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**(2014) 11 J&K CK 0030**

**In the Jammu And Kashmir High Court**

**Case No : 561-A No. 6/2010 and Cr.M.A. 5/2010**

Sanjay Gupta

APPELLANT

Vs

Kanta Devi and Others

RESPONDENT

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**Date of Decision :** 15-11-2014

**Acts Referred:**

**Citation :** (2015) 2 JKJ 248

**Hon'ble Judges :** Dhiraj Singh Thakur, J.

**Bench :** Single Bench

**Advocate :** Vishal Kapur, Advocate, for the Appellant; Aditya Gupta, for the Respondent

**Final Decision :** Disposed off

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## **Judgement**

Dhiraj Singh Thakur, J.â?"The present petition has been filed under Section 561-A Cr.P.C. for quashing the FIR No. 6/10 dated 12.1.2010,

registered with the police station, Gandhi Nagar, Jammu. Briefly stated, the material facts are as under:-

2. A complaint came to be filed by the complainant-Kanta Devi, respondent No. 1, herein, under Section 326/420 RPC, in the court of learned

Chief Judicial Magistrate, Jammu, wherein it was alleged that upon reading an advertisement in the newspaper that a doctor from AIIMS, Delhi,

was coming at GEM Nursing Home, Jammu, the complainant got herself registered for medical checkup and for being operated upon for the

problem of cataract in her eye.

3. Subsequently, the surgery took place on 15.9.2009, as a result of which the complainant, to her dismay, found that she could not see at all from

one eye for which she had undergone the surgery. It was further alleged that the

concerned Nursing home then referred the complainant to one

S.M. Regina and Laser Eye Centre, 13-A/C, Gandhi Nagar, Jammu, where upon check-up, she was informed that the complainant is suffering

from infection in the eye and it would take two to three days to cure the infection whereafter she will be able to see properly.

4. It was further alleged that on 20.9.2009, the complainant went to Amritsar, where she consulted one Dr. Daljeet Singh, who after check up

informed the complainant that her one eye was permanently damaged due to surgery and negligence of the doctor who conducted the said surgery.

Thereafter, the complainant consulted another doctor namely Dr. K.D. Singh at Amritsar on 21.9.09 and 26.9.09, who also similarly opined that

the eye sight of the complainant had been lost due to the negligence of the doctor conducting the surgery and that no repair was possible.

5. Upon a complaint having been filed in the court of learned Chief Judicial Magistrate, Jammu, the same appears to have been forwarded to the

SHO, Police Station Gandhi Nagar, Jammu, under Section 156(3) Cr.P.C., for investigation under law. Pursuant thereto, an FIR bearing No. 6 of

2010, under Section 326/420 RPC, was registered at police station, Gandhi Nagar. It is in this backdrop that the present petition has been filed

under Section 561-A Cr.P.C. for quashing the aforementioned FIR.

6. The main ground of challenge in the petition is that the learned Chief Judicial Magistrate, Jammu, while directing the respondent No. 2, to

investigate the matter and the police in registering the FIR, have acted in a mechanical manner. It is stated that both the authorities were required to

satisfy themselves as to whether the allegations leveled in the complaint disclosed any cognizable offence before directing registration of FIR and its

investigation.

7. It was further asserted by the counsel for the petitioner that the guidelines laid down by the Apex Court in the case of Jacob Mathew v. State of

Punjab & anr, AIR 2005 Supreme Court 3180, had not been followed. Reference was also made to Section 87 of the RPC, to emphasize that if

grievous hurt or death was not intended or known by the doer to be likely to cause death or grievous hurt to a person who has given his consent

whether expressed or implied would not be an offence.

8. Counsel for the respondents reiterated the stand of the complainant as

projected in the complaint and stated that not only the complainant but 13 other patients also lost their eye sight pursuant to the operation conducted by the doctor. However, this assertion is not reflected anywhere in the complaint filed by the complainant, which is on record.

9. Heard learned counsel for the parties.

10. Two issues arise for consideration in the present case; (i) whether while exercising powers under Section 156(3) of the Criminal Procedure

Code, the learned Chief Judicial Magistrate was required to pass a speaking order after proper application of mind, (ii) whether the guidelines

framed by the Apex Court in the case of Jacob Mathew Vs. State of Punjab and Another, have been followed.

First Issue

11. From a perusal of the 1st Information Report, placed on record, it appears that based on a complaint filed by the complainant before the

learned Chief Judicial Magistrate, the same was forwarded to the SHO, Police Station, Gandhi Nagar with the following remark:

Forwarded under Section 156(3) CrPC to SHO, Police Station, Gandhi Nagar for investigation u/law.

12. In Anil Kumar and Others Vs. M.K. Aiyappa and Another, , the Apex Court while relying upon the case of Maksud Saiyed Vs. State of

Gujarat and Others, held as under:

11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case

examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where

jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C., the Magistrate is required to apply his mind, in

such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The

application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and

heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the

complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a

detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge

which, in our view, has stated no reasons for ordering investigation.

13. In *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others*, , the Apex Court in Paragraph 28 held as under:

28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the

complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the

magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to

examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient

for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of

preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even

himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then

examine if any offence is *prima facie* committed by all or any of the accused.

14. In the present case, as will be noticed, no reasons at all were given by the Court below nor does it show any application of mind by the learned

Magistrate while ordering investigation against the respondents in the complaint.

15. The need for application of mind by the Magistrate is imperative inasmuch as once an order under Section 156(3) of the Criminal Procedure

Code is issued for investigation, the police has no option but to register an FIR and set into motion the criminal justice system against the accused.

## Second Issue

16. In *Jacob Mathew's case* (supra), the Apex Court noticed the rising tendency to file criminal cases against doctors on the ground of medical

negligence and hold the view that indiscriminate prosecution of medical professionals for criminal negligence was counter-productive to the interest

of the society.

17. While summing up the conclusions in the judgment (supra) in paragraph 49, the Apex Court, *inter alia*, held that (1) a professional may be held

liable for negligence on one of the two findings: either that he was not possessed of the requisite skill which he professed to have possessed, or he

did not exercise, with reasonable competence in the given case, the skill which he did possess; (2) A simple lack of care, an error of judgment or

an accident is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical

profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available

or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed; (3)

to prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something

which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The

hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent. Finally, the following were

the guidelines laid by the Apex Court in the judgment (supra).

(a) 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.

(b) 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.

(c) A doctor accused of rashness or negligence, may not be arrested in a routine manner 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.

18. The order passed by the Learned Chief Judicial Magistrate in purported exercise of powers under section 156(3) Cr.P.C. was not only

passed mechanically but also did not take into consideration the guidelines

prescribed by the Apex Court in Jacob Mathew's case. The same is, therefore, quashed alongwith FIR No. 6/2010 registered with police station Gandhi Nagar, Jammu under section 326/420 RPC.

19. The Learned Chief Judicial Magistrate shall pass a fresh order on the application filed by the complainant within a period of two weeks from the date of receipt of this order. Disposed of accordingly, along with connected CrMA.