

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. _____ OF 2010
(Arising out of SLP(C) No.19165 of 2009)

Minor Marghesh K. Parikh

.....Appellant

Versus

Dr. Mayur H. Mehta

.....Respondent

J U D G M E N T

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 appeal preferred by the respondent under Section 19 of the Consumer Protection Act, 1986 (for short, 'the Act') was allowed and the order passed by the State Consumer Disputes Redressal Commission, Gujarat (for short, 'the State Commission') for payment of compensation of Rs.5,00,000/- to the appellant with interest @ 9% per annum was set aside.

3. The appellant was admitted in the hospital of the respondent on 31.10.1994 with the complaint of loose motions. After some laboratory tests, the respondent put him on medication and also injected glucose saline through his right shoulder. This did not improve the condition of the appellant, who started vomiting and having loose motions frequently. On 3.11.1994, the respondent is said to have administered glucose saline through the left foot of the appellant. In the evening, the parents of the appellant noticed swelling in the toe of his left foot, which was turning black. This was brought to the notice of the respondent, who stopped the glucose. On the next day, the parents of the appellant pointed out to the respondent that blackish discoloration had spread. Thereupon, the appellant was sent to one Dr. Chudasama, who was known to the respondent. Dr. Chudasama applied a small cut, removed black coloured fluid from the left toe of the appellant and gave some medicines. In the morning of 5.11.1994, it was noticed that the left leg of the appellant had become totally black up to the knee. Thereupon, he was taken to Vadodara. Dr. Ashwin Bhamar, who examined the appellant at Vadodara suspected that he had developed gangrene in his left leg and advised his admission in Bhailal Amin Hospital. The appellant was operated in that hospital and his left leg was amputated below the knee.

4. The appellant filed a complaint through his father and claimed compensation of Rs.10,00,000/- by alleging negligence on the part of the respondent. According to the appellant, even though the factum of swelling of the toe and blackening of the leg was brought to the notice of the respondent, he did not bother to get the appellant examined through an expert, which could save his leg. It was also pleaded that due to the respondent's failure to pay requisite attention, the appellant's left leg had to be amputated below the knee and he will suffer throughout his life.

5. In the written statement filed by him, the respondent claimed that the appellant was hospitalized for gastro-enteritis, dehydration acidosis and septicemia shock and mal-nutrition and anemia and seriousness of the case was communicated to his father. According to the respondent, treatment was given to the appellant keeping in view the laboratory reports and no glucose was administered after 2.11.1994. The respondent denied the allegation of negligence and pleaded that he had taken every possible care in treating the appellant and even got him examined by Dr. Chudasama despite the fact that his hospital was closed on account of holidays.

6. The State Commission did not accept the version of the respondent that the appellant had been brought to his hospital in a serious condition by observing that if this was so, there was no reason for him to stop medication and glucose. The State Commission noted that the case papers were produced by the respondent after a time gap of 6 years and that too after cross-examination of the complainant's father and vascular surgeon, Dr. Ashwin Bhamar, who was produced as an expert. The State Commission further noted that the respondent had not filed the affidavit of Dr. Chudasama, to whom the appellant is said to have been taken for further treatment. The State Commission concluded that the respondent had not exercised reasonable care while treating the appellant and awarded compensation of Rs.5,00,000/- with interest at the rate of 9% from the date of complaint. The relevant portion of the order passed by the State Commission is extracted below:

“After completion of oral arguments respondent has submitted written arguments of seven pages. In that many quotations from medicine text Book and Medical Journals have been cited. The crux of that is gangrene can take place because of so many reason, because of serious type of dehydration and septicemia also it can happen so only because of Glucose bottle this can take place this cannot be said. In this case patient had serious dehydration that could not be established by respondent. Because had that been a reality then the Glucose bottle could not be administered inter vein and if the condition of minor patient was this much serious then in five days not a single laboratory test was carried out that is beyond perception.

