

(1964) 03 RAJ CK 0011
In the Rajasthan High Court
Case No : Criminal Appeal No. 96 of 1963

Baksa

APPELLANT

Vs

Ishwar Singh

RESPONDENT

Date of Decision : 17-03-1964

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 252(2)
Penal Code, 1860 (IPC) — Section 337
Rajasthan Indian Medicine Act, 1953 — Section 36(1), 36(2)

Citation : AIR 1964 Raj 242 : (1964) CriLJ 583 : (1964) RLW 288

Hon'ble Judges : C.B. Bhargava, J

Bench : Single Bench

Advocate : N.L. Chhangani, for the Appellant; R.K. Rastogi and S.K. Goyal, for the Respondent

Final Decision : Allowed

Judgement

C.B. Bhargava, J.—This is an appeal u/s 417(3) of the Code of Criminal Procedure against the order of acquittal passed by the learned Munsif Magistrate, First Class, Sirohi, on 26th September, 1962.

2. The respondent was prosecuted on a complaint by Baksa u/s 337 of the Indian Penal Code. The respondent was enlisted as a practitioner u/s 36 (I) of the Rajasthan Indian Medicine Act, 1953 on 16th March, 1959. The complaint against him was that he was running a private dispensary of his own known as "Amrit Ankhon Ka Dawakhana" and held out himself as an eye specialist. A signboard is also exhibited at this dispensary and from time to time hand-bills are distributed at his instance to the effect that he is an eye specialist and can cure every type of eye trouble. The appellant who had a cataract in his right eye being impressed by the said hand-bills approached the respondent for his treatment on 1st March, 1960. The respondent after examining his right eye, suggested an immediate operation. On the complainant's agreeing to it, on the same day at about 5 P.M. the respondent performed an operation of the appellant's right eye at the house

of his (complainant's) son-in-law.

It is the case of the complainant that after the operation he felt severe pain in his right eye. The respondent was then consulted again on which he gave an injection and some tablets to be taken orally and for about a month the respondent himself continued applying hot water fomentation to the appellant's eye. After a month, since no improvement was found, the respondent gave him some medicines for applying them at his house. It is further the case of the complainant that eventually when the bandage was removed, it was found that he had gone blind by that eye. Then on 30th January, 1961, he showed his eye to Dr. G. P. Banerjee at Sirohi who thus reported that "Pthysis Bulbi of the right eye with an irregular scar at the sebro corneal junction. The right Eyeball is shrinking depressed with no vision. Pupil is absent no projection or perception of light." It is the case of the complainant that the respondent was not authorised to perform eye operation and under the certificate which he held he was authorised to practise medicine only. It is further his case that he had performed the operation with gross negligence with the result that he lost his eyesight completely and the vitreous fluid which was stored in the back of the eye, came out and caused blindness of that eye.

3. After a preliminary enquiry, the case u/s 337 of the Indian Penal Code was registered against the respondent. In support of the complaint, the complainant gave his own statement and examined three more witnesses including Dr. Banerjee.

3a. The respondent admitted having operated the complainant's eye but denied that there was any negligence in performing the operation. He also stated that he was authorised to perform surgical operations. During the course of trial on behalf of complainant, an application was made to summon the Registrar, Board of Indian Medicines, Rajasthan, as a witness in order to prove that under the certificate issued to the respondent, he was authorised only to practise medicine and not surgery. In response, the Registrar did not appear personally but sent one of his clerks with some papers. Statements of two witnesses were also recorded in defence. The learned Magistrate then heard the parties and came to the conclusion that the respondent on the basis of the certificate held by him, was authorised to perform surgical operation also. Further the complainant had failed to prove that the respondent was negligent in performing the operation. In view of these findings he recorded an order of acquittal of the accused.

4. Learned counsel for the appellant contends that under the certificate issued u/s 36 of the Rajasthan Indian Medicine Act, 1953 in favour of the respondent he was only authorised to practise medicine because the certificate is for "Chikitsa Adhikar" and not for "Shalya Chikitsa" i.e. surgery. It is contended that once the court comes to the conclusion that the respondent was not authorised to practise surgery then negligence on his part in performing an eye operation should be presumed. In support of that he relies on a passage from the Treatise entitled "Medical Negligence" by the Right Hon. Lord Nathan, P. C. at page 33 which is as

under: --

"Different principles will apply, however, in any case where treatment or advice has been given by a person who knew or ought to have known that the patient's condition was one which he was not competent to treat or advise or that the treatment he gave was treatment which he was not qualified to give. For it is widely recognised principle that a person will be guilty of negligence if he undertakes a task which he knows or ought to know he is not qualified to perform; indeed, it is sometimes stated that this is the fundamental rule underlying the requirement that a person who undertakes a task requiring special skill or knowledge must bring to the performance of that task the skill and knowledge required. There may of course be circumstances, as for instance where an emergency arises, in which it will be proper for a qualified or even an unqualified person to embark on medical treatment which otherwise he would not undertake because of his lack of qualifications. But ordinarily a person will be liable in negligence if damage results from his undertaking the treatment of a case which he knew or ought to have known was beyond his capabilities."

Learned counsel for the respondent on the other hand urges that the respondent was entitled to practise surgery on the basis of the certificate issued in his favour by the Board of Indian Medicines Rajasthan, Jaipur.

5. There are of course cases which lay down the rule as regards the proof of negligence on the part of qualified medical practitioners. Reference may be made to *John Oni Akereje v. The King* AIR 1943 PC 72. But in the present case the parties are at issue on the question whether the respondent was qualified to practise surgery or not. No different forms of certificates seem to have been prescribed for person practising Indian System of Medicine and Surgery under the Rajasthan Indian Medicine Act, 1953. As stated earlier the appellant's contention is that under the said certificate the respondent was not authorised to practise surgery which contention is not accepted by the respondent. The foremost question therefore, which required determination at the hands of the learned Magistrate was whether under the certificate the respondent was authorised to perform the said operation on the complainant's eye. The learned Magistrate has given no reasons for his coming to the conclusion that the respondent had authority to give surgical treatment on the basis of the said certificate. It is true that the complainant did not further insist to examine the Registrar to prove his contention but at the same time it was the duty of the court as well to have called him as a witness in order to rightly decide the above controversy (See Section 252 (2) Cr. P. C.). There were no materials on the record to arrive at the finding at which the learned Magistrate did. The case was not one in which the interest of the complainant alone was involved but was of general interest because if the respondent was not authorised to perform eye operations his continuance to do so was likely to expose many other persons to grave risk. After the determination of this question whether he was authorised to perform surgical operations or not the next question to decide was whether he

was negligent in performing the operation. The decision of the first question was of vital importance for the decision of the other questions. I am of the view that the case has not been properly tried and the order of acquittal deserves to be set aside and looking to the nature and importance of the case it requires to be retried.

6. This appeal is therefore, allowed, order of acquittal passed by the learned Munsiff Magistrate, First Class, Sirohi is set aside and the case is sent back to that Court for a fresh trial in the light of the above observations.