



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.251 OF 2006

APPLICANTS

- : 1 **Dr. V. K. Mehta,**
Aged about 65 years, Occupation Medical Practitioner, Resident of B-4.1, Doctors Quarters, R.D. Gardi Medical Collage Ujjain, Madhya Pradesh.
- 2 **Dr. N. Khan,**
Aged about 60 years, Occupation Medical Practitioner, R/o. 8 Saraswati Niwas, Dhanvatri Nagar, Warud, Post Sewagram, District Wardha.

..VERSUS..

RESPONDENTS

- : 1 **Smt. Shalinibai W/o Vishnu Choudhari,**
aged about 65 years, Occupation Housewife, Resident of Mouza Deoli, Tahsil Deoli, Dist. Wardha (Dead) thr LRs
- 1A. Ravindra S/o Vishnupant Chaudhari,**
Aged about 51 years, Occu: Unknown, R/o. Ward No.1 at Palasgaon, Post. Nandora, VTC Palasgaon, Dist. Wardha.
- 1B. Meena W/o Dilip Pawar,**
Aged about 57 years, Occu: Unknown, R/o. Plot No.34, Old Bhandara Road, Opp. Lakadganj P. S. Lakadganj, Bhandewadi, Nagpur.
- 1C. Sau. Ujjwala W/o Prakashrao Ghodmare,**
Aged about Major, Occ: Unknown, R/o. Mouza Deoli, Dist. Wardha.
- 2 **The Kasturba Health Society,**
through it's Chairman, Sewagram, Tehsil and District Wardha.

Mr D. L. Dharmadhikari, Advocate for Appellants.
Mr S. P. Kshirsagar, Advocate for LRs of Respondent No.1.

CORAM : M. W. CHANDWANI, J.
RESERVED ON : 12th FEBRUARY, 2025
PRONOUNCED ON : 8th MAY, 2025.

JUDGMENT

1. Heard.
2. The following substantial questions of law were framed by this Court on 01.11.2007, while admitting the appeal:

“(A) Whether the lower appellate Court could have passed the impugned judgment and decree against the doctors for medical negligence for performing and operation after thorough clinical examination and the biopsy report indicating the cancer merely on the ground that one doctor opined that there was no malignancy and no operation was required though he himself has deposed that there can be two different opines of two different doctors if from the same set different slides are examined by the different doctors ?

(B) Whether the lower at that Court could have passed the impugned judgment and decree though Dr. Sharma, who examined the samples and gave his report, on the basis of which it was decided to operate the respondent No.1 was not made party though he was the necessary party ?

(C) Whether the lower appellate Court could have passed the impugned judgment and decree when there was absolutely no evidence to show negligence on part of the appellants ?”

3. For deciding the substantial questions of law framed by this Court, brief facts of the case are necessary.

Shalinibai Vishnu Chaudhari/the original plaintiff had a small cyst in her right breast; it was not adhered to the skin and was movable and therefore, she had been to Kasturba Health Society, Sewagram. The

respondent No.2/the original defendant No.1 got her examined through appellant No.1/the original defendant No.2, a physician. She was advised to get the said cyst removed. Accordingly, on 16.07.1984, the cyst was removed and was sent for biopsy to the pathology department. Appellant No.2, who was in-charge of the pathology department, issued a report concluding that it was a case of fibroadenosis with intraductal carcinoma and opined that it was A-type cancer. Therefore, appellant No.1 informed Sushilabai that she had stage IV cancer. He advised for complete removal of her right breast entirely. Shalinibai and her husband had no option but to go for surgery for removal of the entire right breast. Thereafter, further treatment was continued. Appellant No.1 prescribed heavy doses of medicines resulting into vomiting and loss of hair. The health of Shalinibai started deteriorating. One of the relatives of Shalinibai, Dr. Pawar who visited her got suspicions about the diagnosis and doubted the histopathology report issued by appellant No.2. Therefore, he took slide Nos. B-84-1013 and B-84-1082 from appellant No.2 and got them examined from Dr. Vyawhare. Thereafter, the said slides were sent for obtaining a second opinion from Dr. Arun R. Chitale, Surgical Pathologist and Electron Microscopist at Bombay who also opined that there was no malignancy. On insistence by the husband of Shalinibai, she got discharged from the hospital. However, she was referred to Sant Tukdoji Cancer Hospital, Nagpur but she did not go for treatment at

