

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

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Date of decision: 25th October, 2013

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RFA 774/2002

GOVT.OF NCT OF DELHI & ORS.

..... Appellants

Through: Mrs. Avnish Ahlawat & Ms. Tania
Ahlawat, Advs.

Versus

MAHARAJ KISHAN & ANR.

.....Respondents

Through: Mr. Rajan Joshi & Mr. J.S. Rawat,
Adv. for R-1.

Mr. Sushil Dutt Salwan with Ms.
Latika Dutta, Advs. for R-2.

AND

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RFA 100/2003

SUSHIL ADHAR

..... Appellant

Through: Mr. Sushil Dutt Salwan with Ms.
Latika Dutta, Advs.

Versus

MAHARAJ KISHAN & ORS.

..... Respondents

Through: Mr. Rajan Joshi & Mr. J.S. Rawat,
Adv. for R-1.

Mrs. Avnish Ahlawat & Ms. Tania
Ahlawat, Advs. for R-2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. Both appeals impugn the same judgment and decree dated 6th September, 2002 (of the Court of the Addl. District Judge, Delhi in Suit No.15/2000 filed by the respondent no.1 in each appeal against the three appellants in RFA No.774/2002 and the appellant in RFA No.100/2003) of recovery of compensation in the sum of Rs.4 lacs jointly and severally from the appellants, along with costs and *pendente lite* and future interest at 12% per annum.

2. Notice of RFA No.774/2002 was issued on 3rd December, 2002 and vide *ex parte* order of that date, subject to the deposit of the decretal amount in this Court, execution of the impugned judgment and decree was stayed; 50% of the amount so deposited was ordered to be released to the respondent no.1/plaintiff on his furnishing personal security. In compliance therewith, a sum of Rs.4 lacs and a further sum of Rs.1,20,000/- was deposited. Vide order dated 13th August, 2003, release of 50% of deposited amount to respondent No.1/plaintiff was made subject to furnishing security to satisfaction of Registrar. Upon filing of RFA No.100/2003, notice thereof also was issued and delay in filing the same condoned. Both appeals were admitted for hearing on 9th December, 2003 and the Trial Court record

requisitioned. It however appears that the respondent No.1/plaintiff did not furnish security and thus no part of the decretal amount deposited has been released to him. During the hearing of arguments on 9th February, 2011 the counsel for the respondent no.1/plaintiff as well as the counsels for the appellants agreed that expert opinion of some independent Medical Board be taken as to whether any negligence was committed by the doctors or the hospital and also whether the proper pre-operative and post-operative procedures were fully complied with by the attending doctors. Accordingly the Director of All India Institute of Medical Sciences (AIIMS) was directed to constitute a Medical Board of three eminent doctors specialized in the field, to give their expert opinion with special emphasis on the following:-

- “(i). Whether proper pre-operative and post-operative procedures were fully complied with by the attending Doctors considering the prior medical history of the patient?*
- (ii). Whether any Junior/Trainee Doctor/s, not fully competent to conduct the cataract operation of the respondent-patient started the procedure without the active involvement of the Surgeon expert in the field?*
- (iii). Whether Dr. Sushil Adhar was fully competent to handle the complications developed during the course of the said cataract operation?*

(iv). *Whether the left eye of the patient could have been saved had Dr. B. Ghosh conducted the surgery himself?"*

and the all medical papers filed by the respective parties were directed to be sent to AIIMS.

3. Vide subsequent order dated 11th March, 2011, the earlier order dated 9th February, 2011 was modified to the extent that the direction aforesaid was issued to the Chief/Medical Superintendent of Dr. Rajendra Prasad Centre for Ophthalmic Sciences instead of AIIMS. A report dated 15th June, 2011 was received in pursuance thereto. However vide order dated 10th January, 2012 the following additional question was referred to the same Medical Board:-

"a reference to the questions which have been answered by the report dated 15.6.2011 shows that no question was referred to the Board as to whether on the basis of medical record of the respondent No.1/plaintiff as existing on the date of operation i.e. 6.10.1998, whether the respondent No.1/plaintiff should at all have been operated on his left eye for cataract. Para 7 of the plaint specifically averred that since the respondent No.1/plaintiff was suffering from thyroid, diabetes etc., he should not have been operated on his left eye."

It was further directed that it will be open to the Medical Board to examine whether the papers revealed that there was no absolute

bar/disentitlement for the surgery conducted on the respondent no.1/plaintiff. A further report dated 29th March, 2012 has been received from the Medical Superintendent of Dr. Rajendra Prasad Centre for Ophthalmic Sciences. The counsels have been heard.

