* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CRL.M.C.No.981/2007**

% **Date of decision : 24.10.2008**

Dr.Ritu Rawat and Another ..... Petitioners

Through: Mr.Siddharth Luthra, Sr. Advocate with Mr.Samarjit Pattnaik, Mr.Jai Singh and Ms.Pallavi Sharma, Advocates for the petitioner..

Versus

Tej Singh and Others ..... Respondents

Through : Ms.Rebecca John, Advocate for the respondents.
SI G.S. Rawat, I.O., P.S. Sarita Vihar.

CORAM :-
*** HON'BLE MR. JUSTICE ANIL KUMAR**

1.	Whether reporters of Local papers may be allowed to see the judgment?	YES
2.	To be referred to the reporter or not?	YES
3.	Whether the judgment should be reported in the Digest?	YES

ANIL KUMAR, J.
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1. The petitioners, Dr.Ritu Rawat, Medical Superintendent, Indraprastha Apollo Hospitals and Dr.Rajeev Puri, Consultant ENT seek quashing of complaint in case No.495/1/2007 and orders dated 2nd

March, 2007 and 17th March, 2007 passed in the said complaint case under Section 304(II)/304A/34 IPC.

2. The complainants are respondents No.1 & 2, grandfather and mother of Late Aditya Pal who was suffering from Recurrent Laryngeal Papillomatosis. He was undergoing treatment at Indraprastha Apollo Hospital since November, 2004 and he underwent multiple laserisation of his papillomata on 25th November, 2004, 7th March, 2005, 22nd April, 2005 and 28th July, 2005.

3. The respondents contended in their complaint that on 3rd October, 2005 late Aditya Pal was again admitted in Indraprastha Apollo Hospital and during the procedure one of the pulses caused a luminescence in the airway leading to withdrawal of the procedure as the deceased suffered laser burns in the airway and he was shifted to ventilator support in Paediatric Intensive Care Unit (PICU). For the laser burns during the procedure, he was stabilized initially in O.T and then shifted to ICU for further management where he was put on mechanical ventilator and allegedly started on IV antibiotics and vigorous supportive care (inotopes and IV fluids).

4. The complainants have alleged that the child continued to remain under the treatment till 26th October, 2005 on which day he ultimately expired. It has been contended that the Trachestomy suction was found to be blood stained and volume was increasing. The complainants categorically asserted that the laser equipment operated by petitioner No.2 and maintained by petitioner No.1 and other accused, Indraprashtha Medical Corporation Limited and Anne Moncure, Managing Director, was unfit and defective. It was contended that its poor upkeep and maintenance along with deficient knowledge in running the machine, both at the time of procedure during its normal usage and after its mall-function during the course of operation, caused serious burn injuries. Some of the relevant allegations made in the complaint under Section 200 of Code of Criminal Procedure against the petitioners are as under:-

> "6. That the laser equipment operated by the accused No.4 and maintained by accused Nos.1-3 was unfit and defective. Its poor upkeep and maintenance along with deficient knowledge in running the machine both at the time of procedure during its normal usage and after its malfunction during the course of operation caused serious burn injuries leading to a hole in the traches of the child Aditya Pal which led to further secondary complication and his untimely death.
>
> 7. That the accused No.1 is a company running Indraprastha Apollo Hospital and Accused No.2 is its Managing Director whereas accused No.3 is its Medical Superintendent and both the accused No.2 and 3 are directly and vicariously responsible for the day to day affairs, maintenance and upkeep of the hospital, its equipments and further to ensure that the services being

rendered are upto the mark and of good standard quality as per established medical norms.

8. That accused No.4 who performed the procedure was criminally negligent and incompetent to carry the operation of the given nature. Moreover, due to grossly negligent and inapt handling of the situation, the child was not treated properly and rather suffered serious injuries leading to his death at his hands.

9. That even after the serious burn injuries which resulted from culpable negligence at the hospital there was dismal failure to take necessary care warranted by the situation having arisen from lack of exercise of proper care and due precaution incumbent on the accused. The child was ignored, no proper treatment was offered and eventually the child expired due to the acts and omissions of the accused. In fact, the attending doctor lacked the kind of skill required for handling such spoilt cases as also requisite remedial treatment was not administered despite the complainant having agreed and offered to bear all possible expenses to save the most precious life of the only son and the only hope of a widowed mother."

5. The respondents no.1 & 2 has categorically asserted that the petitioner No.2 was grossly negligent and his inapt handling of the situation, as the child was not treated properly and he suffered serious injuries and even after that he was not looked after properly, ultimately led to his death. The respondents are categorical that even after the serious burn injuries which resulted from culpable negligence there was dismal failure to take necessary care warranted by the situation having arisen from lack of exercise of proper care and due precaution incumbent on the accused. It was stated that no proper treatment was offered resulting in the untimely death of the only son of respondent No.2.

