
(2017) 01 MAD CK 0200
In the Madras High Court
Case No : A.S. No. 1131 of 2007

Dr. Balamugunthan

APPELLANT

Vs

Suganthi

RESPONDENT

Date of Decision : 02-01-2017

Acts Referred:

Citation : (2017) 1 ACC 558 : (2017) 1 CPJ 148 : (2017) 1 CTC 287 : (2017) 1 LW 306 : (2017) 2 MLJ 175

Hon'ble Judges : R. Subramanian, J.

Bench : Single Bench

Advocate : Mr. M. Suresh, Advocate, for the Appellant; Mrs. Hema Sampath Senior Counsel for Mrs. R. Meenal, Advocate, for the Respondents No. 1; Mr. C.T. Ramesh Addl. G.P, for the Respondent No. 2

Final Decision : Disposed Off

Judgement

R. Subramanian, J.—The second defendant in O.S. No. 66 of 2004 on the file of the Additional District Judge, Puducherry at Karaikal is the appellant.

2. The above suit was filed by the first respondent claiming compensation of Rs. 10,00,000/- for the injuries and permanent disability suffered by her as a result of negligence and wrong treatment given in the Government Hospital at Karaikal.

3. The appellant/second defendant was working as a Specialist in Orthopedic Division at Government Hospital, Karaikal at the relevant point of time. According to the plaintiff on 26.1.1999 around 11.30 A.M. while she was returning from school after attending the Republic Day Celebration at Kamarajar Square, Karaikal, a cyclist who was coming in the opposite direction dashed against her. It is claimed that as a result of the said accident she was injured in the right leg below the knee resulting in severe pain as well as bleeding. Immediately, she was taken to the Government General Hospital Karaikal and First Aid was given by the 2nd defendant in the suit namely, Dr. Balamugunthan, Government Hospital, Karaikal and she was referred to Orthopedic Ward. An X-ray was taken

of her right leg. The signature of the mother of the plaintiff was taken informing that there will be a surgery. However, the 2nd defendant Doctor, Head of the Orthopedic Department in the hospital had made a thick bandage with plaster of paris from thigh to toe including the fingers. It is claimed that the bandage was unusually thick.

4. On 27.1.1999, the second defendant who checked the minor plaintiff had asked her mother to meet him in his private clinic. It is stated that the second defendant had demanded Rs. 1000/- for performing a surgery and on payment of the said amount, the second defendant promised to cure the right leg of the plaintiff. On 28.01.1999, the plaintiff was shifted to dressing room by the second defendant. In the dressing room when the bandage was opened there was foul smell and the right leg of the plaintiff found discoloured. On 29.01.1991, the second defendant directed the parents of the minor to take her to 3rd defendant for consultation immediately and she was discharged from the Government Hospital Karaikal on the same day at about 6.30 P.M. The minor plaintiff was taken to the 3rd defendant and she was admitted in the 4th defendant's hospital.

5. The 3rd defendant upon examination, diagnosed that the minor plaintiff had suffered a fracture in tibia u/3 with compartment syndrome with impending gangrene in the right leg. Thereafter it appears that the minor plaintiff was treated in the 4th defendant hospital by the 3rd defendant for nearly three months. The final diagnosis was made as follows:

"Is chemic contracture of right leg with osteomyelitis"

The cause of contracture was found to be due to improper use of tourniquet. Claiming that improper use of tourniquet was due to the negligence of the second defendant and the improper bandage affected the blood circulation which almost resulted in gangrene thereby causing shortening of limb, being a girl child, the disfigurement affected her life prospects and disability is to the tune of 50%, the plaintiff came forward with the suit for compensation of Rs. 10,00,000/- against the Government Hospital, Pondicherry. The 2nd defendant/appellant is the Government Doctor. The 3rd defendant is the Doctor, who treated her after 29.01.1999 in the 4th defendant hospital at Thanjavur.

6. The suit was resisted by the second defendant contending that there was no negligence on his part and he had done whatever he could do, as a Medical professional keeping in mind the facilities available in the Government Hospital Karaikal. He would contend that there was no surgery conducted but she was given anesthesia to administer suture of the wounds and to reduce the pain caused by the fracture. It is also contended that plastering was necessary in order to immobilize the fractured bone.

