

(2012) 07 DEL CK 0703

In the Delhi High Court

Case No : Criminal M.C. No. 2504 of 2011

Meenakshi Jain

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 154(1), 154(3), 156(3), 200
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 304A

Citation : (2012) 194 DLT 745

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : Sunil Sharma, APP., for the Respondent

Final Decision : Dismissed

Judgement

V.K. Shali, J.—This is a petition filed by the petitioner u/s 482 Cr.P.C. seeking the following reliefs:

(a) Issue appropriate order or direction to quash the order dated 28.7.2011 passed by the Court below being illegal, arbitrary and against all principles of criminal justice system showing non-application of mind;

(b) Issue appropriate order/directions to the respondent no.1 to register an FIR on the complaint dated 12.10.2010 of the petitioner under the relevant provisions of law or in the alternative issue appropriate order/directions to the Ld. MM to expeditiously decide the application u/s 156(3) Cr.P.C. of the petitioner on merits in the light of the Medical Opinion dated 14.6.2010 of the Board of Doctors of Maulana Azad Medical College, duly constituted by Dean, MAMC on the directions of the Hon''ble State Commission and other material on record filed with the complaint;

(c) Issue appropriate order or directions to transfer the investigation to some other independent investigating agency;

(d) Issue appropriate order or directions to respondent no.2 to keep the complaint No.780/10 of the petitioner pending before Disciplinary Committee in abeyance as requested;

(e) Pass any other and further order as this Hon''ble Court may deem fit, just and proper in the present facts and circumstances of the case.

Briefly stated the facts leading to the filing of the present petition are that the father of the petitioner, who is a practicing lawyer was admitted on 06.3.2009 in Apollo hospital. Unfortunately, he died on 01.4.2009. It is stated by the petitioner that on 16.2.2010, she had obtained an expert opinion by Dr. V.J. Anand, Consultant Surgeon and on the basis of the same, she filed a complaint on 19.3.2010 before the Delhi State Consumer Disputes Redressal Commission.

2. On 14.6.2010, a Board of Doctors of Maulana Azad Medical College was constituted on the directions of the President of State Consumer Forum and it gave an opinion that the death of the deceased was caused because of the medical negligence. On 12.10.2010, the petitioner filed a complaint seeking prayer to register an FIR u/s 304A IPC against the Apollo Hospital and its doctors for forging and tampering with the record and causing the death of her father by medical negligence. On 19.10.2010, a complaint of the medical negligence and professional misconduct against the said hospital and its doctors was made before the Delhi Medical Council. On 6th December, 2010, the present petitioner filed an application u/s 156 (3) Cr.P.C. before the learned Magistrate, Saket Courts, New Delhi seeking directions to the police for registration of an FIR against the doctors of the Apollo hospital for causing death by negligence. On 28th July, 2011, the impugned order was passed by the learned Magistrate directing the Delhi Medical Council /respondent no.2 to expedite the hearing of the complaint bearing No.780/2010 and file the Action Taken Report.

3. The petitioner feeling aggrieved by the said order has challenged the same before this Court.

4. I have heard the petitioner in person, the learned counsel for the Delhi Medical Council as well as Ms. Indu Malhotra, learned senior counsel appearing for the intervener/applicants.

5. The main contention of the petitioner is that by virtue of the impugned order, the learned Magistrate had directed the Delhi Medical Council to furnish its opinion which is in fact trying to filling up the lacuna and save the doctors who have already been held to be prima facie negligent by the Medical Board constituted by the Consumer Forum in the performance of their duties, as a consequence of which, the death of the father of the petitioner has been caused. It was contended by the petitioner that admittedly, a medical board was duly constituted by the Dean of the Maulana Azad Medical College, in pursuance to the directions given by the President of the State Consumer Forum and this Medical Board has already given an opinion holding the doctors of the Apollo Hospital to be prima facie guilty for medical negligence and therefore, that

opinion ought to have been sufficient for the learned Magistrate to direct the registration of the FIR.

