Dr. Makardhwaj Prasad @ Dr. M. Prasad vs The State Of Jharkhand on 27 November, 2024

Author: Sanjay Kumar Dwivedi

Bench: Sanjay Kumar Dwivedi

IN THE HIGH COURT OF JHARKHAND, RANCHI

W.P. (Cr) No. 528 of 2023

Dr. Makardhwaj Prasad @ Dr. M. Prasad, aged about 66 years, s/o late Sri Ram Naresh Saw, r/o Lohar Kulhi, PRASAD CLINIC, ISM (Dhanbad), PO Saraidhela, PS: Saraidhela, District Dhanbad, Jharkhand, PIN 826004 .... Petitioner

-- Versus --

1.The State of Jharkhand

2.Vijay Ravidas, aged about 39 years, s/o late Raghu Das, R/o Saraidhela Das Pada, PO: Saraidhela, PS:Saraidhela, District Dhanbad, Jharkhand, Pin 826004. .... Respondents

---

CORAM: HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioner	:-	Mr. Abhishek Krishna Gupta, Advocate
		Mr. Neha Agarwal, Advocate
For the State	:-	Mr. Shubham Gautam, Advocate
For the Respondent No.2	:-	Md. Zaid Ahmed, Advocate

9/27.11.2024 Heard the learned counsel appearing on behalf of the petitioner as well as the learned counsel appearing on behalf of the respondent State and the learned counsel appearing on behalf of the respondent no.2.

2. This petition has been filed for quashing of the entire criminal proceeding arising out of Saraidhela P.S. Case No.184 of 2022 dated 12.10.2022 registered under sections 304A, 406, 420, 34

of the IPC and section 3(1)(r)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, pending in the court of learned Additional Sessions Judge-I cum Special Judge (SC/ST), Dhanbad.

3. The complaint case has been filed alleging therein that on 12.10.2022 that is after around five months an FIR bearing Saraidhela PS Case No.184 of 2022 dated 12.10.2022 got registered against the petitioner herein and four un-named persons under sections 304A, 406, 420, 34 of IPC and sections 3(1)(r)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The key aspect of the written complaint/ report which formed the basis of FIR are as follows:

(i) That the complainant is a poor member of scheduled caste.

That on 24.5.2020 complainant's mother namely, Kusum Devi suddenly fell ill. There upon she was taken to the petitioner's Prasad Clinic. Dr. M. Prasad, after examining complainant's mother Kusum Devi, admitted her to his clinic. After diagnosing her to be suffering from stone in the Gall Bladder, operation was suggested. Dr. M.Prasad, took around Rs.One lakh in the name of operation and medicine from the complainant. Dr. M. Prasad, on 26.5.2020 operated complainant's mother. After operation complainants mother was discharged on 30.05.2020. On 8.6.2020, once against complainant's mother suddenly started feeling unwell. As a result, she was again taken to Prasad Clinic. Thereupon after examination Dr. M. Prasad admitted her in his clinic. The complainant's mother was admitted in the Clinic for four days. During this period complainant's mother position deteriorated and was having burning sensation body started to become black and bubbles like things erupted in her body. Dr. M. Prasad entagled him for four days. During this period complainant spent around Rs.Fifty thousand. On 14.06.2020 Dr. M. Prasad, referred complainant's mother to Medica Hospital, Ranchi for better treatment where upon she was treated and during the course of treatment complainant's mother died on 17.6.2020. The Doctor of Medica Hospital, Ranchi told the complaint as well as written in the death certificate that the cause of death is infection and medicine reaction. On 17.6.2020 the complainant got a written complaint to such effect received at Saraidhela Police Station. However the Saraidhela Police Station neither conducted postmortem nor took any action. As a result of inaction on the part of the police station, on 6.7.2020 a pleader notice was sent to Dr. M. Prasad. The complainant's mother was retired employee of BCCL and was pension holder. After sending pleader notice the complainant came to know that Dr. M. Prasad is not a surgeon. Still he conducted operation and as a result of wrong treatment complainant's mother died. On 14.7.2020 the complainant once again reported against Dr. M. Prasad at Saraidhella Police Station. Thereupon the police gave an assurance of action. On 14.07.2020 at around 7.00 pm, while complainant was at his residence the accused Dr. M. Prasad and four unknown persons came to the complainant house and started calling the complainant. The moment the complainant came out of his house, the accused Dr. M. Prasad abused the complaint in his caste in the presence of the local people and committed atrocity. Dr. M. Prasad not being a surgeon conducted wrong treatment and by deceiving cheated Rs. Two lakhs, the complainant sustained a loss of Rs.Five Lakhs and on being complaint he abused him by caste name and spitted on his mouth and such act is a cognizable offence under IPC and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

