

IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

Present: - Hon'ble Mr. Justice Subhendu Samanta.

C.R.R. No. – 2739 of 2018

IN THE MATTER OF

Dr. Nilanjan Indu & Ors.

Vs.

Madhab Chandra Mitra.

**For the Petitioners : Mr. Sandipan Canguly, Adv.,
Ms. Kabita Mukherjee, Adv.
Mr. Manas Dasgupta, Adv.
Mr. Gourav Das Adv.**

**For the OP : Mr. Ayan Bhattacharjee, Adv.,
Mr. Sharequl Haque, Adv.,
Mr. Debarka Guha, Adv.**

Heard on : 07.12.2023

Judgment on : 31.01.2024

Subhendu Samanta, J.

1. This is an application u/s 428 of the Code of Criminal Procedure for quashing the proceeding of a complaint case No. C-33 of 2015 corresponding to TOR 113 of 2015 u/s 304A of the IPC, pending before the Learned Judicial Magistrate, 6th Court Sealdah.

2. Factual Matrix:

The wife of the Opposite party Susmita Mitter was diagnosis with cancer in her ovaries in the year 2012. The patient was operated by Dr. Subhankar Deb, at Apollo Gleneagles Hospital, Calcutta on 24.02.2012. In the month of June, 2013 Cancerous growth recurred

and the patient was again admitted to the said hospital under Dr. P.N. Mahapatra (medical oncologist)– chemo therapy was administered upon her. On 20.07.2014 the patient was finally admitted at surgical ICU Unit under Dr. P.N. Mahapatra and Dr. Subhankar Deb of Apollo Gleneagles Hospital her health held deteriorated from the end of April 2014. Thereafter echo screening was done and it was decided to remove Chemo part from the patient. Surgery held on 29.07.2014 (evening), Dr. Subhankar Deb performed operation at O.T. of Apollo Gleneagles Hospital. On 30.07.2014 at about 09.15.a.m. the patient suffered cardiac Arrest and CPR was administered to save her life. At about 9: 35 am, on the same day, the patient had expired.

The opposite party herein lodged a complaint u/s 200 Cr.P.C. with the Learned ACJM Sealdah against the petitioner alleging criminal negligence and dereliction duties of the present petitioner u/s 304 IPC read with West Bengal Clinical Establishment.....2010 and Indian Medical Council 2002.

3. The specific allegation against the present petition has been mentioned in the paragraph 4 to Paragraph 9 for the said complaint as follows.

4. That the patient was finally admitted to Apollo Gleneagles Hospital, 58, Canal Circular Road, Kolkata – 700054 on 20th July, 2014, after health began to deteriorate from the end of April, 2014. She had to be admitted to the Surgical ICU under the above-mentioned doctors Dr. P.N. Mahapatra and Dr. Subhankar Deb who formally called and consulted a couple of specialists, the patient herself reported to be better. On 28th, the Eco Screening was done and it was decided to remove the ‘port’ through surgery. Accordingly

on 29th Evening. Dr. Subhankar Deb, Onco Surgeon performed the operation at OT3 of Apollo Gleneagles Hospital Limited. The patient, in a stable condition, was shifted to Surgical ICU from the OT. At that moment, the person in charge of Surgical ICU where the patient was admitted was one Dr. Siddhartha S. Mukherjee who himself professed and was also corroborated by the nurses' desk that he is on duty till 10 a.m. tomorrow i.e. 30th July, 2014.

5. That the petitioner visited the hospital to see his wife, the patient/victim on 30th July, 2014 at about 6.45 a.m. He received a rude shock when he was told by the attending nurses that the patient's blood pressure had fallen drastically. The petitioner instantly looked for Dr. Siddhartha S. Mukherjee, the accused No. 1 but to he was flabbergasted upon being reported from the nurses' desk that the said doctor had left.

recovering from his shock, the petitioner frantically began searching for a doctor who could attend his ailing wife. One of the doctors in an adjoining ICU and agreed to take a look into the matter, and came to the concerned ICU and instructed the Nurse present therein for certain treatment.

Unfortunately, at 9.15 a.m. the petitioner was intimated that the patient had suffered a cardiac arrest and CPR (Cardio-Pulmonary-Resuscitation) was being administered to save her life. The petitioner was aghast and upon having some idea of CPR and its probable implications, dashed in search of the said Dr. Mukherjee, but he was nowhere to be found, nor could any of the hospital staff disclose his whereabouts.

