

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. _____ OF 2012

(Appeal under order XXF read with Section 23 of Consumer Protection Act, 1986 against the impugned judgment and final order passed by the Hon'ble National Consumer Disputes Redressal Commission (NCDRC), dated 21.10.2011 in O.P. No. 240 of 1999)

IN THE MATTER OF:

Dr. Kunal Saha

.....Appellant

Vs.

Dr. Sukumar Mukherjee & Ors

.....Respondents

Vol. I

PAPER BOOK

[FOR INDEX PLEASE SEE INSIDE]

ADVOCATE FOR THE APPELLANTS Mr. T.V. GEORGE

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Vol. III

With

Civil I.A. No. _____ of 2012

Application for Condonation of delay

With

PAPER BOOK

[FOR INDEX PLEASE SEE INSIDE]

ADVOCATE FOR THE APPELLANTS Mr. T.V. GEORGE

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SYNOPSIS & LIST OF DATES

1998-1999

Anuradha Saha, a USA-based child psychologist came to visit her family in Kolkata along with her husband and USA-based HIV/AIDS scientist, Dr. Kunal Saha. While in Kolkata, Anuradha developed some skin rashes and she eventually died on May 28, 1998 as a result of medical negligence by the doctors and AMRI Hospital in Kolkata (O.P. Nos. 1-4). A case seeking financial compensation was filed by Anuradha's husband, Dr. Kunal Saha (Appellant/Complainant) before the Hon'ble National Consumer Disputes Redressal Commission (NCDRC). A separate criminal case (under IPC 304A) was also filed against the O.P. Nos. 1 and 2 (also against Dr. Abani Roychowdhury, who was previously O.P. No. 3 and who has since passed away).

June 1,2006

The Hon'ble NCDRC was pleased to absolve all doctors and AMRI Hospital *vide* an order on June 1, 2006 holding that there was no negligence in the treatment of Anuradha. Dr. Saha filed an appeal in the Hon'ble Supreme Court against the said judgment by the NCDRC *vide* Civil Appeal No. 1727/2007. In the criminal case, while the trial court convicted the O.P. Nos. 1 and 2 for criminal negligence under IPC Section 304A, the Calcutta High Court overturned the trial court judgment. Separate

criminal appeals were also filed by Dr. Saha (through his constituted attorney, Mr. Malay Ganguly) before the Apex Court challenging the Calcutta High Court decision *vide* Criminal Appeal Nos. 1191-1194 of 2005.

August 7, 2009 By a common judgment, the Hon'ble Supreme Court disposed off both the Criminal Appeal Nos. 1191-1194 of 2005 and Civil Appeal No. 1727/2007 holding that the respondent doctors (O.P. Nos. 1-2, 4) as well as AMRI Hospital (O.P. No. 3) guilty for medical negligence and responsible for Anuradha's death. However, in the criminal case, although the Apex Court made severe criticism of the Calcutta High Court judge, the criminal appeals were dismissed on the ground of "cumulative negligence" by a plurality of doctors has caused Anuradha's death, no individual doctor can be held guilty under criminal law. The Hon'ble Supreme Court remitted the civil appeal back to the NCDRC only for "determining the compensation with a request to dispose of the matter as expeditiously as possible and preferably within a period of 6 months". In addition, the Apex Court also imposed a cost of Rs. 5 lakh against AMRI Hospital and Rs. 1 lakh against Dr. Sukumar Mukherjee (O.P. No. 1) for their "stand taken and conduct".

Oct. 21, 2011 The Hon'ble NCDRC eventually passed the impugned judgment on October 21, 2011 awarding a total compensation of Rs.1,72,87,500/- against a claim of

97,56,07,000/-. Out of the total amount of the 1,72,87,500 the Hon'ble NCDRC was also pleased to reduce an amount of 10% on account of contributory negligence on the part of the complainant and a further sum of 25,93,000/- on account of death of one of the respondents, Dr. Abani Roy Chowdhury, who passed away in 2010 during the pendency of the proceedings before the Hon'ble NCDRC. In other words, the Hon'ble NCDRC has allowed an overall compensation of only Rs. 1,34,66,000/- (out of a total claim of Rs. 97,56,07,000/-) for the wrongful death of Anuradha Saha, appellant's wife. Aggrieved by the grossly inadequate compensation awarded by the Hon'ble NCDRC, the appellant is filing the present appeal.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. _____ OF 2012

(Appeal under order XXF read with Section 23 of Consumer Protection Act,
1986)

POSITION OF THE PARTIES

TRIAL COURT THIS COURT

IN THE MATTER OF:-

Dr. Kunal Saha, resident of
3937, Kul Circle South
Hilliard, Ohio – 43026, USA-represented by
Sri Prabir Kumar Mullick, resident of
B/307-IIa Apartment, B-I,
Vasundhra Enclave,
New Delhi – 110 096.

Complainant/Appellant

VERSUS

1. Dr. Sukumar Mukherjee,
residing at 1/1A, Tara Road,
Calcutta – 70026
Opp. Party No.1 Resp. No.1
2. Dr. B. N. Haldar (Baidyanth Halder)
R/o FE 382, Salt Lake,
Sector III, Calcutta - 700 091
Opp. Party No.2 Resp. No.2
3. Advanced Medicare and Research Institute Limited,
P-4, 85, CII, Scheme LXXII,
Calcutta – 700029
Opp. Party No.3 Resp. No.3
4. Dr. Balram Prasad,
P-4, 85 CII, Scheme LXXII,
Block-A, Gariahat Road,
Calcutta – 700 029.
Opp. Party No.4 Resp. No.4

(All are contesting Respondents)

TO

THE HON'BLE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUSTICES OF THE

SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE
PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. The appellant prefer the above Appeal under order XXF read with Seton 23 of consumer Protection Act 1986, against the final order passed by the Hon'ble National Consumer Disputes Redressal Commission (NCDRC), dated 21.10.2011 in O.P No.240/1999, whereby the Commission was pleased to award an overall compensation of only Rs. 1,34,66,000/- after reducing an amount of 10% on account of "contributory negligence" on the part of the complainant and a further sum of Rs. 25,93000/- on account of death of one of the respondents, Dr. Abani Roy Chowdhury, who was also found guilty for causing Anuradha's death.

2. Brief facts leading to the filing of the present Civil Appeal are as follows:-

A. That the petitioner, Dr. Kunal Saha (henceforth "Dr. Saha"), a physician and HIV/AIDS specialist, and his wife, late Anuradha Saha (henceforth "Anuradha"), a child psychologist, are non-resident Indians (NRIs) and were permanently settled in the USA since the

mid-1980s. Dr. Saha and his wife came to visit India in April, 1998 after Anuradha completed her masters program in child psychology from the prestigious Columbia University while still working as a student counsellor for children in New York. Anuradha developed some skin rashes while staying at her parental house in Kolkata and was treated by senior medicine specialist Dr. Sukumar Mukherjee (O.P. No. 1). As her condition deteriorated, she was admitted in the AMRI Hospital (O.P. No. 3) where the other two opposite parties, i.e. Dr. Baidyanath Halder (O.P. No. 2), a senior dermatologist and Dr. Balaram Prasad (O.P. No. 4), a resident physician at the AMRI Hospital, also treated her. Anuradha was also treated by another senior medicine specialist, Dr. Abani Roychowdhury (O.P. No. 3 in the original complaint before the NCDRC who has since passed away as the case was pending before the NCDRC). Anuradha eventually died on May 28, 1998 at an age of only 36 years due to gross medical negligence by the opposite parties.

- B.** Dr. Saha filed a petition seeking compensation for the wrongful death of his wife before the NCDRC in March, 1999 (O.P. No. 240/1999) against the five doctors and AMRI Hospital including the O.P. No. 1, 2, and 4 as well as late Dr. Roychowdhury and one Dr. Kausik Nandy, a plastic surgeon. A copy of the Original Petition No.240/1999 dated nil filed before the Hon'ble NCDRC is annexed hereto and is marked as **ANNEXURE-A1.(Pages: to)**
- C.** The respondents filed their counter affidavits opposing the claim of the applicant.

- D.** The applicant/appellant (Dr. Saha) filed a rejoinder affidavit.
- E.** Dr. Saha also filed a criminal case under IPC Section 304A for criminal negligence against the three senior doctors, i.e. O.P. No. 1, 2 and late Dr. Roychowdhury, who were principally responsible for the wrongful death of his wife.
- F.** That the trial court held Dr. Mukherjee (O.P. No. 1) and Dr. Halder (O.P. No. 2) guilty under IPC Section 304A on May 29, 2002 for causing Anuradha's death (but acquitted late Dr. Roychowdhury) and sentenced the two doctors for 3 months of rigorous imprisonment plus fine of Rs. 3000/- each. However, the Calcutta High Court overturned the trial court's decision on March 19, 2004 and exonerated all doctors from charges of criminal negligence. Dr. Saha also filed separate SLPs against the High Court decision which was admitted by the Hon'ble Supreme Court as Criminal Appeal Nos. 1191-1194/2005.
- G.** That in the mean time, the Hon'ble NCDRC also dismissed Dr. Saha's complaint against all doctors and AMRI hospital on June 1, 2006 holding *inter alia* that there was no medical negligence by any doctor. While dismissing the complaint, the NCDRC heavily relied on the decision of the West Bengal Medical Council (WBMC) that also rejected complaints of medical negligence against O.P. No. 1 and 2. A copy of the judgment and final order passed by the Hon'ble NCDRC in O.P. No.240 of 1999 dated 01.06.2006 is annexed hereto and marked as **ANNEXURE-A/2.(Pages: to)**

H. Dr. Saha filed a civil appeal in the Hon'ble Supreme Court (Civil Appeal No. 1727/2007) against the judgment passed by the NCDRC. The Hon'ble Apex Court admitted the said civil appeal and tagged it with the pending criminal appeals for final disposal. That the Hon'ble Supreme Court disposed of both the criminal and civil appeals together *vide* a common judgment on August 7, 2009 in which the Apex Court found Dr. Mukherjee (O.P. No. 1), Dr. Halder (O.P. No. 2), Dr. Prasad (O.P. No. 4) and AMRI Hospital (O.P. No. 3) as well as late Dr. Roychowdhury guilty for medical negligence and responsible for Anuradha's death. However, the Hon'ble Apex Court exonerated Dr. Kausik Nandy who was opposite party no. 6 in the Civil Appeal. The Hon'ble Supreme Court was also pleased to dismiss the criminal appeal against O.P. Nos. 1 and 2 (and late Dr. Roychowdhury) on the ground of "cumulative negligence".

