[2023] 15 S.C.R. 97 : 2023 INSC 921

CASE DETAILS

MRS. KALYANI RAJAN

v.

INDRAPRASTHA APOLLO HOSPITAL & ORS.

(Civil Appeal No. 10347 of 2010)

OCTOBER 17, 2023

[A. S. BOPANNA AND PRASHANT KUMAR MISHRA, JJ.]

HEADNOTES

Issue for consideration: Whether the respondents have committed negligence in not providing proper post-operative medical care to the patient and, accordingly, whether the NCDRC has committed any illegality while dismissing the complaint filed by the appellant herein.

Consumer Protection Act, 1986 – Complainant-appellant, husband (patient) was suffering from Chiari Malformations (Type II) with Hydrocephalous – Patient underwent neurosurgery after which he was shifted to a private room – However, same day around 11:00 p.m., patient suffered a heart attack and consequent to which he died after few days – Complainant alleged apropos lack of medical care from the time he was shifted to the private room – The NCDRC rejected the complaint of the complainant – Propriety:

Held: It is not the case of the complainant that respondent no.2-doctor was negligent in performing the Neurosurgery – Thus, the entire case of the complainant was about lack of proper post-operative medical care – On this score, the allegation is that the patient should have been shifted to ICU instead of shifting him to a private room – The material available on the record demonstrates that as per the standard practice, all patients who show no signs of complications in the recovery room and have no post or pre-operative complications are sent to their rooms – The symptoms, which emerged after the deceased was discharged from the Operation Theatre, were not the symptoms, which typically precede a cardiac arrest – Since, the deceased did not have any known or identifiable heart ailments, it was impossible for the respondents to have prior knowledge that the patient

may develop cardiac problem after few hours of the successful surgery – Also, materials placed before the Court show that patient was examined by doctors after his surgery and all required steps were taken – There is no evidence put forth by the complainant to establish that heart attack suffered by the patient had any connection with the operation in question or that it was on account of negligent post-operative care – Furthermore, affidavit of professor of neurosurgery in AIIMS and Senior Consultant in Neurology at respondent no.1-Hospital opined that the record did not show any abnormality at the operated site and the complications suffered by the patient were totally unrelated to the surgery conducted by respondent no. 2 – Therefore, the appellant has failed to establish negligence on the part of Respondents in taking post-operative care and the findings in this regard recorded by the Commission does not suffer from any illegality or perversity. [Paras 23,25,32]

Principle/Doctrine – Res Ipsa Loquitur – Applicability of:

Held: In so far as the applicability of principles of Res Ipsa Loquitur, in the fact and circumstances of the case, it is to bear in mind that the principles get attracted where circumstances strongly suggest partaking in negligent behaviour by the person against whom an accusation of negligence is made – For applying the principles of Res Ipsa Loquitur, it is necessary that a 'Res' is present to establish the allegation of negligence – Strong incriminating circumstantial or documentary evidence is required for application of the doctrine – In the instant case, there was no mistake in diagnosis or a negligent diagnosis by respondent no. 2 – In the absence of the patient having any history of diabetes, hypertension, or cardiac problem, it is difficult to foresee a possible cardiac problem only because the patient had suffered pain in the neck region. [Para 31]

LIST OF CITATIONS AND OTHER REFERENCES

Bombay Hospital & Medical Research Centre v. Asha Jaiswal and Others 2021 SCC online SC 1149; *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Ors.* [2009] 13 SCR 1 : (2009) 9 SCC 221: – relied on.

Martin F. D'Souza v. Mohd. Ishfaq [2009] 3 SCR 273 : (2009) 3 SCC 1; *Jacob Mathew v. State of Punjab and Another* [2005] 2 Suppl. SCR 307 : (2005) 6 SCC 1: – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10347 of 2010.

From the Judgment and Order dated 03.08.2010 of the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No.74 of 1999.

Appearances:

Nikhil Nayyar, Sr. Adv., T. V. S. Raghavendra Sreyas, Ms. Sugandha Batra, Ms. Gayatri Gulati, Divyanshu Rai, Siddharth Vasudev, Advs. for the Appellant.

Ms. Meenakshi Arora, Sr. Adv., Ms. Radhika Gupta, Dr. Lalit Bhasin, Ms. Nina Gupta, Ms. Ananya Marwah, Rahul Narayan, Adil Vasudeva, Chander Tanay Chobe, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

PRASHANT KUMAR MISHRA, J.

