

(2005) 11 NCDRC CK 0040

In the National Consumer Disputes Redressal Commission

SHARAD HOSPITAL

APPELLANT

Vs

SHANKAR LAL GUPTA

RESPONDENT

Date of Decision : 10-11-2005

Acts Referred:

Citation : 2006 1 CPJ 300

Hon'ble Judges : Sunil Kumar Garg , Sushma Tanwar , T.P.Gupta J.

Final Decision : Appeals dismissed

Judgement

1. THE above two appeals filed by the appellants under Section 15 of the (hereinafter referred to as "the Act of 1986") are being decided by this common judgment as in both of them common questions of law and facts are involved and they have been preferred against the order dated 3.12.2003 passed by the learned District Forum, Camp Jaipur in Case No. 258/2003 by which the complaint filed by the Complainants under Section 12 of the Act of 1986 was allowed in the manner that the appellant No. 1 Sharad Hospital in Appeal No. 161/2004 (opposite party No. 1 in the original complaint) was directed to pay to the Complainants a sum of Rs. 50,000 as compensation and the appellant-Dr. Rajendra Dhar in Appeal No. 419/2004 (opposite party No. 4 in the original complaint) was also directed to pay to the Complainants a sum of Rs. 50,000 as compensation along with interest @ 9% p.a. with effect from 28.1.1997 till payment was made.

2. THE necessary facts giving rise to the above appeals are as follows : On 28.1.1997, the Complainants had filed a complaint under Section 12 of the Act of 1986 before the District Forum, Jaipur stating inter alia that their daughter Umang aged 9 years (hereinafter referred to as "the deceased") was admitted in the Sharad Hospital-appellant No. 1 in Appeal No. 161/2004 and that Hospital was being run by Dr. (Smt.) Santusht Mathur, appellant No. 2 in Appeal No. 161/04 (opposite party No. 2 in original complaint) and she was Director of that hospital. It was further stated in the complaint that on 23.9.1995, deceased was suffering from high fever and, therefore, she was brought to the Sharad Hospital

at about 11.30 a.m. and at that time, in that hospital, Dr. Rajendra Dhar (appellant in Appeal No. 419/2004 and opposite party No. 4 in original complaint) was on duty and after deceased was being examined by Dr. Rajendra Dhar, she was got admitted in that Hospital. It was further stated in the complaint that after having been admitted in the Sharad Hospital, her examination in respect of blood, urine etc. was got done by the staff of the Hospital and when the Complainants intended to contact with the appellant No. 2 Dr. Santusht Mathur in Appeal No. 161/2004, Director of that Hospital, it was stated that there was no necessity to contact her. It was further stated in the complaint that after having been admitted in that hospital, no body took care of the deceased and in the night at about 10.00 p.m. on 23.9.1995, the condition of the deceased became deteriorated, but despite that no body in the Hospital took care to look after her and in the morning of 24.9.1995, the deceased had died and according to the Complainants, death of the deceased had taken place because of negligence of the doctors and staff of Sharad Hospital, especially Dr. Rajendra Dhar (appellant in Appeal No. 419/2004). THEREAFTER, the present complaint was filed by the Complainants claiming Rs. 4,91,465 as compensation. A reply was filed by the appellants Sharad Hospital and its Director Dr. Santusht Mathur of Appeal No. 161/2004 on 21.11.1997 stating inter alia that Dr. Santusht Mathur was a Specialist in Gyne and Obstetrics and for other treatment, Sharad Hospital had employed Dr. Rajendra Dhar (appellant in Appeal No. 419/2004). It was further stated in the reply that whenever Dr. Santusht Mathur, Director of Sharad Hospital, had to go outside, in her absence, no patient was being admitted and if in her absence, any patient was being admitted, it was not the responsibility of the Hospital and since deceased was being admitted by Dr. Rajendra Dhar (appellant in Appeal No. 419/2004) in absence of Dr. Santusht Mathur, Director of Hospital, therefore, if any treatment was given by Dr. Dhar, for that Hospital Administration was not responsible. It was further stated in the reply that from the record of the Hospital, deceased was suffering from cough, fever and vomiting and there was no dispute on the point that drip was given to the deceased. It was further stated in the reply that when deceased was admitted in the hospital by Dr. Rajendra Dhar, appellant in Appeal No. 419/2004, Director of Hospital, namely, Dr. Santusht Mathur was outside Jaipur and she had no knowledge that deceased was admitted in her hospital and in the morning of 24.9.1995 when she had gone for morning walk, she came to know that death had taken place in her hospital and then only she came to know that deceased was being admitted in her hospital. Hence, there was no responsibility of Sharad Hospital and its Director Dr. Santusht Mathur and complaint against them deserves to be dismissed. A reply was also filed by Dr. Rajendra Dhar (appellant in Appeal No. 419/2004) through letter dated 22.10.2003 stating therein that he was duty Doctor in Sharad Hospital (appellant No. 1 in Appeal No. 161/2004) on salary basis and he had to discharge duty from 10.00 a.m. to 1.00 p.m. daily and on 23.9.1995, deceased was brought to that Hospital with history of high grade fever and, therefore, she was admitted in that hospital for evaluation and he left the hospital at around 1.30 p.m. and before that, deceased was admitted in the

