

Compilation and Analysis of Case-laws

**on
Pre-conception
and
Pre-natal Diagnostics Techniques
(Prohibition of Sex Selection)
Act, 1994**

Dr Shalini Phansalkar Joshi
Joint Director
Maharashtra Judicial Academy

Supported by
United Nations Population Fund

This book is an outcome of UNFPA's efforts for improving implementation of the Law to address declining Child Sex Ratio: Preconception and Prenatal Diagnostic techniques Act. Between 2009-2011, UNFPA in collaboration with Bombay High Court, State Health Systems Resource Center, Maharashtra State Legal Services Authority and Public Health Department- Government of Maharashtra, supported organization of judicial colloquia for capacity building of Judicial Officers and prosecutors on the causes and implications of declining Child Sex Ratio and the PCPNDT Act for speedy redressal of cases and integrated the issue as part of all training programmes conducted at the Maharashtra Judicial Academy. The case laws in this book have been compiled and analysed by the Maharashtra Judicial Academy, as a recommendation of the colloquia and training programmes to serve as a good reference for dealing with cases under the PCPNDT Act more effectively.

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Mohit S. Shah
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MESSAGE

Gender inequalities have persisted in India since centuries. Women and girls continue to be discriminated against at every stage of their life cycle. This manifests itself in the form of sex selection; infanticide; neglect; lack of access to education, health care, nutrition; early marriages; repeated and frequent pregnancies at a very young age; violence; etc.

Sex selection, which is now assuming alarming proportions is not a new phenomenon in India, it has existed for decades. The Child Sex Ratio (number of girls per 1000 boys in the 0-6 years age group) in the country declined from 976 in 1961 to 914 in 2011. This is a matter of grave concern and needs to be addressed using a multi-pronged approach involving different sections of the society. Judiciary also has a very important role to play in impacting the issue of sex selection. While different cases could be viewed from different angles, legislative intent should be on promoting equality and protection of the girl child.

Maharashtra was the pioneer in the Country to enact the Maharashtra Regulation of Use of Pre Natal Diagnostic Techniques Act in 1988, which paved the way for the enactment of the Prevention of misuse of Pre-Natal Diagnostic Techniques Act in 1994 and the amended Pre-Conception and Pre-Natal Diagnostic Techniques Act in 2003. Maharashtra has also been a pioneer in training of Judicial officers on the issue of sex selection and PCPNDT Act and seek their involvement for effective implementation of the Act. This activity was jointly undertaken by the Bombay High Court, Maharashtra State Legal Services Authority, Maharashtra Judicial Academy, Public Health Department Government of Maharashtra and United Nations Population Fund. These trainings have enabled Judicial Officers to interpret the law in the broader context of how this issue impacts the social and cultural fabric of the country. In the recent past there have been a series of sensitive and precedent setting judgments in the State. These have helped to draw attention of the judiciary, media, medical community and the society at large about the gravity of the problem.

I feel that the PCPNDT Act should be viewed in the larger context of gender equality and in that an attempt should be made to draw a connect with the implementation of the Hindu Succession Act, the Protection of Women from Domestic Violence Act and the Dowry Prohibition Act. At the same time, while working on sex selection, utmost precaution should be taken to ensure that women's access to safe and legal abortion does not get compromised.

I would like to congratulate the Maharashtra Judicial Academy and United Nations Population Fund for undertaking the compilation and analysis of Judgments under the PCPNDT Act from across the Country. I hope this compilation would serve as a good reference document for all those working on the subject.


(Mohit S. Shah)

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Foreword



Principles of gender equity are an integral part of Constitution. The Constitution confers equal rights and opportunities on women; bars discrimination on the basis of sex and denounces practices derogatory to the dignity of women. In spite of this, discrimination against women and girls is almost universal. Forced abortions of female foetuses and prenatal sex determination results in millions of girls not being allowed to be born just because they are girls.

The 2011 census revealed that the child sex ratio in the country (the number of girls per 1000 boys in the 0-6 years' age group) has shown a sharp decline from 976 girls per 1000 boys in 1961 to 914 in 2011. In certain parts of the country there are less than 800 girls for every 1000 boys born.

