

LAW ON CONTRIBUTORY NEGLIGENCE AND CONSUMERS OF MEDICAL CARE IN INDIA: AN ANALYSIS

By Sunitha K.K.³⁶⁸ & Dr. Tabrez Ahmad³⁶⁹

“Blame is a powerful weapon; its inappropriate use distorts tolerant and constructive relationship between people.”ⁱ

Contributory negligence is conduct on the part of the injured party “which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff’s harm.” Traditionally at common law the plaintiff’s contributory negligence totally precludes any recovery by the plaintiff for damagesⁱⁱ

This concept entered the social scene at later stage of legal development. The 1809 English case of *Butterfield v. Forrester*ⁱⁱⁱ is considered to be the beginning of its application. In that case, the plaintiff was injured by a fall from his horse when, riding at a fast pace, he ran into an obstruction in the road left by the defendant. It was held that, under these particular circumstances, the plaintiff was absolutely barred from any recovery based on his contributory negligence, even though the defendant’s negligent conduct also was a significant cause of the plaintiff’s injuries.^{iv} In *Butterfield*, Lord Ellen borough, cited no supporting authority, nor gave any satisfactory explanation for this draconic legal doctrine.^v As Professor Dan Dobbs has observed, “This rule was extreme. The plaintiff who was guilty of only slight or trivial negligence was barred completely, even if the defendant was guilty of quite serious negligence, as contemporary courts have had occasion to observe in criticizing the rule. The traditional contributory negligence rule was extreme not merely in results but in principle. No satisfactory reasoning has ever explained the rule. It departed seriously from ideals of accountability and deterrence in tort law because it completely relieved the defendant from liability even if he was by far the most negligent actor.”^{vi} The doctrine was well received in America. With the rise of industrial enterprise, the rule really assumed significance^{vii}. The early 19th century was an era in which familiar and relatively safe

³⁶⁸ Research Scholar, College of Legal Studies, University of Petroleum and Energy Studies, Dehradun, & ASST. PROFESSOR, V.K.K Menon College

³⁶⁹ Professor, UPES Dehradun

industrial and agricultural techniques were replaced by strange and not yet perfected machinery. The century witnessed a newer kind of growth different from the traditional impetus. All instrumentalities of the novel movement were potentially dangerous^{viii}. "The railroad, the steamboat, the saw mill, the cotton gin, the factories of all descriptions, gave the new legal setup all the work it could do."^{ix} The economic development of this century was accompanied by the growth of an individualistic political and economic philosophy which called for a system favorable to the entrepreneurial class. This philosophy wanted to limit the liability of the defendant who was most probably belonged to that class. This philosophy had greater influence in formation of this doctrine, which allowed defendant to go scotch free, if an iota of mistake is found on plaintiff's side.^x In the words of Black, CJ., in *Railroad Co. v. Aspell*^{xi} "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties,". Earlier legal thinking had been very much dominated by the notion that while there may be many causes of an injury in a lay or scientific sense, yet the law should quest for a sole or principal proximate cause.^{xii} According to Judge D. Arthur Kelsey, "In theory, but hardly in practice, employees in [nineteenth] century factories were protected by their employer's duty —to provide employees with a reasonably safe place in which to work. Whatever succor this duty provided to employees, it soon surrendered to the —unholy trinity- of employer defenses: contributory negligence, assumption of risk, and the fellow servant rule. They became the 'wicked sisters' of the common law because, working together, they effectively nullified any realistic possibility of holding an employer liable for the great majority of on-the-job injuries."^{xiii}

The question which is critical is whether the act of plaintiff had natural tendency to expose him directly to the danger which resulted in the injury which he has complained about. If the answer is 'no' then the plaintiff's negligence is considered as contributing to the injury. If the dangers to which he has exposed are something which a person with ordinary faculties can understand, he is deemed to have understood it^{xiv}. If the plaintiff by ordinary care could have avoided the effect of negligence of the defendant, he is guilty of contributory negligence, no matter how negligent the defendant might have been at any of the proceeding stages^{xv}.

