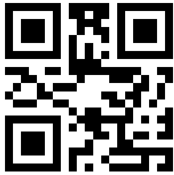
GAHC010302762019



2024:GAU-AS:11286

# THE GAUHATI HIGH COURT

**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : Crl.Pet./1460/2019**

HIMLEENA GAUTAM
W/O- DR. MRINAL CHANDRA BHATTACHARYYA
R/O- HOUSE NO. 160
SUKRESWAR TEMPLE CAMPUS
GUWAHATI- 781001
DIST. KAMRUP(M)
ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY PP
ASSAM.

2:KABIR DEWAN
S/O NURUL ISLAM
R/O- HOUSE NO. 89
SHANTIPUR
MASJID ROAD
GUWAHATI- 781009
DIST. KAMRUP(M)
ASSAM.

------------

Advocate for : MR. D BARUAH
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

**:::BEFORE:::**

**HON'BLE MRS. JUSTICE MITALI THAKURIA**

Date of hearing : 01.08.2024

Date of Judgment & Order : 20.11.2024

## JUDGMENT & ORDER (CAV)

Heard Mr. P. Das, learned counsel for the petitioner. Also heard Mr. P. Borthakur, learned Additional Public Prosecutor for the State respondent No. 1 and Mr. S. Dutta, learned counsel for the respondent No. 2.

**2.** This is an application under Section 482 of the Code of Criminal Procedure, 1973 for setting aside and quashing of the Order dated 07.11.2019, passed by the learned Sub-Divisional Judicial Magistrate (Sadar) – I, Kamrup(M) in Complaint Case No. 3459$^{c}$/2019 taking cognizance against the present petitioner under Section 192/304(A)/316 of the Indian Penal Code, 1860 as well as the entire proceedings thereof insofar as the petitioner is concerned.

**3.** The case of the petitioner, in brief, is that she was working as a Junior Consultant in the Department of Obstetrics and Gynecology and prior to being a Junior Consultant, she was serving as a Senior Registrar, Obstetrics and Gynecology Department, Apollo Hospitals, Guwahati from January, 2018 upto September, 2019. The petitioner was not aware about the case pending against her before the Court of SDJM, (Sadar) – I, Kamrup (Metro) at Guwahati, but on receipt of summons from the learned Trial Court below, dated 26.11.2019, she

came to know that the case has been registered under C.R. Case No. 3549[c]/2019 on the basis of a complaint made by the respondent No. 2 wherein the present petitioner has been arrayed as an accused No. 11.

**4.** Upon enquiry, she came to know that the learned Trial Court below, after recording the deposition of the complainant under Section 200 Cr.P.C. and also recording the statement of the mother-in-law of the complainant as witness under Section 202 Cr.P.C., had taken cognizance vide Order dated 07.11.2019, under Sections 192/304(A)/316 IPC, against the present petitioner as accused No. 11 along with others. But, it is contended that on plain reading of the complaint petition, it is apparent that there is no allegation leveled against the present petitioner except the allegation in paragraph No. 13 of the complaint petition with regard to not making any attempt to deliver the baby in the I.C.U. where the deceased was administered emergency treatment as a patient.

**5.** It is further stated that at the relevant point of time, the petitioner was working as a doctor in the Apollo International Hospital Limited, Guwahati as an Obstetrician. On 15.07.2018, at around 12.15 a.m. (Midnight), a patient was brought to the Apollo International Hospital as an emergency patient, who was in unconscious state at that time, and hence, considering her condition, she was directly admitted to the I.C.U. Accordingly, the team of doctors in the I.C.U., including the present petitioner, had started treating the patient as per protocol which included administering Cardio Pulmonary Resuscitation (CPR) amongst other as the patient had no palpable carotid pulse. The present petitioner, being the Obstetrician on duty, examined the Fetal Heart Rate (FHR) (heart rate of the baby) and the same was not found. Thereafter the patient was declared death

at about 1.15 a.m. on 15.07.2018.