4. The respondent no.1/plaintiff had instituted the suit from which these appeals arise, for recovery of damages and compensation of Rs.4 lacs jointly and severally from the appellants in the two sets of appeals, pleading:-

- (a). that the appellant Government of National Capital Territory of Delhi (GNCTD) has set up various hospitals in Delhi including the appellant Guru Nanak Eye Centre (GNEC) for providing eye healthcare and treatment of eyes to the public; that GNCTD was responsible for the acts and affairs of the said GNEC; that the salary of doctors and employees of the GNEC was paid from the funds of GNCTD collected from taxpayers; that the appellant Dr. Sushil Adhar and the appellant Dr. B. Ghosh were the employees of the said GNEC; as such the appellants are jointly and severally liable for all the acts of negligence, omission, commission and carelessness;

- (b). that the respondent no.1/plaintiff had some problem in his left eye and for its treatment visited the appellant GNEC where he was found to be suffering from cataract and the appellants Dr. Sushil Adhar and Dr. B. Ghosh recommended admission for operation of the respondent no.1/plaintiff;
- (c). that the respondent no.1/plaintiff was admitted to the appellant GNEC on 19th September, 1998 and was referred to the Lok Nayak Jai Prakash Narain (LNJP) Hospital for getting a report regarding his fitness for operation for removal of cataract;
- (d). that various tests/investigations of the respondent no.1/plaintiff were conducted and sent to the appellant GNEC indicating that the respondent no.1/plaintiff was suffering from thyroid, diabetes etc. and the operation should not be performed unless the diseases found in the tests are treated and brought under control;
- (e). that on 6th October, 1998 the respondent no.1/plaintiff was informed that his operation was to be performed on that day; though the respondent no.1/plaintiff informed about his test

report but was brought to the operation theatre inspite of his protest and without paying any heed to the test reports;

- (f). that trainee doctors conducted and performed the operation of the left eye of the respondent no.1/plaintiff; though the appellant Dr. Sushil Adhar was to conduct the operation and the appellant Dr. B. Ghosh was the doctor Unit in charge of the operation and it was his duty to perform the operation of the respondent no.1/plaintiff but they, in utter disregard and dereliction of duty left the operation of the eye of the respondent no.1/plaintiff in the hands of trainee doctors, without any supervision;
- (g). that the appellant Dr. B. Ghosh remained seated in his office and did not turn up at the operation theatre though as the doctor in charge, the operation ought to have been performed by him;
- (h). that the operation was spoiled and only then the trainee doctors performing the operation immediately went to the office of the appellants Dr. Sushil Adhar and Dr. B. Ghosh for help, who then came to the operation theatre;

- (i). that the appellant Dr. B. Ghosh on seeing the condition of the respondent no.1/plaintiff and the reports of the LNJP Hospital exclaimed that the respondent no.1/plaintiff should not have been operated upon;
- (j). that thereafter the operation of the respondent no.1/plaintiff was performed by the appellant Dr. B. Ghosh and his team who extracted the left eye of the respondent no.1/plaintiff;
- (k). thus the respondent no.1/plaintiff was deprived of his left eye and has been left with only a right eye which also is not functioning properly;
- (l). that thereafter the respondent no.1/plaintiff's son was called upon by the appellant Dr. B. Ghosh to sign certain papers representing that the same were in the interest of the respondent no.1/plaintiff and the son of the respondent no.1/plaintiff under the influence of the appellant doctors was made to sign the papers;
- (m). that the respondent no.1/plaintiff subsequently learnt that the said signatures had been used to obtain the consent of the son of

the respondent no.1/plaintiff for removal of the eye of the respondent no.1/plaintiff;

- (n). that the operation of the respondent no.1/plaintiff was performed negligently, carelessly and in utter disregard of the medical advice of the LNJP Hospital;
- (o). that the respondent no.1/plaintiff's eye was taken out with ulterior motive, with a view to implant the same into another person and earn monetary gains; the eye removed was not delivered to the respondent no.1/plaintiff;
- (p). that the respondent no.1/plaintiff had retired as a Water Meter Mechanic Reader in the Delhi Water Supply & Sewage Disposal Undertaking;
- (q). that though the respondent no.1/plaintiff had intended to, post surgery take up private employment on monthly emoluments of Rs.6,000/-, but could not do so; and,
- (r). accordingly damages/compensation of Rs.2 lacs towards loss of salary, of Rs.1 lac towards demoralization due to loss of one

eye and physical appearance and Rs.1 lac towards discomfort occasioned, together with interest was claimed.

