IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 4467 of 2006

With
MISC. CIVIL APPLICATION NO. 1 of 2006
In R/FIRST APPEAL NO. 4467 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE DEVAN M. DESAI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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[redacted]

Versus

[redacted] & ORS.

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Appearance:
MR VIKRAM J THAKOR(2221) for the Appellant(s) No. 1,2
MR HS MUNSHAW(495) for the Defendant(s) No. 2
MS KIRTI S PATHAK(9966) for the Defendant(s) No. 5
RULE SERVED for the Defendant(s) No. 1,3,4

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CORAM:**HONOURABLE MR. JUSTICE DEVAN M. DESAI**

Date : 01/08/2024
ORAL JUDGMENT

1. This appeal is filed by appellant-original plaintiffs under Section 96 of the Code of Civil Procedure, 1908 assailing the

judgment and decree dated 30.04.2004 passed by learned City Civil Court, Ahmedabad in Civil Suit No.4008 of 1988.

2. Heard learned advocate Mr. Robin Prasad appearing for learned advocate Mr. Vikram J. Thakor for the appellants and learned advocate Mr. Devang Bhatt appearing for learned advocate Mr. H.S. Munshaw for respondent No.2 as well as the learned advocate Ms. Kirti S. Pathak for respondent No.5.

3. The brief facts of the case are as under:-

3.1. The appellants-original plaintiffs had filed a suit for recovery of Rs.5,00,000/- with interest @ 18% with other reliefs against the defendants. The son of the plaintiffs was born on 17.11.1984. The plaintiffs took their child [redacted] to defendant No.1 for examination on 26.10.1985. After examining the child and studying the reports defendant No.1 diagnosed that the child was suffering from T.B. The defendant No.1 started treating the child. However, for one month, after taking

treatment, the child was not recovered and when plaintiffs consulted other doctors, the doctors opined that the child is not suffering from T.B. but, suffering from Renal Calculus (a disease relating to Kidney and more particularly to testicles). As the condition worsened, on 27.11.1985, Dr. [redacted] was consulted by defendant No.1 on telephone. Thereafter, the child was taken to Dr. [redacted] nursing home where the child was operated for Renal Calculus on 20.11.1985 and again on 20.12.1985. On 30th January, 1987, the child expired at the age of two years, two months and thirteen days. Thereafter, plaintiffs initiated criminal proceedings against defendant No.1 and also filed the present suit for compensation.

3.2. The defendants were served with the summons of the suit. Defendant No.1 is insured with defendant No.5-present respondent No.5. Vide Exhibit-39, defendant No.1 filed his written statement. Defendant No.2 filed its written statement at Exhibit-24.Defendant No.3 filed its written statement at Exhibit-

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33. Defendant No.1 has denied his liability while contending that he has performed his duties as per the medical practice. Reasonable care was taken during the treatment. It is also contended by defendant No.1 that the child was diagnosed with stone in both the Kidneys with Urinary Track Infection and therefore, advised plaintiffs that their son needs immediate operation to remove the stones from both the Kidneys. Thereafter, plaintiffs were advised to consult a Surgeon for immediate surgery to remove stones form both the Kidneys. Plaintiffs did not turn back with defendant No.1. After 27.11.1985, defendant No.1 did not treat the child. The said doctor has denied the allegations that the child was diagnosed with ailment of T.B. Defendant No.1 has prescribed proper and correct treatment for said ailment. There is no negligence or misdiagnosis by defendant No.1. The false criminal complaint which was lodged by the plaintiffs against defendant No.1 came to be dismissed on 16.09.1989 acquitting him from all the charges which were levelled against defendant No.1 by

plaintiffs. Defendant No.2 and defendant No.3 resisted the suit and contended that the child was never brought to the [redacted] Hospital which is run by Ahmedabad Municipal Corporation. No treatment was given in the said Hospital by defendant No.1. Defendant No.1 was only serving as honorary doctor in [redacted] Hospital. Since the child was never admitted in the said Hospital run by Corporation, no negligence can be attributed on the part of the Corporation for the alleged misdiagnosis by defendant No.1.

3.3. On the basis of pleadings, learned trial Court framed following issues at Exhibit-42;

1. *Whether plaintiffs prove claimed reliefs?*
2. *What order ? What decree?*

3.4. Plaintiff No.1 examined himself at Exhibit-47 and also examined Dr. [redacted] at Exhibit-123 and Dr. [redacted] at Exhibit-130 respectively. Defendant No.1 gave his oral deposition at Exhibit-137. After considering the evidence on record, the learned trial Court dismissed the suit.

