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Mens Rea and Undisclosed Knowledge are Essential to Establish Criminal Negligence

A WhatsApp message has been circulating that Supreme Court has said that criminal charges are not applicable to doctors. The judgment is of 2012 and not new.

It is a settled law that unless a criminal intent is proved (*mens rea*) or there is an element of undisclosed knowledge, criminal sections are not applicable to doctors.

Here are some salient excerpts from the said judgment.

In the matter titled as **"CBI, Hyderabad versus K. Narayana Rao, Criminal Appeal No. 1460 of 2012, the Hon'ble Supreme Court of India** vide judgment dated 21.09.2012 has dealt with the main question whether the panel lawyer of the bank has committed any offence by giving false legal opinion on the basis of the documents provided to him by the bank. After hearing the case and after analyzing all materials and documents on record, the Hon'ble Supreme Court held that the panel lawyer of the Bank has not committed any fraud as he has given his legal opinion on the basis of the documents provided to him by the bank.

Nowhere in the judgment, it has been held that criminal charges are not applicable to doctors. The judgment only takes reference of the law laid down by the Hon'ble Supreme Court in the matter titled as "Jacob Mathew versus State of Punjab, (2005) 6 SCC 1 wherein it has been held that:

> *"To determine whether the person charged has been negligent or not, he has to be judged like an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices."*

In the judgment, the Hon'ble Supreme Court has only held that **no professional can given guarantee to his/her client and a professional may be held liable for negligence on one of the two findings**, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The relevant paragraph of the judgment is reproduced hereunder:

> *"23) A lawyer does not tell his client that he shall win the case in all circumstances. Likewise a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not*

exercise, with reasonable competence in the given case, the skill which he did possess."

FACTS OF THE CASE

(a) According to the prosecution, basing on an information, on 30.11.2005, the CBI, Hyderabad registered an FIR being RC 32(A)/2005 against Shri P. Radha Gopal Reddy (A-1) and Shri Udaya Sankar (A-2), the then Branch Manager and the Assistant Manager, respectively of the Vijaya Bank, Narayanaguda Branch, Hyderabad, for the commission of offence punishable under Sections 120-B, 419, 420, 467, 468, 471 read with Section 109 of the Indian Penal Code, 1860 (in short 'the IPC') and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 for abusing their official position as public servants and for having conspired with private individuals, viz., Shri P.Y. Kondala Rao – the builder (A-3) and Shri N.S. Sanjeeva Rao (A-4) and other unknown persons for defrauding the bank by sanctioning and disbursement of housing loans to 22 borrowers in violation of the Bank's rules and guidelines and thereby caused wrongful loss of Rs. 1.27 crores to the Bank and corresponding gain for themselves. In furtherance of the said conspiracy, A-2 conducted the pre-sanction inspection in respect of 22 housing loans and A-1 sanctioned the same.

(b) After completion of the investigation, the CBI filed charge sheet along with the list of witnesses and the list of documents against all the accused persons. **In the said charge sheet, Shri K. Narayana Rao, the respondent herein, who is a legal practitioner and a panel advocate for the Vijaya Bank, was also arrayed as A-6. The duty of the respondent herein as a panel advocate was to verify the documents and to give legal opinion. The allegation against him is that he gave false legal opinion in respect of 10 housing loans.** It has been specifically alleged in the charge sheet that the respondent herein (A-6) and Mr. K.C. Ramdas (A-7)-the valuer have failed to point out the actual ownership of the properties and to bring out the ownership details and name of the apartments in their reports and also the falsity in the permissions for construction issued by the Municipal Authorities.

(c) Being aggrieved, the respondent herein (A-6) filed a petition being Criminal Petition No. 2347 of 2008 under Section 482 of the Code before the High Court of Andhra Pradesh at Hyderabad for quashing of the criminal proceedings in CC No. 44 of 2007 on the file of the Special Judge for CBI Cases, Hyderabad. By impugned judgment and order dated 09.07.2010, the High Court quashed the proceedings insofar as the respondent herein (A-6) is concerned.

(d) Being aggrieved, the CBI, Hyderabad filed this appeal by way of special leave.

