WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 23.04.2018

DELIVERED ON : 03.09.2018

CORAM :

THE HONOURABLE MRS. JUSTICE R. THARANI

Crl. R.C. (MD) No.317 of 2016

State Represented by
Deputy Supreintendent of Police,
CBI ACB, Chennai. ... Petitioner

vs.

1.Dr.K.Avvai,
M/s. Joseph Eye Hospital, Trichy.

2.Dr.Saujanya,
M/s.Joseph Eye Hospital, Trichy.

3.Dr.Thendral,
M/s.Joseph Eye Hospital, Trichy.

4.Dr.Andrew,
M/s.Joseph Eye Hospital, Trichy. ... Respondents

Prayer:- Criminal Revision Petition filed under Sections 397 and 401 of the Code of Criminal Procedure, 1973, to call for the records, peruse the same, hear the counsel for revision petitioner, set aside the order in Crl.M.P.No.3098 of 2015 in Cr.A.SR No.513 of 2015 dated 20.01.2016 on the file of the learned Sessions Judge, Thiruchirappalli.

For petitioner : Mr.Nagendran
Special Public Prosecutor
For Respondent No.1 : Mr.N.R.Elango, Senior Counsel
For Mr.S.Senthil
For Respondent No .2 : Mrs.Chitra Sampath, Senior Counsel
For M/s.AAV Partners
For Respondent No.3 : Mr.Abdul Salem
For Respondent No.4 : Mrs.Susheela

ORDER

Heard Mr.Nagendran, learned Special Public Prosecutor appearing for the petitioner, Mr.N.R.Elango, learned Senior Counsel, for Mr.S.Senthil, learned counsel appearing for the first respondent, Mrs.Chitra Sampath, learned Senior Counsel, for M/s.AAV Partners, appearing for the second respondent, Mr.Abdul Salem, learned counsel appearing for the third respondent and Mr.Susheela, learned counsel appearing for the fourth respondent.

https://hcservices.ecourts.gov.in/hcservices/

2.This petition is filed to set aside the order passed in Crl.M.P.No.3098 of 2015 in Cr.A.SR No.513 of 2015 dated 20.01.2016 on the file of the learned Sessions Judge, Thiruchirappalli.

3.It is seen that the case in Crime No.RC MA1 2011 A 0016 was registered on 15.03.2011 on the orders of this Court in W.P.No.21804 of 2009 under Sections 120(B), 420, 336, 337 and 338 IPC and Section 13(2) r/w. 13(1)(d) of Prevention and Corruption Act, 1988 against Dr.Ashok (A1) and others. The District Programme Officers, District Blindness Control Society, Perambalur District and Joseph Eye Hospital, made large publicity regarding free Cataract operation under the National Programme for control of Blindness, which was implemented by the Central Government through the State/District Blindness, free glasses to school children etc, grand in aid is provided to the Tamil Nadu State Blindness Control Society by the Ministry of Health and Family Welfare, New Delhi. More than 100 villagers came forward for treatment at the camps held at Kadavannur School, Villupuram and Nainarpalayam School at Kandavannur, Villupuram District. Doctors shortlisted, 23 villagers from Nainarpalayam area and 43 villagers from Kadavannur area for cataract surgeries and they were taken to Joseph Eye Hospital and they conducted the surgery on 29.07.2008. The patients after surgery have unbearable pain in their eyes and they went to Aravind Eye Hospital, Madurai for expert opinion. They were told that their eyes were affected severely due to pus and they cannot get back their vision and this was confirmed by Sankara Hospital, Coimbatore where one of the above patients went for second opinion.

4.The Human Rights Commision, Trichy had filed W.P.No.21804 of 2008 before this Court seeking CBI investigation and this Court directed CBI to investigate the case. After enquiry, the CBI filed a charge sheet against seven persons under Sections 37 r/w. 325 of IPC and the learned Chief Judicial Magistrate, Trichy taken the case on file in C.C.No.87 of 2011. After trial, A1, A3 and A4 were found guilty and were sentenced to undergo one year simple imprisonment and compensation was awarded to 66 victims and ordered to initiate disciplinary proceedings against P.W.20 Dr.Dhanapal and recommended A5 and A6 to be proceeded as per the Medical Council Act, 1956 and Indian Council (Professional Conduct, Etiquitte and Ethics) Regulation 2002. A2, A5 an A6 were acquitted. Against the order of the trial Court, the CBI preferred an appeal in C.A.SR.513 of 2015 on 15.10.2015 under Section 378 of Cr.P.C., along with Crl.M.P.No.3098 of 2015 to condone the delay of 112 days. After hearing both sides, the learned Sessions Judge dismissed the petition. Against the dismissal order, the CBI has filed this Criminal Revision Case.