7. The claim that unusually thick plastering used was denied by the second defendant. The second defendant claimed that he did not demand any money from the parents and the brother of the plaintiff and according to him, the said claim has been made only to buttress the plaintiff's claim for damages. On the

advice of the second defendant/appellant, the plaintiff was referred to 3rd defendant who is an expert. The treatment in higher institution was advised due to lack of facilities at the Government General Hospital Karaikal. He also denied that Ischemic contracture osteomyelitis would set in within two or three days.

8. The 1st defendant did not file any separate written statement denying its liability. The third defendant filed a written statement contending that even at the time of admission, gangrene was diagnosed in the right leg of the minor and she was provided effective treatment and because of the said treatment the amputation of limb was avoided. The 3rd defendant would further contend that shortening of limb is an inevitable sequel of the original injury. The 3rd defendant also claimed that he is an unnecessary party to the suit inasmuch as no relief has been claimed against him. The 4th defendant did not file any separate written statement.

9. In fact the 1st and 2nd defendants were represented by Government Pleader Pondicherry and the 3rd and 4th defendants were represented by a same counsel M/s. S.Pandiyan and A.Thirumal.

10. On the above pleadings, the learned Additional District Judge Puducherry at Karaikal framed the following issues:

(1) Whether the 2nd defendant was negligent in treating the minor plaintiff which resulted in her sustaining permanent disability as stated by the plaintiff?

(2) Whether the other defendants are necessary parties to the suit?

(3) To what other reliefs the parties are entitled?

11. On the side of the plaintiff, PW1 to PW3 were examined and Exs.A1 to A10 were marked. On the side of the defendants, 2nd defendant was examined as DW1 and Exs.B1 to B3 were marked.

12. After a consideration of oral and documentary evidence, learned Additional District Judge Puducherry at Karaikal came to the conclusion that shortening of limb was caused due to improper treatment given by the 2nd defendant and held that the 2nd defendant was in fact negligent in treating the plaintiff. In fact, the learned Additional District Judge Puducherry at Karaikal took notice of certain vital admissions made by the 2nd defendant to the effect that the Karaikal General Hospital did not have facilities providing better treatment by fixing plates to join the fractured bones etc. The learned Additional District Judge Puducherry at Karaikal also took note of the admission made by the 2nd defendant in his deposition as DW1, wherein he had admitted that when vertical bone is broken, it should be joined together and only after joining the bones the traction should be made.

13. It is an admitted case that the 2nd defendant has not followed the said procedure. The learned Additional District Judge Puducherry at Karaikal referring to various steps on medical emergency had finally concluded that the 2nd

defendant was negligent in handling the patient and had further found that disfigurement caused to the right leg of the minor, is due to the maltreatment given by the 2nd defendant. Upon such findings, the learned Additional District Judge held that the 2nd defendant alone is liable to compensate the loss and therefore, passed a decree for a sum of Rs. 10,00,000/- against the 2nd defendant personally, exonerating the other defendants.

14. Aggrieved by the said judgement and decree, the 2nd defendant has filed the above appeal.

15. I have heard Mr. N. Suresh, the learned counsel appearing for Mr. T.R. Rajaraman for the appellant and Mrs. Hemasampath, learned Senior Counsel appearing for the 1st respondent and Mr. C.T. Ramesh, the learned Addl. Government Pleader (Pondicherry) appearing for the 2nd respondent namely, the Government of Pondicherry. Respondents 3 and 4 though served do not appear either in person or through counsel.

16. The following points emerge for consideration in the appeal:

- (1) Whether the appellant/2nd defendant was negligent in treating the plaintiff?
- (2) Whether shortening of limb and dis-figuration of the right leg below the knee had occurred due to maltreatment given by the 2nd defendant in the hospital belonging to the 2nd respondent?
- (3) Whether the learned Additional District Judge Puducherry at Karaikal was right in exonerating the first defendant/ 2nd respondent from the liability?
- (4) Whether 3rd and 4th respondents are also liable as they treated the plaintiff subsequently?

Point Nos. 1 and 2.

