

(2015) 11 AHC CK 0046

In the Allahabad High Court

Case No : Application U/S. 482 No. 26289 of 2015

State of U.P.

APPELLANT

Vs

Rajeev Kulshreshtha

RESPONDENT

Date of Decision : 03-11-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 3(4), 345, 4(m), 457, 482

Penal Code, 1860 (IPC) — Section 175, 417, 418, 420, 423

Transplantation of Human Organs and Tissues Act, 1994 — Section 18

Citation : (2016) 2 ALJ 10 : (2016) 92 ALLCC 769 : (2016) CriLJ 1244

Hon'ble Judges : Ramesh Sinha, J.

Bench : Single Bench

Advocate : Vimlendu Tripathi and Imran Ullah, for the Appellant; Nitinjay Pandey, for the Respondent

Final Decision : Disposed Off

Judgement

Ramesh Sinha, J.—The present application under section 482 Cr.P.C. has been filed for quashing of the impugned judgment and order dated 18.6.2015 passed by Sessions Judge, Etah in Criminal Revision No. Nil of 2015 and order dated 11.6.2015 passed by C.J.M. Etah in Misc. Application No. 250 of 2015, arising out of case crime No. 782 of 2015, under sections 420 , 417 , 418 , 423 IPC & 18 of the Transplantation of Human Organs Act, 1994, P.S. Kotwali Nagar, District Etah.

2. The brief facts of the case are that the District Magistrate, Etah received a complaint on 19.5.2015 from one Chandra Pal s/o Harikesh stating that he has admitted his wife Smt. Meera in Etah Surgical Centre, Etah which is owned by Dr. Rajeev Kulshreshtha and for the treatment of his wife Rs. 26,000/- was settled. Chandra Pal was a poor and handicapped person and he had collected the money from the villagers and paid total amount of Rs. 30,000/- to him but inspite of the fact Rs. 8,000/- was being further demanded by Dr. Rajeev Kulshreshtha and when he showed helplessness to pay the same he was threatened that his wife would be injected some poisonous injection, killed and thrown out from the

Nursing Home. He also lodged a complaint at P.S. Kotwali Nagar, District Etah informing about said fact. He further stated that Dr. Rajeev Kulshreshtha had also obtained his thumb impression on a blank paper and further threatened him of dire consequences to his life.

3. The said complaint was also made to the District Magistrate and the same was forwarded to the Addl. District Magistrate(Admin.), Etah who further ordered for an enquiry to be conducted by the Chief Medical Officer, Etah and constituted three-members Committee alongwith the C.M.O. S.D.M. and Circle Officer, Etah.

4. Similarly another complaint was lodged by Jaswant Singh Yadav, reporter of Swatantra Bharat News Paper on the same very day i.e. 19.5.2015, stating about certain irregularities being committed in the said Nursing Home and the said complaint was also forwarded to A.D.M. (Admin.). The C.M.O. on 26.5.2015 had sent a notice to the said Nursing Home that a Inspection Team would be visiting on 27.5.2015 at 12.30 p.m. for enquiry and the staff of the said Nursing Home be prepared to co-operate with the enquiry.

5. On 27.5.2015 at 12.40 p.m. the inspection team visited the said Nursing Home and issued notice to Dr. Rajeev Kulshreshtha stating when the inspecting team visited the said Nursing Home on 27.5.2015 he nor his staff co-operated with the investigation and submitted that they would submit their reply to the complaint for which two days time was given by the C.M.O., Etah and the team headed by him. On 27.5.2015 reply was given to the C.M.O. by Dr. Rajeev Kulshreshtha and his wife Dr. Manju Verma, who was a Gynecologist in the said Nursing Home.

6. Prior to the complaint made by Chandra Pal a complaint was made by Dr. Rajeev Kulshreshtha to Hon"ble Chief Minister of U.P., Lucknow on 20.5.2015 against the District Magistrate, Etah, Ms. Nidhi Kesarwani raising issues how the D.M. at the instance of some local M.L.A. & M.L.C. who are of the ruling party had pressurized him for not charging fee for the treatment of the wife of the complainant Smt. Meera who was saved by the opposite party while being treated in Nursing Home and when he demanded fee for the medical treatment and saving of her life he was pressurized and influenced by the D.M. and local M.L.C. for not taking money and when he insisted for fee and other expenses for the medical treatment the present illegal and arbitrary action was taken against him and his Nursing Home by the D.M., Etah.

