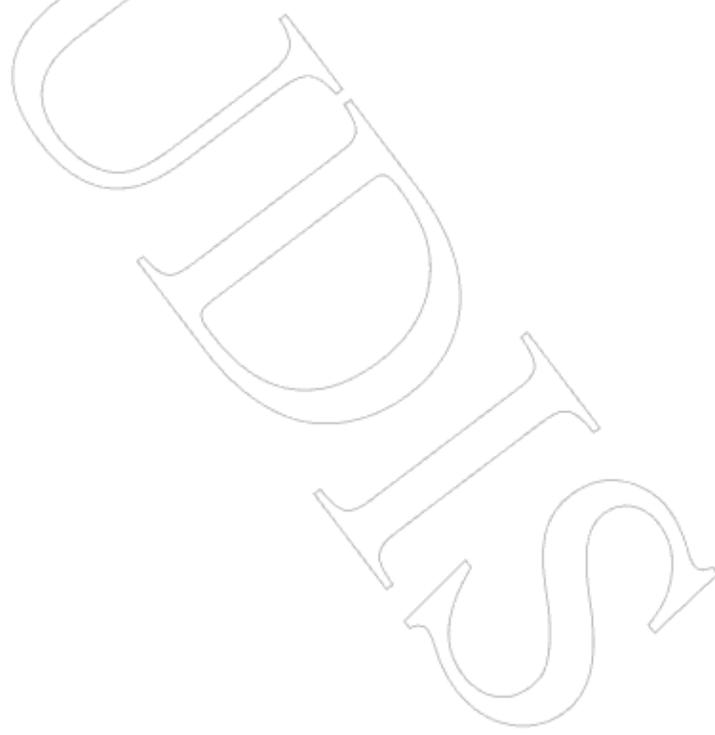


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not impleading the treating doctor as a party. Once an allegation is made that the patient was admitted in a particular hospital and evidence is produced to satisfy that he died because of lack of proper care and negligence, then the burden lies on the hospital to justify that there was no negligence on the part of the treating doctor/ or hospital. Therefore, in any case, the hospital which is in better position to disclose that what care was taken or what medicine was administered to the patient. It is the duty of the hospital to satisfy that there was no lack of care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors being employed on job basis or employed on contract basis, it is the hospital which has to justify and by not impleading a particular doctor will not absolve the hospital of their responsibilities.

In the result, we allow this appeal, set aside the order dated 6.2.2003 passed by the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No.121 of 1993 and remit back the original petition to the National Consumer Disputes Redressal Commission to be decided in accordance with law. No order as to costs.



Appeal (civil) 4024 of 2003

PETITIONER:

Smt. Savita Garg

RESPONDENT:

The Director, National Heart Institute.

DATE OF JUDGMENT: 12/10/2004

BENCH:

B.N.AGRAWAL & A.K.MATHUR

JUDGMENT:

J U D G M E N T

A.K. MATHUR, J.

This appeal is directed against the order passed by the National Consumer Disputes Redressal Commission (hereinafter to be referred to as 'the Commission'), New Delhi whereby the Commission has dismissed the original petition of the appellant on the ground of non-joinder of necessary parties.

Brief facts which are necessary for disposal of this appeal are as follows.

The appellant is the wife of one deceased A.K.Garg who was admitted to the National Heart Institute (hereinafter referred to as 'the Institute') for medical treatment and because of the negligence of the doctors of the Institute he could not get proper medical treatment and ultimately he died. The deceased A.K.Garg was employed as Electrical Engineer in I.D.P.L., Vir Bhadra (Rishikesh). The deceased was drawing a salary of Rs.8000/- per month at the time of his death. He left behind his family members namely; (i) Smt.Savit Garg (wife), (ii) Smt. Sushila Garg (mother), (iii) Shri Ankul Garg (son), (iv) Miss. Ruchi (daughter), (v) Shri Sauragh (son) and (vi) Anoop Garg (brother). Prior to the admission of the deceased, A.K.Garg in the Institute he was being treated at G.B. Pant Hospital and he did not improve there, therefore, his case was referred to the Institute by his employer, IDPL. The deceased was admitted for angiography on 4.7.1994 and a sum of Rs.14,000/- was deposited for his treatment. He was discharged on 5.7.1994 after angiography. Again he was admitted on 2.8.1994 at 11.15 A.M. and remained there till 9.8.1994 and ultimately died at the Institute. It was alleged that on 3.8.1994 he was operated and was brought to the Intensive Care Unit of the Institute. No attendant was allowed to see the patient except through the glass windows of I.C.U. The deceased was operated twice by Dr.O.P. Yadav of the Institute for his treatment. It is further alleged that Dr.O.P.Yadav was too much worried and perturbed after the deceased's operation. On the said day i.e. on 3.8.1994, 8 bottles