I. Interestingly, while dismissing the criminal appeal, the Hon'ble Apex Court made severe criticism of the High Court judge for making "a spate of irresponsible accusations" against Dr. Saha [2009 SCC (9) 221; paragraphs 190-194]. While overturning the judgment passed by the NCDRC, the Hon'ble Supreme Court remanded the case back to the NCDRC only for determination of the quantum of compensation to be paid by the guilty doctors and AMRI hospital. In addition, the Apex Court also imposed a cost of Rs. 5 lakh against AMRI Hospital and Rs. 1 lakh against Dr. Mukherjee for their "stand taken and conduct". Finally, the Hon'ble Supreme Court directed the NCDRC to dispose of the matter as expeditiously as possible and

preferably “within a period of 6 months” and considering the unique nature of the instant case where compensation has to be decided based on the permanent residence of both the victim (Anuradha) and her husband in USA, in the very last sentence of the said judgment, the Hon’ble Apex Court has also categorically directed that if foreign experts are to be examined, “*it shall be done only through videoconferencing and at the cost of the respondents*” [2009 SCC (9) 221]. Obviously, the sole purpose for the Hon’ble Supreme Court to allow “foreign experts” to be examined through videoconferencing at this stage (after categorically holding Dr. Mukherjee, Dr. Halder, Dr. Prasad, late Dr. Roychowdhury and AMRI Hospital guilty for medical negligence causing Anuradha’s death) was to permit recording of evidence of foreign experts who could shed light about income and economic situation in USA to come to a just compensation in this particular case. A copy of the judgment in Criminal Appeals Nos. 1191-1194 of 2005 dated 7.8.2009 passed by the Hon’ble Supreme Court of India is annexed hereto and marked as **ANNEXURE A/3** (Pages: to)

- J.** That despite the specific directions from the Hon’ble Supreme Court that foreign experts may be examined to determine the quantum of compensation in the instant case, the NCDRC rejected Dr. Saha’s attempts to adduce evidence from USA-based economist, psychologist (since Anuradha was a child psychologist) and legal experts to justify his claim of quantum of compensation for his wife’s death. In compliance to the letter and spirit of the final judgment

passed by the Hon'ble Supreme Court on August 7, 2009, Dr. Saha first filed sworn affidavits from 4 foreign experts from USA, namely, Prof. John Burke, Jr. (an internationally renowned economic expert from Cleveland who also appeared as an economic expert in the well-known Bhopal Gas disaster case in the 1980s); Prof. John Broughton (professor of psychology at Columbia University who was also the thesis advisor of Anuradha); Mr. Joe Griffith (a practicing lawyer with experience in medical negligence cases in USA) and Ms. Angela Hill, an economist and CPA. These foreign experts provided their reasoned opinions through sworn affidavits in support of the quantum of compensation claimed by Dr. Saha. A copy of the affidavits filed by the said four foreign experts with supporting documents is annexed hereto and marked as **Annexure A/4**. (Colly).**(Pages: to)**. Dr. Saha also filed an application before the NCDRC being M.A. No.200 of 2010 for taking the aforesaid four affidavits of foreign experts on record. A Copy of the said M.A. 200 of 2010 dated nil filed in the NCDRC are annexed herewith and marked as **Annexure-A/5**.**(Pages: to)**

K. That Dr. Saha also sought permission to examine these four foreign experts through videoconferencing at the expense of the respondents, as directed by the Apex Court. Unfortunately, NCDRC rejected M.A. 200 of 2010 on the ground, as claimed by the respondent doctors, that by mentioning that “foreign experts” may be examined through videoconferencing while remanding the case back to the NCDRC, the Hon'ble Supreme Court actually granted leave to the

accused doctors and AMRI hospital that they may cross-examine the foreign doctors who provided medical opinion in favour of the complainant. A copy of the order dated 23.02.2010 in M A No.200/2010 in O.P. No. 240 of 1999 passed by the Hon'ble NCDRC is annexed hereto and marked as **ANNEXURE A/6**. (Pages: to)

L. The notion that the Apex Court gave leave to the respondent doctors/hospital to cross-examine the foreign medical experts even after deciding that these doctors/hospital were guilty for “medical negligence” is obviously without any merit. The sole purpose for the Hon'ble Supreme Court to allow examination of “foreign experts” while remanding the case back to the NCDRC only for determination of the quantum of compensation was to allow the complainant to adduce evidence from “foreign experts” who might be able to shed light in regard to the quantum of claim in view of the unique facts and circumstances of the instant case. As such, the appellant/complainant filed additional evidence from economic, legal and psychology (because the victim was a psychologist) experts from USA against the said order dated 23.02.10 passed in M.A. No. 200 in O.P. No. 240/1999 by NCDRC the appellant approached the Hon'ble Supreme Court again *vide* SLP (C) No. 15070/2010. This Hon'ble Court clarified the judgment of August 7, 2009 again and permitted the appellant to record evidence of the economic and psychology experts from USA through “Internet videoconferencing” through an order dated April 7, 2011. A copy of the order dated 17.05.2010 in

SLP (C) No. 15070/2010 passed by the Hon'ble Supreme Court is annexed hereto and marked as **ANNEXURE A/7** .(Pages: to)

M. Pursuant to the said order the appellant filed M.A No. 594/2010 for examination of foreign experts through video conference. A copy of the M.A. No. 594 of 2010 in O.P. No. 240 of 1999 filed before the Hon'ble NCDRC is annexed hereto and marked as **ANNEXURE A/8**.(Pages: to)

N. However vide order dated 06.09.2010 the Hon'ble NCDRC dismissed M.A. No. 594 of 2010. A copy of the order dated 07.09.2010 passed by the Hon'ble NCDRC in M.A. No. 594 of 2010 in O.P. No. 240 of 1999 is annexed hereto and marked as **ANNEXURE A/9** (Pages: to)

O. Appellant filed a Special Leave Petition (C) No.27071 of 2010 against the order dated 07.09.2010 in M.A. No. 594 of 2010 in O.P. No. 240 of 1999 before the Hon'ble Supreme Court. The said Special Leave Petition was converted into Civil Appeal No.3173 of 2011 and was disposed off on 07.04.2011. The Hon'ble Supreme Court was pleased to direct the examination of two foreign experts through internet conference. A copy of the order in Civil Appeal No. 3173 of 2011 passed by the Hon'ble Supreme Court dated 07.04.2011 is annexed hereto and marked as **ANNEXURE A/10**(Pages: to)

P. That in accordance to the Apex Court's direction, Prof. John Burke, Jr., economic expert from USA was examined and cross-examined in

May-June, 2011. Prof. Burke, had previously submitted a detail scientifically calculated loss of income of a similarly situated person in USA as appellant's wife, Anuradha. Prof. Burke's was examination and cross-examination through videoconferencing under the supervision of R.S. Chhabra, the officer appointed by the Hon'ble Supreme Court. That on 06.05.2011 Mr. Chhabra filed his report containing the records of examination and cross examination of Prof. Burke to the Hon'ble NCDRC. A copy of the report containing the records of examination and cross examination of Prof. Burke to the Hon'ble NCDRC filed by Mr. Chhabra dated 06.05.2011 is annexed herewith and marked as **ANNEXURE A/11**(Pages: to)

Q. Prof. Burke has categorically testified that direct loss of income for Anuradha's premature death would amount to "5 million and 125 thousand dollars" after deduction of one-third for her "personal expenses". In fact, Prof. Burke has further testified that his calculation for loss of Anuradha's income was a "very conservative forecast" and that to some other estimates, the damages for Anuradha's death could be as much as "9 to 10 million dollars". Under cross-examination, Prof. Burke has also explained in great detail as to how he came to this figure of loss of income for Anuradha's untimely death.

Although loss of income in multi-million dollars for the wrongful death of Anuradha may appear as a big amount in context of India, this is not an extra-ordinary amount by any means in a similar situation in the USA. In *IMA vs. V.P. Shanta & Ors.* (1995 SCC 6,

651), this Hon'ble Court has unequivocally held, “*To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice*” (emphasis added). Far greater amount of compensations for wrongful death from medical negligence are routinely awarded in USA – relevant judgments in this regard from courts in USA were also presented before the NCDRC [*Welch v. Epstein*, (2000) 536 S.E. 2d. 408; *Dardinger v. Anthem Blue Cross & Blue Shield*, (2002) 781 N.E. 2d 121; *Atkins v. Lee*, (1992) 31 A.L.R. 5th 773; *Holston v. Sisters of Third Order of St. Francis*, (1995) 650 N.E. 2d 985; *Advocat, Inc. v. Sauer*, (2003) 111 S.W. 3d 346]. In a decision on Nov. 14, 2011 that was highly publicized across India, this Hon'ble Court has refused to intervene to a decree in the amount of Rs. 100 crore for alleged defamation of a retired justice [*Times Global Broadcasting Co. Ltd. vs. Parshuram Babaram Swant & Ors*; SLP (Civil) No. 29979/2011].