Exceptions to contributory negligence

However the judges in the later years have sought to mitigate the harsh results of the contributory negligence defense by establishing limits and exceptions to its application^{xvi}. It was set that, in order to establish that the plaintiff contributed to the injury, it must be a proximate cause of the injury.

If the plaintiff got frightened and confused due to the action of the defendant and in the attempt to save himself confronted with the mishap and suffered injury, the plaintiff's conduct does not contribute to the injury.^{xvii} Similarly the defendant's actions, if placed plaintiff in a peril, law does not require him to exercise the same degree of care of a normal person who has the full opportunity to make his judgment^{xviii} The defense is usually not applicable when the defendant's conduct is so egregious that it constitutes willful, wanton, or reckless conduct.^{xix} In these situations, the plaintiff is only barred from recovery if the plaintiff's contributory negligence is similarly aggravated.

Under traditional English and American law, the "last clear chance" doctrine created an exception to the rule that the plaintiff's own carelessness barred recovery. In the 1842 English case *Davies v. Mann*^{xx}, the defendant negligently drove horses and a wagon into a donkey that had been left fettered in the highway. Though the plaintiff had been contributory negligent in leaving the donkey in the highway, the plaintiff was allowed to recover the animal's value since the defendant had the last clear chance to avoid the collision^{xxi}.

The "last clear chance" exception provides that when the defendant is negligent and the plaintiff is contributory negligent, but the defendant has "a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence and the plaintiff's contributory negligence,"^{xxii} the defendant will be liable despite the plaintiff's contributory negligence. Therefore, under a last clear chance exception, the defendant would become responsible for the entire loss of the plaintiff, regardless of the plaintiff's own contribution. In a Maryland case^{xxiii}, the exception allowed a plaintiff injured by sitting on the hood of a running car to recover from the driver. The plaintiff, after being offered a ride up the street, sat on the car's hood. The driver accelerated quickly, throwing the plaintiff to the pavement. Though the plaintiff was held to be contributory negligent, recovery by the plaintiff was still allowed because the defendant had the last clear chance to avoid the accident. Under Arkansas law, a plaintiff may not recover any amount of damages if the plaintiff's own negligence is determined to be fifty percent or greater. A plaintiff whose negligence is less than 50% can recover from a defendant whose negligence is less than

plaintiff's where defendants' combined negligence or fault exceeds that of the plaintiff^{xxiv}. Similar rules are existing in other US states as well^{xxv}. Plaintiff's failure to use his senses and prudence was not accepted as a contributing factor for the negligence of the defendant's employees in failing to whistle or ring a bell at a crossing.^{xxvi} With *Alvis v. Ribar*^{xxvii}, Illinois became the thirty-seventh state to abandon the harsh contributory negligence defense. Under the comparative negligence adopted by the Illinois Supreme Court, a negligent plaintiff will be permitted to recover that portion of his damages not attributable to his own fault, and, conversely, a defendant will be liable for only that portion of the damages that he directly caused. In light of the potentially harsh result, most states have moved from the strict nature of a pure contributory negligence system to some form of a comparative negligence system. Currently, only five US states, including the District of Columbia, follow the pure contributory negligence rule^{xxviii}.

Till the passing of Law Reform (Contributory Negligence) Act 1945, contributory negligence was a complete defense in England. This legislation has regulated the application of this defense. It provided for reduction of damages recoverable in case of contributory negligence. The legislation gives the most important directions that the reduction of damage shall not be unfair, unjust, capricious and arbitrary, but it shall be based on equitable principles of justice.^{xxix}

