Uoi and Others Vs. Master Karan Minor Thr. His Next Friend/Father Suraj Bhan

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Court : Delhi

Decided On : May-18-2012

Judge : J.R. Midha

Appeal No. : RFA No. 307 OF 2008

Appellant : Uoi and Others

Respondent : Master Karan Minor Thr. His Next Friend/Father Suraj Bhan

Judgement :

JUDGMENT

1. The appellants have challenged the impugned judgment whereby the learned Trial Court has awarded compensation of Rs.10,00,000/- to respondent. The appellants were defendants No.1 to 8 and the respondent was the plaintiff before the Trial Court. For the sake of convenience, the appellants and the respondent are referred to as per their ranks in the suit as defendants and plaintiff respectively.

2. **Plaintiff’s Case**

2.1 On 11th May, 2000, at about 10:00 A.M., the plaintiff fell down while playing and suffered compound fracture in his left hand below elbow whereupon his father

took him to the emergency of Dr. Ram Manohar Lohia Hospital where he was referred to the OPD. After the X-ray, the plaintiff's left hand was plastered and he was asked to report next day. The plaintiff was 12 years old at that time and studying in 7th standard.

2.2 The plaintiff could not sleep for the whole night of 11th May, 2000 due to acute pain and, therefore, his father took him to the hospital in the morning of 12th May, 2000 at about 09:00 A.M. The doctors on duty said that everything was alright whereupon the father took back the plaintiff. Since the acute pain continued, the plaintiff's father brought him back to the hospital on 12th May, 2000 at about 03:00 P.M. when the doctors cut the plaster and found pus and blood at the injury but without giving proper treatment the left hand was again re-plastered and no treatment was given for gas gangrene. The acute and unbearable pain continued and a foul smell also started coming from the injured portion.

2.3 On 13th May, 2000, the plaintiff's father again took the plaintiff to the hospital at about 09:00 A.M. The doctor of another unit was present in OPD who said that the plaintiff's case has been spoiled by the doctors who attended the plaintiff on 11th and 12th May, 2000. The plaintiff's plaster was cut and he was told that immediate emergency operation was to be done.

2.4 On 14th May, 2000, the surgery was performed to amputate the left arm/hand of the plaintiff.

2.5 The plaintiff claimed compensation of Rs.20,00,000/- on the ground that he was left handed and the amputation of the left hand had permanently disabled him for the whole life, ruined his career as well as matrimonial prospects and disfigured him.

3. **Defendants"Case**

3.1 The defendants admitted the arrival of the plaintiff in the casualty of Dr. Ram Manohar Lohia Hospital at about 11:00 A.M. where he was referred to orthopedic emergency room being a case of fracture of left forearm. The plaintiff was immediately X-rayed in the X-ray room attached to the emergency and was found

having fracture of both the bones of the forearm with a punctured wound. The plaintiff was taken to the attached O.T. where the wound was cleaned, analgesic injection was given and the plaster was applied after setting of the fracture. The injection of tetanus toxoid was also given to the plaintiff and he was asked to report to the hospital next day in the fracture follow-up clinic.

3.2 On 12th May, 2000, the plaintiff visited the follow-up clinic of the hospital and he was warned to come to orthopedic emergency in case of increase in pain.

3.3 On 12th May, 2000 at about 03:00 P.M., the plaintiff again visited the orthopedic emergency when the plaster was cut to clean the wound and a new plaster was applied.

3.4 On 13th May, 2000, the doctors found the signs of gas gangrene and the patient was given all possible treatment like antibiotics, fasciotomy, hyperbaric oxygen, AGGS, etc. which is available in a very few hospitals. The plaintiff's wound swab was taken for gram staining and bacterial identification. After confirmation of gas gangrene by the laboratory test, the limb was sacrificed after obtaining a mandatory written consent from his father to save the life of the plaintiff.

