IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.11.2022
PRONOUNCED ON : 28.04.2023

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.Nos.13133 & 19497 of 2014 and
Crl.M.P.Nos.1 & 1 of 2014

1.Dr.Padmini ... Petitioner in Crl.O.P.No.13133 of 2014
2.Dr.A.Brindha
3.Dr.J.Kabalimurthy
3.Dr.S.Arulmozhichelvan
4.Dr.C.Subramanian ... Petitioners in Crl.O.P.No.19497 of 2014

Vs.

Senthilkumar ...Respondent in both petitions

COMMON PRAYER: Criminal Original Petitions are filed under Section 482 of the Code of Criminal Procedure, to call for the records and quash the proceedings in PRC.No.3 of 2014 on the file of the Judicial Magistrate No.2, Chidambaram.

For Petitioners in Crl.O.P.Nos.13133 & 19497 of 2014 : Mr.V.Karthick, Senior Counsel for Mr.J.Saravanavel

For Respondent in Crl.O.P.Nos.13133 & 19497 of 2014 : Mr.R.Natarajan

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COMMON ORDER

Criminal Original Petitions are filed to quash the proceedings in P.R.C.No.3 of 2014, on the file of the Judicial Magistrate Court No.II, Chidambaram.

2.Since both the Criminal Original Petitions arise out of the case in P.R.C.No.3 of 2014 and the points raised are similar and the respondent is common, this Court took up these petitions together for consideration.

3.For the sake of convenience and clarity, the petitioners are referred to as accused, as per their rank, in P.R.C.No.3 of 2014.

4.The brief facts of the case is as follows:

(i)One Sudha, wife of the respondent, a Pharmacist, who is a Nurse in a Government Hospital, Kattumannarkovil, had delivered a baby on 19.05.2012 by caesarean operation. The caesarean operation was performed by the accused herein in their nursing home, namely, Arul Nursing Home, Chidambaram. The caesarean operation was performed by a trainee trained by the accused and collecting fee from them. When

the same was questioned by Sudha, wife of the respondent, to cover up the misdeeds, misadventure and to do away the said Sudha, they had cut her sigmoid colon during operation. This sigmoid colon is the dissenting colon which leads to the rectum. The accused had wantonly failed to do any surgery, delayed any correction and rectification to aggravate the injury, so that the faeces would remain inside the body creating complications like septicaemia and ultimately, the said Sudha would pass away. Despite request for proper treatment, the same was denied by the accused. Thereafter, the accused advised her to take further treatment at Lifeline Hospital at Chennai. The said Sudha and her husband/respondent made to travel in a car on 23.05.2012 without proper medical aid. On the way, the said Sudha developed medical complications and at about 08.30 p.m, she got admitted in the Jipmer Hospital, Puducherry, where one Dr.Pallavi admitted Sudha in casualty. Since the respondent was not having medical records, he was unable to give details about the previous surgery and the reason for Sudha's complications. This fact informed to the Outpost Police Station at Jipmer Hospital, Puducherry and medico-legal case recorded.

(ii)Thereafter, Dr.Mariyanna and Dr.Pallavi injected and taken out the internal deposits, examined and found that the faeces had accumulated inside the stomach and developed infection infecting the intestine. Hence, immediate surgery was conducted by Vintilotor method. Only after the surgery, on 30.05.2012, Sudha gained conscious and on 31.05.2012, the Ventilotor procedure was withdrawn. Due to the cut of sigmoid colon and improper treatment by the accused, Sudha's bowel movements got affected. From 23.05.2012 to 09.07.2012, she took treatment as inpatient in Jipmer Hospital, Puducherry and the respondent had incurred medical expenditure of Rs.20 lakhs. For the above said reasons, the petitioners, who are Doctors, committed the offence under the Indian Penal Code and under the Indian Medical Council Act, 1956.

(iii)Initially, a complaint was lodged with the All Women Police Station, Chidambaram, but they failed to register any case and take any action. Hence, the above private complaint under Section 200 Cr.P.C., has been filed by the respondent, husband of Sudha, before the Judicial Magistrate No.II, Chidambaram, for offence under Sections 307, 201 &

204 r/w 34 of IPC and Section 20(A) r/w 33(m) of the Indian Medical Council Act, 1956. The learned Magistrate after recording the statements of the respondent, his wife Sudha and one Dr.Balamourougan, Assistant Professor in Jipmer Hospital, Puducherry and on perusal of the documents, medical records, found the above said offences made out against the accused and issued summons. Challenging the same, the above Quash Petitions filed.

5.The submissions of the learned Senior Counsel appearing for the petitioners/accused are as follows:

(i)The learned Senior Counsel submitted that A1 is a meritorious student, graduated from Madras Medical College, Chennai and obtained her Post Graduation in M.D., D.G.O from Kasthuribai Gandhi Medical College, Mangalore. She is a Gynaecologist having professional experience of more than 30 years. She is working in Arul Nursing Home, Chidambaram established by her mother Dr.Palaniammal Swaminathan who practised in the nursing home for more than 50 years. The said Nursing Home is with reputation and legacy. A2 is Qualified with M.B.B.S., and M.D., D.G.O., and started her carrier as Consultant in

Obstetric and Gynaecology at Chidambaram since 1984. She is Member of the Academic Council and Medical Board in RMMC, Annamalai University. A2's husband/A4 Dr.Arulmozhichelvan is qualified with M.B.B.S., and D.A and Diploma in Ultra Sonography. He started his career as Consultant in Anaesthesia at Chidambaram. He also worked as teaching faculty in RMMCH, Annamalai University. He is a trained Ultra Sonologist from 1992 and continues as Consultant ultra sonologist for the past 20 years. He served as President Indian Medical Association, Chidambaram Branch and also Rotary District Governor, Chidambaram. He currently works as Consultant in Ultra sonography and specialised in obstetric and Gynaecology ultra sounds. A3, Dr.J.Kabalimurthy is qualified with M.B.B.S., in 1996 and M.S in 1991, working as Lecturer, Reader and Professor at RMMC, Annamalai University since 1994, he is a Member of the Academic Council and Medical Board in RMMC, Annamalai University. A5, Dr.C.Subramanian is a Veteran Surgeon who graduated in M.B.B.S in 1972 and M.S., in 1978. He has been working at RMMCH since 1987 till date and is presently the Head of Department of Surgery. He was awarded the Best Teacher Award, having 38 years experience in surgical

treatment.