The present appeal is directed against the order passed by the National Consumer Disputes Redressal Commission[1] dated 03.08.2010 whereby the complaint filed by the appellant and proforma respondent No. 3 under Section 2 (c)(iii) of the Consumer Protection Act, 1986[2]was rejected.

2. The complainant-appellant is the wife of the deceased patient namely, Sankar Rajan[3], who was 37 years old and died on 06.11.1998 in the hospital-respondent no. 1 herein while undergoing follow up care and treatment after a major neurosurgery in the care of respondent nos. 1 and 2. The deceased was under the employment of proforma respondent no. 3 and was earning handsome annual package at the time of his demise.

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1 (for short,'the Commission')
2 (for short, 'the Act')
3 (for short, 'the deceased')

3. The deceased was suffering from Chiari Malformations (Type II) with Hydrocephalous. The deceased consulted Dr. Ravi Bhatia – respondent no. 2, Senior Consultant, Department of Neurosurgery of respondent no. 1-hospital on 21.10.1998, who advised him to get admitted to respondent no. 1-hospital where the surgery would be performed by him. As per the advice of respondent no. 2, the deceased got himself admitted to respondent no. 1 on 29.10.1998.After performing pre-operative medical examinations, respondent no. 2conducted the operation of the deceased. The deceased was thereafter shifted to private room at about 04.15 p.m and at about 04.30 p.m, the doctors visiting the deceased were informed about pain in the neck region, which seemed to have transferred downward lower than the region where pain used to occur prior to operation. At about 06.30 p.m. the deceased was given pain reliever intravenously, but the pain increased along with severe sweat spells. At about 09.15 p.m, the deceased started suffering from severe unbearable pain. The complainant-appellant called respondent no. 2 at his residential phone but he was not available. At about 09.30 p.m. another pain killer was intravenously given. At about 11.00 p.m. complainant-appellant talked to respondent no. 2 at his residence. The deceased had suffered heart attack around 11.00 p.m. The deceased was declared brain dead on 31.10.1998. He was kept on life support till his death on 06.11.1998.

4. The grievance of complainant-appellant is that the deceased was not attended to by any doctor from neurosurgery team who had operated the deceased after he was shifted into the private room till 11.00 P.M. After such major surgery, instead of shifting to a private room, the deceased should have been shifted to the Intensive Care Unit[4].

Findings of Commission (Impugned Order)

5. The allegation in the complaint is mainly apropos lack of medical care from the time he was shifted to the Private room till he suffered a cardiac arrest at around 11:00 PM. However, the appellant herein has not been able to establish by any cogent evidence or material on record that the heart attack suffered by the deceased had any connection with the operation in question or on account of lack of post-operative care.

4 (for short, 'ICU')

6. The said finding has been supported by an affidavit of Prof. Gulshan Kumar Ahuja who was professor of neurosurgery in AIIMS & Senior Consultant at R-1/hospital at that time and he has opined that complications suffered by the deceased were totally unrelated to the surgery conducted by R-2. He has further stated that pain in the neck accompanied by symptoms of profuse sweating and nausea cannot be a symptom of cardiac respiratory arrest.

7. The deceased did not have any history of diabetes or hypertension as has been stated by R-2 herein in his evidence neither did he have any heart problem. The said pain in the neck was on account of cervical operation. No material on record to show that the deceased was in pain in any other region of his body. The appellant's contention apropos the deceased sweating is not met out with in the medical records except for once at 9PM.

8. The appellant herein drew the attention to the observation made in *Martin F. D'Souza v. Mohd. Ishfaq*[5] that no prescription should ordinarily be given without actual examination and the tendency to prescription over the phone except in acute emergency should be avoided. These observations would not be applicable to the said present case since the deceased had complained about pain on the neck for which he had been operated and medicine given by Dr. Tyagi over the phone was only apropos pain on the neck.

9. In the facts and circumstances, no case of medical negligence has been proved nor can it be said that the aftercare treatment of the deceased till he suffered a cardiac arrest was inadequate so as to hold the respondents herein liable for medical negligence. Principle of Res Ipsa Locutor does not apply to the facts and circumstances of the said case.

