IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CRM-M-3458-2015
Reserved on: 02.02.2024
Pronounced on: 11.03.2024
2024:PHHC: 034630

MAX SUPER SPECIALITY HOSPITAL AND ANOTHER

. . . . PETITIONERS

Vs.

STATE OF PUNJAB AND ANOTHER

. . . . RESPONDENTS

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CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

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Present: - Mr. R.S. Cheema, Sr. Advocate, with
Mr.Vishal Gupta & Mr. Ashok Sharma, Advocates,
for the petitioners.

Mr. Karunesh Kaushal, AAG, Punjab

Mr. Bhavnik Mehta, Advocate for respondent N: 2 – complainant.

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DEEPAK GUPTA, J.

By way of this petition filed under Section 482 CrPC, petitioners pray to quash criminal complaint No.25 dated 10.06.2014 titled *"Pooja Gupta Vs. Max Super Speciality Hospital and others"* (Annexure P13), the summoning order dated 08.12.2014 (Annexure P25) passed by the Court of Ld. Chief Judicial Magistrate, SAS Nagar, Mohali and all consequent proceedings arising therefrom in the said complaint.

2.1 Complainant Pooja Gupta *(respondent No.2 herein)* filed the complaint Annexure P-13 arraigning Max Super Speciality Hospital, Mohali, through its Chairman, Director, Medical Superintendent as accused N: 1 *(petitioner No.1 herein),* Dr. Sudheer Saxena, Principal Consultant, Interventional Cardiology, working in Max Super Specialty Hospital as accused No.2 *(petitioner No.2 herein);* and one Dr. Pawan K. Kansal,

MBBS, MD (Medicine), Cardiac Rehabilitation & Medical Central, H.No.3201, Sector 21-D, Chandigarh as accused N: 3 *(not a party before this Court)* seeking their prosecution for committing offences under Section 304A, 420 & 120B IPC.

2.2 It was submitted in the complaint that Shri Rishi Gupta (since deceased), the husband of complainant went to Dr. Pawan K. Kansal for a routine checkup on 17.09.2013. After initial diagnosis, Dr. Kansal advised the patient to opt for pacemaker surgery and referred him to accused N: 1 - Max Speciality Hospital and specifically instructed him to meet accused No.2 Dr. Sudheer Saxena. Accordingly, patient Sh. Rishi Gupta went to Max Speciality Hospital, where Dr. Sudheer Saxena, after certain diagnosis, prescribed surgery for implantation of pacemaker in the heart of the patient. The accused Dr. Saxena was well informed about the entire medical history of the patient. Dr. Sudheer Saxena, specifically suggested a bivent pacemaker manufactured by St. Jude Medical India Pvt. Ltd., the cost of which was around ₹4,50,000/-. Accused told that patient would have to take a four day package including the day of admission and that the entire surgery will cost of ₹5.5 Lacs, including the cost of pacemaker. Sh. Rishi Gupta was accordingly admitted in the hospital. The bill related to the admission and initial deposit of ₹20,000/- made on 17.09.2013 is enclosed with the complaint. Subsequent to the admission, few tests and diagnosis, including angiography were performed on the patient under the instructions of accused Dr. Sudheer Saxena on the following day.

2.3 It is alleged that accused did not perform the surgery till 4th day of the admission. In fact, due to a casual attitude and non-cooperation amongst the concerned staff, the required pacemaker was not even arranged

till then. In the morning of 20.09.2013, complainant was instructed by the hospital authorities to deposit ₹3 lakh as part payment. Accused Dr. Sudheer Saxena informed the patient that on that day, his surgery will be conducted. Amount was accordingly deposited on 20.09.2013. Patient was taken for the surgery.

2.4 It is alleged that surgery was conducted on 20.09.2013 without having the actual, requisite and prescribed pacemaker available with Dr. Sudheer Saxena. At about 4:30 PM, accused Dr. Sudheer Saxena informed the complainant that surgery could not be completed, as they did not have the 3rd lead of the pacemaker. When the complainant and her relatives asked the Doctor as to why he had initiated the surgery without having the proper kit of the pacemaker, he did not give any reply and left the patient in that condition without even disclosing that at that stage, he did not have the actual pace maker to conduct the surgery.

2.5 Complainant alleged further that in fact on 20.09.2013, accused Dr. Sudheer Saxena implanted a wrong and cheap "Double Chamber Pacemaker" against his own instructions, though the patient had already paid for the superior pacemaker. It was done by accused No.2 in connivance with the other co-accused with a view to make extra money. It is alleged that as per the bill, "Double Chamber Pacemaker", costing ₹45,000/- was used on 20.09.2013. The hospital management along with Dr. Sudheer Saxena with an even design wanted to extract the money for expensive pacemaker, by installing the cheapest quality pacemaker, which in fact was not suitable for the patient. With a view to hide his deceitful act, accused Dr. Sudheer Saxena made an excuse to the relatives of the patient that he did not have the 3rd wire and that he would complete the surgery on

the next day. However, accused No.2 Dr. Sudheer Saxena was left with no other choice but to arrange actual pacemaker because after the wrong, casual and negligent surgery conducted on 20.09.2013, the condition of the patient was deteriorating every minute. Accused No.2 even did not visit the patient on the following day despite various calls given to him by the relatives.

2.6 It was alleged that eventually Dr. Sudheer Saxena visited the hospital on 22.09.2013 to avoid trouble and on that day, he conducted another surgery in the garb of inserting 3rd wire and this time, he implanted the actual pacemaker. The cost of the said pacemaker has been shown as item No.106 in the bill, worth ₹4,47,869.31/-. This surgery was conducted by accused No.2 Dr. Sudheer Saxena not to save the patient or to complete the treatment but to replace the cheap pacemaker with the actual one, so that in case the patient died, the act of doctor would not be revealed by the postmortem or any other way and the accused would easily escape the liability by stating that surgery went right and that death was consequential to the ailment of the patient or by blaming the pacemaker. The relatives of the patient were falsely informed that surgery was successful.

