

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

**CONSUMER COMPLAINT NO.CC/11/288**

Mrs.Jane Kandhari,  
Widowed mother and legal heir of deceased  
Mr.Flavian Kandhari,  
R/o.403, Kavita Apartments,  
Yari Road, Versova, Andheri West,  
Mumbai 400 061.

.....Complainant(s)

**Versus**

1.Dr.Sujata Patwardhan (ex-Sion Hospital)  
Secretary, ZTCC, Mumbai  
C/o.KEM Hospital, Dr.E.Borges Road, Parel,  
Mumbai 400 012.  
2. Dr.Vatsala Trivedi,  
(ex Secretary ZTCC Sion Hospital)  
17, Nirmala Niwas,  
209, C.B.S. Ambedkar Road, Matunga,  
Mumbai 400 019.  
3. Dr.Martin D'souza,  
(Holy Spirit/Nanavati Hospital)  
C/o.Dr.Balabhai Nanavati Hospital,  
AKD Department, S.V.Road, Vile Parle West,  
Mumbai 400 056.  
4. M/s. Balabhai Nanavati Hospital,  
S.VRoad, Ville Parle West,  
Mumbai 400 0056.  
5. The Dean, L.T.M.G., Hospital,  
Sion West, Mumbai 400 022.

.....Opponent(s)

**BEFORE:**

**Mr.Justice A.P.Bhangale, PRESIDENT  
Mr.Narendra Kawde, MEMBER**

**For the  
Complainant :** Dr.M.S.Kamath, A/R

**For the Opponent :** Adv.Nagraj Hosekar for the opponent  
no.1.  
Adv.G.N.Shenoy for the opponent  
no.2.  
Adv.Yogesh Naidu for the opponent  
no.3 and 4.

**ORDER****Per Mr.Narendra Kawde, Hon'ble Member**

Mr.Flavian Kandhari, deceased was son of the complainant. Mr.Flavian had chronic renal failure. It was therefore decided to have kidney transplant. Kidney doner, Akinky Karve, young boy of 17 years was brain dead due to post-operative complications. Donor, it is alleged, was suffering from Guillian Barre Syndrome [GBS], severe medical condition – neurological ailment initially grapping from toes in the ascending order. After cadaver kidney transplant, Mr.Falvian Kandhari died on 73rd day with cause of death recorded as (i) ARDS (ii) Encephalomyelitis (iii) GBS. Opponents conceded the neurological disorder of kidney donor. Gross medical negligence is alleged against all the opponents for their failure to disclose true facts of kidney donor and for violation of guidelines/professional ethics. Government set fact finding committee of Medicop-expert on complaint to Director of Medical Education & Research [in brief 'DMER'] by complainant/her relative.

[2] Case in brief giving rise to file this consumer complaint is as hereinafter:-

Mr.Flavian Kandhari, son of the complainant [hereinafter referred to as 'patient'] was suffering from chronic Renel Failure since September 2004 and was subjected to dialysis for CRF twice a week and later on thrice a week. The patient was under treatment of opponent no.3, Dr.Martin D'souza throughout his ailment. Patient was also a known case of other health complications such as Ventricular Septal Defect [hole in heart] and underwent open heart surgery in year 1997 followed by treatment for gout with attack of Steven Johnson Syndrome

(SJS) [a very severe immunological reaction with a high percentage of fatality]. With the assistance of opponent no.3 i.e. Dr.Martin D'souze, the complainant tried to explore the possibility for transplantation of kidney and accordingly deposited certain amount with the opponent no.4. Transplantation of kidney could not take place for almost two years as suitable donor was not available. At the instance of opponent no.3, complainant agreed to transplantation of cadaver kidney as it was made available from the donor through ZTCC. Operation to transplant the kidney was carried on 14/05/2009 under the direction of Dr.Martin D'souza by operating surgeon, Dr.(Mrs.) Vastala Trivedi i.e. opponent no.2.

[3] Core issues arising from this consumer complaint for our consideration are :-

- (i) Whether opponents are guilty of medical negligence vis-à-vis findings of Committee report set up by Director of Medical Education and Research {DMER}?
- (ii) Whether opponents have violated guidelines framed under the provisions of the Human Organ Transplant Act 1994 ['HOTA']and professional ethics?

[4] Therefore, Patient was re-admitted on 14/05/2009 in opponent no.4 hospital as he was unable to walk. One Dr.Neeta Mehta, Neurophysician diagnosed that the patient is a case of Guillian Barre Syndrome (GBS). This condition is an neurological ailment initially gripping from toes in the ascending order of the body. The patient was put on treatment as advised by the opponent no.3 to undergo plasma pheresis treatment to get rid of toxins caused by GBS, by paying Rs.1 lac per sitting for three days. However, the patient went into coma and breathed his last on 26/07/2009 with cause of death as recorded (i) Acute

Respiratory Distress Syndrome, (ii) Encephalomyelitis (iii) Gullian Barren Syndrome (GBS).