7. On 30.5.2015 the inspecting team headed by C.M.O., Etah submitted report to the D.M., Etah. On the same day the In charge D.M., Etah passed an order on the basis of the report submitted by the inspecting team and as per the advice of Public Prosecutor, Etah alleging that the said Surgical Centre of Dr. Rajeev Kulshreshtha has no arrangement for disposal of the waste material of post surgical operation due to which there is likelihood of danger of spreading of various diseases which would affect the public at large. It was further submitted that the operation is being conducted without there being a competent doctor for

injecting anesthesia before surgery and there is no expert doctor of anesthesia, though the name of Dr. Prateek Kulshreshtha is mentioned in Surgical Centre but he is not found there and the surgery which is being performed daily is an offence. Though there is an ultrasound machine but there appears to be no expert for conducting ultrasound. Besides, Dr. Manju Verma there is no other para-medical staff in the Nursing Home. On 9.5.2015 Meera Devi w/o Chandra Pal was admitted and a surgery was performed and six bottles of blood was transfused and the said blood was not taken from an authorized Blood Bank under Transplantation of Human Organs Act, 1994 which is also an offence. Hence the D.M. directed the Senior Superintendent of Police, Etah to register FIR under sections 420 , 417 , 418 , 423 IPC & 18 of the Transplantation of Human Organs Act, 1994 against Dr. Rajeev Kulshreshtha and his Nursing Home be sealed in public interest.

8. In pursuance of the order of the D.M. an FIR was lodged against opposite party- Dr. Rajeev Kulshreshtha as case crime No. 782 of 2015 under sections 420 , 417 , 418 , 423 IPC & 18 of the Transplantation of Human Organs Act, 1994, P.S. Kotwali Nagar, District Etah. On 30.5.2015 opposite party- Dr. Rajeev Kulshreshtha challenged the said FIR in Criminal Misc. Writ Petition No. 14015 of 2015, Dr. Rajeev Kulshreshtha v. State of U.P. and three others before this Court and on 4.6.2015 an interim order was passed staying the arrest of Dr. Rajeev Kulshreshtha. The Nursing Home of Dr. Rajeev Kulshreshtha was also seized in pursuance of the order of D.M., Etah by the police on 30.5.2015 against which opposite party filed an application before the C.J.M., Etah, who registered it as a Misc. Case and vide order dated 11.6.2015 ordered for opening of Nursing Home of opposite party and allowed the application No. 3-A and directed the concerned police officer to open the seal of the said Nursing Home within 48 hours.

9. Aggrieved by the order dated 11.6.2015 passed by the C.J.M. the State preferred a criminal revision before the Sessions Judge, Etah which was dismissed by the Sessions Judge, Etah on 18.6.2015 and directed that the seal of the said Nursing Home be also opened and the possession of the same be handed over to Dr. Rajeev Kulshreshtha and restrained any person from interfering in the said possession of Dr. Rajeev Kulshreshtha and further ordered that the said order should be complied with by 5.00 p.m. in the evening on the same day failing which proceeding under section 345 Cr.P.C. be initiated against the defaulter and further notice be given under section 175 I.P.C. to punish the guilty persons.

10. Aggrieved by the orders passed by both the courts below i.e. C.J.M. and Sessions Judge, Etah the State has preferred the present 482 Cr.P.C. application before this court for quashing of the same.

11. Heard Sri Imran Ullah, learned Addl. Advocate General assisted by Sri Vimlendu Tripathi, learned counsel for the applicant and Sri H.N. Singh, learned Senior Advocate assisted by Sri Nitansay Pandey appearing on behalf of sole opposite party.

12. Counter and rejoinder affidavits have been exchanged between the parties.

13. It has been argued by the learned Addl. Advocate General on behalf of the State that the order dated 30.5.2015 passed by the D.M., Etah is an administrative order and the application filed by the opposite party before the C.J.M. for opening of the Nursing Home and removal of the seal was not maintainable. He argued that the said Nursing Home was sealed by the D.M. in public interest under an administrative order and the C.J.M. had no jurisdiction to entertain such application. Moreover, the Sessions Judge, Etah also passed an order on 18.6.2015 dismissing the appeal of the State challenging the order of C.J.M. He argued that the impugned orders passed by the C.J.M. and Sessions Judge, Etah are without jurisdiction and liable to be set aside by this Court as the order passed by the District Magistrate on 30.5.2015 was not an order passed in any judicial proceeding under the Code.

