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NAND KISHORE PRASAD

v.

DR. MOHIB HAMIDI & OTHERS

(Civil Appeal No. 4619 of 2019)

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MAY 10, 2019

**[DR. DHANANJAYA Y CHANDRACHUD AND
HEMANT GUPTA, JJ.]**

C *Consumer Protection Act, 1986 – Medical Negligence –*
Vicarious liability of the Hospital vis-a-vis the Operating Surgeon –
Appellant’s son-patient complained of abdominal pain, fever and
haemorrhage in both eyes – Referred by the physician to the
Hospital-original Opposite Party No.1 – He was taken to the said
Hospital where he was operated upon when the platelets count was
35000 per cubic millimeter (cu.mm) – Since the patient was bleeding,
the relatives of the patient took discharge from the Hospital and on
the same date admitted him to another Hospital where he died–
SCDRC held that the operating surgeon (respondent no.1) was
medically negligent in operating the patient when the platelets count
was so low and inter alia awarded Rs.4 lakhs as compensation to be
paid by the Hospital and Rs.2 lakhs by respondent no.1 – NCDRC
set aside the compensation awarded against respondent no.1 holding
that Rs.4 lakhs awarded against the hospital is just compensation –
On appeal, held: At the time of admission, the recorded history of
the patient was complaint of pain in abdomen, fever and
haemorrhage in both eyes for the past five days – However, there is
no evidence of critical condition of the patient to be operated upon
even with low platelet count – Surgery is not proved to be of
immediate necessity or the only life saving option to save life of a
patient who had critical platelet count – Action to operate upon the
patient cannot be said to be prudent decision – It is a case of
unreasonable decision of the Operating Surgeon to operate and
not a case of “bit negligent” so as to absolve the surgeon from the
allegation of medical negligence – Finding of NCDRC set aside to
that extent – When the SCDRC awarded Rs. 6 lakhs as compensation,
the NCDRC should not have interfered with the amount of
compensation but could apportion the amount payable by the

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Operating Surgeon to the Hospital as the liability of Hospital to pay the amount of compensation was vicarious as the death occurred during the course of employment of Operating Surgeon with the said Hospital – Entire amount of Rs.6 lakhs is payable by the Hospital which would be just compensation in the facts and circumstances of the present case – Enhanced compensation of Rs.2 lakhs be paid by the Hospital along with interest at the rate of 6% per annum from the date of the order passed by SCDRC.

Partly allowing the appeal, the Court

HELD : 1.1 At the time of admission, the recorded history of the patient was complaint of pain in abdomen, fever and haemorrhage in both eyes for the past five days. However, there was no evidence of critical condition of the patient to be operated upon even with low platelet count. The surgery to remove round worms was not proved to be of immediate necessity to save life of a patient who had critical platelet count. In the absence of any evidence that the surgery was the only life saving option available at that time, the action to operate upon the patient cannot be said to be prudent decision. In the absence of any evidence that the surgery was the only option even with low blood platelets, the finding of negligence of the operating surgeon cannot be ignored. Thus, it is a case of unreasonable decision of the Operating Surgeon to operate and not a case of “bit negligent” so as to absolve the surgeon from the allegation of medical negligence. Consequently, the finding of NCDRC to that extent is set aside. In respect of amount of compensation, the NCDRC held that sum of Rs.4,00,000/- awarded by the SCDRC against the Hospital is just compensation. [Paras 12-15] [1081-G-H; 1082-A; E-G]

1.2 The compensation has to be calculated on the basis of twin criteria of age and income. But in the absence of income of the father or family, there is no legally acceptable norm available on record for the enhancement of compensation. The SCDRC awarded a sum Rs.4,00,000/- as compensation payable by the Hospital and Rs.2,00,000/- by the Operating Surgeon. The NCDRC found a sum of Rs. 4,00,000/- as just compensation and absolved the Operating Surgeon from any liability. When the SCDRC has awarded a sum of Rs. 6,00,000/- as compensation,

- A the NCDRC should not have interfered with the amount of compensation but could apportion the amount of compensation payable by the Operating Surgeon to the Hospital as the liability of Hospital to pay the amount of compensation is vicarious as the death has occurred during the course of employment of Operating Surgeon with the said Hospital. Therefore, the entire amount of
- B Rs.6,00,000/- is payable by the Hospital which would be just compensation in the facts and circumstances of the present case. The enhanced amount of compensation of Rs.2,00,000/- shall be paid by the Hospital along with interest at the rate of 6% per annum from the date of the order passed by SCDRC on
- C 12.11.2014. [Paras 17-20] [1084-G-H; 1085-A-C]

Arun Kumar Manglik v. Chirayu Medical Health and Medicare Private Ltd. **2019 (3) SCALE 333** ; *National Insurance Company Limited v. Pranay Sethi and Others* **(2017) 16 SCC 680** – relied on.