2.7 It is alleged that in fact the entire surgery was performed by accused No.1 in connivance with accused No.2 with most casual, negligent, callous and commercial approach. Complainant referred to two different X-ray reports, which were done after conducting the surgery on 20.09.2013 and another on 22.09.2013. It is contended that both the Xray reports show that pacemakers were actually installed in the chest of the petitioner on both the days. As a result of the said treacherous and fatal act on the part of the accused, the patient never recovered. However, accused No.2 along with

the hospital authorities discharged the patient with a view to escape from any sort of liability in the evening of 24.09.2013, though his health was still in bad condition and he was suffering from severe pain in the chest.

2.8 Complainant alleged further that patient could not take the burden of two back to back surgeries conducted on him and just 2 days after his discharge, on 27.09.2013, his pain became severe and unbearable. He was again brought back to the hospital, but could not survive and died in the hospital at 03:00 PM. Complainant insisted for conducting the postmortem examination after the death of her husband, but accused No.1 & 2 resisted the same, stating that it was not required. It is alleged that the hospital along with accused No.2 deliberately did not even release the dead body until the media and police was called. A DDR entry was made on 28.09.2013 and then, the postmortem was conducted at Civil Hospital, Phase VI, Mohali. After the postmortem examination, the pacemaker was confiscated by the police, but neither any investigation was conducted nor any FIR was registered by the Police. The police kept on sitting over the matter. Complainant then made a complaint to SSP on 23.12.2013, but with no result.

2.9 With all the above allegations, the complainant had to approach the Jurisdictional Magistrate to summon and prosecute the accused.

3.1 It is revealed further that in the preliminary evidence, complainant Smt. Pooja Gupta examined herself as CW1 and stated all the allegations made in the complaint on oath. Copy of her testimony is Annexure P14. Her statement was supported by Sh. Jitender Gupta (brother of deceased), Vinay Gupta (son of the deceased), Vinod (brother of the

deceased) and Ashwani (brother of the deceased), who were examined as CW2 to CW5. Copies of their statements are Annexures P15 to P18. Complainant also relied upon copy of the postmortem report of the deceased Rishi Gupta; copy of the complaint made to the SSP, Mohali; Copy of the letter received from St. Jude Medical India Pvt. Ltd. besides the bill of respondent No.1-hospital.

3.2 After perusing preliminary evidence, ld. CJM, SAS Nagar, Mohali vide impugned order dated 8.12.2014 (Annexure P25) observed that there was a clear cut case of medical negligence made out against accused No.1 & 2 *(petitioners herein)*, as there were sufficient grounds to believe that accused No.1 - Max Super Speciality Hospital through its Chief Executive Officer; and Accused No.2 - Dr. Sudheer Saxena were guilty of medical negligence, conspiracy and cheating and thus, had committed offences under Section 304A, 120B and 420 IPC. Both of them were accordingly directed to be summoned to face trial. However, it was further observed that there was no negligence on the part of accused No.3 - Dr. Pawan K. Kansal nor he was shown to have committed any offence and so, there was no ground to summon him.

4.1 Seeking quashing of the aforesaid summoning order dated 08.12.2014 (Annexure P25) along with the complaint (Annexure P13), it is contended by the petitioners that petitioner No.2 is the Principal Consultant, Interventional Cardiology, Coordinator Cardiac Sciences at Max Super Speciality Hospital, Mohali, having qualification of MD and DM (Cardiology) with experience of more than 20 years. He is a leading Cardiologist in the region and has undertaken cases of various chronic patients and treated more than 10,000 patients in the region.

4.2 According to petitioners, late Sh. Rishi Gupta was admitted in Intensive Care Unit of the Hospital on 17.09.2013 with history of prolonged chest pain. The patient had pre-existing severe heart problem i.e. severe Coronary Artery Disease and Triple Vessel Disease, for which he had already undergone bypass surgery at the age of 27 years at AIIMS. After the surgery, patient was not following either at AIIMS or at any other cardiologist for regular checkup and was found to be not taking regular medication. At the time of his admission, condition of the heart of the patient was very poor. Still the petitioner was able to stabilize him. Patient then underwent coronary angiogram on 18.09.2013, which showed that all bypass grafts except one had blocked with severe blockages of native coronaries. After necessary tests including Echo and angiography, the patient and his relatives were given the option of AICD with triple chamber pacemaker. All the risk and benefits of the same were duly explained in detail to the attendants of the patient. Since the cost of the device was more, which patient could not afford, so the second best option of biventricular pacemaker was given. It is alleged that complainant and other relatives took time to deliberate and gave the consent for triple chamber pacemaker only in the evening of 19.09.2023. It was decided to implant St. Jude's triple chamber pacemaker, the procedure regarding the implantation of which was duly informed to the relatives of the patient. Due to the previous history of the patient, the risks involved were also informed.

4.3 It is only after taking the consent from the complainant and the brother of the patient and informing them about advantages/ disadvantages of the procedure to be adopted for carrying out the implantation of the biventricular pacemaker that it was decided to complete

the procedure in two stages. The hospital authorities had taken all the precautions and preventions as required under the circumstances. Petitioners were having all the requisite components for implantation including the biventricular pacemaker.

4.4 The specific contention of the petitioners is that procedure of implantation of the biventricular pacemaker was done in two stages. The first stage was performed on 20.09.2013 and the second was carried out on 22.09.2013. In the first stage, two of the three leads of the biventricular pacemaker were implanted and the said procedure lasted for 3 hours. In the second stage, carried on 22.09.2013, the 3rd lead and the pacemaker were implanted. The reason to conduct the procedure in two stages was to give adequate rest to the patient, who already had severe heart problem. Petitioners submit that each pacemaker carries a unique serial number and can be used only once. Every pacemaker implant anywhere in the world is permanently registered in the name of the patient on the same day by the company and cannot be implanted again in any other patient. Petitioners specifically contend that they implanted only one pacemaker i.e. biventricular pacemaker (triple chamber pacemaker), though in two stages and that they never implanted two pacemakers on the patient as is alleged by the complainant. Said fact is even established from the report (Annexure P3) of St. Jude's Medical India Private Limited. Petitioners refer to the snapshots of the recording of the operation theatre, to contend that they implanted only two leads on the first day, whereas third lead and pacemaker were implanted on 22.09.2013. Copies of the coloured snapshots are Annexure P4 (colly).

