

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

Crl.Rev.Pet.No. 1031 of 2015 ()

AGAINST THE ORDER IN CMP 4717/2012 of J.M.F.C.-I, KANNUR
DATED 03-06-2014

REVISION PETITIONER(S)/COMPLAINANT :

SATHEESH KUMAR.C AGED 52 YEARS
S/O. KARUNAKARAN, RESIDING AT P.T.HOUSE, NARATH
KANNUR.

BY ADVS.SRI.SUNIL NAIR PALAKKAT
SRI.K.N.ABHILASH

RESPONDENT(S)/ACCUSED :

1. ASOKA HOSPITAL
SOUTH BAZAR, KANNUR-2, REP.BY DR.B.V.BHATT
ASOKA HOSPITAL, KANNUR-670 002.

2. DR. ARAVINDA BHATT
ASOKA HOSPITAL, KANNUR-670 002.

3. DR. B.V.BHATT
ASOKA HOSPITAL, KANNUR-670 002.

4. DR. SUJITHRA BHATT
ASOKA HOSPITAL, KANNUR-670 002.

5. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682 031.

R1-R4 BY ADV. SRI.SHEJI P.ABRAHAM
BY PUBLIC PROSECUTOR SRI. JUSTIN JACOB

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 2-09-2015, THE COURT ON 1-10-2015 PASSED THE
FOLLOWING:

B. SUDHEENDRA KUMAR, J.

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Dated this the 1st day of October, 2015.

ORDER

The revision petitioner is the complainant before the court below in CMP No. 4717 of 2012 on the files of the Court of the Judicial Magistrate of First Class – I, Kannur who in this Revision Petition challenges the order passed by the court below dismissing the complaint under Section 203 of Cr.P.C.

2. The revision petitioner filed a complaint before the court below against the respondent Nos. 1 to 4 alleging as follows:–

The revision petitioner was an industrial laith worker who sustained injuries on his left eye on 5-3-2010. He approached the respondent Nos. 1 to 4 for treatment.

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Respondent Nos. 2 to 4 informed the revision petitioner that some foreign objects had pierced into his left eye and hence, he had to undergo an operation immediately. Accordingly, he had undergone an operation and he was discharged from the hospital on the same day. However, after nine months, he lost his vision of left eye. Then he approached Dr. Thomas Cheriyan of Little flower Hospital, Angamaly, for consultation. After scanning the left eye, Dr. Thomas Cheriyan informed the revision petitioner that the foreign objects were not completely removed from his left eye. Another operation was conducted by Dr. Thomas Cheriyan on his left eye to remove the remaining particles from his left eye. On the basis of a complaint filed by the revision petitioner, police registered Crime No. 1302/2011 of Kannur South Police Station, under Section 338 read with Sec. 34 IPC against accused Nos. 1 to 4.

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3. During the course of investigation, the matter was referred to the District Expert Panel for their report. The District Expert Panel reported that there was no prima facie case of medical negligence. Thereafter, the investigating officer filed a refer report before the court below. The court below accepted the report.

4. The statement of the revision petitioner was recorded by the learned Magistrate. The statement of two other witnesses were also recorded by the learned Magistrate. Thereafter, the learned Magistrate dismissed the complaint under Section 203 of Cr.P.C. holding that there was no prima facie case to proceed against the accused. Thereafter, the revision petitioner filed the present complaint.

5. Heard both sides.

6. The complainant and another witness stated before the Court in consonance with the contentions in the complaint. Dr.

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Thomas Cheriyan was examined on behalf of the complainant to prove the medical negligence. The Doctor stated that he had done C.T. scan and found that there was intra-ocular foreign body in the left eye of the revision petitioner. He further stated that he had operated the said eye and removed the foreign particle. It is further in the statement of Dr. Thomas Cheriyan that the first operation was not successful in removing the entire foreign object from the left eye of the revision petitioner. According to the revision petitioner, there was negligence on the part of respondent Nos. 2 to 4 in conducting the operation on the left eye of the revision petitioner.

7. The court below relied on the decision of the Apex Court in Jacob Mathew v. State of Punjab and Another [AIR 2005 SC 3180]; (2005) 6 SCC 1 and held that the doctor who had given the statement before the Court did not give any opinion regarding the rashness or negligence of respondent Nos. 2 to 4

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in conducting the operation.

8. A three-Judge Bench of the Apex Court in Jacob Mathew (supra) held thus:-

“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 given an impartial and unbiased opinion applying

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Bolam's test to the facts collected in the investigation”.

