V.N.Shrikhande vs Anita Sena Fernandes on 20 October, 2010

Author: G.S. Singhvi

Bench: Asok Kumar Ganguly, G.S. Singhvi

NON REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8983 OF 2010
(Arising out of SLP(C) No.5479 of 2009)

Dr. V.N. Shrikhande ..... Appellant

Versus

Mrs. Anita Sena Fernandes ..... Respondent

JUDGMENT

G.S. Singhvi, J.

1. Leave granted.

2. This appeal is directed against the order of the National Consumer Disputes Redressal Commission (for short, `the National Commission') whereby the order passed by the Maharashtra State Consumer Disputes Redressal Commission (for short, `the State Commission') dismissing the complaint filed by the respondent as barred by limitation was reversed and the case was remitted for disposal of the complaint on merits.

3. The respondent was employed as a Nurse in Government Hospital, Goa. In 1993, she complained of pain in abdomen. The doctors in Goa advised her to consult the appellant, who was having a hospital at Dadar, Mumbai. After examining the report of the pathologist, which revealed that the respondent had stones in her gall bladder, the appellant performed `Open Cholecystectomy' on 26.11.1993. The respondent was discharged from the appellant's hospital on 30.11.1993.

4. For the next about 9 years, the respondent neither contacted the appellant nor consulted any other doctor despite the fact that after the surgery she was having pain in the abdomen off and on, for which she was taking painkillers and she had to remain on leave at regular intervals. In

September, 2002, the respondent was admitted in the hospital and C.T. scan of her abdomen was done on 23.9.2002, which revealed the following:

> "A well-defined rounded mass showing predominantly peripheral enhancement is seen in relation to the left lobe of liver as described above. This is more likely to be an exophytic neoplasm from the undersurface of left lobe of liver than a pancreatic lesion. Further evaluation of FNAC is suggested."

5. On being advised by the doctors in Goa, the respondent got herself admitted in Lilavati Hospital at Bombay and was operated by Dr. P. Jagannath on 25.10.2002. The relevant extracts of the report of Dr. P. Jagannath are reproduced below:

> "Findings E/o circumferential mass in lesser sac involving under surface of left lobe (Segment 3) of liver and along lesser curve of stomach extending posteriorly to involve the anterior surface of Pancreatic head.
>
> Mass freed of the pancreas by division of adhesions and from the lesser curve of stomach by successive ligation and division of vessels and mass was freed of lesser curve with No.55 linear butter to divide lesser curve of stomach.
>
> Round ligament was divided.
>
> Wedge of liver, Segment 3, was excised with CUSA Haemostasis checked Drain kept in Morrisson's pouch Abdomen was closed in layers Post-operative:
>
> She had a smooth and uneventful recovery"

6. Histopathology report dated 8.11.2002 prepared by Lilavati Hospital and Research Centre contained the following observations:

> "GROSS EXAMINATION:
>
> A shaggy surfaced firm brownish partly opened mass measures 6x5, 6x3cms and weighs 50 gms. Several gauze pieces aggregating to 5.5x5.2cms are also received alongside and adherent gauze pieces are also present embedded within the mass. The cut surface of the tissue is brownish yellow and shaggy. Four small lymph nodes measuring 3mm each are also observed.
>
> CROSCOPIC EXAMINATION:
>
> Walled within fibrous tissue, overlying the liver are sheets and clumps of foamy histiocytes with scattered foreign body type giant cells admixed linear strands of foreign body material. Areas of necrosis and haemmorrhage are seen in areas the foreign body material has produced a sieve like pattern surrounded by histiocytes,

foreign body giant cells and fibrain. Several cholesterol clefts are seen. The lymph nodes show sinus histiocytes and occasional reactive follicles. The adherent liver shows focal congestion and haemmorrhage towards the surface but is otherwise unremarkable.

There is no evidence of tuberculosis or malignancy.

DIAGNOSIS:

GAUZE PIECES WITHIN A MASS IN EPIGASTRIC REGION ADHERENT TO LIVER - FOREIGN BODY REACTION LYMPH NODES - REACTIVE SINUS HISTIOCYTOSIS."

