

Mr 'X'

Vs

Hospital 'Z'

Civil Appeal No. 4641 of 1998

(S. Saghir Ahmed, B.N. Kirpal JJ)

21.09.1998

JUDGMENT

S. SAGHIR AHMAD, J.-

1. Infringement of "suspended right to marry" cannot be legally compensated by damages either in torts or common law, is our answer to the problem raised in this appeal which is based on the peculiar facts of its own.
2. The appellant after obtaining the Degree of MBBS in 1987 from Jawaharlal Institute of Postgraduate Medical Education and Research, Chandigarh, completed his internship and junior residence at the same College. In June 1990, he joined the Nagaland State Medical and Health Service as Assistant Surgeon Grade I. Thereafter, the appellant joined the MD Pharmacology Course though he continued in the Nagaland State Service on the condition that he would resume his duties after completing the MD Course. In September 1991, the appellant joined the further Course of Diploma in Ophthalmology which he completed in April 1993. In August 1993, he resumed his duties in the Nagaland State Health Service as Assistant Surgeon Grade I.
3. One Itokhu Yepthomi who was ailing from a disease which was provisionally diagnosed as aortic aneurism was advised to go to 'Z' Hospital at Madras and the appellant was directed by the Government of Nagaland to accompany the said patient to Madras for treatment. For the treatment of the above disease, Itokhu Yepthomi was posted for surgery on 31-5-1995 which, however, was cancelled due to shortage of blood. On 1-6-1995, the appellant and one Yehozhe who was the driver of Itokhu Yepthomi were asked to donate blood for the latter. Their blood samples were taken and the result showed that the appellant's blood group was A(+ve). On the next date, namely, on 2-6-1995, Itokhu Yepthomi was operated for aortic aneurism and remained in the Hospital till 10-6-1995 when he was discharged.
4. In August 1995, the appellant proposed marriage to one Ms 'Y' which was accepted and the marriage was proposed to be held on 12-12-1995. But the marriage was called off on the ground of blood test conducted at the respondents' Hospital in which the appellant was found to be HIV(+). The appellant went again to the respondents' Hospital at Madras where several tests were conducted and he was found to be HIV(+). Since the marriage had been settled but was subsequently called off, several people including members of the appellant's family and persons belonging to his community became aware of the appellant's HIV(+) status. This resulted in severe criticism of the appellant and he was ostracised by the community. The appellant left Kohima (Nagaland) around 26-11-1995 and started working and residing at Madras.

5. The appellant then approached the National Consumer Disputes Redressal Commission for damages against the respondents, on the ground that the information which was required to be kept secret under medical ethics was disclosed illegally and, therefore, the respondents were liable to pay damages. The Commission dismissed the petition as also the application for interim relief summarily by order dated 3-7-1998 on the ground that the appellant may seek his remedy in the civil court.

6. Learned counsel for the appellant has vehemently contended that the principle of "duty of care", as applicable to persons in the medical profession, includes the duty to maintain confidentiality and since this duty was violated by the respondents, they are liable in damages to the appellant.

7. Duty to maintain confidentiality has its origin in the Hippocratic oath, which is an ethical code attributed to the ancient Greek physician Hippocrates, adopted as a guide to conduct by the medical profession throughout the ages and still used in the graduation ceremonies of many medical schools and colleges. Hippocrates lived and practised as a physician between the third and first centuries BC. He has been referred to by Plato as a famous Aesculapiad who had a philosophical approach to medicine. His manuscripts, the Hippocratic Collection (Corpus Hippocraticum), contained the Hippocratic oath which is reproduced below :

"I swear by 'Z' the physician and Aesculapius and health and all-heal and all the gods and goddesses that according to my ability and judgment I will keep this oath and this stipulation - to reckon him who taught me this art equally dear to me as my parents, to share my substance with him and relieve his necessities if required, to look upon his offspring in the same footing as my own brothers and to teach them this art if they shall wish to learn it without fee or stipulation and that by precept, lecture, and every other mode of instruction I will impart a knowledge of the art to my own sons and those of my teachers and to disciples bound by a stipulation and oath according to the law of medicine but to none others. I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked nor suggest any such counsel, and in like manner I will not give to a woman a pessary to produce abortion. With purity and with holiness I will pass my life and practise my art. I will not cut persons labouring under the stone but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick and will abstain from every voluntary act of mischief and corruption, and further, from the seduction of females or males, of freemen and slaves. Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge as reckoning that all such should be kept secret. While I continue to keep this oath unviolated, may it be granted to me to enjoy life and the practice of the art, respected by all men, in all times, but should I trespass and violate this oath, may the reverse be my lot."

