

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRR 1711 of 2022

With

CRAN 11 of 2024

Dr. Shiuli Mukherjee

Vs.

The State of West Bengal & Anr.

For the Petitioner : Mr. Bikash Ranjan Bhattacharya Sr. Adv.
Mr. Uday Sankar Chattopadhyay
Mr. Pronoy Basak
Ms. Trisha Rakshit
Ms. Aishwarya Datta

For the O.P. no.2 : Mr. Amarta Ghosh
Mr. Samarjit Balial
Mr. Satyajit Senapati
Mr. Siddhartha Paul
Mr. Souradeep Ghosh
Mr. Rahul Nag
Ms. Smita Singh
Mr. Shibu Sikdar

For the State : Mr. Madhusudhan Sur, Ld. APP
Mr. Dipankar Paramanick

Heard on : 27.09.2024

Judgment on : 13.11.2024

Dr. Ajoy Kumar Mukherjee , J.:

1. The opposite party no. 2 herein lodged a complain before the officer in charge, Bally Police Station on November, 2nd 2021 against the petitioner herein and one Sudipta Sardar, (who is not the petitioner herein). The same was registered as Bally police station case no. 254 of 2021 dated 02.11.2021 being G.R. case no. 6261 of 2021. The petitioners herein has prayed for quashing the said proceeding.

2. In the FIR it has been alleged that the daughter of FIR maker namely Molly Saha Halder was affected by Corona Virus during May 2021 and for which the complainant and his son-in-law admitted her at M.F.C. Women and child care Nursing Home, Bally on 26th May, 2021. It is further alleged that in the said Nursing Home said patient was treated by another accused namely Sudipto Sardar. However, on June, 1 2021, complainants said daughter died in the said hospital, and it is alleged that she did not have very complex difficulty. The complaint was lodged on November 2, 2021 almost five months after the alleged incident. It is further stated that the complainant thereafter came to know from the news paper reporting that the other accused namely said Sudipta Sardar, who treated her daughter is a fake doctor. Thus the complainant claimed that the said fake doctor treated her daughter resulting in her death and the owner of the said Nursing Home namely the present petitioner squarely responsible for the same.

3. Police thereafter investigated the matter and submitted charge sheet in the said criminal proceeding against the present petitioner under sections 304A/120B of the Indian Penal code.

4. Mr. Uday Shankar Chattopadhyay learned counsel appearing on behalf of the petitioner submits that during investigation, the petitioner moved an application for anticipatory bail before this High Court and a Division Bench of this high Court while enlarged the petitioner on bail under section 438 of the Code, Their Lordships prima facie do not find any material to the effect that the present petitioner had a guilty mind or any intention of causing death or it does not appear that the present petitioner admitted the victim under other accused Sudipto Sardar, knowing that he is a fake doctor.

5. The petitioner states that the petitioner upon coming into the knowledge of the alleged incident, herself reported and made a complain to the officer in charge, Bally police station on July 30th 2021. Mr. Chatterjee on behalf of petitioner further submits that the said fake doctor/other accused was never attached with the petitioner's Nursing Home nor he was a paid or empanelled doctor of the Nursing Home. The Nursing Home authority allowed him only because the health department, Government of West Bengal by Notification had directed the medical institutions to covert the Nursing Home as a COVID centre.

6. Mr. Chatterjee further submits that due to the pandemic, the petitioner did not get enough time to enquire about the said fake doctor or to verify about his identification as doctor. He had only submitted with the nursing home authorities his PAN Number and his Registration number of

West Bengal Medical Council. In fact the petitioner had checked the Registration number supplied by the said accused and found that he was a registered doctor and thereby allowed him to treat his patients at his Nursing Home.

7. Mr. Chatterjee further submits that the cause of action of the alleged incident took place on June 1st, 2021 when the daughter of the opposite party no. 1 died. However, there was no complain or suspicion or allegation in the mind of opposite party no.2 at that time. It is only after going through newspaper reporting ,the suspicion arose in his mind that the other accused who had treated her daughter, may have caused the death of her daughter since he is a fake doctor. Accordingly on the sole ground of mere belief that the opposite party no. 2's daughter could have survived COVID, the instant complaint has been lodged and the petitioner herein who is merely a partner or director of the said Nursing Home has been held liable for criminal offence related to medical negligence.

