IN THE HIGH COURT OF MADHYA PRADESH

AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE G. S. AHLUWALIA

ON THE 22nd OF APRIL, 2025

MISC. CRIMINAL CASE No. 7802 of 2025

JABAR SINGH LODHI

Versus

THE STATE OF MADHYA PRADESH AND OTHERS

Appearance:

Shri Deepak Sharma – Advocate for applicant.

Shri Mohit Shivhare – Public Prosecutor for respondent/State.

ORDER

This application, under Section 528 of BNSS, has been filed seeking the following reliefs.

> "अतः माननीय न्यायालय से निवेदन है कि आवेदक की याचिका स्वीकार की जाकर अनावेदक क्रमांक 3 लगायत 5 के विरूद्ध प्रथम सूचना रिपोर्ट पंजीबद्ध कर उन्हे उक्त अपराध में गिरफतार करे तथा पुलिस थाना विश्वविघालय के द्वारा मर्ग क्रमांक 44/24 में दिन प्रतिदिन कार्यवाही की गई है उसकी स्टेटस रिपोर्ट तलब किये जाने का आदेश पारित करने की कृपा करे ।"

2. It is submitted by counsel for the applicant that daughter of applicant was pregnant and therefore she was admitted in a hospital where cesarean operation was done. However, the daughter of the applicant expired. It is alleged that

daughter of applicant had informed her mother Bhoori that her husband Hitendra, father-in-law, mother-in-law (respondent Nos.5 to 7 respectively) and aunt *(Bua*) were saying that two months' prior to her marriage, her father had sold an agricultural field worth rupees two crores and therefore they should be given a Scorpio vehicle. It was also informed by her daughter that after the ultrasound, respondent Nos. 5 to 7 came to know that she is carrying a female baby and therefore they were saying that they do not require a girl child. Accordingly, it was alleged that in connivance with respondent Nos. 3 & 4, the cesarean operation was unnecessarily done, as a result daughter of the applicant has expired. It is submitted that although applicant has made a complaint to Police, but no action has been taken.

3. Heard learned counsel for the applicant.

4. Respondent Nos. 3 and 4 are doctors, who are running a nursing home and an advanced ultrasound lab. Whether daughter of applicant expired on account of any negligent act by doctors/respondent Nos. 3 and 4, or not, cannot be investigated by Police, until and unless a report is given by a body of experts.

5. The Supreme Court in the case of **Jacob Mathew Vs. State of Punjab reported in (2005) 6 SCC 1** has held as under:-

> **"48.** We sum up our conclusions as under:-
>
> (1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice

G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence 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 v. Friern Hospital Management Committee, [1957] 1 W.L.R. 582, at p.586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses

and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

52. 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 [1957] 1 W.L.R. 582, 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."

6. The Supreme Court in the case of **Kusum Sharma and others vs. Batra Hospital and Medical Research Center and Others** reported in **(2010) 3 SCC 480** has held as under:-

> **89.** On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well-known principles must be kept in view:
>
> *I.* Negligence is the breach of a duty exercised 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.
>
> *II.* Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.
>
> *III.* The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.
>
> *IV.* A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.
> *V.* In the realm of diagnosis and treatment there is scope for

genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and

competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals

7. The Supreme Court in the case of **Martin F. D'Souza v. Mohd. Ishfaq** reported in **(2009) 3 SCC 1** has held as under:-

> **31.** As already stated above, the broad general principles of medical negligence have been laid down in the Supreme Court judgment in *Jacob Mathew v. State of Punjab* [(1957) 1 WLR 582 : (1957) 2 All ER 118] . However, these principles can be indicated briefly here:
>
> The basic principle relating to medical negligence is known as the Bolam Rule. This was laid down in the judgment of *McNair, J. in Bolam v. Friern Hospital* [(1957) 1 WLR 582 : (1957) 2 All ER 118] as follows : (WLR p. 586)
>
> "… where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. *The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill*; it is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."
>
> (emphasis supplied)
>
> Bolam test has been approved by the Supreme Court in *Jacob Mathew cas*e.
>
> **65.** From the aforementioned principles and decisions relating to medical negligence, with which we agree, it is evident that doctors and nursing homes/hospitals need not be unduly worried about the performance of their functions. *The law is a*

watchdog, and not a bloodhound, and as long as doctors do their duty with reasonable care they will not be held liable even if their treatment was unsuccessful. However, every doctor should, for his own interest, carefully read the Code of Medical Ethics which is part of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 issued by the Medical Council of India under Section 20-A read with Section 3(m) of the Indian Medical Council Act, 1956.

