

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

FRIDAY, THE 10TH DAY OF APRIL 2015/20TH CHAITHRA, 1937

Cr1.MC.No. 3968 of 2013 ()

AGAINST THE ORDER/JUDGMENT IN CC 471/2013 of J.M.F.C.-II, THRISSUR DATED
CRIME NO. 471/2011 OF TOWN WEST POLICE STATION , THRISSUR

PETITIONER(S)/PETITIONER/1ST & 2ND ACCUSED:

1. DR. P.A. ABDUL HAKKIM
S/O.AKBAR ALI, PARANPATTKANDI HOUSE, KUTTAMANGALAM P.O
EDATHIRUTHY, THRISSUR DISTRICT DIRECTOR
MOTHER HOSPITAL PVT LTD, PULLAZHI, THRISSUR 12

2. DR.P.A ABDUL HAKKIM
S/O.AKBAR ALI, PARANPATTKANDI HOUSE, KUTTAMANGALAM P.O
EDATHIRUTHY
THRISSUR DISTRICT MEDICAL SUPERINTENDENT
MOTHER HOSPITAL PVT LTD, PULLAZHI, THRISSUR 12

BY ADV. SRI.RAJIT

RESPONDENT(S)/RESPONDENTS/STATE, COMPLAINANT & ACCUSED NO 3 TO 5:

1. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM

2. SAROJINI,, AGED 57 YEARS
W/O.LATE JAYAPRAKASH, KARATTUPARAMBIL HOUSE,
PERINGOTTUKARA P.O, KIZHAKKUMURI VILLAGE, DESOM
THRISSUR TALUK, THRISSUR DISTRICT

3. DR.KURUVILA,
MOTHER HOSPITAL PVT LTD, PULLAZHI, THRISSUR 12

4. DR.VISWANATHAN
MOTHER HOSPITAL PVT LTD, PULLAZHI, THRISSUR 12

5. DR.PRASANTH,
MOTHER HOSPITAL PVT LTD, PULLAZHI, THRISSUR 12

R2 BY ADV. SMT.T.B.MINI
R BY PUBLIC PROSECUTOR SRI.GITHESH.R

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 10-04-2015,
ALONG WITH CRMC. 4059/2013, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

Cr1.MC.No. 3968 of 2013 ()

APPENDIX

PETITIONER(S) ' EXHIBITS

ANNEXURE A- TRUE COPY OF THE FIR IN CRIME NO 471/2011 OF THRISSUR TOWN
WEST POLICE STATION

ANNEXURE B- TRUE COPY OF THE REPORT PREPARED BY THE EXPERT MEDICAL PANEL

ANNEXURE C- TRUE COPY OF THE REFER REPORT SUBMITTED BY THE THRISSUR TOWN
WEST POLICE STTION IN CRIME NO 471/2011

ANNEXURE D- TRUE COPY OF THE COMPLAINT FILED BY THE 2ND RESPONDENT BEFORE
THE LEARNED JFCM NO II, THRISSUR

ANNEXURE E- TRUE COPY OF THE COMPLAINT FILED BY THE 2ND RESPONDENT BEFORE
THE CONSUMER FORUM

RESPONDENT(S) ' EXHIBITS: NIL

// TRUE COPY //

PA TO JUDGE

K.ABRAHAM MATHEW J.

Crl.M.C. NOs.3968 of 2013 & 4059 of 2013

Dated this the 10th day of April, 2015

ORDER

Petitioners in Crl.M.C.No.3968 of 2013 are accused 1 and 2 and petitioners in Crl.M.C.4059 of 2013 are accused 3, 4 and 5 in C.C.No.471 of 2013 on the file of the Judicial Magistrate of First Class-II, Thrissur. Accused 1 and 2 are director and medical superintendent respectively and accused 3, 4, and 5 are doctors of Mother Hospital, Thrissur. Respondent No.2 (hereinafter referred to as the complainant) consulted the 4th accused on 26.2.2011 as she had "abdominal discomfort and recent alteration of bowel habits of two months duration". She was advised colonoscopy to rule out colonic pathology. Colonoscopy was performed on 9.3.2011. But due to some complications, it could not be completed. She was taken to intensive care unit. The next day it was noticed that there was perforation near the anti-mesenteric boarder of sigmoid colon. Laparoscopy was done and the perforation was closed. Later, she was discharged. Alleging negligence on the part of the hospital and the doctors her son lodged a complaint with the SHO,

