IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE S.V.BHATTI

&

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

FRIDAY, THE 18TH DAY OF DECEMBER 2020 / 27TH AGRAHAYANA, 1942

RFA.No.131 OF 2020

AGAINST THE DECREE AND JUDGMENT IN OS No.1111/2011 OF PRINCIPAL SUB COURT,THIRUVANANTHAPURAM

APPELLANTS/DEFENDANTS:

1 M/S PRS HOSPITAL
KILLIPALAM,
THIRUVANANTHAPURAM-695002,
REPRESENTED BY ITS ADMINISTRATIVE
OFFICER (GENERAL MANAGER)

2 DR. N.GOPAKUMAR,
CONSULTANT UROLOGIST,
UROLOGY DEPARTMENT, PRS HOSPITAL,
KILLIPALAM,
THIRUVANANTHAPURAM-695002.

BY ADVS.
SRI.C.R.SYAMKUMAR
SRI.P.A.MOHAMMED SHAH
SRI.SOORAJ T.ELENJICKAL
SRI.K.ARJUN VENUGOPAL
SMT.HELEN P.A.
SRI.SHAHIR SHOWKATH ALI

RESPONDENT/PLAINTIFF:

P.ANIL KUMAR
S/O.PRABHAKARAN,
RADHA MANDIRAM,
MANNUMKARA, MYLAKKARA P.O., KATTAKKADA,
THIRUVANANTHAPURAM-695572.

R1 BY ADV. SRI.ANOOP BHASKAR
R1 BY ADV. SRI.GERRY DOUGLES S.
R1 BY ADV. KUM.AMMU MANOHARAN NARAYANAN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 24-11-2020, THE COURT ON 18-12-2020 DELIVERED THE FOLLOWING:

"C.R."

JUDGMENT

Dated this the 18th day of December, 2020

Bechu Kurian Thomas, J.

An otherwise healthy young man of 29 years, rode his motorbike to a hospital to undergo minor surgery/procedure for the removal of kidney stones. Two days later and half an hour into the surgery, tragedy struck and the operation was aborted. The young man was brought out from the operation theater as a paraplegic and his speech, lost. A suit for damages alleging medical negligence filed by the young man was decreed in part. The hospital and the doctor have preferred this appeal.

2. The counsel for both sides agreed that since the incident occurred in 2005 and the suit was actually of the year 2008, delayed consideration can result in further agony for both sides. We acceded to their request for early consideration of the case, taking note of the situation and the circumstances of the parties. For easier comprehension, the parties are referred to as they were arrayed in the trial court.

3. The events that led to this appeal are briefly narrated as

below:-

3.1 Plaintiff developed severe pain in the abdomen and on reference to the 2nd defendant, who is a super-specialist in Urology, the plaintiff was diagnosed as having secondary calculi in the right kidney and was advised to undergo keyhole surgery to remove the calculi. Plaintiff was admitted to the hospital on 25.9.2005 and the operation commenced under general anesthesia on 27.9.2005. Within 30 minutes of commencement of the surgery, the operation was halted and the plaintiff was brought out of the theater with oxygen support and catheter inserted.

3.2 Post operation, plaintiff noticed that he became crippled and unable to move. Subsequently, he was referred to Sree Chithira Tirunal Institute of Medical Sciences, where, spinal subdural clots were detected. He suffered permanent damage to his lower limbs. Plaintiff alleged that illness and disability occurred due to the injury sustained on the spinal cord during the keyhole surgery performed by the 2nd defendant in the most callous, negligent, and irresponsible manner. Plaintiff being in the prime of his youth, the negligent conduct of the 2nd defendant destroyed his future and he claimed compensation to the tune of Rs.60 lakhs, under different heads.

