

A. S. Mittal and Another

Vs

State of U.P. and Others

Writ Petition (Civil) No. 1247 of 1986

(Rangath Misra, M. N. Vankatachaliah JJ)

12.05.1989

ORDER

1. The facts of this case are, indeed, distressing. The Lions Club, Pottery Town at Khurja in Uttar Pradesh arranged and conducted, as part of its social service programme, an "Eye-camp" intended to extend facilities of expert Ophthalmic surgical services to the residents of the town. The club invited Dr R. M. Sahay of the Sahay Hospital, Jaipur and his team of doctors to offer the surgical services. The Camp was arranged in 'Aggarwal Dharamshala' at Novelty Road, Khurja. Dr R. M. Sahay and his team of doctors and para-medical staff, who arrived in Khurja on April 21, 1986, examined about, 122 patients. One hundred and eight patients were operated upon, 88 of them for cataract which, with the modern advances in ophthalmic Surgery, is considered relatively minor and low-risk surgery. Dr Sahay left Khurja that evening for Moradabad where he was scheduled to conduct similar operations at another "Eye-Camp".

2. But the whole programme at Khurja, however laudable the intentions with which it might have been launched, proved a disastrous medical misadventure for the patients. The operated eyes of the patients were irreversibly damaged, owing to a post-operative infection of the intra ocular cavities of the operated eyes. The doctors present at the Camp got in touch with Dr Sahay at Moradabad and administered antibiotic medication, both oral and local, for the infection. Dr Sahay returned on April 24 and undertook himself some ameliorative treatment. But the operated eyes had been damaged completely. Similar mishap, but on lesser scale affecting some 15 patients, repeated itself at Moradabad. Some of the victims were later sent to and treated at Dr Sahay's at Jaipur. But their condition did not improve.

3. It is now undisputed that this terrible medical mishap was due to a common contaminating source. The suggestion in the Report of the enquiries that ensued is that, in all probability, the source of the infection, referred to as E coli infection of the intra ocular cavity, was the "normal saline" used on the eyes at the time of surgery. Dr Sahay who had himself brought all medicines and surgical instruments for use at the Camp claims to have purchased the saline from a certain M/s Mehtaad Company, Jaipur on March 22, 1986 Invoice No. 1533.

4. The matter was brought before this Court in the form of a Public Interest Litigation under Article 32 by two social activists, Shri A. S. Mittal and Shri Om Prakash Tapas, acting on behalf of an organisation called 'Union for Welfare and Human Rights'. Originally, the four respondents were the State of U.P., Dr R. M. Sahay, the Chief Medical Officer, Buland Shahar District (U.P.) and the Lions Club of Pottery Town, Khurja. However, this Court by its order dated September 26, 1986 directed the Indian Medical Council and the Union of India to be impleaded as parties to the proceedings. All the respondents have filed their respective counter-affidavits.

5. In the writ petition, the petitioners have made serious allegations about the very bona fides of, and the intention behind, the sponsoring of the ill-fated 'eye-camp' and have alleged motives of monetary gains by way of State and international subsidies. But no material is placed before the court to substantiate this allegation. The prayers in the writ petition are that : the victims of this medical mishap be given expert rehabilitatory treatment and appropriate compensation; that government do conduct a through investigation as to the conditions which rendered a medical misadventure of such a scale possible and evolve proper guidelines which will prevent recurrence of such tragedies; and that appropriate legal action be instituted against Dr R. M. Sahay and his team and also against officers of the government who, according to allegation, committed serious breaches of duty in sanctioning permission for the conduct of the 'eye-camp' without ensuring a strict compliance with the conditions prescribed in the guidelines prescribed by the government in that behalf and in not effectively discharging the duties enjoined upon them to oversee the satisfactory and safe functioning of the camp.

6. At the directions of the Government of Uttar Pradesh, the Deputy Director (Eye Treatment) conducted an inquiry into the happenings and his report and recommendations submitted to the government are produced in the proceedings. Similarly, the inquiry report dated June 8, 1986 conducted by Shri Shatrughan Singh, Sub-Divisional Magistrate, Khurja as to the incident, are also before the court. We have perused these reports and the counter-affidavits and heard learned counsel.

