

*** HIGH COURT OF DELHI : NEW DELHI**

RFA No.236/2000

% Judgment reserved on: 5th May, 2009

Judgment delivered on: 26th May, 2009

Shri Jagat Narain Sharma
S/o. Late Pt. Ram Prasad,
C/o. Mrs. Savita Sharma
Social Worker
sPresent Address: 358/IJ
Savitri Gali, Behind Post Office,
Mandawali, Delhi-92 Appellant

Through: Ms. Mala Goel, Adv as
Amicus-Curie.

Versus.

1. Union of India
Through Secretary
Ministry of Health,
New Delhi.
2. Ram Manohar Lohia Hospital,
Through its Superintendent
New Delhi.
3. Dr. O.N. Krishna,
Head of Eye Department,
Ram Manohar Lohia Hospital,
New Delhi Respondents

Through : Mr. Rajinder Nischal, Adv.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may

be allowed to see the judgment?	Yes
2. To be referred to Reporter or not?	Yes
3. Whether the judgment should be reported in the Digest?	Yes

V.B. GUPTA, J.

By way of present appeal, appellant has challenged the judgment and decree dated 6th August, 1999, passed by Additional District Judge, Tis Hazari, Delhi, vide which suit of the appellant for compensation for Rs.2 lacs was dismissed.

2. Facts in brief are that appellant, now aged about 88 years old, filed the suit as an indigent person. On 19th October, 1987, he was admitted in Dr. Ram Manohar Lohia Hospital, for his eye-treatment and was operated upon for extraction of cataract of his right eye. He was discharged on 28th October, 1987. The operation was performed in presence and under supervision of respondent No.3, being head of eye-department. Appellant was asked to visit hospital after one week for the removal of the stitches. Respondents

No.2 and 3, further asked the appellant to come again for the removal of the remaining stitches.

3. When appellant's right eye was operated upon, he complained to respondent No.3 and other junior doctors, who removed the stitches, that in the course of a fortnight he felt severe irritation in his eye as there was excessive bleeding and whole eye-ball was covered with blood and he had suffered great mental loss, agony etc. When nothing was heard, he contacted respondent No.3. Thereafter, he was sent to Dr. Sharma who told him that a slit has been formed in the retina due to non removal of the stitches completely and vitreous disorder has developed and for this reason no lense was fitted in his eye.

4. Treatment of appellant continued vide treatment cards dated 22.9.88, 27.10.88, 26.4.89, 18.12.90, 6.2.90, 31.1.91, 30.10.91 and 31-3/1.4.91. Due to negligence on the part of the respondents, the eye of the appellant got damaged. Then he approached Dr. Rajinder Prashad Hospital under All India Institute of

Medical Sciences. He went there on 30.10.87 and remained under its treatment upto 1991. Doctors at Dr. Rajinder Prashad Hospital, informed him, that on account of negligence on the part of the respondents No.2 and 3, as the operation was done wrongly, the whole of the eye-retina was formed and could not be restored/cured in future. Appellant came to know about this fact after 30.10.91. In 1991, respondents refused to give him any treatment. Due to negligence and inexperience of respondent No.3, appellant has become blind and permanent disabled. Consequently, respondents are liable to pay compensation to him. Appellant took advice from various doctors of Sant Parmanand Blind Mission Hospital also on 10.6.91. They also informed that the right eye-ball has been degenerated.

5. Appellant approached the consumer redressal forum, too, which vide its judgment dated 12.2.93, had come to the conclusion that the appellant was not a

consumer. Appellant thus claimed compensation of Rs.2 lacs in the present suit.

6. The suit was contested by the respondents. Defence of respondents is that a routine intracapsulat contract extraction was performed on the appellant on 19.10.87. His stitches were removed in stages, in two-three weeks and he had to come for routine check-up. As a matter of fact, retina is far away from Cornea and such a thing, as a formation of slit is totally ruled out, as per medical science. A simple and plain conventional intraccapsular surgery was performed and that, too, after obtaining written consent of the appellant.

