

HIGH COURT FORM NO. (J) 2.

HEADING OF JUDGMENT IN ORIGINAL SUIT.

IN THE COURT OF MUNSIF NO. 3 AT GUWAHATI.

DISTRICT-KAMRUP

Title Suit Case No. 546/2007

Present:

Naguib Ahmed. A.J.S
M.Sc (Agriculture), LL.B
Munsiff No.3, Kamrup,
Guwahati.

29th day of August, 2012

- 1. Smt. Savya Bala Das**
W.O: Sri. Dharanidhar Das
R.O: Santipur, Chaygaon
P.S: Boko,
District: Kamrup (M), Assam.....: Plaintiff(s).

-Versus-

- 1. The State of Assam**
Represented by the Secretary to the
Govt. of Assam, Health and Family
Welfare Department, Dispur,
Guwahati-6, Assam.
- 2. The Medical Suprintendent,**
Mahendra Mohan Chowdhury Hospital,
Panbazar, Guwahati
- 3. Dr. (Mrs.) Lily Barman**
Eye Department,
Mahendra Mohan Chowdhury Hospital,
Panbazar, Guwahati-1.
- 4. District Blindness Control Society, Kamrup,**
Represented by its Project Director,
Room No.-71, Second Floor,
Office of the Deputy Commissioner,
Kamrup, Assam: Defendant(s)

This suit coming on for final hearing on 02.08.2012 in the presence of:-

1. **Sri. H.L Maurya** : **Advocate for the plaintiff(s).**

And

2. **Sri. B.C Pathak** : **Advocate for the defendant(s).**

and having stood for consideration to this day, the court delivered the following Judgment.

JUDGEMENT

(A suit for declaration and realization of compensation)

1. ***Plaintiff's case:*** The plaintiff is an old lady and is a resident of Santipur, P.S- Boko in the District of Kamrup, Assam. The plaintiff having certain problems in her right eye went to Chaygaon P.H.C. The doctors on examination detected cataract in the right eye and accordingly referred her to Mahendra Mohan Choudhury Hospital (Here in after referred to as MMCH) for treatment. The plaintiff was admitted by District Blindness Control Society, Kamrup in MMCH for cataract operation of right eye and accordingly the right eye of the plaintiff was operated on 07.07.2006 by Dr. (Mrs.) Lily Barman of MMCH. Before the operation, the right eye of the plaintiff was examined and FC +ve was found in the right eye. Before the examination the plaintiff was having eyesight in the right eye. After the operation the plaintiff had pain in her eyes and she along with her daughter apprised the doctor as regards the pain but the treating doctors and the staff of MMCH did not care for the same and left the plaintiff at the mercy of the God. The plaintiff was discharged on 10.07.2006 and was advised to report at MMCH on 21.08.2006 for follow up. However after the discharge the plaintiff found that she has lost her eye-sight of the right eye. Thereafter the plaintiff was advised by Defendant No.3 Dr. (Mrs.) Lily Barman to Sri Sankardev Netralaya, Guwahati for examination. She was accordingly examined on 08.08.2006, 09.08.2006, 22.08.2006, 07.09.2006, 10.09.2006 and on other dates at Sri Sankardev Netralaya. However her sight was already damaged during her operation at MMCH. The plaintiff served a pleader's notice dated 01.11.2008 through registered post to the defendants claiming a sum of Rs. 1,50,000/- (One Lakh Fifty Thousand) only as

compensation against pains and sufferings. The Defendant No.3 on receipt of the notice sent a reply through her advocate dated 21.11.2006 denying the liability for payment of compensation.

2. **Plaintiff's prayer:** In the premises the plaintiff prayed for:

- I) Declaration that the defendants were negligent and careless in course of operation and post-operation treatment.
- II) Realization of compensation.
- III) Interest pendente lite.
- IV) Cost of the suit.
- v) Other relief.

3. **Defendant's version:**

The Defendant No.3 filed the written statement (W.S) and contested the suit. The Defendant No.3 stated that the plaintiff was sent through DBCS as a sponsored case. Such type of cases are being treated/ operated in MMCH on regular basis.