7. After receiving report of the Histopathology, the respondent wrote letters to the appellant and demanded compensation by alleging that due to his negligence gauze was left in her abdomen at the time of surgery done in November, 1993, for the removal of which she had to undergo surgery at Lilavati Hospital by spending substantial amount and she and her family had to undergo mental and physical stress. The appellant sympathysized with the respondent but denied the allegation of negligence. In his letter dated 31.1.2003, the appellant emphasized that he had performed thousands of operations in his long career of about 50 years and there was no cause of complaint from any patient. He claimed that at the time of discharge, every patient was given instruction that in case of any problem, he/she should meet him or write a letter or at least contact on phone but the respondent never apprised him of her problem, though, she was sending seasons greetings. The appellant also made a grievance that despite his request, the respondent had not made available papers relating to the investigation and treatment in Goa and Mumbai from November, 1993 to September 2002.

8. Having failed to elicit favourable response from the appellant on the issue of compensation, the respondent filed complaint under Section 17 of the Consumer Protection Act, 1986 (for short, `the Act'), which came to be registered as Complaint Case No.116 of 2004 and claimed compensation of Rs.50 lakhs by alleging that due to negligence of the appellant, a mass of gauze was left in her abdomen at the time of first operation; that after discharge from the appellant's hospital, the pain in her abdomen persisted and on that account she remained restless at home and also at work place; that her sufferings were endless and she had to spend sleepless nights and mental stress for almost 9 years; that when the pain became unbearable, she had to be admitted in Government Hospital, Goa in September, 2002 and C.T. scan done on 23.9.2002 revealed existence of a mass in her abdomen, which was finally removed at Lilavati Hospital, Bombay. The respondent pleaded that she and her family had suffered mental and physical stress for 9 years and had to incur cost of Rs.1,28,522/- for the second operation. The respondent further pleaded that if the appellant had acted with due care and caution, she would not have suffered for 9 years and may not have been required to undergo second surgery.

9. In his reply, the appellant denied the allegation of negligence and averred that the respondent had never contacted him with the complaint of pain or discomfort. He reiterated the contents of letter

dated 31.1.2003 and prayed that the complaint be dismissed as barred by limitation.

10. By an order dated 17.3.2006, the State Commission dismissed the complaint as barred by time on the ground that the cause of action for filing the complaint had accrued to the respondent on the date of her discharge from the appellant's hospital i.e. 30.11.1993 and the complaint could have been filed within next 2 years. The National Commission reversed that order and held that though the cause of action had arisen for the first time in November, 1993 when operation was performed on her gall bladder, it continued and subsisted throughout the period because she had constant pain in the abdomen and lastly it arose on 25.10.2002 when she was operated for the second time at Lilavati Hospital and gauze allegedly left by the appellant at the time of first surgery was found.

11. Shri Soli J. Sorabjee, learned senior counsel argued that the complaint filed by the respondent on 19.10.2004 in relation to the alleged act of negligence on the appellant's part while performing surgery in November, 1993 was clearly barred by time and the National Commission committed serious error by setting aside the order of the State Commission and remitting the matter for disposal of the complaint on merits. Learned senior counsel relied upon the judgments of the Bombay High Court in Abdulla Mahomed Jabli v. Abdulla Mahomed Zulaikhi, AIR 1924 Bombay 290 and of this Court in Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan, AIR 1959 SC 798 and argued that the discovery of gauze pieces from the mass taken out of the abdomen of the respondent in September, 2002 did not give her fresh cause to file complaint after a time gap of 9 years. Shri Sorabjee emphasized that if the respondent had contacted the appellant or any other doctor immediately after the first operation or within a reasonable time thereafter, effort would have certainly been made to find out the cause of pain in her abdomen and in the event of discovery of the piece of gauze appropriate action could have been taken to remove the same.

12. Shri Devadatt Kamat, learned counsel for the respondent supported the impugned order and argued that the consumer forums established under the Act do not have the power to dismiss the complaint at the stage of admission and, in any case, the complaint of the respondent should not have been dismissed by the State Commission as barred by time ignoring that she had suffered for 9 long years due to negligence of the appellant. Learned counsel further argued that the complaint filed by the respondent in October, 2004 was within limitation because she could come to know about the gauze left in her abdomen at the time of first surgery only after receiving Histopathology report dated 8.11.2002. Learned counsel referred to the "Discovery Rule" evolved by the Courts in United States and submitted that even though the respondent was employed as a Nurse in Government Hospital, Goa, she had no reason to suspect that gauze might have been left in her abdomen at the time of surgery performed in November, 1993 and the State Commission was not at all justified in non suiting her on the premise that the cause of action had accrued in the year 1993. Learned counsel lastly argued that the question of limitation is a mixed question of law and fact and the State Commission could not have decided the same without giving opportunity to the parties to adduce evidence.