hospital. It was further replied that after 1.00 p.m. he had no information that the condition of deceased had deteriorated in the hospital and he came to know about the death of the deceased only on next day i.e., on 24.9.1995 and, therefore, he was not responsible for any negligence, if done in the treatment of deceased and thus, it was prayed that complaint be dismissed against him. After hearing the parties, the learned District Forum, Camp Jaipur through impugned order dated 3.12.2003 allowed the complaint of the Complainants in the manner as indicated above holding inter alia: (i) That there was no dispute on the point that deceased was admitted in the Sharad Hospital after making necessary payments and thus, complainants being father and mother of deceased, are consumers. (ii) That payment was received not by Dr. Rajendra Dhar (appellant in Appeal No. 419/2004), but in the name of Sharad Hospital (appellant in Appeal No. 161/2004) and from the reply of Dr. Rajendra Dhar, it is also clear that he was employed in that Hospital. (iii) That treating Dr. Rajendra Dhar had left the Hospital at 1.00 p.m. and despite the fact that deceased was suffering from high grade fever and her condition was serious one, he had not taken any care to look after her and see her after 1.00 p.m. of 23.9.1995 till she had died in the morning of 24.9.1995 and the conduct and act of Dr. Rajendra Dhar clearly reveals that there was negligence on his part in giving treatment to deceased and he was guilty of committing medical negligence. (iv) That since Dr. Rajendra Dhar was an employee of the Sharad Hospital and deceased was admitted in that hospital and payment was made to that hospital, therefore, the hospital could not escape from its liability and it is also vicariously liable for the act done by its employee Dr. Rajendra Dhar.

Aggrieved from the said order dated 3.12.2003 passed by the learned District Forum, Camp Jaipur, the aforesaid two appeals have been filed by the appellants one by Sharad Hospital and its Director and another by its employee Dr. Rajendra Dhar. In these appeals, the main contentions of the learned Counsel for the appellants are as follows : Appeal No. 161/2004 filed by Sharad Hospital and its Director Dr. Santusht Mathur (i) That since at the time when the deceased was admitted in the Sharad Hospital, its Director, namely, Dr. Santusht Mathur was not present and she was out of station, therefore, whatever would be the responsibility, that would be of Dr. Rajendra Dhar, who had admitted the deceased and given treatment to her. Therefore, the impugned order of the District Forum holding the Sharad Hospital liable to pay compensation to the Complainants for the act done by Dr. Rajendra Dhar was wholly illegal and erroneous one and thus, the same cannot be sustained and liable to be quashed and set aside. Appeal No. 419/2004 filed by Dr. Rajendra Dhar (ii) That since Dr. Rajendra Dhar had left the hospital at 1.00 p.m. on 23.9.1995, and thereafter, no negligence on his part could be attributed if something had happened later on and in giving treatment to deceased upto the period when he was in the hospital, there was no negligence on his part. (iii) The impugned order of the District Forum holding Dr. Rajendra Dhar liable to pay compensation to the Complainants suffers from basic infirmity, illegality and perversity and according to appellant-

Dr. Dhar, whole amount should have been paid by the authorities of Sharad Hospital, where he was employed, as deceased was admitted there and payment was made to that Hospital.

