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(2000) 11 NCDRC CK 0019

In the National Consumer Disputes Redressal Commission

MEENA VYAS — APPELLANT

Vs

CITY NURSING HOME AND HOSPITAL — RESPONDENT

Date of Decision : 06-11-2000

Acts Referred:

Citation : 2001 1 CLT 208 : 2001 1 CPC 258 : 2001 2 CPJ 172

Hon'ble Judges : H.S.Brar , Jasbir Singh , Davinder Kaur Bhamrahs J.

Final Decision : Complaint allowed with costs

Judgement

1. THIS is complaint under Section 12 of the Consumer Protection Act, 1986 for the deficiency in service and negligence on the part of the opposite parties for awarding compensation amount to Rs. 15 lacs to the complainant.

2. THE brief facts as per narration giving rise to this complaint are that on 26.12.1997, the complainant along with her husband visited the opposite parties for checkup. Opposite party No. 2 advised the complainant for admission with opposite parties. Opposite party No. 2 also suggested caesarean operation on the ground showing that uterus of the complainant was downward. Accepting the advice of the opposite party No. 2, the complainant got admission in the City Nursing Home and Hospital, Ludhiana of the opposite party No. 2. On the same day itself operation was done and the wounds were sutured by the opposite party No. 2. After about 35 minutes of the operation, the complainant was sent to private room upstairs. It is alleged that the doctor was negligence in sending the complainant upstairs just after 35 minutes of the operation. She was not kept in delivery room. She was not administered any glucose by respondent No. 2. On the other hand a heavy dose of antibiotics was advised and given by the staff of opposite party No. 1. After 2-3 hours of the operation, the complainant felt pains and sufferings. On 27.12.1997, the complainant was advised to take tea, juice and soup, etc. and the opposite party did not prescribe any precaution to the complainant. On 5th day after the operation the complainant developed vomiting but the opposite party No. 2 did not care and told that it was normal after delivery. THE condition of the complainant further deteriorated that even a drop

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of water could not be digested by her. Glucose drip was started by the opposite parties when constant vomiting could not be controlled. Since the day of operation, the complainant felt pain and sufferings and she felt that something had left in the abdomen at the time of operation. On 7.1.1998, the stitches were opened and the complainant was discharged from hospital by the opposite parties. At the time of discharge, the complainant was still suffering from pain in the abdomen. As per narration, on 8.1.1998, some pus formation was felt by the complainant. On 10.1.1998, the matter was brought to the notice of the opposite party No. 2, who deputed a Nurse who did some cleaning of the sinus with stick and cotton and reported the matter to the doctor, opposite party No. 2. THE complainant was again admitted in the hospital of the opposite party No. 2. Antibiotic was started. THE complainant still suffered vomiting every day and the position remained critical upto 15.1.1998. THE opposite party No. 2 suggested operation to the complainant. THE complainant did not agree for the operation in the absence of her husband. Ultrasound was done. Upto 22.1.1998 continuous discharge of the pus from sinus of the complainant remained. On 22-1.1998, the opposite party No. 2 advised the complainant to consult the General Surgeon to drain the probable sinus. When the complainant suffered continuous discharge of the pain from sinus and she did not feel any relief from the constant pain and sufferings, the discharge was taken from the City Nursing Home, opposite party No. 1. It is alleged that the respondents wrote a letter on 23.1.1998 to the husband of the complainant requesting him to visit opposite party''s hospital and settle the outstanding dues against the complainant. In the letter it was also mentioned that the complainant had left the hospital without informing the opposite parties. THE husband of the complainant visited the opposite parties and explained them that there was nothing due against the complainant. THE opposite parties vide letter dated 24.1.1998 acknowledged that all dues have been settled. In a period of 18 days more than Rs. 55,000/- were charged by the opposite parties. The complainant as alleged had to remain under pains and sufferings continuously. On 6.4.1998 when the complainant''s condition deteriorated due to vomiting, pain and sufferings of the abdomen and due to continuous discharge of pus from the sinus, she was admitted in the Dayanand Medical College and Hospital, Ludhiana. In Dayanand Medical College and Hospital, Ludhiana, the complainant was operated upon. During the operation, the sinus was explored, a foreign body, i.e., old retained sponge was found by the doctors operating upon the complainant in the D.M.C. and Hospital, Ludhiana. The operation in the D.M.C. and Hospital was a second operation of the complainant because of the constant pain, suffering and discharge of pus from the sinus having been formed on the abdominal operated part of the complainant by the opposite parties. The sponge was retained at the time of first caesarean operation performed by the opposite parties on 26.12.1997. After the sponge was taken out, the complainant remained under treatment of Dr. Subhash Goyal. A team of doctors of D.M.C. and Hospital during investigation found as under : "Sinogram shows a collection seen in anterior part of peritoneal cavity communicating with sinus. CT Scan also showed a well defined collection

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containing costing and air in anterior part of peritoneal cavity communicating with sinus."