of blood were transfused in the body of the deceased and even on 4.8.1994 another 8 bottles of blood were demanded by the Doctors of the Institute and the same was somehow arranged. The deceased is said to have developed jaundice may be because of wrong transfusion or extra transfusion of blood. It is further alleged that the deceased developed septic and as the septic in the bone became incurable, therefore a Doctor from Batra Hospital was called for to amputate one leg of the deceased A.K.Garg. Thereafter , as it was reported to be case of kidney failure, the deceased was put on dialysis. However, on 9.8.1994 at 2.30 hours the deceased was

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account of non-joinder of necessary party. So far as the law with regard to the non-joinder of necessary party under Code of Civil Procedure, Order 1 Rule 9 and Order 1 Rule 10 of the CPC there also even no suit shall fail because of mis-joinder or non-joinder of parties. It can proceed against the persons who are parties before the Court. Even the Court has the power under Order 1 Rule 10(4) to give direction to implead a person who is a necessary party. Therefore, even if after the direction given by the Commission the concerned doctor and the nursing staff who were looking after the deceased A.K.Garg have not been impleaded as opposite parties it can not result in dismissal of the original petition as a whole.

The Consumer Forum is primarily meant to provide better protection in the interest of the consumers and not to short circuit the matter or to defeat the claim on technical grounds. Reverting back to the facts of the present case, whether non-joinder of the treating doctor, nursing staff can result into dismissal of the claim petition. As a matter of fact, when a patient is admitted to the highly commercial hospital like the present institute, a thorough check up of the patient is done by the hospital authorities, it is the Institute which selects after the examination of the patient that he suffers from what malady and who is the best doctor who can attend, except when the patient or the family members desire to be treated by a particular doctor or the surgeon as the case may be. Normally, the private hospitals have a panel of doctors in various specialities & it is they who chooses who is to be called. It is very difficult for the patient to give any detail that which doctor treated the patient and whether the doctor was negligent or the nursing staff was negligent. It is very difficult for such patient or his relatives to implead them as parties in the claim petition. It will be an impossible task and if the claim is to be defeated on that ground it will virtually be frustrating the provisions of the Act, leaving the claimant high and dry. We cannot place such a heavy burden on the patient or the family members/ relatives to implead all those doctors who have treated the patient or the nursing staff to be impleaded as party. It will be a difficult task for the patient or his relatives to undertake this searching enquiry from the Hospital and sometimes hospital may not co-operate. It may give such details and sometimes may not give the details. Therefore, the expression used in Rule 14 (1) (b), "so far as they can be ascertained", makes it clear that the framers of the Rules realized that it will be very difficult specially in the case of medical profession to pinpoint that who is responsible for not providing proper and efficient service which gives rise to the cause for filing a complaint and specially in the case like the one in hand. The patients once they are admitted to such hospitals, it is the responsibility of the said hospital or the medical institutions to satisfy that all possible care was taken and no negligence was involved in attending the patient. The burden cannot be placed on the patient to implead all those treating doctors or the attending staff of the hospital as a party so as to substantiate his claim. Once a patient is admitted in a hospital it is the responsibility of the Hospital to provide the best service and if it is not, then hospital cannot take shelter under the technical ground that the concerned surgeon or the nursing staff, as the case may be, was not impleaded, therefore, the claim should be rejected on the basis of non-joinder of necessary parties. In fact, once a claim petition is filed and the claimant has successfully discharged the initial burden that the hospital was negligent, as a result of such negligence the patient died, then in that case the burden lies on the hospital and the concerned doctor who treated that patient that there was no negligence involved in the treatment. Since the burden is on the hospital,

declared dead. Therefore, a complaint was filed before the Commission claiming a sum of Rs.45 lacs, the details of which have already been given in the complaint. The appellant has detailed the reasons for the negligence in her original petition filed before the Commission. An affidavit in opposition was filed by the Institute and they denied the allegations of negligence and pointed out that all proper care was taken, there is no negligence on the part of the Institute. An objection was also taken that the provisions as contained in the Consumer Protection Act, 1986 do not satisfy the requirement of a complaint as defined under the Act as it does not disclose any deficiency. The Institute also challenged the jurisdiction of the Commission to entertain the said original petition.

