IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

CRM-M-53363-2019

Date of Decision:-12.10.2022

Dr. D.L. Budwal.

.....Petitioner.

Vs.

Gurpreet Kaur.

.....Respondent.

CORAM:- HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present:- Mr. Naveen Batra, Advocate for the Petitioner.

Mr. Ramesh Sharma, Advocate for the Respondent.

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JASJIT SINGH BEDI, J.(ORAL)

The prayer in the present petition under Section 482 Cr.PC is for quashing of Complaint No.17 dated 30.09.2016 under Sections 326, 304-A, 447, 504, 506 IPC titled as Gurpreet Kaur Vs. Dr. D.L. Budwal pending in the court of JMIC, Dasuya, District Hoshiarpur (Annexure P-1) along with summoning order dated 18.09.2019 (Annexure P-2) under Section 304-A IPC and all further proceedings arising therefrom.

2. The brief facts of the case are that the son of the respondent/complainant Gurpreet Kaur, namely, Jagdeep Singh is said to have received an eye injury on 20.07.2015 while playing at home. He was immediately taken to the Hospital of the petitioner/accused for treatment. The petitioner-accused gave an assurance to the complainant/respondent that the condition of eye of her son was normal and there was nothing to

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worry about the injury and she need not go to any other hospital for treatment as he would treat her son. Despite treatment, the condition of her son did not improve and so she went back to the petitioner who again gave some medicines to her son. Despite the medication provided, the condition of the son of the complainant did not improve because of which she continuously visited the hospital of the petitioner but each time he promised that her son would recover and continued the treatment. On 25.07.2015, when there was no change in the condition of the eye of Jagdeep Singh, son of the complainant/respondent he was taken to Akal Eye Hospital, Jalandhar where the doctor informed her that the eye of her son had been permanently damaged. She thereafter visited various hospital at Jalandhar and Amritsar for treatment but due to the negligence of the petitioner, the eye of her son was permanently damaged because of which an artificial right eye had to be affixed. When the complainant visited the hospital of the petitioner to complain regarding the damage to the eye of her son she was threatened and abusive language was used against her.

3. On the basis of the facts narrated above, a complaint came to be filed under Sections 326, 304-A, 447, 504, 506 IPC titled as Gurpreet Kaur Vs. Dr. D.L. Budwal on 30.09.2016 (Annexure P-1). Based on the evidence lead the petitioner came to be summoned to face trial under Section 304-A IPC vide order dated 18.09.2019 (Annexure P-2).

4. The aforementioned complaint and summoning order are under challenge before this Court by way of the present petition.

5. The Counsel for the petitioner contends that the summoning order has been issued mechanically under Section 304-A IPC without any application of mind and without considering the fact that Jagdeep Singh

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whose eye got permanently damaged has not died and, therefore, in the absence of any death caused by negligence, the question of the petitioner being summoned to face trial under Section 304-A IPC does not arise.

As per Section 202 Cr.PC if the court had held an enquiry into the allegations made in the complaint or asked for a police investigation to be conducted, the court would have been made aware that since there was no death, Section 304-A IPC would not be made out. He contends that while passing the impugned summoning order the court has not considered the judgments in ***Jacob Mathew Vs. State of Punjab & Anr. 2005(3) RCR (Criminal) 836*** and ***Martin F. D'Souza Vs. Mohd. Ishfaq 2009(2) RCR (Criminal) 64*** as per which an error of judgment on the part of a professional could not be called negligence and a private complaint against the doctor cannot be entertained unless the complaint is supported by the evidence of another competent doctor. He contends that in the present case, there is no evidence of any doctor from a government institution who has supported the complaint of the respondent/complainant with respect to the purported negligence of the petitioner.

He also contends that the respondent/complainant had instituted a complaint under Section 12 of the Consumer Protection Act, 1986 before the District Consumer Disputes Redressal Forum, 3rd Floor, District Administrative Complex, Chandigarh Road, Hoshiarpur (hereinafter referred to as the Consumer Forum) and the said court, vide judgment dated 29.09.2016 came to the conclusion that there was no negligence or deficiency in service on the part of the opposite party (petitioner herein). He contends that the said judgment was passed on 29.09.2016 and the present complaint came to be instituted on the very next day i.e. on

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30.09.2016 without there being any reference whatsoever of the said judgment in the impugned complaint.

It is thus contended that viewed from any angle, the proceedings against the petitioner ought to be quashed.

6. The Counsel for the complainant on the other hand has admitted the fact that since no death had taken place, the summoning order under Section 304-A IPC could not have been passed. He also does not deny the factum of their being no opinion from a government hospital supporting the case of the complainant regarding the purported negligence of the petitioner.

