



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

| Date of Reserving the Order | Date of Pronouncing the Order |
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| 06.09.2018                  | 19.09.2018                    |

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**THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN**Crl.R.C (MD) Nos.885,886 and 887 of 2017  
and

Crl.M.P.Nos.10846 to 10854 of 2017

1.Dr.Nelson Jesudasan : Petitioner in Crl.R.C (MD) No.885/2017  
2.Dr.B.Ashok : Petitioner in Crl.R.C (MD) No.886/2017  
3.Dr.J.Christopher Thomas : Petitioner in Crl.R.C (MD) No.887/2017

**Vs.**

State represented by  
The Deputy Superintendent of Police  
CBI, ACB, Chennai  
RC MAI-2011A- 0016 : Respondent in all Crl.Rc's

**Prayer in Crl.RC (MD) No.885 of 2017:** Criminal Revision Case is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to call for the records and set aside the judgment in C.A.No.30 of 2015 dated 17.11.2017 passed by the II Additional District, Judge, Tiruchirapalli confirming the order passed in C.C.No.87 of 2011 on 22.04.2015 by the Chief Judicial Magistrate, Tiruchirappalli by allowing the criminal Revision.

**Prayer in Crl.RC (MD) No.886 of 2017:** Criminal Revision Case is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to call for the records and set aside the judgment in C.A.No.30 of 2015 dated 17.11.2017 passed by the II Additional District, Judge, Tiruchirapalli confirming the order passed in C.C.No.87 of 2011 on 22.04.2015 by the Chief Judicial Magistrate, Tiruchirappalli by allowing the criminal Revision.

**Prayer in Crl.RC (MD) No.887 of 2017:** Criminal Revision Case is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to call for the records and set aside the judgment in C.A.No.30 of 2015 dated 17.11.2017 passed by the II Additional District, Judge, Tiruchirapalli confirming the order passed in C.C.No.87 of 2011 on 22.04.2015 by the Chief Judicial Magistrate, Tiruchirappalli by allowing the criminal Revision.

**For Petitioner**

in Crl.RC(MD) No.885 of 2017 : Mrs. Chitra Sampath, Senior Counsel for Mr.Anand David  
in Crl.RC(MD) No.886 of 2017 : Mr.B.Kumar, Senior Counsel for M/s.AAV.Partners  
in Crl.RC(MD) No.887 of 2017 : Mr.N.R.Elango, Senior Counsel for Mr.S.Senthil

**For Respondent**

in all Crl.RC's : Mr.N.Nagendran  
Special Public Prosecutor for CBI Cases

**COMMON ORDER**

These three revision petitions are preferred by Dr.Nelson Jesudasan, Dr.J.Christopher Thomas and Dr. B.Ashok who were tried as accused for offence under section 338 of IPC and found guilty by the trial court and confirmed by the appellate court.

2. Before advertng to the controverted facts and grounds of revision, a brief extract of admitted facts is required for easy appreciation.

3. Joseph Eye Hospital, Tiruchy was established in the year 1934 under the aegis of Tamil Evangelical Lutheran Church, a registered society formed with object of imparting education and to render medical care. The Eye Hospital is administered by the Medical Board constituted as per the memorandum of Association.

4.On 29/07/2008 between 7.00 - 7.30 am to 3.30 pm , cataract surgery was performed to 66 patients at Joseph Eye Hospital, Perambalur a unit of Joseph Eye Hospital, Tiruchy. On that night, most of the patients complaint about excruciating pain in the operated eye, nausea and giddiness. Next day, they were given treatment and 29 of them admitted in the Tiruchy hospital. 61 of them lost their vision of the operated eye, 5 partially lost vision of their operated eye.

5. Public went on agitation seeking compensation and action against the hospital management. A public interest litigation was filed in the High Court, Madras. The district collector ordered enquiry by a team of experts. The High court in the writ petition ordered CBI to investigate.

6. CBI registered case against several persons such as the doctors who conducted the cataract surgery, anesthesitian, persons who were incharge of the management of the hosptial, officials of Perambalur District Blind Control Society and unknown Public Servants.

7. After completing the investigation, CBI filed final report against following 7 persons for offences under section 37 r/w 325 IPC.

a) Dr. Nelson Jesudasan, the Director and Medical Superintendent of Joseph Eye Hospital, Tiruchy

b) Dr. K. Avvai, Senior Associate Director of Joseph Eye Hospital, Tiruchy.

c) J. Christopher Thomas, the Chief Administrative Officer of Joseph Eye Hospital, Tiruchy.

d) Dr. B. Ashok, In-charge Medical Officer, Joseph Eye Hospital, Perambalur.

e) Dr. M. Saujanya, Medical Officer, Joseph Eye Hospital, Tiruchy.

f) Dr. Thendral Ponnudurai, Medical Officer, Joseph Eye Hospital, Perambalur.

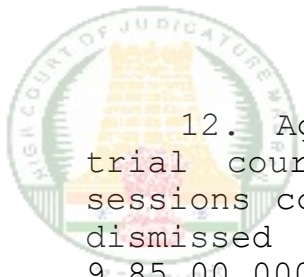
g) D. Andrews, Ophthalmic Technician at Joseph Eye Hospital, Perambalur.

