

Court No. - 88

Case :- APPLICATION U/S 482 No. - 12089 of 2016

Applicant :- Dr. Kavita Agarwal And Another

Opposite Party :- The State Of U.P. And Another

Counsel for Applicant :- Kartikeya Saran

Counsel for Opposite Party :- G.A.,Shyam Sunder Mishra

Hon'ble Sanjay Kumar Singh,J.

1-Heard learned counsel for the applicants, learned Additional Government Advocate for the State of U.P./opposite party no.1 and learned counsel for complainant/opposite party no.2.

2-This application under Section 482 Cr.P.C. has been filed by the applicants with a prayer to quash the summoning order dated 20.03.2015 (Annexure 7 to this application) issued against applicant no.1 under Section 420 I.P.C. as well as proceedings of Complaint Case No. 1721 of 2013, under Sections 409, 420, 467, 468, 471, 120-B I.P.C. read with Section 357 Cr.P.C., pending in the Court of Metropolitan Magistrate, Court No. 10, Kanpur Nagar.

3-Brief facts of the case which are required to be stated are that in the month of July, 2013, opposite party no. 2 filed a complaint against the applicants and staff of 'Guru Kripa Jagrati Hospital and Research Centre Private Limited' for the alleged offence under Sections 409, 420, 467, 468, 471, 120-B I.P.C. read with Section 375 Cr.P.C. in the Court of 10th Metropolitan Magistrate, Kanpur Nagar alleging inter-alia that his wife-Smt. Aparna, was suffering from Ectopic Pregnancy.

She was admitted in Nazareth Hospital Allahabad and her right fallopian tube was excised by Dr. Urmi on 25.05.2012. Again she faced same problem of Ectopic Pregnancy, then she was again admitted in Nazareth Hospital Allahabad on 04.10.2012 and her second fallopian tube was also excised by Dr. Ashok Agrawal. There being no option left and on being advised by her kith and kin to try I.V.F. treatment, the complainant contacted several I.V.F. Centres. He came to know about the applicant no.1 (Dr. Kavita Agrawal) and applicant no. 2 (Guru Kripa Jagrati Hospital and Research Centre Private Limited, Allahabad). He contacted them and discussed his case on telephone with applicant no. 1 and showed his extreme willingness for I.V.F. treatment to get a child. He was told that I.V.F. treatment is conducted in the said hospital by Dr. Jaydeep Mehrotra whose success rate is 100%. When he asked about expenses for said treatment, he was told that total package will cost about Rs. 100,000/-. The applicant started investigation of his wife and again called in April 2013. He deposited Rs. 10,000/- as advance registration fee on 10.04.2013. I.V.F. treatment of his wife started on 29.04.2013 and further 13.05.2013 was the date fixed for E.T. (Embryo Transfer) by Dr. Jaydeep Mehrotra, but Embryo Transfer was done by other Doctor. Thereafter he along with his wife were called on 27.05.2013 for the confirmation of pregnancy, which was done on the said I.V.F. centre in which the confirmation of pregnancy test was negative, even after that an injection 'Gonal-F1050' which cost Rs. 19,048/- was given to his wife and on 12.05.2013 also it was given to his wife. It has also mentioned that said

injection was given to the patient for the growth of follicles. Report of pregnancy confirmation test was given to him on 28.05.2013. It is further alleged that E.T. was done in wrong cycle. On different dates, he had given Rs. 1,65,000/- against the I.V.F. treatment package of Rs.100,000/- (rupees one lakh only) but he was provided the bill of Rs. 82,500/-, excluding the bills dated 12.05.2013 and 27.05.2013 of 'Gonal-F1050' injections costing Rs. 38096/-, expenses of pathological investigation. On putting query about this, no satisfactory reply had given by the applicants and excess amount taken has not been returned to him.

4-The aforesaid complaint was registered as Complaint No. 1721 of 2013 and learned Magistrate after recording the statement under Section 200 of the complainant and statements under Section 202 Cr.P.C. of Smt. Aparna Devi and Mahendra Shukla, summoned applicant no.1 under Section 420 I.P.C. to face trial vide order dated 20.03.2015, which is the subject matter of challenge in the present application.

5-It is submitted by learned counsel for the applicants that applicant no.1 is resident of District-Allahabad and is registered practicing Gynaecologist in Allahabad. She is associated with the 'Guru Kripa Jagrati Hospital and Research Centre Pvt. Ltd.', which is also a registered Hospital and Research Centre at Allahabad. Much emphasis has been given by contending that applicants had never guaranteed 100% success of I.V.F. and in this regard it is pointed out that in the treatment card filed by the complainant himself, it is mentioned that the success rate of the I.V.F. (Test Tube

