Dr. S.K.Jhunjhunwala vs Mrs. Dhanwanti Kaur on 1 October, 2018

Author: Abhay Manohar Sapre

Bench: Vineet Saran, Abhay Manohar Sapre

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.3971 OF 2011

Dr. S.K. Jhunjhunwala ….Appellant(s)

VERSUS

Mrs. Dhanwanti Kaur & Anr. …Respondent(s)

JUDGMENT

Abhay Manohar Sapre, J.

1. This appeal is directed against the final judgment and order dated 01.09.2009 passed by the National Consumer Disputes Redressal Commission (hereinafter referred to as "the National Commission"), at New Delhi in First Appeal No. 93 of 2004 whereby the National Commission allowed the appeal filed by respondent No.1 and set aside the order dated 19.01.2004 of the State Commission, West Bengal, Kolkata in Complaint Case No.698/O/1997.

2. In order to appreciate the issue involved in the appeal, it is necessary to set out the relevant facts hereinbelow.

3. The appellant was the opposite party No.1 whereas the respondent No.1 herein was the complainant and respondent No.2 herein was the opposite party No.2 in the complaint out of which this appeal arises.

4. The appellant is a doctor by profession and is practicing in Calcutta since 1969. He is a qualified Surgeon having expertise, especially in gall bladder surgery. He obtained his MBBS degree from

Banaras Hindu University in 1968 and thereafter went to England and obtained FRCS degree in 1976. He then worked for seven years in various hospitals in England as a Surgeon and returned to India in 1978 and settled in Calcutta. He was a visiting consultant to several Hospitals out of which one was Life Line Diagnostic Center and Nursing Home (respondent No.2 herein) at Calcutta where he used to perform operations on his patients.

5. Respondent No.1(complainant) a lady, who, at the relevant time, was residing in Calcutta felt pain in her abdomen in June 1996. She, therefore, consulted a local doctor but she did not get any relief. Therefore, she consulted Dr. Lakshmi Basu who, on examination, advised her to get some medical tests done such as X-ray, PA Chest, Ultrasound of upper abdomen Endoscopy, Blood Tests etc. Respondent No.1, as advised, carried out these medical tests. On examination of the reports of respondent No.1, Dr. Basu opined that her Gall Bladder had two calculi in its lumen and the same could be cured only by operation. Dr. Basu accordingly advised respondent No.1 to undergo laparoscopic surgery from any good Surgeon and suggested the name of the appellant.

6. Respondent No.1, as advised, consulted Dr. S.K. Jhunjunwala the appellant herein who, after her examination and also her medical test reports, agreed with the advise of Dr. Basu and accordingly advised respondent No.1 for undergoing Surgery of her Gall Bladder. The appellant also advised respondent No.1 to get herself admitted in respondent No.2's Hospital for undergoing Surgery.

7. On 07.08.1996, respondent No.1 got herself admitted in respondent No.2's Hospital as an indoor patient. On 08.08.1996 the appellant performed the laparoscopy and after that open surgery and removed the Gall Bladder of respondent No.1. Respondent No.1 was in the hospital for about a week or ten days for post-operative care and thereafter she was discharged.

8. In December 1997, respondent No.1 filed a complaint under Section 10 of the Consumer Protection Act, 1986 (for short, "the Act") against the appellant (opposite party No.1) and respondent No.2 (opposite party No.2) claiming compensation for the loss, mental suffering and pain suffered by her throughout after the surgery on account of negligence of the appellant in performing the surgery of her Gall Bladder on 08.08.1996. Respondent No.1, in substance, complained that firstly, she had never given her consent for performing general Surgery of her Gall Bladder rather she had given consent for performing laparoscopy Surgery only but the appellant performed general surgery of her Gall Bladder which resulted in putting several stitches and scars on her body, Secondly, even the surgery performed was not successful inasmuch as respondent No.1 thereafter suffered for several days with various ailments, such as dysentery, loss of appetite, reduction of weight, jaundice etc., Thirdly, in June 1997, she was, therefore, required to undergo another Surgery in Ganga Ram Hospital, Delhi for removal of stones which had slipped in CBD. It was alleged that all these ailments were incurred due to the negligence of the appellant, who did not perform the surgery properly and rather performed the surgery carelessly leaving behind for respondent No.1 only mental agony, pain, harassment and money loss and hence she filed a complaint to claim the reasonable amount of compensation under various heads as mentioned above.