5. The three appellants in RFA No.774/2002 contested the suit by filing a common written statement on the grounds:-

- (i). that the suit was bad for mis-joinder of the appellant Dr. B. Ghosh;
- (ii). denying that the appellant Dr. B. Ghosh had recommended the respondent no.1/plaintiff for admission and it was pleaded that the respondent no.1/plaintiff was recommended for admission by other doctors of the Unit of the appellant Dr. B. Ghosh;
- (iii). that the respondent no.1/plaintiff was operated upon after his blood pressure and blood sugar were found to be within normal limits and report of no history suggestive of hypo/hyper-thyroidism; it was for this reason only that the respondent no.1/plaintiff though was admitted on 19th September, 1998 was operated upon only on 6th October, 1998 and after a proper written consent of the respondent no.1/plaintiff;

- (iv). denying that the respondent no.1/plaintiff had protested against his surgery;
- (v). that the tentative list of surgeries scheduled is prepared a day before and the patients are informed and instructed on that date; cataract surgery in adults is done under local anesthesia, with the patients walking up to the operation theater in their full senses; that there was thus no truth in the respondent no.1/plaintiff being forcefully operated upon against his wishes;
- (vi). denying that the surgery was conducted by trainee doctors;
- (vii). denying that it was the duty of the appellant Dr. B. Ghosh to operate upon the respondent no.1/plaintiff;
- (viii). that the surgery had to be performed by the appellant Dr. Sushil Adhar and was performed by him; that the appellant Dr. Sushil Adhar was qualified and competent to perform the surgery;
- (ix). that the appellant Dr. B. Ghosh was very much present in the operation theatre when the surgery on the respondent

no.1/plaintiff was being performed by the appellant Dr. Sushil Adhar, performing other serious operations;

- (x). denying that the appellant Dr. B. Ghosh had exclaimed that the respondent no.1/plaintiff was not to be operated upon; denying that the appellant Dr. B. Ghosh had subsequently operated upon the respondent no.1/plaintiff;
- (xi). that the coat of the left eye is still in the respondent no.1/plaintiff; his intra ocular contents had to be scooped out to prevent excessive blood loss, with no chance of retaining any vision;
- (xii). denying that the son of the respondent no.1/plaintiff was made to sign any papers;
- (xiii). that the subsequent surgical steps which had to be taken were first explained to the respondent no.1/plaintiff who was in his full senses and who had given his consent to the same; that the son of the respondent no.1/plaintiff was also contacted and the situation explained to him and only after obtaining his consent

also was the subsequent surgical procedure of evisceration carried out;

(xiv). denying that the signatures of the son of the respondent no.1/plaintiff were taken after the surgery or have been misused as pleaded by the respondent no.1/plaintiff;

(xv). denying that the eye of the respondent no.1/plaintiff was taken out with the motive alleged and pleading that since the internal eye contents and not the eyeball were eviscerated, the question of using the same on any other patient for monetary gains did not arise; and,

(xvi). denying that there was any medical negligence and pleading that it was a sheer unavoidable operative complication; denying any negligence, carelessness etc.

6. The appellant Dr. Sushil Adhar also contested the suit by filing a separate written statement on the grounds:-

(A). that during routine work-up of the respondent no.1/plaintiff, the respondent no.1/plaintiff was found to be a known diabetic,

hypertensive who had undergone subtotal thyroidectomy two years ago;

- (B). that on 21st September, 1998 and again on 24th September, 1998 the respondent no.1/plaintiff was referred to the Department of Medicine, LNJP Hospital to obtain their opinion regarding medical fitness for operative interference;
- (C). that the respondent no.1/plaintiff was sent on leave w.e.f. 26th September, 1998 and was asked to bring a daily blood pressure record for a week, to assess his hypertensive status;
- (D). the respondent no.1/plaintiff was re-admitted on 3rd October, 1998; he had brought the blood pressure report prepared by a local private practitioner during the leave period, which was within the normal limits;
- (E). a third referral of the respondent no.1/plaintiff was made to the Department of Medicine, LNJP Hospital on 5th October, 1998 which opined that “no urgent medical intervention was necessary” and had given the OK report for operation of the respondent no.1/plaintiff;

- (F). that all pre-operative tests of the respondent no.1/plaintiff were done in a careful manner;
- (G). after obtaining the pre-operative test, the appellant Dr. B. Ghosh had taken a decision to post the respondent no.1/plaintiff for surgery on 6th October, 1998;
- (H). that the appellant Dr. Sushil Adhar is a qualified Ophthalmic Surgeon with a Master of Surgery (Ophthalmology) from Delhi University and having more than 1000 cataract operations to his credit;
- (I). that the respondent no.1/plaintiff and his son had given consent for surgery voluntarily, without any pressure, coercion or undue influence and all the consequences of the operation were explained to them;
- (J). that the son of the respondent no.1/plaintiff is an educated person and a Government employee in U.P. Jal Nigam;
- (K). that evisceration of the eye of the respondent no.1/plaintiff was undertaken as the respondent no.1/plaintiff had suffered sudden

Expulsive Choroidal Hemorrhage which is a known complication of cataract surgery in a patient with a chequered history of hypertension and diabetes mellitus, as the respondent no.1/plaintiff had;

(L). that all reasonable pre-operative, operative and post operative steps were taken for conducting the operation of the respondent no.1/plaintiff; and,

(M). that the appellant Dr. Sushil Adhar had taken all reasonable steps, care and precaution expected from a man of ordinary prudence and by a man practicing similar profession in conducting the operation.

