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to the provisions of the said Act and the Rules which is the governing statute.

39. Those directions are also contrary to the avowed purposes of the Act. In this connection we must remember that the Act was brought about in the background of worldwide movement for consumer protection. The Secretary General, United Nations submitted draft guidelines for consumer protection to the Economic and Social Council in 1983. Thereupon on an extensive discussions and negotiations among various countries on the scope and content of such impending legislation certain guidelines were arrived at. Those guidelines are:-

## JUDGMENT

"Taking into account the interests and needs of consumers in all countries, particularly those in developing countries, recognizing that consumers often face imbalances in economic terms, educational level and bargaining power, and bearing in mind that consumer should have the right of access to non-hazardous products, as well as importance of promoting just, equitable and sustainable economic and social development, these guidelines for consumer protection have the following objectives:-

To assist countries in achieving or maintaining adequate protection for their population as consumers.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2641\_ OF 2010

(Arising out of SLP(C) No.15084/2009)

V. Kishan Rao ..Appellant(s)

*Versus*

Nikhil Super Speciality Hospital ..Respondent(s)

& Another

J U D G M E N T

GANGULY, J.

1. Leave granted.
2. This appeal has been filed challenging the judgment and order dated 19.02.2009 of the National Consumer Disputes Redressal Commission, New Delhi (hereinafter, 'National Commission') which upheld the finding of the State Consumer Forum. The order of the National Commission runs as follows:

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it is clear that one of the duties of the doctor towards his patient is a duty of care in deciding what treatment is 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. The State Forum also relied on a decision of this Court in Indian Medical Association vs. V.P. Shantha & others - (1995) 6 SCC 651.

11. Relying on the aforesaid two decisions, the State Forum found that in the facts and circumstances of the case, the complainant failed to establish any negligence on the part of the hospital authorities and the findings of the District Forum were overturned by the State Commission. In the order of the State Commission there is a casual reference to the effect 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".

12. In this case the State Forum has not held that complicated issues relating to medical treatment have

“Heard. The State Commission after elaborate discussion has come to the conclusion that there was no negligence on the part of the respondent doctor. All possible care was taken by the respondent in treating the petitioner. The State Commission has also recorded a finding that no expert opinion was produced by the petitioner to prove that the line of treatment adopted by the respondent hospital was wrong or was due to negligence of respondent doctor. Dismissed”.

3. The appellant, who happens to be the original complainant, is an officer in the Malaria department and he got his wife admitted in the Respondent No. 1 hospital on 20.07.02 as his wife was suffering from fever which was intermittent in nature and was complaining of chill.

4. In the complaint, the appellant further alleged that his wife was subjected to certain tests by the respondent No.1 but the test did not show that she was suffering from malaria. It was also alleged that his wife was not responding to the medicine given by the opposite party No.1 and on 22<sup>nd</sup> July, 2002 while she was kept admitted by respondent No.1. Saline was given to her and the complainant had seen some particles in the saline bottle. This was brought to

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be unnecessarily burdened and in many cases such remedy would be illusory.

14. In the instant case, RW-1 has admitted in his evidence that the patient was not treated for malaria. Of course evidence shows that of the several injections given to the patient, only one was of Lariago. Apart from Lariago, several other injections were also administered on the patient. Lariago may be one injection for treating malaria but the finding of Yashoda Hospital which has been extracted above shows that smear for malarial parasite was positive. There is 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 Yashoda Hospital in a very critical condition with no pulse, no BP and in an unconscious state with pupils dilated. As a result of which the patient had to be put on a ventilator.

the notice of the authorities of the respondent No.1 but to no effect. Then on 23<sup>rd</sup> July 2002 complainant's wife was complaining of respiratory trouble and the complainant also brought it to the notice of the authorities of the respondent No.1 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. According to the complainant his wife was not responding to the medicines and thus her condition was deteriorating day by day. The patient was finally shifted to Yashoda Hospital from the respondent No.1.

