

(2013) 04 KL CK 0085

High Court Of Kerala

Case No: A.S. No. 199 of 1998 and connected cases

Ummer, N. (Dr.)

APPELLANT

Vs

Hameed, K.M. and Others

RESPONDENT

Date of Decision: April 11, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 33 Rule 10

Citation: (2013) 2 ILR (Ker) 535 : (2013) 2 KHC 450 : (2013) 2 KLJ 568

Hon'ble Judges: Thottathil B. Radhakrishnan, J; B. Kemal Pasha, J

Bench: Division Bench

Advocate: A. Mohamed Mustaque, Sri Saji Varghese and Sri Sheji P. Abraham, for the Appellant; S.V. Balakrishna Iyer (Senior Advocate) and Sri P.B. Krishnan, for the Respondent

Judgement

B. Kemal Pasha, J.

These appeals and cross-objection arise from the judgment and decree in a suit for compensation on account of alleged medical negligence, leading to the death of a patient. When Asia fell ill, she along with her husband, the first plaintiff, approached the first defendant doctor, who was the Medical Director and the 2nd defendant Orthopedic and General Surgeon of the Kasaragod Nursing Home for treatment. A surgery was advised and consequently she was admitted at the Kasaragod Nursing Home on 24-9-1989. A surgery was conducted on her by the 2nd defendant on 25-9-1989 and tissues were removed for biopsy. Biopsy was conducted by the 3rd defendant, M.D. Pathologist. It is alleged that the 3rd defendant had wrongly diagnosed her illness as Tuberculosis, and gave Ext. A-5 report to that effect. Based on the said diagnosis, defendants 1 and 2 continued the treatment and administered medicines for Tuberculosis. She was discharged on 30-9-1989. Her condition became deteriorated day by day and then the first plaintiff took her to Malikdinar Hospital, Kasaragod. They advised her to go to the Kasturba Medical College, Manipal. On investigation at Kasturba Medical College, Manipal, and on

pathological examination, the illness was diagnosed as Synovial Sarcoma (a form of cancer). By that time, the disease had affected her lungs, because of want of proper treatment in time. The deceased died on 19-9-1990, leaving her husband, the first plaintiff and their minor children, plaintiffs 2 to 4. Alleging medical negligence on the part of defendants 1 to 3, the plaintiffs have claimed an amount of Rs. 1,50,000 with interest as compensation.

2. Defendants 1 and 2 filed a joint written statement contending that the deceased had approached the 2nd defendant during the first week of September, 1989 for consultation. Blood test was conducted. X-ray was taken on 4-9-1989. As the results were not conclusive, they referred her to Doctor Sudhakara Shetty, Professor of Orthopedics at the Kasturba Medical College, Manipal. From there also the opinion was that it could be Tuberculosis and she was advised to biopsy test, thereby she came back to the Kasaragod Nursing Home. She was admitted there and a surgery was conducted on 24-9-89 and tissues were taken for biopsy. Tissues were sent for biopsy to the Kasaragod Diagnosis Centre, and the biopsy test was conducted by the 3rd defendant. The 3rd defendant gave the report that the symptoms were suggestive of Tuberculosis. Treatments were continued and she was discharged on 30-9-1989. She came again on 3-10-1989 for removal of suture. The 2nd defendant prescribed medicines for five days for Tuberculosis. Again she came back on 8-10-1989. The 2nd defendant advised her to approach the first defendant as the symptoms were suggestive of Tuberculosis. The first defendant prescribed medicines for Tuberculosis. Again she went to the first defendant on 14-10-1989. The same course of medicines was advised for five more days. On 2-1-1990 she again came back to the 2nd defendant. He again prescribed medicines for Tuberculosis for five more days and hip X-ray was taken. Blood examination was also conducted.

