

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.42448 of 2013

Arising Out of PS.Case No. -3471 Year- 2005 Thana -PATNA COMPLAINT CASE District- PATNA

=====

1. Ajay Kumar Son of Shri Dharmdeo Rai R/O Mahavir Asthan Ishapur, P.O. and P.S.-Phulwarisharif, Distt-Patna

.... Petitioner/s

Versus

1. The State Of Bihar
2. Md Mumtaz Alam Son of Md Shahrudin R/O Naharpar, P.O. & P.S.-Phulwarisharif, Distt- Patna.

.... Opposite Party/s

=====

Appearance :

For the Petitioner/s : Mr. Yugal Kishore, Sr. Adv.
Mr. Birendra Narayan Sharma, Adv.
For the State : Mr. S.N. Shukla, APP
For Opposite Party No.2 : Mr. Md. Aslam Ansari, Adv.

=====

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT
Date: 13-04-2017

By way of the present application filed under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C.') the petitioner seeks quashing of the order dated 10th March, 2006 passed in Complaint Case No. 3471(C) of 2005 by which the learned Judicial Magistrate 1st Class, Patna has summoned the petitioner and six others finding a prima facie case to be made out against them under Sections 304-A, 420 and 120-B of the Indian Penal Code (for short 'IPC').

2. Briefly stated, the case of the complainant is that initially his mother was under the treatment of Dr.Ashok Kumar, who referred



her to Dr. Ravi Bhushan Sharma. After treating the mother of the complainant for some time, Dr. Ravi Bhushan Sharma referred her to Mahavir Cancer Sansthan, Patna. In the meantime, one Sonu, a salesman of Neha Medical Hall advised him to take his mother to Dr. Gulshan Prasad Sinha for treatment whereafter he took his mother to the Nursing Home of Dr. Gulshan Prasad Sinha, who started her treatment. However, the condition of his mother deteriorated but the doctor treating his mother assured that her condition would improve and she would be cured. It is stated that his mother had all symptoms of cancer but she was not given proper treatment. It is alleged that ultimately his mother died on 26th October, 2004 in the Nursing Home of Dr. Gulshan Prasad Sinha. The complainant alleged that Dr. Gulshan Prasad Sinha was not having bonafide medical degree and in course of treatment he had prescribed medicines of over Rs.7,00,000/-. He alleged that the accused persons cheated him of the amount in the name of providing treatment to his mother.

3. The complainant was examined on oath and besides the complainant one witness, namely, Md. Mustaque Alam was examined in course of inquiry under Section 202 of the Cr.P.C. whereafter the learned Magistrate by order dated 10th March, 2006 summoned all the accused including the petitioner to face trial for the offences under Sections 304-A, 420 and 120-B of the IPC.



4. The aforesaid order dated 10th March, 2006 is under challenge in the present application.

5. Mr. Yugal Kishore, learned Senior Counsel appearing for the petitioner submitted that the doctor, compounder, salesmen of the medicine shop and the owner of the medicine shop from where medicines for treatment were purchased have been impleaded as accused in the present case with ulterior motive. He submitted that none of the ingredients of the offences alleged are attracted in the facts and circumstances of the case. He submitted that the complainant in his examination on oath and the sole witness examined during inquiry conducted under Section 202 of the Cr.P.C. have not stated a word regarding qualification of the doctor. They have simply stated that the doctor was not eligible to make treatment of the mother of the complainant.

6. On the other hand, learned counsel for the complainant-opposite party no.2 submitted that the complainant has been cheated of more than Rs.7,00,000/- in the name of treatment of his mother and thus the ingredients of the offence punishable under Section 420 of the IPC are clearly attracted. He submitted that since correct treatment was not provided to the mother of the complainant by the doctor and false assurances were given that she would be cured, the accused persons are also liable to be prosecuted for the offence



punishable under Section 304-A of the IPC. He contended that since all the accused persons conspired together in furtherance of common object, the offence under Section 120-B of the IPC would also be attracted. On the basis of these submissions, he contended that there is no illegality in the order impugned by which the accused persons have been summoned to face trial.