5. At the time of admission in Yashoda Hospital the following conditions were noticed:

**"INVESTIGATIONS**

Smear for MP-Positive-ring forms &  
Gametocytes of P. Falciparam seen

Positive index-2-3/100RBCS

LFT-TB-1.5

DB-1.0

IB-0.5

WIDAL test-Negative

HIV & HBsAG-Negative

PT-TEST-22 sec

CONTROL-13 sec

APTT-TEST-92 sec

CONTROL-38 sec

CBP-HB-3.8% gms

TLC-30.900/cumm



20. With the coming into effect of Human Rights Act, 1988 from 2<sup>nd</sup> October, 2009 in England, the State's obligations under the European Convention on Human Rights (ECHR) are justiciable in the domestic courts of England. Article 2 of the Human Rights Act 1998 reads as under:-

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

21. Even though Bolam test 'has not been uprooted' it has come under some criticism as has been noted in *Jackson & Powell on Professional Negligence (Sweet & Maxwell), Fifth Edition, 2002*. The learned authors have noted (See paragraph 7-047 at page 200 in *Jackson & Powell*) that there is an argument to the effect that Bolam test is inconsistent with the right to life unless the domestic courts construe that the requirement to take reasonable care is equivalent with the requirement of making adequate provision for medical care. In the context of such jurisprudential thinking in England, time has come for this Court also to reconsider the parameters set down in Bolam

RBC-1.2/cumm

HRP II-Positive

B urea-38 mg/dl

S Creatinine-1.3 mb/dl

S Electrolytes-NA/K/CL-148/5.2/103 mEq/L

C X R – s/o ARDS

#### CASE DISCUSSION

45 yrs old of patient admitted in AMC with H/o fever-8 days admitted 5 days back in NIKHIL HOSPITAL & given INJ MONOCEF, INJ CIFRAN, INJ CHOLROQUINE because of dysnoea today suddenly shifted to Y.S.S.H. for further management. Upon arrival in AMC, patient unconscious, no pulse, no BP, pupils dilated. Immediately patient intubated & ambu bagging AMC & connected to ventilator. Inj. Atropine, inj. Adhenoline, inj. Sodabcarb given, DC shock also given. Rhyth restored at 1.35 PM At 10.45 pm, patient developed brady cardia & inspite of repeated Altropine & Adhenolin. HR-'O' DC shock given. External Cardiac massage given. In spite of all the resuscitative measure patient could not be revived & declared dead at 11.30pm on 24.7.2002".

6. In the affidavit, which was filed by one Dr. Venkateswar Rao who is a Medical Practitioner and the Managing Director of the respondent No.1 before the District Forum, it was admitted that patient was removed from respondent No.1 to the Yashoda Hospital

being accompanied by the doctor of the respondent  
No.1. From the particulars noted at the time of  
admission of the patient in Yashoda Hospital it is  
clear that the patient was sent to Yashoda Hospital

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been raised. It is not a case of complicated surgery or a case of transplant of limbs and organs in human body. It is a case of wrong treatment in as much as the patient was not treated for malaria when the complaint is of intermittent fever and chill. Instead the respondent No.1 treated the patient for Typhoid and as a result of which the condition of the patient deteriorated. When the condition became very very critical the patient was removed to Yashoda Hospital but patient could not be revived.

13. In the opinion of this Court, before forming an opinion that expert evidence is necessary, the Fora under the Act must come to a conclusion that the case is complicated enough to require the opinion of an expert or that the facts of the case are such that it cannot be resolved by the members of the Fora without the assistance of expert opinion. This Court makes it clear that in these matters no mechanical approach can be followed by these Fora. Each case has to be judged on its own facts. If a decision is taken 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 this Act will

in a very precarious condition and was virtually, clinically dead.

7. On the complaint of the appellant that his wife was not given proper treatment and the respondent No.1 was negligent in treating the patient the District Forum, on a detailed examination of the facts, came to a finding that there was negligence on the part of the respondent No.1 and as such the District Forum ordered that the complainant is entitled for refund of Rs.10,000/- and compensation of Rs.2 lakhs and also entitled to costs of Rs.2,000/-.

