

(2006) 01 AHC CK 0087

In the Allahabad High Court

Case No : Criminal Miscellaneous Writ Petttion No. 3428 of 2005

Dr. Mukesh Khare, Dr. Alok Khare, Dr. L.S. Ojha and Ojha
E.N.T. and Surgical Complex

APPELLANT

Vs

State of U.P. and Raj Kamal Srivastava

RESPONDENT

Date of Decision : 27-01-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 468, 473
Penal Code, 1860 (IPC) — Section 336, 338

Citation : (2006) CriLJ 1770 : (2006) 3 RCR(Criminal) 397

Hon'ble Judges : R.C. Deepak, J

Bench : Single Bench

Advocate : Rakesh Chandra Upadhyay and G.S. Chaturvedi, for the Appellant;
R.K. Jain, Rajendra Kumar and V.P. Srivasta and A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

R.C. Deepak, J.—Heard Sri G.S. Chaturvedi, learned senior counsel assisted by Sri R.C. Upadhyay, learned Counsel for the petitioners, Sri V.P. Srivastava and Sri Rajendra Kumar, learned Counsel for the respondent no2, learned A.G.A. for the State and perused the record including the cases cited by the parties as under:

2. The cased referred by the learned Counsel for the petitioners :

1. 2005 SCC 1369 Jacob Mathews v. State of Punjab and Anr.

2. R.P. Kapur Vs. The State of Punjab,

3. The Chairman of The Bankura Municipality Vs. Lalji Raja and Sons,

4. Ramesh Chandra Sinha and Others Vs. State of Bihar and Others,

5. 2005 (25) AIC 379 Zandu Pharmaceutical Works Ltd. and Ors. v. M.D. Sharaful Hague and Ors.

6. 2005 (25) AIC 385 (SC) Subramani and Ors. v. M Chandralekha

3. The cases relied upon by the learned Counsel for the respondent no. 2 :

1. 2005 SCC 735 Ramesh and Ors. v. State of Tamil Nadu

2. Arun Vyas and Another Vs. Anita Vyas,

3. N.S. Giri Vs. The Corporation of City of Mangalore and Others,

4. Davinder Pal Sehgal and Another Vs. Partap Steel Rolling Mills Pvt. Ltd. and Others,

5. Bhagirath Kanoria and Others Vs. State of M. P.,

4. The subject matter of the writ petition is a disabled boy aged about 10 years named Rishabh. He was born on 10.4.1995 as a normal child. The disability visited him at a later stage of life due to medical negligence of the medico. Some lime particles fell into his left eye at an age of 11/2 years. The child was taken to Dr. Mukesh Khare. He advised immediate operation and on 24.7.1996 the operation was carried out by him in Ojha Nursing Home, Tagore Town, Allahabad. After the operation and the lapse of convalescence period in the private ward of this nursing home, he was discharged. The advice given by Dr. Mukesh Khare at the time of discharge that after 8 - 9 months in order to keep the eye intact for grafting, another operation is to be undertaken. The treatment continued as per his advice regularly. The ultrasound examination upon him was carried. He was found perfect, but Dr. Alok Khare, Anesthetist - petitioner no. 2 observed that the child was anemic and slightly underweight, but the second operation was undertaken in the same nursing home by Dr. Mukesh Khare on 27.2.1997. The misfortune for the boy began from here. During the course of operation the condition of the boy became grave. Another Dr. Mohan Ji was sent for by the nursing home to attend the child. The condition of the child became stable due to his treatment and gradually improved in the course of time, but the child was unable to perform properly. Several doctors of the Institution of fame including Dr. Navneet Kumar, an eminent Neurologist of Kanpur, Dr. S.P.S. Chauhan, Senior Neurosurgeon, Medical College, Allahabad, Dr. N.C. Dwivedi, Senior Neurologist, Allahabad, Dr. D. Ghosh, P.G.I., Chandigarh as well as the concerned doctors of the A.I.I.M.S. were consulted. Dr. D. Ghosh diagnosed the patient and opined that there was serious negligence by the attending doctor and the anesthetist. The oxygen was not supplied in time causing "Hypoxic Ischemia Encephalopathy". C.T. Scan was also performed upon him. Oedema in brain (brain was swollen) was detected. The opinion of Dr. Chauhan is that there was "Diffuse injury to the Brain" which occurred during the course of surgery.