**6.** The petitioner further stated that the allegation made in paragraph No. 13 of the complaint against the petitioner and his colleagues at Apollo International Hospital relating to not causing delivery of the unborn child from the deceased is misconceived and totally improbable in view of the established medical jurisprudence that successful delivery of an unborn child is possible within 5 minutes of maternal cardiac arrest. But, in the instant case, from the complaint it transpires that the cardiac arrest happened at Institute of Human Reproduction and the said Institute had no Ambulance facility and at 11.30 p.m. only, the ambulance arrived and thereafter the patient arrived Apollo Hospital at 12.15 a.m. That aspect of the matter is further clear from the quote of Dr. Rita Bhuyan as quoted by the respondent No. 2 in his complaint that the baby had to be saved at Institute of Human Reproduction and not at Apollo International Hospital. Thus, the said allegation of the complainant has no basis and the statement with regard to letting the unborn child died in dying mother's womb and not causing emergency surgery is belied by the statement made by the complainant himself in paragraph No. 20 of the complaint. The present petitioner and his colleague doctors were not negligent in providing treatment to the patient who was admitted in the I.C.U. and she was provided with all possible and widely accepted treatments.

**7.** Mr. Das, learned counsel for the petitioner, further submitted that the learned Court below without taking any independent opinion from the competent Doctor had taken cognizance and did not follow the direction passed by the Hon'ble Apex Court in case of **Jacob Mathews Vs. State of Punjab &**

**Anr.,** reported in **(2005) 6 SCC 1,** and hence, the order of taking cognizance against the present petitioner is liable to be set aside and quashed. Further, the learned Court below took cognizance without applying its judicial mind and did not consider the entire facts of the case and had mechanically issued process which is not at all permissible in law. He further submitted that the allegations even if it is taken in its entirety are not enough in the instant case to be tried under the alleged Sections of law against the present petitioner. The petitioner being a Doctor, she is duty bound to save life of a patient and she did all her capability and as per procedure and protocol of the medicine science to save the deceased, but she could not be saved due to her critical conditions and for that the present petitioner cannot be harassed by filing case against her. More so, he submitted that for administering emergency treatment in an I.C.U. to a dying patient to save a life would not make the petitioner guilty of any offence under IPC or any other law and as such, the order of taking cognizance against the present petitioner is liable to be set aside and quashed.

**8.** He further submitted that to constitute an offence under Section 316 IPC, one has to do an act causing death by culpable homicide and by such act caused the death of a quick unborn. But, in the present case, it is the admitted position that the deceased had undergone LSCS surgery (for child birth) in different hospitals and had been brought to the Apollo Hospital where the petitioner had administered emergency treatment only and in no case, the offence under Section 316 IPC is being made out *prima facie* against the present petitioner to take cognizance under the said Section.

**9.** More so, he submitted that there is no allegation brought against the

present petitioner in the complaint to attract Section 192 IPC which is for fabricating false evidence and in paragraph No. 22, it is clearly alleged that only the accused Nos. 4 & 8 had fabricated false evidence as such, the learned Trial Court below committed grave error and mistake while taking cognizance against the present petitioner under Section 192 IPC. Further, to constitute an offence under Indian Penal Code, *mens rea* is necessary and in the instant case since the petitioner has treated the patient trying to save her life, there could not be any *mens rea* for the petitioner and as such, the order of taking cognizance is bad in law and liable to be set aside.

**10.** He further submitted that the learned Trial Court below also did not apply its judicial mind while taking cognizance against all the accused persons under Section 316 IPC which would apply only in case wherein an attempt is made to cause culpable homicide of a pregnant woman and resultantly death is caused to quick unborn child.

