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A F R

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Court No. - 79

Case :- APPLICATION U/S 482 No. - 28703 of 2008
Applicant :- Dr. Ashok Kumar Rai
Opposite Party :- State of U.P. and another
Counsel for Applicant :- Senior Advocate, Shailendra Kumar Rai
Counsel for Opposite Party :- Govt. Advocate, eS.K.Mishra

Hon'ble Prashant Kumar,J.

1. Heard Sri I.K. Chaturvedi, learned Senior Advocate assisted by Sri Shailendra Kumar Rai, learned counsel for the applicant, Sri S.D. Pandey, learned A.G.A. for the State and Sri S.K. Mishra, learned counsel for O.P. no.2.

2. The present application under Section 482 Cr.P.C has been filed by the applicant with a prayer to quash summoning order dated 15.09.2008 passed by A.C.J.M., Court No.19, Deoria under Section 304A, 315, 323 and 506 IPC as well as the entire proceedings of Case No.17 of 2008 pending in the court of Additional Chief Judicial Magistrate, Court no.19, Deoria.

FACTS OF THE CASE

3. In the instant matter, an FIR was lodged on 29.07.2007 by O.P. no.2 wherein it is alleged that wife of younger brother of the informant/O.P. no.2 was admitted in Savitri Nursing Home, Deoria, which is owned/runned by the applicant, who happens to be a doctor. It has been alleged that the patient was admitted to the hospital on 28.07.2007 at 10.30 A.M. for delivery. At around 11 O'Clock on 29.07.2007 the applicant called O.P. No.2 and checked up the patient and

told her relatives that it is necessary for the patient to undergo surgery and asked for their consent. The same was immediately given, however, the surgery was not carried out in time. In the meanwhile, condition of the patient kept deteriorating and it is only at about 5.30 P.M. the patient was taken into the operation theatre. After operation, the informant was informed that the foetus has died. When objection was raised by the family members of the patient, and then they were beaten up by the employees of the doctor (applicant) and his associates. The doctor has also taken ₹8700/- for the surgery and asked the informant to deposit another ₹10,000/-. Even no discharge slip was given to the patient. After registration of the FIR, post mortem examination was conducted on the dead body of the child.

4. After registration of FIR, police wrote a letter to the concerned Chief Medical Officer calling for his opinion in the matter. The C.M.O. called upon the applicant to give his version. The applicant herein had immediately given statement on 14.11.2007 to the C.M.O. which reads as follows:-

> *"आज दिनांक 14.11.2007 को मुख्य चिकित्साधिकारी, देवरिया के समक्ष मेरा कथन निम्न हैः-*
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> *1- यह कि मरीज ऊषा पाण्डेय पत्नी बृजेश पाण्डेय ग्राम सरौरा हमारे यहां 30.03.2007 से हमारे Ante-natal care में थी इनका LMP 10-10-06 था। इसके मुताबिक इनके प्रसव की तिथि 17.07.2007 थी। इनका सिजेरियन आपरेशन लगभग 6 वर्ष पूर्व हमारे यहाँ ही हुआ था।*
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> *2- प्रसव की तिथि (RFF) 17.07.2007 की जानबूझकर अवहेलना करते हुए 11 दिन विलम्ब 28.07.2007 को शांय 3 बजे भर्ती हुए। इनकी अल्ट्रासाउण्ड जांच से पता चला कि पानी कम हो गया है और इनको आपरेशन की सलाह दी गयी। लेकिन वे नार्मल डिलेवरी के लिये आग्रह करते रहे।*
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> *3- 28.07.2007 को शायं 6 बजे एवं रात्रि 10 बजे पुनः मरीज को देखा गया और इन्हें फिर आपरेशन की सलाह दी गयी लेकिन अभिभावक नार्मल डिलेवरी के लिये प्रयास करने पे जोर देते रहे।*
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> *4- 29.07.2007 को सुबह 6 बजे मरीज को देखा गया और पाया गया की बच्चे की धड़कन ज्यादा है और उन्हें तुरन्त आपरेशन की सलाह दी गयी, बावजूद इसके अभिभावक आपरेशन के लिए मना कर दिये।*

