State Commission's order that if that was so, there was no valid reason for the respondent to stop

26 *Supra* note 18.
27 *Supra* note 17.

medication and withdraw the glucose which was being given to the appellant. The apex court further noted that the State Commission took serious view of the respondent's conduct in producing the case papers after a gap of 6 years from the date of filing the complaint and that too, after the appellant's father and Dr. Bhammar had been cross-examined.

On perusing the order of the National Commission, the court was of the view that it did not advert to these important aspects and allowed the appeal on the solitary ground that on his cross-examination, Dr. Bhamar had admitted that there could be ten to twelve other reasons for development of gangrene. The court observed that the respondent had failed to file the affidavit of Dr. Chudasama, who was claimed to have treated the appellant. Taking serious view of these omissions on the part of the National Commission, the court opined that such omissions were extremely serious and had resulted in failure of justice. In view of this, the Supreme Court set aside the impugned order and remanded the matter to the National Commission for fresh disposal of the appeal filed by the respondent.

Kusum Sharma v. *Batra Hospital and Medical Research Centre*,[28] was yet another interesting case wherein the court resolved the issue of medical negligence from a different view point. In this case, Late R.K. Sharma, the husband of the appellant, was a senior operations manager in the Indian Oil Corporation. Being very obese, he developed blood pressure and soon started having complaints of swelling and breathlessness while climbing stairs. He visited Mool Chand Hospital in Delhi but no diagnosis could be made. The Indian Oil Corporation referred him to Batra Hospital where he was examined by the respondent no. 2 who advised him to get admitted for Anarsarca (Swelling). Thereafter, he was admitted in the respondent hospital. An ultrasound and C.T. scan of the abdomen was done and it was found that there was a smooth surface mass in the left adrenal. Surgery became imperative for removing the left adrenal. Sharma and the appellant were informed by respondent no. 2 that it was a well encapsulated benign tumor of the left adrenal which could be taken out by an operation. The respondent no. 3, after obtaining the consent from the appellants, conducted the operation of removal of abdominal tumor. On test, the tumor was found to be malignant. The treatment for malignancy by way of administering Mitotane could not be given as it was known to have side effects. During the surgery, the body of the pancreas was damaged which was treated and a drain was fixed to drain out the fluids. According to the appellants, considerable pain, inconvenience and anxiety were caused to the deceased (Sharma) and the appellants as the flow of fluids did not stop. After another expert consultation with respondent no. 4, a second surgery was carried out in respondent hospital.

Sharma was discharged carrying two bags on his body, for collecting the flowing fluids, with an advice to follow up and for change of the dressing. He

28 AIR 2010 SC 1052.

next visited respondent hospital only on after almost two months and that too to obtain a medical certificate from Dr. Mani, respondent no. 2.

Sharma, after a few days of getting discharged from the respondent hospital, on the suggestion of respondent no. 4, visited Modi hospital where respondent no. 4 was a consulting surgeon for change of dressing after 17 days. Respondent nos. 2 and 3, visited the residence of Sharma and found him in a bad condition and asked him to go to AIIMS, where he was admitted and treatment was given for pancreatic fistula and chronic fistula. He was discharged after four days with an advice to follow up in the O.P.D. Sharma again went to Mool Chand hospital with pancreatic and feacal fistula, which was dressed. Some time later, Sharma vomited at home and arrangements for shifting him to the respondent hospital were made. Sharma died in the hospital on account of 'pyogenic meningitis'.

After the death of Sharma, the appellant filed a complaint before the National Commission, attributing deficiency in services and medical negligence in the treatment of Sharma. The main contention of the appellant was that the 'anterior' approach adopted by the respondent at the time of first surgery was not the correct approach. According to the appellant, the surgery should have been done by adopting 'posterior' approach for the removal of left adrenal tumor. However, taking the view of the medical literature and the evidence of eminent doctors of AIIMS, in favour of opting the anterior approach for malignant tumors, the National Commission did not find any merit in the allegations leveled against the respondents and dismissed the complaint.