Town West Police Station, Thrissur who registered the case as Crime No.471/2011 under Section 337 r/w Section 34 IPC. The police referred it as "mistake of facts". Aggrieved by this the complainant filed a complaint before the Judicial Magistrate of First Class-II, Thrissur. After the procedure prescribed in Sections 200 and 202 Cr.P.C was complied with the learned Magistrate ordered issuance of process to the accused. They have filed these petitions to quash the proceedings.

2. The complainant's case is this: The decision of the 4th accused to perform colonoscopy without doing any non invasive procedure was against all norms of medical protocol; her informed consent was not taken. Though colonoscopy involved risks, no precaution was taken; it was performed not by the 4th accused, but the 3rd accused. She was removed to the observation room after the colonoscopy; her condition was dangerous. She had severe pain and was struggling for breath. This was concealed from her relatives including her son. The next morning her condition became worse. Her son was informed that some mistakes occurred during colonoscopy and it resulted in a perforation in the intestine. There was delay in performing laparoscopy. There was gross negligence on the part of the accused. The police referred the case because of political and other influences. The accused have committed the offences under Sections

337 and 338 r/w Section 34 IPC.

3. The petitioners in CrI.M.C.3968 of 2013 are on and the same person. i.e Dr.P.A.Abdul Hakkim. He is Director as well as Medical Superintendent of Mother Hospital, who are shown as accused 1 and 2 in the complaint. The 5th accused was a doctor in that hospital. There is no allegation of negligence on their part. The learned Magistrate should not have issued process to them under Section 204 Cr.P.C.

4. My attention has been drawn to a number of decisions of the Supreme court by either side, some of which are **B.Jagdish and another Vs. State of Andhra Pradesh and another (2009) 1 SCC 681, Nizam Institute of Medical Sciences vs. Prashanth S Dhananka and others (2010 ACJ 38), Spring Meadows Hospital and another vs. Harjol Ahluwalia through K.S.Ahluwalia and another (1998)4 SCC 39, Jaccob Mathew vs. State of Punjab (2005) 6 SCC(1), Balram Prasad vs. Kunal Saha (2011) 1 SCC 384**. The following observations of the Supreme Court in **Suresh Gupta(Dr.) v. Govt. of NCT of Delhi (2004 (6) SCC 422)** is relevant in this context.

“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 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 giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and the 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”.

In Spring Meadows Hospital case (supra) the Supreme Court has quoted the words of Lord Fraser:

“The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence”.

In Jacob Mathews case (supra) the Supreme Court summed up its conclusions in paragraph 48. Conclusions 2 and 3 are relevant:

(2) Negligence in the context of the 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 of 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 finding 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.

Now it is well settled that unless there is gross negligence on the part a doctor, he cannot be proceeded against in a criminal court. The question of degree of negligence makes the difference between liability in civil and criminal proceedings.

5. Before the police referred the case the investigating officer obtained opinion of a panel of doctors. The report is Annexure B in Criminal M.C.3968/2013. The Board found that there was nothing to suggest negligence on the part of the doctors concerned. A perusal of the report indicates that the Board, which comprised 8 doctors, reached the conclusion only on the basis of the statements of accused 3 and 4. This was not what was expected of the expert panel. I have no doubt that the opinion of the Board only deserves to be ignored.

6. The first submission is that before the decision to do colonoscopy was taken, the 4th accused, whom the complainant consulted, should have adopted non invasive procedure. Dr.P.K.Balakrishnan was examined as CW2 in the enquiry conducted under Section 202 Cr.P.C. He is professor of neuro surgery at Medical

College Hospital, Thrissur. He has mentioned the non invasive procedure. They are X-ray, CT Scan, MRI Scan etc. He stated that these non invasive procedure may not disclose whether the patient has colonic pathology. There is no evidence that the 4th accused adopted non invasive procedure before he took the decision to do colonoscopy.

