Achutrao Haribhau Khodwa and others

Vs

State of Maharashtra and others

Civil Appeal No. 3318 of 1979

(S. P. Bharucha, B. N. Kirpal JJ)

20.02.1996

JUDGEMENT

KIRPAL J.

1.The appellants are aggrieved by the judgment of the Aurangabad Bench of the Bombay High Court which has reversed a decree for Rs.36,000/- passed by the Civil Judge, Second Division, Aurangabad, as damages on account of the death of one Chandrikabai who was the wife of appellant No.1 and the mother of appellant Nos. 2 to 5, after she had undergone a sterlisation operation at the Civil Hospital, Aurangabad.

2. The case of the appellants before the trial Court was that the deceased Chandrikabai was admitted in the Civil Hospital, Aurangabad on 10th July, 1963, for delivery of a child. This maternity hospital is attached to the Medical College at Aurangabad and respondent No.2 was working in the department of Obstetrics and Gynaecology as a doctor and it is she who attainted on Chandrikabai. Respondent No.3 was the Medical Officer of the said hospital while respondent No.4 was the Dean of Medical College, Aurangabad. Chandrikabai delivered a male child on 10th July, 1963. As she had got herself admitted to this hospital with a view to undergo a sterlisation operation after the delivery, the said operation was performed by respondent No.2 on 13th July, 1963. Soon thereafter Chandrikabai developed high fever and also had acute pain which was abnormal after such a simple operation. Her condition deteriorated further and on 15th July, 1963 appellant No.1 approaches respondent No.3 and one Dr. Divan, PW-2, who was a well-known surgeon and was attached to the hospital, but was not directly connected with the Gynecological department. At the instance of appellant No.1 Dr. Divan examined Chandrikabai on 15th July, 1963, and seeing her condition, he is alleged to have suggested that the sterlisation operation which had been performed should be re-opened. This suggestion was not acted upon by respondent Nos. 2 and 3 and the condition of Chandrikabai became very serious. On 19th July, 1963, Dr. Divan, on being called once again, re-opened the wound of the earlier operation in order to ascertain the true cause of the seriousness of the ailment and to find out the cause of the worsening condition of Chandrikabai. According to the appellant, respondent Nos. 2 and 3 assisted Dr. Divan in this operation. Dr. Divan, as a result of the second operation, found that a mop (towel) had been left inside the body of Chandrikabai when sterilisation operation was performed on her. It was found that there was collection of pus and the same was drained out by Dr. Divan. Thereafter, the abdomen was closed and the second operation completed. Even, thereafter the condition of Chandrikabai did not improve and ultimately she expired on 24th July 1963.

3. Alleging that Chandrikabai was working as a teacher in a Government School and her salary augmented the total income of the family, it was pleaded that the death of Chandrikabai was caused

due to the negligence of respondent No.2 who had performed the sterlisation operation on 13th July, 1963, as well as the irresponsible behaviour of respondent No. 3. The appellants also alleged that the hospital lacked adequate medical aid and proper care and there was gross dereliction of duty on the part of the officers of the Government Civil Hospital which directly resulted in the death of Chandrikabai and, therefore, the appellants were entitled to recover damages from the Governor of Maharashtra (respondent No.1) as well as respondent Nos. 2 to 4. The appellants claimed total damages of Rs.1,75,000/-. It may here be noticed that the suit was commenced with the appellants' filing application for permission to sue in forma pauperis and, on the same being allowed, the same was converted to Special Civil Suit No.5 of 1965.

4. Respondents 1 and 4 filed a common written statement contending that the appellants' suit was false. It was denied that there was any negligence in the performance of the sterilisation operation on 13th July, 1963, at the hands of respondent No.2. In fact the case of the respondents was that after the sterlisation operation on 13th July, 1963, the condition of Chandrikabai had improved. All allegations of negligence etc. were specifically denied. In addition thereto, respondents 2 and 3 filed separate written statement in which they also denied any negligence on their part. Respondent No.2 denied having left any mop in the abdomen of Chandrikabai and, in the alternative, pleaded that even if such a mop was left inside the body, the same could not have, either directly or remotely, caused the death. Respondent No.3 also denied the recovery of the mop from the abdomen and generally supported the case of the other respondents.