**11.** Further, Mr. Das relied on a decision of Hon'ble Allahabad High Court in case of **Jabbar & Ors. Vs. State**, reported in **AIR 1966 ALL 590**, wherein in paragraph Nos. 11, 12 & 13, it has been held that the offence under Section 316 consists of any action against the mother, which must be culpable of causing culpable homicide and such action must result in the death of a quick unborn child, which otherwise means that if a person assaults or does anything to a pregnant lady knowing fully well that such an act may lead to culpable homicide of the said lady, but the same results in the death of the quick unborn child, only then, Section 316 IPC would be attracted.

**12.** But, here in the instant case, the Doctors of Apollo Hospitals, including the present petitioner, were trying to save the patient who was admitted in the I.C.U. in a very critical condition. There was no attempt to cause culpable homicide or to cause hurt to the pregnant lady (deceased), rather the Doctors were only trying to save the life of the patient who was admitted in the I.C.U. in the critical condition.

**13.** In regards to Section 304(A) IPC, Mr. Das further submitted that the learned Sub-Divisional Judicial Magistrate (Sadar)-I, Kamrup(M) did not consider the dictum of law laid down by the Hon'ble Apex Court in the case of **Jacob Mathews** (supra), wherein it has been held that a private complaint may not be entertained unless the complainant produces *prima facie* evidence in the form of a credible opinion by another competent doctor, preferably a doctor in Government Service, to support the charge of rashness or negligence.

**14.** He further submitted that this Court in a case reported vide **2013 (4) GLR 870 (Rajendra Prasad Hansaria Vs. Praveen Jain)** also relied on the judgment of **Jacob Mathews** (supra) and it has been held that unless the complainant produced any *prima facie* materials before the Court in the form of credible opinion of a competent doctor, no cognizance under Section 304(A) IPC can be taken against a doctor.

**15.** Mr. Das further relying on a decision of the Hon'ble Apex Court passed in the case of **V. Kishan Rao Vs. Nikhil Superspeciality Hospital**, reported in **(2010) 5 SCC 513**, submitted that the opinion of competent medical doctor is necessary in the Court before taking cognizance of any case as the expert can

throw considerable light on the current state of knowledge in medical science at the time when the patient was treated. However, in the instant case, the learned Trial Court below had taken cognizance mechanically without going into the merit of the case and also failed to consider the fact as to whether *prima facie* any case is established against the present petitioner to take cognizance. More so, the learned Court below did not felt necessary to take any opinion of the medical expert before taking cognizance. The petitioner and the team of Doctors of the Apollo Hospital, who were in duty of I.C.U., had provided all required treatment to the patient as per the protocol and there was no negligence on the part of the doctor and they tried their best to save the life of the patient/deceased.

**16.** Mr. Das also cited a decision of Hon'ble Apex Court reported in **(1998) 5 SCC 749 (Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors.)** and emphasized on paragraph Nos. 28 & 29 of the judgment wherein it has been held that "*summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set in motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegation in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto."* It is further held that "*the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial.*

**17.** Accordingly, he submitted that in the instant case also, it is seen that the learned Trial Court below took cognizance of the case and issued summons to the accused/petitioner along with others without applying his judicial mind and only considering the statement made by the complainant under Section 200 Cr.P.C. as well as the mother-in-law of the complainant under Section 202 Cr.P.C. The learned Trial Court below did not even find it necessary to call for any medical expert opinion before summoning the present petitioner along with others in the instant case.

**18.** More so, he submitted that once the order of taking cognizance is set aside and quashed for being illegal, there cannot be an order for remanding the matter back to the Magistrate for taking fresh cognizance. There is no provision in the Cr.P.C. which provide that after setting aside an order of taking cognizance, the matter would be remanded to the Magistrate for taking fresh cognizance. The law provides for appropriate remedy under such circumstances and the complainant would be at liberty to avail such remedy.