6. After the demise of Aditya Pal post mortem on his body was conducted at AIIMS by a board consisting of Dr.Sudhir Gupta, Associate Professor, Dr.B.L.Chaudhary, Senior Resident and Dr.Raghvinder, Junior Resident who gave a post mortem report No.1313/2005. The relevant observations of the post mortem report as detailed in the complaint are as follows:-

> "Alleged h/o death in Apollo Hospital while he was receiving laser resection under general anesthesia.
>
> Note: However, the alleged blast of laser machine, its model and type, type of anesthesia used and clinical facts should be evaluated by investigating agency.
>
> Ante-Mortem injuries over the body:
>
> 1.) Therepeutic (during the treatment)
>
> Surgical trancheostomy wound of size of 1.5 cm x 4.5 cm red in color. Tracheostomy wound was packed with a gauze piece.
>
> 2.) On dissection of neck and wind pipe severe burn injury with granulation tissue, with charred tissue material and carbon soot present from Oropharynx, full supraglottis, larynx and tracheal wall upto C-7 vertebral level. One trachea-oesophageal fistula present on posterior wall of trachea.
>
> 3.) Burn healed injury of size 004 x 4 cm present in anterior surface of neck on right side. Another injury (burn) seen 1 cm below injury no.20.5 cm x 0.3 cm.
>
> 4.) Healed burn maker on right cheek of size 5 x 1.5 cm whitish in colour.

Other findings:-

1) Pleural Cavity: Serosanginous fluid/oedematous/congested

2) Lungs: pus oozing on pressure

3) Burn healed injury of size 0.4 x 4 cm present in anterior surface of neck on right side. Another injury (burn) seen 1 cm below injury no.20.5 cm x 0.3 cm.

4) Healed burn mark on right cheek of size 5 x 1.5 cm whitish in colour.

5) Other findings

i) Pleural Cavity: Serozanguinous fluid/oedematous/congested. Pleural cavity is jhilli kind of thing which surround lungs, when it gets infected it discharge fluid (serosanguinous) oedema is swelling, congestion is increase of blood supply a normal body response.

ii. Lungs: Pus oozing on pressure (lung infection).

Cause of Death

Extensive ante-mortem laser burn injuries to:-

iii. Oropharnx

iv. Nasopharnx

v. Suppraglottis

vi. Larngeal Cavity

vii. Trachea upto cervical C-7 level

Resulting into R.T.I (Respiratory Track Infection), Lung Infection with Septicaemia.

Opinion

The mentioned burn injury which is primary cause of death was unwarranted. This speaks failure of taking required precautions, care and skill in adopted procedure.

This is res ispa loquitur/a case of gross medical negligence

(common man language of Medical finding during the post mortem)

Ante-mortem injury over body:-

1. Therapeutic (during treatment)

Surgical tracheostomy wound of size of 1.5 cm x 4.5 cm red in colour. Tracheostomy wound was packed with a gauze piece."

7. The complainant further asserted that the reference was made to Delhi Medical Council but the same was not dealt with properly and since no action was initiated against the petitioners they filed the complaint under Section 200 of Code of Criminal Procedure, 1973 and sought action against the petitioners for complaints under Section 304(Part-II), 304A/34 IPC.

8. On 3rd March, 2007 the learned Metropolitan Magistrate passed the following order:-

"Fresh complaint received by way of assignment. It be checked and registered. I take cognizance.

Complainant with the learned counsel Sh.Puneet Mittal. Heard. As it is submitted by the counsel that a complaint was made to the SHO P.S.Sarita Vihar regarding the death of child Aditya Pal due to gross medical negligence of the accused persons but no action was taken by the police. Issue notice to the SHO P.S.Sarita Vihar to give the status report. The copy of the complaint is supplied to constable Ratan.

Put up for 17.3.2007 at 2 PM at the request of the counsel."

9. After the complaint was filed, the learned M.M directed the SHO, P.S. Sarita Vihar to give the status report. After the post mortem report the police had sought an opinion from All India Institute of Medical Sciences, pursuant to which a board was constituted to examine the laser machines and treatment papers of the deceased. The medical board comprised of Dr.Sudhir Bahadur, Professor of ENT, Chairman; Dr.Adarsh Kumar, Assistant Professor of Forensic Medicine, Member; Dr.Biplab Mishra, Assistant Prop. of Surgery; Mr.S.K.Kamboj, Senior Technical Officer and Dr.Raja Dutta, Department of Hospital Administration which held various meetings on 12th June, 18th July, 25th July and 29th July, 2006. The medical board also sought few clarifications from Dr. Sudhir Gupta who was the Chairman of the board which had conducted post mortem on the body of the deceased. The medical board also obtained the YAG Laser Systems MY30/MY60 which was evaluated by Sh.S.K.Kamboj, Senior Technical Officer. The report dated 18th July, 2006 was given by a Senior Technical Officer of the All India Institute of Medical Sciences stipulating that he had received the laser machine Model No.Martine MY60 Serial No.MY-600102951035 with its accessories on 15th June, 2006 for examination from Sub Inspector Hari Prakash, Police Station Sarita Vihar, New

Delhi. On 17th July, 2006 machine was tested and it was found to be functioning normally and all the accessories were also found to be working properly and correct as per its functions.

