(2008) 12 DEL CK 0080

In the Delhi High Court

Case No : Civil Suit (OS) No. 3413 of 1991

Ashish Kumar Mazumdar — APPELLANT

Vs

Aishi Ram Batra Public Charitable Hospital Trust and Others — RESPONDENT

Date of Decision : 02-12-2008

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 9
Limitation Act, 1908 — Article 22
Limitation Act, 1963 — Article 113, 72, 73, 74, 75

Citation : (2008) 12 DEL CK 0080

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Manoj Chatterjee and K. Iyer, for the Appellant; Manavendra Verma, for the Respondent

Judgement

Sanjiv Khanna, J.—Mr. Ashish Kumar Majumdar, the plaintiff has filed the present suit for damages against Chaudhary Aishi Ram Batra Public Charitable Trust, which runs and maintains Batra Hospital and Medical Research Centre (hereinafter referred to as the "Hospital"). President and Vice President of the hospital, Principal Secretary and trustees of the aforesaid Trust have been made co-defendants (collectively they have been referred to as "defendants").

2. The plaintiff, then aged about 30 years was admitted to the hospital on 27.10.1988 with past history of intermittent fever for one month, which had lasted for 12-13 days and again re-occurred after two-three days. The plaintiff was clinically diagnosed as a case of relapse of partially treated typhoid fever. Widal test and blood investigations were directed. The plaintiff was prescribed Perinorm, Crocin, chloromycetin, inj. Mol etc. The temperature of the plaintiff was recorded as 104?F on 28.10.1988 and continued to remain high. There was no substantial improvement in the condition of the plaintiff till 30.10.1988. On 31.10.1988, the Doctors decided to stop Perinorm as they suspected that the said medicine had induced speech disorder. On 31.10.1988, the widal test report was positive for enteric fever.

3. In the night intervening 31.10.1988 and 1.11.1988 at about 2.30 a.m., the plaintiff was found to be missing from his room on the third floor. At about 3 a.m., Mr. Hans Raj, a security guard, found the plaintiff in a crumbled position in a gallery of the ground floor. He was taken into the casualty. X-Ray, revealed that he had suffered multiple fractures on elbow with dislocation of left elbow. Myelogram revealed that the plaintiff had fractured his L-1 and L-2 Lumber Vertebrae with dislocation and complete transaction of cord. He was shifted to ICU and on 3/4.11.1988, fractures in elbow were fixed. He was operated upon to treat lumber vertebra but with limited result and the plaintiff became paraplegic. The hospital decided to waive of their bills for treatment and ultimately the plaintiff was discharged on 23.12.1988 in a paraplegic condition.

4. Counsel for the plaintiff has given up challenge to diagnosis, medical procedure and treatment given in the hospital. It was submitted that plaintiff is entitled to damages as he had suffered multiple fractures including fracture of the Lumber Vertebrae, which has made him paraplegic, when he was under the care and custody of defendants. The defendants had failed to take reasonable care and, therefore, the plaintiff has suffered fractures, the cause for this paraplegic condition. The defendants, on the other hand, had submitted that they are not liable to pay damages as they were not negligent and casual connection between the treatment/hospital and fracture suffered by the plaintiff has not been established. plaintiff had jumped from the 3rd floor room and had suffered injuries.

5. On 24.07.1997 the following issues were framed:

(i) Whether the plaintiff has been reduced to a paraplegic due to the lack of care and attention of the defendants while he was under the treatment? OPP

(ii) Whether the plaintiff is entitled for the compensation along with interest from the defendant? If yes, to what amount? OPP

(iii) Whether the suit is maintainable u/s 9 of the CPC? OPD

(iv) Whether there is any cause of action in favour of the plaintiff to file the present suit? OPD

(v) Relief?

6. During the course of hearing, counsel for the defendant conceded that issue No.(iii) does not arise for consideration and he accepts that the present suit under common law of torts or for breach of contract is maintainable.