5- 29.07.2007 को पुनः 12 बजे मरीज को देखा गया तो बच्चे की धड़कन नहीं मिल रही थी तब इनको यह बताया गया कि यदि तुरन्त आपरेशन नहीं कराया गया तो मरीज की जान को खतरा है, फिर भी अभिभावक आपरेशन के लिये तैयार नहीं हुये।

6- 29.07.2007 दोपहर 2 बजे जब मरीज को पसीना आने लगा और टांके में दर्द होने लगा तथा मरीज की स्थिति गम्भीर होने लगी तब इनके अभिभावक आपरेशन के लिये तैयार हुये।

7- मरीज की पूरी तैयारी करने के बाद 29.07.2007 को शायं 4 बजे आपरेशन हुआ और मृत बच्चा पैदा हुआ।

8- मरीज के अभिभावकों द्वारा बार बार सलाह देने के बावजूद आपरेशन की अनुमति नहीं देने के कारण बच्चे की मृत्यु हुई। बच्चे की मृत्यु के लिये उसके अभिभावक स्वयं जिम्मेदार है।

9- यह कि मरीज 05.08.2007 तक इस अस्पताल में भर्ती रही, उस समय मरीज बिल्कुल सामान्य थी और मरीज के अभिभावक उस दिन जबरदस्ती छुट्टी कारकर मरीज को जिला महिला अस्पताल देवरिया ले गये वहां भी मरीज बिल्कुल स्वस्थ पाया गया।

5. After receiving the statement of the applicant, the C.M.O. constituted Medical Board to look into the issue. The Medical Board looked into the case and gave following report on 17.11.2007 :-

"जाँच आख्या

डा० ए०के० राय गायनायकोलाजिस्ट, निदेशक सावित्री नर्सिंग होम देवरिया के विरूद्ध श्रीमती उषा पाण्डेय के उपचार में लापरवाही बरतने से संबंधित श्री बृजेश कुमार पाण्डेय एडवोकेट को शिकायत की जांच दिनाँक 14-11-2007 को 3.00 बजे अपरान्ह में डा० सुश्रुषा श्रीवास्ताव मुख्य चिकित्सा अधीक्षक, जिला महिला चिकित्सालय देवरिया एवं मेरे द्वारा संयुक्त रूप से जाँच हेतु सावित्री नर्सिंग होम देवरिया जाकर जाँच किया गया। डा० ए०के० राय द्वारा श्रीमती उषा पाण्डेय पत्नि श्री बृजेश पाण्डेय ग्राम सरौरा जनपद देवरिया की डिलीवरी से संबंधित अभिलेखों का अवलोकन किया गया तथा उनका बयान लिया गया डा० ए०के० राय द्वारा दिये गये बयान की पुष्टि श्रीमती उषा पाण्डेय को दिये दिये गये उपचार से संबंधित अभिलेखों से की जाती है। डा० ए०के० राय द्वारा श्रीमती उषा पाण्डेय के उपचार में कोई लापरवाही नहीं की गयी है उनके द्वारा मरीज के हित में उपचार दिया गया है। चूंकि डा० ए०के० राय की अर्हता डी०जी०ओ० है अतः उक्त चिकित्सा उपचार हेतु अधिकृत भी है।"

6. Immediately thereafter the C.M.O. sent a letter to the I.G. Police Gorakhpur stating that the applicant is not at fault by giving following report :-