R. That despite categorical direction given by this Hon'ble Court in the final judgment dated August 7, 2009 that the NCDRC should determine the quantum of compensation for the wrongful death of Anuradha “*preferably within a period of 6 months*”, the case lingered before the NCDRC for more than two years. During the almost 2-week long final argument before the NCDRC in July, 2011, in response to specific direction given by the NCDRC, the appellant filed further affidavit with evidence of the additional loss of income and other pecuniary as well as non-pecuniary losses that he has suffered in the course of the more than 13-year long battle for justice

for the wrongful death of his wife on May 28, 1998 during a social visit to India through an affidavit before the Hon'ble NCDRC. A copy of the affidavit dated nil filed by the applicant before the Hon'ble NCDRC is annexed hereto and marked as **ANNEXURE A/12**(Pages: to)

S. The opposite parties filed response affidavits that were also allowed to be taken on record by an order dated July 21, 2011 by the NCDRC. A copy of the affidavits filed by the opposite parties before the Hon'ble NCDRC dated nil is annexed hereto and marked as **ANNEXURE A/13**(Pages: to)

T. The appellant also submitted an updated and detail account of the entire pecuniary and non-pecuniary losses up to the trial justifying the total claim of Rs. 97,56,07,000/- (ninety-seven crore, fifty-six lakh, seven thousand) with a complete break-up for each and every loss that he has suffered as a result of wife's death. A copy of the said claim filed by the appellant before the NCDRC dated nil is annexed herewith and marked as **ANNEXURE A/14**(Pages: to). While the total claim of Rs. 97.56 crore was acknowledged under paragraph 11.2 in the final judgment passed on October 21, 2011, the Hon'ble NCDRC has dismissed more than 98% of the total claim without providing any valid reason whatsoever. Furthermore, on December 5, 2011, NCDRC also dismissed petitioner's application seeking to expunge unfounded observation made by the Commission that the Apex Court also held the petitioner guilty for "interference" and "contributory negligence" in causing death of his wife.

U. That being aggrieved and dissatisfied with the Judgment/Order dated October 21, 2011 and December 5, 2011 passed by the Hon'ble NCDRC, the petitioner craves to file the present appeal inter-alia amongst the following grounds:-

3. DECLARATION IN TERMS OF RULE 4 (2)

The petitioner state that no other Civil Appeal against the impugned final order, dated 21.10.2011 passed by the Hon'ble National Consumer Redressal Commission (NCDRC) in O.P. No. 240/1999 has been filed by him before this Hon'ble Court.

4. DECLARATION IN TERMS OF RULE 6

That Annexures A/1 to A/14 annexed with this Civil Appeal are True/ Typed copy of the pleadings/ Documents which formed part of the Proceedings in the Hon'ble NCDRC at New Delhi, against whose order the Leave to Appeal is sought for in this Special Leave Petition.

5. GROUNDS FOR APPEAL

a. Because the impugned judgment/order by NCDRC is fatally flawed.

The compensation awarded by the NCDRC is nothing but a glaring example of sheer travesty of justice and as such, the judgment/order passed on October 21, 2011 and December 5, 2011 by NCDRC be set aside.

b. Because NCDRC has ignored the opinion of Economic expert from

USA. While remanding this case back to NCDRC only for determination of the quantum of compensation after holding the

respondent doctors and AMRI Hospital (respondent no. 3) guilty for causing death of appellant's wife, Anuradha, this Hon'ble Court specifically stated in the final judgment dated August 7, 2009 (in very last sentence) that "foreign experts" may be examined by the appellant through videoconferencing. Examination of "foreign experts" was eluded by the Hon'ble Supreme Court while remanding this case back to NCDRC after holding the respondent doctors and AMRI hospital guilty because opinion of an Economic expert from USA is highly pertinent in the present case in view of the unique facts and circumstances since both Anuradha and her husband were citizens and permanent residents of USA and as such, the standard of living and income in USA is a critical factor for proper calculation of "just compensation" in the present case.

Accordingly, the appellant obtained experts' opinions from USA including opinion from an internationally-renowned Economic expert, Prof. John Burke, after overcoming a great deal of resistance from the respondents during which the appellant had to return to the Supreme Court on at least two occasions (*vide* SLP Civil No. 15070/2010; SLP Civil No. 27071/2010). Unfortunately, while calculating the quantum of compensation, NCDRC has completely ignored the opinion expressed by Prof. Burke who was also cross-examined by the respondent doctors/hospital. Prof. Burke's opinion was rejected by NCDRC because he was allegedly supplied information by the appellant or his attorney in USA (Mr. Joe Griffith) and also because he was not aware about Anuradha's income in 1997 when Anuradha was working as a graduate

psychology student in New York (para 12.4).

It is respectfully submitted that NCDRC has failed to comprehend that Prof. Burke provided his expert opinion regarding the economic loss due to the premature death of Anuradha through scientific calculations using economic and other relevant factors including her age, academic qualification etc. that are undisputed in this case. More importantly, as Prof. Burke has categorically testified, his calculation of direct economic loss in the present case was not exclusively for Anuradha but for a “similarly situated” person in USA. For the purpose of evaluating the prospective loss of income suffered by a USA-based Child Psychologist with similar age and qualification as Anuradha, Professor Burke has also explained the information based on which he calculated the total loss of income for Anuradha. Some of these points have also been clearly enumerated during cross-examination of Prof. Burke by respondent no. 3 while answering the question No.14. as reproduced below:

Question No. 14. Can you specify the information you needed from Dr. Kunal Saha (to calculate the economic loss for Anuradha’s death) ?

Prof. Burke: Yes Sir, first I needed demographic information that would be such as name, age, race, sex, date of birth, date of death, that I needed information for all members of the family, spouse and children. Then I needed information considering educational attainments, how far school did you go, what degrees

or honors you have. And next, if there is a person who is old enough to have a worker, I needed information what type of work they have done in their life. Next, I needed information on their record of earnings including wages and fringe benefits and that information is needed if their education is completed and is a member of work force. Next I needed information concerning their participating in house hold activities such as cooking, cleaning, food shopping, food preparation etc. Those two types of information would give sufficient information to look at the pecuniary interest in the case, earning capacity value. Those two pieces of information on concerns work outside the home and the other concerned what inside the home, if you have that information, it allows the economist to determine pecuniary interest in a human being”.

Thus, according to this Economic expert from USA, the information necessary to determine the “pecuniary” or direct loss of income for Anuradha’s untimely death includes demographic information such as age, race, sex, educational attainments, household status, i.e. working wife or home-maker etc. Prof. Burke has also clarified these issues during his examination in-chief some of which are quoted below for ready reference:-

Question: Are you aware of the age of Anu (Anuradha) the deceased in this case at the time of her death?

Prof. Burke: Yes Sir

Question: Can you tell us what was the age?

Prof. Burke: She was born on June 3rd 1961 and she died in the end of May, 1998. She was about 37 years of age.

Question: Sir, what would be the life expectancy of Anu based on the average age expectancy in U.S.A?

Prof. Burke: An additional 45 years that would bring Anu to the age of 82.

Question: Do you know the academic qualification of Anu the deceased?

Prof. Burke: Yes Sir.

Question: Can you Say?

Prof. Burke: She attended high school and finished first in her class. She was the valedictorian i.e. this name given to the first student in the class.

Question: Sir, can I ask you, what is the average income of a person similarly situated as Anu in U.S.A. if she had lived and continued to work in U.S.A.

Prof. Burke: The average life time income of a person similarly situated as Anu will be approximately 5 million and 125 thousand dollars of life time income reduced to the present value in 2009” (emphasis added).

Question: Do you know what was the profession of Anu?

Prof. Burke: Yes Sir.

Question: Can you spell out for the knowledge of the Court?

Prof. Burke: She was trained and educated as a psychologist with the specialization dealing with children.

Question: Where did she obtain her degree? Can you spell it out?

Prof. Burke: Yes Sir, She obtained undergraduate degree from University Southern California, and she graduated from U.S.C. one of the top of her class *Summa cum laudi* that means with the highest praise with the supreme praise.

Question: Considering the academic qualification and the earning capacity of the deceased, what is your opinion about the financial loss suffered by her death?

Prof. Burke: Yes Sir, the financial loss from her earning capacity minus her personal consumption will be approximately 3 million 750 thousand dollars of present value in 2009. In addition to loss of her services around the house will be approximately 1 million 250 thousand dollars of present value in 2009.

Question: Sir can you briefly tell us how you arrived at this amount?

Prof. Burke: Yes Sir, the economist i.e. myself or any other economist needs four pieces of information.

1. How long is a person going to work?
2. What is the current average income of a similarly situated person I.e. wages and fringe benefits?
3. Growth rate, how is income going to grow in five years from now, in 10 years from now etc.
4. You need to know interest rate because all future figures in 2015, 2020, 2025 etc. must be brought back to present value and in this case present is determined in 2009 when I prepared my report”.

In fact, a detail analysis of how Prof. Burke came to the conclusion of the total loss of “approximately 5 million and 125 thousand dollars of life time income reduced to the present value in 2009” has also been provided by Prof. Burke with his affidavit. It is also important to remember that Anuradha’s demography, profession, educational qualifications etc. are all part of the record in this case. In fact, while providing the “Background Facts” about Anuradha and her husband (appellant), this Hon’ble Court has also categorically observed (para 1; 2009 SCC 9, 221):

“The patient (Anuradha) and her husband Dr.

Kunal Saha (for short, “Kunal”) were settled in USA. Anuradha, a child psychologist by profession was a recent graduate from a prestigious Ivy League School (Columbia University in New York State). Although a doctor by profession, Kunal has been engaged in research on HIV/AIDS for the past 15 years”.

Thus, as this Hon’ble Court has unequivocally held, there can be no argument that Anuradha was a recent graduate in child psychology from a “*prestigious Ivy League School (Columbia University in New York State)*” when she died in 1998 from gross medical negligence by the respondent doctors/hospital during a social visit to India. It was never the case of the petitioner/appellant that Anuradha had already joined the work force as a full-fledged child psychologist in USA when she died as a result of negligent therapy by the respondent doctors and AMRI hospital. In fact, it is an admitted position that at the time of Anuradha’s premature demise, she had just completed graduate education in child psychology. The income of Anuradha in 1998 or prior years as a graduate student in New York is not a relevant factor in any manner for the purpose of calculation of loss of her future earnings as a Child Psychologist in USA. It must also be noted that the respondents have never disputed that Anuradha was contributing to the regular household work as a working-student and housewife. Obviously, under these circumstances, Prof. Burke had all the necessary information to arrive at his conclusion about the prospective loss of income for Anuradha’s premature death. It is absolutely erroneous for the

Hon'ble NCDRC to dismiss Prof. Burke's opinion only because he was unaware about the income Anuradha was making as a graduate student in 1998. In this regard, it is very illuminating to note the answer of Prof. Burke to question No.29 when put to him by counsel for Respondent No. 1 & 2 during their cross-examination which is quoted below for ready reference:-

“Question no. 29: I am putting it you that in the instant case, you are deposing on what is being told to you Attorney D. Joe Griffith and Dr. Kunal Saha to substantiate the case?

