
(2015) 01 BOM CK 0143

In the Bombay High Court

Case No : Criminal Writ Petition No. 802 of 2013

Gautam

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 19-01-2015

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 173
Penal Code, 1860 (IPC) — Section 304-A, 34

Citation : (2015) ALLMR(Cri) 2237 : (2015) 3 BomCR(Cri) 829

Hon'ble Judges : S.B. Shukre, J.

Bench : Single Bench

Advocate : V.P. Thakare, for the Appellant; A.K. Bangadkar, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J.—Heard. Smt. V.P.Thakare, learned counsel for the petitioner, Mr. A.K. Bangadkar, learned Additional Public Prosecutor for the respondent No.1, Mr. M.A.Vaishnav, learned counsel for respondent No.2 and Mr. R.J.Mirza, learned counsel for the respondent Nos. 3 and 4.

2. Rule. Rule made returnable forthwith.

3. Heard finally by consent.

4. This petition has been filed challenging refusal of learned Magistrate to issue process for an offence punishable under Section 304-A of the Indian Penal Code against the respondent Nos. 2,3 and 4, who have been made as accused Nos. 1,3 and 4 respectively in the Criminal Complaint No.645/2009 filed by the petitioner against them before the Judicial Magistrate, First Class, Achalpur, District Amravati. This Criminal Writ Petition also challenges the order passed by the learned Additional Sessions Judge, Achalpur on 19.1.2013 in the criminal revision preferred against the order dated 19.6.2010 passed by the Judicial

Magistrate, thereby confirming the order of the Judicial Magistrate, First Class, Achalpur.

5. Facts of the case, in nut shell are as under :

(i) Petitioner is the unfortunate husband of deceased Sheela, who, according to the petitioner-complainant was the victim of medical negligence.

(ii) It so happened that on 20.1.2007 deceased Sheela, aged about 45 years, developed heavy bleeding. Therefore, petitioner took her to hospital of respondent No.3 for treatment. She was admitted there and administered treatment, but to no avail. She was then taken on the advise of respondent No.3, to the hospital of respondent No.4 at Pathrot on 21.2.2007 where she was treated as indoor patient till 2.2.2007. There also her condition did not improve rather, it stated deteriorating. Therefore, petitioner removed deceased Sheela to hospital of respondent No.2 at Paratwada, where as advised by respondent No.2, sonography and pathological tests of samples of blood and urine of patient were got conducted. While sonography was conducted by respondent No.2 herself, blood and urine tests were done by Dr. Chandrashekhar Daud. Thereafter, respondent No.2 started the treatment of deceased Sheela. However, condition of Sheela deteriorated further and, therefore, petitioner took her on 10.2.2007 to hospital of Dr. Bhamkar. Dr. Bhamkar got conducted again pathological tests of samples of blood and urine of Sheela and expressed an opinion that there was possibility of leukemia. He advised that patient be taken to Government Medical College (GMC), Nagpur. As advised, Sheela was brought to G.M.C. On 10.2.2007 itself where her C.T. Scan was taken and then she was given treatment. However, on 12.2.2007 deceased Sheela passed away.

(iii) Petitioner felt that his wife had died due to sheer negligence of respondent Nos. 2,3,4 and Dr. Chandrashekar Daud. He alleged that negligence of respondent Nos. 3 and 4 was evident because they treated Shela without obtaining reports of sonography and pathological tests; negligence of Dr. Chandrashekar Daud was in his failure to detect leukemia in the blood test conducted by him; and negligence of respondent No.2 lay in her wrong diagnosis and treatment.

(iv) Petitioner, therefore, filed a complaint on 1.3.2007 against said four doctors at Police Station Paratwada alleging commission of offence of causing death by negligence punishable under Section 304-A read with Section 34 of the Indian Penal Code. But, as Police did not prosecute them by filing a charge-sheet, petitioner filed a complaint against the doctors before the Judicial Magistrate, First Class, Achalpur, Distt. Amravati for proceeding against them for commission of said offence. In the complaint respondent No.2 was arraigned as accused No.1, Dr. Chandrashekar Daud as accused No.2 and respondent Nos. 3 and 4 as accused Nos. 3 and 4. Incidentally , during pendency of the complaint, petitioner withdrew the complaint against accused No.2 after having reached amicable settlement with him through mediation.

6. It is the contention of the learned counsel for the petitioner that following the spirit of the observations of Hon''ble Apex Court in the case of Jacob Mathew Vs. State of Punjab and Another, , the petitioner, in order to show existence of credible opinion of other doctor that respondent Nos. 3 and 4 were negligent, had invited attention of the learned Magistrate to the statements of all the accused persons and also to the statement of one Dr. Bhamkar recorded by Police, which indicated that the diagnosis of respondent Nos. 2 to 4 was not correct and was not based upon the blood and urine reports. However, these facts, learned counsel further submits, have not been properly appreciated by the learned Magistrate. She submits that even though the petitioner succeeded in establishing existence of prima facie case as regards rashness and negligence on the part of medical professionals that the respondent Nos. 2 to 4 are, the learned Magistrate as well as learned Additional Sessions Judge ignored the same and refused to issue process against these respondents-accused persons.

7. Learned counsel for the respondent Nos. 2 to 4 submits that there is an opinion given by the Board of Doctors consisting of three doctors on the panel, which shows that there was no negligence on the part of the respondent Nos. 2 to 4 in diagnosing and treating deceased Sheela wife of the petitioner and, therefore, as held by the Hon''ble Apex in the case of Jakob Mathew, there is available on record credible opinion of another doctor confirming diagnosis and line of treatment adopted by the these respondents thereby showing hollowness of the allegations of the petitioner against these respondents.

