

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 215 of 2006****Reserved on : 25.04.2019****Delivered on : 26.06.2019**

State of Chhattisgarh, Through The Collector, Bilaspur (C.G.)

---- Appellant**Versus**

1. Smt. Jamuna Devi Gulhare (Dead) Through Lrs.
 1 (A) Vishambhar Gulhare, S/o Prabhu Dayal, aged about 59 years.
 1 (B) Smt. Sadhna Gulhare, W/o Prem Dayal Gulhare, aged about 45 years, D/o Smt. Jamuna Devi Gulhare.
 1 (C) Nupur Gulhare, D/o Prem Dayal Gulhare.
 1 (D) Mridula Gulhare, D/o Prem Dayal Gulhare,
 All are R/o Rajendra Nagar, Link Road, Police Station Civil Lines, Bilaspur, District- Bilaspur (C.G.)
 1 (E) Sunder Gulhare, S/o Prabhu Dayal Gulhare, aged about 55 years.
 1 (F) trilok Gulhare, S/o Prem Dayal Gulhare, aged about 42 years.
 1 (G) Anil Gulhare, S/o Prem Dayal Gulhare, aged about 40 years.
 1 (H) Smt. Malti Jaiswal, W/o Shri Raj Kumar Jaiswal, aged about 44 years.
 All are R/o Jabdapara, Sarkanda, Police Station Sarkanda Bilaspur, District- Bilaspur (C.G.)
2. Smt. Sadhna Gulhare, W/o Late Prem Dayal Gulhare, aged about 45 years.
3. Ku. Payal, D/o Late Premdayal Gulhare, aged about 10 Years.
4. Ku. Kajal, D/o Late Premdayal Gulhare, aged about 8 years.
 Respondents No. 3 & 4 are minor through their Mother Smt. Sadhna Gulahre (Next friend in the trial court through whom they had sued) All are R/o Near Rajaram Mandir Gondpara, Bilaspur Tahsil & District- Bilaspur (C.G.)
5. Civil Surgeon-Cum-Chief Hospital Superintendent, Sardar Patel Hospital, Bilaspur (C.G.)
6. Principal Secretary, Medical & Health Services, Secretariat Raipur (C.G.)
7. Dr. R. K. Gupta, through Sardar Patel Hospital, Bilaspur (C.G.)

---- Respondents

For Appellant/ State	:	Mr. A.N. Bhakta, Dy. A.G.
For Respondents No. 1 to 4	:	Mr. Sourabh Sharma, Advocate.
For Respondent No. 7	:	Mr. P.K. Verma, Sr. Advocate with Mr. Virendra Verma, Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma**CAV JUDGMENT**

1. This first appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against judgment/ decree dated 13.04.2006 passed by District Judge, Bilaspur, District- Bilaspur (C.G.) in Civil Suit No. 4-B/2002, wherein the said court decreed compensation to the tune of Rs. 4,08,000/- with interest against the appellant and in favour of respondents No. 1 to 4.
2. Heard on application dated 01.04.2019 filed under Order 41 Rule 27 read with Order 12 Rule 8 of C.P.C. seeking that respondents No. 1 to 4 be directed to produce the original X-ray report dated 14.08.2001 and opinion vide M.L.C. plate No. 192 (E).
3. Learned counsel for respondents No. 1 to 4 opposes the application.
4. It is pleaded that the documents are necessary for disposal of the instant appeal and the appellant was unable to produce these documents before the trial court even after exercise of due diligence. It is also pleaded that the documents are required bonafidely and the same is necessary for just and proper adjudication of the appeal.
5. To decide the application filed under Order 41 Rule 27 of the Code of Civil Procedure may be read as under:

“The parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary, in the Appellate Court. But if -

(a) The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) The party seeking produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge of could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate court may allow such evidence or document to be produced, or witness to be examined.

6. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal.

7. The two tests for admissibility of additional evidence, is whether the appellate court is able to pronounce judgment on the material before it, without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examine the evidence, as it stands the court comes to the conclusion that some inherent lacuna or defects becomes apparent to the court. It is only for removing a lacuna in the evidence, that the appellate court is empowered to admit additional evidence. When a party failed to discharge its onus before the trial court, he is not entitled to a fresh opportunity to produce evidence.
8. The trial court has provided full opportunity to the appellant to adduce evidence. The doctor who seen the X-ray report namely R.K. Gupta has been examined before the trial court, therefore, it is not a case where lacuna in the evidence should be removed by the court.
9. In view of the above, the application is liable to be and is hereby rejected.
10. As per version of respondents No. 1 to 4/plaintiffs, Prem Dayal Gulhare was husband of respondent- Smt. Sadhna Gulhare, son of respondent- Smt. Jamuna Devi Gulhare and father of Ms. Payal and Ms. Kajal. He was working as Meter Reader in Municipal Corporation, Raipur. He was admitted on 14.08.2001 in Sardar Vallabh Bhai Patel Hospital, Bilaspur after he got injured in an accident, which he met while he driving his two wheeler (Hero Puch). He was treated in the hospital and on 18.08.2001, he was discharged from the hospital. On 22.08.2001, he was again brought to the hospital and was

unconscious. On 23.08.2001 at 6:15 a.m he died. Respondents No. 1 to 4/ plaintiffs filed a suit before the trial court seeking compensation alleging death of Prabhu Dayal Gulhare was caused because of negligence on the part of the doctor who treated him. The trial court recorded finding after hearing both side and decreed the suit that is why this appeal is preferred.

