

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr.M.P. No. 588 of 2013

Dr. Vijay Kumar Petitioner

Versus

1. The State of Jharkhand
 2. Md. Mukhleshur Rahman Opposite Parties

CORAM: HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioner : Mr. Pandey Neeraj Rai, Advocate
 Mr. Rohit Ranjan Sinha, Advocate
 Mr. Saurabh Sagar, Advocate
 Mr. Akchansh Kishore, Advocate
 Mr. Mohit Mukul, Advocate

For the State : Mr. Bishambhar Shastri, A.P.P
 For the O.P. No. 2 : Mr. Ashish Jha, Advocate

08/Dated: 22/03/2023

Heard Mr. Pandey Neeraj Rai, assisted by Mr. Rohit Ranjan Sinha and Mr. Saurabh Sagar, learned counsel for the petitioner, Mr. Bishambhar Shastri learned counsel for the State and Mr. Ashish Jha, learned counsel for the O.P. No.2.

2. This criminal miscellaneous petition has been filed for quashing of entire criminal proceeding including order taking cognizance dated 16.08.2010 passed by the learned Chief Judicial Magistrate, Sahibganj in connection with P.C.R. Case No. 189 of 2009 whereby cognizance has been taken under section 304-A/34 of the Indian Penal Code. Prayer has also been made for quashing of order dated 23.01.2013, passed by the learned Sessions Judge-I, Sahibganj in Criminal Revision No. 83 of 2010 whereby the Criminal Revision No. 83 of 2010 has been dismissed as not maintainable, pending in the Court of learned Chief Judicial Magistrate, Sahibganj.

3. P.C.R. Case No. 189 of 2009 has been filed by the O.P. No. 2 in the Court of learned Chief Judicial Magistrate, Sahibganj alleging therein that on 10.08.2009 at 9 A.M. the complainant brought his father to Surya Nursing Home, Sahibganj for operation of Hernia and the petitioner told him that the operation will be performed in the evening at 7 P.M.. It is further alleged that at 7.30 P.M. the patient was taken to the operation theater and after 30 minutes the patient was

brought out of the operation theater and shifted to a room. It is further alleged that the complainant was waiting that his father regain consciousness but thereafter the complainant saw that the veins of his father stopped. Thereafter immediately the doctor attended the patient and went away to his room and sent a message that the patient has died and when the doctor was again called he did not turn up.

4. Mr. Pandey Neeraj Rai, learned counsel appearing for the petitioner submits that the petitioner is a practicing doctor in the district of Sahibganj and he has clinic in the name of Surya Nursing Home. He further submits that earlier the O.P. No. 2 had filed a written application before the Officer-in-Charge, Town Police Station, Sahibganj on 10.08.2008 at 10.30 P.M. which was registered as Sahibganj (T) P.S. Case No. 86 of 2008 which was investigated by the police and final form bearing Final Form No. 81 of 2008 dated 31.10.2008 has been submitted stating the mistake of facts. On 11.08.2008 at 5.00 P.M. the Manager of the Nursing Home had lodged a written report before the Officer-in-Charge, Sahibganj (T) Police Station stating therein that on 10.08.2008 one Naimuddin along with his son-in-law, Samdani came to his clinic for the operation of Hernia and at 7 P.M. the operation was successfully conducted and the patient sent in the ward at Bed No. M/12. The relatives of the patient remained with him for about 1 hour and at 8 P.M., the petitioner received information that the condition of the petitioner is not well. The petitioner immediately attended the patient and on medical check up he found the patient dead. He further submits that the accused persons sent information through his mobile and called about 100 to 150 persons at the Nursing Home and the mob was led by five accused persons those are Md. Alim, Mehruddin, Mokhtar, Salauddin and Md. Samdani and the mob ran sacked the nursing home, assaulted the staff members of the Nursing Home. The mob was shouting to kill Dr. Vijay Kumar/petitioner. He submits that on the basis of above mentioned written report Sahibganj (Town) P.S. Case No. 87 of 2008 was registered against five named accused persons and 100 to 150 unknown for the