9. The appellant filed his reply and denied the allegations made by respondent No.1 in her complaint. In substance, the appellant stated in his reply that he, after examining respondent No.1, advised her to go for surgery of Gall Bladder, which may even include removal of Gall Bladder. It was stated that consent of respondent No.1 for performing the laparoscopic cholecystectomy was duly obtained before performing the surgery. The appellant stated that after starting laparoscopic surgery, he noticed swelling, inflammation and adhesion on her Gall Bladder and, therefore, he came out of the Operation Theater and disclosed these facts to respondent No.1's husband and told him that in such a situation it would not be possible to perform laparoscopic surgery and only conventional procedure of surgery is the option to remove the malady. The husband of respondent No.1 agreed for the option suggested by the appellant and the appellant accordingly performed conventional surgery. Respondent No.1 was discharged after spending few days in the Hospital for post operative care. The appellant, therefore, denied any kind of negligence or carelessness or inefficiency on his part in performing the surgery on respondent No.1 and stated that all kinds of precautions to the best of his ability and capacity, which were necessary to perform the surgery were taken by him and by the team of doctors that worked with him in all such operational cases.

10. Parties adduced affidavit evidence in support of their respective cases set up in their pleadings. The State Commission, by order dated 19.01.2004, dismissed the complaint filed by respondent No.1 finding no merit therein. Respondent No.1 felt aggrieved and filed appeal before the National Commission.

11. By impugned order, the National Commission allowed the appeal filed by respondent No.1 in part and awarded a total compensation of Rs.2 lakhs to be paid by the appellant to respondent No.1 on account of negligence on his part in performing the surgery which gives rise to filing of the present appeal by way of special leave in this Court by the appellant Dr. S.K. Jhunjhnwala(opposite party No.1).

12. The short question, which arises for consideration in this case, is whether the National Commission was justified in allowing respondent No.1's appeal and was, therefore, justified in holding the appellant (opposite party No.1) negligent in performing the Surgery of Gall Bladder of respondent No.1 and, in consequence thereof, was justified in awarding Rs.2 lakhs by way of compensation to respondent No.1.

13. Heard Mr. Ateev Kumar Mathur, learned counsel for the appellant and Mrs. Rupali Samanta Ghosh, learned counsel for respondent No.1.

14. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside the impugned order restore the order of the State Commission for the following reasons.

15. Before we proceed to examine the facts of this case, it is apposite to take note of legal principle that governs the controversy involved in the appeal.

16. The question as to how and by which principle, the Court should decide the issue of negligence of a professional doctor and hold him liable for his medical acts/advise given by him/her to his patient which caused him/her some monetary loss, mental and physical harassment, injury and suffering on account of doctor's medical advise/treatment (oral or operation) is no longer res integra and settled long back by the series of English decisions as well as the decisions of this Court.

17. The classic exposition of law on this subject is first laid down in a decision of Queens Bench in a leading case of Bolam vs. Friern Hospital Management Committee [1957]1WLR 582 = (1957) 2 All ER 118 (QBD).

18. McNair J., in his opinion, explained the law in the following words:

> "Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill ..... It is well□ established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art"

19. The aforesaid principle of law was reiterated and explained by Bingham L.J. in his speech in Eckersley vs. Binnie (1988) 18 Con LR 1 in the following words:

> "From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet."

20. All along and till date, the law laid down in Bolam's case (supra) is consistently followed by all the Courts all over the World including Indian Courts as laying down the correct principle of law on the subject. It is known as Bolam Test.

21. So far as this Court is concerned, a Three Judge Bench in the case of Jacob Mathew vs. State of Punjab [(2005) 6 SCC 1] examined this issue. Chief Justice R.C. Lahoti, (as he then was) speaking for the Bench extensively referred to the law laid down in Bolam's case (supra) and in Eckersley's

case (supra) and placing reliance on these two decisions observed in his distinctive style of writing that the classical statement of law in Bolam's case (supra) has been widely accepted as decisive of the standard of care required by both of professional men generally and medical practitioner in particular and it is invariably cited with approval before the Courts in India and applied as a touchstone to test the pleas of medical negligence.

22. It was held that a Physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100 % for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is what the entire person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of 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.

23. It was further observed that the fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. It was held that the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident and not at the date of trial. It was held that 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. His Lordship quoted with approval the subtle observations of Lord Denning made in Hucks vs. Cole (1968) 118 New LJ 469, namely, "a medical practitioner was not be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be held liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field."

24. In our view, the facts of the case at hand has to be examined in the light of the aforesaid principle of law with a view to find out as to whether the appellant□a doctor by profession and who treated respondent No.1 and performed surgery on her could be held negligent in performing the general surgery of her Gall Bladder on 08.08.1996.