"आपके पत्र दिनाँक 7-11-2007 के संदर्भ में डा० ए०के० राय निदेशक सावित्री नर्सिंग होम देवरिया के विरूद्ध श्री बृजेश पाण्डेय निवासी ग्राम सरौरा जनपद देवरिया की पत्नि श्रीमती उषा पाण्डेय के उपचार में किये गये लापरवाही से संबंधित मेरे एवं मुख्य चिकित्सा अधीक्षक, जिला महिला चिकित्सालय देवरिया द्वारा जाँच किया गया। जाँच आख्या एवं डा० ए०के० राय के बयान की छायाप्रति संलग्न कर भेजते हुये कहना है कि इसमें डा० ए०के० राय का कोई दोष नहीं है। नियमानुसार उपचार दिया गया है।"

7. However, at this point of time there was no mention of the post mortem report which was carried out of the foetus and same was not placed before the Medical Board.

8. On the basis of the report of the Medical Board, final report was submitted by the I.O. on 30.11.2007. Aggrieved by this final report, the complainant filed protest petition on 15.03.2008 in which it is specifically stated that the consent for surgery was given at 11 O'Clock on 29.07.2007. However, surgery was not carried out. It was only at 5.30 P.M. the patient was taken to O.T. Thereafter, husband of patient made to sign on some papers, and soon, thereafter staff of the applicant announced that the foetus as dead. The death was due to the negligence of the doctor and when the same was challenged, the informant and his family members were beaten up by the staff of the applicant. An FIR was lodged on the same day i.e. 29.07.2007 at 22.45 P.M., however, the patient was not discharged. It is when the informant brought it to the notice of Bar Association, Deoria and when they met the Superintendent of Police, then the patient was discharged. The informant was not given discharge summary and only when the pressure was applied, in front of police officers, some fabricated documents were given and no detail case summary was given as the same was deleted from the computer. It was also mentioned in the protest petition as to how the I.O. was changed. It has been specifically stated that death of foetus was because of delay in carrying out the operation. There was cross-case also lodged against the informant and in the FIR applicant himself admitted that around 12 O' Clock the consent for operation was given. In the statement given by Dr. Chandra Shekhar Azad, he has specifically stated that the applicant had called him at 3.30 P.M. and asked

him to come immediately so that the operation may be carried out. This shows that the applicant had not taken steps for conducting operation from 12 O'Clock to 3.30 P.M. though consent was given at around 12 O'clock and the operation was carried out at 5.30 P.M. Its a clear case of medical negligence. It is alleged that the Medical Board had not carried out investigation properly and statement of informant side has not been adduced.

9. In the protest case, after perusing the case diary and evidence on record, the concerned Magistrate came to a conclusion that prima facie case is made out against the applicant as prima facie it appears to be a case of medical negligence because of which, foetus has died. Accordingly, final report was rejected and allowing the protest petition, summons were issued against the applicant. The summoning order as well as the entire proceedings of the aforesaid case has been assailed by the applicant means of the instant application.

ARGUMENT ON BEHALF OF THE APPLICANT

10. Learned Senior Counsel for the applicant submitted that firstly, the applicant was having the requisite medical qualification for the treatment of the patient. He has the degree of M.B.B.S. and D.G.O. (Diploma in Gynaecology and Obstetrics). He submitted that it is not a case where the applicant was not duly qualified and it was not a case where there was any negligence on the part of the applicant. Secondly, as per report submitted by the Medical Board, no such medical negligence has been proved against the applicant in providing treatment to the alleged victim. To buttress his argument, he has placed reliance on the judgment of Hon'ble Supreme Court in the matter of **Jacob Mathew vs. State of Punjab and another**[1]. He further placed reliance on the judgment passed in the matter of **Dr. Suresh Gupta vs. Govt. of N.C.T. of Delhi & Another**[2] wherein the Court has held has follows:-

1 (2005) 6 SCC 1
2 (2004) 6 SCC 422

> *"21. Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as criminal. It can 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 which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. 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.*
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> *22. This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not reasonably extend to criminal liability and expose them to risk of landing themselves in prison for alleged criminal negligence.*
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> *23. For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilty would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence."*

