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S.A.Nos.332 & 335 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.01.2023

Date of Verdict : 31.01.2023

CORAM

THE HONOURABLE MR. **JUSTICE G.K.ILANTHIRAIYAN**

S.A.Nos.332 & 335 of 2019

SA.No.332 of 2019

M.Vani

...Appellant

Vs.

1.Dr.Sulochana Karuppannan

2.Dr.S.M.Balasubramanian

...Respondents

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 15.12.2016 made in AS.No.12 of 2016 on the file of the II Additional District Court, Erode reversing the judgment and decree dated 10.08.2015 made in OS.No.247 of 2013 on the file of the Principal Sub Court, Erode.

For Appellant : Mr.D.Gopal

For Respondents

For R1 : Mr.C.R.Prasanan

For R2 : Mr.A.K.Kumarasamy,
Senior Counsel
for Mr.S.Kaithamalaikumaran



S.A.Nos.332 & 335 of 2019

SA.No.335 of 2019

WEB C M.Vani

...Appellant

Vs.

1.Dr.S.M.Balasubramanian

2.Dr.Sulochana Karuppannan

...Respondents

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 15.12.2016 made in AS.No.88 of 2015 on the file of the II Additional District Court, Erode reversing the judgment and decree dated 10.08.2015 made in OS.No.247 of 2013 on the file of the Principal Sub Court, Erode.

For Appellant : Mr.D.Gopal

For Respondents

For R1 : Mr.C.R.Prasanan

For R2 : Mr.A.K.Kumarasamy,
Senior Counsel
for Mr.S.Kaithamalaikumaran

COMMON JUDGMENT

The second appeals are directed as against the judgment and decree dated 15.12.2016 made in AS.Nos.12 of 2016 & 88 of 2015 on the file of the II Additional District Court, Erode reversing the judgment and decree dated 10.08.2015 made in OS.No.247 of 2013 on the file of the Principal Sub Court, Erode.



S.A.Nos.332 & 335 of 2019

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The appellant in both the appeals is the plaintiff. The case of the plaintiff in brief is as follows :-

3.1. She filed suit seeking damages to the tune of Rs.10,00,000/- with interest at the rate of 24% per annum from the date of the suit. The defendants are partners in the Baby Hospital, Erode. The plaintiff got pregnant and had regular pregnant check-ups from the month of March 1995 in the hospital owned by the defendants. She was under the supervision of the first defendant. As per her advice, she was admitted into hospital on 27.11.1995 for delivery. She had delivery pain around 1.00 a.m. on 27.11.1995 and one duty doctor Mrs.Rani attended her and administered glucose drip. Therefore, the head of the baby came out in part and there was no further development and informed to first defendant. Even then, she was not attended by the first defendant and she came to the hospital only at 8.00 a.m. in a hurried mood and had taken the plaintiff to the operation theater. Thereafter, she separated the baby from the plaintiff by using forceps. It was



S.A.Nos.332 & 335 of 2019

not informed to the plaintiff or her family members with regard to using forceps during the delivery. Due to rash and negligence of the first defendant, while using the forceps resulted in affecting the baby's head and brain. Therefore, the baby was kept in isolation for one week due to the negligent act done by the first defendant. Thereafter, the baby developed cerebral palsy. In fact, the second defendant gave treatment to the baby and he never diagnosed any disease. The second defendant is a child specialist working along with the first defendant. Thereafter, the plaintiff came to understand that only because of using the forceps during delivery, the child has been affected by cerebral palsy. Now, the child is aged about 7 years and she is not even able to move and she is still bedridden. Therefore, the plaintiff caused notice seeking compensation and filed the suit.

4. Resisting the suit, both the defendants filed their separate written statements. The first defendant stated that she is a well qualified obstetrician and gynaecologist. She is rendering quality medical service for more than 35 years without any blemish. The plaintiff was admitted on 27.11.1995 and thereafter, she developed pain. Immediately she attended the plaintiff and tried for normal delivery. However, it was not possible and as



such, she suggested for cesarean. However, her relatives were not ready for cesarean surgery and as such, the first defendant had no other choice to resorting to forceps delivery, which is an accepted method by all. The forceps cannot be used roughly. Since it will not cause any injury on the head, in the absence of any such injury in the skull or face, it cannot be said that only due to using forceps, the child sustained cerebral palsy. The husband of the plaintiff is an electrician in the same hospital and as such, on free of cost, the plaintiff was treated by the defendants. Therefore, there is no fault on the defendants. Further, the first defendant referred the baby to a neurologist. After a period of seven years, the suit has been filed claiming compensation and as such, it is barred by limitation.