4. The defendants in their joint written statement, denied the allegations and pointed out that the plaintiff's averments were all cooked up, solely for gaining an undue financial advantage. It was further stated that after carrying out all the required investigations, the plaintiff was diagnosed with multiple secondary calculi with right hydronephrosis with obstruction at the pelvic-ureteric junction. The two options were discussed with the plaintiff and his relatives, who finally opted for the Percutaneous Nephrolithotripsy (PCNL) with Endopyelotomy. The defendants averred that after consulting the Cardiologist and after controlling hypertension, the plaintiff was taken for surgery under general anesthesia. While the track dilation was done with coaxial metal dilators, the plaintiff developed cardiac problems and the procedure had to be abandoned. As advised by the Chief Cardiologist, ECG was taken and the patient was put on ventilators and given proper treatment. Though he was moving both his upper limbs, his lower limbs could not be moved. In short, defendants denied that the disability of the plaintiff was caused due to the injury sustained on the spinal cord. The allegation that the incident occurred due to the negligence of the 2nd defendant was denied and on the other hand, according to the defendants, the problems arose either because of a pre-

existing aneurysm rupture or because of cardiac arrest, that occurred while the plaintiff was inside the operation theater and in either case, there was no negligence on the part of the 2nd defendant while performing the operation and that the operation was abandoned to treat the unexpected complication that arose to the plaintiff.

5. Plaintiff examined himself as PW1 through an Advocate Commissioner, along with four other witnesses as PWs 2 to 5 and marked Ext.A1 to Ext.A9(a) to Ext.A9(cd) while the defendants examined the 2nd defendant as DW1 and marked Ext.B1 and Ext.B2. PW4 and PW5 were expert witnesses who were examined pursuant to summons issued for their evidence.

6. The issues raised for consideration by the trial Court included whether any injury was caused to the plaintiff, if so, who was negligent, and also as to the quantum and the person liable to pay the compensation, if any.

7. The Sub Court, Thiruvananthapuram by judgment dated 27.07.2019 decreed the suit holding that the facts, circumstances and the evidence adduced proved that negligence on the part of the 2nd defendant was the cause of paraparesis sustained to the plaintiff, that the 1st defendant was vicariously liable for the negligent act of the 2nd defendant that the

defendants were liable to compensate the plaintiff to the extent of Rs.20,40,000/- with interest at 6% per annum from the date of suit till realization, along with costs, after exonerating the plaintiff from paying the court fee. Rs.40,323/- was awarded as treatment expenses, Rs.10,00,000/- towards loss of future earning and Rs.10,00,000/- towards pain and suffering, and the total was rounded off to Rs.20,40,000/-. Aggrieved by the judgment and decree, the defendants have preferred this appeal.

8. We have heard the learned counsel for the appellants Sri. C.R.Shyamkumar and the learned counsel for the plaintiff Sri. Anoop Bhaskar.

9. Adv. C.R.Shyamkumar submitted at the outset itself and quite fairly too, that the appellants are not disputing the quantum of compensation awarded in the judgment under appeal and that they are questioning only the findings on negligence recorded by the trial court in the judgment under appeal.

10. Adv. Sri. C.R.Shyamkumar questioned the correctness of the impugned judgment by submitting that the trial court had traveled beyond the pleadings to enter the finding of negligence of the 2nd defendant and also that the plaintiff had miserably failed to prove negligence on the part of the 2nd defendant for the

incapacity the plaintiff suffered, post operation. He further contended that reliance upon the principle of res ipsa loquitor was misplaced and undue reliance by the trial court upon the said principle caused prejudice to the appellants. It was also argued that the surgery performed or attempted to be performed and the injury alleged to have been caused on the spinal-cord as pointed out by the plaintiff, had no rationale or anatomical connection to infer negligence. He further argued that the procedure alleged to have been done by the 2nd defendant would not under any circumstances cause any injury as deep as to harm the spinal cord and there was absolutely no evidence whatsoever to show that the 2nd appellant was negligent. The learned counsel for the appellants further argued that the refusal by the court below to accept Ext.B1, as admissible evidence after marking it without any objection, has caused prejudice to the defendants' evidence. The decisions in ***Mohammed Sageer v. Prakash Thomas*** (2005 (2) KLT 400), ***Kalyan Singh Chouhan v. C.P.Joshi*** [(2011) 11 SCC 786] were relied upon for the proposition regarding pleadings, while the decisions in ***R.V.E.Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P.Temple and Another*** [(2003) 8 SCC 752], ***Mohammed Aynuddin Alias Miyam v. State of A.P.*** [(2000) 7 SCC 72] and

Gourikutty v. Raghavan (2001 (3) KLT 332) were referred for the proposition canvassed on the consideration of medical negligence.

