KISHORE LAL

v.

CHAIRMAN, E.S.I. CORPORATION

MAY 8, 2007

[B.N. AGRAWAL, P.P. NAOLEKAR AND DALVEER BHANDARI, JJ.]

Consumer Protection Act, 1986—Ss. 2(d) and 2(o)—Employees' State Insurance Act, 1948—ss.74 and 75—Employees' State Insurance (Central) Rules, 1950—Medical negligence—Claim of compensation by complainant for deficiency in service by ESI hospital before Consumer Forum—Dismissal of the complaint holding that the complainant is not a 'consumer' under the Consumer Protection Act since the medical service rendered is gratuitous in nature—Correctness of—Jurisdiction of Employees' State Insurance Court in dealing with compensation for medical negligence—Held, medical service rendered by ESI hospital is not gratuitous in nature since the expenses are reimbursed by contributions under the Act of 1948—Hence, the Consumer Forum has jurisdiction to deal with deficiency in service—Employees' Insurance Court does not have jurisdiction under the Act of 1948 to deal with claim for damages for medical negligence.

Appellant was insured with respondent-Corporation. The appellant's wife was admitted in the respondent's dispensary for her treatment for diabetes. When her condition deteriorated, the appellant got his wife medically examined in a private hospital. The medical tests done revealed that the deterioration in condition of his wife was due to wrong diagnosis and treatment in the respondent's dispensary. The appellant-complainant filed a complaint under the Consumer Protection Act, 1986 before District Forum claiming compensation. The respondent raised preliminary objections contending that the appellant is not a 'consumer' under the Act since the medical service rendered by the respondent's dispensary is gratuitous in nature. The District Forum dismissed the complaint upholding the contention of the respondent. State Commission and National Commission dismissed the appeals of the appellant.

In appeal to this Court, the appellant contended that the medical services rendered by the respondent's hospital cannot be said to be gratuitous in nature

A since the expenses are reimbursed as he is a member of an insurance scheme applicable in the establishment under the Employees' State Insurance Act where he is serving and therefore, the insurance policy which takes care of the medical treatment of the appellant as well as his dependants which is given in the respondent's dispensary, would be a service falling within the purview of Section 2(1)(o) of the Consumer Protection Act, 1986; that this Court in B *Indian Medical Association* had held that any medical service given under a scheme of insurance fall within the purview of the Act and hence, the appellant is a 'consumer' under the Act.

The respondent-Corporation contended that the appellant is not a C 'consumer' under the Act since the medical service rendered by the respondent's dispensary is gratuitous in nature; and that by virtue of Section 74 read with section 75 of the Employees State Insurance Act, 1948, the claim made by the appellant would exclusively fall for decision within the jurisdiction of the Employees' Insurance Court established under the Insurance Act; and that since the Insurance Act is a special Act, the Consumer Forum has no D jurisdiction to adjudicate upon the issue.

Allowing the appeal, the Court

HELD:1.1. On a plain reading of the provisions of the Employees' State Insurance Act, 1948, it is apparent that the respondent-Corporation is E required to maintain and establish the hospitals and dispensaries and to provide medical and surgical services. Service rendered in the hospital to the insured person or his family member for medical treatment is not free, in the sense that the expenses incurred for the service rendered in the hospital would be borne from the contributions made to the insurance scheme by the F employer and the employee and, therefore, the principle enunciated in *Indian Medical Association* v. *V.P. Shantha & Ors.*, [1995] 6 SCC 651 will squarely apply to the facts of the present case, where the appellant has availed the services under the insurance policy which is compulsory under the statute. Wherever the charges for medical treatment are borne under the insurance policy, it would be a service rendered within the ambit of Section 2(1)(o) of G the Consumer Protection Act, 1986. It cannot be said to be a free service rendered by the respondent's dispensary. [Para 13] [150-C, D, E]

Indian Medical Association v. *V.P. Shantha & Ors.*, [1995] 6 SCC 651, relied on.

