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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.625 OF 2015

Protection of Rights Association … Applicant

vs.

State of Maharashtra & Ors. … Respondents

Mr. Aniket Nikam a/w Aashish Satpute a/w Piyush Toshnival for the Applicant.
Mr. Vinod Chate ,APP, for the Respondent-State.
Mr. Rayees Shaikh for Respondent no.2.
Mr. Raja Thakare i/b. Shreeram Shirsat for Respondent nos.3 and 4.

CORAM : A.K. MENON, J.
DATED : 3rd JULY, 2017

P.C.

1 The applicant claims to be a trust registered under the Bombay Public Trust Act, 1950. It espouses the cause of the parents of a child who unfortunately expired post-surgery. The applicant claims to represent the said parents. It is the case of the applicant that the parents of the child had initially caused the child to be treated in Escorts Hospital, New Delhi when he was 7 months old. Later, in April 2011 it appears the Cardiologist suggested a reinforcing surgery to be carried out. The application proceeds on the basis that the mother of the child was insisting with her husband to go ahead with the post-surgery at the earliest. On this basis the child came to be admitted to the Fortis Hospital, Mulund, for an operation on 5th October, 2011. The respondent nos.2 to 4 who were impleaded post amendment are stated to be the doctor members of medical team which

undertook the surgery.

2 According to the applicant, the child was cheerful post-surgery. It is further stated that the parents were advised that the surgery was successful and the child would be recover in 2-3 weeks. However, quite to the contrary the child was experiencing "chest drains" in both the chest cavities and developed severe pain and breathing difficulty and thereafter unfortunately passed away on 11th November, 2011.

3 Mr. Nikam the learned counsel for the applicant has challenged an order dated 5th March, 2015 passed by the Metropolitan Magistrate, 17th Court, Borivali, Mumbai accepting the final report filed by the Investigating Officer and the Case Summary was granted. The impugned order records that the proposed petition filed by the petitioner association was also disposed of. This order has been called in question in this application by the aforesaid association.

4 Mr. Nikam submitted that filing of the "C Summary" is not warranted given the fact that the surgery in this case resulted in internal bleeding leading to the demise of the child despite which police had failed to register an FIR and that the applicant association had approached this Court in Criminal Writ Petition no.40 of 2013 wherein an order came to be passed on 12th August, 2013 directing the Investigating Officer to file an affidavit as also that of the Senior Police Inspector, in charge of the Police Station as to why for 6 months the

complaint of the parents of the child was not attended to. It transpires that the FIR came to be registered after the said order was passed. Mr. Nikam has taken me through the Post-Mortem Report which indicates that the cause of death was caused inter alia due to internal bleeding. He submitted that the reports at item no.20 and item no.21 clearly records the presence of a substantial clot of blood which indicative of internal bleeding attributable to negligence by the team of doctors who were involved in the surgery. In Post-Mortem Report dated 14th November, 2011 in the column relating to "Opinion as to cause and probable cause of death", the following endorsement appears:-

> *"Opinion reserved pending for histopathology and chemical analysis of visceral organs examinations."*

5 Since the opinion as to cause of death was reserved pending the receipt of histopathology and chemical analysis the final endorsement of cause/probable cause of death is shown as follows:-

> *"Death due to pulmonary oedema with congenital heart disease, focal fatty degeneratic lungs collapsed, internal bleed, contusions, stitches and injection marks (Operated case of double inlet single outlet ventricle – single, with pulmonary artery sterosis."*

This supplementary of the cause of death is dated 26th June, 2013. Thereafter it appears that the Investigating Officer sought an independent opinion of the Grant Medical College and Sir J.J. Group of Hospital. This opinion is seen to be issued on 11th September, 2013.

6 Mr. Nikam relied upon to Clause B of the said report dated 11th September, 2013 under the heading "Autopsy Finding" and submitted that the report of the Medical Board is contrary to the findings of the post-mortem. He relied upon clause B(a) which indicates that there was no injury to any vital organ or major vascular structure which if injured would have resulted in profuse bleeding. He also drew my attention to the observation that the child had a large collection of fluid in serous cavities which was mixed with a little blood, giving the wrong impression that the entire fluid looked like blood. This was contrary to the Post-Mortem Report which clearly mentions that 1000 CC of "blood" was found in the abdominal cavity and further that a "clot of around about 500 CC" was found in the small intestine. He submitted that the cause of death, as certified by the medical officer on 26th June, 2013, is contrary to the opinion of the board. He therefore submitted that the impugned order is liable to be set aside and investigation may be proceeded with. He submitted that the closure was not justified in the fact situation at hand.

7 Mr. Thakare representing respondent nos.3 and 4 and Mr. Shaikh for respondent no.2 on the other hand submitted that the report of the Medical Board was obtained as part of the mandatory requirements. The guidelines in this behalf were specified by the Supreme Court in the case of ***Jacob Mathew v/s. State of Punjab & Anr. in Criminal Appeal nos.144-145 of 2004***. The Supreme Court laid down that a private complaint may not be entertained unless the Complainant has produced prima facie evidence 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 and that the Investigating Officer should, before proceeding against the doctor accused of a rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in the relevant branch that can be expected to provide an impartial and unbiased opinion. Further, the doctor accused of rashness or negligence, may not be arrested in a routine manner simply because a charge has been leveled against him.