3. The 3rd defendant filed a written statement contending that the deceased had approached the 2nd defendant with a complaint of pain at the trochanter region. The 2nd defendant took tissues from that part and they were brought to the 3rd defendant. He conducted histopathological examination of the tissues and gave the result that features are suggestive of Tuberculosis. After taking first course of treatment from defendants 1 and 2, she has not taken the follow up treatments. She was admitted at the Kasturba Medical College, Manipal by the end of March, 1990 and discharged on 9-4-1990. The 3rd defendant was not aware whether she was suffering from cancer. From 9-4-1990 she has not taken any treatment. The 3rd defendant was covered by an insurance policy issued by the supplemental 4th defendant towards claims arising from professional negligence.

4. Based on the claim of indemnity by the 3rd respondent as revealed in his written statement, the supplemental 4th defendant insurance company was impleaded. The supplemental 4th defendant filed a written statement taking up the contentions in tune with those resorted to by the 3rd defendant.

5. The court below found professional negligence on the part of the 3rd defendant which has resulted in the death of the deceased thereby constituting tortious liability on the part of the 3rd defendant. The court below assessed the damages at Rs. 75,000 and ordered the 3rd defendant to pay the same and further ordered the supplemental 4th defendant to indemnify the 3rd defendant.

6. The 3rd defendant and supplemental 4th defendant have preferred A. S. 199 of 1998 and A. S. No. 212 of 1998 respectively. Dissatisfied with the quantum of compensation fixed by the court below, the plaintiffs have filed the cross objection in A. S. 199 of 1998. In the course of hearing, as we felt that the insurance policy issued by the supplemental 4th defendant covering the 3rd defendant for claims arising out of professional negligence was also required to be marked in evidence, the same was called for and marked as Ext. X-2.

7. The learned counsel for the appellants have argued that there is no evidence in this case to prove that the deceased died on account of any negligence from the part of the 3rd defendant. It was also argued that the diagnosis made by the 3rd defendant could not be treated as a professional negligence, as the said diagnosis was made with the skill and knowledge which he had. It was also argued that there was no guarantee that the deceased could have lived for more period even if the 3rd defendant had diagnosed the illness as synovial sarcoma.

8. We have noticed that the 3rd defendant has not cared to mount the box to depose in support of the contentions resorted to by him in the written statement. It is evident that he has conveniently avoided it, for evading explanation to unpleasant questions in cross-examination. The fact that Ext. A-5 report of biological examination of the biopsy test was furnished by the 3rd defendant in respect of the tissues taken from the deceased in the surgery on 24-9-1989, is not in dispute. Even now, the 3rd defendant stands with his diagnosis of such pathological examination "as suggestive of Tuberculosis". The fact that defendants 1 and 2 as well as the deceased were made to believe the illness of the deceased as Tuberculosis on account of Ext. A-5 report of the 3rd defendant, is also not in dispute. The appellants are not challenging the diagnosis made by P.Ws. 2 and 3 at the Kasturba Medical College Hospital, Manipal as synovial sarcoma. Synovial sarcoma is a type of cancer relating to joints of human body.

9. It has to be noted that the surgery was conducted by the 2nd defendant on the deceased on 25-9-1989 and tissues were removed for biopsy. The biopsy was conducted by the 3rd defendant, who furnished Ext. A-5 report to the effect that the features were suggestive of Tuberculosis. Thereafter, defendants 1 and 2 continued to treat the deceased for Tuberculosis. Even though the 3rd defendant has contended that the deceased had not turned up for follow up treatment after taking the first course of medicine, the contentions of defendants 1 and 2 reveal otherwise. According to defendants 1 and 2, she was discharged on 30-10-1989 and medicines were prescribed for five days. She came back on 8-10-1989. Medicines for

Tuberculosis were prescribed. She came back on 14-10-1989 and medicines for 5 more days were prescribed. Again on 2-1-1990, she came back to the 2nd defendant, and medicines for five more days were given. Matters being so, the contention resorted to by the 3rd defendant that the deceased had discontinued the treatment after the first course of medicine and has not made the follow up treatments, is false. It is true that defendants 1 and 2 were misguided by the opinion expressed by the 3rd defendant through Ext. A-5.

