IN THE HIGH COURT OF ANDHRA PRADESH, AMARAVATHI

****

SECOND APPEAL No.396 of 2022

Between:

A.Bhagyasree, W/o B.Ravichandran, aged35 years, Occ: Housewife, R/o Jayanagar village, Diguvathadakara Post, Thavanampalle Mandal, Chittoor District.

... Appellant / Plaintiff.

Versus

The Present Medical Officer, Community Health Centre, Bangarupalyam, Chittoor District and 3 others.

... Respondents/Defendants.

DATE OF JUDGMENT PRONOUNCED**: 08.11.2022**

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE SUBBA REDDY SATTI

1. Whether Reporters of Local Newspapers may be allowed to see the judgment? Yes / No
2. Whether the copies of judgment may be marked to Law Reporters / Journals? Yes / No
3. Whether His Lordship wish to see the fair copy of the Judgment? Yes / No

SUBBA REDDY SATTI, J

*** HONOURABLE SRI JUSTICE SUBBA REDDY SATTI**

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... Appellant / Plaintiff.

Versus

The Present Medical Officer, Community Health Centre, Bangarupalyam, Chittoor District and 3 others.

... Respondents/Defendants.

! Counsel for Appellant **:** Sri Suresh Kumar Reddy Kalava

^ Counsel for Respondents : ---

< Gist:

> Head Note:

? Cases referred:

1) (2005) 6 SCC 1

2) (2010) 3 SCC 480

3) (2021) 10 SCC 291

This Court delivered the following:

HONOURABLE SRI JUSTICE SUBBA REDDY SATTI

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... Appellant / Plaintiff.

Versus

The Present Medical Officer, Community Health Centre, Bangarupalyam, Chittoor District and 3 others.

... Respondents/Defendants.

Counsel for Appellant : Sri Suresh Kumar Reddy Kalava

Counsel for respondents : ---

JUDGMENT

Plaintiff in the suit filed second appeal against the judgment and decree dated 18.12.2019 in A.S.No.48 of 2015 on the file of IX Additional District Judge, Chittoor, confirming the judgment and decree dated 04.12.2013 in O.S.No.131 of 2006 on the file of Additional Senior Civil Judge, Chittoor.

2. For the sake of convenience, the parties to this judgment are referred to as per their array in the plaint.

3. Suit O.S.No.131 of 2006 was filed by the plaintiff for damages and also for expenditure incurred by the plaintiff for treatment.

4. The averments in the plaint, in brief, are that, plaintiff was married to B.Ravichandran of Jainagar village, Diguvathadakara Post, Thavanampalle Mandal, Chittoor District; that plaintiff had first delivery of a female child in a private nursing home under caesarean section on 08.03.1993 and the female baby died after some time on account of onset of fever; that doctor advised the plaintiff not to conceive for the second time at least for 3 years; that plaintiff conceived second time and hence, she was admitted as inpatient in the Community Health Centre (CHC), Bangarupalyam to undergo abortion on 12.11.1993, since she had four months pregnancy; that 1st defendant did abortion as opted by the plaintiff and she was discharged from CHC, Bangarupalyam on 14.11.1993; that at the time of performing operation, a plastic tube was inserted to induce abortion, which was

found missing and the same was disclosed by 1st defendant; that subsequent to discharge plaintiff developed unbearable pain in abdomen; that when the plaintiff consulted 1st defendant, he gave some tablets to the plaintiff; that plaintiff had pain continuously in the abdomen and on consulting 1st defendant, he advised her to go to a private doctor; that the private doctor whom the plaintiff consulted prescribed some tablets and had only temporary relief; that when the plaintiff was passing stools, she noticed a bit of plastic tube and the plaintiff became panic and she was advised to go to CMC Hospital, Vellore for proper treatment; that plaintiff was admitted in CMC Hospital on 30.12.1997 as inpatient and the doctor performed laparotomy for removal plastic tube and after laparotomy, the plaintiff is hale and healthy; that the doctor who conducted laparotomy kept the plastic tube in a sealed cover and handed over to plaintiff; that plaintiff spent Rs.1,00,000/- towards treatment; that 1st defendant being qualified practitioner without taking possible steps left the plastic tube and hence, the plaintiff suffered complications and thus, defendants 3 to 5 are jointly and severally liable along with 1st defendant to pay damages. Hence, the suit.