Prof. Burke: Yes sir, I did not personally know Anu. I never met her. Therefore, people like Attorney Griffith, Dr. Saha, Prof. Broughton had to give me information about Anu. They had to tell me Anu's name, they had to tell me Anu's date of birth, they had to tell me Anu's date of death, they had to tell me that she was a woman, they had to tell me that she grew up in India and came to the United States of America and studied in USC. Somebody have to tell me that she graduated the top of her class summa cum laudi. Somebody have to tell me that she then went to Columbia and somebody have to tell me that all the other information that I have known about Anu. Given that information I applied economic social science to the earning capacity of a person like Anu similarly situated” (emphasis added).

As discussed above, Prof. Burke has also provided sworn affidavit showing through scientific calculation that a conservative estimate of direct loss of income for the premature death of a person in USA who is similarly

situated as Anuradha would be “5 million 125 thousand dollars”. Both under direct and cross-examination, Prof. Burke has explained that his calculation on the prospective loss of income in the instant case was based on scientific economic analysis using data obtained from National Vital Statistics as well as Health Statistics Reports in USA. The NCDRC has dismissed Prof. Burke’s entire opinion with a sweeping statement that his opinion was “*imaginary and unrealistic*” (para 12.3-5). The NCDRC has made a serious error in rejecting more than 95% of Prof. Burke’s calculated direct loss of income for Anuradha’s death without providing a single cogent reason. Prof. Burke’s opinion is an important factor in the instant case that should be considered in proper perspective to come to a just conclusion about the direct loss of income for the wrongful death of Anuradha Saha.

- c. **Because NCDRC has calculated an erroneous compensation with total disregard to the directions issued by the Hon’ble Supreme Court.** Instead of giving due regard to the evidence on record including the opinion of Economic expert Prof. Burke, NCDRC has drastically minimized the compensation in the instant case by depending solely on the paltry income that Anuradha was earning as a graduate student in 1998 (para 12.6). Furthermore, NCDRC has also ignored the specific directions issued by the Hon’ble Apex Court for calculation of a “just compensation”. While remitting this case back to NCDRC only for determining the quantum of compensation, this Hon’ble Court categorically stated that the compensation should be calculated with due regard of the “*status*”, “*educational qualification*”, “*upbringing*” and

“husband’s income” etc. of the victim, Anuradha (2009 SCC 9, 221; para 194). The NCDRC has completely ignored these specific directions by this Hon’ble Court and calculated the compensation in a blatantly irrational manner solely on the basis of the meagre income that Anuradha was earning in 1998 while she was working merely as a graduate student in child psychology at Columbia University in New York. The NCDRC has also ignored the status or income of victim’s husband who was a professor and accomplished HIV/AIDS researcher in USA for the past more than 15 years as this Hon’ble Court has also noted these facts in the final judgment.

- d. Because NCDRC has made blatant errors in calculation of the quantum of compensation.** The NCDRC has calculated the total financial loss for Anuradha’s premature death solely on the basis of her paltry income in 1998 as a graduate student based on her pay-check in January 1998 when she was working as a student counsellor at Catholic Home Bureau in New York. Shockingly, even while considering Anuradha’s meagre income as a student in 1998, NCDRC has made seemingly deliberate reduction from her pay-check which is unsustainable under any condition. As shown on Anuradha’s pay-check, NCDRC has initially considered that after deduction of all federal and social security taxes, Anuradha’s net pay per week was \$814.03. But unbelievably, NCDRC then somehow concluded that Anuradha’s annual income may be rounded off to only “\$30,000/year” (see para 12.7). A simple mathematical calculation would demonstrate that an income of \$814.03/week would produce an annual income of \$814.03 x 52 weeks

or a total of \$42,329.56 per year and NOT \$30,000/year as held by NCDRC. In other words, NCDRC has willy-nilly reduced Anuradha's income by more than 40% even after considering a grossly reduced income as a graduate student in the year 1998 when she died at an age of only 36 years due to negligent therapy by the respondents.

- e. **Because NCDRC has deducted 50% of Anuradha's income for personal expenses.** Even after the untenable mathematical calculation that reduced Anuradha's loss of income in the most erratic manner as shown in the paragraph above, NCDRC further made incredible jump in logic by deducting half of Anuradha's net income on ground of her "personal maintenance" expenses. The NCDRC has made this unbelievable conclusion of deducting 50% income for "personal maintenance" without an iota of supporting legal evidence as the Commission has observed, "Bearing in mind the cost and standard of living in a country like USA and the income of the complainant, in our view the deceased would have spent at least half of the said income for her own upkeep and maintenance" (para 12.11). For deciding quantum of compensation, courts in India and around the world deduct a only one-third or less from the net income of the deceased as personal expenses. In fact, deduction for personal expenses is generally higher in cases of unmarried individuals while for married couples, deduction for personal expenses is frequently one-fourth or even lower. In the instant case, NCDRC has deducted 50% from Anuradha's adjusted lifetime net income for "personal maintenance" even though she was married. The NCDRC has made a totally erratic assumption that because of the high

standard of living in USA, 50% from Anuradha's net income can be deducted as the cost for her personal maintenance. The NCDRC has not cited any reports or judgments from India or USA to lend credence to this absolutely inconceivable claim that as a married person, Anuradha would have spent half of her net income for "personal maintenance". Ironically, the Apex Court's decision in *Sarla Verma (Smt) & Others Vs. Delhi Transport Corporation & Anr.* (2009 SCC 6, 121) which NCDRC has heavily relied upon to calculate compensation in the present case has also advised to deduct a maximum of one-third of net income on ground on personal expenses. As discussed above, internationally-known Economic expert, Prof. John Burke, who has calculated the loss of income for Anuradha's death has also deducted one-third of her net income for personal expenses. Thus, NCDRC has made a grave error by reducing 50% of Anuradha's net income on the ground of her "personal maintenance" in USA.

- f. Because NCDRC has rejected legitimate expenses paid by the appellant since filing of the original petition.** The NCDRC has kept a blind eye on the comprehensive list of all the legitimate claims made by the appellant including the expenses that he incurred since filing the original complaint in March 1999. The NCDRC has merely followed only those claims submitted with the original complaint which obviously could not have contained the other legitimate expenses in relation to this legal case that were incurred by the appellant over than 12 years ago. For example, the appellant has filed a claim for Rs. 70 lakh for pecuniary damages under the heading "Travel expenses over past 12 years" with

supporting references that are on record. These expenses included the numerous trips to India that the appellant was compelled to take to conduct the legal proceedings since filing the original petition in 1999. The voluminous record in this case would bear undeniable proofs about the numerous trips that the appellant took in the course of this legal battle since 1999. While remitting this case back to NCDRC only for determination of compensation, the Hon'ble Supreme Court has categorically stated that the compensation should also include all material losses "*up to the date of trial*" (2009 SCC 9, 221; para 174) which has also been reproduced in the final judgment passed by NCDRC (paragraph 9.1). Obviously, the respondents are liable to pay all the costs that were incurred by the appellant to conduct the trial over the past 12 years. Unfortunately, NCDRC has not even considered these legitimate expenses and dismissed these claims without providing any reason whatsoever.

Instead of using a logical mind to consider the huge amount of travel and other associated expenses that the appellant had to spend in view of the extraordinary nature of the instant case, NCDRC has allowed a sum of Rs. 5 lakh with a sweeping comment, "In our opinion having regard to peculiar facts and circumstances of the present case and as a special case, the complainant is at best entitled to cost of Rs. 5,00,000/- (Rupees five lakh only), lest it becomes too onerous for the opposite parties to pay the same" (para 15.1). The travel and other pecuniary expenses that the appellant had to pay in the course of the long legal battle before NCDRC have been elaborately presented in Annexure-A14.

The appellant also produced copy of his USA passport before NCDRC to underscore the large number of trips that he had to take from USA over the past 12 years. The claim of Rs. 70 lakh by the appellant as the overall expenses for the numerous trips that he took to contest this legal case over the past more than 12 years can hardly be viewed as exaggerated claim considering that a single trip from USA and stay in India may easily cost several lakh rupees in the present days. The allowance of paltry Rs. 5 lakh with a broad brush by NCDRC to cover all related expenses in this context is a sheer travesty of justice.

Similarly, NCDRC has also rejected virtually the entire claim made for legal and related expenses that the appellant had incurred since filing the original complaint in March 1999. The legal expenses were claimed by the appellant with appropriate references for countless number of hearings in the instant case (mostly represented through senior advocates) for a total amount of Rs. 1.5 crore over the past 12 years. Incredibly, NCDRC did not consider even those legal expenses that the appellant had to pay at the direction of the court, e.g. cost for videoconferencing. The total disregard of these legitimate and enormous expenses incurred by the appellant is a glaring example of grave injustice by NCDRC.

- g. Because NCDRC has assumed a role superior to the Supreme Court of India.** The Hon'ble Supreme Court *vide* its final judgment dated August 7, 2009 overturned NCDRC's previous acquittal of the respondent doctors and AMRI Hospital (respondent no. 3) and categorically held that these doctors/hospital were solely responsible for

the wrongful death of Anuradha. The Hon'ble Apex Court remanded this case back to NCDRC only for determination of the quantum of compensation within a "*period of 6 months*". After the lapse of more than 2 years, the Hon'ble NCDRC has not only dismissed more than 98% of appellant's overall claim for compensation, the Commission has also ventured into the question of "medical negligence" and re-examined the roles played by other individuals (including the appellant) who were not found in any manner responsible for the eventual death of Anuradha by the Hon'ble Apex Court. In total disregard to the findings of this Hon'ble Court, NCDRC has found that the appellant was also guilty for contributory negligence in the treatment of his wife and that he should also be held responsible for her death. In fact, NCDRC has deducted 10% from the total compensation on account of appellant's alleged role in causing death of his wife. It must also be mentioned that even after this point that NCDRC has exceeded its jurisdiction by going above and beyond the conclusion made by the Hon'ble Apex Court was brought to the notice to the Commission *vide* M.A. No. 946/2011 with a specific prayer to expunge these untenable observations, NCDRC remained unfazed with their observation and dismissed the said application on December 5, 2011.