H *Laxman Thamappa Kotgiri* v. *G.M. Central Railway & Ors.*, [2005] 1

SCALE 600 and *Regional Provident Fund Commissioner* v. *Shiv Kumar Joshi,* [2000] 1 SCC 98, referred to. A

Birbal Singh v. *ESI Corporation,* (1993) II CPJ 1028, referred to.

2.1. The jurisdiction of the Consumer Forum should not and would not be curtailed unless there is an express provision prohibiting the consumer forum to take up the matter which falls within the jurisdiction of civil court or any other forum as established under some enactment. If two different fora have jurisdiction to entertain the dispute in regard to the same subject, the jurisdiction of the consumer forum would not be barred and the power of the consumer forum to adjudicate upon the dispute could not be negated. B C

[Para 17] [153-B, C]

M/s Spring Meadows Hospital & Anr. v. *Harjol Ahluwalia & Anr.,* AIR (1998) SC 1801; *State of Karnataka* v. *Vishwabarathi House Building Co-op. Society & Ors.,* AIR (2003) SC 1043 and *Secretary, Thirumugam Cooperative Agricultural Credit Society* v. *M. Lalitha & Ors.,* [2004] 1 SCC 305, referred to. D

2.2. The appellant's claim has no relation to any of the benefits which are provided in Employees' State Insurance (Central) Rules, 1950 framed under the Employees' State Insurance Act, 1948 for which claim can be made in the Employees' Insurance Court. The appellant's claim is for damages for the negligence on the part of the respondent's dispensary. A bare perusal of the provisions of Section 75 of the Act clearly shows that it does not include claim for damages for medical negligence. [Paras 18 and 19] [153-G; 154-A] E

2.3. Cause of action for negligence arises only when damage occurs and thus the claimant has to satisfy the court three ingredients viz. existence of duty to take care; failure to attain that standard of care; and damage suffered on account of breach of duty. This could not be a question which could be adjudicated upon by the Employees' Insurance Courts which have been given specific powers of the issues, which they can adjudicate and decide. Claim for damages for negligence of the doctors or the ESI hospital/dispensary is clearly beyond the jurisdictional power of the Employees' Insurance Court. A bare reading of Section 75(2) of the Employees' State Insurance Act, 1948 does not indicate that the claim for damages for negligence would fall within the purview of the decisions being made by the Employees' Insurance Court. Further, any claim arising out of and within the purview of the Employees' F G H

Insurance Court is expressly barred by virtue of section 75(3) of the Act to be adjudicated upon by a civil court, but there is no such express bar for the consumer forum to exercise the jurisdiction even if the subject matter of the claim or dispute falls within section 75(a) to (g) of the Act or where the jurisdiction to adjudicate upon the claim is vested with the Employees' Insurance Court under section 75(2)(a) to (f) if it is a consumer's dispute falling under the Consumer Protection Act. [Para 20] [154-F, G; 155-A, B]

Jacob Mathew v. *State of Punjab & Anr.*, **[2005] 6 SCC 1, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4965 of 2000.

From the Judgment and Order dated 19.04.1999 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 606 of 1996.

Gopal Subramaniam, (A.C.), Dayan Krishnan, Nikhil Nayyar and Gautam Narayan for the Appellant.

Vijay K. Mehta for the Respondent.

The Judgment of the Court was delivered by

P.P. NAOLEKAR, J. 1. The appellant was insured with the respondent-Employees' State Insurance Corporation (for short "the Corporation") with Insurance No. 913644. The employee's/appellant's contribution towards the insurance scheme under the Employees' State Insurance Act, 1948 (hereinafter referred to as "the ESI Act") was being deducted regularly from his salary and deposited by his employer with the Corporation. In 1993, the appellant's wife was admitted in the ESI dispensary at Sonepat for her treatment for diabetes. However, the condition of his wife continued to deteriorate. As alleged by the appellant, there were instances when the doctors were not available even during emergencies. Later, the appellant got his wife medically examined in a private hospital. The tests done revealed that his wife had been diagnosed incorrectly in the ESI dispensary; and that the deterioration in the condition of the appellant's wife was a direct result of the wrong diagnosis. The appellant filed a complaint under the Consumer Protection Act, 1986 (hereinafter referred to as "the CP Act") before the District Consumer Disputes Redressal Forum seeking (i) compensation towards mental agony, harassment, physical torture, pains, sufferings and monetary loss for the negligence of the authorities; (ii) direction for removal of, and improvement in, the deficiencies; and (iii)