- D *Kusum Sharma and Others v. Batra Hospital and Medical Research Centre and Others* **(2010) 3 SCC 480** : **[2010] 2 SCR 685** ; *V. Krishnakumar v. State of Tamil Nadu and Others* **(2015) 9 SCC 388**;**[2015] 8 SCR 100** – referred to.

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Case Law Reference

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|---------------------|-------------|---------|
| 2019 (3) SCALE 333 | relied on | Para 12 |
| [2010] 2 SCR 685 | referred to | Para 13 |
| [2015] 8 SCR 100 | referred to | Para 15 |
| F (2017) 16 SCC 680 | relied on | Para 16 |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4619 of 2019.

- G From the Judgment and Order dated 02.11.2015 of the National Consumer Disputes Redressal Commission, New Delhi in First Appeal No. 8 of 2015.

Kamlesh Jain, Pradeep Kumar Yadav, Ms. C. Rubavathi, Ms. Richa Dhawan, V. Senthil Kumar, M. A. Chinnasamy, Advs. for the Appellant.

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Rajeev Sharma, T. Rajat Krishna, Advs. for the Respondents. A

The Judgment of the Court was delivered by

HEMANT GUPTA, J.

1. The challenge in the present appeal is to an order passed by the National Consumer Disputes Redressal Commission¹ on 02.11.2015 whereby the original Opposite Party No. 3 (Respondent No. 1 herein) was absolved of the damages of Rs. 2,00,000/- imposed by State Consumer Disputes Redressal Commission² *vide* order dated 12.11.2014. B

2. Sanjay Kumar aged about 15 years, son of the Appellant complained of abdominal pain, fever and haemorrhage in both eyes. Initially, the Appellant had taken his son to a physician Dr. Arun Tiwari on 08.11.1995 who advised some tests and medicines. He was advised to consult with the specialist as well. After examining the blood report, Dr. Arun Tiwari referred the patient to the Kurji Holy Family Hospital-original Opposite Party No. 1 on 10.11.1995. He was taken to the Hospital at about 8.00 PM. The recorded history of the patient is as under: C D

“A 15 years old male patient is admitted in 3A-7 with the complaints of fever, pain abdomen and hemorrhage from both eyes since 5 days.”

3. The patient was operated upon on 11.11.1995 when the platelets count was 35000 per cubic millimeter (cu.mm) at about 11.15 AM. Before the surgery, the patient was transfused with two units of blood and after the surgery another two units of blood were transfused. Since the patient was bleeding and in spite of packing of leakages, the relatives of the patient took discharge from the Kurji Holy Family Hospital at about 2.00 PM on 13.11.1995. On the same date, the patient was admitted to Patna Medical College and Hospital (PMCH) where the patient died on 16.11.1995. E F

4. In consumer complaint under the Consumer Protection Act, 1986³, the Appellant produced an affidavit of Dr. Hare Ram Singh, then posted in Jharkhand State Assembly at Russian Hostel, Dhurwa, P.S. Jaganathpur, District Ranchi. Dr. Hare Ram Singh opined that Bleeding Time (BT) was 3' 00" against normal value of 2-4 seconds and Clotting G

¹ NCDRC

² SCDRC

³ 1986 Act

- A Time (CT) was 5' 00" against normal value of 3-6 seconds. The affidavit further states that there was a second test which shows that the platelets decreased excessively and there were very few plasma cells present. There was another test conducted before surgery, showing platelets count as 35000 per cu. mm. Dr. Hare Ram Singh was of the opinion that to operate the patient with excessive low platelets count was the greatest blunder and clear case of extreme negligence of doctors.
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5. The surgery was performed on 11.11.1995 at about 11.15 AM. The post-operative note of the operating team reads as under:

“Name(s) of Operation(s) : Exp.Lap. & Extraction of R. W.

- C Operative Findings: Numerous R.W. in the small gut with yellowish collection of fluid in the peritoneal cavity.