8. Mr. Chatterjee further submits that the petitioner being the owner of the Nursing Home could not verify the authenticity of the other accused namely Sudipto Sardar whom she has engaged as doctor during COVID pandemic. He further submits that it appears from the medical document with respect to the admission, treatment, medicine tickets etc of the deceased daughter of opposite party no.2 that the due standard protocol guided by Department of Health related to Covid-19 patient which were prevailing at the time of treatment of the victim were duly followed by the petitioners Nursing Home. Mr. Chatterjee strenuously argued that in view of notification issued by Government of West Bengal dated 4th May, 2021

the petitioner's Nursing Home was designated as COVID centre and as such the petitioner ought not to have refused admission of a COVID patient for treatment. There was no negligence on behalf of the petitioner or her Nursing Home while treating the daughter of opposite party no. 2 nor the petitioner was involved in direct treatment of the deceased.

9. He further submits that the investigating authority and the court below ought to have considered the agony and hardship that the petitioner and a huge number of patient at her Nursing Home are going through owing to such vexatious proceeding. Infact investigating agency did find any kind of medical negligence on the part of the petitioner. In the charge sheet the petitioner has been implicated only with the alleged negligence in verifying the identity of the other accused namely Sudipta Sardar. Infact the investigating authority and the court below failed to understand that it is reasonable to identify the identity of a doctor on the basis of his registration number and not on the basis of the spelling of the name of the registered person. The fake doctor i.e. other accused spelled his name as 'Sudipto Sardar' whereas the genuine doctor under that Registration number spelled his name as 'Sudipta Sardar'.

10. He further submits that the alleged negligence must be in close proximity with the cause of death to attract offence under section 304 A of IPC and in absence of such proximity the criminal proceeding against the petitioner is liable to be quashed and in this context petitioner relied upon the judgment of **Sushil Ansal Vs. State**, reported in **(2014) 6 SCC 173**. The allegations levelled in the FIR and the evidence collected in support of the same do not disclose the commission of any offence by the present

petitioner. Infact the proceeding has been maliciously instituted with an ulterior motive for tarnishing the reputation of the petitioner and harassing her and for which the petitioner submits that the continuance of the present proceeding any further against the present petitioner will be abuse of process of the court.

11. Petitioner in this context also relied upon following judgments

- (i) Jacob Mathew Vs. State of Punjab and another** reported in **(2005) 6 SCC 1.**
- (ii) Rajon Vs. Joseph and others,** reported in **(2015) 8 SCC 436.**
- (iii) Kusum Sharma and others Vs. Batra Hospital and Medical Research and others,** reported in **(2010) 3 SCC 480.**

12. Mr. Ghosh learned counsel appearing on behalf of the opposite party no.2 submits that specific charge has been attributed against the petitioner which forms the essential ingredients of the offence, punishable under section 304A of the Indian Penal Code. He further submits according to section 40 of the IPC, any act or omission punishable in law for the time being in force makes an offence. Accordingly the conduct of the petitioner in allowing a fake doctor to continue in her Nursing Home as a Resident Medical Officer (in short RMO)squarely makes up the essential ingredient of the offence punishable under section 304A of the Indian Penal code and there is every chance that the said conduct of the petitioner would lead to her conviction. He further submits that though the petitioner has heavily relied upon the observation made by this court while granting anticipatory bail to the petitioner but an order of anticipatory bail does not necessarily indicate the innocence of an accused in a criminal case, rather it is widely

understood that an order of anticipatory bail is granted only after determining whether an accused requires custodial interrogation or not.

13. He further submits that it is palpably clear from the sequence of events as well as the conduct of the petitioner that had the petitioner not allowed the fake doctor Sudipto Sardar, the facility to practice in her Nursing Home, the innocent victim would not have lost her life due to medical negligence.