(ii)The learned Senior Counsel further submitted that one Sudha approached Arul Nursing Home, Chidambaram for infertility problem during 04.04.2011. She was treated for infertility problem and advised to go for laparoscopic and hysteroscopy evaluation and removal of the fibroid, for which, the said Sudha took treatment at Chennai with one Dr.Gopinath during May 2011, thereafter, the said Sudha approached Arul Nursing Home, Chidambaram on 05.10.2011 with medical reports confirming her pregnancy and requested for further treatment. The said Sudha had periodical anti-natal checkups and during that time, it was found she had “breech presentation” which means that the child was in a reverse position i.e., legs in the lower position and head in the upper position of the uterus. The said breech position was informed to the respondent as well to Sudha during checkup and review. In view of the breech position, earlier a surgery was done on the said Sudha. The pregnancy was within four months of removal of fibroid surgery, she was suggested to undergo an operation for the delivery of the child by caesarean during 3rd week of May 2012 once the maturity of the baby

completed. The same was agreed and necessary consent was obtained from the respondent on 19.05.2012. In fact the delivery time was fixed between 4.30 p.m to 05.30 p.m on 19.05.2012 by the respondent and his wife, since 19.05.2012 was an auspicious day as per her star predictions. The caesarian operation was performed on 19.05.2012 by A1 with Surgeon/A5. The epidural anaesthesia was administered by one Dr.Dhanasekar, M.D. On the administration of the anaesthesia at about 04.15 p.m., surgery was performed by A5 and a healthy male baby weighing 3.3 kg was delivered at about 04.32 p.m., after the surgery, the patient Sudha was shifted to post operative care and she was comfortable there and the surgical wound was also healing well.

(iii)On the night of 21.05.2012, at about 08.30 p.m., the said Sudha complained about distention and Dr.C.Subramanian, HOD of Surgery RMMCH examined her and found that the said Sudha had a condition called as “paralytic ileus”, which is common phenomena during post operative period. Thereafter, scan was taken on 23.05.2012 afternoon and it was found fluid in the abdominal cavity by ultrasound. Thereafter, discussions were made with the relatives of Sudha on the afternoon of

23.05.2012. The said Sudha and her relatives informed they will take further treatment at Chennai with Dr.J.S.Rajkumar at Lifeline Hospital as the said Sudha was previously worked with the said Doctor. While it being so, for what reason, she got admitted in the Jipmer Hospital, Puducherry is not known. One Mr.Navaseelan, brother of the respondent came to Arul Nursing Home, Chidambaram on 04.07.2012 asking for all medical records of Sudha. Once again, the medical records were given with acknowledgement eventhough the same were already handed over to the respondent. This being so, months after the delivery, a complaint was lodged during October 2012 to the Police with false allegations. After enquiry, the said complaint was closed finding that it is a false complaint.

(iv)Learned Senior Counsel further submitted that one year thereafter, another vexatious complaint during November 2013 was filed with the Tamil Nadu Medical Council with the same allegations. On receipt of the same, the Tamil Nadu Medical Council called for explanation. After considering the explanation with medical records, the complaint was closed. Thereafter, the said Sudha made a complaint to

the Tamil Nadu Medical Council on 24.03.2014 accusing that the accused failed to provide the medical records to her when she got discharged from the hospital. The accused sent detailed reply on 05.04.2014 giving all details about handing over the documents to the respondent on 23.05.2012 and to one Mr.Navaseelan, Sudha's brother-in-law on 04.07.2012. Thus, the act of the said Sudha is only to cause harassment to the accused, for oblique motive.

(v)The learned Senior Counsel further submitted that learned Magistrate not followed the procedure prescribed under Section 202 Cr.P.C., which causes incurable prejudice to the accused since all the witnesses on the side of the respondent/complainant not examined. This is imperative in view of the offence complained is triable exclusively by a Court of Sessions and no deviation can be made. In this case, admittedly, only three witnesses examined, namely, the respondent/PW1, his wife/PW2 and one Dr.Balamourougan/PW3. The said Dr.Balamourougan was not even listed as witness in the complaint and there is no mention about the said Dr.Balamourougan in the complaint. While this being so, how come the said Dr.Balamourougan summoned

and examined in this case, is not known. The Hon'ble Apex Court in the case of "***Jacob Mathew Versus the State of Punjab*** reported in ***(2005) 6 SCC 1***" given guidelines in this regard, but the same not followed. More so, in the case of private complaint, the guidelines is that a private complaint not to be entertained unless the complainant produced *prima facie* evidence before the Court in the form of a credible opinion given by the another competent Doctor to support the charge of rashness or negligence on the part of the accused Doctor. In this case, from the statement of Dr.Balamourougan/PW3, no such credible opinion of rashness or negligence is found.