11. He further placed reliance on the judgment passed by this Court in the matter of **Dr. A.K. Gupta and others vs. State of U.P. and others[3], 2018 AHC 173248** wherein it has been held in para 28 to 31 as follows:-

> *"28. The Court surely could not have proceeded with the complaint in case no evidence were led before the Magistrate, looking to the law laid down in Suresh Gupta (supra). The issue of proceeding with a complaint bereft of medical opinion as to professional negligence, and, documents relating to treatment, was considered by their Lordships in Jacob Mathew (supra). It was held:*
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> *"50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he*

3 (2018) 0 Supreme (All) 2304

may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

29. The requirement of a credible opinion, given by another Doctor, to support a charge of rashness or negligence on the part of an accused Doctor, is a louder echo of their Lordships' decision in Suresh Gupta (supra), where it says that criminal prosecution of doctors, without adequate medical opinion pointing to their guilt, would be counter-productive. Thus, in order to maintain a complaint for an offence punishable under Section 304-A IPC against a doctor with regard to his professional acts, the requirement of the law is that it should be supported by adequate medical evidence, prima facie demonstrative of a case of criminal negligence. A private complaint, or even an FIR, based on a non-medico layman's vantage, howsoever categorical or systematic, would not entitle the Magistrate to proceed with the complaint against a doctor for criminal negligence, relating to his professional acts.

30. In a later decision, the Hon'ble Supreme Court in Kusum Sharma and others (supra), summarized the principles to be applied in case of medical negligence, that are expressed in the words of their Lordships, thus:

"89. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:-

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

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.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

90. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind."

31. It must be noticed here, that Kusum Sharma (supra) was a case that arose from proceedings under the Consumer Protection Act, but their Lordships considered the position of law regarding medical negligence, in its widest possible terms, whether involved in a criminal prosecution, a civil action or a consumer complaint. Their Lordships enunciation of the law shows, like the decision, in Jacob Mathew (supra) to be founded on principles propounded in the face of this new world challenge of a changing order. It is also based on a searching review of authority from different jurisdictions across the world, where courts have been confronted with similar claims against doctors and hospital establishments, by dissatisfied patients, sometimes blackmailers. There is no manner of doubt that the decision of their Lordships under reference, though rendered in the context of a consumer dispute, adumbrates principles, that provide ground rules to judge, irrespective of the nature of jurisdiction or proceedings, claims and complaints regarding medical negligence. They also served as an infallible guide for courts, called upon to decide, whether a criminal prosecution initiated, on a complaint, or a police report, is worth permitting to proceed to trial, or requires as is proverbially called, to be nipped in the bud."

12. Relying on the aforesaid ratio learned counsel for the applicant submitted that the prosecution of the applicant is not justified because admittedly, the medical board has given a report in which it was held that it is not a case of medical negligence. He further submitted that the FIR has only been lodged to extort money from the applicant.

ARGUMENT ON BEHALF OF OPPOSITE PARTIES

13. Per contra, Sri S.K. Mishra, learned counsel for O.P. no.2 submits that the applicant in his evidence stated that the patient was admitted in his Nursing Home at 10.30 AM on 28.07.2007 whereas before the Medical Board, the applicant has stated that the patient was admitted at 3.30 P.M. on 28.07.2007. He submits that there is contradiction in two statements of the

applicant. He further submits that the applicant himself has lodged a cross FIR against O.P. no.2 on 30.07.2007 in which time of admission of the patient has been mentioned to be 7.00 P.M and alleged that the surgery was carried out on 29.07.2007, which is a completely different stand from what has been stated before the Medical Board. He submits that the applicant is trying to fill up the lacunas of the case by stating different times of admission. He further submits that at the time of admission it was mentioned by the applicant that the patient was in perfect condition and still asked her family members for carrying out the surgery. He further submits that the post mortem report of the foetus shows that cause of death was due to "Prolonged labour".