8. The Chief Judicial Magistrate after perusing the final report and the documents relied by the prosecution, heard the prosecutor before framing charge and found that there is no material to prima facie show existence of *mens rea* or motive to the accused to voluntarily and intentionally to cause grievous hurt. Material only disclose prima facie case for offence under section 338 of IPC. The prosecution challenging for the framing of charge under section 338 IPC instead of Section 37 r/w 325 IPC preferred revision petition before the III Additional District Court, Tiruchy. The district court dismissed the revision petition preferred by the CBI. Holding that framing of charge under section 338 IPC does not warrant any interference.

9. The accused were tried before the Chief Judicial Magistrate, Tiruchy. Prosecution examined 33 witnesses. 85 documents were marked as exhibits P-1 to P-85. On the side of the defence 5 exhibits were marked as Ex D-1 to D-5. An album consisting of 22 photo's were marked as M.O.1 series.

10. The trial court after considering the evidence before it, held A-1, A-3 and A-4 guilty of offence under section 338 IPC. Convicted and sentenced to undergo one year Simple Imprisonment and to pay a total sum of Rs 2,75,19,620/- as compensation to the victims as mentioned in the schedule of the judgment. Rest of the accused A-2, A-5 to A-7 were not found guilty of the charge and acquitted.

11. Certain directions were also given to the authorities concern to take action against PW-20, against the staff authorities of District Blind Control Society (DBCS) /, the Deputy Director Health Services, Villupuram and against A-5 and A-6 by the Medical Council.



12. Aggrieved by the conviction and sentence passed by the trial court, the convicted accused preferred appeal before the sessions court, Tiruchy. The II Additional District Judge, Tiruchy dismissed the appeal. Also enhanced the compensation to Rs 9,85,00,000/- from 2,75,19,620/-.

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13. The Criminal Revision Cases 885 to 887 of 2017 is filed challenging the concurrent finding of the courts below and also against the enhancement of compensation without notice and affording opportunity to the appellants.

14. Gist of the prosecution case:

As per the direction of the Hon'ble High Court in its order passed in WP 21804/2009, CBI registered RC MA 1/2011-A a016 dated 15/03/2011 and took up the investigation. The First Information Report alleged conspiracy, cheating rash and negligence endangering human life, personal safety and causing grievous hurt which are offences under IPC besides offence under the sections under prevention of corruption Act, for misconduct by public servants.

15. In the accused column the names of Dr.Ashok, Dr.Saujanya, Dr.Thendran all employees of Joseph Eye Hospital, Tiruchy, the Management of Joseph Eye Hospital, Tiruchy, Office bearers of Perambalur District Blind Control Society, Unknown Public Servants of Tamilnadu Government and Unknown others were shown.

16. On completion of investigation, final report indicated 7 persons who were incharge of the management of Joseph Eye Hospital and the doctors who conducted surgery on that fateful day. As far as involvement of public servants, the final report concluded that no evidence could be unearthed that Joseph Eye Hospital was given preferential treatment in funding under National Rural Health Mission Scheme. Therefore the final report disclosing offence under section 37 r/w 325 IPC to proceed against Dr.NelsonJesudasan, Dr Avvai, Chistorpher Thomas, Dr.Ashok, Dr.Saujanya Dr. Thendral and D.Andrews.

17. The allegations against these accused persons as summed up in the final report is extracted below:

- A4 Dr. Nelson, the director, Jospeh Eye hospital and A-6 Christopher Thomas, CAO did not get approval to run the hospital
- No consent was obtained from Tamil Nadu Pollution Control Board for running the hosptial at Perambalur by A1 Dr. Nelson and A-6 Christopher Thomas
- There was no proper design and maintenance of operating room, sterilization room or separate room was available for storage of medicines.
- A4 Dr. Ashok , A1 Dr. Nelson Jesudasan, A2-Dr.Avvai and A-3 Christopher Thomas did not appoint any anesthetist to assist in the cataract



operations but had utilised the services of ophthalmic technicians

A-1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas did not appoint any pharmacist to Joseph Eye hospital, Perambalur as required by Drugs and Pharmaceuticals act

- A-1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas and A4- Dr.Ashok allowed functioning the hospital without laboratory or laboratory Technician at Josephy Eye hospital, Perambalur to conduct blood urine test etc and to medically check for systemic illeness including Diabetes, Chronic Pulmonary conditions , hyper tension cardio vascular condition and renal condition etc before surgery for cataract at the hospital
- A1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas and A4 Dr. Ashok allowed functioning of the operation theatre at Joseph Eye hospital Perambalur without proper trained staff for sterilization at Operation theatre and Sterilization room.
- A-4 Dr. Ashok the medical officer in charge of Joseph Eye hospital , Perambalur did not indent for formalin for using as sterilization agent for using at operation theatre , when it was out of stock from 03.07.2008
- A1- Dr.Nelson Jesudasan , A3- Christopher Thomas and A-4 Dr.Ashok knowing fully well that the Intra Ocular Lens cost only Rs.56 for the purpose of enticing the villagers to give consent for cataract surgery had distributed pamphlets stating that they will be implainted with Intra Ocular Lens worth Rs.1000 to Rs.3000.
- A1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas and A4 Dr. Ashok did not take permission from DBCS Villupuram for conducting Eye Screening Camp at Villupuram and conducting Cataract surgery at Joseph Eye Hospital, Perambalur.
- A1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas and A4 Dr. Ashok did not repoint the mass post operative infection to the District Medial authorities and DBCS till 22.08.2008
- A1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas after learning that the post operative infection caused by pseudomonas did not inform the office of Drug Control Inspector immediately so that the authorities would take necessary measures.
- A1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas and A4 Dr. Ashok did not intimate