Sant Tukdoji Cancer Hospital, Nagpur and thereafter, filed a suit for damages against Kasturba Health Society, Sewagram demanding damages of Rs.50,000/- on account of deformity and Rs.1,00,000/- towards physical and mental harassment. The learned Trial Court dismissed the suit. Feeling aggrieved, Shalinibai preferred an appeal before the learned District Judge, Wardha. The learned District Judge, Wardha allowed the appeal and decreed the suit of Shalinibai. Feeling aggrieved with the impugned judgment of the First Appellate Court, this appeal came to be filed and the above substantial questions of law were raised.

4. Mr. Dharmadhikari, learned counsel appearing on behalf of the appellants submitted that the appellants are well experienced doctors in the medical field and that most of the cases of cysts in the breast are found to be breast cancer. Appellant No.1 after conducting clinical examination and finding the cyst in the right breast of Shalinibai, thought it fit to rule out the possibility of cancer and therefore, a biopsy was suggested. Accordingly, Shalinibai was operated for removal of the cyst and the tissues were sent for histopathological analysis to the pathology department of Kasturba Health Society, Sewagram, where appellant No.2 was the Head of Department. Upon receipt of the histopathology report, the appellant suggested removal of the entire right breast which was accordingly removed under the supervision of appellant No.1.

5. According to him, even if a wrong diagnosis was done by appellants, that cannot make them liable for negligence. To buttress his submission, he seeks to rely on the case of *Dr Chanda Rani Akhoury and others vs. Dr M. A. Methusethupathi and others.*, (2023) 13 SCC 632, wherein, in para 29 of the judgment, the Hon'ble Supreme Court quoted para 89 of the decision in *Kusum Sharma vs. Batra Hospital and Medical Research Centre*, (2010) 3 SCC 480, which is reproduced here.

“29. In para 89 of the judgment in Kusum Sharma (supra), the tests of medical negligence while deciding whether the medical professional is guilty of medical negligence, varied tested principles have to be kept in view, this Court held as under:

“89. On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well-known principles must be kept in view:

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope

for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.”

6. Mr. Dharmadhikari, learned counsel further submitted that the test was conducted by Dr. Satishchandra Sharma and he reported the matter to appellant No.2, who was the Head of Pathology Department.

After verifying the test conducted by Dr. Sharma, a report came to be issued by appellant No.2. According to him, Dr. Sharma who was necessary party has not been joined by Shalinibai/the original plaintiff in the suit and therefore, the suit has failed on the ground of non-joining of Dr. Sharma as necessary party. He further submitted that the sample was further examined by DW-1 Dr. Ramvishal Narayandas Agrawal who also opined about intraductal carcinoma of breast which is against the opinion given by PW-5 Dr. Arun Raghunath Chitale. Thus, the opinion given by appellant No.2 was re-affirmed by DW-1 Dr. Ramvishal Agrawal. Therefore, in view of the differences in opinion given by different doctors, the First Appellate Court ought not to have passed a decree of damages in favour of the patient, Shalinibai. He submitted that the decree passed by the First Appellate Court is not sustainable and seeks setting aside of the same.

7. Per contra, Mr. Kshirsagar, learned counsel appearing on behalf of respondent No.1 vehemently submitted that the legal heirs of patient Shalinibai who died during the pendency of this appeal, support the judgment of the First Appellate Court. According to him, PW-5 Dr. Arun Chitale has given reasons in support of his conclusion, whereas DW-1 Dr. Babulal Ramniwas Agrawal examined by appellant No.2 has simply opined that it was the case of intraductal carcinoma of right breast.

Therefore, the opinion that is given alongwith reasons thereto, has rightly been accepted by the First Appellate Court. Since, the report was issued by appellant No.2 and not by Dr. Sharma, therefore, he was not necessary party to the suit. He further went on to submit that removal of breast is a very serious aspect for a woman. It affects her not only physically but also mentally and also deforms a part of the body. Therefore, the First Appellate Court was completely justified in decreeing the suit in toto. If anything, Shalinibai was entitled for more damages. Hence, he sought rejection of the present appeal.

