IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : COMPENSATION MATTER

LPA No.2339/2006

Date of Decision: 7th December, 2007

SHANTI MUKAND HOSPITAL ……. Appellant
Through: Mr.C.N. Srikumar, Advocate with Mr. C. Hari Shankar, Mr. S.Souil and Mr. Rituraj Jagdishan, Advocates

Versus

MS. RINCHU & ORS. …… Respondents
Through:Mr.Aman Lekhi, Sr. Advocate with Mr. Jaspreet S. Rai, Ms. Meenakshi Lekhi, Mr. Rakesh Kumar and Mr. Rohit Nagpal, Advocates for respondent No.1.
Ms. Avnish Ahlawat, Counsel for respondent Nos. 2&3.

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

DR. MUKUNDAKAM SHARMA, CJ

1. The issue that arises for consideration in this appeal is whether the appellant Shanti Mukand Hospital could be saddled with a liability of

making payment of compensation of an amount of Rs.5.5 lacs out of the total 7.5 lacs awarded to the respondent No.1 who became a victim of rape and grievous injury thereby loosing one eye while being on private duty attending a patient at the aforesaid hospital.

2. The writ petition was filed by the respondent No.1 herein who is a nurse by profession. She was engaged to render her services to a paralytic patient, namely, Mr. S.K. Kaushik, who was an indoor patient at the appellant Shanti Mukand Hospital. On the night between 6-7 September, 2003, she not only became subjected to sexual assault and violence by a ward boy/ sweeper Bhura engaged by the appellant through a contractor but she also lost her right eye. She filed a writ petition seeking for adequate compensation from the respondent No.2, Government of NCT of Delhi, respondent No.3, Guru Teg Bahadur Hospital, which is a hospital run by the respondent No.2 and also from the appellant Shanti Mukand Hospital, which is a nursing home and being run through a licence issued by the respondent No.2. In the writ petition there was a further prayer seeking direction to the appellant nursing home for making provision for free medical treatment and a suitable job for herself. The aforesaid writ petition was heard after completion of the pleadings of the parties. On consideration of the records placed and the pleadings, the learned Single Judge held that the respondent

No.1 has undergone a horrific violence and trauma apart from violation of her person leaving her psychologically shattered at a young age of 19 years and that she has also been left with a permanent disability on account of loss of her right eye. The learned Single Judge also considered the factor that she has become handicapped which would not only adversely affect her potential as a professional nurse but also would affect her matrimonial prospects in future. Having considered the fact that the respondent No.2 had given her some relief and succor by providing her a job, it was held that taking all the factors into account, total compensation of Rs.7.5 lacs should be paid to the respondent No.1 out of which Rs.5.5 lacs should be paid by the appellant nursing home and the remaining 2.00 lacs should be paid by the respondent Nos. 2&3 herein. As to how the aforesaid amount is to be disbursed to the respondent No.1 is also recorded by the learned Single Judge in the aforesaid order. Being aggrieved by the aforesaid order passed by the learned Single Judge, the present appeal is filed on which we have heard the learned counsel appearing for the parties.

3. Counsel appearing for the appellant submitted before us that Bhura who has committed the offence of rape on the respondent No.1 and inflicted a grievous injury as a consequence of which she lost her right eye is not a direct employee of the appellant and he was employed only through a

contractor and, therefore, the appellant could not have been saddled with the aforesaid liability of making payment of compensation to the victim. The next submission of the counsel for the appellant was that in the criminal case the learned Additional Chief Metropolitan Magistrate (ACMM) held that there was no criminal negligence on the part of the appellant in the entire matter and, therefore, the learned Single Judge was wrong in holding that the appellant is liable to pay the aforesaid compensation. Another submission of the learned counsel appearing for the appellant was that disputed questions of fact as to whether or not the respondent No.1 had suffered any injury and, if so, to what extent, amount of compensation etc., are matters which are required to be proved and established by filing a civil suit and such a disputed question of fact cannot be decided by filing a writ petition. In support of the said contention the counsel for the appellant relied upon two decisions of the Supreme Court to which reference has been made during the course of discussion in this judgment.

4. With regard to the aforesaid submissions raised, we also heard the learned counsel appearing for the respondent No.2 and 3/Government of NCT of Delhi, GTB Hospital and the respondent No.1 victim. In order to appreciate the contentions of the parties, it would be relevant to refer to some background facts which led to the filing of the aforesaid writ petition.

