

GAHC010208242018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./951/2018

A.J.HOSPITAL AND RESEARCH CENTRE. AND 2 ORS.
M.D. ROAD, MORIKOLONG, PO MORIKOLONG, PS NAGAON SADAR, DIST.
NAGAON, ASSAM REPRESENTED BY ITS MANAGING DIRECTOR,
FIRDOUSI LAILA

2: FIRDOUSI LAILA
W/O DR. SAFIQUUL ISLAM
R/O R.R.B. ROAD
SOUTH HAIBORGAON
PO HAIBORGAON
PS NAGAON SADAR
DIST. NAGAON (ASSAM)
PIN-782002

3: AMRIT NARAYAN BORA

SUPERINTENDANT
A.J. HOSPITAL AND RESEARCH CENTRE
M.D. ROAD
MORIKOLONG
P.O. MORIKOLONG P.S. NAGAON SADAR
DIST. NAGAON
ASSAM-782001

VERSUS

RAJ AHMED TALUKDAR AND ANR.
S/O MD. AZIZUR RAHMAN, PERMANENT R/O VILL MIKIRHATI,
HOWGAON, PO KATHIATOLI, PIN-782440, PS DOBOKA, DIST. HOJAI
(ASSAM)
PRESENTLY RESIDING AT CHRISTIAN PATTY, PS NAGAON SADAR, PO
NAGAON SADAR, PIN-782001, DIST. NAGAON (ASSAM)

2:JAYANTA HAZARIKA

DCH
CHILD SPECIALIST
MERCY HOSPITAL
ISLAMPATTY
NAGAON
P.O. HOIBORGAON
P.S. NAGAON SADAR
DIST. NAGAON
ASSAM-782002

Advocate for the Petitioner : MR Z HUSSAIN

Advocate for the Respondent : MR. B M CHOUDHURY (R1)

:: PRESENT ::

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the Petitioners	:	Mr. Z. Hussain, Advocate.
For the Respondents	:	Mr. B.M. Choudhury, Advocate.
Date of Hearing	:	04.04.2024.
Date of Judgment	:	09.04.2024.

JUDGMENT AND ORDER (CAV)

Heard Mr. Z. Hussain, learned counsel appearing for the petitioners. Also heard Mr. B.M. Choudhury, learned counsel representing the respondents.

2. This is an application under Section 482 of the CrPC praying for quashing the proceedings of C.R. Case No.634/2016 pending in the court of learned S.D.J.M.(S), Nagaon.

3. The wife of the Respondent No.1 was pregnant and therefore, he was looking for a suitable hospital for delivery of the baby. He found the petitioner A.J. Hospital & Research Centre to be suitable for that purpose. Therefore, he admitted his wife in that Hospital where, she delivered a baby boy. The baby developed some complications but he was not subjected to the care of a Paediatrician. The

complications continued with the baby who expired during pendency of this criminal petition.

4. Before the expiry of the baby, the Respondent No.1 filed a complaint case in the court of the learned Chief Judicial Magistrate, Nagaon, who alleged that his baby would not have developed complications had he been subjected to the care of a Paediatrician. The Respondent No.1 alleged that the present petitioner Hospital had cheated him.

5. The trial court examined Dr. Motiur Rahman and Dr. Jayanta Hazarika under Section 202 of the CrPC and finally on 21.02.2018, the court took cognizance of the offences under Sections 417/418 and 337 of the I.P.C. against Smti. Firdousi Laila, the proprietor of A.J. Hospital & Research Centre, Dr. Nazrul Islam and the Superintendent of the said Hospital.

6. Dr. Motiur Rahman is the T.B. Officer of B.P. Civil Hospital. He has stated in his statement under Section 202 of the CrPC that if there was a Paediatrician at the time of birth of the baby, the baby would not have developed complications.

7. The Respondent No.2 Dr. Jayanta Hazarika was also examined by the trial court under Section 202 of the CrPC. He was the Paediatrician. He has stated before the trial court that he never worked permanently with A.J. Hospital & Research Centre. He stated that he sometimes used to visit the said Hospital as a visiting doctor. He has further disclosed that when the baby of the wife of Respondent No.1 was born, he was present there. He has stated that the baby developed some complications and he should have been immediately shifted to Mercy Hospital. Dr. Hazarika also stated that he did not know why the child was not shifted to Mercy Hospital. He further denied that there was any lapse on the part of A.J. Hospital & Research Centre.

8. The learned counsel Mr. Hussain has submitted that there was no evidence of medical negligence on the part of A.J. Hospital & Research Centre and the trial court has erroneously taken cognizance of the said offences against the Hospital. In order

to buttress his argument, Mr. Hussain has relied upon a judgment of the Supreme Court that was delivered in *Jacob Mathew v. State of Punjab*, reported in (2005) 6 SCC 1.

9. In this case, the Supreme Court has held as under –

“25. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence *per se*. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. 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. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

26. 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 person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of *res ipsa loquitur* is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter-productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable *per se* by applying the doctrine of *res ipsa loquitur*.”

10. The learned counsel Mr. Choudhury has submitted that Dr. Jayanta Hazarika has stated in his evidence under Section 202 of the CrPC that the child had developed some complications and therefore, he should have been shifted to Mercy Hospital. Mr. Choudhury further submitted that since the baby was not shifted to

Mercy Hospital, it was a negligence on the part of the Hospital.

11. I have considered the submissions made by the learned counsel of both sides.

12. In *Jacob Mathew (supra)*, the Supreme Court has prescribed the guidelines for trial courts which should be followed before taking cognizance of an offence against a medical professional. They are –

Guidelines — Re: prosecuting medical professionals

“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 the 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 a rash or negligent act within the domain of criminal law under Section 304-A 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 to 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 emphasise 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 prefer recourse to criminal process as a tool for pressurising 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 the *Bolam* [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] 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 investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

13. Dr. Motiur Rahman is a specialist in T.B. Dr. Jayanta Hazarika has stated that though the baby developed some complications after birth, but he did not know as to why the baby was not shifted to Mercy Hospital. Dr. Hazarika further stated that there was no negligence on the part of the Hospital.

14. The trial court has taken cognizance of the offences under Sections 417/418 and 337 of the Indian Penal Code. The definition of the offence cheating is given by Section 415 of the Indian Penal Code. Let me have a brief visit to this section. Section 415 of the IPC, reads as under:

"Section 415- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

15. Similarly Section 418 of the Indian Penal Code reads as under –

"Section 418 - Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

16. Section 337 of the IPC reads as under –

“**Section 337**- Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.”

17. Reverting to the case in hand, I find that the learned trial court has erroneously taken cognizance of the offence under Sections 417/418 and 337 of the Indian Penal Code against the present petitioners as the evidence under Section 202 of the CrPC failed to satisfy that the case involves ingredients of those offences. There is no *prima facie* evidence that of rash and negligent act on the part of the petitioners.

18. In *State of Haryana v. Bhajan Lal*, AIR 1992 SC 604 the Supreme Court has laid down the guidelines as to when the power under Section 482 of the CrPC can be exercised by the High Court. Paragraph 102 of the judgment reads as under:

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) 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.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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."

19. There is no possibility of a future conviction in the instant case. I have no doubt that allowing the criminal prosecution to continue against the present petitioners would be nothing but an abuse of the process of the court. This, Court is of the opinion that this is a fit case for exercising the power under Section 482 of the CrPC.

20. Therefore, the criminal petition is allowed. The proceedings of C.R. Case No.634/2016 pending in the court of learned S.D.J.M.(S), Nagaon, is quashed and set aside.

The criminal petition is disposed of accordingly.

JUDGE

Comparing Assistant