3.5 Gas Gangrene is a disease which can happen to anyone at any given time with smallest of injuries even by a pin prick or by abrasion just like tetanus and sometimes it does not occur in patients with massive wounds. This condition cannot be foretold. Routine prophylazis using Anti Gas Gangrene Serum like Tetanus Toxoid cannot be and is not used on every patient as it has its inherent complications and serious reactions. The usual incubation period is 2-3 days before the disease presents with a rapid progression of the disease once the bacteria establishes itself actively.

ISSUES

On 7th April, 2004, the following issues were framed by the learned Trial Court:-

"(i) Whether the defendants No.1 to 7 were negligent/careless in giving the proper treatment to the plaintiff, as alleged in the plaint? OPP.

(ii) Whether it was a case of “GAS GANGRENE” and imputation of left fore aram was necessary as alleged in the W.S.? OPD.

(iii) Whether the plaintiff has suffered loses on account of negligence/careless/dereliction on duty of the defendants No.1 to 7, if so, the computation of the amount in terms of money. OPP.

(iv) Whether the plaintiff is entitled to relief of the principal amount. OPP.

(v) Whether the plaintiff is entitled to interest, if so, the rate period and amount thereof? OPP.

(vi) Relief.”

5. **Plaintiff’s evidence**

The plaintiff examined three witnesses. The father of the plaintiff appeared as PW-1. Mr. Surinder Singh, Record Clerk, RML Hospital appeared as PW-2 and Dr. Shambhuji, Senior Chief Medical Officer of Safdarjung Hospital appeared as the third witness but he has also been wrongly mentioned as PW-2. PW-1 reiterated the averments made in the plaint. PW-1 proved the record of the treatment of the plaintiff produced by the hospital. PW-1 also proved the disability certificate - Ex.PW1/8. PW-2, Surinder Singh produced the record of RML Hospital. Dr. Shambhuji, Senior Chief Medical Officer of Safdarjung Hospital deposed having perused the casualty treatment card of the plaintiff. Dr. Shambhuji deposed that in the casualty treatment card dated 11th May, 2000, the attending doctor suspected gas gangrene on the first day, i.e, on 11th May, 2000 and he recorded the same in the column for diagnosis on the casualty treatment card. Dr. Shambhuji opined that the patient should not have been allowed to go home and should have been admitted in Intensive Care Unit for taking a wound swab and prophylactic antibiotics, preferably intravenous and Anti-Gas Gangrene Serum (AGGS). Dr. Shambhuji further opined that no plaster should have been applied on the limb because it creates low oxygen conditions in which the gas gangrene bacteria thrive rapidly being an anaerobic bacteria. Dr. Shambhuji further opined that one of the diagnostic symptom of gas gangrene is excessive pain which the plaintiff

complained throughout since 11th May, 2000. Dr. Shambhuji also deposed with respect to the vital signs and diagnosis of gas gangrene as prescribed in Bailey and Love's Short Practice of Surgery which was exhibited as Ex.PW-2/A (colly.). Dr. Shambhuji further deposed that tetanus and gas gangrene should also be kept in mind in all trauma cases in the casualty. The electronic copy of the chapter of gas gangrene describing the minimum standard of clinical care required in the cases of suspected gas gangrene downloaded from the website "eMedicine"was proved as Ex.PW-2/B (colly.).

6. **Defendants"Evidence**

The defendants examined one witness, Dr. Ajay Shukla, Ortho-surgeon in RML Hospital who appeared as DW-1 and deposed that proper treatment was given to the plaintiff and no signs or symptoms of gas gangrene were noticed till 13th May, 2000 when the plaintiff was admitted in the hospital and immediate surgery was performed to control the disease by amputating left forearm. DW-1 deposed that usual incubation period of gas gangrene is 2-3 days and after recognizing the symptoms, the patient is given antibiotics, fasciotomy, hyperbaric oxygen and AGGS and the wound swab is taken for gram staining and bacterial identification. In cross-examination, DW-1 admitted that he was not involved in the treatment of the plaintiff. He further admitted that if a diligent doctor suspects gas gangrene then the patient should not be allowed to go home and should have been admitted in the Intensive Care Unit. He further admitted that wound swab for gram staining was taken on 13th May, 2000 and the confirmed diagnosis for gas gangrene was made by the doctor on 14th May, 2000. He further admitted that no efforts to detect gas gangrene were made by the doctors on 12th May, 2000 when the plaintiff visited the hospital and reported acute pain because no sign of gas gangrene was noticed by the doctors. He further deposed that the laboratory test for diagnosis of gas gangrene is not done on a routine basis as it involves serious side effects, high cost and is time consuming. The witness further deposed that ordinarily a window is made in the plaster to observe the wound beneath the plaster for 1-2 days.