8. First, I will deal with the objection regarding the non-joinder of necessary parties. Dr. Sharma who conducted the biopsy by examining the tissues has not been made a party defendant in the suit since the report is issued under the signature of appellant No.2. It is to be noted here that, this objection was neither raised before the Trial Court nor before the First Appellate Court. This reminds me Order 1 Rule 13 of the Code of Civil Procedure which contemplates that all objections on the ground of non-joinder of parties shall be taken at the earliest possible opportunity before settlement of the issues. Though, each appellant filed a separate written statement but none of them objected to the non-joinder of Dr. Sharma as a party defendant in the suit. Therefore, this objection cannot be taken at a later stage. Be that as it may, necessary

party is a party in absence of whom, an effective decree cannot be passed. Albeit, Dr. Sharma has not been made party defendant by Shalinibai in the suit but the fact remains that he has been examined. Thus, the evidence of Dr. Sharma was available before the Trial Court. Therefore, it cannot be said that merely due to non-joinder of Dr. Sharma as a party defendant in the suit, an effective decree cannot be passed. Therefore, I do not find force in the argument of the learned counsel for the appellants.

9. This takes me to the question with regard to different opinions of two doctors on record. The First Appellate Court opined that Dr. Chitale, who gave his opinion about the absence of malignancy explained the procedure and sources, whereas Dr. Ramvishal Narayandas Agrawal did not depose about manner, sources and procedure adopted by him for examination. This gave a higher probative value to the report of Dr. Chitale. Consequently, the First Appellate Court opined that there was negligence on the part of the appellants.

10. With the able assistance of the learned counsels for the respective parties, I have gone through the report of Dr. Chitale PW-5 who has given report which reads as under :

“MICROSCOPIC : Section reveal a benign lesion of medium sized ducts which display in intraluminal epithelial proliferation with secondary lumina and double cell

layered contour. Moderately abundant edematous fibrous connective tissue is seen. At the periphery in tact mammary lobules are noted. There is no malignancy.

DIAGNOSIS : Chronic Cystic Mast it is with benign Epithelial prolieftion.”

11. Dr. Chitale has, with certainty and conviction opined that there is no malignancy, whereas Dr. Agrawal has opined that the possibility of intraductal malignancy cannot be ruled out. Further Dr. Chitale has deposed about how he has examined the sample slides under different microscopes. Thus, the manner and procedure which was adopted is deposed by Dr. Chitale which is absent in the case of Dr. Agrawal. More so, the patient was informed that the cancer is at stage IV which is considered as serious. The fact that she could survive in spite of that is also one of the factors which supports the report of Dr. Chitale. Therefore, I see no infirmity in the order passed by the learned First Appellate Court.

12. No doubt, there is a scope for genuine difference of opinion and the doctor cannot be held negligent merely because his conclusion differs from all other professional doctors as held in the case of Dr. Chanda Rani Akhouri (supra) relied upon by the learned counsel for the appellants. Let me state that this is not a case of diagnosis based on experience, skill and knowledge of a doctor. The case in hand is a case of improper reporting of histopathology report of biopsy by examining the

tissues. One has to opine the presence or absence of malignancy and in such a case, margin of error is rarely present. Therefore, the same will not help to appellant No.2. So far as the appellant No.1 is concerned, he is a physician by profession and it was obvious that after finding a cyst in the breast, he suggested for biopsy looking at the rising cases of breast cancer. After getting the biopsy report from appellant No.2, he has reasonably opined for removal of the right breast. Therefore, he cannot be held liable for damages because he acted on the very report issued by appellant No.2 as he was supposed to. Therefore, it cannot be termed as negligence on the part of appellant No.1. Hence, the appeal of appellant No.1 **succeeds**, whereas the appeal of appellant No.2 is **dismissed**. Accordingly, Clause (D) of the operative order of the impugned judgment and order dated 05.08.2005 passed in Regular Civil Appeal No.149 of 2000 by the learned First Appellate Court is modified as under :

- i) The legal representatives of deceased respondent No.1 - Shalinibai W/o Vishnu Choudhari are entitled to recover Rs.1,50,000/- from appellant No.2.

(M. W. CHANDWANI, J.)