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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on: 29th October, 2015

+ CRL.M.C. 2140/2015 & CrI. M.A. 7597/2015

DR SUMAN SABHARWAL & ANR Petitioners
Represented by: Mr. Madhav Khurana, Adv.

versus

STATE & ANR Respondents
Represented by: Mr. Amit Chadha, APP for
State with SI Pramod Anand, PS-DBG Road.
Mr. H.S. Arora, Adv. for R2.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

+ **CRL.M.C. 2140/2015**

1. Vide the present petition, petitioners seek directions thereby quashing of FIR No. 219/2010, registered at PS-Deshbandhu Gupta Road, New Delhi for the offences punishable under Sections 337/420/468/471/201/120B IPC against them.

2. Further seek directions thereby setting aside the order dated 05.03.2015 passed by Id. Chief Metropolitan Magistrate, Central District, Delhi whereby the cognizance in the aforesaid case was taken.

3. The aforesaid case was registered on the complaint of respondent no. 2 filed under Section 156 (3) Cr.P.C. wherein she alleged that on 15.09.2009, she was admitted in Shree Jeewan Hospital for delivery and on the same day at about 11.15 PM, she gave birth to a female child. However, while conducting the delivery, the Doctors of the aforesaid hospital left a needle in her uterus. As a result of which, she suffered mental agony, trauma, pain and profuse bleeding. After the delivery, she was shifted to a room, but there also her bleeding did not stop and when she requested the Doctors for her check up, they did not pay any heed to her request. However, on the next day, i.e., 16.09.2009, her x-ray was conducted and it was revealed that a needle was left in her Uterus while conducting delivery, due to which she got infection and thus is not able to conceive in future. Accordingly, she reported the matter to the Police, but Police did not take any action. Thereafter, she filed a complaint under Section 156 (3) Cr.P.C. wherein Id. CMM directed to lodge an FIR and accordingly the aforesaid case was registered against the petitioners.

4. Ld. Counsel appearing on behalf of the petitioners submitted that during the course of investigation, Investigating Officer of this case wrote to Delhi Medical Council and Lady Hardinge Medical College & Smt. S.K. Hospital and sought their opinions whether the Doctors who had conducted the surgery on 15.09.2009 were negligent or not. Both the institutions mentioned above vide their letters dated 10.06.2011 and

29.03.2011 respectively opined that Doctors were not negligent. Despite the aforesaid opinions, the Investigating Officer once again sought the same opinion from Delhi Medical Council, which was replied vide letter dated 20.06.2012 thereby reiterating its earlier opinion dated 10.06.2011. Despite, the Police filed the chargesheet and thereafter vide order dated 05.03.2015, Id. CMM has taken the cognizance without noting that no-one was negligent in performing the surgery. In such eventuality, no case is made out against the petitioners. Therefore, there would be no purpose to direct the petitioners to face the trial which ultimately will result into acquittal of the petitioners.

5. To strengthen his arguments, Id. Counsel has heavily relied upon a case of ***Martin F D'Souza v. Mohd. Ishfaq 2009 3 SCC 1***, wherein the Hon'ble Supreme Court held as under:

“22. The case of the respondent, in brief, is that the appellant was negligent in prescribing Amikacin to the respondent of 500 mg twice a day for 14 days as such dosage was excessive and caused hearing impairment. It is also the case of the respondent that the infection he was suffering from was not of a nature as to warrant administration of Amikacin to him.

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25. *Cases, both civil and criminal as well as in Consumer Fora, are often filed against medical*

practitioners and hospitals, complaining of medical negligence against doctors/hospitals/nursing homes and hence the latter naturally would like to know about their liability. The general principles on this subject have been lucidly and elaborately explained in the three Judge Bench decision of this Court in Jacob Mathew v. State of Punjab and Anr. : 2005 6 SCC 1. However, difficulties arise in the application of those general principles to specific cases. For instance, in para 41 of the aforesaid decision it was observed:

“41.....The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence is what the law requires.”

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28. The law, like medicine, is an inexact science. One cannot predict with certainty an outcome of many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge concerned who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood.

29. Before dealing with these principles two things have to be kept in mind: (1) Judges are not experts in medical science, rather they are lay men. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges have usually to rely on testimonies of other doctors which may not necessarily in all cases be objective, since like in all

professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand, particularly in complicated medical matters, for a layman in medical matters like a Judge; and (2) a balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation.

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34. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation vide Achutrao Haribhau Khodwa and Ors. v. State of Maharashtra and Ors. [1996]2SCC 634 or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.”

6. Ld. Counsel submitted that Id. CMM has failed to appreciate that as per the case of the prosecution itself, there was no negligence

committed by the operating Doctors. Furthermore, petitioner no. 1 was not even in Delhi on 15.09.2009 when respondent no.2 was operated upon for the delivery of her child. The investigation has also revealed that even petitioner no. 2 did not operate upon respondent no. 2 on 16.09.2009. Hence, both the allegations of respondent no. 2 qua the petitioners have been found to be false. Thus, Id. CMM ignored the evidence and the opinions of the two institutions mentioned above, however, issued summons without application of its mind.

