



Crl.O.P.No.27197 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.09.2022

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.27197 of 2014
and M.P.No.1 of 2014

1.Doctor D.Jayanthi
2.Uma

... Petitioners

Vs.

R.Solaiyappan

... Respondent

Prayer : Criminal Original Petition has been filed under Section 482 of Criminal Procedure Code to call for the records on the file of the learned Judicial Magistrate No.I, Puducherry in STR.No.2081 of 2011 and quash the same.

For Petitioners : Mr.S.Ashok Kumar
Senior Counsel
for Mr.A.Sasidharan

For Respondent : Mr.K.Selvarangan



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ORDER

The petitioners/accused in STR.No.2081 of 2011 who are facing trial for the offence under Section 338 IPC on the file of the learned Judicial Magistrate No.I, Puducherry filed this quash petition.

2.The gist of the complaint is that the respondent's wife Mrs.S.Dharani was admitted in Puducherry Government Hospital on 26.05.2004 for second pregnancy delivery. On 07.06.2004 cesarean operation conducted, she gave birth to a male child and she was discharged from the hospital on 15.06.2004. The specific case against the petitioners is that due to negligence during cesarean operation, the said Mrs.S.Dharani developed complications and she developed tumor in her stomach. She was again admitted in the same hospital on 30.06.2004 as in-patient and without giving proper treatment, she was discharged on 13.07.2004. Subsequently she was taken to a Private Hospital at Tindivanam and later, to Government Hospital at Villupuram where she was advised surgery for the tumor in the



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stomach and she was further advised to approach the Puducherry Government Hospital for necessary treatment. When she was taken to the Puducherry Government Hospital, she was not given proper treatment and was discharged on 01.09.2004. For the negligence committed and improper cesarean operation, the complainant's wife Mrs.S.Dharani had developed oozing of pus. On the advise of a Doctor at Tindivanam, scan was taken at Sona Scan Centre, Puducherry on 02.09.2004. At that time, she was informed that during cesarean operation, some foreign object was left in the stomach which is the reason for all complications. Thereafter, on medical advise she was admitted at Santhosh Hospital, Besant Nagar, Chennai on 23.09.2004 and after a major surgery the foreign object was identified and removed from her stomach. The respondent's wife suffered all these serious ailments and pain due to the negligence of the Doctor who conducted surgery, to her at Government Hospital, Puducherry on 07.06.2004. Due to the negligence, the life of the said Dharani was in danger and only due to timely operation conducted, her life was saved. The Doctor in Government Hospital, Puducherry failed to give reason, on the other hand attempted to cover up their misdeeds. Hence, complaint was lodged with Grand Bazaar



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Police Station, Puducherry on 16.10.2004 which was not acted upon.

Therefore, a private complaint was filed by the respondent before the learned Judicial Magistrate No.I, Puducherry. The learned Magistrate caused enquiry under Section 202 Cr.P.C. and directed the Inspector of Police, Puducherry to cause an enquiry and a report was filed on 23.01.2012. Further, in the report it was stated that the victim Dharani filed a petition before the District Consumer Redressal Forum, Puducherry in Consumer Complaint No.26/2005 which was pending as on the said date.

3.The contention of the learned counsel appearing for the petitioners is that the respondent made bald and sweeping allegations against the Puducherry Government Hospital and was not specific about the Doctor who conducted cesarean operation and taken care of his wife. There is no specific overt act attributed against the petitioners, for any gross negligence and questioned competency of their qualification and work. The respondent suppressed the material fact of approaching the Consumer forum by filing consumer dispute which was dismissed both by the District Consumer Forum as well as State Consumer Forum. Thus, suppressing these facts, the



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complaint was lodged. It is further submitted that even according to the complaint, cesarean operation was conducted on 07.06.2004, complaint was lodged after six months, i.e. On 02.12.2004 and there is no reason given for taking the complaint on file by the Lower Court in the year 2011, after a lapse of nearly six years. Hence, it is barred by limitation under Section 468 Cr.P.C. Further, no reason was given by the Lower Court for condoning the delay in lodging the complaint and taking the complaint on file.

4.The learned counsel for the petitioners relied on the decision of the Apex Court in the case of ***Jacob Mathew vs. State of Punjab and another*** reported in ***[2005] 6 SCC 1***, wherein the Apex Court held that negligence in the context of 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. A professional may be liable for negligence



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on one of two findings, if it is found he has not possessed requisite skill which he professed to have possessed or he did not exercise with reasonable competence in the given case. Further, it also referred to the medical negligence in the case of ***Bolam vs. Friern Hospital Management Committee*** reported in ***1957 [2] All ER 118***, wherein it was held that 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 become an offence, the element of mens rea must be shown to exist. For an act to amount, 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. Further, it also held that *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law, especially in cases of torts and helps in determining the onus of proof in actions relating to negligence. Further, the decision in ***Dr.Suresh Gupta vs. Government of NCT of Delhi*** reported in ***2004 SCC [Cri] 1785*** reaffirm the legal principle *Ex abundanti*



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cautela. Further, it also emphasize the need for care and caution in the interest of society; for the service which the medical professional 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 pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against. Further, it was also observed that a private complaint may not be entertained unless the complainant 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, 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* test to the facts collected in the investigation.