66. Having mentioned the principles and some decisions relating to medical negligence (with which we respectfully agree), we may now consider whether the impugned judgment of the Commission is sustainable. In our opinion the judgment of the Commission cannot be sustained and deserves to be set aside.

67. The basic principle relating to the law of medical negligence is the Bolam Rule which has been quoted above. The test in fixing negligence is the standard of the ordinary skilled doctor exercising and professing to have that special skill, but a doctor need not possess the highest expert skill. Considering the facts of the case we cannot hold that the appellant was guilty of medical negligence.

104. Hence courts/Consumer Fora should keep the above factors in mind when deciding cases related to medical negligence, and not take a view which would be in fact a disservice to the public. The decision of this Court in *Indian Medical Assn. v. V.P. Shantha* [(1995) 6 SCC 651] should not be understood to mean that doctors should be harassed merely because their treatment was unsuccessful or caused some mishap which was not necessarily due to negligence. In fact in the aforesaid decision it has been observed (vide SCC para 22) : (*V.P. Shantha case* [(1995) 6 SCC 651] , SCC p. 665)

"22. In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control."

105. It may be mentioned that All India Institute of Medical Sciences has been doing outstanding research in stem cell therapy for the last eight years or so for treating patients suffering from paralysis, terminal cardiac condition, parkinsonism, etc. though not yet with very notable success. This does not mean that the work of stem cell therapy should stop, otherwise science cannot progress.

106. 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 the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised 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 doctor/hospital concerned. 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 case* [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369], otherwise the policemen will themselves have to face legal action."

8. The Supreme Court in the case of **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and others** reported in **(2009) 9 SCC 221** has held as under :-

> **133.** It is noteworthy that standard of proof as also culpability requirements under Section 304-A of the Penal Code, 1860 stand on an altogether different footing. On comparison of the provisions of the Penal Code with the thresholds under the tort law or the Consumer Protection Act, a foundational principle that the attributes of care and negligence are not similar under civil and criminal branches of medical negligence law is borne out. An act which may constitute negligence or even rashness under torts may not amount to the same under Section 304-A.
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> **175.** Criminal medical negligence is governed by Section 304-A of the Penal Code. Section 304-A of the Penal Code reads as under:
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> "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."
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> **176.** The essential ingredients of Section 304-A are as under:
>
> *(i)* Death of a person.
>
> *(ii)* Death was caused by the accused during any rash or negligent act.
>
> *(iii)* Act does not amount to culpable homicide.
>
> And to prove negligence under criminal law, the prosecution must prove:
>
> *(i)* The existence of a duty.
>
> *(ii)* A breach of the duty causing death.

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

(See *R. v. Prentice* [1994 QB 302 : (1993) 3 WLR 927 : (1993) 4 All ER 935] .)

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 the 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 (sic of a) 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."

9. The Supreme Court in the case of **S. K. Jhunjhunwala v. Dhanwanti Kaur and another** reported in **(2019) 2 SCC 282** has held as under:-

> **21.** So far as this Court is concerned, a three-Judge Bench in *Jacob Mathew v. State of Punjab [Jacob Mathew v. State of Punjab,* (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] examined this issue. R.C. Lahoti, C.J. (as he then was) speaking for the Bench extensively referred to the law laid down in Bolam case [*Bolam v. Friern Hospital Management Committee,* (1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] and in *Eckersley case [Eckersley v. Binnie*, (1988) 18 Con LR 1 (CA)] and placing reliance on these two decisions observed in his distinctive style of writing that the classical statement of law in *Bolam case* [*Bolam v. Friern Hospital Management Committee*, (1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] has been widely accepted as decisive of the standard of care required by both of professional men generally and medical practitioner in particular and it is invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence.
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> **22**. It was held in *Jacob Mathew case [Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] that a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This

is what the entire person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings : either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did not possess.

23. It was further observed in *Jacob Mathew case [Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] that the fact that a defendant charged with negligence who acted in accord with the general and approved practice is enough to clear him of the charge. It was held that the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident and not at the date of trial. It was held that 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 practises. His Lordship quoted with approval the subtle observations of Lord Denning made in *Hucks v. Cole [Hucks v. Cole*, (1968) 118 New LJ 469], namely,

"a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be held liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field".