On appeal, the Supreme Court, after a perusal of the facts and the materials on record, placed reliance on a few pertinent cases so as to highlight various aspects of medical negligence. Placing reliance on *Bolam*,[29] two things that the court found pertinent to be noted were, *firstly*, the standard of care, judged in the light of knowledge available at that time and, *secondly*, 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 point of time, on which it is suggested as should have been used. The court then emphasized the observation made in *John Oni Akerele* v. *The King*,[30] wherein it was held that the most favourable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck. The court, thereafter, also placed reliance on the guidelines and principles rendered in prominent cases such as *Jacob Mathew*,[31] *Poonam Verma* v. *Ashwin Pate*[32] and other catena of cases.[33]

29 *Supra* note 21.
30 AIR 1943 PC 72.
31 *Supra* note 18.
32 (1996) 4 SCC 332.
33 *State of Haryana* v. *Smt. Santra* (2000) 5 SCC 182; *Kurban Hussein Mohammedali Rangawalla* v. *State of Maharashtra* (1965) 2 SCR 622; *Spring Meadows Hospital*

In view of these guidelines and principles, the court observed that doctors can never be prosecuted for medical negligence as long as they had performed their duties and exercised an ordinary degree of professional skill and competence. Applying the well settled principles enumerated in the referred cases, the court concluded that the appellants had failed to make out any case of medical negligence against the respondents and, therefore, dismissed the complaint of the appellants.

VIII EDUCATION

In *Maharshi Dayanand University* v. *Surjeet Kaur*,[34] the court examined the significant issue regarding the competence of a court or a tribunal to issue a direction contrary to law and to act in contravention of a statutory provision. The dispute in this case arose when the conferment of the degree of B.Ed. was refused by the appellant to the respondent. The fact giving rise to the case was that the respondent was a regular student of M.A. degree from a Government College, Gurgaon. She also applied for admission in B.Ed. (correspondence) degree course without disclosing the fact that she was already pursuing the regular course of M.A. The University at the time of preparation of the results of M.A. discovered that the respondent had been pursuing her B.Ed. degree course in violation of clause 17(b) of the general rules of examination and accordingly the respondent was informed that in view of the aforesaid rules she should exercise her option to choose anyone of the courses. The respondent opted for pursuing her course of M.A. and forewent her B.Ed. degree course. Subsequently, the University as a general measure of benefit through a notification gave a further chance to such ex-students who had not been able to complete their post-graduation/B.Ed. courses within the span of prescribed period as provided for under the rules. The respondent applied under the said notification for appearing in B.Ed. examination and succeeded in appearing in the examinations and also passed the same. However, the appellant University refused to confer the degree of B.Ed. on the respondent. Aggrieved, the respondent approached the District Forum which passed an order in favour of the respondent and directed the appellant to issue the B.Ed. degree and also awarded Rs. 1,000/- as compensation to the respondent. This order was passed by the District Forum despite a specific objection taken by the appellant that the District Forum had no jurisdiction to entertain such a complaint and award any such relief.

Aggrieved, the appellant filed an appeal before the State Commission. The State Commission set aside the order of the District Forum on the ground that the District Forum should not have entertained the complaint. On a revision petition, the National Commission took notice of the issue relating to the

v. *Harjot Ahluwalia through K.S. Ahluwalia* (1998) 4 SCC 39; *Dr. Laxman Balkrishna Joshi* v. *Dr. Trimbak Bapu Godbole*, AIR 1969 SC 128.

34 2010 (5) ALT 65 (SC).

entertaining of the complaint and the jurisdiction of the District Forum to hear the same and held that imparting of education by the educational institutions for consideration falls within the ambit of 'service' as defined under the CP Act.

When the matter reached the Supreme Court, clause 17 of the general rules of examination was scanned by the court on the basis of which it observed that the rule being prohibitory in nature, the District Forum or the National Commission could not have issued a direction which violated the aforesaid statutory provision. Placing reliance on the decisions of a few cases,[35] the court further clarified that it was a settled legal proposition that neither the court nor any tribunal had the competence to issue a direction contrary to law and to act in contravention of a statutory provision.

Responding to the issue with regard to the competence of the District Forum and the hierarchy of the tribunals constituted under the CP Act to entertain such a complaint, the court made reference to *Bihar School Examination Board* v. *Suresh Prasad Sinha*,[36] where it was held that a school board was a statutory body to conduct school examinations. The court in the instant case stressed that when the examination board conducts an examination in discharge of its statutory function, it does not offer its 'services' 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 process, according to the court, is therefore not availment of a service by a student, but participation in a general examination conducted by the board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. It was also clarified that the examination fee paid by the student is not the consideration for availment of any service, but the charge paid for the privilege of participation in the examination. Accordingly, the court held that since, neither the respondent was a consumer nor was the appellant rendering any service, the entire exercise of entertaining the complaint by the District Forum and the award of relief which had been approved by the National Commission was not in conformity with the law. The order was thus set aside allowing the appeal.