On the other hand, the learned Counsel appearing for the Complainants has supported the impugned order of the learned District Forum.

3. WE have heard the learned Counsel for the appellants and the learned Counsel for the Complainants and gone through the entire materials available on record. There is no dispute on the point that Sharad Hospital (appellant No. 1 in Appeal No. 161/2004) was being run by Dr. Santusht Mathur (appellant No. 2 in Appeal No. 161/2004) who was its Director and Dr. Rajendra Dhar (appellant in Appeal No. 419/2004) was working in that Hospital as Duty Doctor from 10.00 a.m. to 1.00 p.m. daily.

4. THERE is also no dispute on the point that on the relevant day i.e. on 23.9.1995, deceased was got admitted by Dr. Rajendra Dhar in the Sharad Hospital and at that time, deceased was suffering from high grade fever and drip was given to her by Dr. Dhar and Dr. Dhar had left the hospital at around 1.30 p.m. on 23.9.1995. There is also no dispute on the point that on the day when the deceased was admitted in Sharad Hospital by Dr. Rajendra Dhar on 23.9.2005, its Director Dr. Santusht Mathur was not present. There is also no dispute on the point that after 1.30 p.m. of 23.9.1995, Dr. Rajendra Dhar had not visited Sharad Hospital and he had not seen deceased after 1.30 p.m. till she had died in the morning of 24.9.1995.

5. THUS, in the facts and circumstances just narrated above, the question for consideration is whether the findings of the learned District Forum holding Dr. Rajendra Dhar guilty of committing medical negligence and also holding Sharad Hospital vicariously liable for the act done by Dr. Dhar, could be sustained or not.

6. BEFORE proceeding further, we must have a bird's eye view pertaining to negligence and medical negligence. Winfield has defined negligence as a tort which is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff. An act involving the above ingredients is a negligent act. It can very well be stated that negligence comprises of, (a) Existence of legal duty; (b) Breach of legal duty; (c) Damage caused by the breach. (a) Existence of legal duty Whenever a person approaches another trusting him to possess certain skill, or special knowledge on a given problem and depends on him for service and dispensation of that skill, the second party is under an implied legal duty to exercise due diligence as is expected to act at least in such a manner as is expected in the ordinary course from his contemporaries. So it is not that the legal duty can only be contractual and not otherwise. Failure on the part of such a person to do something which was incumbent upon him to do so, that which would be just and reasonable tantamounts to negligence. Every time a patient visits a doctor for treatment of his ailment he does not enter into any written contract but there is a contract by

implication and any lack of carelessness or proper care can make the erring doctor liable for breach of professional duty. (b) Breach of legal duty There is certainly a breach of legal duty if the person exercising the skill does something which an ordinary prudent man would not have done or fails to do that which an ordinary prudent man would not have done in a similar situation. The standards are not supposed to be of the very high degree or of a very low degree but just the relative kind that is expected from an ordinary prudent man in the ordinary course of treatment. (c) Damage caused by the breach The wrong, injury occasioned by such a negligence is liable to be compensated in terms of money and the Courts apply the well settled principles for determination of the exact liquidated amount. In a suit for damages on account of negligence, the onus lies on the patient to prove that the doctor was negligent and the said negligence resulted in the injury which is complained to be compensated.

Medical Negligence

Basically, medical negligence means such negligence resulting from the failure on the part of the doctor to act in accordance with medical standards in vogue which are being practised by an ordinarily and reasonably competent man practising the same art.