The doctors gave their opinion on 18.4.1998. It is also asserted that there was swelling on the abdomen of the complainant. The complainant was feeling tenderness and was also feeling temperature all the times. This all was due to negligence of the opposite parties in performing the operation on the complainant and leaving of the foreign material (old retained sponge) in the abdomen of the complainant. Thus, the opposite parties were not careful while performing the caesarean operation on the complainant and were thus negligent. Thus, the opposite parties were deficient in rendering service qua the complainant. Due to operation, the complainant is not in a position to lift any weight and perform homely duties. The complainant was unable to extend her motherly love to the newly born child. So much so the complainant was unable to feed the child from the breast. The complainant has asserted that she has suffered the following side effects/sufferings due to the retention of sponge in the body and even after taking out the same by operation : (i) body pain and suffering by complainant; (ii) mental pain and suffering; (iii) excessive vomiting due to foreign material in the body; (iv) pus formation; (v) sinus formation; (vi) defect in digestive system due to foreign material and vomiting; (vii) advice by doctors not to lift any weight even the newly born baby; (viii) suffered operationals twice.

3. ON these allegations, the complainant has sought a direction to recover the following relief from the opposite parties : (i) Body pain and sufferings Rs. 5,00,000/-; (ii) Mental pain and sufferings Rs. 2,00,000/-; (iii) Expenditure on treatment Rs. 2,00,000/-; (iv) Deprivation of love and affection of the child Rs. 2,00,000/-; (v) Future loss of body due to infection of foreign material in the body Rs. 2,00,000/-; (vi) Rs. 1,00,000/- on account of deprivation of providing own milk from the breast of the complainant to the newly born child; (vii) Rs. 1,00,000/- are being claim on account of deprivation having third female child.

On notice being served the opposite parties filed a written version. It is contended that the complaint is not maintainable under the Consumer Protection Act. This complaint is also not maintainable as no notice has been given to the partners. It is asserted that the opposite party No. 2 has never performed the operation on the complainant. The operation was performed by Dr. Vijay K. Sekhri, MBBS, DGO, MD, Ex Assistant Professor, C.M.C., Ludhiana, who is a very renowned Surgeon in this field. The opposite parties admitted that the complainant was pregnant and she visited the Nursing Home but it could not be ascertained whether the complainant took the precautions and medicines as advised. It has also been pleaded that the purpose of admission on 24.12.1998 was that the baby of the complainant was suspected to be growing less, than the expected and that her antenatal scan showed that the placenta was situated in lower portion of the uterus (PLACENTA PREVIA) thus will not allow normal delivery. The complainant knew this fact for a long time from the antenatal,

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checku-ps and scans. On 26.12.1998 the opposite parties noticed that the heart of baby started showing occasional irregularity and tendency to slow down. In medical terminology this is explained as that "The baby is showing evidence of distress and if allowed to progress may lead to the death of the baby". The patient was not given any Glucose said to be part of negligence of the hospital by the complainant is totally false. In fact for the first day patient is not allowed food and some amount of Glucose is given. Amount and duration of it is decided by the doctor, according to the requirement based on medical judgment.

4. THE opposite parties admitted the fact that they performed the caesarean operation on the complainant for her delivery on 26.12.1997 at their Nursing Home. THE opposite parties have averred that the complainant was given Glucose. In fact, on the first day patient was not given food and some amount of Glucose was given. THE opposite parties denied their liability to pay compensation as claimed by the complainant. To support her version the complainant filed evidence by way of various documents Annexures C-1 to C-16 and affidavits. The complainant also examined herself and Dr. Subhash Goyal, M.S., Professor of Surgery, Dayanand Medical College and Hospital, Ludhiana (C.W. 1). The opposite parties filed affidavits namely, Dr. (Mrs.) Ajit Kang, Dr. Vijay K. Sekhri, Dr. Sirish Chandra. They got Exs. R-l to R-8 documents marked in evidence. We have heard the learned Counsel for the parties, perused the pleadings and the material placed on record by the parties.

