MCRC-965-2008

(DR.B.C.JAIN Vs ***MAULANA SALEEM)***

28-02-2017

Dr.B.C.Jain .....â¦â¦â¦â¦â¦â¦..â¦â¦â¦....Petitioner

Versus

Maulana Saleem.....â¦.. â¦â¦â¦â¦â¦â¦Respondent

For the petitioner : None.

For the respondent : Mr.Ajay Mishra, Advocate.

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Present: HONOURABLE MR.JUSTICE ATUL SREEDHARAN

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O R D E R

28.02.2017

This petition is pending since 2008. The proceeding before the learned J.M.F.C. Sagar were stayed vide order dated 01/02/08.

In the order dated 02/02/17 it was specifically noted that if nobody appears on behalf of the petitioner or the respondent on the next date of hearing, this Court shall consider the petition on merits and dispose of the same. Today also, no one appears on behalf of the Petitioner.

The present petition has been filed under Section 482 of Cr.P.C. for the quash of the proceedings in Criminal Complaint Case No.1259/2006 pending in the Court of learned J.M.F.C. Sagar. The petition raises an important question of law relating to the prosecution of a doctor who is in the service of the State Government, for an offence u/s. 304-A IPC alleged to have been committed while discharging his duty as a Government Doctor.

1. The facts relating to the case are that on 27/05/02, the daughter (hereinafter referred to as the â□□Deceasedâ□□) of the respondent was admitted in Ward No.2 at the Government Hospital, Sagar, as she was unwell. The cerebral spinal fluid (hereinafter referred to as â□□CSFâ□□) of the deceased was extracted by the Petitioner. Subsequently, the deceased passed away and it was alleged by the Respondent that the Petitioner failed to send the CSF for pathological evaluation and therefore, in the absence of a report on the said sample, proper diagnosis of the affliction was not made and therefore, in the absence of appropriate treatment, the deceased died. Thereafter, the respondent is stated to have written to several authorities including the Collector and the minority commission and to various other authorities seeking prosecution of the petitioner herein for negligence under Section 304-A of I.P.C but however, no action was taken against the Petitioner. It is not disputed that the petitioner by occupation is a Government doctor and therefore a public servant.

2. The respondent approached the Court of the learned J.M.F.C. in a complaint case under Section 200 Cr.P.C. in which the learned J.M.F.C. was pleased to take cognizance for offence U/s.304-A I.P.C. against the petitioner and proceeded against him. The petitioner

preferred a criminal revision before the Court of Ist Additional Sessions Judge, Sagar being Criminal Revision No.287/2007, which was dismissed vide order dated 28/12/07 against which the present petition has been filed. The petitioner has prayed for quash of the entire proceedings pending against the petitioner in Complaint Case No.1259/2006. The revision preferred before the Court of Sessions was dismissed primarily on two grounds. Firstly, the learned Sessions Court observed, that the report of the Civil Surgeon/Hospital Superintendent, Sagar District, is stated to have indicted the petitioner herein and found him prima-facie guilty of negligence. The crux of the issue is that the CSF which was taken out by the petitioner, the same having not been sent for pathological evaluation, resulted in the death of the deceased as the affliction suffered by her could not be diagnosed properly in the absence of the laboratory report and therefore appropriate treatment could not have been given to the deceased on account of which she died. Secondly, though the Petitioner was a public servant, his negligence in not sending the CSF to the laboratory for evaluation could not be said to be an omission done in discharge of his official duty.

3. The petitioner in his pleadings has disclosed that the CSF that was taken from the deceased which ought to have been clear was actually mixed with blood on account of movements made by the deceased at the time when the sample was extracted and the sample of CSF which is mixed with blood could not be sent for pathological evaluation and, therefore, the same was not sent. Annexure A/3 at page 17 is a copy of the reply submitted by the petitioner herein to the notice sent to him by the Collector, in which the petitioner has stated that the reasons for taking the CSF were

two-fold. Firstly, the petitioner has stated that the deceased was suffering from cerebral tuberculosis and drawing out of the CSF would reduce the pressure on the brain giving relief to the patient and Secondly, the sample could be thereafter sent for pathological evaluation which would ascertain if the clinical diagnosis made by the petitioner was precise. In the said letter, he has also stated that as the sample was mixed with blood, it was worthless sending the same for pathological evaluation, as four other CSF sample which were earlier sent for pathological evaluation, mixed with blood, could not be evaluated by the laboratory.

4. It also appears to be undisputed that post-mortem was not done in this case and therefore the cause of death remained speculative without any certainty. In other words, there was nothing to substantiate that the deceased died on account of conduct by the Petitioner that could be termed as â□□grossly negligentâ□□.