Mr. N. Suresh, the learned counsel appearing for the appellant would invite my attention to the oral and documentary evidence on record, particularly, the case sheet, the depositions of PW3 and DW1 and contend that there was no negligence or maltreatment, while the plaintiff was admitted at Karaikal. He would also invite my attention to the remarks in the case sheet to the effect that he had advised the patient that she should be taken to a higher institution at the earliest. He would claim that he had done whatever possible with the available facilities at Government Hospital, Karaikal and therefore, negligence attributed against him is in order to make him liable for the suit claim. The learned counsel would also plead that the 2nd defendant/appellant being a Government servant, admittedly working with 1st defendant/second respondent, it is the 2nd respondent, should have been made vicariously liable and the learned Additional District Judge Puducherry at Karaikal ought not to have exonerated the 2nd respondent/1st defendant from the liability.

17. The learned counsel would also draw my attention to the observations of the evidence of 2nd defendant, who examined himself as DW1 and would submit

that want of sufficient care on his part has not been established. On the other hand Mrs. Hema Sampath, learned Senior Counsel appearing for the 1st respondent/plaintiff would contend that 2nd defendant/appellant as DW1 has admitted that he had adopted a wrong process in treating fracture on a vertical bone, that too an important bone like tibia and he has made the plaster without providing for ventilation, which had resulted the serious situation of impending gangrene and the claim of the 2nd defendant/appellant that he had advised the parents to take the minor-plaintiff to an higher institution is not correct.

18. I have gone through the evidence of PW1 as well as the evidence of DW3. Both are Orthopedic doctors. It is admitted that DW3 is a specialist, and a reputed Doctor in Thanjavur. DW3 in his evidence has stated as follows:

"Muk;g fhy kUj;JtKiw kht[fl;Lg;nghLt]/ g[wj;njhw;wj;jpy; kUj;Jtk; bra;a[k;nghJk; me;jg; gFjpapy; nghjpa fhw;nwhl;lk; ,Uf;Fk; tifapy; kht[fl;L ngl;l fhak; ,Ue;jg;gFjpapy; xU Jisia Vw;gLj;jp kht[fl;Lg;nghLt] rhpahd giHa kUj;Jtk;"

The Second defendant/appellant who was examination as DW1 has deposed as follows in his evidence.

"cile;j vYk;g[fis xd;whf nrh;f;f jfL itj;J Mzp nghUj;jtw;F kUj;Jt trjp fhiuf;fhy; kUj;Jtkidapy; ,y;;iy/ mjd; gpwF me;j rpWkpia mWit rpfpr;ir bra;ag;gl;lgpd; mDkjp;fg;gLk; thh;oy; mDkjpj;J bjhlh;;e;J rpfpr;ir kUe;;Jf; bfhLf;f Vw;ghL bra;njd;/ me;j rpWkpia Koe;j kl;Lk; Kd;djhfmt nky; rpfpr;irf;fhf ntW kUj;Jtkidf;F vLj;Jf; bfhz;L nghf Mnyhrid brhd;ndd;/ me;j rpWkp mUfpy; mg;bghGJ ,Ue;j mtuJ jhahUf;F me;j Mnyhridia brhd;ndd;"

"ntW kUj;Jtkidf;F vLj;Jf; bfhz;L nghf mth;fs; ja";fpdhh; jaf;fk; fhl;odhh;fs;"

"29-1-1999 njjpna mtu kUj;JtkidapypUe;J btspnaw;wpndd;/ o!;rhh;\$; rpypg; md;nw bfhLj;njd; mJ thh;oyUe;J kUj;Jtkid eph;thfj;ij ftdpf;Fk; mYtyh;fs; mij bfhLj;jpUg;ghh;fs;/ mijmth;fs; th";f;fpf; bfhz;lhh;fsh vd;W v";fSf;F bjhpahJ/ o!;rhh;\$; rpypg; bfhLf;fhky; mDg;gpagaJ rhpay;y"

",uj;j FHha;fs; kw;Wk; rij RU";fhJ vYk;g[mGfhJ 3 ehl;fspy; mit Vw;gltha;gpy;iy rij tPz; MfhJ"