7. I have heard learned Counsel for both the sides at length.

8. Before proceeding further it would be apposite to refer to the relevant provisions of Criminal Procedure Code and the same are reproduced hereinbelow:-

" ***Section 200 Cr.PC***:-

200. ***Examination of complainant****. A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate: Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-*

(a) if a public servant acting or- purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re- examine them.

Section 202 Cr.PC*-*

202. ***Postponement of issue of process****.*

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(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer incharge of a police station except the power to arrest without warrant.

Section 203 Cr.PC:-

*203. **Dismissal of complaint**. If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.*

Section 204 Cr.PC:-

*204. **Issue of process**.*

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

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(a) a summons- case, he shall issue his summons for the attendance of the accused, or

(b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub- section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub- section (1) shall be accom- panied by a copy of such complaint.

(4) When by any law for the time being in force any process- fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

9. The Hon'ble Supreme Court has enumerated the circumstances in which a summoning order ought to be passed.

In ***M/s Pepsi Foods Ltd. Vs. Special Judicial Magistrate 1997 (4) RCR (Criminal) 761*** it was held as under:-

" *26. 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 that would 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. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit*

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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."

In ***Lalankumar Singh & Ors. Vs. State of Maharashtra Criminal Appeal No.1757 of 2022 (Arising out of SLP (Crl.) No.8882 of 2015) Decided on 11.10.2022*** it was held as under:-

" *28. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of* ***Sunil Bharti Mittal v. Central Bureau of Investigation (2015) 4 SCC 609****, which reads thus:*

"*51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.*

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

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10. In the present case, the petitioner has been summoned to face trial under Section 304-A IPC and the said provision is reproduced herein below:-

> " *304-A.* ***Causing death by negligence****. —Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

11. With respect to the prosecution of doctors for medical negligence, the Hon'ble Supreme Court in ***Jacob Mathew Vs. State of Punjab & Anr. 2005(3) RCR (Criminal) 836*** has held as under:-

> **"** *51. We sum up our conclusions as under :-*
>
> *(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three : 'duty', 'breach' and 'resulting damage'.*
>
> *(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. 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. When it comes to*

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the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings : either 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. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither action in civil law but gross nor of a higher degree may provide a ground cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of Indian Penal Code, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be

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'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the Indian Penal Code has to be read as qualified by the word 'grossly'.

(7) ***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****.*

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

52. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report).

Guidelines-re: prosecuting medical professionals

53. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304A of Indian Penal Code. The criminal

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process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

54. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

55. ***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. ”***

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Similarly, the Hon'ble Supreme Court in ***Martin F. D'Souza Vs. Mohd. Ishfaq 2009(2) RCR (Criminal) 64*** held as under:-

> **"** *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, specialised 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 negligence. We furtehr 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.***"***

12. In view of the aforementioned discussion it is apparent that no death has taken place and, therefore, the question of summoning of the petitioner under Section 304-A IPC would not arise. The Magistrate has passed the summoning order mechanically just by adverting to the evidence lead without any application of mind as to how an offence under Section 304-A IPC was made out in the absence of death. In fact, once it was disclosed to the Magistrate that a police complaint had been made regarding the allegations as mentioned in the complaint, the Magistrate was well within his powers to hold an enquiry in terms of Section 202 Cr.PC to satisfy himself as to the genuineness of the allegations and could have also called for the police report regarding the action taken on the said complaint, if any. Therefore, in cases where the allegations and the preliminary evidence lead in support of those allegations are hazy the court can, and in fact should, hold a preliminary enquiry in the manner that it deems fit before

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proceeding to summon an accused. That is the purpose and purport of Section 202 Cr.PC.

In the present case, as per the judgments in ***Jacob Mathew's case (supra) & Martin F. D'Souza's case (supra)*** criminal/civil proceedings could not have been initiated against the petitioner in the absence of any report/evidence submitted by a competent doctor or committee of doctors testifying as to the negligence on the part of the petitioner. Further it is apparent that the Consumer Forum had dismissed the complaint of the complainant on 29.09.2016 holding that there was no negligence or deficiency of service and the present compliant came to be instituted on 30.09.2016 wherein no reference whatsoever was made of the dismissal of the complaint by the Consumer Forum. Had this fact been disclosed in the complaint, the impugned summoning order might not have been passed.

13. In view of the above, I find merit in the present petition and the same is therefore allowed and the Complaint No.17 dated 30.09.2016 under Sections 326, 304-A, 447, 504, 506 IPC titled as Gurpreet Kaur Vs. Dr. D.L. Budwal pending in the court of JMIC, Dasuya, District Hoshiarpur (Annexure P-1) along with summoning order dated 18.09.2019 (Annexure P-2) under Section 304-A IPC and all further proceedings arising therefrom are hereby quashed in the interest of justice.

(JASJIT SINGH BEDI)
JUDGE

October 12, 2022
Vinay

Whether speaking/reasoned	***Yes/No***
Whether reportable	***Yes/No***

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