

Court No. - 86

Case :- CRIMINAL REVISION No. - 3527 of 2023

Revisionist :- Dr.Anil Kumar Gupta

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Vinay Kumar Singh

Counsel for Opposite Party :- G.A.

Hon'ble Ram Manohar Narayan Mishra,J.

1. Instant Criminal Revision has been preferred against the order dated 28.03.2023 passed by learned Civil Judge (JD)/FTC (Offence Against Women) (AOW) Gorakhpur in Criminal Case No.299 of 2013, arising out of Case Crime No.32 of 2012, under Sections 323, 336, 406, 504, 506 IPC, Police Station Barhalganj, District Gorakhpur.

2. By the impugned order learned trial court has dismissed the discharge application filed on behalf of the accused under Section 239 Cr.P.C. bearing dated 26.07.2019.

3. Notice has been issued to respondent No.2, which is served on him.

4. None appeared on behalf of him.

5. Heard learned counsel for the revisionist and learned A.G.A. for the State-respondent and perused the material available on record.

6. The prosecution case is brief it that the informant who is respondent No.2 appeared before this Court and filed an application under Section 156(3) Cr.P.C. before the learned Magistrate with prayer to direct the police, the SHO concerned to register the case and investigate. The application was moved on 05.01.2012, wherein he stated that informant met with a road accident on 28.02.2011 at around 07:30 pm and in which he suffered serious injuries. He got admitted on the same day in Govind Orthopedic Hospital and Maternity Center (LIC) Office, Barhalganj, Gorakhpur, which is operated by Dr. A.K. Gupta. Dr. A.K. Gupta told the informant that this not a serious case and he would get him well within two days and he also advised him to not lodge a report regarding the accident to avoid legal complications. After two or three days of seeking treatment by Dr. A.K. Gupta, the patient realized acute pain in his right leg, but Dr. Gupta kept him in in clinic forcefully and kept on treating him in negligent and careless manner. He was patient of diabetes, but no blood test

was carried out. Said doctor used to take money from the informant on the assurance of getting him well soon. On 07.03.2011 some well wishers of the informant visited him and found him crying in pain, when they spoke to the doctor in this regard he became furious and abused the visitors, his associates also joined him and threatened them. The informant was any how released from the detention of Dr. A.K. Gupta after paying Rs.20,000/- . He subsequently consulted Dr. S.C. Kaushik at Buddha Hospital Gorakhpur on 07.03.2011, who refused to treat him, as his condition deteriorated due to treatment given by Dr. A.K. Gupta in casual and callous manner. He was admitted in Mayo Hospital, in Lucknow on 08.03.2011, where his right leg was amputated on 15.03.2011 by surgery to save his life. The informant lost his one leg due to wrong treatment given by Dr.A.K. Gupta and his life became endangered. The FIR was lodged under Section 326, 406, 323, 504 506 IPC, Police investigated the case and filed chargesheet under Section 323/336, 406, 504, 506 IPC. A report of Medical Board was also taken during investigation, a copy thereof is filed as annexure No.3 to this affidavit.

7. Doctor A.K. Gupta was enlarged on bail by by orders of court of session on 11.07.2018. He file an application under Section 482 No.20793 of 2018, which was disposed of with some directions with regard to bail. The revision was preferred against issuance of NBW and ultimately he was enlarged on bail by order dated 11.07.2018 passed by court of Session. On commencement of trial, the accused doctor filed a discharge application under Section 239 Cr.P.C. before the trial court which has been dismissed by impugned order.

8. Learned counsel for the revisionist submits that the ingredients of any of the offences mentioned in the chargesheet are made out in the case. This is not disputed fact that the applicant/revisionist is a qualified orthopedic doctor. This is also not alleged that he was operating and running an orthopedic medical centre in illegal manner. He had imparted best treatment to the revisionist, which was available in his clinic. This is wrong to state that he died not refer the patient to higher center for treatment. This is also wrong to say that he had illegally detained the patient when his condition became out of control. He had not extorted any money from the informant, he only received the consultation and other charges which are prescribed. He committed no negligence in treatment of the patient, he neither abused any one nor threatened the patient of his visitors at any point of time. None of the ingredients of alleged

offences are made out in the case.

9. Learned counsel for the revisionist lastly submitted that on perusal of report of medical board itself shows that a patient was referred by the revisionist twice to the BRD Medical College, Gorakhpur but the patient stayed in his clinic on his own and had received treatment there.