5. In view of the pleadings of the parties the Civil Judge framed as many as 11 issues which are as follows :-

> "(1) Do plaintiffs prove that the defendant No.2 performed the operation without due care, attention and caution and in the most negligent manner ?
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> (2) Do plaintiffs prove that a mop was left in the abdomen of the deceased Chandrikabai during the first operation, and if so, do plaintiffs further prove that it was so left as a result of negligence, lack of care and insufficient diligence in the operation performed by defendant No.2 ?
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> (3) Do plaintiffs prove that as a result of the mop remaining inside the body of Chandrikabai during the first operation by defendant No.2, a severe pain was caused to her deteriorating her health and that the said mop disturbed the internal organism of the body and resulted ultimately in the death of Chandrikabai on 24th of July, 1963".
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> (4) Do plaintiff's prove that the defendants Nos. 2 and 3 did not take proper care of Chandrikabai in the post-operation stage as per details stated in para 7 of the plaint.
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> (5) Do plaintiff's prove that the defendant No.4 also did not take any proper and necessary steps when he was instructed about the pain received by Chandrakabai ?
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> (6) Do they prove that there was mismanagement and careless behaviour in the hospital and negligence by defendant No.3 in the removal of the same as stated in last para 7 and that it aggravated the situation resulting in the death of Chandrikabai ?
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> (7) Do the plaintiffs prove that the death of Chandrikabai was caused due to failure of duty on the part of hospital authorities and their dereliction of duty and hence all

defendants are liable for the same ?

(8) Do plaintiffs prove the various details of compensation as stated in para 9 of the plaint ?

(9) To what amount the plaintiffs entitled on account of damages ?

(10) What order about the recovery of the Court fee ?

(11) What decree and order ?

6. In support of their case the appellants, apart from examining appellant No.1 and his mother-in-law, also relied upon the evidence of Dr. Divan PW-2. In addition thereto the appellants also examined, on commission, Dr. Ajinkya who was a Gynaecologist and Obstetricion of Bombay. According to Dr. Divan, after the sterilisation operation Chandrikabai had suffered from post operative peritonitis. This was due to a mop which had remained inside the peritonial cavity for a number of days and inflammatory condition had reached a stage from which recovery was very difficult. After the removal of the mop Dr. Divan said that he saw the condition of the intestine which continued to remain paralysed. The treatment of peritonitis was started from 15th July, 1963 and in his opinion the death of the patient was due to the complications following the leaving of the mop inside the abdomen. The other expert witness Dr. Ajinkya also came to the same conclusion, though his statement was recorded without his having the benefit of seeing the case papers. On behalf of the respondent, apart from themselves, two experts, namely Dr. Marwa, Professor of Surgery, Medical College, Aurangabad and Dr. B. V. Purandare, a leading Obstetrician and Gynaecologist of Bombay were examined. The trial Court did not rely upon the evidence of the experts examined by the respondents because it came to the conclusion that the original documents and case papers had been filed late, some relevant entries had also been tampered with and it was only the typed papers, which were copies of the tampered document, which were supplied to the respondents' expert witnesses for their opinion. The trial Court, while accepting and relying on the evidence of Dr. Divan, also observed that the effort of respondent 2 and 3 was to throw the blame on Dr. Divan. According to them, they had prohibited Dr. Divan from performing the second operation and the said respondents even denied that a mop was recovered from the abdomen of Chandrikabai. The trial Court decided all the issues, except issues 5 and 6, in favour of the appellants and passed a decree for Rs.36,000/- against respondents Nos. 1 to 3, but the suit against respondent No.4 was dismissed.