7. A branch of the civil wrongs is known as negligence. A sub-branch of this is medical negligence, which deals with situations in which a physician or surgeon or other member of the medical profession may have to pay compensation, if he has not exercised reasonable care. The degree of care to be exercised depends on the facts of each case. However, in general, it may be stated that the test is the standard of the ordinary skilled man, exercising and professing to have that special skill. If a medical man fails to measure up to that standard in any respect, he has been negligent and has to pay compensation to the person harmed by him. Once a doctor accepts a patient, this principle becomes applicable, whether the doctor accepts fees or not, and whether the doctor is a private practitioner or a public servant, general practitioner or a Specialist. A person who offers medical advice or treatment, implicitly undertakes that he has the requisite skill and knowledge. Such a person owes to the patient certain duties of which the following are important: (a) duty of care in deciding whether to take in a case; (b) duty of care in deciding what treatment to give and in diagnosis; (c) duty of care in administering the treatment; (d) a duty of care in answering a question put to him by a patient when he knows that the patient intends to rely on his answer.

8. THERE is a difference between a specialist and general practitioner. A person may be general practitioner but not specialist and not vice versa. A specialist is one from whom, in case of a contract, more skill can be demanded than from a general practitioner. In case of eye the person who holds the degree of Master of surgery can be regarded as a specialist but not the person who is a general practitioner. A breach of any of these duties will support a suit by the patient. Professional negligence Professional negligence, rather medical negligence is that

which, as the term suggests, relates to the medical profession and is the result of some irregular conduct on the part of any member of the profession or related services in discharge of professional duties. It may be stated here that to establish negligence on the part of the defendant, the claimant must show: (a) what is the standard of care; and (b) on the facts of the case, that the defendant's conduct fell below that standard. Burden of proof

9. IN the famous case of *Hucks v. Cole* decided by Lord Denning, (1968) 118 New.LJ 469, Lord Denning pointed out that a charge of professional negligence against a medical man stood on a different footing to a charge of negligence against the driver of a motor car. It affected his professional status and reputation. Therefore, the burden of proof was correspondingly greater.

10. IN *Halsbury's Laws of England* (Vol. 26 page 17), it has been held that a doctor is not liable in negligence because someone else of better skill and knowledge would have prescribed a different treatment or operated in a different way, nor is he guilty of negligence if he had acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art although a body of adverse opinion also existed among medical men. This principle has been affirmed by the Apex Court in a famous case of *Dr. Laxman, Balkrishna Joshi v. Bapu Godbole*, AIR 1969 SC 128. Liability of medical men and hospitals A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise reasonable degree of care. Neither the very highest nor a very low degree of care and competent judged in the light of the particular circumstances of each case is what the law requires. (*Halsbury's Laws of England*, 3rd Edn. Vol. 26 p. 17).

In *Clark v. MacLenna*, 1983 (1) All. ER 416, it has been clearly stated that in case where a general duty of care arose and there was failure to take a recognized precaution and that failure was followed by the very beginning, the burden of proof lay on the defendant to show that he was not in breach of any duty.

11. IN *Poonam Verma v. Ashwani Patel*, II (1996) CPJ 1 (SC)=AIR 1996 SC 2111, the Hon"ble Supreme Court has held as under: "The breach of duty may be occasioned either by not doing something which a reasonable man, under a given set of circumstances, would do or by doing some act which a reasonable prudent man would not do."

Vicarious liability Vicarious liability means substitute or indirect responsibility of senior doctor when he delegates a task to his junior/nursing staff or to doctors in locum tenens. In other words, the hospital may be held directly responsible for faulty premises, equipment, inadequate or unqualified staff and other

organizational errors and may also be held vicariously liable for the fault of their employees. The hospital authorities are responsible for the whole of their staff, not only for the nurses and doctor but also for the anaesthetists and surgeons.

