
(2004) 09 GAU CK 0018
In the Gauhati High Court
Case No : Writ Appeal No"s. 9 and 10 of 2001

State of Tripura and Another	Vs	APPELLANT
Amrita Bala Sen and Others		RESPONDENT

Date of Decision : 15-09-2004

Acts Referred:

Constitution of India, 1950 — Article 21, 226

Citation : (2005) 1 GLR 7 : (2004) 3 GLT 720

Hon'ble Judges : Tinlianhang Vaiphei, J;Ranjan Gogoi, J

Bench : Division Bench

Advocate : U.B. Saha and T.D. Majumder, for the Appellant; K.N. Bhattacharjee, A.K. Bhowmik, S. Ghosh, S.R. Dey, S. Roy and S. Talapatra, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—Both the appeals being directed against a common Judgment and order dated 07.12.2000 were heard analogously and are being disposed of by the present order.

2. The facts, in brief, may be noted at the outset.

The two petitioners in the writ proceeding registered as Civil Rule No. 511 of 1996 were admitted in the B.R. Ambedkar Memorial Hospital at Hapania, West Tripura on 17.6.1996. A cataract operation was performed in the left eye of each of the petitioners in the said hospital on 18.6.1996 and they were discharged from the hospital on 21.6.1996. The petitioner No. 1 in the connected writ proceeding, i.e., Civil Rule No. 557 of 1996 was admitted in the hospital on 18.6.1996; his left eye was operated on 19.6.1996 and he was discharged on 21.6.1996. Similarly, the petitioner No. 2 in the said writ proceeding was admitted in the hospital on 11.6.1996; her left eye was operated on 12.6.1996 and she was discharged on 24.6.1996 whereas the third petitioner was admitted in the hospital on 12.6.1996; her left eye was operated on 13.6.1996 and she was discharged from the hospital on 26.6.1996. According to the petitioners in

both the writ petitions, their left eyes, on which operations were performed in the hospital were permanently damaged due to an infection suffered in the hospital. Accordingly, they have filed the writ petitions in question alleging violation of their fundamental rights guaranteed under Article 21 of the Constitution and seeking, inter alia, compensation of Rs. 2,00,000 (Rupees two lakh) each for such violation.

The learned Single Judge after hearing the writ petitions by a judgment and order dated 07.12.2000 came to the conclusion that the left eye of each of the five petitioners were damaged on account of infection suffered due to the operation performed in the hospital and that the said event amounted to a gross violation of the fundamental rights of the petitioners under Article 21 of the Constitution. The learned Single Judge took the further view that the writ petitioners would be entitled to compensation of Rs. 60,000/- (Rupees sixty thousand) each in addition to cost of litigation, which was quantified at Rs. 2,000/- (Rupees two thousand) in favour of each of the petition Rs. Aggrieved by the conclusions reached and the award of compensation made, the present appeals have been filed by the State.

3. We have heard Mr. U.B. Saha, learned senior Govt. Advocate, assisted by Mr. T.D. Majumder, learned counsel for the appellants and Mr. A.K. Bhowmik, learned senior counsel appearing on behalf of the respondents-writ petitioners (hereinafter referred to as "the petitioners").

4. Mr. Saha, the learned senior Govt. Advocate, Tripura appearing for the appellant State has argued that the present writ petitions raised several disputed questions of fact which were not appropriate for adjudication in the exercise of power under Article 226 of the Constitution. According to learned counsel, whether the infections suffered by the petitioners occurred during their stay in the hospital or after their release; whether there was any negligence on the part of the respondents leading to the infection and what was the exact damage suffered by the petitioners for award of compensation, are all questions which are disputed and, therefore, the learned Single Judge has gone clearly wrong in deciding the aforesaid questions in the writ petitions filed. According the learned counsel, the grievances of the petitioners should have been left for consideration by the appropriate forum on the basis of oral and documentary evidence that may have been addressed by the parties. Continuing, learned counsel has argued that hospital infection, in varying proportions, is a normal feature in health care facilities provided and by referring to certain literature, which have been enclosed to the counter-affidavit of the respondents, learned counsel has argued that no negligence can be attributed to the respondents. In any case, no finding of negligence on the part of the respondents has been categorically recorded by the learned Single Judge. Shri Saha has further argued that after the incident had occurred, the State Government had constituted two expert committees to go into the matter and the reports of the said committees, dated 03.07.1997 and 25.7.1996, which are available on record, do not clearly indicate any negligence

on the part of the respondents. It is precisely on account of the aforesaid reason that this Court by order dated 07.9.1999 had referred the matter to another expert body for its opinion. However, the report of the aforesaid third committee was not furnished to the court. On the above facts, it has been argued that as the court itself felt the necessity of the report of the third committee, which was not forthcoming, reliance should not have been placed by the learned Single Judge on the two reports, dated 03.07.1996 and 25.7.1996 submitted earlier. In support of the challenge made in the present appeals, learned counsel for the appellants has further argued that the petitioners had come to the hospital at the stage when they were virtually blind because of cataract having formed in their left eyes, The result of the operation and the unfortunate mishap that took place did not place the petitioners in a worse position than they were before. The award of compensation, therefore, is contended to be unjustified. Lastly, it has been argued by the learned counsel for the appellants that if this court is inclined to take the view that the petitioners should be, in any manner, restituted for the incident in question, the amount awarded by the learned Single Judge should be clarified by this Court to be in a nature of ex gratia payment and not on account of compensation awarded.