10. The next surgery conducted on the deceased was on 26-3-1990 at the Kasturba Medical College Hospital, Manipal. The pathological examination of biopsy conducted by P.W. 3 who was the head of the Department of Pathology at the Kasturba Medical College, Manipal proved the illness of the deceased as synovial sarcoma. She was referred to P.W. 2 of the very same Medical College on 6-4-1990. The examination conducted by him confirmed the disease as synovial sarcoma. P.W. 2 took the chest X-ray of the deceased on 5-4-1990, which showed multiple secondary deposits in both her lungs which were clear indications of the advanced stage of cancer.

11. Ext. A-A is prescription dated 22-1-1990 issued by the 2nd defendant to the deceased in which also it is stated "old Tuberculosis hip". Ext. A-5 is the histopathological report furnished by the 3rd defendant on 30-9-1989 in respect of the specimen received on 25-9-89 from the deceased Asia. The findings noted in Ext. A-5 are,

Section shows area of necrosis and fibrous area with chronic inflammatory lymphocytets, epetheloid cells and langhan"s type of giant cells.

Features are suggestive of tuberculosis.

12. The 3rd defendant has not cared to mount the box to explain as to how he had arrived at such a conclusion and findings. P.W. 2, Dr. K. Koteswar Rao of the Department of Radio Therapy of the Kasturba Medical College, Manipal proved Ext. X-1 record relating to the out-patient and in-patient in respect of the deceased, initially she was admitted under the orthopedic surgeon with complaints of pain and swelling on the left hip area. The surgery was conducted on 26-3-1990. She was referred to P.W. 2 on 6-4-1990 for further line of treatment with the oncologist. The post operate diagnosis was made as synovial sarcoma of left hip bone which is a type of cancer related to the joint area. The consultation record dated 6-4-1990 which is available in Ext. X-1 treatment records clearly reveals that even prior to the histopathological examination the disease was suspected to be synovial sarcoma left greater trochanter with multiple lung secondaries. It was recommended that the case would be reviewed with the final histopathological report for consideration of chemotherapy (palliative).

13. Ext. X-1(a) is the X-ray report of the deceased. According to P.W. 2. clear message was given to the patient and the person who had accompanied her, that further

treatment in the case of the deceased could only be of palliative in nature.

14. P.W. 3 is the Head of Department of Pathology at the Kasturba Medical College, Manipal. Ext. X-1(b) is the histopathology report of the deceased, prepared and furnished by P.W. 3, which shows,

The site of biopsy is noted as "inflamed brusae" over the trochanter left side. The section showed tumour composed of small round to oval cells with scanty cytoplasm and vesicular folded nucleus arranged in sheets and alveolar pattern separated by thin walled capillaries. In areas spindle shaped cells are seen. Mitosis are 4-5/HPF. Areas of necrosis and lymphatic emboli are seen. Periphery shows atrophic muscle fibres and haemosiderin pigment.

The result of the analysis was that it was a case of synovial sarcoma. According to P.W. 3, the illness of the deceased was diagnosed to be synovial sarcoma. The histopathology examination by P.W. 3 did not show any evidence of tuberculosis and it showed only malignant tumour.

15. Ext. A-11 is another histopathological report in respect of the deceased prepared by P.W. 3. Ext. A-11 is dated 1-11-1990, and therefore, the said report is after the death of the deceased. P.W. 3 prepared the said report on the basis of the examination of the slide that was tested by the 3rd defendant through which he had allegedly prepared Ext. A-5 report. According to P.W. 3, the said slide was received for second opinion and that the said original slide from Kasaragod was tested by her. P.W. 3 has given clear opinion that the said slide on examination also did not show any symptoms of tuberculosis. In Ext. A-11 it has been stated that there is no evidence of tuberculosis on the section and what could be suggested is only synovial sarcoma. It has also been stated in Ext. A-11 that the said slide was of poor quality. It has to be noted that the findings in Ext. A-11 by P.W. 3 are almost the same as contained in Ext. X-1(b). In spite of the poor quality of the said slide, according to P.W. 3, what could be suggested is only synovial sarcoma and not tuberculosis. From the evidence of P.Ws. 2 and 3 it has clearly come out that the deceased showed the symptoms of synovial sarcoma only and not that of tuberculosis. On a perusal of Exts. A-5, X-1(b) and A-11 it is evident that the 3rd defendant had misread the microscopic findings in respect of the biopsy of the deceased. The findings in Exts. X-1(b) and A-11 by P.W. 3 are almost the same, whereas, the microscopic findings entered by the 3rd defendant in Ext. A-5 regarding the very same slide are totally different. It cannot be believed that the very same slide can give two separate findings on two different microscopic examinations. It is evident that the 3rd defendant had miserably failed to make a proper reading of the findings on microscopic examination of the slide.