8. Learned Additional Public Prosecutor for the respondent No.1/State has adopted the argument of learned counsel for the petitioner, though has also submitted that approximate order be passed.

9. There are statements recorded by the Police during the course of investigation into the first complaint of the petitioner that did not end up in filing of final report under Section 173 Cr.P.C. These statements include statements of Dr. Deepak Gadge (accused No.3-respondent No.3), Dr. Sau. Laxmi Jawanjal (accused No.1-respondent No.2), Dr. Arvind Mahadeo Bhamkar, another doctor who had treated the patient deceased Sheela and some other persons. Statements of said doctors, copies of which are filed on record of the case by petitioner, throw some useful light on the nature of present case. They are in the nature of public documents and, therefore, can be tooked into in exercise of extra-ordinary jurisdiction of this Court under Article 227 of the Constitution of India.

10. According to the learned counsel for the petitioner, these statements, particularly the statements of Dr. Arvind Mahadeo Bhamkar, would show that there was wrong diagnosis made and wrong treatment given by Dr. Sau. Laxmi Jawanjal, Dr. Deepak Gadge and Dr. Sushama Gadge as regards the ailment suffered by deceased Sheela and, therefore, it amounted to rashness and negligence on their part.

11. The afore stated argument can hardly be accepted for the simple reason that

in this case there is no material present on record to show that diagnosis of deceased Sheela made by respondent Nos. 2,3 and 4 was not even based on her clinical examination, nor is it the case of the petitioner. In such a case, statement of these doctors would have to be accepted as bringing out the true facts of the case. Dr. Deepak Gadge as well as Dr. Mrs. Laxmi Jawanjale both have stated that after seeing deceased Sheela by them and respondent No.4, they diagnosed the ailment the way they did and accordingly they treated the patient-deceased Sheela. This shows that these doctors did what they, in their opinion made after examining the patient, thought to be the diagnosis of the patient and also the proper treatment of the patient. A particular line of treatment was adopted by them as it was considered appropriate and necessary to improve the condition of deceased Sheela. In doing so, if some error of judgment had occurred, which perhaps may have occurred, it was only a mistake made in good faith, not resulting from any negligence, much less criminal negligence. There can be an error of judgment but as long as the error is not shown to be the result of lack of as much degree of care a medical professional is expected to exercise, which lack of care has not been shown by evidence collected in this case, rather the evidence prima facie suggests exercise of reasonable care, the error of judgment would not turn itself into criminal negligence requisite for initiating criminal prosecution. Therefore, this cannot be said to be a case of medical negligence.

12. There can be another scenario. In a given case, it may happen that two doctors have different opinions about the ailment being suffered by a patient and they may also differ on the line of treatment to be adopted for treating such a patient. Could it then be said that because of difference of opinions, both the doctors are criminally liable being negligent ? Answer would have to be given as in the negative because both the doctors being professionals are entitled to form their opinions after duly considering the result of examination of the patient. If such opinions are not based upon some objective material before the professionals or are in ignorance of the same, and result in some damage or loss, then only could they be said to assume attributes of negligence sufficient to prosecute the professionals under criminal law. What is a case of criminal negligence and what is not, therefore, always depends upon the facts and circumstances of each case, and has to be ascertained from all the relevant facts and circumstances taken together.

13. Elements of rashness and negligence are essential constituents of an offence punishable under Section 304-A of the Indian Penal Code. They are something which cannot be recklessness, lack of care, throwing to winds the procedural requirements and similar such other factors. In the instant case, the doctors-respondent Nos. 3 and 4, appear to have made some or other examination of the patient and then only these doctors had come to a conclusion about what and how should they diagnose the ailment of Sheela and accordingly diagnosed and treated her. As said earlier, this is not a case of diagnosis made and treatment given in total contrast to result of patient's clinical and other examination or in absence of it. If Dr. Arvind Bhamkar has given a different opinion, it would not

mean that Dr. Laxmi Jawanjali, Dr. Deepak Gadge and Dr. Sushama Gadge, the respondents Nos. 2 to 4, on their respective parts, were negligent. One has to understand the difference between negligence and incorrectness of an opinion. What has happened in this case could either be called as error of judgment made in good-faith without any mala fides or negligence or a case of conflict of opinions between two sets of doctors without any criminality attached to either of the sets.

14. The conclusions reached above receive further support from the material present on record. It is in the nature of opinion of the Board of Medical Experts set up by Civil Surgeon, Amravati and there is no dispute about the said opinion. According to this opinion, the diagnosis made as well as treatment given to the deceased Sheela by respondent Nos. 2 to 4 was proper in the fact situation of this case. Thus, as rightly submitted by the learned counsel for the respondent Nos. 2 to 4, in this case, the prima facie evidence available on record supports the case of respondent Nos. 2 to 4 and not the allegations levelled against them by the petitioner. It then follows that all these facts attract to them the ratio of Jacob Mathew (supra), and as such, I find that this is a case wherein there is no credible opinion given by another competent doctor that the diagnosis had been made in a rash and negligent manner and so the treatment was given rashly and negligently.

15. In the circumstances, I am of the view that the impugned orders passed by the both the Courts below are legal and proper, and they cannot be said to be arbitrary or perverse. No interference with them is called for. Criminal Writ Petition deserves to be dismissed and is dismissed accordingly.

16. Rule is discharged.