5. After filing of the suit, 1st defendant died. 2nd defendant filed written statement and the same was adopted by defendants 3 to 5. It was contended *inter alia* that plaintiff was admitted to CHC, Bangarupalyam on 12.11.1993 with the history of three months pregnancy with abdominal pain and gastritis; that plaintiff was given treatment for pain in abdomen and was discharged on 14.11.1993 at 6.00 p.m.; that no abortion was done at CHC; that the inpatient register would reveal that patient was admitted only for treatment of abdominal pain; that plaintiff might have undergone operation for termination of pregnancy in some other place; that the inpatient register maintained by CHC contains all the details from the date of admission till the date of discharge and prayed the Court to dismiss the suit.

6. Basing on the pleadings, trial court framed the following issues:

(1) Whether the plaintiff suffered any damage or agony due to negligence of defendants?

(2) Whether the plaintiff is entitled for damages from defendants as claimed by her?

(3) To what relief?

7. During the trial, plaintiff examined herself as P.W.1 and got examined P.Ws.2 to 5. Exs.A-1 to A-4 and Exs.X-1 and X-2 were marked. On behalf of defendants, D.W.1 was examined and Exs.B-1 to B-4 were marked.

8. Trial Court on consideration of oral and documentary evidence dismissed the by judgment and decree dated 04.12.2013. Aggrieved by the same, plaintiff filed appeal A.S.No.48 of 2015 on the file of IX Additional District Judge, Chittoor. Lower Appellate Court being final fact recording Court framed the following points for consideration:

(1) Whether the appellant/plaintiff could prove that the deceased 1st defendant did abortion to her on 13.11.1993 and left Ex.X1 tube in her stomach?

(2) Whether the appellant/plaintiff is entitled for damages as claimed by her?

(3) Whether the decree and judgment passed by the trial Court is factually and legally sustainable?

(4) To what relief?

9. Lower appellate Court on consideration of both oral and documentary evidence dismissed the appeal by judgment and decree dated 18.01.2019. Assailing the same, the above second appeal is filed.

10. Sri Suresh Kumar Reddy Kalava, learned counsel for the appellant would submit that the plaintiff proved that 1st defendant conducted abortion and left Ex.X-1 in the stomach of plaintiff by placing both oral and documentary evidence. He also would submit that evidence of P.W.5 doctor was not properly considered by the Courts below. He also would submit that Courts below did not consider Exs.X-1 and X-2 in proper perspective.

11. Basing on the pleadings and contentions, the following substantial questions of law would arise for consideration:

(1) Whether the appellant proved that deceased 1st defendant did abortion to her on 13.11.1993 and left Ex.X-1 tube in her stomach?

(2) Whether the Courts below considered the evidence of P.W.5 and Exs.X-1 and X-2 in proper perspective?

12. The suit is filed for damages basing on medical negligence. In **Jacob Mathew Vs. State of Punjab and Ors.**[1], the Hon'ble Apex Court held thus:

> "48. Before we embark upon summing up our conclusions on the several issues of law which we have dealt with hereinabove, we are inclined to quote some of the

[1] (2005) 6 SCC 1 = MANU/SC/0457/2005

conclusions arrived at by the learned authors of "Errors, Medicine and the Law" (pp. 241-248), (recorded at the end of the book in the chapter titled - 'Conclusion') highlighting the link between moral fault, blame and justice in reference to medical profession and negligence. These are of significance and relevant to the issues before us. Hence we quote :-

> (i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity - in principle - from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasized may become paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable. (ibid, pp. 242-243);
>
> (ii) Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable. (ibid, p. 245).
>
> (iii) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake : the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. (ibid, p.246). A consequence of encouraging litigation for loss is to

persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. (ibid, p.247). While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks. (ibid, p. 247).