[5] Upon reading a English newspaper, the complainant/her sister came to know, the kidney donor Mr.Ajinkya Karve, young boy of 17 years also suffered from GBS prior to his death which came as a shock to the complainant as well as her sister. Thereupon the complainant approached to the Director of Medical Education & Research (DMER) and Director Health Services (DHS) to ascertain the truth. Opponent no.1-Dr.Sujata Patwardhan, Urologist of Sion Hospital retrieved the kidney who knew all facts about the kidney donors. Opponent no.2 Dr.Vastala Trivedi, who was at the crucial time, Secretary of ZTCC allotted and transplanted the kidney, though she was aware of the fact of serious ailment of the kidney donors. Act of opponent no.2 was in clear conflict of interest as she was at the relevant time, managing the post of Secretary of ZTCC. It is alleged by the complainant that these opponents have violated guidelines meant for transplantation of kidney/organ donation as laid down under title as "CRITERIA FOR FITNESS OF CADAVERIC ORGAN DONORS; OTHER THAN CORNEA; EAR DRUMS AND BONE" framed under transplantation of Human Organ Transplant Act, 1994 [HOTA].

[6] Gross negligence is alleged against all the opponents, more particularly against the opponent no.2-Dr.Vatsala Trivedi and opponent no.3-Dr.Martin D'souze as these two opponents were well aware of medical condition of the patient, proceeded to conduct transplantation with 'tainted' kidney thereby exposing the patient to the highest risk of 'bad kidney'. Their decision ultimately proved fatal leading to the death of the patient. ZTCC/HOTA guidelines are amply clear prohibiting donation of

kidney of the patients with neurological diseases which is, per se, gross negligence on behalf of the opponents, as averred.

[7] It is further stated that the patient was only son of the complainant who succumbed due to the decision of opponent no.2 and 3 as they managed to procure kidney of brain dead person with neurological disorder. Complainant suffered irreparable loss of love and affection due to demise of the only son after transplantation of the kidney allegedly attributed to the failure of the accurate assessment and ill decision of the opponent no.2 and 3. Complainant filed this consumer complaint alleging gross medical negligence against the opponent claiming Rs.77,36,794/- under various heads as patient was earning Rs.35,000/- per month who unfortunately died at the young age of 33 years.

[8] On perusal of record and hearing submissions on behalf of the parties, we find that foundation of complaint is,

- (i) News paper report.
- (ii) Committee Report set up by DMER
- (iii) Case history recorded by LTMG Hospital of kidney donor.
- (iv) Provision of guidelines under HOTA 1994.

[9] All the opponents have refuted adverse allegations by filing written versions.

[10] Opponent no.1, Dr.Sujata Patwardhan denied the allegations against her stating that she is not a service provider nor the complainant is her consumer. She was not Secretary of ZTCC at the relevant time. There are no incriminating averments or evidence against her. The expert opinion on behalf of the

complainant is silent about the role of this opponent. The complaint is based on unilateral and subjective considerations. This opponent further says that she is qualified Urologist having 23 years experience in medical practice and also worked as Head of Department of Urology in KEM Hospital. Her role is very limited to the extent of retrieval of kidney of the donor and handing it over to the institute. At no point of time, she was in contact with the complainant/or her relatives. Patient survived for 73 days after the transplantation which was functional normally. This opponent denied stating that GBS is not infective, per se, nor it can be said to be transmittable. GBS had no role vis-à-vis cause of death as it is wrongly presumed. Patient was suffering from multiple pre-medical conditions since his birth. Cerebro Spinal Fluid [CSF] report of the kidney donor was normal. Allegations are not corroborated by placing on record post-mortem report. Therefore, this opponent states that it is wrong to say that the kidney donor was suffering from GBS. Cause of death as reported is due to respiratory paralysis and Acute Respiratory Distress Syndrome [ARDS].

[11] Opponent no.2, Dr.Vastala Trivedi denied allegations of medical negligence stating that the patient was suffering from multiple medical conditions since birth. Opponent no.2 explained by submitting that at crucial time though she was Secretary of ZTCC, she followed well led down procedure for allocating kidney to the patient not out of turn. One kidney of the donor was small and it was found unfit for transplantation. Therefore other kidney was allocated to the first waitlisted patient, namely, Mr.Flavian Kandhari of Nanavati Hospital as per record of ZTCC. This opponent at no point of time visited the donor nor examined the donor. Retrieval of the kidney was carried out by retrieval team of brain-dead kidney donor. Once

the kidney allocation was done, the job of this opponent was accomplished as Secretary of ZTCC. Only after assessing the medical condition of the recipient patient as regard to his fitness and obtaining high risk consent by registering doctor, in this case, the opponent no.3, she carried out transplantation. The transplantation of Cadaver kidney was carried out at the opponent no.4 hospital. High risk consent was obtained and entire procedure possible intra-operative complications including possibility of table death of the patient was explained to the complainant. Transplant was carried out with care and caution. Post-operative management was under the care and supervision of the opponent no.3. Health complications since childhood in the patient developed urethral stricture – due to long time of catheterization. Only after operation, she visited the patient and removed double J stent. The patient was extremely happy as he was not required to undergo dialysis and his creatinine was dropping. Thereafter at any point of time this opponent had no contact with the patient and/or relatives. There were no post-operative complications till death which unfortunately occurred after 73 days of transplant. This opponent defended her role and discharge of function as Secretary of ZTCC. She defended that there is no violation of statutory or ethical guidelines in allocation and transplantation of kidney and even charging professional fees.