7. The State as well as the respondents 2 and 3 filed appeals to the High Court. In a marathon judgment of over 300 pages the High Court discussed all the evidence and firstly came to the conclusion that, in law, the Government could not be held liable for tortious act committed in a hospital maintained by it. Thereafter, it held that though there was no justification for the delay in the authorities' concerned in supplying the case papers to the appellants, no prejudice had been caused. The High Court did observe that there were some erasure marks and rubbing off of the entries in the original case papers, but held that it was not possible to infer therefrom that the registers had been tampered with and that there was no material before the trial Court to hold that the case papers were tampered with by respondents 2 to 4. The High Court also noticed that the opinion of the experts was conflicting. Whereas according to Dr. Diwan and Dr. Ajinkya, Chandrikabai had peritonitis even before the second operation on 19th July, 1963, and she died because of the same, according to Dr. Purandare, Chandrikabai was only suffering from acute gastric disorder till 19th July, 1963, and it was necessary for the doctor to have waited after removal

of the pus on that day and the second operation was possibly not necessary. Dr. Purandare deposed that in the absence of a post-mortem examination the exact and correct cause of death could not be determined though, by looking at the case papers, the cause of death was peritonitis with septicaemia following the second operation. The opinion of Dr. Marwa was also to the same effect. The High Court while accepting the evidence of Dr. Purandare came to the conclusion that it was difficult to hold that anything that was done during the sterilisation operation, or thereafter, had definitely caused the death of Chandrikabai. While, holding that respondent No.2 had definitely been negligent in leaving a mop inside the abdomen of Chandrikabai, it held that the appellant had failed to prove that the negligence of leaving the mop inside the abdomen had caused the death of Chandrikabai. It, therefore, concluded that none of the respondents could be held liable for negligence. It, accordingly, allowed the appeals and dismissed the suit.

8. Two questions which arise for consideration in this appeal are whether the State of Maharashtra can be held liable for any negligence of its employees and secondly whether the respondents or any one of them acted negligently in the discharge of their duties.

9. Decisions of this Court now leave to scope for arguing that the State cannot be held to be vicariously liable if it is found that the death of Chandrikabai was caused due to negligence on the part of its employees.

10. In State of Rajasthan v. Mst. Vidhyawati, AIR 1962 SC 933, the question arose with regard to the vicarious liability of the State of Rajasthan. In that case a vehicle owned by the State of Rajasthan, which was being driven by its driver, met with an accident which resulted in the death of one person. The death was caused due to negligence of the driver. The two contentions of the State of Rajasthan were that under Article 300 of the Constitution, the State would not be liable, as the corresponding Indian State would not have been liable if the case had arisen before the Constitution came into force. Secondly, it was contended that the jeep which was driven rashly and negligently was being maintained by the State in exercise of its sovereign powers and was not a part of any commercial activity of the State. Rejecting the said contention this Court held that "the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer". This question again came up for consideration in Kasturi Lal Ralia Ram Jain v. State of Uttar Pradesh, AIR 1965 SC 1039 and which has been referred to by the High Court in the present case while coming to the conclusion that the State of Maharashtra cannot be held to be vicariously liable. In Kasturi Lal's case gold had been seized and the same had been kept in a malkhana. The appellant demanded the return of this gold but the same was not returned. It appeared that the same had been misappropriated by the person in-charge of the malkhana. The respondents therein claimed that it was not a case of negligence by the police officers and even if negligence was proved the State could not be held to be liable for the said loss. While holding that there was negligence on the part of the police officers, this Court denied relief by observing that the powers which were exercised by the police officers could be properly characterised as sovereign powers and, therefore, the claim could not be sustained. This Court distinguished the decision in Vidhyawati's case by observing:

> "In dealing with such cases, it must be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servants, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise of sovereign power, or to the exercise of delegated

sovereign power.....".

Explaining the distinction between the two types of cases, it was also observed as follows :-

It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when, in pursuit of their welfare ideal, the Government of the States as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign powers, so that if acts are committed by Government employees in relation to other activities which may be conveniently described as non-governmental or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such claims must be limited; and this is exactly what has been done by this Court in its decision in the case of State of Rajasthan".