Being aggrieved and dissatisfied with the impugned judgment and decree, the appellants-original plaintiffs are before this Court.

4. Learned advocate for the appellants has submitted that the son of plaintiffs was misdiagnosed by defendant No.1. Defendant No.1 diagnosed the child with ailment of T.B. and started treating the child for the ailment of T.B. by prescribing Tab. Isonex, Micabittol and Syrup R.Cin. As the condition of the child did not improve, the child was referred to Dr. [redacted], Child Specialist & Surgeon who diagnosed the child having stone in Kidney and opined to go for surgery. Resultantly, at the Hospital of Dr. [redacted], the child was operated on 20.11.1985 and thereafter on 20.12.1985. Defendant No.1 did not provide the case papers to Dr. [redacted] on the ground that case papers are misplaced. The child was also treated for the Kidney ailment at Kidney Hospital, [redacted] in month of June 1986. The child expired on 30th January 1987, as

defendant No.1 could not diagnose that the child is having Chronic Renal Failure (CRF) and Urinary Track Infection and misdiagnosed. It is further submitted that as the child was misdiagnosed and for wrong treatment given by defendant No.1, plaintiffs have lost their child.

4.1. In support of the case, plaintiffs have relied upon the xerox copies of the medical bills issued by Medical Store at Exhibits-81 to 85, which are from the date 26.10.1985 to 16.11.1985. It is further submitted that Tab. Isonex, Micabittol and Syrup R.Cin which are mentioned in bills is given for the treatment of T.B. Plaintiff No.1 has also examined Dr. [redacted] at Exhibit-123 and Dr. [redacted] at Exhibit-130, with whom the child was treated. The submission canvassed by the learned advocate for the appellant is that as per the direction of Dr. [redacted], the child was also examined by Dr. [redacted], Kidney Specialist and in the month of June 1986, the child was admitted in Kidney Hospital [redacted]. It is further submitted

that, thereafter, the child was again brought to Dr. [redacted] and Dr. [redacted] for the treatment of Kidney. After the surgery done by Dr. [redacted] in the month of December, 1985 the child was treated for year and two months by various doctors in various hospitals. It is further submitted that the learned trial Court has not considered the evidence available on record in the right perspective and wrongly rejected the suit of the plaintiffs. It is further submitted that the oral deposition of independent doctors have not been properly considered by the learned trial Court. From the oral deposition of defendant No.1, it is established that defendant No.1 has remained negligent and no proper care was taken by defendant No.1 in treating their minor child.

4.2. Learned advocate for the appellant has placed reliance upon the decision in the case of ***Kusum Sharma & Others Versus Batra Hospital and Medical Research Centre and Others*** reported in ***(2010) 3 SCC 480***, in which, reliance has

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been placed upon para No.89(iv), which is as under:

> *"89*
> *(i)……..*
> *(ii)……..*
> *(iii)……..*
> *(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."*

It is submitted that in the present case, defendant No.1 is liable for his conduct which fell below the standards of a reasonable competent doctor.

4.3. It is further submitted the defendant No.1 has fall far below in taking due care in treating the minor child. It is further submitted that a medical practitioner is always expected to have a reasonable degree of skill and knowledge and must exercise a reasonable degree of care and caution in treating a patient. In the present case, defendant No.1 has failed in discharging his duties in a reasonable manner.

5. *Per contra*, the learned advocate Ms. Kirti Pathak for the respondent No.5 Insurance Company has submitted that the

defendant No.1 is insured with defendant No.5. It is further submitted that the learned trial Court has rightly rejected the claim of the plaintiffs. It is submitted that plaintiffs have not been able to establish the alleged negligence on the part of the defendant No.1-doctor. It is further submitted that the error in judgment may not be said to be negligence and submited only on the basis of xerox copies of bills Exhibits-81 to 85 without prescription of doctor defendant No.1, it cannot be presumed that the child was treated for ailment of T.B. It is further submitted that there is no evidence of expert doctors in arriving at the conclusion that the cause of the death of the child was the side effects of the drugs which were administered to the patient. There is no nexus between the consumption of medicines Tab. Isonex, Micabittol and Syrup R.Cin with the cause of death. It is further submitted that from the oral deposition of Dr. [redacted] at Exhibit-123 and Dr. [redacted] at Exhibit-130, the plaintiffs have not been able to establish that because of the wrong diagnosis by defendant No.1, the child has expired. It is

further submitted that Dr. [redacted] who performed surgeries on the child on 20.11.1985 and 20.12.1985, was not examined by the plaintiffs and the case papers at Exhibit-104, also do not lead to a conclusion that because of the wrong diagnosis by defendant No.1, the patient has expired. It is further submitted that child was taken to various hospitals and the child had taken treatment of various doctors as it can been seen from the evidence available on record. As the child had taken treatment from the various doctors, it cannot be said that defendant No.1 is negligent in the cause of the death of the child.