"me;j bgz;Q}f;F Kwpe;j vYk;g[ePskhd ogpah vd;w vYk;g[mJ jpwe;j g[z;zhd vYk;g[,uz;L vYk;g[k; jdpj;jdpahf cile;j vYk;g[jhd;/ ePsthfpy; vYk;g[ogpahtpy; Kwpa[k; nghJ mJ Tltjw;fhd kUj;jJtj;ij bra;a ntz;Lk;/ ePsthf;fpyhd vYk;g[Kwpe;j ,lj;jpy; ,uz;Lk; xd;whf ,izf;f itj;Jtpl;L cile;j gFjp ,uz;Lk; rkkhf ,Uf;Fk; tifapy; ouhc&d; Kiwapy; ifahStJ rpwg;ghdJ/ mjd; gpwF fhaj;ij Rj;jk; bra;J Mzogahof; bfhLj;J kUe;J bfhLj;J mjd;kPJ ngz;o\$; nghl ntz;Lk;/ Kwpe;j vYk;g[Kwpt[g;gl;l ,lj;jpy; ve;j thf;fpy; Kwpe;Js;sJ vd;gijnah ouhf;c&d; Kiwia gad;gLj;jp kUj;Jtk; bra;jhy;. fhy; vYk;g[ghuj;ij jh";Fkh vd;gij ehd; ghpnrhjid bra;J nf!; hpf;fhh;oy; vGjtpy;iy/ g[z; Md ,lj;jpy; jpR nrjk; milatpy;iy/ Kwpe;j vYk;g[,uz;lhk; epiy vYk;g["

"gHikahf itj;jpa Kiwia eilKiwg;gLj;jpdhh;/ fd;dpf;!; eilKiwg;go kUj;Jtk; bra;a ntz;Lkhdhy; vYk;g[Kwpe;j ,lj;jpy; Kwpe;j vYk;g[ntW v";Fk; efuhky; xl;of; bfhz;oUf;Fk; nghJ bra;jjhy; jhd; gyidf; bfhLf;Fk;/ Kwpe;j fhYf;F Mzp my;yJ jfL bghUj;jg;gl;l epiyapnyh my;yJ ghhp!; gpyh!;lh;; nghl;l gpwF xU thuk; my;yJ 10 ehl;fs; kUj;Jtkidapy; gLf;f itj;jpUf;f ntz;Lk;/ vYk;g[Tltjw;fhf hpf;c&d; Kiwia mst[f;F To cs;sjh vd;W vf;!;nu glk; vLj;J ghh;f;ftpy;iy/ K:d;W ehspy; me;j egui mDg;gptpl;nlhk;/ me;j bgz;zpd;a[ila btsp jpRf;fs; mjpgf mstpy; nrjk; milahjjhy; fhYf;F vYk;ig TI itj;J gpwF mij bjh";ftpl;l epiyapy; btspg[wj;jpy; Mzpf; bghUj;jp ,uz;lhk; epiy vGk;g[Kwptpw;F itj;jpak; bra;J tpiue;J Fzkhf;ff;Toa giHa epiyf;F fhy; jpUk;g To kUj;Jt Kiw/ me;j trjp kUj;Jtkidapy; te;jg;ngghJ ,y;iy/ ghz;or;nrhp muR kUj;Jtkidapy; me;j trjp ,Ue;jjh vd;W vdf;Fj; bjhpahJ/ ngz;nl\$; nghLjtjw;F Kd;g[btspg[w Mzp. jfL bghUj;Jt ey;y kUj;jt Kiw vd;Wk;. mJ ,e;j kUj;Jtkidapy; ,y;yhjhy; ntW kUj;Jtkidf;F ngha; kUj;Jtk; bra;Jf; bfhs;s ntz;Lbkd;Wk; ehd; mwpt[Wj;jtpy;iy"

"ngz;nl\$; nghl;lhy; gpyh!; nghl;lhy; ,uz;lhk; epiyapy; g[z; mGFk; ,uz;lhk; epiy g[z; mGFk; epiyf;F me;j bgz; ,Ue;jhs; vd;gij mstJ tuyhw;W Fwpg;gpy; vGjtpy;iy."