direction for payment of interest on the amount of reimbursement bills. The Corporation through its officers entered appearance and raised certain preliminary objections, namely, (i) that the complaint filed is not maintainable in the District Consumer Forum and is liable to be dismissed as the wife of the complainant was treated in the ESI dispensary, Sonepat, which is a government dispensary and the complainant cannot be treated as a consumer; and (ii) that the complainant is not a consumer within the definition of 'consumer' in the CP Act and he is not entitled to file a complaint against the ESI dispensary. It was also contended that the facility of medical treatment in government hospital cannot be regarded as a 'service' hired for consideration, apart from the other defences raised in the written statement.

2. The District Consumer Forum relied on the ratio of *Birbal Singh* v. *ESI Corporation,* (1993) II CPJ 1028, wherein on a complaint filed for compensation for being aggrieved by poor medical attention received by the late wife of the complainant at an ESI hospital, the Haryana State Commission had held that the complainants did not come within the ambit of the definition of 'consumer' under the CP Act because of the gratuitous nature of the medical services provided. On this basis, the District Forum held that the services rendered by the ESI dispensary are gratuitous in nature and, therefore, out of the purview of the CP Act. Appeal was preferred to the Haryana State Consumer Disputes Redressal Commission and it was urged by the appellant that ESI is a scheme of insurance and hence the service rendered by the Corporation was not gratuitous. The State Commission relying on the judgment in *Birbal Singh* (supra) and *Indian Medical Association* v. *V.P. Shantha and Ors.,* [1995] 6 SCC 651 held that free medical services were not covered by the CP Act and upheld the judgment of the District Forum. Appellant preferred a revision before the National Consumer Disputes Redressal Commission, but the same was also dismissed in limine. Hence, this appeal by special leave.

3. By second counter affidavit filed in August, 2000, the respondent-Corporation have also raised the question of the jurisdiction of a consumer forum. The respondent contended that by virtue of Section 75 of the ESI Act, the dispute raised by the appellant is covered and is to be decided by the Employees' Insurance Court established under Section 74 of the ESI Act and it being a special Act the jurisdiction of the consumer forum is ousted.

4. From the decisions rendered by the District Forum, the State Commission and the National Commission, and the questions raised by the appellant and the respondent, the question that falls for our consideration is

A two-fold:

1. Whether the service rendered by an ESI hospital is gratuitous or not, and consequently whether it falls within the ambit of 'service' as defined in the Consumer Protection Act, 1986?

B 2. Whether Section 74 read with Section 75 of the Employees' State Insurance Act, 1948 ousts the jurisdiction of the consumer forum as regards the issues involved for consideration?

5. It is contended by Shri Dayan Krishnan, the learned counsel for the appellant, that in the case of *Indian Medical Association* (supra) although C it was held that the free medical service was not covered under the CP Act, the very same judgment in conclusion No. (11) in para 55 includes any medical service given under the scheme of insurance within the scope of the CP Act and, therefore, the claim made by the appellant squarely falls within the jurisdiction of the consumer forum, the appellant being a consumer and the respondent's dispensary having rendered a service to him for consideration. D

6. At this stage, it would be appropriate to refer to certain statutory provisions of the Consumer Protection Act, 1986. 'Consumer' is defined in clause (d) and 'service' in clause (o) of Section 2(1) of the CP Act as under:

