

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.1688 of 2019

Arising Out of PS. Case No.-579 Year-2018 Thana- LAHERIYASARAI District- Darbhanga

Paras Global Hospital having its place of business at VIP Road, Allalpati, Darbhanga through its Unit Head, Ashish Mukharjee, aged about 46 years, Son of Sri Rathin Mukharjee, Resident of 42/58, New Ballyganj Road, P.S.- Kasba, District- Kolkata, West Bengal Petitioner

Versus

1. The State of Bihar through Principal Secretary Department Of Home, Govt. Of Bihar, Patna
2. The Senior Superintendent of Police, Darbhanga
3. The Officer In Charge of Allalpati Police Station, Darbhanga
4. Subhash Chandra Thakur S/o Yadunandan Thakur R/o village- Akod, P.S.- Benipatti, District- Madhubani

... .. Respondents

Appearance :

For the Petitioner/s : Ms. Archna Sinha, Advocate
Mr. Alok Kumar @ Alok Kr Shahi, Advocate
For the Respondent/s : Ms. Divya Verma, AC to AAG 3

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

7 01-12-2022 Heard learned counsel for the petitioner and Ms. Divya Verma, learned AC to AAG-3 for the State.

2. Despite service of notice on the informant-respondent no. 4, he has not turned up to contest this application.

3. Petitioner in the present case is one Paras Global Hospital, Darbhanga represented through its Unit Head namely Ashish Mukherjee. The petitioner is seeking quashing of the first information report being Lahariyasarai P.S. Case No. 579 of 2018 registered for the offences registered under Sections 304A, 420 and 34 of the Indian Penal Code.

Brief Facts of the Case:-

4. It is stated that on 01.02.2018, at about 11:30AM, the FIR



in question was lodged by the respondent no. 4 alleging therein that one Jitendra Kumar met with an accident and he was referred to Paras Global Hospital, Darbhanga from Darbhanga Medical College and Hospital, Darbhanga (hereinafter referred to as 'D.M.C.H.'). The allegation is that there were negligence in the matter of treatment of said Jitendra Kumar. Further allegation is that the hospital manager namely Farukhi kept on assuring that Jitendra Kumar would be alright and in the name of saving his life, he cheated the relatives and took Rs. 72,000/-. The said Jitendra Kumar was referred to Paras HMRI Hospital, Patna for advanced treatment.

It is further alleged that the hospital took four hours in giving papers relating to the treatment provided to said Jitendra Kumar. It is alleged that because of the negligence in the matter of treatment, said Jitendra Kumar died and his two minor children became orphan. He was working in Aristo Pharma and while discharging his duty, he was going to Benipur and had met the road accident on way.

5. On the basis of aforesaid allegations, the FIR was lodged. This Court has been informed that the investigation of the case has been kept pending so far and no police report has been submitted till date.

6. Learned counsel for the petitioner has argued that on a bare reading of the first information report, it may be found that the allegations are completely vague and does not disclose commission of a cognizable offence. The entire allegations are based on surmises



and conjectures saying that the deceased was not properly treated by the hospital and had he been treated properly, he could have been saved.

7. Learned counsel further submits that Annexure '2' series of the writ application are the copies of the admission form and referral summary of the injured Jitendra Kumar who was referred to Higher Centre/Paras HMRI Hospital, Patna. The documents have remained uncontroverted, therefore, this Court may safely rely upon them.

8. Learned counsel has further submitted that in this case prior to lodging of the FIR no preliminary inquiry was held. Reliance has been placed upon the judgment of the Hon'ble Supreme Court in the case of **Jacob Mathew versus State of Punjab and Anr.** reported in (2005) 6 SCC 1, judgment of the Constitution Bench of the Hon'ble Supreme Court in the case of **Lalita Kumari versus Govt. of U.P.** reported in (2004) 2 SCC 1 to submit that in the nature of the present case, it was obligatory upon the police to conduct a preliminary inquiry before registering the FIR. The submission is that even if it is assumed without admitting that it may be a case of negligence, a first information report could not have been lodged in a routine and in a mechanical manner and on mere asking that an allegation of medical negligence.

9. Learned counsel has further submitted that in fact from Annexure '2 series', it would appear that the patient was



referred for further treatment at Patna Paras HMRI Hospital/Higher Centre. He was shifted from ICU to ambulance and put on ventilator and two units of blood were handed over to E.M.T. Technician of that ACLS Ambulance, along with attendants. Some attendants of the patient remained there and after completing the paper formalities they left. But immediately after the patient left for Patna, the relatives of the patient started quarelling with the staffs and doctors. It is alleged that some of the hospital management staffs were assaulted by them and they broke the furniture and other things of the hospital which continued till next morning. At 10:00 A.M. crowd started throwing stones at the hospital. In this regard, the petitioner registered an F.I.R. being Laharisarai P.S. Case No. 580 of 2018 under Sections 147, 149, 341, 323, 324, 427, 506 of the Indian Penal Code. A copy of the FIR has been brought on record as Annexure '3'.