In *Secretary, Board of Secondary Education, Orissa* v. *Santosh Kumar Sahoo*,[37] the court had again the occasion to consider the issue of maintainability of complaint involving an educational institution. In the instant case, the respondent appeared in the supplementary examination conducted by the appellant. Upon receipt of the matriculation certificate, the respondent contacted the headmaster of his school and informed him of an error in the date

35 *State of Punjab* v. *Renuka Singla* (1994) 1 SCC 175; *Karnataka State Road Transport Corporation* v. *Ashrafulla Khan,* AIR 2002 SC 629 and *Manish Goel* v. *Rohini Goel*, AIR 2010 SC 1099.

36 (2009) 8 SCC 483.

37 AIR 2010 SC 3553.

of birth entered in the certificate. In reply, the headmaster assured the respondent that he will write to the appellant for making necessary corrections. The appellant contended that it had sent a few communications to the headmaster requesting him to furnish certain details of the respondent but the latter did not respond. Finally, the original certificate was returned without any corrections. After 12 years of his appearing in the examination and more than 3 years of the return of original certificate to the headmaster, the respondent filed a complaint before the District Forum, which allowed the complaint and directed the appellant and the headmaster to carry out the necessary corrections and issue the revised certificate. After the decision of the District Forum, the deputy secretary of the appellant board conducted an inquiry to verify the correct date of birth of the respondent and submitted a report to the secretary of the appellant board with the finding that the respondent had taken admission in class X on the basis of fake transfer certificate. An appeal was thus filed against the order of the District Forum, wherein the appellant made specific mention of the enquiry report and pleaded that in view of the said finding the respondent's prayer for correction of the recorded date of birth should be rejected. The State Commission, however, not paying any attention to the said report dismissed the appeal. This report was not accepted even by the National Commission on two grounds: *firstly*, on the ground that such a defense cannot be used as the fact of the report was included neither in the written statement nor before the District Forum or the State Commission and *secondly*, it was noted that the report was submitted in 1995 whereas the original certificate was issued in the year 1985. On these two grounds, the National Commission took the view that the report was an afterthought to cover up deficiency committed by the board in showing an incorrect date of birth of the respondent, which has thus resulted in miscarriage of justice.

On appeal, the Supreme Court after taking into consideration the submissions of the parties, took the view that the impugned order was liable to be set aside because all the consumer forums had failed to consider the issue of maintainability of the complaint in a correct perspective. According to the court, the District Forum before moving to any other issue should have verified whether the act of the appellant of not carrying out the corrections amounted to 'deficiency of service'. The court further observed that all the lower foras had overlooked the fact that despite repeated communications sent to him, the respondent did not produce the original documents required by the appellant. According to the court, the lower fora had wrongly brushed aside the report of the deputy secretary, ignoring the fact that the same was based on a comprehensive analysis and evaluation of the documents made available by the authorities of the concerned schools. In view of the above, the court, allowing the appeal, held that this failure on the part of the lower consumer fora had resulted in miscarriage of justice.

38 (2010) 4 SCC 536.

IX MOTOR INSURANCE

Breach of terms of comprehensive policy

In *Amalendu Sahoo* v. *Oriental Insurance Co. Ltd*.,[38] the Supreme Court had the occasion to examine a case where an insurance company had denied the claim of a consumer due to violation of the terms of the insurance policy. The United Bank of India's regional office was the tenant of the complainant. Due to this, many of its employees were known to the complainant. The complainant had handed over his vehicle to one of these employees for a few hours for urgent use by the employees of the bank. The complainant by way of a good gesture did not take any rent from the bank in this regard. The vehicle met with an accident. As the vehicle was covered under a subsisting insurance policy, a claim was made to the respondent company. The claim was denied by the respondent company on the ground that the vehicle was given on hire and, as per the policy terms, such use was not permitted and the insured was not entitled to any compensation for such unauthorised use.

