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

+ **CRL.M.C. 1973/2012**

% **Decided on: 25th July, 2016**

HUKAM CHAND

..... Petitioner

Through: Mr. Neeraj Bhardwaj, Advocate with
petitioner in person.

versus

STATE & ORS

..... Respondents

Through: Mr. Kewal Singh Ahuja, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. The petitioner filed a complaint case along with an application under Section 156 (3) Cr.P.C. for registration of a case against respondent Nos. 4 to 6, that is, Dr. Monica Khosla and Dr. Ashok Aggarwal both working at NDMC Charak Palika Chikitsalaya and Inspector Om Prakash, SHO, PS R.K. Puram, Delhi for offences under Sections 302/201/120B/34 IPC and Section 3 of Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act.

2. The grievance of the petitioner was that on 22nd November, 2005 his daughter was suffering from acute dizziness when she was taken to NDMC Charak Palika Chikitsalaya, Moti Bagh. Chhaya, the daughter of the petitioner was examined by Dr. Monica Khosla who prescribed two tablets, one in the evening and another in the morning and sent back the patient stating that there was nothing to worry. While the petitioner along with his daughter and wife were sitting outside on the bench waiting for the scooter,

condition of Chhaya deteriorated whereafter Dr. Monica Khosla re-examined her at 8.15 PM in casualty room and administered an injection. However, after seven-eight minutes Chhaya passed away. When the petitioner and his wife raised their voice being aggrieved by the negligence of the doctors, they abused them. The petitioner made a complaint to the SHO, PS Moti Bagh however, no action was taken. Despite making representations and written complaints to the senior officers including the Commissioner of Police and Lieutenant Governor of Delhi no action was taken.

3. Vide the impugned order dated 7th November, 2009 the learned Metropolitan Magistrate dismissed the application after it had received the opinion of the doctors along with the other documents on 3rd July, 2007. The Court noted that in view of the proceedings before the Court the police had investigated the matter at the level of ACP concerned under the supervision of the Court and recorded statements of the witnesses, collected postmortem report, viscera report and CFSL report. Thus no useful purpose will be served for sending the matter for investigation to the police again and thus application under Section 156 (3) Cr.P.C. was dismissed. As regards cognizance of the offence of medical negligence, the Court noted that the Board of doctors had observed that the treatment given to the deceased was proper and adequate and the cause of death of the deceased was natural. The opinion of the CFSL also pointed out that no Metallic poison, Ethyl and Methyl Alcohol, Cyanide, Phosphide, Alkaloids, Barbiturates, Tranquilizers and insecticides could be detected in the samples seized. Thus in view of the judgment of the Supreme Court reported as 2006 (6) SCC 1 Jacob Mathew vs. State of Punjab no case for medical negligence was made out. Further, both the doctors were government doctors and sanction under Section 197

Cr.PC was required for proceeding further which was not there on record. Hence the Court did not have the power to take cognizance of the offence alleged. The Court thus declined to take cognizance of the offence alleged against them.

4. The petitioner preferred a revision petition before the learned Additional Sessions Judge against the order dated 7th November, 2009 passed by the learned Trial Court. The learned Revisional Court noted that the learned Metropolitan Magistrate vide order dated 20th May, 2006 inter alia held that provision of Section 3 of the SC/ST (Prevention of Atrocities) Act are not attracted and as regards the medical negligence, detailed inquiry had been conducted and the cause of death of the deceased was opined to be “cerebro pulmonary oedema” which could be due to tonic clonic convulsion. Noting the decision of the Supreme Court in Jacob Mathew (supra) and 2004 (6) SC JT 238 Dr. Suresh Gupta vs. Govt. of NCT of Delhi the learned Additional Sessions Judge observed that the complainant was required to prove the negligence on the part of the doctors concerned as per the tests laid down, which were missing and as per the report of the Board, the cause of death was not due to negligence of the doctors. Hence the revision petition was dismissed.

5. The Supreme Court in Jacob Mathew (Supra) laid down the following guidelines:

“(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 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 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 case [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] , WLR at p. 586 [[Ed.: Also at All ER p. 121 D-F and set out in para 19, p. 19 herein.]] 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 304-A 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 304-A 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.”

6. Thus to proceed against a doctor the complainant is required to, even at the stage of summoning, prima facie show that the negligence is of such a kind that either the doctor was not possessed of the requisite skills which he professed to possess or the negligence and recklessness was of a high degree which could be termed as gross. From the facts noted above and the cause of death being opined to be natural, no case for taking cognizance of the offence under Section 304 A IPC was made out. This court also notes that vide order dated 20th May, 2006 the learned Trial Court held that the provisions of Section 3 of SC/ST (Prevention of Atrocities) Act were not attracted, which order has not been challenged by the petitioner. Finding no merit in the present petition, the same is dismissed.

(MUKTA GUPTA)
JUDGE

JULY 25, 2016/‘vn’