5.1. In support of her contentions, learned advocate Ms. Kirti Pathak for the respondent No.5 has placed reliance upon the following decisions;

> ***"(i) C.P. Sreekumar (Dr.), Ms (Ortho) V. S. Ramanujam reported in 2009 AIR SC 0 3878;***
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> ***(ii) Satya Prakash Pant Vs. Dr. P.N. Joshi & Anr. delivered by the National Consumer Disputes Redressal Commission New Delhi on 06.05.2015;***
>
> ***(iii) Sajjan Kumar Chaudhary V. Indraprastha Apollo***

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Hospitals reported in 2014 SCC ONLINE NCDRC 794;

(iv) Mrs. Jyoti Chopra vs M/S. Indraprastha Medical Corporation delivered on 12.05.2015 by the National Consumer Disputes Redressal Commission New Delhi"

In the case of Mrs. Jyoti Chopra (supra), in which, reliance has been placed in para 27, which is as under:-

"27. In spite of every effort, the patient''s fever and infection continued, hence transplantation was not possible, therefore unfortunately the patient died. In our view, OPs are not responsible. This view dovetails from the case " Martin F. D'' souza vs. Mohd. Ishfaq ", 2009 CTJ 352 (Supreme Court) (CP) in which the Hon''ble Supreme Court was pleased to observe as under:-

" 41. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another."

" 49. when a patient dies of 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 penalized for losing a case provided he appeared in it and made his submissions."

5.2. The sum and substance of the submission of the learned advocate for the respondent No.5 is that merely because there is an error in judgment in making diagnosis, negligence cannot be

attributed on the part of the defendant No.1. What is to be seen while considering cases of medical negligence is that whether the treating doctor has taken due care and has followed the established medical practice in treating the patient. It is further submitted that there cannot be a guarantee for curing the patient when a medical practitioner treats the patient. It is further submitted that the primary burden of establishing the negligence is on the plaintiffs and plaintiffs have to establish by leading cogent and convincing medical evidence that defendant No.1 has not taken due and reasonable care in treating the child. It is further submitted that plaintiffs have only averred in the plaint and in oral deposition that because of the negligence of defendant No.1 in misdiagnosing the ailment, plaintiffs' son has expired. It is further submitted that the allegations which have been levelled against the defendant No.1 that case papers were not supplied by defendant No.1 to Dr. [redacted], has no force, for the simple reason that whenever a medical practitioner prescribes any medicine to the patient, the original prescription

is always with the patient or his / her relatives. In the present case, plaintiffs have not produced any prescription from which, it can be established that the child was treated for ailment of T.B. by defendant No.1.

6. On the other hand, learned advocate for the respondent No.2 has supported the submissions canvassed by the learned advocate for respondent No.5. In addition, the learned advocate for the respondent No.2 has submitted that it is not the case of the plaintiffs in the plaint that the child was admitted and treated in Hospital run by defendant No.2-Corporation. It is further submitted that the child was never admitted in [redacted] Hospital, therefore, no negligence can be attributed on the part of the defendant No.2. It is contended by the learned advocate for the respondent No.2 that there is no role of defendant No.2 in occurrence of unfortunate event. Thus, learned advocate for the respondent No.2 has prayed for dismissal of the First Appeal on the ground that no interference

is required by this Court.

7. I have considered the rival submissions canvassed by learned advocates appearing for the respective parties and also perused the entire record and proceedings which is placed on record. The issue involved in the present First Appeal is whether the misjudgment in diagnosis of ailment *per se* amounts to negligence of a medical practitioner or not. The undisputed fact which is coming out from the record is that the child was firstly consulted with family doctor of plaintiffs who suggested some reports to be undergone. After studying the reports, Dr. [redacted] and Dr. [redacted] of the [redacted] to suggest plaintiffs to consult [redacted] Pediatrician i.e. defendant No.1. The child was taken to defendant No.1 on 26.10.1985. Before the child was taken to defendant No.1, the plaintiffs also consulted Dr. [redacted], Pediatric Surgeon for undescended testicles and for such problem, he was advised to operate the child, but because of

high temperature, the child was referred to defendant No.1. The plaintiffs were directed to go for routine investigation as screening tests etc., as the child was suffering from pyrexia of unknown origin. After studying reports of the child, defendant No.1 diagnosed the cause of high temperature was due to Urinary Track Infection. It is also coming out from the record that the child was treated by Dr. [redacted] and was operated by Dr. [redacted] on 20.11.1985 and 20.12.1985 and the child had also taken treatment at Kidney Hospital, [redacted] after surgeries. After taking rigorous treatments, on the unfortunate day, the child succumbed.