7. I have heard counsel for the parties and carefully perused the record.

8. Though in the complaint case an allegation has been made that Dr. Gulshan Prasad Sinha was not having bonafide MBBS Degree, the said contention has not been supported by the complainant in his statement made on oath before the Court. In his statement made on oath, he has simply stated that when Dr. Ravi Bhushan Sharma referred his mother to Mahavir Cancer Sansthan, the petitioner advised him to take his mother to Dr. Gulshan Prasad Sinha and as per his advice, he took her to the Nursing Home of Dr. Gulshan Prasad Sinha where in course of treatment she died. The complainant stated that the medicines which were being prescribed were being made available only in the medicine shop of the petitioner. He stated that in the name of treatment of his mother, he had to spend over Rs.7,00,000/- for which he had sent a legal notice and the accused persons also assured him to return the amount but,



thereafter, the doctor left the clinic. He stated that he went to the Police Station but no case was registered. In reply to the court's question, he stated that Dr. Gulshan Prasad Sinha is not a Government Doctor. He further stated that his mother was treated for more than nine months in the Nursing Home of Dr. Gulshan Prasad Sinha. He also admitted that the petitioner Ajay Kumar is his co-villager and on his assurance he did not take his mother to Mahavir Cancer Sansthan. He stated that though his mother was suffering from cancer for the last ten months, she had no such disease from before.

9. The sole witness examined in support of the complaint, namely, Md. Mustaque Alam stated in course of inquiry that while being treated initially the condition of the mother of the complainant improved but later on her condition deteriorated day by day. He stated that the doctor had assured that the patient would be cured but the mother of the complainant died in the Nursing Home itself. In reply to the court's question, he stated that the patient was aged about 52 years and she was suffering from cancer.

10. Having taken note of the statement of the complainant made on oath and the sole inquiry witness examined on behalf of the complainant, I find that the ingredients of the offences under Sections 304-A, 420 and 120-B of the IPC are not at all attracted in the present case. It is admitted case of the complainant that his mother, who was



suffering from cancer, received treatment in the Nursing Home of co-accused Dr. Gulshan Prasad Sinha for over nine months. The complainant also admits that in course of treatment he had to spend money in respect of purchase of medicines etc. If the amount was spent in treatment of cancer, by no stretch of imagination, it can be said that the amount spent by the complainant was fraudulently or dishonestly taken by the accused persons. It is not a case where no treatment was provided to the patient rather the witness examined on behalf of the complainant stated that initially the condition of the patient improved but later on her condition deteriorated.

11. In the opinion of this Court, neither there was any intention to cheat nor is it a case where two or more persons agreed to do or caused to be done illegal act or an act which was done legally by illegal means. In absence of these fundamental ingredients neither the offence of cheating nor the offence of criminal conspiracy is made out. The only other Section under which cognizance has been taken is Section 304-A of the IPC.

12. Section 304-A of the IPC states that whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. It would appear from the statement made in the complaint



petition that there is no allegation of negligence against the accused persons. Further, in absence of any medical expert report, it would be unsafe to straightway draw a conclusion that there was prima facie case against the petitioners for committing the offence of criminal medical negligence. It is well settled that the offence under Section 304-A of the IPC cannot be attracted in case of unfavourable result of treatment. Further, according to the complainant, his mother died on 26th October, 2004 whereas the complaint was filed after more than one year of death of his mother on 29th November, 2005 for which no plausible explanation has been given by the complainant.

13. Having noticed the facts of the case, I deem it proper to refer here that in *Kusum Sharma & others v. Batra Hospital & Medical Research Centre and others [(2010) 3 SCC 480]*, the Supreme Court held that 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 or 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 or most likely imminent.

14. It would also be pertinent to note that in *MARTIN F. D'SOUZA Vs. MOHD. ISHFAQ [(2009) 3 SCC 1]*, a two-Judge



Bench of the Supreme Court has lucidly and elaborately explained the subject of medical negligence and held in para 106 as under:-

“106. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Forum (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew case [Jacob Mathew v. State of Punjab, (2005) 6 SCC 1], otherwise the policemen will themselves have to face legal action.”

15. Having regard to the ratio laid down by the Supreme Court in the aforementioned decisions, the instant complaint cannot be allowed to continue as neither the body was medically examined nor the matter was ever referred to a competent doctor or committee of doctors. Apparently, the entire complaint is malicious in nature.

16. Hence, allowing such a prosecution to continue any more would amount to a gross abuse of the process of the Court. Accordingly, the Complaint Case No. 3471(C) of 2005 and all the proceedings arising therefrom including the order dated 10th March,



2006 are quashed.

17. The application stands allowed.

(Ashwani Kumar Singh, J)

Pradeep/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	03-05-2017
Transmission Date	03-05-2017