7. So far as the grievance in the writ petition of prosecutorial inaction on the part of the government and the need to direct government to initiate appropriate action against those responsible for the tragedy is concerned, it was submitted before us that pursuant to the results of the inquiries conducted by the Deputy Director (Eye Treatment) and the Sub-Divisional Magistrate, appropriate follow-up action is contemplated by the government against persons concerned and that, indeed, a criminal case has been registered against Dr R. M. Sahay under Section 338 of the Indian Penal Code.

8. It was, however, submitted on behalf of Dr R. M. Sahay, respondent 2, that we should abstain from saying anything which might tend to pre-judge merits of the prosecution. In this counter-affidavit, Dr Sahay says :

The police has registered a case under Section 338 of the Indian Penal Code, against the answering respondent, and he has been admitted to bail. Any process by which the answering respondent would be compelled to disclose, in advance, his defence at the criminal trial by replying to specific allegations in the writ petition would be violative of Article 20(3) of the Constitution of India, insofar as it concerns the answering respondent.

9. Referring to the limited scope of the present proceedings, Dr Sahay expresses the confidence :

... that in view of the noble objective of this kind of litigation, it will not in any manner be prejudicial to the answering respondent.

10. We think we should accept the submission of the doctor and should abstain from pronouncing on the question of culpable rashness or negligence on the part of the doctors or others against whom separate action is either pending or contemplated.

11. But there are some assumptions and statements in counter-affidavit of Dr Sahay that cannot be allowed to pass without comment. It is undisputed that out of those operated at Khurja, at least 84 persons suffered permanent damage of the operated eyes. It is said that about 15 similar cases occurred at the Moradabad 'Eye-Camp'. Indeed, in the course of his counter-affidavit, Dr Sahay admitted the unfortunate event which he called a "Mishap" :

The medical mishap at the Khurja Camp is the only one he has encountered in his entire extensive experience.

Despite all possible care MISHAPS cannot always be avoided in human efforts because the error of one link in the entire chain may sometimes result in total failure.

12. But the doctor's description of what happened to the victims is somewhat of an over-simplification. As to the devastation the almost universal post-operative infection left behind it its trail, the doctor says :

It is unfortunate that despite every care taken by the answering respondent and his associates and assistants a large number of patients could not regain their vision in the Khurja Camp.

it is extremely unfortunate that some 84 patients' vision could not be restored despite every care bestowed by the answering respondent and his associates and assistants.

The number of patients operated upon at Moradabad Camp for cataract were about 380 and the vision of about 10 of them could not be restored. A small percentage of failures is considered normal....

13. We are afraid, the doctor may not be justified in this description of the large-scale and calamitous effects the operation had on the hapless victims. It is, perhaps, a euphemism to call the incident as one where "some 84 patients' vision could not be restored". These are not mere cases of eyesight of the patients not having been restored in the sense that the surgical operations conducted on them did not yield the desired result; or that no positive benefit was derived by them from the surgery. But the picture is entirely different. It is not merely that the unfortunate patients did not derive any benefit from the surgery but were greatly worse off than they were before the surgery, owing to the post-operative intra ocular infection that damaged the operated eyes beyond redemption. Even according to Dr Sahay the modern techniques in ophthalmic surgery render cataract a minor operation. A cataract affected eye when properly operated is expected to become normal. The operation is meant to remove an obstruction to vision and restoration of normal eyesight. This implies that the eyes of patients selected for operations had the potential for restoration of sight. In the present cases, they have become totally blind in the operated eyes.

14. Apart altogether from the causal connection between the widespread infection and medication or surgical procedures, as the case may be, applied or employed, it is really undisputed that such a general and widespread post-operative infection did occur. Referring to the medical management of the emerging crisis, Dr Sahay himself says :

It may be mentioned that on the morning of April 22, 1986, Dr R. Sekhri opened the bandage and suspected intra ocular infection and therefore commenced antibiotic treatment both local and oral. On April 22, Dr Sekhri reached Moradabad for consultations. The answering respondent approval of the antibiotic medicines and

sent Dr M. Punjabi with additional supplies of medicines to Khurja. On April 23, 1986 both Dr R. Sekhri and Dr M. Punjabi gave anterior chamber wash and antibiotic medicines. At about midnight the answering respondent rushed by road to Khurja without any consideration for his personal comfort and commenced attending the patients. He washed anterior chambers performed vitrectomy (removing the infected part) and administered pain relieving medicines. The petitioners have inexactly described the doings as operation, sedation and removal of cornea. All this was done in the same room in which the earlier operations were performed.

