

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 23RD DAY OF SEPTEMBER, 2022

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

WRIT PETITION NO.60243 OF 2016(GM-RES)

BETWEEN:

DR. NAGESH,
.....

...PETITIONER

(BY SRI.UDAYA HOLLA, SENIOR COUNSEL A/W
SRI. KUMARA, ADVOCATE)

AND:

1. KARNATAKA MEDICAL COUNCIL,
#16/6, 2ND FLOOR,
MILLER TANK BED AREA,
VASANTHANAGAR,
BANGALORE - 560 052.
REP BY ITS REGISTRAR.
2. NOVA MEDICALCENTRE PVT LTD.,
1ST FLOOR, LEELA GALLERIA,
THE LEELA PALACE, 23, AIRPORT ROAD,
BANGALORE - 560 008.
REP BY THE MANAGER
MR. TEJASWI.
3. DR.RAVINDRA ALUR,

4. SMT. SOUMAY P,

..RESPONDENTS

(BY SRI. SHIVAYOGESH SHIVA YOGIMATH, ADVOCATE FOR
SMT. RATNA N SHIVAYOGIMATH, ADVOCATE FOR R1;
SMT. CHETANA, ADVOCATE FOR R2;
SRI. N C MOHAN, ADVOCATE FOR R4;
R3 IS SERVED AND UNREPRESENTED)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE THAT THE R-1 HAS NO POWER, COMPETENCE OR JURISDICTION TO ENTERTAIN THE COMPLAINT DATED 20.12.2011 LODGED BY THE R-2 WITH THE R-1 HEREIN COPY OF WHICH IS PRODUCED AS ANNEXURE-J AND ETC.,

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

Petitioner a medical practitioner has presented this petition under Articles 226 & 227, grieving against the complaint dated 20.12.2011 made by the 2nd Respondent – Hospital, cognizance whereof having been taken, the 1st Respondent has issued Notice dated 23.12.2011 (Annexure K) initiating the proceedings for the alleged misconduct.

2. After service of notice, the 1st respondent- Karnataka Medical Council has entered appearance through its Panel Counsel and filed its Statement of Objections on 04.04.2012. The 2nd Respondent – complainant having been represented by its private counsel, has also filed its Statement of Objections on 01.03.2017. The 3rd Respondent – doctor, despite service of notice, has chosen to remain unrepresented. The 4th Respondent whose husband was the patient is represented by her counsel as well. All the advocates appearing for the respondents resist the petition making submission in justification of the impugned proceedings.

3. BRIEF FACTS OF THE CASE:

(i) The petitioner was a Visiting Doctor and the 3rd Respondent was the Visiting Consultant Surgeon during the relevant period i.e., 2011 in the 2nd Respondent – Hospital; a patient namely, Mr. Jayaprakash, i.e., the husband of 4th Respondent herein underwent a serious surgical treatment in the 3rd week of September, 2011. Some medical complications having arisen, the patient was shifted to Apollo Hospital on 29.03.2011, wherein better medical facilities were available.

(ii) Some ruckus allegedly having been generated by the 4th Respondent & her father Puttegowda accompanied by *hooligans*, petitioner lodged an FIR on 02.10.2011 with the Kengeri Police, Bengaluru. The 4th Respondent too filed a police complaint against the petitioner for offences punishable u/s 506 (criminal intimidation) & u/s 338 (causing grievous hurt). This complaint having been investigated, Police have filed a 'B' Report dated 11.10.2011 (Annexure-C) What happened to petitioner's complaint remains inscrutable.

(iii) On 19.10.2011, the 4th Respondent accompanied by media people visited the premises of 2nd Respondent - Hospital and coerced for payment of Rs.40 Lakh towards reimbursement of Apollo Hospital Medical bills. The 4th Respondent claiming to have paid the same, issued a Legal Notice dated 21.12.2011 (Annexure-G) asking the Petitioner and 3rd Respondent to reimburse the same. In addition, it had also sought for a compensation of Rs.10 Lakh. Petitioner sent his reply dated 02.01.2012 (Annexure-H) denying the Notice claim.