5. BEFORE proceeding to deal with the merits of the complaint, we have to see whether the opposite parties fulfilled the character of being a provider of "service" within the meaning of the relevant provisions of the Consumer Protection Act, 1986, the other question is whether the complaint is maintainable in the present form as the necessary partner has not been impleaded in the present complaint. With regard to the service the definition of the term "Consumer" as given in Section 2(1)(d) of the Consumer Protection Act, 1986 is as under : "(d)''consumer'' means any persn who- (i) buys any goods for consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised,, or under any system of deferred payments, when such services are availed of with the approval of the first-mentioned person;"

6. IN the present case, there is no dispute that the complainant is not a

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consumer qua the opposite parties and the opposite party has not provided the service. With regard to the preliminary objections that the complaint is not maintainable, there is no evidence provided on behalf of the opposite parties/City Nursing Home and Hospital to suggest that there is any ether partner/owner of the said hospital. No partnership deed has been placed on record to support the preliminary objection. The status of the partnership has not been made known to us through evidence whether the partnership deed is registered or unregistered. Whether it is a partnership or co-ownership. What is the status of the partner according to partnership law. According to law of partnership the relationship of principal and agent is established among the partners and this relationship is governed by the law of Agency. It was held in Cox v. Hickman, that the law as to partnership is undoubted a branch of the law of the principal and agent. The liability of one partner for the acts of his co-partners is in truth the liability of a principal for the acts of his agent. When two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all others by contract entered into according to usual course of business in that trade. As no partnership deed has been placed on record, we do not agree with the contention of the learned Advocate that City Nursing Home and Hospital is a partnership concern. The contention is, therefore, rejected.

Amidst the arguments, learned Counsel for the opposite parties vehemently asserted that this Commission could not entertain the complaint on account of lack of pecuniary jurisdiction. This point has not been raised in the written version. He has referred to the claim made in the complaint that in prayer para No. 16, Rs. 15 lacs and the actual loss has been calculated as Rs. 2,00,000/-. Calculating the amount of speculative compensation is not a part of loss. Thus the alleged amount of loss works out to be Rs. 2,00,000/- till 8.8.1999, the date of filing the complaint and hence it is the District Forum where the complaint could be entertained and not before the State Commission. The learned Counsel further argued that the claim made is patently excessive and has alleged liability by the complainant with a view to create jurisdiction of this Commission. We are not inclined to accept this contention. The amount of Rs. 15 lacs plus interest @ 18% per annum claimed towards compensation is to be taken into consideration while deciding the question of pecuniary jurisdiction. In terms of Section 11 of the Consumer Protection Act, 1986, pecuniary jurisdiction of the FORA depends upon the quantum of compensation claimed in the complaint. Section 11 of the Consumer Protection Act, 1986 stipulates as under : "11. Jurisdiction of the District Forum.-(1) Subject to the other provisions of this Act, the District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed does not exceed rupees five lakhs. (2) A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction,- (a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily reside or carries on business or has a branch office or personally works for gain or (b) any of the opposite parties, where there are

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more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or carry on business or have a branch office, or personally work for gain, as the case may be, acquiesce in such institution; or (c) the cause of action, wholly or in part, arises."

7. THUS, for determining the question of pecuniary jurisdiction, the costs and interest part as prayed for cannot be taken into consideration. However, the amount of compensation as prayed for by the complainant shall be the test for determining the pecuniary jurisdiction. In the case in hand, the complainant has claimed Rs. 15 lacs including compensation as detailed above, this Commission has the jurisdiction to adjudicate the dispute, as the amount exceeds rupees five lakh. This is very clear, specific and unambiguous from the term of Section 11, which governs the matter of jurisdiction. In order to prove medical negligence, learned Counsel for the complainant vehemently argued that it is a case of prima facie negligence on the part of opposite party in leaving the sponge while performing caesarean operation. On 26.12.1997 caesarean operation on the ground that uterus of the complainant was downward, was done by the opposite party No. 2 for the delivery of the child. After operation, the wound was sutured. The complainant felt pain and sufferings. The complainant was feeling uneasiness/pains since the day of operation and felt that something had left in the abdomen at the time of operation on 7.1.1998 the stitches were opened and the complainant was discharged from hospital by the opposite parties. On 8.1.1998 and 9.1.1998 some pus formation was felt at house by the complainant on 10.1.1998. The matter was reported to the opposite party who deputed the Nurse and some cleaning of the sinus was done. The complainant was readmitted on 15.1.1998 in the hospital of the opposite parties. Ultrasound was done. Discharge of the pus continued till 22.1.1998. The complainant was taken by her husband from the hospital of the opposite parties on 6.4.1998 when her condition deteriorated due to vomiting, pain and suffering of the abdomen and due to continuous discharge of pus from the sinus as per the advice of the opposite parties. She was admitted in the Dayanand Medical College and Hospital, Ludhiana where she was operated upon and during the operation the sinus was explored, a foreign body, i.e. old retained sponge was found by a team of doctors operating upon her in the D.M.C and Hospital (Annexure C-10).

