



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.06.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.72 of 2014

Dr.N.Fauzia,
Assistant Professor (O & G),
Raja Mirasdar Government Hospital,
Thanjavur.

... Appellant/1st Appellant/
1st Defendant

Vs.

1.S.Balasubramanian

2.Minor.Kayalvizhi

3.Minor.Tamilselvi

(Minor respondents 2 and 3 are

represented by their father the 1st respondent)

...1st to 3rd Respondent/Respondent Plaintiff

4.Dr.E.Kalrani,

Assistant Station Medical Officer,
Raja Mirasdar Government Hospital,
Thanjavur.

5.Dr.Meenakshi Sundaram,

Anaesthetist,
Government Medical College Hospital,
Palayamkottai,
Tirunelveli District.

6.The Dean,

Raja Mirasdar Government Hospital,
Thanjavur.

7.Government of Tamilnadu,

Through District Collector,
Thanjavur District.

... 4th 7th Respondents/Appellants
2 to 5/Defendants

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Additional District Judge (F.T.C.), Thanjavur dated 09.08.2010 in A.S.No.29 of 2007, partly allowed the judgment and decree passed by the Principal Sub Judge, Thanjavur dated 12.02.2007 in O.S.No.93 of 2004.

For Appellant : Mr.S.Anand Chandrasekar
For M/s.Sarvabhuman Associates.

For Respondents : Mr.T.Sesubalan Raja for R1 to R3 & R7

Mr.M.Karunanithi for R5

No appearance for R4 & R6

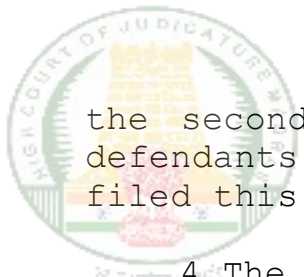


JUDGEMENT

The first defendant in O.S.No.93 of 2004 on the file of the Principal Sub Court (Fast Track Court), Thanjavur, is the appellant in this second appeal. The said suit was instituted by the respondents 1 to 3 herein claiming compensation to the tune of Rs.2,00,000/- with interest for the death of Vetriselvi, wife of the first plaintiff and mother of plaintiffs 2 and 3. The plaintiffs alleged that Vetriselvi died on account of negligence on the part of the defendants. Vetriselvi was admitted for delivery on 23.08.2003 in Raja Mirasdar Government Hospital, Thanjavur as in-patient. She developed labour pain in the late evening of 25.08.2003. Since the duty doctor advised performance of caesarean operation, the first plaintiff/husband of Vetriselvi gave his consent both for caesarean operation but also for family planning operation. There is no dispute that during the relevant time Vetriselvi's condition was normal. On 26.08.2003 at about 11.30 a.m. Vetriselvi was operated upon and she delivered a baby at about 1.30 p.m. The specific allegation in the plaint is that Vetriselvi had excessive bleeding. She also had severe pain in the neck and suffered from fits also later. She also was not able to move freely. Therefore, she was shifted to Thanjavur Medical College Hosiptal on 02.09.2003. Vetriselvi passed away on 06.09.2003 at 11.30 P.M. in Thanjavur Medical College Hospital. The first plaintiff would allege that the death was entirely due to the negligence on the part of the doctors and staff at Raja Mirasdar Government Hospital and Thanjavur Medical College Hospital. Even though he demanded that postmortem should be done, the authorities declined to do. Contending that the defendants are bound to compensate the plaintiffs, the suit was instituted. The appellant herein, who was shown as the first defendant, was the doctor who had performed caesarean operation on Vetriselvi. In her written statement, she denied the plaint allegations. Defendants 2 to 5 also filed their written statements controverting the stand of the plaintiffs.

2.The first plaintiff examined himself as P.W.1. The sister of Vetriselvi was examined as P.W.2 and Exs.A1 to A13 were marked. The appellant herein examined herself as D.W.1. Two other doctors were examined as D.W.2 and D.W.3 and Exs.B1 to B3 were marked.