Ultimately at 9.45 a.m. the petitioner was informed by attending Nurse that the patient had expired.

6. That despite all the traumatic experiences the petitioner/complainant went through on that fateful day, he still found the resolve to enquire about Dr. Siddhartha S. Mukherjee but he conspicuous by absence in the surgical ICU.

Thereafter the petitioner/complainant demanded a reply about such call us, indifferent and neglect act of the doctors from the Director, Medical Services, Apollo Gleneagles Hospital, Accused No. 3, 58, Canal Circular Road, Kolkata - 700054 but in his

reply the said Director assured that he will personally enquire into the matter at the earliest and would provide feedback to your petitioner/complainant.

7. That the petitioner/complainant submits that despite a period of four months having elapsed from the date of the incident no communication was made from the Hospital Authority as regards the action taken, as promised. Ultimately the petitioner was compelled to issue a letter dated 25.11.2014 which was duly received by the Hospital Authorities on 28.11.2014, asking the authorities to update the petitioner as regards the steps taken in pursuance to the assurances made by the Director, Medical Services, upon failure of which the petitioner was to be left no alternative but to take appropriate legal recourses against the accused persons for justice.

Unfortunately despite receipt of such letter the Hospital authorities never reverted back to the petitioner/complainant.

8. That the gross omission which tantamount to criminal negligence committed on the part of Dr. Siddhartha S. Mukherjee is in utter violation of the law of the land and also the code of conduct in which he was being a doctor was duty bound to adhere to the established norms of medical treatment.

That your petitioner/complainant submits that the Medical Council of India in the Indian Medical Council (professional conduct, Etiquette and Ethics) Regulations, 2002, has clearly laid down the code of conduct as to be observed by the medical professionals in course of their work. All doctors are required to give an undertaking in the manner as per the India Medical Council Act, 1956 while enrolling themselves under the Act. Certain relevant portions of the code are quoted hereunder:-

a) A physician is free to choose whom he will serve. He should, however, respond to any request for his assistance in an emergency. Once having undertaken a case, the physician should not neglect the patient, nor should he withdraw from the case without giving adequate notice to the patient and his family. Provisionally or fully registered medical practitioner shall not wilfully commit and act

of negligence that may deprive his patient or patients from necessary medical care.

b) Though a physician is not bound to treat each and every person asking his service, he should not only be every ready to respond to the calls of the sick and the injured, but should be mindful of the high character of his mission and the responsibility he discharges in the course of his professional duties. In his treatment, he should never forget that the health and the lives of those entrusted to his case depend on his skill and attention a physician should endeavour to add to the comfort of the sick by making his visits at the hour indicated to the patients. A physician advising a patient to seek service of another physician is acceptable; however, in case of emergency a physician must treat the patient. No physician shall arbitrarily refuse treatment to a patient. However for good reason, when a patient is suffering from an ailment which is not within the range of experience of the treating physician, the physician may refuse treatment and refer the patient to another physician.

That the petitioner states in the instant case, the said Dr. Mukherjee had withdrawn himself for duty without any intimation to the patient's family or the Hospital Management as is revealed by the existing circumstances. He never handed over the charge to any other doctor who, with the right instruction in due time, would certainly have gone for a more specific mode of response, tailored to suit the patient's physiological condition.

9. That the petitioner submits that the administration of CPR is a most delicate procedure and comes with several riders. It is globally acknowledged by Medical Experts that CPR is not always an advisable method of treatment in cases of cancer.

Cancer patients have a poor survival rate after the administration of CPR into them. Cancer most commonly causes organ failure in the body, thereby reducing the functioning of multiple organs, and CPR would only make things worse. CPR often leaves terminally ill patients with brain damage and other grievous side effects, often death itself. This means that doctors, nurses and Emergency Medical Personnel will not attempt emergency CPR if the patient's breathing or heartbeat stops.

That the petitioner further submits in the instant case, the CPR had been administered in a

most unethical impulsive way and rush without attempting to obtain any prior consent of the patient's family, and moreover in the absence of the Medical officer who was in charge of her, and also in absence of Dr. P.N. Mahapatra and Dr. Subhankar Deb, the consultants who were aware of the patient's medical history. This is in contravention to the standards of care and safety with regard to CPR that is practiced the world over.

That the petitioner says that any Medical Professional is bound as per the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002, which provide that doctors may refuse treatments if the ailment of the patient is beyond his range of experience. In the present case, despite having no brief on the patient's status, the doctor went for CPR, which failed leading to the patient's death.