ISSUE Nos. (i) AND (iv)

7. These issues are inter connected and therefore, are being examined together. At about 3.00 a.m. in the night on 1.11.1988, the plaintiff was found in a crumbled position on the ground floor, outside the main hospital building but within the hospital compound. He, as per the plaintiff, was found at a distance of 20 feet below the room occupied by him. As per the defendants the plaintiff was

found on the ground floor below the room on the third floor occupied by him. The plaintiff was semi-conscious. On examination it was found that plaintiff had suffered multiple fractures including fracture of Lumber Vertebrae that has made him paraplegic.

8. Both parties agree that sister of the plaintiff, Ms. Kajal Chakravorty had stayed back in the hospital that night. It is conceded by the counsel for the plaintiff that Ms. Kajal Chakravorty went off to sleep and woke up at about 2.20 a.m. and found the plaintiff missing. She contacted nursing staff and informed them. Security staff was also informed and about 3.00 a.m., she learnt that a patient was found in the corridor on the ground floor.

9. A suit for damages based upon law of torts requires proof of: (i) existence of duty to take care (ii) breach of the said duty by the defender due to failure to attain standard of care prescribed in law and (iii) causal connection between the breach and the loss caused. Breach of the duty recognized by law should be proximate or real cause of the loss.

10. Duty to take care or standard of care can be prescribed by common law, by a contract or under a statute. The distinction between the three for the purpose of the present case is immaterial and need not be examined for the consequences are the same. The present case pertains to duty prescribed under common law and implied contract. Suit for damages based on breach of contract also requires existence of contract, breach of obligation to take care or observe standard of care and consequential damages.

11. The second condition, i.e. breach of duty, is satisfied when a defendant fails to use requisite amount of care required by law in a case where duty to take care exists. It is failure to take care, which the defendants were duty bound to exercise, which furnishes cause of action and constitutes negligence. Everyone is required to exercise requisite amount of care required by law in a case where a duty to use care exists.

12. Way back in 1856, Alderson B. In Blyth v. Birmingham Water works Co. had defined negligence to mean "omission to do something which a reasonable man guided upon by those considerations which ordinarily regulate human affair would do, or doing something which a prudent or a reasonable man could not do". Reasonable and prudent man is neither over apprehensive nor over confident and a man of ordinary intelligence and experience.

13. Foresight test is generally applied to decide the question whether a duty to take care exists and the degree of care required and to determine causal connection between the act or omission and the loss/damage caused. Loss or damage should be traceable to the defender''s negligence. Foresight test requires that every person should avoid an act or an omission which a reasonable man could foresee as is likely to cause injury to a person to whom duty to take care is owed. Every person is responsible for natural and probable consequences of his act or omission and is required to avoid risk of injury to a third person when

reasonable foresight suggests that a person might be injured by failure to exercise reasonable care. Negligence is failure to take care and avoid acts or omissions, even when resultant loss or injury can be anticipated and reasonably contemplated. Question of negligence therefore requires scrutiny into the question of duty to take care and degree of care imposed and whether there was any breach of the duty to take care. Degree of care varies with relationship between the parties, particular situation and obviousness of risk.

14. One is negligent not because of intention to cause loss/injury but because of carelessness or thoughtlessness which produces the said result. Negligence is a state of mind and is different from intention. Deliberate, wilful or intentional act to cause harm will amount to negligence but the converse need not be true. Absence of intention is not an alibi to a claim for damages based on negligence.

15. The plaintiff was admitted as a patient in the hospital. The defendants, therefore, owed a duty to take care, ensure safety and well being of the plaintiff. The plaintiff was suffering from high fever, sickness and was under medication. The hospital was required to protect the plaintiff from all foreseeable harms and anticipated dangers. Quality of care expected from specialized private hospitals is not ordinary but of a high degree. The defendants-hospital professes and claims special skills in treating sick and infirm patients and charges substantial fee and charges. Duty of care as expected is of a high quality and of the same degree as expected from a parent. Medicines and drugs can be administered to patients at home. A patient is shifted to a hospital because it ensures better care, facilities and help with constant professional medical attention. In Thompson v. Nason Hospital reported in 527 Pa. 330 : 591 A.2nd 703 (1991), hospital''s duties were classified into four areas, which read as under:

The hospital''s duties have been classified into four general areas: (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients....