Baby) is 20-40% only. The complainant had deposited total Rs. 1,25,000/- (advance amount Rs. 10,000/- on 10.04.2013 and Rs. 1,15,000/- through various cheques between April 2013 and May 2013). The applicant had given the bill of entire treatment excluding that of injections and medicines on 12.05.2013 amounting to Rs. 82,500/- and a bill of Rs. 21,010/- and 20,000/- issued by the Medicine House was also given by the Hospital for the injections given during treatment to the wife of the complainant. The said injection was not available at that time in Allahabad, therefore the dealer at Agra provided the same at whole-sale price to the applicant. So far as allegation of the complainant that charge of an injection 'Gonal-F1050' was also taken, but the same was not injected to his wife is concerned, it is argued that the same was injected to the complainant's wife during the period 29.04.2013 to 08.05.2013, which is also mentioned as Re Combinant FSH in the treatment chart submitted by the complainant, which is the same Gonal-F injection. Entire process of I.V.F. was completed in May 2013, but result was in negative. Since wife of the complainant could not conceive the Test Tube Baby despite providing proper and best treatment to her, therefore, the complaint has been filed by the complainant with malicious intentions with ulterior motive making false and concocted allegations in order to extract money from the applicant.

6- Lastly relying upon the judgments of the Hon'ble Apex Court in the case of **State of Harayana and others vs Chaudhary Bhajan Lal and others** 1992 SCC (Cri) 426 and **Pepsi Foods Ltd. v. Special Judicial Magistrate,**

(1998) 5 SCC 749, it is submitted that the criminal proceeding against the applicant is nothing but malicious prosecution, therefore same is liable to be quashed.

7-On the other hand, learned A.G.A. for the State as well as learned counsel for opposite party no. 2 reiterating the prosecution case as mentioned in the complainant submit that from the allegations levelled by opposite party no.2 against the applicants, prima facie offence under Section 420 I.P.C. is made out against the applicant no. 1, therefore, the application is liable to be dismissed.

8-Before delving into the matter, here it would be apposite to mention that "In vitro fertilisation" is commonly known as IVF, is a procedure used to help women get pregnant. In IVF, a human egg is fertilised with sperm in a laboratory then implanted into a uterus. If the fertilised egg (embryo) successfully implants in the uterus, this will result in pregnancy. IVF is a highly complicated procedure with a series of steps with a few different medications, to help with fertility and the conception of a child. IVF requires a doctor to retrieve mature eggs from the ovaries of a woman during a minor procedure while she is under intravenous sedation. Those eggs are fertilized by sperm in a laboratory. The fertilized embryo is then transferred to the uterus.

9-As per medical literatures, there are basically following five steps within IVF:

- i. The woman's eggs are stimulated to grow and mature by daily injectable fertility drugs.

- ii. The eggs are removed in a minor surgical procedure called a follicular aspiration.
- iii. Sperm will be collected from your donor or partner.
- iv. Insemination of the eggs by sperm occurs in the laboratory.
- v. About three to five days after fertilization, the embryos are placed into the uterus while extra unused embryos are frozen for subsequent transfer.

10-So far as factors which impact the success of IVF is concerned, it depends upon the quantity and quality of the eggs/embryo, the quantity and quality of sperm, the stimulation protocols and the timing of ovulation, etc.

11- Since the applicant has been summoned for the offence under Section 420 I.P.C., therefore it is also relevant to discuss the essential requisites of the offence of cheating, which are as under:-

- i. Deception of any person,
- ii. (a) fraudulently or dishonestly inducing that person-
 - (i) to deliver any property to any person, or
 - (ii) to consent that any person should retain any property,or
 - (b) intentionally inducing that person to do or omit to do anything which that person would not do or omit to do but for the deception and which act or omission causes damage or harm to that person in body, mind or property.

12-Having heard the submissions of learned counsel for the parties and perusing the record in its entirety I find that complainant/opposite party no. 2 is resident of District-Kanpur Nagar and the applicant is resident of district Allahabad, but complaint has been filed in District-Kanpur Nagar. Record indicates that the inquiry under Section 202(1) Cr.P.C. was also done, but in the impugned summoning order dated 20.03.2015 passed against applicant, there is no reference that what report was submitted by the concerned police station in the matter. It is not the case of complainant that despite receiving the treatment fee, treatment of his wife-Aparna Devi was not done. It is also admitted fact that wife of the complainant suffered Ectopic Pregnancy twice and her both fallopian tubes have already been excised. An ectopic pregnancy occurs when fetal tissue implants outside the uterus or attaches to an abnormal or scarred portion of the uterus. Ectopic pregnancies carry high rates of morbidity and mortality if not identified and treated promptly. It is also admitted fact that after Ectopic pregnancy as noted above, complainant's wife had no option, therefore complainant himself contacted the staff of the hospital for IVF treatment of his wife. I find that as per the case of the complainant he has paid Rs. 1,65,000/- for IVF treatment against the package cost of Rs. 100,000/- (rupees one lakh) whereas case of applicant is that complainant has paid Rs.1,25,000/- through various cheques between April 2013 and May 2013, which is corroborated from the record also. From the contents of paragraph no. 5 of the complaint, I also find that

