REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2049 OF 2008
(Arising out of SLP (Crl.) No.1688 of 2007)

B. Jagdish & Anr. **…Appellants**

Versus

State of A.P. & Anr. **…Respondents**

J U D G M E N T

S.B. Sinha, J.

1. Leave granted.

2. The second respondent took his seven years' old ailing daughter to the appellant who is said to be a child specialist for treatment. He was running a hospital known as 'Disney's Medi-Kid Children's Hospital'. He advertised himself as a specialist in child diseases. The child was a student of third standard. On 22.6.2000, she vomited while in school. She was

brought home immediately and thereafter taken to the appellant's hospital at about 3.p.m.

3. She was admitted in the hospital for undergoing some tests. Respondent No.2 was asked to deposit a sum of Rs.4,000/- therefor. The said amount was deposited. A blood test was conducted which disclosed abnormal increase in white blood cells.

4. A second blood test was also carried on which also showed abnormality in white blood cells. The child was discharged on 25.6.2000. She was advised to take the medicine prescribed. Appellant diagnosed the disease which she was suffering from as Tuberculosis. Vomiting by the girl, however, did not stop. It became more frequent. On 25.6.2000 she developed high fever. Appellant was consulted again. He assured the respondents that there was nothing to worry about the child and her condition was satisfactory. Respondent No.2 was advised to bring her back on 30.6.2000. Treatment on the same line was directed to be continued.

5. The child, in the meantime, had become weak. There had been considerable increase in the number of times of vomiting. She was taken to the hospital on 30.6.2000. Considering her condition, she was again admitted but was discharged in the night with the advice to continue the

medicine advised for Tuberculosis with anemia. The treatment continued but instead of showing improvement, the child became almost crippled and was not even able to move. She had been taken to the hospital on a large number of occasions but respondent No.2 was on each occasion assured that there was nothing to worry about. Even his request to refer the child to another specialist for having a second opinion was not acceded to, contending that it was an acute case of Tuberculosis coupled with anemia and the patient would have slow recovery.

6. On 1.10.2000 early in the morning, the child developed high fever. She had rashes all over her body. Her face became swollen. She had been vomiting also. The child was taken to the hospital immediately.

7. Appellant, seeing her condition, became panicky. One Dr. Ramanna was called. He immediately suggested a 'Biopsy of Bone Marrow' at a hospital. The child underwent the said test. The report was delivered on 4.10.2000. Dr. Ramanna informed the second respondent that the girl had been suffering from Leukemia which is in advanced stage and her liver was enlarged. He advised the girl to be admitted either in NIMS or Apollo Hospital pursuant whereto she was taken to Apollo Hospital. One Dr. Srinivasa Chakravarthy of Apollo Hospital informed the second respondent

that the girl was at advanced stage of Leukemia and chance of her survival was bleak. She breathed her last on 10.11.2000.

8. Thereafter respondent No.2 filed a complaint petition before the A.P. State Consumer Disputes Redressal Commission on or about 4.12.2000.

9. He also filed a private complaint in terms of Section 200 of the Code of Criminal Procedure, 1973. The same was referred to P.S. Panjagutta under Section 156(3) of the Code of Criminal Procedure. A final report was filed on 30.09.2001 stating that the case was a 'Mistake of Fact'. A protest petition was filed thereagainst. A re-investigation was directed as earlier the investigation had been transferred to Police Station, Saifabad whereas the final report was filed by Panjagutta Police Station.

10. Another final report was filed on 13.3.2004. Another protest petition was filed on the basis whereof cognizance was taken and processes were issued against the appellant by the learned Magistrate by an order dated 16.7.2004.

11. Indisputably, the Consumer Disputes Redressal Commission at Hyderabad found the appellant to be negligent in his performance of professional services to the deceased child and awarded damages of Rs.4,00,000/- by an order dated 13.6.2006.

12. Appellant filed an application for quashing of the order issuing summons to him in the criminal matter before the High Court which by reason of the impugned judgment has been dismissed.