14. He further submitted that the D.M. on receiving the complaint made by Chandra Pal regarding various irregularities and illegal activities being committed in the said Nursing Home constituted an enquiry under C.M.O., Etah and on the report submitted the D.M. has passed an order for registering an FIR and sealing of Nursing Home in public interest.

15. He pointed out an order passed by a Single Bench of this Court taking cognizance about the rampant irregularities and malpractices being committed by the doctors engaged in private practice through various private hospitals/nursing homes/polyclinics etc. and with a view to have check and balance the order dated 28.1.2004 was passed in Civil Misc. Contempt Petition No. 802 of 2002 wherein various directions were issued for registration of such private establishments offering medical facilities. The authority of registration was entrusted to the C.M.O. of the concerned districts where such establishments are situated.

16. The aforesaid order dated 28.1.2004 was challenged by the Indian Medical Association in Special Appeal No. 439 of 2004 which was dismissed vide order dated 29.4.2004. The same was further challenged by the Indian Medical Association in S.L.P.(C) No. 11452 of 2004 which too was dismissed vide order dated 30.4.2013 passed by the Apex Court.

17. He further drawn the attention of a Public Interest Litigation filed against carrying on medical profession by unqualified and unregistered medical practitioners, the Apex Court issued several directions in D.K. Joshi Vs. State of U.P. and Others, . He further argued that the directions issued in the aforesaid case as well as the inbuilt executive power of the State Government makes it amply clear that the executive authorities may lawfully check and inspect the private establishments offering medical facilities and may take necessary steps to ensure that such private establishments may not perform their functions against the interest of general public and may not carry on practice without having requisite amenities, facilities and qualified staff/technical hands.

18. He submitted that in pursuance of the order dated 28.1.2004 passed by Single Bench of this Court, the Principal Secretary, U.P., Lucknow on 13.2.2004 has also issued a circular regarding the manner in which the Nursing Home and the private hospitals have to be registered in order to ensure good health and services to the public, a copy of the same has been annexed as Annexure No. RA-3 to the rejoinder affidavit.

19. Sri Imran Ullah, learned counsel for the applicant further placed reliance on a judgement of Full Bench of High Court of Kerala reported in Mammoo Vs. State of Kerala and Another, in which it was held that the powers exercised by the District Magistrate are administrative and not judicial in nature and revision against the said order before the Sessions Judge is not maintainable. The functions exercisable by the Executive Magistrate under section 3(4) or 7 of the Code of Criminal Procedure, 1973 are not necessarily executive. They are invested with judicial function also under the Code. His functioning under the Code may be executive, administrative or judicial. But when acting under any law other than the Cr.P.C. the Executive Magistrate can exercise only executive or administration function only.

20. The Madras High Court in R. Subramaniam Vs. Commissioner of Police, of the judgment thus held:

"To constitute a criminal Court it is not sufficient that it is one of the Courts mentioned in Section 6 , Criminal Procedure Code. It must be acting as a criminal court. The Magistrate may be acting under his executive or administrative capacity or under the powers conferred on him by some other law. These proceedings are not that of a Court and are not revisable. The Magistrate should be acting as a Court and the proceeding that is sought to be revised should be a judicial proceeding. Under the code, the Magistrate is empowered to act judicially as well as in his administrative capacity. The orders that can be revised are those that are passed in judicial proceedings, "judicial proceedings" is defined in Section 4(m) Criminal Procedure Code as including any proceeding in the course of which evidence is or may be legally taken on oath. The definition is an inclusive one. Under "judicial proceeding" the acts of the Court are passed judicially, that is after hearing the parties, and which affect the rights of parties will be included."

21. Dealing with this controversy the Supreme Court in The Dargah Committee, Ajmer Vs. State of Rajasthan, observed in para 6 of the judgement.

"In any event it is difficult to hold that the Magistrate who entertains the application in an inferior criminal court, the claim made before him is for the recovery of a tax and the order prayed for is for the recovery of a tax by distress and sale of the moveable property of the defaulter. If at all, this would at best be a proceeding of a civil nature and not criminal. That is why, we think, whatever may be the character of the proceeding, whether it is purely ministerial or judicial or quasi-judicial, the Magistrate who entertains the application and holds

the enquiry does so because he is designated in that behalf and so he must be treated as a person designate and not as a Magistrate functioning and exercising his authority under the Code of Criminal Procedure. He cannot therefore be regarded as an inferior criminal court. That is the view is taken by the High Court and we see no reason to differ from it."

22. Thus he submitted that the impugned orders passed by the courts below are illegal and without jurisdiction and be quashed by this court.