4.5 Petitioners further submit that the entire implantation was

carried out perfectly; that patient withstood the procedure well in two stages. The patient was duly checked prior to his discharge. His parameters were found satisfactory and then, he was discharged in stable condition on 24.09.2013.

4.6 Petitioners alleged further that patient was brought dead in the hospital on 27.09.2013 and on examination, it was found that he had died because of the sudden cardiac death, as he was prone due to his poor heart condition. Petitioners submit that pacemaker do not prevent from the fresh heart attacks and sudden cardiac deaths. Petitioner No.1 - hospital duly lodged the DDR with the police authorities in view of the fact that relatives had created a scene at the hospital. On the request of relatives of the deceased, even the postmortem was got conducted at Civil Hospital, Mohali and it was found that patient had died due to Myocardial infarction i.e. sudden heart attack.

4.7 Petitioners submit further that respondent No.2 then filed a complaint before the State Consumer Disputes Redressal Commission, Punjab on 28.02.2014 alleging medical negligence on the part of the petitioners and claimed compensation of ₹84.73 lakh. Petitioners contested the complaint by denying any negligence on their part and submitting that due care and caution had taken during medical treatment as per settled medical norms and that only one pacemaker was installed on 22.09.2013 into two sittings. Copy of the reply filed by the petitioners along with the ECHO reports and Angiographic reports are Annexures P10 to P12, respectively. Said complaint before the State Commission is pending. Petitioners alleged that present complaint has been filed without disclosing the factum of pendency of the consumer complaint.

4.8 Petitioners further submit that in the complaint only the relatives of the deceased have been examined in the preliminary evidence and certain documents have been annexed. The Chief Judicial Magistrate, SAS Nagar, Mohali, has passed the impugned summoning order, which is liable to be set aside being the result of non-application of mind. Ld. CJM blatantly overlooked the binding mandate of the Hon'ble Supreme Court in the matter relating to the prosecution of the medical experts. The total absence of the medical expert evidence is writ large and thus, the impugned order is in gross violation of mandatory guidelines prescribed by Hon'ble Supreme Court in the case of ***Jacob Mathews Vs. State of Punjab, 2005 (6) SCC 1.*** Ld. CJM has not mentioned as to on what basis Section 120B IPC relating to conspiracy is attracted. There was no evidence to attract Section 420 IPC. The medical expert was intentionally not examined, as no such expert would have supported the allegations of the complainant.

4.9 In order to contend that the summoning order is bad in law having been passed in violation of the necessary guidelines for prosecution of a medical professional, ld. counsel for the petitioners has relied upon the following cases:

(i) Dr. Suresh Gupta Vs. Govt. of NCT of Delhi and another, (2004) 6 SCC 422

(ii) Jacob Mathew Vs. State of Punjab, 2005(6) SCC 1

(iii) Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and others, (2009) 9 SCC 221

(iv) Martin F.D. Souza Vs. Mohd. Ishfaq, AIR 2009 SC 2049

(v) Kusum Sharma Vs. Batra Hospital and Medical Research, (2010) 3 SCC 480

(vi) A.S. V. Narayanan Rao Vs. Ratnamala, 2013(10) SCC 741

(vii) P.B. Desai Vs. State of Maharashtra, (2013) 15 SCC 481

(viii) Jayshree Ujwal Ingole Vs. State of Maharashtra and another, (2017) 14 SCC 571

(ix) Prabhat Kumar Singh Vs. State of Bihar, 2021(3) Apex Court Judgments (SC) 289

(x) Dr. Sanjay Saluja Vs. State of UT of Chandigarh [CRR-469-2007, Date of Decision 16.09.2011 (P&H)]

(xi) Dr. J.B. Dilawari Vs. State of Punjab and another and another [CRM-M-11991-2016, Date of Decision 22.12.2016 (P&H)]

(xii) Parmod Kumar Vs. State of Haryana [CRM-M-9790-2016, Date of decision 24.01.2018 (P&H)]

4.10. Petitioners further contend that summoning order has been passed on wrong understanding of the complicated medical procedure as involved in the graft of the Triple Chamber Pacemaker. In order to install such a pacemaker, three leads are required to be grafted in the body of the patient before installation of the pacemaker and only after the grafting of the three leads, the pacemaker can be installed. In the present case, petitioner No.2 had installed/grafted two leads of the triple chamber pacemaker in the body of patient on 20.09.2013. As the patient got exhausted during this implant, so, it was decided to implant the third lead in the second stage as the procedure for implanting two leads had already lasted for more than 3 hours and patient was feeling fatigued and was required to give adequate rest. This is a standard procedure in case of patients like deceased Rishi Gupta and it is in view of these circumstances that third lead along with pacemaker were implanted on 22.09.2013.

4.11 Petitioners further submit that impugned order is also based on misreading of X-ray report (Ex.C6) by inferring that pacemaker was already installed on 20.09.2013, though it was also installed on 22.9.2013.

Petitioners submit that as per Xray reports (Annexures P22 & P23), on the first day, only the wires of the pacemaker were installed.

4.12 Petitioners have further relied upon the report of the Internal Review Committee of the petitioners' Hospital, which examined the case of the patient as well as the alleged negligence on the part of petitioner No.2. As per the report of the peer committee, there was no negligence on the part of petitioner No.2. Copy of the report of peer committee is Annexure P26.