14. Sri Mishra further submits that documents produced before the Medical Board were manufactured documents and on the basis thereof, the Medical Board had come up to a conclusion of no negligence on the part of the applicant. He further submits that in fact the O.T. Note, which was prepared by the applicant just before the operation, was also not placed before the Medical Board. Further, he submits that there is another O.T. Note which has been filed along with the supplementary counter affidavit, and there is no rational for having two O.T. notes specially in the fact when there is difference between the two notes. He further submits that the post mortem of the dead child was carried out and in the post mortem report, the cause of death was "due to prolonged labour". There is nothing on record to show that this post mortem report was placed before the Medical Board or the Medical Board had any chance to deal with it. In absence of aforesaid important documentary evidence, the Medical Board could not have come to the conclusion that it is not a case of medical negligence on behalf of the applicant.

15. He submitted that the consent for surgery was given around 11 O'clock on 29.07.2007 and since the applicant did not have any anaesthetist in his nursing home, so the necessary surgery could not be carried out. He submitted

that as per statement of the anaesthetist, it was around 3.30 P.M. the applicant called him and asked him to come as the applicant had to carry out surgery. He next submitted that thereafter the operation was carried out at 5.30 P.M. Further after the call made to the anaesthetist at 3.30 P.M. it took almost 2 hours for carrying out the operation, it is again further case of medical negligence. He contended that apparently there is clear cut delay from 11 O'clock to 3.30 P.M., which amounts to medical negligence and has not been explained by the applicant. He further added that the post mortem record clearly shows that death was due to prolonged labour and had the operation been carried out in time, the child would have been alive. He further submits that the allegation against O.P. no.2 is that, the family members of the patient were pressing for normal delivery and that was the reason for delaying the operation. This averment of the applicant is totally incorrect and has not been substantiated by any evidence. He submits that the first child of the patient was caesarean then how it is possible or why would the family members would press for a normal delivery. Such averment is just a ploy of the applicant to hide his mistake. At last, he submitted that it is clear case of medical negligence.

16. Per contra, Sri S.D. Pandey, learned A.G.A. submits that foetus died only because of the delay in carrying out the surgery in time by the applicant. He submits that there are two O.T. notes and it seems that one of the O.T. note has been manufactured/prepared just for the help of the applicant, which casts serious doubt upon his conduct. He submits that the court below after perusing the case diary and other evidences in detail has rightly come to a conclusion that, prima facie, case of negligence is made out against the applicant and this is the reason why the final report was rejected and summons were rightly issued. At last he submitted that there is no illegality in the summoning order, hence, the instant application should be rejected. He further submitted that in the instant case there are lot of material

contradictions in the evidences, which can only be adjudicated upon after adducing the evidence. He further submitted that it is not a case where no prima facie case is made out, hence, this Court should not use inherent power conferred under section 482 Cr.P.C. He further submitted that this is not a case which falls under the guidelines laid down by Hon'ble Supreme Court in the matter of **State of Haryana and others Vs. Bhajan Lal and others**[4].

REJOINDER ON BEHALF OF THE APPLICANT

17. In rejoinder, Sri Chaturvedi, learned Senior Counsel submits that as per report of the Medical Board there was nothing on the record to show that there was any medical negligence on the part of the applicant. Hence, the issue of medical negligence is hyper technical issue. He next submitted that the Medical Board has clearly found that it is not a case of medical negligence, hence the summons issued against the applicant is illegal and liable to be set aside, as the same has been issued by overreaching the report of the Medical Board.