"Kjy; ehspnyna ntW kUj;Jtkidf;F nghfr; brhd;dJ jhd; kUj;JtkidapypUe;J ntW kUj;Jtkidf;F mDg;gp itf;f Mk;g[yhd;!; Vw;ghL bra;a kUj;Jt fz;fhzpg;ghsUf;F vGj;J thapyhf vGjtpy;iy nfl; hpfhh;oYk; vGjtpy;iy/ mg;bghGJ gzpapypUe;j eh;rplk; ehd; brhd;ndd;/ eh;!; kUj;Jf; bfhLg;gjw;F mtUila cly; epiy mwptjw;Fk; bfhLf;fg;gl;l eh;!; rhh;l; nfl; hpf;fhh;oYk; ,y;iy/ o!;rhh;\$; rpypg; vGjp thjpaplk; bfhLj;Jtpl;nld;/ o!;rhh;\$; rpypg;gpy; mth; Mk;g[yhd;!py; ntW kUj;Jtkidf;F miHj;Jr; bry;yg;gl ntz;Lbkd;W vGjtpy;iy"

"rhpahd kUj;Jt Kiw ve;j kUj;Jtkidapy; ,Uf;fpwnjh me;j kUj;Jtkidf;Fj;jhd; ehd; mDg;gppaUf;f ntz;Lk; vd;whYk; rhjhuzkhf cah; kUj;Jtkidf;F ngh";fs; vd;W xU nehahspia kUj;jJtkidapypUe;J mDg;g KoahJ vd;whYk; mJ rhpay;y/ mth;fs; nfl;Lf; bfhz;lhy; cah; kUj;Jtkidf;F mDg;gpajhf vGjpapUf;fpnwd;"

19. From the above extracted evidence, it could be seen that 2nd defendant, who was aware of the fact that maltreatment employed by him was not the latest and he had not ensured that the fractured bone was joined before applying plaster of paris bondage. He has also admitted, if paris plaster bandage has been applied, the patient should be discharged only after 10 days, after ensuring that the bone is joined properly. It is also on record that the plaintiff/first respondent was discharged without discharge slip and the said discharge slip was given later at the request of the mother of the plaintiff/first respondent.

20. Though the learned counsel for the appellant would claim that the appellant had advised the first respondent/plaintiff to be treated in a higher institution, the entries to that effect are not found in the case-sheet, which is marked as Ex.B2. It states that no male attender was available. The 2nd defendant after making entries in the case-sheet should have taken steps to inform the parents of the patient of the seriousness of the situation. No steps were taken to shift her to the

Government Hospital at Pondicherry.

21. I find that DW1 has chosen to claim that he is not aware of the facilities available at the Government General Hospital at Pondicherry and the reason for referring the first respondent/plaintiff to a private hospital at Thanjavur is still mystery. At the time of examination in Court, the 2nd defendant has stated that he is working in the Government ESI Hospital at Pondicherry as a Orthopedic Surgeon and he is aged about 56 years on 11 July 2006, which means he was at least 49 years of age at the time of the accident and being a Government Doctor working in small State like Pondicherry, he cannot ignore the facilities available in the Government Hospital at Pondicherry.

22. Upon reading the entire evidence of second defendant/appellant as DW1, I find that he has made a conscious effort to cover up the happenings and wriggle out of the situation.

23. Mr. N. Suresh, learned counsel appearing for the appellant would draw my attention to the judgement of the Hon''ble Supreme Court in *Martin F.D'souza v. Mohd.Ishfaq* Reported In (2009) 3 SCC 1 and submit that liability could be fastened for medical negligence only if the conduct of the medical professionals fell below that of the standards of the reasonably competent professional. The learned counsel would also contend that opinion from the competent professional should be taken before concluding on the negligence that too medical negligence. The learned counsel for the appellant also relied upon a judgement of the Hon''ble Supreme Court in *Kusum Sharma And Others v. Batra Hospital And Medical Research Centre And Others* Reported In (2010) 3 SCC 480 and contend that a very high degree of negligence should be established to hold Doctor is liable for his conduct.