"2. Definitions.- (1) In this Act, unless the context otherwise requires,- E

xxx xxx xxx

(d) "consumer" means any person who, -

(i) buys any goods for consideration which has been paid or promised or partly paid and partly promised, or under any system F of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such G goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or H avails of the services for consideration paid or promised, or

partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose;

Explanation.- For the purposes of this clause, "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;"

xxx xxx xxx

"(o) "Service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

7. The definition of `consumer' in the CP Act is apparently wide enough and encompasses within its fold not only the goods but also the services, bought or hired, for consideration. Such consideration may be paid or promised or partly paid or partly promised under any system of deferred payment and includes any beneficiary of such person other than the person who hires the service for consideration. The Act being a beneficial legislation, aims to protect the interests of a consumer as understood in the business parlance. The important characteristics of goods and services under the Act are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. The comprehensive definition aims at covering every man who pays money as the price or cost of goods and services. However, by virtue of the definition, the person who obtains goods for resale or for any commercial purpose is excluded, but the services hired for consideration even for commercial purposes are not excluded. The term `service' unambiguously indicates in the definition that the definition is not restrictive and includes within its ambit such services as well which are specified therein. However, a service hired or availed, which does not cost anything or can be said free of charge, or under a contract of personal service, is not included within the meaning of `service' for the purposes of the CP Act.

8. A 3-Judge Bench of this Court in *Indian Medical Association* (supra)

A has extensively considered the provisions of the CP Act and particularly what shall be a 'service' within the meaning of Section 2(1)(o) of the said Act. The Court was considering whether the service rendered by the doctors would fall within the purview of the CP Act, it being a service rendered for the charges; and whether the patients, who are treated by the doctors, are 'consumers' as defined in Section 2(1)(d) of the CP Act. The Court said that the definition B of 'service' in Section 2(1)(o) can be split into three parts: the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean service of any description which is made available to the potential users. The inclusionary part expressly includes the provision of facilities in connection with banking, financing, insurance, C transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, whereas the exclusionary part excludes rendering of any service free of charge or under a contract of personal service. The exclusionary part in Section 2(1)(o) excludes from the main part service rendered (i) free of charge; or (ii) under a contract of personal service. The expression D 'contract of personal service' in the exclusionary part of Section 2(1)(o) must be construed as excluding the services rendered by an employee to his employer under the contract of personal service from the ambit of the expression 'service'. There is a distinction between a 'contract of service' and a 'contract for service'. A 'contract for service' implies a contract whereby E one party undertakes to render service e.g. professional or technical service, to or for another in the performance of which he is not subject to detailed direction and control and exercises professional or technical skill and uses his own knowledge and discretion, whereas a 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. F A contract of service is excluded for consideration from the ambit of definition of 'service' in the CP Act, whereas a contract for service is included. As regards service rendered free of charge under Section 2(1)(o), the Court held that the medical practitioners, government hospitals/nursing homes and private hospitals/nursing homes, who render service without any charge whatsoever G to every person availing of the service would not fall within the ambit of 'service' under Section 2(1)(o) of the Act. The payment of a token amount for registration purposes only would, however, not alter the position in respect of such doctors and hospitals, but the service rendered for which charges are required to be paid by everybody availing the service would fall within the purview of the expression 'service' as defined in Section 2(1)(o) H of the Act. The Court held that the relationship between a medical practitioner