4.13 Petitioners further submit that no pacemaker costing only ₹45,000/- is available in the market as the minimum price for a pacemaker is more than ₹1 lakh and therefore, contention of the complainant to the effect that a double chamber pacemaker costing ₹45,000/- is reflected in the bill Annexure P1 is incorrect. Petitioners submit that in fact Item No.1 for an amount of ₹45,000/- in the bill dated 24.09.2013 is the cost of services for installation of double chamber pacemaker and not the cost of pacemaker, as has been wrongly alleged and inferred by the complainant as well as by the ld. CJM.

4.14 It is further contended that petitioner No.1 is a unit of Home Trail Estate Pvt. Ltd. Company registered under the Companies Act and being not a juristic person, could not have been summoned.

4.15 With all the aforesaid submissions, prayer is made to quash the impugned complaint as well as summoning order.

5.1 In the reply filed by respondent No.2-Pooja Gupta, objections are raised regarding maintainability of this petition, without exhausting the remedy under section 397 CrPC before the Court of Sessions. On merits, respondent No.2 has controverted the stand of the petitioners and reiterated the allegations as made in the impugned complaint. Attention has been

drawn towards the X-ray reports dated 20.09.2013 and 22.09.2013, besides bill of the hospital so as to controvert the stand of the petitioners that only one surgery was performed in two stages. It is reiterated that in fact two surgeries were performed, one on 20.09.2013 and that at that time, double chamber pacemaker was implanted and as the patient developed problems, so in order to conceal the mischief, the triple chamber pacemaker was implanted on 22.09.2023 and that the patient could not undertake the burden of two surgeries. Respondent has also drawn attention towards the internal medical notes of the petitioner-hospital of 20.09.2013 and 22.09.2013 in this regard.

5.2 It is submitted further that snapshot as relied by the petitioners is partial and incomplete in order to mislead the Court. Attention is drawn towards the fact that in the internal medical notes, it is mentioned by petitioner No.2 that he had implanted the left ventricular lead (LV) on 22.09.2013, which fact is contradicted by snapshot Annexure P30 dated 20.09.2013, placed on record by the petitioners themselves, revealing that LV was already in place on 20.09.2013. It is alleged that selective and incomplete snapshot (Annexure P4) is placed on record, further making the case of the petitioners as dubious. Petitioners never placed on record the entire video recording of the surgery including the internal attendance sheets. Till date, even the X-ray films have not been provided either to the complainant or to the Court. Respondent No.2 has also referred to the postmortem report to emphasize that the same disclosed external injuries besides the cause of death to be Mayo Cardial Infarction consequent to injuries described. Respondent No.2 further submits that mere providing of an afterthought break-up of bill does not absolve the petitioners of their

criminal act.

5.3 Respondent No.2 has further drawn attention towards the proceedings conducted before ld. CJM so as to contend that despite repeated directions by the Court, police did not take any action on the complaint made by respondent No.2. Even the status report sought by the Court was not filed, clearly indicating the fact that police was colluding with the petitioners.

5.4 Respondent No.2 contends further that summoning order *prima facie* reflects sound application of judicious mind and the precise understanding of the issue involved therein. It is still further contended that ingredients of Section 304A besides Section 420 read with Section 120B IPC are clearly made out.

5.5 Regarding the guidelines framed by Hon'ble Supreme Court in the case of ***Jacob Mathew's (Supra),*** it is contended that ld. CJM did not overlook the same and that the use of the word 'may' in the guidelines leave enough scope for the Court to find a *prima facie* case. It has also been made clear by Hon'ble Supreme Court that object of the guidelines is to save the doctors from false and frivolous complaints and not to shield the ones, who are overtly guilty. Respondent No.2 submits that in the present case, the evidence on record leaves no doubt regarding the gross negligence apart from cheating and conspiracy on the part of the respondents.

5.6 With these submissions, prayer is made for dismissing the petition.

6. In their rejoinder, petitioners reiterated their case.

7. I have considered submissions of both sides and have carefully gone through the entire paper-book including the brief synopsis,

notes and arguments, submitted by counsel for the parties.

8. It is undisputed that Shri Rishi Gupta was brought to the respondent N: 1 hospital on 17.09.2013 on the recommendations of accused No.3 - Dr. Pawan K. Kansal. He had been advised for pacemaker surgery. It is also not in dispute that a biventricular pacemaker (triple chamber pacemaker) was consented to have been implanted in the patient.

9. The allegation of respondent No.2-complainant is that instead of implanting a triple chamber pacemaker, cost of which was roughly ₹4,50,000/-, the accused-petitioners in order to make extra money, implanted a cheap poor quality double chamber pacemaker on 20.09.2013, which could not be implanted properly and as the patient developed problem, so in order to conceal the mischief, petitioner No.2 - Dr. Sudheer Saxena implanted triple chamber pacemaker on 22.09.2013. On the other hand, the specific stand taken by the petitioners-accused is that only one surgery was performed, though in two stages. It is their specific stand that only the biventricular triple chamber pacemaker was implanted. In the first stage on 20.09.2013, two leads were implanted and the said operation lasted for three hours and as the patient was feeling fatigued, and in order to give proper rest to him, the second stage of surgery was performed on 22.09.2013, during which the third lead along with the pacemaker was implanted. It is also the specific stand of the petitioners-accused that unless all the three leads are implanted, the pacemaker cannot be implanted as per the standard procedure.

10. The material on record, which has been taken into consideration by Ld. CJM, Mohali in order to summon the petitioners, *prima facie* contradicts the entire stand of the petitioners. Following are the

circumstances so as to reach this conclusion:-

(A)

10.1 Petitioners have placed on record snapshots (Annexure P4) of 22.09.2013; and Annexure P30 of 20.09.2013 in order to support their stand that only two leads were installed on 20.09.2013 in the first stage of the surgery and that the third lead and the pacemaker were implanted on 22.09.2013. Annexure P30 is produced to project that on 20.09.2013, two leads [Left Ventricular (LV) and Right Ventricular (RV)] were implanted. Annexure P4 is placed on record to project that on 22.09.2013, the third lead [i.e. Right Atrial (RA)] and pacemaker were implanted. Meaning thereby that by way of these snapshots, petitioners contend that LV and RV leads were grafted on 20.09.2013; whereas, RA and the pacemaker were implanted on 22.09.2013.