7. The respondent no.1/plaintiff filed replications reiterating his case.

8. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 5th December, 2000:-

“1) Whether the plaintiff has got no legal right to file the present suit? OPD-3

2) Whether the plaintiff is guilty of suppressing material facts from the court? OPD-3

- 3) *Whether there is no cause of action in filing of present suit? OPD1,2&4*
- 4) *Whether suit of plaintiff is bad for misjoinder of necessary parties? OPD 1,2&4*
- 5) *Whether plaintiff is entitled to the amount claimed? OPP*
- 6) *Relief.”*

9. The respondent no.1/plaintiff, besides examining himself examined a witness from the office where he was offered employment and which offer was subsequently withdrawn, and another witness.

10. The appellants Dr. B.Ghosh and Dr. Sushil Adhar besides examining themselves, also examined another doctor.

11. The learned Addl. District Judge, vide the impugned judgment, has decreed the suit of the respondent no.1/plaintiff, finding/observing/holding:-

- (I). that when a person is bleeding from his eye, he will not be in a position to give free consent for removal of his eye; thus the consent taken of the respondent No.1/plaintiff on the operation table, while he was bleeding from his eye, without explaining all the facts to him, cannot be said to be free consent, given without undue influence;

- (II). that the written statement of the appellant Dr. Sushil Adhar admits a chequered history of hypertension and diabetes mellitus of the respondent no.1/plaintiff; inspite of that the appellant Dr. B. Ghosh assigned the operation to junior doctors without taking any special steps to ensure that no complications arose;
- (III). merely because the respondent no.1/plaintiff had consented to being operated upon by any doctor, did not absolve the doctors operating upon him from the duty of taking special care required under the circumstances;
- (IV). the very fact that upon complication having arisen, the appellant Dr. B. Ghosh was called, shows that the appellant Dr. Sushil Adhar was not competent to perform a surgery with likely complications as was the case of the respondent no.1/plaintiff;
- (V). that the appellants were thus clearly negligent and careless in not giving the special care required under the facts and circumstances of the case and in omitting to take special care in a known case of chequered history of hypertension and diabetic

mellitus which could result in a known complication of sudden
Expulsive Choroidal Hemorrhage;

(VI). even though such a complication was stated to arise only in 1%
of cases but it still called for special care on the part of the
appellants; and,

(VII). that considering that the respondent no.1/plaintiff had lost an
opportunity of employment and loss of physical appearance and
loss of vision, the damages claimed of Rs.4 lacs were on the
lower side only.

12. The counsels for the parties during the hearing of this appeal having
consented to reference to a independent Medical Board, it is deemed
appropriate to, before considering the contentions of the counsels, refer to
the report of the said Medical Board.

13. The Medical Board in its report dated 15th June, 2011 answered the
four questions addressed to it as under:-

“Qua query No.1

*The provided records indicate that proper
procedures were followed preoperatively, notable
amongst which were blood pressure control, medical*

referrals and clearances, consents, and preoperative precautions. Of the records of postoperative follow up provided, the management for the eviscerated eye seems proper, under the circumstances.

Qua query No.2

The exact designation and period of training of Dr. Sushil Adhar at the time of his conducting the surgery is not clearly provided; therefore, his competence cannot be commented upon, unless he was a qualified Senior Resident in the Department.

Qua query No.3

The exact designation and period of training of Dr. Sushil Adhar at the time of conducting the surgery is not clearly provided; therefore, his competence cannot be commented upon, unless he was a fully qualified Senior Resident in the Department.

Qua query No.4

Expulsive hemorrhage is a rare, but very serious complication of cataract surgery, which can lead to complete expulsion of ocular contents so very quickly and dramatically that it may need urgent evisceration as was required in this case. Though rare, it could have occurred in the same circumstances had the surgery been conducted by Dr. Ghosh himself, or by any other very experienced and well qualified eye surgeon.

In summary, it appears that all the attending doctors followed standard medical protocols according to the patient's condition. However, most unfortunately, the patient had an unfavourable outcome in spite of referrals and aggressive therapy instituted timely. As the records made available suggest, there is no evidence of any willful negligence on the part of the doctors or any medical negligence, but a known though rare

complication in such a situation. Though we emphathize with the usual expectations of the patient [as any other] about the excellent outcomes of the operation, such a complication is well documented in such procedures [as in the medical literature also supplied and enclosed] and should not amount in any way to culpable negligence”.