12. THE moment a doctor/hospital accepts to treat a patient who has submitted himself for such treatment, the duty of care starts, irrespective of monetary considerations. In such a situation, the hospital cannot escape liability by mere statement that it only provides infrastructural facilities, services of nursing staff, supporting staff and technicians and that it cannot suo motu perform or recommend any operation/amputation In the light of the above principles, if the facts of the present case are examined, it clearly appears that Dr. Rajendra Dhar (appellant in Appeal No. 419/2004), who admitted the deceased in the Sharad Hospital (appellant No. 1 in Appeal No. 161/2004) has not taken due and reasonable care and has also not followed the medical standards in treating the deceased and while treating deceased after having been admitted in that hospital, he has not performed his duty with proper care and skill. The manner in which he has treated the deceased clearly shows that he was guilty of committing medical negligence as he failed to exercise due diligence and reasonable degree of care in administering the treatment to deceased. When the patient was admitted by himself in the Sharad Hospital and when he had left hospital at 1.30 p.m., therefore, to say that he was not informed about the deteriorated condition of deceased would not be sufficient to exonerate him from his liability as he was under legal duty to have seen and observed deceased and since he has not done so, therefore, carelessness and negligence in treating deceased on his part is well established and thus, he could be treated as erring doctor liable for breach of professional duty.

13. THUS, no illegality or irregularity has been committed by the learned District Forum in holding Dr. Rajendra Dhar (appellant in Appeal No. 419/2004) guilty of committing medical negligence and the findings of the learned District Forum in this respect are liable to be confirmed one.

14. SO far as the liability of Sharad Hospital is concerned, since Dr. Rajendra Dhar was an employee of the Sharad Hospital and deceased was admitted and treated in that hospital and payment was made to that hospital, therefore, the hospital could not escape from its liability and it is also vicariously liable for the act done by its employee Dr. Rajendra Dhar, irrespective of the fact that at the time when the deceased was admitted in that hospital, its Director Dr. Santusht Mathur was not present. Whether liability of Sharad Hospital and its employee Dr. Rajendra Dhar should be joint as well as several It may be stated here that consistent with the control test which was earlier followed, a hospital authority was not held liable for the negligence of its staff in matters requiring professional skill, but with the change in the legal position that the control test is not decisive in all cases and it breaks down when applied to skilled and professional work, a hospital authority has now been held liable for negligence of its professional staff and the distinction earlier drawn between professional duties and ministerial or

administrative duties has been disapproved. The State has been held liable for the negligence of the staff of a Government hospital.

The expression "vicarious liability" is, however, to some extent a misnomer if one thinks that it is a liability of A instead of that of B, where B, the servant of A, the master, does a wrong to C. In such cases, therefore, the liability is joint as well as several. The wrong-doer himself is liable as he does an act and the master is also liable as he commands to do it. This is on the principle of vicarious liability because by employing him he sets the whole thing in motion.

15. THUS, the liability of Sharad Hospital (appellant No. 1 in Appeal No. 161/2004) and its employee Dr. Rajendra Dhar (appellant in Appeal No. 419/2004) is joint as well as several and the findings of the District Forum holding the Sharad Hospital and its employee Dr. Rajendra Dhar liable separately and directing both of them to separately pay Rs. 50,000 and Rs. 50,000 to the Complainants cannot be sustained and liable to be modified in the manner that both Sharad Hospital and its employee Dr. Rajendra Dhar are held liable jointly and severally to pay to the Complainants a sum of Rs. one lac instead of paying by them separately Rs. 50,000 and Rs. 50,000 to the Complainants. For the reasons stated above, there is no merit in the aforesaid two appeals and they are liable to be dismissed with some modification in the impugned order on the point of joint and several liability in the manner as indicated above. Accordingly, both the aforesaid appeals filed by the appellants are dismissed with some modification in the impugned order of the learned District Forum, Camp Jaipur dated 3.12.2003 to the extent and in the manner that instead of separately paying Rs. 50,000 and Rs. 50,000 by the Sharad Hospital (appellant No. 1 in Appeal No. 161/2004) and Dr. Rajendra Dhar (appellant in Appeal No. 419/2004) to the Complainants, both Sharad Hospital and Dr. Rajendra Dhar are held liable jointly and severally to pay Rs. one lac to the Complainants. Appeals dismissed.