10.2 Contrary to the above, the internal medical notes dated 22.09.2013 (3:00 PM) [Annexure R2/4 – *page N: 286 of the paperbook*] would indicate – *"TODAY LV LEAD THROUGH CORONARY SINUS PLACED"*. In case, LV lead was already grafted on 20.09.2013, then how internal progress notes of the petitioners-hospital reveal placement of the LV lead on 22.09.2013. The said notes do not reveal that RA and pacemaker were in fact installed on 22.09.2013.

(B)

10.3 Still further, the X-ray reports Annexure P20 and P21 further contradicts the stand of the petitioners. Annexure P20 is the X-ray Chest AP view taken on 20.09.2013. In the said X-ray reports, it is mentioned as under: -

"Left ECPM with wires, sterna metallic sutures seen in situ....."

In case the pacemaker was engrafted in the body of the patient Rishi Gupta on 22.09.2013 as per the stand of the petitioners, it is not explained that how the X-ray conducted on 20.09.2013 is reflecting the ECPM with wires i.e. installation of the conventional pacemaker.

[C)

10.4 Not only above, stand of the petitioners is further contradicted by the hospital record. [Annexure R2/4 – *page N: 276 of the paperbook*], the In-Patient Record-Nursing Progress Notes dated 20.09.2013 at 17:52 (5:52 PM) reads as under:

"Special instructions to handover staff: Patient CRT done……."

10.5 CRT simply stands for Cardiac resynchronization therapy, which is a treatment to help heart beat with the right rhythm. Said therapy uses a pacemaker to restore the normal timing pattern of the heartbeat. The CRT pacemaker coordinates the timing of the Upper Heart Chamber (Artia) and Lower Heart Chamber (Ventricular). It also works on the timing between the left and right side of the heart.

10.6 The above said record of the hospital would prima-facie indicate that pacemaker had been installed on 20.09.2013, as is being contended by respondent No.2-complainant. In case, pacemaker was not implanted on 20.09.2013 and rather, it was implanted on 22.09.2013 as is contended by the petitioners, how their own hospital record (Annexure P2/4) reflects that CRT was done on 20.09.2013.

(D)

10.7 Still further, as per the stand of the petitioners, double chamber pacemaker was never installed and it is only the biventricular pacemaker, which was implanted in the body of Rishi Gupta, though in two stages.

However, Bill (Annexure P19) issued by the petitioners-hospital further contradicts the said stand. In the said bill at Sr. No.1, the item mentioned is *"double chamber pacemaker"* costing ₹45,000/-; whereas at Sr. No.106, in the said bill, the item shown is *"Bivent Pacemaker Allure Quadra CRTP with Accessories",* costing ₹4,47,869.31.

10.8 In case, double chamber pacemaker was neither ever implanted in the body of Rishi Gupta nor it was ever planned to be implanted, how the bill (Annexure P19) reflects double chamber pacemaker. In order to justify the inclusion of this item i.e. double chamber pacemaker in the bill (Annexure P19), petitioners have tried to contend that the said amount of ₹45,000/- at item No.1 in the bill is the cost of services for installation of the double chamber pacemaker and not the cost of the pacemaker.

10.9 The said stand taken by the petitioners is not only self-contradictory but quite contrary to the record. In the first place, the bill (Annexure P19) clearly reveals item No.1 to be the "double chamber pacemaker" and not the cost of services of the double chamber pacemaker. Secondly, in case double chamber pacemaker was neither planned to be implanted nor it was ever planted as per the own stand of the petitioners, how the cost of the services of the installation of the double chamber pacemaker, could have reflected in the bill.

11. Apart from above, it is the admitted case of both the parties that prior to the impugned complaint, respondent No.2-complainant had approached the Consumer Forum for seeking damages regarding the medical negligence of the petitioners. At the time of filing of this petition, that complaint bearing Consumer Complaint No.47/2014 was pending. However, during pendency of the petition, that complaint has since been

decided by State Consumer Disputes Redressal Commission on 04.05.2017, copy of which has been placed on record as Annexure R2/7. This Court is conscious of the fact that decision of the State Consumer Disputes Redressal Commission is not binding on the criminal Court, but at the same time, certain factual aspects, as noticed in the order dated 04.05.2017, which reflects the conduct of the petitioners – accused, are worth mentioning, which read as under:

> "15. Xxxxxx
>
> Intimation regarding first letter from St. Jude Medical Company alongwith that report was sent by Max Hospital to St. Jude in which it has been observed that there was no complication during the procedure and the patient withstood the procedure well and all the parameters were satisfactory and no evidence of Pneurnothorax. Therefore, no reference of the complication, which the patient experienced as per the version given by the Ops. These documents are itself contradictory, on the one hand Ops say that pacemaker vas ultimately fixed on 22.9.2013 because according to their version 3d wire (lead) was not available on 20.9.2013, it was made available and then the procedure was done on 22.9.2013. In case 3d lead was not there and without placing the lead at a proper place, fixing of ECPM is not possible. Whereas X-ray report dated 20.9.2013 clearly shows placement of ECPM with wires and there is no reference that 3d lead was not there, therefore, the implantation of ACP (ECPM) was deferred. Then X-rays were taken by the Ops, after the first surgery on 20.9.2013 and after the 2nd surgery on 22.9.2013. Although the report Ex. C-6 has been produced by the complainant <u>but X-ray film has not been produced. What was the position on 22.9.2013? Again X-ray report as well as X-ray film has not been produced on the record</u>. No doubt that in the discharge summary, it has been referred that X-ray film was handed over to the patient vide document Ex. R-3. However, during the course of arguments, it was admitted that it was digital X-ray and its record remains with the Ops. However, for the reasons best known to the Ops, those X-ray reports and X-ray film has not been produced on the record. Perhaps it may not be helping the Ops, therefore, withholding the record itself amounts to deficiency in service and its adverse inference is required to be

taken against the Ops.