8. WE have considered the relevant submissions made by the Counsel for the opposite parties. The learned Counsel for the opposite parties forcefully argued that the complaint is frivolous. It is stated that the plea of the complainant that the complainant availed the services of the opposite parties for consideration is not correct. The learned Counsel for the opposite parties also vehemently asserted that Dr. (Mrs.) Ajit Kang, opposite party No. 2 is not at all involved and in fact at no point of time the complainant had called for the services of the second opposite party for her operation. The case set-out against the opposite party No. 2 is false and afterthought. To be fair to the Counsel for the opposite

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parties, we have seriously applied our mind to the cases law referred by the Counsel for the opposite parties. The ratio of these cases cannot be stoutly applied to the case in hand. If the old left sponge, i.e., foreign body has caused any damage to body of the complainant, it amounts to negligent act on the part of the opposite party. However, the learned Counsel for the parties denied that during the operation performed any sponge was left. According to "A Textbook of the Practice of Medicine by various authors edite by Frederick W. Price Oxford Medical Publications, 7th Edition, pages 1647 to 1650 published by Geoferry Cumberlege, Oxford University Press, London, New York, Torronto" sinus thrombosis has been described as under : "Thrombosis of Cerebral Sinuses and Veins.- Thrombosis of the cerebral sinuses or veins may occur as a primary condition, or it may be secondary to infective processes spreading to the sinuses from contiguous infected regions. Aetiology.-Primary thrombosis is a rare condition. It is said to affect the superior longitudinal sinus most commonly. It is more common in the first year of life than at any other period, when it may follow diarrhoea, bronchitis, or the conditions of exhaustion met with in tuberculous disease and in congenital symphilis, and it may follow acute diseases, such as measles, diphtheria, etc. It may also occur at any age, up to advanced old age, in the terminal stages of cancer pulmonary tuberculosis and other chronic diseases. In the puerperium and after abortion, an ambolus deposited on the wall of the sinus may form the basis for a new clot. The essential causes of secondary thrombosis is the advent of microorganisms to the sinuses. The infection is often a mixed one, but the common organisms present are streptococcus, pneumococcus and Bacillus coli. The sinus may become infected as a part of a general pyaemia, or infection may spread directly through its wall from a focus of local disease, most commonly from an extradural abscess due to ear disease or frontal sinusitis. In most cases, however, the sinus becomes infected from a local spreading septic thrombosis of the veins, which open into the sinus, from an infected spot at a distance. Thrombosis of sinuses may also occur from injury, as by bullet wounds and fractures of the skull, and may also result from surgical procedures in the region of the sinuses. In the condition known as otitic hydrocephalus, a sterile mural clot or deposit of fibrin beginning in the lateral sinus above an infected middle ear extends into the superior longitudinal sinus, or spreading sterile clot may obstruct both lateral sinuses, and consequent interference with absorption of cerebro-spinal fluid gives rise to hydrocephalus. Pathalogy.-The affected sinus, if filled with clot, is distended and bulging, and feels to the touch as if it were injected with a solid mass. In many of the non-infected cases, however, the clot does not fill the sinus. This applies particularly to the superior longitudinal sinus, where there may be extensive mural clot with retention of a blood-channel. One or several veins draining into the sinus may become obstructed and thrombosed, and in cases in which the sinus is filled with clot, all the veins entering it may suffer blockage and the thrombosis. Thrombosis of a vein causes intense congestion of the convolutions which it drains, and a moderate degree of subarachnoid haemorrhage due to rupture of the small tributary veins. The underlying brain