15. One of the points brought out in the petition is that the propaganda literature published by the Lions Club in relation to the camp was that allurements, prohibited by medical ethics, were held out to the patients with attractive slogans such as 'Get operated and go home', 'No restriction of food', 'No bed rest', and 'No stitches to be removed' etc., etc. It was alleged that the guidelines required a minimal institutional post-operative care for few days under constant competent medical supervision and that in the present case the patients were allowed to go back immediately after the operations. Dr Sahay's affidavit, in a way, does not deny this kind of propaganda or lack of institutional post-operative care. Indeed, some justification is pleaded. Dr Sahay says in his counter-affidavit :

It is true in the modern technique a cataract operation by Crye - Micro Surgery System does not require 10 days immobility or liquid diet and the like, because the modern sutures securely seal the operation incision and make it watertight. The sutures are seldom removed - and the patient is, in normal cases fit enough to move about within few hours of the operation. The Khurja Camp operations were conducted between the hours of about 11 a.m. to 6 p.m. with half an hour's break. The nine operation tables for three and post-operative procedures.

16. How far the lack of intensive post-operative institutional care contributed to the infection or the aggravation of its effects is a matter which cannot be decided in these proceedings. These are technical matters for professional medical assessments. But the guidelines prescribed by government do not, prima facie, seem to encourage such complacency in regard to the imperatives of post-operative care.

17. The problems of the Ophthalmic Health Status of the Indian citizen are of a dimension causing an understandable concern. The very large number of cases of impairment of visual acuity in the country needs the purposeful involvement of voluntary social organisations so as to provide an augmented, broad-based, participatory medi-care for the general improvement of the tone of ophthalmic health in the country. Government of India, evolved a comprehensive policy and programmed for control of blindness, which, amongst other things envisaged a programme for the promotion of eye care through 'eye-camps' organised by social and voluntary organisations and to provide financial assistance to them.

18. Our attention was drawn to the Circular No. T. 12011/4/82/OPHTH dated October 13, 1982 issued by the Ministry of Health and Family Welfare to all the States and Union territories, laying down certain norms and guidelines for the conduct of such 'eye-camps'. A copy of that circular is annexure 'R-1' to the counter-affidavit dated January 10, 1987 filed on behalf of the State of U. P. Pursuant thereto, on April 18, 1984 State Government issued appropriate directions to its officers and authorities for strict compliance with the guidelines issued by the Central Government. It is on the basis of these guidelines that permission was accord to the Lions Club to conduct the eye-camp, The permission granted by Chief Medical Officer, Buland Shahar on April 21, 1986 :

The Lions Club, Pottery Town, Institute/organisation is permitted to hold free eye camps applied with the specific condition that the camps will be organised in rural areas and supervised by Senior Ophthalmic Surgeon and the operation will be performed by the qualified ophthalmic surgeons and staff and that competent ophthalmic surgeon (s) would remain at the camp site throughout the duration of the camp till the last patient is discharged.

19. Though the events at the eye-camp raise several questions of interest on the law as to professional negligence, we do not want to be understood as intending to record any findings on the conduct of Dr R. M. Sahay and his team or the officers of U.P. Government who granted permission for the eye-camp and who, allegedly, did not discharge their duties implicit in the guidelines issued by government. A mistake by a medical practitioner which no reasonably competent and careful practitioner would have committed is a negligent one. One of the questions that might arise in the appropriate forum is whether the doctors, judged by the circumstances in which they were working, made a mistake and if so whether such a mistake was negligent.

20. A vast amount of legal literature concerns the concept of 'reasonable man' in the Law of Torts. To some like Sir Allen Herbert, he is "never a woman"; to some others 'an odious and insufferable creature who never makes a mistake'; and according to Lord Radcliff the parties would become disembodied spirits in whose place arises the idea of a reasonable man as the "anthropomorphic conception of justice".

21. But the law recognises the dangers which are inherent in surgican operations. Mistakes will occur on occasions despite the exercise of reasonable skill and care. Jackson and Powell on 'Professional Negligence', (1982 edn., 232) say :

In *White v. Board of Governors of Westminster Hospital* ((1961) Times, 26th October (Ed. : See Halsbury, 4th edn., Vol. 30, para 35) a Surgeon accidentally cut the retina during an operation on the plaintiff's right eye. As a result the eye became useless and had to be removed. He was working within a very few millimeters and exercised due skill, care and judgment....