13. We shall first consider the question whether the consumer forums established under the Act can refuse to admit the complaint on the ground that the same is barred by time. The decision of this

question depends on the interpretation of Sections 12(1), (3), (4), 18, 22 and 24A of the Act, which are reproduced below:

> "12. Manner in which complaint shall be made.- (1) A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by-
>
> (a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;
>
> (b) any recognised consumer association whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not;
>
> (c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or
>
> (d) the Central Government or the State Government, as the case may be, either in its individual capacity or as a representative of interests of the consumers in general.
>
> (3) On receipt of a complaint made under sub-section (1), the District Forum may, by order, allow the complaint to be proceeded with or rejected:
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> Provided that a complaint shall not be rejected under this sub-section unless an opportunity of being heard has been given to the complainant:
>
> Provided further that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint was received.
>
> (4) Where a complaint is allowed to be proceeded with under sub-section (3), the District Forum may proceed with the complaint in the manner provided under this Act:
>
> Provided that where a complaint has been admitted by the District Forum, it shall not be transferred to any other court or tribunal or any authority set up by or under any other law for the time being in force.
>
> Explanation.- For the purposes of this section, "recognised consumer association" means any voluntary consumer association registered under the Companies Act, 1956 (1 of 1956) or any other law for the time being in force.
>
> 18. Procedure applicable to State Commissions.- The provisions of sections 12, 13 and 14 and the rules made thereunder for the disposal of complaints by the District

> Forum shall, with such modifications as may be necessary, be applicable to the disposal of disputes by the State Commission.
>
> 22. Power and procedure applicable to the National Commission. - (1) The provisions of sections 12, 13 and 14 and the rules made thereunder for the disposal of complaints by the District Forum shall, with such modifications as may be considered necessary by the Commission, be applicable to the disposal of disputes by the National Commission.

(2) Without prejudice to the provisions contained in sub- section (1), the National Commission shall have the power to review any order made by it, when there is an error apparent on the face of record.

24A. Limitation period.- (1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub- section (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

> Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay."

14. A reading of the above noted provisions makes it clear that the District Forum, the State Commission and the National Commission are not bound to admit each and every complaint. Under Section 12(3), the District Forum is empowered to decide the issue of admissibility of the complaint. The District Forum can either allow the complaint to be proceeded with, which implies that the complaint is admitted or reject the same. Similar power is vested with the State Commission under Section 18 and the National Commission under Section 22. If the concerned forum is prima facie satisfied that the complainant is a `consumer' as defined in Section 2(d) and there is a `defect', as defined in Section 2(f) in relation to any goods or there is `deficiency in service' as defined in Section 2(g) read with Section 2(o) and the complaint has been filed within the prescribed period of limitation then it can direct that the complaint may be proceeded with. On the other hand, if the concerned forum is satisfied that the complaint does not disclose any grievance which can be redressed under the Act then it can reject the complaint at the threshold after recording reasons for doing so. Section 24A(1) contains a negative legislative mandate against admission of a complaint which has been filed after 2 years from the date of accrual of cause of action. In other words, the consumer forums do not have the jurisdiction to entertain a complaint if the same is not filed within 2 years from the date on which the cause of action has arisen. This power is required to be exercised after giving opportunity of hearing to the complainant, who can seek condonation of delay under Section 24A(2) by showing that there was sufficient cause for not filing the complaint within the

period prescribed under Section 24A(1). If the complaint is per se barred by time and the complainant does not seek condonation of delay under Section 24A(2), the consumer forums will have no option but to dismiss the same. Reference in this connection can usefully be made to the recent judgments in State Bank of India v. B.S. Agricultural Industries (I) (2009) 5 SCC 121 and Kandimalla Raghavaiah and Company v. National Insurance Company and another (2009) 7 SCC 768. Section 26 is another provision which empowers the consumer forums to dismiss the complaint if it is found that that same is frivolous and vexatious. The exercise of this power is hedged with the condition that the concerned consumer forum must record reasons for dismissal of the complaint.

15. We may hasten to add that the power conferred upon the consumer forums under Sections 12(3), 18 or 22 to reject the complaint at the stage of admission should not be exercised lightly because the Act has been enacted to provide for better protection of the interest of consumers and the speedy and inexpensive redressal mechanism enshrined therein is in addition to other remedies which may be available to the consumer under the ordinary law of land. Therefore, admission of the complaint filed under the Act should be the rule and dismissal thereof should be an exception. Of course, if the complaint is barred by time, the consumer forum is bound to dismiss the same unless the consumer makes out a case for condonation of delay under Section 24A(2).