**19.** In this context, Mr. Das relied on a decision of Hon'ble Apex Court passed in the case of **Adalat Prasad Vs. Rooplal Jindal**, reported in **(2004) 4 SCC 338**, wherein it has been held that when a Magistrate takes cognizance of an offence and issues process without there being any allegation, the order is vitiated and there being no power of review or inherent power with the sub-ordinate criminal Courts, the remedy against such order is Section 482 Cr.P.C. Therefore, Mr. Deka submitted that there cannot be an order remanding the matter to the learned Magistrate once the order of taking cognizance is set aside and quashed.

**20.** Accordingly, he submitted that it is a fit case wherein the power under Section 482 Cr.P.C. can be invoked for quashing and setting aside the order of cognizance as well as the criminal proceeding against the present petitioner.

**21.** On the other hand, Mr. Dutta, learned counsel for the respondent No. 2, submitted orally and through his written argument that in the instant case, the entire trust of the complainant/respondent No. 1 is that the doctors at Apollo Hospitals completely overlooked the fact of existence of the unborn baby in the mother's womb and did not make any attempt to save the baby, although the situation of the mother was critical. The said fact is absolutely clear from the statement given by the Apollo Hospitals before the Assam Human Rights Commission, where there is not a single mention or whisper about the very existence of the unborn baby in the mother's womb nor there is any statement to show that if any attempt was made to save the baby. Further he submitted that if there was any risk for operation in an emergency, the option would have been given to the complainant as to whether he would opt for an attempt by doctors to save the unborn baby.

**22.** Further he submitted that though the factual assertion regarding absence of Fetal Heart Rate of the unborn baby has been taken in the present petition and whether the unborn baby was in a position to be saved or not or whether there was a risk to the life of the mother in case of an emergency operation, the best can be determined by the opinion of an independent doctor or a committee of doctors that can be obtained by the learned Trial Court below under Section 202 Cr.P.C. by directing the Investigating Officer in terms of the directions given

by the Hon'ble Supreme Court in the case of **Jacob Mathews** (supra).

**23.** Mr. Dutta further submitted that the unborn baby is a person within the meaning of Section 304-A of the IPC whose death by a negligent act would make the accused liable for prosecution under the said Section of law. The negligent act is when the accused in unmindful, oblivious, completely unaware or totally overlooks the consequences of his negligent act leading to death, but does not have any intention of causing death. Thus, in the instant case, the doctors have overlooked the existence of unborn baby, which is a higher degree of gross medical negligence, which is even higher than that of a lack of care and protection.

**24.** Mr. Dutta further submitted that the statement made on behalf of the petitioner that under Section 482 Cr.P.C., a complaint case cannot be remanded to the Trial Court once the cognizance order is set aside, that the complaint case gets quashed automatically once the order of cognizance is set aside and that the Jacob Mathew's case casts the sole duty upon the complainant and not the Court to submit a credible opinion from another doctor, is completely fallacious, erroneous and absurd.

**25.** In this context, Mr. Dutta relied on a decision of a Full Bench of Hon'ble Apex Court passed in **Criminal Appeal No. 2063/2010 (Aruna & Anr. Vs. Mukund & Ors.)**, wherein it has been observed that since no medical expert opinion was taken while framing the charge, the Trial Court shall examine a medical expert on behalf of the complainant and from an opinion as to whether any charge is made out or not. Thus, it is absolutely clear that even after setting

aside of an order of framing charge, leaving aside even an order of cognizance, a complaint case can still be proceeded with as there are sufficient powers vested with the Trial Court under Section 202 Cr.P.C. to direct an investigation to be caused by a Police Officer or by such person as he thinks fit.