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softens on its surface and, later, a saucer-shaped depression is left at the site. The cavernous and lateral sinuses do not drain the brain directly, and blocking of one of them does not cause so much cerebral disturbance as obstruction of the superior longitudinal sinus. Thrombosis of the cavernous sinus may, however, extend to the ophthalmic veins and cause blindness, and at the same time the nerves which lies in its outer wall the third, the fourth, the ophthalmic division of the fifth, and the sixth nerves may be paralysed. In the infective forms, the clot very quickly breaks down into pus, and general pyaemia results, or the spread of infection along a tributary vein may give rise to a cerebral abscess. Symptoms.-Many cases are infective and the clinical picture is greatly complicated by, (1) the presence of infective disease in relation to the cranium, e.g. in the ear; and especially by (2) the onset of pyaemia. The symptoms due to thrombosis of individual sinuses or of cerebral veins are more easily recognised in the non-ineffective or "primary" cases. Superior longitudinal sinus.-This sinus has two functions : (1) it is a channel into which drain the veins from the upper and medial surfaces of the cerebral hemispheres; and (2) by the pacchionian bodies associated with it, it forms part of the mechanism by which the cerebro-spinal fluid is absorbed into the blood strearn. Complete obstruction of the sinus by a clot gives rise to, (a) extensive bilateral venous thrombosis on the surface of the brain, with resulting spastic paralvsis of the legs and upper arms, the hands and face being spared; and (b) increased intracranial pressure, and in most cases some degree of papilloedema. In many cases, however, the clot does not obstruct the sinus. Mural clot may obstruct one or more of the entering veins and thus give rise to hemiplegia, which may or may not be ushered in by convulsions; or again, bilateral paralytic phenomena of any degree may occur. There may be associated drowsiness or coma. On the other hand, the veins may not be obstructed and the clot may be so situated as to interfere with the absorption of cerebro-spinal fluid through the Pacchionian bodies; paralytic phenomena are then absent, and the disturbance is limited to the manifestations of raised intracranial pressure headaches, papilledema and, in some cases, vomiting. In otitic hydrocephalus the symptoms of this group alone are present. Lateral sinus.-It is doubtful whether aseptic thrombosis of one lateral sinus gives rise to any symptoms, provided the other one is of normal size and communication at the torcular is free. Since the superior longitudinal sinus usually turns into the right lateral sinus, obstruction of the right lateral sinus may produce a moderate degree of hydrocephalus with headaches and papilledema. In most cases of lateral sinus thrombosis, however, the clot is infected and manifestations of paemia rapidly ensure. Meanwhile the clot may extend into the jugular vein and cause pain and stiffness in the side of the neck, and occasionally the thrombosed jugular vein may be felt beneath the anterior border of the sterno-mastoid as a tender solid cord. There may be tenderness and swelling over the region of the mastoid emissary vein, and the cervical lymph glands may be enlarged. If when Queckenstedt''s test is performed the jugular veins are compressed separately, compression of the vein on the side of the obstructed sinus causes little or no rise in the mano-meter, whereas compression of the

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other gives a normal result. Cavernous sinus.-Thrombosis of this sinus is usually consequent upon septic spots or injuries on the face, sepsis in the frontal sinus or orbital cellulitis. Ordinarily, the thrombus is infected. There is oedema of the orbit, with proptosis and oedema of the conjunctive, forehead and face. Ambylopia, or blindness, is the rule, but the appearance of the fundus of the eye usually remains normal until the late stages. Paralysis of the ocular muscles and anaesthesia of the eye may also occur. The condition Susually becomes bilateral within a day or two. Diagnosis.-This usually depends on the presence of some of the conditions with which sinus or venous thrombosis is known to be associated. The possibility of clot in the superior longitudinal sinus and related veins should always be considered : (1) in regard to any conclusive or paralytic phenomena coming on within a month of child birth or abortion; (2) when in any elderly or debilitated patient manifestations, which may include alexia and visual disorientation, suggesting vascular lesions on the two sides of the brain occur within a few days of each other; (3) when signs of hydrocephalus appear in association with or soon after an attack of otitis media, and there are no other uidications of cerebral abscess; and (4) when paralytic or convulsive phenomena occur soon after an injury near the vertex of the skull. Lateral sinus thrombosis is almost exclusively associated with ear disease, and its presence can usually be confirmed by Quickenstedt''s test. Thrombosis of the cavernous sinus presents such a characteristic picture that if an exciting cause is present the diagnosis is seldom in doubt. Prognosis.-In the non-infective cases the prognosis as regards life is usually good. The paralytic phenomena generally make great and often complete recovery within a, few weeks, but in the severe cases spasticity in the legs and upper arms may be left. Blindness or impairment of vision may follow cavernous sinus thrombosis. As to the infected cases the prognosis, formerly ominous, has been greatly improved by the introduction of the sulphonamide drugs and penicillin. With lateral thrombosis, recovery usually follows prompt operation."

9. AND according to Black''s Medical Dictionary edited by C.W.H. Harvard, 36th Edition, Jaypee Brothers, P.B. No. 7193, New Delhi, at page 607, sinus: has been termed as under: "SINUS is a term applied to narrow cavities of various kinds, occurring naturally in the body, or resulting from disease. Thus it is applied to the air-containing cavities which are found in the frontal, ethmoidal, sphenoidal and maxillary bones, and which communicate with the nose. The function of these paranasal sinuses, as they are known, is doubtful, but they do lighten the skull and add resonance to the voice. They enlarge considerably around puberty and in this way are a factory in the alteration of the size and shape of the face. The term is also used in connection with the wide spaces through which the blood circulates in the membranes of the brain. Cavities which are produced when an abscess has burst but remain unhealed, are also known as sinuses."