16. There is no challenge with regard to the competence of P.W. 2 and P.W. 3 as experts on the field of Oncology and Pathology. They can clearly diagnose and conclude the disease of the deceased as synovial sarcoma. At the same time, it is

evident that the 3rd defendant had made a wrong diagnosis in Ext. A-5 regarding the illness of the deceased as tuberculosis, as a result of which, the deceased who was a patient suffering from synovial sarcoma was treated for tuberculosis by defendants 1 and 2.

17. It has clearly come out that this is not a case wherein there could be two opinions regarding the illness of the deceased on pathological examination. The very same slide cannot have two readings. The microscopic findings on the examination of the slide made by the 3rd defendant as revealed in Ext. A-5 and the microscopical findings entered by P.W. 3 on reading the very same slide as shown in Ext. A-11 are totally different. The microscopical findings can be entered by a Pathologist correctly with an ordinary skill. It is not a case wherein there can be two findings.

18. The learned counsel for the 3rd defendant as well as the supplemental 4th defendant have argued that the stage of illness of synovial sarcoma, which the deceased was suffering from, at the time of pathological examination by the 3rd defendant had not been ascertained and therefore, there was no guarantee that the deceased could have lived further or could have been cured even if the illness was diagnosed as synovial sarcoma by the 3rd defendant. Of course, nobody can decide the duration of the life of a human being or living thing. One can only try to save or prolong the life of a human being by administering proper medicines. The deceased who was suffering from synovial sarcoma was treated with medicines for tuberculosis on the wrong diagnosis by the 3rd defendant in Ext. A-5. The 3rd defendant cannot be heard to say that there is no guaranty that the deceased could have lived further or her disease could be cured even if it was ascertained that she was suffering from synovial sarcoma by the 3rd defendant. It has to be noted that the 3rd defendant had made the pathological examination through which he prepared and furnished Ext. A-5, more than six months back to the pathological examination by P.W. 3. Nobody can successfully contend that the said period of six months was not crucial.

19. The lack of application of proper skill which the 3rd defendant had possessed at the time of the pathological examination by him through which he had prepared Ext. A-5 can clearly be categorised as medical negligence from the part of the 3rd defendant. Had the disease could be ascertained as synovial sarcoma at the stage of examination by the 3rd defendant, even from commonsense it can be stated that she could have lived long or illness could have been cured on proper treatment for synovial sarcoma from the very beginning. Of course, it is correct that, nobody can predict the duration of the life of a human being. But, that does not mitigate the gravity of the professional negligence from the part of the 3rd defendant.

20. In [Jacob Mathew Vs. State of Punjab and Another](#), it was held in paragraph 19:

The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of 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 necessary for every professional to possess the highest level of expertise in that branch which he practices.

21. In *Bolam v. Friern Hospital Management Committee* (1957) 1 W.L.R. 582, it was held:

A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

The degree of skill and care required by a medical practitioner is stated in Halsbury's Laws of England (Fourth Edition, Vol. 30, Para 35) as follows:

The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.

22. Relying on the decision in *Whitehouse & Jordan* (1981) 1 ALL. E.R. 267, the Apex Court in [Spring Meadows Hospital and Another Vs. Harjol Ahluwalia through K.S. Ahluwalia and Another](#), held:

The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence.

23. In *Jacob Mathew v. State of Punjab* (supra) it was held that the test for determining medical negligence as laid down in *Bolam v. Friern Hospital Management Committee* (1957) 1 W.L.R. 582, holds good in its applicability in India.