Law in India

Contributory negligence was never accepted as a complete defense in India. High Courts in India dealt this matter in the initial independence years. As back as in 1947, the Calcutta High Court^{xxx} held that "Ordinarily, in case of contributory negligence, there is negligence on both sides ... the real test is whether one party could reasonably have avoided the consequences for the other party's negligence. Therefore, in the present case, even mere absence of negligence on the part of the deceased would not be sufficient to justify want of contributory negligence." The Patna High Court made candid observations in *Jang Bahadur Singh vs Sunder Lal Mandal And Ors*^{xxxi}. "Contributory negligence implies negligence on both sides. It is a question of fact in each case whether the conduct of the plaintiff amounts to contributory negligence. Furthermore, it is well-settled that in order that negligence of a party may be contributory, it is necessary that it should be the decisive or effective cause of the accident or collision. Therefore, where a party's negligence, even though it continued to the end but did not contribute to the accident, or

the collision, which was entirely due to the negligence of the other party, the latter is liable to the former in damages^{xxxii}

“This rule of "last opportunity" obviously failed to give an equitable treatment to the parties concerned because it was based on an illogical postulate that in every case the person whose negligence came last in time was solely responsible for the damage. It took no account of the partial contribution to the unfortunate accident by the other party” said the Court in 1976.^{xxxiii}

In the instant case the Court observed that, “The question is to what extent she has made this contribution. Answer to this question is necessary because the damages which would eventually be awarded to the petitioner would stand reduced in proportion to her contribution to the accident” Thus not complete bar of recovery but only apportionment was set as a practice in such cases.

In a case of contributory negligence, the Madras High Court expressed^{xxxiv}, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of the other’s negligence. Whichever party could have avoided the consequence of the other’s negligence would be liable for the accident. If a person’s negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defense to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage.

In India the law is clear that, in a case of contributory negligence, the Courts have the power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damage is reduced to such an extent as the court thinks just and equitable having regard to the claim shared in the responsibility for the damage^{xxxv} While differentiating composite negligence and contributory negligence, Jharkhand High Court in 2015^{xxxvi} held that, It is significant to notice that every case of head on collision does not make out a case of contributory negligence. The manner and place of collision has to be proved. The offending vehicle moving to the wrong side of the road colliding head on with the vehicle coming from the other side will never be a case of contributory negligence. But head on collision in the middle of the road could be a case.

Contributory Negligence: Liability for children

According to Halsbury laws of England, "A distinction must be drawn between children and adults, for an act which would constitute contributory negligence on the part of an adult may fail to do so in the case of a child of young person, the reason being that a child cannot be expected to be as careful for his own safety as an adult. Where a child is of such an age as to be naturally ignorant of danger or to be unable to fend for contributory negligence with regard to a matter beyond his appreciation, but quite young children are held responsible for not exercising that care which may reasonably be expected of them.

Where a child in doing an act which contributed to the accident was only following the instincts natural to his age and the circumstances, he is not guilty of contributory negligence, but the taking of reasonable precautions by the defendant to protect a child against his own propensities may afford evidence that the defendant was not negligent, and is, therefore, not liable".^{xxxvii}

In the case of children, Courts have taken serious note of tender age and related psychological factors. "Conduct on the part of such child contributing to an accident may not preclude it from recovering in full in circumstances in which similar conduct would preclude a grown up person from doing so ... Negligence means want of ordinary care, and "ordinary care" must mean that degree of care which may reasonably be expected of a person in the plaintiff's situation.." said Lord Denman in *Lynch v, Nurdin*^{xxxviii}

In *Jones v. Lawrence*^{xxxix}, while delineating with the concept of culpable want of care by child Cumming Bruce, J. has held that a child of seven years and three months has the propensity to forget altogether what had been talked to him. He may become momentarily forgetful of the peril of the crossing of the roads. Therefore, the theory of contributory negligence cannot be applied.^{xl} In the case of *Macanmara v. E.S.B.*,^{xli} the Court observed that in cases where contributory negligence is alleged against a child it is the duty of the trial Judge to rule in each particular case whether taking into consideration the age and mental development of the child, it is expected of him to take some precaution of his own safety and consequently be capable of being guilty of contributory negligence^{xlii}. There are many instances of cases under the English law where the defense of contributory negligence has been negated in so far as small children are

concerned. In India also courts have recognized that generally speaking children cannot be imputed with contributory negligence^{xliii}

