**BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI**

**Complaint Case No. CC/03/221**

Mr.Prashant Tamhane
17, Kalanagar, Bandra (East),
Mumbai – 400 051. .....Complainant(s)

Versus

1. The Chief Executive Officer,
P.D. Hinduja Hospital,
Veer Savarkar Marg, Mahim,
Mumbai – 400 016.

2. Dr.Ashit V. Hegde
Intensivist,
P.D. Hinduja Hospital,
Veer Savarkar Marg, Mahim,
Mumbai – 400 016. .....Opponent (s)

**BEFORE:**
**Justice A.P. Bhangale PRESIDENT**
**D.R. Shirasao JUDICIAL MEMBER**

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| **For the Complainant:** | Dr.M.S. Kamath, A.R. for complainant. |
| **For the Opponent:** | Mr.S.B. Prabhavalkar, Advocate for opponent No.1.<br>Mr.G.N. Shenoy, Advocate for opponent No.2. |

## ORDER

Per Mr.Justice A.P. Bhangale, Hon'ble President

1. Heard submissions at the Bar and perused affidavits and copies of documents on record. This complaint is lodged for alleged medical negligence on the part of the Opposite parties. Smt. Swapna, wife of the Complainant reported ill with fever on 16.06.2002. Initially, she was attended by their Family doctor for about 4 days. Diagnosed for viral fever She was asked to undergo blood tests which were reviewed by Dr. Savardekar (Consultant in General Medicine). He advised immediate

hospitalization as the sample shown the symptoms of hepatitis. She was taken to P.D. Hinduja Hospital. She was examined by Dr.Ashit Hegde. She was asked to undergo further tests which she underwent on the same day. Dr.Hegde opined that she need not be hospitalized as she was stable. Certain medications were prescribed for the Patient which she took regularly. She was asked for periodical follow up. Her condition was gradually improving. But on 14.07.2002 she had Chest pain and difficulty in breathing. On15.07. 2002 she was X-rayed for chest, it was reported normal. On 19July 2002 she was called for follow up. The pain was present but her jaundice was under control. On 21 July 2002 she was again called up for X-ray when she was diagnosed as suffering from pleural effusion. Doctor had asked the Patient to be brought on next day on 22 July2002. She was taken to casualty Ward of the Hospital at 5 p.m. on 23 July 2002. The Patient was taken to minor operation theater of Casualty Ward for pleural tapping conducted by Dr.Hegde himself. Patient was asked to rest and Dr.Hegde left the Patient who complained of severe giddiness. Dr.Hegde was immediately summoned. He himself was quite non-plussed of the happening as the Patient was visibly sinking within a span of 20 to 30 minutes Dr.Hegde admitted tacitly that this could have happened due to puncturing of the spleen by needle during tapping. There was profuse internal bleeding resulting in lowering of the blood pressure due to loss of blood. CT scanning also revealed that the needle had punctured the spleen resulting in spleenic tear and profuse bleeding internally. Last ditch efforts to revive the Patient failed and she was declared as succumbed to her injuries at 7.30 a.m. on the following morning. Thus according to Complainant due to faulty and negligent treatment the Patient was lost to her family consisting of her husband and two children aged 7 and 4 years respectively. The Complainant prayed for compensation of Rs.51 Lakhs,

Ten Lakhs for negligent treatment leading to death of Swapna Tamhane and Rs.15 Lakhs for loss of Consortium, Ten Lakhs for Children, One Lakh twenty-five thousand for hospitalization expenses and litigation Costs of Rs.50,000/- from the opponents.

2. Opponent No.2 Dr.Ashit Hegde defended the complaint on the ground that there was neither any deficiency in service nor any unfair trade practice committed by him. It is submitted that the complaint give rise to the complicated questions of facts and the law requiring the same to be adjudicated in a full fledged trial before Civil Court and not in the State Consumer Dispute Redressal Commission. It is then argued that the Complainant have suppressed the material facts that the Patient was chronic alcoholic suffering from early cirrhosis of liver and chronic calcific pancreatitis. Critically ill patient with alcoholic hepatitis have short term mortality rate of 70%. Presence of ascites predicts a dismal prognosis. Pleural effusion is pleural cavity which is moistened by pleural fluid which helps to reduce the friction between the thoracic cage and the lugs during respiration. When the quantity of fluid is excessive pleural effusion is said to result. All efforts are needed to determine the cause and the first step is to ascertain whether the fluid is transudate or an exudate by biochemical study of the sample of pleural fluid obtained by thoracentesis or pleural tap. A diagnostic thoracentasis has to be performed on all patients with pleural effusion, by using a small needle on almost any patient on intercostal space below the spot where the tactile fermitus is lost and the percussion note becomes dull. A Chest X-ray is of immense help in locating the site.