5.On the side of the petitioner, it is stated that the trial Court has acquitted three Doctors who performed the surgery and convicted the Manager for not maintaining the theatre clean. There is no such charge. The learned District Judge has decided that as per Section of 338 of Cr.P.C., the appeal cannot be filed before the

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

District Court against the order of the learned Chief Judicial Magistrate. This finding is not necessary when deciding the question of delay. If the learned District Judge found the appeal is not maintainable, he can return the petition instead of dismissing the same. Considering the merits of the appeal in a petition for delay excuse is not necessary. The learned Sessions Judge has not taken into consideration the eye sights of 66 innocent illiterate poor villagers were lost and the learned District Judge has gone beyond the scope of the petition and ought not to have brought in the maintainability of the appeal while deciding the petition seeking condonation of delay in filing the appeal.

6.On the side of the petitioner, it is stated that the headquaters of the petitioner is at Delhi and the petitioner has to get approval from Delhi and the delay is caused due to the process of getting approval. It is further stated that negligence includes keeping the operation theatre clean also and there is no necessary for the charge sheet to contain all the particulars. Unless the order is set aside, the victims cannot get justice. It is the duty of the Doctor to see whether the theatre is disinfected or not. People believe the Doctors and not the staff and vicarious liability is also there.

7.Though the respondents 1, 2, 3 and 4 filed separate counter, the contention in all the counter are the same.

8.On the side of the respondents, it is stated that the post operative infection developed by the patients resulted in the loss of vision on one eye of 58 persons. W.P.No.21804 of 2009 was filed by one Human Rights Commision before this Court and this Court ordered the Hospital to pay compensation of Rs.1,00,000/- (Rupees One Lakh only) per victim. The hospital had complied with the said order. Subsequently, this Court has passed an order dated 10.03.2011 directing the CBI to conduct an enquiry and to submit a detail report. While disposing of the said Writ Petition on 12.01.2012, this Court had made it clear that the criminal Court shall not in any way be prejudiced by any of the observations made in the writ petition and the case to be disposed on its own merits.

9.It is further stated that the prosecution has laid the charge sheet dated 15.03.2011, under Section 37 r/w. 325 of IPC. It is further stated that the learned Chief Judicial Magistrate, Thiruchirapalli while taking cognizance of the case on 07.12.2011 held that as there was no *mens rea* or any motive and the accused cannot be charged under Section 37 r/w. 325 of IPC and held that they would become chargeable only under Section 338 of IPC. The prosecution aggreived by the said order of taking cognizance filed a revision against the order passed by the learned Chief Judicial Magistrate, Thiruchirapalli in Criminal Revision No.20 of 2013 before the learned III Additional District Judge, Thiruchirapalli. The revision petition was dismissed on 15.07.2013. After trial, the learned Chief Judicial Magistrate in C.C.No.87 of 2011 had acquitted

https://hcservices.ecourts.gov.in/hcservices/

A2, A5, A6 and A7 and convicted A1, A3 and A4 on 22.04.2015.

10.It is further stated that aggrieved by the order dated 22.04.2015 passed in C.C.No.87 of 2011, A1, A3 and A4 had preferred the appeal in C.A.No.30 of 2015 before the learned II Additional District Judge, Thiruchirapalli. The learned II Additional District Judge dismissed the appeal on 17.11.2017 by confirming the order of sentence passed in C.C.No.87 of 2011 dated 22.04.2015 and enhanced the compensation for a sum of Rs.9,85,00,000/- (Rupees Nine Crores and Eighty Five Lakhs only). Aggrieved by the said order, A1, A3 and A4 had preferred Crl.R.C.(MD)No.885 to 887 of 2017 before this Court and the same is still pending before this Court.

11.The petitioner preferred an appeal against the acquittal of A2, A5 and A7 with a delay of 112 days in Cr.M.P.No.3098 of 2015 in Cr.A.SR.513 of 2015 before the Sessions Court, Thiruchirappalli. The same was dismissed on 20.01.2016. Against the dismissal order, the CBI filed the present Criminal Revision Case.

12.It is further stated that under Section 378 of Cr.P.C., for an offence under Section 338 of IPC, the appeal against acquittal has to be filed before this Court. The petitioner herein has wrongly filed the appeal against acquittal before the Sessions Court, Thiruchirapalli with a delay of 112 days. Despite the petition was dismissed, the petitioner has not come forward to file criminal revision before this Court. Hence, the present petition is liable to be dismissed. It is the bounden duty of the petitioner to prove each and every day of delay with evidence. The petitioner has failed to withdraw the appeal. Even if the revision being allowed, it will cause incurable procedural defect as against the provision contemplated under Section 378 of Cr.P.C., In support, the Judgment passed by the Hon'ble Supreme Court in the case of *Subhash Chand v. State (Delhi Administration)* reported in *2013 1 SCC Crl 802* is cited.