10. LEARNED Counsel for the complainant agitated that according to the literature "Choper IV - Page 39 - Examination of a sinus or a Fistula, causes of persistence of a sinus is presence of foreign body or necrotic tissue, i.e., a suture

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material in the depth. Hospitals are expected to provide services to the patients in accordance with the standards accepted as per norms. We have to examine whether there had been negligence or proper care and precautions on the part of the hospital entrusted with the job of operation. Besides cogent evidence, we are to take the aid the maxim res ipsa loquitur. Hon''ble Supreme Court of India in Sayed Akbar v. State of Karnataka, 1980 ACJ 38 (SC), wherein it was held as under : "The rule of res ipsa loquitur in reality belongs to the Law of Torts. Where negligence is in issue, the peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of event or accident. It is to such cases that the maxim res ipsa loquitur may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. The event or accident must be of a kind which does not happen in the ordinary course of things, if those who have the management and control use due care. Further the event which caused the accident must be within the defendants'' control. The reasons for this second requirement is that where the defendant had control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred."

If the aforesaid principle is applied leaving the sponge inside the body of the patient during operation of the patient per se it is negligence of the opposite parties. The complainant herself was in the witness box. She swears that she correctly got recorded the history while getting admission in D.M.C. Hospital, Ludhiana and whatever she has stated in her affidavit is correct. In reply to questions she answered as under (only the relevant portion is being reproduced) : "Q. Do you admit that whatever you have said in para No. 8 of the affidavit with respect to date of your admission, i.e., 6.4.1998 in D.M.C. Ludhiana is correct ? A. It has just been mentioned due to clerical mistake. In fact I got myself admitted in D.M.C. on 11.4.1998. Q. Have you written in para No. 3 of your affidavit dated 15.4.1999 that you went to City Nursing Home, Ludhiana on 26.1.1997 alongwith your husband and you were admitted on the same date in there and was operated upon LST ? A. Though it has been mentioned in my affidavit but it is just due to clerical mistake."

In cross-examination by the Counsel for the respondents, she says in the following terms : "I had given my all investigations in D.M.C. Hospital, Ludhiana when I got admitted there. I correctly got recorded the history while getting admitted in D.M.C. Hospital, Ludhiana. Whatever I have stated in my affidavit in para No. 3 is correct. I came to know from CT Scan that something is there in the abdomen. That report is on the record. The CT Scan report is in the file of DMC. I have produced the CT Scan report on record after getting it from D.M.C. It is incorrect to suggest that the record produced by me from D.M.C. does not disclose the presence of any sponge left inside my abdomen. I did not get any ultra sound scan or any other scan from outside except D.M.C. When I was admitted in D.M.C. Hospital, Ludhiana I had submitted the record of City Nursing

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Home to D.M.C. Authorities, Ludhiana the papers which had been given to me by Dr. Mrs. Ajit Kang. It is correct that in those papers seen report dated 15.12.1997 was also there. I do not understand medical language. Upto the last movement I was not told that only caesarean operation shall be conducted. I do not know being a medical term that it was mentioned in the scan report of 15.12.1997 that I had low lying plasanta which was indication of caesarean section. It is incorrect to suggest that I gave the consent for conducting caesarean section in favour of Dr. Vijay K. Sekhri. It was conducted by Dr. Mrs. Ajit Kang. It is incorrect to sugest that Dr. Mrs. Ajit Kang was ill on that date. She had checked me and advised that caesarian operation will be conducted. It is incorrect to suggest that my operation was not conducted by Dr. Mrs. Ajit Kang and was conducted by Dr. Vijay Sekhri. It is correct that Dr. Vijay Sekhri is working in City Nursing Home but I had never consulted him in my case or any other case. It is incorrect to suggest that I have deposed false."

11. THE complainant examined Dr. Subash Goyal, M.S., MAMS, FAIS, FICS, Professor of Surgery, Dayanand Medical College, Ludhiana (C.W. 1), who conducted operation on 12.4.1998 on the complainant Meena Vyas. He swears and says as under : "A sponge was taken out about 2 ft. x ft. approx. in size. It was foul smelling sponge. THE details are given in the operation notes, photocopy of which is C.W. 1/1. Q. What was the side effects of existence of sponge ? . Ans. Non-healing of chronic sinus formation. Q. Could there be sensation of vomiting and pain on account of sponge ? Ans. It may or may not be. Q. Can you state how the sponge happened to be in the body ? Ans. This is the universal practice in surgery to have a pre-operative count and post-operative count by the scrub nurse, who checks it and reconfirms it that nothing is left inside. Q. Was previously caesarean operation performed on Meena Vyas ? Ans. Yes. THEre was history of caesarean section done in December, 1997. Q. Can you give any reason from existence of the sponge in the abdomen, taking into consideration the history of the patient ? Ans. It may be left in the previous surgery to stop bleeding or it is unintentionally and inadvertently left inside the abdominal cavity. In the month of January, 1998, the patient first of all contacted me, in my clinic. By that time caesarean operation had already been performed. Prescription slips if any may be with the patient. Orally from my memory I have stated that I knew the patient prior thereto and his family. I visited England in May, 1998. But I did not stay with the relations of the patient aforesaid. Q. What did you diagnose in January, when the patient approached ? Ans. I found it to be case of discharging sinus. Q. What investigations were done and what treatment were given ? Ans. Without records I cannot answer. I maintain patients register at my clinic. I do not think that the name of the complainant was entered in the register. Although I know that under Medical Council of India directions such a register is required to be maintained. I explained that I do not remember have I entered the name of this patient in the register or not. In January and February the patient came three-four times. I gave free treatment to her during those visits. I am not related to her. I know her on account of acquaintance. By