The Apex Court in *Martin F.D' Souza v. Mohd. Ishfaq* [(2009) 3 SCC 1] followed the decision in *Jacob Mathew* (supra). However, the observation in paragraph 106 of *Martin F.D'Souza* (supra) with regard to Consumer Fora was not approved by a subsequent decision of the Apex Court in *V.Krishna Rao v. Nikhil Super Speciality Hospital and Another* – [(2010) 5 SCC 513] . In *Krishna Rao* (supra) also, the decision in *Jacob Mathew* (supra) was followed by their Lordships.

9. In this context, it is relevant to mention that a Division Bench of this Court in *Suvarna v. Reni Philip* [2014 (1) KLT 799] upheld the executive instructions and guidelines issued in Circular dated 16-6-2008 and as modified by Circular dated 8-8-2008, issued by the Government of Kerala in regard to the investigation of cases against doctors, as valid. The Expert Panel

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constituted as per Circular dated 16-6-2008, which was issued in supersession of all other Circulars, consisted of members from different fields including medical profession. The chances of occurring differences in views among the members of the Expert Panel in respect of the case referred to them are not remote. Therefore, it is provided in the Circular that in case the views of the members of the Expert Panel differ, they should immediately refer the issue for the opinion of the Apex Body consisting of various authorities. It shall be the duty of the Investigating Officer to consider the views expressed by the Expert Panel and to continue further investigation in the light of the views taken by the Expert Panel . If it is not satisfied with the views expressed by the Expert panel, it has to get the opinion from the Apex Body. It is directed in the Circular that the Expert Panel/Apex Body should not in any way interfere with or impede the smooth investigation of any case by the Investigating Officer.

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The complainant admitted that there was a report by the Expert Panel that there was no prima facie case of medical negligence.

10. The learned counsel for the revision petitioner has submitted that the Investigating Officer should have obtained the opinion of the Apex Body before filing the refer report before the Court as there is no provision for a private complainant to approach the Apex Body as per the above said Circular, if at all a private person is aggrieved by the opinion of the expert. It is true that if the Investigating Officer is not satisfied with the views expressed by the Expert Panel or the Apex Body, it would be open to him to seek additional Expert opinion. In this case, the petitioner filed complaint before the court below alleging medical negligence. The statement of Dr. Thomas Cheriyan was recorded by the learned Magistrate as requested by the revision petitioner, to ascertain as to whether there was prima facie material to indicate medical negligence. However, the doctor

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did not opine that there was any medical negligence on the part of respondent Nos. 2 to 4. Even before filing the private complaint, the respondents moved the High Court challenging the report of the Expert Panel. As per Judgment in W.P.C. No. 13668 of 2010 dated 3-12-2012, a learned single Judge of this Court, while disposing of the above Writ Petition, observed that it was open for the petitioner to challenge the veracity of the expert opinion in appropriate proceedings, in the event of accepting of the said report for the purpose of exonerating the doctors. Even though the revision petitioner was fully aware of the fact that the report of the Expert Panel was accepted by the Investigating Officer, before filing the refer report before the Court, the revision petitioner did not incline to take any step to get the report of the Apex Body or opinion of any another expert during the proceedings under Section 202 Cr.P.C. before the court below. In fact, enquiry under Section 202 Cr.P.C. was an

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opportunity to the revision petitioner to get the opinion from the Apex Body or from some other experts with the assistance of the Court. Having failed to take any attempt to get the opinion of the Apex Body or expert opinion, the revision petitioner cannot be heard to say that he had no opportunity to get the opinion of the Apex Body or the opinion of another expert.

11. From the records available, the only material produced by the revision petitioner is the statement of Dr. Thomas Cheriyan. Dr. Thomas Cheriyan did not state that there was any medical negligence on the part of respondent Nos. 2 to 4 in conducting operation on the left eye of the revision petitioner. The revision petitioner himself admitted in the complaint that the matter was initially referred to an expert Panel and the expert Panel filed a report stating that there was no medical negligence on the part of respondent Nos. 2 to 4 in conducting the operation on the left eye of the revision petitioner. It is true that

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there is statement of the complainant and another witness to the effect that there was medical negligence. However, the complainant and the other witness, whose statement was recorded, are not expert in the field of medicine. Since there was no material before the court to support the contention of rashness or negligence of the doctors, the court below rightly dismissed the complaint under Sec. 203 of Cr.P.C.

12. Having gone through the relevant inputs, I do not find any reason to hold that there was any illegality, impropriety or incorrectness in the order impugned warranting interference by this Court.

In the result, this Revision Petition stands dismissed.

Sd/-B. SUDHEENDRA KUMAR,
JUDGE.

Ani/

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P.S. To Judge