7. It is not in dispute that colonoscopy involves certain risks, the most important of which is perforation of intestine. Before it is done, the doctor is expected to obtain informed consent of the patient. The specific allegation of the complainant is that she was not informed of the risk involved in colonoscopy. But the petitioners have produced consent in writing of the complainant's daughter. The complainant would say that the signature of her daughter was obtained after the complainant developed problems. In this context the evidence of PW2 Dr. Balakrishnan that the case sheet of the complainant does not reveal that informed consent of the complainant had been obtained before the colonoscopy was done assumes significance.

8. It has come out in the statement of CW2 Dr.Balakrishnan that before the colonoscopy was done even the blood pressure of the complainant was not taken. His statement is based on the facts recorded in the case sheet. This was in spite of the fact that the procedure involved risks which could have endangered the patient's life.

9. Another allegation is that it was not the 4th accused, whom the complainant consulted, who performed the colonoscopy. There is no two opinion that the 4th accused himself should have performed it. As deposed to by CW2 Dr.Balakrishnan the case sheet does not reveal that the 4th accused performed the colonoscopy. Prima facie, the conclusion is that it was not he who performed it. Added to this the court has the words of the complainant that it was the 3rd accused who performed it. Her sworn statement is that though the 4th accused was in the theater he was writing something sitting at a table. The 4th accused allowed the 3rd accused to do it.

10. It came out in the testimony of CW2 Dr.Balakrishnan that ordinarily some quantity of carbon dioxide would be pumped into the intestine of the patient. But the case sheet of the complainant does not reveal it.

11. It is an admitted fact that colonoscopy was abandoned in the midst of it. The reason stated by the 4th accused is that as there was "a tight angulation at the recto- sigmoid/ sigmoid area scope could not be traversed beyond it" (vide Annexure R2(b) in CrI.M.C.4059 of 2013). But the reason given by the 3rd accused in Annexure R2(c) is this: "The procedure could not be completed as she was complaining of abdominal discomfort and distention". These two doctors have given

conflicting reasons for abandoning the colonoscopy before its completion. The real reason for its non completion is not disclosed. Suppression of the real fact is evident. The probability of both reasons being false cannot be ruled out. Ordinarily, a patient on whom colonoscopy is performed is treated as an out patient only. But in this case after the colonoscopy was abandoned the complainant was not discharged. She was taken to an observation room. That she had developed some problems alone can be the reason. Perforation was noticed only at 8.30 a.m the next day. During this period the only doctor who is said to have visited the complaint is the 5th accused who had nothing to do with colonoscopy. Even the truth of this statement is doubtful because the nurses' record does not disclose his visit. It is not in dispute that at 8.45 p.m on the date on which the colonoscopy was performed distention of the abdomen aggravated. The complainant had high blood pressure which is seen to have been recorded at 9.30 p.m on the same day. It is in spite of these facts the 4th accused whom the complainant consulted did not even visit her till the next morning. He left his patient to the mercy of the fate. Though perforation is a known risk in colonoscopy, the doctors did not do anything to ascertain whether it caused perforation even after the complainant developed problems during the colonoscopy. Prima facie, there is evidence to

prove that there was gross negligence on the part of the 3rd and 4th accused in treating the complainant.

12. In the light of the discussion made above, I hold that the proceedings against the petitioners in CrL.M.C.No.3968 of 2013 and the proceedings against the 3rd petitioner in CrL.M.C.4059 of 2013 are liable to be quashed. The proceedings against petitioners 1 and 2 in CrL.M.C No.4059 of 2013 cannot be quashed.

In the result, CrL.M.C.3968 of 2013 is allowed and the proceedings against the petitioners in it in C.C.No.471 of 2013 on the file of the Judicial Magistrate of First Class-II, Thrissur are quashed. CrL.M.C.No.4059 of 2013 is partly allowed and the proceedings against the 3rd petitioner in it in the said criminal case are quashed.

**K.ABRAHAM MATHEW
JUDGE**

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