- h. Because NCDRC has made a grave error by using "multiplier" method to calculate compensation in a case of "medical negligence".** Indian Courts have never used the "multiplier" method to calculate compensation in a case involving "medical negligence". Even in countries like UK and USA, the "multiplier" methods are not used for

determination of compensation for death of a patient from wrongful treatment by a delinquent doctor or hospital. In the instant case, NCDRC has calculated the compensation for Anuradha's wrongful death using the "multiplier" method for the first time in Indian medico-legal history. The NCDRC has claimed that it has used the "multiplier" method because the Apex Court had cited some judgments where "multiplier" methods were used to determine compensation. Ironically, all the decisions cited by the Apex Court in the instant case where the "multiplier" methods were used involved accidental victims and not death from "medical negligence" (2009 SCC 6, 1; 2004 SCC 8, 56; 2009 SCC 3, 1; 1998 AC 1, 232; 2005 SCC 6, 1; 1957 WLR 1, 582; 1995 SCC 6, 651). In fact, not a single case involving "medical negligence" was referred to even by NCDRC where the "multiplier" method was used to determine compensation. Obviously, this Hon'ble Court's reference of some anecdotal cases involving accidental deaths where the "multiplier" methods have been used to calculate compensation was only to underscore the basic principles for determination of just compensation. The NCDRC has further claimed that some previous court decisions have laid down "*the criteria for determination of compensation in the cases of death of a patient due to medical negligence of the medical professionals or deficiency in service on the part of the hospital*" (para 9.5). Ironically, not a single decision as cited by NCDRC involving death from "medical negligence" used the "multiplier" method for determination of compensation.

The "multiplier" method is generally used to determine

compensation under the Motor Vehicle Act (MVA) where death or injury of a person is caused because of an accident without any *mens rea* or negligent act. Death of an innocent patient from “medical negligence” is undoubtedly a negligent act which is far a more reprehensible act compared to death from motor accidents. Compensation for death of a patient from “medical negligence” cannot and should not be calculated by using the “multiplier” method. In *Nizam Ins. Med. Sci. vs. Prashanth Dhananka & Ors.* (2009 SCC 6, 1), which was also relied upon by NCDRC, the Hon’ble Apex Court has given a lump sum award of Rs. 1 crore (plus interests) in a case involving “medical negligence”. While disposing the said case, Hon’ble Apex Court has categorically stated that there is “*absolutely no merit*” in the plea made by the hospital authority that the “multiplier” method should be used to determine compensation in cases involving medical negligence [para 92; *Nizam Ins. Med. Sci.* (Supra.)]. Other recent judgments by the Apex Court involving “medical negligence” cases have also never used the “multiplier method” and always decided the amount of compensation in these matters solely on a lump sum basis (2008 SCC 2, 1; 2010 SCC 5, 513). Even in *Sarla Verma & Ors. vs. Delhi Transport Corp. & Anr.* (2009 SCC 6, 121) which NCDRC has heavily relied upon for using the “multiplier” method while deciding the compensation in the instant case, the Hon’ble Supreme Court has clearly admitted under para 37 that the principles for determining compensation using the “multiplier” system do not apply in all cases and cannot be used even in some accident cases under Section 166. In fact, in *Sarla Verma* (Supra.), it has been held in para 14, “*The lack of uniformity and consistency in awarding compensation has been a*

matter of grave concern". The use of the "multiplier" method, instead of the lump sum award, for the first time in a case of death from "medical negligence" would set a wrong precedent and would bring grave injustice for the appellant for obvious lack of "*uniformity and consistency*".

- i. Because NCDRC has failed to properly apply the basic principles of the "multiplier" method.** While the use of the "multiplier" method in the instant case was obviously wrong as discussed above, NCDRC has also miserably failed to properly apply the fundamental principles even while using the "multiplier" method to determine compensation in the present case. One of the principal factors for determining compensation using the "multiplier" method is the rate of interest that prevails in a stable economy because the underlying principle for using the "multiplier" method lies on the return of annual interest from the investment of the total compensation granted which should be perpetually equivalent to the loss of dependency every year. In fact, citing from *General Manager, Kerala State Road Transport Corp. v. Susamma Thomas* (1994 SCC 2, 176), NCDRC has provided a specific example in the impugned judgment (para 9.5) on the significance of the rate of interest for calculating compensation which is reproduced below:

"The multiplier represents the number of years' purchase on which the loss of dependency is capitalised. Take for instance a case where annual loss of dependency is Rs 10,000. If a sum of Rs 1,00,000 is invested at 10% annual interest, the interest will take care of the dependency, perpetually. The multiplier in this case works out to 10. If

the rate of interest is 5% per annum and not 10% then the multiplier needed to capitalise the loss of the annual dependency at Rs 10,000 would be 20. Then the multiplier, i.e., the number of years' purchase of 20 will yield the annual dependency perpetually”.

The simple example provided above by the Hon'ble Apex Court underscores the vital significance of the “interest rate” for proper use of the “multiplier” method for determination of compensation. The Hon'ble NCDRC has failed to appreciate this fundamental principle based on which the “multiplier” method was developed while using the said method for determining the quantum of compensation for Anuradha's death. The NCDRC has seemingly remained totally oblivious of the basic fact that in the instant case, both the victim (Anuradha) and her sole dependent (appellant) were citizens and permanent residents of USA. It is a common knowledge that “interest rate” in USA is vastly lower compared to that in India and other developing nations. The market long-term interest rate in USA has traditionally been extremely low, generally in the vicinity of 1% or even lower, compared to India where the interest rate routinely stays 10% or even higher. In fact, while calculating the loss of income for Anuradha's death, Economist Prof. John Burke has provided an extended retrospective and prospective average rate of interest prevailing in USA which is typically 1 percent or lower (Annexure-A4). Thus, even though the “multiplier” method was used by NCDRC, the multiplier to be used in the instant case should have been about ten times higher considering

that both the victim (Anuradha) and sole dependent (appellant) in the present case were permanent residents of USA. The NCDRC has obviously lost sight of this critical factor while calculating the compensation for Anuradha's death using the "multiplier" method and as a result, came to a quantum of compensation which is many times lower than what it should have been.

J Because the NCDRC has failed to take note of the categorical direction of the Hon'ble Supreme Court in para 170. At para 170 the Supreme Court had held

“Indisputably, grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of *restitutio in integrum*. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. (See *Livingstone v. Rawyards Coal Co.*²⁸)”

It is respectfully submitted that in the facts and circumstances of the instant case, multiplier method is not capable of placing the appellant in the same position as he would have been if he had not sustained the wrongs done by the respondents.

k. Because NCDRC has failed to consider the “pecuniary” (direct) and “non-pecuniary” damages suffered by the appellant. A list detailing the break-up of the individual items for the total compensation of Rs.

97,56,07,000/- under direct or “pecuniary” as well as “non-pecuniary” losses suffered by the appellant as a result of the wrongful death of his wife was submitted with the NCDRC to come to a just compensation (Annexure-A14). Although NCDRC has acknowledged these specific items listed for compensation and copied the entire list under para 11.2, the Commission has dismissed most of these claims, sometimes even without considering the specific items or providing any reason for their denial. For example, NCDRC has totally ignored the pecuniary damages listed under “Paid for court proceedings including videoconferencing from USA”. These expenses were paid by the appellant to conduct court proceedings at the direction of the Commission. Other direct expenses listed under “pecuniary damages” have also been either totally dismissed or drastically reduced by NCDRC without providing any cogent reason. Similarly, direct loss of Anuradha’s prospective income of equivalent to Rs. 29,25,00,000/- was cut by NCDRC by more than 98% while the direct loss of her “social security income” (after retirement in USA) of equivalent to Rs. 1,44,00,000/- was totally rejected by NCDRC without providing any ground.

It is ironic that NCDRC has considered only the initial claims filed with the original petition in March 1999. The NCDRC should have considered the entire list of claims filed by the appellant which contained specific and detail explanation of each of the “pecuniary” as well as “non-pecuniary” or “special” damages claimed (Annexure-A14). The NCDRC has suggested that the revised claim presented by the appellant was not filed by amending the original

complaint before the Commission. It is respectfully submitted that a formal amendment of the complaint was not necessary for delivery of equitable justice before the consumer courts as the proceedings under Consumer Protection Act are not being governed by the Civil Procedure Code. Consumer courts were established for summarily procedures for protection of consumers and delivery of expedited justice. The consumer courts are duty bound to consider every just and reasonable claim made by the complainant even in the absence of a formal amendment to the complaint. Furthermore, many of the direct or pecuniary damages listed in occurred over the years following submission of the original complaint filed and as such, it was impossible to list these losses with the original complaint in 1999. It was even more warranted in the facts and circumstances of the instant case where the Hon'ble Supreme Court after finding the respondents guilty for "medical negligence" remitted the matter back to the Hon'ble NCDRC to decide the quantum of compensation with express permission to the appellant/complainant to adduce further evidence on the question of compensation.

It may also be noted in this regard that the Hon'ble Supreme Court has taken into consideration a revised and upgraded claim for compensation for medical negligence under the Consumer Protection Act filed only with the appeal (against NCDRC's judgment) before the Hon'ble Supreme Court in the case of *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka* (2009 SCC 6, 1). In said case, Hon'ble Apex Court considered a revised claim filed by the appellant with his written submission in which a total compensation of Rs. 7.50

crore was considered even though his original claim before NCDRC was only Rs. 4.61 [see para 81, 82 in *Nizam's Institute of Medical Sciences (Supra.)*]. In the instant case, the original claim of about Rs. 77 crore has remained virtually same as the claim filed later with detail explanation of the specific expenses claimed except the addition of \$4,000,000 as “special damages” because of an event (tenure denial and loss of job for the appellant) that occurred long after filing of the original complaint but which was as a consequence of the wrongful death of his wife, Anuradha (see below).

