



Crl.O.P.No.23349 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.09.2023

PRONOUNCED ON: 25.09.2023

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

Crl.O.P.No.23349 of 2016

and

Crl.M.P.No.10916 of 2016

Dr. S. Balagopal

...

Petitioner

/vs/

1. State by Inspector of Police,
T-15, SRMC Police Station,
Porur, Chennai.

2. Mr. Mahavir Shivaji

...

Respondents

Prayer : Criminal Original Petition has been filed under Section 482 of Cr.P.C. to call for the records and quash the proceedings in C.C.No.13 of 2008 on the file of the learned Judicial Magistrate No.1, Poonamallee.



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For Petitioner ... Mr. K.Ravi Anantha Padmanaban

For Respondents ... Mr. L. Baskaran,
Government Advocate (crl.side)
for R1

... Mr. S.Mahaveer Shivaji
for R2

ORDER

Challenging the criminal proceedings in C.C.No.13 of 2008 on the file of the Judicial Magistrate No.1, Poonamallee, this Criminal original petition has been filed.

2. The fact of the prosecution case is that On 23.08.2005, the defacto complainant, the 2nd respondent herein admitted his son Niveshik Kumar, aged about 1 ½ years, at Sri Ramachandra Medical Center for Hernia operation. On 24.08.2005, the petitioner herein, who is the Pediatric Surgeon, had informed the defacto complainant about the nature of the operation on which he is going to perform on the child, i.e., Hernia operation and obtained consent letter from him clearly mentioning that the operation of the positioning of testis(bilateral Orchidopexy). The



petitioner has not mentioned anything about the removal of left testicles of the child in the consent letter. Therefore, the defacto complainant has signed in the document believing that the petitioner would perform only bilateral Orchidopexy. But, at the time of performing the operation on the child, the petitioner had acted in a rash and negligent manner and removed the left testicle of the child during the hernia operation. He had also intentionally caused the disappearance of the evidence of his rash and negligent act, to escape from the legal punishment, altered the medical documents and consent letter for performing the surgery. In the same transaction, he created a forged documents by inserting the letter “ left Orchidectomy” in the consent letter and thereby used the forged document as genuine to escape from the legal punishment. Thus, the respondent police prosecuted the petitioner for the offences punishable under sections 336, 201, 465 and 471 of IPC.

3. The learned counsel appearing for the petitioner contended that the the petitioner is a medical practitioner and it is a case of the alleged medical negligence. During the relevant time, the petitioner was employed



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both as a surgeon and an associate professor at Ramachandra Medical College, Porur, Chennai. The petitioner had duly obtained a valid consent in writing from the defacto complainant, who is the father of the child for performing Orchidectomy, which is removal of testis on the left side and hernia on the right side of the testis. The operation was done successfully and there is no post-operation complication or any form of complaint after the operation till date. The defacto complainant, who is a practising advocate, one year after the operation, lodged a complaint against this petitioner. After investigation, the respondent police had filed the chargesheet. In this regard, the law laid down by the Apex Court mandating the Investigation Officer to obtain an independent medical opinion, preferably, from a Government Doctor, practising in the same field, namely, the pediatric surgeon. But, the Investigation Officer had obtained a medical report from a forensic expert though the matter falls under pediatric department. Without knowing the fact that the defacto complainant had already obtained a direction from this Court to make a further investigation into the case, the petitioner had filed a quash petition in Crl.O.P.No.7614 of 2008. The defacto complainant also filed another



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petition to constitute a three member medical board to go into the issue independently. The defacto complainant also filed yet another petition in Crl.O.P.No.18043 of 2008 seeking a direction to direct the Investigation Officer to act impartially. Upon hearing all the parties, this Court passed a common order directing the Director of Medical Sciences to constitute a medical board consisting three members and send the report to the investigation officer within the stipulated time and thereafter, Investigation Officer was directed to file a further final report. Accordingly, the medical team consisting an oncologist, a pathologist and a paediatric surgeon, had independently opined that there is no medical negligence. While all of them opined that there is no medical negligence, the pediatric surgeon made an observation that the operation should have been done with the prior consent of the parent. So the Investigation Officer wrote a letter to the Director of Medical Sciences that the police department had found a consent form in writing signed by the defacto complainant and whether it could be construed as a valid consent from the defacto complainant for the performance of the said operations, if not, he sought an advice as to whether the Doctor should be prosecuted or how the matter should be