5. The revision was preferred on two grounds firstly that there was no negligence by the petitioner herein and therefore, the offence U/s.304-A of I.P.C. was not made out and secondly even if such an offence was committed, keeping in view the fact that the petitioner was a public servant, prior sanction of the Government was required under Section 197 Cr.P.C. which was mandatory, and in the absence of same, cognizance ought not to have been taken. The learned Court of Sessions while dealing with this aspect in para 14 of its order has also conceded to the fact that the act of extracting the CSF was done as part of the discharge of official duties of the petitioner. However, his conduct in not having sent the same for pathological evaluation could not have been stated to be an omission done in the discharge of duties as a public servant.

6. Heard the Ld. Counsel for the Respondent and perused the documents filed along with the petition. The Ld. Counsel for the Respondent has opposed the Petitioner and has argued for its dismissal on the ground that there is nothing illegal with the impugned order. He has further submitted that prima facie, a case of negligence has been made out against the Petitioner and that this Court must desist from going into disputed questions of facts as that would mean transgressing into the domain of the Trial Court. He has also supported the impugned order on the question of the non-requirement of previous sanction u/s. 197 Cr.P.C by arguing that being negligent in not sending the CSF for pathological assessment, his conduct would not fall into the category of â□□discharge of official dutyâ□□.

7. This Court, with the utmost respect, finds the reasoning given by the Ld. Court below to be incorrect and unsustainable. Once it was clear to the Ld. Court below that the petitioner was a public servant and was discharging his duties as such, then the alleged negligent omission arising therefrom had to be seen in the context of the discharge of official duties. If such a nexus was there between the act complained of and the discharge of official duty, notwithstanding the remoteness between the two, a sanction U/s.197 Cr.P.C. was a *sine qua non* for taking cognizance of the said offence against the Petitioner.

8. As regards the aspect of negligence, in the absence of a post-mortem report, there can be no conclusive assessment relating to the cause of death. Further, the appreciation of document dated 24/08/02 by the learned Court below has been incorrect. The said document is the report of the Civil Surgeon, which the Ld.

Revisional Court has held to indict the petitioner of negligence. However, upon reading the same, the said document approves of the action of the petitioner herein in extracting the CSF. However, for not having sent the said sample for pathological evaluation to the laboratory, the Civil Surgeon only opined that the petitioner may be asked to give an answer for such an omission. The said document does not state either directly or by necessary implication, that the petitioner herein was prima facie guilty of negligence.

9. Even otherwise, the law as it stands today has been well settled by the Supreme Court in **Jacob Mathew Vs. State of Punjab â (2006) 6 SCC 1**, where a three judge bench of the Supreme Court had laid down in paragraph 52, that before a criminal court takes cognizance or the police proceeds against a doctor for an offence u/s. 304-A, both shall secure a report from an independent doctor or a board of doctors, preferably practicing in the same field as the doctor sought to be proceeded against, who opines that the doctor to be prosecuted, acted in â gross negligenceâ to the known standards of the medical profession.

10. In **Manorama Tiwari Vs. Surendra Nath Rai â (2016) 1 SCC 594**, the Supreme Court, while deciding the case of the Petitioner therein, who was a doctor in the service of the State of Chhattisgarh and was dragged into a case u/s. 304-A by the Complainant whose daughter had died after being operated upon by the Petitioner in that case. The case proceeded on a complaint u/s. 200 Cr.P.C before the JMFC, before whom the Petitioner had moved an application saying that she could not be prosecuted in the absence of a sanction u/s. 197 Cr.P.C. The said application was

dismissed by the JMFC and the Petitioner failed to get any succour from the High Court also and so, approached the Supreme Court. The Supreme Court, following its earlier judgements in Jacob Mathewâ□□s case quashed the case by holding that as the Petitioner was serving as a doctor in a Government Hospital, she was entitled to the protection accorded u/s. 197 Cr.P.C.

11. Likewise, in **Amal Kumar Jha Vs. State of Chhattisgarh â□□ (2016) 6 SCC 734**, the police had registered an FIR against the Petitioner U/s. 304-A IPC and the Court of the Ld. JMFC Dharamjaigarh, dismissed the application filed by the Petitioner for discharge on account of the non-availability of sanction U/s. 197 Cr.P.C. The High Court of Chhattisgarh declined to intervene with the order passed by the Ld. JMFC and so as the Petitioner appealed to the Supreme Court. The Petitioner was the in charge of the Primary Health Centre at Patthalgaon. The deceased needed to be moved to the District Hospital at Raigarh. There was no ambulance at the Patthalgaon PHC to transport the patient to the District Hospital at Raigarh and so the official vehicle of the Petitioner was requested for this purpose which, was declined by the Petitioner. As the deceased died, it was alleged that it was negligent on the part of the Petitioner in that case for not having given his official vehicle to transport the deceased to Raigarh for treatment. While quashing the case against the Petitioner, the Supreme Court held at paragraph 4 of the said judgement that **â□□It is apparent from the facts of the instant case that the allegation against the appellant is of omission in discharge of official duty in not providing government vehicle for shifting the patient from Primary Health Centre to District Hospital, Raigad; whereas he himself travelled in the vehicle in question for attending**