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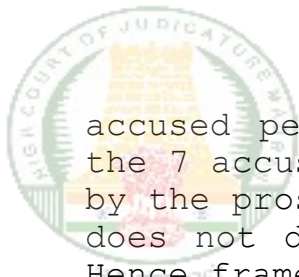
the incident to the families of the victims.

- A1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas and A4 Dr. Ashok did not inform the District Medical authorities and DBCS about the mass infections
- A7 Dr. Andrews, the Ophthalmic Technician, knowing fully well that he is not qualified as an anesthetist and gave anesthesia to the 66 victims when cataract surgery were performed by Saujanya (A5) and Dr. Thendral Ponnudurai (A6)

Thus A1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas ,A4 Dr. Ashok and A7 Dr.Andrews performed the above said actions singularly and jointly so that Saujanya (A5) and Dr.Thendral Ponnudurai (A6) performed operations in an Unsterilized environment.

- Saujanya (A5) and Dr.Thendral Ponnudurai (A6) conducted cataract operations in the unsterile Operation theatre
- Saujanya (A5) and Dr.Thendral Ponnudurai (A6) had utilised the service of A7 D.Andrew the ophtalmic technician to perform the job of anesthetist leading to post operative function.
- Saujanya (A5) and Dr.Thendral Ponnudurai (A6) did not conduct medical checkup for systemic illness including Diabetes, Chronic Pulmonary conditions, hyper tension, Cardio vascular condition and renal condition etc before surgery for cataract leading to post operative infection.
- Saujanya (A5) and Dr.Thendral Ponnudurai (A6) conducted the surgeries without using gloves leading to post operative infection
- Saujanya (A5) and Dr.Thendral Ponnudurai (A6) conducted the surgeries without using providone-Iodine leading to Post operative function
- Saujanya (A5) and Dr.Thendral Ponnudurai (A6) conducted 66 cataract surgeries used only minical medications leading to post operative infection and privation of vision of one eye of the victims

By the above acts, A1 Dr.Nelson Jesudasan, A-2 Dr.Avvai, A-3 Christopher Thomas,A4 Dr. Ashok, A5- Dr.Saujanya , A6- Dr. Thendral and and A7 Dr.Andrews intentionally co-operated in the commission of voluntarily causing grievous hurt of permanent privation of the sight of eye of the 66 villagers who had undergone cataract operation, by doing the above mentioned acts, singly and jointly and thereby committed offence punishable u/s.37 r/w.325 of IPC"



accused persons, framed charged under section 338 IPC against all the 7 accused. The trial court after considering the material placed by the prosecution, held that the material placed by the prosecution does not disclose any motive or mens rea to cause grievous hurt. Hence framed charge under section 338 IPC and tried the accused.

19. Findings of the courts below:

After examining 33 witnesses, 85 prosecution exhibits, 5 defence exhibits and one M.O series. The trial court found three of the accused guilty for offence under section 338 IPC. Acquitted 4 accused.

20. The accused who were convicted are persons administrating the Joseph Eye Hospital at Tiruchy and Perambalur. The accused persons who were acquitted are the two doctors who conducted the surgery, person who administered anesthesia and the Senior Associate Director of Joseph Eye Hospital.

21. The trial court in nutshell has summed up the reasoning for his decision as below:

"71. ....

(1) After the surgery when the patients are infected, the hospital chosen to analyze only the ringer lactate solution used batch No.108360 and not analyzed the used solution of 108361 which would clearly indicate only ringer lactate solutions 108360 alone used for surgery

(2) As per the G.O.No.D.1193 dated 09.11.2009, the manufacturer or ringer lactate solution i.e M/s. Baxter India Limited has been exonerated in view of the test conducted by King Institute with the control samples of the Baxter India Limited under report No. 145. The decision of the Government that no action needs to be taken against the company that their products are sterilized as per the condition is correct

(3) As per the report of the Joseph Eye hospital, Perambalur from the sample immediately collected after suspicious of infection or after commencement of the treatment for infection would clearly indicate the presence of Pseudomonas in 108360 whereas no bacteria is available in the unused ringer lactate solution in batch No.108360

(4) The earliest report of the Joseph eye hospital from the sample collected from the patients under Ex.P.65 indicates the infection of bacteria Pseudomonas from the operated eyes.

(5) the sterility of the operation theatre found to be sterile as per the entries available in M.Cases under Ex.P.66 even well before the subject matter of surgeries



(6) As per the inspection report the operation theatre is not in the expected design and having no approval even for the required basic design to conduct operations and contained many lapses as indicated in Ex.P.49 which can also be the cause for infection

(7) The drug book and also the indent would clearly indicate that there is no stock of formalin prior to the date of operation and as per the available material formalin of 1000 ml through two bottles were purchased on 02.07.2008 are not sufficient for fumigation, the operation room since more than 11 theatre sessions were conducted previously in the said operation theatre and hence the defect in the fumigation is also resulted in contamination and the infections in the operation theatre.