14. The Medical Board in its further report dated 29th March, 2012 has qua the additional query addressed to it opined as under:-

“This patient was a known mild diabetic [with no evidence however of diabetic retinopathy in his operated RE or glaucoma as recorded on admission in Sep 1998], on dietary control alone (in fact, his medical consultation states that there is no need for anti-diabetic medication). Nowadays, a number of patients are operated upon with a far worse diabetic status. His intraocular pressures were normal. He was a known mid hypertensive on oral medication, with enough time post-admission to ensure adequate control with the revised regimen in hospital as recorded – his BP (and Blood & Urine Sugars) were within normal limits on 6.10.98 and thereafter postoperatively also. He had had a subtotal thyroidectomy a year ago (for multinodular goiter) for which he was on maintenance dose of Eltroxin, with no current clinical or investigative data suggestive of hyper- or hypo-thyroidism as per records. There was thus no medical bar at all and nothing per se then against an elective surgery for his LE on admission in Sep 1998. Even then, at least 2 medical referral and their specialized opinions were sought and obtained after his admission, and he was finally posted for surgery LE on 6.10.98, for which he was taken up after due preoperative care and precautions as recorded.

*Maybe no surgery for any part of the body can be deemed absolutely necessary, vital, indispensable, and definitely and positively essential, unquestionably and indubitably. The patient may choose to continue suffering his/her problems in spite of medical advice. Here the patient himself reported to a doctor at a Govt. Eye Centre for his poor vision of hand movements in LE close to face, discussed with them, agreed to the treatment for his poor vision of hand movements in LE close to face, discussed with them, agreed to the treatment for his advanced immature senile cataract LE, was admitted to GNEC under Prof. Ghosh on 19.9.98, signed his full consent, (in fact as the hospital inpatient records state, the patient was adamant and pestering to get operated at the earliest in view of visual disability) and after detailed investigations as an inpatient, accordingly underwent his surgery LE on 6.10.98 more than 2 weeks after his admission and mostly remaining in the wards, fully aware of the outcomes good or bad. He had already undergone surgery in his RE earlier in 1996 with postoperative complications from which he reasonable recovered. **All these had already been summarized and pointed out in this Board's earlier report of 15 June 2011.***

Within the realms of medical science and parlance, such a surgery as this considering all the background, should be classed as required for best patient management, and done as a timely elective procedure with proper consent and under patient's willful volition. If cataracts are not intervened in time, there are well-known complications recorded in literature - if these had occurred, then the question could well have been "why was surgery not done earlier in today's era for an advanced IMSC, with the patient's urban setting and facilities available?"

15. Of course, the counsels for the appellants have opened their arguments by contending that in view of the reports aforesaid of the independent Medical Board to which reference was made with the consent of the parties, all charges of the respondent no.1/plaintiff of medical negligence against the appellants are baseless and the said reports absolve the appellants thereof. They further:

- (a). invited attention to the cross examination of Dr. Anju Arora, then of the LNJP Hospital who had examined the respondent no.1/plaintiff (and who was examined by the respondent no.1/plaintiff as his witness) who had deposed that the respondent no.1/plaintiff was Euthyroid i.e. with no features of either hypo or hyper thyroidism;
- (b). contented that the learned Addl. District Judge has decided the matter not on the basis of evidence but on the basis of allegations;
- (c). contended that it was not the case of the respondent no.1/plaintiff that the appellant Dr. Sushil Adhar was not

qualified or not competent to perform the surgery, but the case was that juniors had performed the surgery;

- (d). that the appellant Dr. Sushil Adhar was proved to be then working as a senior resident;
- (e). that had the appellants not scooped out the left eye of the respondent no.1/plaintiff it would have rotted and would have affected the other eye also;
- (f). that the occasion for this Court to refer the matter to an independent Medical Board arose because though the respondent no.1/plaintiff had failed to prove his case, the Court did not want him to, if was a victim of medical negligence, to go uncompensated; however now that the said Board has absolved the appellants, the impugned judgment and decree has to be set aside;
- (g). attention is invited to the record of the daily blood pressure reading produced by the respondent no.1/plaintiff before surgery, showing the blood pressure to be normal for a week before surgery;

(h). attention is invited to:-

(i). ***Kusum Sharma Vs. Batra Hospital & Medical Research Centre*** 2000 CPJ 18 (NCDRC);

(ii) ***Sukumari Sahu Vs. Tata Memorial Hospital*** 3 (2006) CPJ 293;

(iii) ***Philips India Ltd. Vs. Kunju Punnu*** AIR 1997 BOM 306;

(iv) ***Achutrao Haribhau Khodwa Vs. State of Maharashtra*** (1996) 2 SCC 634; and,

(v) ***Jacob Mathew Vs. State of Punjab*** 2005 (6) SCC 1.

on the aspect of medical negligence.