JUDGMENT OF THE HON'BLE SUPREME COURT

"16) We have already extracted the relevant allegations and the role of the respondent herein (A-6). The only allegation against the respondent is that he submitted false legal opinion to the Bank in respect of the housing loans in the capacity of a panel advocate and did not point out actual ownership of the properties. As rightly pointed out by Mr. Venkataramani, learned senior counsel for the respondent, the respondent was not named in the FIR. The allegations in the FIR are that A-1 to A-4 conspired together and cheated Vijaya Bank, Narayanaguda, Hyderabad to the tune of Rs. 1.27 crores. It is further seen that the offences alleged against A-1 to A-4 are the offences punishable under Sections 120B, 419, 420, 467, 468 and 471 of IPC and Section 13(2) read with Section 13 (1)(d) of the Prevention of Corruption Act, 1988. It is not in dispute that the respondent is a practicing advocate and according to Mr. Venkataramani, he has experience in giving legal opinion and has conducted several cases for the banks including Vijaya Bank. As stated earlier, the only allegation against him is that he submitted false legal opinion about the genuineness of the properties in question. It is the definite stand of the respondent herein that he has rendered Legal Scrutiny Reports in all the cases after perusing the documents submitted by the Bank. It is also his claim that rendition of legal opinion cannot be construed as an offence. He further pointed out that it is not possible for the panel advocate to investigate the genuineness of the documents and in the present case, he only perused the contents and concluded whether the title was conveyed through a document or not. It is also brought to our notice that LW-5 (Listed Witness), who is the Law Officer of Vijaya Bank, has given a statement regarding flaw in respect of title of several properties. It is the claim of the respondent that in his statement, LW-5 has not even made a single comment as to the veracity of the legal opinion rendered by the respondent herein. In other words, it is the claim of the respondent that none of the witnesses have spoken to any overt act on his part or his involvement in the alleged conspiracy. Learned senior counsel for the respondent has also pointed out that out of 78 witnesses no one has made any relevant

comment or statement about the alleged involvement of the respondent herein in the matter in question.

17)…The above particulars show that the respondent herein, as a panel advocate, verified the documents supplied by the Bank and rendered his opinion. It also shows that he was furnished with Xerox copies of the documents and very few original documents as well as Xerox copies of Death Certificate, Legal heirship Certificate, Encumbrance Certificate for his perusal and opinion. It is his definite claim that he perused those documents and only after that he rendered his opinion. He also advised the bank to obtain Encumbrance Certificate for the period from 21.04.2003 till date. It is pointed out that in the same way, he furnished Legal Scrutiny Reports in respect of other cases also.

22) The High Court while quashing the criminal proceedings in respect of the respondent herein has gone into the allegations in the charge sheet and the materials placed for his scrutiny and arrived at a conclusion that the same does not disclose any criminal offence committed by him. It also concluded that there is no material to show that the respondent herein joined hands with A-1 to A-3 for giving false opinion. In the absence of direct material, he cannot be implicated as one of the conspirators of the offence punishable under Section 420 read with Section 109 of IPC. The High Court has also opined that even after critically examining the entire material, it does not disclose any criminal offence committed by him. Though as pointed out earlier, a roving enquiry is not needed, however, it is the duty of the Court to find out whether any prima facie material available against the person who has charged with an offence under Section 420 read with Section 109 of IPC. In the banking sector in particular, rendering of legal opinion for granting of loans has become an important component of an advocate's work. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skills.

23) A lawyer does not tell his client that he shall win the case in all circumstances. Likewise a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

24) In Jacob Mathew vs. State of Punjab & Anr. (2005) 6 SCC 1 this court laid down the standard to be applied for judging. To determine whether the person charged has been negligent or not, he has to be judged like an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.

25) In Pandurang Dattatraya Khandekar vs. Bar Council of Maharashtra & Ors. (1984) 2 SCC556, this Court held that "…there is a world of difference between the giving of improper legal advice and the giving of wrong legal advice. Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct.

26) Therefore, the liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the given case, there is no evidence to prove that A-6 was abetting or aiding the original conspirators.

27) However, it is beyond doubt that a lawyer owes an "unremitting loyalty" to the interests of the client and it is the lawyer's responsibility to act in a manner that would best advance the interest of the client. Merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated with other conspirators. At the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence under Sections 420 and 109 of IPC along with other conspirators without proper and acceptable link between them. It is further made clear that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent herein.

28) In the light of the above discussion and after analyzing all the materials, we are satisfied that there is no prima facie case for proceeding in respect of the charges alleged insofar as respondent herein is concerned. We agree with the conclusion of the High Court in quashing the criminal proceedings and reject the stand taken by the CBI.

29) In the light of what is stated above, the appeal fails and the same is dismissed."