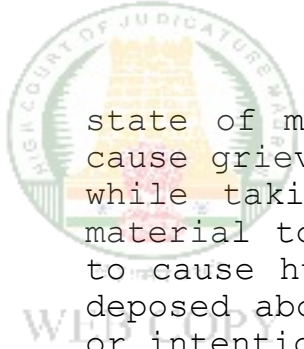
72. The purchase of bill under page 101 at Ex.P.58 and the indent would clearly indicate that ringer lactate solution in batch No.108360 of 750 numbers were alone purchased by the hospital"

22. The appellate court negated the grounds of appeal. Confirmed the trial court conviction and sentence. Further enhanced the compensation amount from Rs 2,75,19,620 to Rs 9,85,00,000/-.

23. While confirming the trial court judgment, the appellate court has also recorded the following observation as disturbing aspects in this case which has caused pain to the court.

- ➔ As the evidence adduced is cumulatively analyzed, it points out the prosecution agency has not fully probed the role of Baxter India Limited
- ➔ While the FIR was registered along with the appellants, the office Bearers of Perambalur District Blind Control Society and unknown public servants of Government of TamilNadu are added. But while the final report was filed, the Office Bearers of Perambalur District Blind Control Society and the unknown Public Government Servants of Tamil Nadu were dropped and this court is unable to find out on what basis the above mentioned two were dropped from the clutches of law and why that aspect was not considered at the inception.
- ➔ In Tamil Nadu where there are mushroom of private hospitals which are doing these kinds of surgeries, till date there is no law to regulate the private hospitals in Tamil Nadu.

24. The learned senior counsels appearing for the revision petitions submitted that, the courts below have legally erred in holding A-1, A-3 and A-4 guilty of offence under section 338 of IPC. To convict a person for offence under section 338 IPC, culpable



state of mind to commit any act of rash or negligence thereby to cause grievous hurt is a necessary ingredient. The trial court even while taking cognizance had categorically held that there is no material to indicate the accused persons had any mens rea or motive to cause hurt to the victims. In the trial none of the witness has deposed about the any of the accused persons had previous knowledge or intention to cause hurt or likely to cause hurt.

25. The doctors who conducted the cataract operations were found not guilty since there is no proof for gross negligence. But erroneously held the revision petitioners guilty since they are the persons administering the day to day affairs of the hospital, though they were not involved in the operation or present during the operation.

26. The courts below had erroneously concluded that, the building had no planning permit, it had no licence to store pharmacy, it has no permission to run hospital or to conduct eye surgery, it had no pollution control board clearance, on seeing the sketch it appears the operation theatre is opposite to out patient ward so every possibility the operation theatre getting infected and causing contamination of the Ringer lactate solution administered to the patients.

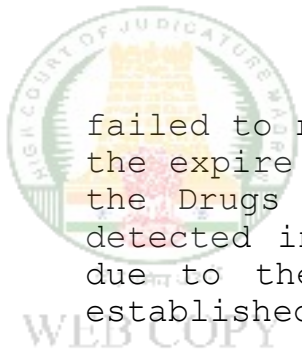
27. Purely on surmises and conjectures without any positive material to prove that the infection was only because of the presence of pseudomonas in the ringer lactate solution and that was due to non aseptic condition of the operation theatre, the courts below had held the revision petitioners criminally liable for not maintaining the operation theatre in sterile condition.

28. The reports relied by the prosecution regarding the sterile condition of the operation theatre was based on the inspection dated 23/03/2011 and collection of swabs long after the operation ( 29/07/2008 ) took place. Post operation condition of the theatre long after the operation had been heavily relied by the prosecution. The courts below failed to appreciate the said report Ex P-49 properly.

29. The perfunctory investigation about the particular batch of drug Ringer Lactate manufactured and supplied by M/s Boxter India Limited has lead to miscarriage of justice. The trial court as well the appellate court failed to note that the manufacturer of Ringer Lactate drug is under statutory obligation to preserve the standard samples of each batch they manufacture till the expiry date. In this case, Joseph Eye Hospital used ringer lactate solution batch No. 108360 and 108361. It is admitted by the investigation officer that he did not collect the standard sample from the manufacturer M/s Boxter India Limited. What he collected from the manufacturer is sample from a different batch ( 108507 ).

<https://hcservices.ecourts.gov.in/hcservices/>

30. It is established by the defence that the manufacturer



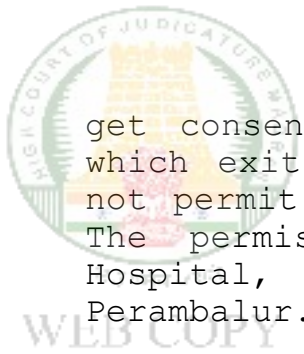
failed to retain the standard samples of the concern batch drug till the expire date, which he is bound to preserve as per Rule 78 (m) of the Drugs and Cosmetics Rules. Therefore the bacteria pseudomonas detected in the used bottle of ringer lactate solution was whether due to the manufacturing defect or due to any other reason not established by the prosecution.