25. It is not in dispute that the appellant is a professionally trained doctor and has acquired the post□graduate degree in the subject (FRCS) from London way back in 1976 and worked there (UK) for seven years and earned enough experience in the field of surgery. It is also not in dispute that since 1976/1977, he has been in the field of surgery in India till the date he performed operation of respondent No.1 on 08.08.1996.

26. These undisputed facts, in our opinion, clearly prove that the appellant is a qualified senior doctor with an experience in the field and had also possessed the requisite knowledge and skill in

the subject to perform the surgery of Gall Bladder.

27. It is also not in dispute that initially he proceeded to perform the laparoscopy surgery of the Gall Bladder of respondent No.1 as advised but while so performing he noticed some inflammation, adhesion and swelling on the Gall Bladder and, therefore, decided to perform the conventional surgery, which he actually did on respondent No.1, to remove the Gall Bladder.

28. According to respondent No.1, the appellant could not have done so because she had not given her consent to him to perform this surgery on her. In other words, according to respondent No.1, she had given her express consent in writing to perform only "laparoscopy surgery" but the appellant instead of performing "laparoscopy surgery" proceeded to perform conventional surgery and in that process removed her Gall Bladder. It is due to this reason, according to respondent No.1, a clear case of negligence on the part of the appellant is made out which entitles respondent No.1 to claim compensation in terms of money.

29. The State Commission did not accept the aforementioned submission of respondent No.1 but this submission found favour to the National Commission for holding the appellant guilty of negligence in performance of his duty in performing the surgery. We do not agree with the reasoning of the National Commission on this issue for more than one reason mentioned below.

30. First, clause 4 of the Consent Form dated 07.08.1996 at page 282 of the SLP paper book, which is duly signed by respondent No.1, in clear terms, empowers the performing doctor to perform such additional operation or procedure including the administration of a blood transfusion or blood plasma as they or he may consider substitute necessary or proper in the event of any emergency or if any anticipated condition is discovered during the course of the operation.

31. Second, in terms of clause 4 of the Consent Form, the appellant was entitled to perform the conventional surgery as a substitute to the former one having noticed some abnormalities at the time of performing Laparoscopy that it would not be possible for the team of doctors attending respondent No.1 to continue further with laparoscopy of the Gall Bladder.

32. In other words, we are of the view that there was no need to have another Consent Form to do the conventional surgery in the light of authorization contained in clause 4 itself because the substitute operation was of a same organ for which the former one was advised except with a difference of another well known method known in medical subject to get rid of the malady.

33. Third, there is an evidence on record and we are inclined to accept the evidence that the appellant having noticed while performing laparoscopy that there was some inflammation, adhesion and swelling on Gall Bladder, he came out of operation theater and informed respondent No.1's husband who was sitting outside the operation theater about what the condition of respondent No.1's gall bladder and sought his consent to perform the substitute operation. It is only after the consent given by the husband of respondent No.1, the appellant proceeded to do conventional surgery.

34. In our opinion, there is no reason to disbelieve this fact stated by the appellant in his evidence. It is, in our opinion, a natural conduct and the behavior of any prudent doctor, who is performing the operation to apprise the attending persons of what he noticed in the patient and then go ahead accordingly to complete the operation.

35. It is not the case of respondent No.1 that her husband was neither present in the hospital on that day nor he was not sitting outside the Operation Theater and nor he ever met the appellant on that day.

36. In our opinion, a clear case of grant of consent to the appellant to perform the substituted operation of Gall Bladder of respondent No.1 was, therefore, made out to enable the appellant to perform the conventional surgery, which he actually performed.

37. The National Commission while recording the finding on the issue of consent against the appellant relied upon the decision of this Court in the case of Samira Kohli vs. Dr. Prabha Manchanda & Anr. (2008) 2 SCC 1. In our view, the said decision itself has made an exception to the cases observing in para 49 of the judgment which reads as under:

> " "The only exception to this rule is where the additional procedure though unauthorised, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorised procedure until patient regains consciousness and takes a decision."

38. In our opinion, the case of the appellant also falls in the excepted category mentioned by this Court because the appellant having noticed the abnormalities in the Gall Bladder while performing laparoscopy surgery proceeded to perform the conventional surgery and that too after obtaining fresh consent of respondent No.1's husband. In other words, it was not an unauthorized act of the appellant and he could legally perform on the basis of original consent (clause 4) of respondent No.1 as also on the basis of the further consent given by the respondent No.1's husband.

39. That apart, we also find that respondent No.1 never raised the objection of "consent issue" to the appellant or/and opposite party respondent No.2 ☐Hospital and it was for the first time in the complaint, she raised this issue and made a foundation to claim compensation from the appellant. Nothing prevented her or her husband to raise the issue of consent immediately after performance the surgery while she was in hospital as an indoor patient and even after discharge that being the natural conduct of any patient. It was, however, not done.

