IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKHAT
SRINAGAR

Reserved on: 26.08.2022
Pronounced on:02.09.2022

CRMC No.47/2018

FAROOQ AHMAD BHAT ... PETITIONER(S)

Through: - Mr. Arif Sikander, Advocate.

Vs.

SYED BASHARAT SALEEM & ANR …RESPONDENT(S)

Through: - Mr. Shabir Ahmad Dar, Adv-for R1.
Mr. Asif Maqbool, Dy. AG-for R2.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged order dated 05.02.2018 passed by learned Chief Judicial Magistrate, Pulwama, whereby, in the complaint filed by respondent No.1 against him, a direction has been issued to respondent No.2, SHO, P/S, Pulwama, to register an FIR and investigate the case. Challenge has also been thrown to FIR No.32/2018 for offence under Section 304-A RPC that has been registered with P/S Pulwama pursuant to the aforesaid direction of the learned Chief Judicial Magistrate.

2) It appears that respondent No.1 had filed a complaint before Chief Judicial Magistrate, Pulwama, alleging therein that his maternal aunt, Mst. Rafeeqa, was under the treatment of the petitioner and during her treatment, the petitioner prescribed a drug, namely,

Gravidol-200 mg, that was to be injected to the above-named patient. It was further alleged in the complaint that respondent No.1/complainant purchased the said drug from the market and thereafter handed it over to the petitioner who got it injected to the patient through a medical assistant whereafter the condition of the patient deteriorated. It was further alleged that the petitioner did not bother to examine the patient which compelled respondent No.1 to administer oxygen to the patient himself but the patient could not survive. It was alleged by the complainant that he sought medical advice from other experts in the field and he was told that the injection that was administered to the patient is advisable to be given to the patients with acute hypertension and not to the patients like Mst. Rafeeqa. According to the complainant, the death of the deceased patient was caused due to the administration of aforesaid drug which, according to the complainant, was a wrong treatment prescribed by the petitioner.

3) The learned Chief Judicial Magistrate, Pulwama, in exercise of his powers under Section 156(3) of the Cr. P. C, upon going through the contents of the complaint, forwarded the same to SHO, P/S Pulwama, and directed registration of FIR and investigation of the case. A further direction was issued to SSP, Pulwama, to monitor the investigation. It is this order as well as the FIR registered pursuant to the said order, which is under challenge by way of the instant petition.

4) It is contended in the petition that it was not open to the learned Magistrate to direct registration of the FIR on the basis of the aforesaid

complaint without obtaining an opinion of the Medical Board. It is further contended that the petitioner is a Government employee who is removable from service by the Government, as such, without obtaining a sanction for prosecution in terms of Section 197 of the Cr. P. C, the direction for registration of the FIR against him could not have been made. It has been further contended that while issuing the impugned direction, the learned Magistrate has not followed the guidelines occupying the field.

5) Nobody has appeared on behalf of respondent No.1 whereas respondent No.2 has filed the status report. In its status report, respondent No.2 has narrated the allegations made in the complaint and it has been stated that the impugned FIR discloses commission of cognizable offence against the petitioner, as such, its investigation is required to be taken to its logical conclusion.

6) I have heard learned counsel for the parties and perused the material on record.

7) As is clear from the contents of the complaint, which is subject matter of this case, respondent No.1/complainant has alleged criminal negligence on the part of a medical professional while treating the deceased patient.

8) In the cases relating to prosecution of medical professionals for criminal negligence on their part, the Supreme Court has, in the case of

Jacob Mathew vs. State of Punjab, (2005) 6 SCC 1, issued certain guidelines which are reproduced as under:

> ***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.*
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> ***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.*
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> ***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.*

9) The aforesaid guidelines were noticed with approval by the Supreme Court in its later judgment in the case of **Martin F. D'Souza v. Mohd. Ishfaq,** (2009) 3 SCC 1, and while reiterating these guidelines, the Court has observed that certain factors are required to be kept in mind. Para 29 of the judgment is relevant to the context and the same is reproduced as under:

> ***29.*** *Before dealing with these principles two things have to be kept in mind : (1) Judges are not experts in medical science, rather they are laymen. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges have usually to rely on testimonies of other doctors which may not necessarily in all cases be objective, since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand, particularly in complicated medical matters, for a layman in medical matters like a Judge; and (2) a balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalised, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practise his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation.*

10) In the same judgment, the Supreme Court has directed that whenever a complaint is received against a doctor or a hospital by a Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made, the Criminal Court should first refer the matter to a competent doctor or committee of 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 case of medical negligence should notice be then issued to the concerned doctor/hospital. The Court went on to emphasize that this is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. A warning has been issued by the Court to 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.

11) From the aforesaid analysis of law on the subject of prosecuting medical professionals for offence of criminal negligence, it is clear that before initiating such prosecution, a Criminal Court has to obtain opinion of the medical expert and if from such opinion, a prima facie case of criminal negligence is made out against a medical professional, only then the machinery of criminal law should be set into motion. This is necessary to avoid any indiscriminate and frivolous proceedings against the doctors.

