

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-2506 of 2016
Reserved on: 15.02.2024
Pronounced on: 11.03.2024

Phoola RamPetitioner

Vs.

Shalini MehtaRespondent

CORAM:- HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Akshay Jindal, Advocate with Mr. Vrishank Suri,
Advocate for the petitioner.

Mr. Pawan Kumar Hooda, Advocate for the respondent.

DEEPAK GUPTA, J.

Petitioner – Phoola Ram (*now deceased represented through his brother*) had filed a Criminal Complaint before the jurisdictional Magistrate, Karnal seeking prosecution of a Medical Professional – accused – Dr. Shalini Mehta (*respondent herein*) under various provisions of the Indian Penal Code. Vide an order dated 08.06.2015 (*Annexure P1*), learned Judicial Magistrate Ist Class, after considering the preliminary evidence, the report under Section 202 Cr.P.C and the report of the Medical Experts, directed summoning of the respondent to face trial under Sections 336, 338, 465, 466 IPC.

2. Against the afore-said order, both the parties filed separate revisions (*copies Annexures P2 and P3*). Petitioner – Phoola Ram claimed that summoning of the respondent was warranted under remaining provisions of IPC as well; whereas, respondent – Dr. Shalini Mehta sought to set aside the summoning order dated 08.06.2015. Both the revisions were

heard together by learned Additional Sessions Judge, Karnal and vide his

order dated 07.12.2015 (*Annexure P4*), the revision as filed by petitioner – Phoola Ram was dismissed; whereas the revision as filed by respondent- Dr. Shalini Mehta was allowed and the complaint in question was dismissed.

3. Against the afore-said order dated 07.12.2015, petitioner is now before this Court under Section 482 Cr.P.C to quash the said impugned order.

4.1 As per allegations, petitioner visited Civil Hospital, Karnal on 07.11.2009 for checkup of his eyes. Dr. Yogesh, Senior Medical Officer checked his eyes and prescribed certain medicines. Petitioner then visited the hospital again on 26.11.2009 and this time, he was examined by respondent – Dr. Shalini Mehta, the Medical Officer posted at that time, who declared that petitioner had cataract in his right eye, for which he required immediate operation, which will be stitchless.

4.2 The operation was performed in the right eye on 27.11.2009 and the petitioner was informed that a lens had been inserted. However, on 28.11.2009, when the bandage was undressed, petitioner found that he did not have the vision in that eye. Respondent assured that he will get the vision in that eye within a week. On 12.12.2009, when petitioner visited again, the respondent told him that no lens had been inserted in the eye.

4.3 The petitioner – complainant alleged negligence on the part of the respondent – accused and made a complaint to the authorities on 18.12.2009, at which an inquiry was conducted on 13.01.2010. Thereafter, complainant got his eyes checked from Dr. Yogesh Sharma, Senior Medical Officer, Karnal on 13.01.2010, who told him that he had glaucoma in both the eyes. He prescribed treatment for the same, as the intra-ocular pressure of both the eyes was very high. Complainant then visited a Private Eye Surgeon – Dr. Sushil Garg on the same day, who after checking the eyes of

the complainant found that he was a patient of glaucoma and that pressure of the right eye was 41 and that of the left eye was 31. Said doctor further told him that in case of glaucoma, the doctor is first required to perform the operation of the same and only then the operation for cataract can be performed. Medicines were prescribed so as to save his left eye. To have a second opinion, complainant visited Dr. Kakkar, who also told him that operation for glaucoma was required to be conducted.

4.4 The left eye was operated by Dr. Kakkar on 30.01.2010. However, complainant- petitioner lost vision in his right eye due to medical negligence of the accused- respondent, as proper procedure was not followed. It was alleged by the complainant that accused was in habit of conducting operations of illiterate persons without following proper procedure; that accused had not even got the consent of the complainant before operating on him; that when complaints were made to the higher authorities, accused tampered with the record of the hospital and got marked the thumb impression of some other person on the documents of complainant to show his consent.

4.5 With these allegations, the complaint was filed to summon and prosecute the accused - respondent under Sections 167, 192, 193, 196, 319, 322, 323, 336, 337, 338, 463, 466, 471, 474, 506 IPC.