Taking cognizance of this issue the Government of India has put in place a law, the PCPNDT ACT that prohibits the use of pre conception and prenatal diagnostic techniques to determine the sex of the unborn child. It also imposes a fine and imprisonment on doctors indulging in this practice. It has however been difficult to implement the Act because sex selection happens within the confines of the doctor client relationship. There are few convictions under the Act. The Maharashtra Judicial Academy with support from the United Nations Population Fund has undertaken to compile and analyse the case law under the Act with the hope that this compilation will help to serve as a guide and reference book on the issue of sex selection.

I appreciate the efforts of Dr Shalini Phansalkar Joshi, Joint Director of the Academy in compiling this volume. The Academy is doing this work as part of its endeavor towards building capacities of Judicial officers on issues of social relevance.

Hon'ble Dr. Justice D. Y. Chandrachud
Judge Bombay High Court &
Officiating Director
Maharashtra Judicial Academy

Preface

Son preference and discrimination against the girl child is almost universal in India and manifests itself in many ways, including sex selection i.e. pre-birth elimination of female foetuses. This practice has led to decline in the Child Sex Ratio in most parts of India. The Child Sex ratio, which is the number of girls per 1000 boys in the 0-6 years age group has declined from 976 in 1961 to 914 in 2011. The Child Sex Ratio in the State of Maharashtra declined from 940 in 1991 to 913 in 2001 to 883 in 2011. Child sex ratio in the State has declined at a rate of 3.28% between 2001 and 2011 as against 1.4% for the Country.

The decline in sex ratio can severely impact the delicate equilibrium of nature and destroy our moral and social fabric. Sex selection is a reflection of the low status of women in society and a patriarchal mindset steeped in son preference. Sex selection also occurs because of the perceived financial cost of having a girl child, which includes paying for her education, community customs that put burden on the family, the increasing commercialization of the institution of marriage because of which large sums have to be spent on the marriage ceremony and given away as dowry. In general this perception conjoined with the attitude that the girl is a *paraya dhan* creates a mindset that girls are indeed a liability and boys assets because of reasons of lineage and the perception that they would provide old age support.

The consequences of declining sex ratio are serious, all pervading and far reaching. Lesser number of girls in society has resulted in increased violence against women and denial of basic rights to them. It has also led to increase in sex related crimes (rape, abduction, forced polyandry). Sex selection, further, impacts health, especially reproductive health of women who are forced to go in for repeated pregnancies followed by abortions in the desire to have a male child.

Ironically the major reason for declining sex ratio is the proliferation of modern technology and easy and affordable access to such technology with its rapidly expanding use for the purpose of pre and post conception sex selection followed by elimination of foetus, if found to be of female.

Taking cognizance of this issue, the Government of India responded to the imperative need of the hour by passing Prenatal Diagnostic Techniques Act, 1994 to stop this practice and misuse of technology for prenatal sex determination.

Maharashtra was the first state in the Country to enact the Maharashtra regulation of use of Pre Natal Diagnostic Techniques Act in 1988, prohibiting the use of new scientific techniques for sex determination and sex selection treating it as totally insulting to the dignity of womanhood and against the spirit of Constitution in which the right to equality is embedded. Thereafter the Central Government took up the initiative and passed the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (P.N.D.T. Act). Though this Act was passed on September 20, 1994, it came into force from 1/1/1996. During the course of years thereafter several deficiencies, inadequacies and practical difficulties in the implementation of the Act came to notice of the Government, which necessitated amendments in the Act. Moreover new technology was also being developed to select sex of the child before conception. Therefore to bring these pre-conception sex selection techniques within the ambit of the law and also in conformity with the directions of the Apex Court, certain amendments were carried out in the Act, making its provisions more comprehensive and the Act was titled as the "Pre-conception and Pre-natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 1994" (PCPNDT Act).