5. The respondent No.1, who is a nurse, was engaged to provide and give nursing care to a private patient, namely, Mr. S.K. Kaushik, a paralytic patient who could neither speak nor move, housed in room No.208 of the appellant hospital. On the intervening night of 6-7th September, 2003 at about 1.30 A.M. ward boy Bhura who was also on night duty approached the respondent No.1 and tried to touch her in an undesirable manner. When she protested and screamed and asked Bhura to get out of the room, Bhura, realizing that her loud screams might be heard, held her tight, inserted his hand in her wind pipe in order to choke the voice, clawed her on the throat. It is alleged that he used criminal force with such intensity that her entire right eye ball got detached from the socket and came out. It was also contended in the writ petition by the respondent No.1 that Bhura hit her hard on the head and threw her against the wall of the room and threatened to kill her and pushed her down and committed rape on her. Thereafter, he lifted the respondent No.1 and threw her into the bathroom, where she fell down and became unconscious. The respondent No.1 vomited blood and kept bleeding due to rape as well as due to grievous eye injury.

6. Respondent No.1 partially regained consciousness at about 6 A.M. when another ward boy came into the room, opened the bathroom door and found her there. Although the hospital came to know of the state of her

health at about 6 A.M. in the morning, no medical treatment was provided to her to treat her right eye as also the other injuries that she had suffered, and that she was not even transferred to casualty for over two hours, i.e., upto about 8 A.M. probably on the ground that the medico-legal certificate (in short 'MLC') was not prepared. The time of reporting the offence to the police as recorded in the FIR is 7.55 a.m. The delay in the filing of the FIR is not explained.

7. The evidence brought on record indicate that MLC was prepared only at about 8.15 A.M. and she was examined by a junior gynaecologist and not by a senior consultant. Even thereafter no medical treatment was offered to her by an ophthalmologist on the ground that the Resident Ophthalmologist was not available in the hospital. The appellant hospital apparently forgot that proper and immediate medical treatment and care of the respondent No.1 was required and if required senior ophthalmologist from another hospital or from outside should be summoned. The medical condition and trauma suffered by the respondent No.1 was known and doctors were aware that her entire right eye ball had got detached and was hanging. She was sent unattended to GTB Hospital at about 11.30 A.M. where she was not even attended till 1.30 P.M. It is alleged that no treatment was given to her at the G.T.B. Hospital, except bandaging her eye. No senior consultant/

doctor examined her. A second year post graduate resident only examined her and she simply had a telephonic consultation with the Reader in the Department. She was shunted from fifth floor to ground floor three times in the hospital. Respondent No.1 alleged that the respondent no.3 hospital failed to provide adequate treatment and they sent her back to the appellant hospital on the plea that she had been referred only for opthalmologic examination. Gross negligence and violation of medical ethics and irresponsibility was alleged as against both the appellant hospital and the respondent No.3 on the basis of which the aforesaid claim was made.

8. The appellant herein took a defence in their counter affidavit contending, inter alia, that the respondent No.1 was not an employee of the appellant hospital and that she was a private attendant of a patient, namely, Mr. S.K. Kaushik. It was also stated that Bhura who had committed the aforesaid offence on the respondent No.1 was a ward sweeper employed by Baba House Keeping Services, who was given the contract for providing such services at the hospital. They also denied the allegation of any delay and negligence in providing treatment to the respondent No.1. The appellant pleaded that they came to know of the incident at around 6 A.M. when she was immediately brought to the casualty with the help of other staff. It was alleged that the hospital administrator and the police arrived at 7.30 AM and

a case was registered at 8.15 AM. when the eye of the respondent No.1 was duly bandaged and gynaecological examination was done. It was stated that out of the two Opthalmology Consultants available on call, Dr. Angra was on leave and Dr. Rajiv Ghai was not available and, therefore, she was referred to GTB Hospital for examination of the eye. It was also alleged that she was taken to the hospital in ambulance accompanied by Dr. Sachin Gupta. Further contention was that she was again examined on 9th September, 2003 by Dr. Angra who discovered that the eye ball was still lying outside the orbit on the lids and therefore required to be removed on emergent basis and, consequently, an emergency operation was done to remove the said eye ball.

9. In the light of the aforesaid pleadings and background facts we may now proceed to decide the issues raised before us.