16. The next question which merits consideration is whether the complaint filed by the respondent was within limitation and the State Commission committed an error by dismissing the same as barred by time. A perusal of order dated 17.3.2006 shows that after adverting to the report of Dr. P. Jagannath, in which there was no mention of any gauze having been found in the abdomen of the respondent, the State Commission held that this was sufficient for recording a negative finding on the issue of negligence on the part of the appellant while conducting operation on 26.11.1993. The State Commission then observed that the complainant had not produced any prescription for the treatment taken for 10 years prior to 25.10.2002 to show that she was suffering from unbearable pain, was having sleepless nights and was unable to perform her duties as Nurse in Government Hospital, Goa and held that in the absence of such evidence, the period of limitation commenced from the date of discharge i.e., 30.11.1993 and the complaint filed in 2004 was clearly barred by time. The National Commission too opined that the cause of action first accrued to the respondent in November, 1993 when she was operated by the appellant but proceeded to observe that the same continued throughout the period during which she had constant pain in the abdomen and lastly it arose on 25.10.2002 i.e. the date on which she was operated at Lilavati Hospital and a piece of gauze was found in her abdomen.

17. Since, the term `cause of action' has not been defined in the Act, the same has to be interpreted keeping in view the context in which it has been used in Section 24A(1) and object of the legislation. In his famous work on statutory interpretation, Justice G.P. Singh has quoted Professor H.A. Smith in the following words:

> "`No word', says Professor H.A. Smith `has an absolute meaning, for no words can be defined in vacuo, or without reference to some context'. According to Sutherland there is a `basic fallacy' in saying `that words have meaning in and of themselves', and `reference to the abstract meaning of words', states Craies, `if there be any such

> thing, is of little value in interpreting statutes'. ... in determining the meaning of any word or phrase in a statute the first question to be asked is
>
> -- `What is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase.' The context, as already seen, in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."

In RBI v. Peerless General Finance and Investment Co. Ltd. (1987) 1 SCC 424, Chinnappa Reddy, J. referred to the rule of contextual interpretation and observed:

> "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation."

18. In cases of medical negligence, no straitjacket formula can be applied for determining as to when the cause of action has accrued to the consumer. Each case is to be decided on its own facts. If the effect of negligence on the doctor's part or any person associated with him is patent, the cause of action will be deemed to have arisen on the date when the act of negligence was done. If, on the other hand, the effect of negligence is latent, then the cause of action will arise on the date when the patient or his representative- complainant discovers the harm/injury caused due to such act or the date when the patient or his representative-complainant could have, by exercise of reasonable diligence discovered the act constituting negligence.

19. The Discovery Rule to which reference has been made by the learned counsel for the respondent was evolved by the Courts in United States because it was found that the claim lodged by the complainants in cases involving acts of medical negligence were getting defeated by strict adherence to the statutes of limitation. In Pennsylvania, the Discovery Rule was adopted in Ayers v. Morgan 397 Pa.282, 154A.2d 788. In that case a surgeon had left a sponge in the patient's body when he performed an operation. It was held that the statute of limitation did not begin to run until years

later when the presence of the sponge in the patient's body was discovered. In West Virginia, the Discovery Rule was applied in Morgan v. Grace Hospital Inc. 149 W.Va.783, 144 S.E.2d 156. In that case a piece of sponge had been left in the wound during a surgical operation but its presence in the body did not come to light until 10 years later. The Court rejected the objection of limitation and observed:

> "It simply places an undue strain upon common sense, reality, logic and simple justice to say that a cause of action had `accrued' to the plaintiff until the X-ray examination disclosed a foreign object within her abdomen and until she had reasonable basis for believing or reasonable means of ascertaining that the foreign object was within her abdomen as a consequence of the negligent performance of the hysterectomy."

Again, the Court observed:

> "We believe that the `discovery rule' as stated and applied in cases cited above represents a distinct and marked trend in recent decisions of appellate courts throughout the nation."