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proceeded. The Director of Medical Sciences replied that the consent form obtained by the petitioner from the defacto complainant is a valid consent and it is the normal practice of every surgeon and hence no prosecution is required at all. Thereafter, the petitioner filed Crl.M.P.No.938 of 2015 seeking his discharge from the above case by the trial Court, by the order dated 18.05.2015, the trial Court dismissed the discharge petition by wrongly understanding the facts of the case. Against which, he filed a revision petition in Crl.R.C.No.623 of 2015. Since the petitioner was legally advised to withdraw it with liberty to file the petition to quash, he withdrew the same and filed the present petition to quash.

4. The learned counsel further submitted that based on the Order passed by the State Government in G.O.No.220 dated 04.07.2008, the Investigation Officer obtained an independent medical opinion from another senior paediatric surgeon, where it was opined that there is no medical negligence. Even prior to the latest report of the committee of three members of doctors, two paediatric surgeons had already opined that there is absolutely no medical negligence. In fact, they have appreciated



the work done by Dr. Balagopal for positioning the scrotum by repairing hernia and removing the left testis on account of its dysplastic, and non palpable.

5. The learned counsel further submitted that in the first complaint of the defacto complainant to the SRM Hospital authorities, he admitted in writing that Dr. Balagopal explained to him about the surgery that there was 99% chance of not removing the testis but there was 1% of chance for removing the left testis . The defacto complainant, after one year of the surgery only with an afterthought stating that during the course of the operation, the petitioner called him through phone from the operation theatre and told him about the necessity to remove the left testis, as it became non palpable and dysplastic, but for which the defacto complainant did not agree and told him that it could be decided in future, when the malignancy aspect starts. Admittedly, there is a written consent form available on record, in which he has signed as a parent.



6. It is a common knowledge that no body is allowed to speak to a surgeon while he is inside the operation theatre. Dehors it, the surgery was explained by the surgeon to the defacto complainant and he had signed the consent form. During the course of surgery, Dr.Balagopal found out that the undescended testis on the left side had become non-palpable and dysplastic and it was of the size of 0.7cm., which is less than the normal size. Therefore, he had to perform orchidectomy (removal of testis) for the left testis and he done it successfully. As per the recent medical literature, if the testis has become non palpable, dysplastic etc, it is better to remove it even by the end of the 1st year of the child's birth. In this case, the child was one and half year old at the time of surgery. The earlier opinion given by pediatric surgeons and the last report of the committee of doctors furnished as per the directions of our High Court confirm this view. The uniform medical opinion is that there is no medical negligence in the surgery performed by Dr.Balagopal. The child was produced nearly 3 times after the surgery before the hospital doctors and at that time, the defacto complainant did not make any hue and cry and he did not make any complainant about medical negligence or post operation complications.



The boy is hale and healthy and he has been attending the school without any difficulty, and the same is also admitted by the defacto complainant.

The surgery performed by the petitioner is in tune with the international acceptable standard which has been confirmed by the committee of doctors. Hence, the allegation of medical negligence in performing the operation does not arise at all. The law laid down by the Supreme Court in quashing the proceedings squarely apply to the facts of this case and thus, he prays to allow the criminal original petition.

7. To support his case, the learned counsel relied upon the following judgments of the Hon'ble Supreme Court :-

1. 2013 (10) SCC 741 (A.S.V.Narayanan Rao /vs/ Retnamala ananr)
2. 2017(14) SCC 571 (Jayshree Ujwal Ingole /vs/ State of Maharashtra and another)
3. 2004(2) SCC page 731 (K.C.Builders & ors /vs. The Assistant Commissioner of Income Tax)
4. 2014(1) CTC page 329 (Kamlesh Kumar /vs. State of Bihar & ors)



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8. The learned Government Advocate(crl.side) appearing for the first respondent submitted that in this case, chief examination of P.W.1 has been recorded. The evidence relied on by the learned counsel for the petitioner, i.e. opinion of the committee of three doctors to be looked into by the Trial Court. Before recording the evidence, at the initial stage of criminal proceedings, it cannot be quashed. Therefore, there is no merit in the Criminal original petition and thus, prays for the dismissal of the petition.