10. The report dated 29th July, 2006 was given by All India Institute of Medical Science by the Medical Board of All India Institute of Medical Sciences consisting of Dr.Sudhir Bahadur, Professor of ENT; Dr. Adarsh Kumar, Assistant Professor of Forensic Medicine; Dr. Biplab Mishra, Assistant Professor of Surgery; Mr.S.K. Kamboj, Sr. Technical Officer and Dr. Raja Dutta, Department of Hospital Administration. The Medical Board in the said report stipulated that in view of the post mortem report No. 1313/05 of the deceased and of the request of Investigating Officer by letter No.NIL dated 5th June, 2006, few clarifications were to be sought from Dr.Sudhir Gupta, Associate Professor of Forensic Medicine, who was the Chairman of the Board which had conducted the post-mortem and had held the case to be *res ipsa loquitur*/a case of gross medical negligence and requested Dr.Sudhir Gupta to attend the meeting on 18th July, 2006. Despite the request of the Medical Board to Dr.Sudhir Gupta to appear, he did not attend the meeting. Thereafter, the Board obtained the legible and complete copy of post mortem report and after considering the post mortem report and the report of technical examination of YAG Laser System opined as under:-

> "Apparently the patient suffered from recurrent laryngeal papilloma. It is well known that this condition affects young children and is treated by micro-laryngeal surgery using conventional instruments or laser. There is some evidence in literature to suggest that use of laser may result in fewer recurrences. However, there is always an inherent risk in using laser surgery and accidental laser fire is a known but rare complication, even if the machine is functioning normally (as appears to have happened in the instant case). Nevertheless, there are standard laid down guidelines to prevent and manage these complications."

11. On the basis of representation from the office of DCP Headquarters, Delhi, forwarded by Government of NCT, a hearing was given to the accused and the complainant/respondent No.1 and 2 by the Delhi Medical Council and on the basis of these statements and the record, a report dated 15th September, 2006 was also given. It was held that laser spark which occurred in the airway at the time of surgery which caused burn injuries in the airway though rare is known to occur with the incidence of 0.5% to 1.5% in the USA. Delhi Medical Council board of Dr.Praveen Khilani, Dr.K.Lathita and Dr.Sanjay Durari held that post explosion treatment including treatment provided in PICU and the ward was as per the standard treatment protocol. It further opined that explicit/specific information about probability of such complications during such procedures should be made available to the patient in the consent form.

> "It has been observed that the preoperative, intraoperative and postoperative treatment provided to Master Aditya was fully in consonance with the known standard protocol of

> treatment in such cases. The laser equipment used was also in working order as per inspection report dated 9.11.205. It was unfortunate that after having successful laser resection in four consecutive occasions, accidental fire occurred during the fifth session which resulted in laser burn of the airway of Master Aditya leading to secondary complications and he finally succumbed to them. After going through all the records and also examining the doctors associated with this case, the Council did not observe any negligence in the management of the entire episode. The laser spark which occurred in the airway at the site of surgery and which caused burn injuries in the airway, although very rare, is known to occur with the incidence of 0.5% to 1.5% in the U.S.A. Post explosion treatment including treatment provided in the PICU and the ward was as per standard treatment protocol. However, it is felt that explicit/specific information about probability of such complications during such procedures should be made available to the patient in the consent form. The same may be recommended to the Government in all Delhi hospitals.

12. The SHO filed the status report before the learned M.M on 17th March, 2007. The SHO relied on opinion of the Board of Directors constituted by All India Institute of Medical Sciences which was obtained on account of adverse remarks regarding cause of death in the post mortem report. According to the report, the Board of Doctors had examined the laser machine and treatment papers of the deceased and on inspection laser machine was found to be in normal working condition. The SHO had also referred to the opinion obtained from Delhi Medical Council which had opined that the case of the deceased was of accidental burn. On the basis of these reports, it was stated that the Doctor who had treated the patient is guilty for treatment procedure

even though the Medical Council of Delhi has not observed any negligence in the management of the entire episode.

13. The status report was filed before the learned M.M along with the report of the medical board and technical examination report. The learned Magistrate after considering the status report and the allegations made in the complaint and the post mortem report issued by the medical board of All India Medical Sciences held that there is sufficient material on record which suggests that there is a commission of cognizable offence and, therefore, SHO P.S.Sarita Vihar was directed to register the FIR by its order dated 17th March, 2007. The order dated 2nd March, 2007 and 17th March, 2007 along with the complaint are challenged by the petitioners who are accused Nos.3 & 4 in the complaint filed by respondent Nos.1 & 2.