(iv) The 2nd Respondent – Hospital also filed a complaint before the 1st Respondent – KMC on 22.12.2011 alleging professional misconduct against the petitioner. The same having been registered, the petitioner has been issued the subject Notice which he is calling in question in this petition *inter alia* on the grounds of lack of jurisdiction, absence of jurisdictional facts *malafide*.

4. Having heard the learned counsel for the parties and having perused the petition papers, this Court is inclined to grant indulgence in the matter for the following reasons:

(a) What the Apex Court in *JACOB MATHEW v. STATE OF PUNJAB* (2005) 6 SCC 1 observed at paragraph 48 of the decision reads as under:

"...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...."

(b) The above observations of the Apex Court should be the prelude to approach of the court to make the decision in the petition at hands. The complaint in question has been lodged before the Karnataka Medical Council by the 2nd Respondent – Hospital in which the services of the petitioner and the 3rd Respondent were engaged. Thus, obviously the complaint is not from the side of aggrieved patient nor on his behalf. There is no explanation whatsoever for the patient's side for not making the complaint, even

though they could have lodged an FIR with the Police. At least some explanation ought to have been offered by the 2nd Respondent-Hospital in its complaint itself. It is not that such a complaint is not maintainable in law, the definition of misconduct having been widened by the successive amendment to the Rules. Thus, the issue is not as to the maintainability of the complaint but its *prima facie* consideration-worthiness, in the light of other attending circumstances that are discussed *infra*.

(c) The 4th Respondent being the wife of patient who admittedly was treated by the petitioner and the 3rd Respondent, has not filed any Statement of Objections supporting the case of 2nd Respondent-Hospital, nor even a Memo is filed adopting the said Objections to the Writ Petition. Although some xerox copies of photographs of the patient assumedly snapped whilst he was on the operation theatre are produced in the midst of the hearing this day, from these photographs, nothing can be ascertained as to alleged misconduct of the petitioner. A cursory glance at these photographs irks an unassumed onlooker,

that is beside the point, more particularly when the surgery was admittedly conducted by the 3rd Respondent-Senior Surgeon, the petitioner being only a Visiting Doctor in the 2nd Respondent – Hospital had only assisted. These facts raise a thick ring of doubt in the allegations. Petitioner had lodged a Police complaint against the 4th Respondent, her father & others for manhandling him and for robbing Rs.80,000/-. A counter FIR was lodged by the 4th Respondent subsequently at Sadashivanagar Police Station who after investigation, have filed a 'B' Report dated 11.10.2011. It is not the case of any of the Respondents that any protest petition to the said report has been filed in the light of decision of the Apex Court in *RUPEN DEOL BAJAJ vs. K.P. SINGH GILL*, AIR 1996 SC 309. Not even a whisper is made by the 4th Respondent as to why no such course of action has been taken.

(d) It is significant to note that the filing of 'B' report was preceded by a considered expert opinion obtained from Victoria Hospital, Bengaluru, specifically formulating certain questions and soliciting relevant

information as to the professional deficiency in medical service. This is perfectly in accord with the decision of Apex Court in JACOB MATHEW, *supra*, wherein it is observed as under:

"...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 Professor cum Head of the Department, Surgical Gastroenterology, who having examined the Medical Records at the hands of 2nd Respondent – Hospital, gave an elaborate Report dated 29.11.2012 which reads as under:

"(1) Dr. Nagesh along with Dr. Ravindra Alur is found to be competent enough with enough qualification to perform the laparoscopic cholecystectomy. (2) Perforation of the duodenum, the transverse colon, small intestine, diaphragm, etc due to a thermal injury is a known/recognized complication of any laparoscopic surgical procedure. (3) The operating surgeon has thought of such complications when the patient's conditions started deteriorating and he has also made an attempt to look for collections following perforation by submitting the patient for ultrasound examination of the abdomen.(4) The Nova Medical Centre of Sadashivnagar

has got a tie up with MS. Ramaiah Memorial Speciality Hospital and Dr. Nagesh with his team wanted to shift the patient to this higher centre for further management. (5) As per the letter of the Nova Medical Centre it looks reasonably well equipped to carry out laparoscopic day care procedures such as laparoscopic cholecystectomy, etc. (6) it has been observed that the Histo-Pathology Report shows the date as 19/09/2011. But name, age, lab.no. etc coincides. This may be a typographical error I suppose. In view of the above facts, I am of the opinion that there is no medical negligence on part of Dr. Nagesh and his team."