- 1. Because NCDRC has denied direct losses paid at the direction of the Court.** In the course of the protracted legal battle in the instant case, the appellant had to spend a large sum of money, frequently at the Court’s direction to conduct various court proceedings in different stages of the trial. Recordings of evidence were conducted through court-appointed Commissioners, sometimes travelling long distances, at the direction of the court. For example, entire examination/cross-examination of the respondent doctors and AMRI Hospital took place in Kolkata over a period of many days under the supervision of NCDRC-appointed Commissioner from Delhi. The appellant had to bear the entire expenses for all these proceedings which included the travel cost, hotel and honorarium of Rs. 10,000/- per day for the Commissioner etc. Similarly, examination/cross-examination of the complainant and evidence of expert witnesses were also recorded on several occasions through “videoconferencing” from USA at a huge expense for the appellant. These direct expenses incurred by the appellant are undeniable and they

are part of the record in the instant case. The appellant has filed a detail break-up of all “pecuniary” as well as “non-pecuniary” and “special” damages in his compensation claim with. These “pecuniary” costs also includes Rs. 11,57,000/- under the heading “Paid for Court Proceedings” with specific references for each of these expenses. The NCDRC has outright rejected these claims without providing any reason whatsoever. The blatant denial of the direct expenses paid by the appellant at the direction of the court is nothing but a gross abuse of the process of law.

- m. Because NCDRC has rejected expenses admitted even by the Hon’ble Supreme Court.** The appellant submitted a comprehensive list of his total claim of Rs. 97,56,07,000/- (ninety-seven crore, fifty-six lakh, seven thousand) with a detail break-up of the individual expenses. This list also contained necessary explanation and supporting materials for the Commission to come to a “just compensation”. The Annexure-A14 also included a specific claim of US \$ 20,000 as the cost paid to transfer Anuradha in a moribund condition in an air-ambulance from Kolkata to Breach Candy Hospital. This direct cost for transfer of Anuradha was also admitted by the Hon’ble Supreme Court in its final judgment on August 7, 2009. In fact, there was a typo-graphical error in the final judgment passed by the Hon’ble Apex Court as it missed one zero and made the expense of \$20,000 to only \$2,000 because of the inadvertent typographical error. A separate application was moved by the appellant before the Hon’ble Supreme Court to correct this typographical error and this Hon’ble Court in an order passed on 23rd November, 2009 corrected the said typographical error and changed the cost for air-ambulance

transfer of Anuradha to US \$20,000. Indeed, this fact has also been specifically acknowledged by NCDRC in its final judgment under para 3.6. But even after acknowledging that that \$20,000 was paid for air-transfer of Anuradha, NCDRC has allowed only about half of this total amount, i.e. Rs. 5 lakh (para 12.11). It is indeed astonishing to find that NCDRC has drastically slashed the cost paid for air-transfer of Anuradha which was admitted even by the Hon'ble Supreme Court. The appellant undoubtedly deserved to be paid full amount for these direct expenses. Unfortunately, NCDRC has denied even the direct expenses in the most capricious manner going beyond its jurisdiction by ignoring the categorical finding of the Apex Court.

- n. Because NCDRC has failed to consider damages for pain and suffering in proper perspective.** The NCDRC has miserably failed to appreciate the gravity of the endless pain and suffering that the appellant has been put through (due to the untimely loss of his wife) in proper perspective. A total of sixty lakh dollars (\$ 6,000,000) was claimed by the appellant on the grounds of pain and suffering as well as loss of companionship and life amenities for the premature death of his wife. Anuradha, appellant's wife, died at an age of only 36 years old and at a stage when the appellant and his wife were almost at the door-step to fulfil the "American Dream" and start a family life together following a long and hard struggle after migrating to USA as a young couple in the late 1980s. The appellant has spent a single and lonely life in USA since losing his wife in 1998. In fact, as the appellant has repeatedly stated in the course of a protracted trial before NCDRC, the incomprehensible

death of his wife has destroyed at least two lives, not just one. While remitting this case back to NCDRC, this Hon'ble Court, citing from *R.D. Hattangi vs. Pest Control Ind. Pvt. Ltd.* (AIR 1995 SC 755), has also affirmed that compensation for a victim must also include “*damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future*” (2009 SCC 9, 221; para 196).

It is shocking that the NCDRC has granted a measly Rs. 10 lakh which is equivalent to only about \$20,000 for the endless pain, suffering and permanent loss of companionship for the appellant. The NCDRC has attempt to justify that since the Hon'ble Apex Court allowed Rs. 10 lakh in the case of *Nizam Institute Med. Sciences* (Supra.), an equal amount may be granted for the appellant as “non-pecuniary” damages for his pain, suffering and loss of companionship. It is astounding that NCDRC has failed to appreciate the basic fact that the instant case is in no way comparable to the facts and circumstances involved with the case in *Nizam Institute Med. Sciences* (Supra.) except that the victims in both cases were victims of negligent therapy. First, unlike Anuradha, the victim in *Nizam Institute Med. Sciences* (Supra.) survived the negligent treatment. Second, the victim in *Nizam Institute Med. Sciences* (Supra.) was unmarried who built a high-profile career in Engineering despite his permanent handicapped condition while Anuradha, in the instant case, was killed by the respondents when she had the bright prospect to have a brilliant career as a child psychologist in USA leaving behind a forlorn husband. Third and perhaps most importantly, NCDRC has failed to appreciate that the sole living victim in the instant case (appellant) is a

permanent resident of USA, not India. Thus, in reality, NCDRC has allowed only about twenty thousand dollars and not Rs. 10 lakh as awarded to the victim in the case of *Nizam Institute Med. Sciences* (Supra.). Even if NCDRC had followed the principles underlying the *Nizam Institute Med. Sciences* (Supra.) case in equal terms, it should have granted at least ten lakh dollars for the appellant for his pain and suffering. It is truly shocking that only about \$20,000 was allowed to the appellant for his unspeakable pain and suffering due to the horrific death of his wife as a result of the reckless treatment by the respondents. Multi-million dollar compensations are routinely awarded by courts in USA for pain and suffering in wrongful death cases. A number of judgments from different High Courts in USA involving deaths from “medical negligence” were submitted before NCDRC where millions of dollars were awarded to the victim of “medical negligence”. The NCDRC has also admitted that courts in USA routinely award huge amounts of compensation in cases involving medical negligence but dismissed appropriate compensation for pain and suffering for the appellant in the instant case (para 12.3). Ironically, NCDRC has acknowledged that the quantum of compensation should be decided “*in the background of the country where most of the dependent beneficiaries resides*” as held by this Hon’ble Court in *United India Insurance Company Ltd.*(Supra.) (para 10.3). The incidence in *United India Insurance Company Ltd.*(Supra.) has direct and important relevance with the present case because a permanent American resident died from an auto accident during a trip to India. In the said case, the Hon’ble Apex Court granted compensation in excess of Rs. 16 crore plus interest in

2002. It is shocking that NCDRC has allowed “non-pecuniary” damages of only about \$20,000 for the endless pain, suffering and loss of companionship for the appellant in the instant case without any regard to the relevant decision delivered by this Hon’ble Court in *United India Insurance Company Ltd.* (Supra.).

o. Because NCDRC has erroneously rejected compensation for pain and suffering endured by the victim, Anuradha. It is undisputed that as a result of the negligent therapy by the respondent doctors and AMRI Hospital, Anuradha went through intense pain and suffering for several weeks before her eventual demise on May 28, 1998. This fact has also been categorically recorded by this Hon’ble Court in its final judgment while remitting this case back to NCDRC to determine the quantum of compensation (2009 SCC 9, 221). For the immense physical as well as mental pain and suffering that hapless Anuradha was put through by the respondent doctors/hospital until she breathed her last, a compensation of \$1,000,000 (one million dollars) was claimed under “non-pecuniary” damages. Unfortunately, the NCDRC did not grant a single dollar on this account and did not provide any reason as to why entire compensation was disallowed on this ground for which Anuradha, since deceased, had to endure the undeniable and excruciating pain and suffering until she breathed her last on May 28, 1998.

p. Because NCDRC has failed to consider punitive/exemplary damages. Punitive damages are generally awarded as exemplary punishment against heinous acts that have wider implications in the society at large. The instant case involves the loss of life of a young patient (Anuradha)

who was afflicted with a curable illness (drug allergy) but who eventually had to die solely because of rash and negligent therapy by so-called “eminent” doctors and a premier private hospital (AMRI Hospital). “Medical negligence” is undoubtedly a social evil of the worst kind that has continued to affect countless innocent patients across India.

Punitive or exemplary damages amounting to multi-million dollars are routinely awarded in cases involving “medical negligence” in USA and other developed countries in order to send a strong and deterrent signal to the errant members of the medical community. Several cases where large punitive/exemplary damages were awarded by the high courts in USA involving “medical negligence” were also submitted before NCDRC underscoring the significance of punitive/exemplary damages in the instant case [*Welch v. Epstein* (536 S.E. 2d 408, 2000); *Dardinger v. Anthem Blue Cross & Blue Shield et al.* (781 N.E. 2d, 2002); *Atkins v. Lee*; (31 A.L.R. 5th 773, 1992); *Advocat, Inc. v. Sauer*. (111 S.W. 3d 346, 2003)]. Unfortunately, NCDRC has refused even to look into these relevant judgments from USA as the Commission has claimed that the “*Commission cannot take into account the system of award of compensation in other countries*” (para 12.2). Even the Hon’ble Apex Court considers judgments from foreign courts including courts in UK and USA whenever these decisions are relevant in the context of a particular case in India. Incidentally, punitive or exemplary damages involving rash and negligent act are not unprecedented in India. In the well-known case of *Lata Wadhwa & Ors. vs. State of Bihar & Ors.* (2001 SCC 8, 197) in which a number of children and women died from an accidental fire, this Hon’ble Court

awarded punitive/exemplary damages to send a message against the unsafe condition kept by greedy organizations or companies in the common public places in India (para 13). The instant case involves death of Anuradha, a permanent resident and citizen of USA, as a result of an overtly odious act of “medical negligence” by several top doctors and hospital in India and it deserves award of an appropriate amount of punitive/exemplary damages. Although punitive/exemplary damages generally exceeds the awards for pecuniary and non-pecuniary damages combined (see the USA judgments referred above), a total of only \$3,000,000 (three million dollars) was sought as “punitive/exemplary” damages for Anuradha’s death considering the difference in the economic conditions between India and USA. Unfortunately NCDRC has dismissed the entire claim for punitive/exemplary damages without mentioning a single word or providing any reason.