5. The second defendant stated that he attended the patient and found that the new born child was totally asphyxiated. The baby had no cry and had severe respiratory distress. The baby was admitted in NICU i.e. New born Intensive Care Unit for eight days and thereafter, in the room for four days. Even on the date of delivery itself, health condition of the baby was critical. At the time of discharge, it was clearly explained that the new born child would have neuro problems. Thereafter, one Neurologist attended the child and explained clearly about the health condition of the child. Therefore,



there was no medical negligence on the part of the defendants and the suit itself is barred by limitation. After completion of pleadings, the trial court framed the following issues:

- (i) Whether the suit is barred by limitation?
- (ii) Whether the plaintiff is entitled to the damages as claimed for in the suit as against the defendants?
- (iii) To what other relief?

6. After framing the issues, the plaintiff herself was examined as PW1 and the defendants were examined as DW1 and DW2. On the side of the plaintiff, Ex.A1 to Ex.A11 were marked and on the side of the defendants, no documents were marked. The Court examined an expert as CW1. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court partly decreed the suit and directed the defendants to jointly and severally pay compensation of Rs.6,00,000/- with interest at the rate of 12% per annum from the date of the suit till realisation. Aggrieved over the judgment and decree of the trial Court, both the defendants filed separate appeal suits in AS.Nos.12 of 2016 & 88 of 2015 respectively on the file of



S.A.Nos.332 & 335 of 2019

the II Additional District Court, Erode. Both the appeal suits were clubbed together and the first appellate court allowed the appeal suits, thereby dismissing the suit filed by the plaintiff by common judgment and decree dated 15.12.2016. Challenging the same, the plaintiff has come forward with the present second appeals.

7. At the time of admission of the second appeals, the following substantial questions of law were framed :-

a) Whether the judgment of the lower appellate court is vitiated, in that it has selectively extracted the evidence of CW1, for rendering a finding to reverse the judgment of the trial court?

b) Whether an adverse inference cannot be drawn against the defendants for failure to produce the medical records in their possession, to rebut the allegation of medical negligence?

8. The learned counsel appearing for the appellant/plaintiff submitted that only due to the negligence of the first defendant, the permanent brain damage was caused to the baby thereby rendering the baby immovable for rest of her life. Initially, the duty doctor attended the plaintiff and administered glucose in a very fast manner resulting in movement of the



baby causing immense pain and agony to the plaintiff. It also caused blockage of blood supply to the baby resulting in permanent brain damage.

The first defendant failed to attend the plaintiff immediately. She attended the plaintiff only at 8.00 a.m. Thereafter, she forcibly removed the baby by wrongful use of forceps on the baby's head causing asphyxia resulting permanent damage to the skull and brain. After delivery, the baby was referred to the second defendant who is the partner of the Baby Hospital along with the first defendant. He gave false assurance to the plaintiff that the baby will become alright.

8.1 He further submitted that if Oxytoxin was not properly injected, it will create problem in child and due to lack of supply of oxygen, it could lead to cerebral palsy. Now the child could not able to even move and got bedridden. Therefore, the trial court rightly decreed the suit. Unfortunately, the first appellate court failed to consider those aspects and dismissed the suit. He further submitted that in the case of medical negligence, the cause of action remains continuous till the patient or the complainant comes to know about the real injury. The baby is still taking treatment and the plaintiff has now only come to understand that the cerebral palsy could not be treated.



Therefore, the suit is not barred by limitation. He further submitted that

Oxytoxin has been administered to induce labour pain. If the Administration of oxytocin at excessive doses results in uterine over stimulation which may cause foetal distress, asphyxia and death, or may lead to hypertonicity, tetanic contractions or rupture of the uterus . In support of his contention, he relied upon the judgment of the National Consumer Disputes Redressal Commission, New Delhi in the case of ***Dr.Indu Sharma Vs. Indraprastha Apollo Hospital*** rendered on 22.04.2015, wherein it is held as follows:

66. Thus, in this instant case, the patient with precious pregnancy was unnecessarily suffered during prolonged labour; there was administration of excessive Syntocinon which caused birth asphyxia to the baby Nishtha, who further suffered Cerebral Palsy and 95% disability. She survived in such pathetic condition for 12 years. Keeping in the view that during this period certainly her parents were whole time engaged in care of Nishtha, incurred heavy expenditure for care, medical assistance, regular medication and physiotherapy etc. from several hospitals in Delhi. Also, the parents sustained distress and suffered metal agony, further embracement in the society for 12 years. They sustained a loss of their baby forever. In case of precious full term pregnancy, no prudent Obsterician/Gynecologist will wait for more than 24 hours after rupture of membranes and allow