16. Duty of care in the case of hospitals is not limited to diagnosis and treatment but extends to providing safe and secure place to ensure that the patients do not injure themselves. It is not uncommon that patients who are sick or under medication can become delirious, incoherent or act in a manner which would be harmful and not in their interest. Patients under the influence of drugs/ medicines, due to high fever, nature of disease or psychological reasons need not obey instructions/advise of doctors, can become disoriented and lose ability to decide what is right or wrong. Reasonable foresight predicates that hospitals should be conscious and aware that mishaps or injuries can result to a patient and keep supervision and surveillance to check, prevent and protect patients from doing anything or acting in a manner which might cause harm to themselves or even others. Instances when a patient in a delirium or in psychosis

cannot be regarded as farfetched or beyond reasonable contemplation. The defendant-hospital therefore was aware and had duty to take care that the plaintiff does not act in a manner by which he would injure and cause harm to himself. The defendant-hospital owed this duty of care to the plaintiff. It is, therefore not possible to accept the contention of the defendants that they did not owe duty to take care of the plaintiff beyond the diagnosis and treatment. The plaintiff was admitted and confined to bed in the hospital. Duty to take care included duty to prevent the plaintiff from moving out of the room, going down the staircase or injuring or causing harm to himself by taking a stroll. The defendants were aware and had knowledge that a sick patient may get injured or harm himself if he decides to go out for a stroll or a walk, even when his physical condition does not permit or allows him to do so. Injury or harm to patients is reasonably foreseeable. Strict vigil in hospital premises and round the clock safety checks are required to prevent a patient from taking steps or acting in a manner that could cause injury or harm.

17. The defendants in their written statement have stated that in view of the nature of the injuries, it is evident that the plaintiff had jumped out of the window of the room sometime around 2.30 a.m. on 1.11.1988, when his sister Ms. Kajol Chakravorty was fast asleep and, therefore, injuries sustained by the plaintiff and consequent complications are not a result of negligence by the defendant-hospital. It is stated that call bell was available. In Private Wards/ rooms, personal attendants are required to attend to patients and each patient is not provided separate nursing staff unlike a patient, who is admitted to ICU.

18. Allegation that the plaintiff had jumped out of the window from the third floor and, therefore, suffered multiple fractures, is presumptuous and on preponderance is to be rejected. On directions given by the Court, the defendants have filed affidavit of Dr.(Brig) R.K. Gupta, Medical Director, Batra Hospital and Medical Research Centre, which reads as under:

2. I say that there is one single window in Room No. 305 of the Hospital. The Width of the window is 4''-8'' and height is 5''-3''. The window is further located 3? above the floor level of the room. As is evident from enclosed photograph, ''C & D'', the window is divided into three panels. The middle panel has a fixed glass, whereas the two panels on each side are openable and have a width of 1'' each.

3. The opening mechanism of these windows is side-hung type. This means that openable panels/shutters are swinging on hinges. A handle has been provided in the center of each shutter for opening and closing the same.

4. That each window has further been provided with a more than 3'' wide ledge (chhajja) outside, which is further protected by a 3 feet high steel hand-rails and toe rails also (Enclosed photographs E, F & G).

5. That no grills have been provided on the windows as considering the size of openable shutters being one feet each and window being at the floor level of 3

feet, there being a ledge outside are considered to be adequate safety measures.