- Procedure: The abdomen was opened by midline incision above and below the umbilicus. The peritoneal cavity was found to contain yellowish fluid a small amount of which was collected and sent for c/s & biomedical examination. The small gut was found to contain many round worms. They were collected at one place and extracted out by making a nick in the gut. The wound was closed in layers. A rubber corrugated drain was placed in the peritoneal cavity. The abdomen was closed in one layer by vieryl. skin was left open.”
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6. Learned SCDRC found that the patient was haemophilic and not peritonitis as diagnosed by the Respondents. However, since the platelets count was 35000 per cu.mm against normal range of 1.5 lakhs to 4 lakhs per cu. mm, the Operating Surgeon was medically negligent in operating patient when the platelets count was so low. Thus, the opposite party was found negligent in carrying out surgery. The SCDRC awarded a sum of Rs. 4,00,000/- as compensation to be paid by the Kurji Holy Family Hospital-Opposite Party No.1 and Rs. 2,00,000/- by the Opposite Party No.3-Operating Surgeon with 6 percent simple interest, apart from Rs. 32,000/- as expenditure incurred in medical treatment and the litigation costs of Rs. 25,000/-. In appeal by the Operating Surgeon, the amount of compensation awarded against Operating Surgeon was set aside by NCDRC.
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7. The NCDRC though held the Opposite Party No. 3 wee bit negligent but, it found that the amount of compensation awarded by the
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SCDRC and paid by the Kurji Holy Family Hospital is just a proper compensation. The Operating Surgeon was warned to be careful in future. A

8. The argument of the learned counsel for the Appellant is that it is a case of sheer medical negligence in operating the son of the Appellant even though he had low platelet count as 35000 cu.mm as against normal platelet count of 1.5 lakhs cu.mm to 4 lakhs cu. mm. B

9. On the other hand, learned counsel for the Respondents argued that when the patient was admitted on 10.11.1995, there was haemorrhage in both eyes for the last five days. After admission as per the affidavit of Dr. Hare Ram Singh, the first BT and CT test were done at about 8.55 pm (pg. 23 of paper book) which was quite low. The second test which was higher than the normal bleeding and clotting time was conducted at 7.30 AM on 11.11.1995 (pg. 24 of paper book). Another test was conducted at 9.00 AM on 11.11.1995 (pg. 25 of paper book). The last test before the surgery was conducted at 10.30 AM. C

10. It is thus, contended that the patient was in difficult and critical medical condition. Therefore, the option with the Surgeon was to try to save life by removing the round worms and transfuse blood to facilitate recovery of the patient. It was *bona fide* decision taken by the Operating Surgeon in the situation in which the patient was. Therefore, performing of surgery on 11.11.1995 at 11.15 AM is not a case of medical negligence. D

11. It is contented that the affidavit of Dr. Hare Ram Singh is in respect of reports immediately before the surgery but there is no report in respect of the medical condition of the patient at the time of his admission to the Kurji Holy Family Hospital. Therefore, the affidavit of Dr. Hare Ram Singh is not the complete evidence as without reporting about the condition of the patient at the time of admission, it is not possible for another doctor to report whether the action of Operating Surgeon was negligent or not. E

12. At the time of admission, the recorded history of the patient is complaint of pain in abdomen, fever and haemorrhage in both eyes for the past five days. However, there is no evidence of critical condition of the patient to be operated upon even with low platelet count. The surgery to remove round worms is not proved to be of immediate necessity to save life of a patient who had critical platelet count. In the absence of any evidence that the surgery was the only life saving option available at F

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A that time, the action to operate upon the patient cannot be said to be prudent decision. This Court recently in **Arun Kumar Manglik v. Chirayu Medical Health and Medicare Private Ltd.**⁴ held as under:-

B “53. In the practice of medicine, there could be varying approaches to treatment. There can be a genuine difference of opinion. However, while adopting a course of treatment, the medical professional must ensure that it is not unreasonable. The threshold to prove unreasonableness is set with due regard to the risks associated with medical treatment and the conditions under which medical professionals function. This is to avoid a situation where doctors resort to ‘defensive medicine’ to avoid claims of negligence, often to the detriment of the patient. Hence, in a specific case where unreasonableness in professional conduct has been proven with regard to the circumstances of that case, a professional cannot escape liability for medical evidence merely by relying on a body of professional opinion.”