**26.** He further submitted that the judgment of the Hon'ble Supreme Court nowhere lays down that such a complaint cannot be proceeded at all and that it should be dismissed at the threshold if it is not accompanied with *prima facie* evidence of medical negligence. More so the judgment of **Jacob Mathew** (supra) says that such a complaint may not be entertained since in the very next line, the judgment observes that "*the investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferable 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."*

**27.** Mr. Dutta further submitted that in the instant case, the complainant does not have access to any of the medical papers or documents relating to the treatment given by the petitioners in the instant case. The petitioner has herself not produced any of the said documents in the instant proceeding or in the proceedings before Human Rights Commission or the Assam State Consumer Disputes Redressal Commission. Therefore, the complainant cannot rely upon the petitioner to give a truthful disclosure of the events of the fateful night or to furnish any of the documents so that he can approach another doctor to submit an opinion based on them. More so, the independent medical professional is not

bound to give any opinion based on the request of the complainant and in such a situation, the power only vested on the learned Trial Court under Section 202 Cr.P.C. by calling for the relevant documents and obtaining an expert opinion from an independent doctor or committee of doctors or by directing the police officer to conduct the same.

**28.** Mr. Dutta further submitted that it is a fact that there are numerous instances as observed in various pronouncement of judgment by the Apex Court long after the Jacob Mathew's case wherein it is observed that despite non-availability of a medical opinion produced by the complainant himself, the Trial Courts can call for an expert opinion under Section 202 Cr.P.C. which have been relied upon by the Hon'ble High Courts for arriving at a *prima facie* findings regarding the issue of medical negligence. He accordingly cited some decisions of the various High Courts as follows:

(i) **ILR 2017 MP 1762 [BC Jain (Dr) Vs Maulana Saleem]** (Madhya Pradesh High Court).

(ii) **Dr P.A. Abdul Hakkim Vs. State of Kerala** passed in **Crl MC No. 3968 of 2013** (Kerala High Court)

(iii) **Phool Singh Vs Dr Ranjit Ahlawat (2012 SC Online P & H 14826** (Delhi High Court), wherein also it is decided that the medical negligence based on the opinion of a medical board constituted under Section 202 CrPC, even though the complaint was not accompanied by a medical opinion itself and the complainant

had only led his primary evidence.

(iv) **Meenakshi Jain Vs. State & Anr. (2012 SC Online Del 3334)** wherein it is observed that the Trial Court has sufficient powers under the law to call for an expert opinion to satisfy itself for forming a *prima facie* opinion regarding medical negligence.

**29.** Accordingly, relying on above referred judgments, Mr. Dutta submitted that the power under Section 482 Cr.P.C. are to be exercised to prevent the abuse of the process of the Court and for securing the ends of justice which are broad and wide enough to direct the Trial Court to proceed under Section 202 Cr.P.C. and as per the guidelines laid down by the Apex Court, since on the principle of Actus Curiae Neminem Gravabit, no litigant or party shall suffer due to an error committed by the Court and since the learned Trial Court readily took cognizance without first obtaining an expert opinion under Section 202 Cr.P.C.; therefore, even though the cognizance order is set aside, the complaint proceeding shall be relegated back to the state of Section 202 Cr.P.C. where the Trial Court can postpone the issuing of process and can still decide whether to take cognizance based on the expert opinion.

**30.** In this context, he submitted that Section 460 (e) & 461 (k) Cr.P.C. provides under which circumstances the cognizance order will be vitiated and in one circumstance, the cognizance order will not vitiate the proceeding.

**31.** For ready reference, Section 460 (e) & 461 (k) Cr.P.C. are extracted hereinbelow:

*"460. Irregularities which do no vitiate proceedings.*

- *If any Magistrate not empowered by law to do any of the following things, namely, - (e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of Section 190.*

*461. Irregularities which vitiate proceedings.*

- *If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely – (k) takes cognizance of an offence under clause (c) of sub-section (1) of Section 190."*

**32.** Accordingly, Mr. Dutta submitted that the error in order of taking cognizance is curable and it also can be considered as an interlocutory order.