9. The learned counsel appearing for the 2nd respondent/defacto complainant submitted that though the committee of the three doctors had opined in favour of the petitioner, it has to be looked into by the Trial Court after cross examining the committee of the three doctors. At the initial stage of the criminal proceedings, based upon their opinion, the proceedings may not be quashed. It is also not proper to appreciate the evidence while considering the petition filed under Section 482 of Cr.P.C for quashing the criminal proceedings and thus, pleaded to dismiss the criminal original petition.



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10. I have considered the matter in the light of the submissions made by the learned counsel for the parties and perused the materials available on records carefully.

11. It is not in dispute that the defacto complainant/2nd respondent had brought his son Nivesh Kumar for admission at Ramachandra Medical Centre on 23.08.2005 and the operation was done by the petitioner on 24.08.2005. It is also not in dispute that the petitioner performed surgery for positioning the scrotum by repairing hernia and removing the left testis on account of its dysplastic, and non-palpable nature.

12. The substance of the charge against the petitioner is that the defacto complainant did not give consent for performing Orchidectomy. Further the petitioner had inserted “ left Orchidectomy” in the consent form by the side of bilateral Orchidopexy. Further, though the defacto complainant did not give any consent for removing left testies during operation, the petitioner had created forged documents in favour of him.



WEB COPY 13. I have gone through the report of the three members committee doctors. In their report, they ruled out the medical negligence as alleged by the defacto complainant.

14. It is no more res-integra that exercise of power under Section 482 Cr.P.C to quash a criminal proceedings is only when an allegation made in the First Information Report or charge sheet not constitutes the ingredients of the offences alleged. Interference by the High Court under Section 482 Cr.P.C is to prevent the abuse of process of any Court or otherwise to secure the ends of justice. Further, it is trite law that the High Court cannot embark upon the contraries of evidence while considering the petition filed under Section 482 Cr.P.C for quashing the criminal proceedings.

15. It is clear from the law laid down by the Hon'ble Supreme Court that the factual dispute cannot be adjudicated while exercising power under Section 482 Cr.P.C. In this case, the consent letter for operation is disputed by the defacto complainant. He had stated that he did not give consent for



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Orchidectomy operation and in the consent letter, it was inserted by the petitioner himself fraudelently. Further it is alleged that the petitioner herein told with the defacto complainant only during the operation with regard to the removal of left testis and according to the defacto complainant, he informed not to remove the left side testis. But according to the petitioner, the defacto complainant had given consent to remove the left testis. This denial of fact cannot be adjudicated by this Court while exercising the power under Section 482 Cr.P.C. Under these circumstances, it does not meet the parameters laid down by the Hon'ble Supreme Court in the following cases:

(i) R.P.Kapur Vs. The State of Punjab* reported in *AIR 1960 SC 866

(ii) State of Haryana & Ors. Vs. Ch.Bhajan Lal & Ors.* reported in *AIR 1992 SC 604

(iii) M/s.Neeharika Infrastructure Pvt. Limited Vs. State of Maharashtra & Ors.* reported in *2021 SCC Online SC 315



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WEB COPY 16. The judgments relied on by the learned counsel for the petitioners factually not applicable to the case on hand, since in this case there are factual disputes about the consent for operation with regard to removal of the left testis apart from the medical negligence. Therefore, the decisions relied on by the learned counsel for the petitioner is not helpful to decide this case. Hence, I find no reason to quash the criminal proceedings and I find no merit in the criminal original petition and hence, it is liable to be dismissed.

17. Accordingly, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petition is closed.

18. While pronouncing this judgment, the learned counsel appearing for the petitioner seeks to dispense with the personal appearance of the petitioner before the trial Court.



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19. Considering the submission made by the learned counsel for the petitioner, the personal appearance of the petitioner before the Trial Court is hereby dispensed with on condition that he should appear before the trial Court as and when required for further proceedings. The Trial Court is directed to complete the trial within a period of six months from the date of receipt of a copy of this order.

Index : Yes/No

Internet : Yes/No

25.09.2023

mrp

To

The Judicial Magistrate No.1,
Poonamallee



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V.SIVAGNANAM ,J.

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Pre-delivery order made in
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