24. It should be pointed out that in *Jacob Mathew v. State of Punjab* and another reported in AIR 2005 SC 3180 the Hon''ble Supreme Court while considering the liability of medical professional under Section 304-A of Indian Penal Code has summed up its conclusion as follows:

"49. We sum up our conclusion as under:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Law of Torts*, Rantanlal and Dhirajlal (edited by Justice G.P. Singh), referred to herein above, holds good, Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", "breach" and "resulting damage".

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a

professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practise acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practise or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to sue special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practise as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled. @ page-SC 3199 professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4)The test for determining medical negligence as laid down in Bolam's case(1957) 1 WLR 582, 586 holds good in its applicability in India.

(5)The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word "gross" has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304A of the IPC has to be read as qualified by the word "grossly".

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

25. In both the subsequent judgements relied upon by the learned counsel, it is only the principles stated in Jacob Mathew v. State of Punjab and another reported in AIR 2005 SC 3180 are quoted with approval. We must bear in mind, the case on hand is one of civil liability and not a criminal prosecution. Therefore, I find class-5 of the above observations of the Hon"ble Supreme Court would apply to the present case. The Hon"ble Supreme Court has observed that negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution. The Hon"ble Supreme Court in Kusum Sharma and others v. Batra Hospital and Medical Research Centre and others reported in (2010) 3 SCC 480 had made difference between criminal prosecution and civil liability.

The observation of the Hon"ble Apex Court reads as follows:

"63. Lord Atkin in his speech in Andrews v. Director of Public Prosecutions, stated (AC p.5830)

".... Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established"

Thus a clear distinction exists between "simple lack of care"incurring civil liability and "very high degree of negligence"which is required in criminal cases. Lord Porter said in his speech in he same case".

".... A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability"

26. Therefore, it is clear even a simple lack of care would incur civil liability like damages. At the same time it cannot amount to criminal negligence. Therefore, I am of the considered view that 2nd defendant had been negligent in treating the plaintiff and the said negligence was enough to create the civil liability for damages. Thus point No. 1 is answered against the appellant.

27. Admittedly PW3 is an expert Orthopedic Surgeon and his evidence reveals that there has been shortening of limb and disfigurement of the right leg below

the knee. Though the 2nd defendant/appellant would claim that it was not due to the treatment given by him, I am unable to accept the said contention. The evidence of 2nd defendant/appellant as DW1 extracted earlier would show that he was aware of the proper procedure that was to be employed while treating the injured for a fracture in tibia, with an external lacerated injury. It is quite clear from his evidence that he has not followed the proper procedure. Therefore, I am unable to find any material which is not considered by the learned District Judge, in order to differ from his findings that shortening of the limb and the disfigurement was caused in fact because of the wrong methods employed by the 2nd defendant/appellant. Therefore, the question No. 2 is answered against the appellant.

28. Coming to the question of liability arrived at by the learned Additional District Judge, Puducherry at Karaikal, it is seen that the plaintiff has sought for damages and it is an admitted case that the second defendant was working in the hospital run by the first defendant. It is seen that a notice under Section 80 has been issued prior to the institution of suit under Ex.A1. The 1st defendant has not chosen to send a reply. The 1st defendant namely, the Government of Pondicherry has also not filed a separate written statement denying its liability. Mr. N. Suresh, learned counsel appearing for the appellant/2nd defendant would contend that the 1st defendant as employer is vicariously liable and therefore, the Trial court erred in exonerating the 1st defendant from the liability. It should be pointed out that the learned Additional District Judge, Puducherry at Karaikal, has not have given any reason for exonerating the 1st defendant.

29. The fact that the 2nd defendant was working as Doctor in Government Hospital under the first defendant is not denied. The first defendant has also not let in any evidence to show that it is not vicariously liable. The learned counsel relying upon the judgement in Achutrao Haribhau Khodwa and others v. State of Maharashtra and others reported in (1996) 2 SCC 634 would contend that the 1st defendant would be vicariously liable for the negligence of its employee. In the said judgement, the Hon"ble Supreme Court had observed as follows:

"In State of Rajasthan v. Mst. Vidhyawati and Anr. (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 the 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. The 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 variously 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 characterized 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 or 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 nongovernmental 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 variously 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) and *State of Maharashtra & Ors. v. Kanchanmala Vijay Singh Shrike & Ors.* (JT 1995 SC 155). 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 variously liable for negligence of its officers in charge of their statutory duties. Negating this, this Court while allowing the appeal observed at page 235 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 various liability of the State being linked with negligence of its officer, if they can be sued personally for which there is no death of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rational 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, than there is no reason to hold that it would not be maintainable against the State."