7. The alleged negligence on the part of the respondents has been categorically denied. It is explained that the appellant's eye was operated upon to the best capability of the respondents. Actually, the appellant did not develop any hole in retina as a result of the operation or because of the subsequent treatment by the respondents. The hole, if any, could

be the result of independent happening and is not necessarily related to the surgery/operation done or performed by the respondents. At the age of 75 years, as in the case of the appellant, the holes are commonly found in the unoperated eyes, hence, the hole of the appellant has no co-relations with the operation performed by the respondent. The appellant is not visually handicapped. His visual status of vision 6/36 Rt. Eye and 6/9 Lt. eye, does not fall into the category of visually handicapped (even minimal handicap).

8. It is further stated that the present suit is barred by time. Appellant has tried to abuse the process of the court. He is nuisance monger and the allegations contained in the suit lack bonafides. The present suit has been filed in order to harass the doctors with oblique motive and to achieve unlawful gain and un-earned income in the form of compensation.

9. It is contended by learned counsel for the appellant that there was sufficient evidence on the record before the trial court which suggests gross

negligence on the part of respondent No.3, which has resulted in complete and incurable damage to the appellant's eye. It is also clear from the treatment chart of Dr. Rajender Prasad Hospital and All India Institute of Medical Science, that operation was performed by respondent No.3 on the appellant in a negligence manner, which caused incurable damage to the appellant's eye.

10. It is also contended that when respondent No.3 came to know about the damage caused by his wrong operation, he refused to treat the appellant any further. Such refusal clearly indicates the guilt on the part of respondent No.3. Damage to the appellant's eye could be caused only due to wrong operation as was opined by the doctors of other hospitals and not due to over age as was pleaded by respondent No.3 during cross-examination.

11. In support of its contention learned counsel for the appellant cited ***Savita Garg v. Director, National Heart institute (2004) 8 SCC 56, Achutrao H.***

Khodwa v. State of Maharashtra & Ors. AIR 1996 SC 2377, A.S. Mittal & Ors. v. State of U.P. & Ors. AIR 1989 SC 1570.

12. On the other hand, it has been contended by learned counsel for the respondents, that it was for the appellant to prove that there was negligence on the part of the doctor, who had performed the operation. Appellant's eye was operated upon to the best capability of the doctors and he did not develop any hole in retina as a result of the operation or because of subsequent treatment. It was the appellant, who did not visit the doctor after the operation, as advised by Dr. Anil Tara, DW 2 and as such there is no negligence on the part of the doctor.

13. On 3rd November, 2006, a Division Bench of this Court, heard the matter at some length and thereafter it passed the following order;

“Having given our careful consideration to the submissions made at the bar, we are of the view that the question whether loss of vitreous reported in the OPD card marked Ex.PW1/2 was on account of the negligence of the surgeon operating the patient or for any other reason is a matter that needs to be clarified. Unfortunately, for the parties, there is no clear evidence on that aspect of the matter before us. It was in that view suggested to counsel for the parties that an eye specialist of repute could be examined in terms of order 41 Rule 27 of the Code of Civil Procedure to clarify whether loss of vitreous could be on account of the negligence of the surgeon operating upon the patient or could also be attributed to any other reason. In the latter event percentage of cases in which this could happen, could also be clarified by the witness.

Learned counsel for the parties agreed that Dr. Rasik Vajpayee of Rajendra Prasad Institute of Ophthalmic Sciences, who is a specialist of repute, could be examined as a witness. They further agreed that since Dr. Vajpayee is an extremely busy person, instead of summoning him before the court to make a statement, it would be more appropriate if a Court Commissioner is appointed to get his statement recorded.

In the circumstances, therefore, we appoint Ms. Sidhi Arora, Advocate of this Court as a Local Commissioner with the direction that she shall record the statement of Dr. Rasik Vajpayee of

Rajendra Prashad Institute of Ophthalmic Sciences, New Delhi. The Local Commissioner shall have the following aspects clarified from the witness.

(1) Whether loss of vitreous can be caused only because of the negligence of the doctor operating upon the patient for removal of cataract?

(2) If there are other reasons apart from negligence that can result in loss of vitreous, what are those reasons and what is the percentage of cases of such losses attributable to those reasons? In particular, whether old age of vitreous in the course of or even without an operation for removal of cataract.