3. According to the OP no.2 the Complaint is false and frivolous and not on cogent grounds, hence must be dismissed with Costs. Post Mortem revealed that the death was due to hepatocellullar failure, abscesses in the

Brain, Spleen, kidneys and the septicemia. There were multiple Abscesses in the Brain and the Kidneys and generalized septicemia this contributed to the death of the Patient. Cause of death was also possible due to petchieal hemorrhages over entire external surfaces of the Heart pericardium, trachea, bronchi, and peritoneum due to disseminated intravascular coagulopathy. It is argued that the Complaint is based upon the surmises and conjectures and not on facts. It is further contended that Dr.Hegde is well qualified M.D. (Internal Medicine) passed in 1984 from Bombay University and well trained medical practitioner passed associated in Hinduja Hospital from its inception and heading Critical Care Department. It is 48 bedded Hospital dealing with multi disciplinary unit dealing with complex problems encompassing all the branches of Medicine and Surgery. Fees for professional work are collected by Opponent No.1 and after deducting 20% is paid to the Opponent No.2.

4. According to Opponent No.2 Mrs.Tamhane was reluctant for admission on 20.06.2002 to get admitted for the investigations. On 27.06.2002 upon reviewing her reports it was observed that her liver functions were quite deranged and she had marked jaundice. She was diagnosed for early cirrhosis of Liver. Few spider nevi were noticed in further examination. Patient had admitted that she is consuming alcohol in excess. She was diagnosed as a case of acute alcoholic hepatitis in the background of chronic alcoholic liver disease. On 05.07.2002 the Patient felt much better but the jaundice persisted. She had continued with steroids and was also prescribed antioxidants. On 12.07.2002 Patient had symptoms of depression but fully conscious with no edema feet. She had developed facial swelling due to steroids. On 14.07.2002 the Patient came as an emergency case with local tenderness over chest wall. X-ray

did not reveal any abnormality. On 20.07.2002 the Patient continued to have pain in the Chest She was advised to be analgesics. On 22.07.2002 the chest pain of the Patient was severe. Upon X-ray left pleural effusion was revealed. It was decided to study the pleural fluid. There was no emergency. OP no. 2 undertook thoracentesis without any further investigations as X-ray was already taken. Needle was inserted. At the first puncture frank free flowing blood was taken from inter costal vessel or from hemothorax. One more try drew serosanguineous fluid, which OP no.2 sent for examination. The Patient who complained of mild dizziness became serious. At this time instead of waiting by the side of the Patient OP no.2 left for to see the other Patients leaving the Patient to her fate till he received call of her felled blood pressure and breathlessness, and she became breath less, pale and hypotensive. Patient then suffered from large loculated pleural effusion and innumerable hypo dense foci within the spleen occupying the whole organ and he also reported the presence of large sub capsular splenic hematoma and the presence of free fluid in the abdomen. The efforts to resuscitate the Patient and to do emergency splenoctomy, leparatomy failed according to OP no.2 as Patient continued to bleed from multiple sites and succumbed within few hours.

5. Opponents have referred to the plethora of rulings some of which we must refer here with legal position explained as under Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely, because the doctor chooses one course of action in preference to the other one available, he would not be liable if for the course of action chosen by him which is acceptable to the medical profession. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely,

because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck. It was our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

6. The medical practitioners at time also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical profession/hospital particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

7. In the case of *Kusum Sharma & Ors vs. Batra Hospital and Medical Research Centre and Others - 2012 (2) R C R (Civil) 161*, the Hon'ble Supreme Court while deciding whether the medical professional is guilty of medical negligence held that following well known principles must be kept in view:

*I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.*

II. *Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.*

III. *The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.*

IV. *A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.*

V. *In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.*

VI. *The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.*

VII. *Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and*

*competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.*

*VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.*

*IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.*

*X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.*

*XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.*

8. The Hon'ble Supreme Court in the case of *Martin F D'Souza vs. Mohd. Ishfaq - (2009) 3 Supreme Court Cases 1* decided on 17.02.2009 has held that:

"In para 52 of Jacob Mathew case, the Supreme Court realising

that doctors have to be protected from frivolous complaints of medical negligence, has laid down the following rules:

> *A private complaint should not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial opinion applying the Bolam test.*
>
> *A doctor accused of negligence should not be arrested in a routine manner simply because a charge has been levelled against him. Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld. [Jacob Mathew vs. State of Punjab (2005) 6 SCC 1: 2005 SCC (Cri) 1369, reiterated.]*

9. Therefore, it is directed that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctor who may not be ultimately found to be negligent. Further, the police officers are warned not to arrest or harass doctors unless the facts clearly come within the parameters laid

down in Jacob Mathew case otherwise the policeman will themselves have to face legal action.

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

**General Principles Relating to Medical Negligence**

11. As already stated above, the broad general principles of medical negligence have been laid down in the Supreme Court Judgment in Jacob Mathew vs. State of Punjab and Anr. (supra). However, these principles can be indicated briefly here :

The basic principle relating to medical negligence is known as the BOLAM Rule. This was laid down in the judgment of Justice McNair in Bolam vs. Friern Hospital Management Committee (1957) 1 WLR 586 as follows:

> *"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."*

Bolam's test has been approved by the Supreme Court in Jacob Mathew's case.

