

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

WA.No. 781 of 2015 IN WP(C).14473/2012

AGAINST THE JUDGMENT IN WP(C) 14473/2012 DATED 14-11-2014

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APPELLANT/PETITIONER :

HARIDAS M., AGED 48 YEARS,
S/O GOPALAN, TECHNICIAN, PARAMBATH HOUSE
PANNYANNUR AMSOM, CHAMPAD DESOM, P.O.CHAMPAD
THALASSERY TALUK, KANNUR DISTRICT.

BY ADVS.SRI.M.SASINDRAN
SRI.V.VENUGOPAL

RESPONDENTS/RESPONDENTS :

1. DIRECTOR OF HEALTH SERVICES, THIRUVANANTHAPURAM
THIRUVANANTHAPURAM-695001.
2. THE DISTRICT MEDICAL OFFICER(HEALTH), KANNUR-670001.
3. JOSEGIRI HOSPITAL,
THALASSERY, REPRESENTED BY ITS SUPERINTENDENT
THALSSERY, KANNUR DISTRICT-670001.
4. DR.(SR.)LOUIS,
GYNECOLOGIST, JOSEGIRI HOSPITAL, THALASSERY
KANNUR DISTRICT-670001.
5. THE DEPUTY SUPERINTENDENT OF POLICE,
THALASSERY, KANNUR DISTRICT-670001.

R1, R2 & R5 BY SR.GOVERNMENT PLEADER, SRI. P.I. DAVIS.

R3 & R4 BY ADV. DR.S.GOPAKUMARAN NAIR (SR.)

SRI.P.CHANDRASEKHAR
SRI.S.PRASANTH
SRI.P.SREEKUMAR
SRI.SOORAJ T.ELENJICKAL
SRI.K.NANDAKUMAR
SMT.V.A.HARITHA
SMT.P.M.MAZNA MANSOOR
SRI.P.VIVEK.
SRI.A.RAJASIMHAN

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
28-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**ASHOK BHUSHAN, C.J &
A.M. SHAFFIQUE, J.**

W.A. No.781 of 2015

Dated this the 28th day of October 2015

J U D G M E N T

Shaffique, J.

This appeal is filed against the judgment dated 14.11.2014 in W.P.(C) No.14473 of 2012, by which, the learned Single Judge dismissed the writ petition.

2. The writ petition was filed by the petitioner seeking to quash Ext.P4, a Circular issued by the Government, by which, the Government had issued instructions for investigation of complaints against doctors in Government service as well as private medical practitioners on the allegation of commission of offence leading to medical negligence etc. As per the said Circular the investigating agency will have to obtain a report from the expert agency assisted by the District Medical Officer of Health, District Government Pleader/Public Prosecutor and Forensic expert from the nearest Medical College. If there is any difference of opinion in the view of the members, they will have to refer the matter to the Apex Body consisting of the Director of Health Services, Director of Medical Education,

Additional Director of Health Services (Vigilance) and the Director General of Prosecution. The Apex Body can obtain expert opinion from the specialists in the Private Sector as well. It is also stated that the affected doctors are free to approach the Apex Body with appeal.

3. The complaint of the petitioner is that in the case of medical negligence, in which, the 3rd respondent hospital as well as the 4th respondent Doctor were involved, the Expert Agency had formed an opinion that there is no convincing material to prove the negligence and on the basis of the said finding, the prosecuting agency has referred the matter. The contention urged by the petitioner is that the petitioner has not been given an opportunity to prefer an appeal to the Apex Body whereas, such an opportunity has been given to the Doctors. On this basis, though the petitioner had approached the Apex Body of the Health Department, his request had been rejected in terms of Ext.P11 dated 17.3.2012, which is also under challenge.

4. The learned Single Judge, after evaluating the respective contentions of the parties, formed an opinion that in

so far as the Circular is intended to aid the police authorities to come to a conclusion as to whether prosecution should be initiated against the doctor or the hospital concerned, the petitioner in his role as a complainant has no right of appeal as he is not an affected person. Accordingly, the writ petition has been dismissed.

