

(2017) 02 MAD CK 0017

In the Madras High Court

Case No : 11899 of 2010 and M P (MD) No 1 of 2010

Dr.Thiravium, & Ors.

APPELLANT

Vs

L.Wilfred Raj

RESPONDENT

Date of Decision : 24-02-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#) - Saving of inherent powers of High Court

Citation : (2017) 02 MAD CK 0017

Hon'ble Judges : P.Kalaiyaran

Bench : SINGLE BENCH

Advocate : P.Kalaiyaran

Final Decision : Allowed

Judgement

1. This criminal original petition has been filed under Section 482 of Cr.P.C., seeking to quash the proceedings in C.C.No.222 of 2010 on the file of the Judicial Magistrate No.2, Nagercoil.

2. It is averred in the petition that the respondent's wife Tmt.Vimala Rani was admitted in the petitioners' hospital on 16.05.2008 for right hip pain,

which was present for five years. After preliminary investigation and treatment, she was suggested right hip replacement surgery as other measures

had failed. After getting consent and proper fitness, surgery was performed on 25.05.2008 under anesthesia. During reaming of femur, thigh bone,

so as to fit into the joint cavity, fat present in femur got dislodged and resulted in fatt embolism. Fat embolism caused pulmonary embolism finally

ending up with disseminated intra vascular coagulation, by which the blood loses its potency to clot and all the blood vessels of the body start to

bleed uninterrupted. The best possible treatment was given and many bottles of

blood were transfused. In spite of herculean efforts, the patient died later in ICU.

3. The respondent/complainant preferred a private complaint before the Judicial Magistrate No.2, Nagercoil on 09.09.2008. The Judicial

Magistrate instructed the DSP to submit an enquiry report. On the request of DSP, the Dean, Kanniyakumari Government Medical College

Hospital constituted an enquiry committee consisting of head of department of orthopedics, medicine and anesthesia. The committee gave a finding

that patient was given all the necessary treatment and there is no negligence on the part of medical personnel as per the records of the hospital.

However, the Judicial Magistrate sent notice to the petitioners, taking the case on file as C.C.No.222 of 2010. The Judicial Magistrate is in error

to have taken the complaint on file. The Judicial Magistrate has not followed the judgment of the Hon''ble Supreme Court, which ex facie illegal.

Therefore, the proceedings as against the petitioners are to be quashed.

4. The learned counsel for the petitioners contends that as per the decisions of the Hon''ble Supreme Court, there should be a credible opinion

given by another competent doctor to support the charge and then only, the complaint can be taken on file by the Judicial Magistrate. But, contrary

to the decision, the Judicial Magistrate took the case on file and therefore, the same is liable to be quashed.

5. The learned counsel for the respondent inter alia contends that prima facie there are sufficient materials to make out a case for the offence of

medical negligence and after considering the complaint and other materials, the Judicial Magistrate has rightly taken the case on file and the same

does not require any interference.

6. The learned counsel for the respondent cited the judgments of the Hon''ble Supreme Court in Malay Kumar Ganguly Vs. Dr.Sukumar

Mukherjee reported in (2009) 9 Supreme Court Cases 221 and Kusum Sharma and Others Vs. Batra Hospital reported in (2010) 3 Supreme

Court Cases 480, for the proposition that the jurisprudential concept of negligence differs in civil and criminal law and for negligence to amount to

an offence, the element of mens rea must be shown to exist and for an act to amount to criminal negligence, the degree of negligence should be

much high degree. There is no dispute with this.

7. The point for consideration in this case is whether the Judicial Magistrate is right in taking the case on file after getting a report from a committee

of doctors opining that there is no negligence on the part of the doctors, who gave treatment.

8. In the instant case, the petitioners treated the patient by name Tmt.Vimala Rani, wife of the complainant and during surgery, complication arose

and she passed away. The complainant preferred a private complaint before the Judicial Magistrate. As per the instructions of the Judicial

Magistrate, DSP approached the Dean of Kanyakumari Medical College Hospital for an enquiry report. The Dean constituted an enquiry

committee consisting of Head of Department of Orthopedics, Medicine and Anesthesia.

They gave a report and the finding is given in the concluding paragraph, which reads thus:

Patient was given all the necessary treatment for the above said condition and there is no negligence on the part of Medical Personnel as per the

records of the hospital.

After getting the above report, the Judicial Magistrate took the case on file and issued summons to the petitioners. It is pertinent to note that no

other opinion from any other competent doctor has been filed by the complainant to support the charge of rashness or negligence on the part of the

petitioners.