8 Relying upon the said guidelines, it is submitted that Investigating Officer has in compliance with the said guidelines had sought the opinion from the J.J. Hospital and that is how the opinion dated 11th September, 2013 has been obtained. Mr. Thakare submitted that the surgery itself was inherently risky and it was not an ordinary case. He referred to Brief Case Summary incorporated in the report of the Medical Board which sets out that the child was born with "complex congenital cyanotic heart disease" at Dubai on 24th November, 2002 and was thereafter treated for the said congenital defect at Escorts Hospital, New Delhi. The child was thereafter under regular follow up and in 2010 he was detected with breathlessness and decreased oxygen saturation and was once again advised surgery.

9 Having heard the learned counsel for the parties, I am not persuaded to hold that the impugned order was perverse in any manner. Quite apart from the

fact that the applicant has proceeded to file this application on its own unsupported by any medical opinion as mandated by the Supreme Court, to suggest that the respondent nos.2 to 4 were rash and negligent in their conduct and discharge of their duties before, during or after the surgery does not appear to have basis in fact. The guidelines laid down of the Supreme Court clearly specify that before the complaint is entertained, the complainant must produce the prima facie evidence before the Court in the form of a credible opinion of another competent doctor to support the charge of rash and negligence on the part of the doctor so accused. It appears that the complex nature of the surgery itself was fraught with risks. Therefore it was unfortunate that the child did not cope with the post-surgical period and ultimately succumbed during the post-operative stage. The fact that the child did not survive alone be a reason to allege negligence on the part of the doctors.

10 On a query from the Court Mr. Nikam conceded that no such independent opinion has been obtained by the applicant or anyone else in support of the complaint filed. Thus, before the Magistrate's Court and in this application, the record does not indicate that any independent competent doctor conversant with the complexities of the surgery at the hand had opined that the respondent nos.2 to 4 or any of them had acted rashly or negligently at any stage. It seems that the applicant has proceeded on the basis of an assumption as to the cause of death and has attributed negligence to the respondent nos.2 to 4. The pleadings even in this application do not indicate the applicant or the parents of the child had

obtained any independent opinion. Mr. Nikam then contended that applicant association has doctors who are trustees and therefore the complaint is competent and in compliance with the guidelines.

11 This submission that cannot be accepted since it is not the case of the applicant that any of the trustees or any doctors otherwise specialized in that field of surgery had even examined the case papers before pursuing this complaint and the present application. Moreover, the record reveals that the Post-Mortem Report records the date and hour of the receipt of the body as 2.00 a.m. on 14th November, 2011. The report though otherwise undated is signed on the last page by the Medical Officer reserving the opinion *"pending receipt of the histopathology and chemical analysis of visceral organs examination."* It is pertinent to mention that subsequent report of the medical officer endorsing the cause/probable cause of death and quoted on last page of the Post-Mortem Report is dated 26th June, 2013.

12 The applicants seem to have been convinced that the demise of the child was a result of negligence by making reference only to the expression "internal bleed" appearing in the supplementary report. On a careful consideration of the supplementary report I find that the cause of death/probable cause of death is primarily indicated as *"pulmonary oedema with congenital heart disease"*. Other various causes include lung collapsed. It also makes reference to contusions, stitches and injection marks which are certainly not indicative of the direct cause

of death. It is a report which is received after chemical analysis of the visceral organs. The report is made several months after the initial report.

13 Based on the material in hand and having considered the conclusion of the Medical Board and J.J. Hospital that the cross on the part of the concerned team of doctors it is also clarifies that all necessary treatments were carried out by the qualified doctors as per standard medical practice. The Board has gone through the records in the files and annexures received from the Dean of the Medical College as seen from the first page of the report and three medical professionals are seen to have made this report. In the circumstances, the pre-requisites of pursuing the criminal complaint have not been complied. No effort we made to obtain on independent opinion on the probability that the death was caused by negligence. The allegation appears to be fuelled by suspicion and bereft of any inquiry into material aspects, merely out of a general interpretation of the reports and at best on adhoc conclusion reached by the applicants. There is no room for adhocism in matters of launching criminal prosecution nary a complaint from the parents of the child and/or any supporting medical opinion that is suggestive of negligence by the respondent nos.2 to 4. Given the current trend to blame doctors and hospitals and in cases accompanied by mindless violence against the person and property of doctors and hospitals, it would be appropriate that the guidelines in Jacob Mathew (Supra) are strictly complied with. In criminal complaints in matters of alleged medical negligence against doctors or hospitals if the Magistrate is otherwise

satisfied, it is appropriate that before issuing process the Magistrate should ensure that a credible opinion of a competent doctor conversant with the relevant medical field and one who has practical experience in that field of surgery has opined that the death was caused by negligence. The conclusion in the credible opinion should be pleaded in the complaint and a copy thereof shall be annexed to the complaint.

14 In the facts of the present case there is no cause for interference. I therefore pass the following order:-

(i) The Application is dismissed.

(ii) No costs.

(A. K. MENON, J.)