[12] Opponent no.3, Dr.Martin D'souza defended his role by filing written version and submitted that the patient had host of serious co-morbid conditions when he approached to him which includes:-

- a) *Patient had congenital VSD for which he had been operated at age of 8 years;*

- b) had gout;*
- c) had allergy to sulphazaloric;*
- d) developed Steven Johnson Syndrome;*
- e) was stabilized on dialysis;*
- f) complaint of dry eyes;*
- g) was very hypertensive with low ejection fraction.*

[13] Dr. Martin D'souza further submits that Patient was suffering from chronic renal failure and maintained on dialysis. Patient was suffering from various ailments such as pneumonia, hypertension, loose motions, breathlessness etc. Since it was a difficult case of medical conditions, all the treatment has been administered only after discussions with the complainant and his relatives. In the medical science, it is submitted that most of the co-morbid conditions of the patient were irreversible. Complainant and her relatives were not in position to accept the ground reality. Around January-February 2006, the patient's condition was such that managing him on dialysis was impossible. Therefore, only alternative available (though with bleak prognosis, albeit to save a human life) was a kidney transplant. This opponent explained the procedure for transplant of Cadaver kidney stating that it cannot be predetermined or preplanned or scheduled procedure. Its only the relative of the patient, namely, Alina Horta tried to pressurized and imposed upon the ZTCC for immediate/urgent kidney transplant which was very contrary to the various facts. At the instance of the opponent, earlier attempt was made to make available donation of the kidney but the complainant and her relative refused to accept a donor kidney of any donor below 45 years age. In this case, the donor patient was a case of brain death aged 17 years and after following due procedure donor patient was taken up for harvesting retrieval organs. It was

found that only one kidney was fit for transplant. The diagnosis of GBS relating to the donor patient was not confirmed as the CSF investigation was within normal limits and GBS is not mentioned as contraindication for organ donation as per guidelines published by the State Appropriate Authorities. Patient accepted the donor organ (kidney) very well on 14/05/2009 and was discharged on 06/06/2009.

[14] As submitted further by the opponent no.3, again the patient was brought to the opponent no.4 hospital on 14/06/2009 with complaint of loss of weight and dehydration. Upon immediate admission, reference to neurologist Dr.Mrs.Neeta Shah was made and simultaneous investigations were carried out. Upon investigations and clinical evaluations, appropriate treatment commenced immediately. This opponent extended all possible assistance including that of raising funds for the treatment of the patient and refunded with interest the amount of Rs.30,000/- which was charged as a professional fees. Relying on the report of the Committee of the Public Health Officials, complainant raised the dispute making wild allegations that infected kidney of a donor was transplanted resulting into the death of the patient.

[15] On behalf of the opponent no.4 hospital, by filing written version denied all the allegations stating that the issues raised in the complaint are extremely complicated and in a summary and speedy proceedings under the Consumer Protection Act, 1986, satisfactory adjudication is not possible. Opponent no.4 is a reputed institute and well equipped and having professionally qualified, vastly experienced, service oriented doctors and dedicated supporting staff. All the hospital record of the complainant's case was made available on request. All the

medical professionals dealing with case of the patients has exercised abundant care and caution to attend the patient. In view of this, it is submitted that no negligence can be attributed against this opponent as alleged.

[16] Heard at length Dr.M.S.Kamath, Learned Authorised Representative of the complainant, Learned Advocate Mr.Nagraj Hosekari for the opponent no.1, Learned Advocate Dr.G.N.Shenoy for the opponent no.2 and Learned Advocate Mr.Yogesh Naidu for the opponent no.3 and 4.

[17] We have perused the voluminous record and documents relied upon with able assistance of the Learned Authorised Representative and Learned Advocates of the parties.

[18] Learned Dr.Kamath narrated role play of each opponents stating that opponent no.1 was member of retrieval team for removal of kidney of brain dead patient viz.Ajinkya Karve, young boy and 17 years, who was in coma due to post operative complication. Opponent no.2 was Secretary of ZTCC at relevant time who allocated kidney and performed transplant operation. Opponent no.3 is nephrologist attached to opponent no.4 hospital under whose guidance and medical care patient was under treatment. Dr.D'souza facilitated obtaining of kidney through opponent no.2. Opponent no.4 is hospital where kidney transplant was carried out. These facts are not in dispute.

[19] Learned Authorised Representative, Dr.Kamath appearing for the complainant narrated the case history of medical condition of the patient stating that patient was a case of Chronic Renal Failure [CRF] who needed dialysis frequently and also underwent open heart surgery in the year 1987 for closure

of Ventricular Septal Defect [commonly known as hole in heart]. Patient suffered from gout in the year 1999 and was administered a drug called Zyloric, which precipitated an attack of Steven Johnson Syndromes [very severe immunological reaction with a high percentage of fatality] but recovered from the same. In case of this patient, only two options were available for treatment – a) long term dialysis or b) kidney transplant. Mother and aunt of the patient decided to choose second option i.e.transplant of kidney though it was very difficult to procure kidney as rules and regulations are very stringent framed under Human Organ Transplant Act 1994 [hereinafter to be referred to as 'HOTA'].