(vi)The learned Senior Counsel further submitted that the respondent making allegation as though his wife Sudha over-heard some conversation between the accused instructing the trainee to perform caesarian operation, is highly imaginary. During operation, the patient/Sudha was put under anaesthesia which might create some hallucinations. Hence, the above allegation is only a concocted story. Further, the allegations against the accused by both respondent and his wife Sudha is that during the period between 19.05.2012 and 23.05.2012,

when the said Sudha delivered a baby by caesarian and during her post operative period at Arul Nursing Home, Chidambarm, the said Sudha made complaint to the her husband/respondent that the Doctors in the nursing home are not good people. The respondent is a Pharmacist employed in a Government Hospital and Sudha is a trained Nurse. Both well aware of the medical procedure and the medical treatment given to a patient. The respondent and Sudha underwent procedural treatment for removal of fibroid in Chennai. He further submitted that the accused discharged their professional duties as medical Doctors by exercising due care and caution to the best of their ability, experience and no malafide can be attributed for discharging their professional duty. The respondent and his wife signed in the consent form for conducting caesarian operation in view of the "breech position of baby" inside the womb. The admitted case itself is that A2 to A4 were not present on 19.05.2012 when the caesarian operation was performed to Sudha. The presence of trainee student at the time of operation is nothing but figment of imagination by Sudha.

(vii)He further submitted that the accused not cut any sigmoid colon of Sudha during operation. The post operative "paralytic ileus" was diagonized and brought to the knowledge of the respondent and his wife by A5 after the operation. During Sudha's post operative stay and discharge till October 2012, she made no Police complaint making such allegation of any conversation between the Doctors and a trainee who was present, allowed to perform the operation. Since Sudha worked in Lifeline Hospital at Chennai, she was referred there, that too, on her request. All the receipts, discharge summary and other reports were handed over to the respondent and his wife. From the uncontroverted statement of the witnesses, namely, the respondent, his wife and Dr.Balamourougan, no offence is made out in this case as alleged by them. Sections 88 and 92 of IPC protects the bonafide treatment made by the accused as Surgeons. To implicate a person under Section 307 IPC, there must be tangible evidence to show there was imminent danger of life and it was due to the result of negligent act of the accused. In this case, the said Sudha's health condition was due to the "paralytic ileus" which might be for various factors and reasons.

(viii)Learned Senior Counsel further submitted that in this case, before issuance of summons, the subjective satisfaction arrived by the Magistrate not recorded and the summons were issued mechanically against the Doctors who are carrying on medical practise for decades with no adversity. Wild allegations are made against the accused without any basis. The learned Magistrate ought to have followed the dictum and directions laid down by the Hon'ble Apex Court in the case of ***Jacob Mathew*** cited supra which is consistently followed by the Hon'ble Apex Court in subsequent cases. The respondent having failed in all earlier attempts to somehow harass and to cause humiliation to the accused, the present complaint filed. The Tamil Nadu Medical Council considered the complaint of the respondent in detail. On the reference by the Joint Director of Health Service, Cuddalore, further expert opinion was obtained. The professor, Head of the Department, Madras Medical College and Rajiv Gandhi General Hospital, as a Medical Board, found adhesions are common in the post operative abdomen and gave opinion considering the medical records of Sudha including Jipmer Hospital, Puducherry recording that there have been delay in the diagnosis of post operative septicaemia and nothing more. Thus, looking the case from

any angle on the materials available, the learned Senior Counsel submitted that the case against the accused is unsustainable.

(ix)Apart from the above submissions, learned Senior Counsel filed Additional Typedset with Hon'ble Apex Court and this Court citations and extracts from text book of Anaesthesia 5th Edition edited by Alan R.Aitkenhead, Graham Smith and David J.Rowbotham.

(x)Referring to the text book, namely, Anaesthesia 5th Edition edited by Alan R.Aitkenhead, Graham Smith and David J.Rowbotham, the learned Senior Counsel submitted that it is medically proved hallucination is one of the adverse effects while putting the patient under anaesthesia.

(xi)He strongly placed reliance on the decision of Hon'ble Apex Court in the case of ***Jacob Mathew*** case for the principle of Bolam test and also the essential components of the negligence such as 'duty', 'breach' and 'resulting damage'. Further, the learned Senior Counsel referred to the ***Jacob Mathew*** case in detail and submitted that the

professionals may be held liable for negligence, either 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 Hon'ble Apex Court in ***Jacob Mathew*** case reiterated the guidelines given in "***Suresh Gupta (Dr.) Versus Govt. of NCT of Dehli*** reported in ***(2004) 6 SCC 422***" in prosecuting the medical professionals and held that a private complaint may not be entertained unless the complainant produced *prima facie* evidence before the Court in the form of credible opinion given by another competent Doctor to support the charge of rashness or negligence on the part of the accused. In the present case, from the statement of PW3, Dr.Balamourougan, there is nothing even remotely to infer that there was any rashness or negligence on the part of the accused.

(xii)Further, ***Jacob Mathew*** case followed in the case of "***Martin F.D'Souza Versus Mohd. Ishfaq*** reported in ***(2009) 3 SCC 1***" wherein the Hon'ble Apex Court referring to the case of "***Indian Medical Association Versus V.P.Shantha*** reported in ***(1995) 6 SCC 651***" stressed on the point that the Doctors should not be harassed merely because their

treatment was unsuccessful or caused some mishap which was not necessarily due to negligence.