9. The learned counsel for the petitioners cited the judgment of the Hon''ble Supreme Court in (i)Jacob Mathew V. State of Punjab and another

reported in 2005(3) CPR 70 (SC) and (ii) Martin F.D'souza V. Mohd. Ishfaq reported in 1(2009) CPJ 32 (SC) and argued that before issuance

of summons to the accused in a case of medical negligence, there should be a report from another competent doctor to strengthen the charge of

negligence or rashness. In the first judgment, it has been held as follows:

53.Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the

State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the

future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private

complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion

given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer

should, before proceeding against the doctor accused of rash or negligent act or omission, 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 applying Bolam's test to the facts collected in the investigation.

A doctor accused of rashness or negligence, may not be arrested

in a routine manner (simply because a charge has been levelled against him).

Unless his arrest is necessary for furthering the investigation or for

collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the

prosecution unless arrested, the arrest may be withheld.

In the second judgment, it has been held as follows:

54. In para 52 of Jacob Mathew's case the Supreme Court realizing that doctors have to be protected from frivolous complaints of medical

negligence, has laid down certain rules in this connection :

(i) A private complaint should not be entertained unless the complainant has produced prima facie evidence before the court in the form of a

credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

(ii) The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, 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 opinion applying the Bolam test.

(iii) A doctor accused of negligence should not be arrested in a routine manner simply because a charge has been leveled against him. Unless his

arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor

proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld.

Precautions which Doctor/Hospitals/Nursing Homes should take :

(a) Current practices, infrastructure, paramedical and other staff, hygiene and sterility should be observed strictly. Thus, in Sarwat Ali Khan vs.

Prof. R. Gogi and others Original Petition No.181 of 1997, decided on 18.7.2007 by the National Consumer Commission, the facts were that out

of 52 cataract operations performed between 26th and 28th September, 1995 in an eye hospital 14 persons lost their vision in the operated eye.

An enquiry revealed that in the Operation Theatre two autoclaves were not working properly. This equipment is absolutely necessary to carry out

sterilization of instruments, cotton, pads, linen, etc., and the damage occurred because of its absence in working condition. The doctors were held

liable.

(b) No prescription should ordinarily be given without actual examination. The tendency to give prescription over the telephone, except in an acute

emergency, should be avoided.

(c) A doctor should not merely go by the version of the patient regarding his symptoms, but should also make his own analysis including tests and

investigations where necessary.

(d) A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient.

(e) An expert should be consulted in case of any doubt. Thus, in Smt. Indrani Bhattacharjee, Original Petition No.233 of 1996 decided by the

National Consumer Commission on 9.8.2007, the patient was diagnosed as having 'Mild Lateral Wall Eschemia'. The doctor prescribed medicine

for gastro-enteritis, but he expired. It was held that the doctor was negligent as he should have advised consulting a Cardiologist in writing.

(f) Full record of the diagnosis, treatment, etc. should be maintained.

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117. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or

National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum

or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical

negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then

issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We

further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's

case (supra), otherwise the policemen will themselves have to face legal action.

10. Either the statutory rules or executive instructions as to the guidelines is yet to be framed by the Government of India and/or the State

Governments in consultation with the Medical Council of India. Therefore, as per the above judgments of the Hon'ble Supreme Court, a private

complaint is entertainable only when the complainant produce prima facie evidence before the Court in the form of credible opinion given by

another competent doctor to support the charge of rashness or negligence on the part of the accused doctors.

11. In this case on hand, as already pointed out, the opinion obtained by the Court from a committee of doctors is not supporting the charge of

rashness or negligence. The complainant has also not produced any other evidence in the form of credible opinion given by another competent

doctor to support the charge. Therefore, the complaint taken on file by the Judicial Magistrate as against the petitioners is not in consonance with

the above dictum of the Hon'ble Supreme Court. Putting the petitioners under ordeal of trial is nothing but harassment to the petitioners and abuse

of process of court.

12. For the aforesaid reasons, the proceedings in C.C.No.222 of 2010 on the file of the Judicial Magistrate No.2, Nagercoil is liable to be

quashed.

13. In the result, this criminal petition is allowed and the proceedings in C.C.No.222 of 2010 on the file of the Judicial Magistrate No.2, Nagercoil

against the petitioners are quashed. Consequently, connected miscellaneous petition is closed.