31. Further, the additional document sought to be filed pending appeal to prove that M/s Boxter India Limited was found manufacturing contaminated Ringer Lactate solution during the probe regarding similar incident took place in Andhra pradesh was erroneously rejected by the appellate court that it has no relevancy to the present case.

32. The Enquiry committee supplementary report Ex P-33, the theatre surveillance report Ex P-42 and the final ( supplementary report ) which are result of investigation done by doctors immediate after the incident. These reports clearly indicates the presence of pseudomonas bacteria was the cause for the unfortunate incident. The operation theatre was not infested with pseudomonas bacteria. The theatre was in aseptic condition. While so the courts below omitted to consider this contemporaneous report but relied upon Ex 49 a report based on inspection done after two years to conclude that the operation theatre was not in sterile condition.

33. The learned counsel for the revision petitioner also contented that , the lab register D-28 containing the details of lab tests conducted by the hospital is maintained . It is the clinical sample register, a record containing the details of test conducted not only in respect of patients of Joseph Eye hospital, Tiruchy and its branches but also the patients of other hospitals whose samples are sent for lab test. This lab register consist of 464 pages. Details of lab test No M 138/08 to M 356/2008 are recorded in it. Only pages 218 to 245 are marked as Ex P-66. Only these pages contain the lab report details of the patients who underwent cataract on 29/07/2008 at Joseph Eye Hospital, Perambalur. The respective M case numbers are M 237/08 to M 252/08. The trial judge has wrongly considered that the details found in the other pages are also pertaining to the patients of Joseph Eye Hospital, Perambalur. Without proper understanding of the entries made in those pages which does not form part of Ex P-66, the trial judge has misconstrued that the operation theatre of joseph eye hospital was not sterile and infected by pseudomonas bacteria for a long time. An improper understanding of a entries found in a unmarked portions of a document had lead to erroneous conclusion, causing prejudice to the accused.

34. Per contra, the Special public prosecutor for CBI submit that, the courts below have properly considered the case of the prosecution and rightly convicted the revision petitioners who knowingly omitted to get permission from the Town and Country Planning officer for the building to run hospital. They failed to



get consent from pollution control board for their establishment which exit clinical waste. The District Blind Control Society did not permit the Joseph Eye Hospital Perambalur to conduct eye camp. The permission given to the base hospital namely Joseph Eye Hospital, Tiruchy will not extend to the branch hospital in Perambalur.

35. PW-28, Maruthupandiayan and the letter Ex P-75 proves that the Joseph Eye Hospital, Perambalur building is a approved building to run a hospital. PW-31 Dr.Balaji in his evidence had deposed about the omission to get consent from Pollution control board. PW-23 Dr. Prabu has deposed that Joseph Eye Hospital, Perambalur has not obtained permission from DBCS to conduct eye camp, which is mandatory.

36. The evidence of PW-20 and his report are not reliable since while conducting the inspection PW-20 has failed to follow the protocol. Therefore the trial court has rightly rejected his reports marked as Ex P-30 and 34. Whereas the prosecution has proved through witnesses that 66 cataract surgery in 390 minutes were done in one operation theatre. The lack of hygiene, location of the operation theatre opposit to Out patient ward. The ringer lactate solution which should be used in aseptic condition. Whereas during the said camp, it has been used in an unhygienic condition causing infection to the patients.

37. PW-30 in her evidence referring from Ex P-42 had explained the cause of infection. The inadequate medicine and formaline for sanitation caused contamination of the ringer lactate solution. The pseudomonas bacteria formed in the contaminated ringer lactate solution caused infection in the operated eye of the patients. Out of 66 patients , 61 lost their vision of the eye which was operated on that day. The micro biological swabs taken in the operation theatre reveal that the aerobic bacteria colon count was excessive.

38. Regarding the test of ringer lactate solution manufactured by M/s Baxter India Ltd, the learned spl public prosecutor submitted that, through the product manager of M/s Baxter India Ltd, ( Mr. Sathyanarayanan Ramadoss PW-29) the prosecution has proved that the Ringer Lactate solution carrying batch No. 108360 were sold to several customers, none of them had complaint about its quality. The King Institute which tested the unused bottle of the batch No. 108360 Ringer Lactate had certified that it is in good condition. Whereas in the used bottle of Ringer Lactate they had found pseudomonas bacteria. Thus the prosecution has proved that the contamination of Ringer Lactate solution has occured only in the operation theatre kept unhygienic.

39. The negligence being gross, done knowing well that this negligence will cause danger to the life of a person, their act of omission amounts to criminal negligence falling within the penal provision of section 338 of IPC.



40. The compensation amount was enhanced by the appellate court in compliance with the High Court direction which has specifically ordered the court to fix adequate compensation taking note of the damages caused to the victims. The age, loss of income, loss of vision, mental agony, pain were taken into account while fixing the compensation. Hence there is no error or illegality in the judgment. Therefore no need to interfere in the judgment of conviction and sentence.

41. Point for consideration:

Whether the ingredients of the offence for which the Revision petitioners / accused were convicted and sentenced, have been made out?