5. It is also pertinent to point out here that initially the left eye suffered injury and was operated upon by Dr. Khare. Subsequent operation was to be done for grafting a cornea in future. Meaning thereby, the second operation was taken up to secure the eye to receive in grafting a new cornea at a later stage when the child attain the age for that, but instead of performing the operation, as was earlier advised on the left eye for securing it reception of a fresh cornea, his right

eye was operated upon without obtaining sanction of his parents. How and why this happened remained wholly unanswered by the petitioners.

6. Two submissions were raised before me by the learned Counsel for the petitioners :

(A) that the prosecution is barred by time;

(B) that there is no evidence of negligence. No medical officer has been examined by the complainant. Summoning order, therefore, suffers for lack of any cognizable evidence.

7. For dealing with this submission, the reference of Sections 468 & 473 Cr.P.C. is relevant. The petitioners have been summoned under Sections 336 & 338 IPC. Imprisonment u/s 336 IPC is for 3 months or fine upto Rs. 250/- or both and u/s 338 IPC, imprisonment for 2 years or fine of Rs. 1000/- or both. Therefore, the limitation for cognizance of the offence, as prescribed u/s 468 Cr.P.C. is 3 years.

8. Section 473 Cr.P.C. deals with the cognizance of the offence even after the expiry of the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or it is necessary so to do in the interest of justice.

9. Taking up the first submission suffice will it be to say that in a case of the nature at hand, every parent will have all possible efforts for the recovery of the child who had suffered damage at the hands of a negligent eye surgeon. The boy was his only son. The anxiety to rccope the child to normal health would hardly leave any prospect for the prosecution. So far as the agonised father is concerned, he ran from pillar to post in the achievement of the above pursuit. He went from one medical institution of fame to another. When all his hopes were shattered, the broken father watching everyday his disabled child whose disability was a consequence of the negligence practiced by the doctor conducting the operation, who instead of operating upon the left eye second time for a grafting, operated the right eye. Therefore, any delay in lodging the complaint by a hapless father, who is broken in all respects, whose only son has to lose his health due to the mistake of a surgeon cannot allow culprit to go unpunished. The complainant also approached the Consumer Forum and he also applied for condonation of delay before the learned magistrate, but no order was passed before issuance of summon.

10. In the circumstances discussed above and considering the gravity of the offence, in the interest of justice and equity both, I do not find any merit in the submission. The delay cannot be considered a ground for quashing the prosecution. The submission is, therefore, rejected.

11. Coming to the subsequent submission, I find that there is evidence on record though it is merely in the form of circumstances such as operation of another eye instead of the effected eye for which the second operation was suggested and the opinion of Dr. S.P.S. Chauhan - "Deffuse injury to the Brain", that there exist

injury to the brain after the operation which ultimately occurred to the child after the second operation. According to him, the inaction of the child was a consequence of improper operation. The record indicates that the inaction of the child is still continuing. The report of the review committee filed on behalf of the petitioners will have no relevance at this stage. So far as the judgments cited on behalf of the petitioners are concerned, with due regard to the same, I am of the view that the facts and the circumstances of those of the judgments and these of the present case are different. Thus, no relief in this regard can be granted to the petitioners. Therefore, they are not discussed brevity. It has also been avoided because the trial is to take place and any opinion expressed before this Court at this juncture may adversely effect the petitioners' case.

12. In view of the above discussions, I find no merit in this submission as well.
13. The petition lacks merit and is accordingly dismissed.
14. The stay order dated 19.5.2005 granted by this Court shall stand vacated.