[20] Dr.Kamath further submitted that the opponent no.1 was in retrieval team. Opponent no.3 facilitated allocation of kidney through ZTCC, Mumbai. Operation for transplantation of kidney carried out transplantation on 14/05/2009 under overall guidance of opponent no.3-Dr.Martine D'souza by opponent no.2-Dr.Vatsala Trivedi at the opponent no.4 hospital. Patient, post-operative period, for first ten days, passed only 10cc blood stained urine and from 11<sup>th</sup> day, there was free flow of urine. Right from the date of operation, patient was complaining of pain in toes of right leg which persisted though he was given treatment by the opponent no.3.Dr.D'souza. Finally, the patient was discharged on 06/06/2009. Thereafter, the patient was suffering from weight loss and dehydration, abdominal pain, therefore, he was unable to walk. Under the care and guidance of the opponent no.3, the he was admitted at opponent no.4 hospital. Since there was no improvement, patient was referred to Dr.Neeta Mehta, Neurophysician who diagnosed the patient as case of GBS – a neurological ailment wherein initially the limbs and then rest of body get paralyzed in ascending order from the

toes. As suggested by opponent no.3, patient underwent costly treatment to get rid of toxins caused by GBS. Even though deteriorating condition, the patient could not be arrested and went into coma and finally expired on 26/07/2009 with cause of death as recorded "(i) Acute Respiratory Distress Syndrome – (ii) Encephalomyelitis (iii) Gullian Barre Syndrome (GBS)".

[21] Learned Dr.Kamath further continued and submitted that later on, it came to know from newspaper that the kidney donor had also suffered from GBS prior to his death. However, opponent no.3 who facilitated kidney donation pleaded innocence about the medical condition of the kidney donor and also cause of death due to GBS. Dr.Kamath relied heavily on the source material to relate that GBS was serious neurological disorder and transplantation of kidney of such donor is prohibited as per guidelines framed under HOTA. Opponent no.1 i.e. Dr.Sujata Patwardhan and opponent no.2, Dr.Vatsala Trivedi were well aware of the serious neurological condition of kidney donor even though they played innocence. This fact was concealed by these opponents.

[22] Dr.Kamath continued stating that on filing the complaint, with Director of Medical Education and Research {DMER} and Director of Public Health Services {DHS}, a committee was constituted of medical expert to go into the root cause of allegations levelled by the complainant. Committee reports are available on record. Fact finding committee headed by Dr.N.N.Ambhore, Jt.Director of Medical Education & Research, Mumbai recorded in the Minutes of Meetings [comprising three other doctors] as under:-

*"strong suspicion of unethical behaviour on the part of doctors and hospital involved in the care of this patient*

*with violation of the Transplantation of Human Organs Act, 1994".*

At the crucial time as observed by the committee, opponent no.2, Dr.Vatsala Trivedi was Secretary of ZTCC, Mumbai who allotted the kidney to this waitlist patient no.11 recipient bypassing the first 10 waitlisted patients as her co-ordinator Sujata Ashtekar was on leave. Dr.Trivedi carried operation of transplant, which is a clear clash of interest. Moreover, she accepted Rs.50,000/- by two cheque over and above the fees paid by the opponent no.4 hospital for her services. Committee also observed that kidney donor was 17 year old and his kidney was garbaged. None of the other organs were retrieved from the donor. Suspicion of GBS of the kidney donor was not informed to the recipient's mother and his relative.

[23] According to the committee report, the patient who suffers Left Ventrical Ejection Fraction of 15% should not have been listed for kidney transplant operation yet transplant took place. Learned A/R Dr.Kamath further submitted that the opponent no.2 Dr.Vatsala Trivedi and opponent no.3-Dr.Martine D'souza violated professional ethics by accepting the fees over and above the one received from the opponent no.4 hospital for offering their services. Opponent no.2 was paid by opponent no.4. for carrying out transplant of kidney Rs.36,500/- yet she has accepted payment of Rs.50,000/- by cheque from the relative of the patient. Likewise, opponent no.3 was paid Rs.9,600/- by opponent no.4 hospital for the services offered by him as a nephrologist yet Dr.D'souza accepted payment of Rs.25,000/- from the patient's relative by cheque. Additionally, allotment of kidney by opponent no.2 in her capacity as ZTCC Secretary out of turn was a gross misuse as observed by committee amounting

to violation of Sec.19 of HOTA.

[24] While advancing his submissions, (while admitting that GBS is not transmittable disease) Dr.Kamath emphatically argued on two aspects of violation viz. statutory guidelines and professional ethics by the opponent no.1 to 3. In support, he relies on guidelines under HOTA 1994. For useful reference, guidelines are reproduced as hereinbelow.

*Firstly, cadaver organ donor is not suitable if the following are present:-*

- (i) Loss of his organs due to his initial insult or due to shock lasting for more than 30 minutes; unless it corrected and biochemical parameters are shown to be within normal limits.*
- (ii) Malignancy confirmed or suspected (except primary brain tumour proved by brain biopsy and basal cell carcinoma of the skin)*
- (iii) Unexplained or unknown disease.*
- (iv) Active generalized viral or bacterial infection.*
- (v) HIV positive patients.*
- (vi) Hepatitis B and C positive patients.*
- (vii) Neurological diseases e.g.Reye's syndrome, slow virus diseases e.g. Creutzfeldt-Jacom disease or subacute sclerosing panencephalitis, rabies or Kawasaki disease.*
- (viii) Narcotic addiction.*
- (ix) HBsAg positive donor may be used for hepatitis B immune patients or HBsAg positive patients on the conditions that they do not had active hepatitis.*

Learned Dr.Kamath continued to submit that even though, it is a case of opponents' that the kidney donor was not suffering from GBS as diagnostic test report i.e. level CSF was within normal limit, yet there was no other established diagnosis of kidney donor who was declared brain dead. As such this state of donor is covered under the category of "Unexplained or Unknown disease". Opponents failed to explain the cause as required under general criteria of guidelines as pleaded by Dr.Kamath.