In Idaho, the Discovery Rule was invoked in Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224. The facts of that case were that the plaintiff underwent a surgical operation in 1946. A sponge was left in the wound when the incision was closed. The same was discovered in the patient's body in 1961. During the intervening period the patient sustained considerable suffering, during which she consulted various physicians. After reviewing numerous authorities at great length, the Court cast aside the earlier doctrine, adopted the Discovery Rule and observed:

> "In reality, the `general rule' has little to recommend it. It is neither the position of a majority of the jurisdictions nor is it firmly based on considerations of reason or justice. We will, therefore, adhere to the following rule: where a foreign object is negligently left in a patient's body by a surgeon and the patient is in ignorance of the fact, and consequently of his right of action for malpractice, the cause of action does not accrue until the patient learns of, or in the exercise of reasonable care and diligence should have learned of the presence of such foreign object in his body."

The facts in Quinton v. United States, 304 F.2d 234 were that the wife of the plaintiff was given blood transfusion in a Government hospital in 1956. In June, 1959, the plaintiff and his wife during the latter's pregnancy discovered that wrong type of blood was given to her in 1956 and as a result she gave birth to a stillborn child. The Government sought dismissal of the action for damages on the ground of limitation. The Court of Appeals opined that when a claim accrues under the Federal Tort Claims Act, it is governed by Federal law and not by local State law. The Court then held that the period of limitation does not begin to run until the claimant discovers, or in the exercise of reasonable diligence should have discovered the act constituting the alleged negligence.

In Josephine Flanagan v. Mount Eden General Hospital LEXSEE 24 N.Y. 2d 427, the application of the rule of Discovery was considered in the background of fact that during the course of operation done on 14.7.1958, surgical clamps were inserted in the plaintiff's body. In 1966, the plaintiff consulted a doctor because she experienced severe pain in the region of her abdomen. The doctor told her that surgical clamps were discovered by X- ray analysis. Thereafter, another operation was performed to remove the clamps. The defendants sought dismissal of the complaint on the ground that the same was barred by time. The Court referred to the Discovery Rule and observed:

> "The so-called discovery rule employed in foreign object medical malpractice cases is in compatible harmony with the purpose for which Statutes of Limitation were enacted and strikes a fair balance in the field of medical malpractice. The unsoundness of the traditional rule, as applied in the case where an object is discovered in the plaintiff's body, is patent. "It simply places an undue strain upon common sense, reality, logic and simple justice to say that a cause of action had `accrued' to the plaintiff until the X-ray examination disclosed a foreign object within her abdomen and until she had reasonable basis for believing or reasonable means of ascertaining that the foreign object was within her abdomen as a consequence of the negligent performance of the operation."

In the case before us, the danger of belated, false or frivolous claims is eliminated. In addition, plaintiff's claim does not raise questions as to credibility nor does it rest on professional diagnostic judgment or discretion. It rests solely on the presence of a foreign object within her abdomen.

The policy of insulating defendants from the burden of defending stale claims brought by a party who, with reasonable diligence, could have instituted the action more expeditiously is not a convincing justification for the harsh consequences resulting from applying the same concept of accrual in foreign object cases as is applied in medical treatment cases. A clamp, though immersed within the patient's body and undiscovered for a long period of time, retains its identity so that a defendant's ability to defend a "stale" claim is not unduly impaired.

Therefore, where a foreign object has negligently been left in the patient's body, the Statute of Limitations will not begin to run until the patient could have reasonably discovered the malpractice."

(Emphasis added) The proposition laid down in Flaganan's case was reiterated in John D. Adams and Jeanette S. Adams v. New Rochelle Hospital Medical Center, 919 F.Supp.711.

20. In the light of the above, it is to be seen whether the cause of action accrued to the respondent on 26.11.1993 i.e. the date on which the appellant performed `Open Cholecystectomy' and the piece of gauze is said to have been left in her abdomen or in November, 2002 when she received Histopathology report from Lilavati Hospital. If the respondent had not suffered pain, restlessness or any other discomfort till September, 2002, it could reasonably be said that the cause of action accrued to her only on discovery of the pieces of gauze which were found embedded in the mass taken out of her abdomen as a result of surgery performed by Dr. P. Jagannath on 25.10.2002. In

that case, the complaint filed by her on 19.10.2004 would have been within limitation. However, the factual matrix of the case tells a different story. In the complaint filed by her, the respondent categorically averred that after discharge from the appellant's hospital, she suffered pain off and on and it was giving unrest to her at home and at work place; that her sufferings were endless and she had spent sleepless nights and mental strain for almost 9 years. This is clearly borne out from the averments contained in paragraph 8 of the complaint, the relevant portion of which is extracted below:

> ".....Even after discharging the complainant from the hospital the pain in the abdomen still persisted as on and off and it was giving unrest to the complainant again at home and at the place where she worked. The sufferings of the complainant were endless, had to spend sleepless nights and mental strain for almost nine years and as the pain became unbearable by the passage of time, the complainant had to be admitted in the Government Hospital in Goa in September, 2002....."