12) The Courts are not experts in the medical science and, as such, they cannot substitute their own views over that of the specialists.

Medical science is an inexact science and outcome of treatment of a patient cannot be predicted with certainty. Sometime even after best efforts of the doctor, his treatment of a patient may ultimately result in failure but simply because his treatment has not yielded desired result, he cannot be held liable for criminal negligence. All these factors have to be taken into account while dealing with a case of medical negligence. Therefore, without opinion of a medical expert, the Criminal Courts have to desist from setting the criminal law into motion against a medical professional.

13) The Supreme Court has, in the case of ***Anil Kumar v. M.K. Aiyappa*, (2013) 10 SCC 705,** held that application of mind by the Magistrate should be reflected in the order and the mere statement that he has gone through the complaint, documents and heard the complainant will not be sufficient. The Court further observed that after going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr. P. C, should be reflected in the order, though a detailed expression of his views is neither required nor warranted.

14) In the instant case, the learned Magistrate in the impugned order dated 05.02.2018 has, after narrating the contents of the complaint, observed as under:

> *"Heard the ld. Counsel for the complainant, perused the complaint which is supported by an affidavit duly attested by Judicial Magistrate, 1st Class, Pulwama and also the Out Patient Card. Keeping the above facts and submissions in view, the instant complaint*

is forwarded to SHO Police Station Pulwama under section 156 clause (3) of the CrPC for investigation and registration of the FIR. SSP Pulwama is directed to monitor the investigation of the case so that no injustice is done to any party in the mater."

15) As is clear from the aforequoted extracts of the impugned order of the learned Magistrate, it has been observed that in view of the facts and submissions, the complaint is forwarded to SHO, P/S, Pulwama, for investigation and registration of the FIR. The learned Magistrate has nowhere, in his order, stated as to what has weighed in his mind for persuading him to come to a tentative opinion that cognizable offences are disclosed from the contents of the complaint. The impugned order passed by the learned Magistrate exhibits total non-application of mind as also his failure to discharge the duty cast upon him while exercising power under Section 156(3) of Cr. P. C. The learned Magistrate could not have formed an opinion that the offence of criminal negligence is made out against the petitioner without there being any medical opinion on record. The impugned order on this ground alone is not sustainable in law.

16) Apart from the above, if we have a look at the contents of the complaint, respondent No.1/complainant has nowhere stated that he had either approached the SHO concerned or the SSP concerned prior to filing the complaint before the learned Chief Judicial Magistrate. The Supreme Court has, in the case of **Priyanka Srivastava and another vs. State of Uttar Pradesh and others, (2015) 6 SCC 287,** laid down that without exhausting the remedies under Section 154(1) and 154(3) of

the Cr. P. C, a Magistrate should not exercise his jurisdiction under Section 156(3) and direct registration of an FIR. It has been further laid down by the Supreme Court that both these aspects should be clearly reflected in the application and necessary documents to that effect should be filed. In the instant case, nothing of this sort has even been indicated in the complaint nor any documents suggesting adherence to the guidelines laid down by the Supreme Court in the aforesaid case have been annexed by respondent No.1/complainant with the complaint. The impugned order passed by the learned Magistrate is, therefore, in breach of the guidelines laid down by the Supreme Court in **Priyanka Srivastava's** case.

17) It is also to be noted that the Supreme Court has, in the case of **Lalita Kumari vs. State of UP**, (2014) 2 SCC 1, while holding that Section 154 of the Cr. P. C postulates the mandatory registration of FIRs on receipt of information relating to all cognizable offences, observed that there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. The Supreme Court further went on to observe that one such instance is in the case of allegations relating to medical negligence on the part of doctors as it will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

18) From the above it is clear that in the cases of medical negligence, a Magistrate before directing registration of an FIR has to make a

direction with regard to preliminary enquiry and if police receives an information relating to a case of medical negligence, it is also duty bound to undertake preliminary enquiry before registering an FIR. I am supported in my aforesaid view by the judgment of the High Court of Chhattisgarh in the case of **Dr. Smt. Krishna Dixit vs. State of Chhattisgarh and others**, 2019 SCC Online Chh 47. In the present case, the learned Magistrate has, without directing preliminary enquiry into the allegations made in the complaint, asked the police to register the FIR and investigate the case, which is contrary to the guidelines laid down by the Supreme Court in **Lalita Kumari's** case (supra). On this ground also, the impugned order passed by the learned Magistrate and the impugned FIR registered pursuant thereto are liable to be quashed.

19) For the foregoing reasons, this is a fit case where this Court should exercise its jurisdiction under Section 482 of the Cr. P. C to quash the impugned order and the consequent FIR registered by Police Station, Pulwama. The petition is, accordingly, allowed and the impugned order as also the impugned FIR are quashed.

(SANJAY DHAR)
JUDGE

Srinagar,
02.09.2022
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***