3.The learned trial Judge after considering the evidence on record concluded that the plaintiffs have established that the defendants were negligent and directed them to pay a sum of Rs.1,70,000/- with interest at the rate of 6% per annum. Questioning the said judgment and decree dated 12.02.2007, the defendants filed A.S.No.29 of 2007 before the Additional District Court (Fast Track Court), Thanjavur. The first appellate court by judgment and decree dated 09.08.2010 allowed the appeal as regards



the second defendant and dismissed it as regards the remaining defendants. Challenging the same, the first defendant alone had filed this second appeal.

4.The second appeal was admitted on the following substantial questions of law:-

"(i) In cases involving medical negligence, when the initial burden is upon the plaintiff to prove that the doctor who performed the surgery is negligent, whether the approach of the courts below holding the appellant negligent, without the plaintiffs discharging the onus placed on them, is correct in law? and

(ii) When the plaintiffs have not established that there is a direct connection between the surgery performed by appellant/1st defendant and death of 1st plaintiff's wife, whether the approach of the courts below in holding the appellant/1st defendant guilty of negligence along with other defendants is correct in law?"

5.The learned counsel appearing for the appellant reiterated the contentions set out in the memorandum of grounds of appeal and took me through the evidence on record. He placed reliance on the decisions reported in **2010 (2) CTC 710 (The Collector of North Arcot v. K.Mani)** and **(2020) 6 SCC 501 (Maharaja Agrasen Hospital v. Rishabh Sharma)**. He called upon this Court to answer the substantial questions of law in favour of the appellant and allow this second appeal.

6.Per contra, the learned counsel appearing for the respondents 1 to 3/plaintiffs submitted that this is a case in which the medical negligence of the defendants is apparent. He pointed out that though consent was given for performing family planning operation also, it was not done. The reason given by the appellant during cross examination does not sound convincing. He took me through the plaint averments. In order to ascertain the true cause of death, the first plaintiff demanded that postmortem should be performed. The hospital authorities however had declined to do it. In the written statements filed by the defendants, this specific allegation had not been dealt with. That is why the first appellate court had sharply commented on the failure to conduct post-mortem. The learned counsel wanted me to draw adverse inference against the defendants in this regard. He would also state that in a case of this nature, the plaintiffs cannot be expected to adduce evidence beyond a point. Vetriselvi



23.08.2003 and she was there till 02.09.2003. She was later shifted to Thanjavur Medical College Hospital where she breathed her last on 06.09.2003. It is only the defendants who will be privy to what actually happened. The plaintiffs cannot be saddled with an impossible burden. He pressed for dismissal of the second appeal.

7.I carefully considered the rival contentions and went through the evidence on record. Even though the general principle is that the burden of proof is on the complainant to establish medical negligence, in a case of this nature, the onus will shift to the defendants after the plaintiff discharges the initial burden. The deceased/Vetriselvi was all along under the care, custody and treatment of the Government doctors. It is only they who can competently speak as to what actually had happened. Section 106 of the Indian Evidence Act, 1872 states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The plaintiffs need only to show that Vetriselvi was in a normal condition, when she was admitted to the hospital for delivery. She came out dead two weeks later. There was nothing to indicate that she suffered from any initial complication or that death was a foreseeable possibility. Even though consent to perform family planning operation was given in advance, it was not done. When Vetriselvi was brought out from the operation theatre, she was soaked in blood. She developed severe pain in the neck and was unable to move. She died on 06.09.2003. From these circumstances, the first plaintiff was justified in making an allegation that the death of his wife was due to medical negligence. The plaintiffs cannot be expected to prove anything more than this. The onus lay only on the defendants to establish that the deceased did not die on account of any medical negligence on their part. It is the hospital management that will have the relevant medical records. They have to furnish the treatment details and explain the sequence of events. After the initial burden is discharged and the onus is shifted, it is the defendants who have to place materials to absolve them of blame. The first substantial question of law is therefore answered against the appellant.

8.The next question that arises for my determination is whether the defendants have discharged the burden cast on them. Let me deal with the allegation regarding the failure to conduct autopsy. Though there is a specific allegation in the plaint in this regard, the same has not been controverted. When I queried the learned counsel for the appellant as to why this averment has not been traversed, he explained that Vetriselvi did not die in Raja Mirasdar Government Hospital but in Thanjavur Medical College Hospital. The plaintiffs failed to implead the Dean, Thanjavur Medical College Hospital. It is not known before whom the demand



for conducting autopsy was made. In the representation dated 06.10.2003 given by the first plaintiff to the District Collector, Thanjavur, there is no reference to any such request or its unjustified denial by the authority concerned. This allegation has been made for the first time only in the plaint. The first plaintiff has not spelt out the details. Neither the appellant nor the other defendants can be expected to controvert an allegation with which they are not concerned.