14. Mr. Ghosh further submits that the petitioner has taken a conscious effort to distance herself from the fake doctor and feign innocence by taking the plea that she was not in a position to verify the genuineness of the documents produced to certify the fake doctor as genuine. However such plea is disputed question of fact, since it is a matter of record that the said fake doctor was functioning as the RMO of the Nursing Home run by the petitioner and as such the plea of innocence by the petitioner at this belated stage after the innocent victim has lost her life, cannot be tenable in the eyes of law. The conduct of the owner of the Nursing Home is the immediate cause of death and is often termed as '*causa causans*' under Indian Penal Code which forms the basic ingredients of the offence punishable under section 304A of the IPC. He further submits that though the petitioner has taken a plea for not being able to verify the authenticity of the fake doctor by taking the COVID 19 pandemic as an excuse to evade her responsibility but such plea does not have any substance. The petitioner also tried to distance herself from the fake doctor by stating that said fake doctor used to bring his own patients to the Nursing Home and

was not employed at her Nursing Home but the materials available in the case diary suggest that such statements are not correct.

15. Mr. Ghosh further submits that the grounds preferred by the petitioner for quashing the instant proceeding are all factual in nature and it is trite law that this Court while exercising jurisdiction under section 482 of the Code cannot conduct a mini trial to ascertain the veracity or authenticity of the fact as narrated by the petitioner and all such factual issues are to be thrashed during trial and as such the instant Application is liable to be dismissed and the prosecution is to be given a chance to prove their case in a full-fledged trial.

16. Mr. Madhusudan Sur learned counsel appearing on behalf of the State/Opposite Party placed the case diary before this court and submits that there are sufficient materials against the present petitioner in order to convict her after conclusion of trial and as such this is not a fit case to quash the criminal proceeding invoking jurisdiction under section 482 of the Code of Criminal Procedure.

17. I have considered submissions made by both the parties.

18. On bare perusal of the allegations made in the complaint, it is clear that specific allegations have been attributed against the petitioner alleging that the petitioner has direct instigation in entrusting the other accused/fake doctor for the treatment of the victim, knowing fully well that the other accused is not a registered medical practitioner. It is true that the petitioner herein has taken a specific plea that it is reasonable to identify the identity of a doctor on the basis of his registration number and not on the basis of the spelling of the name of the registered person and it may be

that the name used by the said fake doctor could not be verified in proper way during COVID Pandemic situation and as such the said fake doctor treated the deceased who was suffering from COVID related disorder and ultimately succumbed on June 20, 2021, and her further plea is such lacuna of verification of medical documents from concerned medical authority, even if could be established during investigation which allegedly caused death of the victim, was never intentional and it cannot constitute any criminal offence as *mens rea* on the part of the petitioner is completely absent.

19. Per contra the plea of the opposite parties is that it is not the case of the petitioner that the fake doctor had brought the victim/patient in the Nursing Home and on the contrary it is the specific case of the complainant that they admitted the victim in the Nursing Home and the petitioner has entrusted the fake doctor to treat the patient, knowing that the other accused is not a registered medical practitioner. It is further case of the complainant that negligence which leads to a fake doctor being allowed to function as a resident medical officer, which eventually leads to the death of a patient is the immediate cause of her death which is termed as *causa causans* under the Indian penal code which forms one of the basic ingredients of the offence punishable under section 304A of the IPC.

20. On perusal of the materials annexed by the petitioner it appears that the witnesses while they were examined under section 161 and 164 of the Code had specifically alleged that the petitioner had entrusted the fake doctor knowing well that he has no right to practice and the witnesses further alleged before the police and magistrate that the petitioner has

insisted the patient party to remain under the treatment of the fake doctor describing him as a good doctor. Even the real registered doctor Sudipta Sardar, whose registration number has been allegedly misused by the fake doctor/other accused, while made statement under section 164 Cr.P.C. before the magistrate has directly accused the present petitioner stating that the petitioner is in collusion with the said fake doctor. In the charge sheet it has been specifically stated by the investigating agency that the lacuna of verification of medical documents from concerned medical authority has been established during investigation which ultimately resulted the death of victim Moly Saha Halder and as such prima facie charges under section 304A /120B of the IPC has been well established against the present petitioner.