Submissions advanced on behalf of the Appellant apropos Medical Negligence by the Respondents:

10. Shri Nikhil Nayyar, learned senior counsel appearing for the appellant submits that the deceased died due to cardiac arrest, albeit, admittedly, the deceased had no cardiac problems. He would further submit that at the time of admission the deceased was informed that after the surgery

5 *(2009) 3 SCC 1*

he would be shifted to the ICU. However, he was shifted from the recovery room directly to a private room and not to the ICU.

11. In respect of lack of care, he submits that, Dr. Brahm Prakash & Dr. S. Tyagi, visited the room at around 4.30 p.m. and the deceased mentioned about pain in the neck region. The said complaint by the deceased was dismissed as post operative symptom. The said visit was the only visit by R-2 and other specialists post the surgery in the private room till the deceased lost consciousness. Since the pain was not reducing, the Duty Doctor spoke to Dr. Tyagi around 7.15 p.m. on telephone on the basis which Nimulid was prescribed by Dr. Tyagi. Thereafter, Dr. Tyagi had a telephonic conversation with the deceased wherein he was informed that Nimulid did give some temporary relief, basis which he concluded that the symptoms of pain felt by the patient were clearly normal post operative reaction.

12. It is submitted that the patient had an episode of Ventricular Tachycardia ('VT') and R-2 in his admission has stated that VT is not his area of expertise and in such cases, patient should have been referred to the appropriate doctor. However, this was not done and no consultant/specialist with the relevant expertise was available to attend to the medical needs of the deceased.

13. Apropos the findings of the impugned order, the appellant herein refutes the same and submits that they are contrary to the facts on record which establishes negligence of the respondents in the post operative care of the deceased.

14. Learned senior counsel further states that the Commission has not appreciated that the present case reflects clear example of negligence due to absence of care. In support of this, he states that there was: i) complete absence of senior doctor, surgeon/specialist to respond to patient's distress call from the time the patient was shifted to the room/ward till the time he became unconscious and; ii) absence of investigation of pain to diagnose the cause.

Submissions on behalf of Respondent No.1/Hospital

15. Dr. Lalit Bhasin, learned counsel appearing for respondent no. 1 would submit that respondent no. 1 is one of the best hospitals equipped with latest medical equipments and the patient was looked after by Dr.

Ravi Bhatia of international repute, who was formerly Professor and Head of the Neuro-Surgery and he was assisted by Dr. Brahm Prakash, senior Neurosurgeon. It was also submitted that patient had made excellent recovery after neurosurgery and there were no post operative complications, therefore, he was shifted to recovery room and thereafter to private room.

16. Learned counsel has drawn our attention to the records of the hospital containing pre and post operative history of the patient. Thus, according to learned counsel, there is no negligence on the part of the hospital or the treating doctors.

17. Learned counsel for respondent no. 1 refutes the contentions of the appellant and submits that in view of the findings of the Commission and the dicta of this Court in ***Bombay Hospital & Medical Research Centre v. Asha Jaiswal and Others***[6], the present appeal is liable to be dismissed.

Submissions on behalf of Respondent-No.2/Dr. Bhatia

18. Ms. Meenakshi Arora, learned senior counsel for respondent no. 2 adopts the submissions advanced on behalf of respondent no. 1 apropos findings of the Commission in the impugned order as well as the dicta of this Court in ***Bombay Hospital*** (supra).

19. Additionally, respondent no. 2 submits that it was explained to the appellant and the deceased that the patient would be examined in the recovery room first and thereafter as per standard practice followed by the hospital, all patients who do not show signs of complications in the Recovery Room and have no pre-operative medical problems are shifted to their ward/ room. In case the patient develops some post-operative complications that requires round the clock care and observation, he/she would be transferred to the Neurology Intensive Care Unit. Respondent no. 2 also submits that the deceased had regained full consciousness at the time when he had been moved from the Operation Theatre to the Recovery Room. Also, less than half the numbers of neurosurgical patients operated upon are moved from the OT to Recovery Room and then to Neurosurgery ICU. In support of the same, he has submitted data of respondent no.1/hospital apropos the

6 2021 SCC online SC 1149

neurosurgeries conducted and number of patients transferred to Neuro ICU thereafter.