7. The learned counsel for the defendants has urged only one ground at the time of hearing of this appeal namely that there was no negligence on the part of the defendants and, therefore, the defendants are not liable to pay any compensation whatsoever to the plaintiff. It is submitted that the defendants took all possible care and precaution in the treatment. Gas gangrene is a disease which can happen to anyone at any time, even with the smallest of injuries by pin prick or by abrasion like tetanus. The incubation period is 2-3 days before the onset of the disease and there is rapid progression of the same once the bacteria establishes actively. The defendants gave medications which included antibiotics, fasciotomy, hyperbaric oxygen and AGGS upon observing the signs of this disease. The doctors decided to amputate the limb of the plaintiff to save his life on 14th May, 2000 only after getting confirmed that there was onset of gas gangrene, by laboratory tests. The whole case of negligence was built upon noting by a resident doctor in casualty ward regarding suspected gas gangrene. Had the patient developed gas gangrene on 11th May, 2000 then by the second day, there would have been foul smell emanating from his wound. The onset of gas gangrene is sudden and dramatic. Symptoms usually begin suddenly and quickly worsen. X-Ray, CT Scan or MRI of the area may show gas in the tissues. Without treatment, death occurs within 48 hours. The learned counsel for the defendants refer to and rely upon the literature on gas gangrene and the judgment of the Supreme Court in **Kusum Sharma v. Batra Hospital and Medical Research Centre, (2010) 3 SCC 480** in which the Supreme Court laid down the following principles for deciding the case of medical negligence:-

“89. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence 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, would do, or doing something which a prudent and reasonable man would not do.

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 professional 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/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 conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

90. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind."

8. On a careful consideration of the rival contentions of the parties and evidence on record, this Court is of the view that the defendants were negligent in giving proper treatment to the plaintiff. The reasons for the above finding are as under:-

8.1 When the plaintiff was first taken to Dr. Ram Manohar Lohia Hospital on 11th May, 2000, the attending doctor suspected gas gangrene which is recorded in the casualty treatment card in the column of diagnosis. The defendants should have immediately admitted the plaintiff in the Intensive Care Unit and put the plaintiff on prophylactic antibiotics, preferably intravenous, after taking wound swab and other measures such as Anti-Gas Gangrene Serum as opined by Dr. Shambhuji. However, no treatment for gas gangrene was given and the plaintiff was plastered and sent back.

8.2 When the plaintiff was brought to the hospital on 12th May, 2000 at 9:00 am and again at 3:00 pm on complaint of excessive pain which is a clear symptom of gas gangrene, the doctors merely opened the plaster and re-plastered and sent

back the plaintiff. However, again no treatment for gas gangrene was given.

8.3 No efforts to diagnose gas gangrene were made either on 11th or 12th May, 2000 though the plaintiff complained of excessive pain all throughout.

8.4 Dr. Shambhuji, Senior Chief Medical Officer of Safdarjung Hospital appeared as PW-2 and gave a very fair opinion of medical negligence by the defendants. He also proved the minimum standard of clinical care required in the case of suspected gas gangrene as Ex.PW2/A (colly.) and Ex.PW2/B (colly.) according to which the diagnosis of gas gangrene is essentially clinical, namely, pain, swelling, oedema and toxemia, rapid increase in pulse-rate, a slight rise or in severe cases, a fall of temperature and vomiting.

8.5 The vital signs of the plaintiff, namely, pulse-rate, temperature, respiratory or blood pressure of the plaintiff were not recorded on 11th, 12th or 13th May, 2000.