A similar view has been taken in Kanchanmala Vijaysingh's case (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:

"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 pronouncements 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 various 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 negligence 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 has 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."

The High Court has observed that the government cannot be held liable in tort for tortious acts committed in a hospital maintained 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 it 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 itself, in the passage which has been quoted herein above, 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 variously liable for the damages which may become payable on account of negligence of its doctors or other employees.

30. Relying upon the said judgment the learned counsel appearing for the appellant would contend that the learned Additional District Judge, Pudukcherry at Karaikal was not right in exonerating the 1st defendant from the liability without assigning any reason whatsoever.

31. Mr. C.T. Ramesh, learned Additional Government Pleader Pondicherry appearing for the 1st defendant would contend that the prayer in the suit itself seeks a decree against the 2nd defendant alone and therefore, there cannot be a decree against the 1st defendant namely Government of Pondicherry. Mr. N. Suresh, learned counsel appearing for the 2nd defendant would contend that the 1st defendant is only vicariously liable. He would submit that it is a kind of indemnity, where 1st defendant is made to pay the damages for the loss suffered by the plaintiff due to negligence on the part of his servant namely, the second defendant. Mrs. Hema Sampath, learned Senior Counsel appearing for the plaintiff would submit that the Government of Pondicherry has been made a party to the suit and notice under Section 80 has also been issued. Therefore, even in the absence of formal prayer, this Court could invoke the provisions under Order 41 Rule 33 and direct the 1st respondent to pay the damages thereby doing complete justice between the parties. The learned Senior Counsel would also rely upon the judgement of the Hon'ble Supreme Court in *Pralhad and others v. State of Maharashtra* and another reported in (2010) 10 SCC 458,

wherein, the Hon"ble Supreme Court had while discussing the scope of the powers of Appellate Court under Order 41 Rule 33, observed as follows:

"18. The provision of Order 41, Rule 33 of Civil Procedure Code is clearly an enabling provision, whereby the Appellate Court is empowered to pass any decree or make any order which ought to have been passed or made, and to pass or make such further or other decree or order as the case may require. Therefore, the power is very wide and in this enabling provision, the crucial words are that the Appellate Court is empowered to pass any order which ought to have been made as the case may require. The expression " Order ought to have been made" would obviously mean an Order which justice of the case requires to be made. This is made clear from the expression used in the said Rule by saying " the court may pass such further or other Order as the case may require." This expression " case" would mean the justice of the case. Of course, this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law.

19. In fact, the ambit of this provision has come up for consideration in several decisions of this Court. Commenting on this power, Mulla (CPC, 15th Edition, pg. 2647) observed that this Rule is modelled on Order 59, Rule 10(4) of the Supreme Court of Judicature of England, and Mulla further opined that the purpose of this rule is to do complete justice between the parties.

20. In *Vanarsi v. Ramphal*, AIR 2004 SC 1989 this Court construing the provisions of Order 41 Rule 33 of Civil Procedure Code held that this provision confers powers of the widest amplitude on the appellate court so as to do complete justice between the parties. This Court further held that such power is unfettered by considerations as to what is the subject matter of appeal or who filed the appeal or whether the appeal is being dismissed, allowed or disposed of while modifying the judgements appealed against. The learned Judges held that one of the objects in conferring such power is to avoid inconsistency, inequity and inequality in granting reliefs and the overriding consideration is achieving the ends of justice. The learned Judges also held that the power can be exercised subject to three limitations: firstly, this power cannot be exercised to the prejudice of a person who is not a party before lost; and thirdly, the power cannot be exercised when such part of the decree which has been permitted to become final by a party is reversed to the advantage of that party. (See para 15 at pg.1997. It has also been held by this Court in *Samundra Devli and others v. Narendra Kaur and others*, 2009 (1) AICJ 433 : (2008) 9 SCC 100 (para 21) that this power under Order 41, Rule 33 of Civil Procedure Code cannot be exercised ignoring a legal interdict."