12. In Halsbury's Laws of England the degree of skill and care required by a medical practitioner is stated as follows:

*"35. Degree of skill and care required - The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.*

*Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."* ***(Emphasis Supplied)***

13. The happenings in chronology revealed that the Patient Swapna Tamhane during the period of 14.07.2002 to 24.07.2002, though not continuously, but was intermittently under the medical treatment of Dr.Hegde but he did not insist upon the Patient to admit herself in hospital despite knowing her medically complex condition with

jaundice, alcoholic hepatitis, liver ailment etc. It is true that Patient would not have survived for long years with such ailments as stated by the Dr.Hegde. But the Process of injecting a needle or puncturing twice of space below chest for Pleural effusion was done casually in the casualty section of the Hinduja Hospital. The question arise as to why the Doctor did not insist upon the hospitalization of the Patient in intensive care unit when there was likelihood of vital organ spleen being injured during the surgical process of puncturing twice after her chest X-ray was taken. Why and How X-ray remained in custody of the Patient when Dr.Hegde had advised it for further procedure. No sonography was used while passing or inserting the needle which resulted in puncturing of the spleen. This omission on Dr.Hegde's part is personally blameworthy and punctured Spleen of the Patient did hasten the dizziness, breathlessness and death of the Patient Principle of res ipsa loquitur i.e. things speak for itself, gets attracted in the facts and circumstances of the case. No expert opinion was required. The defence that injuries to the spleen are known complications that can take place in best of the centers any where in the world is neither excusable nor acceptable plea as caution was thrown to the winds to get the Patient duly admitted in the Hospital before using the needle puncturing made twice in a procedure described as minor operation in the casualty section of the Hospital. This was not a case of accident but blameworthy rashness or imputable negligence on the part of treating Dr.Hegde. There was lack of skill and due care in carrying out the procedure on Mrs.Swapna Tamhane . Post mortem revealed the cause of death as unnatural as hemorrhagic shock following disseminated intra-vascular coagulation as a complication of septicemia complicated by introgenic rupture of spleen during pleural tapping with splenectom in a known case of chronic hepatocellular failure. Dr.Kamat who pleaded and argued the case of the Complainant stressed upon the Lack of skill,

carelessness (not using Sonography while inserting the needle twice in a case of pleural effusion) resulted in puncturing of the spleen which hastened death of Patient Swapna. Ante mortem Tear of the spleen was a consequence of the procedure that unfortunately led to the death of the Patient Swapna. Subsequent decision to remove the affected spleen in a major operation was obvious cause of death in post mortem findings. Thus, complainant has satisfactorily proved the case of medical negligence on the part of Dr.Hegde.

14. In the facts and circumstances of the case Opponent No.1 Hinduja Hospital have no role as such in respect of deficiencies in service rendered to the Patient in particular. The liability for deficiency in service was exclusively that of Dr.Hegde. Rulings cited on his behalf, in the facts and circumstances of the case, cannot come to his rescue to escape liability for medical negligence, lack of care, and deficiency in service.

15. Now as regards compensation payable, Claim aggregating to the sum of Rs.87,50,000/- appears exaggerated and demand made is exorbitant. Compensation cannot be a lottery or jackpot for a Patient who was suffering from ailments like jaundice, hepatitis for which she was under medical treatment of Dr.Hegde. At the same time, we cannot ignore imponderables such as Patient may have died in due course in near future with serious ailments she suffered prior to her death. As stated Swapna was aged about 35 years. Her annual income is stated as Rs.4.25 Lakhs. The claim however is not supported by any adequate and satisfactory material except a copy of isolated IT return form showing aggregate income of Rs.4.25 Lakhs per year. Loss to the family can be computed with annual net income of Rs.4 Lakhs using multiplier 10 as appropriate in the facts and circumstances. Considering the just and

reasonable sum as compensation, we feel ends of justice would be met if we award compensation in the sum of Rs.40 Lakhs (Four Lakhs x 10), towards Hospital expenses, we award sum of Rs.One Lakh and for the litigation costs Rs.25,000/-. Thus, we award total sum of Rs.41,25,000/- (Rupees Forty One Lakhs Twenty Five Thousand only) [all inclusive] as just and reasonable compensation payable by Opponent No.2-Dr.Hegde to the Complainant in the peculiar facts and circumstances of the case. The amount shall be paid within ninety days from the date of this order failing which the amount due as stated shall carry interest at the rate of Rs.9% per annum till realization. Complaint is partly allowed and disposed of accordingly. Copies of the order be furnished to the parties.

Pronounced
Dated 31st March 2017.

**[ Justice A.P. Bhangale ]**
**PRESIDENT**

**[ D.R. Shirasao]**
**JUDICIAL MEMBER**