(2015) 07 AHC CK 0101

In the Allahabad High Court

Case No : Misc. Bench No. 6587 of 2015

Arun Kumar Srivastava — APPELLANT

Vs

The State of Uttar Pradesh and Others — RESPONDENT

Date of Decision : 30-07-2015

Acts Referred:
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 438
Penal Code, 1860 (IPC) — Section 304, 304-A

Citation : (2015) 07 AHC CK 0101

Hon'ble Judges : Arvind Kumar Tripathi, J;Ranjana Pandya, J

Bench : Division Bench

Advocate : Meenakshi Singh, for the Appellant

Final Decision : Dismissed

Judgement

1. Supplementary affidavit filed on behalf of petitioner is taken on record.

2. Learned AGA has also placed the copy of the inquiry report.

3. Heard learned counsel for the petitioner, learned AGA for the State, learned counsel for the complainant and perused the record.

4. This petition under section 226 Constitution of India has been filed with the following relief''s as under:-

"i) issue a writ, order or directions in the nature of certiorari quashing the impugned F.I.R. dated 20.7.2017 lodged at Case Crime No. 0207/2015 u/s. 304 IPC at Police Station Vibhuti Khand, Gomti Nagar, Lucknow as contained in Annexure No. 1 to this Writ Petition.

ii) issue a writ, order or direction in the nature of mandamus restraining the opposite parties from arresting the petitioner in Case Crime No. 207/2015 u/s. 304 IPC, P.S. Vibhuti Khand, Gomti Nagar, Lucknow

iii) issue a writ, order or direction in the nature which this Hon''ble High Court

deems fit and proper in the circumstances of the case, in favour of the petitioner.

iv) Cost of the Writ Petition may be awarded in favour of the petitioner."

5. It has been submitted on behalf of petitioner that no case under section 304 IPC is made out against him in as much as according to FIR it is a case of only negligence, which cannot travel beyond scope of section 304-A IPC, which is a boilable offence hence petitioner is entitled to the relief claimed for.

6. It has also been submitted on behalf of petitioner that petitioner was trained in surgical laparoscopy and he was competent to conduct a lesser operation. In support he has placed to reliance upon annexure 2 seeking permission to undergo Indoscopy/laparoscopic/TUR, Systocropy training.

7. Learned counsel for the petitioner submitted that petitioner while doing surgery by laparoscopic procedure found that open surgery was necessary hence to save the life of patient he opened the abdomen.

8. On the other hand learned AGA while opposing the prayer submitted that perusal of the inquiry report conducted by the Inquiry Committee reveals that according to postmortem report the deceased went in shock as a result of haemorrhage due to injury in the inferior venacave. It has come on record that although the petitioner was posted in the Government Hospital i.e. Dr. Ram Manohar Lohiya Hospital, still he advised the deceased to get operated in private hospital. He also advised that laser operation would be more successful. Besides it is also clear that the petitioner misrepresented that the machine of the Dr. Ram Manohar Lohiya Hospital were out of order due to which it would be advisable to get the operation done in a private nursing home although the machines were in orders.

9. Learned counsel for the petitioner could not show any certificate about the training undergone by the petitioner in surgical laparoscopy. It has also come on record that petitioner had knowledge that the private nursing home namely Surgical Clinic Surendra Nagar was not having necessary equipments including ventilator hence only on the ground that petitioner had conducted 200 operation of the gallbladder by the laparoscopy will not authorise him to conduct such a operation without the necessary training and necessary equipments. As has been earlier said the death of the deceased occurred due to extra-ordinary bleeding and injury in the inferior venacave.

10. Learned counsel for the petitioner could not point out as to why the petitioner made incorrect statements, before the attendant of the patient, that Dr. Ram Manohar Lohiya Hospital did not have necessary equipments and facilities.

11. Learned AGA has also contended that the patient was examined by the petitioner twice before the incident in OPD and there was no emergency for the surgery hence the petitioner would have waited for some time to get the machines of Dr. Ram Mahohar Lohiya Hospital in working condition, if at all they

were not in working condition. Though as per report placed by learned AGA laparoscopy surgery machine was functioning.

12. A bare perusal of the inquest report shows that the deceased was wearing a blue and grey colour designed T-shirt, full pant, under wear '' kara'' in his hand and ''kalawa'' in his other hand. This is prima facie indicative of the fact that the petitioner did not bother even to see that the patient was dressed in the sterilised clothes meant to be worn at the time of surgery.

13. The petitioner also performed the surgery on the deceased without obtaining prior permission from the superior authority, in a private hospital while working in a Government Hospital. It has also been contended by learned AGA that ultimately when the condition of the patient deteriorated again the petitioner referred the deceased to the same hospital i.e. Dr. Ram Manohar Lohiya Hospital, where the deceased was advised not to get operated.

14. Learned counsel for the petitioner has placed reliance upon Kanwarjit Singh Kakkar Vs. State of Punjab and Another, (2011) 2 Crimes 235 : (2011) 3 JCC 1917 : (2011) 5 JT 214 : (2011) 4 RCR(Criminal) 127 : (2011) 5 SCALE 37 : (2011) 13 SCC 158 : (2011) 2 UJ 1855 , in which the Apex Court has held that a Doctor while doing private practice being a Government Doctor indulged in mal practice or took gratification or did any act like prescribing unnecessary surgery for the purpose of extracting money by way of professional fee and host of other circumstances would be a clear case to be registered under IPC as also under the Prevention of Corruption Act.

15. Learned counsel for the petitioner has also placed reliance upon Jacob Mathew Vs. State of Punjab and Another, (2005) ACJ 1840 : AIR 2005 SC 3180 : (2009) 2 CompLJ 367 : (2005) 3 CPJ 9 : (2005) CriLJ 3710 : (2005) 4 CTC 540 : (2005) 6 JT 584 : (2005) 6 SCC 1 : (2005) 2 SCR 307 Supp , in which the Apex Court held "A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient."