6. The second submission of the petitioner is that the Delhi Medical Council has no power to furnish the medical opinion in cases of negligence. The power to furnish opinion in the cases of medical negligence vests only with the government doctors and not with the Board constituted by the Delhi Medical Council. It was urged that it was not proper for the learned MM to have directed the Delhi Medical Council to constitute a Board and give its opinion. It was also contended by the petitioner that the SHO to whom the direction was sent on the basis of an application u/S 156 (3) Cr.P.C. had absolutely no business to have approached the Delhi Medical Council for the purpose of furnishing an opinion. Since such an opinion is already in existence and given by the Medical Board constituted in pursuance to the directions of the State Commission, this exercise is being undertaken to cover up lacunas to save the doctors.

7. The learned counsel appearing for the Delhi Medical Council has contested the claim of the petitioner. He has denied that the Medical Council has any interest in the matter, so as to shield the doctors who may be found prima facie guilty of being negligent in the performance of their duties. On the contrary, it has been contended that the disciplinary committee constituted in terms of Section 21 of the Delhi Medical Council Act (hereinafter referred to as the "Act") not only has the power to proceed departmentally for the Disciplinary action against the medical practitioners, who are registered with it but it also has the authority to give an opinion as to whether the doctors are guilty of negligence or not. It was contended by the learned counsel that it was totally wrong on the part of the petitioner to contend that the Disciplinary Committee or the Delhi Medical Council was acting in pursuance to the request of the SHO. On the contrary, it was contended that as a matter of fact, no doubt the SHO had approached the Council with the orders of the learned Magistrate dated 28.7.2011 for the purpose of obtaining an opinion, but it was essentially on the basis of the letter dated 14.10.2011 purported to have been received from the Joint Secretary, Dept. of Home, Govt. of Delhi stating that the Delhi Medical Council may constitute a Disciplinary Committee and forward an opinion whether the doctors of the Apollo Hospital who treated the deceased were negligent or not. It has been further stated that the Disciplinary Committee had conducted and concluded the proceedings after giving due notice to the petitioner and the outcome of the same has still not been placed before the Council for approval. It is only after the approval by the Council that it be placed before the Court. It was contended that once the Court gives the permission in this regard, the matter will be placed before the Council.

8. It was also contended by the learned counsel that the petitioner had separately made a complaint directly to the Council against the doctors who had treated her father and since the letter of the Joint Secretary and that the complaint of the petitioner pertained to the same subject, both of them were

being dealt together. It is stated that notices were issued to the complainant to appear before the disciplinary committee constituted in terms of Section 21 of the Act and present her case but she had been indulging in dilatory tactics and the filing of the present petition was only one of the steps in the said direction.

9. The petitioner had also during the course of hearing, raised an objection with regard to the right of hearing having been given to the applicants/intervenors. It was the contention of the petitioner that the intervener/applicants have no locus standi to assail the order of the learned Magistrate or the opinion of the Board constituted by Maulana Azad Medical College. For this purpose, the petitioner has relied upon a number of judgments. These are *Grow-On Exports (India) Ltd. and Others Vs. J.K. Goel and another, Prakash Devi & Ors. vs. State of Delhi & Anr.*, 2010 (4) JCC 2833; *Crl. M.C. No.2626/2009 dated 5.2.2010*; *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, Prabha Mathur & Anr. Vs. Pramod Aggarwal & Ors., SLP (Criminal) No.1368/2007 dated 26.9.2008* and *V. Kishan Rao Vs. Nikhil Super Speciality Hospital and Another*,