[25] Learned Advocate Mr.Nagraj Hosekari for the opponent no.1 submitted that services rendered by the opponent no.1 were gratis [without charging any amount]. At the relevant time, opponent no.1 was not Secretary of the ZTCC and was appointed as such in the month of November 2009. According to Mr.Hosekary, this opponent had very limited role as a member of retrieval team and she never participated in the process of identification, certification, and maintenance or obtaining consent for allocation procedure. It is denied that the kidney donor was suffering from GBS. In absence of post-mortem report of the patient, it is difficult to co-relate cause of death of the patient due to GBS. It is reiterated that patient had multiple health complications due to pre-medical conditions since birth. In view of these submissions, learned advocate further submitted that no negligence can be attributed against opponent no.1 as no consideration was paid and accepted.

[26] Learned Advocate Dr.G.N.Shenoy representing opponent no.2 appraised briefly of pre-medical condition of the patient who was suffering from ailments such as gout, VHD, SJS and Chronic kidney failure. Additionally, the patient was suffering from *left ventricular ejection fraction (15%)*, left corneal graft, right eye cataract, dry eyes and colonic disease had been concealed by

the complainant. He also submitted that after transplant of the left kidney the patient survived for 73 days and there was a free flow of urine as admitted by the complainant therefore dialysis was discontinued. According to Dr.Shenoy this fact is enough to substantiate that the kidney transplantation was successful. There is no diagnostic record to allege that the kidney donor was suffering from GBS as the CSF level carried out prior to retrieval of kidney was below normal level. Kidney donor was brain dead, young boy of 17 years who was in coma due to post-operative complications. Moreover, there is no diagnostic test of Electromyography [EMG] carried out to establish GBS. Therefore, it is difficult to ascertain that the donor was suffering from GBS. According to Learned Adv.Shenoy, GBS is never transmittable disease since it is auto-immune. Keratin serum was 1.2 which indicates that the kidney transplant was successful and patient was in so far as medical condition pertaining to kidney was almost at a normal level. Dr.Shenoy heavily relies on the report from LTMG Hospital available in the complaint compilation to support his submission relevant to diagnosis by clinical method of the kidney donor. Complainant's family insisted donation of kidney organ. Question of violation of Sec.19 of the HOTA does not arise as the opponent no.2 has accepted the professional fees which were permissible and negotiable. Adv.Shenoy to strengthen his submissions relied on text material and authorities as mentioned below to strengthen defence of the opponent no.2:-

- (i) 2005 (3) CPR 70 (SC) – *Jacob Mathew vs. State of Punjab & Anr.*
- (ii) 2009 (I) CPR 231 (SC) – *Martin F. D'souza vs. Mohd.Ishfaq*
- (iii) II (1994) CPJ 90 – *Surendra Kumar Kumawat & another vs. Dr.(Smt.)Sunil Jain & ors.*

- (iv) First Appeal No.4/1993, *Ramji Lal vs. M/s.Sarvodaya Medical*, decided on 17/02/1995 [National Commission]
- (v) First Appeal No.220/1993, *D.C.M.Data Products vs. Hanuman Prasad Poddar Cancer Hospita, Gorakhpur* [National Commission]
- (vi) 2010 (4) Mh.L.J., *Kusum Sharma & others vs. Batra Hospital and Medical Research*.

a) In the matter of Jacob Mathew the Hon'ble Apex Court reiterated the test of determining medical negligence as laid down in celebrated case of Bolam's Case (1957) 1 WLR 582 hold good in its applicability in India. It is not the case of complainant the Opponent Doctors were not qualified to treat the patient.

b) Hon'ble Apex Court in the mater of Martin D'souza's case the Hon'ble Apex Court ruled that medical practitioner held not to be liable simply because things wrong from mischance or mis- adventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. Doctor would be held liable only where his conduct fail below that of standards of reasonably competent practitioner in this field. Complainant does not dispute the reasonable course of treatment adopted by Opponent No.3 Dr. D'souza in choosing the option for transplantation which was in the best interest of the life of the patient. Further it was held, "it must be remembered that some times despite their best efforts the treatment of the doctor fails. For instance, some times despite the best efforts of the surgeon the patient dies. That does not mean that doctor and surgeon must be held guilty of medical

negligence unless there is strong evidence to suggest that he is”

- c) In case of Surendra Kumar Kumawat & Anr v/s. Dr. (Smt) Sunil Jain & ors. it was held as per citations about medical negligence in the matter of Hunter v/s. Hartley (1955) SLT 213 it was ruled by the Lord President, “Naturally Doctor will not be liable if, by reason of some peculiarity in the frame or constitution of a patient which was not reasonably to be anticipated a treatment in ordinary circumstances would be sound has unforeseen results. But he will not even be liable for every slip or accident. Patient in the consumer complaint had multiple health complications admittedly.
- d) Hon’ble National Consumer Disputes Redressal Commission, New Delhi in the matter of Ramji Lal v/s. M/s. Sarvodaya Medical and In the matter of DCM Data Product v/s Hanuman Prasad Poddar Cancer Hospital, Gorakhpur dealt with the issue of awarding compensation in case the medical negligence is proved against the doctor.
- e) The Hon’ble Apex Court in the matter of Kusum Sharma v/s. Batra hospital and Medical Research Centre and ors laid down certain guiding principles to be kept in mind while deciding medical negligence against the doctors. It was ruled that mere deviation from normal professional practice is not necessary for evidence of negligence.