(3) Whether non removal of all the stitches put by the surgeon in connection with the cataract operation can result in or contribute to the loss of eye sight?

Apart from eliciting the opinion of the doctor on the above aspects, the Local Commissioner shall also ask questions to the doctor suggested to her by learned counsel for the parties in the course of examination."

14. In pursuance of the above order, Local Commissioner appointed by this Court, recorded the statement of Dr. Jeewan S. Tityal of Rajinder Prasad Institute of Ophthalmic Sciences, New Delhi. The questions put to this doctor in terms of Court's order along with deposition of the doctor, as are under;

“Q.1 Whether loss of vitreous can be caused only because of the negligence of the doctor operating upon the patient for removal of cataract?

Ans. No, vitreous loss does not happen because of negligence. It is a known complication of the cataract surgery.

Q.2 If there are other reasons apart from negligence that can result in loss of vitreous, what are those reasons and what is the percentage of cases of such losses attributable to those reasons? In particular, whether old age of a patient is in itself a reason for the loss of vitreous in the course of or even without an operation for removal of cataract.

Ans. There are many reasons for vitreous loss during cataract surgery.

- Ocular diseases like subluxated lens, trauma, hyper mature cataract, previous history of glaucoma or retinal surgery.

- Coexisting causes of non dilating pupil like senile miosis(rigid) pseudaeexfoliation syndrome and several others.
- It is well known, that ICCE (Intra capsular extractions) has more incidence of vitreous loss as compared to conventional ECCE (Extra capsula cataract extractions.). Old age perse is not associated with vitreous loss unless coexistent with hyper mature cataract, glaucoma, pre-existing posterior capsular defect, posterior polar cataract, which can increase the risk of vitreous loss.
- Vitreous can be there in the interior chamber without surgery in cases of spontaneous subluxtion/ dislocation of the lens in a hyper mature cataract or when there is history of troma.

Q.3 Whether non removal of all the stitches put by the surgeon in connection with the cataract operation can result in or contribute to the loss of eye sight?

Ans. Non removal of stitches usually does not cause loss of eye sight. Most ECCE surgeries where sutures/stitches are used are made of nylon which is inert and is normally not removed until indicated due to significant suture induced astigmatism. If silk sutures are used then they need to be removed

within 6 to 8 (six to eight) weeks. Suture related infection can occur which can lead to infection to the eye.

The questions suggested by Ms. Mala Goel, Counsel for the appellant & put to Dr. Jeewan S. Tatyai by me alongwith his answers/deposition is an under;

Q.1 What is ICCE?

Ans. ICCEE is a type of cataract surgery where the lens is removed in toto (complete). The newer surgeries performed now a days are ECCE where an opening is made in the anterior capsule of the lens and the lens is removed leaving the capsular bag intact.

Q. 2 What is vitreous loss?

Ans. Vitreous is a Gel-like structure which is located behind the lens. During cataract surgery vitreous can prolapse into the anterior chamber if there is a break in the posterior capsule or anterior vitreous phase.

Q.3 What is the effect of vitreous loss?

Ans. The major effect of vitreous loss are seen if it is not managed effectively. In the immediate post operative period there can be increased inflammation, glaucoma and corneal oedema. In the long term patient can develop retinal oedema and corneal decomposition. These can cause decrease in vision. The retinal oedema can also occur due to age related changes also. The proper management of vitreous loss includes complete removal of vitreous from

anterior chamber by manual or automated vitrectomy machines. The prolonged use of anti inflammatory drugs in the post operative period also helps.

Implantation of IOL (Intro Ocular Lens) will depend upon adequate support of posterior capsule for posterior chamber IOL, or sufficiently normal anterior chamber anatomy for an anterior chamber IOL. The IOL implantation may be avoided in the same sitting and the patient can be reassessed after 6 to 8 weeks. A secondary IOL can then be planted.

Q.4. What is slit lamp?

Ans. Slit lamp is an apparatus need for the examination of eyes under variable magnification.

Q.5 In which part of eye is cataract is formed?

