SUPREME COURT OF INDIA

A. Srimannarayana

Vs.

Dasari Santakumari

C.A.No.368 of 2013

(Surinder Singh Nijjar and Anil R.Dave JJ.)

09.01.2013

ORDER

1. Delay condoned.

2. Leave granted.

3. These appeals arising out of the aforesaid special leave petitions have been filed against the judgment and order dated 15.07.2010 in R.P. No. 2032 of 2010 passed by the National Consumer Disputes Redressal Commission (hereinafter referred to as "the National Commission"), New Delhi.

4. Relevant facts are taken from Special Leave Petition (C) No.26043 of 2010.

5. The appellant and respondent No.2, who are doctors, conducted an operation on the left leg of the husband of the complainant. Sometime after the operation, the patient died on 13.07.2008. Respondent No. 1, wife of the deceased, filed a complaint against the appellant and respondent No.2, before the District Consumer Forum. We may notice here that respondent No.2 is the appellant in Civil Appeal No……of 2013 arising out of SLP(C) No.1495 of 2011. The complaint was duly registered and notice was issued to the appellant and respondent No.2. Against the issuance of the notice, the appellant filed a revision petition before the State Consumer Disputes Redressal Commission, Hyderabad on the ground that the complaint could not have been registered by the District Forum without seeking an opinion of an expert in terms of the decision of the Supreme Court reported in Martin F. D'Souza Vs. Mohd. Ishfaq (2009) 3 SCC 1. In this revision petition, respondent No.2 filed IA No.2240 of 2009 praying for stay of

proceedings before the District Consumer Forum. The State Commission rejected the revision petition by granting liberty to the appellant to file the necessary application before the District Forum to refer the matter to an expert. He did not file any application before the District Forum, but challenged the aforesaid order of the State Commission by filing revision petition No. 2032 of 2010 before the National Commission. The revision petition has been dismissed by the National Commission by relying upon the subsequent judgment of this Court in V. Kishan Rao Vs. Nikhil Super Speciality Hospital Anr. (2010) 5 SCC 513, wherein this Court has declared that the judgment rendered in Martin F. D'Souza (supra) is per incuriam. Hence the present special leave petitions challenging the aforesaid order of the National Commission dated 15.07.2010.

6. Heard Mr. Rao, learned counsel appearing on behalf of the appellant and respondent No.2 and Mr. K.K. Kishore, learned counsel appearing on behalf of the respondent No.1, at length.

7. Mr. Rao has tried to persuade us that the judgment of this Court in the case of V. Kishan Rao Vs. Nikhil Super Speciality Hospital Anr. (supra), has erroneously declared the earlier judgment of this Court in the case of Martin F. D'Souza Vs. Mohd. Ishfaq (supra) as per incuriam, on a misconception of the law laid down by a three-Judge Bench of this Court in Jacob Mathew Vs. State of Punjab Anr., (2005) 6 SCC 1. We are not inclined to accept the submission made by Mr. Rao. The judgment in Jacob Mathew (supra) is clearly confined to the question of medical negligence leading to criminal prosecution, either on the basis of a criminal complaint or on the basis of an FIR. The conclusions recorded in paragraph 48 of Jacob Mathew (supra) leave no manner of doubt that in the aforesaid judgment this Court was concerned with a case of medical negligence which resulted in prosecution of the concerned doctor under Section 304A of the Indian Penal Code. We may notice here the relevant conclusions which are summed up by this Court as under: xxx xxx xxx xxx xxx xxx xxx xxx

> "(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 304A of 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 304A of the 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."

8. The guidelines in Paragraph 48 were laid down after rejecting the submission that in both jurisdictions i.e. under civil law and criminal law, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. It was observed that :-

"12.……
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…… The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.

28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason — whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society."

9. The aforesaid observations leave no manner of doubt that the observations in Jacob Mathew (supra) were limited only with regard to the prosecution of doctors for the offence under Section 304A IPC.

10. The aforesaid observations and conclusions leave no manner of doubt that the judgment rendered by a two-Judge Bench of this Court in the case of Martin F. D'Souza (supra) has been correctly declared per incuriam by the judgment in V. Kishan Rao (supra) as the law laid down in Martin F. D'Souza (supra) was contrary to the law laid down in Jacob Mathew (supra).

11. In view of the above, we are of the opinion that the conclusions recorded by the National Commission in the impugned order does not call for any interference. The civil appeals are dismissed.