20. Learned senior counsel further submits that Dr. Brahm Prakash of the Neuro-Sciences Department at the R-1/hospital met the deceased, and no complaint was made by the patient at that time. Similarly, at about 5 p.m. he along with Dr. Tyagi met with the deceased and examined him. The deceased at that time complained of only a mild neck pain, which is normal after an operation on the cervical (neck) region. Thereafter, he left the hospital for his premises and submits that since the time he left i.e., around 5,30 p.m. till the time he received a phone call from the appellant at about 11.15 p.m. about the condition of the deceased, he had not received any calls on his mobile phone or his landline, nor was any message left for him at his residence.

21. Learned senior counsel categorically refutes the contentions of the appellant and submits that the impugned order suffers from no infirmity warranting interference by this Court and is liable to be accordingly dismissed.

Analysis and Findings:

22. The crucial issue to be decided is whether the respondents have committed negligence in not providing proper post-operative medical care to the patient and, accordingly, whether the Commission has committed any illegality while dismissing the complaint filed by the appellant herein.

23. Concededly, the complainant has never questioned the diagnosis and recommended surgical treatment given to him by respondent no. 2-Dr. Bhatia. It is not the case of the complainant that Dr. Bhatia was negligent in performing the Neurosurgery. Thus, the entire case of the complainant was about lack of proper post-operative medical care. On this score, the allegation is that the patient should have been shifted to ICU instead of shifting him to a private room. The material available on the record demonstrates that as per the standard practice, all patients who show no signs of complications in the recovery room and have no post or pre-operative complications are sent to their rooms. According to the figures submitted by the respondents, during the months of September to November 1998, out of 166 neurosurgeries, only 68 patients were sent to the ICU from the recovery room in the hospital

of respondent no. 1. The rest were sent back to their wards in accordance with standard procedure. It is the stand of respondent no. 2 that there exists no link or interconnection between post-operative treatment/care and the cardiac arrest suffered by the deceased. The symptoms, which emerged after the deceased was discharged from the Operation Theatre, were not the symptoms, which typically precede a cardiac arrest. Since, the deceased did not have any known or identifiable heart ailments, it was impossible for the respondents to have prior knowledge that the patient may develop cardiac problem after few hours of the successful surgery. The symptoms, including dizziness, sweating, and pain in the neck area, experienced by the deceased post-surgery, could not be treated as post-surgery reactions. The patient would have been shifted to the ICU immediately, if serious complications would have arisen after the surgery, therefore, in the absence of complications in the surgery or soon thereafter, the patient was not required to be shifted to ICU and there is no negligence on this count by either of the respondents.

24. On the issue as to when a medical officer may be held liable for negligence, this Court in ***Jacob Mathew v. State of Punjab and Another***[7] has observed thus:

> "A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence."

25. The next limb of allegation apropos negligence is that the deceased was not attended to by any doctor from neurosurgery team after he was

7 *(2005) 6 SCC 1*

shifted into the private room till 11.00 p.m. when he suffered cardiac arrest. Material placed before this Court including the record maintained by the hospital would reveal that the patient was examined by Dr. Brahm Prakash, Dr. Ravi Bhatia and Dr. Tyagi after the patient was shifted to the private room. He had complained of pain in the neck region to Dr. Ravi Bhatia and the patient was told that it was on account of the operation. Pain in the neck region started increasing at 06:00 p.m. for which injection was given. When the doctor on duty contacted Dr. Tyagi, he was instructed to give tablet Nimulid. Except for the pain in neck region, the patient did not complain of pain in any other part of his body. The attending nurse called Dr. Tyagi at around 08:15 p.m. to inform him that the patient is complaining about the problem of sweating, pain and dizziness which, according to Dr. Tyagi, were normal post operative reactions. Dr. Tyagi spoke to the complainant and the patient on which the patient informed him that he was better. At 09:30 p.m. pain killer was given and around 11:00 p.m., the patient lost consciousness due to severe cardiac arrest. Dr. Ravi Bhatia was informed, and he immediately came to the hospital. Thereafter, all required steps were taken as revealed from the hospital record. There is no evidence put forth by the complainant to establish that heart attack suffered by the patient had any connection with the operation in question or that it was on account of negligent post operative care.

26. The respondents have filed affidavit of Prof. Gulshan Kumar Ahuja, professor of neurosurgery in AIIMS and Senior Consultant in Neurology at Respondent No.1-Hospital. After going through the record and CT Scan dated 04.11.1998, Dr. Ahuja opined that the record did not show any abnormality at the operated site and the complications suffered by the patient were totally unrelated to the surgery conducted by Respondent No. 2. While answering the interrogatories, Dr. Ahuja stated that pain in the neck along with sweating and nausea are not the symptoms of cardiac respiratory arrest.

