

Court No. - 40

Case :- WRIT - C No. - 26458 of 2023

Petitioner :- Chinta Mani Yadav

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Chinta Mani

Counsel for Respondent :- C.S.C,Alok Kumar Rai

Hon'ble Mahesh Chandra Tripathi,J.

Hon'ble Prashant Kumar,J.

1. Heard Sri Chinta Mani (petitioner) in person; Sri Ambrish Shukla, learned Additional Chief Standing Counsel for the State respondent nos.1 to 4 and Sri Alok Kumar Rai, learned counsel for private respondent no.5.

2. Present writ petition is preferred seeking following reliefs:-

"i) issue a writ, order or direction in the nature of certiorari quashing the inquiry report dated 15.05.2023 submitted by the Inquiry Officer to the respondent no.4.

ii) issue a writ, order or direction in the nature of mandamus commanding the respondent no.1 to conclude the investigating directing the higher investigating agency i.e. Criminal Investigation Department (C.ID.)/Special Investigation Team (S.I.T.) to investigate the matter in respect of death of new born baby at the hospital of respondent no.5 dated 02.09.2022 at 09.45 p.m. within stipulated period."

3. The petitioner appearing in person submits that the sister of the petitioner namely Kaushilya was initially admitted in "Navyug Medical Hospital, Basti" due to labour pain. A cesarean operation was done by Dr. Shashi Srivastava on 31.08.2022 at about 9 a.m. and after the operation, a male child was born. Later on, as medical facility was not available at the said hospital, the baby was subsequently admitted in NICU at Baby Doll Hospital, Basti on the same day i.e. 31.08.2022. Unfortunately, the new born baby died on 02.09.2022. The petitioner moved a complaint before the District Magistrate, Basti (respondent no.2) alleging that due to negligence of respondent no.5, the petitioner's sister has lost the new born baby. On the said complaint, the Chief Medical Officer (CMO) Basti (respondent no.4) vide order dated 17.09.2022 constituted an Enquiry Committee for conducting an enquiry in the matter and submitting its report. When nothing has been done by the Enquiry Committee then the petitioner had preferred Writ C No.10226 of 2023 (Chinta Mani Yadav vs. State of UP and others), which was disposed of by the Division Bench vide order dated 27.4.2023 directing the respondent no.4 to conclude the inquiry, if

not concluded so far within three weeks and submit report to the District Magistrate for appropriate action. Thereafter, the Enquiry Committee submitted the impugned report to the respondent no.4 on 15.05.2023, giving rise to the present writ petition.

4. On the other hand, Sri Ambrish Shukla, learned Additional Chief Standing Counsel has vehemently opposed the writ petition and submitted that the constitution of the Enquiry Committee cannot be challenged at this stage. The petitioner moved a complaint to various authorities including the District Magistrate, Basti, Chief Medical Officer, Basti and the Superintendent of Police, Basti and on his application, the District Magistrate, Basti passed an order on 10.9.2022 forwarding the complaint of the petitioner to the Chief Medical Officer, Basti for necessary action. Later on, the CMO had constituted a Committee of four Officers namely, Sri Shailesh Dubey, SDM, Sadar, Basti; Vinod Kumar, Deputy District Immunization Officer, Basti, Dr. S.B. Singh, Deputy Chief Medical Officer, Second, Basti and the Circle Officer, Sadar, Basti. While pressing the earlier writ petition, the petitioner had pressed that as the Enquiry Committee had already been constituted but till date, it had not finalised the proceeding. Much insistence was made for conclusion of the enquiry and accordingly, the Division Bench vide order dated 27.4.2023 had disposed of the said writ petition with direction to the respondents to conclude the enquiry, if not concluded so far, within three weeks. Once the petitioner himself had insisted upon and pressed the relief before the Division Bench for conclusion of the enquiry then after finalisation of the enquiry report it cannot be pressed at this stage in the second round of litigation that the constitution of the Enquiry Committee was invalid. On the direction of the Division Bench detailed enquiry was concluded by the Four-Members Committee, which had opined that there was no medical negligence. In support of his submission, he has placed reliance on the judgement passed by the Apex Court in **Jacob Mathew vs. State of Punjab and Anr.**(2005) 6 SCC 1, wherein the Apex Court has opined that simple negligence may result only in civil liability, but gross negligence or recklessness may result in criminal liability as well. Detailed parameters have also been given in para-52 of the judgement. No other ground has been pressed by the petitioner. The writ petition is devoid of merit and is liable to be dismissed.

5. Sri Alok Kumar Rai, learned counsel for the respondent no.5 namely Dr. N.K. Srivastava has also vehemently opposed the writ petition and submitted that the respondent no.5 is an honest and

upright doctor and till date, no complaint whatsoever has ever been made against him. The medical care was provided with utmost dedication and sincerity and at this stage, the entire claim has been set up just to tarnish his image and extract certain amount from the respondent no.5. In case the writ petition is entertained, the respondent no.5 would suffer irreparable loss and injury.

6. Heard rival submissions and perused the record.

7. Before proceeding further in the matter, it would be appropriate to reproduce the order passed by the Division Bench while entertaining Writ C No.10226 of 2023, as under:-

"On 17.04.2023, this court granted ten days' time to the respondent nos. 2 & 4 i.e. the District Magistrate, Basti and Chief Medical Officer, Basti, to give instructions.