8. The Hippocratic oath consists of two parts. The first, or covenant, is the solemn agreement concerning the relationship of apprentice to teacher and the obligations enjoined on the pupil. The second part constitutes the ethical code.

9. It is on the basis of the above that the International Code of Medical Ethics has also laid down as under :

"A physician shall preserve absolute confidentiality on all he knows about his patient even after his patient has died."

10. Here, in this country, there is the Indian Medical Council Act, 1956 which controls the medical education and regulates the professional conduct. Section 20-A which was inserted by the Indian Medical Council (Amendment) Act, 1964 provides as under :

"20-A. Professional conduct. - (1) The Council may prescribe the standards of professional conduct and etiquette and a code of ethics for medical practitioners.

(2) Regulations made by the Council under sub-section (1) may specify which violations thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any law for the time being in force."

At the same time, that is, by the same Amending Act, clause (m) was also introduced in Section 33 and this clause provides as under :

"33. Power to make regulations. - The Council may, with the previous sanction of the Central Government, make regulations generally to carry out the purposes of this Act, and, without prejudice to the generality of this power, such regulations may provide for -

#(a)-(1) * * *##

(m) the standards of professional conduct and etiquette and code of ethics to be observed by medical practitioners."

11. It is under these provisions that the Code of Medical Ethics has been made by the Indian Medical Council which, inter alia, provides as under :

"Do not disclose the secrets of a patient that have been learnt in the exercise of your profession. Those may be disclosed only in a court of law under orders of the Presiding Judge."

12. It is true that in the doctor-patient relationship, the most important aspect is the doctor's duty of maintaining secrecy. A doctor cannot disclose to a person any information regarding his patient which he has gathered in the course of treatment nor can the doctor disclose to anyone else the mode of treatment or the advice given by him to the patient.

13. It is contended that the doctor's duty to maintain secrecy has a correlative right vested in the patient that whatever has come to the knowledge of the doctor would not be divulged and it is this right which is being enforced through these proceedings.

14. It is the basic principle of jurisprudence that every right has a correlative duty and every duty has a correlative right. But the rule is not absolute. It is subject to certain exceptions in the sense that a person may have a right but there may not be a correlative duty. The instant case, as we shall presently see, falls within the exceptions.

15. "Right" is an interest recognised and protected by moral or legal rules. It is an interest the

violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how Salmond has defined "right". In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition. The elements of a "legal right" are that the "right" is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right.

16. The Hippocratic oath as such is not enforceable in a court of law as it has no statutory force. Medical information about a person is protected by the Code of Professional Conduct made by the Medical Council of India under Section 33(m) read with Section 20-A of the Act. The relevant provisions of the Code of Medical Ethics have already been reproduced above which contain an exception to the general rule of confidentiality, inasmuch as it provides that the information may be disclosed in a court of law under the orders of the Presiding Judge. This is also the law in England where it is provided that the exceptions to this rule permit disclosure with the consent, or in the best interests, of the patient, in compliance with a court order or other legally enforceable duty and, in very limited circumstances, where the public interest so requires. Circumstances in which the public interest would override the duty of confidentiality could, for example, be the investigation and prosecution of serious crime or where there is an immediate or future (but not a past and remote) health risk to others.

17. The General Medical Council of Great Britain in its guidance on HIV infection and AIDS has provided as under :

"When diagnosis has been made by a specialist and the patient after appropriate counselling, still refuses permission for the general practitioner to be informed of the result, that request for privacy should be respected. The only exception would be when failure to disclose would put the health of the health-care team at serious risk. All people receiving such information must consider themselves to be under the same obligations of confidentiality as the doctor principally responsible for the patient's care. Occasionally the doctor may wish to disclose a diagnosis to a third party other than a health-care professional. The Council think that the only grounds for this are when there is a serious and identifiable risk to a specific person, who, if not so informed would be exposed to infection A doctor may consider it a duty to ensure that any sexual partner is informed regardless of the patient's own wishes."