Ans. Cataract is formed in the natural crystalline lens.

Q.6 Can removal of cataract by ICCE cause vitreous loss?

Ans. Yes, the highest incidence of vitreous loss has been reported with ICCE surgery as compared to ECCE surgery.

Q.7. Can cornea ulcer be caused by vitreous loss?

Ans. Vitreous loss perse will not be associated with a corneal ulcer. Vitreous when associated with a compromised surgical wound or a compromised

cornea, may be associated with a corneal ulcer.”

15. In the light of evidence recorded in this case as well as statement of Dr. Jeewan S. Tityal, it is to be seen as to whether there has been any negligence on the part of respondent doctor, while performing the operation of the eye of appellant or not.

16. Before entering into this venture, the first and foremost question which arises for consideration is as to which doctor has performed operation, on the eye of the appellant and whether he is negligent.

17. It is appellant’s case throughout, that respondent No.3, Dr. O.N. Krishan, performed his eye operation and there has been gross negligence on part of respondent No.3.

18. Appellant, in his evidence stated that, he was operated upon for extraction of cataract of right eye on 19th October, 1987. His half eye stitches, were

removed by Dr. Tarun and for remaining half, he was called after one week. He again went there after one week. They told him that his eye was covered with water and therefore it was not possible to remove the stitches. Again he visited the hospital and approached Dr. Krishna and Dr. Sharma, but his remaining stitches were never removed. Dr. Sharma examined him fully and informed that a hole had cropped up in the retina and he was not rightly operated upon.

19. In cross-examination, appellant stated that Dr. Krishan has prescribed few drops but he did not listen to him properly and sent him out of this room, when he went to meet him, after the discharge.

20. There is nothing on record to show that respondent No.3, had ever conducted the operation of the appellant's eye. Respondent No.3 who appeared as DW 1, in his cross-examination stated that he had not conducted any operation in this case and he is neither

personally concerned nor had any personal knowledge about this case.

21. On the other hand, it is DW 2, Dr. Anil Tara, who has conducted the operation of the appellant in this case, as in his examination-in-chief, DW 2 has categorically stated that he had conducted the operation of the appellant.

22. Since respondent No.3 is not at all connected with the operation of the appellant, I fail to understand, as to how he has been made as a party in this case. As respondent No.3 has not conducted the operation of appellant, no relief can be granted against him.

23. Apex Court has held in ***Udit Narain Singh Malpaharia v. Addl. Member, Board of Revenue, Bihar, [(1963) Supp 1 SCR 676]***, that there is a distinction between “necessary party” and “proper party”. In that case, the Court said;

“The law on the subject is well settled: It is enough if we state the principle. A necessary party is one without whom no

order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.”

24. Since respondent No.3 did not conduct the operation of the appellant, so, no negligence can be attributed to him.

25. Nevertheless, fact remains, that appellant was operated upon for cataract of his right eye in Ram Manohar Lal Hospital, and this fact has been admitted by DW2, Dr. Anil Tara. DW 2 in his statement has also stated that appellant's ailment regarding muscular degeneration is an age related process and has nothing to do with the operation.

26. In cross-examination, he stated that as per document Ex- DW 2/2, dated 19th October, 1987, appellant was operated upon in their hospital and he conducted the operation. He advised removal of stitches on 18th November, 1987. He does not

remember, whether he removed the stitches or not. He denied the suggestion that due to wrong operation conducted by him, the stitches in the eye of the appellant could not be removed completely, and his right eye got damaged.

27. As per discharge slip, Ex. PW 1/1, the appellant was advised for removal of stitches. There is no material on record to show that after 1st November, 1987 till 27th October, 1988, appellant ever visited Dr. Ram Manohar Lohia Hospital, where he was operated upon. Only document placed on record, thereafter is Ex- PW 1/2, the O.P.D. Card dated 22nd October, 1988. So, as per medical evidence on record, after 1st November, 1987, appellant did not visit Dr. Ram Manohar Lal Hospital till 27th October, 1988. This fact has been corroborated by respondent No.3 in his evidence, who has stated, that appellant was operated in the Eye Department on 19th October, 1987. He had submitted a discharge slip dated 28th October, 1987 and subsequently, appellant came after one year for

check-up while he was supposed to come after one week.