19. Photographs of the said window have also been filed, both from inside and outside. Photographs reveal that outside the window there is a small canopy/ ledge with railing almost 3 feet in height. It will be difficult for anyone to squeeze himself from a one feet wide window 3 feet above the floor level, jump across and stand in the canopy and then again jump over the three feet high railing, until and unless this is deliberately and intentionally done. It will also require considerable physical effort and strength on the part of the said person. A fragile and a sick patient who has been suffering for a month with high fever will hardly have necessary physical strength to move around as an acrobat. The original medical file filed by the defendants reveals that the plaintiff was having high fever throughout with past history of vomiting. As per the noting in the medical file, the plaintiff had lost weight and there was also loss of appetite. The medical file does not reveal that the plaintiff was depressed with suicidal tendency or depressed to have deliberately attempted suicide. There is no such allegation or statement in the medical records, though various doctors had examined the plaintiff and as stated below had even recorded statement of the plaintiff as to what had transpired.

20. I may note here that there is no allegation that the window of the room was found to be open or there were signs to show that the plaintiff had jumped out from the window. No such suggestion was given to Ms. Kajal Chakravorty, PW-2, who has admitted that she was in the room and had tried to locate the plaintiff and had approached the nursing and security staff. It is admitted by the defendants that the room was searched immediately by the hospital staff. If the window was open, inspite of the room being centrally air conditioned, it would have been certainly noticed by nursing or security staff and even by PW-2, Ms. Kajal Chakravorty as the patient was found missing. The window could not have been latched/closed from out-side and such precision can hardly be expected from a sick patient ill for nearly one month. Medical file noting do not record that the defendants or other staff had suspected a suicide attempt or a deliberate act on the part of the plaintiff to jump from third floor.

21. The file noting at 4.15 a.m. on 1.11.1988 made by one of the Doctors of the defendant-hospital reads:

Pt (i.e patient) says he went for a walk around 2.30 am as he was unable to sleep but does not gave any proper answer as to how he fell and was found near oncology gallery and taken to casualty.

22. This noting by the Doctor of the defendant-hospital immediately after the plaintiff came to his senses is the first statement recorded of what had happened and goes contrary to the stand taken by the defendants, which is presumptuous and an afterthought only to get over the allegations made by the plaintiff and their relatives. Father of the plaintiff on 1.11.1988 had submitted a written complaint to the SHO, Police Station Ambedkar Nagar, alleging criminal

negligence. It is prudent to accept and rely upon the first statement made, recorded and written in the records by the defendants themselves.

23. The above statement recorded at 4.15 a.m. on 1.11.1988, is reconfirmed in the recording of Dr. Veena Kapoor, Consultant Psychiatrist made on 1.11.1988 at 2.00 p.m.:

2 PM - Patient & brother Seen. Case of Enteric relapse. Had sleep difficulty and decided to go for a walk. After that all he remembers is falling on the steps. Denies any other psych. Discomfort.

24. The defendants have examined Mr. Hans Raj, Security Guard, as DW-2 who had found the patient at about 3.00 a.m. on 1.11.1988 in the Oncology Gallery. In his examination in chief, filed by way of an affidavit, he has not alleged or stated that plaintiff had jumped from the third floor. He has stated that he had seen a white object and upon approaching found a young man of 30 years, dressed like a patient was lying in an awkward posture. The patient was few feet away from below window of the room No. 305 on the third floor. The patient had informed him that he had fallen from the third floor but he could not give his name and, therefore, the patient was shifted to OPD/Casualty and subsequently he came to know about his name. In cross examination he has stated as under:

Qus: Please explain how did you conclude that the particular patient had fallen from Room No. 305 at IIIrd floor of the hospital?

Ans : When I analysed in the day then I had come to this conclusion that he may have fallen from room No. 305 which was the IIIrd floor of the hospital.

Qus: What prompted you to analyse that the patient had fallen from which room?

Ans : I was prompted to analyse this fact of my own.

25. Thus from the cross examination it is clear that there is no firm basis for the statements made by DW-2 Mr. Hans Raj in his affidavit. If the plaintiff had stated that he had fallen from the room on the third floor it should have been recorded. There is also no explanation why the alleged statement by the plaintiff made to DW-2, Mr. Hans Raj, or the assumption drawn by Mr. Hans Raj was not recorded in the medical file.