FINDINGS

18. Heard learned counsel for the parties and perused the record.

19. Evidently, an FIR was lodged on 29.07.2007 by brother-in-law of the patient (O.P. no.2) wherein patient, who was in advance stage of pregnancy, was admitted in the nursing home owned/runned by the applicant on 28.07.2007 at 10.30 A.M. The applicant, who is a doctor having M.B.B.S. and D.G.O. degree, attended the patient and suggested for caesarean. For that, consent by the brother of informant/husband of the patient was obtained but since there was no anaesthetist present, the operation could not be carried out. It is only about later in the afternoon when the anaesthetist came and operation was carried out on 29.07.2007 at 5.30 P.M.. The foetus was found dead. After registration of the FIR, the I.O. has referred the matter to the C.M.O. for his opinion, who had constituted a Medical Board. However, it is

4 1992 Supp (1) SCC 335

evident that no opportunity was given to the informant/O.P. no.2 or the patient by the Medical Board and it is only the applicant, who had appeared before the Medical Board and given his statement wherein he has stated that he (applicant/doctor) has checked the patient at about 6.00 P.M. and again at 10.00 P.M. on 28.07.2007 and suggested for operation. The patient was again checked at 6.00 A.M. on the next morning and it was found that the heartbeat of the foetus was high and suggested for surgery. He further stated that at about 12 O'clock the patient was re-examined and it was found that heartbeat of the foetus was missing and suggest for immediate surgery. He also told the patient that in case operation is not carried out that would become fatal. Then the attendant of the patient agreed for the surgery. According to him, surgery was carried out at 4.00 P.M. on 29.07.2007. The reason for the death, as stated by the applicant, is because the family members of the patient did not agree for surgery at the right time.

20. The aforesaid statement of the doctor is contrary to the FIR wherein the timings are quite different and do not match with the other evidences.

21. The allegation of the informant is that the doctor had taken consent for operation at about 12 O' clock but surgery could not be carried out as the nursing home did not have the anaesthetist . It is only after the arrival of the anaesthetist that the patient was operated.

22. A bare perusal of the post mortem report of the foetus, which has been annexed along with the supplementary counter affidavit, shows that cause of death was "Prolonged Labour". However, there is nothing on record to show that the post mortem report was placed before the Medical Board and even the report of the Medical Board does not talk anything about the post mortem report.

23. Further, counsel for O.P. no.2 brought it to the notice of the Court that there are two O.T. Notes. However, the second O.T. note seems to be

manufactured and created to fill in lacunas, for the help of the applicant. There was no reason for any doctor to prepare two O.T. notes.

24. It has been argued that the patient and her family members have already moved for compensation before the Consumer Court in the year 2009 and same is still pending, hence, there is no reasons for pursuing the criminal case against the applicant. In fact, Hon'ble Supreme Court in the matter of **V. Kishan Rao vs. Nikhil Super Speciality Hospital** in **Civil Appeal no.2641 of 2010 arising out of SLP (C) No. 15084/2009** has held as follows:-

> *"It is clear from the statement of objects and reasons of the Act that it is to provide a forum for speedy and simple redressal of consumer disputes. Such avowed legislative purpose cannot be either defeated or diluted by superimposing a requirement of having expert evidence in all cases of medical negligence regardless of factual requirement of the case. It will be substantially curtailed and in many cases the remedy will become illusory to the common man."*

Surprisingly, the consumer complaint lodged by the victim's family has still not been deliberated upon and has been lying for the last 16 years in the Consumer Court. Since, the said proceeding is not under challenge in this application, I refrain from making any comments on the same.

25. As far as medical negligence is concerned, the first notable judgment in the field of medical negligence is in the matter of **Bolam Vs. Friern Hospital Management Committee, (1957) I WLR 582 : (1957) 2 All ER 118** wherein Lord Justice McNair observed as under :-

> *"(i) a doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view.*
>
> *The direction that, where there are two different schools of medical practice, both having recognition among practitioners, it is not negligent for a practitioner to follow one in preference to the other accords also with American law; See 70 Corpus Juris Secondum (1951) 952, 953, para 44. Moreover, it seems that by American law a failure to warn the patient of dangers of treatment is not, of itself, negligence ibid. 971, para 48.*
>
> *Lord Justice McNair also observed : Before I turn that I must explain what in law we mean by "negligence". In the ordinary case, which does not involve any special skill, negligence in law means this : some failure to so some act which a reasonable man in the circumstances would do, or*

> *doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case, it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of Claphm omnibus, because he has not got this man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if her exercises the ordinary skill of an ordinary competent man exercising that particular art."*

26. Later, a three-Judges' Bench of Hon'ble Supreme Court in the matter of **Bhalchandra alias Bapu and another vs. State of Maharashtra**[5], has carved out a distinction between Negligence and Criminal Negligence, the Court held that while Negligence is breach of duty caused by omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do. However, criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual.