13. Mr. Mohan Rao, learned counsel appearing on behalf of the appellant, would submit that the learned Magistrate as also the High Court have committed a serious error in passing the impugned judgments insofar as they failed to take into consideration the observations made by this Court in Jacob Mathew v. State of Punjab & Anr. [(2005) 6 SCC 1].

14. Medical negligence being not an ordinary type of negligence, it was urged, the courts below should have evaluated the evidence by shifting through the materials brought on record by the parties for the purpose of ascertaining as to whether there is prima facie material available for pointing out reckless negligence on the part of the doctor causing death of the patient, as in this case there were conflicting opinions of the experts; one opining that there was no negligence on the part of the appellant and the other opining that there was gross and reckless negligence on his part and, thus, the court should have held that the appellant cannot be said to be guilty of gross and reckless negligence so as to attract the provisions of Section 304A of the Indian Penal Code.

15. The learned counsel would contend that the doctors examined by the complainant being not experts on the subject, the same should not have been taken into consideration by the learned Magistrate at the time of taking cognizance of the offence.

16. Mr. A.D.N. Rao, learned counsel appearing on behalf of the respondent, on the other hand, would contend

(1) The power of the High Court under Section 482 of the Code of Criminal Procedure being limited and charges having been directed to be framed, this Court should not exercise its extra-ordinary jurisdiction under Article 136 of the Constitution of India.

(2) The revisional court as also the High Court has rightly refused to exercise their jurisdiction as it has come in evidence that the doctors examined on behalf of the appellant admitted that they had based their opinion on different materials and, thus, no reliance can be placed thereupon.

(3) Appellant having not made out a case of misuse of the process of law, the High Court was right in its view particularly when the

appellant wrongly advertised himself as a child specialist although he did not hold the requisite qualifications therefor.

17. The question as to the extent of negligence on the part of the members of the medical profession would attract criminal liability came up before this Court on more than one occasion. In Suresh Gupta (Dr.) v. Govt. of NCT of Delhi [(2004) 6 SCC 422], a case involving negligence in performance of rhinoplasty; the cause of death whereof was said to be non-introduction of cuffed endotracheal tube of proper size as to prevent aspiration of blood from wound in respiratory passage, was held to be an act of negligence. It was opined :

> "**22.** This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not unreasonably extend to criminal liability and expose them to the risk of landing themselves in prison for alleged criminal negligence.
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> **23.** For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own

> safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and the patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence."

18. A distinction was drawn therein between a civil liability and a criminal liability.

19. This Court while acknowledging the limited jurisdiction the High Court exercises under Section 482 of the Code of Criminal Procedure, proceeded to consider the question of criminal liability on the basis of the medical documents produced by the prosecution itself. The fact admitted, according to this Court, did not attract the provisions of Section 80 and 88 of the Indian Penal Code.

20. Correctness of the said decision was questioned in Jacob Mathew (supra) by a Division Bench of this Court. The matter was referred to a larger Bench. A Three Judge Bench, inter alia, opined that the averments made in the complaint therein even if held to be proved did not make out a case of criminal offence on the part of the accused-appellant, stating :

> "It is not a case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat."

21. In that case, an Oxygen cylinder was not available and on that premise, it was held that the hospital having failed to keep available a gas cylinder and/or the gas cylinder having been found empty, the hospital may be liable to civil law but the doctor cannot be proceeded against under Section 304A of the Indian Penal Code. In Jacob Mathew's judgment also the expression 'gas cylinder' appears twice in Para 53. But it is obvious from the facts of the case that it was 'oxygen cylinder' (and not gas cylinder) that was not available.

22. In arriving at the said finding, reliance was placed on Bolam v. Friern Hospital Management Committee [1957 (2) All.ER 118], wherein the plaintiff, a voluntary patient in the defendant's mental hospital sustained fractures in course of electroconvulsive therapy. There were differences of opinion in the profession about the mode of treatment; one favouring the use of relaxant drugs or manual control as a general practice and the other opining that as the use of those drugs was attended by mortality risks, use thereof should have been confined to cases where there were particular reasons for their use.