8. The District Forum relied on the evidence of Dr. Venkateswar Rao who was examined on behalf of the respondent No.1. Dr. Rao categorically deposed “I have not treated the case for malaria fever”. The District Forum found that the same is a clear admission on the part of the respondent No.1 that the patient was not treated for malaria. But the death certificate given by the Yashoda Hospital disclosed that the patient died due to “cardio respiratory arrest and malaria”. In view of the aforesaid finding the District Forum came to the conclusion that the

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"Heard. The State Commission after elaborate discussion has come to the conclusion that there was no negligence on the part of the respondent doctor. All possible care was taken by the respondent in treating the petitioner. The State Commission has also recorded a finding that no expert opinion was produced by the petitioner to prove that the line of treatment adopted by the respondent hospital was wrong or was due to negligence of respondent doctor. Dismissed".

3. The appellant, who happens to be the original complainant, is an officer in the Malaria department and he got his wife admitted in the Respondent No. 1 hospital on 20.07.02 as his wife was suffering from fever which was intermittent in nature and was complaining of chill.
4. In the complaint, the appellant further alleged that his wife was subjected to certain tests by the respondent No.1 but the test did not show that she was suffering from malaria. It was also alleged that his wife was not responding to the medicine given by the opposite party No.1 and on 22<sup>nd</sup> July, 2002 while she was kept admitted by respondent No.1. Saline was given to her and the complainant had seen some particles in the saline bottle. This was brought to

patient was subjected to wrong treatment and awarded compensation of Rs.2 lakhs and other directions as mentioned above in favour of the appellant. The District Forum also noted when the patient was admitted in a very critical condition in Yoshoda Hospital the copy of the Haematology report dated 24.7.2002 disclosed blood smear for malaria parasite whereas Widal test showed negative. The District Forum also noted that the case sheet also does not show that any treatment was given for Malaria. The Forum also noted that the respondent-authorities, despite the order of the Forum to file the case sheet, delayed its filing and there were over writings on the case sheet. Under these circumstances the District Forum noted that case records go to show that wrong treatment for Typhoid was given to the complainant's wife. As a result of such treatment the condition of the complainant's wife became serious and in a very precarious condition she was shifted to Yashoda Hospital where the record shows that the patient suffered from malaria but was not treated for malaria. Before the District Forum, on behalf of the respondent No.1, it was argued that the complaint sought to prove Yashoda Hospital record without

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the notice of the authorities of the respondent No.1 but to no effect. Then on 23<sup>rd</sup> July 2002 complainant's wife was complaining of respiratory trouble and the complainant also brought it to the notice of the authorities of the respondent No.1 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. According to the complainant his wife was not responding to the medicines and thus her condition was deteriorating day by day. The patient was finally shifted to Yashoda Hospital from the respondent No.1.

5. At the time of admission in Yashoda Hospital the following conditions were noticed:

"INVESTIGATIONS"

Smear for MP-Positive-ring forms &  
Gametocytes of P. Falciparum seen  
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following the provisions of Sections 61, 64, 74 and 75 of Evidence Act. The Forum overruled the objection, and in our view rightly, that complaints before consumer are tried summarily and Evidence Act in terms does not apply. This Court held in the case of Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and others reported in (2009) 9 SCC 221 that provisions of Evidence Act are not applicable and the Fora under the Act are to follow principles of natural justice (See paragraph 43, page 252 of the report).

9. Aggrieved by the order of the District Forum respondent No. 1 preferred an appeal to the State Consumer Disputes Redressal Commission (FA No. 89 of 2005) and the insurance company, which is respondent no. 2 before this Court, preferred another appeal (FA no. 1066 of 2005). The State Forum vide its order dated 31.10.2008 allowed the appeals.

10. In doing so the State Commission relied on a decision in Tarun Thakore vs. Dr. Noshir M. Shroff (O.P. No. 215/2000 dated 24.9.2002) wherein the National Commission made some observations about the duties of doctor towards his patient. From those observations



illusory, (f) those directions run contrary to principle of 'Res ipsa loquitur' which has matured into a rule of law in some cases of medical negligence where negligence is evident and obvious.