The amended Act came into effect on 14/2/2003. However, as observed by the Apex Court, there was total inaction on the part of the Government in implementing the provisions of the Act. Only after several directions were issued by the Supreme Court and the various High Courts, that Government took upon itself the task of creating general awareness, sensitization and also prosecuting doctors and clinics which were found violating the provisions of the Act. Even then, the Act was not being implemented with the zeal and vigour which was expected in implementation of this important piece of social welfare legislation. This was reflected by the fact that there were very few prosecutions launched and hence not many case laws were available. The majority of rulings dealt with challenges raised to the Constitutional validity of the Act and to the directions issued by the Higher Courts

for effective implementation of the Act. There are very few cases which are registered, prosecuted and are finally decided after full fledged trial. Hence vast body of decisional law of the district and the trial courts, where the bulk of the cases are ordinarily filed, fought and decided, is not available under this Act.

Moreover most of the cases booked under the Act are still pending for trial and are also concerned with ultrasonography centres not having licenses and registrations. Very few of them deal with the problem of sex selection. Very few provisions of the Act have come for judicial interpretation as the unfolding of the Act is yet to take place in the manner it was expected. There are several other social causes for the same. The Act aims and attempts to address technology and medical issues but not social issues. Sex selection is the result of unholy alliance between traditional values and modern technology. The Act regulates the use of technology but the mindset of the people who adopt and practice this cannot be addressed by Law. Girl Child still remains unwanted in several households. These hard realities of life cannot be ignored and are required to be addressed in implementation of the Act. It hence becomes the duty of the society as to eliminate this social evil by effective implementation of the provisions of the Act with the sensitivity it deserves.

The burden of the legal community including the bench and the bar in such situation becomes onerous. If the mindset of society is not changed and it lags behind the legislation, it has to be the job of judiciary to fill this gap by adopting a realistic and sensitive approach for proper implementation of the legislation. The need of the hour is to mould and evolve the law so as to meet its Object by effective implementation.

With this intention in mind United Nations Population Fund India (UNFPA) Maharashtra has, in association with Bombay High Court , Maharashtra State Legal Services Authorities, State Health Systems Resource Centre and Public Health Department- Government of Maharashtra conducted various Judicial Colloquia at the State level and in all districts for Judicial Officers and sensitization workshops for newly inducted trainee judicial officers at the Maharashtra Judicial Academy on the issue of Sex selection and PCPNDT Act. As on today 28 Judicial colloquia have been conducted covering all districts of Maharashtra. As part of these colloquia 1192 Judicial officers including District Judges, Chief Judicial Magistrates, Civil judges at Senior and junior level have been trained. In addition to this, around three hundred newly recruited civil judges junior division and judicial magistrates first class have been trained at the Maharashtra Judicial Academy.

The district colloquia and the training programs recommended the need for compilation of all judgments under the PCPNDT Act. It was decided that the Maharashtra Judicial Academy could undertake such a compilation. Hence the idea for such a book was born. The book is not just a compilation of cases but also provides an analysis of each case with a view to share the best practices and positive rulings which can be used by all stake holders involved in implementation of the Act. This book is designed to give exposure to the latest position in interpretation of the provisions of the Act and is expected to serve as ready reference for judges, public prosecutors, legal practitioners and other stake holders. Although each of the Judgment passed by the Court aids and has aided in clarifying, expanding and throwing light on some aspect of the provisions while interpreting them, the Judgments which are selected in this book are those which touch some fundamental aspects, like directions of the Supreme Court and High Court for implementation of the Act, Constitutional validity of the Act and which touch upon issues, though factual or procedural, but frequently raised or provide clarity on the spirit, object and reasons of the Act. The case law compiled in this book are selective and representative in nature and an attempt is made to cover most of the issues involved in interpretation and implementation of the Act by the judiciary. The comments prefixing the case law are only illustrative and explanatory in nature. They are not to be read in any other way.

This book is a joint venture between Bombay High Court, UNFPA, Maharashtra Judicial Academy and Maharashtra State Legal Services Authority

Hope and pray this book serves its purpose and the cause.