A rejoinder was also filed by the appellant and it is alleged that septic was developed because of the negligence which shows lack of care on the part of the doctors. However, when the matter came up for hearing on 12.4.2002, the Commission directed both the parties to file brief notes of submissions on the question of maintainability of the complaint as well as the effect of non-impleading the attending doctors against whom the medical negligence has been alleged and the matter was posted to 2.5.2002 for directions. Thereafter, ultimately the matter was disposed of by the Commission by its order dated 6.2.2003 holding that the original petition is not maintainable in the absence of the treating doctors being impleaded as party. It was also observed that no effort was made by the appellant to implead the concerned doctors at any stage of the proceedings. Therefore, the Commission held that there is no alternative but to dismiss the complaint for non-joinder of parties. The Commission however observed that considering the age of the deceased and the number of dependents upon her, the Institute will consider the matter sympathetically and make some ex-gratia payment to the family members of the deceased.

The question is whether non-impleading the treating doctor as party could result in dismissal of the original petition for non-joinder of necessary party.

It is the common experience that when a patient goes to a private clinic, he goes by the reputation of the clinic and with the hope that proper care will be taken by the Hospital authorities. It is not possible for the patient to know that which doctor will treat him. When a patient is admitted to a private clinic/ hospital it is hospital/ clinic which engages the doctors for treatment. In the present case, the appellant's husband was admitted to the best of the hospital and it is not possible for the appellant to find out that who is the best doctor

and who is not. Normally, the private clinics go by the reputation and people look forward for best treatment when they are run commercially. It is the responsibility of the clinic that they must provide best of the services when they charge for the services rendered by them. In case it is found that services rendered by the clinic or hospital, as the case may be, is not up to the mark and it involves some negligence on their part, for which the patients suffer, then they are bound to reimburse them. They charge fee for the services rendered by them and they are supposed to bestow the best care. Looking at the present appeal, the whole claim petition was dismissed simple on the ground that the treating doctor was not impleaded as a party. The question is therefore, whether in the absence of the treating doctor could the original petition be dismissed on the ground of non-joinder of necessary party. As per the provisions of Section 22 of the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act') the Commission has to regulate its business. Section 22 lays down the power of and procedure applicable to the National Commission. It reads as under:

" 22. Power of and procedure applicable to the

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referred to in sub-clause (iv) of clause(b) of sub-section (1) of section 2, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908 (3 of 1908) shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to a complaint or the order of the District Forum thereon."

Sub-sections (4), (3) & (6) of Section 13 lay down that the Forum shall have the power to summon and enforce the attendance of any defendant or witness as laid down in the Code of Civil Procedure. Likewise, it shall have the power to direct for production of material object producible as evidence, reception of evidence on affidavit; requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source; issuing of any commission for the examination of any witness and any other matter which may be prescribed. Sub-section (3) says that every proceeding before the District Forum shall be judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code and the District Forum shall be deemed to be a Civil Court for the purposes of section 193 and Chapter XXVI of the Code of Civil Procedure. Sub-section (6) says that when there are more than one consumer, then one of them can sue as required under Order 1 Rule 8 of the Code of Civil Procedure. Therefore, if there are number of consumers, one of them can represent the interest of all. Therefore, as far as the Commission is concerned, the provisions of the Code of Civil Procedure are applicable to the limited extent and not all the provisions of the Code of Civil Procedure are made applicable to the proceedings to the National Forum. Rules have also been framed under the Act, known as the Consumer Protection Rules, 1987, where Rule 14 has prescribed the procedure to be followed by the Commission. Rule 14 says that the name, description and the address of the complainant and the opposite parties, as the case may be, so far as they can be ascertained, should be given. Clause (b) of sub-section (1) which is relevant for our purposes reads as under:

" (b) the name, description and address of the opposite party or parties, as the case may be, so far as they can be ascertained"

Therefore, according to the procedure laid down by the Rules a complainant has to give the name, description and address of the opposite party or parties so far as they can be ascertained.

So far as the filing of complaint directly before the Commission because of higher valuation, the procedures laid down in Rule 14 of the Rules have to be followed and in that case, the name of the opposite party has to be given so far as they can be ascertained. In the present case, the appellant filed original petition impleading the Institute where her husband was admitted as a party but she did not implead the treating doctors and nurses who were attending on her husband. Though the Commission directed that necessary parties may be impleaded and it appears that no effort was made to implead the treating surgeon or the nursing staff as a party. Therefore, the question is whether non-impleading the treating surgeon or a nursing staff can be said to be necessary party and if they are not impleaded then in that case, the original petition can result into dismissal on

National Commission.- The National Commission shall, in the disposal of any complaints or any proceedings before it, have-

- (a) the power of a civil court as specified in sub-sections (4), (5) and (6) of section 13;
- (b) the power to issue an order to the opposite party directing him to do any one or more of the things referred to in clauses (a) to (i) of sub-section (1) of section 14,

and follow such procedure as may be prescribed by the Central Government."