no.3 and 4 while advancing his arguments invited our attention patient's pre-medical history as narrated by Dr.Shenoy which is not in dispute. Despite of pre-medical health condition of the patient, the complainant and relatives insisted and proceeded for carrying out kidney transplantation. The allegation that the GBS in the kidney donor is refuted as the CSF level [diagnostic test] was below normal level. There is no tainted kidney in the medical science and GBS is not at all transmittable as vouched by medical resource material, it is neither an infection. Due to health complications of the patient, as narrated by Dr.Shenoy "which has no relevance attributing cause of death to GBS. High risk consent was obtained considering the pre-medical complication of the patient. Opponent no.3 according to Mr.Naidu acted in good faith to extend all available options as good Samaritan for treating the patient for years since the patient was under his care and medical supervision. As goodwill gesture whatever professional fees was received has been refunded with interest. Opponent no.3 facilitated in good faith to make available kidney. Therefore it cannot be alleged that opponent no.3 has played malafide role in entire process of kidney transplantation.

[28] According to learned Adv.Naidu, opponent no.4 is an institution where Dr.Martine D'souza is attached. Opponent no.4 as usual extended all the facilities that would require for smooth operation of transplantation of kidney. No negligence therefore be attributed against the opponent no.3 and 4. Adv.Naidu to strengthen his submissions relied on text material and catena of authorities as mentioned below:

- (i) *MANU/SC/0457/2005, Jacob Mathew vs. State of Punjab and Anr.*

- (ii) *MANU/SC/0225/2009, Martin F. D'souza vs. Mohd.Ishfaq*
- (iii) *MANU/SC/1028/2011, The National Textile Corporation Ltd. vs. Nareshkumar Badrikumar Jagad and ors.*
- (iv) *1986-99 CONSUMER 4745 (NS), I.C.Mehta, Convenor, Consumer Protection Society vs. Divisional Engineer, Telegraphs, Rewari.*

a) Jacob Mathew v/s. State of Punjab & anr. And Martine D'souza's , we have discussed these case laws and appreciated the ratio in para no.26, supra.

b) In the FA/52/2010 decided by the Hon'ble National Commission in the matter of Dr. Alankar Laxman Khanwilkar v/s. L.H.Hiranandani Hospital & ors it was held that the complaint was dismissed on single ground namely availability of expert opinion of the Committee.

However, it is observed in V Krishnarao v/s Nikhil Superspeciality the Hon'ble Supreme Court has held that opinion of expert is not pre-requisite in each and every case and complaint can be proceeded with even in absence of expert opinion. Consumer Complaint has already been processed without there being any expert opinion to the support the contentions.

c) The judgment relied in the matter of National Textile Corporation Ltd. Pertains to suit and in the matter of Rent Control Act,1999. In this case, relation between opponent No.4 Hospital and Opponent No.3 Doctor have not been explained whether the relations are on

the basis of known principle of 'employer' and 'employee'.

d) In the matter of *I.C.Mehta Consumer Protection Society v/s. Divisional Engineer, Telegraph, Rewari* the Hon'ble National Commission held that parties cannot travel beyond the basic pleadings before the Consumer Fora. However, we are satisfied that considering the totality of the pleadings in the complaint, issues raised are needed to be addressed.

[29] Opponents to support their defence relied on expert opinion of Dr.Ashok Kirpalani, Senior Nephrologist-cum-Transplant Physician who has endorsed that GBS is not transmittable by the process of organ transplantation and to deny the entity of 'tainted kidney', Dr.Kirpalani has opined that administration of drug "Tarcolimus to GBS patient and withdrawal thereof was proper course adopted by treating doctors. It is not possible to differentiate cause of GBS between being Adverse Drug Reaction (GBS) induced by the drug Tarcolimus and de-novo GBS.

[30] Sum of substance of rulings supporting the opponents is that expert may differ on reasonableness of medical case simply because patient has not favourably responded to treatment or surgery failed. The doctor cannot be held straightway liable for medical negligence by applying the doctrine of res ipsa loquitur – as no sensible professional would intentionally commit an act or omission to harm or injure the patient as ruled in case of Dr.Martin D'souza's case by Hon'ble Apex Court in C.A.No.3541 of 2002 decided on 17/02/2009 – "Medical practitioner cannot be held negligent simply because things went wrong from

mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another."

[31] Main contention of the learned authorized representative of the complainant is not about the death of the patient due to transmission of GBS and at no point of time there is any adverse submission in respect of the services rendered by the opponent in so far as transplantation of kidney is concerned. Main grouse is about;

- (i) violation of statutory guidelines for allocating cadaver organ [kidney] of a brain dead donor who was suffering a neurological disorder.*
- (ii) Violation of professional ethics by the opponents and*
- (iii) Suitability of patient to receive kidney.*

Dr.Kamath pointedly focused our attention to the guidelines framed under HOTA by Govt.of Maharashtra described in para no.24. (Supra). Under the chapter "Precautions" for allocating the kidney, cadaver organ donors suffering from unexplained or unknown disease and neurological diseases among other debilities described in sub-chapter 'General Criteria', there is prohibition for retrieval and allocation of the organs. GBS is directly related to the neurological disease and Dr.Kamath in support; relies on text material filed along with affidavit of the complainant and the report dated 10/07/2010 addressed to Director, Public Health Services by the Dean of LTMG Hospital describing the health status of the kidney donor, namely.

