

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

THURSDAY, THE 2ND DAY OF DECEMBER 2021/11TH AGRAHAYANA, 1943

CRL.A NO. 138 OF 2005

AGAINST THE JUDGMENT IN CC 262/2003 OF JUDICIAL MAGISTRATE
OF FIRST CLASS -II, THAMARASSERY

APPELLANT/COMPLAINANT:

SYJA

W/O.JAYAPRAKASAN, NEDUTHEDIKAYIL, THAZHEKKODE,
MUKKAM P.O., KOZHIKODE.

BY ADVS.T.R.HARIKUMAR, ADITHYA RAJEEV

RESPONDENTS/ACCUSED AND STATE:

- 1 DR.CHANDRAMATHI
KARTHIKA, MUKKAM P.O., KOZHIKODE.
- 2 SHEENA
NURSE, ST.JOSEPHS HOSPITAL, AUGUSTHAMUZHI, MUKKOM,
KOZHIKODE.
- 3 STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,,
ERNAKULAM.

BY ADVS.SRI.P.V.ANOOP FOR R1, SRI.S.ANANTHAKRISHNAN
PUBLIC PROSECUTOR SRI.SANAL P.RAJ FOR R3,
SRI.N.K.SUBRAMANIAN, SRI.SHYAM PADMAN FOR R2
SRI.C.M.ANDREWS, SMT.BOBY M.SEKHAR
KUM.LAYA MARY JOSEPH, SRI.HARISH ABRAHAM

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
02.12.2021, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

J U D G M E N T

Dated this the 2nd day of December, 2021

This appeal has been preferred against acquittal in CC No.262/2003 on the file of the Judicial First Class Magistrate Court- II, Thamarassery.

2. The appellant herein filed a private complaint at the court below against respondents 1 and 2 herein and two other doctors alleging that they committed offence punishable u/s 304A of IPC. The 1st respondent herein is a gynecologist and the 2nd respondent is a staff nurse at St.Joseph's Hospital, Kozhikode. The appellant was admittedly treated by the 1st respondent for her second delivery at St.Joseph's Hospital. Her baby died during delivery and hysterectomy had to be done which according to the doctors was to save her life. The case of the appellant is that she was not given proper medical care and attention by the accused while she was treated at St.Joseph's Hospital in connection with her second delivery and that the delivery was carried out in a most negligent manner and resultantly the baby died during delivery. It is her further case that she was subjected to

hysterectomy without her knowledge or consent or of her family members.

3. Initially, the appellant approached the Mukkom Police Station. The police was not prepared to register the crime. Hence, she filed a private complaint as CMP No.664/2002 at the court below. The learned Magistrate forwarded the complaint to the police u/s 156(3) of Cr.P.C. The police after investigation filed a refer report. It was thereafter the protest complaint was filed. It appears from the case records that the complaint was taken on file by the learned Magistrate and process was issued. The respondents 1 and 2 herein and the other two accused appeared at the court below and they were released on bail. Subsequently, the appellant filed a petition at the court below seeking permission to withdraw the complaint as against remaining accused other than respondents 1 and 2, which was allowed. The case was proceeded against the present respondents 1 and 2. The case was posted for examination of the complainant and the witnesses. The complainant gave evidence in chief examination. At that time, respondents 1 and 2 herein challenged the maintainability of the complaint itself relying on the decision of the Apex Court in ***Suresh Gupta v. Govt.of N.C.T. Of Delhi***

and Others [(2004) 6 SCC 422]. The court below relying on the dictum laid down in the said judgment found that the criminal prosecution alleging medical negligence against the respondents 1 and 2 is not maintainable and they were acquitted invoking S.248(1) of Cr.P.C as per the impugned judgment. The said judgment is under challenge in this appeal.

4. I have heard Sri. Adithya Rajeev, the learned counsel for the appellant, Sri.P.V.Anoop, the learned counsel for the 1st respondent, Sri.Shyam Padman, the learned counsel appearing for the 2nd respondent and Sri.Sanal P.Raj, the learned Public Prosecutor appearing for the 3rd respondent.

