

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No.2290/2010**

% **Date of Decision: 08.04.2010**

MUNICIPAL CORPORATION OF DELHI PETITIONER
Through Mr. Sanjeev Sabharwal, Standing
Counsel with Mr. Alok Singh, Advocate

Versus

DR.(MRS.) PAMELA WALIA RESPONDENT
Through Dr. Pamela Walia, respondent/caveator
in person.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

: **MOOL CHAND GARG, J.**

1. This writ petition has been filed on behalf of the MCD assailing the order dated 12.05.2009 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'the Tribunal') whereby the T.A. No.610/2009 filed by the respondent, Dr. (Mrs.) Pamela Walia has been allowed.

2. Briefly stating the facts, giving rise to the filing of the petition are that the respondent who is a doctor and was working as General Duty

Officer, Grade-II had been posted in October, 1986 for looking after the work of two maternity establishments viz., Dev Nagar, Maternity Centre and Narela Maternity Home, in addition to that she was also to attend the Anganwadi Center near Narela. Vide order dated 14.10.1991, a penalty was imposed against the respondent whereby her four annual increments were stopped with cumulative effect on the allegations that she had committed gross misconduct and failed to maintain devotion to duty inasmuch as she showed negligence towards duty which resulted in causing the death of a patient on 23.10.1996 admitted in the maternity home.

3. The crux of the allegations leveled against the respondent is that one Murti Devi from Nai Basti, Mamurpur, Narela was admitted in the Hospital at 2:00 pm on 22.10.1986. She gave delivery to a child at 3:00 pm. The delivery was attended to by the midwife and supporting staff. During the night, the patient had complained of pain in the abdomen. On the following day when the respondent came on duty at about 9:30 am, she was apprised about these details. She went to the ward, examined the patient and recommended an injection of Stemetil and simultaneously referred the lady to Kasturba Gandhi Hospital for expert care and thereafter she went to Anganwadi Center. She came back around 12:00 noon by that time, the patient had expired.

4. According to the chargesheet issued to the respondent, it was alleged that instead of making arrangements for sending the patient to Kasturba Gandhi Hospital, she had gone to Anganwadi Center without caring to see whether intravenous drips had been administered upon the patient or not. It has, thus, been alleged that negligence could be spelt in the matter of discharge of her duty which, ultimately resulted in the death of a patient. The charge memo also accused her with the allegation that she did not ensure procurement of an ambulance so as to send the patient over to Kasturba Gandhi Hospital or not.

5. It is a matter of record that the inquiry officer has held the respondent guilty of negligence only to the extent that she had not ensured administration of intravenous drips to the patient only on the basis of her statement made before an inquiry committee. There is nothing in the evidence to show that the death of the patient has been caused because of non-administration of intravenous drips. Even though it is her case that she was forced to make such statement because of rush of public at that time. Admittedly, no post mortem has been conducted on the body of the deceased.

6. As stated above the disciplinary authority, i.e., the Commissioner, MCD imposed a penalty upon respondent withholding her four annual increments with cumulative effect. An appeal was filed by the

respondent challenging the penalty but the same was also dismissed vide order dated 01.09.1992.

7. Against the order imposing the penalty and dismissing the appeal, the respondent filed a Writ Petition No. 2563/2009 which was transferred to the Tribunal and was numbered as T.A. No.610/2009 and the T.A. has been decided in favour of the respondent vide impugned order dated 12.05.2009. Some of the observations made by the Tribunal as borne out from the record are reproduced hereunder for the sake of reference:

7. While we refer to the chargesheet, at once we are to note that there was no specific allegation of negligence against the applicant. Especially it was not a case where the applicant had herself attended to the delivery of the lady. But on the following day when she had come to attend her duty, she had been supplied with the details. Even as per the allegation memo. she is seen to have attended the patient and issued instructions, which required to be carried out and complied with by the supporting staff. There is no suggestion that she had not followed up the issue, or an indication that she was expected to do so.

8. The principal direction was to give I.V Fluid and also to take the patient to a better equipped hospital. It is not disputed that in the course of duty, she was required to attend also to the work of the Angwanwadi Centre, and she had proceeded to the above spot. She could not have been blamed for any of such steps. In other words, if the allegation was that she had been loitering and had gone out for extraneous reasons, there would have been justification for finding fault. But the enquiry officer has not adverted to these important aspects.

9. Evidence show that ambulance was available for taking the patient to Kasturba Gandhi Hospital. But evidence from all sides indicates that the bye standard of the patient was not prepared to take the patient to the hospital in spite of availability of conveyance. On a perusal of the evidence it is revealed that although the hospital staff was prepared to take the patient no co-operation was coming from the aid of the patient. She was adopting a stand that there were no male member of the family available and she could not have taken a decision on her own. The patient, therefore, remained when she was not knowing about her imminent fate.