16. The Ops have placed on the record one CD, which contains 23 hand-picked edited clips with total duration of 98.54 seconds covering from 18.9.2013 to 22.9.2013. Otherwise, Ops were required to get the complete CD of the entire procedure adopted for implantation of the pacemaker. In case it was a complete CD, it was not tendered into evidence by the Ops. Therefore, Ops had prepared the CD but selectively hand-picked edited clips and the entire CD record has been withheld for the reasons best known to the Ops and again withholding the best evidence, the inference can be drawn against the Ops.

17. With regard to implantation of a wrong and cheap double chamber pacemaker as alleged by the complainant, he has referred to the bills Ex. C-4 (colly) in which detail has been given as double chamber pacemaker Rs. 45,000/-. It has been argued by the counsel for the Ops that it is not the price of the double chamber pacemaker but it was charges taken by the Hospital i.e. Hospital charges. Even if this contention is taken, it is never the case of the Ops that the complainant had opted for double chamber pacemaker. From the very beginning, the stand taken by the Ops is also that the patient/attendants had opted for biventricular pacemaker. In case it is so, then in the bill, in the column of hospital charges, instead of double chamber pacemaker, it should have been biventricular pacemaker and not the double chamber pacemaker. The patient has a faith in the hospital and patient and attendants blindly follow what the Doctor says but in case the documents are suggesting otherwise then element of suspicion is there. Therefore, reference of double chamber pacemaker in the bill Ex. C-4 creates a doubt whether at the initial stage any effort has been made by the Ops for the implantation of the double chamber pacemaker. Although in the final stage, it is not proved that double chamber pacemaker was implanted but plantation of pacemaker in two stages creates a doubt in the version of the Ops, when it is not supported from the documents referred above.

18. The counsel for the Ops in its written arguments have not touched Ex. C-6 that in case ECPM was finally installed on 22.9.2013 then how it appeared in Ex. C-6 that ECPM with wires seen in situ. X-ray report dated 20.9.2013 also does not corroborate the version of the Ops that on 20.9.2013 only two leads were inserted and 3rd lead was not available, which was completed on 22.9.2013. Then the X-ray report dated 22.9.2013

has not been placed on the record. Whereas post mortem report does not make a reference of LV because it makes a reference of RA & RV, therefore, inconsistencies are apparent in the procedure followed by the Ops.

19. With regard to the expert report, this matter was referred to the PGI. There is report dated 30.9.2015, wherein it was observed by the Medical Board that according to the version of Dr. Sudheer Saxena, RA+RV leads were implanted in 1" stage and LV lead in second stage. This scenario does occur in biventricular pacemaker. Later implantation of LV lead is as per protocol. The Board once again requests that medical record may be made available to actually verify the facts and Medical Board feels that Mrs. Pooja Gupta's statement regarding double chamber pacemaker may not be correct because even the cheapest double chamber pacemaker has much higher cost. The Board however, would like to go through the medical record of Rishi Gupta including the hospitalization file and old medical records, ECG & echocardiogram so that Dr. Sudheer Saxena's statement can be verified from the record. Then there is another report dated 18.1.2016. The requisite documents asked for have been provided and studied by the Medical Board. After going through the documents, the Board is of the opinion that the procedure was carried out as per protocol. The Board was consisting of four Doctors i.e. Dr. Ankur Gupta, Assistant Professor, Dr. Saurabh Mehrotra, Associate Professor, Dr. Ajay Bahl, Professor and Dr. Yash Paul Sharma, Professor and Head, all from Department of Cardiology, PGIMER, Chandigarh."

12. The factual position as noticed above in the order passed by the State Consumer Disputes Redressal Commission, Punjab, Chandigarh, clearly reflects the contradictory stand of the petitioners, to the effect that third lead and the pacemaker were implanted on 22.09.2013. As per the petitioners, without placing all the three leads at the proper place, fixing of the ECPM was not possible, whereas the X-ray report dated 20.09.2013 clearly showed the placement of ECPM with wires and there was no reference regarding the non-availability of third lead. It was also noticed

that X-ray films were never produced by the petitioner-accused. Similar is the case before this Court. The Consumer Forum has also noticed that during the proceedings before it, one CD containing 23 handpicked edited clips with duration of 98.54 seconds covering from 18.09.2013 to 22.09.2013 was placed on record, instead of complete CD of the entire procedure adopted for implantation of the pacemaker. The mentioning of the double chamber pacemaker costing ₹45,000/- in the bill was also noticed, clearly creating doubt in the stand taken by the petitioners.

13. Petitioners have also relied upon the expert reports before this Court. It is revealed that the State Consumer Disputes Redressal Commission, Punjab, Chandigarh had referred the matter to PGI. Report dated 30.09.2015 was received, in which it was observed by the Medical Board that as per the version of Dr. Sudheer Saxena, RA & RV leads were implanted in first stage and LV lead in second stage and this scenario does occur in biventricular pacemaker and that later implantation of LV lead is as per protocol. However, the Board requested for medical record to be made available to actually verify the facts, as it was felt that complainant-Pooja Gupta's Statement regarding double chamber pacemaker might not be correct as even the cheapest double chamber pacemaker has a much higher cost. Board submitted that it wanted to go through the medical record of Rishi Gupta including the hospitalization file and old medical records, ECG & Echocardiogram so as to verify the statement of Dr. Sudheer Saxena from the record. Thereafter, another report dated 18.01.2016 was received, as per which requisite documents as asked for had been provided and studied by the medical board and after going through the documents, the Board gave an opinion that procedure was carried out as per

protocol.