10. Ms. Indu Malhotra, the learned counsel for the applicants/intervenors has contested this submission of the petitioner that the applicants/intervenors do not have any locus standi. It has been contended by her that in the instant case, the entire effort on the part of the petitioner is to see that a case u/S 304A IPC on account of the alleged medical negligence is registered against the doctors without following due processes of law as has been enunciated by the Apex Court in *Jacob Mathew's* case. She has stated that there are a number of authorities passed by the Apex Court where principles of natural justice have been given effect to, for the purpose of giving right of hearing to the aggrieved party. In this regard, the learned counsel has referred to the following judgments:

(i) *Uma Nath Pandey and Others Vs. State of U.P. and Another*,

(ii) *P. Sundarrajan & Ors. Vs. R. Vidhya Sekar* (2004) 13 SCC 472;

(iii) *Prashant Goel Vs. State and Anr.* 134 (2006) DLT 221;

(iv) *T.G N. Kumar Vs. State of Kerala and Others*,

(v) *Gangadhar Janardan Mhatre Vs. State of Maharashtra and Others*,

11. I have gone through the said authorities. I am cognizant of the fact that merely because the right of hearing has been given in these reported judgments does not ipso facto mean that the right of hearing has to be given to the applicants/intervenors in the present case also on the basis of the said judgments. The Apex Court in number of authorities has laid down that the law which is laid down by the Apex Court should not be treated as theorems and should not be applied blindly without co-relating the facts of the reported judgment with the facts of the case in hand. The authorities which have been cited by the learned senior counsel are the cases where the powers of revision were being exercised by the Court and the right of hearing was involved except in the case of Delhi High Court judgment in *Prakash Devi's* case where the Court

has come to a finding that before a delay in filing the complaint u/S 138 of the Negotiable Instruments Act is condoned, the prospective accused or the respondent against whom the complaint is filed will have a right of hearing.

12. I have gone through these authorities. Dehose these authorities, I am of the view that the law with regard to the right of hearing to the applicants/interveners can be crystallized, so far as the present case is concerned in the following manner.

13. So far as the legal position is concerned, no doubt the accused/respondent or the prospective accused has no right of participation in the proceedings at the pre-summoning stage or till the time he is summoned, he has no locus standi to assail the order passed by the learned Magistrate. But the situation in my view changes, in case the complainant himself goes to the High Court u/S 482 Cr.P.C. assailing the order of the learned Magistrate seeking to obtain an adverse order against the respondent/accused. It will be more apt to give a right of hearing to the accused in cases of the present nature, where the Supreme Court has put an embargo on registration of a criminal case against the medical practitioners without obtaining an opinion from the Medical Board.

14. In the peculiar facts of the present case, I feel that the applicants/interveners were well within their right to assist the Court in presenting the clearer picture but their participation would have gone unnoticed and an FIR u/s 304A IPC would have been registered against them. This is because of the fact that the petitioner's father had admittedly died in the instant case. The petitioner is an Advocate by profession. She has opened almost all the fronts against the doctors with a view to ensure that a case u/S 304A IPC is registered against them without observing the law laid down by the Apex Court in letter and spirit in Jacob's Mathew's case.

15. Dehose the judgment cited by the learned senior counsel for the applicants, I feel that this Court has inherent powers to prevent an abuse of the processes of law and also to pass an order in the interest of justice in respect of a case pending before the Court. The Court is well within its right to give a right of hearing to the applicants/interveners in the light of peculiar facts of the case. If the right of hearing would not have been given to the interveners/applicants, it may have done incalculable damage inasmuch as, the FIR might have got registered against them without following the dictates of Jacob Mathew's case. Accordingly, this contention of the petitioner challenging the locus standi of the applicants/interveners to assist the Court is disallowed as the question of locus standi would have arisen if the applicants/interveners would have come to the Court. It is not the applicants/interveners who have come to the Court but they are the prospective respondents in the complaint before the trial court.

16. For these reasons, I feel that this contention of the petitioner has no merit.

17. So far as the submissions of Ms. Indu Malhotra, learned senior counsel with regard to the merits of the case are concerned, it has been contended by her

that the petitioner had no doubt obtained an opinion from a medical board in terms of the directions of the President of the State Consumer Forum but that opinion was obtained by her at the back of the intervener/applicants and the opinion of the said board could not be relied upon for the purpose of registering a criminal case of medical negligence against the intervener/applicants.