offence under sections 341, 323, 427, 504, 34 I.P.C. and later on after investigation chargesheet has been submitted and cognizance has been taken in that case. He further submits that in the case filed by the O.P. No. 2 final form has been submitted and notices were issued to the O.P. No. 2 for filing protest petition. He further submits that the learned court has taken cognizance on the protest petition under section 304-A/34 of the I.P.C. which is against the mandate of law. He submits that O.P. No. 2 has informed the National Human Rights Commission and National Minority Commission and thereafter one enquiry committee was directed to be set up against the petitioner. The enquiry had been conducted by a team of three doctors and Dr. Pradee Basky M.S. (General Surgery) and a qualified surgeon and Dy. Director Malaria-cum-State Malaria Officer, Jharkhand was the Chairman of the Committee. He submits that enquiry committee recorded the statements of the relatives of Md. Naimuddin (deceased) and statement of Dr. Vijay Kumar-petitioner, statement of Nurse and the compounder and also the risk bound as well as the post mortem report and thereafter upon the detailed enquiry arrived at a conclusion that there is no technical evidence to hold that Md. Naimuddin died due to negligence while conducting Hernia operation. The said enquiry report has been obtained by the petitioner under the R.T.I. Act brought on record by way of Annexure-9 to this petition.

5. On these background, learned counsel for the petitioner submits that it is well settled that if a case against the doctor is filed the requirement of proceeding further examination by the expert as held in the case of **"Martin F. D'Souza V. Mohd. Ishfaq"** reported in (2009) 3 SCC 1 wherein para 106 the Hon'ble Supreme Court has held as under:-

"106. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer For a (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 the criminal court should first refer the matter to a competent doctor or committee or 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 of medical negligence should notice be then issued to the doctor/hospital concerned. 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 case, otherwise the policemen will themselves have to face legal action.

6. He further submits that to allow the proceeding to be continued will amount the abuse of process of law. He submits that inspite of that opinion that there was no negligence on the part of the doctor, on the protest petition as well as looking into deposition of certain enquiry witnesses cognizance has been taken which is bad in law. However, the learned Sessions Judge dismissed the criminal revision that the same is not maintainable. On these grounds, he submits that the entire criminal proceeding may be quashed.

7. On the other hand, Mr. Ashish Jha, learned counsel for the O.P. No. 2 submits that on submission of final form notice has been received by the O.P. No. 2 from the learned court thereafter O.P. No. 2 filed protest petition and examined him on solemn affirmation as well as five enquiry witnesses and thereafter the learned court has taken cognizance.

8. He further submits that the learned court has rightly proceeded in the light of protest petition under section 200 and 202 of Cr.P.C. and he has not proceeded under section 190(1)(b) of Cr.P.C. on the basis of final form. He submits that there is no illegality in the impugned order. He submits that based on the identical the fact the Hon'ble Supreme Court directed to register case under section 304-A of the I.P.C in the case of "***Mahadev Prasad Kaushik V. State of Uttar Pradesh and another***" (2008) 14 SCC 479. On these grounds he submits that cognizance order is a well reasoned order and no interference is required by this Court.

9. On the other hand, Mr. Bishambhar Shastri, learned counsel for the State submits that the learned court has rightly taken cognizance and there is no illegality in the cognizance order.

10. In view of above submission of the learned counsel for the parties, the court has gone through the material on record and certain judgements relied by the learned counsel for the petitioner as well as O.P. No. 2. It is an admitted fact that the petitioner is a qualified doctor and he is running his clinic in the

district of Sahibganj in the name of Surya Nursing Home. On the fateful day the father of the petitioner was admitted in the said hospital and operation of hernia was operated which was successful. The patient was brought to the ward. The relatives of the deceased were waiting for his consciousness of the patient and after that the petitioner has received information that condition of the father of the O.P. No. 2 is deteriorated the petitioner reached to the hospital and he examined the patient and found that the patient has left for his heavenly abode. On the complaint of the O.P. No.2 made before the National Human Rights Commission and National Minority Commission a committee was constituted to look into the allegation of O.P. No.2 and that committee was headed by experts who were doctors namely, Dr. Pradee Basky M.S. (General Surgery) and a qualified surgeon and Dy. Director Malaria-cum-State Malaria Officer, Jharkhand was the Chairman of the committee and considering the enquiry committee report final form has been submitted stating the mistake of facts. However, on the protest petition, learned court has taken cognizance considering the solemn affirmation and deposition of five enquiry witnesses. There is no doubt that once the final form is submitted, the learned Magistrate is having four options:-