14. Interestingly, though the Board assessed the medical record, but did not make out any detailed discussion with regard to the inconsistency in the record. It simply concluded that proper protocol had been followed by the petitioner-Dr. Sudheer Saxena and that a biventricular pacemaker (triple chamber pacemaker) can be fitted in two stages. The Board of Doctors remained silent regarding the X-ray reports dated 20.09.2013 and 22.09.2013, in as much as the X-ray report of 20.09.2013 showed that the left ECPM with wires sterna metallic sutures was seen in situ. The Board did not give any opinion that once it was undisputed that ECPM could not be fitted till all the leads are in place and in case ECPM was not fitted on 22.09.2013, then how the medical notes dated 20.09.2013 mentioned "CRT done". There is nothing in the report of the Board of Doctors that they checked X-ray report and X-ray films of 20.09.2013 and 22.09.2013 or that they were shown the complete CD of the operation.

15. In view of all the aforesaid facts and circumstances, this Court finds that apart from the case of gross medical negligence, it is more a case of cheating having been committed under a conspiracy by the petitioners. Petitioner No.2 Dr. Sudheer Saxena *prima facie,* despite planning to install as biventricular triple chamber pacemaker as per the consent given by the relatives of the patient, which costed roughly ₹4.5 lakh, instead planted a cheap double chamber pacemaker on 20.09.2013 costing only ₹45,000/- and when the patient developed problems or as the said pacemaker was not fitted properly, then implanted the triple chamber pacemaker on 22.09.2013. In order to conceal the said mischief, stand is taken that only triple chamber pacemaker was implanted, but in two stages and that in the

first stage, only two leads were engrafted and in the second stage, third lead and pacemaker were implanted. The said stand is *prima facie* found to be incorrect in view of the various documents of the hospital itself.

16. In the aforesaid facts and circumstances, the question is -

"*As to whether the guidelines provided by Hon'ble Supreme Court in the case of Jacob Mathew, providing for the Bolam's tests to be applied in case of negligence by the medical professionals, are applicable; or that without the opinion from the medical expert, the summoning could have been ordered?"*

17. The basic tests regarding the parameters to prove medical negligence was laid down in ***Bolam Vs. Friern Hospital Management Committee, (1957) 2 ALL ER 118 (QBD),*** wherein the law was summed up as under: -

> "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 exercises the ordinary skill of an ordinary competent man exercising that particular art. 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. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent."

18. In the case of ***Dr. Suresh Gupta (Supra)***, Hon'ble Supreme Court held as under: -

> "20. For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or recklessness". It is not merely lack of necessary care, attention and skill. The decision of the House of Lords in **R. Vs. Adomako (Supra)** relied upon on behalf of the doctor elucidates the said legal position and contains following observations :-
>
> > "Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State."

21. Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

22. This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not unreasonably extend to criminal liability and expose them to risk of landing themselves in prison for alleged criminal negligence.

23. For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.

24. xx

25. Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing i.e. a higher degree of morally blameworthy conduct.

26. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against doctor causing death of his patient during treatment, that

the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable."

19. In the case of ***Jacob Mathew (Supra),*** Hon'ble Supreme Court relied upon ***Bolam test*** as well as the case of ***Dr. Suresh Gupta (Supra)*** and held as under:

" 51. We sum up our conclusions as under :-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of 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's case [1957] 1 W.L.R. 582, 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 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 action in civil law but gross nor of a higher degree may provide a ground cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of Indian Penal Code, 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 of the Indian Penal Code 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.

52. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having

expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report). Guidelines-re: prosecuting medical professionals

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

54. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

55. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in Government-service qualified in that branch

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

20. The Hon'ble Supreme Court in the case of ***Martin F. D'Souza (Supra)*** held as under:-

> "117. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligence. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's case (supra), otherwise the policemen will themselves have to face legal action."

21. In the case of ***Malay Kumar Ganguly (Supra),*** Hon'ble Supreme Court held as under: -

> "175. Criminal Medical Negligence is governed by Section 304A of the Indian Penal Code. Section 304-A of the Indian Penal Code reads as under:-
>
> "304-A. 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."
>
> 176. Essential ingredients of Section 304-A are as under:-
>
> (i) Death of a person
>
> (ii) Death was caused by accused during any rash or negligence act.
>
> iii) Act does not amount to culpable homicide.
>
> And to prove negligence under Criminal Law, the prosecution must prove:

(i) The existence of duty.

(ii)A breach of the duty causing death.

(iii) The breach of the duty must be characterized as gross negligence.

177. The question in the instant case would be whether the Respondents are guilty of criminal negligence.

178. Criminal negligence is the failure to exercise duty with reasonable and proper care and employing precautions guarding against injury to the public generally or to any individual in particular. It is, however, well settled that so far as the negligence alleged to have been caused by medical practitioner is concerned, to constitute negligence, simple lack of care or an error of judgment is not sufficient. Negligence must be of a gross or a very high degree to amount to Criminal Negligence.

179. Medical science is a complex science. Before an inference of medical negligence is drawn, the court must hold not only existence of negligence but also omission or commission on his part upon going into the depth of the working of the professional as also the nature of the job. The cause of death should be direct or proximate. A distinction must be borne in mind between civil action and the criminal action.

180. 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 high degree. A negligence which is not of such a high degree may provide a ground for action in civil law but cannot form the basis for prosecution.

181. 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."