**33.** He further relied on a decision of Hon'ble Apex Court rendered in **V Kishan Rao Vs. Nikhil Super Speciality Hospital [(2010) 5 SCC 513]** and emphasized on paragraph Nos. 35, 36 & 37, which reads as under:

*"35. The three Judge Bench in Dr. J. J. Merchant (supra) accepted the position that it has to be left to the discretion of Commission "to examine experts if required in an appropriate matter. It is equally true that in cases where it is deemed fit to examine experts, recording of evidence before a Commission may consume time. The Act specifically empowers the Consumer Forums to follow the procedure which may not require more time or delay the proceedings. The only caution required is to follow the said procedure strictly." [para 19, page 645 of the report] [Emphasis supplied]*

*36. It is, therefore, clear that the larger Bench in Dr. J. J. Merchant (supra) held that only in appropriate cases examination of expert may be made and the matter is left to the discretion of Commission. Therefore, the general direction given in para 106 in D'Souza (Supra) to have expert evidence in all cases of medical negligence is not consistent with the principle laid down by the larger bench in paragraph 19 in Dr. J. J. Merchant (supra).*

*37. In view of the aforesaid clear formulation of principles on the requirement of expert evidence only in complicated cases, and where in its discretion, the Consumer Fora feels it is required the direction in paragraph 106, quoted above in D'souza (supra) for referring all cases of medical negligence to a competent doctor or committee of doctors specialized in the field is a direction which is contrary to the principles laid down by larger Bench of this Court on this point. In D'souza (supra) the*

*earlier larger Bench decision in Dr. J. J. Merchant (supra) has not been noticed."*

**34.** Accordingly, it is submitted that as per the opinion of the Hon'ble Apex Court either to call for or not to call for an expert opinion in cases of medical negligence, depending upon the nature of the negligence, similarly the explicit and vested laid down powers of the Criminal Courts under Section 202 Cr.P.C. to call for an expert opinion in cases where the complainant is not able to produce an expert opinion, should naturally be deemed to have been upheld.

**35.** Mr. Dutta further submitted that in case of **Jacob Mathews** (supra), the Hon'ble Apex Court also observed that the modality of getting an expert opinion through the Investigating Officer in cases where the Criminal Courts cannot readily entertain a complaint case in the absence of a Medical Opinion produce on behalf of the complainant himself.

**36.** He further relied on another decision of Hon'ble Supreme Court passed in **Martin F. D' Souza Vs. Mohd. Ishfaq (AIR 2009 SC 2049)** and emphasized on paragraph No. 117 of the judgment, which reads 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 committed 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 negligent. 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."*

**37.** Thus, Mr. Dutta submitted that it is a fit case to be remanded back with a direction to the learned Court below to obtain an independent medical opinion preferably from a Doctor of Government Service qualified in the branch of medical practice who can normally be accepted to give impartial and unbiased opinion. He accordingly submitted that even in absence of the expert medical opinion, the cognizance order is irregular, the matter may be remanded to conduct enquiry under Section 202 Cr.P.C. and the issue of process may be postpone accordingly.

**38.** I have considered the submissions made by the learned counsels for both sides and also perused the materials placed on record.

**39.** It is the case of the petitioner that she is no way connected in the alleged offence and there is no allegation brought against her except in paragraph No. 13 of the complaint petition wherein it is alleged that the present petitioner, along with the team of doctors at I.C.U., did not make any attempt to deliver the baby of the deceased who was admitted for emergency treatment. The learned Trial Court below took cognizance of the offence against the present petitioner along with other only recording the statement of the complainant under Section 200 Cr.P.C. and also recording the statement of the mother-in-law of the complainant as witness under Section 202 Cr.P.C. without obtaining any expert medical opinion before taking cognizance against the present petitioner. The petitioner being the doctor was working in the Apollo International Hospital, Guwahati as an Obstetrician. The patient was brought in the hospital in an unconscious state and hence, considering the health condition of the deceased,

she was immediately admitted in the I.C.U. wherein the present petitioner, along with the accused persons, had started treating the patient as per protocol which included administering Cardio Pulmonary Resuscitation (CPR) amongst other as the patient had no palpable carotid pulse. But, even after best effort of the team of doctors of the I.C.U. and after best possible treatment, the patient could not be recovered and as such she was declared dead on 15.07.2018, at about 1.15 a.m. The only allegation brought against the present petitioner is for not causing delivery of the unborn child of the deceased, but it is contended that the present petitioner along with the team of doctors were not negligent in providing treatment to the patient who was admitted in the I.C.U. and she was provided with all possible and widely accepted treatments. More so, on examination, the Fetal Heart Rate (FHR) (heart rate of the baby) was not found.