14. The petitioners seek setting aside of order dated 2nd March, 2007 and 17th March, 2007 on the grounds that they are incorrect and bad in law. It was also asserted that the learned M.M after taking cognizance under Section 200 of the Criminal Procedure Code and issuing a direction for filing of inquiry/status report under Section 202 of the Criminal Procedure Code could not have reverted to the pre-cognizance stage and issued directions under Section 156(3) of Cr.P.C by order

dated 17th March, 2007 and, therefore, the orders and procedures are bad in law. The petitioners further asserted that the findings of the post mortem relied upon by the complainant were preliminary in nature and rather records a note that the investigating agency should examine the machine and anesthesia and clinical facts and since the findings of the post mortem board were not findings of the medical board constituted later on and the opinion of Delhi Medical Council pursuant to the representation from the office of DCP reflect that there was no negligence and the death occurred due to unforeseen complications as recorded in the medical literature, therefore, there is no justification for filing the complaint or invoking Section 304(II) of IPC as the ingredients of that provisions are not made out. The petitioners counsel contended that the doctor's duty is to try and cure and there is no element of certainty in the treatment. Since there is an absence of commission of any cognizable offence the order dated 2nd March, 2007 and 17th March, 2007 ought not to have been passed.

15. Learned counsel for petitioners has relied on Jacob Mathew v. State of Punjab & Another (2005) 6 SCC 1; Dr. G.S. Chandraker v. State & Another (2007) 3 JCC 2407; Tula Ram and Others v. Kishor Singh (1977) 4 SCC 459; Mohd. Yousuf v. Afaq Jahan (Smt.) & Another (2006) 1 SCC 627; State of Assam v. Abdul Noor and others (1970) 3 SCC 10; Crl.M.C. No.831/2008 titled Dr.Narendra Nath v. State and Another

decided on 8th April, 2008; and S.K. Sinha, Chief Enforcement Officer v. Videocon International Ltd. and Others (2008) 2 SCC 492, to contend that there is no medical negligence attributable to the petitioner and since the Magistrate had taken cognizance by order dated 2nd March, 2007, he could not proceed under Section 156(3) of the Criminal Procedure Code and the option left with the Magistrate was to proceed under Chapter 15 of the Criminal Procedure Code.

16. Per contra, learned counsel for the respondents No.1 and 2 has relied on Sanjay Bansal & Another v. Jawaharlal Vats & Others Air 2008 SC 207 and Dilawar Singh v. State of Delhi AIR 2007 SC 3234 to contend that for taking cognizance, the Magistrate must not only apply his mind to the contents of the petition but after doing so must proceed in a particular way as indicated in Chapter 15 and thereafter send it for inquiry and report under Section 202. Where Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of Chapter but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, it cannot be inferred that he had taken cognizance of the offence. Learned counsel also relied on Mohanan v. Prabha G. Nair and Another AIR 2004 SC 1719, to contend that the respondents No.1 and 2 are entitled for full opportunity to produce evidence before the Magistrate regarding the negligence of the doctor

which could be ascertained only by allowing the respondents to produce evidence to negate the allegations by the petitioners.

17. It is no more *res integra* that negligence in law means a failure to do some act which a reasonable man in the circumstances would do or the doing of the same act which a reasonable man in the circumstances would not do; and if that failure or the doing of the act results in injury, then there is a cause of action. In an ordinary case, it is generally judged by the action of an ordinary man, however, where special skill or competence is required, the test is not the action of an ordinary man but it is the test of the ordinary skilled man exercising and professing to have that special skill. The duty of care required of a physician or a surgeon or one possessing special skills was considered by McNair, J., in Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582 in the following terms:

> "I must tell you what in law we mean by 'negligence'. In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where 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 that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by Counsel. Mr Fox-Andrews put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent.

The test enunciated in Bolam (supra) was also followed and approved by the Apex Court in Jacob Mathew (supra) in the following terms:

> 24. The classical statement of law in *Bolam case*[9] 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 courts 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.

The Supreme Court while approving the above test, in Suresh Gupta and, later in Jacob Mathew also declared the test to be applicable in cases of criminal negligence where a doctor is indicted of having committed an offence, in the following terms:

> "(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 and 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 or 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 of judging the alleged negligence. So also, the stand 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 skill 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 or negligence.

(4) The test for determining medical negligence as laid down in Bolam's case (1957) 1 WLR 582 hold 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 304A, 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 304A, 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.
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> (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".
>
> The above, particularly (7) suggest that the threshold of behaviour which would amount to criminal negligence is not mere inaction or omission, or some error of judgment, but something greater. The doctor who may be held liable in tort, or under consumer law, may yet not be charged for criminal negligence, on account of this higher standard of culpability insisted upon by the decision.