4. Upon the said complaint Learned Magistrate had examined the Present Opposite Party and one witness namely Manas Kumar Kar on SA on the basis of such evidence. Learned Magistrate issued process against the accused persons in connection with that complaint case No. 33 of 2015.

5. Dr. Dipankar Ganguly and other filed an application u/s 482 of the Code of Criminal Procedure before this court for quashing the said proceeding in No. 33 of 2015. After hearing, one Coordinate Bench of this court was pleased to set aside the summons issued against the present petitioner and remanded the matter back to the Learned Magistrate directing the Learned Magistrate to proceed with the inquiry u/s 200/202 of the Code of Criminal Procedure following the law laid down by the Hon'ble Supreme Court in the case of **Jacob Mathew Vs. State of Punjab and Ors.** Learned Magistrate 6th Court Seladah directed the superintendent NRS Medical College and Hospital to call for the records from the Apollo Gleneagles Hospital

and upon receiving of the reports the medical board as constituted by virtue of decision of this court has submitted a report as follows:

Opinion

Mrs. Susmita Mitter w/o Madhab Chand Mitter was a patient of metastatic Carcinoma Ovary post Chemotherapy. She had an Indwelling chemoport (needed for treatment) and developed systemic candidiasis subsequently septicaemia with hypovolemic shock, respiratory failure and renal failure. She was requiring high dosage of inotropic support for maintaining blood pressure and ventilator support for maintaining respiration. The patient already suffering from terminal disease with such serious life threatening complications developed cardiac asystole and could not be revived inspite of CPR being given as per ACLS protocols. However there are some technical lapses and improper documentation of the treatment procedure in the terminal stages but where that has lead to or hastened the death process of the patient who was already suffering from malignancy disease in terminal stage could not be ascertained.

On perusing such report the Learned Magistrate was pleased to issue process against the present petitioner u/s 304A IPC.

6. Hence this criminal revision has been preferred by the present petitioner for quashing.

Submission of the petitioner :-

7. Learned Advocate Mr. Sandipan Ganguly appearing on behalf of the petitioner submits that the instant proceeding is a gross abuse of process of court which it allowed to continue will degenerate itself into of weapon of harassment and persecution and as such the same is liable to be quashed for the ends of justice. It is the submission of Mr. Ganguly that the present petitioner were all along present at the surgical ICU as would be evident from the certificate issued by the hospital. After it was detected by the petitioner as also other doctors present in the ICU that the condition of the patient was

deteriorating, the petitioners did their best as per their competence and job description to overcome the deteriorating condition of the patient. However, in spite of all the best efforts, the condition of the patient continued to deteriorated and finally about 9:45 a.m. the patient expired. Moreover, the petitioner No. 2 finished his duty at 7:00 a.m. and left the ICU after giving charge administratively to the relevant doctor present at the time at ICU. Mr. Ganguly further argued that a professional may be held liable for negligence one of two findings that is, either he was not possessed of the requisite skill which it professed to have possessed or he did not exercise the requisite with competence in the given case, the skill he did possessed. The standard to be applied for the Learned Judge whether the person charged with had negligence or not, would be that of an ordinary competent person exercising ordinary skill in that position. It is not possible for every professional to possess highest level of expertise or skill in that branch which he practices, in the instant case, it is an admitted position that the patient was admitted under the meaning of supervision of Dr. PK Mahapatra and Dr. Subhankar Deb and the petitioner herein was only the Rotating Registrar in the ICU Unit as appointed by the management of Apollo Gleneagles Hospital. However, the said person under whose treatment the patient was admitted were not arraigned as an accused by the opposite party. In such circumstances continuance of the proceeding against the present petitioner in bad in law and liable to be quashed.

8. Mr. Ganguly further argued that a medical practitioner is not liable to be held negligent simply because things went wrong due

to mischance or misadventure through an error of judgment in choosing one reasonable course of treatment and preference to another. An error of judgment may or may not be negligent but it depends on the nature of error. He further argued that the wife of the OP was diagnosed with Cancer in her ovary since April 2012. Thereafter operation was conducted by the Dr. Subhankar Deb, later on in the year 2012 Chemo Therapy were administered by Dr. Mahapatra Later on, cancerous growth recurred for which Chemo Therapy were resorted after admitted her to hospital; lastly on July 2014 Dr. Deb performed surgery to remove the chemo port. After such surgery, she was admitted to the surgical ICU of Apollo Gleneagles Hospital where she died on the next morning. From the petition of complaint, it is crystal clear that the condition of the patient was precarious and the Doctors under whose treatment the patient was admitted in spite of taking all possible recourse, the patient was not responding to any treatment. However, while all the doctors were involved as a team in the treatment of the patient. The present petitioner who was only authorised to look after the ICU, have been arraigned as accused by the opposite party. In such circumstances Mr. Ganguly argued that the impugned proceedings is liable to be quashed.