32. In the case on hand, of course, the prayer in the plaint is only against the 2nd defendant. The facts are not in dispute. The findings of the Trial Court regarding the negligence on the part of the 2nd defendant have been upheld by me. I have also concluded that the 1st defendant is vicariously liable for the action of the 2nd defendant. Therefore, only question is as to whether the decree

could be granted against the 1st defendant also in the absence of prayer. The only impediment for the exercise of power under Order 41 Rule 33 to pass a decree that should have been passed so as to do complete justice between the parties is a legal interdict. I do not find any legal interdict which prevents the exercise of power under Order 41 Rule 33 in the case on hand. The 1st defendant cannot take shelter under a technicality of the absence of a prayer. After all the 1st defendant is a Welfare State and is bound to protect its employee and a citizen like plaintiff. It has been made a party to the suit and the Government Pleader Pondicherry has in fact appeared for both the defendants 1 and 2. The 1st defendant cannot claim that it will be taken by surprise. The observation of the Hon''ble Supreme Court in Pralhad's case referred to above are to the effect that Appellate Court's powers are of the widest amplitude and the object is to do complete justice between the parties and therefore, I have no hesitation in exercising the power under Order 41 Rule 33 to modify the decree of the Trial Court and make the 1st defendant vicariously liable for the negligence on the part of its employee namely, the 2nd defendant. From the records, I am unable to find that the District Court was of alive to the fact that the prayer in the suit was only against the 2nd defendant. I find that the Trial Court had in fact stated that the 1st defendant is exonerated from the liability. It leads me to believe that even during trial the parties were under the belief that the prayer has been made against the defendants 1 and 2 as otherwise there would have been no occasion for the learned District Judge to observe that the 1st defendant is exonerated from the liability.

33. Hence, I am constrained to hold that the 1st defendant/2nd respondent namely, Government of Pondicherry is vicariously liable to answer the suit claim and the learned Additional District Judge, Puducherry at Karaikal was not right in exonerating the Government of Pondicherry without assigning any reason for the same. Therefore, I have no other option except to interfere with the said finding of the learned Additional District Judge, Puducherry at Karaikal exonerating the 1st respondent from its liability.

34. Hence the judgement and decree of the learned Additional District Judge, Puducherry at Karaikal are liable to be modified making the 1st defendant/2nd respondent also vicariously liable for the suit claim. It is brought to my notice that the 2nd defendant/appellant, pursuant to an order passed in the miscellaneous petition namely, M.P. No. 1 of 2007, deposited a sum of Rs. 5,00,000/- to the credit of the above suit and the 1st respondent herein has been permitted to withdraw the same by order dated 30.06.2010 in M.P. No. 1 of 2010. An undertaking affidavit has also been filed by the 1st respondent/ plaintiff to the effect that she will deposit the money, if the appeal is allowed against her.

35. Taking note of the circumstance and the fact that 1st defendant/2nd respondent is made liable to answer the suit claim in the interest of justice. I am of the considered opinion, interest of justice would be served by directing the 2nd respondent/1st defendant to pay the balance decree amount alone, after

deducting the sum of Rs. 5,00,000/- which has been withdrawn by the plaintiff/ first respondent pursuant to the order dated 30.6.2010.

36. In fine the judgement and decree of the Trial Court dated 31.10.2007 made in O.S. No. 66 of 2004 on the file of the Additional District Judge, Puducherry at Karaikal are modified and the appeal will stand partly allowed. The findings of the learned Additional District Judge, Puducherry at Karaikal exonerating the 1st defendant from the liability will stand set aside and the 1st defendant will be liable to pay the suit claim, less the sum of Rs. 5,00,000/- already withdrawn by the plaintiff/first respondent pursuant to the interim orders dated 30.06.2010 made in M.P. No. 1 of 2010. In other aspects the judgement and decree of the Trial Court stand confirmed.

37. However, considering the facts and circumstances of the case, there shall be no order as to costs and the parties shall bear their own costs in this appeal. Consequently the connected Miscellaneous Petitions are closed.