(xiii)The learned Senior Counsel further placed reliance in the case of "***Kusum Sharma and others Versus Batra Hospital and Medical Research Centre and others*** reported in ***(2010) 3 SCC 480***", wherein the Hon'ble Apex Court issued eleven guidelines to be followed to proceed against the medical professionals and their negligence. He further relied on the decision in the case of "***Lakshmi Nursing Home, represented by Dr.C.Jegadeesan Versus State through the Inspector of Police and another*** reported in ***2019 SCC OnLine Mad 38829***" wherein this Court finding that there is a delay in lodging the complaint from the date of incident, quashed the proceedings. He further placed reliance on the decision in the case of "***Ahmad Ali Quraishi and another Versus State of Uttar Pradesh and another*** reported in ***(2020) 13 SCC 435***" wherein the Hon'ble Apex Court following the decision in "***State of Haryana Versus Bhajan Lal, reported in 1992 Supp(1) SCC 335***" had quashed the proceedings therein holding that the criminal proceedings is manifestly attended with malafide and the proceeding is maliciously

instituted with an ulterior motive. Here, the present case is one such.

6.The submissions of the learned counsel for the respondent/complainant are as follows:

(i)The respondent filed the private complaint against the accused before the learned Judicial Magistrate No.II, Chidambaram. On the complaint filed, materials submitted and after examining the respondent, his wife Sudha and one Dr.Balamourougan, the Magistrate found *prima facie* case made out for offence under Sections 307, 201 and 204 r/w 34 of IPC and Section 20(A) r/w 33(m) of the Indian Medical Council Act, 1956 and issued summons. Immediately thereafter, the petitioners filed the present Quash Petitions and obtained stay. Due to which, the proceedings before the Lower Court stalled and committal of the case to the Court of Sessions put on hold. In this case, the respondent examined as PW1, his wife Sudha examined as PW2 and one Dr.Balamourougan, Assistant Professor in Jipmer Hospital, Puducherry examined as PW3. The case against the accused is that the respondent employed as Pharmacist in Government Hospital and his wife Sudha is a Nurse in Government Hospital, Kattumannarkovil. His wife took treatment from

Arul Nursing Home, Chidambaram, which is run by the accused herein. A5 is a Professor in surgery Department in Raja Muthaih College, Chidambaram. On 18.05.2012, A1 to A4 examined Sudha and informed that the position of baby in the womb is contrary to the natural birth position and there is no possibility of natural birth and recommended for caesarian operation by Lower Segment Caesarean Section (LSCS) mode. The respondent finding that there was no blood bank and proper facility for emergent operation in Arul Nursing Home, intended to take his wife to some other hospital, however, accused A1 and A2 took his wife separately and prevailed upon her and thereafter, she agreed to get operated in Arul Nursing Home. It was also informed to them that A5, a specialist in conducting LSCS would be part of the operating team. Thereafter, on 19.05.2012 at about 04.30 p.m., LSCS operation was conducted. To avoid pain, during operation, she was put under anaesthesia. The said Sudha eye were closed and mask was placed over her mouth with a provision for breathing. The respondent's wife was able to hear and recognize what was being done in the operation theatre by the accused. During operation, she heard A5 was giving instructions instructing someone to hold the knife in this position, cut in this position,

remove the balder in this way, remove peritoneum, push the uterus, don't go to the intestine, don't go to gall bladder place, don't go to liver place, so on and so forth. She further heard about the trainee not properly conducting the operation causing a cut near the intestine. The respondent's wife being a Nurse understood that the accused was giving training to trainees. His wife Sudha removed her mask, called her husband to come inside the operation theatre for taking action against the accused and to inform the Police by screaming.

(ii)The accused were shocked and realized their illegal act. To cover up the incident and outsiders knowing about Aurl Nursing Home collecting money from trainee students for teaching operations procedures in an illegal manner, the accused felt that the victim Sudha should not be alive henceforth, otherwise she would reveal the illegal activities to outsiders and thereby no patients would come to their Nursing Home. Hence, the accused decided to eliminate Sudha otherwise their profession would be ruined. Further, A1 informed that there is no option except to cut the sigmoid colon and accordingly, A5 carried out the same. A4 administered the fainting injection, due to

which, Sudha became unconscious. Without giving treatment for sigmoid colon cut injury, the caesarian operation completed, which was a deliberate act, to see to that the said Sudha would get affected due to stagnation and leakage of faeces and thereby, pus formation, septicaemia and ultimately the respondent's wife would die of medical complications. A1 and A5 instructed A2 to A4 ensure no one can meet Sudha and further given solid food like rice and Idiyappam with an intention that Sudha would get stomach pain and the food stuff would get stagnated in the stomach leading to her death.

(iii)The stomach of Sudha got swelled with fever and no proper treatment was given to her despite requested by the respondent for better treatment. On 20.05.2012, at about 07.00 p.m., the respondent visited his wife who informed that the Doctors in Arul Nursing Home are not good person and requested for shifting her to some other hospital to save her life. When the respondent requested for shifting and handing over medical records for treatment, A1 in this case, requested the respondent to bring and handover all prior medical prescriptions for better treatment to be given by A5. The respondent not knowingly handed over all

medical records. On 21.05.2012, on perusal of the prior medical records, the respondent was informed that his wife was suffering from digestion problem and it will get alright if undigested food is taken out from the stomach. A1 to A4 adopted the process of removal of undigested food by pipe through nose and thereafter infused apple juice through nose to the stomach of the victim, the respondent's wife was given sleeping tablets, so that she will not made any complaint.