[32] Opponent no.2 did not demonstrate guidelines meant for

transplant are not violated by her in allocating kidney out of turn since the patient recipient was listed at Sr.No.11. No record in respect of each wait listed first 10 patients is brought to our notice. Conflict of interest in her dual capacity as Secretary of ZTCC and operating Surgeon is writ large as observed by the Committee of DMER, while offering her services.

[33] According to Dr.Kamath, even if it is treated that kidney donor was not suffering from GBS in that case, the kidney donor would cover under General Criteria appearing at Sub-clause 3 of the Guidelines which reads as "Unexplained or unknown disease."

Secondly, it is concluded that high risk consent was obtained but nowhere GBS was mentioned may be for obvious reason that there was no final diagnosis as the EMG test was not carried out. In that event also, nature of disease as unexplained ought to have been and explained to the complainant.

Further it is submitted that Opponent no.2 and 3 have admitted to accept the cheque payment over and above the one received by them from opponent no.4 hospital as their fees was negotiable. Though opponent no.3 refunded the amount together with interest does not absolve him from the unethical practice of charging the patient beyond the prescribed fees.

[34] Admittedly patient's relative relied on the press report appearing in the newspaper about donation of tainted kidney resulting into death of the patient and thereafter filed complaint with DMER and DHS, Maharashtra Government. On the complaint, DMER constituted a committee headed by Dr.N.N.Ambhore, Jt.Director of Medical Education & Research, Mumbai consisted other five experts with different disciplines

[two of them Nephrologists]. Committee expressed suspicion in the entire transplantation of kidney and more particularly role played by Dr.Vastala Trivedi who was Secretary of ZTCC at the time of allocation and who offered her services as Neurologist for transplantation of kidney. Committee further opined that the patient with Left Ventricular Ejection Fraction of 15% could not have been listed as a recipient for kidney. Opponent no.2 failed to justify as how the kidney was allocated out of turn when the patient was at Sr.No.11 in the waitlist. No record has been produced of first 10 patients awaiting organ donations. No guidelines whatsoever governing allocation of organ like kidney are placed on record. Accepting professional fees over and above the prescribed one is not justifiable in as much as no approved guidelines for negotiable fees are made available. At the relevant time, the opponent no.2 was Secretary of the ZTCC, allocated the kidney and carried out transplant operation by allocation of kidney out of turn which undoubtedly it is enough to establish clashes of interest and unethical practice while offering services by the opponent no.2. High risk consent was obtained, but it was not mentioned that the kidney donor was suffering from the GBS or neurological disorder may be because GBS was diagnosed with clinical diagnosis which later found that diagnostic test of CSF was below normal level with the kidney donor. Another crucial test EMG to determine final diagnosis of GBS with donor was not carried out as it was directly infeasible. Therefore, one cannot jump to the conclusion that the donor was suffering from GBS. Rulings relied upon by the complainant are as under for supporting the contention of *res ipsa loquitur* :-

- a) In the ruling of Poonam Varma's case (Civil Appeal 8856 of 1994) decided on 10/5/1996 by the Hon'ble Apex Court it was held that the opponent doctor was

not qualified in allopathic system of medicine since he was a homeopath therefore he was held guilty of negligence for breach of duty of care. Reliance on these authorities by the complainant in support of the case is not relevant in as much as the facts are distinguishable in the case of the complainant since it is not the case of the complainant that the opponents are not qualified. In view of this, principle of *res ipsa loquitur* is not attracting in this case.

b) In the FA/52/2010 decided by the Hon'ble National Commission in the matter of Dr. Alankar Laxman Khanwilkar v/s. L.H.Hiranandani Hospital & ors it was held that the complaint was dismissed on single ground namely availability of expert opinion of the Committee.

However, in V Krishnarao v/s Nikhil Superspeciality the Hon'ble Supreme Court has held that opinion of expert is not pre-requisite in each and every case and complaint can be proceeded with even in absence of expert opinion. Consumer Complaint has already been processed without there being any expert opinion to the support the contentions.

[35] We find no role for the opponent no.1 as submitted by the learned advocate except that she was a member of retrieval team. Moreover, there is no denial that this opponent discharged her duty Gratis (i.e without charging to complainant) nor it is the case of deferred payment. Therefore, allegations of deficiency in service cannot be substantiated hence no liability can be fastened against her.

[36] LTMG Hospital report does refer about neurological condition and brain stem death of the kidney donor. It also states that EMG-NCB was advised but was not clinically feasible due to highly unstable condition of kidney donor. There is no direct evidence with supporting authentic text material that GBS is transmittable resulting in the death of patient. On the contrary, medically admitted position is that GBS is not transmittable. Therefore, even though one of the reasons for death of the patient is recorded as GBS cannot be attributed to GBS condition of the kidney donor as GBS is non-transmittable disease.

[37] Guidelines prepared under provisions of HOTA, 1994 [para no.24] supra, explains prohibition of cadaver organ donation. One of such condition is "unexplained or unknown disease" with the donor. Such unknown disease according to Dr.Kamath was not disclosed while recording high risk consent. However, LTMG Hospital has recorded various ailments in kidney donor in case history which is brought on record by the complainant only. Therefore, we are not in agreement with Dr.Kamath on this issue.