10. Learned counsel submits that in the case of **Jacob Mathew** (supra) and **A.S.V. Narayanan Rao versus Ratnamala & Ors.** reported in **(2013) 10 SCC 741** laid down the guidelines for prosecuting the medical professionals for criminal negligence. The Hon'ble Supreme Court has provided several safeguards for the medical professionals from malicious prosecution. In the nature of the present case, the Investigating Officer should have, before proceeding against the petitioner alleging rash and negligence act or omission, obtained an independent competent medical opinion preferably of a doctor from a Government Hospital who could have



given an impartial and unbiased opinion applying Bolam Test which provides that a doctor would not be held negligent if his line of treatment may be endorsed by a team of medical experts in the given speciality at the relevant time.

11. It is lastly submitted that in the light of the judgment of the Hon'ble Supreme Court in the case of **State of Haryana and Others versus Bhajan Lal** reported in **AIR 1992 SCC 604**, **State of Karnataka versus M. Devendrappa and another** reported in **(2002) 3 SCC 89** and **Vineet Kumar and Others versus State of U.P. and Another** reported in **(2017) 13 SCC 369**, this Hon'ble Court may quash the first information report holding the same to be a mere toll of harassment, abuse of the process of the Court and in the ends of justice.

12. As stated above, respondent no.4 who is the informant of the case has not contested this application. Learned AC to learned AAG-3 has though opposed this application but there is no contest on the law laid down by the Hon'ble Supreme Court and the propositions initiated thereunder providing for the safeguards in the matter of initiation of a criminal prosecution against a medical professional. There is no contest to the documents (Annexure-2 series).

13. Learned counsel for the State has not brought to the notice of this Court any material, if any, collected by the investigating agency to show that the investigating agency had found



any prima facie material to proceed against the petitioner.

Consideration:-

14. Having heard learned counsel for the petitioner and learned AC to AAG-3 for the State and upon perusal of the materials available on the record, this Court finds at first instance that as per the FIR, the deceased had met a road accident on 28.11.2018 whereafter he was brought to D.M.C.H., Darbhanga. He was referred to Paras Hospital (the petitioner) where he was admitted. There is an allegation that because of negligence in treatment, the patient died, but on this issue, there is no expert opinion. Neither the FIR discloses any basis to make such allegation against the petitioner in the FIR nor any material in this regard has been collected by the investigating agency in course of investigation.

15. On the other hand, the uncontroverted documents (Annexure '2' series) would show that the patient was admitted in the hospital on 28.11.2018 itself and he was taken to the emergency. The patient was presented with loss of consciousness and multiple episode vomiting since then. He was bleeding from left ear and had abrasion over head, face and right leg. There were multiple abrasion on head, face and eye, several investigations were carried on and he was managed conservatively by ventilator support. According to Annexure '2' Series, the critical condition and poor prognosis was explained to the attendants. On the same day, at about 8:00 P.M., he was referred to Higher Centre/Paras HMRI Hospital, Patna. The



treatment was undertaken on the strength of a declaration made by the attendant namely Roshan Kumar Jha.

16. This Court finds that the present FIR was lodged on 01.12.2018. Prior to lodging of the FIR, no preliminary enquiry was held. In this regard, the judgment of the Hon'ble Supreme Court in the case of **Jacob Mathew** (Supra), the relevant part of the tests laid down by the Hon'ble Supreme Court in **Jacob Mathew** (supra) are being reproduced hereunder for a ready reference:

“**48.**(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 he 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 case⁹, WLR at p. 586¹⁰ 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”.

⁹ *Bolam v. Friern Hospital Management Committee*, (1957 1 WLR 582 : (1957) 2 All ER 118 (QBD)

¹⁰ [ED.:Also at All ER P. 121 D-F and set out in para 19, p. 19 herein.]



(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.”

17. In the case of **Lalita Kumari** (Supra), the Constitution Bench of the Hon’ble Supreme Court has again carved out the exceptions on the matter of lodging of the FIR on the allegation of medical negligence. The test laid down by the Hon’ble Supreme Court in the said judgment is quoted hereunder for a ready reference:-

“120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to



ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.”

18. To this Court, it appears that the police has acted in hot haste in registering the FIR in the present case. There was no material before the police to come to form a prima facie opinion that the allegations as contained in the written complaint that upon applying ‘Bolan Test’ would give rise to a cognizable offence. In such situation, the only option left with the police was to follow the judgment of the Hon’ble Supreme Court in the case of **Chaudhary Bhajan Lal** (Supra). It is well-settled that where the allegations in the first information report and the other materials brought in support thereof do not disclose commission of the cognizable offence justifying investigation by police officer under Section 156(1)



Cr.P.C., the Magistrate should act only as per Section 155(2) Cr.P.C.
Section 155(2) and 156(1) Cr.P.C. are quoted hereunder for a ready
reference:-

“155 Information as to non-cognizable cases and investigation of such cases - (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

156. Police officer's power to investigate cognizable case -(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.”

19. In the entirety of the facts and circumstances of the case, this Court is of the considered opinion that the present FIR does not disclose commission of a cognizable offence and it has not been duly registered in the terms of the provisions of the Cr.P.C. as indicated



above and the judgment of the Hon’ble Supreme Court in the case of Jacob Mathew and Lalita Kumari, the first information report is hereby quashed.

20. This application stands allowed.

(Rajeev Ranjan Prasad, J)

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