5. Controverting the submissions advanced on behalf of the appellants, Shri Bhowmik, learned counsel for the respondents has argued that the reports, dated 03.7.1996 and 25.7.1996 submitted by the two expert committees constituted by the Government clearly indicate lack of due care and caution on the part of the official respondents to ensure the full recovery of the petitioners from the operation. According to the learned counsel for the petitioners, each of the petitioners having been admitted to the hospital had a right to expect exercise of reasonable care and caution by the hospital authorities in order to facilitate full vision to the petitioners in their left eyes. The reports of the expert committees have clearly indicated that due care and caution was not exercised by the hospital authorities while the petitioners were receiving medical attention in the hospital and, therefore, negligence on the part of the hospital authorities was clearly proved. It is further submitted by Shri Bhowmik that cataract in the eye is a reversible process and the fact that the petitioners were admitted for surgery is a clear demonstration of the fact that the petitioners had good chances of recovering their eye sight. On the above broad facts, the learned counsel for the respondents has argued that the findings recorded by the learned Single Judge have been so recorded correctly and on a due consideration of the materials on record and the award of compensation made by the learned Single Judge is justified.

6. The rival submissions advanced on behalf of the parties have received due consideration of the court. Scrutiny of allegations of commission of a tort in a proceeding under Article 226 of the Constitution would be permissible if such scrutiny does not require the court to investigate into any disputed question of fact. The above limitation is self-imposed and the reason therefore appears to be that the question of negligence, which is essentially a question of fact has to be

determined in every action in tort. However, in situations where negligence is apparent on the face of the record and does not require any probe there is no reason why the dispute cannot be finally resolved in a proceeding under Article 226 of the Constitution. Situations where negligence is apparent on face of the record is embraced by the principle of *res ipsa loquitur*, which is essentially a rule of evidence. The above principle, i.e. *res ipsa loquitur* has the effect of throwing the burden that there is no negligence to the defendants. The above principle has received application to cases of medical negligence also as would be evident from a reading of the judgment of the Apex Court in the case of *State of Haryana and Ors. v. Smt. Santra* reported in AIR 2000 SC 888. Though in the aforesaid judgment, there is no explicit reference to the principle of *res ipsa loquitur*, what is noticeable is the acceptance of the said principle as "negligence per se". Not only the principle of *res ipsa loquitur* has received application to cases of medical negligence as noticed above, the same has also been applied for determination of liability/culpability in a disciplinary proceeding against a Govt. servant *Karnataka State Road Transport Corporation v. B.S. Hullikatti* (2001) 2 SCC 574.

7. Adverting to the facts of the present cases, we have noticed that in the judgment under challenge, the learned Single Judge has elaborately reproduced the relevant parts of the two reports, dated 03.7.1996 and 25.7.1996. The aforesaid two reports make it amply clear that not only the petitioners but there are several other postoperative cases were affected by infections, which had occurred in cases operated on 13.6.1996, 15.6.1996 and 18.6.1996. The first case of infection was detected on 17.6.1996 and the source of the infection was identified to be the operation theatre. Infections having developed in the hospital and the reports of the expert bodies having identified the source of the infection to be the operation theater in the hospital, little argument or persuasion is required for this court to come to the conclusion that the petitioners were affected by the infections during their stay in the hospital. The proximity between the date of the operations and the infections formed do not permit this court to accept the contrary argument advanced on behalf of the appellants that the petitioners could have been infected by sources outside the hospital. When cases of infection and that too of a sizeable number were detected on 17.6.1996, there is no good reason why the surgeries should have continued on 18.6.1996 and though a valiant attempt has been made on behalf of the appellants to show that no operations were done on 17.6.1996, the report dated 03.7.1996 clearly records that "the operations continued even after detection of postoperative infection on 17.6.1996 and verbal objection by the O.T. staff. The facts, indeed, are self-evident and self-explanatory and the conduct of further surgeries on 18.6.1996 was a grossly negligent act. In so far as the O.T. being the source of infection is concerned, the same cannot be reasonably explained by reference to statistics to show that such infections are common. The possibility of infections in certain areas in a hospital cannot be overlooked by any acceptance of the fact that such infections must exist. All hospitals in the country must make constant endeavours to keep its premises and establishments free from infections to

ensure that postoperative treatment is uneventful. In the present case, no material has been laid on behalf of the official respondents to show that any steps had been taken to make the B.R. Ambedkar Memorial Hospital free from infections and/or that the official respondents had a systematic programme to check hospital infections. A citizen admitted to hospital has a right to expect that he would leave the hospital after a successful course of treatment and without being affected by any postoperative hospital infection.

8. On the basis of the above discussions, we consider it appropriate to concur with the findings recorded by the learned Single Judge that the petitioners had developed infections during their stay in the hospital thereby leading to virtual blindness of their left eyes. The concomitant violation of the fundamental rights of the petitioners under Article 21 of the Constitution need hardly detain the court and we, therefore, proceed to consider the quantum of compensation awarded.

9. What should be such quantum is largely a matter of subjective determination though care must be taken to consider all objective facts and circumstances. Having regard to the age of the petitioners, the pains and sufferings besides the agony and anguish they have suffered and the resultant quality of life that they would now be required to live, we are of the considered view that no interference with the quantum of compensation ought to be made by us. Furthermore, as full payment of the compensation awarded have not yet been made to the petitioners, we are of the view that of such unpaid amount should now carry an interest of 9% per annum from the date when such compensation was awarded, i.e., 07.12.2000 till the date of payment along with cost of the present litigation, which is quantified at Rs. 3,000/- (Rupees three thousand) for each of the petitioners. We also see no reason as to why any observation should be recorded by us to convey the impression that what has been directed to be awarded is payment by way of ex gratia and not by way of compensation.

10. Both the writ appeals shall stand dismissed in terms of the above.