11. On the other hand, Adv. Sri.Anoop Bhaskar contradicted the arguments of the appellants and submitted that this is a classic instance of the maxim res ipsa loquitor to be applied and the trial court was perfectly justified in applying the said maxim to the instant case. He further argued that the uncertain and wavering defense case showed that the defendants were trying to build up a case, especially after PW4 was examined. According to the learned counsel for the plaintiff, in the written statement, the defendants did not have a case of any cardiac arrest having occurred during the operation. He further submitted that the defendants during cross-examination had admitted the case of the plaintiff. The learned counsel for the plaintiff further submitted that Ext.B1, though marked through the cross-examination of PW1, its admissibility was rightly rejected by the Sub Court. It was pointed out that the production of a photocopy of the medical records of the plaintiff, that too, just before the evidence commenced, made the said document, not only inadmissible in evidence but also unreliable. It was contended that a document marked during the cross-examination of the

opposite party can be utilized only to contradict the witness. The statutory requirement of laying down the foundation for producing secondary evidence was not done in the instant case and the failure to lay foundation rendered Ext.B1 unreliable and inadmissible in law. The learned counsel further relied upon the decisions in ***Gourikutty v. Raghavan*** (2001 (3) KLT 332), ***V.Kishan Rao v. Nikhil Super Speciality Hospital and Another*** [(2010) 5 SCC 513], and ***H.Siddiqui (dead) by Lrs. v. A. Ramalingam*** [(2011) 4 SCC 240].

12. In view of the submissions as above, the points that arise for consideration are:

(i) Whether the plaintiff pleaded the material facts to constitute negligence?

(ii) Whether Ext.B1 is admissible in evidence?

(iii) Whether the defendants were negligent during the surgery resulting in injury to the plaintiff and whether the plaintiff is entitled to claim damages;

(iv) Whether the damages awarded by the Subordinate Judges Court, Thiruvananthapuram, require interference, If so to what extent?

13. It is the admitted case of all parties to the instant lis that the plaintiff was a healthy person, who drove his motorbike to the hospital two days before the operation, and within half an hour of commencement of the operation, the doctors were

compelled to abandon the operation. Plaintiff was under general anesthesia inside the operation theater. He was brought out of the operation theater within half-an-hour, with loss of mobility of limbs and his ability of speech absent. He could move out of the hospital only after three months of treatment, that too with the help of support. It is not in dispute that the plaintiff has become crippled for life and his condition is referred to in medical terms as postrio paresis.

Point No:1

14. Order 6 rule 2 of the Code of Civil Procedure, 1908, states that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading, relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved. As observed by Courts, far too often, pleadings are to be interpreted not with formalistic rigour but with the full awareness of the legal literacy levels of the litigants and also the nature of the case.

15. A perusal of paragraph 6 to 9 of the plaint shows that the plaintiff has averred that he was given anesthesia and taken to the operation theater and within thirty minutes, he was taken out after abandoning the operation and that he developed postrio paresis and became crippled for life. It was averred that

the injury sustained by the plaintiff on his spinal-cord during keyhole surgery performed on him by the 2nd defendant was in a most callous, negligent, and irresponsible manner, as a result of which, the plaintiff had paraplegia from D4 level. It is further pleaded that the plaintiff was at his prime of youth and as a result of the negligent and callous keyhole surgery done on him, he became disabled and bedridden and that the 2nd defendant is responsible for the negligence.