8. Now the question which is required to be answered is in the background of the above facts. If the averments made in the plaint by the plaintiffs are tested, it is the case of the plaintiffs that child was treated initially by defendant No.1 for the ailment of T.B. and advised to take Tab. Isonex, Micabittol and Syrup R.Cin and when the condition of the child was not improved, the

child was taken to Dr. [redacted] who is the Pediatrics Surgeon who performed two surgeries as discussed hereinabove. Even after surgeries, the patient could not recover and he was taken to the Kidney Hospital at [redacted]. Plaintiffs have relied upon xerox copies of the medicine bills, which are produced at Exhibits-81 to 85, wherein there is a reference of aforesaid three medicines. In the oral testimony, defendant No.1 has given replies with regard to the effects and side effects of those three medicines. As per the version of defendant No.1 in the cross-examination that even if a patient is given excess dozes of Tab. Isonex and Syrup R.Cin, at the most, patient can have Hepatitis. Defendant No.1 has also admitted in the cross-examination that the medicine of Isonex is for curing T.B. but the access dozes of such medicine can affect the liver of patient. Micabittol is also given for curing T.B., the access dozes can result in blindness in patients in some cases, but no such case has been reported so far. From the deposition of defendant No.1, the fact which emerges is that the child was given aforesaid three medicines for

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the ailment of T.B. However, later on, it was found that the child is having Kidney stone.

9. Except the aforesaid oral deposition of defendant No.1, the plaintiffs have not been able to extract any adverse fact which attributes the negligence on the part of the defendant No.1 in resulting death of child. From the facts, which are placed before this Court, is a case of error in judgment. And it is for the plaintiffs to establish the same by leading cogent and convincing medical evidence that the result of the death of the child is because of the side effect of dozes of medicines which were prescribed to the child. None of the treating doctors of the child has opined by relying upon medical literature that the medicines which were prescribed by defendant No.1, is the ultimate cause of death of the child. In establishing medical negligence, there has to be conclusive medical evidence which can establish the fact that medical practitioner has remained negligent in discharging his / her duties and the line of treatment which was

adopted in treating the patient was not as per the prescribed adopted medical practise.

10. In the cross-examination of defendant No.1, he has however, denied the fact of prescribing the Micabitto and Isonex medicines to the patient. As discussed above, reliance is only placed upon few xerox copy of the bills of medicines, which were issued by Medical Store, wherein the name of defendant No.1 is reflected on the xerox copy of the bills. It is thus, clear from record that Defendant No.1 prescribed those three medicines to the child.

11. As per the oral deposition of Dr. [redacted] at Exhibit-130, the child was treated by him on 23.11.1985 and the child was diagnosed as having puss in the Kidney and in the Urinary Track. The child was referred by him to the Kidney Hospital at [redacted]. The said doctor has not stated in his oral deposition that the child has expired because of the negligence of defendant No.1, more particularly in wrong assessment of ailment. Dr.

[redacted] at Exhibit-129, in his deposition, has also not stated that the child has expired because of the sheer negligence of defendant No.1. Dr. [redacted] who has performed two surgeries is not examined by the plaintiffs. None of the medical practitioners deposed that there is a nexus of side effects of aforesaid three medicines and cause of death. As observed earlier, it is not the case of plaintiffs that because of side effects of aforesaid three medicines, their son has expired. The side effects, as per the say of Defendant No.1 is not fatal to the patient. In such set of facts, when the patient had taken treatment from various doctors and from various hospital and in absence of any cogent material in proving medical negligence on the part of the defendant No.1 and mere an error in judgment in diagnosis of ailment cannot be said to be the medical negligence. This view is fortified by various decisions of the Hon'ble Apex Court.

12. Thus, in the totality of the facts and circumstances of the

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case, I am of the view that plaintiffs have not been able to establish the allegations of negligence by defendant No.1. The learned trial Court has not committed any error in arriving at a conclusion which is based on medical evidence that defendant No.1 has not acted in a negligent manner. Resultantly, the First Appeal fails and the same is dismissed with no order as to costs. Accordingly, the connected Miscellaneous Civil Application is also disposed of.

(D. M. DESAI,J)

RINKU MALI