**40.** As per the petitioner, the statement made by the complainant under Section 200 Cr.P.C. as well as the statement made by the mother-in-law of the complainant under Section 202 Cr.P.C. are not at all sufficient to take cognizance against the present petitioner without obtaining any expert opinion/medical opinion. But, from the order of taking cognizance, it is seen that the learned Trial Court below took cognizance against the present petitioner along with some others under Sections 192/304(A)/316 IPC without following the dictum of law laid down by the Hon'ble Apex Court in case of **Jacob Mathews** (supra) and without obtaining any medical/expert opinion from any competent doctor or government doctor before taking cognizance against the petitioner along with the others who are the doctors of the Apollo Hospital.

**41.** It is further the case of the petitioner that Section 192 IPC does not attract

against the present petitioner as there is no statement in the complaint in regards to fabricating false evidence and the same allegation is only brought against the accused Nos. 4 & 8. More so, it is also the case of the petitioner that ingredient of Section 316 IPC also does not attract against the present petitioner as there was no culpable mentality to cause death of the deceased and her quick unborn baby. The petitioner, along with her team of doctors in the I.C.U., tried their level best to save the life of the patient and it cannot be expected for delivery of a baby when they were busy in providing emergency treatment to the patient who was brought in a very critical condition for which she had to be admitted directly in the I.C.U.

**42.** On the other hand, it is the case of the respondent that the learned Trial Court below rightly took the cognizance of the offence after recording the statement of the complainant as well as after recording the statement of the mother-in-law of the complainant under Section 202 Cr.P.C. Further it is the case of the respondent that the doctors of the Apollo Hospital completely overlooked the fact of existence of unborn baby in the mother’s womb and did not make any attempt to save the baby although the situation of the mother was critical. The statement made by the doctors before the Human Rights Commission also clearly indicates that there is no whisper about the very existence of the unborn baby in the mother’s womb nor there is any statement that if any attempt was made to save the baby. Thus, there was no evidence as to whether the unborn baby was in a position to be saved or not or whether there was a risk of the life of the mother in case of an emergency operation is not mentioned by the doctors of the Apollo Hospital. Thus, the doctors completely overlooked the consequences of their negligent act leading to death which constitute basically

the lack of due care and protection and it is the case of higher degree of gross medical negligence, which is even higher than that of a lack of care and protection.

**43.** As per the respondent, the unborn baby is also a person within the meaning of Section 304(A) IPC whose death by negligent act would make the accused liable for prosecution under the said section of law. However, it is the case of the respondent that the case may be remanded back as without the proper medical opinion of the expert doctors in that filed or competent doctors, the cognizance order may be irregular but it cannot vitiate the trial and even after the rejection of the cognizance order, the matter may be remanded back to the learned Trial Court below to enquire the matter from the stage of Section 202 Cr.P.C. by constituting a proper medical board or directing the police officer to get an information by constituting a proper medical board.

**44.** It is an admitted fact that the learned Court below took cognizance against the present petitioner only recording the statement of the complainant under Section 200 Cr.P.C. and the statement of the mother-in-law of the complainant under Section 202 Cr.P.C. without going into the other details of the case or without obtaining any expert opinion/medical opinion to ascertain as to whether there was negligence on the part of the doctors of the Apollo Hospital wherein the petitioner was also working as an Obstetrician.