and a patient carries within it a certain degree of mutual confidence and trust and, therefore, the service rendered by the medical practitioners can be regarded as a service of personal nature, but since there is no relationship of master and servant between the doctor and the patient the contract between the medical practitioner and his patient cannot be treated as a contract of personal service and it is a contract for service and the service rendered by the medical practitioner to his patient under such contract is not covered by the exclusionary part of the definition of 'service' contained in Section 2(1)(o) of the CP Act. In paragraph 55 of the judgment, the Court summarized its conclusions. We are really concerned in this case with conclusions Nos. (9), (10), (11) and (12). Conclusion No. (9) is in regard to the service rendered at a government hospital/health center/dispensary where no charges whatsoever are made from any person and they are given free service, which would not be a service under Section 2(1)(o) of the CP Act. Conclusion No. (10) lays down that where the service is rendered at a government hospital/health center/dispensary on payment of charges and also rendered free of charge, then it would fall within the ambit of the expression 'service'. Conclusion No. (11) says that if a patient or his relation availed of the service of a medical practitioner or hospital/nursing home where the charges for consultation, diagnosis and medical treatment are borne by the insurance company, then such service would fall within the ambit of service. Similarly, under conclusion No. (12), where as a part of the conditions of service the employer bears the expenses of medical treatment of an employee and his family members dependent on him, then the service rendered by a medical practitioner or a hospital/nursing home would not be treated to be free of charge and would constitute 'service' under Section 2(1)(o).

9. In the case of *Laxman Thamappa Kotgiri* v. *G.M. Central Railway & Ors.*, (2005) 1 Scale 600, where an employee of the railways had filed a complaint on the ground that his wife had been negligently treated at a hospital of the Central Railway as a result of which she had died, the State Commission concluded that since the hospital had been set up to treat railway employees predominantly and the service provided was free of charge it did not come within the definition of 'service' under the CP Act and hence the complaint was not maintainable. On appeal to the National Commission, the judgment of the State Commission was upheld and the appeal filed by the employee was rejected. Thereafter, appeal was preferred to this Court. Allowing the appeal, this Court in paras 6 and 7 has held as under:

"6. There is no dispute that the Hospital in question has been set up

A for the purpose of granting medical treatment to the Railway employees and their dependents. Apart from the nominal charges which are taken from such an employee, this facility is part of the service conditions of the Railway employees. *V.P. Shantha's* case has made a distinction between non-Governmental hospital/nursing home where no charge whatsoever was made from any person availing of the service and all B patients are given free service (vide para 55(6) at page 681) and services rendered at Government Hospital/Health Centre/Dispensary where no charge whatsoever is made from any person availing of the services and all patients are given free service (vide para 55(9)) on the hand and service rendered to an employee and his family members by C a medical practitioner or a hospital/nursing home which are given as part of the conditions of service to the employee and where the employer bears expenses of the medical treatment of the employee and his family members, (paragraph 55(12) on the other. In the first two circumstances, it would not be free service within the definition of the Sec. 2(1)(o) of the Act. In the third circumstance it would be. D

7. Since it is not in dispute that the medical treatment in the said Hospital is given to employees like the appellant and his family members is part of the conditions of service of the appellant and that the Hospital is run and subsidised by the appellants employer, namely, the Union of India, the appellant's case would fall within the parameters E laid down in paragraph 55(12) of the judgment in *V.P. Shantha's* case and not within the parameters of either para 55(6) or para 55(9) of the said case."

10. Further, the appellant has brought to our notice a judgment of this F Court in the case of *Regional Provident Fund Commissioner* v. *Shiv Kumar Joshi,* [2000] 1 SCC 98, wherein the Employees' Provident Fund Scheme, 1952, framed under Section 5 of the Employees' Provident Fund Act came for consideration of the Court and the Court held in para 11 as under:

"..... G

A perusal of the Scheme unambiguously shows that it is for consideration which is applicable to all those factories and establishments covered under the Act and the Scheme who are required to become a member of the fund under the Scheme. The contribution of the employee has to be equal to the contribution payable by the H employer *in respect* of such employee. The words "in respect of" are

significant as they indicate the liability of the employer to pay his part of the contribution in consideration of the employee working with him. But for the employment of the employee there is no obligation upon the employer to pay his part of the contribution to the Scheme. The administrative charges, as required to be paid under Para 30 of the Scheme are also paid for consideration of the employee being the member of the Scheme and for the services rendered under the Scheme. It is immaterial as to whether such charges are deducted actually from the wages of the employee or paid by his employer in respect of the member-employee of the Scheme working for such employer. It cannot be held that even though the employee is a member of the Scheme, yet the employer would only be deemed to be a consumer for having made payments of the administrative charges. .."