According to Section 22 whatever procedures which have been prescribed under Section 13 for the District Forum shall be applicable. Sub-sections (4), (5) & (6) of Section 13 which are relevant for our purpose read as under:

" 13. Procedure on receipt of complaint.-
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(4) For the purposes of this section, the District Forum shall have be same powers as are vested in a civil court under Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:-

- (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath,
- (ii) the discovery and production of any document or other material object producible as evidence,
- (iii) the reception of evidence on affidavits,
- (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source,
- (v) issuing of any commission for the examination of any witness, and
- (vi) any other matter which may be prescribed.

(5) Every proceeding before the District Forum shall be deemed to be a judicial proceeding within the meaning of section 193and 228 of the Indian Penal Code (45 of 1860), and the District Forum shall be deemed to be a civil court for the purposes of section 195, and

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realized that it will be very difficult specially in the case of medical profession to pinpoint that who is responsible for not providing proper and efficient service which gives rise to the cause for filing a complaint and specially in the case like the one in hand. The patients once they are admitted to such hospitals, it is the responsibility of the said hospital or the medical institutions to satisfy that all possible care was taken and no negligence was involved in attending the patient. The burden cannot be placed on the patient to implead all those treating doctors or the attending staff of the hospital as a party so as to substantiate his claim. Once a patient is admitted in a hospital it is the responsibility of the Hospital to provide the best service and if it is not, then hospital cannot take shelter under the technical ground that the concerned surgeon or the nursing staff, as the case may be, was not impleaded, therefore, the claim should be rejected on the basis of non-joinder of necessary parties. In fact, once a claim petition is filed and the claimant has successfully discharged the initial burden that the hospital was negligent, as a result of such negligence the patient died, then in that case the burden lies on the hospital and the concerned doctor who treated that patient that there was no negligence involved in the treatment. Since the burden is on the hospital,

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the end of the treatment it was found that his hand had been rendered useless. The trial judge dismissed his action for damages for negligent treatment which he brought against the hospital on the ground that he had failed to prove any negligence. On appeal it was held that in the circumstances, the doctrine of *res ipsa loquitur* applied, and the onus lay on the hospital authority to prove that there had been no negligence on its part or on the part of anyone for whose acts or omission it was liable, and that onus had not been discharged."

Therefore, as per the English decisions also the distinction of 'contract of service' and 'contract for service', in both the contingencies the courts have taken the view that the hospital is responsible for the acts of their permanent staff as well as staff whose services are temporarily requisitioned for the treatment of the patients. Therefore, the distinction which is sought to be pressed into service so ably by learned counsel cannot absolve the hospital or the institute as it is responsible for the acts of its treating doctors who are on the panel and whose services are requisitioned from time to time by the hospital looking to the nature of the diseases. The hospital or the institute is responsible and no distinction could be made between the two classes of persons i.e. the treating doctor who was on the staff of the hospital and the nursing staff and the doctors whose services were temporarily taken for treatment of the patients. On both, the hospital as the controlling authority is responsible and it cannot take the shelter under the plea that treating physician is not impleaded as a party, the claim petition should be dismissed. In this connection, a reference may be made to a decision of this Court in the case of *Indian Medical Association v. V.P. Shantha & ors.* reported in AIR 1996 SC 550. There the question had come up before this Court with regard to the provisions of the Consumer Protection Act, 1986 vis-à-vis the medical profession. This Court has dealt with all aspects of medical profession from every angle and has come to the conclusion that the doctors or the institutes owe a duty to the patients and they cannot get away in case of lack of care to the patients. Their Lordships have gone to the extent that even if the doctors are rendering services free of charge to the patients in the Government hospitals, the provisions of the Consumer Protection Act will apply since the expenses of running the said hospitals are met by appropriation from the Consolidated Fund which is raised from the taxes paid by the tax payers. Their Lordships have dealt with regard to the definition of "service" given in Section 2(1)(o) of the Consumer Protection Act, 1986, and have observed as follows:

