IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CM Nos.6360-61-C of 2015 in/and
RSA No.770 of 2011 (O&M)
Date of Decision: 28.07.2015

Baldev Raj

..... Appellant

Versus

The State of Haryana and others ..... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Sunil Polist, Advocate,
for the applicant-appellant.

Mr. Ashok Kumar Muthreja, DAG, Haryana.

Mr. Sushil Bhardwaj, Advocate,
for R-3.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

CM No.6361-C of 2015

For the reasons stated in the application filed under Order 41 Rule 19 CPC, the order dated 13.03.2015 dismissing the case for non-prosecution is withdrawn. The appeal is restored to its original number. The case is taken up today itself for final disposal.

RSA No.770 of 2011 (O&M)

Heard the learned counsel for the parties.

The facts in brief. The plaintiff filed a suit for damages against the State of Haryana, Chief Medical Officer, Civil Hospital, Kaithal and Dr. Bimla Gauri, Medical Officer, Civil Hospital, Kaithal who performed the

Orthopaedic surgery on the left arm of the plaintiff. The plaintiff had suffered injuries in an accident and was fitted with a steel rod and plate by the operating surgeon. The plaintiff alleged medical negligence against Dr. Bimla Gauri – defendant # 3. His complaint is that the steel rod and plate used in the surgery to repair his broken arm is larger in size than the one required because of which he had regular pain in his left arm and was unable to do his daily work. The Medical Board has certified him handicapped with 6% permanent disability. It is his case that he consulted a private doctor who advised that he should get himself checked up by experts at the PGI, Chandigarh. On being referred to the PGI, Chandigarh the doctors in the Orthopaedic Department advised repeat surgery. He was admitted on August 09, 2002 in PGI. The rod was removed.

Dr. Pebam Sudesh, Assistant Professor at the PGI appeared as witness PW-9 and deposed that if the rod of the right size is not inserted in the first instance it may lead to complications.

A specific question was asked in his cross-examination as to whether the size of the rod (nail) used on the patient was longer than the size required. The answer was “it is not bigger”.

If it is not bigger than the one which should have been used in the first instance then it is hard to lay blame on the operating surgeon at Kaithal who performed the first surgery that there was any negligence on her part in the performance of surgery. It was a bona fide opinion formed at the time in the OT while dealing with trauma of the injured plaintiff of what the doctor thought was in her judgment the best interest of the patient and the material available.

Mr. Muthreja learned AG, Haryana points out that even after taking opinion from a private doctor it has come on record that plaintiff visited PGI after a month and a half. The X-ray produced in support of his claim for damages due to medical negligence of the defendant was also based on an X-ray produced on record which was taken after the second operation was performed in PGI, Chandigarh but not the original one. Both the courts below have found no element of medical negligence or that due care was not taken and merely because of the size of the rod a charge of negligence cannot be fastened on the doctor who performed the operation as a professional with the available knowledge that a doctor of ordinary skill would possess in the field of surgery. Issues based on medical negligence have been dealt with in detail in the leading authorities in **Jacob Mathew vs. State of Punjab**, (2005) 6 SCC 1 and **Martin F.D'Souza vs. Mohd. Ishfaq**, (2009) 3 SCC 1. In the first case the court dealt with the subject extensively and laid down the prudent doctor principle exercising reasonable care to be applied to cases of medical negligence by observing:-

> *"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 is what the law requires."*

In *Jacob Mathew* case the Supreme court accepted the Bolam test to India citing Justice McNair in the lead ruling in **Bolam vs. Friern Hospital Management Committee** (1957) 1 WLR 582 holding as follows:

> *"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 law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."*

In *Martin F. D'Souza* case the Supreme Court observed in para. 41 and 45 of the report :

> *"41. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field."*
> *"45. The higher the acuteness in an emergency and the higher the complication, the more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and has to choose the lesser evil. The doctor 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. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case but a doctor cannot be penalized if he adopts the former procedure, even if it results in a failure."*

In view of the above position and in the light of the evidence on record, I find no ground to interfere with the concurrent findings of fact recorded by the courts below dismissing the suit for damages. I see no failure on the part of the treating medical practitioner on the fronts explained above exhaustively in the binding precedents.

No question of law arises in the appeal much less a substantial one for consideration in the second appeal side of this Court.

Accordingly, the appeal stands dismissed.

(RAJIV NARAIN RAINA)
JUDGE

28.07.2015
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