42. The revision petitioners herein along with others were charged for offence under section 338 of IPC. The trial court has exonerated Dr.M.Saujanya and Dr. Thendral Ponnudurai who have conducted the cataract surgery. As per evidence A5 has conducted 40 number of surgeries and A6 conducted 27 surgeries. Dr.Andrews (A7) working as Ophthalmic Technician at Joseph Eye Hospital, Perambalur administered anesthetics to all these patients. These three accused were the persons who were present in the operation theatre and had direct contact with the patients who have developed infection in their eyes after operation. Apart from these accused the trial court has also acquitted the second accused Senior Associate Director of Joseph Eye Hospital, Tiruchy for want of evidence to establish her part of negligence. The trial court having found that A1, A3 and A4 guilty of offence under Section 338 of IPC had also recommended action against PW 20 and other officials who were shown as accused in the First Information Report but later deleted in the charge sheet and as against A5 and A6. The directions given by the trial court is as under :

" 106....

1. to initiate disciplinary proceedings against the P.W 20 for his violation to follow the protocol while collecting the air in the operation theatre of the Joseph Eye Hospital Perambalur and also for non- application of his mind while collecting the sample and making the entire proceedings as a futile exercise.
2. To determine the lapses on the staff/authorities of DBCS/Deputy Director of Health Services, Villuputam for not visiting the hospital premises after the receipt of the application from the 1<sup>st</sup> accused within a reasonable time. Had they visited this tragedy could have been avoided any contrary to that they indirectly aided the hospital to conduct the cataract surgeries without the basic requirement and hence they have to be dealt with departmental proceedings
3. The 5<sup>th</sup> and 6<sup>th</sup> accused have to be proceeded as per



*the provisions of the Medical Council Act 1956 and Indian Council (Professional Conduct, Etiquette and Ethics) Regulation 2002".*

43. The appellate court while confirming the conviction and sentence of A1, A3 and A5 had also enhanced the compensation and also painfully recorded certain disturbing aspects which has already been extracted above. Both the courts below while testing the offence in the light of Section 338 of IPC had considered the documents and evidence extensively and have come to conclusion that there was gross negligence on the part of the revision petitioners herein in maintaining sterility of the operation theatre in which the operations were conducted on 29.07.2008.

44. This Court does not find any fault in the concern expressed by the court below since 66 innocent persons have been put to great sufferance by losing their vision. However, in the Court of law just emotion and public outcry should not sway the scale of justice. When a person is charged for gross negligence, proximity of the negligence alleged and the persons alleged to have committed negligence should not be remote. There should not be any intervening facts which could have aggravated damage.

45. The trial court have been very choosy in appreciating report of the experts. While disbelieving PW.20 and also suggested to take departmental action against him for not adhering protocol and giving misleading report, the court itself has relied upon his report regarding physical feature of the building. Similarly in respect of the report regarding operation theatre, it has chosen to rely upon the inspection report conducted 2 ½ years after the incident, but had rejected the report Ex.P.30 and Ex.P.33. These reports was out come of the inspection done immediately the next day of operation .

46. The possibility of infection by pseudomonas bacteria could have been due to contaminated ringer lactate solution supplied by M/s. Baxter India Limited or due to unhygienic atmosphere alleged to have been developed in the operation theatre on that day or due to infection due to artificial lense placed on the retina of the patients or due to infection due to contaminated visco elastic substances . Ringer lactate solution of all batches used on the date of the operation were not put to test. Further it is admitted by Sathiyarayan Ramadoss (PW 29) representing M/s. Baxter India Ltd and the Investigating Officer (P.W.33) that manufacturer has not preserved standard sample till its expiry date. The standard sample of ringer lactate solution batch numbers 108360 , 108361 were not collected from the manufacturer. The Courts below had presumed for itself that since there was no complaint from any other customers regarding ringer lactate solution of batch numbers 108360 and 108361, the contamination found in the ringer lactate solution recovered by Joseph Eye Hospital, Tiruchy ought not to have been only due to unsterile atmosphere in the laboratory.



47. It is also to be pointed out that the lab test report register (Pg. No.218-245) marked as Ex.P.66 has been improperly appreciated by the trial court to presume that the operation theatre of the Joseph eye hospital was always been contaminated with pseudomonas bacteria. This observation of the trial court is erroneous and baseless.

48. Joseph Eye Hospital, Tiruchy had applied for permission from April 2008 to 2013. In the said application they have mentioned that cataract surgery will be conducted at their peripherals hospitals also. Though application was made vide their letter dated 15.02.2008 no formal permission was granted for conducting cataract surgery. At the same time District Blind Control society had sanctioned granting aid to Joseph eye hospital for eye surgery conducted by them during this period. PW.23 Dr. Prabu had deposed that expecting permission with retrospective effect Joseph eye hospital was permitted to conduct cataract surgery.

49. It is the case of the prosecution that through investigation they found that Rs.1,15,25,280/- was paid by the District Blind Control Society to Joseph Eye Hospital out of total amount of Rs. 2325.39 lakhs released by the Government of Tamil Nadu to the state Health society. The investigation reveals that during the financial year 2008-2009 a total sum of Rs. 3,43,56,740/- was paid to Joseph Eye Hospital from all the 19 districts where the hospital conducted free eye camps out of total amount of Rs 25,41,15,000/- paid to all the NGO's in all districts. The final report has concluded that no evidence should be unearthed that Joseph Eye Hospital was given preferential treatment in funding and National Rural Mission Scheme.