4. The learned counsel for the petitioner submits that the said complaint case was sent by the learned court under section 156(3) of the Cr.P.C for registration of the F.I.R and investigation by the order dated 26.05.2022 and thereafter the F.I.R has been registered. He submits that the police has started investigation and the investigating officer has issued notice under section 41A of the Cr.P.C and the petitioner has replied the same. He submits that the petitioner is a qualified doctor and he is having a degree of M.B.B.S and he is a renowned physician. He further submits that the petitioner runs a clinic in the name of Prasad Clinic situated at Lohar Kulhi, Saraidhela, Dhanbad. He also holds the post in the Department of Anatomy in a renowned medical college-cum- hospital namely, Shahid Nirmal Mahto Medical College and Hospital, Dhanbad. He further submits that the mother of the respondent no.2 was admitted on 24.05.2020 in Prasad Clinic and she was operated on 26.05.2020 and finally she was discharged on 30.05.2020 and on the day of discharge she was absolutely well except certain symptom of weakness as is evident from the discharge ticket dated 30.05.2020 as contained in Annexure-6. He submits that such weakness was there in consequence of surgery of an old lady aged about 67 years. He further submits that the said surgery was not made by this petitioner and the surgery was made by a renowned surgeon who was a visiting doctor of the said clinic namely Dr. Rajiv Kumar. She was again admitted in the said clinic on 08.06.2020 and was discharged on 10.06.2020. During her admission she was attended by the petitioner, doctor, surgeon and other doctors of Prasad Clinic and on 10.06.2020 she was alright except weakness. He then submits that mother of the respondent no.2 was further re-examined by another doctor namely, Dr. K.S. Narain and Ultrasonography of whole abdomen was done and operation was found to be correct as contained in Annexure-8. Thereafter, she was again admitted on 12.06.2020 with regard to fever and discharged on 14.06.2020 and she was referred to Medica Hospital at Ranchi and she was treated in Medica Hospital from 14.06.2020 to 17.06.2020 and while undergoing treatment there, she died. He submits that thereafter the petitioner has received a legal notice from one of the son of the deceased demanding a sum of Rs.10 lacs (ten lacs) which was refused by the petitioner and thereafter the present complaint case has been lodged falsely against the petitioner and even SC/ST Act has been inserted maliciously. He submits that thereafter the F.I.R was registered pursuant to the order of the learned court. He further submits that if the medical negligence is proved, then only the case can be registered and there are lines of judgments of Hon'ble Supreme Court as well as the High Court. He relied in the case of "Jacob Mathew v. State of Punjab" (2005) 6 SCC 1.

5. Learned counsel for the respondent State submits that only the F.I.R is registered and the investigation is not complete.

6. Learned counsel for the respondent no.2 has opposed the prayer and submits that medical negligence is there and that is why death occurred and the petitioner is liable and as such the learned court has rightly passed the order under section 156(3) of the Cr.P.C. He submits that this writ petition may kindly be dismissed.

7. In view of the above submission of the learned counsels appearing on behalf of the parties, the Court has gone through the materials on record including the courter affidavit filed by the respondent no.2. In the counter affidavit filed by the respondent no.2, the facts which has been argued by the learned counsel for the petitioner is not denied. Thus, it is admitted position that

mother of the respondent no.2 was treated on different dates, however, she was discharged from the hospital after curing of the ailment. The subsequent complaint was also dealt with by the said Clinic and she was again discharged as has been noted in the argument of the learned counsel appearing on behalf of the petitioner and finally she was being treated in Medica Hospital at Ranchi and in course of treatment there, she has left for her heavenly abode. Thus, it is crystal clear that what medical negligence made by this doctor while treatment upon the mother of the respondent no.2 is not disclosed and if such a situation is there for making out a case of medical negligence, one has to comply the direction of the Hon'ble Supreme Court rendered in the case of "Jacob Mathew v. State of Punjab"

(supra), wherein at paragraph nos.48, 49, 50, 51 and 52, it has been held as under :

"48. 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 the 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 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 case, 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 gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word "gross" has not been used in Section 304-A IPC, 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 "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC 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.

49. 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 case and reaffirm 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 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 case1 (noted vide para 27 of the Report).

Guidelines -- Re: prosecuting medical professionals

50. 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 the 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 a rash or negligent act within the domain of criminal law under Section 304-A IPC. The criminal 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 to his reputation cannot be compensated by any standards.

51. 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 prefer 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.

52. 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 the Bolam 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 investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

8. In view of the above judgment of the Hon'ble Supreme Court in a case of medical negligence competent medical opinion with regard to the negligent act or omission by an independent doctor is necessary as has been held by the Hon'ble Supreme Court in the case of "Jacob Mathew v. State of Punjab"(supra), particularly, at paragraph no.52 of the said judgment. The case of the petitioner further strengthened in light of further examination of Dr. K.S. Narain as operated part was found to be correct which has come in the ultrasonography of the entire abdomen. The judgment rendered in the case of "Jacob Mathew v. State of Punjab"(supra) has been followed in different High Courts including Jharkhand High Court. In the case of Biswajith Bandopadyay and Ors v. The State of

Jharkhand and Ors, MANU/JH/1662/2019, and in the case of Martin F.D'Souza v. Mohd. Ishfaq, (2009) 3 SCC 1 . Paragraph no.106 of the said judgment is quoted below:

> "106. 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 the 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 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."