The patients including the plaintiff were taken up for pre-operation treatment on 06.07.2006. After due pre-operation treatment they were operated upon with all medical, surgical and pathological care with all care skill and diligence. The operation was carried out by ophthalmologists including Defendant No. 3 Dr. (Mrs.) Lily Barman with the assistance of paramedical staffs. Defendant No.3 operated 9 (Nine) cases out of total twelve cases including the plaintiff on 07.07.2006. In the morning of 08.07.2006 Defendant No.3 attended the ward of the plaintiff and found the pad and bandage of Smt. Savya Bala Das in a displaced condition. The Defendant No.3 removed it and then observed a flat anterior chamber and Hazy Cornea in the operated eye. This type of complication usually happens when injury is inflicted by the patient herself unintentionally or accidentally by rubbing of the eyes during sleep. The plaintiff was then put under observation for next course of treatment. The other patient were however operated and later on discharged successfully. On 10.07.2006 the patient was taken to O.T and was examined by the Defendant No.3 and other Para-medical staffs. Under microscope the Defendant No.3 noticed some lens matter and distorted pupil through hazy cornea. On the next morning at the time of dressing the

cornea was found to be hazier and the plaintiff complained of mild discomfort. On examination her intra-ocular pressure (IOP) was found to be digitally normal and there was no sign of infection or inflammation, so she was discharged on 13.07.2006 with the instruction to report on 21.08.2006. In between that period patient came to MMCH and the Defendant No.3 examined her and found that perception of hand movement close to face was present through hazy cornea. At that time the plaintiff complained of only mild irritation in the eye but no pain as such. The persistence of irritation could be due to presence of stitches which was usually removed after 1 ½ months. Her cornea was decompensate but such cornea may become cleaner with progress of time. In case it does not improve there are measures to tackle such problem. Prescribing some medicine, the Defendant No.3 advised her to attend Sri Sankardev Netralaya, Guwahati for further investigation and treatment as MMCH does not have sophisticated gadgets to evaluate/ diagnose such a case. There is no single iota of evidence to show that there has been any scope of negligence in the entire process of treatment of the plaintiff. There is also not a single iota of evidence to show that there had been any lapse or negligence in IOL implantation as no infection, or pain or rise of intra ocular pressure was found. The condition justified the release of the patient from the hospital and which was done accordingly. There was admittedly a specific instruction to the plaintiff patient to report for medical follow-up on 21.08.2006 but the plaintiff failed to follow. Hence the ophthalmology department of the MMCH including the Defendant No.3 cannot say anything as to whether the patient has perception of light in her right eye or not as she did not report to MMCH on 21.08.2006 or afterwards. That being the proven state of affairs the allegation is either false or not related to the MMCH and the same are not tenable in law. The Defendant under the facts and circumstances of the case prayed for dismissal of the suit with costs.

4. Defendant No.4 also filed the WS and stated that the answering defendant is the honorary project director of District Blindness Control Society (DBCS), Kamrup only. DBCS participation in such camps is restricted to the support of drugs, IOL etc. In camps, cataract operation was conducted in those patients, whose eye sight was already lost due to matured

cataract and the surgeons tried to restore these patients' eye sight to normal. In the premises the Defendant No.4 prayed for dismissal of the suit with cost.

5. **Issues:**

Considering the rival pleadings the following 3 (Three) issues were accordingly framed on 11.11.2008.

1. Whether the Defendant No.1, 2 and 3 were negligent and careless in course of operation and post operation treatment of the plaintiff right eye and thereby caused complete blindness to plaintiff right eye?
2. Whether the plaintiff is entitled to get the decree as prayed for?
3. To what relief the plaintiff is entitle?

6. **Witnesses:**

The plaintiff examined 3 (Three) witnesses and defendant examined 1 (One) witness. Some documents were also exhibited by either party.

7. **Proceedings of the suit:**

The suit proceeded ex-parte against Defendant No.1 and 2. Defendant No.3 Dr. (Mrs.) Lily Barman and Defendant No.4 contested the suit. The court vide its order dated 01.08.2011 at the instance of the plaintiff appointed a commission for determining the cause of blindness and to have the opinion of expert. The order was made five years after the date of operation to have a report as to the status of the operated eye as on the time of the order. The head of the Department of the Eye, Guwahati Medical College and Hospital was appointed as Commissioner to examine the operated eye. However no steps were taken by the plaintiff as regards the said commission and the stage of the said examination by the commission was dispensed with after the plaintiff availed much adjournment to take steps for the commission.