28. In the light of this evidence, it is to be seen as to whether doctors of Dr. Ram Manohar Lal Hospital are negligent or not, when admittedly, appellant after his operation did not act as per advice of the doctor and visited the hospital for treatment after one year. Since there is a gap of one year, it cannot be said with certainty, that problem in the eye of appellant which occurred in October, 1988 is due to negligence act of the doctors.

29. As per statement of Dr. Jeewan S. Tityal, it is clear that vitreous loss does not happen due to negligence. He has further stated that non-removal of stitches usually does not cause any loss of eye sight and if silk sutures are used, then they need to be removed within six to eight weeks.

30. There is nothing on record to show that appellant went to Dr. Ram Manohar Lohia Hospital for removal of the stitches as advised.

31. What is “negligence”, has been discussed by Supreme Court in length at ***Jacob Mathew v. State of Punjab and Anr. AIR 2005 SC 3180***. It lays down that;

“The jurisprudential concept of negligence defies any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to India jurisprudential thought is well-stated in the Law of Torts, Ratanlal & Dhirajlal (Twenty-fourth Edition 2002, edited by Justice G.P. Singh). It is stated (at p.441-442) – “Negligence is the breach of a duty caused by the 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. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property...The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party

complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.

According to Charles worth & Percy on Negligence (Tenth Edition, 2001), in current forensic speech, negligence has three meanings. They are: (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings. (Para 1.01) The essential components of negligence, as recognized, are three: "duty", "breach" and "resulting damage", that is to say:-

1. the existence of a duty to take care, which is owed by the defendant to the complainant;
2. the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and
3. damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant. (Para 1.23)

If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence.”

32. Further held;

“The degree of skill and care required by a medical practitioner is so stated in **Halsbury's Laws of England** (Fourth Edition, Vol.30, Para 35):-

“The practitioner must bring to his task 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, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."

33. As per case of the appellant, he was discharged in normal condition from the hospital after his eye operation on 28th October, 1987 and thereafter, did not visit the hospital for about one year. The fact that eye of the appellant did not give him any trouble for a period of about one year after his operation, goes on to show that there was no problem in the eye of the appellant during that period. Problem in the eye of the appellant occurred after about one year after his operation, and for this, the doctors who performed the operation one year ago, cannot be held liable.

34. The case of the appellant is also that he had undergone treatment in various other hospitals and

doctors of other hospitals have attributed this negligence to the doctors of Ram Manohar Lal Hospital, who had performed the operation. In this regard it would be fruitful to reproduce the findings given by the trial court. The trial court observed that;

“As a matter of fact, his story remains opaque despite the explanations given by him. The evidence given by the plaintiff stands rebutted by the statement of DW.2. It is beyond the pale of my comprehension as to why the important witnesses such as the doctors from the Rajinder Parsahd Eye Centre, All India Institute of Medical Sciences, Bhai PArmanand Eye Hospital, Dr. Lohia, a private practitioner in Shakarpur, had not been produced in the dock. It may be recalled that the plaintiff has clearly, specifically and unequivocally stated that the Dr. Lohia, Dr. Setrhi and doctors from AIIMS has informed him that the doctors of Ram Manohar Lohia Hospital had wrongly conducted the operation. The evidence of the above said doctors carrying infinite value would have gone a long way to throw light on this controversy. Absence of these

doctors or medical evidence dampens
the ardour of the plaintiff's case."

35. So, from the entire material available on record, I come to the conclusion, that appellant has failed to prove, that there was any negligence on the part of the doctors of Ram Manohar Lohia Hospital, who performed eye operation of the appellant in 1987. Since, there is no negligence on the part of any of the doctors, various judgments cited by learned counsel for the appellant, in support of its case are not applicable to the facts of the present case.

36. Consequently, the appeal filed by the appellant is not maintainable and the same is hereby dismissed.

37. Parties shall bear their own costs.

38. Trial court record be sent back.

26th May, 2009
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V.B.GUPTA, J.