18. In the circumstances, to establish medical professional negligence under criminal law, it has to be demonstrated that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses or prudence would do or fail to do. In order to have a medical professional negligence, therefore, the act of the accused doctor should be of such a nature that the injury which resulted was most likely imminent. The post mortem report dated 27th October, 2005 indicated that it is a case of res ipsa loquitur/a case of gross criminal negligence and the burn injuries which were the primary cause of death was unwarranted and

speaks of failure of taking required precautions, care and skill in the adopted procedure.

19. The learned Magistrate has directed on the basis of the post mortem report and the report of the Medical Board of All India Institute of Medical Sciences and the report of Delhi Medical Council and other materials for registering of an FIR. The petitioners are seeking quashing of complaint against them on the basis of the report of All India Institute of Medical Sciences and Delhi Medical Council and other facts and circumstances. What will be the scope under Section 482 of the Code of Criminal Procedure to quash the complaint filed against the petitioners in the facts and circumstances? The legal position is well settled that even at the stage of framing of charge the trial Court is not to examine and assess in detail the material placed on record by the prosecution nor is it for the Court to consider the sufficiency of the materials to establish the offence alleged against the accused persons. The Court prima facie has to see only whether the commission of offence alleged has been made out against the accused person. It is also well settled that in a petition under Section 482 of the Criminal Procedure Code seeking quashing of complaint, the High Court should not interfere with the order unless there are strong reasons to hold that in the interest of justice and to avoid abuse of the process of the Court the complaint or the charge framed against the accused need to be

quashed. An order quashing the complaint can be passed only in exceptional and on rare occasion. The Apex Court in Meenakshi Bala v. Sudhir Kumar & Ors, (1994) 4 SCC 142, had considered the question of quashing of charge by the High Court in invoking its inherent jurisdiction under Section 482 of the Criminal Procedure Code. In that context the Apex Court made the following pertinent observations:-

> ".....To put it differently, once charge are framed under Section 240 CrPC the High Court in its revisional jurisdiction would not be justified in relying upon documents other than those referred to in Sections 239 and 240 CrPC; nor would it be justified in invoking its inherent jurisdiction under Section 482 CrPC to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional cases the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence. Apart from the infirmity in the approach of the High Court in dealing with the matter which we have already noticed, we further find that instead of adverting to and confining its attention to the documents referred to in Sections 239 and 240 CrPC the High Court has dealt with the rival contentions of the parties raised through their respective affidavits at length and on a threadbare discussion thereof passed the impugned order. The course so adopted cannot be supported; firstly, because finding regarding commission of an offence cannot be recorded on the basis of affidavit evidence and secondly, because at the stage of framing of charge the Court cannot usurp the functions of a trial court to delve into and decide upon the respective merits of the case."

20. In another decision State of M.P v. S.B.Johari & Ors, (2000) 2 SCC 57 the Supreme Court adverting to the question of quashing of charges in the light of the provisions contained in Section 227 & 228,

401 & 397 and 482 of the Criminal Procedure Code had not favoured the approach of the High Court in meticulously examining the materials on record for coming to the conclusion that the charge could not have been framed for a particular offence. The Apex Court while quashing and setting aside the order passed by the High Court had made the following observations:-

> …After considering the material on record, learned Sessions Judge framed the charge as stated above. That charge is quashed by the High Court against the respondents by accepting the contention raised and considering the details of the material produced on record. The same is challenged by filing these appeals.
>
> In our view, it is apparent that the entire approach of the High Court is illegal and erroneous. From the reasons recorded by the High Court, it appears that instead of considering the prima facie case, the High Court has appreciated and weighed the materials on record for coming to the conclusion that charge against the respondents could not have been framed. It is settled law that at the stage of framing the charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that the accused committed the particular offence. In such case, there would be no sufficient ground for proceeding with the trial.

21. From the decisions of the Supreme Court it is, therefore, apparent that the law is well settled that in exercise of inherent powers, the High

Court should take great care before embarking to scrutinize the FIR/chargesheet/complaint. In deciding whether the case is rarest of rare cases to scuttle the prosecution in its inception, it first has to get into the grip of the matter whether the allegation constitute the offence. It must be remembered that an FIR is only an initiation to move the machinery and to investigate into cognizable offence. In the present case on the basis of the material produced including the post mortem report holding that it is a case of medical negligence and taking into consideration the report of the board constituted by All India Institute of Medical Sciences and Delhi Medical Council, the learned Magistrate has only directed registering of an FIR. At this stage it is not the function of this Court to weigh all the pros and cons of the prosecution case or to consider necessary or strict compliance of the provisions which are considered mandatory and the effect of its non compliance or to accept the report of the medical board and Delhi Medical Council in preference to the post mortem report. The learned counsel for the respondents No.1 & 2 has categorically contended that the opinion of the medical board is based on the inspection done of the laser machine after a considerable period after the fire was caused during the operations in October, 2005 and on the basis of alleged examination it could not be concluded conclusively that the equipment was functioning normally at the time the procedure was carried out on the deceased. It is only in the rarest of the rare cases of mala fide initiation of the criminal proceeding to wreak private vengeance by filing a

complaint or FIR which in itself does not disclose at all any cognizable offence, that the Court may embark upon the consideration thereof and in such cases the exercise of the power under Section 482 of the Criminal Procedure Code would be justified. In State of Bihar v. Rajendra Aggarwala, Criminal Appeal No.66 of 1996 decided on 18th January, 1996 this Court had observed as under:-