" The service rendered free of charge to patients by doctors/ hospitals whether non-Govt. or Govt. who render free service to poor patients but charge fee for services rendered to other patients would, even though it is free, not be excluded from definition of service in S.2(1)(o). The Act seeks to protect the interests of consumers as a class. To hold otherwise would mean that the protection of the Act would be available to only those who can afford to pay and such protection would be denied to those who cannot so afford, though they are the people who need the protection more. It is difficult to conceive that the legislature intended to achieve such a

they can discharge the same by producing that doctor who treated the patient in defence to substantiate their allegation that there was no negligence. In fact it is the hospital who engages the treating doctor thereafter it is their responsibility. The burden is greater on the Institution/ hospital than that of the claimant. The institution is private body and they are responsible to provide efficient service and if in discharge of their efficient service there are couple of weak links which has caused damage to the patient then it is the hospital which is to justify the same and it is not possible for the claimant to implead all of them as parties.

In this connection, learned counsel appearing for the respondent ably tried to make a distinction between 'contract for service' and 'contract of service'. He submitted that those persons who are on contract for service are different from those persons who are on contract of service. He submitted that in a contract for service there is a contract whereby one party undertakes to render service e.g. professional or technical service, to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. By this learned counsel submitted that so far as the permanent staff of the hospital is concerned, there is a contract of service and negligence thereof the hospital can be made liable and for that they need not be impleaded as parties in respect of any negligence of service but the doctors who come on visit, they are on contract for service over which the hospital has no control and therefore, unless they are impleaded as parties, no relief can be given. He also based his submission with reference to some of the English decisions given in the case of *Gold & Ors v. Essex County Council* reported in [1942] 2 All E.R.237 and *Collins v. Hertfordshire County Council & Anr.* reported in [1947] 1 All E.R. 633. So far as *Gold & Ors. v. Essex County Council* is concerned, in that case, the infant plaintiff was treated by a radiographer, an employee of the respondents at one of their county hospitals. By reason of his failure to provide adequate screening material in giving Grenz-ray treatment the infant plaintiff suffered injury to her face. It was proved that the radiographer was fully competent to administer the treatment

given to the infant plaintiff. However, it was held that as the radiographer was under a contract of service of the respondents, they were liable for his negligence under the doctrine of respondeat superior. It was further held that if a local authority had exercised power under the Public Health Act, 1936, the obligation undertaken is an obligation to treat and the authority is liable if the person employed by it to perform the obligation on its behalf acts without due care. This was a case in which the radiographer was under regular employment with the county council. This is a case in which a person was on contract of service and not on contract for service. Therefore, this case does not provide any assistance to the present case.

In the case of *Collins v. Hertfordshire County Council & Anr*, while undergoing an operation, a patient in a county council hospital was killed by an injection of cocaine which was given by the operating surgeon in the mistaken belief that it was procaine. The operating surgeon had ordered procaine on the telephone, but the resident house surgeon (who was then unqualified) had mis-heard "procaine" as "cocaine", and had told the pharmacist to dispense a mixture which was, in fact, lethal. The pharmacist

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result. Another consequence of adopting a construction, which would restrict the protection of the Act to persons who can afford to pay for the services availed by them and deny such protection to those who are not in a position to pay for such services, would be that the standard and quality of services rendered at an establishment would cease to be uniform. It would be of a higher standard and of better quality for persons who are in a position to pay for such service while the standard and quality of such service would be inferior for person who cannot afford to pay for such service and who avail the service without payment. Such a consequence would defeat the object of the Act. All persons who avail the services by doctors and hospitals who give free service to poor patients but charge fee for others, are required to be treated on the same footing irrespective of the fact that some of them pay for the service and others avail the same free of charge. Most of the doctors and hospitals work on commercial lines and the expenses incurred for providing services free of charge to patients who are not in a position to bear the charges are met out of the income earned by such doctors and hospitals from services rendered to paying patients. The Government hospitals may not be commercial in that sense but on the overall consideration of the objectives and the scheme of the Act it would not be possible to treat the Government hospitals differently. In such a situation the persons belonging to "Poor class" who are provided services free of charge are the beneficiaries of the service which is hired or availed of by the "paying class". Service rendered by the doctors and hospitals who render free service to poor patients and charge fees for others irrespective of the fact that part of the service is rendered free of charge, would nevertheless fall within the ambit of the expression "service" as defined in Section 2(1)(c) of the Act."