13.On the side of the petitioner, it is stated that the basis of criminal trial is that the surgery was conducted negligently. The offence is only due to the negligence in conducting the surgery but the lower Court has presumed that it is only due to the unhygienic condition of the operation theatre and the petitioner is having valuable points for consideration in the appeal.

14.On the side of the respondents, it is stated that the petitioner has wrongly filed the appeal against the acquittal before the District Court. Even while filing the appeal against the acquittal, special leave from this Court is necessary and the petitioner has not filed any petition for special leave and the limitation starts from the date of Judgment and there is delay of 3 ½ years and this delay is not explained. Even if the petition is allowed and was sent back to the Sessions Court, the Sessions Court cannot take up the appeal. No appeal against acquittal is pending and no petition for leave for appeal against acquittal is also

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

pending. In support, the Judgment passed by the Hon'ble Supreme Court in the case of *Lalu Prasad Yadav and another v. State of Bihar and Another* reported in *(2010) 2 Supreme Court Cases (Cri) 1215* is cited.

WEB COPY

15.It is further stated that whether the Public Prosecutor has obtained the sanction and whether the Deputy Superintendent of Police is having power for filing revison is not stated in the petition. Only the Public Prosecutor can file the appeal and no authority is given to the Deputy Superintendent of Police to file the appeal. When the Court has no jurisdiction, it cannot condone the delay. The learned District Judge is right in dismissing the application. A persons who cannot represent the Government cannot file this revision petition.

16.The learned counsel appearing for the respondents relied on the Judgment passed by the Hon'ble Supreme Court in the case of *Mohtesham Mohd. Ismail v. Spl. Director* reported in *(2007) 8 Supreme Court Cases 254*, which reads as follows:

> *"Before the High Court, no notification was filed to show that the authority concerned was empowered to prefer an appeal on behalf of the Central Government. The Central Government was not even impleaded as a party to the appeal. First respondent did not file the appeal on behalf of or representing the Central Government. It was filed in its official capacity as the adjudicating authority and not as a delegatee of the Central Government."*

17.It is further stated that there was no infection and there was no proof by the prosecution or by the Investigating Agency regarding the infection. No overt act is there on the part of the persons who are convicted. The decision in the revision will have an impact on the convicted accused also.

18.On the side of the petitioner, it is stated that there cannot be a chance for infection for all the 66 persons who lost their eye sight. Infection cannot be taken as a defence in this cases. The technical flaw cannot be taken as a defence. Justice cannot be denied for the poor victim. The District Court must return the appeal for filing it before the proper forum. Appeal is a contination of the proceedings and an opportunity for the petitioner is to be given.

19.The learned counsel appearing for the respondents relied on the Judgment passed by the Hon'ble Supreme Court in the case of *State of Rajasthan v. Smt. Manbhar* reported in *(1981) 2 Supreme Court Cases 525*, which reads as follows:

> *"Section 378- Application under, filed by a person authorised by notifications as PP would not become incompetent merely because its contents failed to disclose that it was being presented by a PP-*

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

the State Government may, in any case, direct the Public Posecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court or an order of acquittal passed by the Court of Session in revision.

For the application to be treated as incompetent, the High Court was bound to enquire into the status of the person presenting it and to throw it out only if it was found as a fact that he did not enjoy the status of a Public Prosecutor."

20.Records perused. A perusal of the records reveals that the District Court has come to the conclusion that the appeal is not maintainable before the District Court and the reasons are not clearly explained and has dismissed the delay excuse petition.

21.On the side of the petitioner, it is stated that delay is due to the official proceedings for getting sanction. On the side of the respondents, the maintainability of the appeal and the *locus standi* of the petitioner are questioned. It is further pointed out that no petition for granting leave for filing appeal against acquittal is filed before this Court.

22.Getting official sanction from Delhi will take some time on the part of the prosecution. Considering the fact that 66 poor villagers lost their eye sight, an opportunity for the victim to get remedy has to be given. Mere technical flaw on the part of prosecution cannot curtail the rights of the victim. Remedy and justice should be given to the poor victims. In the light of the above aspect, this Court come to the conclusion that the petitioner is to be given liberty to file a petition for grant of leave to file an appeal against acquittal before this Court without taking into consideration the period of delay. With the above direction, this Criminal Revision Case is disposed of.

Sd/
Assistant Registrar(AS)

/True copy/

Sub Assistant Registrar(CS-II)

To
1.The Sessions Judge, Thiruchirappalli.
2.The Deputy Supreintendent of Police,
CBI ACB, Chennai.
3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
+4cc to M/s.A.A.V PARTNERS, Advocate, SR.No.81743

Crl. R.C. (MD) No.317 of 2016
03.09.2018

https://hcservices.ecourts.gov.in/hcservices/

MRN
KK/RP/SAR-2/27.09.2018/6P-8C