22. But, in a case where the plaintiff developed meningitis as a result of some infection in the apparatus used in the operation it was held that there must have been some negligence any the hospital staff for which the hospital authority was responsible. (ibid para 6.53) But where the operation is a race against time, the court will make greater allowance for mistakes on the part of the surgeon or his assistants, taking into account the 'Risk-benefit' test. In *Dr Laxman Balkrishna Joshi v. Dr. Trimbak Babu Godbole* (AIR 1969 SC 128, 11 : (1969) 1 SCR 206 : 71 Bom LR 236), this Court held :

The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. 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.... The doctor no doubt has a discretion in choosing treatment which he proposes to give the patient and such discretion is relatively ampler in cases of emergency.

23. Street on Torts (1983, 7th edn., p. 126) suggests that doctrine of *res ipsa loquitur* is attracted :

Where an unexplained accident occurs from a thing under the control of the defendant, and medical or other expert evidence shows that such accidents would not happen if proper care were used, there is at least evidence of negligence for a jury.

24. Charlsworth and Percy on 'Negligence' refer to a case where a woman was placed in the same ward with another suspected of, and later found to be suffering from, puerperal fever and as a result she got puerperal fever herself. The doctor was held negligent in not isolating her when the other case was suspected and in not taking steps to prevent her from being infected. (See p. 546)

25. The explanation of the doctors appears to be that the infection occurred despite all precaution. Though it is not said so in so many words, the drift of the explanation is that the saline, used to irrigate the eyes during surgery to maintain turgidity of the operational surface, which was purchased from a reputed manufacturer might be the source of the contamination. If that be so, the question of the liability of the manufacturer for what it called "product liability" and the further question whether in such cases of mass use, a pre-test for safety and purity of the article was necessary and whether failure to do so would be actionable. These questions are necessarily to be answered on evidence. In these proceedings neither do we have full evidence nor does the scope of the proceedings permit such findings to be recorded conclusively.

26. The aspects to which the present proceedings are confined are :

(a) Whether the guidelines prescribing norms conditions for the conduct of 'eye-camp' are sufficiently comprehensive to ensure the protection of the patients who are generally drawn from the poorer and less affluent section of society or whether any further guidelines would require to be evolved ?

(b) What relief, monetary or otherwise, should be afforded to those who have suffered ?

Re Point (a)

27. After the institution of these proceedings Central Government, in the wake of reports of mishaps in 'eye-camps', constituted a Committee under the Chairmanship of the Union Health Minister with six State Health Ministers and four experts as members to re-examine and update the existing guidelines or evolve fresh ones. As a result of the deliberations of the said Committee and pursuant to its recommendations, the guidelines for conduct of eye-camps earlier issued have been updated and revised. A copy of the Revised Guidelines issued on February 9, 1988 by the Ministry of Health and Family Welfare vide their No. T. 12019/41/86 OPTH (Pt. 11) dated February 9, 1988, is filed before the court. We have perused these guidelines which are sent to all the States for implementation.

28. The Indian Medical Council, after its impleadment in these proceedings also constituted a sub-committee with Dr P. Shiva Reddy and other members. The Committee deliberated on the issue and its recommendations in regard to the norms for the conduct and management of eye-camps have

been field before this Court. We place on record our appreciation of the assistance rendered by the Council.

29. We have examined the revised guidelines issued on February 9, 1988 by the Union Government and the recommendation of the Sub-committee of the Indian Medical Council. The two sets of norms though evolved independently, substantially cover all the important areas. We think that the revised norms issued by the Union Government on February 9, 1988 arrived at after a careful study of all aspects of the problem are quite comprehensive. However, we venture to suggest that some points made in the Report and recommendation of the expert sub-committee of the Indian Medical Council may be considered by the Union Government for incorporation in their Revised Guidelines dated February 9, 1988. The prescriptions referred to by the said sub-committee of the Indian Medical Council at pages 4,5 and 10 respectively, of the report are these :

Staff : The operations in the camp should only be performed by qualified, experienced Ophthalmic Surgeons registered with Medical Council of India or any State Medical Council. The camp should not be used as training ground for post-graduate students, and operative work should not be entrusted to post-graduate students.

There should be a pathologist to examine urine, blood, sugar etc.