23. Sri H.N. Singh, learned Senior Advocate appearing on behalf of the sole opposite party has vehemently opposed the argument of learned Addl. Advocate General and submitted that the opposite party Dr. Rajeev Kulshreshtha is a practicing surgeon for a long time at Etah and runs a Nursing Home at Gandhi Market, Etah where his wife also works as a renowned Gynecologist. Dr. Rajeev Kulshreshtha has resigned from Government Medical Service in the year 1998 and started his own practice to serve the people of Etah, who were previously deprived of critical, surgical and gynecological services and he had earned a lot of love and affection from the people of Etah for rendering his service. The district administration always appreciated and commended his services rendered in the past. Dr. Kulshreshtha also operated upon various top district officers and their family members showing that they had deep faith and confidence in his service.

24. He submitted that on 6.5.2015 a patient Meera Devi w/o Chandra Pal, r/o Village Barthar, Etah came to his clinic, brought by some persons in critical condition. His wife Dr. Manju Verma examined her and found her bleeding per vaginum for last many days. The persons who had brought the patient had informed him that she was taken to the district hospitals and various other doctors but she was advised to go to some higher centre. Dr. Kulshreshtha and his wife also decided to refer the patient upon seeing her bad condition but she was not in a condition to go and if they had referred her she might not have survived en route and after attendants persuasion they decided to go ahead to save patient's life and after the blood examination it was found that the patient's Hb was about 4gm% and she was not in a position to undergo surgery instantly. Therefore, she was properly resuscitated and she was operated successfully on 10.5.2015 and she remained in critical condition for three days and she responded well.

25. He pointed out that she was discharged on 17.5.2015. One local M.L.C. Sri Ramesh Yadav sent a person to him who insisted upon the doctor to waive off entire operation fee and other nursing home charges and next day on 18.5.2015 he again sent the same person to threaten doctor that if he charged any money from the patient he would have to face dire consequences.

26. Thus the dispute arose between the parties. The D.M., Etah on 18.5.2015 also under the influence of this M.L.C. sent some persons and so called photographer-journalist to create nuisance at the clinic. The opposite party was

so much pressurized by the D.M. and other political persons that Dr. Kulshreshtha had to discharge the patient without realizing his fees etc. In spite of all this, the D.M. Etah became instrumental to malign the reputation of Dr. Rajeev Kulshreshtha on the social media. He submitted that the opposite party had become a victim of the harassment at the instance of D.M. Etah, Ms. Nidhi Kesarwani who under the influence of M.L.C. of the ruling party had got a false complaint prepared on a back date to malign his image and of his nursing home and further they had illegally got an FIR lodged against them and further sealed his Nursing Home.

27. Regarding the harassment and atrocities which have been committed by the D.M. the applicant on 20.5.2015 had sent a complaint to Hon'ble the Chief Minister of U.P. and other higher authorities and the complaint of the opposite party has been entertained by the Human Rights Commission and an enquiry has also been instituted which is evident from the letter dated 28.8.2015 and the enquiry officer is Divisional Commissioner, Aligarh and the statement of Dr. Rajeev Kulshreshtha has already been recorded by the Divisional Commissioner on 1.9.2015.

28. Sri H.N. Singh further argued that the FIR of the present case was challenged by the applicant before this Court in which his arrest was stayed and further allegations which have been made are absolutely false, frivolous and baseless and the said complaint is ante dated to the complaint sent by the applicant to Hon'ble the Chief Minister and other higher authorities on 20.5.2015.

29. He submitted that as per the FIR itself no offence under section 18 of the Transplantation of Human Organs Act, 1994, is made out against opposite party Dr. Rajeev Kulshreshtha and the allegation of transfusion of blood is not an offence which has been alleged in the FIR. He submitted that seizure memo was prepared by the police in pursuance of the FIR registered against the opposite party by the C.M.O. which has been annexed as CA-1 dated 30.5.2015.

30. He argued that the contention of the applicant that the Nursing Home of the opposite party was sealed under the administrative order passed by the D.M. has no substance as in pursuance of the said order the FIR was lodged against Dr. Rajeev Kulshreshtha and further in pursuance of the said FIR which was lodged, the Nursing Home was sealed and the applicant had moved an application for opening of the seal of the Nursing Home before the C.J.M., Etah which was allowed and the C.J.M. had directed to open the seal of the Nursing Home in view of Section 457 Cr.P.C.