10. Learned trial court failed to consider the grounds taken in discharge application. The revisionist is a self-practicing doctor and runs the hospital in Barhalganj market Gorakhpur. He has been falsely implicated in the case by the informant, due to malafide and ulterior motive. The revisionist had carried out readymade pathological test on patient. There is no report of the panel of doctors to the effect there was any professional negligence was committed by the revisionist. The impugned order passed by the learned trial court is wholly illegal, arbitrary and against the evidence and deserves to be quashed by this Hon'ble Court.

11. Per contra, learned A.G.A. submitted that there is no illegality or irregularity in the the impugned order passed by the learned trial court. The medical negligence and highhandedness of the revisionist towards a serious patient is made out on the basis of material collected during investigation. Inasmuch as the Medical Board constituted by Chief Medical Officer has also reported that had doctor A.K. Gupta referred the patient Mahendra Yadav to higher medical center well within time, there was least possibility of further complications. The patient had to bear subsequently huge monetary expenses in his treatment due to negligent and callous manner of treatment given by accused.

12. However, the Board has stated that Doctor A.K. Gupta was having valid degree of orthopedic surgeon, some medical examinations were carried during treatment which are stated in BHT dated 04.02.2011, the medical opinion of the doctor is mentioned, but the related test report is not available. According to BHSP the patient was referred to BRD Medical College on 04.03.2011, but the patient was treated upto 07.03.2011, thereafter the patient was referred to BRD Medical College on 07.03.2011.

13. Learned counsel for the revisionist placed reliance on a judgment of Hon'ble Supreme Court in **Dr. Suresh Gupta Vs. Government of N.C.T. of Delhi and another AIR 2004 SC 4091**, where it is held that for every mishap or death during medical treatment, a medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate

medical opinion pointing to their guilt 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 to give 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.

14. Hon'ble Court further observed that no doubt in the present case, the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be 'not introducing a cuffed endo-tracheal tube of proper size as to prevent effusion of blood from the wound in the respiratory passage'. This act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable.

15. Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing i.e. a higher degree of morally blameworthy conduct.

16. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.

17. Learned counsel for the revisionist also placed reliance on a judgment of Hon'ble Supreme Court in **Jacob Mathew Vs State of Punjab and another AIR 2005 SC 3180**, wherein Hon'ble

Supreme Court observed as under:-

"49. 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."

18. Having a glance at averments in FIR and statements of the witnesses recorded during investigation, it is manifest that no charge under Sections 323, 336, 406 I.P.C. is made out in the case, even if the allegations made in the FIR and accusation made by the witnesses in their statements under Section 161 Cr.P.C. are taken on face value. There is no allegation that the patient Mahendra Yadav was ever assaulted or hurt by the accused doctor or any of his employees during his treatment at his orthopedic center. The amount of Rs.20,000/- which has been stated to be extorted by the doctor appears to be taken as consultation, hospitalization and treatment fee and that cannot be termed as an amount which was entrusted to the doctor by the patient or his attendant and same was misappropriated by him in criminal breach of trust. Therefore, the offence under Section 406 I.P.C. is also not made out in the case.

19. Even there is lack of specific averments in respect of these charges in FIR as well as in the statements of the witnesses. The actual word used in support of charge under Section 504 and 506 IPC are nowhere mentioned by the informant or witnesses and even if it is assumed that the revisionist and his employees abused the attendants/visitors of the patient, there is no material in its support that they intentionally insulted them with intent to provoke breach of peace. There is no specific averment in FIR or in statements of patient Mahendra Yadav in respect of charge under Section 506 IPC.

20. The learned trial court has dismissed the discharge application filed by the accused/applicant without considering the grounds taken therein in proper perspective. Section 239 Cr.P.C. provides as under:-

Section 239 Cr.P.C. "When accused shall be discharged- If, upon considering the police report and the documents sent with it under section [173](#) and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

Considering the rival submissions of learned counsel for the revisionist and learned A.G.A. appearing for the State and judgments of Hon'ble Supreme Court cited as above, the impugned order appears to be non-sustainable and it deserves to be set-aside.

21. The matter is remitted to learned court below to decide the discharge application afresh in the light of judgments of Hon'ble

Supreme Court cited as above and observations made herein above in present revision and to decide the discharge application a fresh by a speaking order by giving an opportunity of hearing to the accused, State and the defacto complainant in accordance with law.

22. The revision stands **allowed, accordingly.**

Order Date :- 28.11.2024

Ashish/-