IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.87388 of 2019

Arising Out of PS. Case No.-444 Year-2017 Thana- KISHANGANJ District- Kishanganj

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Dr. Manzar Alam @ Md. Manzar Alam Son of Md. Nurul Alam Resident of Channi, P.S.- Routa, District - Purnea at present medical officer Sadar Hospital Kishanganj, P.S. and District - Kishanganj.

... ... Petitioner/s

Versus

1. The State of Bihar
2. Nitu Gupta Wife of Amit Gupta Resident of Aasansol, P.S.- Aasansol, Distt.- Bardhman (West Bengal) At - present daughter of Baiju Parsad Gupta, resident of Rollbag, P.S. and District - Kishanganj.

... ... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Dilip Kumar Singh, Advocate
For the State : Mr. Umanath Mishra, APP

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CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA

ORAL ORDER

5 03-11-2022 Heard learned counsel appearing on behalf of the petitioner and learned APP appearing on behalf of the State.

This application is filed for quashing the cognizance order dated 22.07.2019 only to the extent of petitioner whereby and whereunder learned Chief Judicial Magistrate, Kishanganj has been pleased to take cognizance against the petitioner u/s 304(A) of the Indian Penal Code in connection with Kishanganj

P.S. Case No. 444 of 2017 presently pending in the Court of learned Chief Judicial Magistrate, Kishanganj for trial and disposal.

The prosecution case in brief is that on 18.08.2017, informant was admitted in Sadar Hospital, Kishanganj for delivery and she gave birth to a healthy child but after delivery, the health of the child was deterioted, on which she was advised by the nurse to get it treated by Dr. Abhay Kumar, privately. Therafter, the petitioner convinced them that the said doctor had no knowledge and he would cure the child on payment of Rs.50,000/- (Rupees Fifty Thousand) as award and ordered the nurse to give an injection to the baby child but after administering the said injection, infection spread throughout the body. Thereafter, the petitioner advised the informant to admit the child in M.G.M. Hospital for better treatement, but when the informant took the child to the M.G.M. Hospital, it was told by doctor that the baby child had collapsed 45 minutes earlier.

Learned counsel for the petitioner submitted that petitioner is a government employee and a renowned doctor and prior to take congnizance against him, no previous sanction has been taken by the State Government, as enshrined u/s 197 of the Cr.P.C. because the alleged allegation or act was done by the

petitioner in the discharge of his official duty, hence, no offence is committed by him. It is submitted that most of the witnesses are hearsay witnesses and they have deposed contradictorily among themselves before the investigating agency. It is submitted that, as per F.I.R., no offence u/s 304(A) of the Indian Penal Code is made out against the petitioner, hence, cognizance order is bad in the eye of law and not sustainable.

Further, Apex Court in the case of ***Jacob Mathew vs. State of Punjab and Another reported in (2005) 6 SCC 1*** observed that simple lack of care, an error of judgement or an accident, is not a proof of negligence on the part of a medical professional. Paragraph no.48 of the said decision is reads as under:

> *"48. We sum up our conclusions as under:*
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> *(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.*

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(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."

It is further observed by Hon'ble Supreme Court in the matter of Jacob Mathew case (supra) as:

"As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by the police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to a rash or negligent act within the domain of criminal law under Section 304-A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by

any standards."

"We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against."

It was further observed as:

"Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State

Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court 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. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam [(1957) 1 WLR

582 : (1957) 2 All ER 118 (QBD)] test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

Importing the ratio of Jacob Mathew case (supra) in the present facts and circumstances, it appears that when health condition of new born baby of the informant started to deteriorate, an injection was given to him, under the direction of the petitioner at Sadar Hospital, Kishanganj and on further deterioration, informant was advised to go for higher medical centre of that area i.e., M.G.M. College and Hospital. Investigating Officer of this case failed to obtain an independent and competent medical opinion from government hospital, in the present case, it was likely to be obtained from higher centre.

It is an admitted position that no payment was made to the petitioner. Hence, the facts of this case, alongwith the manner of investigation, is sufficient to suggest that it does not constitute a criminal negligence, being a doctor of government hospital.

Accordingly, impugned order dated 22.07.2019 is set aside.

Hence, the present quashing petition is allowed.

(Chandra Shekhar Jha, J)

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