(iv)On 22.05.2012, the respondent's wife suffered heavy breathing problem, the respondent and his relatives requested the accused to take scan but the same was avoided. By administering regular sleeping dose, the respondent's wife was always in seduced stage. On 23.05.2012, around noon, scan was taken and the Doctors in the Arul Nursing Home informed that there is a small blood clot and further, they decided to shift the patient to Lifeline Hospital, Chennai. On 23.05.2012 without handing over case sheet, surgery report, discharge report they sent the respondent's wife in a car even without any oxygen support. On the way down, the respondent's wife development serious breathing problem,hence, to save her life, the respondent took her to Jipmer

Hospital emergency ward. The Jipmer Doctors finding no medical records available with the patient and the patient was in a serious condition informed the same to the Outpost Police and immediate operation done to save the life of victim, the Jipmer Doctors constituted a team and conducted operation and saved her life. Prior to it, injection was inserted in the stomach and found faeces spread inside the stomach. After prolonged battle the life of Sudha would be saved and she was finally discharged on 09.07.2012 from the Jipmer Hospital. The respondent had spend around twenty lakhs to save his wife Sudha.

(v)The victim Sudha examined herself as PW2, who narrated the sequence of events and corroborated the evidence of the respondent. Further, due to the complications created during caesarean operation, she continues to suffer, disabilities faced by her and she was unable to touch, feel and feed her newly born child for months together due to negligence of the accused. PW3, the Jipmer Doctor who headed the surgery team and conducted surgery on the victim confirmed the victim was with high pulse beating and heart beating and she was suffering with breathing trouble, intestine was not functioning in the normal way, Doctors

evidence clearly revealed that due to incompetency and negligence of the Doctors at Arul Nursing Home, Chidambaram. PW2 deteriorated but for the timely intervention of the Doctors at Jipmer Hospital PW2 could have saved.

(vi)He further submitted that the plan of the accused was to do away the victim since she came to know about the misdeeds of allowing the trainees to conduct operation collecting fee which fact was understood by the victim. To silence the victim from disclosing the same to outsiders and to save the name of the nursing home and Doctors, the accused cut the sigmoid colon and left it unattended so that that the victim collapses creating no doubt. He further submitted that in this case, the respondent earlier lodged a complaint with All Women Police Station, Chidambaram on 11.10.2012. Since the Police failed to take any action, the respondent filed the above private complaint before the learned Judicial Magistrate No.II, Chidambaram. The learned Magistrate recorded the statements of PW1 to PW3 and on the medical records produced finding the accused to be prosecuted, took the complaint on file and issued summons. The *prima facie* averments constituted the offence

for issuing summons, the same cannot be challenged mechanically. The victim Sudha clearly stated that when she informed the Doctors that she would lodge the complaint to the Police, A1 directed A5 to cut the sigmoid colon. The claim of the accused the they have been exonerated by the Medical Board is not correct, but in fact indicted them referring to the medical report of the Jipmer Hospital. The accused transported the victim Sudha on 23.05.2012 after 06.00 p.m., in a vehicle not supported with oxygen cylinder is confirmed by PW1 to PW3, post operative complications was due to the negligence and improper treatment by the accused.

(vii)In support of his contention, the learned Senior Counsel relied on the following citations. The Hon'ble Apex Court in the case of "***Bhushan Kumar Versus State reported in (2012) 5 SCC 424***" had held that the summons is a process issued by a Court for calling upon the person to appear before the Court, wilful disobedience is liable to be punished under Section 174 of I.P.C and it amounts to contempt of Court. As per Section 204 Cr.P.C., the learned Magistrate at the stage of issuance of process, is only to see *prima facie* satisfaction to proceed

against the accused. It is settled position that summoning order cannot be faulted for the reason that there is no reasoned order. The cardinal principle of criminal jurisprudence is that "a crime never dies" and the delay by itself is not a ground for dismissing the complaint, certain omission by the learned Magistrate in following the procedure would neither nullify the complaint nor the complainant can be non-suited because of failure or omission by the learned Magistrate.

(viii)The learned counsel placed reliance on the decision "***Japani Sahoo Versus Chandra Sekhar Mohanty reported in (2007) 7 SCC 394***" and submitted that non examination of all witnesses by the Magistrate would not be fatal to the complaint. Further, referring to the case of "***Rambhau and another Versus State of Maharashtra reported in (2001) 4 SCC 759***", submitted that it is not a defect incurable in nature, but mere irregularity, fit to be cured. In this case, by the act of the accused, they have committed criminal offence and it is not mere medical negligence case. Further placed reliance in the case of "***State of M.P Versus Bhooraji and others*** reported in ***(2001) 7 SCC 679***" wherein the Hon'ble Apex Court held that the condition precedent for taking

cognizance is not the standard to determine whether the Court concerned is a Court of competent jurisdiction. He placed reliance on the case of "***Mohd. Yousuf Versus Afaq Jahan (Smt) and another reported in (2006) 1 SCC 627***" for the point that there is no particular format of a complaint. A petition addressed to the magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprits be suitably dealt with, as in the instant case, is a complaint.

(ix)Further placed reliance on the case of "***S.K.Sinha, Chief Enforcement Officer Versus Videocon International Ltd., and others reported in (2008) 2 SCC 492***" for the point that as per Section 202 Cr.P.C., the Magistrate is to examine whether there is sufficient ground for proceeding with the matter and not whether there is sufficient ground for conviction of the accused. Further placed reliance on the case of "***Bhushan Kumar Versus State (NCT of Delhi) and another reported in (2012) 5 SCC 424***" for the point that the order passed by the learned Magistrate cannot be faulted with only on the ground that the summoning order was not a reasoned order.

(x)Assailing the above submissions and referring to the decisions, the learned counsel finally submitted that the points raised by the accused to quash the proceedings are factual in nature necessarily to be decided during trial. It is for the accused to appear before the Court of Sessions and prove their innocence during trial. Hence, he prayed for dismissal of both petitions with a direction to the lower Court to complete the committal proceedings and to complete the trial within a stipulated period.