9. Mr. Ganguly further argued that the Learned Magistrate accepted the finding of the medical board and was pleased issued summons against the present petitioner for commission of offence u/s 304 IPC. It is possibly erroneous in view of the fact that Learned Magistrate had failed to consider the Medical Board itself opined

whether the wife of the OP could be attributed to the technical lapses or improper documentation of the treatment proceeding could not be ascertained. Learned Magistrate should not have placed reliance upon non-conclusive report of the Medical Board.

10. Mr. Ganguly further argued that by virtue of decision of **Hon'ble Apex Court in Jacob Mathew Vs. State of Punjab** followed by the decision of Hon'ble Apex Court in **Dr. Suresh Gupta** and after the parameters of Bolan Test, the negligence has defined u/s 304 A of IPC should be "gross negligence". In this case the "gross negligence" against the present petitioner cannot be made out. Hence the present criminal proceeding against the present petitioner is liable to quashed. In support of his contention Learned Advocate for the petitioner cited several judgments of Hon'ble Apex Court as follows:

- 1. Dr. Suresh Gupta Vs. Government of NCT of Delhi (2004) 6SCC 422.**
- 2. Jacob Mathew Vs. State of Punjab and anrs. (2005) 6 SCC1**
- 3. Rakesh Ranjan Gupta Vs. State of UP and Anr. (1999) 1SCC 188.**
- 4. Jayashree Ujwal Ingole Vs. State of Maharstra and Anr. (2017) 14 SCC 571.**
- 5. A.S.V. Narayan Rao Vs. Ratnamala and Ors.(2013) 10 SCC 741.**

Submission of Learned Advocate for the Opposite party:

11. Mr. Ayan Bhattacharya Learned Advocate appearing on behalf of the opposite party/complainant submits that it would be revealed from the fact of the instant case that on July 30,2014 at

about 06:45 a.m. the complainant visited Apollo Gleneagles Hospital to see his wife, the victim, when he was astonished to be informed that the blood pressure of the victim had fallen drastically. The complainant instantly looked for the petitioner No. 2 but he was flabbergasted to know from the nurses desk that the petitioner No. 2 had left by then. No other doctors could be traced in an around the surgical ICU. Thereafter the complainant frantically began searching for a doctor who could attend the victim. The petitioner No. 1 was found in another ICU being requested with folded hands come to the concerned surgical ICU and verbally instructed the nurses for certain treatment. Unfortunately, at 9:15 a.m. on the same day, the complainant was informed that the victim had a cardiac arrest and Cardio Pulmonary Resuscitation (CPR) was administered to the victim. The complainant was dumb founded to know that as he was aware of the probable implications of CPR on a Cancer Patient. As the petitioner No. 2 was the Doctor-in charge in the said ICU, the opposite party/ the complaint tried to find the petitioner No. 2 but could not locate him as he has reported to be left. Ultimately at 09:45 a.m the complaint was informed by the attending nurses that the victim had expired.

12. Mr. Bhattacharya specifically argued that the petitioner No. 2 was the doctor-in charge of the said ICU and he without information to the present complainant had left the ICU at about 06:45 a.m. while he was a duty till 09:00a.m. The negligence on the part of the opposite party No. 2 solely caused the death of the wife of the complainant. The present petitioner No. 1 being the registered

Medical Practitioner is also responsible for the gross negligence act when he administered CPR to the victim, a patient of Cancer in a terminal stage. The conduct of the petitioner No. 1 resulted the untimed death of the wife of the present complainant. He further argued that petitioner No. 2 had withdrawn himself from duty without any intention to the patients family or the hospital management as is reflect from the attending circumstances. He never handover the charge to any other doctor. He further argued that the administration of CPR is most delicate procedure and come with several riders which is advised to be ignored by the medical expert i.e. CPR is not always and advisable method of treatment in cases of Cancer. Mr. Bhattacharya further argued that the Learned Trial Magistrate after remand of the case had followed the procedure laid down by the Hon'ble Supreme Court in **Jacob Mathews (supra)** and constitute a medical board comprising several of Head of the Departments of NRS medical college and Hospital. The Medical Board requisitioned the documents from Apollo Gleneagles Hospital for conclusive finding but stringent enough, the Apollo Gleneagles Hospital did not respond to such process to save the present petitioner. However it was reported to the Learned Magistrate by the superintendent NRS Medical Hospital who was given unfettered power to call for the records from Apollo Gleneagles Hospital. After considering the report and also considered the opinion of Professor AK Gupta the medical board as submitted a report to the Learned Magistrate. The Learned Magistrate after perusing the report had satisfied about the prima facie commission of offence, issued process