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high - a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness. (ibid, p.248).

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society, (ibid, p. 248).

Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society."

13. In **Kusum Sharma and Ors. vs. Batra Hospital and Medical Research Centre and Ors.**[2], the Hon'ble Apex Court held thus:

> "94. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:
>
> **I.** Negligence is the breach of a duty exercised 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.
>
> **II.** Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.
>
> **III**. 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.
>
> **IV**. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.
>
> **V**. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.
>
> **VI**. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving

[2] (2010) 3 SCC 480 = MANU/SC/0098/2010

lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

14. In **Harish Kumar Khurana Vs. Joginder Singh and Ors.**[3], the Hon'ble Apex Court held thus:

"19. On the principle of *res ipsa loquitur*, the NCDRC has taken note of an earlier case wherein the conclusion reached was taken note in a circumstance where the

[3] (2021) 10 SCC 291 = MANU/SC/0610/2021

anaesthesia had killed the patient on the operating table. In the instant facts, the patient had undergone the same process of being administered anaesthesia for the first operation and the operation had been performed successfully and the entire process was said to be uneventful. Though in the second operation, the patient had suffered a cardiac arrest, the subsequent processes with the help of the Boyle's apparatus had been conducted and the patient had also been moved to the CCU whereafter the subsequent efforts had failed. The patient had breathed her last after few days. As already noted, there was no contrary medical evidence placed on record to establish that the situation had arisen due to the medical negligence on the part of the doctors.

20. The very questions raised by the NCDRC at issue Nos. 2 to 7 would indicate that in the present fact situation the first operation performed by the same team of doctors in the same hospital was successful and the unfortunate incident occurred when the second operation was scheduled. Hence what was required to be determined was whether medically, the second operation could have been conducted or not in that situation and whether the medical condition of the patient in the present case permitted the same. The issues raised by framing the other questions would have arisen depending only on the analysis of the medical evidence on those issues at 2 to 7 more particularly issues 2 and 3.

21. In addition to what has been noted above, in the context of the issues which had been raised for consideration, the verbatim conclusion reached by the NCDRC would be relevant to be noted. The issues No. 2 and 3 which were raised for consideration are the crucial issues which entirely was on the medical parlance of the case. The said issues were to the effect as to whether the second surgery should have been undertaken since it was recorded that the patient has poor tolerance to anaesthesia and whether the surgery of the second kidney should have been taken within eight days from the first surgery though it was not an emergency. As noted, the Appellants being doctors had tendered their affidavits indicating that as per the medical practice the same was permissible. On behalf of the claimants no medical evidence was tendered. Though from the available records the NCDRC could have formed its opinion with reference to medical evidence if any, the nature of the conclusion recorded is necessary to be noted.

> We are surprised to note that the treating doctor after recording that the patient had poor tolerance to anaesthesia has tried to defend his action by stating that poor tolerance to anaesthesia means nothing.
>
> However, we cannot be oblivious of the fact that Dr. Khurana was the Anaesthesiologist during the first surgery also and he was fully aware of the conditions of the patient. In reply to the interrogatories, he has clearly admitted that he has gone through the notings of Dr. Mazumdar wherein he has said the patient has poor tolerance to anaesthesia. We are stunned to note that he has stated in the reply to interrogatories that in medical parlance poor tolerance to anaesthesia means nothing'.
>
> It is common knowledge that a person can survive with one kidney, just as a person can survive with one lung. There are cases where a patient suffers from failure of both the kidneys and nephrectomy is performed to replace one of the damaged kidneys by a kidney of a donor after proper test and verification. Therefore, there was no hurry to perform the second surgery.
>
> The extracted portion would indicate that the opinion as expressed by the NCDRC is not on analysis or based on medical opinion but their perception of the situation to arrive at a conclusion. Having expressed their personal opinion, they have in that context referred to the principles declared regarding Bolam test and have arrived at the conclusion that the second surgery should not have been taken up in such a hurry and in that context that the Appellants have failed to clear the Bolam test and therefore they are negligent in performing of their duties. The conclusion reached to that effect is purely on applying the legal principles, without having any contra medical evidence on record despite the NCDRC itself observing that the surgeon was a qualified and experienced doctor and also that the anaesthetist had administered anaesthesia to 25,000 patients and are not ordinary but experienced doctors."