16. In para 36 of Jacob Mathew (Supra), the Apex Court has laid down "The following statement of law on criminal negligence by reference to surgeons, doctors etc. and unskillful treatment contained in Roscoe''s Law of Evidence (15th Edn.) is classic:

"Where a person, acting as a medical man, &c., whether licensed or unlicensed, is so negligent in his treatment of a patient that death results, it is manslaughter if the negligence was so great as to amount to a crime, and whether or not there was such a degree of negligence is a question in each case for the jury. "In explaining to juries the test which they should apply to determine whether the

negligence in the particular case amounted or did not amount to a crime, judges have used many epithets, such as ''culpable,'' ''criminal'', ''gross'', ''wicked'', ''clear'', ''complete.'' But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." (pp. 848-849)

"whether he be licensed or unlicensed, if he display gross ignorance, or gross inattention, or gross rashness, in his treatment, he is criminally responsible. Where a person who, though not educated as an accoucheur, had been in the habit of acting as a man-midwife, and had un-skillfully treated a woman who died in childbirth, was indicted for the murder, L. Ellenborough said that there was no evidence of murder, but the jury might convict of man-slaughter. "To substantiate that charge the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the [most?] criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct which is essential to make out a case of manslaughter."

(p. 849)

A review of Indian decisions on criminal negligence"

17. In order to attract 304-A IPC, it is necessary that death should have been the direct result of a rash and negligent act of the accused and that act must be the proximate and efficient cause without the intervention of another negligence, it must be the causans.

18. In Jacob Mathew (Supra), it has been held that it is the duty of the Investigating Officer to 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 to the facts collected in the investigation.

19. The cases of Jacob Mathew(supra) and Kanwarjit Singh Kakkar (supra) are not applicable in view of the facts and circumstances of the present case, because it is not a case of only private medical practice by a Government Doctor, which is prohibited and further it is not only a case of gross negligence but further in the present case though the deceased was under treatment of the petitioner, who was examined as outdoor patient in Dr. Ram Manohar Lohia Hospital and he was aware that the facility of laproscopic surgery and other facilities in case of complexity including ICU, etc., were available, but patient was advised to be admitted in private nursing home for surgery. When his condition was deteriorated then he was referred to the same hospital where he was advised that no requisite facilities were available. Besides laproscopic surgery it is admitted case that open surgery was conducted. Further petitioner failed to

place any certificate of training and specialisation in ''surgical laproscopy'' and as per report produced by learned AGA though he conducted laproscopy operation but in presence of the qualified Doctors. Before operation, the patient/deceased was quite healthy so there was no emergency of immediate operation and his condition was deteriorated after operation was conducted by the petitioner.

20. Learned AGA submitted that the exercise of jurisdiction under Article 226 of the Constitution for grant of relief prayed for should be exercised very sparingly because the jurisdiction exercised under Section 226 is an extraordinary jurisdiction exercised by the superior courts. In support he has placed reliance upon Km. Hema Mishra Vs. State of U.P. and Others, AIR 2014 SC 1066 : (2014) AIRSCW 624 : (2014) CriLJ 1107 : (2014) 2 JT 26 : (2014) 1 SCALE 342 : (2014) 4 SCC 453 . and Others, in which it has been held that the court should ensure that power under Article 226 is not exercised liberally so as to convert a petition under Article 226 into one under 438 Cr.P.C. proceedings when Section 438 Cr.P.C. is specifically omitted in the State of U.P., it cannot be resorted to via backdoor entry via Article 226.

21. Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on a petition under Article 226 because an interim relief can be granted only in aid of as an ancillary to the main relief which may be available to the party. The investigation in this case is in progress and it is expected that the investigation will be conducted by the Investigating Officer in a fair and transparent manner. Thus there is no ground to interfere in the investigation and quash the F.I.R. and the petition is liable to be dismissed.

22. We cannot loose sight of the fact that the petitioner has not hesitated in misleading, misguiding and placing incorrect facts before the Courts on affidavit also in as much as in para 6 of the affidavit it has been mentioned that "That it is pertinent to mention here that in the year 2002, the petitioner had done two months'' observership in the Department of Surgical Gastroenterology in S.G.P.G.I. Lucknow from 19.8.2002 to 18.10.2002 with permission from the Director (Training), Medical & Health Services as well as the Chief Medical Officer, Lucknow. The copy of the relevant documents regarding the training of the petitioner in Laparoscopic in S.G.P.G.I., Lucknow is being annexed herewith as ANNEXURE No. 2 to this Writ Petition."

23. Thus according to aforesaid paragraph the petitioner under went training from 19.8.2002 to 18.10.2002 whereas the fees for the aforesaid training is said to have been deposited on 2.12.2002. The charge is said to have been handed over by the petitioner on 1.12.2002 as evident from annexure-2 and other documents placed on record by the petitioner.

24. Though the trainee was required to deposit Rs. 10,000/- as institutional fees at the time of joining as per condition No. 1 mentioned in the letter dated 12.8.2002.

25. In view of the aforesaid facts and from perusal of the FIR it reveals that the

FIR clearly discloses the commission of a cognizable offence. It has specifically been mentioned in the FIR that the petitioner took the life of the deceased due to negligence and greed. Thus the arguments of the counsel for the petitioner that the case does not travel beyond scope of 304-A IPC has no legs to stand.

26. Thus there is no ground to interfere in the investigation and to quash the F.I.R. as the matter requires investigation.

27. Accordingly, the present petition is dismissed.