5. It was brought to the notice of the learned Single Judge that a complaint has already been filed before the Consumer Forum and hence, a direction had been issued by the learned Single Judge to consider Ext.P5 report, if relied upon by the 3rd and 4th respondents, only in the same manner as any other evidence adduced by them in support of their contention.

6. Learned counsel for the appellant, while impugning the aforesaid judgment, submits that the circular is clearly arbitrary in so far as a right of appeal has not been given to the appellant, though the same was given to the Doctor, who is involved in the alleged offence. He also relied upon the judgment of this Court in **Suvarna v. Reni Philip** [2014 (1) KLT 799] to emphasise the requirement of the aforesaid Ext.P4 circular to the extend it provides a guideline to the

Investigating Agency to initiate prosecution against the Doctor involved in medical negligence cases.

7. Learned Government Pleader, on the other hand, submits that the circular is only a guideline for the Investigating Agency and the expert opinion can only be treated as an opinion expressed by the members of the Expert Agency/ Apex Body and it is for the Court to ultimately decide as to whether the opinion expressed can be treated as proof or not. It is only intended for the Investigating Agency to verify whether there is prima facie case especially when the police officers, who are conducting the investigation is not aware of the particulars regarding medical negligence cases and technicalities involved in the same.

8. Learned Senior Counsel, Dr.S.Gopakumaran Nair, appearing on behalf of respondents 3 and 4 would submit that the petitioner's contention that he has no remedy is absolutely baseless. It is submitted that the petitioner has already preferred a private complaint to the concerned Magistrate Court, which is still pending consideration.

9. Having regard to the aforesaid factual situation, the short question to be considered is whether Ext.P4 circular to the extend it does not provide right of appeal to the victim/complainant is discriminatory or not. On a perusal of the circular clearly indicates that it is only a guideline issued for the purpose of conducting proper investigation in the matter, before taking prosecution against a Doctor or a Hospital, for medical negligence. The Investigating Agency will have to obtain proper report from competent agencies. If the members of the Expert Agency differs in their opinion, the matter has to be referred to the Apex Body and the Apex Body is free to obtain report from private doctors as well. It is thereafter that a decision is to be taken either to prosecute the Doctor concerned or not. The Doctor gets right of appeal only if there is difference of opinion among the members of the Committee. This circular is only for the purpose of enabling the Investigating Officer to proceed with prosecution. It is not intended for any other purpose and once an opinion is obtained to prosecute the concerned Doctor, still the Investigating Officer can consider whether a charge should be filed before

the Court or not. However, when the matter comes before the Court or any other Forum, it is for the Court/Forum to ascertain the veracity of such an opinion and whether it is a sufficient proof to prosecute or take action against the Doctor or not.

10. Under such circumstances, as far as the victim/complainant is concerned, if there is difference of opinion among the members in the Expert Agency that there is no case of medical negligence, their remedy is to approach the Court or appropriate Forum with sufficient materials. The right to file a suit for damages or to prosecute the Doctor concerned is not deprived in any manner. That right is always available to the petitioner or the victim. Even as far as this case is concerned, since the petitioner has already filed a criminal complaint, it is always open for the petitioner to approach the Court with sufficient materials to obtain appropriate relief in the matter.

Under such circumstances, we are of the view that there is no discrimination meted out against the petitioner and therefore, we do not find any error in the judgment of the learned Single Judge dismissing the writ petition.

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The learned Single Judge had already given appropriate direction to the Consumer Forum to consider Ext.P5 report, if relied upon by the 3rd and 4th respondents, only in the same manner as any other evidence adduced by them in support of their contention. When such an opinion had already been expressed by the learned Single Judge, we do not think that the right of the petitioner is in any way affected, by virtue of absence of right of appeal to the Apex Body.

Accordingly, the writ appeal is dismissed.

Sd/-
ASHOK BHUSHAN
CHIEF JUSTICE

Sd/-
A.M. SHAFFIQUE
JUDGE