A similar statement was made by her in the affidavit filed before the National Commission, paragraphs 2 and 3 (two paragraphs have been marked as 3) of which read as under:

> "2. I say that to arrest the pains, sufferings and mental strains during the period of nine years I was taking tablets and their names are as follows:
>
> Tablets CYCLOPAM BRUFEN -400mg CROCIN DICLO FENAC
>
> 3. As a nurse in the Government Hospital I know from my personal knowledge that the aforesaid tablets are taken as painkillers, to suppress the pain and to arrest the pain.
>
> 3. I say that because of the pains, sufferings and mental strains. I had to often apply for leave at the place where I was posted. The number of days I was on leave and the leave that I have taken from 1.12.1993 to 17.06.2002 on account of pains, sufferings and mental strains is mentioned herein below:
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> From 22.11.93 to 23.12.93 - 32 days " 24.12.93 to 31.12.93 - 8 days (Sick leave-S.L.16 days) " 01.01.94 to 22.01.94 - 22 days (S.L. 44 days) " 27.07.94 to 7.08.94 - 12 days (S.L. 24 days) " 30.09.04 to - - - 1 days (S.L. 02 days) " 17.05.96 to 26.05.96 - 10 days " 15.07.96 to 21.07.96 - 7 days (S.L. 14 days) " 01.02.97 to 06.02.97 - 13 days " 19.03.99 to 26.03.99 - 8 days " 21.03.00 to 23.03.00 - 3 days (S.L. 6 days) " 17.03.01 to 22.03.01 - 6 days " 21.05.01 to 27.05.01 - 7 days " 21.06.01 to 23.06.01 - 3 days (S.L. 6 days) " 17.02.02 to 20.02.02 - 4 days (S.L. 8 days) " 13.03.02 to 22.03.02 - 10 days " 16.06.02 to 17.06.02 - 2 days (S.L. 4 days)"

21. The respondent was not an ordinary layperson. She was an experienced Nurse and was employed in the Government Hospital. It was the respondent's case before the State Commission and the National Commission that after the surgery in November, 1993, she was having pain in the abdomen

off and on and, on that account, she was restless at home and also at work place and had to take leave including sick leave on various occasions. Therefore, it was reasonably expected of her to have contacted the appellant and apprised him about her pain and agony and sought his advice. That would have been the natural conduct of any other patient. If the respondent had got in touch with the appellant, he would have definitely suggested measures for relieving her from pain and restlessness. If the respondent was not to get relief by medication, the appellant may have suggested her to go for an X-ray or C.T. scan. In the event of discovery of gauze in the respondent's abdomen, the appellant would have taken appropriate action for extracting the same without requiring the respondent to pay for it. If the measures suggested by the appellant were not to the satisfaction of the respondent and the pain in her abdomen persisted then she could have consulted any other doctor for relief. However, the fact of the matter is that after the surgery, the respondent never informed the appellant that she was having pain in the abdomen, was restless and having sleepless nights. At no point of time she contacted the appellant and sought his advice in the matter. Not only this, she did not consult any other doctor including those who were working in the Government Hospital where she was employed. Any person of ordinary prudence, who may have suffered pain and discomfort after surgery would have consulted the concerned surgeon or any other competent doctor and sought his advice but the respondent did nothing except taking some pain killers. If the respondent had been little diligent, she would have contacted the appellant and informed him about her sufferings. In that event, the appellant may have suggested appropriate medicines or advised her to go for X-ray or C.T. scan. If piece of gauze was found in the abdomen of the respondent, the appellant would have certainly taken remedial measures. The respondent has not explained as to why she kept quite for about 9 years despite pain and agony. The long silence on her part militates against the bonafides of the respondent's claim for compensation and the Discovery Rule cannot be invoked for recording a finding that the cause of action accrued to her in November, 2002. The National Commission, in our considered view, was clearly wrong when it held that cause of action lastly arose to the respondent on 25.10.2002 when the second surgery was performed at Lilavati Hospital and the complaint filed by her on 19.10.2004 was within limitation.

22. In the result, the appeal is allowed. The impugned order is set aside and the complaint filed by the respondent is dismissed. The parties are left to bear their own costs.

.....J. [G.S. Singhvi] .....J. [Asok Kumar Ganguly] New Delhi October 20, 2010.