- (1) He may agree with the conclusion of the police and accept the final report and drop the proceeding.
- (2) He may take cognizance under Section 190(1)(b) CrPC and issue process straightaway to the accused without being bound by the conclusion of the investigating agency where he is satisfied that upon the facts discovered by the police, there is sufficient ground to proceed.
- (3) He may order for further investigation if he is satisfied that the investigation was made in a perfunctory manner.
- (4) He may without issuing process and dropping the proceedings under Section 190(1)(a) CrPC upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 CrPC and thereafter whether complaint should be dismissed or process should be

issued.

11. In the case in hand the learned Magistrate has chosen option no. 4 and doing so he has proceeded in accordance with law. Further, it transpires that the learned court has not taken care of judgement delivered by the Hon'ble Supreme Court in the case of ***Martin F. D'Souza(supra)*** as well as "***Jacob Mathew Vs. State of Punjab***" reported in ***2005 (6) SCC 1.***

12. In these two cases the concern of the court was that unnecessarily a bonafide action of any doctor may not be subject matter of civil wrong as well as criminal wrong and in that aspect in both the judgements it has been directed that the case will be proceeded against the doctors after taking expert opinion and the case in hand expert report was there which is contained in annexure-9 and thereafter final form was submitted. In that view of the matter the Court finds that proceeding further on the protest petition when the finding of the expert committee is in favour of the petitioner amounts to abuse of process of law.

13. To put criminal law in motion by examining two witnesses is also deprecated by the Hon'ble Supreme Court in the case of '***Pepsi Foods Ltd. V. Special Judicial Magistrate***' (1998) 5 SCC 749.

14. In the case in hand, doctor has discharged his responsibility. The operation was successful. The patient was brought to the ward thereafter the condition of the father of father of the O.P. No.2 was deteriorated. In the case of ***Martin F. D'Souza(supra)*** the Hon'ble Supreme Court has noted the facts that the courts and the Consumer Forum are not experts in medical science, and must not substitute their own views over that of specialists. It is true that the medical profession has to an extent become commercialized and there are many doctors who depart from their Hippocratic oath for their selfish ends of making money. However, the entire medical fraternity cannot be blamed or branded as lacking in integrity or competence just because of some bad apples.

15. It is well known that inspite of best effort made by the doctor sometime they are not successful and this does not mean that doctor must be held

guilty. The Court comes to the conclusion that the case of the petitioner is fully covered with the aforesaid two judgments of the Hon'ble Supreme Court in the case of ***Martin F. D'Souza(supra)*** as well as "***Jacob Mathew Vs. State of Punjab***" reported in 2005 (6) SCC 1.

16. The hospital has also filed the case against the O.P. No. 2 which resulted in final form and accused persons have been sent up for trial.

In the case of ***Mahadev Prasad Kaushik(supra)*** relied by O.P. No.2, the allegation was that Dr. Mahadev was stocking poisonous injection and illegal drugs in his clinic and after injecting the body of deceased turned into blue and in that view of the matter that order was passed by Hon'ble Supreme Court. Thus, this judgment is not helping the O.P. No.2.

17. It is well known that even after the revision petition the case under section 482 Cr.P.C. can be maintainable if the court comes to the conclusion that injustice has been done to the petitioner. However, in the case in hand the Revisional Court dismissed the revision petition on the ground of maintainability.

18. In view of the aforesaid facts, reasons and analysis, the entire criminal proceeding including order taking cognizance dated 16.08.2010 passed by the learned Chief Judicial Magistrate, Sahibganj in connection with P.C.R. Case No. 189 of 2009 and order dated 23.01.2013, passed by the learned Sessions Judge-I, Sahibganj in Criminal Revision No. 83 of 2010 are set aside.

19. This petition stands allowed and disposed of. Pending, I.A., if any, stands, disposed of. Interim order is vacated.

(**Sanjay Kumar Dwivedi, J.**)