21. A rash act under section 304A is primarily described as an over hasty act which is generally opposed to deliberate act and the word negligence implies failure to exercise due care expected of a reasonable and prudent person. In fact the provisions of section 304A applies to cases where there is no intention to cause death and where there is no knowledge that the act done in all probability will cause death and that is why this provision is kept outside the range of section 299 and 300 IPC and obviously contemplates those cases into which neither intention nor knowledge enters. This particular section is applicable to acts which are rash and/or negligent and has a direct nexus to the cause of death of the victim.

22. It is true that the petitioner in this application has made a conscious effort to distance herself from the other accused Sudipto Sardar by saying

that due to Government notification and also due to an unprecedented situation resulted out of COVID 19 pandemic, she was not in a position to verify the genuineness of the documents produced by the other accused but such plea is certainly a disputed question of fact, specially when the fake doctor has signed in the death certificate of the victim disclosing himself as a resident medical officer. The opposite party also filed an information dated 07.01.2023 obtained under the Right to Information Act, which discloses that total nine numbers of death certificate have been issued by the said fake doctor from the said Nursing Home. All these allegations and counter allegations are factual in nature and the High Court while exercising jurisdiction under section 482 of the Code cannot go for a mini trial to ascertain the veracity and authenticity of the case and counter case as narrated by the parties. All these issues are to be considered and decided during trial to ascertain as to whether the alleged negligence attributed by the complainant is culpable and/or gross negligence or such alleged negligence merely based upon an error of judgment.

23. Though the power conferred under section 482 of the Code is to be used sparingly but the law as has been laid down by the Hon'ble Apex Court and the High Courts from time to time, such power may be exercised:-

- (i) If the allegations in complaint, if taken in its face value makes no case disclosing essential ingredients of the offence alleged.

- (ii) Where the allegations are patently absurd and inherently improbable, so that no prudent person can ever reach a conclusion that there are sufficient ground for proceeding.
- (iii) Where discretion exercised by the magistrate in issuing process is capricious and arbitrary having based on no evidence or those are wholly irrelevant and inadmissible.
- (iv) Where it suffers from fundamental legal defects.
- (v) Where it is required to be exercised to prevent miscarriage of justice
- (vi) Where in order to prevent the abuse of process of law, exercise of inherent power has become inevitable
- (vii) Continuance of the proceeding would not sub-serve the cause of justice.

24. In the case of ***Zandu Pharmaceutical works ltd. Vs.Mohd. Sharaful Haque***, reported in ***(2005) 1 SCC 122*** . it has been specifically held that it is not necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole and if it appears that on consideration of an allegation in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complain is *malafide*, frivolous or vexus, in that event there would be no justification for interference by the High court.

25. Since in the present case in my opinion the allegations made in the complaint and materials collected during investigation, clearly constitute a

cognizable offence, this case also does not fall under any one of the categories as laid down in ***State of Haryana Vs. Bhajanlal*** reported in **AIR 1992 SC 604** .

26. Though the petitioner has placed much reliance upon the observation made by Division Bench of this court while disposing petitioners application for anticipatory bail, but such observation was made on 20th January 2022, when the investigation was in progress. Thereafter the investigation was completed and the investigating agency submitted charge sheet against the petitioner with sufficient materials and as such that stray observation of this court in an interlocutory proceeding may not have any binding force, while disposing the present application or while disposing the criminal proceeding itself. Since a prima facie case is made out disclosing cognizable offence alleged against the accused, it would not be just or prudent to quash the proceeding.

27. Moreover in the present case the charge sheet against the petitioner under section 304A/120B of the IPC has already been filed and as such accused has always the remedy at the time of framing of charge to pray for discharge if the material on the basis of which charge sheet has been filed can be said to be insufficient to frame a charge but the High Court would not be justified in quashing the proceeding by appreciating the materials collected during the investigation.

28. In such view of the matter I find that this is not a fit case where the impugned criminal proceeding can be quashed invoking jurisdiction under section 482 of the Code

29. CRR 1711 of 2022 thus stands dismissed. In view of disposal of the original application the connected application also stands disposed of.

30. However this order of dismissal will not preclude the petitioner to agitate the grievances made herein at the time of framing of charge or at any subsequent stage during trial before the court below.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Dr. AJOY KUMAR MUKHERJEE, J.)