40. It is not in dispute that respondent No.1 failed to prove any specific kind of negligence of the appellant while performing the operation or/and thereafter. Indeed, even the National Commission in Para 18 held this issue in favour of the appellant in following words:

"18. Yet another grievance of the complainant is that she was not treated with care during her hospitalization from 07.08.96 to 18.08.96. No specific instances which can amount to carelessness or negligence on the part of the surgeon or the nursing home have been brought on record and,

therefore, we are unable to hold that there was any lack of care amounting to negligence during her stay in the nursing home for which either the surgeon or nursing home can be made liable."

41. Likewise the National Commission further held in favour of the appellant in para 19 that the stones, which were removed in the second operation at Ganga Ram Hospital after 11 months (04.06.1997) were the same which were noticed by the appellant while performing the first surgery on 08.08.1996 and remained inside. In other words, respondent No.1 failed to prove with the aid of any medical evidence that the stones, which were noticed in the second surgery performed after 11 months, were the same stones which the appellant failed to remove from the Gall Bladder. It is apposite to note the finding of the National Commission in para 19 hereinbelow.

".....We have already found that from the material placed on record that it is not possible to hold with certainty that any of the calculi which were removed from the bile duct of the complainant at Sir Ganga Ram Hospital was the same for which she had undergone Cholecystectomy at the hands of the surgeon and, therefore, the only lapse which we can find on the part of the surgeon is that he did not care to bestow the kind of attention which the problem of complainant required when she consulted him after the procedure of Cholecystectomy, more particularly during April□May 1997....."

42. Had it been so, the appellant could be held liable for failure on his part to remove the stones and allowed them to remain in the Gall Bladder for such a long time. There was no medical evidence adduced by respondent No.1 to prove this fact.

43. In our opinion, no medical evidence of any expert was adduced by respondent No.1 to prove any specific kind of negligence on the part of the appellant in performing the surgery (conventional surgery) of Gall Bladder except raising the issue of "non□giving of express consent". This issue we have already dealt with above and found no merit therein. In our view, respondent No.1 was under

> legal obligation to prove a specific kind of negligence on the part of the appellant in performing the surgery and also was required to prove that any subsequent ailment which she suffered on her return to home such as, jaundice, dysentery, fever, loss of weight etc. were suffered by her only due to improper performance of conventional surgery by the appellant and if the surgery had been successful, she would not have suffered any kind of these ailments.

44. In our opinion, there has to be a direct nexus with these two factors to sue a doctor for his negligence. Suffering of ailment by the patient after surgery is one thing. It may be due to myriad reasons known in medical jurisprudence. Whereas suffering of any such ailment as a result of improper performance of the surgery and that too with the degree of negligence on the part of Doctor is another thing. To prove the case of negligence of a doctor, the medical evidence of experts in field to prove the latter is required. Simply proving the former is not sufficient.

45. In our considered opinion, respondent No. 1 was not able to prove that the ailments which she suffered after she returned home from the Hospital on 08.08.1996 were as a result of faulty surgery

performed by the appellant.

46. Learned counsel for respondent No.1 (complainant) vehemently argued that respondent No.1 suffered immensely due to the surgery performed by the appellant and that she was rightly, therefore, awarded the compensation by the National Commission.

47. Learned counsel for respondent No.1 also placed reliance on the Discharge Certificate which, according to her, mentions that Laparoscopy surgery was performed on respondent No.1. On this basis, learned counsel contended that respondent No.1 had not given her consent for performing general surgery.

48. In the light of the detailed discussion made above on the issues arising in the case including the issue of grant of consent, we are unable to accept the aforesaid submissions of learned counsel for respondent No.1.

49. It is apt to remember the words of the then Chief Justice of India when he said in Jacob Mathew's case (supra) which reads as under:

> "The subject of negligence in the context of medical profession necessarily calls for treatment with a difference. There is a marked tendency to look for a human actor to blame for an untoward event, a tendency that is closely linked with a desire to punish. Things have gone wrong and therefore somebody must be found to answer for it. An empirical study reveals that background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner, and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. The human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against eh operator i.e. the doctor, cannot be ruled out. One may have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how the doctor functions in real life. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine. The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in□depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability."

50. In the light of what we have held above, we cannot concur with the reasoning and the conclusion arrived at by the National Commission. As a consequence, the appeal succeeds and is accordingly allowed. The impugned order is set aside and that of the order passed by the State Commission is restored.

.....J. [ABHAY MANOHAR SAPRE] .....J. [VINEET SARAN] New Delhi;

October 01, 2018