against the present petitioner. He argued that the report may not have directly implicate the present petitioner, but it is the duty of the Magistrate/Court to look into the merit of the instant case u/s 304A of the IPC. The order of Learned Magistrate dated February 10, 2017 to re-issue the process against the present u/s 304A IPC is not at all an order liable to be quashed.

13. Mr. Bhattacharya further submits that the instant revisional application is the second quashing petitioner after the first petition was disposed by Hon'ble Justice Jaymalya Bagchi by his order dated 04th March 2016. The order of remand passed by the Coordinate bench would reveal that it was a limited remand. Thus following of second quashing petition of the petitioner on similarly and identical grounds for second time adjudication is illegal in the eye of law. The term "*at this stage*" as mentioned any order dated May 4, 2015 demonstrate the stage of the case which was issuance of process. The first quashing petition was filed targeting the entire proceeding which was turned down by the co-ordinate bench of this court. The hearing of the instant quashing application tantamount to the sitting in appeal over the order dated March 4, 2016 passed in the first quashing petition.

14. He further argued that the High Court has its inherent power u/s 482 Cr.P.C. which is a very limited power. High Court in its inherent power does not act as a Court of Appeal or Revision. Inherent power to quash the proceeding appears to be illegitimate or beyond any doubt the jurisdiction u/s 482 Cr.P.C. is a small one and it is triggering only the prima facie case. The defence of the accused

however plausible that may be, cannot be taken into consideration at this stage. In support of his contention he referred:-

Alka Bapu Gund Vs. Prakash Kanhaiyalal Kankaria (2017) 11 SCC

108.

3. The High court in the impugned judgment seems to have embarked on a virtual trial of the case though it was entertaining an application under Section 482 Cr.P.C./Article 227 of the Constitution of India for quashing of evidence tendered by the complainant's witnesses prior to issuance of process was even gone into by the High Court.

4. Having regard to the settled principles of law, we do not consider the approach of the High Court to be correct in law. at the stage at which the case was poised for consideration, it was beyond the jurisdiction of the High Court to have embarked upon the exercise that was undertaken. As the same appears to be in clear excess of jurisdiction. We set aside the order of the High Court and direct that the complaint proceedings against the respondent-accused be continued from the stage where the same was interdicted.

15. He further argued that when prima facie case has been made out and the magistrate was satisfied to issue a process it is not desirable for the High Court to quash the proceeding disregarding the observation of the Magistrate. In support of his contention he cited a decision of Hon'ble Supreme Court reported in **Fiona Shrikhande Vs. State of Maharastra and Anrs. (2013) 44**

11. We are, in this case, concerned only with the question as to whether, on a reading of the complaint, a prima facie case has been made out or not to issue process by the Magistrate. The law as regards issuance of process in criminal cases is well settled. At the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to prima facie satisfy whether there are sufficient grounds to proceed against the accused and it is not the province of the Magistrate to enquire into a detailed discussion on the merits or demerits of the case. The scope of

enquiry under Section 202 is extremely limited in the sense that the Magistrate, at this stage, is expected to examine prima facie the truth or falsehood of the allegations made in the complaint. The Magistrate is not expected to embark upon a detailed discussion of the merits or demerits of the case, but only consider the inherent probabilities apparent on the statement made in the complaint. In *Nagawwa v. Veranna Shivalinagappa Kojalgi*, this Court held that once the Magistrate has exercised his discretion in forming an opinion that there is ground for proceeding, it is not for the Higher Courts to substitute its own discretion for that of the Magistrate. The Magistrate has to decide the question purely from the point of view of the complaint, without at all advert to any defence that the accused may have.