regarding the expenses of IVF treatment, it is the case of the complainant that he was told that the package will cost about Rs. 1,00,000/- (rupees one lac only). The word 'about' is very significant, which itself indicates that there may be variation from either side. So far as stand of the complainant that he had given Rs. 40,000/- in cash is concerned, there is no proof of the same on record. There is nothing on record to prima-facie establish that complainant was given assurance by the applicant no.1 that E.T. (Embryo Transfer) will be done by Dr. Jaydeep Mehrotra. The allegation of the complainant that E.T. was done in wrong cycle is also not sustainable because the same is a bald allegation. No objection was raised in this regard at that relevant point of time. Unless the complainant is able to establish before this Court any specific course of conduct suggesting a lack of due medical attention and care, it would not be possible for the Court to guess the line of medical treatment of the registered professional/practising Doctor. Non-success of IVF even after medical treatment which was given to the spouse of the complainant, does not necessarily amount to medical negligence on a hypothetical assumption of lack of due medical care. There is no evidence of medical negligence on the part of the applicant on record. A medical practitioner faced with an emergency ordinarily tries his/her best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act.

13-It is well settled by the Apex Court that the criminal law has invariably placed the medical professionals on a pedestal

different from ordinary mortals. A doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he/she has knowledge of that branch of science and if he/she does not, in fact, possess that knowledge, he/she is prima facie acting with rashness or negligence. To prosecute a medical professional for negligence under criminal law, it must be shown that the accused/Doctor 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.

14-It is not in dispute that the applicant has reasonable degree of skill and knowledge and exercised a reasonable degree of care in the treatment of spouse of the complainant. The Doctor, no doubt has a discretion in choosing the treatment which he/she proposes to give to the patient and such discretion is relatively ampler in cases of emergency.

15-This Court is of the view that no sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the Doctor is at stake, because a single failure may cost them dear in his/her career. Simply because a patient has not favourably responded to a treatment given by a qualified Doctor, a rare treatment has failed, the doctor cannot be held liable for the same.

16-In the above background, this Court also feels it appropriate to refer some Judgments of the Apex Court wherein the Hon'ble Apex Court after wholesome treatment has laid down the criteria for quashing of criminal proceeding, which are as under:-

16.1 The Hon'ble Apex Court in the case of **Pepsi Foods Ltd. v. Special Judicial Magistrate, (1998) 5 SCC 749** has held that:-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

- 16.2-The Apex Court in the case of **Madhavrao Jiwajirao Scindia and others vs. Sambhajirao Chandrojirao Angre and others (1988) 1 SCC 692** has observed as under :-

Para 7 *"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to*

consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

- 16.3-The Apex Court in **State of Harayana and others vs Chaudhary Bhajan Lal and others 1992 SCC (Cri) 426**, considering a series of decisions has laid down seven criterias for quashing the entire proceedings in exercise of powers under Section 482 Cr.P.C. by this Court, which reads as under:-

"(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

(b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

- 16.4-The Apex Court in case of **Dilawar Babu Kurane Vs. State of Maharashtra 2002 (2) SCC 135**, has observed that:-

“In exercise of jurisdiction under Section of Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but could not make a roving enquiry into the pros and cons of the matter and weigh the evidence, as if he was conducting a trial.”

- 16.5-The Apex Court in the case of **Som Mittal vs Government of Karnataka, 2008 (3) SCC 753**, has held that :-

“When grave miscarriage of justice would be committed if the trial is allowed to proceed; or where the accused would be harassed unnecessarily if the trial is allowed; or when prima facie it appears to Court that the trial would likely to be ended in acquittal. Then the inherent power of the Court

under section 482 of the Code of Criminal Procedure can be invoked by the High Court either to prevent abuse of process of any Court, or otherwise To secure the ends of justice."

- 16.6-The Apex Court in the case of **Ravinder Singh Vs. Sukhbir Singh & Ors, 2013 (9) SCC 245**, has held as under:-

"It may be so necessary to curb the menace of criminal prosecution as an instrument of operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any person needlessly. Ex debito justitiae is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the courts exist. Thus, it becomes the paramount duty of the court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint."

Conclusion:-

17. As a fallout of the aforesaid discussion, this Court is of the view that criminal proceedings against the applicant by opposite party No. 2 is nothing but a clear abuse of process of Court. Impugned summoning order dated 20.03.2015 is also not sustainable, as the basic ingredients to constitute the alleged offence under Section 420 I.P.C. are lacking in this case against applicant no.1, hence no offence is made out against her. This Court under the facts and circumstances of this case, feels that it is the solemn duty of the Court to protect apparently an innocent person, not to be subjected to such frivolous prosecution on the basis of wholly untenable allegations and complaint, if criminal proceeding is allowed to go on, the same will tantamount to causing grave miscarriage of justice, therefore in order to

secure the ends of justice, the impugned criminal proceeding against the applicant is liable to be quashed.

18-Accordingly impugned summoning order dated 20.03.2015 and above criminal proceedings of Complaint Case No. 1721 of 2013 against the applicants, pending in the Court of Metropolitan Magistrate, Court No. 10, Kanpur Nagar are hereby quashed.

19-This application under Section 482 Cr.P.C. stands ***allowed.***

Order Date:-01.11.2023
Kashifa