15. Keeping in view the expressions of the Apex Court, the Court must scrutinize whether the appellant proved that she

has undergone abortion on 13.11.1993 and whether the 1st defendant did abortion.

16. The evidence on record discloses that the plaintiff was admitted in CHC, Bangarupalyam on 12.11.1993. Ex.B-1 is copy of diet sheet, Ex.B-2 is case sheet, Ex.B-3 is outpatient record and Ex.B-4 is copy of discharge record. A perusal of Exs.B-1 to B-4 would disclose that the plaintiff was treated for abdominal pain and gastritis. The record further discloses that the plaintiff was admitted on the complaint of stomach pain. In the cross examination P.W.1 admitted that she has not filed any document to show that deceased 1st defendant did abortion to her in CHC, Bangarupalyam. The initial burden lies on the plaintiff under Section 101 of the Indian Evidence Act to establish that 1st defendant did abortion on 13.11.1993 in CHC, Bangarupalyam. However, as stated *supra*, neither plaintiff place material nor established that 1st defendant did abortion. In the absence of any evidence let in by the plaintiff, a scrutiny of Exs.B-1 to B-4, medical record do not support the case of plaintiff.

17. The doctor who conducted laparotomy to P.W.1 in CMC Hospital, Vellore on 09.01.1998 was not examined. Ex.X-1 is the tube produced by plaintiff and it does not contain the signature of doctor, who conducted operation. P.W.5 another doctor from the CMC Hospital, Vellore deposed that he did not produce Exs.X-1 and X-2 from the hospital. P.W.2 is husband and the evidence of P.Ws.3 and 4 in fact, as observed by the trial Court, is unbelievable, as they have no personal knowledge about the alleged abortion incident, and it is running contrary to the evidence of P.W.1. Ex.B-3 prescription does not indicate that medicine is prescribed relating to cases of abortion. Exs.X-1 and X-2, said to have been issued by Dr.Bala Subrahmanyam, who also subsequent operation do not have any evidentiary value unless they are duly proved in accordance with law. In fact, P.W.1 in her cross examination deposed that she was admitted in CHC, Bangarupalyam for the purpose of treatment of her stomach pain. P.W.3 states that first child of P.W.1 died at Bangarupalyem in the hospital and the said death was after abortion to P.W.1. Thus, the evidence of P.W.3 is quite contrary to the evidence of P.Ws.1 and 2.

18. The findings of fact recorded by the Courts below are basing on appreciation of evidence. This Court while exercising jurisdiction under Section 100 of the CPC must confine to the substantial question of law involved in the appeal. This Court cannot re-appreciate the evidence and interfere with the concurrent findings of the Court below where the Courts below have exercised the discretion judicially. Further the existence of substantial question of law is the *sine qua non* for the exercise of jurisdiction. This Court cannot substitute its own opinion unless the findings of the Court are manifestly perverse and contrary to the evidence on record.

19. Since, the findings recorded by the Courts below are based on appreciation of evidence, and unless, the appellant demonstrates that substantial question of law involved in the second appeal, interference of this Court in exercise of jurisdiction under Section 100 of CPC is not warranted. No questions of law much less substantial questions of law arose in the appeal. Hence, the second appeal is liable to be dismissed, however, without costs.

20. Accordingly, the second appeal is dismissed at admission stage. No order as to costs.

As a sequel, all the pending miscellaneous applications shall stand closed.

SUBBA REDDY SATTI, J

8th November, 2022

PVD