Contributory Negligence of Consumer in Medical Care

The general law of professional negligence is applicable to medical profession also, as it was held in *Indian Medical Association v. Shantha*^{xliv}. The apex Court in its judgment traced the back ground in the light of UN resolution on Consumer protection against which Consumer Protection Act was enacted by the Indian Parliament^{xlv}. In this case, service rendered by the doctor to his patient, was brought within the definition of 'service' under section 2(1)(o) of the Consumer Protection Act, 1986. In *Jacob Mathew's*^{xlvi} case, the Supreme Court explained the meaning of negligence in medical profession and discussed the difference between the concept of negligence in civil and criminal law and held that the negligence in civil law may not necessarily be negligence in criminal law and the element of mens rea must be shown to establish the criminal liability. In *Martin F D'Souza's* case^{xlvii}, the Supreme Court sought to protect the doctors from unnecessary harassment and laid down the guidelines to be followed by the consumer forum as well as police officials when they receive complaints of medical negligence.^{xlviii}

If the patient did not follow the advice of the doctor and this had a catalytic effect in causing injury, it is wrong to only blame the doctor for negligence. The defense of contributory negligence is available to the doctor in such cases. Contributory negligence is measured by the standard of a reasonable, prudent man, of similar education acting in similar socio-cultural environment^{xlix}.

Failure to provide complete medical history or to follow instructions will be a contributing factor in medical negligence cases. Sometimes the unexpected results may not be only due to negligence of the doctor but also due to negligence of patients or relatives. Such situations can be (a) Not coming for follow-up as per the advice of doctor; (b) Failure to follow the instructions given by the treating doctor; (c) Investigations advised by the doctor are not done by the patient; (d) Patient fails to take advice of a specialist and (e) patient leaves the hospital against medical advice. The liability for the damage in such cases is suitably divided between the doctor, patients and relatives. The burden of proof of is on the part of patient is on doctors.¹ Contributory negligence must be specifically pleaded. If it is not pleaded, it is open for the court to find that the plaintiff had been contributory negligent.^{li}

The general view of the physician-patient relationship is based on the assumption that the physician knowledge superior to that of the patient. This assumption is gradually fading over the years and the physician and patient are now placed on practically equal footing.^{lii} The increased knowledge and awareness of health care issues to the patient is considered by courts also.

In an operation for cataract intra-ocular lens was implanted but the patient did not turn up for follow up treatment .It was shown the procedure adopted by the doctor was wrong. Though there was loss of vision, the doctor was not held liable ^{liii}.In another case^{liv},complaint was liable to be dismissed on the ground of contributory negligence, where the complainant ,a minor boy, tampered with the plaster and gave movement to fractured elbow without waiting for the full period for waiting for the removal of plaster. Similarly in *Balwinder Kumar's* case,^{lv}the complainant removed the drainage pipe inserted in the wound for drainage purpose against medical purpose against medical advice and did not take follow up treatment, ignoring the instructions given to him. This was again held to be a clear case of contributory negligence to the extent of dismissing the complaint.

In another case^{lvi}, the complainant who had undergone surgery in left eye adopting vitrectomy and endo-laser, which is an accepted treatment was a discharged with a direction to come back on 22-11-1996.But he visited the hospital only on 14-12-1996.Doctor discovered that he is suffering from retinal detachment and referred him to another hospital, where he underwent an operation unsuccessfully. The West Bengal State Commission found that such deterioration is not uncommon after vitrectomy. In this case there was a delay in discovering it due to the negligent behavior of the patient. The complaint was dismissed.