18. It was contended by the learned senior counsel that the petitioner is guilty of concealing material facts, inasmuch as the said opinion which was given by the Medical Board of Maulana Azad Medical College was assailed by the intervener/applicants before the same forum which had given the direction to constitute the Board. In any case, it was contended that this fact ought to have been disclosed by the petitioner that the intervener/applicants have already filed an application before the State Consumer Forum challenging the opinion of the Medical Board of Maulana Azad Medical College in which she had accepted the notice and, therefore, this became a material fact which ought to have been revealed by her in this petition. It was urged that the very fact that the petitioner has come u/S 482 Cr.P.C., she was expected to come to Court with clean hands and since she has not done so, therefore, the petition deserves to be dismissed on this short ground itself.

19. With regard to the constitution of the Medical Board by the Delhi Medical Council, it was contended that the Council has all the powers to constitute a Board for the purpose of obtaining an opinion and in terms of the judgment of the Supreme Court in case titled Jacob Mathew -vs- State of Punjab & Anr., 2005 (6) SCALE 130 as to whether a prima facie case for medical negligence is made out against the doctors, who treated the patient and if the Board furnishes an opinion that there was negligence only then, FIR can be registered.

20. It was contended that in paragraphs 51, 52 and 53 of Jacob Mathew's case (supra), the offence u/s 304-A IPC cannot be registered against any doctor unless and until the medical opinion from a Board is constituted. The said paragraphs read as under:-

Guidelines - re: prosecuting medical professionals

51. 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 complainants 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 u/s 304A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

52. 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 emphasize 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 pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

53. 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 negligence 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 leveled 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.

21. It has been submitted by Ms. Malhotra, the learned senior counsel that it was because of the judgment of Jacob Mathew (supra) by the Apex Court, that the learned Magistrate had referred the matter to Delhi Medical Council for an expert opinion of the Board as to whether there was medical negligence or not, before any adverse action is taken against the doctors treating the patient. It is further stated that the opinion of the doctors of Maulana Azad Medical College could not be treated as a substitute for this opinion of the Board constituted by the Delhi Medical Council before the registration of the FIR.

22. I have carefully considered the submissions made by the learned counsel for the parties and gone through the entire record.

Prayer for Registration of an FIR

23. In clause "b" of the prayer clause, the petitioner has sought appropriate order or direction to the respondent no.1 to register an FIR on the basis of the

complaint dated 12.10.2010 of the petitioner against the relevant provisions of law or alternatively issue a direction to the learned MM to expeditiously decide the application of the petitioner u/S 156 (3) Cr.P.C. on merits in the light of the medical opinion dated 14.6.2010 of the Board of doctors of Maulana Azad Medical College duly constituted by the Dean of Maulana Azad Medical College. The third prayer of the petitioner is for transfer of investigation to some other independent investigating board.

24. It has been settled by now authoritatively by number of judgments that if a person is feeling aggrieved on account of non registration of an FIR in respect of an cognizable offence in terms of Section 154 (1)Cr.P.C. then the appropriate course of remedy open to him is to approach the SP or DCP of the concerned area u/s 154 (3) Cr.P.C. If the FIR is still not registered inspite of this, then the alternate remedy which is open to the petitioner or any party is to file an appropriate complaint u/S 200 Cr.P.C. which may be inquired into by the learned Magistrate u/S 200 and 202 Cr.P.C. and thereafter, pass an appropriate order either u/S 203 Cr.P.C. dismissing the complaint u/s 204 Cr.P.C. issuing the process to the accused persons. It has been repeatedly laid down that if a person is feeling aggrieved on account of non registration of an FIR u/S 154 Cr.P.C. in respect of a cognizable offence, then it is not open to him to approach the High Court by way of a writ petition for getting the said FIR registered. Reliance in this regard is placed on the case titled Sakiri Vasu Vs. State of U.P. and Others, as well as Aleque Padamsee and Others Vs. Union of India (UOI) and Others,