It is not the case of respondents that the said expert opinion was truncated, ill-informed or otherwise unworthy of credence.

(e) The 2nd Respondent – Hospital in which the husband of 4th Respondent had undergone surgical treatment had sent a Legal Notice dated 21.12.2011 to the Petitioner & the 3rd Respondent – Surgeon wherein paragraphs 10 to 13 read as under:

"(10) It is submitted that since the expenditure towards the patient's treatment was increasing day by day and the patient's wife, father and other family members requested out client to settle the bills of M/s. Apollo Hospital on behalf of the first and second of you, they had to agree and pay an amount of Rs.40.00 lakhs to M/s. Apollo Hospital, Bangalore towards the treatment of the patient. (11) For the aforesaid acts and omissions of both first and second of you as

stated above, you are jointly liable to pay a sum of Rs.40.00 lakhs (Rupees Forty Lakhs Only) towards refund of amount paid by our client to M/s. Apollo Hospitals for the treatment that the patient is being undergoing and Rs.10 lakhs compensation in the form of damages for mental agony that our client had undergone in this regard which is still continuing. (12) Both first and second of you are therefore, hereby called upon to meet the authorities immediately on receipt of this notice and settle the matter and to refund the amount paid to M/s. Apollo Hospitals as stated above immediately on receipt of this legal notice failing which our client would be constrained to initiate appropriate civil, consumer and criminal or any other proceedings available to our client against both of you under the law..."

The contents of this Notice when construed in the light of other attending material, generates a reasonable impression that the 2nd Respondent – Hospital desired to recover from the Petitioner & 3rd Respondent-Surgeon, a sum of Rs.40 Lakh, contending that on the request of the patient's wife, her father & other family members, this amount was paid towards Apollo Hospital bills of the patient. Petitioner sent his reply dated 02.01.2012 denying the Notice claim and alleging a fowl arrangement between the 2nd Respondent – Hospital and the 4th Respondent. It is in the light of this, the

complaint in question was put at the hands of KMC, by the 2nd Respondent – Hospital.

(f) The complaint lodged by the 2nd Respondent-Hospital with the 1st Respondent – KMC at paragraph 9 reads as under:

"Complications are known to occur in surgery. But it is the responsibility of the surgeon to communicate with the patient and family, reassure them and take due responsibility to take further steps in the treatment to cure the patient. This irresponsible behavior of Dr. Nagesh and Dr. Ravindra Alur of disappearing from the scene, not communicating and not being with family during the critical period, not taking responsibility for the case of the patient who has suffered the complications during surgery performed by them, not meeting and discussing with the staff of the Nova medical Centers, not responding to our repeated requests at his home and repeated telephone calls amounts to gross negligence and blatant professional misconduct and unethical practice on the part of Dr. Nagesh and Dr Ravindra Alur."

The 2nd Respondent in so many words, states *"complications are known to occur in surgery."* This is what the expert opinion of HOD of Gastroenterology, Victoria Hospital had also said vouching the professional qualification & efficiency of the petitioner and that there was no culpable negligence on his part. The provisions of

law i.e., Chapter VII of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 read with Section 15 of the Karnataka Medical Registration Act, 1961, cannot be used either by the complainant or by the disciplinary authority i.e., KMC as the machinery for recovery of the money, in the guise of disciplinary proceedings. A law cannot be used for a purpose for which it is not made vide *HEYDON'S RULE* (1584) 76 ER 637. The definition of 'misconduct' has been broadened by amendment to law, as passionately contended by learned counsel appearing for the 4th Respondent, though true, cannot come to the rescue of impugned proceedings.