27. In the matter of **Poonam Verma v. Ashwing Patel and others**[6] where the question of medical negligence was considered in the context of treatment of a patient, Hon'ble Supreme Court has observed as follows:-

> *"40. Negligence has many manifestations-it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or Negligence per se."*

28. The ratio laid down by Hon'ble Supreme Court in the matter of **Dr. Suresh Gupta vs. Govt. of N.C.T. of Delhi and another (supra)** it has been held that for fixing criminal liability on a doctor, the standard negligence

5 AIR 1968 SC 1319

6 (1996) 4 SCC 332

required to be proved should be high and can only be proceeded if it is a case of gross negligence or recklessness. No criminal prosecution should be carried out against the doctor without adequate medical opinion.

29. The guidelines laid down in this case subsequently came to be known as Bolam's test, wherein it has been specifically stated that medical negligence would mean, some failure to do some act which a reasonable mean in the circumstances would do and in failure to do the act resulted into injury, then it is a case of medical negligence.

30. The issue of medical negligence has been dealt with by Hon'ble Supreme Court in the matter of **Jacob Mathew vs. State of Punjab and another, (2005) 6 SCC 1,** which has been relied upon by learned counsel for the applicant, wherein the Court has held as follows:-

> *"50. Before we embark upon summing up our conclusions on the several issues of law which we have dealt with hereinabove, we are inclined to quote some of the conclusions arrived at by the learned authors of "Errors, Medicine and the Law" (pp. 241-248), (recorded at the end of the book in the chapter titled 'Conclusion') highlighting the link between moral fault, blame and justice in reference to medical profession and negligence. These are of significance and relevant to the issues before us. Hence we quote :-*
>
> *(i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity in principle from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasized may become paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable. (ibid, pp. 242-243)*
>
> *(ii) Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a*

tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable. (ibid, p. 245).

(iii) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake : the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. (ibid, p.246). A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. (ibid, p.247). While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks. (ibid, p. 247).

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness. (ibid, p.248).

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society. (ibid, p. 248).

Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society.

Conclusions summed up

51. We sum up our conclusions as under :

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary

skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

31. On the hind side it is also common phenomenon that whenever there is death, then nowadays there is marked tendency of the family members of the deceased to look for human factor to blame for the untoward event as they find doctors as a “sitting duck” to be targeted. In such condition, there has to be protection for the medical professionals. Unless and until protection is granted, the hands of a surgeon is going to shiver and he might not conduct the surgery out of fear of prosecution, if there is no protection.

32. However, this protection has to be balanced as per the ratio laid down in several judgments, this protection can only be applied if the medical professional has carried out its duty skilfully, as any other doctor would have done in the given circumstances.

33. A criminal liability occurs, if ordinary care is not taken by a doctor while treating the patient. In case of criminal liability, the ingredients of mens rea have to be seen. The true rest for establishing criminal negligence is to see whether the doctor was guilty of not acting with ordinary care.

34. The instant matter is not a case where the applicant does not possess the requisite qualification. However, the instant matter hinges on the second aspect as to whether the applicant had exercised reasonable care in providing medical service in time, or he had acted carelessly. In this matter, though consent was taken around 12 O'Clock but the operation was conducted at 5.30 P.M. Delay in conducting the surgery was non availability of the anaesthetist, which resulted in death of the child.