16. Per contra the counsel for the respondent no.1/plaintiff has argued:-

(i). that PW3 Dr. Anju Arora of the LNJP Hospital had opined and had also deposed that “no urgent medical intervention was required” on the respondent no.1/plaintiff, meaning that he was not fit for surgery;

- (ii). that the appellant Dr. B. Ghosh in his cross examination, though had admitted that before operation the possibility of high blood pressure, diabetes, chronic lung disease, or thyroid, if significant, was ruled out but the appellants have not proved having got any thyroid test done; the same shows negligence;
- (iii). that the appellants have not produced any document to show who actually conducted the surgery; such record ought to be in the custody of the appellants; there is nothing to show that the appellant Dr. Sushil Adhar had conducted the surgery;
- (iv). that the onus to prove having taken due care and caution in the conduct of the surgery was on the appellants, which they have failed to discharge;
- (v). reliance in this regard is placed on Section 106 of the Indian Evidence Act, 1872, contending that the caution and care taken were in the exclusive knowledge of the appellants but no document / record in this regard had been produced;

- (vi). the doctrine of *res ipsa loquitur* is invoked, contending that the loss of eye and vision and consequent damage to the respondent no.1/plaintiff is not in dispute;
- (vii). reliance is placed on *Smt. Savita Garg Vs. Director, National Heart Institute* (2004) 8 SCC 56 laying down that the burden of proof that all due care and caution was taken and despite that the patient died is on the hospital and on *The Union of India Vs. The Delhi Cloth and General Mills Co. Ltd.* AIR 1964 Punjab 147 laying down that where the facts as to how the damage and loss had occurred was within the special knowledge of the defendant, the onus is on the defendant and an adverse presumption has to be drawn from non-production of such evidence; and,
- (viii). with respect to the report of the independent Medical Board, to which reference was made during the pendency of this appeal, it is contended that they have failed to answer the question addressed to them and have given vague and general observations and not addressed the aspect of thyroidism and

have erroneously proceeded on the premise that the complication was on account of blood pressure.

17. The counsels for the appellants in rejoinder have argued:-

- (A). that the respondent no.1/plaintiff had not pleaded, that the complication arose owing to test of thyroid having not been conducted;
- (B) that the appellants Dr. B. Ghose and Dr. Sushil Adhar have deposed of the surgery having been conducted by Dr. Sushil Adhar; that the admission and discharge records of the respondent no.1/plaintiff bear the signatures of Dr. Sushil Adhar as a senior resident; that the operation theatre notes on the Trial Court record also show the surgery to have been conducted by Dr. Sushil Adhar; that the discharge summary of the respondent no.1/plaintiff in the Trial Court record also shows the surgery to have been done by Dr. Sushil Adhar/Dr. B. Ghose;

- (C). that *Smt. Savita Garg* supra relied upon by the respondent no.1/plaintiff was concerned only with non-impleadment of the hospital and not with determination of negligence;
- (D). that the doctrine of *res ipsa loquitur* does not apply;
- (E). that the case with which the respondent no.1/plaintiff had filed the suit was of negligence by getting the surgery done from the trainee doctors and not of the requisite thyroid test having not been done before the surgery; that the respondent no.1/plaintiff without pleading and proving that the same was the cause of the complication, cannot take the said argument in this appeal; that there is no evidence that the thyroid levels/parameters of the respondent no.1/plaintiff on the date of surgery were not within the prescribed limits; and,
- (F). that the test evolved in the judgments supra relied upon by the appellants is that an error of judgment on the part of the doctor/medical practitioner is not negligence if the doctor/medical practitioner acted to the best of his judgment.

18. The counsel for the respondent no.1/plaintiff in sur-rejoinder has contended that the respondent no.1/plaintiff had pleaded thyroidism.

19. As the aforesaid narrative would show, after the receipt of the report of the Medical Board, to which the matter was referred during the pendency of this appeal, the controversy is narrowed down to (i) whether Dr. Anju Arora of the LNJP Hospital had advised against the respondent no.1/plaintiff being operated upon and he was operated upon inspite thereof and if so to what effect; (ii) who had conducted the surgery, whether the appellant Dr. Sushil Aadhar or his juniors; and, (iii) whether there was any negligence in not getting the thyroid test done before the surgery.

20. I have perused the plaint and the evidence in the aforesaid perspective. I find that though the respondent no.1/plaintiff to have in para 7 of the plaint pleaded that LNJP Hospital had reported that the respondent no.1/plaintiff was suffering from thyroid, diabetes etc. and he should not be operated upon unless the same are treated and brought under control and in para 12 to have further pleaded that the appellant Dr. B. Ghosh had exclaimed that the respondent no.1/plaintiff should not have been operated upon in view of the said report and to have in para 15 also pleaded that the

surgery was performed in disregard of the said medical advice. It is thus cannot be said that there are no pleadings on the aforesaid aspect.

21. The admission, treatment and discharge record of the respondent no.1/plaintiff on the Trial Court record also shows the respondent no.1/plaintiff to have, at the time of his first visit itself to the appellant GNEC on 5th September, 1998, informed that he had undergone thyroid surgery one year back and was on eltroxin medicine for keeping the thyroid level under control and records his thyroid test readings and does not record anything to indicate that the readings mentioned were not normal.