31. Moreover, the State being aggrieved by the order of the C.J.M. challenged the same before the Sessions Judge, Etah in revision which was dismissed and the order passed by the D.M. was upheld by the lower revisional court. Hence to say, that the courts below had committed error in entertaining such application of opposite party for opening of the seal of the Nursing Home which is wholly unfounded. He submitted that the case law which has been cited by the applicant

is distinguishable from the case of the present case and submitted that in view of the same the present application is devoid of merits and be dismissed. He further pointed out that the D.M., Etah Ms. Nidhi Kesarwani had deliberately after the incident had gone on leave on 30.5.2015 and the officiating D.M. who is the C.D.O. had passed the said order in order to show that the D.M. was not after the incident to prevent herself from abuse of process of her powers.

32. Considered the submission advanced by the learned counsel for the parties and perused the record..

33. It appears from the record that Smt. Meera Devi w/o Chandra Pal was admitted in the said Nursing Home of opposite party who was brought in a critical condition and she was saved of her life and her husband finding himself unable to pay the expenses of the Nursing Home taken assistance of some political persons of district Etah who pressurized Dr. Rajeev Kulshreshtha for not charging for the treatment of Smt. Meera Devi and when he resisted from the same he was threatened for dire consequences of his life and on the interference of the local political persons of ruling party the doctor had to discharge the said patient from his Nursing Home without taking any charge from him.

34. The sole opposite party is running his Nursing Home in the name & style "Etah Surgical Centre" under valid license which has been renewed upto 4.6.2016 by the C.M.O., Etah and just after this renewal the said incident appears to have taken place and prior to it there was no complaint regarding any irregularity or malpractices of the said Nursing Home by any person which shows that there appears to be some political influence on the opposite party for not charging fee from the patient and because of the political pressure in collusion of the District Administration the doctor had to discharge the patient without charging any fee for the treatment So far as the sealing of the Nursing Home under the orders of the D.M. dated 30.5.2015 in pursuance of which the FIR was also lodged and the application filed by opposite party for opening of seal before the C.J.M., Etah on the ground that the said application was not maintainable against an administrative order of the D.M. appears to have some substance as the applicant had challenged the FIR of the present case which was lodged under the orders of D.M. but he did not make any prayer for opening of the seal of the said Nursing Home in the writ petition filed by him before this Court challenging the FIR and his arrest was only stayed.

35. There further appears to be some over doing and high handedness from the side of the district administration in collusion with the political persons as well as from the side of opposite party who also filed an application for opening of seal of his Nursing Home before the C.J.M. Etah which was not maintainable and allowed by the C.J.M. and the lower revisional Court also dismissed the revision of the State which can not be sustained in the eyes of law as there was no judicial order passed by the District Magistrate under the Code of Criminal Procedure, 1973. The arguments of the learned counsel for the opposite party that the said order was passed by the Magistrate under Section 457 Cr.P.C. does

not appear to be correct neither from the application of the opposite party Dr. Rajeev Kulshreshtha or from the order of the C.J.M. it appears that the order dated 18.6.2015 was passed under any provisions of the Code, 1973. Moreover, the lower revisional court also dismissed the revision of the State filed against the order of C.J.M. mechanically and further it appears both the courts below have over stepped their jurisdiction in passing the impugned orders. The order of the D.M. was an administrative order sealing the said Nursing Home in public interest as there has been an order of Single Bench of this Court filed in the Contempt Petition on 28.1.2004 in pursuance of which a circular was also issued to the State Government to regulate the functioning of nursing homes and private hospitals.

36. Though the order dated 30.5.2015 passed by the District Magistrate, Etah shows some political pressure and may have been passed by misusing of his powers, but the C.J.M. Etah was not at all justified in entertaining the application of the opposite party and pass order for opening of seal of the Nursing Home which was sealed in pursuance of administrative order dated 30.5.2015 by District Magistrate, Etah for which a proper remedy to the opposite party was to take recourse available to him under law other than filing an application before the C.J.M., Etah, hence the said orders passed by the C.J.M., Etah and Sessions Judge, Etah are hereby quashed, but taking into account the malafide which has been alleged by opposite party in sealing his Nursing Home by the District Magistrate, Etah under the political influence, he is allowed a month's time to avail the appropriate legal remedy against the order passed by the District Magistrate, Etah on 30.5.2015 sealing his Nursing Home.

37. For a period of one month from today the District Magistrate. Etah and its officers are restrained from interfering in peaceful running of the nursing home of opposite party Dr. Rajeev Kulshreshtha.

38. With the aforesaid observations, the 482 Cr.P.C. application stands disposed of.