**45.** Thus, it is seen that before taking cognizance, the learned Trial Court below did not try to get any opinion from the medical expert to assess as to whether the patient along with her child in the womb died due to negligence of

the petitioner along with the other accused persons, who were providing treatment to the deceased in the I.C.U. However, it cannot directly be held as to whether there was any negligence on the part of the doctors in providing proper treatment to the patient who was admitted in the I.C.U. in a critical condition. In the same time, it also cannot be denied that the prime duty of the team of doctors of the I.C.U. was to save the life of the patient who was admitted in a critical condition in the I.C.U. More so, it may not be possible for the doctors to conduct operation of the patient who was in critical condition with a child in her womb.

**46.** To fulfill the ingredient of Section 316 IPC, a person has to do an act against the mother with the knowledge that such act may cause death of a pregnant woman and such action must result in the death of a quick unborn child.

**47.** Section 316 IPC provides as under:

> "*316. Causing death of quick unborn child by act amounting to culpable homicide.—*
>
> *Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

**48.** As relied by Mr. Das, learned counsel for the petitioner, the decision of Hon'ble Allahabad High Court in case of **Jabbar** (supra) [**AIR 1966 ALL 590**], it has been held that the offence under Section 316 IPC consists of any action against the mother, which must be culpable of causing culpable homicide and

such action must result in the death of a quick unborn child, which otherwise means that if a person assaults or does anything to a pregnant lady knowing fully well that such an act may lead to culpable homicide of the said lady, but the same results in the death of the quick unborn child, only then, Section 316 IPC would be attracted.

**49.** Thus, there has to be a culpable mentality to cause death of a woman and in that process, if the quick unborn dies in the mother's womb, the person may be held guilty under Section 316 IPC. But, here in the instant case, it is seen that there was no *men area* on the part of the petitioner or the other doctors to cause death of the pregnant woman, rather they were providing the treatment to the patient and during that process, the patient died along with her child in the womb. However, the present petitioner, along with the other team of doctors, may be negligent in providing treatment to the patient while she was in the I.C.U., but on that ground it cannot be directly held that the accused petitioner is guilty under Section 316 IPC. Thus, there is no material found against the present accused/petitioner to take cognizance under Sections 192/316 IPC.

**50.** In view of the entire discussion made above and also in view of the decisions as relied by the learned counsels for the petitioner as well as for the respondent and further for the ends of justice, this Court is of the opinion that the matter may be remanded back to the learned Trial Court below to enquire the matter under Section 202 Cr.P.C. obtaining a medical/expert opinion from the competent doctors or board of doctors who are competent and can give an unbiased opinion in that regard. The doctors of the any Government Hospital

can be authorized to constitute the medical board and to examine and verify all the documents to examine as to whether proper care was taken in the I.C.U. while the patient was admitted in a critical condition.

**51.** Thus, for the reasons state above, the impugned order dated 07.11.2019, passed by the learned Sub-Divisional Judicial Magistrate (Sadar) - I, Kamrup(M) in Complaint Case No. 3459$^{c}$/2019, taking cognizance against the present petitioner under Section 192/316 of the Indian Penal Code, 1860 insofar as the present petitioner is concerned, is hereby set aside and quashed. The matter is remanded to the Trial Court for further enquiry under Section 202 Cr.P.C and to obtain opinion of a doctor either constituting a Medical Board or from competent doctor and/or directing the police officer to obtain a proper medical opinion by constituting a Medical Board in terms of the law laid down by the Hon'ble Supreme Court in the case of **Jacob Mathew** (supra) and thereafter to form an opinion whether cognizance under Section 304(A) IPC is made out or not against the present petitioner. However, needless to say, the Trial Court shall not be influenced by any observation made by this Court in the present judgment and order. The matter to be decided strictly in accordance with law on the basis of evidence and after hearing both the sides.

**52.** In terms of above, this criminal petition stands partly allowed and disposed of.

**JUDGE**

**Comparing Assistant**