25. Therefore, this prayer made by the petitioner that a direction be given to the respondent no.1 namely to the State to register an FIR on the basis of a complaint dated 12.10.2010, against the accused doctors is not maintainable in law. A direction cannot be issued to the Magistrate for deciding expeditiously the application of the petitioner u/S 156 (3) Cr.P.C. because the petitioner has not placed any document on record to show that the learned Magistrate has been lax in dealing with the application. On the contrary, the learned Magistrate has, on the very threshold, directed the SHO to obtain a medical opinion from the Delhi Medical Council regarding medical negligence by constituting a Board which is a sine qua non for registration of an offence and which direction has got repeated on number of occasions yet the petitioner did not feel aggrieved, but suddenly he has woken up to challenge the order dated 28.7.2011, when the learned Magistrate has reiterated the earlier order to expedite the report of the Board regarding medical negligence.

26. In my view, whatever orders have been placed on record show that the Magistrate is acting with great deal of expedition to dispose of the applications from time to time.

27. If the relief, as prayed by the petitioner under clause (b) regarding registration of an FIR, cannot be granted to her, obviously there is no question of transfer of investigation from one agency to the other agency. Accordingly, prayer (c) also cannot be granted. Therefore, both the prayers "b" and "c" are

not maintainable in the present petition apart from this, both these prayers are beyond the scope of the main complaint which has been filed by the petitioner before the learned MM who has seized of the matter.

Professional complaint against the offending doctor before the Delhi Medical Council

28. In Prayer (d) a direction is sought by the petitioner against the respondent no.2/Delhi Medical Council to keep his complaint bearing no. 780/2010 pending before the Disciplinary Committee. This prayer also cannot be entertained. The reason for this is that the petitioner has challenged the order dated 28.7.2011 which does not deal with this aspect of the matter nor the deferring or keeping of the complaint in abeyance is the main issue involved or the relief claimed before the Magistrate. If a subject matter has not been encompassed before the learned Magistrate, I fail to understand as to how it can be made the basis of the challenge before the High Court. Further, a perusal of the record shows that the petitioner seems to be confused and somehow or the other, wants to keep the Damocles sword hanging on the head of the doctors. This is evident from the fact that firstly, she goes to the Consumer Forum on account of alleged medical negligence and obtains an ex parte order for constitution of a Medical Board. Thereafter, she files a criminal complaint u/S 200 Cr.P.C. for prosecution of the doctors for having committed the offence u/S 304A IPC. Later on, she files an application u/S 156(3) for registration of an FIR. But curiously, when the Action Taken Report was called by the learned Magistrate, it is not disclosed that she has already obtained a report of the so called medical board. Simultaneously, she makes a complaint to the Medical Council and when she is asked to appear and assist the Disciplinary Committee, she writes that the proceedings be kept in abeyance / waiting. The orders of the criminal Court would take considerable time so she starts crying hoarse, that the policeman is approaching the Council for constitution of a Board while as, the fact of the matter is that the Joint Secretary, Govt. of Delhi requested the Council to constitute the Board vide letter dated 14.10.2011 so that prima facie, it could be established that the death was because of medical negligence. Simultaneously, when the Court wants to expedite the constitution of the Board for giving medical opinion, she rushes to this Court for stopping the same. She does not disclose in the petition that the Consumer Forum has already issued the notice to her for setting aside the order or challenging the opinion of the so called Board. Therefore, all the facts clearly show that the petitioner has lost all objectivity only because the victim in the instant case happened to be her father. She has started witch hunting with a view to teach the doctors a lesson which the Apex Court wanted to prevent by its judgment in Jacob Mathew's case.