16. Mr. Bhattacharya further argued that the direction of Hon'ble Apex Court in **Jacob Mathew (supra)** has been properly complied with by the trial Magistrate and the opinion of the trial Magistrate is based upon the opinion of Doctor AK Gupta and also the opinion of Medical Board comprising of 05 doctors who found merit in the allegations. He also submitted that it is not out of place to mention herein that in the **Jacob Mathew (supra)** the Hon'ble Supreme Court has not suggested for a definite and conclusive opinion from the board. Conclusiveness and the definiteness has to be arrived at by a court of law in judging the guilt, the same would be misinterpretation of the ratio of **Jacob Mathew (supra)**. In support of his contention Mr. Bhattacharya cited a decision of Hon'ble Apex Court reported in **Malay kr. Ganguly Vs. Sukumar Mukherjee and Ors (2009) SCC 221**.

139. In fact, Bolam Case in common law jurisdiction is weakened in the recent years by reason of a series of decision in Australia (Rogers v. Whitaker and Rosenberg v. Percival); Canada (Reibl v. Hughes) and the United States and even in the United Kingdom.

140. we may refer to Bolitho v. City and Hackney Health Authority where the Court got away from yet another aspect of Bolam Case. It was observed: (WLR pp. 1158 H-1159C)

“.... the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant’s treatment or diagnosis accorded with sound medical practice... The use of these adjectives—responsible , reasonable and respectable – all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter”

141. in this regard it would be imperative to notice the views rendered in Jacob Mathew v. State of Punjab where the Court came to the conclusions:

(i) Mere deviation from normal professional practice is not necessarily evidence of negligence.

(ii) Mere accident is not evidence of negligence.

(iii) An error of judgment of the part of a professional is not negligence per se.

(iv) Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur.

17. Mr. Bhattacharya further argued that the stand taken by the petitioner before different forum are also significant as such the stances are not only contradictory but also mutual destructive. From the **Indian Medical Council (professional conduct, antiquate and cheques). Regulations 2002** particularly their regulations 1.1.2/1.3/1.3.1/1.3.2/2.3/2.4, it would be revealed that the petitioner No. 2 doctor in charge of the ICU has violate the professional conduct which tantamount to be a “gross negligence”. The maintenance of medical records and the duties and obligation to

the patients mentioned in the said regulations made it clear that the present petitioners has grossly violated the regulations.

18. Learned Advocate Mr. Ayan Bhattacharya also distinguished the ration of judgments cited by the Learned Advocate for the petitioner on the ground that the facts and circumstances of the cited case are clearly distinguishable to the present case. He finally submits that it would be revealed from the litigations pending between the parties in the other forum that the petitioner No. 2 was “gross negligent” in the treatment which directly resulted to the death of the wife of the complainant by discontinued the “nor- adrenaline”. It would be revealed from the notice of the pharmacy bill of the patient dated 30.07.2014 that the entire 08 units of Vasocan (trade name of adrenaline) was returned to the pharmacy after expiry of the patient, that means the adrenaline was not at all administered to the patient to maintain the blood pressure of the victim. On the basis of the said argument Mr. Bhattacharya submits that the instant quashing application filed by the present petitioner is devoid of merit and the proceeding pending before the Learned Magistrate cannot be quashed.

Litigation between the parties in the different forum:

19. The opposite party filed a consumer complaint before the Learned District Consumer Forum, unit- I, Calcutta in Consumer case No. 144 of 2016 against the present petitioner and hospital authorities. The Learned District Forum rejected the Consumer Complaint of the opposite party filed against the present petitioner. The OP filed an appeal before the Hon’ble State Consumer

Commission who set aside the order of the Learned District Forum. The petitioner filed a revisional application being No. 620 of 2020 against the judgment and order of the State Consumer Forum Commission before the Hon'ble National Consumer Dispute Redressal Forum, which has allowed the said revision against which one SLP preferred before the Hon'ble Apex Court vide SLP (c) No. 18709-18710/2002 Hon'ble Apex Court has allowed the present opposite party to file a proper application before the Hon'ble High court Delhi. Hon'ble High Court of Delhi vide its order dated October 4, 2023 CM APPL. 50903/2023 directed the respondents/present petitioner not to rely upon the impugned orders in any proceeding. The Opposite party had also lodged a complaint against the present petitioner before the West Bengal medical Council (WBMC) wherein the Medical Council has formed an opinion that no negligence may be substantiated against the present petitioner. The opposite party filed an appeal against the said order of WBMC before the Ethics Committee. The Ethics Committee also affirmed the order of WBMC by rejecting the appeal. The OP preferred before the board of Governors. The Board of Governors was also not considered the prayer of the Opposite Party and pass an order on 11.05.2019. The OP preferred a writ petition before the Hon'ble High Court Delhi against the said order dated 11.05.2019 vide WP No. 905 of 2020 wherein, the Delhi High Court has set aside the impugned order dated 11.05.2019 and the matter is remanded back to the Ethics and Medical Registration Board of National Medical Commission to consider the matter and pass a reasoned order.