7.This Court considered the rival submissions and perused the materials available on record.

8.It is not in dispute that the respondent's wife Sudha was taking treatment in Arul Nursing Home, Chidambaram, consulting the Doctors therein from 30.08.2011 and she was regularly going for check up. It was informed to the respondent and his wife Sudha that she had “breech presentation”. It is to be seen that the respondent is a Pharmacist in Government Hospital and his wife Sudha is a qualified Nurse in the Government Hospital, Kattumannarkovil. Both are familiar with the

medical procedure, medical condition and likely treatments.

9.It is projected that normal date of delivery was expected on 07.06.2012, but during their regular check up on 18.05.2012, A1 and A2 informed that normal delivery is not possible and Sudha has to undergo caesarian operation by Lower Segment Caesarean Section (LSCS) mode. A1 to A4 informed that A5, a Senior Surgeon specialist will do the surgery for Sudha. The respondent was not inclined for conducting surgery in Arul Nursing Home, Chidambaram for the reason that Arul Nursing Home, Chidambaram was not well equipped and it was without any blood bank or emergent operation theatre. A1 and A2 is said to have taken Sudha alone and convinced her. Thereafter, the respondent and said Sudha agreed for the caesarian operation, on 19.05.2012 consent was obtained from the respondent. The operation was fixed on 19.05.2012 at about 04.30 p.m. Anaesthesia administered by Dr.Dhanasekaran and thereafter, LSCS operation conducted by A1 and A5. Admittedly A2 to A4 were not there during the operation.

10.It is projected by the respondent that his wife Sudha informed him that she over heard A1 and A5 instructing a trainee to perform caesarian operation and giving directions, which was objected by his wife and she shouted, raised voice calling her husband. She also informed the accused that she would lodge a complaint with the Police. A1 and A5 finding exposed fearing and their name and reputation of nursing home would get affected, they cut sigmoid colon and thereafter, completed the caesarian operation, so that health complications will develop. On 20.05.2015, they forcibly given solid food like rice, Idiyappam, so that faeces get generated into the body, which will not get ejected due to the improper bowel movement and due to the cut in the sigmoid colon. This accumulation of faeces would develop into pus formation, septicaemia and ultimately, the said Sudha would die and later, it can be projected as medical complications.

11.It is further projected that Sudha informed the respondent that the Doctors in Arul Nursing Home, Chidambaram were not good people and asked him to immediately get her discharged and take her to a better nursing home. When the respondent asked for discharge and medical

records, the respondent was asked to bring the previous records. Further, respondent was informed by A1 and A2 that bowel sound was normal and on 21.05.2012, A5 would do further course of treatment and rectify the problem. A5 examined the patient and medical records and informed that if undigested food inside the intestine taken out, Sudha would become normal. A1 and A4 inserted the pipe through nose to remove the undigested food and they sent apple juice through the external pipe. On 22.05.2012, Sudha again developed breathing discomfort. The respondent and his relatives insisted for a scan for Sudha's problem, the accused deliberately delayed the said process and failed to take any scan or x-ray immediately. On the other hand, some sleeping tablets were given to Sudha so that she does not make any complaint. Thereafter, on the compulsion of the respondent and his relatives, on 23.05.2012 at about 12.00 noon, a scan was taken and the accused informed that the said Sudha had mild thrombosis. Thereafter, at about 06.00 p.m., without handing over the medical prescription, case sheet, surgery report, medical report, the accused referred Sudha to Lifeline Hospital, Chennai for further treatment and discharged Sudha. These allegations are not in consensus with the medical records and the same was made much after

the treatment taken in Jipmer Hospital, Puducherry.

12.The said Sudha got admitted in the Jipmer Hospital, Puducherry and took treatment from 23.05.2012 to 09.07.2012. Immediately, after her admission, on 23.05.2012, she was taken to emergency ward and the Doctors at Jipmer Hospital asked for previous medical records which could not be immediately given, due to which, a medico-legal case was reported to Outpost Police Station, Puducherry. In order to substantiate these allegations, no contemporary documents available.

13.On 23.05.2012, the Doctors from Jipmer Hospital, Puducherry injected and found pus formation and development of septicaemia. Immediately, surgery was decided on 24.05.2012. During surgery, around two litres of faeces were found, which is possible only if there is cut in the sigmoid colon. PW3, the Doctor of Jipmer Hospital, Puducherry states that it is possible during LSCS operation, hole in sigmoid colon not detected, post operative complications developed.

14.The respondent and his wife Sudha examined themselves as PW1 and PW2 at pre-cognizance stage, narrated the events from 19.05.2012 to 23.05.2012 and projected forced LSCS caesarian operation carried out by the accused forgetting for a moment that both the respondents and his wife are Pharmacist and Nurse who are well aware about the medical procedures better than a common man. Added to it, a new theory of trainee being present and Sudha over hearing the instructions given to the trainee to perform the operation is an exaggerated version to project a case that operation was done by a person without possessing the skill and the accused not exercised medical profession etiquette, so that a case of medical negligence is made out.

15.From the statement of the respondent and his wife Sudha, it is seen that the sigmoid colon was deliberately cut by A5 on the instructions of A1 to cover up the misdeeds of not getting exposed for allowing a trainee to perform the LSCS operation, for not furnishing all medical records, during discharge of Sudha. Further, Sudha's life could be saved by the timely surgery of Jipmer Doctors. A1 to A5 are Doctors attached with Arul Nursing Home, Chidambaram and they are all

qualified medical professionals, having considerable experience. The presence of trainee during the operation procedure is a clear afterthought to project operation done by a person without requisite skill. Further, stressing the statement of Dr.K.Balamourougan/PW3 that post operative complications is possible by not noticing the hole in sigmoid colon and proceeded with the case against the accused.