Therefore, the distinction between the 'contract of service' and 'contract for service' has been very elaborately discussed in the above case and this Court has extended the provisions of the Consumer Protection Act, 1986, to the medical profession also and included in its ambit the services rendered by private doctors as well as the Government Institutions or the non-Governmental institutions, be it free medical services provided by the Government Hospitals. In the case of Achutrao Maribhadra Khodwa & Ors. v. State of Maharashtra & Ors. reported in (1996) 2 SCC 634, Their Lordships observed that in cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action on torts would be maintainable. Their Lordships further observed

that if the doctor has taken proper precaution and despite that if the patient does not survive then the Court should be very slow in attributing negligence on the part of the doctor. It was held as follows:

dispensed the mixture without making further inquiry and without requiring the written instruction of a qualified person, and the operating surgeon had given the injection without checking that it was what he had ordered. The operating surgeon, the house surgeon, and the pharmacist were all three in the full-time or part-time employment of the council. In an action by the patient's widow against the county council and the operating surgeon alleging that the death was the result of (a) the council's negligence in the conduct of their hospital, and (b) the operating surgeon's failure to exercise reasonable care. It was held as follows:

" (i) The county council, in managing the hospital, was permitting a dangerous and negligent system to be in operation, and the operating surgeon and the house surgeon had failed to exercise reasonable skill and care.
(ii) the council were able to control the manner in which the resident medical officer performed her work and, therefore, the acts of the house surgeon done in the course of her employment were acts for which the council was responsible,
(iii) although the operating surgeon was a part-time employee on the staff of the council, the council could not control how he was to perform his duties and was not responsible for his want of care."

Learned counsel submitted that in view of the above decisions since the doctor was on part-time employment, as such he was not responsible. With respect this distinction which is tried to be advanced by learned counsel for the respondent, does not find favour in subsequent decision rendered by the English Court in the case of *Cassidy v. Ministry of Health* reported in [1951] 2 K.B. 343. In this case, the earlier decision in the case of *Gold & Ors. v. Essex County Council* reported in [1942] 2 All E.R.237 came up for consideration. Lord Denning, J. speaking for himself observed that a hospital authority is liable for the negligence of doctors and surgeons employed by the authority under a contract for service arising in the course of the performance of their professional duties. It was observed as follows:

" The hospital authority is liable for the

negligence of professional men employed by the authority under contracts for service as well as under contracts of service. The authority owes a duty to give proper treatment \026amp; medical, surgical, nursing and the like- and though it may delegate the performance of that duty to those who are not its servants, it remains liable if that duty be improperly or inadequately performed by its delegates.

The plaintiff entered a hospital for an operation on his left hand, which necessitated post-operational treatment. While undergoing that treatment he was under the care of the surgeon who performed the operation, who was a whole-time assistant medical officer of the hospital, the house surgeon and members of the nursing staff of the hospital, all of whom were employed under contracts of service. At

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they can discharge the same by producing that doctor who treated the patient in defence to substantiate their allegation that there was no negligence. In fact it is the hospital who engages the treating doctor thereafter it is their responsibility. The burden is greater on the Institution/ hospital than that of the claimant. The institution is private body and they are responsible to provide efficient service and if in discharge of their efficient service there are couple of weak links which has caused damage to the patient then it is the hospital which is to justify the same and it is not possible for the claimant to implead all of them as parties.

In this connection, learned counsel appearing for the respondent ably tried to make a distinction between 'contract for service' and 'contract of service'. He submitted that those persons who are on contract for service are different from those persons who are on contract of service. He submitted that in a contract for service there is a contract whereby one party undertakes to render service e.g. professional or technical service, to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance.

By this learned counsel submitted that so far as the permanent staff of the hospital is concerned, there is a contract of service and negligence thereof the hospital can be made liable and for that they need not be impleaded as parties in respect of any negligence of service but the doctors who come on visit, they are on contract for service over which the hospital has no control and therefore, unless they are impleaded as parties, no relief can be given. He also based his submission with reference to some of the English decisions given in the case of Gold & Ors v. Essex County Council reported in [1942] 2 All E.R. 237 and Collins v. Hertfordshire County Council & Anr. reported in [1947] 1 All E.R. 633. So far as Gold & Ors. v. Essex County Council is concerned, in that case, the infant plaintiff was treated by a radiographer, an employee of the respondents at one of their county hospitals. By reason of his failure to provide adequate screening material in giving Grenz-ray treatment the infant plaintiff suffered injury to her face. It was proved that the radiographer was fully competent to administer the treatment given to the infant plaintiff. However, it was held that as the radiographer was under a contract of service of the respondents, they were liable for his negligence under the doctrine of respondeat superior. It was further held that if a local authority had exercised power under the Public Health Act, 1936, the obligation undertaken is an obligation to treat and the authority is liable if the person employed by it to perform the obligation on its behalf acts without due care. This was a case in which the radiographer was under regular employment with the county council. This is a case in which a person was on contract of service and not on contract for service. Therefore, this case does not provide any assistance to the present case.