(Dr. Mrs. S. S. Phansalkar-Joshi)

Joint Director, Maharashtra Judicial Academy,
Indian Mediation Center and Training Institute, Uttan

Acknowledgements

While working as a Judicial Officer one rarely gets the time and opportunity to write or publish a book, but my tenure in the Maharashtra Judicial Academy as Joint Director has bestowed me with this opportunity. At the Academy our source of inspiration and pillar of support are Hon' ble Shri Justice Mohit S. Shah Chief Justice of Bombay High Court and Patron in Chief of the Academy and Hon'ble Dr. Justice D. Y. Chandrachud, officiating Director of the Academy. It was their vision, inspiration, constant support and guidance that instilled in me the idea of writing a book compiling and analysing judgements under the Prevention of Misuse of Pre Conception and Pre natal Diagnostic Techniques Act. I would like to express my heartfelt thanks to them for having permitted me to undertake this assignment, which I feel would be a lasting contribution of the Academy on the issue of sex selection. I am also grateful to them for their kind and gracious gesture of writing the Message and Foreword respectively for the book.

The credit for the idea of bringing out such a book also goes to Ms. Anuja Gulati, the State Programme Officer of United Nations Population Fund, Maharashtra whom I first met in one of the Judicial Colloquia on this subject in Pune. Then we kept on meeting regularly in the sensitization courses, which she conducts for every batch of our Trainee Judges at the Maharashtra Judicial Academy. Her total commitment to the cause impressed me and inspired me to undertake this venture. She is the motivating force and also an active partner in this collaborative effort. Whenever any new Judgment was pronounced in any part of the Country, she was the first one to inform me and send me its copy. Naturally I owe a great deal to her in publication of this book. I am also grateful to Dr Daya Krishan Mangal, State Program Coordinator of UNFPA for his support.

I am extremely thankful to Shri Prakash Doke, Director, SHSRC who took an active role in organisation of the Judicial Colloquia in partnership with UNFPA and Maharashtra State Legal Services Authority. The need for compilation of judgements was an outcome of the colloquia. I would also like to thank Dr Doke and Ms. Ashwini Devane for their continuous support during various stages of this venture.

I must also place on record a special note of thanks to Advocate Uday Warunjikar, Adv Varsha Despande, Adv Shambhaji Jadhav and Ms Medha Kale, Tathapi for having done the peer review of this book.

I would like to express my sincere gratitude to the entire staff of Maharashtra Judicial Academy, who have made valuable contributions in making this book as perfect as possible.

I hope that this book will contribute towards the cause for which it is published to make the girl child a 'Laadli' (Cherished darling) of everyone.

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Landmark Decisions for Implementation of the Act Directions Issued by the Supreme Court and High Courts

It is normally the function of the Government to implement laws enacted by the legislature. But when the Government fails to do so, resort is taken to judiciary. The primary credit for implementation of the Pre Natal Diagnostic Techniques (Prevention of Misuse) Act goes to the judiciary. The PNDT Act was enacted by Parliament in 1994. However it came into operation after 2 years, on 1.1.1996 and even after lapse of 5 years neither the Central nor the State Governments had taken any action for its implementation. Hence the judiciary had to take upon it self the task of giving effect to the said Act. There are a series of petitions filed either *Suo motu* or being moved by NGOs in which the Supreme Court and the High Courts, have issued various directions and pronounced orders to the Central and the State Governments for creating public awareness and for effective implementation of this Act.

Writ Petition (Civil) No. 301 of 2000

Decided on May 4, 2001.

CENTRE FOR ENQUIRY INTO HEALTH & ALLIED THEMES (CEHAT) AND OTHERS

-VERSUS-

UNION OF INDIA AND OTHERS

Hon'ble Judges : M. B. Shah And Hon'ble Mr. Justice S. N. Variava,

Per Hon'ble Mr. Justice M. B. Shah J.1 (1)