16.From the documents and statements, it is seen that for the allegation of not handing over the medical records i.e., case sheet, surgery report, discharge report, Sudha, wife of the respondent made a complaint to the Tamil Nadu Medical Council on 17.03.2014. In this regard, the Tamil Nadu Medical Council, by communication, dated 15.04.2014 directed the Doctors to send medical record to Sudha. The Doctors, by reply, dated 27.04.2014 informed that the medical records already furnished to one Mr.Navaseelan, brother of the respondent on 04.07.2012 as requested by the respondent. From the reply, it is seen that the Inspector, All Women Police Station, Chidambaram conducted an enquiry in this regard. All the Doctors, A1 to A5 were enquired and they gave written explanation on 01.11.2012. Again on 03.12.2012, the

Doctors appeared before the Joint Director, Medical and Rural Welfare Services and Family Welfare, Cuddalore with medical records and gave explanation. On the complaint of respondent, dated 21.11.2013, the Tamil Nadu Medical Council enquired, by explanation, dated 22.12.2013, all details furnished, again another complaint, dated 24.03.2014 for not furnishing medical records made to the Tamil Nadu Medical Council which was properly replied with contemporary records, thereafter, the complaint was closed. In this case, the respondent withheld earlier complaints, enquiry and the report of the Tamil Nadu Medical Council.

17.The Medical Board Report is filed by the respondent. The report of Prof.Dr.S.Deivanayagam, Head of Department, Madras Medical College, Chennai to the Director of Social Obstetric, ISO & Govt. Kasturba Gandhi Hospital for Women and Children, Chennai is scanned herein:

DEPARTMENT OF GENERAL SURGERY
MADRAS MEDICAL COLLEGE & RAJIV GANDHI GOVT. GENERAL HOSPITAL
CHENNAI - 600 003.

Prof. Dr. S. DEIVANAYAGAM M.S.,
Professor & Head of Department

Phone : 044-2530 5000 Extn. : 583
Email : dr_deiva@yahoo.com

To

The Director of social Obstetric,

ISO & Govt. Kasturba Gandhi Hospital for Women and Children,

Chennai – 05.

Sub : Medical Board – ISO & Govt. Kasturba Gandhi Hospital for Women and Children, Chennai- 05 – Tmt.Sudha W/o Senthilkumar – expert opinion – regarding.

Ref : Letter No.13202/E5/12 dt.9.1.2013 form the Joint Director of Health Service, Cuddalore transmitted by the Dean, R.G.Govt.General Hospital, Chennai -03. Ref No.1644/RMB/GH dt.22-1-13.

Respected madam,

Thanks for the reference.

After the detail perusal of the letter and enclosure I wish to the state the following.

Parient Miss.Sudha was admitted at Arul nursing home Chithamparam on 19-5-2012 for an elective caesarean section. On the same day at12.15PM caesarean was done.

As for the progress note and the surgeons note, patients was asymptomatic, till 21st evening. On 21st night patient developed mild distention of the abdomen. The surgeon was called and he advised to continue conservative treatment. The distension increased on 22-5-12 were the patient was again seen by the surgeon who diagnosed

13

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paralytic ileus and advised naso-gastric suction and continued the intravenous fluids. On 23-5-12 an ultra sonogram was done and there was 200ml of fluid in the peritoneal cavity. Then the patient was referred to a higher center at the request of the patient's husband.

Patient got admitted at JIPMER Hospital at pondichery. The discharge summary of the JIPMER Hospital suggests that the patient was admitted with signs and symptoms of septicemia and laparotomy was done where in there in the patient was found to have sigmoid perforation / post LSCS/ILEAL Gangrene peritonitis/ pyo-peritonium/ pyo-thorax with DVT. Ileostomy done.

Patient has had turbulent post operative period and underwent intensive surgical care treatment and other remedial surgeries.

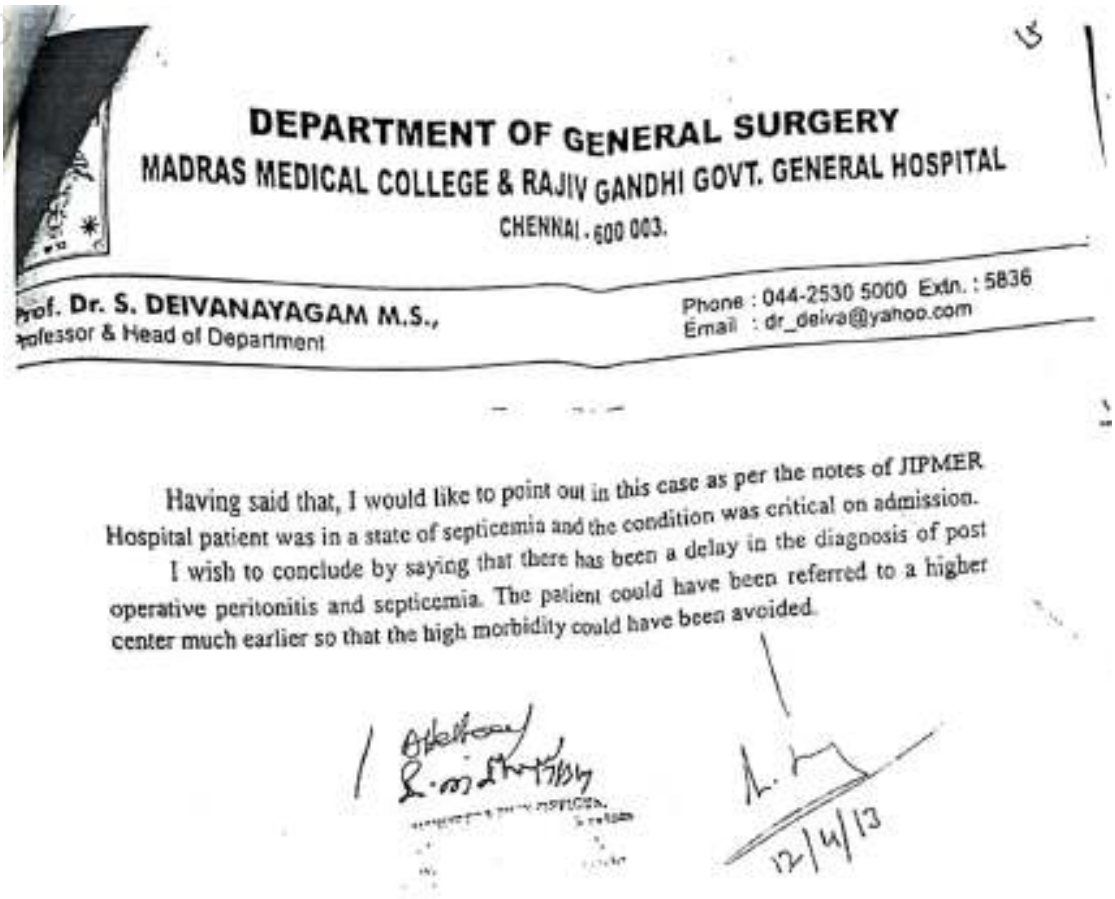
Conclusion :