16. The purpose of pleadings is to intimate the opposite party about the nature of the case that is set up against him. As held by the Supreme Court in ***Shyam Narayan Prasad v. Krishna Prasad and Others*** [(2018) 7 SCC 646], pleadings are meant to give to each side, an intimation of the case of the other, so that, it may be met, to enable courts to determine what is really at issue between the parties. In the case of medical negligence alleged to have occurred under anesthesia and inside the operation theater, the injured may be able to specify in his pleadings only the material fact of nature of injury caused. Detailed or specific acts of negligence are not within the domain of the plaintiff's knowledge, since admittedly the plaintiff was under general anesthesia.

17. Further, the pleading that due to the negligence of the

defendant's, the injury was caused to the plaintiff along with the other averments in the plaint constitute sufficient material pleading, in cases where legal presumptions also get attracted. At this juncture, we bear in mind Order 6 rule 13 of the CPC, which entitles that the parties need not plead any matter of fact, which the law presumes in his favour, or as to which the burden of proof lies upon the other side. In view of the above, we find that the plaintiff had put the defendants to notice about the case set by him. The plaintiff had not traveled beyond the pleadings, as argued by the learned counsel for the appellants, and on the contrary, he had pleaded in a concise form, the material facts which he relied upon for his claim.

18. The decision relied upon by the defendants in ***Mohammed Sageer v. Prakash Thomas*** (2005 (2) KLT 400) has no application to the instant case. In the aforecited decision, the tenant claimed express consent for subletting the tenanted premises while in evidence he claimed implied consent. It was in such instance the court held that the claim was never made earlier and the tenant cannot travel beyond the pleadings. The decision in ***Kalyan Singh Chowhan v. C.P. John*** [(2011) 11 SCC 786) though, a case arising under the election laws, the proposition stated therein cannot be disputed. Suffice to state,

we are of the view that, the pleadings in the plaint, in the instant case, constitute sufficient material pleading, to put the defendants in the knowledge of the case of the plaintiff. The point is answered accordingly.

Point No. (ii)

19. Ext.B1 is a photocopy of the alleged treatment record of the plaintiff, which was marked by the defendants, during the cross-examination of PW1. Ext.B1(a) is a photocopy of the consent letter given by the plaintiff before the operation, which bears his signature. The manner in which Exts.B1 and B1(a) were marked through PW1 is as follows:

> "ആശുപത്രിയിൽ വെച്ച് test കളും മറ്റും നടത്താനായിട്ട് ഉള്ള സമ്മതം കൊടുത്തിട്ടുണ്ടോ (Q). ഞാൻ കൊടുത്തിട്ടുണ്ട് (A). Sindhu അനിൽകുമാർ ഭാര്യയാണ്. അജികുമാർ എന്റെ സഹോദരനാണ് (A). അനിൽകുമാർ എന്ന് എഴുതി ഒപ്പിട്ടിരിക്കുന്നത് ഞാനാണ്. Case-sheet of PRS hospital relating to Anil Kumar P marked as exhibit B1 (reverse of page 14 containing signature of Anil Kumar marked as B1(A)".

20. Ext.B1 was produced, according to the plaintiff, not along with the written statement, but just before the commencement of evidence and sufficient foundation had not been laid for marking such a photocopy. It was pointed out that a

document produced by the 2nd defendant and marked through the plaintiff, during cross-examination, can be utilized only to contradict the witness, in this case PW1, and not for utilizing it for the benefit of the 2nd defendant.

21. Chapter V of the Indian Evidence Act, 1872, deals with documentary evidence. Section 61 states that the contents of a document may be proved either by primary or by secondary evidence. Primary evidence as per Section 62 means the document itself, while secondary evidence as per Section 63 includes copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies or even copies made from or compared with the original. Under Section 64, documents are to be proved by primary evidence except in the sub-clauses specified in Section 65.

