



Crl.O.P.No.26170 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.08.2022

Pronounced on : 22.08.2022

CORAM:

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Crl.O.P.No.26170 of 2019

1. Dr.Dharmendra,
2. Dr.R.T.Vinod Rajkumar

... Petitioners/Accused No.1 & 2

/versus/

1. The State,
Represented by
The Inspector of Police,
B-3, Kattoor Police Station,
Coimbatore.

... 1st Respondent/Complainant

2. Mr.K.Vinoth Kumar.

... 2nd Respondent/defacto complainant

Prayer : Criminal Original Petition has been filed under Section 482 of Cr.P.C., to call for the records in C.C.No.1486 of 2019 pending on the file of the Judicial Magistrate-II, Coimbatore and quash the same as against the petitioners herein.

For Petitioners : Mr.P.H.Manoj Pandian

For R1 : Mr.N.S.Suganthan,
Government Advocate (Crl.Side)

For R2 : Mr.N.Ponraj



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ORDER

The petitioners herein are Doctors by profession. They are facing trial in C.C.No.1486/2019 on the file of Judicial Magistrate-II, Coimbatore, for alleged negligence endangering the life by their act of omission to remove the gauze (3x3c.m) from the operation site of the patient's body after completion of surgery performed to the minor boy Master Vishnu son of Mr.K.Vinoth Kumar held on 08/09/2017. Subsequently, on coming to know that he/defacto complainant, had approached the police and lodged a criminal complaint that they called the parents of the minor boy to their hospital on 20/01/2018 and threatened them.

2. Contending that, the criminal proceedings initiated by the defacto complainant with a malafide intention to put pressure on the petitioners to settle the claim petition for Rs.90,00,000/- (Rupees Ninety Lakhs) pending on the file of State Consumer Disputes Redressal Commission, Chennai and moreover, the



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alleged act of negligence will not fall within the scope of Section 337 of I.P.C since the non-removal of the foreign body (gauze) from the patient was not intentional. The Left cohen's trigonal ureteric reimplantation surgery performed to the minor boy aged 4½ years old was a complicated and it took about 2½ hours to complete. The foreign body (gauze) kept in the tissue to wipe the blood oozing at the time of surgery since it was difficult to differentiate the tissue and the gauze soaked in blood. In the course of investigation, the field Experts opinion was obtained and in the opinion of the Experts, the alleged act of omission will not amount to criminal negligence. In spite of the clear opinion by the committee of Experts, the Trial Court had taken cognizance of the final report and proceed with the trial.

3. The Learned Counsel for the petitioner, relying upon the judicial pronouncements on criminal prosecution for medical negligence, submitted that, the unjust prosecution of the petitioners are not sustainable in view of the dictum laid in *Jacob Mathew's v. State of Punjab reported in (2005) 6 SCC 1* by the Hon'ble Supreme Court applying the Bolem's test, (i.e.,) to prosecute a medical



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professional for negligence under criminal law, it must be shown that the accused persons have done or omitted 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.

4. The Learned Counsel representing the defacto complainant relying upon the medical reports and the candid admission of the petitioners submitted that, the negligence on their part while performing the surgery is an undisputed fact. The gross negligence and recklessness of the petitioners are an inferential fact from their conduct by not conducting necessary surgery to remove the foreign body gauze even after knowing that, they failed to remove the foreign body (gauze) used during the surgery conducted by them on 08/09/2017. The defacto complainant was forced to conduct the second surgery at Vedanayagam Hospital, on 04/01/2018 to remove the gauze.

5. The Hon'ble Supreme Court in *Indian Medical Association -vs- V.P.Shantha* reported in (1995 (6) SCC 651), had categorically held that, leaving



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inside the patient swabs or other items of operating equipment after surgery is a negligence in rendering medical service. The act of gross negligence is to be tried by the Criminal Court and cannot be pre-concluded that there was no criminal negligence based on the opinion of the Expert committee, without being testified.

6. Heard the Learned Counsel for the petitioners and the Learned Counsel for the respondents.

7. In the instant case, the documents relied by the prosecution reveals that, Master Vishnu aged 4 ½ years was admitted in SGR Hospital with complaints of abdominal pain and recurrent Urinary Tract Infection. He was diagnosed of left vesicoureteral reflux (VUR). The left kidney of the patient was smaller than the right kidney. Therefore, on 08/09/2017 left cohen's trigonal ureteric reimplantation surgery was conducted by the petitioners at SGR Hospital. The patient was discharged from hospital on 19/09/2017. The patient was asked to come for review after one week. The patient was complaining of pain while walking and while urination, when this was informed to the petitioners, they



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advised to take scan. In the scan report dated 23/09/2017, it was observed that the small left kidney with mild left hydrouretero nephrosis.

8. The complainant alleges that, suppressing the fact that, in the said scan report, they noticed foreign body in the bladder but Dr.Kannasadan falsely assured them that there is no problem. No further test required and the patient will recover soon. Believing his words, they returned back to home, but his son continued to suffer acute pain. Hence, they went to Apollo Hospital at Trichy, on 04/10/2017. On the advice of the doctors at Apollo Hospital, they took ultra sound scan and the scan test revealed a mobile 3x3 cm mass in bladder. The mass (gauze) was later removed through a surgery conducted at Vedanayagam Hospital on 04/01/2018. The omission to remove the gauze from the patient's body at the time of surgery held on 08/09/2017, non-disclosure of the existence of a foreign body after the scan on 23/09/2017 and threatening the defacto complainant and his wife to withdraw the complaint are the substance of the final report.