11. It is contended by the learned counsel for the appellant that the appellant is a member of the insurance scheme applicable in the establishment where he is serving and, therefore, the insurance policy which takes care of the medical treatment of the appellant as well as his dependents which is given in the ESI hospital/dispensary would be a service falling within the purview of Section 2(1)(o) of the CP Act. To appreciate this contention of the learned counsel, it would be necessary to consider the insurance scheme which is applicable in the establishment under various provisions of the ESI Act.

12. It is an admitted fact that the appellant's wife was given treatment in the ESI dispensary at Sonepat. Under Section 38 of the ESI Act, all employees in a factory or establishment where the Act applies are required to be insured under the insurance scheme. Section 39 speaks of the contribution which is required to be paid to the Corporation for the insurance scheme which shall comprise the contribution payable by the employer and the contribution payable by the employee. The contribution is required to be paid at such rates as may be prescribed by the Central Government. By virtue of Section 40, the principal employer is liable to pay the contributions, both the employer's contribution and the employee's contribution, in the first instance of the employees directly employed by him or by or through an immediate employer. Sub-section (2) of Section 40 authorises the principal employer to recover the contribution made for the employee by deducting the same from the wages of the employee. Chapter V of the ESI Act deals with benefits. Sub-section (1) of Section 46 falling within this Chapter contemplates that the insured persons, their dependents and the persons mentioned under

A the Section shall be entitled to the various benefits referred to in clauses (a) to (f). Clause (e) reads: "medical treatment for an attendance on insured persons (hereinafter referred to as medical benefit)". Section 56 is a specific Section which has reference to the medical benefits available to an insured person or to his family member whose condition requires medical treatment and attendance and they shall be entitled to receive medical benefit. Under B Section 59, the Corporation is called upon with the approval of the State Government to establish and maintain in a State such hospitals, dispensaries and other medical and surgical services as it may think fit for the benefit of insured persons and, where such medical benefit is extended, to their families.

C 13. On a plain reading of the aforesaid provisions of the ESI Act, it is apparent that the Corporation is required to maintain and establish the hospitals and dispensaries and to provide medical and surgical services. Service rendered in the hospital to the insured person or his family member for medical treatment is not free, in the sense that the expense incurred for the service rendered in the hospital would be borne from the contributions made to the insurance D scheme by the employer and the employee and, therefore, the principle enunciated in conclusion No. (11) in para 55 in the case of *Indian Medical Association* (supra) will squarely apply to the facts of the present case, where the appellant has availed the services under the insurance policy which is compulsory under the statute. Wherever the charges for medical treatment are E borne under the insurance policy, it would be a service rendered within the ambit of Section 2(1)(o) of the CP Act. It cannot be said to be a free service rendered by the ESI hospital/dispensary.

14. The service rendered by the medical practitioners of hospitals/ nursing homes run by the ESI Corporation cannot be regarded as a service F rendered free of charge. The person availing of such service under an insurance scheme of medical care, whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurer, such service would fall within the ambit of service' as defined in Section 2(1)(o) of the CP Act. We are of the opinion that the service provided by the ESI hospital/dispensary falls G within the ambit of `service' as defined in Section 2(1)(o) of the CP Act. ESI scheme is an insurance scheme and it contributes for the service rendered by the ESI hospitals/dispensaries, of medical care in its hospitals/dispensaries, and as such service given in the ESI hospitals/dispensaries to a member of the Scheme or his family cannot be treated as gratuitous.

H 15. We shall now proceed to consider the second question raised by

Shri Vijay K. Mehta, the learned counsel for the respondent that by virtue of Section 74 read with Section 75, and particularly Section 75(e), of the ESI Act, the claim made by the appellant would exclusively fall for decision within the jurisdiction of the Employees' Insurance Court and that being the position the consumer forum has no jurisdiction to adjudicate upon the issue.