18. Thus, the Code of Medical Ethics also carves out an exception to the rule of confidentiality and permits the disclosure in the circumstances enumerated above under which public interest would override the duty of confidentiality, particularly where there is an immediate or future health risk to others.

19. The argument of the learned counsel for the appellant, therefore, that the respondents were under a duty to maintain confidentiality on account of the Code of Medical Ethics formulated by the Indian Medical Council cannot be accepted as the proposed marriage carried with it the health risk to an identifiable person who had to be protected from being infected with the communicable disease from which the appellant suffered. The right to confidentiality, if any, vested in the appellant was not enforceable in the present situation.

20. Learned counsel for the appellant then contended that the appellant's right of privacy has been infringed by the respondents by disclosing that the appellant was HIV(+) and, therefore, they are liable in damages. Let us examine this contention.

21. Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy. It was in this context that it was held by this Court in *Kharak Singh v. State of U.P.* [AIR 1963 SC 1295 : (1964) 1 SCR 332] that police surveillance of a person by domiciliary visits would be violative of Article 21 of the Constitution. This decision was considered by Mathew, J. in his classic judgment in *Gobind v. State of M.P.* [(1975) 2 SCC 148 : 1975 SCC(Cri) 468] in which the origin of "right to privacy" was traced and a number of American decisions, including *Munn v. Illinois* [94 US 113 : 24 L Ed 77 (1877)], *Wolf v. Colorado* [338 US 25 : 93 L Ed 1782 (1949)] and various articles were considered and it was laid down ultimately, as under : (SCC p. 157, para 31)

"31. Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."

22. *Kharak Singh v. State of U.P.* [AIR 1963 SC 1295 : (1964) 1 SCR 332] and *Gobind v. State of M. R.* [(1975) 2 SCC 148 : 1975 SCC(Cri) 468] came to be considered again by this Court in *Malak Singh v. State of P&H* [(1981) 1 SCC 420 : 1981 SCC (Cri) 169] and the view taken earlier on the right of privacy was reiterated.

23. In another classic judgment rendered by Jeevan Reddy, J., in *R. Rajagopal v. State of T.N.* [(1994) 6 SCC 632] the right of privacy vis-A-vis the right of the Press under Article 19 of the Constitution was considered and in the research-oriented judgment, it was laid down, inter alia, as under : (SCC pp. 649-50, para 26)

"26. (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."

24. In an American decision, *Jane Roe v. Henry Wade* [410 US 113 : 35 L Ed 2d 147 (1973)] the Supreme Court of United States said that :

"Although the Constitution of the USA does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth

and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment and that the 'right to privacy is not absolute'."

25. Reference may, at this stage, be made to Article 8 of the European Convention on Human Rights which defines this right as follows :

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

27. Right of privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed.

28. Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

29. Having regard to the fact that the appellant was found to be HIV(+), its disclosure would not be violative of either the rule of confidentiality or the appellant's right of privacy as Ms 'Y', with whom the appellant was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if the marriage had taken place and consummated.

30. We may now examine the right based on confidentiality in the context of marriage.

31. Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how, life goes on and on on this planet.

32. Mental and physical health is of prime importance in a marriage, as one of the objects of the marriage is the procreation of equally healthy children. That is why, in every system of matrimonial law, it has been provided that if a person was found to be suffering from any (sic), including

venereal disease, in a communicable form, it will be open to the other partner in the marriage to seek divorce. Reference, for instance, may be made to Section 13(1)(v) of the Hindu Marriage Act, 1955 which provides as under :

"13. (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

#(i)-(iv) * * *##

(v) Has been suffering from venereal disease in a communicable form."

33. So also Section 2 of the Dissolution of Muslim Marriages Act, 1939 sets out that if the husband is suffering from a virulent venereal disease, a woman married under Muslim law to such person shall be entitled to obtain a decree for dissolution of her marriage.

34. Under the Parsi Marriage and Divorce Act, 1936, one of the grounds for divorce set out in Section 32 is that the defendant has, since the marriage, infected the plaintiff with venereal disease.