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acquaintance I mean I knew her through her family. No ultra sound or X-ray was got conducted then. THE patient did not show me any such report. I did not make any enquiry from her. Rekha Goyal is my wife. Both of us are running private clinic. She is employed in D.M.C. I have seen P.W. 1/1. Which is prescription of 10.4.1998. I have seen the same. Q. I put it to you that in this prescription slip the diagnosis recorded is ''the complaint of sinus abdomen''. Is it so? Ans. No, it is recorded as chronic sinus abdomen (Post LSDCS). It means Lower Segment Caesarean Section. On 10.4.1998 she was advised to be admitted. She was not admitted on 10th but she was admitted on 11th. Q. I put it to you that in this prescription slip of 10th April, there is no mention of observing foreign body in the abdomen. Is it so ? Ans. It is not so recorded. Admission was advised for exploratory leparotomy. Q. I put it to you that in the sponge used in the hospital during the operation there is radio opaque thread. Is it so ? Ans. Not always. Q. Did you use radio opaque thread sponge at the time of operation. Ans. No. Q. Did you get the sponge recovered from the patient abdomen to find out if the same was having radio opaque thread. Ans. THE said sponge was not sent for X-ray. Q. Where is the sponge recovered ? Ans. It was sent to the Pathology Deptt. of D.M.C. and Hospital. I cannot produce the specimen. It must be with the Pathology Deptt. aforesaid. Q. Is it so that radio opaque sponge is observed under X-ray or under Ultrasound Scan ? Ans. This is for the radiologist to answer. Q. I put it to you that all patent sponges now available are having radio opaque thread ? Ans. In our hospital, we are not using such sponge. Q. I put it to you that in the prescription slip of 10th April there is no mention of observation regarding diagnoses made after seeing such scan regarding existing of any foreign body ? Ans. I explain that since I had ordered/ advised exploration. It was on account of observations made on the scans. Q. On 10th April after seeing such reports, was there still suspicion or confirm diagnoses about existence of foreign body in the abdomen ? Ans. I suspected and to rule out the cause of chronic sinus formation after caesarean section by Exploratory Laprotomy. Q. Is it so that foreign body retention is not known as Fistula ? Ans. No, it is not known as such. Q. Do you know that the patient left City Nursing Home against medical advice ? Ans. THE record does not mention it. Q. Is it so that the bed head ticket prepared of the patient indicates that she remained well for three months back after the operation ? Ans. It is not as such recorded. It is recorded "History of present illness reads as patient was apparently well three months back when she underwent LSCS outside DMC (City Nursing Home). Q. Is it so that in case of existence of foreign body is not removed and the wound will not dry ? Ans. Fever may subside under the influence of drugs and the wound may continue discharging off and on till the foreign body is removed. It is incorrect that I have deposed wrongly about it. Q. I put it to you that if the foreign body like sponge was retained in the body the patient would not have carried the same for two months and twenty days ? Ans. May or may not. Q. Is it so that the sinus is treated by putting in packs and wicks ? Ans. Such treatment was given long time ago but not now. It is incorrect to suggest that no sponge was recovered by us from the abdomen of the patient.

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It is further incorrect to suggest that the entire bed head ticket has been fabricated. It is further incorrect to suggest that I have deposed falsely the help of the acquaintance. Discharge summary was not prepared in my presence by my junior doctor."

Dr. Subash Goyal was assisted by a team of other doctors (P.W. 1/1) at the time of operation. Since the operation was conducted by a team of doctors, therefore, no importance can be attached to the attack of the Counsel for the opposite parties, otherwise also there is no reason before us on the record as to why Dr. Subash Goyal will depose falsely to implicate the opposite parties. It is established from the patient''s Indoor Patient Record of Dayanand Medical College, Ludhiana and evidence of Dr. Subash Goyal that old retained sponge was found. Nothing cogent was brought on the record to discard his testimony or record of operation of patient. The objection raised by the Counsel for the opposite party with regard to witness of Dr. Subash Goyal cannot be accepted. In view of the above discussion sustainability of the evidence aforesaid cannot be doubted. The report has been signed by five doctors as referred to above.