50. Bearing in mind that the trial court even before framing charge have found that there is no *mens rea* for frame charge under 37 r/w.325 IPC. After trial, the trial court has found those those doctors and technician who were in the operation theatre committed offence under section 338 of IPC. Admittedly the District Blind Control society has earlier permitted Joseph Eye Hospital based at Tiruchy to conduct free eye camps at the hospital at Tiruchy and peripherals and paid the central Grant -in aid. It is to be tested whether the revision petitioners who were not directly involved in the operation are criminally responsible for the alleged incident.

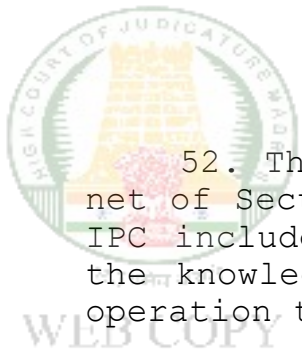
51. Section 338 of IPC reads as under:

A perusal of this Section demonstrates that before a person is held guilty of the said offence the following ingredients needs to be established.

- a) Causing grievous hurt to any person by doing any act
- b) The said act should have been rash or negligent

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- c) the intensity of the commission of the offence of the said act ought to endanger human life or personal safety of others.



52. The Courts below has brought the revision petitioner on the net of Section 338 IPC on the premise that Act referred in 338 of IPC includes omission. Negligent in this case is gross and with the knowledge that omission to provide sterile atmosphere in the operation theatre will endanger human life or their safety.

53. To arrive at the said conclusion, the Courts below have substituted its inference based on the expert report but not spoken by concerned expert. Particularly while considering Ex.P.66 the trial court had considered the entries made in the said register for the month of April and May not pertaining to the patients of Joseph eye hospital. The trial court has applied its own logic regarding the measurement of the operation theatre from the sketch and had concluded that the formalin used during the operation sessions was not adequate. Also presumed that general ward and special ward doors are located exactly opposite to the operation theatre. The authenticity of the report of Ex.P.49 not been tested through its authors. However the content of the report has been relied by the trial court.

54. The concern for the gullible poor victims who have lost their sight due to negligence, has made the courts below to traverse beyond the scope of Section 338 of IPC. No doubt there should have been negligence on the part of the doctors who have conducted operation and management, but the prosecution has not proved the negligence was so gross and was result of culpable state of mind. The record does not indicate that on the date of operation the revision petitioners herein had any knowledge about the aseptic condition of the operation theatre. Contrary their conduct prove their deligence after the occurence.

i) A4 immediately after knowing that the petitioners are reporting irritation in their eyes they have organized for review and voluntarily they have taken samples of the operation theater conduct test of ringer lactate solution. Admitted patients for post operation case.

ii) From the deposition of PW 25 Karunanithi it could be seen after complaint of irritation many of the patients have not come for follow up treatment few of them have gone to celebrate aadi festival and some of them were taken to other hospitals including KAPV hospital, Government hospital Tiruchy.

55. These intervening factors were not considered by the courts below. Negligence need not be caused by positive act even omission to act may also amount to negligence, but to attract section 338 IPC the said negligence should be with knowledge that it will endanger the life. In this case failure to fumigate the operation theatre or inadequate utilization of the ringer lactate solution even it is true are act of commission or omission which could be attributed to the revision petitioners herein.



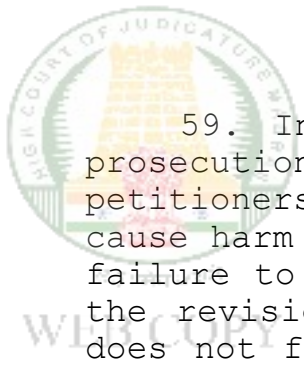
56. Negligence under law of Torts and negligence under law of crimes are different. Observations and quotations made by courts in respect of civil negligence cannot be substituted for criminal negligence. The Honourable Supreme Court in **Jacob Mathew - vs- State of Punjab and others** reported in **2005 SC 3180 (1) volum-6 page No.16** has held as under :

"Negligence \_\_\_ as a tort and as a crime

12. The term 'negligence' is used for the purpose of fastening the defendant with liability under the Civil Law and, at times, under the Criminal Law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence upto the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in Criminal Law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in Civil Law. The essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In *R. v. Lawrence*, [1981] 1 All ER 974 (HL), Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in *R. v. Caldwell* and dealt with the concept of recklessness as constituting mens rea in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said (All ER.P.982 e-f)

"Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so





59. In the light of the facts and law discussed above, the prosecution has failed to make out case against these revision petitioners regarding any expressed or implied state of mind to cause harm or danger to life. At the most what could be inferred is failure to exercise due diligence. The said failure and conduct of the revision petitioners though may not be up to the standard it does not fall within the ambit of section 338 of IPC. The courts below being conscious of this, have recorded their observation regarding lacuna in the prosecution and suggested certain remedial measures including enhancing the compensation without notice to the revision petitioners.