8. **Discussions, Decisions and Reasons thereof:**

I have also heard arguments advanced by both the sides at length.

9. **Issue No. 1:**

This issue is framed to determine whether the Defendant No.1, 2 and 3 were negligent and careless in course of operation and during post operation phase. The plaintiff **Smt. Savya Bala Das** deposed herself as **PW-1**.

In her evidence she mostly reiterated her complaint story. In cross-examination she deposed that since 2-3 years before the operation she had problems with her eyes. On the next day of operation she was examined upon but no medicines were provided to her. Next day her bandage was removed but she could not properly see with her operated eyes. Later on she went to "Sankardev Netralaya" who told her that the operation on her eyes was not properly done. The Sankardev Netralaya has given her in writing that the operation was not properly done and the same was annexed in the case. Prior to her operation she could somehow see by her eye but after the operation she completely lost her vision. **PW-2 Sri. Dharani Das** is the husband of the plaintiff who in his cross-examination deposed that on the next day of operation the bandage was not removed and the doctor was not present at the hospital on that day. **PW-3 Smt. Padmabati Das** deposed that the bandage from the operated eye was removed on the next day of operation. On the removal of the said operation the plaintiff stated to the doctor that she could not see anything with the operated eyes. The eyes were examined on the next day of operation also. The patient was kept in MMCH for 8 (Eight) days. At Sankardev Netralaya it was intimated to them that due to wrong operation the plaintiff lost her eye sight. Thereafter **DW-1 Dr. (Mrs.) Lily Barman** deposed in her cross-examination that no post operation problems of the plaintiff were informed to her. DW-1 reported in evidence-in-chief that such complications generally happens by unintentional or accidental rubbing of eyes. However no such rubbing of eyes was reported by the plaintiff to her. She denied the suggestion that no proper bandage was put over the operated eye. On 08.08.2006 the plaintiff complained of irritation and then she prescribed medicines to her. Exhibit-3 is the said prescription wherein she has not mentioned about the complain being made by the plaintiff to her. The plaintiff complained of total loss of vision of the operated eye and through Exhibit-3 she referred the plaintiff to Sri Sankardev Netralaya. MMCH are custodians of Exhibit-E and Exhibit-F. In her exhibited documents she has not mentioned that the plaintiff caused self inflicted injury in her operated eyes.

Appreciating the aforesaid evidence it seems that the PW-1 had deposed that "Sankardev Netralaya" had given her in writing that the operation was faulty which cost her, her eyes. As deposed, such written

certificate has not been annexed herein to authenticate the aforesaid claim of the plaintiff.

The Defendant No.3 relied upon several case laws to define medical negligence. In *Kusum Sharma and others -Vrs- Batra Hospital and Medical Research Centre and others (2010) 3 SCC 480*, “Medical Negligence” has been discussed elaborately. It observed that while deciding whether medical professional is guilty of medical negligence, the following well known principles must be kept in view.

- (i) Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs.
- (ii) Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.
- (iii) The medical profession is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.
- (iv) A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.
- (v) In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.
- (vi) The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure, just because a professional looking to the gravity of illness has taken higher element of risk to redeem

the patient out of his or her suffering which did not yield the desired result may not amount to negligence.

- (vii) Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.
- (viii) It would not be conclusive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

In *Martin F. D'Souza -Vrs- Mohd Tsfaq (2009) 3 SCC 1*, it was discussed as regards the precautions which Doctor/ Hospital / Nursing Homes should take.

- (a) Current practices, infrastructure, Para-medical and other staff, hygiene and sterility should be observed strictly. In relation to *Sarwat Ali Khan Vs Prof. R. Gogi and others* it was observed that out of 52 cataract operations in an eye hospital 14 persons lost their vision in the operated eye. An enquiry revealed that in the operation theatre two autoclaves were not working properly. This equipment is absolutely necessary to carry out sterilization of instruments, cotton, pads, linen etc, and the damage occurred because of its absence in working condition. The doctors were held liable.
- (b) No prescription should ordinarily be given without actual examination.
- (c) A doctor should not merely go by the version of the patient regarding his symptoms but should also make his own analysis including tests and investigations where necessary.
- (d) A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient.
- (e) An expert should be consulted in case of any doubt.
- (f) Full record of the diagnosis, treatment etc should be maintained.