22. PW3 Dr. Anju Arora then of the LNJP Hospital examined by the respondent no.1/plaintiff has also deposed that clinically there was no evidence on 21st September, 1998 of the respondent no.1/plaintiff suffering from hyperthyroidism or hypothyroidism and that she had advised thyroid function test. She has further deposed having examined the respondent no.1/plaintiff again on 24th September, 1998 with thyroid report of the test done in October, 1997 which was normal and having advised the respondent no.1/plaintiff to continue with the medicine Eltroxin for hypothyroidism. She has further deposed that the respondent no.1/plaintiff was again referred

to her for evaluation of blood pressure and thyroid status on 5th October, 1998 and having found his blood pressure to be within normal limits and the thyroid function report done in October, 1997 to be also within normal limits and the respondent no.1/plaintiff to be clinically Euthyroid i.e. neither hypo nor hyper thyroid and having asked for a fresh report. She further clarified that she had advised for a fresh thyroid test despite finding the respondent no.1/plaintiff to be Euthyroid, because the respondent no.1/plaintiff had undergone the test one year back and to confirm the clinical evaluation. In cross examination, she deposed that the report of thyroid function is normally taken to be correct for a period of one year unless there are reasons for hyperthyroidism.

23. The respondent no.1/plaintiff in his evidence deposed that though he was on 5th October, 1998 sent to PW3 Dr. Anju Arora for thyroid examination but she had refused to conduct the same in the absence of the report; that on 6th October, 1998 he was sent to the operation theatre though had told the doctor that the report was not ready. In cross examination, he stated that he at the relevant time was not suffering any other disease except cataract; that his blood sugar was normal; that his blood pressure and blood

sugar was found normal for the purpose of operation; that he had signed the consent letter for getting the eye operated.

24. I have also perused the cross examination by the respondent no.1/plaintiff of Dr. B. Ghosh; he denied the suggestion that in the file of the respondent no.1/plaintiff it was mentioned that he was having thyroid problem and deposed that the medical examination of the respondent no.1/plaintiff got done on three occasions had reported that the respondent no.1/plaintiff was normal and there was no history of hyper or hypo thyroidism and that his thyroid function was normal. He further denied the suggestion that on the date of operation the respondent no.1/plaintiff was suffering from thyroid and despite that the operation was carried out and failed for the said reason.

25. The appellant Dr. Sushil Adhar in his examination-in-chief deposed, (i) that the complication which occurred during the surgery of the respondent no.1/plaintiff was a known complication of routine cataract surgery and more so especially in high risk patients with systemic disorder of diabetes mellitus, hypertension and thyroid dysfunction, as was the case with the respondent no.1/plaintiff; (ii) that the respondent no.1/plaintiff was suffering

from all these disorders and was not compliant with the treatment prior to his reporting to the GNEC; and, (iii) that the respondent no.1/plaintiff had no previous medical records regarding any form of treatment he might have been undertaking by any specialized doctor. In cross examination he deposed, having done lab investigations including Blood Sugar Fasting and PP, Urine, Ablumin, Sugar, Blood Pressure Charting in the Ward.

26. The admission/treatment/discharge record on the Trial Court record contains the report of the tests done on 6th October, 1998 and which includes a thyroid test also.

27. I am therefore unable to accept the contention of the appellants that the respondent no.1/plaintiff has not pleaded or proved negligence by non-conduct of the thyroid test before surgery.

28. I am nevertheless on the basis of the evidence on record unable to find any case of negligence on the said account. It is not as if the appellants, especially the appellant Dr. Sushil Adhar, was not conscious of the requirement of checking the parameters of thyroid before surgery. The said parameter appears to have been checked. The only ambiguity is whether the

thyroid test was actually done on 6th October, 1998 or the readings mentioned are on the basis of the previous report of the respondent no.1/plaintiff which was a year old. The said doubt arises because the thyroid parameters mentioned on 6th October, 1998 are identical to those of 5th September, 1998. It is quite possible that the appellants, instead of carrying out a fresh test, relied on the thyroid test report which was of October, 1997 in the light of the clinical examination of the respondent no.1/plaintiff not showing any sign of hypo or hyper thyroidism. However that, in my opinion, would not amount to medical negligence in the absence of any plea or proof of the respondent no.1/plaintiff at any time after the surgery showing sign of hypo or hyper thyroidism and in the absence of any case having built by the respondent no.1/plaintiff of his thyroid level being beyond the prescribed parameters at the time of surgery or thereafter. The counsel for the respondent no.1/plaintiff also has not shown that a thyroid test on the day of the surgery is essential. On the contrary Dr. Anju Arora witness of respondent No.1/plaintiff has deposed that a thyroid report is good for a year. The Supreme Court in ***Jacob Mathew*** supra has held that so long as a doctor follows a practice acceptable to the medical profession of that date, 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 charged doctor followed. It was further held that a failure to use special or extraordinary precautions which might have prevented the particular happenings cannot be the standard for judging the alleged negligence. The Supreme Court further held that it is not possible for every professional to possess the highest level of expertise or skills in the branch which he practices and merely because there may be another with better qualities cannot be made the basis of the yardstick for judging the performance of the professional. It is also the settled principle of law that a doctor is not to be held negligent simply because something went wrong or for an error of judgment and is to be held liable only when he failed to follow the standard of a reasonable competent practitioner so much so that his conduct might be inexcusable or worthy of censure.