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S.A.Nos.332 & 335 of 2019

induction by Oxytocin stimulation. Thus, the complainant had established a prima facie case of negligence against the OPs. The complainant's evidence stood uncontroverted, and that there was no cogent evidence adduced by the OP. Thus, accordingly, the complaint deserves for just and proper compensation. The higher the level of hospital had specialised facilities and specialist doctors available and also the cost of treatment will be higher, thus the level of expectation of the patient certainly will be high. Most of the hospitals either government or private sector who treat a large number of patients and must be held accountable in cases of negligence. It is very disappointing that, the sky-rocketing costs in health care spurred public and private reform. Knowing full well how the corporate hospitals now function and huge amount of fee they charge, it is very well evidenced by the currency counting machine in the cashier section of each of these hospitals.

8.2 He also relied upon the following judgments:

- (i) *Postgraduate Institute of Medical Education and Research, Chandigarh Vs. Jaspal Singh and others* reported in (2009) 7 SCC 330**
- (ii) *V.Kishan Rao Vs. Nikhil Super Speciality Hospital and another* reported in (2010) 5 SCC 513**
- (iii) *Dr.Bharat Vipran Vs. Malkiat Singh* reported in CDJ 2014 PunjabSCDRC 285**



S.A.Nos.332 & 335 of 2019

WEB COPY

9. Per contra, both the learned Senior Counsel appearing for the defendants 1 and 2 submitted that there is no medical negligence. CW1, an expert doctor gave evidence that just because of forceps is used, cerebral palsy cannot happen. The evidence on record shows that cerebral palsy might occur for many reasons and merely using the medicine syntocin may aggravate situation but will not result in cerebral palsy and that the use of forceps may cause minor injuries to the child but the same will not result in cerebral palsy. The cerebral palsy to the child cannot be attributed solely to the first defendant for the alleged negligence at the time of delivery. It did not occur due to the negligence of the defendants. The trial court decreed the suit from the information obtained from wikipedia, which cannot be treated as evidence. Therefore, the appellate court rightly set aside the judgment and decree passed by the trial court and dismissed the suit.

9.1 They further submitted that the expert doctor categorically deposed that there is no chance for the same when forceps is used. When mother has high blood pressure and when the child gets less oxygen then



required, then it is possible for brain to get affected. It is not possible for pressure to happen when forceps was used to take up the head of the child.

There is no possibility for cerebral palsy to happen when forceps is used. Syntocin is a medicine which is to be mixed with saline drops for the purpose of uterus to shrink or expand. Therefore, there is absolutely no question of negligence to award compensation. In fact, the trial court failed to frame any issue in respect of medical negligence in order to award compensation. The trial court framed issues only in respect of compensation. The appellant failed to prove any medical negligence on the part of the defendants and as such, the first appellate court rightly dismissed the suit. In order to prove their contention, they relied upon the following judgments:

(i) ***Vinitha Ashok(Smt) Vs. Lakshmi Hospital and Others***

reported in ***(2001) 8 SCC 731***

(ii) ***The Collector of North Arcot Ambedkar District and anr.***

Vs. K.Mani reported in ***2010-1-LW 696***

(iii) ***State of Punjab Vs. Shiv Ram and others***

reported in ***(2005) 7 SCC 1***

(iv) ***Dr.Chanda Rani Akhouri and Others Vs. Dr.M.A.Methu***

sethupathi and others reported in ***2022 SCC Online SC 481***



(v)***Dr.Harish Kumar Khurana Vs. Joginder Singh and Others***

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10. Heard, Mr.D.Gopal, the learned counsel for the appellant, Mr.C.R.Prasanan, the learned counsel for the first respondent and Mr.A.K.Kumarasamy, Senior Counsel appearing for the second respondent.

11. Admittedly, the plaintiff's husband was working as Electrician in the defendants' hospital. His wife i.e. the plaintiff got pregnant and had medical check-up in the defendants' hospital. At the earlier stage itself, the first defendant suggested for cesarean delivery. However, the plaintiff was not affordable to undergo cesarean surgery and opted for normal delivery. Though she was asked to go for medical check up on 24.11.1995, she had visited only on 27.11.1995 and she got admitted for delivery. At about 1.00 a.m., she developed delivery pain. She was attended by duty doctor and the plaintiff was administered with glucose drip at the rate of 10 drops per minute. The first defendant attended the delivery by using the method called 'forceps delivery'. Whereas the case of the plaintiff is that the baby's head was lying outside her vagina and she was made to wait till the first



S.A.Nos.332 & 335 of 2019

defendant's arrival. Therefore, there was no need to use the forceps method.