5. Preliminary evidence was taken on record. The report under Section 202 Cr.P.C was called from Police Station Gharaunda. Expert medical opinion was obtained from Kalpana Chawla Government Medical College, Karnal, as per order passed by learned Additional Sessions Judge, Karnal and after perusing the entire record, learned Magistrate passed the order dated 08.06.2015 summoning the accused under Sections 336, 338, 465, 466 IPC, which order has since been set aside by the Revisional Court

by way of the impugned order dated 07.12.2015.

6.1 After giving factual background as noticed above, it is contended by learned counsel for the petitioner that the impugned order is the result of complete misreading of the evidence available on record; a well-reasoned summoning order passed by learned Judicial Magistrate Ist Class, Karnal, has been wrongly set aside by ignoring the relevant piece of evidence; that the evidence on record established that petitioner was operated by the respondent on 27.11.2009 without conducting any test upon him. The testimony of CW2 – Dr. Sushil Garg and that of CW3 Dr. P.D. Kakkar made it clear that the petitioner was suffering from glaucoma; that both of them had noticed pressure in the eyes of the petitioner, whereas in the operation slip of the petitioner conducted in Government Hospital, Karnal, there was no mention of pressure in the eyes of petitioner.

6.2 Learned counsel contends further that the trial Court had rightly appreciated that glaucoma was a disease, which is called as “silent thief of sight”, which develops over a period of time and so it could not be stated that the said disease developed for the first time, when the petitioner was operated. To the contrary, learned Additional Sessions Judge, Karnal accepted the revision on two counts: Firstly, that disease of glaucoma might have developed in the eyes of petitioner, when he was examined by Dr. Kakkar and Dr. Sushil Garg and secondly; that the Board constituted by the concerned authorities did not find respondent to be negligent.

6.3 Learned counsel contends that both these findings of Ld. ASJ are erroneous, as the disease of glaucoma develops over the passage of time and cannot develop within 45 days i.e. from the date of operation as conducted by the respondent and then the date of operation for glaucoma in the left eye conducted by Dr. Kakkar on 30.01.2010.

6.4 Learned counsel contends further that the documentary evidence is in itself to the effect that the respondent never detected glaucoma, as she did not conduct any pre-operative assessment, which in itself shows negligence on her part.

6.5 Besides, though learned Additional Sessions Judge, Karnal, categorically admitted that there was no thumb impression of the petitioner on the Consent Form but gave benefit of doubt by making sweeping statement that there was no direct evidence to the effect that the forged thumb impressions were taken by the respondent. Learned counsel has referred to the Rules framed by Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, so as to contend that it is the doctor himself, who is required to take consent of the patient or his relative before conducting the operation and so, the finding of the learned Additional Sessions Judge is erroneous and based on conjectures and surmises.

6.6 Learned counsel contends further that the observations of learned Additional Sessions Judge to the effect that sanction under Section 197 Cr.P.C was required to prosecute the respondent is also not sustainable, as a public servant is not vested with the power to do anything not permitted under law. Learned counsel made reference *to Dr. Smt. Manoram Tiwari Vs. Surendra Nath Rai, 2015(4) RCR (Criminal) 416* and *Rajesh Pal Vs. Ajhar Alam, 1984 PLR 234*.

6.7 Learned counsel contends that there was strong prima-facie evidence of negligence against the respondent and that in view of all these submissions, the impugned order deserves to be set aside and the respondent is required to be summoned and punished.

7. Refuting the afore-said contentions, learned counsel for the

respondent defended the impugned order passed by learned Additional Sessions Judge, Karnal and contended that all the pleas as raised in this petition were duly considered by the learned Additional Sessions Judge, Karnal and that it has been rightly held that the respondent could not have been summoned to face prosecution. Prayer is made for dismissal of the petition.