9.The entire medical records have been marked as Exs.B1 to B3. It is not case of the plaintiffs that these records have been fabricated or cooked up later. No such suggestion has been put to the medical witnesses examined on the side of the defendants. The learned counsel for the appellant draws my attention to the entries made in Ex.B1. The case of the appellant is that the uterus of Vetriselvi did not contract well and that led to bleeding. Though this was arrested in due course, due to lapse of time and due to the late cry of the baby, the family planning operation was not performed. There is a contemporaneous entry in Ex.B1 in this regard.

10.The major defence of the appellant is that Vetriselvi developed a medical condition known as cerebral vein thrombosis. It is submitted that though it is not uncommon during post-delivery, it is not possible to foresee the same. In the decision reported in **2010 (2) CTC 710 (The Collector of North Arcot v. K.Mani)**, it was held that when there is a possibility of a mother delivering a child to develop cerebral vein thrombosis, it cannot be stated that the death was due to medical negligence. In **Maharaja Agrasen Hospital v. Rishabh Sharma (2020) 6 SCC 501**, the Hon'ble Apex Court held that the damage must be sufficiently proximate to the medical practitioner's breach of duty. It is enough for the doctor to show that the standard of care and skill exercised by him or her was that of an ordinary competent medical practitioner exercising an ordinary degree of professional skill. In the case on hand, the patient had developed a special medical condition known as cerebral vein thrombosis. It was that which eventually caused her death. The courts below have concluded straightaway that since the patient had eventually died, it must be only due to the negligence of the defendants. But there is no such causal link. The death was due to the condition mentioned above and therefore, I have no hesitation to conclude that the finding of the courts below suffers from perversity. The courts below did not apply the settled principles of law relating to medical negligence while giving an adverse finding against the appellant and the hospital management. Therefore, the 2nd substantial question of law is answered in favour of the appellant.

<https://hcservices.courts.gov.in> 11. Even though the appellant has been absolved of all



liability and the impugned judgment and decree is set aside insofar as the appellant is concerned, the matter cannot rest there. The learned counsel appearing for the plaintiffs/respondents 1 to 3 placed reliance on the order dated 01.02.2021 made in **W.P. (MD)No.2721 of 2017 (Tamil Selvi Vs. The State of Tamil Nadu and Others** in which I had held that when a patient is admitted in a government hospital for treatment and he/she suffers any injury or death which is not anticipated to occur in the normal course of events, even in the absence of medical negligence, the government is obliged to disburse ex-gratia to the affected party. My attention is drawn to G.O(Ms) No.395 dated 04.09.2018 whereby a corpus fund has been created by the Tamil Nadu Government. It appears that every Government doctor contributes certain sum of money towards this corpus fund and whenever compensation is directed to be paid by the courts, amount will be drawn from this fund and paid. The plaintiffs had asked for a very nominal sum of Rs.2,00,000/-. In my view, even though the appellant as well as the hospital authorities cannot be fastened with medical negligence, it is a clear case in which ex-gratia ought to be paid to the plaintiffs.

12.The compensation awarded to the plaintiffs will have to be enhanced to what they actually sought for. The learned counsel on either side informed the Court that the decreetal amount had already been deposited and that the same had also been withdrawn. Since the suit is now decreed as prayed for, the seventh respondent/Government of Tamilnadu is directed to pay a further sum of Rs.30,000/- with interest at the rate of 6% p.a from the date of plaint till the date of payment to the first plaintiff within a period of six weeks from the date of receipt of a copy of this judgment. Since the appellant has been absolved of the charge of medical negligence, the question of recovering the decreetal amount from her does not arise. With this direction, the second appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

skm

Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

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



To:

1.The Additional District Judge,
Fast Track Court, Thanjavur.

2.The Principal Sub Judge,
Thanjavur.

3.The District Collector,
Thanjavur District. Thanjavur.

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

S.A. (MD)No.72 of 2014

17.06.2021

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