8. It is no more *res integra* that negligence in law means a failure to do some act which a reasonable man in the circumstances would do or the doing of the same act which a reasonable man in the circumstances would not do; and if that failure or the doing of the act results in injury, then there is a cause of action. In an ordinary case, it is generally judged by the action of an ordinary man, however, where special skill or competence is required, the test is not the action of an ordinary man but it is the test of the ordinary skilled man exercising and professing to have that special skill. The duty of care required of a physician or a surgeon or one possessing special skills was considered by McNair, J., in *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582 in the following terms:

“I must tell you what in law we mean by ‘negligence’. In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing

of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by Counsel. Mr Fox-Andrews put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent.

The test enunciated in *Bolam* (supra) was also followed and approved by the Apex Court in *Jacob Mathew Vs State of Punjab*, (2005) 6 SCC 1 in the following terms:

24. The classical statement of law in *Bolam case* has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge

available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

The Supreme Court while approving the above test, in Suresh Gupta and, later in Jacob Mathew also declared the test to be applicable in cases of negligence where a doctor is indicted of having committed an offence, in the following terms:

“(1) Negligence is the breach of a duty caused 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. The definition of negligence as given in Law of Torts, Ratanlal and Dhirajlal (edited by Justice G. P. Singh) referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three : ‘duty’, ‘breach’ and ‘resulting damage’.

(2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error or judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions, were taken which the ordinary experience of men has found to be sufficient : a failure to use special or

extraordinary precautions which might have prevented the particular happening cannot be the standard of judging the alleged negligence. So also, the stand of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings : either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skill in that branch which he practises. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment or negligence.

(4) The test for determining medical negligence as laid down in Bolam's case (1957) 1 WLR 582 hold good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence; the degree of negligence should be much higher i.e., gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A, IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as

occurring in Section 304A, IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence”.

The above, particularly (7) suggest that the threshold of behaviour which would amount to criminal negligence is not mere inaction or omission, or some error of judgment, but something greater. The doctor who may be held liable in tort, or under consumer law, may yet not be charged for criminal negligence, on account of this higher standard of culpability insisted upon by the decision.

9. In the circumstances, to establish medical professional negligence under law, it has to be demonstrated that the respondent did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses or prudence would do or fail to do. In order to have a medical professional negligence, therefore, the act of the doctor should be of such a nature that the injury which resulted was most likely imminent. Taking into consideration the aforesaid peculiar facts, the Tribunal held that the aforesaid sequence

cannot have been characterized as an act of negligence on the part of the respondent. Even if the respondent would have remained with the patient without going to the Anganwadi she could not have given any more expert care to the patient which expert care had to be rendered from other quarters. There is no postmortem report which may point out that the cause of death would be directly attributable to the omission of not giving intravenous drips. In fact, the respondent after examining the patient gave a direction to administer intravenous drips to her and also directed her to be taken to Kasturba Gandhi Hospital but it was the deceased patient who was not prepared to go to Kasturba Gandhi Hospital. These aspects have not been appreciated either by the disciplinary authority or by the appellate authority which is apparent from reading of the inquiry report as well as the order of the appellate authority. In these circumstances, the Tribunal held that the punishment against the respondent was not justified at all inasmuch as in the matter of negligence, the burden lies on the prosecution to conclusively establish the charge and also that there was culpable conduct directly contributing to the unfortunate incident.

10. Moreover, there are certain observations made by the inquiry officer itself which goes to the benefit of the respondent. In this regard, the following portion of the observations made by the inquiry officer, which appears at page-40 of the paper book are reproduced:

“P.W.-2 is of the confirmed view that a patient of such a condition and without any relative shall not be referred for shifting at the full responsibility of the Doctor Incharge. He emphasized on the said necessity by adding that no Doctor will do so including the witness himself. There is no controversy over the treatment prescribed by a Doctor because it all depends upon the Doctor to Doctor and a Doctor himself, is the best judge of his patient. The joint investigation team to which PW-1 was member has not stressed much on the point of shifting the patient through ambulance as he had not made investigation on the point whether the relatives of the patient reached the Maternity Home before her death took place or not. Rather PW-1 has also stated that the patients cannot be transferred/removed forcibly in the absence of her near relative. Thus, for all accounts this portion of the charge as framed against the respondent is not proved.”

11. For the foregoing reasons, we do not find any illegality or irregularity in the order of the Tribunal which would entail any interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

12. The writ petition is without any merit and it is, therefore, dismissed with no order as to costs. All the pending applications are also disposed of.

MOOL CHAND GARG, J.

APRIL 08, 2010

'anb'

ANIL KUMAR, J.