29. As far as the opinion dated 5th October, 1998 of Dr. Anju Arora is concerned, the respondent no.1/plaintiff was referred to her as he was scheduled for surgery the next day and her opinion was sought as to his fitness for surgery. Though she in her opinion used the expression “no urgent medical intervention” but the same has to be understood in

consonance with her remaining opinion where she reported that his blood pressure was normal and there was no sign of hypo/hyper thyroidism. Not only so, she further appended a note to her opinion “kindly do not send routine referrals in emergency in future” again indicating that there was no urgency qua the respondent no.1/plaintiff and that his referral was ‘a routine one’. Of course qua thyroid, she indicated that the test had been done in October, 1997 and that fresh test report be sent. I am unable to decipher from the opinion of Dr. Anju Arora, that the respondent no.1/plaintiff was not fit for surgery.

30. It cannot also be lost sight of that the admission, treatment and discharge records of the respondent no.1/plaintiff on the Trial Court record which have been perused by the undersigned, were also sent to the Independent Medical Board to which reference was made during the pendency of this appeal. What has been recorded by me hereinabove is quite evident therefrom. The Medical Board has reported that proper pre-operational procedures were followed and have not found any fault in the thyroid test having not been done on 6th October, 1998 or the surgery having been done on the basis of the thyroid test done in October, 1997. In the second report dated 29th March, 2012, ‘a year old report of thyroid test’ and

no current clinical or investigative data suggestive of hyper or hypo thyroidism was specifically noted and it was still opined that there was no bar against an elective surgery.

31. I see no reason to take a different view.

32. As far as the allegation of the respondent no.1/plaintiff, of the surgery having not been conducted by the appellant Dr. Sushil Adhar also and having been conducted by his juniors is concerned, it is now no longer in controversy that Dr. Sushil Adhar as a senior resident was competent to conduct the surgery. The entire records produced are indicative of the surgery having been conducted by the appellant Dr. Sushil Aadhar. In light thereof, the deposition of the respondent no.1/plaintiff, of the surgery having not been conducted by Dr. Sushil Adhar but by juniors, cannot be accepted. Though the respondent no.1/plaintiff was conscious at the time of surgery but his statement is pitted against that of appellants Dr. Sushil Adhar and Dr. B. Ghose and which is duly supported by the records. It is not the case of the appellants also that the surgery was performed by Dr. Sushil Adhar alone. They admit involvement of junior resident and other junior doctors also. However as long as Dr. Sushil Adhar was in charge of the

surgery, merely because some part of it may have been conducted/performed by his juniors, cannot be deductive of Dr. Sushil Adhar having not conducted surgery. Surgeries today are a team effort. It has also to be remembered that in most professions juniors gain experience by initially watching and then performing, first, bit parts and later major parts of surgery under supervision of their seniors. If the same is not permitted and it were to be held that the juniors cannot be allowed to even touch the patient, they would never become competent themselves to take the responsibility.

33. Unfortunately the learned Addl. District Judge, as rightly contended by the counsels for the appellants, rendered the impugned judgment *de hors* the evidence on record and without analyzing the same.

34. The impugned judgment thus cannot be sustained. No case of any negligence on the part of any of the appellants, so as to make the respondent no.1/plaintiff entitled to any compensation or damages from them, is made out. The appeals accordingly succeed and are allowed. Resultantly the suit of the respondent no.1/plaintiff is dismissed.

35. Before parting with the case, I would like to record that the sympathies of this Court are with the respondent no.1/plaintiff and it is not

as if this Court does not feel or appreciate the agony and pain of the respondent no.1/plaintiff; at the same time, it cannot be forgotten that grant of any compensation or damage to the respondent no.1/plaintiff cannot be on sympathy alone and without a finding of any negligence on the part of the appellants Dr. B. Ghose and Dr. Sushil Adhar, and which finding can mar their career as medical practitioners and shake their confidence to successfully conduct similar surgeries/procedures in future. A charge of professional negligence against a medical man is serious, having far more consequences than mere monetary. Thus, the injury, though suffered by the respondent no.1/plaintiff, being not attributable to any of the appellants, does not call for grant of any relief. The concept of *res-ipsa-loquitur* does not apply to such cases, where inspite of best efforts of the attending doctors, the patient may suffer.

36. In the circumstances no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

OCTOBER 25, 2013

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