the monthly official meeting at the District Headquarters. In our considered opinion, it was an act or omission in discharge of the official duty. The sanction to prosecute was necessary. In this case, the accused was acting in discharge of his official duty when he refused to provide the official vehicle. The refusal is directly and reasonably connected with his official duty, thus sanction is required for prosecution as provided under Section 197(1) CrPCâ□□.

12. While assessing the degree of negligence on the part of a medical professional which would expose him to a criminal prosecution for an offence U/s. 304-A, the Supreme Court in **A.S.V Narayana Rao Vs. Ratnamala â□□ (2013) 10 SCC 741**, held that mere negligence, which could make the doctor liable under civil law or under the consumer law, was inadequate to prosecute the doctor u/s. 304-A IPC. It followed the law laid down earlier in Joseph Mathewâ□□s case and quotes paragraph 48 of that judgement to support the abovesaid view and held, that to make an act or omission of a doctor punishable u/s. 304-A, the degree of negligence ought to be â□□gross negligenceâ□□.

13. The only allegation against the Petitioner in this case is that he did not send the sample of the CSF that he had extracted from the spine of the deceased for pathological test to the laboratory and that the deceased died on account of the absence of the report relating to the CSF which had indirectly impacted the administration of the treatment given to the deceased.

14. Looking at the rising trend of roping in doctors working in the Government Hospitals by the next of kin of persons dying during

the course of treatment at Government Hospitals, this Court considers it essential to lay down guidelines for the police and the courts below while dealing with cases implicating doctors working in Government Hospitals and Health Centers.

I. That, all allegations relating to negligent conduct on the part of a Government Doctor for which a prosecution u/s. 304-A IPC and/or its cognate provisions, or under such other law involving penal consequences is sought, the same shall be enquired into by a Medical Board consisting of at least three doctors, constituted by the Dean of any Government Medical College in the State of Madhya Pradesh, upon the request of the Police, Administration or the directions of a Court/Tribunal/Commission, within seven days of such requisition.

II. The doctor so selected by the Dean of the Medical College concerned to sit on the Medical Board, shall not be inferior in seniority and experience to that of an Associate Professor.

III. The doctor against whom such negligence is alleged, shall be given an opportunity by the Medical Board to give his reply/explanation in writing and if the doctor so desires to be heard personally, he shall be given such an opportunity by the Medical Board. However, if the Medical Board is of the opinion that the request for personal hearing is with the intent of procrastinating the proceedings before the Board, it may, for reasons to be recorded, waive the opportunity of a personal hearing and proceed to decide the case on the basis of the documents/treatment record and give its finding.

IV. The Medical Board shall endeavour to complete the exercise within sixty days from the date on which it is constituted and upon completion of the enquiry, submit the report to the Police, Administration or the Court/Tribunal/Commission, as the case may be.

V. The police shall not register an FIR against such a doctor in the absence of the report of the Medical Board referred hereinabove and also, only when the report by the Medical Board has held the doctor prima facie guilty of â□□Gross Negligenceâ□□ and not otherwise.

VI. If a complaint case has been preferred U/s. 200 Cr.P.C, there shall be no order u/s. 156(3) Cr.P.C unless the complaint is accompanied by the report of the Medical Board adverted to in guideline I with prima facie finding of â□□Gross Negligenceâ□□ on the part of the Doctor. However, if the complaint is not accompanied with a report of the Medical Board, the Court may ask the Police to enquire into the case u/s. 202 Cr.P.C. The police, if so directed by the Court, shall approach the Dean of the Medical College for the constitution of the Medical Board and thereafter place the report of the Medical Board before the Court concerned.

VII. If the opinion of the Medical Board is one of â□□Gross Negligenceâ□□ on the part of the doctor, the Court concerned shall direct the police to seek sanction u/s. 197 Cr.P.C from the State Government. The State Government shall, within thirty days from the date of such request for sanction, either grant or refuse the same, which the police shall convey to the Court concerned. Thereafter, the Court concerned shall either dismiss the complaint

case against the doctor by exercising jurisdiction u/s. 203 Cr.P.C or issue process u/s. 204 Cr.P.C and try the case in accordance with the law.

15. Thus, on account of what has been stated hereinabove, the petition is allowed. The proceedings against the Petitioner in complaint case No.1259/2016 pending before the Court of learned J.M.F.C., Sagar is quashed.

(ATUL SREEDHARAN)
JUDGE

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