In Malay Kumar Ganguly's case^{lvii} holding the claimant responsible for contributory negligence, the National Commission deducted 10% from the total compensation .The national commission observed “...even if we agree that there was interference by Kunal Saha during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the defendants. In spite of a possibility of him playing an overanxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of defendants is not diluted. To that extent, contributory negligence is not pertinent. It may, however, have some role to play for the purpose of damages.”

Observations

- The doctor-patient relationship had undergone sea change and corresponding changes are reflecting in doctor's liability also.
- The general law of professional negligence is applicable to medical profession also.
- A doctor is considered as a professional with expected standards of skill and observation. He is not infallible, neither God.
- The patient who is a 'consumer' of 'services' can approach the Consumer fora against negligent doctors, which will provide an expeditious remedy.
- Patients are expected to understand and follow the instruction of the doctors diligently.
- Contributory negligence of patients is a well-established defense in medical negligence cases
- However, Courts in India were conscientious in the use of this rule .Due weightage was given to factors like, age, social background and the mental status of the plaintiff before invoking this liability.
- Though there are cases where complaints were dismissed after finding that the injury was the result of complainant's own negligence, generally contributory negligence is considered at the time of calculation of damages.

Conclusion

As opined by the authors Alan Merry and Alexander McCall Smith^{lviii} Some of life's misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis. Application of contributory negligence principle appropriately is a task that require painstaking and careful judgment of the factual situation. Indian Courts have been doing a commendable job in this direction. Passing a comprehensive law in similar lines of Law Reform (Contributory Negligence) Act 1945 of England will be a great step easing this endeavor.

ⁱ ALAN MERRY AND ALEXANDER MCCALL SMITH, ERRORS, MEDICINE AND THE LAW 247-248, quoted in Dr. Suresh Gupta vs. Govt. Of N.C.T. Of Delhi & Anr (2004) 6 SCC 422.

ⁱⁱ Harrison v. Montgomery Cnty. Bd. of Educ., 295 Md. 442, 456 A.2d 894, *Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability*, Department of Legislative Services Office of

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- ^{vi} DAN B. DOBBS, THE LAW OF TORTS, § 199, at 494-95 (2000) Id at 360
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- ^{viii} Id at 692,693
- ^{ix} Green, *The Duty Problem in Negligence Cases*, 29 CoL. L RE. 255, 260 (1929) Id at 695
- ^x Id at 695
- ^{xi} 23 Pa. 147, 149-50 (1854) Id at 692
- ^{xii} Id at 692,693
- ^{xiii} D. Arthur Kelsey, *Social Compact as Law: The Workers' Compensation Act and the Wicked Sisters of the Common Law*, VBA NEWS J., Oct./Nov. 2005, at 13 supra note Peter Nash Swisher, *Virginia Should Abolish The Archaic Tort Defense Of Contributory Negligence And Adopt A Comparative Negligence Defense In Its Place*, University Of Richmond Law Review Vol. 46 359-371(2011). <http://lawreview.richmond.edu/wp/wp-content/uploads/2012/01/Swisher-461.pdf>
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- ^{xv} Turff vs. Warmann 2 C.B.N.S.740 Id at 171
- ^{xvi} *Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability*, Department of Legislative Services Office of Policy Analysis Annapolis, Maryland January 1-3(2004).
- ^{xvii} Coulter vs. Exp.Co. 56 NV.585 Id at 170
- ^{xviii} supra note 14 Gordas chakrabarti
- ^{xix} supra note 7 Flemings james jr
- ^{xx} 10 M. & W. 546, 548, 152 Eng. Rep. 588 (Ex. 1842).supra *Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability*, Department of Legislative Services Office of Policy Analysis Annapolis, Maryland January 1-3(2004).
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- ^{xxii} Smiley v. Atkinson, 12 Md. App. 543, 553, 280 A.2d 277, 283 (1971),supra note 118
- ^{xxiii} Ritter v. Portera, 59 Md. App. 65, 474 A.2d 556 (1984), supra note 118
- ^{xxiv} Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962); Riddell v. Little, 253 Ark. 686, 488 S.W.2d 34 (1972),quoted by Christy Comstock Arkansas ,Sonia Di Valerio,*Comparative/Contributory Negligence Joint and Sevearl Liability*,Commercial Transportation Litigation Committee 8-9 (2009).http://axilonlaw.com/wp-content/uploads/2012/04/50_State_Compendum_Final_reduced_size.pdf
- ^{xxv} *Contributory Negligence vs. Comparative Negligence*, The personal injury Lawyer Directory. <http://www.the-injury-lawyer-directory.com/>
- ^{xxvi} Carlson Vs. R.Co 96 MNN 504,104 NW.555,41.ra.(n.s) 349 113 Am St.Rep.655, GOURDAS CHAKRABARTI,THE LAW OF NEGLIGENCE 168-187 (1996)
- ^{xxvii} 85 Ill. 2d 1, 421 N.E.2d 886 (1981), Carol Isackson, *Pure Comparative Negligence in Illinois*, 58 Chi.-Kent. L. Rev. 599 (1982). <http://scholarship.kentlaw.iit.edu/cklawreview/vol58/iss2/12>
- ^{xxviii} *Contributory Negligence vs. Comparative Negligence*, The personal injury Lawyer Directory. <http://www.the-injury-lawyer-directory.com/>
- ^{xxix} supra note 14
- ^{xxx} Sm. Jeet Kumari Poddar And Ors. vs Chittagong Engineering AIR 1947 Cal 195