12. WE have considered the affidavits of Dr. (Mrs.) Ajit Kang of City Nursing Home, Ludhiana. It is not disputed that the caesarean operation was performed in the hospital of the opposite parties. Dr. (Mrs.) Kang, opposite party No. 2, has however denied that she has performed the operation on the complainant. It is stated that the operation was performed by Dr. Vijay Sekhri. It is not necessary to go into the depth of the case as to who performed the operation. Suffice it to say that the operation was performed in the hospital, opposite party No. 1, owned by opposite party No. 2, by the doctors, In Harjot Ahluwalia (Minor) v. M/s. Spring Meadows Hospital & Ors., II (1997) CPJ 98 (NC)=1997 (2) CPC 593, Hon''ble National Commission has settled the law that the hospital is responsible by the acts of its employees and so negligence can be attributed to the functionaries and authorities of the hospital and the hospital is liable for the consequences. The principle as laid down is squarely covered and is applicable to the present case. Even otherwise the hospital is owned by the opposite party No. 2. WE have considered the entire affidavit of Mrs. Kang from all angles. Affidavit of Dr. Vijay Sekhri and Dr. Sirish Chandra have also been considered. Affidavit of Dr. T.S. Cheema, Medical Superintendent of City Nursing Home and Hospital, Ludhiana, has also been gone through along with other documents on record. In order to prove medical negligence, this Commission can take up the case of apparent negligence or negligent act proved by expert opinion as laid down by the Hon''ble Supreme Court in Indian Medical Association v. V.P. Shantha, III (1995) CPJ 1 (SC)=1995 (2) CPC 602. In this case the sponge was left negligently in abdominal cavity of the complainant during the operation performed by the opposite parties which endangered the life of the complainant. After the operation, the condition of the complainant was deteriorated. She developed constant vomiting and pains. She felt that something had left in her abdomen at the time of operation. There was no improvement though the opposite parties assured her that she would be alright after some days. On

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7.1.1998, the stitches were removed and the complainant was discharged from the hospital by the respondents. Even at the time of discharge she was suffering from pain in the abdomen. The complainant suffered vomiting every day. Eventually, it developed continuous discharge of the pus from sinus of the complainant. The complainant remained under treatment with the opposite parties upto 22.1.1998 when she was asked to consult from other Surgeon to drain the probable sinus. On 6.4.1998 she was admitted in the Dayanand Medical College and Hospital, Ludhiana where she was operated upon. During the operation the sinus was explored, a foreign body (old retained sponge) was found as per report referred above of the doctors operating upon the complainant in the Dayanand Medical College and Hospital. There was no operation in between 26.12.1997 and 6.4.1998. On 26.12.1997 the caesarean operation was performed by the opposite parties. On 6.4.1998 during the operation in the Dayanand Medical College, old retained sponge was found by the doctors of the D.M.C. Apparently the old retained sponge was that of the opposite parties. It may be observed that the vital organ in the body remained disturbed ever since she was relieved from the hospital of the opposite parties. In the circumstances, it is assumed that the sponge was left in the process of caesarean operation for the delivery of the child by the opposite parties which could cause damage to other organs. Thus, we hold opposite parties guilty of negligence and accept the ipsedixit of the complaint. This case is squarely covered by judgment in Ramanand B. Raikar v. Salgaonkar Medical Research Centre & Anr., 1993 (3) CPR 300, of Goa State Commission. In that case, it was held that the gauze towel was left negligently in abdominal cavity of the complainant during the operation performed by the opposite party. This resulted in post splemectomy fever and septicemia. The complainant was treated in some other hospital for about 71 days. There such towel was removed. The ratio of the aforementioned case is also applicable in the case in hand. In the case in hand also the opposite party is held guilty of negligent act and rendering deficient service. Learned Counsel for the complainant argued for payment of compensation as prayed for in the complaint. Under Section 14 of the Consumer Protection Act, 1986, compensation can be granted if the deficiency is proved. However, that has to be just compensation keeping in view the circumstances of the case and not arbitrarily on well-recognised principles governing the quantification of damages. The complainant is not to get unlawful enrichment. No doubt the complainant suffered pain and mental agony and has claimed compensation under different heads. Evidence of the complainant for compensation as prayed for has not been considered sufficient to arrive at the claim referred in the complaint. In such like cases, only compensation is to be fixed keeping in view the facts and the circumstances of the case. Payment of Rs. two lacs in our opinion is sufficient compensation for the sufferings, loss and mental agony of the complainant. For the reasons recorded above, this complaint is accepted. The complainant shall be entitled to the costs of litigation of this complaint to be paid by the opposite party No. 1, which are quantified as Rs. 10,000/-. Let this order be complied within 30 days from the receipt of its copy.

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Complaint allowed with costs.

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