7. Ld. Counsel further submitted that Id. CMM has failed to appreciate that for considering the medical negligence it has to be seen whether precautions were taken with the ordinary experience of men is found to be sufficient. 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 has adopted, is judged in the light of knowledge available at the time of incident and not at the time of trial. It has further failed to appreciate that to prosecute a medical professional or negligence in 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 or prudence would have done or failed to do so. So long as a Doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for any negligence merely because a

better alternative course or method of treatment was also available or simply because a more skilled Doctor would not have been chosen to follow or resort to that practice or procedure which the accused followed.

8. Ld. Counsel submitted that the case of ***Bolam v. Friern Hospital Management Committee reported in (1957) 1 WLR 582*** still holds good in its applicability in India wherein held as under:

“But here you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill..... A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”

9. Ld. Counsel further submitted that if in this manner as in the present case, action would be taken against the professional Doctors it will be very difficult for them to serve the patients. He further submitted that it is true if deliberate and intentional negligence is there, then the said Doctor is liable to be prosecuted, but not in the present case. Therefore, the present petition may be allowed.

10. I have heard ld. Counsel for the parties.

11. It is not in dispute that when allegations of negligence are levelled against a Doctor, an opinion is required to be taken whether there was negligence on his part or not. In this case also, opinion was taken, which is a part of chargesheet and on considering the same, Id. Trial Court has taken the cognizance. The fact remains that during the course of investigation, original treatment sheet of complainant was taken into police possession, which reveals that it has cutting on 'Page 3' on the original notes and name of Dr. Anita and nurse Chunchun has been added, which were not there in the earlier notes provided by the hospital authorities. Moreover, hospital authorities also failed to produce the X-ray plate of the complainant. Accordingly, Section 420/468/471/120B IPC was also added during investigation and chargesheet under sections 337/420/468/471/120B/201 IPC was filed.

12. In the FSL report at Point-III, the Assistant Director Forensic Science Laboratory, Govt. of NCT of Delhi gave a report that the person who wrote the red enclosed signatures, stamped and marked S-70 to S-93 also wrote the red enclosed signatures similarly stamped and marked Q-6/1 to Q6/2. This fact is also evident from the reply of respondent no. 2, wherein she stated that a comparative signatures / writing marked as S-70 to S-93 are of Dr. Akash Sabharwal (petitioner no. 2). Hence FSL authorities have clearly stated that Q6/1 and Q6/2 are of petitioner no. 2. Thus, it clearly shows that Dr. Ashok Sabharwal has committed forgery.

13. It is not in dispute that the hospital is registered in the name of Dr. Suman Sabharwal, petitioner no.1. Dr. Anita of the aforesaid Hospital in reply to questionnaire submitted that Dr. Raheen had performed the delivery of the complainant Rubina. It is pertinent to mention here that Ms. Raheen is registered with Delhi Pharmacy Council only as a Pharmacist, whereas she has been alleged to be a Doctor by the hospital authority. Thus, the petitioner no.1 had employed a Pharmacist to carry out the surgery. This shows an utter carelessness on the part of the petitioner no. 1, in whose name the hospital is registered. Thus, petitioner no.1 conspired and manipulated with the records. Therefore, the benefits of the judgments relied upon by the petitioners cannot be given to the petitioners herein, keeping in view the facts and circumstances of the present case.

14. The complainant was admitted for delivery in the petitioner's hospital on 15.09.2009 and a female child was born on 11.15 PM. The doctors of the petitioner's hospital were most negligent in attending respondent no. 2 and left a needle in her Uterus and after the surgery, they stitched the vagina and shifted respondent no.2 to a Ward. However, in the Ward she suffered gigantic mental trauma and further lots of blood came out of her vagina / Uterus and it was the restless night in the lifetime of respondent no.2. This fact is admitted by the Doctors in the discharge slip that a needle was left in the uterus of the

complainant during surgery and after diagnosis X-ray in the evening same was removed.

15. It is pertinent to note that in reply to the complaint filed under Section 12 of the Consumer Protection Act, petitioners admitted that due the presence of blood and Oedema (Swelling) of the tissues, the needle slipped into superficial layers of the muscles. However, stated that the Doctors tried to feel the needle, but it could not be located and the Doctor decided to explore the area under general anaesthesia later in the morning after the swelling would reduce and bleeding would be under control. But the fact remains that the Consumer Forum vide order dated 14.08.2013 had directed the petitioner's hospital to pay a sum of Rs.3,00,000/- as compensation to respondent no. 2 for causing harassment, pain and mental agony and further directed to pay a sum of Rs.10,000/- as litigation expenses. However, till date, the petitioners have not paid even a single penny to respondent no. 2.

16. It is important to mention here that petitioner no.1 had filed Crl. M.C. 3369/2010 thereby seeking quashing of the aforesaid FIR. However, the same was dismissed vide order dated 27.10.2010 and the petitioners were directed to join and cooperate in the investigation.

17. In view of the facts recorded above and the fact that there are sufficient evidences in the chargesheet filed by the Police against the

petitioners, I find no ground to quash the FIR mentioned above and setting aside the impugned order dated 05.03.2015.

18. Accordingly, petition is dismissed with cost of Rs.25,000/- each to be paid in favour of respondent no. 2 / complainant within two weeks from the receipt of this order.

Crl. M.A. 7597/2015 (for Stay)

Dismissed as infructuous.

SURESH KAIT, J

OCTOBER 29, 2015

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