In the case of Collins v. Hertfordshire County Council & Anr, while undergoing an operation, a patient in a county council hospital was killed by an injection of cocaine which was given by the operating surgeon in the mistaken belief that it was procaine. The operating surgeon had ordered procaine on the telephone, but the resident house surgeon (who was then unqualified) had mis-heard "procaine" as "cocaine", and had told the pharmacist to dispense a mixture which was, in fact, lethal. The pharmacist

the end of the treatment it was found that his hand had been rendered useless. The trial judge dismissed his action for damages for negligent treatment which he brought against the hospital on the ground that he had failed to prove any negligence. On appeal it was held that in the circumstances, the doctrine of *res ipsa loquitur* applied, and the onus lay on the hospital authority to prove that there had been no negligence on its part or on the part of anyone for whose acts or omission it was liable, and that onus had not been discharged."

Therefore, as per the English decisions also the distinction of 'contract of service' and 'contract for service', in both the contingencies the courts have taken the view that the hospital is responsible for the acts of their permanent staff as well as staff whose services are temporarily requisitioned for the treatment of the patients. Therefore, the distinction which is sought to be pressed into service so ably by learned counsel cannot absolve the hospital or the institute as it is responsible for the acts of its treating doctors who are on the panel and whose services are requisitioned from time to time by the hospital looking to the nature of the diseases. The hospital or the institute is responsible and no distinction could be made between the two classes of persons i.e. the treating doctor who was on the staff of the hospital and the nursing staff and the doctors whose services were temporarily taken for treatment of the patients. On both, the hospital as the controlling authority is responsible and it cannot take the shelter under the plea that treating physician is not impleaded as a party, the claim petition should be dismissed. In this connection, a reference may be made to a decision of this Court in the case of *Indian Medical Association v. V.P. Shantha & ors.* reported in AIR 1996 SC 550. There the question had come up before this Court with regard to the provisions of the Consumer Protection Act, 1986 vis-à-vis the medical profession. This Court has dealt with all aspects of medical profession from every angle and has come to the conclusion that the doctors or the institutes owe a duty to the patients and they cannot get away in case of lack of care to the patients. Their Lordships have gone to the extent that even if the doctors are rendering services free of charge to the patients in the Government hospitals, the

provisions of the Consumer Protection Act will apply since the expenses of running the said hospitals are met by appropriation from the Consolidated Fund which is raised from the taxes paid by the tax payers. Their Lordships have dealt with regard to the definition of "service" given in Section 2(1)(o) of the Consumer Protection Act, 1986, and have observed as follows:

" The service rendered free of charge to patients by doctors/ hospitals whether non-Govt. or Govt. who render free service to poor patients but charge fee for services rendered to other patients would, even though it is free, not be excluded from definition of service in S.2(1)(o). The Act seeks to protect the interests of consumers as a class. To hold otherwise would mean that the protection of the Act would be available to only those who can afford to pay and such protection would be denied to those who cannot so afford, though they are the people who need the protection more. It is difficult to conceive that the legislature intended to achieve such a

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CASE NO.:
Appeal (civil) 4024 of 2003

PETITIONER:
Smt. Savita Garg

RESPONDENT:
The Director, National Heart Institute.

DATE OF JUDGMENT: 12/10/2004

BENCH:
B.N.AGNAWAL & A.K.MATHUR

JUDGMENT:
J U D G M E N T

A.K. MATHUR, J.

This appeal is directed against the order passed by the National Consumer Disputes Redressal Commission (hereinafter to be referred to as 'the Commission'), New Delhi whereby the Commission has dismissed the original petition of the appellant on the ground of non-joinder of necessary parties.

Brief facts which are necessary for disposal of this appeal are as follows.