22. Evidence given by the witnesses do not whisper anything about the original of Ext.B1. The foundation for accepting Ext.B1 as secondary evidence has not been laid. It has not been stated by DW1 that the original has been destroyed or lost or that he could not produce the original before the court. In the absence of such a statement, Ext.B1 is inadmissible in evidence as secondary evidence and the said document and its

contents cannot be looked into at all.

23. Other than page 14 in Ext. B1, no other page contains the signature of the plaintiff. The only document in Ext.B1 that could have been marked through the plaintiff was Ext.B1(a) since that alone contained the signature of the plaintiff. Plaintiff has no knowledge of the contents of Ext.B1, nor can he vouchsafe the truth of the facts stated in Ext.B1. By the mere marking of a document, the person bound to prove that document, cannot be absolved of the burden to prove it. Marking of a document is different from proof of the contents of a document. In this context, it is necessary to refer to the decision in ***Sait Tarajee Khimchand and Others v. Yelamarti Satyam Alias Satteyya and Others*** [(1972) 4 SCC 562], where the Supreme Court held that mere marking of a document does not dispense with the proof of a document. Similarly, in ***Ramji Dayawala and Sons (P) Ltd. v. Invest Import*** [(1981) 1 SCC 80], it was held that the truth or otherwise, of the facts or contents of a document, ought to be proved by admissible evidence. i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue. Thus, the mere marking of Ext.B1 does not enable the court to look into the contents of the said document, unless the said document is admissible in evidence.

24. The mode in which proof of documents can be given as mentioned earlier, is by primary or secondary evidence. When the primary evidence is not available or in cases where the original document is not produced at any time, in order to establish the right to adduce secondary evidence, a proper foundation is required to be laid. When the original of a document is not produced nor any factual foundation laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence.

25. In the decision in ***H.Siddiqui (dead) by Lrs. v. A. Ramalingam*** [(2011) 4 SCC 240], it was held as follows:

> *"10. Provisions of S.65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon."*

26. There are four stages before a Court of law can rely upon a document. They are (i) marking of a document, (ii) admissibility of a document, (iii) proof of contents of the document, and (iv) evaluation of the document. Reliance upon a document can be made by the court only if all the above four stages are complied with or satisfied. By the mere marking of a document, it does not become admissible in evidence. Further, the marking of a document and being admissible in evidence, will still not render the contents of a document as 'proved'. When a document, admissible in evidence, is marked, still to be relied upon by the courts, its contents will have to be proved. For the contents of a document to have a probative value, the person who wrote the contents or is aware of the contents and its veracity must be invited to give evidence about it. It is thereafter the last stage i.e. evaluation takes place. Evaluation of the document is a judicial exercise. Unless all these stages are done, a court of law cannot rely upon any document produced or marked before it.

27. In the instant case, except for marking Ext.B1 during the cross-examination of the plaintiff, no foundation has been laid by the defendants to produce secondary evidence. The decisions in ***R.V.E.Venkatachala Gounder v. Arulmigu***

Viswesaraswami & V. P.Temple and Another [(2003) 8 SCC 752] and ***Malaykumar Ganguly v. Dr. Sukumar Mukherjee and Others*** [(2009) 9 SCC 221], are also relevant in this context. Ext.B1 is not only inadmissible in evidence, its contents are also not of any probative value. The finding of the learned Sub Judge, that Ext.B1 is inadmissible in evidence, is correct and justified in the circumstances and therefore, warrants no interference. Hence the point held accordingly.

Point No. (iii).

28. While appreciating the arguments of Adv. C.R.Shyam Kumar that there was absolutely no evidence to prove that the 2nd defendant was negligent, one must step into the shoes of the plaintiff to have a proper assessment. Only then we will be able to appreciate the argument regarding lack of evidence. As a patient, when one lies on the operation table, that too under general anesthesia, it is impossible for the patient to comprehend what happens around him. When the patient is under general anesthesia, he is unaware of the processes that are being carried out. Admittedly, the plaintiff was being operated upon under general anesthesia. it was not possible for the plaintiff to specify the nature of acts done or performed on him, that could be depicted as negligent. Plaintiff, as a patient

undergoing a procedure, can never claim knowledge of the niceties of the procedure and actual omissions, if any, by the professional, whom he relied upon for treatment.