9. In view of the judgment rendered by the Hon'ble Supreme Court in the case of Martin F.D'Souza v. Mohd. Ishfaq(supra), the doctors are not required to be harassed unless the facts clearly come within the parameters laid down in the case of "Jacob Mathew v. State of Punjab"(supra).

10. Looking to the contents of the complaint petition, the allegations are made that in the house of the respondent no.2 the caste name has been taken and if such a situation is there, then the said occurrence is not taken place in 'public view' and in light of that the case of the petitioner is covered in view of the judgment rendered by the Hon'ble Supreme Court in the case of Hitesh Verma v. State of Uttarakhand, reported in (2020) 10 SCC 710 wherein at paragraph no.14 and 15 of the said judgment, it has been held as under:

> "14. Another key ingredient of the provision is insult or intimidation in "any place within public view". What is to be regarded as "place in public view" had come up for consideration before this Court in the judgment reported as Swaran Singh v. State [Swaran Singh v. State, (2008) 8 SCC 435 : (2008) 3 SCC (Cri) 527] . The Court had drawn distinction between the expression "public place" and "in any place within public view". It was held that if an offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, then the lawn would certainly be a place within the public view. On the contrary, if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then it would not be an offence since it is not in the public view (sic) [Ed. : This sentence appears to be contrary to what is stated below in the extract from Swaran Singh, (2008) 8 SCC 435, at p. 736d-e, and in the application of this principle in para 15, below:"Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view."] . The Court held as under : (SCC pp. 443-44, para 28) "28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by Appellants 2 and 3

> (by calling him a "chamar") when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression "place within public view" with the expression "public place". A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies."

15. As per the FIR, the allegations of abusing the informant were within the four walls of her building. It is not the case of the informant that there was any member of the public (not merely relatives or friends) at the time of the incident in the house. Therefore, the basic ingredient that the words were uttered "in any place within public view" is not made out. In the list of witnesses appended to the charge-sheet, certain witnesses are named but it could not be said that those were the persons present within the four walls of the building. The offence is alleged to have taken place within the four walls of the building. Therefore, in view of the judgment of this Court in Swaran Singh [Swaran Singh v. State, (2008) 8 SCC 435 : (2008) 3 SCC (Cri) 527] , it cannot be said to be a place within public view as none was said to be present within the four walls of the building as per the FIR and/or charge-sheet."

11. In the case of Gorige Pentaiah v. State of Andhra Pradesh reported in (2008) 12 SCC 531 wherein at paragraph no.6 it has been held as under:

> 6. In the instant case, the allegation of Respondent 3 in the entire complaint is that on 27-5-2004, the appellant abused them with the name of their caste. According to the basic ingredients of Section 3(1)(x) of the Act, the complainant ought to have alleged that the appellant-

accused was not a member of the Scheduled Caste or a Scheduled Tribe and he (Respondent 3) was intentionally insulted or intimidated by the accused with intent to humiliate in a place within public view. In the entire complaint, nowhere it is mentioned that the appellant- accused was not a member of the Scheduled Caste or a Scheduled Tribe and he intentionally insulted or intimidated with intent to humiliate Respondent 3 in a place within public view. When the basic ingredients of the offence are missing in the complaint, then permitting such a complaint to continue and to compel the appellant to face the rigmarole of the criminal trial would be totally unjustified leading to abuse of process of law.

12. Thus, it appears that maliciously the present case has been filed and even the SC/ST Act has been added, however, the ingredient of SC/ST Act is not made out.

13. At the initial stage also, the case can be quashed if the parameters as laid down by the Hon'ble Supreme Court in the case of State of Haryana v. Bhajanlal, reported in 1992 (Supp.) 1 SCC 335 is made out. Paragraph no. 102 of the said judgment speaks as under:

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.
>
> (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code. (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> (4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party. (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

14. In view of the above facts and analysis, the case of the petitioner is coming within the parameters of paragraph no.102(5) and 102(7) in the case of State of Haryana v. Bhajanlal(supra).

15. In view of the above, it is crystal clear that maliciously the present case has been lodged against the petitioner and it is an admitted fact that death of the mother of the respondent no.2 has not taken place in the hospital of the petitioner and she was discharged from that hospital and she was subsequently treated in Medica hospital at Ranchi. Even if the case is lodged under the Consumer Protection Act for deficiency of services in light of Martin F.D'Souza v. Mohd. Ishfaq(supra), the doctor is not required to be noticed at the threshold and only after obtaining the opinion of expert, notice may be issued for medical negligence of the doctor.

16. As a cumulative effect of the above discussion, reasons and analysis, it is a malicious prosecution against the petitioner. Accordingly, the entire criminal proceeding arising out of Saraidhela P.S. Case No.184 of 2022 dated 12.10.2022, pending in the court of learned Additional Sessions Judge-I cum Special Judge (SC/ST), Dhanbad, is hereby, quashed.

17. W.P.(Cr) No.528 of 2023 is allowed and disposed of.

(Sanjay Kumar Dwivedi, J.) SI/, A.F.R.