10. At the request of counsel appearing for the appellant, we have perused the copy of the order passed by the Additional Chief Metropolitan Magistrate in the case registered against Bhura under FIR No.447/2003. The aforesaid case was registered under sections 336/338 IPC. While rendering the aforesaid order, the learned ACMM considered the evidence on record and on appreciation thereof he held that when a patient agreed to go for medical treatment or surgical operation every careless act of the medical

man cannot be termed as 'criminal' and that it could be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and also when it is found to have arisen from gross ignorance or gross negligence. It was held that where a patient's sufferings result merely from error of judgment or an accident, no criminal liability should be attached to it and that mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable. It was also held that from the medical opinions produced by the prosecution this act attributed to the doctors, even if accepted to be true, could be described as negligent act as there was lack of due care and precaution and for such act of negligence, they might be liable in torts but their carelessness or want of due attention and skill could not be described to be so reckless or grossly negligent as to make them criminally liable. It was recorded in the order that from the medical records and medical literature it was clear that approach of Dr. Saurabh Srivastava was callous and pathetic towards the treatment of the patient which amounted to criminal negligence and rashness on her part. It was held that the case under Section 336 IPC was made out against the accused Dr. Saurabh Srivastava. It was held that prima facie no criminal case was made out against the accused Dr. S.K. Singh, Dr. O.P. Sharma, Dr.

Mayank. Relying on the aforesaid order passed by the learned ACMM, Delhi it was contended by the counsel appearing for the appellant that since it was held that there was no criminal negligence on the part of the doctors of the appellant, therefore, the appellant could not have been saddled with the liability to pay compensation at all.

11. The aforesaid contention, however, is misplaced. What was discussed by the learned ACMM in the aforesaid order is whether or not there is a criminal liability of the doctors. So far civil liability is concerned, the learned ACMM has held that evidence on record would make at best a case of civil liability in the nature of tort and that no case was made out of criminal liability as against the doctors of the appellant. It may also be noted that the appellant hospital being a juristic person is not an accused in the said criminal case.

12. The contention of the appellant that since the offence was committed by an individual who was not in direct employment of the appellant, is liable to be rejected. One needs to only refer to an earlier decision of this Court in the case of **Sunil Mathew versus BSES Rajdhani** Reported in (2006) I AD (Delhi) 698). In the instant case a motorist died after his vehicle crashed against a mobile crane used for repairing street lights that was left unattended, while the respondent BSES sought to deflect its culpability by

contending that the contract for that purpose was given to a third person. This however was not accepted and the respondent-Corporation was directed to pay the compensation. The Court further noted that even if the liability is not direct, it is certainly vicarious in nature. Black's Law Dictionary, 5th edition defined this type of liability as "indirect legal responsibility", for example, "the liability of an employer for the acts of an employee, or, a principal for the torts of its agent." The said view is given further credence by the observations of the Supreme Court in the case of ***Savita Garg v. Director, National Heart Institute,(2004) 8 SCC 56*** **, at page 68 :**

> **"15.** ... as per the English decisions also the distinction of "contract of service" and "contract for service", in both the contingencies, the courts have taken the view that the hospital is responsible for the acts of their permanent staff as well as staff whose services are temporarily requisitioned for the treatment of the patients. Therefore, the distinction which is sought to be pressed into service so ably by learned counsel cannot absolve the hospital or the Institute as it is responsible for the acts of its treating doctors who are on the panel and whose services are requisitioned from time to time by the hospital looking to the nature of the diseases. The hospital or the Institute is responsible and no distinction could be made between the two classes of persons i.e. the treating doctor who was on the staff of the hospital and the nursing staff and the doctors whose services were temporarily taken for treatment of the patients. ....."

The aforesaid observation made in the context of medical negligence would equally, apply to the present case. Since the hospital for its own convenience

had employed the services of workers through a contractor, it cannot escape the legal duty to care on that ground.