29. An admittedly healthy man, who drove his bike to the hospital and 'walks' into the operation theater, is administered general anesthesia to carry out surgery for removal of kidney stones, is later, taken out of the operation theater as a paraplegic, will the maxim *res ipsa loquitor* get attracted on the above facts? If the maxim applies, what would be the effect?

30. Before we consider the applicability of the aforesaid maxim, it may be worthwhile to remind ourselves about the principle of the maxim 'res ipsa loquitor'. As is common knowledge, the maxim means “the thing speaks for itself”. It is a rule of evidence. It is a maxim that can be relied upon by a party to a litigation, who has no knowledge or insufficient knowledge about how the incident occurred, to rely upon the incident and the attendant circumstances, as evidence of what that party intends to prove. The maxim imposes a burden upon the defendant, who has knowledge about what happened, from avoiding his responsibility, simply by choosing not to give any evidence regarding the negligent act. In other words, a person, who may not be in a position to explain the reason for a certain

state of affairs, cannot be compelled by law to explain those reasons, if he proves the existence of those state of affairs, and instead, can compel that person within whose realm of knowledge lies the reason for the state of affairs. In the event of an explanation not forthcoming from the person who has the knowledge, then the law comes to the aid of the person who suffered the state of affairs and makes certain presumptions to that person's advantage.

31. In the case of medical negligence, the principle of res ipsa loquitor is applicable, if the patient suffers a complication not contemplated normally. In such a case, the plaintiff is not required to prove anything more than the complication as having occurred. The *res* proves itself. The onus shifts to the defendant who has to discharge it by adducing evidence. In the decision in ***V.Kishan Rao v. Nikhil Super Speciality Hospital and Another*** [(2010) 5 SCC 513], it has been held in paragraph 48 as follows:

> "*In the treaties on Medical Negligence by Michael Jones, the learned author has explained the principle of res ipsa loquitor as essentially an evidential principle and the learned author opined that the said principle is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred. The principle has been explained in the case of Scott v. London & St. Katherine Docks Co. [reported in (1865 (3) H&C 596)], by Chief Justice Erle in the following manner-*

> "*...where the thing is shown to be under the management of the defendant or the servants, and accident such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care*".

32. In the above decision, the Supreme Court referred to the illustrations given by the learned author Michael Jones, which were based upon decided cases. The illustrations were referred to in paragraph 49 of the aforesaid judgment, of which, three are similar to the present case. Those three illustrations are extracted below:

> *"(i) Where, following an operation under general anesthetic, a patient in the recovery ward sustained brain damage caused by bypoxia for a period of four to five minutes. [See Coyne vs. Wigan Health Authority, [(1991) 2 Med.LR 301, (QBD)]*.
>
> *(ii) Where, following a routine appendicectomy under general anesthetic, an otherwise fit and healthy girl suffered a fit and went into a permanent coma, [see Lindsay vs. Mid-Western Health Board [(1993) 2 IR 147] at p.181].*
>
> *(iii) Where an infection following surgery in a 'well-staffed and modern hospital" remained undiagnosed until the patient sustained crippling injury [see Hajgato v. London Health Association [(1982) 36 0R 2d 669] at p.682]"*

33. The decision in ***Gourikutty v. Raghavan,*** reported in (2001 (3) KLT 332) can also be of useful reference to the facts of this case.