Medical negligence and registration of an FIR u/s 304A IPC

29. This leaves us with only prayer (a) which is drafted as under :-

(a) issue appropriate order or direction to quash the order dated 28.7.2011

passed by the court below being illegal, arbitrary and against all the principles of criminal justice system essentially non-application of mind.

31. The order dated 28.7.2011 reads as under:-

Fresh Vakalatnama filed on behalf of the DMC. Same is taken on record.

Written submissions filed by the complainant stating therein that Complaint No.780/10 is pending before the Disciplinary Committee of DMC and that proceedings before it are equal to a trial even before the registration of FIR and as such SHO concerned is creating evidence in favour of the accused. A letter dated 12.07.2011 is annexed along with the same, as per which the complainant had requested the DMC to keep her complaint abeyance.

Further minutes of meeting dated 15.7.2011 filed, according to which Disciplinary Committee has been constituted by the DMC consisting of seven members out of which three are expert members. It is stated that the said Committee/Medical Board had been constituted for filing the opinion as requested by the SHO. It is also informed that complainant did not appear on last date and therefore, dated i.e. 5.8.2011 has been fixed for hearing of the parties.

In view of the above, DMC is further directed to expedite the proceedings and file opinion at the earliest. List for filing of status report/ATR on 19.08.2011.

31. A perusal of the aforesaid order would show that the petitioner is feeling aggrieved by virtue of the last portion of the order. By the said portion of the order, the learned Magistrate had directed the Delhi Medical Council to expedite the proceedings and file its opinion at the earliest. As a matter of fact, even if this part of the impugned order is set aside, it would not bring any relief to the petitioner because of the fact that this order reiterates the earlier order passed by the Court directing the constitution of a medical Board by the Delhi Medical Council and file its medical opinion, which is sine qua non for registration of the FIR. The petitioner along with his complaint u/s 200 had also filed an application u/S 156(3) Cr.P.C. seeking registration of an FIR. Neither prima facie medical opinion was attached nor was this the case of the petitioner. She has a medical opinion of Maulana Azad Medical College in her favour which must be made the basis of registration of FIR. It is only belatedly that wisdom dawned on her, therefore, it was necessary for the learned Magistrate to have obtained a medical opinion as the petitioner had failed to produce any prima facie evidence showing medical negligence on the part of the doctors concerned.

32. It may be pertinent here to refer to the few orders which were passed by the learned Magistrate which culminated into the passing of the impugned order.

33. The complaint came up for the first time before the learned Magistrate on 06.12.10 when the Presiding Officer did not hold the Court and the matter was adjourned to the next date i.e. 07.12.10 on which date the Action Taken Report was called for from the police. It was pursuant to this Action Taken Report that

the IO intimated the Court that the matter has been referred to Delhi Medical Council for giving an opinion with regard to the medical negligence. Since the furnishing of a medical opinion report by the Delhi Medical Council was being delayed and in the meantime, the IO of the case seemed to have done some mischief by approaching a private doctor for the purpose of obtaining a medical opinion that the learned Magistrate had sent for the SHO of the police station where the incident had taken place and also directed the constitution of a medical Board. This effective order was passed on 03.06.11. It is this order which was sought to be reviewed by the petitioner by filing an application seeking recall of this order and having failed to do so, it culminated into the order dated 28.07.11. As has been observed hereinabove by this Court that even if the order dated 28.07.11 is set aside even then the order regarding obtaining of a medical opinion from the Board, duly constituted by Delhi Medical Council, still remains on record.

