(2006) 11 GAU CK 0047

Gauhati High Court (Agartala Bench)

Case No: None

Dr. Parimal Chakraborty and etc.	APPELLANT
Vs	
Smt. Bijaya Paul and Others	RESPONDENT

Date of Decision: Nov. 22, 2006

Acts Referred:

- Consumer Protection Act, 1986 - Section 2
- Penal Code, 1860 (IPC) - Section 304A

Citation: AIR 2007 Guw 72 : (2006) GLT 501 Supp

Hon'ble Judges: R.B. Misra, J; A.B. Pal, J

Bench: Division Bench

Final Decision: Allowed

Judgement

R.B. Misra, J.

These two appeals have been preferred against the judgment and order dated 23-7-2001 of the learned single Judge of this Court passed in W.P. (C) No. 41 of 1999. Therefore, these two appeals are being disposed of by a common judgment & order.

2. By the. impugned order dated 23-7-2001, the learned single Judge while entertaining the Writ Petition (Civil) No. 41 of 1999 filed by Smt. Bijaya Paul regarding claim of compensation in reference to the death of her husband on the allegation of negligence in medical treatment in G. B. Hospital, Agartala, has awarded a compensation of Rs. 1,00,000/- to the writ petitioner with a direction to recover the said amount from the erring doctors, namely Dr. Dhruba Kishore Paul and Dr. Parimal Chakraborty of Kakraban Primary Health Centre after making a formal enquiry. Apart from that medical department was expected to initiate sepa-rate disciplinary proceeding against the above two doctors for commission of gross misconduct in attending the patient in Government Primary Health Centre at Kakraban.

3. It has been argued on behalf of the writ petitioner/respondent that the husband of the writ petitioner Krishna Kishore Paul, aged about 60 years sustained severe burnt injury due to fire accident in his house in the night of 23-10-1997 and he was brought to Kakraban Primary Health Centre, South Tripura. The attending doctor, namely, Dr. Dhruba Prasad Paul, appellant in Writ Appeal No. 102 of 2001 though admitted the patient but neither administered medicine and in the following morning said doctor left the Primary Health Centre without handing over the charge of the patient to any other doctor nor prescribed any medicine to the patient. On 24-1-1997 another doctor, namely, Dr. Parimal Chakraborty, appellant of Writ Appeal No. 101 of 2001 initially refused to lake care of the patient on the ground that patient was admitted under the superintendence/appellant Dr. Dhruba Prasad Paul. However, on request said appellant Dr. Parimal Chakraborty attended the patient and administered few medicines. The appellant Dr. Dhruba Prasad Paul did not resume his duty till 4-2-1997. Since the condition of the patient had been deteriorated and despite the writ petitioner''s request no proper treatment was extended, the writ petitioner approached to the Hon''ble Health Minister and at his intervention the patient was shifted to G.B. Hospital where he was admitted in Male .Snrgical Ward No. II, but the attending doctor, respondent No. 6. Dr. Pratap Sanyal did not take care of the patient and the dressing on the injuries/ wounds had to be managed privately spending expenditure by the writ petitioner. Even the doctor at G.B. Hospital particularly. Dr. Pratap Sanyal, respondent No. 6 herein advised that unless the patient is shifted to ''Care & Cur'' a privately managed Nursing Home, Agartala it would be very difficult for him to provide the patient better treatment in the hospital. Unfortunately, the writ petitioner''s husband died on 1-3-1997.

4. The State of Tripura, the Director of Health Services and the Superintendent. G.B. Hospital had preferred a joint counter-affidavit contending that when the injured was brought to Kakraban Primary Health Centre, the doctors advised shifting of the patient to Tripura Sundari Hospital, Udapur, But the wife of the deceased Krishnan Kishore Paul/the writ petitioner did not concede to the advice and as such the doctors extended the treatment utmost to their endeavour. Subsequently at the intervention of the Hon''ble Health Minister the patient Krishna Kishore Paul was shifted to G.B. Hospital. The authorities of the State Government have denied the claim of compensation as according to them thr death of Krishna Kishore Paul was not due to negligence of any doctor. It has also been noted that the appellants were on duty at different times and treated the patient for about nine days, whereafter, the patient was referred to G.B. Hospital where he was treated for another twenty six days before he died.

5. The appellants, instead of appearing before the Court, submitted their defence to the State Government and on that reference the State Government and authorities have submitted their counter-affidavit protecting the interest of the present appellants. However, on the materials available on records, the learned single Judge has allowed the writ petition with about directions holding the two appellants guilty

of negligence and awarded the compensation as indicated above.

6. It has been submitted on behalf of the appellants that the issue of negligence or claim for compensation could have been agitated in a civil Court of competent jurisdiction or the issue in question could have been agitated before the Consumer Forum specificaly'' constituted under the Consumer Protection Act. According to the learned Counsel for the appellants the claim of compensation involves the disputed question of fact which cannot be resolved by the High Court in the writ jurisdiction, as the writ petition was filed in the year 1999, when the Consumer Protection Act and the Consumer Forums were already available in the State and even if to avoid expenses of, the civil Court proceeding the writ petitioner could have approached to the Consumer Forum where the appellants could have been allowed to adduce adequate materials and evidences and could have availed the opportunity of placing their stand. Even Consumer Forum could have provided the opportunity of taking the materials on record and could have invited expert opinion to deal with such material of vicarious liability, under tort or for negligence, if any or for compensation.