13. The facts and the statements made in the pleadings amply make out and prove a case that the appellant hospital was negligent and did not take any follow up and immediate action to provide medical treatment to the patient at least till after 8.15 P.M. although they detected the incident at 6 A.M. They waited for the police to come and register a case of medico-legal certificate and after the said formality was completed then only they provided the patient gynecological treatment and that also was provided through a junior gynecologist. It is also established that her eye was not examined at the appellant hospital and no treatment was given in that regard on the pretext that the resident doctor of OPD was not available for which she was sent at about 11.30 AM to the G.T.B. Hospital. Even in the G.T.B. Hospital she was not given proper treatment immediately on her arrival and she had to wait for a pretty long time and then also she was provided only partial treatment. In our considered opinion, therefore, definitely a case of negligence and improper conduct and behavior is made out. The appellant suffered agony and injury while working in the hospital of the appellant. Whatever untoward act and brutality took place within the premises of the

hospital of the appellant, the responsibility would have to be borne and owned by the concerned hospital as they are bound to provide proper care and attention to the safety and well being of not only the patient but also of the attendant and nurses working there although engaged privately. The hospital cannot get away by saying that neither the victim was their employee nor the person who committed the offence was directly on their pay roll. A brutal act of violating a professional nurse while on duty was committed. She suffered an injury thereby loosing one of her eyes which would definitely prejudicially affect her in rendering and discharging her professional duties and would also adversely affect her matrimonial prospect. She has become permanently disabled although the respondent No.2 and 3 had kindly provided her a job so that she can live rest of her life without being a financial burden on others. The act committed in the hospital of the appellant was inhuman and in our considered opinion the appellant is directly and vicariously liable for whatever happened in the hospital and, therefore, there is a civil liability of the appellant as also of the respondent No.2&3 which stands proved from the documents on record. In view of the aforesaid position the contentions raised that the appellant is not liable for any action of Bhura stand rejected in view of the aforesaid discussion on facts and circumstances of the case.

14. The next issue that is required to be resolved is whether or not in view of the aforesaid negligence on the part of the appellant and the respondent Nos. 2&3 compensation can be claimed by the respondent No.1 by filing a writ petition and if not whether she should be directed to go through the process of filing a civil suit. Counsel appearing for the appellant, in support of his submission that claim of the aforesaid nature could only be adjudicated upon and decided when a civil suit is filed and not through a writ petition, relied upon the decision of this Court in ***Abdul Haque & Ors. vs. BSES Yamuna Power Ltd. & Ors.*** reported in 142(2007) DLT 526. The counsel appearing for the appellant also referred to the decision of the Supreme Court in ***SDO, Grid Corporation of Orissa Ltd. and others Vs. Timudu Oram reported in (2005) 6 SCC 156***. A bare perusal of the aforesaid cases would indicate that the said cases arise out of claim for compensation for death due to electrocution. In para 24 of the judgment in ***Abdul Haque & Ors.(supra),*** the learned Single Judge of this Court held that the approach of the Hon'ble Supreme Court in certain other cases where writ petitions have been filed claiming compensation for constitutional wrongs, involving death or injuries not due to electrocution, has been different. The learned Single Judge clearly held that in cases of electrocution involving disputed question of fact a writ petition under Article 226 of the Constitution

of India is not maintainable and that in such cases only the approach of the Supreme Court has been different. Consequently, on a reading of the aforesaid decisions it is established that the decisions which are relied upon by the counsel appearing for the appellant were decided on facts relating to claims of compensation due to electrocution which is different from the facts of the present case. Negligence was not established and proved. In para 25 of the aforesaid judgment, the above position is made clear. What was held by the learned Single Judge in para 25 of the said judgment are extracted herein below:-

> "The net result is that in cases involving claim for compensation on account of death due to electrocution, where the facts are disputed, the Hon'ble Supreme Court has held that a writ petition for payment of compensation is not maintainable under Article 226 of the Constitution. The remedy in such cases will obviously be only before the Civil Court."

15. It is pertinent to note that both judgment referred to by the Appellant are in relation to electrocution and the Courts refused to interfere on the ground that the factum of negligence by the electricity authorities had to be shown and the fact was not apparent on record. One has provide the necessary leeway to electricity companies in terms of their operations which are spread over open stretches of public roads/ spaces which make the

maintenance of strict vigil that much more difficult. Since incidence of wire tapping is an acknowledged fact, the facts of each case have to be examined. We make it clear that we should not be understood as stating that in no case of electrocution, Writ Petition will be maintainable. The Appellant, however, cannot escape responsibility as the offence took place within the premises of the Appellant which purportedly has "high level of security": within the Hospital premises. The entire incident is indeed shocking .The hapless victim remained unnoticed from 1:30 am till 6:20 am. This fact alone puts gapping hole in the so called defence of the Appellant who has gloated about the security measures taken by it.