In light of the aforesaid evidence and case-laws negligence may be defined as the breach of a duty caused by the omission to do something which a reasonable man guided by these considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.

Simply because a patient has not favorably responded to a treatment given by a doctor or a surgery has failed the doctor cannot be held straightway liable for medical negligence. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of professional would be at stake. However it is well known that even the best professionals have failures. That doesn't mean that the doctor or surgeon must be held guilty of medical negligence, unless there is some strong evidence to suggest that he is.

In *Spring meadows Hospital and Anr -Vrs- Harjola Ahluwalia and Anr (1998) 4 SCC 39* the apex court laid down following principles for holding doctors negligent. "Gross medical mistake will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of res ipsa loquitur can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances....."

In view of the principles discussed above there is nothing on record to show that the elements of negligence are apparent on the activities of the defendant including Defendant No.3. The documentary evidence goes to show that the Defendant No.3 is highly experienced and skilled professional. None of the witnesses in term of the aforesaid principles could however lead to show that negligence of any kind was committed by the Defendant No.3.

From the depositions and materials on record it cannot be said that the Defendant No.3 was negligent. In my considered opinion the Defendant No.3 cannot be held guilty of medical negligence. In the absence of any expert report the court cannot act as a super-specialist in medical science. The available evidences on record fail to substantiate the claims of the plaintiff. To fasten civil liability as regards negligence, it may be enough for

the complainant to prove that the doctor did not exercise reasonable care in the treatment of the patient. However there is no such evidence in the instant case to fasten such liability.

Accordingly the issue is decided in negative and goes against the plaintiff.

10. **Issue No. 2 and 3:**

For better appreciation and discussion both the issues are taken together.

However in view of the discussions made in Issue No.1 and decisions arrived there on I am of the considered opinion that no further discussion are required in the present circumstances of the case.

The plaintiff is not entitled to get the decree as prayed for and the plaintiff is also not entitled to any other reliefs.

Accordingly the issues are decided and goes against the plaintiff.

11. **ORDER**

In the conclusion, the suit is dismissed on contest without cost.

Prepare decree accordingly.

The case is disposed of on contest.

Given under my hand and seal of this court on **29th day of August 2012.**

Naguib Ahmed
Munsiff No.-3, Kamrup,
Guwahati.

APPENDIX

Plaintiff's Witnesses

1. PW-1: Smt. Savya Bala Das.
2. PW-2: Sri. Dharani Das.
3. PW-3: Smt. Padmabati Das.

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|-----------|---|--|
| Exhibit-1 | : | Chaygaon P.H.C certificate. |
| Exhibit-2 | : | Discharge Slip issued by District Blindness Control Society. |
| Exhibit-3 | : | Advice slip by Defendant No.3. |
| Exhibit-4 | : | Appoint slip of Sri Sankardev Netralaya. |
| Exhibit-5 | : | Cash receipt of Sri Sankardev Netralaya. |

- Exhibit-6 : Doctor's prescription of Sri Sankardev Netralaya.
Exhibit-7 : Cash receipt of Sri Sankardev Netralaya.
Exhibit-8 : Cash receipt of Sri Sankardev Netralaya.
Exhibit-9 : Prescription.
Exhibit-10 : Appointment slip.
Exhibit-11 : Advocate Notice of Plaintiff.
Exhibit-15 : Reply of Defendant No.5.

Defendant's Witnesses

1. DW-1: Dr. (Mrs.) Lily Barman

- Exhibit-A(i) : Academic Certificates.
Exhibit-A(ii) : Academic Certificates.
Exhibit-A(iii) : Academic Certificates.
Exhibit-A(v) : Academic Certificates.
Exhibit-A(vi) : Academic Certificates.
Exhibit-C : Registration slip of Chaygaon P.H.C.

Case-Laws Discussed

1. Kusum Sharma and others -Vrs- Batra Hospital and Medical Research Centre and others (2010) 3 SCC 480.
2. Martin F. D'Souza -Vrs- Mohd Tsfaq (2009) 3 SCC 1.
3. Spring meadows Hospital and Anr -Vrs- Harjola Ahluwalia and Anr (1998) 4 SCC 39.

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