23. We are in this case not faced with such a situation, at least at this stage.

24. A person should not profess himself to be a child specialist unless he has the requisite expertise. In Bolam (supra) the Court was concerned with a situation involving use of some special skills or competence. The test which was applied is the standard of special skill.

25. Unless a person has a special skill to treat a child, ordinarily he could not have treated her, not because he was wholly incompetent therefor but because it required a specialized skill keeping in view the nature of the disease the child was suffering from.

26. It may not be a valid argument at least at this stage that the child would have otherwise died having been suffering from Leukemia. The question which has been raised is that if on the face of the first blood report medical opinion other than the diagnosis of cancer was possible, whether it will fall within the ambit of medical negligence, is a matter which in our opinion requires deeper consideration.

27. For the said purpose, the opinion of the experts will have to be thoroughly examined. Their opinion must be tested. We are given to

understand that there are two views; which view ultimately would prevail is a matter of evidence.

28. The civil liability of the appellant having been determined, we are of the opinion that at this stage it may not be relevant to consider the charges of criminal negligence on the part of the appellant herein on the touchstone of standard of proof required for proving a case of criminal negligence as the same would fall for consideration at the hands of the Trial court at an appropriate stage.

29. The question is as to whether the High Court should have interfered with the order summoning the appellant at this stage? It is now a well settled principle of law that at the stage of quashing of an order taking cognizance, an accused cannot be permitted to use the material which would be available to him only as his defence. In his defence, the court would be left to consider and weigh materials brought on record by the parties for the purpose of marshalling and appreciating the evidence. The jurisdiction of the Courts, at this stage, is limited as whether a case of reckless/gross negligence has been made out or not will depend upon the facts of each case.

30. Mr. Rao has brought to our notice the evidence of one of the doctors, who had deposed in favour of the appellant to show that he was not supplied with all the documents. This contention of Mr. Rao has been seriously disputed by Mr. Mohan Rao contending that all the medical opinions were obtained by the investigating agency. This may be so or may not be, but it is accepted at the Bar that the doctors who had rendered their opinion in favour of the complainant stated that no member of the medical profession could treat the child for 'Tuberculosis' and it was a clear case where the diagnoses at the outset should have been one of 'Leukemia'.

31. We need not take this discussion any further as it may prejudice the case of either of the parties at the trial.

32. We may, however, refer to a decision of this Court in State of Orissa v. Debendra Nath Padhi [(2005) 1 SCC 568] wherein this Court upon considering a large number of decisions opined :

> "It is evident from the above that this Court was considering the rare and exceptional cases where the High Court may consider unimpeachable evidence while exercising jurisdiction for quashing under Section 482 of the Code. In the present case, however, the question involved is not about the exercise of jurisdiction under Section 482 of the Code where along with the petition the accused may file unimpeachable evidence of sterling quality and on that basis seek quashing,

> but is about the right claimed by the accused to produce material at the stage of framing of charge."

It was furthermore held :

> "23. As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. ***Satish Mehra case*** (2000) 6 SCC 338 holding that the trial court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided.

33. Keeping in view the facts and circumstances of this case, we are of the opinion that it cannot be said that the materials brought on record by the complainant, even if given face value and taken to be correct in their entirety do not disclose an offence. We say so because there are two sets of opinions; one in favour of the complainant and another in favour of the appellants. Which opinion would ultimately prevail is essentially a question to be determined by the learned Trial Judge upon considering the evidence adduced by the parties hereto in their entirety.

34. For the reasons aforementioned, we do not find any merit in this case. It is dismissed accordingly with costs. Counsel's fee assessed at Rs.25,000/-.

…….J.
[S.B. Sinha]

..……..…J.
[Cyriac Joseph]

New Delhi;
December 16, 2008