8.6 The doctors who treated the plaintiff did not appear in the witness box. No reason has been given for withholding best evidence of the doctors who treated the plaintiff.

8.7 Dr. Ajay Shukla appeared as DW-1 but his opinion is not at all convincing. Dr. Ajay Shukla could not justify why the first diagnosis of gas gangrene on 11th May, 2000 was not correct and what action was taken by the doctors.

8.8 The defendants were negligent in applying the plaster on 11th May, 2000 and again on 12th May, 2000. As opined by Dr. Shambhuji, no plaster should have been applied on the limb as it creates low oxygen conditions in which gas gangrene bacteria thrive rapidly being an anaerobic bacteria.

8.9 As per the medical literature placed on record by the defendants, the incubation period for gas gangrene varies from one hour to six weeks. If that is so, the gas gangrene could have developed by the time the plaintiff reached the hospital on 11th May, 2000. Even assuming that the gas gangrene was not there on 11th May, 2000, this Court is certain that the gas gangrene had developed on 12th May, 2000 and the plaintiff’s limb could have been saved if the treatment would have been started by the defendants on 12th May, 2000. Since the

defendants miserably failed to start the treatment of gas gangrene even on 12th May, 2000, the defendants" conduct fell below the standards of reasonable degree of skill and care.

8.10 The defendants failed to maintain a reasonable degree of skill and care expected from them and their conduct fell below all standards of a reasonably competent practitioner in their field. This case is squarely covered by the principles laid down by the Supreme Court in the case of **Kusum Sharma v. Batra Hospital and Medical Research Centre** (supra).

9. The Claims Tribunal has awarded compensation of Rs.10,00,000/- to the plaintiff. The defendants have not challenged the quantum of compensation awarded by the learned Trial Court in the appeal. During the course of the hearing also, no submissions were made to challenge the quantum of compensation awarded to the plaintiff. However, written submissions filed by the defendants contain one sentence that the amount awarded by the learned Trial Court is excessive. In that view of the matter, this Court has also considered whether the award amount awarded by the Trial Court as fair and reasonable. The principles relating to the award of compensation in case of permanent disability are well settled and laid down by the Supreme Court in **R.D. Hatangadi v. Pest Control (India) Pvt. Ltd., (1995) 1 SCC 551, Common Cause, A Registered Society v. Union of India, AIR 1999 SC 2979** and **Nagappa v. Gurudayal Singh and Ors., 2003 ACJ 12 : 2003 ACJ 12**.

10. In **Nizam Institute of Medical Sciences v. Prasanth S. Dhananka, (2009) 6 SCC 1,** the negligence in the surgical operation resulted in acute paraplegia (paralysis from the waist down) of a 20 years old engineering student. The Supreme Court awarded compensation of Rs.1,00,00,000/- (Rs.7,20,000/- for the driver-cum-attendant, Rs.14,40,000/- towards nursing care, Rs.10,80,000/- for physiotherapy, Rs.25,00,000/- for future continuous medical aid, Rs.25,00,000/- towards loss of future earning, Rs.10,00,000/- towards pain and suffering). The Supreme Court observed as under:-

"91. We can also visualize the anxiety of the complainant and his parents for the future after the latter, as must all of us, inevitably fade away. We, have, therefore

computed the compensation keeping in mind that his brilliant career has been cut short and there is, as of now, no possibility of improvement in his condition, the compensation will ensure a steady and reasonable income to him for a time when he is unable to earn for himself.

92. Mr. Tandale, the learned Counsel for the respondent has, further, submitted that the proper method for determining compensation would be the multiplier method. We find absolutely no merit in this plea. The kind of damage that the complainant has suffered, the expenditure that he has incurred and is likely to incur in the future and the possibility that his rise in his chosen field would now be restricted, are matters which cannot be taken care of under the multiplier method."