27. It is significant to notice that the patient did not have any history of diabetes or hypertension or any cardiac problem. Therefore, it was difficult for treating doctors including the duty doctor or the hospital to assume that the patient may suffer cardiac arrest and moreover, the patient had also not complained of pain in any other part of the body except neck region. As per

the medical record, the patient complained of sweating only around 09:00 p.m. on which Dr. Tyagi spoke to the patient.

28. In the matter of ***Bombay Hospital*** (supra) this Court has elaborately considered previous judgments on the subject to hold thus:

> "16.……..It was argued that the professional competence of Doctor has not been doubted even by the Commission but two factors have been taken against the Doctor for holding him negligent; first, that he did not visit the patient soon after the surgery till 9/9.30 a.m. on the next day to verify the blood flow after the surgery, and second, he did not visit the patient from 29.4.1998 to 9.5.1998 when he was in Mumbai and from 9.5.1998 to 7.6.1998 when he went abroad for attending medical conferences.
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> 23 …… There is no proof that there was any negligence in performing the surgery on 23.4.1998 or in the process of re-exploration on 24.4.1998. The allegation is of failure of the Doctor to take the follow-up action after surgery on 23.4.1998, a delayed decision to amputate the leg subsequent to re-exploration on 24.4.1998, and the alleged undue foreign visit of the Doctor.
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> 29. In Martin F. D'Souza v. Mohd. Ishfaq(2009) 3 SCC 1, this court observed that the doctor cannot be held liable for medical negligence by applying the doctrine of res ipsa loquitur for the reason that a patient has not favourably responded to a treatment given by a doctor or a surgery has failed. There is a tendency to blame the doctor when a patient dies or suffers some mishap. This is an intolerant conduct of the family members to not accept the death in such cases. The increased cases of manhandling of medical professionals who worked day and night without their comfort has been very well seen in this pandemic. This Court held as under:
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> > "40. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightaway liable for medical negligence by applying the doctrine of res ipsa loquitur. No sensible professional would intentionally commit an act or omission which would

> result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.
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> 42. When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalised for losing a case provided he appeared in it and made his submissions."

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32. In C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam[(2009) 7 SCC 130], this Court held that the Commission ought not to presume that the allegations in the complaint are inviolable truth even though they remained unsupported by any evidence. This Court held as under:

> "37. We find from a reading of the order of the Commission that it proceeded on the basis that whatever had been alleged in the complaint by the respondent was in fact the inviolable truth even though it remained unsupported by any evidence. As already observed in Jacob Mathew case [(2005) 6 SCC 1] the onus to prove medical negligence lies largely on the claimant and that this onus can be discharged by leading cogent evidence. A mere averment in a complaint which is denied by the other side can, by no stretch of imagination, be said to be evidence by which the case of the complainant can be said to be proved. It is the obligation of the complainant to provide the facta probanda as well as the facta probantia."

33. In another judgment reported as Kusum Sharma v. Batra Hospital and Medical Research Centre[(2010) 3 SCC 480], a complaint was filed attributing medical negligence to a doctor who performed the surgery but while performing surgery, the tumour was found to be

malignant. The patient died later on after prolonged treatment in different hospitals. This Court held as under:

> "47. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking risks. Every advancement in technique is also attended by risks.
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> 72. The ratio of Bolam case [[1957] 1 WLR 582 : (1957) 2 All ER 118] is that it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that the respondent charged with negligence acted in accordance with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.
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> 78. It is a matter of common knowledge that after happening of some unfortunate event, there is a marked tendency to look for a human factor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. A professional deserves total protection. The Penal Code, 1860 has taken care to ensure that people who act in good faith should not be punished. Sections 88, 92 and 370 of the Penal Code give adequate protection to the professionals and particularly medical professionals."