After going through the policy, the District Forum dismissed the claim of the appellant on the ground that there was a clear condition as to the mode of use of the insured vehicle. Even though no payment was proved, the Forum held that the use of private car without payment of charges could not be imagined. The report of the surveyor was that the vehicle was given on a hire basis. However, that report was apparently prepared *ex parte*. Aggrieved by the aforesaid order, the complainant preferred an appeal to the State Commission which dismissed the appeal and held that from the documents and circumstances it was established that the car was given on a hire. A revision petition before the National Commission was also dismissed on the ground that there was concurrent finding of fact that at the time of the accident, the car was used for hire and it was not given as a gesture of goodwill.

On appeal, the Supreme Court noted that the respondent had not disputed the validity of the comprehensive insurance policy covering the appellant's vehicle on the date of the accident. The fact, that was in dispute, was that the vehicle was not used for personal use but was used by way of being hired, though no payment for hiring charges was proved. According to the respondent's submission, by using the vehicle on hire, the appellant had violated the terms of the insurance policy and on that basis the insurance company was within its right to repudiate the claim.

At this juncture, the court placed reliance on the decision of National Commission rendered in *United India Insurance Company Limited* v. *Gian Singh*,[39] wherein it was held that in a case of violation of condition of the policy as to the nature of use of the vehicle, the claim ought to be settled on a non-standard basis. This decision of the National Commission was also referred by the apex court in *National Insurance Company Limited* v. *Nitin*

39 2006 CTJ 221 (CP) (NCDRC).

Khandelwal,[40] wherein it opined that even if there was a breach of condition of the insurance policy, the insurance company was liable to indemnify the owner of a vehicle on a non-standard basis when the insurer had obtained comprehensive policy for the loss caused to the insurer. Reference was also made to the decision rendered in *New India Assurance Company Limited* v. *Narayan Prasad Appaprasad Pathak*[41] wherein the National Commission had set out the guidelines issued by the insurance company about settling all such non-standard claims.

The court in the instant case, after perusing the aforesaid guidelines, made it clear that in cases where condition of policy including limitation as to use was breached, 75 per cent of the admissible claim was the entitled amount. Applying this to the instant case, the court was of the opinion that the insurance company cannot repudiate the claim in toto and thus allowed the appeal by granting a consolidated sum of Rs.2,50,000/- even though compensation claimed was of Rs.5,00,000/-.

X PROCEDURE

Section 21 – An alternative remedy

In *Om Prakash Saini* v. *DCM Ltd*.,[42] the appellant invested in the fully secured debentures floated by the respondent. Just before the maturity date, the respondent informed the appellant and other similarly situated persons that due to financial difficulties it would not be possible to pay the amount of maturity on the scheduled dates and a revised scheme has been worked out for payment of the dues. On failure of the respondent to pay the amount of maturity as per the revised scheme, the appellant filed a complaint before the State Commission with the prayer for direction to the respondent to pay the amount due to him with interest and compensation of Rs. 1 lakh. This complaint was allowed by the State Commission. Challenging this order of the State Commission, the respondent filed an appeal before the National Commission but later withdrew the same. Subsequently, the respondent filed a writ petition which was allowed by the High Court on the ground that the State Commission did not have the jurisdiction to entertain the complaint.

Finally, when the matter reached the Supreme Court, the basic issue was whether the High Court committed a jurisdictional error by entertaining the petition filed by respondent under article 227 of the Constitution ignoring that respondent had already availed the statutory remedy of appeal. Highlighting the salient features of the CP Act, the court observed that the CP Act was enacted by the Parliament for better protection of the interest of consumers and a wholesome mechanism had been put in place for adjudication of consumer disputes. The court further held that the remedy of appeal, available

40 2008 (7) SCALE 351.
41 (2006) CPJ 144 (NC).
42 AIR 2010 SC 2608.

to a person aggrieved by an order of the State Commission can be treated as an effective alternative remedy. As per the CP Act, if an aggrieved was not satisfied with the order of the State Commission, a further remedy was available by way of revision before the National Commission. Examining the instant case on the aforesaid lines, the court observed that the respondent had availed the alternative remedy available to it under section 21 by filing an appeal against the order of the State Commission. However, during the pendency of appeal, the respondent filed a writ petition under article 227 of the Constitution of India to challenge the State Commission's order. This petition was entertained by the High Court on the basis of assurance given by the respondent that the appeal filed before the National Commission would be withdrawn.