Moreover, it is mentioned in these quotations that gangrene can happen to any leg or hand whereas here it is clear fact that where the bottle was given to the same leg it has happened. Moreover the Vascular Surgeon Dr. Bhamar says in his cross-examination that “it has not come in my examination that if there is vomiting and loose motion it results in gangrene.” Thus the person like Vascular Surgeon having an experience given contrary opinion to the quotations submitted by the respondent. Moreover in his affidavit Dr. Bhamar clearly states that in this case because of the Glucose bottles gangrene has taken place as against this the respondent has not produced any opinion of expert doctor or Dr. Chudasama on oath. In our honest opinion the value of quotations is negligible as against the opinion of expert doctor. Because opinion of expert doctor explains these quotations and is given.

It is necessary to note here that respondent submits that the treatment given by respondent himself and symptoms recorded by him like swelling, blackness of the skin and in support to the condition of the patient at every stage he took advice from Dr. Chudasama but here no affidavit of Dr. Chudasama is produced. Therefore the truthfulness of this submission cannot be verified. Moreover as stated above after admitting in the hospital no tests have been carried out that also catches the attention. Thus what Dr. Chudasama said, was his diagnosis what he had advised when this advice was given these questions are remaining unanswered.

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Thus the Glucose bottle was given to the left leg to it swelling came and skin became black and that resulted into gangrene regarding that no proper action was taken and because of that the one and half year old child had to loose leg below the knee is proved with support of affidavit of an expert the Vascular Surgeon. As against this, respondent has produced his reply and only certain quotations. The most important thing is that respondent is not caring to produce the affidavit of such surgeon Dr. Chudasama whose opinion that was taken. Considering all these facts and circumstances as per our honest opinion clear cut defective service on the part of respondent is established."

7. The National Commission allowed the appeal preferred by the respondent and set aside the order of the State Commission only on the ground that in his cross-examination, Dr. Ashwin Bhamar admitted that there could be ten other reasons for gangrene. This is evident from the following portion of the order of the National Commission:

"Copy of the affidavit of Dr. Bhammar is at pages 121 to 123 and his cross-examination is at pages 124 & 125 in Vol.IV of the paper book. To be noted that besides the affidavit of Dr.

Bhammar only the affidavit of the father of respondent was filed by way of evidence. In this affidavit Dr. Bhammar has averred that he has been practicing as vascular surgeon at Baroda and has been attending Bhailal Amin General Hospital. On 05.11.1994, respondent was brought to him by his father for treatment. He found gangrene on his left leg and advised amputation of left leg immediately. Reason for gangrene may be wrong application of glucose bottle on the left leg. In cross-examination, he admitted that there could be 10-12 other reasons for gangrene. It did not come to his notice that gangrene may occur if a patient has diarrhea and vomiting. In this case, he can not definitely say what was the reason for gangrene. In the impugned order, the State Commission has omitted to refer the admissions made to the said effect by Dr. Bhammar. As may be seen from the averments made in complaint, the case of the respondent is that wrong application of glucose on left leg of on 3.11.1994 had caused gangrene. In the written version, the appellant has pleaded that respondent was not given any intravenous fluids from 11.30 pm on 02.11.1994 to 04.11.1994. Assuming this plea to be false and accepting the case of the respondent that he was given intravenous glucose on 03.11.1994, still in view of the admissions referred to above made by Dr. Bhammar, the appellant cannot be held guilty of medical negligence. Having reached this conclusion the other part of the submission, advanced on behalf of the appellant, need not be gone into. Order under appeal thus, cannot be legally sustained and deserves to be set aside.

8. In **Jacob Mathew v. State of Punjab** (2005) 6 SCC 1, a three-Judge Bench, considered the question whether charges could be framed against the appellant under Section 304A read with Section 34 of the Indian Penal Code on the allegation of negligence. The three-Judge Bench highlighted the jurisprudential distinction between civil and criminal liability in cases of

medical negligence, considered various facets of negligence by professionals and laid down several propositions including the following:

“(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Law of Torts*, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: “duty”, “breach” and “resulting damage”.