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9. In the scan report dated 23/09/2017, Dr.Kannasadan has suggested clinical correlation and MCU for further evaluation. The statement found in the complaint that, the Doctor assured no problem and no further test required is an incorrect statement. From the medical records and the statements of the witnesses, the lack of diligence during the surgery held on 08/09/2017 indicates higher degree of negligence to prosecute a qualified medical professional under section 337 of I.P.C. The jurisprudential concept of negligence differs in Civil and Criminal Law. The defacto complainant has initiated proceedings invoking Consumer Protection Act and sought for compensation on being fully aware that, the act of the petitioners are only deficiency in service. The complaint alleging criminal negligence was given to the police on 17/01/2018 and initially, case in Crime No:59/2018 registered for offence under Section 337 of I.P.C against the petitioners and one Dr.Kannadasan. After lodging the F.I.R, on 17/01/2018 and recording of the statement under Section 161(3) of Cr.P.C on 18/01/2018, presumably the defacto complainant has been ill-advised that the complaint does not contain the ingredient to sustain the criminal complaint to prosecute the petitioners. Hence, had invented a story of intimidation and further statement of



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the defacto complainant and his wife were recorded on 20/01/2018 and alteration charge by including Section 506(ii) of I.P.C filed before the Judicial Magistrate by deleting the name of Dr.Kannadasan.

10. The above observation is made since, the charge alteration report signed by the Investigating Officer with dated as 20/01/2018 is corrected as 26/01/2018 in the typed portion. The further statements of the defacto complainant and his wife recorded on 20.01.2018 are same and in duplicate. Even the gender not changed. In both the further statements, the witnesses have not even mentioned the date and time of their meeting with the petitioners after lodging the complaint to the police on 17/01/2018, when they intimidated and threatened to withdraw the complaint.

11. In *Indian Medical Association -vs- V.P.Shantha and others* cited supra relied by the Learned Counsel appearing for the 2nd respondent/defacto complainant, the Hon'ble Supreme Court while considering the provisions of Consumer Protection Act, 1986 and its application to medical practitioner/hospital



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and nursing home, remedy against medical malpractice or negligence held that,

“In service may be due to obvious faults which can be easily established such as removal of wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out-patient card containing the warning looking into the out-patient card containing the warning (as in Chin Keow v. Govt. of Malaysia [(1967) 1 WLR 813 (PC)]) or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. One often reads about such incidents in the newspapers.”

12. This observation is made in contest of application of Consumer Protection Act, which falls under Civil negligence. Whereas, in case of criminal negligence, most appropriate judgment to rely upon is *Jacob Mathew's case cited supra* wherein, the Hon'ble Supreme Court rely upon Privy Council decision in *John Oni Akerele -vs- The King* reported in *AIR 1943 PC 72*, has held that,

“That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and



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showed such disregard for life and safety of others as to amount to a crime against the State.”

13. The observation of the Privy Council is more relevant and applicable to the case in hand that, it is an admitted fact that the surgery conducted by the petitioner is a complicated surgery involving risk. Having successfully done the surgery as an ill fate gauze of 3x3 c.m size had inadvertently not removed. This is a negligence without any culpability but surely an actionable negligence.

“(iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinion. The most favourable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.”

14. In *Jacob Mathew's* case cited supra, the Hon’ble Supreme Court



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has also referred ***Indian Medical Association -vs- V.P.Shantha and others*** cited *supra* and had highlighted that,

“(iv). Conviction for any substantial criminal offence requires that the accused person should be have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness.”

and had concluded that, indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to society.

16. Considering the facts and circumstances of the case, the person



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aggrieved has already launched the proceedings under Consumer Protection Act for adequate compensation which arises out of actionable negligence, admittedly committed by the petitioners. Whereas, in the criminal complaint alleging criminal negligence is not supported by *prima facie* material except the self serving document of the defacto complainant.

17. The record indicates that, in spite of written report dated 23.09.2017, the Scan Report of Aswath Diagnostics suggested clinical correlation in MCU for further evaluation, it was the petitioners in his discretion has not followed the said suggestion given at SGR Hospital but has chosen to proceed with further investigation and surgery at different hospital. Therefore, the conduct of the petitioners cannot be termed as blameworthy to bring their conduct under the definition of criminal negligence. Any observation made in this Criminal Original Petition is only in respect of criminal negligence and shall have no bearing in the petition filed for compensation before the Consumer Forum.

18. For the aforesaid reasons, this ***Criminal Original Petition is***



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Allowed. The complaint in C.C.No.1486 of 2019 on the file of the Judicial Magistrate-II, Coimbatore, is hereby quashed.

22.08.2022

Index :Yes.
Internet :Yes.
Speaking Order/Non-speaking Order
bsm

To:-

- 1.The Judicial Magistrate-II, Coimbatore.
2. The Inspector of Police, B-3, Kattoor Police Station, Coimbatore.
- 3.The Public Prosecutor, High Court, Madras.

Dr.G.JAYACHANDRAN,J.



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Pre-delivery order made in
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