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- xxxⁱ AIR 1962 Pat 258
- xxxⁱⁱ Jang Bahadur Singh vs Sunder Lal Mandal And Ors AIR 1962 Pat 258
- xxxⁱⁱⁱ Rehana Rahimbhai Kasambhai vs The Transport Manager, Ahmedabad AIR 1976 Guj 37
- xxx^{iv} United India Insurance Co. Ltd vs K.V.Prema on 14 September, 2006. <http://indiankanoon.org/doc/461684/>
- xxx^v *Id*
- xxx^{vi} The Divisional Manager United India Insurance Company Ltd vs. Smt Madhulika Kumari And Another on 3rd August 2015. <http://indiankanoon.org/doc/165661785/>
- xxx^{vii} Halsbury Laws of England, Third Edition Volume 28 Para 98 at page 93, quoted in M.P. State Road Transport vs Abdul Rahman And Ors AIR 1997 MP 248
- xxx^{viii} (1841) 1 Q. B. 29(5), Pearson v. Coleman Bros. (1948) 2 K. B. 359, quoted in Delhi Transport Corporation vs Lalita AIR 1981 Delhi 558
- xxx^{ix} 1970 Acc CJ 358
- xl M.P. State Road Transport vs Abdul Rahman And Ors AIR 1997 MP 248
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- xlii AIR 1997 MP 248
- xliii Sh. Kishan Lal And Ors. vs Govt. Of Nct Of Delhi And Ors. on 3 July, 2007.
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- xl^v DR.JAGDISH SINGH AND VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 39-43(2ND ed.1999).
- xl^{vi} Jacob Mathew vs. State of Punjab and Another AIR 2005SC 3180
- xl^{vii} Martin F. D' Souza vs Mohd. Ishfaq on 17 February, 2009. <http://indiankanoon.org/doc/1092676/>
- xl^{viii} *Justice NV Ramana, Medical Negligence and Consumer Protection Act.* <http://www.ima-india.org/ima/news.php?nid=24>
- xl^{ix} DR.JAGDISH SINGH AND VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 39-43(2ND ed.1999).
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- ^{lv} Master Ashok Kumar vs. Agadi Nursing Home And Another, 1995 (I) CPR (Kar), 1995 (3) CPJ 142 (Kar), Y.V.RAO *Id*
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- ^{lvi} Tapas Basu vs. Dr.Sandeep Mitra 2005 CTJ 1282(WB). Y.V.RAO supra note 52
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