(emphasis supplied)

> **24.** In our view, the facts of the case at hand have to be examined in the light of the aforesaid principle of law with a view to find out as to whether the appellant, a doctor by profession and who treated Respondent 1 and performed surgery on her could be held negligent in performing the general surgery of her gall bladder on 8- 8-1996."

10. A similar law has been laid down by the Supreme Court in the case of **Kalyani Rajan vs. Indraprastha Apollo Hospital and others, reported in 2024 (1) MPLJ Page 1.**

11. Thus, it is clear that unless and until the committee constituted as per the directions given by the Supreme Court in the case of **Jacob Mathew (supra)** gives its report about the medical negligence of the doctors, the doctors should not be prosecuted.

12. Therefore, no direction can be given to the police to register FIR against respondent Nos. 3 and 4, until and unless a report is given by a Committee of Experts regarding medical negligence of respondent Nos 3 and 4.

13. Accordingly, this application, so far as it relates to respondent Nos 3 and 4, is hereby rejected.

14. So far as direction to register FIR against respondent Nos. 5 to 7 is concerned, they are the husband, father-in-law, and mother-in-law of daughter of the applicant.

Now the only question for consideration is as to whether an application under Section 528 of BNSS for registration of FIR is maintainable or not?

15. The Supreme Court in the case of **Aleque Padamsee and others vs. Union of India & Ors,** reported in **(2007) 6 SCC 171** has held as under :-

*"**7.** Whenever any information is received by the police about the alleged commission of offence which is a cognizable one there is a duty to register the FIR. There can be no dispute on that score. The only question is whether a writ can be issued to the police authorities to register the same. The basic question is as to what course is to be adopted if the police does not do it. As was held in All India Institute of Medical Sciences case [(1996) 11 SCC 582 : 1997 SCC (Cri) 303] and reiterated in Gangadhar case [(2004) 7 SCC 768 : 2005 SCC (Cri) 404] the remedy available is as set out above by filing a complaint before the Magistrate. Though it was faintly suggested that there was conflict in the views in All India Institute of Medical Sciences case [(1996) 11 SCC 582 : 1997 SCC (Cri) 303] , Gangadhar case [(2004) 7 SCC 768 : 2005 SCC (Cri) 404] , Hari Singh case [(2006) 5 SCC 733 : (2006) 3 SCC (Cri) 63] , Minu Kumari case [(2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310] and Ramesh Kumari case [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678 : AIR 2006 SC 1322] , we find that the view expressed in Ramesh Kumari case [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678 : AIR 2006 SC 1322] related to the action required to be taken by the police when any cognizable offence is brought to its notice. In Ramesh Kumari case [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678 : AIR 2006 SC 1322] the basic issue did not relate to the methodology to be adopted which was expressly dealt with in All India Institute of Medical Sciences case [(1996) 11 SCC 582 : 1997 SCC (Cri) 303] , Gangadhar case [(2004) 7 SCC 768 : 2005 SCC (Cri) 404] , Minu Kumari case [(2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310] and Hari Singh case [(2006) 5 SCC 733 : (2006) 3*

SCC (Cri) 63] . The view expressed in Ramesh Kumari case [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678 : AIR 2006 SC 1322] was reiterated in Lallan Chaudhary v. State of Bihar [(2006) 12 SCC 229 : (2007) 1 SCC (Cri) 684 : AIR 2006 SC 3376] . The course available, when the police does not carry out the statutory requirements under Section 154 was directly in issue in All India Institute of Medical Sciences case [(1996) 11 SCC 582 : 1997 SCC (Cri) 303] , Gangadhar case [(2004) 7 SCC 768 : 2005 SCC (Cri) 404] , Hari Singh case [(2006) 5 SCC 733 : (2006) 3 SCC (Cri) 63] and Minu Kumari case [(2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310] . The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to their notice show that cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code. It appears that in the present case initially the case was tagged by order dated 24-2-2003 with WP (C) No. 530 of 2002 and WP (C) No. 221 of 2002. Subsequently, these writ petitions were delinked from the aforesaid writ petitions.

8. *The writ petitions are finally disposed of with the following directions:*

(1) If any person is aggrieved by the inaction of the police officials in registering the FIR, the modalities contained in Section 190 read with Section 200 of the Code are to be adopted and observed.

(2) It is open to any person aggrieved by the inaction of the police officials to adopt the remedy in terms of the aforesaid provisions.