22. Parameters as laid down in the case of ***Jacob Mathew (Supra)*** have also relied upon by Hon'ble Supreme Court in the cases of ***A.S. V. Narayanan Rao (Supra), Jayshree Ujwal Ingole (Supra), Prabhat Kumar Singh (Supra)*** and by this Court in ***Dr. Sanjay Saluja (Supra).***

23. However, it will not be out of place to mention that of late, the Bolam test as laid down in the case of ***Jacob Mathew (Supra)*** and reiterated in the subsequent judgments of Hon'ble Supreme Court has been

discarded by the Courts of England. Said position was noticed by Hon'ble Supreme Court in ***Maharaja Agrasen Hospital and others Vs. Master Rishabh Sharma and others,*** *2019 SCC 1658*, wherein, after referring to the Bolam Test as followed in the case of ***Jacob Mathew (Supra)***, it was held as under: -

> "11.4.8 In recent years, the Bolam test has been discarded by the courts in England. In **Bolitho v. City and Hackney Health Authority**, a five judge bench of the House of Lords ruled that :
>
> > *"... 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. In the Bolam case itself, McNair J. stated that the defendant had to have acted in accordance with the practice accepted as proper by a " responsible body of medical men." Later, .. he referred to "a standard of practice recognised as proper by a competent reasonable body of opinion." Again, in the passage which I have cited from Maynard's case, Lord Scarman refers to a "respectable" body of professional opinion. 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."*
>
> [emphasis supplied]

Hon'ble Supreme Court also referred to the observations made in ***V. Kishan Rao v. Nikhil Super Speciality Hospital, (2010) 5 SCC 513*** and held as under:

> "11.4.11 This Court in **V. Kishan Rao v. Nikhil Super Speciality Hospital** has opined that the Bolam test requires re- consideration. A.K. Ganguly, J. speaking for this Court, observed that:

> "23. Even though Bolam test was accepted by this Court as providing the standard norms in cases of medical negligence, in the country of its origin, it is questioned on various grounds. It has been found that the inherent danger in Bolam test is that if the courts defer too readily to expert evidence medical standards would obviously decline. Michael Jones in his treatise on Medical Negligence (Sweet and Maxwell), 4th Edn., 2008 criticised the Bolam test as it opts for the lowest common denominator. The learned author noted that opinion was gaining ground in England that Bolam test should be restricted to those cases where an adverse result follows a course of treatment which has been intentional and has been shown to benefit other patients previously. This should not be extended to certain types of medical accidents merely on the basis of how common they are. It is felt "to do this would set us on the slippery slope of excusing carelessness when it happens often enough" (see Michael Jones on Medical Negligence, para 3-039 at p. 246).
>
> 25. Even though Bolam test "has not been uprooted" it has come under some criticism as has been noted in Jackson & Powell on Professional Negligence (Sweet and Maxwell), 5th Edn., 2002. The learned authors have noted (see para 7-047 at p. 200 in Professional Negligence) that there is an argument to the effect that Bolam test is inconsistent with the right to life unless the domestic courts construe that the requirement to take reasonable care is equivalent with the requirement of making adequate provision for medical care. In the context of such jurisprudential thinking in England, time has come for this Court also to reconsider the parameters set down in Bolam test as a guide to decide cases on medical negligence and specially in view of Article 21 of our Constitution which encompasses within its guarantee, a right to medical treatment and medical care.
>
> 26. In England, Bolam test is now considered merely a "rule of practice or of evidence. It is not a rule of law" (see para 1.60 in Clinical Negligence by Michael Powers QC, Nigel Harris and Anthony Barton, 4th Edn., Tottel Publishing). However, as in the larger Bench of this Court in Jacob Mathew v. State of Punjab, Lahoti, C.J. has accepted Bolam test as correctly laying down the standards for judging cases of medical negligence, we follow the same and refuse to depart from it.
>
> 11.4.12 More recently, this Court in **Arun Kumar Manglik v.Chirayu Health and Medicare (P) Ltd.** has held that the standard of care as enunciated in Bolam (supra) must evolve in consonance with its subsequent interpretation adopted by English and Indian courts."

24.1 Apart from above, in ***Gurbachan Pal Singh Vs. Devinder Singh***, *2014(14) RCR (Criminal) 733,* a petition was filed to quash summoning order. It was a case of medical negligence on account of delay in referring the patient to a specialized hospital/institution. Complainant had alleged that petitioner had not given proper medicines and treatment and

had not informed the complainant intentionally in time that he deserved to be treated in a better hospital and required better treatment in an institution.

24.2 It was held by this Court that launching of prosecution by a complainant did not appear to be an abuse of the process of the Court, as it was a case, where the petitioners would be required to establish by producing their defence evidence that if the ailment had been diagnosed and treatment which could have been given by any other professional had been provided. It was not a case where the petitioners had been unnecessarily harassed. This Court also referred to the test laid down in ***Bolam's case (Supra)*** and the observations made in ***Jacob Mathew's case (Supra)*** to the effect that the Court should not be misunderstood as to hold that Doctors can never be prosecuted for an offence of which rashness or negligence is an essential element. What is essential is the need for care and caution in the interest of society, as the service of the medical profession rendered to human beings is probably the noblest of all, and so there was need to protect them from frivolous or unjust prosecutions. It was observed by this Court that having regard to facts of this case, it was premature to form an opinion that the prosecution against the petitioners/Doctors was malicious.

25. ***Dr. Ritu Rawat and another Vs. Tej Singh and others,*** *2008(4) JCC 2854* was also a case before Delhi High Court in respect of medical negligence, wherein it was held that at the stage of framing of the charge, neither the Court is required to examine and assess in detail the material place on record by the Prosecution nor it is required to consider the sufficiently of the materials and that only *prima facie* case is required to be seen as to whether the commission of offence alleged therein is there. The High Court should not interfere with the summoning order or the order

charge sheeting in a petition quashing the complaint, unless there are strong reasons to hold that in the interest of justice and to avoid abuse of process of the Court, the complaint or charge framed against the accused should be quashed. Quashing should be done only in exceptional cases.

26. Having noticed the legal and factual position as above, this Court finds that there is sufficient material to hold that petitioner should face the prosecution. No fault can be found with the impugned summoning order. The hospital record, as placed on record by the respondent-complainant *prima facie* demonstrate the sufficient material to proceed with the complaint against the petitioners, even in the absence of any opinion of the medical expert, as it has already been observed by this Court that more than a case of gross medical negligence, it is a case of cheating having been committed by the petitioners in conspiracy with each other.

27. Consequently, finding no merit in the present petition, the same is hereby dismissed.

(DEEPAK GUPTA)
JUDGE

11.03.2024
Vivek

Whether speaking/reasoned? Yes
Whether reportable? Yes