16. Relevant portions of Sections 74 and 75 of the ESI Act are reproduced below:

> "74. *Constitution of Employees' Insurance Court.*—(1) The State Government shall, by notification in the Official Gazette, constitute an Employees' Insurance Court of such local area as may be specified in the notification.
>
> xxx xxx xxx"
>
> "75. *Matters to be decided by Employees' Insurance Court.*- (1) If any question or dispute arises as to
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> (a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or
>
> (b) the rate of wages or average daily wages of an employee for the purpose of this Act, or
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> (c) the rate of contribution payable by the principal employer in respect of any employee, or
>
> (d) the person who is or was the principal employer in respect of any employee, or
>
> (e) the right of any person to any benefit and as to the amount and duration thereof, or
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> (ee) any direction issued by the Corporation under Section 55-A on a review of any payment of dependants' benefits, or,
>
> (f) [Omitted], or
>
> (g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues

A payable or recoverable under this Act, or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act,

such question or dispute subject to the provisions of sub-section (2-A) shall be decided by the Employees' Insurance Court in accordance B with the provisions of this Act.

(2) Subject to the provisions of sub-section (2-A), the following claims shall be decided by the Employees' Insurance Court, namely,-

(a) claim for the recovery of contributions from the principal C employer;

(b) claim by a principal employer to recover contributions from any immediate employer;

(c) (Omitted);

D (d) claim against a principal employer under Section 68;

(e) claim under Section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto; and

(f) any claim for the recovery of any benefit admissible under this E Act.

xxx xxx xxx

(3). No Civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by a medical board, or F by a medical appeal tribunal or by the Employees' Insurance Court."

17. It has been held in numerous cases of this Court that the jurisdiction of a consumer forum has to be construed liberally so as to bring many cases under it for their speedy disposal. In the case of *M/s. Spring Meadows Hospital and Anr.* v. *Harjol Ahluwalia and Anr.*, AIR (1998) SC 1801, it was G held that the CP Act creates a framework for speedy disposal of consumer disputes and an attempt has been made to remove the existing evils of the ordinary court system. The Act being a beneficial legislation should receive a liberal construction. In *State of Karnataka* v. *Vishwabarathi House Building Co-op. Society and Ors.*, AIR (2003) SC 1043, the Court speaking on the H jurisdiction of the consumer fora held that the provisions of the said Act are

required to be interpreted as broadly as possible and the fora under the CP Act have jurisdiction to entertain a complaint despite the fact that other fora/ courts would also have jurisdiction to adjudicate upon the lis. These judgments have been cited with approval in paras 16 and 17 of the judgment in *Secretary, Thirumurugan Cooperative Agricultural Credit Society* v. *M. Lalitha and Ors.*, [2004] 1 SCC 305. The trend of the decisions of this Court is that the jurisdiction of the consumer forum should not and would not be curtailed unless there is an express provision prohibiting the consumer forum to take up the matter which falls within the jurisdiction of civil court or any other forum as established under some enactment. The Court had gone to the extent of saying that if two different fora have jurisdiction to entertain the dispute in regard to the same subject, the jurisdiction of the consumer forum would not be barred and the power of the consumer forum to adjudicate upon the dispute could not be negated.