D 13. In fact, this Court in **Kusum Sharma and Others v. Batra Hospital and Medical Research Centre and Others**⁵, held that the “Doctors in complicated cases have to take chance even if the rate of survival is low. The professional should be held liable for his act or omission, if negligent; is to make life safer and to eliminate the possibility of recurrence of negligence in future”. But, in the absence of any evidence that the surgery was the only option even with low blood platelets, the finding of negligence of the operating surgeon cannot be ignored.

F 14. Thus, we find that it is a case of unreasonable decision of the Operating Surgeon to operate and not a case of “bit negligent” so as to absolve the surgeon from the allegation of medical negligence. Consequently, the finding of NCDRC to that extent is set aside.

G 15. In respect of amount of compensation, the NCDRC held that sum of Rs.4,00,000/- awarded by the SCDRC against the Hospital is just compensation. The appellant relies upon judgment of this court reported as **V. Krishnakumar v. State of Tamil Nadu and Others**⁶ to claim enhanced amount of compensation. In the said case of medical negligence at the time of delivery of a baby girl born to middle class family, this Court held as under:-

⁴ 2019 SCC OnLine SC 197

⁵ (2010) 3 SCC 480

H ⁶ (2015) 9 SCC 388

“19. The principle of awarding compensation that can be safely relied on is *restitutio in integrum*. This principle has been recognised and relied on in *Malay Kumar Ganguly v. Sukumar Mukherjee*⁷ and in *Balram Prasad case*⁸, in the following passage from the latter: (*Malay Kumar Ganguly case*, SCC p. 282, para 170)

“170. Indisputably, grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of *restitutio in integrum*. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. (See *Livingstone v. Rawyards Coal Co*⁹)”

An application of this principle is that the aggrieved person should get that sum of money, which would put him in the same position if he had not sustained the wrong. It must necessarily result in compensating the aggrieved person for the financial loss suffered due to the event, the pain and suffering undergone and the liability that he/she would have to incur due to the disability caused by the event.”

16. In a Judgment of this Court reported as **National Insurance Company Limited v. Pranay Sethi and Others**¹⁰, a Constitution Bench has laid down parameters for the grant of compensation in respect of claims arising out of Motor Vehicular accidents as just compensation has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. The Court held as under:-

“55. Section 168 of the Act deals with the concept of “just compensation” and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual

⁷ (2009) 9 SCC 221

⁸ (2014) 1 SCC 384

⁹ (1880) LR 5 AC 25 (HL)

¹⁰ (2017) 16 SCC 680

A case. The conception of “just compensation” has to be viewed through the prism of fairness, reasonableness and non-violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, “just compensation”. The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the apposite multiplier to be applied. The formula relating to multiplier has been clearly stated in *Sarla Verma*¹¹ and it has been approved in *Reshma Kumari*¹². The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well-accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the courts is difficult and hence, an endeavour has been made by this Court for standardisation which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardisation keeping in view the principle of certainty, stability and consistency. We approve the principle of “standardisation” so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.”

17. Thus, the compensation has to be calculated on the basis of twin criteria of age and income. But in the absence of income of the father or family, there is no legally acceptable norm available on record for the enhancement of compensation.

18. The SCDRC has awarded a sum Rs.4,00,000/- as compensation payable by the Hospital and Rs.2,00,000/- by the Operating Surgeon. The NCDRC found a sum of Rs. 4,00,000/- as just compensation

¹¹ (2009) 6 SCC 121

¹² (2013) 9 SCC 65

and absolved the Operating Surgeon from any liability. When the SCDRC has awarded a sum of Rs. 6,00,000/- as compensation, the NCDRC should not have interfered with the amount of compensation but could apportion the amount of compensation payable by the Operating Surgeon to the Hospital as the liability of Hospital to pay the amount of compensation is vicarious as the death has occurred during the course of employment of Operating Surgeon with the said Hospital.

19. Therefore, we find that the entire amount of Rs.6,00,000/- is payable by the Hospital which would be just compensation in the facts and circumstances of the present case. The enhanced amount of compensation of Rs.2,00,000/- shall be paid by the Hospital along with interest at the rate of 6% per annum from the date of the order passed by SCDRC on 12.11.2014.

20. Thus, the appeal is partly allowed in the manner mentioned above.

Divya Pandey

Appeal partly allowed.