34. Ext. A1 discharge certificate issued by defendant no.1 shows that plaintiff was admitted on 25-09-2005 and was discharged only on 22-12-2005. Though Ext. A1 was prepared at the time of discharge of the plaintiff from the hospital, still, it mentions that right PCNL and Endopyelotomy under general anesthesia was planned on 27-09-2005, the patient was put to a prone position, pelvicalicine was opacified with contrast injected through the ureteric catheter, sub coastal mid posterior calyceal puncture and track dilation done and amplatz sheath introduced over the dilators. During the process, the patient developed a cardiac problem, and the procedure was abandoned and he was shifted immediately to ICCU and that both his lower limbs were not moving. Ext. A2 CT scan report dated 28-09-2005 at the Sree Uthradom Thirunal Hospital shows that cerebral oedema is present on the next day. Ext.A4 MRI of the brain shows findings that can represent hypoxic ischaemic encephalopathy. It also shows compression of D4-D6 level suggestive of subdural haemorrhage. Ext. A5 certificate issued by the Medical Board constituted by the Government of Kerala shows that the plaintiff suffers from a permanent disability of 50%.

35. From the above discussed documentary evidence, coupled with the oral evidence of PW1 to PW3 and even that of

DW1 and the pleadings in the case, it can be safely concluded that the plaintiff had sustained serious injuries during the operation performed by the 2nd defendant at the 1st defendant hospital. the maxim res ipsa loquitor applies in the instant case. In the list of cases, referred to as illustrations in ***V.Kishan Rao's case (supra)*** it would not be out of place to add the present case as an illustration as follows:

> "*a healthy young man undergoing an operation for kidney stone removal under general anesthesia sustains paralysis and becomes crippled for life*".

36. The explanation offered by defendant no.2 falls way short of a plausible or valid explanation. In fact, other than some vague suggestions, no specific explanation was given by DW1 as to the cause of injury. Defendants failed to prove the cause of the injury sustained by the plaintiff. Even though he deposed that the cardiologist of the Hospital and two other Doctors had seen the plaintiff when the injury occurred, none of them were examined as witnesses or even cited as witnesses. Even the anesthetist who was inside the operation theater throughout was not examined. These are all direct witnesses who were not examined. The absence of any independent oral evidence of the happenings inside the operation theater, failure to produce the original of Ext.B1, the failure to examine anyone associated with

the preparation of Ext.B1 or who can vouchsafe the veracity of the contents of Ext. B1, all results in the defendants failing to prove that there was no negligence in the surgery performed on 27-09-2005. Even the vague and indirect reference to a possible lack of oxygen supply to the brain and its cause has not been explained by the defendants. They have miserably failed to discharge their onus or explain the cause of the injury.

37. In this context, it may be of relevance to refer to Ext.B1(a) which is the photocopy of the consent given by the plaintiff for the surgery. Even though the said document has many of the flaws that could be attributed to Ext.B1, still, since the signature in Ext.B1(a) is admitted, the same is looked into for the limited purpose of identifying the possible mishaps which were in contemplation for which consent was given. In none of the possible outcomes referred to in Ext.B1(a), is there a complication referred to or mentioned, of the nature that occurred to the plaintiff. The disability now suffered by the plaintiff is not seen referred to as an expected complication from a procedure of this nature. This also indicates that it is not a normal complication that has occurred to the plaintiff. Thus by the application of the principle of res ipsa loquitor, the defendants alone could have answered or explained the

allegation of negligence. In the nature of the evidence adduced, the defendants have failed to prove the absence of negligence. The findings of the learned Sub Judge regarding the negligence of the defendants was perfectly justified in the facts and circumstances of the case and calls for no interference in this appeal. Hence the point is held in favour of the plaintiff and against the defendants.

Point No. (iv)

38. As mentioned in the earlier part of this Judgment, the learned Counsel for the appellant had fairly submitted that the appellants are not challenging the quantum of damages awarded. Having stated so, in the absence of any challenge against the quantum of damages awarded, we affirm the judgment dated 27.07.2019 in O.S. No.1111 of 2011 of the Principal Subordinate Judge's Court, Thiruvananthapuram.

The appeal is therefore dismissed with costs.

Sd/-

S.V.BHATTI
JUDGE
Sd/-

BECHU KURIAN THOMAS
JUDGE

vps