> ".....It has been held by this Court in several cases that the inherent power of the court under Section 482 of the Code of Criminal Procedure should be very sparingly and cautiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations in the First Information Report or the complaint together with the other materials collected during investigation taken at their face value, do not constitute the offence alleged. At that stage it is not open for the court either to shift the evidence or appreciate the - evidence and come to the conclusion that no prima facie case is made out.

22. In the present case the post mortem report dated 27th October, 2005 held that it is a case of res ipsa loquitur/a case of gross criminal negligence and the burn injuries which were the primary cause of death was unwarranted and speaks of failure of taking required precautions, care and skill in adopted procedure. These observations of the post mortem report cannot be ruled out completely on the basis of the report

dated 18th July, 2006 of Senior Technical officer Sh.S.K.Kamboj and the report dated 29th July, 2006 of the board constituted by All India Institute of Medical Sciences holding that use of laser may result in fewer recurrences and there is always an inherent risk in using laser surgery and accidental laser fire is a known but rare complication, even if the machine is functioning normally. What is also relevant is that the medical board had requested Dr. Sudhir Gupta, Associate Professor of Forensic Science, All India Institute of Medical Sciences who was the Chairman of the board which had conducted the post mortem and had given the report dated 27th October, 2005, to attend the meeting of the board, however, Dr. Sudhir Gupta, it appears declined the same and did not appear before the board. Thereafter the board had only considered the legible copy of the post mortem report and has held that the patient suffered from recurrent laryngeal papillomatosis and there is some evidence in literature to suggest that use of laser may result in fewer recurrences. Similarly, the Delhi Medical Council in its report dated 15th September, 2006 although held that post explosion treatment including treatment provided in the PICU and the ward was as per standard treatment protocol, however, did not specifically negate the observations of the board which carried out the postmortem and which had held that it was a case of res ipsa loquitur/a case of gross criminal negligence. This Court is not to consider the evidentiary value of these reports and accept the reports of All India Institute of Medical Sciences and Delhi Medical Council in preference to post mortem report

which is also by a board of All India Institute of Medical Sciences. It will not be appropriate to give a finding at this stage on the basis of medical evidence in the facts and circumstances of the case that there is no medical negligence. The plea of the learned senior counsel for the petitioners Mr. Luthra that the findings of the board which conducted post mortem are only preliminary in nature and so the findings of board constituted later on and the report of the Delhi Medical Council should be taken as conclusive, cannot be accepted in the facts and circumstances. It will be pertinent to consider that the Board which conducted the post mortem had the body of the deceased who is alleged to have died on account of medical negligence while the other Boards did not have the advantage of examining the body of the deceased and only on the basis of observations made in the post mortem report and other material it has been opined that the fire could be accidental. At this stage it is not open to this Court to shift through the evidence or appreciate the evidence and reject some evidence and accept other evidence and conclude that there was no medical negligence. On the basis of inspection of the laser machine which was done considerably after the incident and on the basis of said technical report of the laser machine it cannot be concluded conclusively that the fire occurred on account of malfunctioning of the machine not imputable to negligence in maintenance and operation of the machine or because of some other factors beyond the control of petitioners and other accused. In Mohanan v. Prabha G Nair and Another AIR 2004 SC 1719, and

another relied on by the learned counsel for the respondents No.1 & 2 it was held that the negligence of the Doctor could be ascertained only by scanning the material and by the expert evidence. The Apex Court had held that the High Court was not justified in quashing the complaint especially in a case where culpability could be established only on proper analysis of expert evidence and only by scanning the material that may be adduced by the complainant. It was also held that the complainant should have full opportunity to produce the material before the Magistrate and quashing of complaint at the threshold is not proper.