26. Learned Counsel for the defendants has submitted that there is no evidence and material to show how and what caused injury to the plaintiff leaving him paralysed. No one had seen him getting injured or what caused the said injury. Thus breach of duty and causal connection with injuries suffered is not established.

27. The plaintiff was in care and custody of the defendants, who were responsible for his safety and well-being. The defendants were required to take care and prevent the plaintiff from doing anything that would cause injury to him. It is not the case of the defendants that the plaintiff or his relatives had been warned of any such possibility or were asked to be extra vigilant. Ms. Kajal

Chakravorty may have stayed back in the hospital but no specific duty or responsibility was assigned to her. She was not a substitute for the hospital staff or to perform duties of the hospital staff.

28. DW-1, Dr. Arun Dewan in his cross examination has admitted that generally speaking patients suffering from high temperature of about 104? have a tendency to become delirious or incoherent though he has clarified that this is not so in all cases and has stated that the plaintiff was not delirious or incoherent on 28th, 29th and 30th October, 1988 as per records. Dr. Arun Dewan has in his cross examination stated as under:

Qus : Generally speaking when a patient is having a temperature as high as 104 degrees Farenheit is there a tendency for the patient to become delirious or incoherent?

Ans : When patient gets a high grade fever that is 104 degrees Farenheit or more than that he can become delirious or incoherent but not in all the cases.

29. As per medical records produced by the defendants, the plaintiff was suffering from high temperature throughout and had been advised rest. Three Consultants of the hospital Dr. Sadhoo, Dr. Veena Kapoor and Dr. Surendra Man Singh in their observations as recorded on 1.11.1988 and 3.11.1988 have recorded that the plaintiff was suffering from psychosis (see pages 65, 75 and 69 of the medical file). Psychosis is a serious but treatable medical condition that reflects a disturbance in brain functioning and a person experiencing psychosis can be disoriented and loose contact with reality. One of the suggestions given by counsel for the defendants to PW-2, Ms. Kajal Chakravorty in her cross examination is as under:

It is correct that on 31.10.1988 the plaintiff was speaking incoherently and with difficulty.

30. There are statements of doctors DW-1, Dr. Arun Diwan and PW-5, Dr. R.K. Srivastava that fracture of L-1 vertebrae is caused by violent injury including fall from a height. It is prudent to prima facie accept and rely upon the said statements as recorded in the medical file immediately after the patient was found and taken to the Casualty as true and correct. Thus there is some evidence or material to suggest that the plaintiff had left the room at night at about 2.30 a.m. and had gone down the steps, to take a stroll. The plaintiff had been confined to bed for almost three days and may be because of high temperature was incoherent and delirious. The above evidence is consistent with lack of adequate duty and failure to take proper care of the plaintiff so as to prevent harm and protect him from acting in a manner that could cause injury. There is no evidence of steps taken by the defendants to prevent and stop patients from going for a walk or going down the steps. The injuries, in view of the facts pleaded and proved, were prima facie caused by negligence on the part of the defendants and are more consistent with negligence on the part of the defendant-hospital than otherwise. Res Ipsa Loquitor is a principle of evidence effecting

onus and states that an accident speaks for itself. The said doctrine applies when on the basis of evidence available, inference of negligence can be drawn but negligence cannot be proved and conclusively established. Therefore it cannot be applied when there is no evidence consistent with negligence by the defender or there can be several causes for the injury which cannot be attributed to the defender. It requires three conditions to be satisfied. Firstly, the happening should be unexplained. Secondly, unexplained would not have happened in ordinary course without negligence on the part of somebody and lastly circumstances are a pointer to negligence of the defender rather than any other person. The last requirement is usually fulfilled when there is material to establish that the damage/loss was caused by an instrument/act or omission under the maintenance and control of the defender. The above doctrine therefore requires facts which sufficiently indicates and point towards negligence but the real and actual cause is unknown or known only to the defender. This doctrine has been explained by Kenndy, L.J in Russell v. L. & S.W.Ry. reported in (1908) 24 T.L.R. 548, 551 as under:

The meaning, as I understand, of that phrase....is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is, some want of reasonable care under the circumstances. Res ipsa loquitur does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of.