7. The learned Counsel for the appellants has referred decision of Hon''ble Supreme Court in Jacob Mathew Vs. State of Punjab and Another, it was observed by the Supreme Court that for fixing liability of doctor u/s 304-A of IPC in reference to the death of a patient caused due to criminal medical negligence of a particular doctor, it must be shown that accused doctor did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. It has also to be looked into that hazard taken by accused doctor should be of such a nature that injury which resulted was most likely imminent. It. has also to be looked into that the death of a person due to administration of medicine of which knowledge not possessed by doctor, though professed expressly or impliedly. In respect of prosecution of criminal offence against a doctor detailed guideline has been laid down in the case of Jacob Mathew (supra) where it was observed as below:

The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly". To impose criminal liability u/s 304-A, the Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another''s negligence. It must be the cause causans; if is not enough that it may have been the causa sine qua non.

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To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

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A doctor who administers a medicine known to or used in a particular branch or medical profession impliedly declares that he has knowledge of that branch of science and it he does not, in fact, possess that knowledge, he is prima facie acting with rashness or negligence.

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A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in Government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test. (1957) 1 All ER 118 121 D-F (set out in Para 19 herein), to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

8. It was further held by the Supreme Court in Jacob Mathew AIR 2006 SC 3180 (supra) that for negligence to amount in a criminal offence, element of mens rea must be shown to exist. It is recklessness that constitutes the mens rea in criminal negligence. It was also held:

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. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law 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 of prosecution.

9. In respect of professional negligence and in the matter of tort when actionable, the Supreme Court has laid down as below:

a professional may be held liable for negligence either (1) when he was not possessed of the requisite skill which he professed to have possessed, or (2) when he did not exercise, with reasonable competence in the given case, the skill which he did possess. Standard to be applied would be that of an ordinary competent person exercising ordinary skill in that profession. Test for professional negligence laid down in Bolam case (1957) 2 All ER 118 121 D-F held applicable in India. Professional negligence distinguished from occupational negligence.

10. The Supreme Court has also held in the case of Jacob Mathew AIR 2006 SC 3180 (supra) that the deficiency in service in reference to Section 2(1)(g) & (o) of Consumer Protection Act, 1986 is very widely expressed and defined and provides a forum for redressal of grievances against professionals including doctors.

11. The decision of Jacob Mathew was considered in subsequent judgment of Supreme Court in State of Punjab Vs. Shiv Ram and Others, where, the Supreme Court has observed that a woman had undergone a sterilization operation performed by a surgeon and when the woman became pregnant and delivered a child, even then such pregnancy cannot be held unwanted pregnancy and the child is an unwanted child. In such matter in respect of negligence under tort the Supreme Court has held that claim under tort can be sustained on parameters of Bolam test (1957) 2 ALL ER 118 121 D-F (as set out in Para 19 of Jacob Mathew''s case).

12. The vicarious liability under torts in respect of doctors employed by the State would arise only if doctors are found to be negligent.

The basis of liability of a professional in tort is negligence. Unless that negligence is established, the primary liability cannot be fastened on the medical practitioner. Unless the primary liability is established, vicarious liability on the State cannot be imposed. In the present case, the vicarious liability of the State is not denied if only its employee doctor is found to have performed the surgery negligently and if the unwanted pregnancy thereafter is attributable to such negligent act or omission on the part of the employee doctor of the State.

13. The Supreme Court subsequently followed its own decision of State of Punjab Vs. Shiv Ram and Others, in State of Haryana and Others Vs. Raj Rani, wherein for a case deciding the medical negligence under torts in the matter of sterilization operation the doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise. It was further held that in the absence of proof of negligence, the surgeon cannot be held liable to pay compensation, then the question of the State being held vicariously liable also would not arise.

14. We have heard learned Counsel for the parties and perused the documents. In the matter of death of husband of the writ-petitioner, any claim or any negligence on the part of the doctor and in respect of any vicarious liability under tort for negligence on the part of the doctor and for any deficiency in service, the different elements, factors are involved, the appraisal of evidences are to be made and many of the disputed questions are also to be dealt with. For that purpose the proper course could also have been the civil Court. However, for dealing deficiency in service, the Consumer Protection Act, 1986 has specifically been provided which is the appropriate forum for redressal such grievances or for claim of compensation or for deficiency in service against professionals including doctors. Therefore, no scope is available to deal such issues and grievances of the claimant in the writ petition by the High Court and to assess the compensation involving disputed questions of fact.

15. In the facts and circumstances of the case, we are of the considered view that the learned single Judge was not legally correct to adjudicate the claim of compensation for alleged negligence in reference to the death of the husband of the writ-petitioner and in reference to the vicarious liability under tort holding the State vicariously liable declaring doctors to be negligent in their duties.

16. Both the appeals are allowed. The impugned judgment and order dated 23-7-2001 passed by the learned single Judge of this Court in W.P. (C) No. 41 of 1999 is set aside without making any comments on the merits of the case of the writ-petitioner, however the writ-petitioner shall be at liberty to approach the appropriate forum for adjudication of the matter if so advised.