24. In [Kusum Sharma and Others Vs. Batra Hospital and Medical Research Centre and Others](#), it was held:

The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

25. Applying the principles enunciated through the precedents discussed above, it can safely be concluded that a medical professional is expected to bring reasonable degree of skill and knowledge and he must exercise a reasonable degree of care. What is expected from him is neither the very highest nor the very low degree of care and competence. In the present case, no doubt, the 3rd defendant has failed to exercise a reasonable degree of care in noting down the symptoms in the microscopic examination. Even without the highest degree of competence, he could have noted down the microscopic findings which is expected from an expert in pathology by applying ordinary skills. By applying the broad principles of preponderance of probabilities, the case of P.W. 1 that the deceased could have lived long, had her disease been not erroneously identified as tuberculosis by the 3rd defendant, is only to be believed.

26. When a person who possesses sufficient qualifications in the field, is ready to give medical advice and treatment as an expert in that field, he impliedly undertakes that he possesses all sufficient skill and knowledge for such medical advice or treatment. Such a person has a duty to diagnose the illness and to decide the treatment to be given and the proper medicines to be administered. He has to show a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. What is expected is neither the very highest, nor the very low degree of care and competence required in such particular circumstances. The 3rd defendant who had offered himself as an expert in Pathology should have been shown the minimum degree of care in conducting biopsy test and in diagnosing the disease. When the 3rd defendant has evidently failed in the exercise of such a degree of care, he has committed professional negligence and therefore, he is liable to compensate the plaintiffs on account of the untimely death of the deceased.

27. It is a fact that the young lady had to meet with her untimely death on account of the erroneous diagnosis by the 3rd defendant. At the time of her death, the deceased was aged 25 only. According to P.W. 1, the deceased was a tailor by profession and was getting an income of Rs. 1,000/- Rs. 1,200 per month. In the cross-examination of P.W. 1, there was no challenge with regard to the job or income of the deceased. The yearly income of the deceased can be considered as Rs.

13,000. Her contribution to the family after deducting her personal expenses can be considered as Rs. 9,000 per annum. Considering the age and dependency, the multiplier of 18 can be considered. The total claim of the plaintiffs is Rs. 1,50,000 only. It seems that the court below has arrived at the compensation of Rs. 75,000 without furnishing any data as to how the said amount could be arrived at. Ext. X-2, insurance policy, clearly shows that the 3rd defendant was validly covered by an indemnity insurance by the supplemental 4th defendant during the period in question, and as per Ext. X-2 he has coverage for any one claim arising out of any one event to the tune of Rs. 5 lakhs towards negligence in professional service rendered. Even on a calculation of compensation towards loss of dependency of dependency alone by applying the monthly contribution of the deceased to the family at the rate of Rs. 9,000 per annum and the multiplier of 18, the amount will come in excess of the plaint claim. Therefore, we are limiting the compensation payable to the plaintiffs at Rs. 1,50,000, being the plaint claim. The 3rd defendant is liable to pay the said amount of compensation with interest and in turn, the 3rd defendant is entitled to be indemnified by the supplemental 4th defendant. The appeals are devoid of merits and are only to be dismissed.

In the result, these appeals are dismissed and the Cross-objection in A. S. No. 199 of 1998 is allowed to the extend as follows:

(1) The Cross objectors are granted a decree for recovery of Rs. 1,50,000 with interest at 6% per annum from 19-9-1990, the date of death of the deceased, till payment/recovery, with costs of the Cross-objection and of the suit, from the assets of the supplemental 4th defendant. It is further decreed that if the liability in terms of the aforesaid is not satisfied by depositing the entire amounts within a period of two months from now, the rate of interest awarded by this decree will stand modified at 12% per annum from 19-9-1990 till date of payment" recovery.

(2) In exercise of the power under Order XXXIII, Rule 10 r/w O. XLIV, R. 1, it is ordered that the court fee payable by the plaintiffs in the Cross-objection, and in the suit from which this Cross-objection has arisen, shall be recoverable from the supplemental 4th defendant.