11. Learned counsel for the appellant/ State submits as under:-

(i) The hospital in which Prabhu Dayal Gulhare was admitted provided free service and there is no evidence that act of the doctor was negligent while treating the said patient.

(ii) The postmortem report was not proved as the doctor who conducted autopsy has not been examined, therefore, the said document is not part of record, but the trial court recorded finding on the basis of said unproved document.

(iii) The trial court overlooked the fact that the X-ray of the said person was produced and as per report dated 14.08.2001, there was no fracture in his head. The trial court proceeded against the report and recorded the finding that there was some head injury on 14.08.2001.

(iv) The trial court has erroneously shifted onus of proof on the appellant. The injury sustained by the deceased were because of his own act and no doctor can be attributed to that act.

(v) The trial court erroneously rejected the material piece of evidence that the bed-head-ticket dated 18.08.2001 which

categorically said that the deceased was discharge on his prayer. If any injury was caused after discharge from the hospital, the surgeon cannot be held responsible for that.

(vi) The trial court recorded that head injury was appeared on 18.08.2001 or after 18.08.2001. Dr. R.K. Gupta (DW-1) advised to the deceased to get the CT Scan done after going through the X-ray Plate dated 14.08.2001 and in fact, he wanted to rule out all the possibility of head injury, but that is not done by the deceased. CT scan was not available in the hospital, therefore, any doctor is not liable for CT Scan which was not available in the hospital.

(vii) The trial court overlooked the fact that the treating doctor administered life saving drugs to the said person, therefore, no liability can be fastened on them. The finding arrived at by the trial court is liable to be set aside.

12. On the other hand, learned counsel for respondents No. 1 to 4 submits that the finding arrived at by the trial court is based on factual matrix and legal aspect of the matter and the same does not warrant any interference of this court while invoking jurisdiction of the appeal.
13. Respondents No. 1 to 4 side adduced evidence of Smt. Jamuna Devi (PW-1), Vishambhar Gulhare (PW-2) and Accounts Officer- M.B. Gupta (PW-3) and the appellant side examined Dr. R.K. Gupta (DW-1). No expert was examined on behalf of respondents No. 1 to 4/ plaintiff. As per version of Dr. R.K. Gupta (DW-1 of respondent No. 7/defendant No. 4), the injured admitted on 14.08.2001 and after treatment, no fracture was found in his head. He advised them to go

for CT Scan which was not available in the Government Hospital, but was available in Maharshi Hospital, Bilaspur, but relatives of the injured did not go for CT Scan. As per version of this witness, when sign of cure appeared, they discharged the injured on 18.08.2001. He again admitted on 22.08.2001 and died on 23.08.2001. From cross-examination of this witness, it is clear that the injured was conscious and due to normalness of his system, he was discharged as per Ex. D/1.

14. First question for consideration before this Court is whether the finding recorded by the trial court that the injured suffered fracture on his head, is proved before the trial court. In the present case, postmortem was conducted by Dr. R.K. Verma. Dr. R.K. Verma was not examined before the trial court, therefore, autopsy report is not proved and in absence of examination of the doctor who conducted autopsy, it is also not proved as to when any fracture was caused in head of the injured.
15. As per version of Dr. R.K. Gupta, it is established that no fracture was found after X-ray of injured while admitted on 14.08.2001. He was discharged from hospital on 18.08.2001 and upto his discharge, there is no evidence that any fracture was found in head of the deceased, therefore, there is no evidence to say that any fracture was found on head of the deceased before 14.08.2001. There is nothing on record to show that any doctor was negligent in treatment of the injured. As per version of Dr. R.K. Gupta, doctors have treated the patient seriously and looking to his normal condition, he was discharged from

the hospital. After three days of his discharge, he was again admitted in deteriorate condition and after admission, he succumbed on next day.

16. It is not clear from the evidence as to what happened between 18.08.2001 to 21.08.2001. Anything happened outside the hospital cannot be attributed to act of any doctor of the hospital, therefore, no liability cannot be fastened on him. No expert was examined by respondents No. 1 to 4/ plaintiffs to show that there was negligency on the part of any treating doctor. Unless negligency is shown by opinion of doctor, version of respondents No. 1 to 4 and their witnesses who were not expert, is irrelevant.
17. As per Section 45 of the Indian Evidence Act, 1872, opinion of expert is only relevant. A person who is not expert in the field of medical science cannot record his opinion regarding line of treatment, therefore, evidence of respondents No. 1 to 4 who are relatives of injured, is not expert opinion and the same cannot be acted upon. Finding without opinion of any expert on behalf of claimants, is not sustainable on the basis of statement of claimant. There is nothing on record to say that any of the surgeon was negligent that is why the injured succumbed.
18. On overall assessment of entire evidence, this court has no reason to say that any of the doctor was negligent, therefore, compensation cannot be awarded to respondents No. 1 to 4 for negligence on the part of the doctor. Finding arrived at by the trial court is not based on any expert opinion, therefore, the same is not liable to be sustained.

19. Accordingly, the appeal is allowed. The decree is passed in favour of the appellant/ State and against respondents No. 1 to 4 on the following terms and conditions:-

- (i) The appeal is allowed. The suit filed by respondents No. 1 to 4/ plaintiffs is dismissed with cost.
- (ii) Parties to bear their own cost.
- (iii) Pleaders' fee, if certified be calculated as per certificate or as per schedule whichever is less.
- (iv) A decree be drawn accordingly.

Sd/-
(Ram Prasanna Sharma)
Judge