(2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would

fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in *Bolam case*, WLR at p.586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.”

9. In **Martin F. D’Souza v. Mohd. Ishfaq** (2009) 3 SCC 1, a two-Judge Bench referred to the judgment in **Jacob Mathew’s** case and proceeded to equate criminal complaint against doctor or hospital with a complaint filed

under the Act. This is evident from para 106 of the judgment, which is extracted below:

“We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew case, otherwise the policemen will themselves have to face legal action.”

10. In **V. Kishan Rao v. Nikhil Super Specialty Hospital and another** (2010) 5 SCC 513, the Court noted that the proposition laid down in **Martin D’Souza’s** case is contrary to the three-Judge Bench judgment in **Jacob Mathew’s** case and observed:

“We are of the view that the aforesaid directions in *D’Souza* are not consistent with the law laid down by the larger Bench in Mathew. In Mathew the direction for consulting the opinion of another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the Consumer Fora. The reason why the larger Bench in Mathew did not equate the two is obvious in view of the jurisprudential and conceptual difference between

cases of negligence in civil and criminal matter. This has been elaborately discussed in Mathew.”

11. In the light of the above noted judgments, it is to be seen whether the finding recorded by the State Commission that the respondent did not exercise due diligence and skill in treating the appellant was correct and the National Commission committed an error by upsetting the order of the State Commission. A critical analysis of the order of the State Commission shows that it did not accept the respondent's version that the appellant had been brought to his hospital in a serious condition and he was suffering from gastro-enteritis, dehydration acidosis and septicemia shock and mal-nutrition and anemia by observing that if that was so, there was no valid reason for the respondent to stop medication and withdraw glucose on 2.11.1994. The State Commission also took serious view of the respondent's conduct in producing the case papers after a gap of 6 years from the date of filing the complaint and that too, after the appellant's father and Dr. Ashwin Bhammar had been cross-examined. The State Commission then referred to the statement of Dr. Ashwin Bhammar and opined that in view of his statement, the printed material produced by the respondent cannot be relied for denying relief to the appellant. The State Commission concluded that there was deficiency in service on the part of the respondent and directed him to pay

compensation to the appellant. The National Commission did not advert to these important aspects and allowed the appeal on the solitary ground that on his cross-examination, Dr. Ashwin Bhamar had admitted that there could be ten to twelve other reasons for development of gangrene.

12. In our view, the National Commission was duty bound to pay serious attention on the respondent's failure to produce the case papers for 6 long years and called upon him to explain why the record pertaining to the treatment given to the appellant was held back from the State Commission till the complainant's evidence was virtually over. The case papers/bed ticket maintained by the hospital of the respondent would have disclosed the line of treatment adopted by him. Why he did not produce those papers along with reply to the complaint or at least before commencement of the evidence of the appellant is inexplicable. By withholding those papers till the completion of the evidence of Dr. Bhamar, the respondent appears to have made an attempt to mislead the State Commission about the steps taken by him for treating the appellant. Equally intriguing was respondent's failure to file affidavit of Dr. Chudasama to whom he claims to have taken the appellant for treatment. The respondent did try to fill in this lacuna by filing affidavit of Dr. Chudasama before the National Commission. The

latter should have enquired as to why he had not filed such affidavit before the State Commission or examined him as a witness before the State Commission. These omissions on the part of the National Commission are extremely serious and have resulted in failure of justice.

13. For the reasons stated above, the appeal is allowed. The impugned order is set aside and the matter is remanded to the National Commission for fresh disposal of the appeal filed by the respondent. Since, the matter is almost 16 years old, we request the National Commission to decide the appeal within a period of 6 months from the date of receipt/production of copy of this judgment. The parties are directed to appear before the National Commission on 8th of November, 2010. They may file additional affidavits and documents within next four weeks.

.....J.
[G.S. Singhvi]

.....J.
[Asok Kumar Ganguly]

New Delhi
October 26, 2010