5. Sri.Adithya Rajeev, the learned counsel for the appellant submitted that the court below has committed gross procedural irregularity in acquitting the accused invoking S.248 (1) of Cr.P.C without examining the witnesses. It is true there is irregularity in the procedure adopted by the court below. Being a private complaint, that too summons trial, provision u/s 248(1) could not have been invoked. However, I am of the view that no purpose would be served in remanding the matter and directing the court below to give opportunity to the complainant to adduce evidence and to dispose of the case thereafter for the reason

that, a perusal of the case records would show that the complaint itself is not *prima facie* sustainable as against respondents 1 and 2.

6. The decision relied on by the court below (**Suresh**) was referred to a Larger Bench. The Larger Bench in **Jacob Mathew v. State of Punjab** (2005 (3) KLT 965) held that so long as the 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. In paragraph 53 of the said judgment, it is specifically stated that a private complaint alleging medical negligence 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. No such credible opinion has been obtained or produced by the complainant. On the other hand, the final report would show that during investigation, the investigating officer has obtained an independent and competent

- : 6 : -

medical opinion from the Medical College, Calicut. The doctor who gave the opinion is the Professor and Head of Department of Gynecology at Calicut. On perusing the entire record, the doctor opined as follows.

"I have gone through the case sheet of Mrs. Shyja, 25 years, W/o Jayaprakasan, Neduthodikayil House, admitted in ST. Joseph's Hospital, Makkam and found that she was admitted to this Hospital on 17.12.2001 at 9.30 a.m. as per instructions of Dr. Chandramathi. Her expected date was 22.12.01 and she was observed till 26.12.01, on which day Cerviprime (Prostaglandin E2 Gel) was instilled. This is the usual procedure that we do if the patient does not go into labour 4 days after her expected date. She was kept in the Labour Room, but did not get any contractions up till 11.30 p.m., when mild contractions started. According to Dr. Chandramathi, the sister in-charge had started, without doctor's instructions, IV Oxytocin which was flowing at 60 drops/minute and at 1.30 a.m., the doctor was summoned as there was doubt of meconium stained liquor. There was evidence of fetal distress which indicated an early delivery and for early caesarean section. Dr. Thomas summoned, but since the anesthetist was away, without wasting time, Dr. Babu was summoned, who reached at 2.45 a.m. and laparotomy done, which showed evidence of a rupture uterus for which a subtotal hysterectomy was done.

The operation notes of Dr. Thomas clearly shows evidence of a tear on the posterior surface of the lower uterine segment, which extended into the leaf of left broad ligament. This would have resulted either due to strong uterotonic agents like Oxytocin or Prostaglandins or may be

-:7:-

the result of a weak area in the lower segment, which was the result of a previous medical termination of pregnancy.

In the case of a spontaneous rupture with ragged edges which the doctor has clearly documented as beyond repair, the treatment that can be undertaken is only subtotal hysterectomy. If it were a clean wound, it could have been sutured. The hysterectomy was done, as per the case sheet, only after getting the consent of the husband.

So I cannot conclude that the rupture uterus had occurred due to the negligence of Dr. Chandramathi and the hysterectomy done by Dr. Thomas and Dr. Babu was only a life saving procedure which could not have been avoided. Moreover, consent for the same procedure has been obtained by patient's husband Mr. Jayaprakash. The loss of foetal heart occurred because the uterus had ruptured and the cause of breathlessness, restlessness and tachy cardia and abdominal tenderness were all due to the rupture uterus and internal haemorrhage."

7. The case records would also show that the husband of the appellant has given consent for conducting hysterectomy. In these circumstances, I am of the view that no purpose will be served in proceeding with the private complaint further.

8. The 1st respondent is now aged 80 years and the respondents have been facing the ordeal of trial for the last 20 years. The learned counsel for the 2nd respondent Sri.Shyam Padman submitted that consumer complaint filed by the appellant as OP No.339/2002 alleging medical negligence for

Cr1.Appeal No.138/2005

-:8:-

compensation against the respondents 1 and 2 and others was dismissed and it was confirmed by the State Commission in Appeal No.706/2010. A copy of the order of the State Commission has been made available for perusal.

For the reasons stated above, I find no reason to interfere with the impugned judgment. The appeal is accordingly dismissed.

Sd/-

DR. KAUSER EDAPPAGATH
JUDGE

Rp