It is a well settled law that a High Court cannot entertain a petition under article 226 or 227 of the Constitution if an effective alternative remedy was available to the aggrieved person. Keeping this in view, the apex court in the instant case took the view that since no reasons were recorded as to why the High Court thought it proper to make a departure from the aforesaid rule, the High Court was not at all justified in entertaining the petition filed under article 227 of the Constitution. The appeal filed by the appellant was thus allowed on these grounds; the impugned order was set aside and the matter was remitted back to the High Court for fresh adjudication.

Recording of reasons to serve the principle of natural justice

In *Kranti Associates Pvt. Ltd.* v. *Masood Ahmed Khan*,[43] the Supreme Court had the occasion to reinstate that any order passed by a quasi-judicial authority or an administrative authority should be supported with the reasons for the same. In this case, a revision petition was filed by a builder before the National Commission against the order of the State Commission in favour of the corporation. The National Commission dismissed the petition by just affirming the order passed by the State Commission without providing any reasons for the same.

When the matter came before the Supreme Court, the necessity of giving reason by a body or authority in support of its decision was examined in detail by the court. In this regard, reliance was placed on the decisions in a catena of cases[44] wherein the question of recording reasons had come up for consideration and wherein it was clearly affirmed that the face of an order passed by a quasi-judicial authority or even an administrative authority

43 (2010) 9 SCC 496.

44 *A.K. Kraipak* v. *Union of India*, AIR 1970 SC 150; *Kesava Mills Co. Ltd.* v. *Union of India,* AIR 1973 SC 389, *Harinagar Sugar Mills Ltd.* v. *Shyam Sunder Jhunjhunwala,* AIR 1961 SC 1669; *M/s. Mahabir Prasad Santosh Kumar* v. *State of U.P.,* AIR 1970 SC 1302; *M/s. Travancore Rayons Ltd.* v. *Union of India,* AIR 1971 SC 862; *Rama Varma Bharathan Thampuran* v. *State of Kerala*, AIR 1979 SC 1918; *M/s. Bombay Oil Industries Pvt. Ltd.* v. *Union of India*, AIR 1984 SC 160; *Star Enterprises* v. *City and Industrial Development Corporation of Maharashtra Ltd.* (1990) 3 SCC 280; *Charan Singh* v. *Healing Touch Hospital,* AIR 2000 SC 3138.

affecting the rights of parties, must speak. Summarizing the decisions rendered in the referred case, the court in the instant case observed:

- In India, the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
- A quasi-judicial authority must record reasons in support of its conclusions.
- Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
- Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
- Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
- Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
- Reasons facilitate the process of judicial review by superior courts.
- The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.
- Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.
- Insistence on reason is a requirement for both judicial accountability and transparency.
- If a judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.
- Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.
- It cannot be doubted that transparency is the *sine qua non* of restraint on abuse of judicial powers.

- In all common law jurisdictions, judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

In view of the above principles, the court set aside the impugned order and remanded the matter to the National Commission for deciding the matter by passing a reasoned order in the light of the observations made above.

XI CONCLUSION

Compared to the previous year, it can be concluded that the number of cases that came up before the apex court during 2010 has certainly got reduced which is a matter of cheer at least for the apex court to the extent that its precious time is saved considerably. Further, apart from reinstating some well settled and recognized rules such as the rule which prohibits the High Court from entertaining petition under article 226 or 227 of the Constitution if an effective alternative remedy was available to the aggrieved person and also the rule requiring a quasi-judicial or administrative authority to render decisions supported with reasons, the Supreme Court effectively highlighted new rules as well. For instance, the rights of subrogee under the CP Act were elucidated. Similarly, the uncertainty with regard to a claim of compensation even in cases, where no deficiency in rendering the service to a consumer had been proved, was also cleared off.

The decision of the apex court on the above said critical issues have not only clarified the legal status of such issues to benefit of the consumer, on the one hand and supplier of goods and service providers, on the other, but have also laid down the principles to be followed uniformly in all similar cases.

Amongst various cases identified and discussed in this survey, one of the most striking areas was the education related cases which clearly reveal a disturbing situation that the student fraternity is put to a lot of hardship who have to wait for a very long period for a relief even on peripheral issues such as correction in the records pertaining to the date of birth.