1. Patient Sudha was operated for elective caesarean section.
2. Patient already has had open myomectomy one year back.
3. So anticipating adhesions the treating obstredician has rightly taken the help of a General surgeon during the surgery.
4. Operation notes say there were adhesions which were separated during surgery.
5. Post operative period was unevent full from 19-5-2012 till 21-5-2012 evening, then the patient developed abdomen distention and was referred to the higher center only on23-5-2012.

Adhesions are common in the post operative abdomen. There a is possibility 10% chances for injury to occur in the adjacent bowel and there is also possibility of missing the bowel injury because of dense adhesions.

Attested

17/3/14



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Having said that, I would like to point out in this case as per the notes of JIPMER Hospital patient was in a state of septicemia and the condition was critical on admission.

I wish to conclude by saying that there has been a delay in the diagnosis of post operative peritonitis and septicemia. The patient could have been referred to a higher center much earlier so that the high morbidity could have been avoided.

12/4/13

The conclusion of the report is that "*the patient could have been referred to be higher center much earlier so that the high morbidity could have been avoided*".

18.The Hon'ble Apex Court in ***Jacob Mathew*** case had dealt in detail with regard to the medical negligence as a tort and as a crime. In this Landmark Judgment, guidelines are issued to be followed before prosecuting the medical professionals and the same is extracted as follows:

> "***Conclusions summed up***
>
> ***48.*** *We sum up our conclusions as under:*
>
> *(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", "breach" and "resulting damage".*
>
> *(2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional.*

So long as a 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. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: 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 standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be

possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

*(4)The test for determining medical negligence as laid down in Bolam case [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] , WLR at p. 586 [[**Ed.**: Also at All ER p. 121 D-F and set out in para 19, p. 19 herein.]] holds good in its applicability in India.*

(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 304-A 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 304-A 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.

49. *In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta case [(2004) 6 SCC 422 : 2004 SCC (Cri) 1785] and reaffirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta case [(2004) 6 SCC 422 : 2004 SCC (Cri) 1785] . We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage [[**Ed.**: The following is the said extract from Merry and McCall Smith: Errors, Medicine and the Law, cited with approval in Dr. Suresh Gupta case, (2004) 6 SCC 422 (at pp. 247-48 of the book):"Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral*

blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, levels four and five are classification of blame, are normally blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high — a standard traditionally described as gross negligence.

***

Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its inappropriate use, however, distorts tolerant and constructive relations between people. Some of life's misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis."]] from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith

which has been cited with approval in Dr. Suresh Gupta case [(2004) 6 SCC 422 : 2004 SCC (Cri) 1785] (noted vide para 27 of the Report).

50. *As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by the police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to a rash or negligent act within the domain of criminal law under Section 304-A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by any standards.*

51. *We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution*

in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. *Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint 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. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical*

practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

19.Thus, looking the case against the petitioners, it can be safely held that there is nothing to show the accused lack necessary skill for performing operation to the respondent. Further, there is no gross negligence with an intention to cause harm. Under criminal law, the degree of negligence required is of very high degree and the negligence must be culpable or gross negligence and not the negligence merely based upon an error of Judgment. In this case, no satisfaction demonstratively shown before issuance of summons. While summoning medical professionals for rendering professional work, caution to be

shown, more so, when summons issued for a trial of Session case need demonstrative satisfaction. In this case, no such satisfaction shown.

20.In view of the above, this Court quashes the proceedings in P.R.C.No.3 of 2014 and C.M.P.No.578 of 2014 on the file of the Judicial Magistrate No.II, Chidambaram. Consequently, the connected Criminal Miscellaneous Petitions are closed.

28.04.2023

Speaking order/Non-speaking order
Neutral Citation: Yes/No
Index: Yes/No
Internet: Yes/No

vv2

To

The Judicial Magistrate Court No.II,
Chidambaram.

M.NIRMAL KUMAR, J.

vv2

PRE-DELIVERY ORDERS IN
Crl.O.P.Nos.13133 & 19497 of 2014

28.04.2023