34. The main grievance of the petitioner is not that the Court is trying to obtain the medical opinion from the Delhi Medical Council but the contention of the petitioner is that the State Consumer Forum had constituted a Medical Board headed by three Doctors of Maulana Azad Medical College which had prima facie found it to be a case of medical negligence and therefore, that should have been the ground for registration of an FIR. I must say that this was only an improvement and a belated wisdom which had dawned upon the petitioner. This is on account of the fact that when the petitioner filed the complaint and also an application u/S 156 (3) C.r.P.C for direction to the police to register an FIR, it was not her case that the medical opinion has already been furnished by a competent Board duly constituted by an appropriate authority which should form the basis of the registration of an FIR. More so, when the very medical opinion furnished by the said Board was not challenged by the applicants/interveners before the said Forum in which notice was issued to the petitioner, it will not be safe to rely on the said opinion and the Court cannot today set aside the order passed by the learned Magistrate directing the Delhi Medical Council to constitute a Board and furnish an opinion with regard to the medical negligence of the doctors.

35. In Jacob Mathew's case, the Supreme Court has already observed that once the criminal process is initiated, this subjects the medical profession and the professionals to serious embarrassment and sometimes even harassment. The accused apprehending arrest may have to seek bail which may or may not be granted to him and therefore, this becomes imperative that the greatest possible care is taken that no doctor is put to peril of being arrested or facing a criminal case without observing the procedure which has been laid down by the said judgment which precisely the Court was trying to do in the instant case. The Apex Court, in the said case, has also observed that 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 rash or negligence act on the part of the accused doctor. It was also observed that the IO should, before proceeding against the doctor, accused of

rash or negligent act or omission obtain an independent medical opinion, preferably from a doctor in a Government service qualified in that field of medical practice who should normally be expected to give an impartial and unbiased opinion. If this standard was to be observed by the Court before registration of an FIR against the applicant/intervener, it was necessary that a fresh opinion from the Board duly constituted by the Delhi Medical Board has to be obtained and once the petitioner has put the criminal justice machinery into motion and she has not produced any prima facie evidence with regard to the medical negligence, it was not open to her to have retraced her steps belatedly and then urge before the said trial Magistrate or before this Court that the order passed by the learned Magistrate directing for constitution of a Board of Delhi Medical Council to furnish a medical opinion be recalled because there is already an opinion furnished by the doctors of Maulana Azad Medical College.

36. This is on account of two reasons; firstly, that the opinion furnished by the Board constituted by the doctor of Maulana Azad Medical College was constituted by a Consumer Forum and not by a Criminal Court. Moreover, the report furnished by the said Board is already under challenge by the applicants/interveners inasmuch as, their application has been allowed and the notice issued to the petitioner stands accepted. Therefore, that opinion is of not much relevance for the present and the medical opinion which will be furnished by the Board constituted by the Delhi Medical Council would only be prima facie relevant before the learned Magistrate to decide further course of action. Therefore, I feel that so far as this part of the impugned order is concerned, there is nothing wrong or illegal or perverse in the order of the learned Magistrate.

37. I have also been handed over a sealed envelope during the course of the present proceedings by the counsel appearing for the Delhi Medical Council wherein, an opinion has been furnished by the Board in which admittedly there are doctors belonging to the Government hospitals as well as the doctors from some specialty who are highly reputed. The said opinion of the Board has to be approved by the Delhi Medical Council before it is given effect to or handed over to the Court. I feel, since the said opinion has to be approved by the Council, it must be permitted to complete the said processes and once the said opinion is approved by the Council, it can be submitted to the learned Magistrate where the petitioner, if aggrieved will have appropriate remedies available to him.

38. The Delhi Medical Council is permitted to act in accordance with their statute and get the report of the medical Board approved and thereafter, place the same before the learned Magistrate for such action in accordance with law, as may be deemed fit.

39. Having regard to the aforesaid discussion and in view of the totality of circumstances, I am of the view that the present petition of the petitioner assailing the impugned order dated 28.7.2011 is without any merit and accordingly, the same is dismissed. The stay granted on 05.8.2011 is vacated.

40. It is further clarified that expression of opinion made hereinbefore may not be treated as an expression on the merits of the case by the learned Magistrate and without being influenced by any observation, the Court must act in accordance with law. With the above observations, the petition is dismissed.