- q. Because NCDRC has drastically reduced cost involved with Anuradha’s treatment at AMRI and Breach Candy Hospital.** It is undisputed that Anuradha was treated as an indoor patient in ICU or specialized cabin in top private hospitals in Kolkata (AMRI Hospital) and Mumbai (Breach Candy Hospital) for almost 3 weeks (11th May to 28th May, 1998). The appellant has claimed Rs. 12 lakh as the total cost for his wife’s treatment at AMRI and Breach Candy Hospital. While every receipt for hospital expenses could not collected by the appellant for obvious reason in an incomprehensible situation under which his wife died during a social visit to India, a receipt of Rs. 2.5 lakh (for a single occasion) from Breach Candy Hospital was produced before

NCDRC. Furthermore, the appellant has also referred to the appropriate evidences present in the record to underscore the high cost of treatment which was associated for treatment of his wife at the two hospitals. It is a common knowledge today that treatment at premier private hospitals like AMRI or Breach Candy Hospital is exorbitantly expensive. None of the respondents argued that the appellant did not spend Rs. 12 lakh for the long period of treatment for his wife in India. The respondent doctors and AMRI Hospital could also have produced evidence showing that Anuradha's treatment cost less than Rs. 12 lakh. Unfortunately, NCDRC has allowed only Rs. 5 lakh as the cost of entire treatment of Anuradha between the two hospitals.

Similarly, NCDRC has also rejected the cost that was involved with travel, hotel and other expenses incurred by the appellant during Anuradha's treatment at AMRI and Breach Candy Hospitals in 1998. It is undisputed that the appellant and his wife came to India as visitors from USA and as such, when Anuradha became suddenly ill and taken to hospitals in Kolkata and Mumbai over a period of almost three weeks, huge cost was involved with hotel, travel etc. not only for her husband (appellant) but also her parental family. While a reasonable amount of Rs. 7 lakh was claimed by the appellant, NCDRC has allowed only Rs. 1 lakh for this purpose. The NCDRC has failed to apply its mind in proper perspective about the costs of treatment, travel, hotel etc. during the last 3 weeks of life of appellant's wife (para 12.11).

- r. Because NCDRC has failed to consider the losses suffered by appellant for “tenure denial”, “foreclosure” and “bankruptcy”. The**

principal goal for determination of “just compensation” must include all damages suffered by the dependent as a direct or indirect consequence of death/injury of the victim. While remitting the instant case back to NCDRC for determination of the quantum of compensation, the Hon’ble Apex Court has clearly indicated that NCDRC must consider all losses incurred by the appellant for the wrongful death of his wife “*up to the date of trial*” (2009 SCC 9, 221; para 174). At para 170 the Supreme Court had also held:

“Indisputably, grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of *restitutio in integrum*. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. (See *Livingstone v. Rawyards Coal Co.*²⁸)”

As indicated above, in the course of the more than 12-year long quest for justice in India for the wrongful death of his wife, the appellant had to take numerous trips from USA and stayed for extended period in India to attend the court proceedings that involved intricate questions of medicine. There are numerous evidences present in the record showing that the appellant had to travel to India on countless occasions to attend hearings. An interim Order passed on 14th May, 2009 by this Hon’ble Court would also underscore this point which is reproduced below for ready reference:

“Put up before a bench of which Hon'ble Mr. Justice Ashok Kumar Ganguly is not a member. Keeping in view the fact that the appellant intends to argue the matter in person and as he is ordinarily a resident of USA, he has been waiting for hearing of this case for the last three months, we are of the opinion that a firm date should be fixed for hearing. The matter be placed before an appropriate bench at the top of the list, irrespective of the part-heard matters on 14th July, 2009.”

As evident from the Order by this Hon'ble Court as mentioned above, the appellant had to stay in India for three months or even longer leaving his profession behind in USA. Although the appellant is originally a physician from India, the accused doctors in the instant case are highly influential members of the medical community in India. Despite many foreign medical experts providing supportive opinions on behalf of the appellant, no doctor from India was willing to testify against the accused doctors/hospital. In fact, the appellant appeared “in person” for the final argument before this Hon'ble Court on 14th July, 2009. Unfortunately, the appellant had to pay a heavy price, personally and professionally, for his frequent trips and extended stay in India as he was denied tenure at the Ohio State University (OSU) where the appellant was working as a tenure-track professor since 1998 and had a thriving research on HIV/AIDS. The OSU has categorically claimed that appellant's tenure was denied solely due to his frequent trips and extended stay in India. Although the appellant challenged his tenure denial before the court in Ohio, his appeal was denied as the court has also held that appellant's stay in India was the

primary reason for loss of his tenure as the court has observed:

“In light of the parameters outlined above, the court finds that OSU did not violate its policy and that the timing of plaintiff’s (Dr. Kunal Saha) annual and mandatory reviews overlapped due in large part to plaintiff’s prolonged absence from the department (which occurred at the same time as the scheduled fourth-year review) and to plaintiff’s inability to submit the required documents to the department in a timely fashion. There was ample evidence submitted to establish that plaintiff had difficulty compiling the dossier from abroad and that he attempted to delegate some of his responsibility to his support staff while he was in India in 2002” (emphasis added).

The appellant has also been ruined financially following his tenure denial by OSU so much so that he also had to foreclose his home and file bankruptcy in USA. Thus, the appellant had to suffer excruciating pain and pay an unimaginable price solely because of the wrongful death of his wife during a social visit to India in 1998.

In fact, the respondents raised this issue (about appellant’s termination and tenure denial by OSU) and submitted the Ohio Court order (against the appellant) during the trial before NCDRC. The appellant also filed an affidavit after NCDRC ordered him to provide relevant information in this regard. The respondents also filed affidavits opposing appellant’s submission which was also allowed by NCDRC. There can be no argument that the incredible professional (“tenure denial”) as well as personal (“bankruptcy” and “foreclosure”) sacrifices that the appellant had to make since the demise of his wife would have

never happened but for the negligent treatment by the respondent doctors and AMRI Hospital that took the life of Anuradha. The appellant has calculated the financial loss as a result of his tenure denial by OSU as well as bankruptcy/foreclosure valued at \$4,000,000 and submitted this claim before NCDRC under “Special Damages” with . The appellant also personally argued these issues before the NCDRC. Unfortunately, NCDRC has remained completely silent about these specific claims for direct loss for tenure denial/bankruptcy/foreclosure but dismissed these claims without providing a single reason.

- s. **Because NCDRC has made grossly erroneous apportionment of compensation.** The NCDRC has distributed the severely inadequate compensation among different respondents in the most irrational manner which is also contrary to the degree of culpability by the individual respondents as held by the Hon’ble Supreme Court. Out of the total compensation of Rs. 1,72,87,500/- awarded by NCDRC, Rs. 38,90,000/- (about 22%) each was awarded against Dr. Mukherjee (respondent no. 1) and AMRI Hospital (respondent no. 3) and Rs. 25,93,000/- (about 15%) each was awarded against Dr. Halder (respondent no. 2) and Dr. Prasad (respondent no. 4). Shockingly, NCDRC has also penalized the appellant and awarded 10% of the total compensation for his alleged “contributory negligence” as indicated above. Finally, even though NCDRC has also awarded Rs. 25,93,000/- (about 15%) against Dr. Abani Roychowdhury (one of the doctors held guilty by the Apex Court), this amount was also deducted from the total compensation because Dr. Roychowdhury had already passed away while this matter was pending before NCDRC.

Therefore, in reality, NCDRC has actually awarded a compensation of only about Rs. 1.3 crore for Anuradha's death, which is less than 2% of the claim for compensation. This apportionment of the total compensation by NCDRC is nothing but a sheer travesty of justice in view of the degree of culpability of individual respondents as already determined by this Hon'ble Court while remanding this case back to NCDRC on August 7, 2009. The apportionment by NCDRC is grossly misconceived for more reasons than one:

Hospitals should bear the primary responsibility for negligent death of any patient: There is no argument that hospitals provide the platform for the doctors to treat patients. Hospitals also reap huge profit from the patients who are treated in the hospital by different doctors. While delinquent doctors are undoubtedly responsible for advising wrong therapy, hospitals must be held primarily responsible for death or injury of a patient as a result of medical negligence. This Hon'ble Court and consumer forums across the country have routinely imposed the entire compensation for "medical negligence" against the errant hospital where the victim has been treated by different doctors who either work in the hospital or brought from outside as a "visiting" or "attending" physician. In fact, an order recently passed by the same Presiding judge (Justice Mr. R.C. Jain) under an identical situation where a number of doctors were involved in the maltreatment of a patient, NCDRC has imposed the entire cost against the errant hospital with a specific and cogent reason,

“In view of the fact that several doctors and paramedical staff of the respondent Institute were involved, it is the

respondent Institute which has to be held vicariously liable to compensate the complainant to the above extent” (emphasis added) (S.P. Aggarwal vs. Sanjay Gandhi Post-graduate Institute; NCDRC F.A. No. 478/2005).

Further, this Hon’ble Court has recently imposed a compensation of Rs. 1 crore (plus interest) in *Nizam Ins. Of Med. Sciences vs. Prashant Dhananka & Ors.*, where the entire compensation was levied against the hospital authority despite the fact that a number of delinquent doctors were responsible for the medical negligence (2009 SCC 6, 1).