(3) So far as non-grant of sanction aspect is concerned, it is for the Government concerned to deal with the prayer. The Government concerned would do well to deal with the matter within three months from the date of receipt of this order.

(4) We make it clear that we have not expressed any opinion on the merits of the case."

16. The Supreme Court in the case of **Divine Retreat Centre Vs. State of Kerala and Others** reported in **(2008) 3 SCC 542** has held as under:-

*"**41.** It is altogether a different matter that the High Court in exercise of its power under Article 226 of the Constitution of India can always issue appropriate directions at the instance of an aggrieved person if the High Court is convinced that the power of investigation has been exercised by an investigating officer mala fide. That power is to be exercised in the rarest of the rare case where a clear case of abuse of power and non-compliance with the provisions falling under Chapter XII of the Code is clearly made out requiring the interference of the High Court. But even in such cases, the High Court cannot direct the police as to how the investigation is to be conducted but can always insist for the observance of process as provided for in the Code.*

***42.** Even in cases where no action is taken by the police on the information given to them, the informant's remedy lies under Sections 190, 200 CrPC, but a writ petition in such a case is not to be entertained. This Court in Gangadhar Janardan Mhatre v. State of Maharashtra [(2004) 7 SCC 768] held : (SCC pp. 774-75, para 13)*

> *"13. When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Regd.) v. Union of India [(1996) 11 SCC 582 : 1997 SCC (Cri) 303] . It was specifically observed that a writ petition in such cases is not to be entertained.*"

17. The Supreme Court in the case of **Sakiri Vasu Vs. State of Uttar Pradesh and Others** reported in **(2008) 2 SCC 409** has held as under:-

> *"**11.** In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 CrPC, then he can approach the Superintendent of Police under Section 154(3) CrPC by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3) CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.*"

18. The Supreme Court in the case of **Sudhir Bhaskarrao Tambe Vs. Hemant Yashwant Dhage and Others** reported in **(2016) 6 SCC 277** has held as under:-

> *"**2.** This Court has held in Sakiri Vasu v. State of U.P. [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440 : AIR 2008 SC 907] , that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct*

the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440 : AIR 2008 SC 907] because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

3. *We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under Section 156(3) CrPC and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation.*

4. *In view of the settled position in Sakiri Vasu case [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440 : AIR 2008 SC 907] , the impugned judgment [Hemant Yashwant Dhage v. S.T. Mohite, 2009 SCC OnLine Bom 2251] of the High Court cannot be sustained and is hereby set aside. The Magistrate concerned is directed to ensure proper investigation into the alleged offence under Section 156(3) CrPC and if he deems it necessary, he can also recommend to the SSP/SP concerned a change of the*

> *investigating officer, so that a proper investigation is done. The Magistrate can also monitor the investigation, though he cannot himself investigate (as investigation is the job of the police). Parties may produce any material they wish before the Magistrate concerned. The learned Magistrate shall be uninfluenced by any observation in the impugned order of the High Court.*"

19. A Division Bench of this Court in the case of **Shweta Bhadauria Vs. State of M.P. & Ors.** decided on **20/12/2016** in **W.A. No. 247/2016** (Gwalior Bench) has held that a Writ Petition for the purposes of directing the respondents to lodge the FIR is not maintainable and has held as under:-

> *"**(1)** Writ of mandamus to compel the police to perform its statutory duty u/s 154 Cr.P.C can be denied to the informant /victim for non-availing of alternative remedy u/Ss. 154(3), 156(3), 190 and 200 Cr.P.C., unless the four exceptions enumerated in decision of Apex Court in the the case of **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 1**, come to rescue of the informant / victim.*
>
> ***(2)** The verdict of Apex Court in the case of **Lalita Kumari Vs. Government of U.P. & Ors.** reported in **(2014) 2 SCC 1** does not pertain to issue of entitlement to writ of mandamus for compelling the police to perform statutory duty under Section 154 Cr.P.C without availing alternative remedy under Section 154(3), 156(3), 190 and 200 Cr.P.C.*"

20. Accordingly, the application is dismissed with liberty to applicant that if he so desires, then he can approach the concerning Magistrate under Section

200 of Cr.P.C./Section 223 of Bharatiya Nagarik Suraksha Sanhita, 2023 for redressal of his grievance *qua* applicant Nos. 5 to 7.

(Justice G.S.Ahluwalia)
Judge

(and)