35. Under the Indian Divorce Act, 1869, the grounds for dissolution of a marriage have been set out in Section 10 which provides that a wife may petition for dissolution if her husband was guilty of incestuous adultery, bigamy with adultery or of rape, sodomy or bestiality.

36. Under Section 27 of the Special Marriage Act, 1954 the party to a marriage has been given the right to obtain divorce if the other party to whom he or she was married was suffering from venereal disease in a communicable form.

37. The emphasis, therefore, in practically all systems of marriage is on a healthy body with moral ethics. Once the law provides the "venereal disease" as a ground for divorce to either husband or wife, such a person who was suffering from that disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease. If the disease, with which he was suffering, would constitute a valid ground for divorce, was concealed by him and he entered into marital ties with a woman who did not know that the person with whom she was being married was suffering from a virulent venereal disease, that person must be enjoined from entering into marital ties so as to prevent him from spoiling the health and, consequently, the life of an innocent woman.

38. The contention of the learned counsel that every young man or, for that matter, a woman, has a right to marry cannot be accepted in the absolute terms in which it is being contended. Having regard to the age and the biological needs, a person may have a right to marry but this right is not without a duty. If that person is suffering from any communicable venereal disease or is impotent so that marriage would be a complete failure or that his wife would seek divorce from him on that ground, that person is under a moral, as also legal duty, to inform the woman with whom the marriage is proposed that he was not physically healthy and that he was suffering from a disease which was likely to be communicated to her. In this situation, the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person. Such a right, for these reasons also, would be an exception to the general rule that every "right" has a correlative "duty". Moreover, so long as the person is not cured of the communicable venereal disease or impotency, the right to marry cannot be enforced through a court of law and shall be treated to be a "suspended right".

39. There is yet another aspect of the matter.

40. Sections 269 and 270 of the Indian Penal Code provide as under :

"269. Negligent act likely to spread infection of disease dangerous to life. - Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease, dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

270. Malignant act likely to spread infection of disease dangerous to life. - Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

41. These two sections spell out two separate and distinct offences by providing that if a person, negligently or unlawfully, does an act which he knew was likely to spread the infection of a disease, dangerous to life, to another person, then, the former would be guilty of an offence, punishable with imprisonment for the term indicated therein. Therefore, if a person suffering from the dreadful disease "AIDS", knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offences indicated in Sections 269 and 270 of the Indian Penal Code.

42. The above statutory provisions thus impose a duty upon the appellant not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence.

43. Can the appellant, in the face of these statutory provisions, contend that the respondents, in this situation, should have maintained strict secrecy ? We are afraid, the respondents' silence would have made them *particeps criminis*.

44. Ms 'Y', with whom the marriage of the appellant was settled, was saved in time by the disclosure of the vital information that the appellant was HIV(+). The disease which is communicable would have been positively communicated to her immediately on the consummation of marriage. As a human being, Ms 'Y' must also enjoy, as she obviously is entitled to, all the Human Rights available to any other human being. This is apart from, and in addition to, the Fundamental Right available to her under Article 21, which, as we have seen, guarantees "right to life" to every citizen of this country. This right would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since "right to life" includes right to lead a healthy life so as to enjoy all the faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant's right to privacy as part of right to life and Ms 'Y's right to lead a healthy life which is her Fundamental Right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day". (See : Allen : Legal Duties)

45. "AIDS" is the product of undisciplined sexual impulse. This impulse, being a notorious human failing if not disciplined, can afflict and overtake anyone howsoever high or, for that matter, how low he may be in the social strata. The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled to all respect as human beings. Their society cannot, and should not be avoided, which otherwise, would have a bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions. (See : School Board of Nassau Country, Florida v. Airline [107 S Ct 1123 (1987)]; Chalk v. USDC CD of Cal. [(9th Circuit 1988) 840 2F 2d 701]; Shuttleworth v. Broward Cty. [(SDA Fla 1986) 639 F Supp 654]; Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne [261 Cal Rep 197 (1989)]. But "sex" with them or the possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist that person to achieve that object.

46. For the reasons stated above, the appeal is without merits and is, consequently, dismissed.