35. Hon'ble Supreme Court in the matter of **Kusum Sharma and others vs. Batra Hospital & Medical Research Centre and others**[7] has held that in the case of medical negligence mens rea has to be seen as well as on the element of criminality, it has to be seen whether the accused has done the act with recklessness or by indifference.

36. In the case in hand, there was clear distinction between simple lack of care incurring civil liability and very high degree of negligence, which incurred criminal liability. As far as prosecution of the applicant in instant criminal case is concerned, there is difference between civil liability and criminal liability. It cannot be said that if action has been taken in civil liability, no criminal liability rises.

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7 (2010) SCR (2) 685

37. This is a case of pure misadventure where the doctor has admitted the patient and after taking go ahead for operation from the patient's family members, did not perform the operation in time as he was not having the requisite doctor (i.e. anaesthetist) to perform the surgery. In fact, as per the statement of the anaesthetist he got a call at 3.30 P.M. This delay (medical negligence) can only be attributed to the applicant.

38. In this case there is a contradiction of time of admission, time of consent and time of operation. And there have been two O.T. notes and a post mortem report. All the documents were not produced before the Medical Board and hence, opinion of the Medical Board would have no credence in this matter. This is a case where prima facie offence is made out against the applicant and there is no justification to invoke inherent powers for any interference in the impugned proceedings.

39. It is common practice these days that private nursing homes/hospitals tend to entice the patients for treatment even though they do not have the doctors or infrastructure. When the patient is admitted in a private hospital they start calling for the doctor to treat the patient. It is common knowledge that the private hospitals/nursing homes have started treating the patients as guinea pig/ATM machines only to extort money out of them.

40. No doubt, yes the medical practitioner had to be saved from the clutches of medical negligence otherwise that would cause trembling and dangling fear among doctors of commencing criminal prosecution of any failure in any operation/surgery. This is the fact that any medical professional, who carries out his profession with due diligence and caution, has to be protected but certainly not those doctors who have opened nursing home without proper facilities, doctors and infrastructure and enticing the patients just to extract money out of them.

41. The instant case is a classic case where consent of the family members of the patient was taken around 12 O'clock and thereafter the doctor

suggested for operation but operation was not carried out till 4/5 P.M. and further no reason was given by the doctor for delay of 4-5 hours. The post mortem report shows that the foetus died because of the prolonged labour. This clearly shows malafide intention of the doctor/applicant in cheating the patient.

42. The time of admission of the patient and the time of surgery and time of taking the consent from the family member of the patient are three crucial aspects in this case which has to be seen upon after adducing evidences. If the consent of the family members was given at around 12 O' Clock why the operation was carried out at 4/5 P.M. There is no rationale for delay on the part of the doctor/nursing home/hospital. Such negligence can only be attributed to the doctor/applicant.

CONCLUSION

43. From the perusal of material on record and looking into the facts of the case at this stage it cannot be said that prima facie no offence is made out against the applicants. The cognizance order dated 15.09.2008 has been issued after perusing the material collected during investigation of the case. The arguments raised by learned counsel for the applicants are all disputed question of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court.

44. Hon'ble Supreme Court in the matters of **State of Haryana Vs. Bhajan Lal 1992 Supp (1) SCC 335, M/s Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra, AIR 2021 SC 1918, R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192**, and lastly, **Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283** has held that only those cases in which no prima facie case is made out can be considered in an application under Section 482 Cr.P.C.

45. The instant application does not fall under the guidelines laid down by the Hon'ble Supreme Court in the judgments mentioned above, and followed in a number of matters. Moreover, the facts as alleged cannot be said that, prima facie, no offence is made out against the applicants. It is only after the evidence and trial, it can be seen as to whether the offence, as alleged, has been committed or not.

46. However, it is open for the applicants to take all its defence in the trial.

47. The instant application is devoid of merits and is, accordingly, **dismissed.**

48. However, it is made clear that the observation made in this judgment would not come in the way of the trial and the trial would proceed independently without taking findings of this Court into consideration.

Order date : 24.07.2025
Manish Himwan