11. In **Susan Leigh Beer v. ITDC, 178 (2011) DLT 83,** this Court awarded compensation of Rs.1,82,00,000/- (Rs.5,00,000/- towards medical treatment, Rs.50,00,000/- towards physical pain, mental anguish, psychological anguish and loss of education and Rs.1,27,00,000/- towards loss of income due to permanent disability) to the patient who became quadriplegic due to the accident in the hotel swimming pool and the negligence was attributed to the respondent-hotel.

12. The plaintiff was aged 12 years at the time of the accident and was a student of 7th standard and has suffered above elbow amputation of left upper limb resulting in 70% permanent disability as per the disability certificate - Ex.PW1/8. The plaintiff is entitled to pecuniary as well as non-pecuniary damages. The pecuniary damages would include the expenses incurred on the treatment, special diet, conveyance, cost of nursing, loss of income and loss of earning capacity due to the permanent disability. The non-pecuniary damages would include the compensation for pain and suffering, loss of amenities of life, disfiguration, loss of marriage prospects, inconvenience, hardship, etc. However, the Trial Court has not considered the aforesaid heads and has awarded Rs.5,00,000/- towards physical loss and Rs.5,00,000/- towards mental agony and torture. This Court is of the view that the compensation of Rs.10,00,000/- awarded by the learned Trial Court is just, fair and reasonable. However, this Court does not agree with the heads under which the compensation has been awarded. The heads under which the compensation is awarded by the learned Trial Court are, therefore, substituted

with the following:-

Compensation for pain and suffering	Rs.1,00,000/-
Compensation for loss of amenities of life	Rs.1,00,000/-
Compensation for disfiguration	Rs.1,00,000/-
Compensation for loss of matrimonial prospects	Rs.1,00,000/-
Compensation towards treatment, special diet and conveyance	Rs.1,19,335/-
Compensation for loss of earning capacity due to permanent disability (Taking minimum wages of Rs.3,179/- as on 11th May, 2000 and applying the multiplier of 18 and taking loss of earning capacity as 70%)	Rs.4,80,665/-

13. For the reasons as aforesaid, the appeal is dismissed with costs. The defendants have deposited the entire decretal amount with the Registrar General of this Court out of which Rs.48,616/- has been released to the plaintiff and the remaining amount is lying in fixed deposit. The principal decretal amount of Rs.10,00,000/- is lying in fixed deposit. The principal amount of Rs.10,00,000/- along with interest thereon is directed to be kept in fixed deposit for a further period of 10 years on which the monthly interest be given to the plaintiff. The interest amount of Rs.11,00,000/- is lying in eleven fixed deposits for Rs.1,00,000/- each in terms of the order dated 29th September, 2011. The eleven fixed deposits towards the interest amount should continue for their respective periods. All the original fixed deposit receipts shall be retained by the Bank in the safe custody. However, the original Pass Book shall be given to the beneficiary along with the photocopy of the FDRs. Upon the expiry of the period of each FDR, the Bank shall automatically credit the maturity amount in the Savings Account of the beneficiary.

14. The interest on the aforesaid fixed deposits shall be paid monthly by automatic credit of interest in the respective Savings Account of the beneficiary.

15. Withdrawal from the aforesaid account shall be permitted to the beneficiary after due verification and the Bank shall issue photo Identity Card to the beneficiary to facilitate identity.

16. No cheque book be issued to the beneficiary without the permission of this Court.

17. No loan, advance or withdrawal shall be allowed on the said fixed deposit receipts without the permission of this Court.

18. Half yearly statement of account be filed by the Bank in this Court.

19. On the request of the beneficiary, Bank shall transfer the Savings Account to any other branch according to their convenience.

20. The beneficiary shall furnish all the relevant documents for opening of the Saving Bank Account and Fixed Deposit Account to Mr. M.S. Rao, AGM, UCO Bank, Delhi High Court Branch, New Delhi (Mobile No. 09871129345).

21. Copy of this judgment be sent to Mr. M.S. Rao, AGM, UCO Bank, Delhi High Court Branch, New Delhi (Mobile No.09871129345).

22. The Registrar General shall comply of this judgment within four weeks.