16. The aforesaid decisions, therefore, would have no application to the facts of the present case. On the other hand, we may appropriately refer to the decision of the Supreme Court in ***Rohtash Industries Ltd. and anr. Vs. Rohtas Industries Staff Union and ors. (1976) 2 SCC 82*** wherein the amplitude of the power of the High Court under Article 226 was discussed as follows:-

> "The expansive and extraordinary power of the High Court under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person even a private individual and be available for any (other) purpose even one for which another remedy may exist...This Court has spelt out wise and clear restraints on the use of this extraordinary remedy and the High Court will not go

> beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry of timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has by and large been the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights."

17. We may also refer to the decision of the Supreme Court in ***M.S. Grewal and anr. Vs. Deep Chand Sood and ors. (2001) 8 SCC 151*** in which case the Supreme Court while dealing with a claim for grant of compensation in a writ petition under Article 226 and 32 of the Constitution of India, commended adoption of a justice oriented approach. It was a case for compensation against a school, when school children taken on a picnic, had drowned on account of negligence of the teachers. The Supreme Court considered the vicarious liability of the school on account of the negligence of the teachers and observed:-

> "..The law courts exist for the society and they have an obligation to met the social aspirations of the citizens since law courts must also respond to the needs of the people.
>
> ..Currently judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system–affectation of the people has been taken note of rather seriously and judicial concern stands on the footing to provide expeditious relief to an individual when needed rather than taking recourse to old conservative doctrine of the civil court's obligation to award damages... Law courts

> will lose their efficacy if they cannot respondent to the need of the society–technicalities there might be many but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not outweigh the course of justice."

18. Reference can also be made to a decision of the Supreme Court in a case titled as ***Dwarkanath, Hindu Undivided Family Vs. Income Tax Officer, Special Circle, Kanpur and anr.(1965) 3 SCR 536*** in which the Supreme Court observed that:

> "It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the Article itself."

19. We may also refer to another decision of the Supreme Court, which would be very apposite and similar to the facts of the present case. The decision is ***Bodhisattwa Gautam Vs.Shubhra Chakraborty (Ms) (1996) 1 SCC 490*** where the Supreme Court directed the person accused of rape to pay the victim compensation during the course of trial and not just upon conviction. It was accepted in that case that the victim could have invoked

the writ jurisdiction of the Courts in the facts of the case, fundamental rights being enforceable even against private bodies and individuals.

20. In the present case, and in terms of the discussion as aforesaid it is established that there is apparent violation of the provisions of Article 21 which guarantees a life to live with dignity. In the present case, protection guaranteed by Article 21 was denied and, therefore, compensation towards damages suffered could be claimed by filing a writ petition on the basis of which the Court can award compensation. In view of the breach and infringement of the Article 21 of the Constitution of India, we hold that in the present case the breach being incontrovertible, the following ratio of the judgment in the case titled as ***M.C. Mehta and another vs. Union of India and others (1987)1 SCC 395*** of the Supreme Court is applicable wherein the Supreme Court held thus:

> "If we make a fact analysis of the cases where compensation has been awarded by this Court, we will find that in all cases, the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the Court and it would have been gravely unjust to the persons whose fundamental right was violated, to require him to go to the civil court for claiming compensation."

21. We, therefore, find and hold that the appellant is liable to the extent indicated in the order passed by the learned Single Judge. An amount of Rs.

3.00 lacs, out of Rs.5.5 lacs, has been deposited by the appellant. They are directed to deposit the balance 2.5 lacs immediately in this Court which shall be deposited within two weeks so as to make up the deficiency of 7.5 lacs inasmuch as a total sum of Rs.5.00 lacs is lying deposited in fixed deposit. After the said amount of Rs.2.5 lacs is deposited within a week, the amount deposited so far alongwith the amount of Rs.2.5 lacs total amounting to Rs.7.5 lacs would be released in favour of the appellant in terms of the order passed by the learned Single Judge. If in case, the amount of Rs.2.5 lacs is not deposited within two weeks, the same would carry an interest @ 12% p.a. from the date of the order of the writ petition till the date of payment.

22. In terms of the aforesaid judgment and order, we dismiss this appeal, but without awarding any cost.

Sd/-
(CHIEF JUSTICE)

Sd/-
(SANJIV KHANNA)
JUDGE