Findings :-

20. Heard the Learned Advocates. Perused the materials on record. Heard the arguments and the relevant law laid down by the Hon'ble Apex Court. A criminal complaint initiated against the doctors before the Learned Magistrate was challenged by this instant criminal revision. the charge was levelled against the doctor u/s 304 IPC Section 304- A IPC read as follows:-

304A. Causing Death by negligence.-

Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

21. It has been alleged in this case that the petitioner No. 2 being a doctor-in charge of the ICU had left the ICU without information to the OP or the hospital authority thus the wife of the OP, victim has died due to non providing treatment by the Dr. (petitioner No.2); its allegation against the petitioner No. 2 that he committed gross negligence by leaving hospital while he was in-charge to treat the serious patient. The allegation against the petitioner No. 1 is that he had administered CPR to the victim without knowing fully well that CPR is not the right treatment for a patient of Cancer in terminal stage. That is the petitioner No. 1 also has committed gross negligence by providing wrong treatment to the victim which resulted the untimely death of the wife of the complainant. The Supreme Court in **Jacob Mathew (supra)** has specified the term '*negligence*' in Section- 304A IPC and the degree thereto required under the law of tort and under the criminal law as follows:-

13. The Moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the act may hope that they do not occur, but this hope nevertheless failed to inhibit the taking of the risk. Certain types of violation, called optimising the violations, may be motivated by thrill-seeking. These are clearly reckless.

14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in *Andrews v. Director of Public Prosecutions* stated (All ER p. 556C)

“Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree or negligence is required to be proved before the felony is established.

Thus, a clear distinction exists between “simple lack of care” incurring civil liability and “very high degree of negligence” which is required in criminal cases. In *Riddell v. Reid* (AC at p 31) Lord Porter said in his speech--

“A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability.” (Charlesworth & Percy *ibid.*, para 1.13)

15. The fore-quoted statement of law in *Andrews* had been noted with approval by this Court in *Syad Akbar v. State of Karnataka*. The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence viz. The proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution

must be culpable or gross and not the negligence merely based upon an error of judgment.

22. The Hon'ble Supreme Court in **Jacob Mathew** also proposed the "*Bolan Test*" to assess the gross negligence of a doctor in a criminal proceedings. The parameters of the "*Bolan Test*" has been stated by the Hon'ble Supreme Court in **Jacob Mathew** as follows:

18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. 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 understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of 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 necessary for every professional to possess the highest level of expertise in that branch which he practises. In Michael Hyde and Associates v. JD Williams & Co. Ltd. Sedley, L.J. said that where a profession embraces a

range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable.

19. An oftquoted passage defining by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair, J. In *Bolam v. Friern Hospital Management Committee*, WLR at p. 586 in the following words:

“[W]here you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill.. It is well established law that it is sufficient if he exercise the ordinary skill of an ordinary competent man exercising that particular art”.

20. The water of Bolam test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and a well condensed one. After a review of various authorities Bingham, L.J. in his speech in *Eckersley v. Binnie* summarised the Bolam test in the following words: (Con LR p. 79)

“From these general statements it follows that professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.” (Charlesworth & Percy, *ibid.*, para 8.04)

24. The classical statement of law in Bolam case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before the court in India and applied as a

touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly the standard of care, when 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. Secondly, 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 point of time on which it is suggested as should have been used.

25. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. T times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

26. No sensible profession would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter- productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur.

23. The Hon'ble Supreme Court has also framed the parameters in a case of medical negligence as follows:-

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 attributed to the person sued. The essential components of negligence are there: "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, WLR at p. 586 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 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.