23. The judgments relied on by the petitioners are apparently distinguishable. Though in Dr. Suresh Gupta (supra), it was held that when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical men cannot be termed as "criminal", however, in the present case the post mortem report dated 27th October, 2005 held that it is a case of res ipsa loquitur/a case of gross criminal negligence and the burn injuries which were the primary cause of death were unwarranted and speaks of failure of taking required precautions, care and skill in adopted procedure. The Apex Court was of the view that where a patient's death results merely from error of judgment or an accident no criminal liability should be attached to it as even though mere inadvertence or some decree of want of adequate care and caution

may create several civil liability it would not suffice to hold him criminally liable. In the said case, the death occurred due to negligence in performing of rhinoplasty. The cause of death was stated to be non introduction of endotracheal tube of the proper size to prevent aspiration of blood from wound in respiratory passage. It was held that inherent power of the High Court under Section 482 of Criminal Procedure Code for quashing criminal proceedings should be invoked only in cases where on the face of the complaint or the papers accompanying the same, no offence is made out for proceeding with the trial. The Apex Court had laid down test to be adopted by the High Courts in exercising its inherent powers under Section 482 for quashing criminal proceedings as follows- "The test is that taking the allegations and complaint as they are, without adding or subtracting anything, if no offence is made out the High Court will be justified in quashing the proceedings." In contra distinction to the judgment of the Supreme Court, in the present case the post mortem report indicates that it is a case of medical negligence and burn injuries which were the primary cause of death were unwarranted and speaks of failure in taking required precautions, care and skill. Though the independent Board has requested Dr.Sudhir Gupta to appear before the Board, however, the said doctor who conducted the post mortem did not appear before the alleged independent Board and merely on the basis of the legible copies of the post mortem report, the Board opined that there is always an inherent risk in using laser surgeries and that accidental laser fire is

a known complication. The alleged independent Board of All India Institute of Medical Science and Delhi Medical Council in their report also do not absolve the petitioners conclusively.

24. The present complaint, prima facie, does not seem to be a case of abuse of process of Court or of such forensic exigencies and formidable compulsion justifying quashing of complaint. In the entirety of the case the petitioners have failed to make out a rare case in which this Court should exercise its jurisdiction under Section 482 of the Criminal Procedure Code and quash the complaint.

25. The other contention of the petitioner is that on 2nd March, 2007, the learned Magistrate had taken cognizance and so could not direct the SHO to register the FIR by order dated 17th March, 2007. On consideration of the relevant provisions of the Criminal Procedure Code it is clear that before it can be said that cognizance has been taken of any offence under Section 190(1)(a) of the Criminal Procedure Code, it must be apparent that the Magistrate has not only applied his mind to the contents of the complaint but he has done so for the purpose of proceeding in a particular way under Section 200 and thereafter for sending it for inquiry and report. However, whenever a Magistrate applies his mind for taking action of some other kind like investigation

under Section 156(3) or for issuing a search warrant for the purpose of investigation, such application of mind is not for the purpose of proceeding under Section 200 and therefore it cannot be said that he had taken cognizance of the offence for the purpose of proceeding under Chapter XV.

26. The Apex Court in the case of R.R. Chari (supra) had held that before a Magistrate takes cognizance of any offence under Section 190(1)(a), he must apply his mind to the contents of the complaint for the purpose of proceeding in a particular way as indicated in subsequent provisions of the chapter XV and thereafter send it for inquiry and report u/S-202. However, when the Magistrate applies his mind not for the purpose of proceeding under the subsequent provisions of the chapter but for taking action of some other kind, e.g., ordering investigation under Section 156(3) or issuing a search warrant for the purpose of investigations, he cannot be said to have taken cognizance of the offence. Perusal of the order dated 2nd March, 2007 makes it amply clear that the learned Magistrate had applied his mind mainly for the purpose of ordering investigation under Section 156(3) of the Criminal Procedure Code. In the said order the Ld. Magistrate had directed the SHO P.S. Sarita Vihar to file the status report on the complaint that had been filed by the respondents 1 & 2 at the said police station pursuant to which the report was filed by SHO, dated 17th

March, 2007 and thereafter after perusing the status report and other material and hearing the arguments, the concerned SHO was directed to register FIR and investigate the matter.

27. The Apex Court in R.R. Chari (supra) had referred to Supdt. & Remembrancer of Legal Affairs, W.B. v. Alani Kumar AIR 1950 (37) Calcutta 437, where it was held that `taking cognizance' has not been defined in the Criminal Procedure Code. The Apex Court in Supdt. & Remembrancer of Legal Affairs, W.B. (supra) held as under:-

> "What is taking cognizance has not been defined in the Crl.P.C & I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Mag.has taken cognizance of any offence u/S.190 (1)(a) Crl.P.C he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding, in a particular way as indicated in the subsequent provisions of this Chap., proceeding u/s.200 & thereafter sending it for inquiry & report u/s.202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chap. but for taking action of some other kind e.g. ordering investigation…u/S.156(3), or issuing a search warrant for the purpose of the investigation he cannot be said to have taken cognizance of the offence."