The appellant is the wife of one deceased A.K.Garg who was admitted to the National Heart Institute (hereinafter referred to as 'the Institute') for medical treatment and because of the negligence of the doctors of the Institute he could not get proper medical treatment and ultimately he died. The deceased A.K.Garg was employed as Electrical Engineer in I.D.P.L., Vir Bhadra (Mishikesh). The deceased was drawing a salary of Rs.8000/- per month at the time of his death. He left behind his family members namely; (i) Smt.Savit Garg (wife), (ii) Smt. Sushila Garg (mother), (iii) Shri Ankul Garg (son), (iv) Miss. Nuchi (daughter), (v) Shri Sauragh (son) and (vi) Anoop Garg (brother). Prior to the admission of the deceased, A.K.Garg in the Institute he was being treated at G.B. Pant Hospital and he did not improve there, therefore, his case was referred to the Institute by his employer, IDPL. The deceased was admitted for angiography on 4.7.1994 and a sum of Rs.14,000/- was deposited for his treatment. He was discharged on 5.7.1994 after angiography. Again he was admitted on 2.8.1994 at 11.15 A.M. and remained there till 9.8.1994 and ultimately died at the Institute. It was alleged that on 3.8.1994 he was operated and was brought to the Intensive Care Unit of the Institute. No attendant was allowed to see the patient except through the glass windows of I.C.U. The deceased was operated twice by Dr.O.P. Yadav of the Institute for his treatment. It is further alleged that Dr.O.P.Yadav was too much worried and perturbed after the deceased's operation. On the said day i.e. on 3.8.1994, 8 bottles of blood were transfused in the body of the deceased and even on 4.8.1994 another 8 bottles of blood were demanded by the Doctors of the Institute and the same was somehow arranged. The deceased is said to have developed jaundice may be because of wrong transfusion or extra transfusion of blood. It is further alleged that the deceased developed septic and as the septic in the bone became incurable, therefore a Doctor from Batra Hospital was called for to amputate one leg of the deceased A.K.Garg. Thereafter, as it was reported to be case of kidney failure, the deceased was put on dialysis. However, on 9.8.1994 at 2.30 hours the deceased was

result. Another consequence of adopting a construction, which would restrict the protection of the Act to persons who can afford to pay for the services availed by them and deny such protection to those who are not in a position to pay for such services, would be that the standard and quality of services rendered at an establishment would cease to be uniform. It would be of a higher standard and of better quality for persons who are in a position to pay for such service while the standard and quality of such service would be inferior for person who cannot afford to pay for such service and who avail the service without payment. Such a consequence would defeat the object of the Act. All persons who avail the services by doctors and hospitals who give free service to poor patients but charge fee for others, are required to be treated on the same footing irrespective of the fact that some of them pay for the service and others avail the same free of charge. Most of the doctors and hospitals work on commercial lines and the expenses incurred for providing services free of charge to patients who are not in a position to bear the charges are met out of the income earned by such doctors and hospitals from services rendered to paying patients. The Government hospitals may not be commercial in that sense but on the overall consideration of the objectives and the scheme of the Act it would not be possible to treat the Government hospitals differently. In such a situation the persons belonging to "Poor class" who are provided services free of charge are the beneficiaries of the service which is hired or availed of by the "paying class". Service rendered by the doctors and hospitals who render free service to poor patients and charge fees for others irrespective of the fact that part of the service is rendered free of charge, would nevertheless fall within the

ambit of the expression "service" as defined in Section 2(1)(o) of the Act."

Therefore, the distinction between the 'contract of service' and 'contract for service' has been very elaborately discussed in the above case and this Court has extended the provisions of the Consumer Protection Act, 1986, to the medical profession also and included in its ambit the services rendered by private doctors as well as the Government Institutions or the non-Governmental institutions, be it free medical services provided by the Government Hospitals. In the case of Achutrao Haribhau Khodwa & Ors. v. State of Maharashtra & Ors. reported in (1996) 2 SCC 634, Their Lordships observed that in cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action on torts would be maintainable. Their Lordships further observed that if the doctor has taken proper precaution and despite that if the patient does not survive then the Court should be very slow in attributing negligence on the part of the doctor. It was held as follows:

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" A medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor. The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence. But in cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable."

Similarly, our attention was invited to a decision in the case of Spring Meadows Hospital & Anr. v. Marjot Ahluwalia through K.S. Ahluwalia & Anr. reported in (1998) 4 SCC 39. Their Lordships observed as follows:

" Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the skill of a reasonably competent doctor."

Therefore, as a result of our above discussion we are opinion that summary dismissal of the original petition by the Commission on the question of non-joinder of necessary parties was not proper. In case, the complainant fails to substantiate the allegation, then the complaint will fail. But not on the ground of non-joinder of necessary party. But at the same time the hospital can discharge the burden by producing the treating doctor in defence that all due care and caution was taken and despite that patient died. The hospital/Institute is not going to suffer on account of non-joinder of necessary parties and Commission should have proceeded against hospital Even otherwise also the Institute had to produce the concerned treating physician and has to produce evidence that all care and caution was taken by them or their staff to justify that there was no negligence involved in the matter. Therefore, nothing turns in

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