24. Considering the entire facts and circumstances and considering the law laid down by the Hon'ble Supreme Court in **Jacob Mathew** followed by **Dr. Suresh Gupta**, it appears to me that

to prove the prima facie allegation against the present petitioner for an offence of “gross negligence” in treating the wife of the complainant, the facts and circumstances shows the petitioner No. 2 was in the ICU since 2:00 a.m., had treated the wife of the complainant according to the procedure laid down thereof and guided by the consultant doctors; admittedly patient was in the terminal stage. If the case of the complainant is believed to be true, that the petitioner No. 2 had left the hospital premises before 06:45 a.m. on 30.07.2014, that does not prove that he has committed “gross negligence” as defined by the Hon’ble Supreme Court in **Jacob Mathew**. The certificate of Apollo Clinical hospital shows that the Petitioner No. 2 had its scheduled duty ended at 7:00a.m. on 30th July 2014; thus the absence of the petitioner No. 2 during the serious condition of the victim i.e. about 9:00 a.m. of 30th July 2014 has its relevancy. The Hon’ble Supreme court in the cases of **Dr. Suresh Gupta (supra)** as well as **Jayashri Ujwal Ingole (supra)** has quashed the criminal proceeding against the doctor u/s 304A IPC on the similar facts and circumstances. The “gross negligence” as required to be proved u/s 304A IPC against the doctor must be of the such a degree that can be equated with the “mens rea” of the accused persons. Mere breach of duty or omission to do the required duty by the medical practitioners does not prove the “gross negligence”. The petitioner No. 1 being a doctor had administered the CPR which was opined by Professor AK Gupta as well as the complainant to be the incorrect procedure of treatment but the board of doctors comprising 05 doctors (Head of the Departments) of the NRS Medical College and

Hospital opined that the administering CPR of the petitioner No. 1 is not at all a wrong treatment.

25. Considering the facts and circumstances of this case also considering the argument advanced by the Learned Advocates it appears to me that the complaint case initiated by the complainant/Op before the Learned Magistrate does not made out a case of rash or negligent act by the present petitioners as contemplated u/s 304A of IPC. The negligence if any so attributed by the present petitioner (according to the complainant) is not at come within the meaning “gross negligence” as defined by the Hon’ble Supreme Court in **Jacob Mathew (Supra)**.

26. The fact of the case goes to show that the present complainant opposite party has preferred parallel two proceedings against the present petitioners before the different forum; one is before Consumer Dispute Redressal Forum and another is before the Medical council. Both the proceeding are about to conclude. I can understand that the pain of the complaint is so immense due to loss of his beloved wife that, he left no stone unturned to proceed against the present petitioners. The present petitioners, being the doctors had to drag/appear before the different forum according to the directions of the forum. The loss of the complaint cannot be compensated in any terms of money but such pain of the complaint cannot be minimised by initiated different proceedings against the present petitioner which are pending for more than 10 years. It can be assumed that the professional reputation of the present

petitioners has also been hampered drastically by virtue of those pending proceedings.

27. Furthermore, the present petitioners acted under the guidance of the consultant senior doctors to take care of the patients in ICU. The petitioners were only responsible for basic care of the patients at the ICU and to fight an emergent situation as per the direction of the senior doctors under whose observation the patient has been admitted. The doctors available in the ICU duly followed the mandate laid down by the senior consultant under whose guidance the victim was admitted. In this situation the present petitioners cannot directly liable for serious damage to the victim. Moreover, WBMC Export opined that adrenaline was not needed as high dose of non-adrenaline was being administered. It is not a case that the petitioners have ever stop the non-adrenaline of any life support system of the victim; thus the alleged offence of “gross negligence” on the part of the petitioners did not prima facie made out. The doctors-in charge of ICU (Rotating Registrars) are not liable to be prosecuted for “gross negligence” u/s- 304A IPC when there are no allegation of stoppage of life support system of victim in ICU.

28. The previous application for quashing filed by the present petitioners has not been disposed of on the merits. Moreover, the prayer for quashing was not considered by the Co-ordinate Bench on the earlier occasion, thus it appears to me that the present application for quashing is not barred by the issue-estoppel.

29. Under the above observations, in my view, the further proceeding of the impugned criminal complaint case against the

present petitioners if allowed to be continued, would tantamount to be an abuse of process of court. Thus the same is liable to be quashed.

30. Accordingly the instant criminal revision has got merit and it is allowed.

31. The complaint case being No. 33 of 2015 corresponding to TR No. 113 of 2015 u/s 304 A of IPC against the present petitioners pending before the Learned Judicial Magistrate 6th Court Sealdah is hereby quashed.

32. CRR is disposed of.

33. Connected CRAN applications, if pending, are also disposed of. Any order of stay passed by this court during the pendency of the instant criminal revision is also vacated.

34. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)