Two recent decisions where the State has been held to be vicariously liable on account of the negligent acts of its employees are those of N.Nagendra Rao and Company v. State of Andhra Pradesh, (1994) 6 SCC 205 : (1994 AIR SCW 3753) and State of Maharashtra v. Kanchanmala Vijaysingh Shirke, (1995) JT (SC) 155 : (1995 AIR SCW 3684). In Nagendra Rao's case some goods had been confiscated pursuant to an order passed under Section 6-A of the Essential Commodities Act, 1955. The said order was annulled but due to the negligence of the officers concerned goods were not found to be of the same quality and quantity which were there at the time of its confiscation. The owners of the goods refused to take delivery and filed a suit claiming value of the goods by way of compensation. The High Court of Andhra Pradesh held that the State was not vicariously liable for negligence of its officers in charge of their statutory duties. Negativing this, this Court while allowing the appeal observed at page 235 (of SCC) as follows :-

"In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officer, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharging of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in Viscount Canterbury. But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable

> against the officer personally, then there is no reason to hold that it would not be maintainable against the State".

11. A similar view has been taken in Kanchanmala Vijaysingh's case (1995 AIR SCW 3684) (supra) where, dealing with a claim for compensation arising as a result of an accident with a jeep belonging to the State, it was observed as follows (para 9):

> "Traditionally, before Court directed payment of tort compensation, the claimant had to establish the fault of the person causing injury or damage. But of late, it shall appear from different judicial pronouncement that the fault is being read as because of someone's negligence or carelessness. Same is the approach and attitude of the Courts while judging the vicarious liability of the employer for negligence of the employee. Negligence is the omission to do something which a reasonable man is expected to do or a prudent man is expected not to do. Whether in the facts and circumstances of a particular case, the person causing injury to the other was negligent or not has to be examined on the materials produced before the Court. it is the rule that an employer, though guilty of no fault himself, is liable for the damage done by the fault or negligence of his servant acting in the course of his employment. In some case, it can be found that an employee was doing an authorised act in an unauthorised but not a prohibited way. The employer shall be liable for such act, because such employee was acting within the scope of his employment and in so acting done something negligent or wrongful. A master is liable even for acts which he was not authorised provided they are so connected with acts which he has been so authorised. On the other hand, if the act of the servant is not even remotely connected within the scope of employment and is an independent act, the master shall not be responsible because the servant is not acting in the course of his employment but has gone outside".

12. The High Court has observed that the Government cannot be held liable in tort for tortious acts committed in a hospital maintainable by it because it considered that maintaining and running a hospital was an exercise of the State's sovereign power. We do not think that this conclusion is correct. Running a hospital is a welfare activity undertaken by the Government but is not an exclusive function or activity of the Government so as to be classified as one which could be regarded as being in exercise of its sovereign power. In Kasturi Lal's case (AIR 1965 SC 1039) itself, in the passage which has been quoted hereinabove, this Court noticed that in pursuit of the welfare ideal the Government may enter into many commercial and other activities which have no relation to the traditional concept of governmental activity in exercise of sovereign power. Just as running of passenger buses for the benefit of general public is not a sovereign function, similarly the running of a hospital, where the members of the general public can come for treatment, cannot also be regarded as being an activity having a sovereign character. This being so, the State would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees.

13. Before considering whether the respondents in the present case could be held to be negligent, it will be useful to see as to what can be regarded as negligence on the part of a doctor. The test with regard to the negligence of a doctor was laid down in Bolam v. Friern Hospital Management Committee, (1957) 1 WLR 582. It was to the effect that a doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical-men skilled in that particular art. This principle in Bolam's case has been accepted by the House of Lords in

England as applicable to diagnosis and treatment. See Sidaway v. Board of Governors of Bethlem Royal Hospital, (1985) AC 871 at 881). Dealing with the question of negligence, the High Court of Australia in Rogers v. Whitaker, (1993) 109 ALR (sic), has held that the question is not whether the doctor's conduct accords with the practice of a medical profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the Court to decide and the duty of deciding it cannot be delegated to any profession or group in the community. It would, therefore, appear that the Australian High Court has taken somewhat different view than the principle enunciated in Bolam's case. This Court has had an occasion to go into this question in the case of Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole, AIR 1969 SC 128. In that case the High Court had held that the death of the son of the claimant was due to the shock resulting from reduction of the petient's fracture attempted by the doctor without taking the elementary caution of giving anaesthesia. In this context, with reference to the duties of the doctors to the patient this Court, in appeal, observed as follows :

> "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, the duty of care in deciding whether treatment to give or 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".