[38] In respect of violation of professional ethics by the opponents as alleged, we find that the opponent no.2 in her capacity of Secretary, ZTCC and also operating urologist for transplantation undoubtedly explains clash of interest amounting to breach ethical code. Moreover, this opponent no.2 failed to explain the provisions of charging professional fees. In view of this, opponent no.2 while rendering her services incurred deficiency in service by committing breach of professional ethics. As far as opponent no.3 is concerned, he has played a vital role to facilitate availability of kidney in the best interest of patient's

life as the patient was not manageable on the dialysis. Dr.D'souza took decision considering multiple health complication and the fact that patient was not in position to accept dialysis, suggested alternate of kidney transplant. Many times doctor is called upon to adopt procedure which involves higher element of risk and honestly believes to provide greater chances of success to the patient. Looking to the gravity of illness, he has taken higher element of risk to redeem the patient out of suffering. Patient was benefitted after transplant as his dialysis was discontinued and pass free flow of urine. Only after 73 days, patient died. In view of this opponent doctors cannot be held negligent as ruled by the Hon'ble Apex Court in 2010 (4) Mh.L.J., Kusum Sharma & others vs. Batra Hospital and Medical Research. Admittedly, after transplantation of kidney, the patient survived for 73 days and was off the dialysis and passed urine free flow bears testimony that transplant was successful. In view of this, opponent no.3 cannot be faulted for advising kidney transplant and registering with authorities for kidney recipient. *Unanimously accepted fact is that medical profession is a science of uncertainty and the art of possibility at the same time.* Dr.D'souza took conscious decision in the best interest of patient's life for transplant, even though, DMER Committee observed to the contrary.

[39] Dr.Martine D'souza refunded an amount of Rs.30,000/- which was charged by him as profession fees over and above paid by the complainant prior to filing of this consumer complaint. Therefore, Dr.Martine D'souza cannot be held liable for violation of profession ethics incurring deficiency in service. All through he acted as good Samaritan.

[40] We are aware of the fact that as ruled by Hon'ble Supreme

Court in celebrated case of - Bolam vs. Friern Hospital Management Committee - (1975) 2 All ELR 118 - observed that "A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art." In other words, if doctor has acted in accordance with the practice accepted by the responsible body of medical men skilled in that particular act, then no question of deficiency would arise.

[41] No negligence can be attributed against opponents in the case as at no stage such allegations are levelled in complaint. Allegations are confined to transplant of 'tainted kidney' and violation of guidelines under HOTA and unethical practice by opponents Dr.Martin D'souza has taken his best possible decision choosing to have kidney transplant to save life of the patient as managing him on dialysis was not possible. Therefore issue arising for our decision is limited to violation of guidelines and of adopting unethical practice while offering services.

[42] In this consumer complaint, there are no direct allegations against the opponents about treatment part and/or procedural aspect of transplant. Allegations are about transplant of tainted kidney. There is no such a word in the medical bibliography. Therefore, our findings are confined to violation of profession ethics and general guidelines of HOTA by the opponents to incur deficiency in service. For the reasons recorded above, we do not hold the opponents liable for medical negligence. However, while offering services, opponent no.2 had clashes of interest and failed to explain the guidelines made for allotment of kidney out of turn and additional amount as professional fees which incurs deficiency in service on her part. As against opponent no.1, 3 and 4, we do not find deficiency in service and therefore, these

opponents cannot be held liable as such.

[43] Since we are holding opponent no.2 deficient in rendering services, we need to discuss about the quantum of the compensation to be awarded. Under various heads, complainant has claimed total Rs.77,36,795/-. Average annual earning of the deceased is estimated to Rs.6,30,000/-. However, going through the multiple health complications prior to transplant of kidney of the patient whether actually patient was in position to work is not answered satisfactorily. Claim is not supported by documentary evidence. We are certainly aware that there is permanent loss of love and affection for the complainant since deceased was her only son. Efforts put in by the complainant along with her relatives to revive the patient for living a normal life are most laudable. However, the destiny chose otherwise. We are inclined to award a lumpsum compensation of Rs.10 lacs to be paid by the opponent no.2.

[44] In view of our above findings, our answer to the issues no.1 in para 3 is negative and for issue no.2 is in affirmative to the extent of the opponent no.2 only.

[45] In view of aforesaid observations, we allow the consumer complaint partly against the opponent no.2 only and dismiss against rest of opponents and proceed to pass the order as under:-

### **ORDER**

- 1) Consumer complaint is partly allowed against opponent no.2-Dr.Vatsala Trivedi only with costs quantified to Rs.30,000/-[Rs.Thirty Thousand only] payable to the complainant.

- 2) Opponent no.2-Dr.Vatsala Trivedi is directed to pay Rs.10 lacs [Rs.Ten lacs only] to the complainant as compensation within a period of 45 days from the date of the order. Interest @9% p.a. shall be payable for non-compliance till realization.
- 3) One set of the complaint compilation be retained and rest of the sets be returned to the complainant.
- 4) Copies of the order be furnished to the parties free of cost forthwith

Pronounced on  
Dated 30<sup>th</sup> August, 2016.

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

**[Narendra Kawde]**  
**MEMBER**