Later, he adds : Res ipsa loquitur in this sense; the circumstances are more consistent, reasonably interpreted without further explanation, with your negligence than with any other cause of the accident happening.

31. In view of findings given above Res ipsa louitur applies. Accordingly, the above issues are decided in favour of the plaintiff and against the defendants.

ISSUE No. (ii)

32. On the question of quantum of damages, it is an admitted case of the plaintiff that he was employed with Punjab National Bank at the time of the incident and continues to remain in employment. The plaintiff who appeared as PW-1 has however stated in his examination in chief that his contemporaneous colleagues in 2001 were getting higher salary of about Rs. 5000/- p.m. However, he has not placed on record the salary slips of his colleagues or produced any

documentary evidence in support thereof or adduced evidence from the Bank. To this extent there is lack of evidence, yet it cannot be denied that the plaintiff''s future prospects of further rise, promotions etc. have suffered, causing monetary loss.

33. plaintiff has produced certificate of hundred percent disability Exhibit PW1/4. In this connection, the plaintiff had also produced Dr. R.K. Srivastava (PW-5) who had issued the said certificate. It is admitted by the defendants that the plaintiff is paraplegic waist downwards. The plight, stress and strain as well as the difficulties and problems faced by the plaintiff are understandable. One can also visualise the day to day difficulties and help required by the plaintiff and extra expenditure that he must be incurring on medicines, help, etc. Able and healthy body is cherished and loss thereof is difficult to quantify. It is difficult to measure loss of happiness, limb etc. The plaintiff is entitled to both pecuniary and non pecuniary damages like prospective loss of earnings, medicinal expenses, future prospects, pain and suffering, mental and physical shock, loss of amenities in life, disfigurement, discomfort or inconvenience, hardship, mental stress etc. (See R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others, and Lata Wadhwa and Others Vs. State of Bihar and Others,

34. Keeping these aspects in mind, I feel that the plaintiff is entitled to damages of Rs. 7 lacs from defendant No. 1. While quantifying the above amount I have taken into account both pecuniary, non pecuniary damages, the fact that the plaintiff continues to remain employed, no pendent lite interest is being awarded and the incident is of 1988.

ADDITIOINAL ISSUE

Whether the Suit is barred by limitation?

35. By Order dated 22.8.2008 the parties were directed to address arguments on the question of limitation, though the said plea was not raised by the defendants. The plaintiff was discharged from hospital on 23.12.1988 and the present Suit for compensation/damages was filed on 29.10.1991.

36. First Division of the Schedule to the Limitation Act, 1963 (hereinafter referred to as the Act, for short) prescribes limitation period for filing of suits. Part VII thereof relates to suits relating to torts and the same are governed by Articles 72 to 91. Scrutiny of the said Articles reveals that the said Articles are not applicable to a suit based on torts claiming compensation for injury suffered. Article 72 of the Act is not applicable as it only applies when there is failure to comply with an enactment. plaintiff has not claimed damages for failure of the defendants to comply with any enactment in force. The Act therefore makes a distinct departure from the Limitation Act, 1908 and Article 22 of Limitation Act, 1908 has been partly re-enacted in a different language. As already stated above, Article 72 of the Act applies to cases for compensation for failure to comply with any enactment in force. In view of the above, the present Suit is governed by Article 113 of the Act and the period of limitation prescribed therein

is three years.

37. Accordingly, this issue is decided in favour of the plaintiff and against the defendants.

RELIEF

38. A decree of Rs. 7 lacs with costs is passed in favour of the plaintiff and against the defendant No. 1. The plaintiff will be entitled interest @ 12% per annum from the date of judgment till payment is made.