5.The learned counsel appearing for the respondent submitted that due to the negligence of the petitioners/accused herein the respondent's wife was made to visit many Doctors, finally on on 24.02.2005, she was operated



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at Santhosh Hospital, Chennai and one Doctor Kannan opined that the abdominal pad was left behind after the cesarean operation held on 07.06.2004. If the pad was not removed by surgery, the patient Smt.Dharani might have developed septicemia and died. He also handed over two photos which was taken at the time of operation and one CT scan dated 12.08.2004 taken at Government Hospital, Villupuram to prove the negligence of the accused. The respondent and his wife undergone mental torture, pain and sufferings. The respondent filed a private complaint on 02.12.2004 before the learned Judicial Magistrate, No.I, Puducherry which is within the time limit as the last operation was done in February 2005. Hence within limitation. The learned Judicial Magistrate No.I, Puducherry referred the matter under Section 202 Cr.P.C. to the Inspector of Police to file his report and hence, there is no delay on the part of the respondent. Equity and fair play should not try to stretch itself too far to dismiss applications on technical grounds. It is further submitted that the complaint was filed by the petitioner in December 2004 whereas petition before the Consumer Court was filed in the year 2005 and hence, there is no possibility of mentioning about this fact in the complaint filed on 02.12.2004. Likewise, dismissal of



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the appeal on 22.03.2010 by the District Consumer Redressal Forum could not find place in the complaint. Hence, there is no suppression of facts. It is further submitted that the dismissal of the petition in Consumer Forum, by no stretch of imagination can be held to be an appellate order or a final order binding the criminal courts proceedings.

6.Today [26.09.2022], the respondent filed an affidavit informing that the names of the petitioners were not mentioned in the complaint and in order to give quietus to the matter, the respondent and his wife are willing to settle the issue out of Court and agreed for a compromise as the petitioners agreed to pay a sum of Rs.1,25,000/- as compensation for the pain and sufferings. Further, the respondent has no objection for quashing the proceedings in S.T.R.No.2081 of 2011 on the file of the learned Judicial Magistrate No.I, Puducherry.

7.Today, the petitioners paid the compensation amount by way of Demand Draft drawn on State Bank of India, PBB Branch, Pondicherry in D.D.No.729147 dated 19.09.2022 for a sum of Rs.1,25,000/- in the name of



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Smt.Dharani, wife of the respondent herein. The respondent received the Demand Draft and the same is acknowledged. Further, the respondent has got no objection for quashing the private complaint against the petitioners.

8.Considering the submissions and on perusal of the materials, it is seen that the respondent lodged a complaint with delay alleging that during the cesarean operation conducted to his wife on 07.06.2004, some foreign object was placed inside her abdomen, she got discharged on 15.06.2004 and six months thereafter she developed pain and pus formation, for which she approached Tindivanam Government Hospital, thereafter a private hospital, Scan Centre in Puducherry and again Government Hospital, Puducherry and since her pain and problem continued, she approached Santhosh Hospital, Chennai wherein from perusal of the scan report and examination, she was informed by the Doctor that some foreign object was found inside her abdomen which might be during the cesarean operation. After the surgery conducted at Santhosh Hospital, Chennai, she got completely recovered. During this period, the respondent's wife suffered pain and mental agony. The complaint proceeds on the above premise and



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facts. The learned Judicial Magistrate No.I, Puducherry caused enquiry under Section 202 Cr.P.C., Inspector of Police, CBCID submitted his report narrating the same but no material collected to show that during cesarean operation some foreign objects were left inside the abdomen which caused medical complications. Further, there is a delay between the cesarean operation and the final operation and thereafter, complaint was lodged. The respondent approached the Consumer Court which got dismissed, thereafter appeal filed and the same also dismissed finding that there is no negligence on the part of the petitioner. The medical negligence complaints cannot be entertained as a matter of course. The Apex Court in the case of **Jacob Mathew vs. State of Punjab and another** [cited supra] referring to the case of **Dr.Suresh Gupta vs. Government of NCT of Delhi** and the case of **Bolam vs. Friern Hospital Management Committee** held that to prosecute the medical professional for negligence under Criminal Law, it must be shown that the accused did something or failed to do something, no medical professional in the ordinary sense and prudence would have done or failed to do so. Further, the maxim *res ipsa loquitor* is only a rule of evidence



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operates in the domain of civil law and it has got a limited application in trial on a charge of criminal negligence. It was further held that the Doctor Profession is the noblest of all, hence there is a need for protecting Doctor from frivolous or unjust prosecution. It would be appropriate to extract the following:

“34.The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 sets out a few vocal examples. Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm to a person and that person has not consented to suffer such harm. There are four exceptions listed in the Section which is not necessary in this context to deal with. Section 93 saves from criminality certain communications made in good faith. To these provisions are appended the following illustrations:-

Section 88

“A, a surgeon, knowing that a particular operation is



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likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death and intending in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

Section 92

“(a) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

* * *

A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

Section 93

“A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.”



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9.Thus, looking the case from any angle both on the facts and further on the ground that the respondent agreeing for a compromise and had no objection for quashing the proceedings, this Court finds that continuation of proceedings against the petitioners would amount to abuse of process of law. Hence, the proceedings against the petitioners in S.T.R.No.2081 of 2011 before the learned Judicial Magistrate No.I, Puducherry is hereby quashed.

10.Accordingly, this Criminal Original Petition stands allowed. Consequently, connected miscellaneous petition is closed.

26.09.2022

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Index : Yes/No

Internet: Yes/No

Speaking Order/Non-Speaking Order

To

The Judicial Magistrate No.I,
Puducherry



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M.NIRMAL KUMAR, J.

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