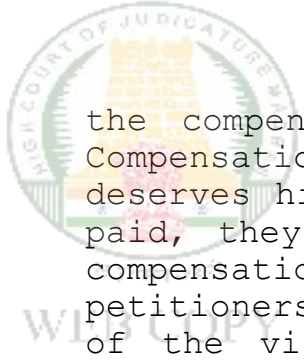
60. The Trial Court in reference to the order of the High Court in W.P.No.21804 of 2009, dated 12.01.2012, had fixed compensation to the victims based on the Workmen Compensation Act, 1923 applying multipliers. The relevant paragraph of the High Court order is also extracted in its Judgments, which reads as under:

*"In the facts and circumstances of the case, we direct the Chief Judicial Magistrate, Trichy, before whom the criminal cases are pending, to assess the quantum of compensation to be paid to those victims. In addition to the compensation already paid by the Government and also by the Hospital. It is made clear that if the compensation that may be assessed by the Chief Judicial Magistrate is less than Rs.2 lakhs (Rs.1 lakh paid by government and Rs.1 lakh paid by the Hospital, then the balance shall not be recovered from the patients. Similarly, if the compensation that may be assessed is more than Rs.2 lakhs, which amount has already been paid, then the balance shall be paid by the Hospital".*

61. While so, the appellate Court has viewed that the compensation fixed by the Trial Court is much less. Considering the poor and pathetic condition of the victim, the appellate Court has enhanced the compensation and had fixed the compensation as below:

- (i) Victims who are 80 years and above - Rs.5,00,000/-;
- (ii) Victims who are 70 years and above - Rs.10,00,000/-;
- (iii) Victims who are 60 years and above - Rs.15,00,000/-;
- (iv) Victims who are 50 years and above - Rs.20,00,000/-;

In respect of one victim by name Kuppammal, aged 45 years, the appellate Court has enhanced compensation of Rs.30,00,000/- and one victim by name Kuppu, the enhanced compensation is Rs.50,00,000/-. The basis on which the appellate Court has fixed the above enhanced compensation is not known, except an observation made by the appellate Court, Joseph Eye Hospital have chain of hospitals, which was established in the year 1934 and in the view of the Court, it has capacity to pay the enhanced compensation. The appellate Court has neither given an opportunity to the revision petitioners before enhancing the compensation nor basis upon which the order enhancement, or any logical reasoning. Therefore, it is liable to be set aside. At the same time, the vicarious liability of the management under the law of torts cannot be wiped off. Therefore,



the compensation fixed by the Trial Court based on the Workmen Compensation Act, shall hold good. Further, if any of the victims deserves higher compensation than what fixed by the Trial Court and paid, they are at liberty to establish their case and get higher compensation from the management. Acquittal of these revision petitioners in the criminal prosecution will no way stand in the way of the victims seeking further compensation, if they desire to claim.

62. In the result of the above discussions, this court hold that the prosecution has failed to establish the culpable state of mind of the revision petitioners herein. They are not criminally liable. Hence the judgment of the courts below are liable to be set aside, in respect of sentence. As far the compensation awarded by the trial court shall stand. It is to be treated as compensation under tortuous liability.

63. In the result,

(i) These criminal revision cases are allowed and the judgments of the courts below are set aside. The revision petitioners are acquitted of the charge under Section 338 of IPC.

(ii) As far as the compensation awarded by the trial court and enhanced by the appellate court, it is stated by the revision petitioner that they have already deposited the compensation as ordered by the trial court and the same has been withdrawn by the victims. They have also given an undertaking to the court even if they succeed in the revision petition, they will not claim back the money. As pointed out earlier, the negligence on the part of the revision petitioner are not ruled out, this Court has held that the negligence does not fall within the meaning of criminal negligence, liable for prosecution. For tortious liability, the revision petitioners are responsible and liable to compensate the victims. Therefore, it is left open to the victims to approach the appropriate forum for any further compensation more than what they have been paid as per Workmen Compensation Act 1923, if they so desire. If any application is filed for enhanced compensation more and above what they have already paid, those petition cannot be rejected on the ground of limitation. For all legal purpose limitation to claim enhanced compensation shall commence from the date of this order. Consequently connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CO)

/True Copy/

Sub Assistant Registrar (CS-II)



1. The II Additional District Judge,  
Tiruchirapalli.

2. The Chief Judicial Magistrate,  
Tiruchirapalli.

3. The Deputy Superintendent of Police,  
CBI, ACB, Chennai.

4. The Record Keeper,  
Criminal Section,  
Madurai Bench of Madras High Court,  
Madurai. (2 Copies)

5. The Special Public Prosecutor for CBI Cases,  
Madurai Bench of Madras High Court,  
Madurai.

+ 1 CC TO Mr.S.SENTHIL, ADVOCATE IN SR No. 85263  
+ 1 CC TO M/s.A.A.V.PARTNERS, IN SR No. 85264  
+ 1 CC TO Mr.ANAND DAVID, ADVOCATE IN SR No. 85265

AAV

TE/SV/SAR-2 : 09/10/2018 : 20P/10C

ORDER MADE IN  
Crl.R.C(MD)Nos.885,886  
and 887 of 2017  
19.09.2018