14. The above principle was again applied by this Court in the case of A.S. Mittal v. State of U.P., AIR 1989 SC 1570. In that case irreparable damage had been done to the eyes of some of the patients who were operated upon at an eye camp. Though this Court refrained from deciding, in that particular case, whether the doctors were negligent, it observed "A mistake by a medical practitioner which no reasonably competent and a careful practitioner would have committed is a negligent one". The Court also took note that the law recognises the dangers which are inherent in surgical operations and that mistakes will occur, on occasions, despite the exercise of reasonable skill and care. The Court further quoted Street on Torts (1983) (7th Edn.) wherein it was stated that the doctrine of res ipsa loquitur was 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". The latest case to which reference can be made is that of Indian Medical Association v. V.P. Shantha, (1995) 6 SCC 651 : (1995 AIR SCW 4463). The question which arose in this case was whether the Consumer Protection Act, 1986, applied to medical practitioners, hospitals and nursing homes. It was held in this case that medical practitioners were not immune from a claim for damages on the ground of negligence. The Court also approved a passage from Jackson & Powell on Professional Negligence and held that "the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing service".

15. The skill of medial practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has

performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold that the doctor to be guilty of negligence.

16. In case where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable. As held in Laxman's case (AIR 1969 SC 128 (supra) by this Court a medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor.

17. In the present case the facts speak for themselves. Negligence is writ large. The facts as found by both the Courts, in a nutshell, are that Chandrikabai was admitted to the Government hospital where she delivered a child on 10th July, 1963. She had a sterilisation operation on 13th July, 1963. This operation is not known to be serious in nature and in fact was performed under local anaethesia. Complications arose thereafter which resulted in a second operation being performed on her on 19th July, 1963. She did not survive for long and died on 24th July, 1963. Both Dr. Divan and Dr. Purandare have stated that the cause of death was peritonitis. In a case like this the doctrine of res ipsa loquitur clearly applies. Chandrikabai had a minor operation on 13th July, 1963 and due to the negligence of respondent No.2 a mop (towel) was left inside her peritonial cavity. It is true that in a number of cases when foreign bodies are left inside the body of a human being either deliberately, as in the case of orthopaedic operations, or accidentally no harm may befall the patient, but it also happens that complications can arise when the doctors acts without due care and caution and leaves a foreign body inside the patient after performing an operation and it suppurates. The formation of pus leaves no doubt that the mop left in the abdomen caused it, and it was the pus formation that caused all the subsequent difficulties. There is no escape from the conclusion that the negligence in leaving the mop in Chandrikabai's abdomen during the first operation led, ultimately, to her death. But for the fact that a mop was left inside the body, the second operation on 19th July, 1963 would not have taken place. It is the leaving of that mop inside the abdomen of Chandrikabai which led to the developments of peritonitis leading to her death. She was admitted to the hospital on 10th July, 1963 for a simple case of delivery followed by a sterilisation operation. But even after a normal delivery she did not come out of the hospital alive. Under these circumstances, and in the absence of any valid explanation by the respondents which would satisfy the Court that there was no negligence on their part, we have no hesitation in holding that Chandrikabai died due to negligence of respondent Nos. 2 and 3.

18. Even if it be assumed that it is the second operation performed by Dr. Divan which led to the peritonitis, as has been deposed to by Dr. Purandare, the fact still remains that but for the leaving of the mop inside the peritionial cavity, it would not have been necessary to have the second operation. Assuming even that the second operation was done negligently or that there was lack of adequate care after the operation which led to peritonitis, the fact remains that Dr. Divan was an employee of respondent No.1 and the State must be held to be vicariously liable to the negligent acts of its employees working in the said hospital. The claim of the appellants cannot be defeated merely because it may not have been conclusively proved as to which of the doctors employed by the State in the hospital or other staff acted negligently which caused the death of Chandrikabai. Once death by negligence in the hospital is established, as in the case here, the State would be liable to pay the damages. In our opinion, therefore, the High Court clearly fell in error in reversing the judgment of the trial Court and in dismissing the appellants' suit.

19. For the aforesaid reasons, this appeal is allowed, the judgment of the High Court of Bombay under appeal is set aside and the judgment and decree of the trial Court is restored. The appellants will also be entitled to costs throughout.

Appeal allowed.