8. I have considered submissions of both the sides and have appraised the record.

9. It is undisputed that right eye of the petitioner was operated for cataract by the respondent on 27.11.2009. The said operation was conducted without doing any pre-operative assessment/ test. Petitioner has placed on record copy of report dated 29.04.2016 (*Annexure P5*) submitted by Committee constituted by the President, Haryana Medical Council. The Committee was comprised of Dr. Jagdeep Singh, MO(Eye), CH, Panchkula; Dr. Rajendra Prashad, DD (SS), DGMER and Dr. Parveen Sethi, DHS (Dental). On the basis of evidence produced by both the parties, it was found that in the name of pre-operative investigation, only Blood Sugar and BP was recorded, though ideally the pre-operative assessment should be documented including a full history and physical examination as well as the management plan and patient's consent as per NCPB and WHO guidelines. It was further noticed in the inquiry that no pre-operative intra-ocular pressure was recorded, which is required as per National Programme for Control of Blindness (NPCB) and WHO guidelines. Inquiry further found that when the petitioner showed to other two doctors on 13.01.2010 and also to Dr. Yogesh in Civil Hospital, increased IOP in both the eyes was found. It was further noticed that increased IOP in both the eyes in post operative period is suggestive of pre-existing glaucoma.

10. The afore-said inquiry report to be read with the statements of CW2 Dr. Sushil Garg and CW3 Dr. P.D. Kakkar prima-facie suggested that there was pre-existing glaucoma in the eyes of the petitioner, before conducting surgery for cataract in the right eye on 27.11.2009 by the respondent but the respondent did not conduct any pre-operative assessment/test, which was required as per NCPB and WHO guidelines. The finding of learned Additional Sessions Judge, Karnal to the effect that glaucoma could develop at any time and that it could have developed even after surgery conducted by the respondent, is based upon conjectures and surmises and without any basis to hold so.

11. Further, handwriting expert examined by the petitioner in his preliminary evidence as CW8 proved by way of his reports supported by photographic enlargements that the thumb impression of petitioner – Phoola Ram on the Consent Form did not tally with the thumb impression of the said petitioner, which clearly was suggestive of the forgery committed by the respondent. The observations made by learned Additional Sessions Judge, Karnal in the impugned order to the effect that the said forgery could have been conducted by anybody else and there was no evidence that it was done by the respondent, is again based upon conjectures, as the Regulation 7.16 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, clearly provides as under:-

“7.16 Before performing an operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of minor, or the patient himself as the case may be. In an operation which may result in sterility the consent of both husband and wife is needed.”

12. As such, respondent at this stage cannot be allowed to claim that somebody else had taken thumb impression of the petitioner on the

consent form.

13. Learned Judicial Magistrate Ist Class, Karnal in his order dated 08.06.2015, rightly ignored the report under Section 202 Cr.P.C., as per which the Police concluded that complaint was based upon personal vendetta, as the said report negated the facts made out from the record. Learned Judicial Magistrate Ist Class, Karnal also observed that it had been stated by the two experts that the pre-operative documents as prepared by the respondent- accused did not mention the pressure of the eyes and so, it could not be stated whether the petitioner at the time of operation was suffering from glaucoma or not and that this very finding by the experts was sufficient to come to the conclusion at this stage that the respondent was negligent, as in case she had checked the pressure of the eye of the complainant, she would have found as to whether the petitioner was suffering from glaucoma or not and had he been suffering from glaucoma, the surgery for cataract would not have been conducted.

14. As far as the sanction under Section 197 Cr.P.C is concerned, it has been held by Hon'ble Supreme Court in ***Dr. Smt. Manoram Tiwari Vs. Surendra Nath Rai, 2015(4) RCR (Criminal) 416*** that the act of forgery done by the accused, was beyond her official duties and so, no sanction was required. Similarly in case of ***Rajesh Pal Vs. Ajhar Alarm, 1984 PLR 234***, it has been observed by the Hon'ble Supreme Court that if the authority, as vested in the public servant is misused for doing things, for which he is not permitted under the law, cannot claim protection of sanction 197 Cr.P.C. Similar view was taken by the Hon'ble Supreme Court in ***Criminal Appeal 129 of 2013 – Inspector of Police and another Vs. Battenapatla Venkata Ratnam and another.***

15. In view of the afore-said discussion, the impugned order as

passed by learned Additional Sessions Judge, Karnal cannot be sustained in the eyes of law. The said order is set aside. The order dated 08.06.2015 as passed by learned Judicial Magistrate Ist Class, Karnal, whereby respondent-accused was directed to be summoned to face trial under Sections 336, 338, 465, 466 IPC is hereby restored.

Parties are directed to appear before the court of Ld. Magistrate on 01.04.2024 for further proceedings.

March 11, 2024

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Whether Speaking/reasoned
Whether Reportable

Yes/No
Yes/No

(DEEPAK GUPTA)

JUDGE