18. The submission of the learned counsel for the respondent is that the claim made by the appellant before the consumer forum raises a dispute in regard to damages for negligence of doctors in the ESI hospital/dispensary and would tantamount to claiming benefit and the amount under the ESI Act provisions and would fall within clause (e) of Section 75(1) and, therefore, it is the Employees' Insurance Court alone which has the jurisdiction to decide it. We are afraid that we cannot agree with the submission made by the learned counsel. Section 75 provides for the subjects on which the jurisdiction shall be exercised by the Employees' Insurance Court. Clause (e) of Section 75(1) gives power to the Employees' Insurance Court to adjudicate upon the dispute of the right of any person to any benefit and as to the amount and duration thereof. The benefit which has been referred to, has a reference to the benefits under the Act, i.e., the ESI Act. The Employees' State Insurance (Central) Rules, 1950 (hereinafter referred to as "the Rules") have been framed in exercise of the powers under Section 95 of the ESI Act. Rule 56 provides for maternity benefits, Rule 57 for disablement benefits, Rule 58 for dependents' benefits, Rule 60 for medical benefits to insured person who ceases to be in an insurable employment on account of permanent disablement and Rule 61 for medical benefits to retired insured persons. Thus, these are the benefits which are provided under the Rules to the employees and the ex-employees for which claim can be made in the Employees' Insurance Court. The appellant's claim has no relation to any of the benefits which are provided in the Rules for which the claim can be made in the Employees' Insurance Court. The appellant's claim is for damages for the negligence on the part of the ESI hospital/dispensary and the doctors working therein.

A 19. A bare perusal of the provisions of clauses (a) to (g) of Section 75(1) clearly shows that it does not include claim for damages for medical negligence, like the present case which we are dealing with. Although the question does not directly arise before us, we shall consider what in the ordinary course shall constitute negligence.

B 20. This Court has considered the principles of the law on negligence in *Jacob Mathew* v. *State of Punjab and Anr.*, [2005] 6 SCC 1. The jurisprudential concept of negligence defies any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well-
C stated in the Law of Torts, Ratanlal & Dhirajlal (24th Ed. 2002, edited by Justice G.P. Singh). It is stated (at pp. 441-442) :

> "Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or
D doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property . the definition involves three constituents of negligence: (1) A legal duty to exercise due care on
E the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."

F Cause of action for negligence arises only when damage occurs and thus the claimant has to satisfy the court on the evidence that three ingredients of negligence, namely, (a) existence of duty to take care; (b) failure to attain that standard of care; and (c) damage suffered on account of breach of duty, are present for the defendant to be held liable for negligence. Therefore, the
G claimant has to satisfy these ingredients before he can claim damages for medical negligence of the doctors and that could not be a question which could be adjudicated upon by the Employees' Insurance Courts which have been given specific powers of the issues, which they can adjudicate and decide. Claim for damages for negligence of the doctors or the ESI hospital/
H dispensary is clearly beyond the jurisdictional power of the Employees'

Insurance Court. An Employees' Insurance Court has jurisdiction to decide certain claims which fall under sub-section (2) of Section 75 of the ESI Act. A bare reading of Section 75(2) also does not indicate, in any manner, that the claim for damages for negligence would fall within the purview of the decisions being made by the Employees' Insurance Court. Further, it can be seen that any claim arising out of and within the purview of the Employees' Insurance Court is expressly barred by virtue of sub-section (3) to be adjudicated upon by a civil court, but there is no such express bar for the consumer forum to exercise the jurisdiction even if the subject matter of the claim or dispute falls within clauses (a) to (g) of sub-section (1) of Section 75 or where the jurisdiction to adjudicate upon the claim is vested with the Employees' Insurance Court under clauses (a) to (f) of sub-section (2) of Section 75 if it is a consumer's dispute falling under the CP Act.

21. Having considered all these aspects, we are of the view that the appellant is a consumer within the ambit of Section 2(1)(d) of the Consumer Protection Act, 1986 and the medical service rendered in the ESI hospital/ dispensary by the respondent Corporation falls within the ambit of Section 2(1)(o) of the Consumer Protection Act and, therefore, the consumer forum has jurisdiction to adjudicate upon the case of the appellant. We further hold that the jurisdiction of the consumer forum is not ousted by virtue of sub-section (1) or (2) or (3) of Section 75 of the Employees' State Insurance Act, 1948.

22. For the aforesaid reasons, the appeal is allowed. The impugned order is set aside and the matter is remitted back to the District Consumer Disputes Redressal Forum, Sonepat, for decision in accordance with law laid down herein.

B.S. Appeal allowed.