34. Recently, this Court in a judgment reported as Dr. Harish Kumar Khurana v. Joginder Singh[2021 SCC OnLine SC 673] held that hospital and the doctors are required to exercise sufficient care in treating the patient in all circumstances. However, in an unfortunate case, death may occur. It is necessary that sufficient material or medical evidence should be available before the adjudicating authority to arrive at the conclusion that death is due to medical negligence. Every death of a patient cannot on the face of it be considered to be medical negligence. The Court held as under:

> "11. …….. Ordinarily an accident means an unintended and unforeseen injurious occurrence, something that does not occur in the usual course of events or that could not be reasonably anticipated. The learned counsel has also referred to the decision in Martin F.D'Souza v. Mohd. Ishfaq, (2009) 3 SCC 1 wherein it is stated that simply because the patient has not favourably responded to a treatment given by doctor or a surgery has failed, the doctor cannot be held straight away liable for medical negligence by applying the doctrine of Res Ipsa Loquitor. It is further observed therein that sometimes despite best efforts the treatment of a doctor fails and the same does not mean that the doctor or the surgeon must be held guilty of medical negligence unless there is some strong evidence to suggest that the doctor is negligent.
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> 14.Having noted the decisions relied upon by the learned counsel for the parties, it is clear that in every case where the treatment is not successful or the patient dies during surgery, it cannot be automatically assumed that the medical professional was negligent. To indicate negligence there should be material available on record or else appropriate medical evidence should be tendered. The negligence alleged should be so glaring, in which event the principle of res ipsa loquitur could be made applicable and not based on perception. In the instant case, apart from the allegations made by the claimants before the NCDRC both in the complaint and in the affidavit filed in the proceedings,

there is no other medical evidence tendered by the complainant to indicate negligence on the part of the doctors who, on their own behalf had explained their position relating to the medical process in their affidavit to explain there was no negligence. ……"

36. As discussed above, the sole basis of finding the appellants negligent was res ipsa loquitor which would not be applicable herein keeping in view the treatment record produced by the Hospital and/ or the Doctor. There was never a stage when the patient was left unattended. The patient was in a critical condition and if he could not survive even after surgery, the blame cannot be passed on to the Hospital and the Doctor who provided all possible treatment within their means and capacity. The DSA test was conducted by the Hospital itself on 22.4.1998. However, since it became dysfunctional on 24.4.1998 and considering the critical condition of the patient, an alternative angiography test was advised and conducted and the re-exploration was thus planned. It is only a matter of chance that all the four operation theatres of the Hospital were occupied when the patient was to undergo surgery. We do not find that the expectation of the patient to have an emergency operation theatre is reasonable as the hospital can provide only as many operation theatres as the patient load warrants. If the operation theatres were occupied at the time when the operation of the patient was contemplated, it cannot be said that there is a negligence on the part of the Hospital. A team of specialist doctors was available and also have attended to the patient but unfortunately nature had the last word and the patient breathed his last. The family may not have coped with the loss of their loved one, but the Hospital and the Doctor cannot be blamed as they provided the requisite care at all given times. No doctor can assure life to his patient but can only attempt to treat his patient to the best of his ability which was being done in the present case as well."

29. In so far as the applicability of principles of Res Ipsa Locutor, in the fact and circumstances of the case, it is to bear in mind that the principles get attracted where circumstances strongly suggest partaking in negligent behaviour by the person against whom an accusation of negligence is made.

For applying the principles of Res Ipsa Locutor, it is necessary that a 'Res' is present to establish the allegation of negligence. Strong incriminating circumstantial or documentary evidence is required for application of the doctrine.

30. In ***Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Ors.***[8] this Court has observed in paragraph 34 as follows:

> "34. Charge of professional negligence on a medical person is a serious one as it affects his professional status and reputation and as such the burden of proof would be more onerous. A doctor cannot be held negligent only because something has gone wrong. He also cannot be held liable for mischance or misadventure or for an error of judgment in making a choice when two options are available. The mistake in diagnosis is not necessarily a negligent diagnosis."

31. The case in hand stands on a better footing, inasmuch as there was no mistake in diagnosis or a negligent diagnosis by Respondent no. 2. In the absence of the patient having any history of diabetes, hypertension, or cardiac problem, it is difficult to foresee a possible cardiac problem only because the patient had suffered pain in the neck region.

32. For the foregoing, this Court is of the considered view that the appellant has failed to establish negligence on the part of Respondents in taking post operative care and the findings in this regard recorded by the Commission does not suffer from any illegality or perversity.

33. The appeal sans substance and is, accordingly, dismissed.

34. Pending application(s), if any, shall stand disposed of.

Headnotes prepared by:
Ankit Gyan

Appeal dismissed.

8 (2009) 9 SCC 221