It is preferable to have a Dentist to check the teeth for sepsis and a Physician for general medical check-up.

Medication :

(a) All medicines to be used should be of standard quality duly verified by the doctor in-charge of the camp.

These aspects are generally covered in the government's Revised Guidelines dated 9, 1988. But, for the sake of special emphasis keeping their importance in view the above aspects stressed in the Reports of the sub-committee of the Indian Medical Council may be considered for incorporation in the Revised Guidelines for incorporation in the Revised Guidelines of February 9, 1988. We direct accordingly.

30. The necessity of maintenance of the highest standards of aseptic and sterile conditions at places where Ophthalmic surgery - or any surgery - is conducted cannot be over-emphasised. It is not merely on the formulation of the theoretical standards but really on the professional commitment with which the prescriptions are implemented that the ultimate result rests. Governments, States and Union, incur enormous expenditure of public money on health care. But, the standard of cleanliness and hygiene in public hospitals are fortunately, leave greatly to be desired. The maintenance of steriles, aseptic conditions in hospitals to prevent cross-infection should be ordinary, routine and minimal incidents of maintenance of hospitals. Purity of the drugs and medicines intended for man-use would have to be ensured by prior tests and inspection. But, owing to a general air of cynical irreverence towards values that has, unfortunately, developed and to the mood of complacency with the continuing deterioration of standards, the very concept of standards and the imperative of their observance tend to be impaired. This is a disturbing feature. The remedy lies in a ruthless adherence to the virtue of method and lying down practical procedures in the minutest of detail and by exacting - not merely expecting - strict adherence to these procedures.

31. On point (a), we think that the Revised Guidelines dated February 9, 1988, with the suggested modifications, can be held to be satisfactory.

Re Point (b)

32. Pursuant to earlier orders of this Court, each of the victims had been paid a sum of Rs. 5000 by the state Government by way of interim relief. Shri Ranji Thomas, learned counsel for the petitioners, submitted that this was a wholly avoidable mishap and is entirely the result of the composite negligence on the part of the surgical team and the authorities of the U.P. Government, who failed to ensure obedience to the norms. Learned counsel also sought to rest the right of the victims for damages on the footing that the persons who organised the 'eye-camp' were acting pursuant to and under the authority of government and that on the doctrine of the State action the activity must be reckoned as that of the State itself which must, accordingly be held vicariously liable. In regard to the quantum of relief learned counsel submitted that the unfortunate victims had suffered irreversible damage of the eyes which has rendered them wholly incapacitated.

33. We are afraid in the circumstances of this case, the factual foundations laid before the court and the limited scope of the proceedings no appeal could be made to the doctrine of State action. Shri Yogeshwar Prasad, learned senior counsel appearing for the State of Utter Pradesh, submitted that the State would approach the matter not with the spirit of a litigant in any adversary action but would look upon the proceedings as participatory exploration for relief to the victims. He further submitted that the State would indeed, be willing to render help to the victims within the constraints of its resources.

34. Indeed, the factual foundations requisite for establishing the proximate causal connection for the injury has yet to be established conclusively. These matters would have to be gone into in the criminal and other proceedings that may be pending or in the contemplation of the government.

35. However, we think that on humanitarian consideration, the victims should be afforded some monetary relief by the State Government. We direct that in addition to the sum of Rs. 5000, already paid by way of interim relief, the State Government shall pay a further sum of Rs. 12,500 to each of the victims. The victims entitled to receive benefit of the interim relief of Rs. 5000. The amount shall be deposited as was done in the matter of distribution of interim relief, with the District Judge who shall arrange to distribute the same in accordance with the procedure adopted at the time of administration of the interim relief. The deposit shall be made within two months from today and the District Judge shall ensure distribution within the next two months.

36. Further direct that, additionally, if any of the victims are, otherwise, eligible for any benefit of pension under any of the existing schemes now in force in the State, their cases shall be considered for such benefit. The Legal Aid and Advice Board of U.P. State shall take up this issue any of the existing government schemes providing for aid to the aged, the disabled, and the destitute, subject to the condition that the victims otherwise satisfy the conditions of those schemes.

37. We place on record the services rendered by the petitioners in espousing the cause of these unfortunate victims and prosecuting it with diligence. We direct the State of U.P. to pay their costs which is quantified at Rs. 5000. The writ petition is disposed of accordingly.

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