If really the head of the baby was lying out of the vagina, there is absolutely no need to use forceps method for delivery of the child.

12. That apart, if the forceps is used in a negligent manner or forcibly, there should be some mark either on the head or on the face of the baby. Admittedly, there is no injury on the head or face of the baby. Even during the delivery of the baby, the baby had cerebral palsy. In this regard, an expert was examined as CW1. Her evidence revealed that cerebral palsy might occur for many reasons and it would not happen when merely using the medicine Syntocin and the over dosage of Syntocin will not result in cerebral palsy. She never came across in her experience where the use of forceps has resulted in cerebral palsy to the child. The use of forceps may cause minor injuries to the child and it will not result in cerebral palsy. She is a specialist in gynaecology and she had sufficient experience in attending the delivery of the child. Normally, cerebral palsy will be caused due to hereditary diseases, under growth of the child, premature delivery, asphyxia of the child at the time of delivery. Therefore, there is no possibility of causing cerebral palsy by use of oxytocin which facilitates the child to come out of the womb.



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13. That apart the trial court failed to frame any issue with regards to medical negligence. Even then, in order to prove medical negligence, it has to be proved beyond doubt and not preponderance of probabilities. Negligence in the context of the medical profession necessarily calls for a treatment with a difference. In the case of ***Jacob Mathew Vs. State of Punjab and another*** reported in ***2005 (6) SCC 1***, the Hon'ble Supreme Court of India held that to infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, 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 accused followed. In the case on hand, there is absolutely no evidence to show that only because of the rash and negligent act of the first defendant, the cerebral palsy occurred to the child. Therefore, this Court has no hesitation to decide



the first substantial question of law in favour of the defendants.

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14. The learned counsel for the appellant vehemently contended that the head of the baby was half way through her vagina and as such, there is absolutely to need to use the method of forceps while delivering the child. As stated supra, if the head of the child was half way through vagina, no prudent doctor would use the method of forceps since it does not require. Immediately after getting delivery pain by the plaintiff, the first defendant used the method of forceps. The Hon'ble Supreme Court of India repeatedly held that the skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.



S.A.Nos.332 & 335 of 2019

WEB COPY 15. The method of forceps used by the first defendant is acceptable one and adopted by all the doctors. There is no evidence to show that the first defendant used forceps in a rash and negligent manner. If at all the first defendant used the forceps negligently, there should be injury on the head and face of the baby. It shows that the first defendant had acted in accordance with practice adopted as proper by a doctor. Hence, he cannot be held liable for any medical negligence. Therefore, the judgments cited by the learned counsel for the appellant are not applicable to the case on hand.

16. Admittedly, the plaintiff filed suit after seven years from the date of the birth of the child. The plaintiff is also taking treatment for the child. After seven years, she claimed that only because of the negligent act of the defendants, her child got affected by cerebral palsy. After seven years, no hospital authorities have medical records of patients. That apart, when the plaintiff is taking treatment continuously, she ought to have produced all the medical records. The plaintiff produced Ex.A1 and A2 medical records furnished by the defendants' hospital. Therefore, non production of medical records by the defendants cannot be the reason for drawing adverse inference



S.A.Nos.332 & 335 of 2019

against the respondents since the plaintiff failed to prove any medical negligence on the part of the defendants. Therefore, this Court answer the second substantial question of law against the plaintiff.

17. Insofar as the second defendant is concerned, admittedly, he did not attend the delivery and he treated the baby after delivery. Therefore, both the defendants are not liable to pay any compensation as claimed by the plaintiff. As such, the first appellate court rightly allowed the appeal suits and dismissed the suit. Hence, both the second appeals fail and liable to be dismissed. Accordingly, the judgment and decree dated 15.12.2016 made in AS.Nos.12 of 2016 & 88 of 2015 on the file of the II Additional District Court, Erode are confirmed.

18. In the result, both the second appeals are dismissed. There shall be no order as to costs.

31.01.2023

Index : Yes/No
Internet : Yes/No
Speaking order/Non-speaking order

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S.A.Nos.332 & 335 of 2019

To

- 1.The II Additional District Court,
Erode
- 2.The Principal Sub Court,
Erode.
3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.



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S.A.Nos.332 & 335 of 2019

G.K.ILANTHIRAIYAN, J.

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