51. When a judgment is rendered by ignoring the provisions of the governing statute and earlier larger Bench decision on the point such decisions are rendered 'Per incuriam'. This concept of 'Per incuriam' has been explained in many decisions of this Court. Justice Sabyasachi Mukharji (as his Lordship then was) speaking for the majority in the case of A.R. Antulay vs. R.S. Nayak and another reported in (1988) 2 SCC 602 explained the concept in paragraph 42 at page 652 of the report in following words:-

## JUDGMENT

"Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.

52. Subsequently also in the Constitution Bench judgment of this Court in Punjab Land Development

it is clear that one of the duties of the doctor towards his patient is a duty of care in deciding what treatment is 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. The State Forum also relied on a decision of this Court in *Indian Medical Association vs. V.P. Shantha & others* – (1995) 6 SCC 651.

11. Relying on the aforesaid two decisions, the State Forum found that in the facts and circumstances of the case, the complainant failed to establish any negligence on the part of the hospital authorities and the findings of the District Forum were overturned by the State Commission. In the order of the State Commission there is a casual reference to the effect 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”.

12. In this case the State Forum has not held that complicated issues relating to medical treatment have



against a doctor is filed and before the investigating officer proceeds against the doctor accused of rash and negligent act, the investigating officer must obtain an independent and competent medical opinion preferably from a doctor in Government service, qualified in that branch of medical practice. Such a doctor is expected to give an impartial and unbiased opinion applying the primary test to the facts collected in the course of investigation. Hon'ble Chief Justice suggested that some statutory rules and statutory instructions incorporating certain guidelines should be issued by the Government of India or the State Government in consultation with the Medical Council of India in this regard. Till that is done, the aforesaid course should be followed. But those directions in paragraph 52 of **Mathew** (supra) were certainly not given in respect of complaints filed before the Consumer Fora under the said Act where medical negligence is treated as civil liability for payment of damages.

28. This fundamental distinction pointed out by the learned Chief Justice in the unanimous three-Judge Bench decision in **Mathew** (supra) was unfortunately

been raised. It is not a case of complicated surgery or a case of transplant of limbs and organs in human body. It is a case of wrong treatment in as much as the patient was not treated for malaria when the complaint is of intermittent fever and chill. Instead the respondent No.1 treated the patient for Typhoid and as a result of which the condition of the patient deteriorated. When the condition became very very critical the patient was removed to Yashoda Hospital but patient could not be revived.

13. In the opinion of this Court, before forming an opinion that expert evidence is necessary, the Fora under the Act must come to a conclusion that the case is complicated enough to require the opinion of an expert or that the facts of the case are such that it cannot be resolved by the members of the Fora without the assistance of expert opinion. This Court makes it clear that in these matters no mechanical approach can be followed by these Fora. Each case has to be judged on its own facts. If a decision is taken 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 this Act will

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as a general practice, and the other opinion was for the use of drug that was attended by mortality risks and confined the use of relaxant drugs only to cases where there are particular reasons for their use and Bolam case was not under that category. On these facts the expert opinion of Dr. J.de Bastarrechea, consultant psychiatrist attached to the Hospital was taken. Ultimately the Court held the Doctors were not negligent. In this context the following principles have been laid down:

"A Doctor is not 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" (See page 122 placitum 'B' of the report)

18. It is also held that in the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and a doctor is not negligent merely because his conclusion differs from that of other professional men. It was also made clear that the true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with

be unnecessarily burdened and in many cases such remedy would be illusory.

14. In the instant case, RW-1 has admitted in his evidence that the patient was not treated for malaria. Of course evidence shows that of the several injections given to the patient, only one was of Lariago. Apart from Lariago, several other injections were also administered on the patient. Lariago may be one injection for treating malaria but the finding of Yashoda Hospital which has been extracted above shows that smear for malarial parasite was positive. There is 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 Yashoda Hospital in a very critical condition with no pulse, no BP and in an unconscious state with pupils dilated. As a result of which the patient had to be put on a ventilator.

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