(g) All the above aspects have not been examined by the 1st Respondent – KMC before registering the complaint in question and issuing notice to the petitioner. As already observed by the Apex Court, in matters of professional misconduct of a doctor, the disciplinary authority like the KMC has to act with due seriousness and read between the lines before registering the complaint, and without ascertaining the *prima facie* case worthy of investigation. It cannot act as a *post office*

which transmits the mail to the addressee,. Setting in motion the disciplinary proceedings against the professionals and more particularly, the doctors, is a more serious matter than setting the criminal law in motion. Onset of such proceedings has deleterious effect on public interest since that would drive the delinquent doctor to '*defensive medicine*' to the prejudice of the patient. Therefore, such proceedings cannot be initiated just for an askance. A preliminary enquiry is eminently warranted in cases like this.

(h) The above view is supported by the decision of Apex Court in BOMBAY HOSPITAL & MEDICAL RESEARCH CENTRE vs. ASHA JAISWAL in Civil Appeal No.1658/2010 disposed off on 30.11.2021 wherein paragraph 31 reads as under:

"In another judgment reported as Arun Kumar Manglik v. Chirayu Health and Medicare Private Limited and Anr, is Court held that the standard of care as enunciated in Bolam case must evolve in consonance with its subsequent interpretation by English and Indian Courts. The threshold to prove unreasonableness is set with due regard to the risks associated with medical treatment and the conditions under which medical professionals' function. The Court held as under: 'In the practice of medicine, there could be varying approaches to treatment.

There can be a genuine difference of opinion. However, while adopting a course of treatment, the medical professional must ensure that it is not unreasonable. The threshold to prove unreasonableness is set with due regard to the risks associated with medical treatment and the conditions under which medical professionals function. This is to avoid a situation where doctors resort to "defensive medicine" to avoid claims of negligence, often to the detriment of the patient. Hence, in a specific case where unreasonableness in professional conduct has been proven with regard to the circumstances of that case, a professional cannot escape liability for medical evidence merely by relying on a body of professional opinion."

(i) What this Court in W.P.No.21688/2009 between DR GANESH NAYAK vs. V.SHAMANNA & OTHERS disposed off on 14.01.2022 had observed comes to the aid of petitioner:

"...medical and paramedical professionals are inevitable for a healthy society; Vedic literature lauds medical practitioners and medicine as 'vaidyo naaraayano harihi', nearly meaning that a true doctor as a healer is God and that a true medicine is like the sacred water from the river Ganga; during COVID pandemic, how the doctors and paramedics served our society does not fade away from the public memory; society has to gratefully appreciate the valuable services rendered by the medicos; however, at times, being the victims, the medicos are made to apologize to the attackers and this led to the State enacting the Prevention of Violence Against Doctors, Medical Professionals and Medical Institutions Act, 2018; having said all this, this court hastens to add that the doctors' is a

profession wherein service ought to be the motto and not the profit; as any professionals, they too are not immune from legal action for medical negligence, as observed by the Apex Court in INDIAN MEDICAL ASSOCIATION VS. V.P.SHANTHA (2005) 6 SCC 1".

(j) All the above having been said, there is yet another aspect: the incident in question happened more than a decade ago. It is not the case of Medical Council that post incident any objections have been received about the professional conduct of the petitioner. The enquiry has been interdicted by a Coordinate Bench of this Court by the interim order, all through. Years have rolled and much water has flowed under the bridges; cause of justice would be served more by the quashment of impugned proceedings than by their continuance in the given circumstances.

In the above circumstances, this petition succeeds; a Writ of Certiorari issues quashing the impugned complaint and the Notice, costs having been made easy.

Liberty is reserved to the 2nd Respondent – Hospital and the 4th Respondent i.e., wife of the patient to pursue civil remedies in accordance with law, if they so choose.

Nothing observed hereinabove would come in their way and that all contentions in that regard are also kept open.

**Sd/-
JUDGE**

Snb/bsv