28. In the complaint filed by the respondents no.1 & 2 they had stated that a complaint was filed by them to the police and had produced the copies of statements recorded by the police. They also reproduced the relevant extract of the post mortem report indicating

that it is a case of res ipsa loquitur/a case of gross criminal negligence. The Magistrate did not record the statements of the complainant and of other witnesses. The word `may' in Section 190 of the Criminal Procedure Code cannot be read to mean `must' that is if a complaint is filed, the Magistrate must take cognizance, if the facts stated in the complaint discloses the commission of any offense. A complaint disclosing cognizable offences may well justify the Magistrate sending the complaint under section 156(3) to the police for investigation. A Magistrate taking cognizance of an offense on a complaint filed before him u/S-200 of the Cr.P.C is obliged to examine the complainant on oath and the witnesses present at the time of filing the complaint. In the present case the Magistrate has not examined the complainant on oath and therefore it cannot be said that the Magistrate has taken cognizance under Section 200 of Cr.P.C. This is also true that for purposes of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR as registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Cr.P.C and to investigate the matter further.

29. Steps involved in investigation under Section 156 of the Cr. P.C have been elaborated in Chapter XII. The investigation starts pursuant

to an entry made in the book which is kept by the officer in charge of the police station and end up with the report filed by the police as indicated in Section 173 of Cr.P.C. The investigation contemplated in this chapter can be started by the police even without the order of Magistrate. If the Magistrate has not taken cognizance under Section 200 and has ordered an investigation under Section 156 (3) then such an investigation is not different from the investigation which is started by the police on its own. However, investigation envisaged in Section 202 contained in Chapter XV is different from the investigation contemplated under section 156 of the Cr.P.C.

30. The Apex Court had held in Superintendent and Remembrancer of legal Affairs West Bengal (supra) that when the Magistrate applies his mind not for the purpose of proceeding under Chapter XV but for taking action of some other kind e.g ordering investigation under Section 156(3), he cannot be said to have taken cognizance of offence. The complaint came up before the Magistrate on 2nd March, 2007 and he issued notice to the SHO Police Station Sarita Vihar and directed him to give the Status report. On the basis of status report and considering various reports filed by the police, it was held by the Magistrate that there is commission of offence and a thorough investigation is required and therefore, directed SHO by his order dated 17th March, 2007 to register the FIR and investigate the matter. In the circumstances

inevitable inference is that the Magistrate on the first date when the matter came up before him did not apply his mind for the purpose of taking cognizance but he took cognizance for the purposes of considering whether the matter should be investigated by the police under Section 156 (3) of the Cr.P.C

31. In Sanjay Bansal and Another v. Jawaharlal Vats and Others 2004(4) JCC 3257, the Supreme Court held that for a proper and fair investigation of the case informant is entitled to a notice and an opportunity to be heard at the time of consideration of the report. It was further held that the Magistrate can ignore the conclusion arrived at by the investigating office and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Supreme Court had held that the function of the Magistrate and the police are entirely different and the Magistrate cannot impinge upon the jurisdiction of the police by compelling them to change from their opinion so as to agree with his view. However, the Magistrate is not deprived of the power to proceed with the matter and there is no obligation on the Magistrate to accept the report, if he does not agree with the opinion formed by the police.

32. In Gopal Das Sindhi and Ors. v. State of Assam & Anr., AIR 1961 SC 986, the Apex Court while dealing with the question whether the Magistrate had taken cognizance or not had held as under:

> **7.** When the complaint was received by Mr Thomas on August 3, 1957, his order, which we have already quoted, clearly indicates that he did not take cognizance of the offences mentioned in the complaint but had sent the complaint under Section 156(3) of the Code to the Officer Incharge of Police Station Gauhati for investigation. Section 156(3) states "Any Magistrate empowered under Section 190 may order such investigation as above-mentioned." Mr Thomas was certainly a Magistrate empowered to take cognizance under Section 190 and he was empowered to take cognizance of an offence upon receiving a complaint. He, however, decided not to take cognizance but to send the complaint to the police for investigation as Sections 147, 342 and 448 were cognizable offences. It was, however, urged that once a complaint was filed the Magistrate was bound to take cognizance and proceed under Chapter XVI of the Code. It is clear, **however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because Section 200 states that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate.** If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in Section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offence is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so, then he would have to proceed in the manner provided by Chapter XVI of the Code. Numerous cases were cited before us in support of the submissions made on behalf of the appellants. Certain

submissions were also made as to what is meant by "taking cognizance." It is unnecessary to refer to the cases cited.

33. In the circumstances and for the aforesaid reasons it is not appropriate to infer that the Magistrate had taken cognizance for the purpose of proceeding under chapter XV of the Cr.P.C. The Magistrate had only taken cognizance for the purposes of investigation by the police under section 156 (3) of the Cr.P.C. Therefore the order dated 17th March, 2007 of the Magistrate directing the SHO Police Station Sarita Vihar to register the FIR and investigate the matter cannot be faulted on the grounds as has been raised by the petitioners.

34. Therefore, in the present facts and circumstances, the complaint filed by the petitioners cannot be quashed nor the orders dated 2nd March, 2007 and 17th March, 2007 can be set aside. The petition is therefore, dismissed. The parties are however, left to bear their own costs. Trial Court record be sent back forthwith.

October 24, 2008. **ANIL KUMAR, J.**
'Dev'