Today, learned Additional Chief Standing Counsel states that despite letter being sent to the respondents informing the order of this Court dated 17.04.2023, no instructions has been received.

According to the petitioner his nephew (sister's son) was born in Baby Doll Hospital, Malviya Road, District - Basti, where he died on 02.09.2022. According to the petitioner there was signs of the injuries on the body of the deceased newly born baby, which according to him, also stands affirmed by a postmortem report. The petitioner made complaints before various authorities including District Magistrate, Basti, Chief Medical Officer, Basti and the Superintendent of Police, Basti. On his application the District Magistrate, Basti passed an order dated 10.9.2022 forwarding the complaint of the petitioner to the Chief Medical Officer, Basti for necessary action. As per letter of Chief Medical Officer, Basti dated 17.09.2022 filed as Annexure 3 to the writ petition, a Committee of four Officers, namely, Sri Shailesh Dubey, SDM, Sadar, Basti; Vinod Kumar, Deputy District Immunization Officer, Basti, Dr. S.B. Singh, Deputy Chief Medical Officer, Second, Basti and Circle Officer, Sadar, Basti, was constituted to inquire and submit report within ten days.

According to the petitioner the aforesaid letter of the Chief Medical Officer, Basti, was followed by another reminder letter dated 21.01.2023 addressed to the Inquiry Committee to conclude inquiry and submit report. According to the petitioner the aforesaid Committee has not submitted report. Consequently, the petitioner submitted another application before the District Magistrate, Basti, by registered post on 21.02.2023 requesting him to provide copy of inquiry report. Since nothing has been done, therefore, the petitioner has filed the present writ petition praying for a direction to the respondent no.4 i.e. Chief Medical Officer, Basti, to submit inquiry report of the Inquiry Committee constituted by him within a stipulated period.

Learned Additional Chief Standing Counsel submits that the Chief Medical Officer, Basti shall conclude inquiry, if not concluded so far and submit a report to the District Magistrate, Basti, as directed, within three weeks.

In view of the aforesaid, we direct the respondent no.4 to conclude the inquiry, if not concluded so far; within three weeks from the date of submission of a certified copy of this order, impartially and without being influenced by any of the observations made in the body of this order and submit a report to the Competent Authority/District Magistrate, Basti, for appropriate action, if any, in accordance with law.

With the aforesaid directions, the writ petition is disposed of. Copy of the report shall also be given to the petitioner by the respondent no.4."

8. From a bare perusal of the aforesaid order it transpires that

while pressing the relief before the writ Court, the constitution of the Enquiry Committee was not challenged and only at the insistence of the petitioner, the order was passed on 27.4.2023, whereby the Division Bench had directed the respondents to conclude the enquiry, if not concluded so far, within three weeks. In compliance thereof, the said enquiry committee comprising of two doctors, one administrative officer and one police officer, submitted its report, holding that there was no negligence. At this stage, the constitution of the Enquiry Committee cannot be challenged as the Division Bench has mandated the said Enquiry Committee to finalize the enquiry as per law. Therefore, the objection to the constitution of the Enquiry Committee cannot sustain and said objection stands rejected.

9. So far as medical negligence is concerned, said aspect of the matter has been considered by the three Judge Bench of Hon'ble Supreme Court in **Jacob Mathew vs. State of Punjab and Anr.** (supra), wherein it has been stated that simple negligence may result only in civil liability, but gross negligence or recklessness may result in criminal liability as well. Relevant portion of the judgement is reproduced hereinafter:-

"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.

52. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report).

Guidelines re: prosecuting medical professionals

53. 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 304A 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 may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

54. 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.

55. 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.

Case at hand

Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused appellant. It is not the case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be we express no opinion thereon) but the accused appellant cannot be proceeded against under Section 304A IPC on the parameters of Bolam's test."

10. This was laid down in the judgment of Justice **McNair in Bolam vs. Friern Hospital Management Committee** (1957) 1 WLR 582 as follows :

"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill..... It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

11. In the case of **Indian Medical Association vs. Santha** reported in (1995) 6 SCC 651, the Apex Court has decided that the skill of a medical practitioner differs from doctor to doctor and it is incumbent upon the complainant to prove that a doctor was negligent in the line of treatment that resulted in the life of the patient. Therefore, a Judge can find a doctor guilty only when it is proved that he has fallen short of the standard of reasonable medical care. The principle of res-ipsa-loquitur has not been generally followed by the Consumer Courts in India including the National Commission or even by the Apex Court in deciding the

case under this Act. In catena of decisions, it has been held that it is for the complainant to prove the negligence or deficiency in service by adducing expert evidence or opinion and this fact is to be proved beyond all reasonable doubts. Mere allegation of negligence will be of no help to the complainant.

12. In medical negligence cases, it is for the patient/complainant to establish his case against the medical professional and not for the medical professional to prove that he acted with sufficient care and skill as has been held in the case of Madhya Pradesh High Court in the case of **Smt. Sudha Gupta and Ors. vs. State of M.P. and Ors.**, 1999 (2) MPLJ 259.

13. In the facts and circumstances, we are not inclined to intervene in the matter.

14. The writ petition sans merit and is accordingly dismissed.

Order Date :- 6.12.2023

RKP