Supreme Court made clear distinction about degree of culpability by different respondents for Anuradha’s death: While delivering the final judgment in the instant case, NCDRC has claimed that “*the Supreme Court has not indicated the criteria for apportionment of the compensation amongst the opposite parties*” (para 14.1) despite the fact that the Apex Court had clearly indicated the level of culpability on part of the respondent doctors and AMRI Hospital while remitting this case back to NCDRC. While remanding this case back to NCDRC only for determination of the quantum of compensation, this Hon’ble Court has explicitly as well as implicitly indicated on numerous occasions about the degree of culpability on part of different respondents for causing Anuradha’s death. For example, this Hon’ble Court has imposed a cost of Rs. 5 lakh against AMRI Hospital (respondent no. 3) and Rs. 1 lakh against Dr. Sukumar Mukherjee (respondent no. 1) in view of their “*stand taken and conduct*”. No such cost was imposed against any other respondents clearing underscoring that in view of this Hon’ble Court, the

maximum culpability for Anuradha's death was for the AMRI Hospital followed by the respondent no. 1 (Dr. Mukherjee). Further, Dr. Mukherjee, Dr. Halder (respondent no. 2) and late Dr. Roychowdhury senior physicians and professors, were primarily in charge of Anuradha's treatment at AMRI Hospital. These three senior doctors were also charged for "criminal negligence" for their primary role in Anuradha's treatment while Dr. Prasad, a junior physician, was sued only for civil liability for secondary role and failure to apply his mind. This Hon'ble Court has also found Dr. Prasad guilty only because "*he stood as second fiddle to the treatment and failed to apply his own mind*" (2009 SCC 9, 221).

Thus, it is wrong for NCDRC to suggest that the Supreme Court has not indicated any criteria for apportionment for distribution of compensation. Obviously, as the Hon'ble Apex Court has clearly held in the final judgment while remanding this matter back to NCDRC, AMRI Hospital (respondent no. 3) must share by far the maximum responsibility for Anuradha's death followed by Dr. Mukherjee (respondent no. 1). While Dr. Prasad (respondent no. 4) was also found guilty for playing a role of "second fiddle", Dr. Halder (respondent no. 2) and Dr. Roychowdhury (who has passed away) should have a greater responsibility for Anuradha's death. It is shocking that in view of NCDRC, both AMRI Hospital and Dr. Mukherjee were equally culpable for Anuradha's death as they equally shared only about 22% of the compensation while Dr. Halder and Dr. Prasad (also late Dr. Roychowdhury) were also held equally responsible and penalized about 15% of the total compensation. Perhaps even more shocking in this

regard is the fact that NCDRC has also held the appellant almost equally responsible for his wife's death as he has also been penalized about 10% of the total compensation while late Dr. Roychowdhury had to pay absolutely nothing because he had expired as this case was pending before NCDRC. The AMRI Hospital should pay the lion share of the total compensation followed by Dr. Mukherjee, Dr. Halder and Dr. Prasad as implicitly suggested by this Hon'ble Court.

- t. Because NCDRC has not allowed any interest in this 12-year old claim.** In an unprecedented move which is clearly unfair for the appellant and which goes against the common practice and wisdom in law, NCDRC has refused to add a single rupee of interest to the basic compensation amount even though the instant case for the wrongful death of Anuradha lingered before the Commission for more than 12 years. Cases for compensation in the civil courts or before consumer commissions routinely award reasonable interest from the date of filing of the case for delivery of equitable justice. There is always a gradual depreciation of the economic and monetary value with the passage of time due to inflation and/or increase in the general price index. The instant case was first filed in March, 1999 by the appellant seeking compensation for the wrongful death of his wife, Anuradha. Even in *United India Insurance Company Ltd.*(Supra.) which involved wrongful death of a 48-year old USA citizen whiling visiting India, the Hon'ble Supreme Court granted an interest of 12% from the date of filing of the case. This case has also been discussed extensively by NCDRC (para 9.9). But it is astounding that while declaring compensation in the instant case more than 12 years after the

original complaint was filed, NCDRC has simply directed the respondents only to pay the compensation amount without any interest whatsoever. The quantum of the original claim which was filed by the appellant in 1999 is obviously worth much less today. Without providing a single cogent reason, NCDRC has simply decided not to add any interest against the respondent doctors and AMRI Hospital in the most irrational and capricious manner.

- u. Because NCDRC has made highly derogatory comment that the appellant is trying to make a “fortune out of a misfortune”.** As discussed above, after losing his wife due to grossly negligent therapy by the respondents during a social visit to India more than 12 years ago, the appellant has kept on paying a hefty professional as well as financial price in search of equitable justice for his departed wife. While the compensation claimed by the appellant may appear large in Indian context primarily due to the living standard and high value of currency in USA where both the appellant and his departed wife permanently lived, there is absolutely no evidence anywhere that the appellant filed the instant lawsuit to make personal financial gain. The appellant has been intimately involved with charitable work in India ever since he lost his young wife in the most incomprehensible manner during a social visit to India. In fact, the appellant has testified before the court and also filed sworn affidavit that he would donate the entire compensation (except legal expenses) for promotion of better healthcare and benefit of the poor children in India. Shockingly, while dismissing more than 98% of appellant’s claim, NCDRC has also made a highly objectionable and defamatory assertion

about appellant's motive to file this case as the Commission has observed, "A complainant cannot be allowed to get undue enrichment by making a fortune out of a misfortune" (para 16.5).

There is absolutely no basis for NCDRC to make such slanderous comments against the appellant. Ironically, the Calcutta High Court also made similar baseless and defamatory accusations against the appellant while acquitting the doctors (respondent nos. 1 and 2) in the related case for "criminal negligence" (under IPC Section 304A). The Hon'ble Supreme Court made scathing criticism of these comments made by the single-judge of Calcutta High Court while disposing both the criminal and civil appeals together on August 7, 2009 as the Apex Court has held:

"In a case of this nature, Kunal (complainant) would have expected sympathy and not a spate of irresponsible accusations from the High Court" (2009 SCC 9, 221; para 194).

Unfortunately, instead of showing any sympathy or deciding the quantum of compensation with an open mind, NCDRC has also indulged in groundless personal attack against the appellant by claiming that the appellant is trying to make a "fortune" from his wife's death. It may be pertinent to mention that over the years, this case has been highly publicized by the media across India and beyond. The disparaging comments made by NCDRC against the appellant have also been widely reported by the media. In fact, *Hindustan Times*, a top national daily has quoted in the front page the exact words from NCDRC judgment that "A

complainant cannot be allowed to get undue enrichment by making a fortune out of a misfortune". Needless to say that these slanderous comments by NCDRC have brought untold amount of pain and misery for the appellant. These baseless comments should be expunged from the final judgment by NCDRC.

v. **Because the Hon'ble NCDRC has given misplaced sympathy to the respondents in total disregard of the finding by the Hon'ble Supreme Court.** The NCDRC has given consideration to the hardship of the respondents in spite of the finding that the applicant/appellant had engaged the best doctors available and the most renowned hospital in Kolkota to treat his wife but the so called best doctors are found to be lacking in basic knowledge and the renowned hospital was found lacking in providing basic care. In para 152 of the judgement the Hon'ble Supreme Court has held as follows:

“Kunal approached the best doctors available. He admitted his wife at AMRI on the recommendation of Dr. Mukherjee, evidently, expecting the best possible treatment from the renowned doctors and a renowned Hospital. It was not too much for a patient to expect the best treatment from the doctors of the stature of Dr. Mukherjee, Dr. Halder and Dr. Abani Roy Chowdhury.”

However, earlier in para 109 of the judgement the Supreme Court had recorded the finding

“The treatment line, in this case, does not flow from any

considered affinity to a particular school of thought, but out of sheer ignorance of basic hazards relating to use of steroids as also lack of judgment.”

Moreover in para 155 of the judgment the Supreme Court held:

“ AMRI makes a representation that it is one of the best hospitals in Calcutta and provides very good medical care to its patients. In fact the learned Senior Counsel appearing on behalf of the respondents, when confronted with the question in regard to maintenance of the nurses register, urged that it is not expected that in AMRI regular daily medical check-up would not have been conducted. We thought so, but the records suggest otherwise. The deficiency in service emanates therefrom.”

From the above it is clear that the facts of the case was one which called for very stringent view against the respondents but for the reasons best known to the respondents the Hon’ble NCDRC seems to have taken a lenient view towards the respondents and a stringent view against the appellant.

- w. **Because NCDRC has calculated the quantum of compensation in total disregard of the relevant evidence on record.** The Hon’ble NCDRC has ignored virtually all the recorded documents that are pertinent to the loss of income due to the premature death of Anuradha. The Commission has also thrown away opinions of the all the foreign economic/psychology experts that were submitted to help coming to a just compensation under the unique context of this particular case as indicated by the Hon’ble Supreme Court in its final judgment on August

7, 2009 following the verdict of guilt for “medical negligence” by the respondent doctors and AMRI hospital. The Hon’ble NCDRC also disregarded the testimony given under direct and cross-examination by Prof. John Burke, a renowned economic expert from USA.

It must be pointed out that the Hon’ble NCDRC first dismissed the original complaint against all accused doctors and AMRI hospital in 2006 because in their view, there was absolutely no evidence of any medical negligence. After the Hon’ble Apex Court overturned the NCDRC verdict in 2009 and held that the respondent doctors and AMRI hospital were responsible for Anuradha’s death from medical negligence and remanded the case back to the NCDRC only for determination of the quantum of compensation with specific observation for recording of “foreign experts” via videoconferencing to come to a just compensation, the NCDRC continued to put obstacles and repeatedly refused to admit evidence from “foreign experts” on one flimsy ground or another.

6. This application is made bona fide and for the ends of justice.

PRAYER

It is therefore most humbly prayed that this Hon'ble Court may be pleased to;

- a. Admit and allow the appeal against the impugned final order in O.P. No. 240 of 1999 dated 21.10.2011 passed by the Hon'ble National Commission for Consumer Dispute Redressal at New Delhi.
- b. Pass such other reliefs as this Hon'ble Court deems fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IS DUTY BOUND SHALL EVER PRAY

DRAWN ON:

FILED ON: January 12, 2012

NEW DELHI

FILED BY :

T.V. GEORGE

ADVOCATE FOR THE PETITIONER