Soli J. Sorabjee, Attorney General, Ms Indira Jaising, Yogeshwar Prasad, Dinesh Dwivedi and Kailash Vasdev, Senior Advocates (Sanjay Parikh, R.R. Chandrachud, Sanjay Ghosh, Ms Jayna Kothari, Manish Singhvi, Ms Hemantika Wahi, Ms Sumita Hazarika, Krishan Mahana, C. Radha Krishan, Ajay Sharma, Ms Jayshree Anand, Additional Advocate General for State of Punjab, Jain Hansaria & Co., Advocates, Radhashyam Jena, Brijender Chahar, Ashok Mathur, Sushil Kr. Jain, K.M.K. Nair, S.R. Sharma, Mahabir Singh, Bhavani Shankar V. Gadnis, Shiv Sagar Tiwari, Ms A. Subhashini, Rajiv Sharma, Anil Shrivastav, Sanjay R. Hegde, Sanjay Mitra, Sanjay Kr. Shandilya, V.D. Khanna, Satish Kr. Agnihotri, Sakesh Kumar, Anil Kr. Pandey, Rohit Kr. Singh, Gopal Singh, Ms Alka Agarwal, Kamendra Misra, Ms Sangeeta Sharma, R.C. Verma, Ajay Kr. Agarwal, Vibhakar Mishra, Dev Brat Tiwari, A. Mariaputham, Ms Aruna Mathur, Rajeev Sharma, Tara Chandra Sharma, Ms Sunita R. Singh, Kh. Nobin Singh, Ranjan Mukherjee, Naresh Kr. Sharma, V.G. Pragasam, S.V. Deshpande, Ms Sunita Sharma and D.S. Mahra, Advocates, with them) for the appearing parties.

Acts/Rules/Orders : Dowry Prohibition Act; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Sections 2, 3, 7, 7(2), 9(1), 16, 16A, 17, 17(5), 17(6), 22, 23, 28 and 30; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act – Section 3B, Constitution of India – Article 32; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996 – Rules 15 and 17(3)

CASE SUMMARY

A path breaking order with regard to the implementation of the PNDT Act, is the Writ Petition (C) No. 301/ 2000. It was a Public Interest Litigation, filed under Article 32 of the Constitution of India, by Centre for Enquiry into Health and Allied Themes (CEHAT), a research organisation; Mahila Sarvangin Utkarsh Mandal (MASUM), a Non-Governmental organization and Dr. Sabu M. George, a civil society member. In this Petition it took nearly one year for various States to file their affidavits in reply/ written submissions and after hearing them, from time to time the Supreme Court has issued number of directions to the Central and State Governments, to the Central Supervisory Board and Appropriate Authorities established under the Act, for its proper implementation with all vigor and zeal.

The first set of directions were issued on 4.5.2001 whereby both State and Central Governments were directed to create public awareness against the practice of pre-natal sex determination and sex selection and to implement the Act in the earnest interest. Central Supervisory Board was directed to review and monitor the implementation of the Act and at the same time to examine the necessity

to amend the Act in view of the emerging technology of pre conception sex selection and difficulties encountered in implementation of the Act. State Governments were directed to immediately appoint fully empowered Appropriate Authorities and Appropriate Authorities were further directed to take appropriate criminal action in case of violation of the provisions of the Act. (Para-3) Being aware of the lackadaisical manner in which the Governments were functioning, the Supreme Court did not stop merely by issuing directions but called for the compliance reports and kept the matter pending for further directions on 06.08.2001.

In spite of these directions by the Supreme Court as certain States did not file compliance affidavits, the matter had to be adjourned from time to time and on 19.09.2001 the Supreme Court recorded with anguish that directions were not complied with and there was a total disregard on the part of administration in implementation of the Act. The Supreme Court issued further directions for taking appropriate criminal action against the Medical Officers and the Clinics violating the provisions of the Act.

On 07.11.2001 in the same Writ Petition, on the suggestion of Central Government, Supreme Court ordered setting up of National Inspection and Monitoring Committee for the implementation of the Act.(Para 3) In the year 2003 in conformity with the several directions issued by the Supreme Court, the Act was amended to bring within its purview the misuse of pre-conception and pre-natal diagnostic techniques and was titled as the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act. On 31.03.2003 and 10.09.2003 after giving some further directions, for creating public awareness and for effective implementation of the amended Act, the Supreme Court finally disposed of the Petition on 10.09.2003.

The perusal of these directions in the form of total six orders is sufficient to reflect that the Supreme Court has to in this matter literally legislate on how the Act should be implemented. This decision hence constitutes a land mark in its impact. It exhibits the deep concern and the anguish felt by the Apex Court towards the social evil of sex selection followed by elimination of foetus if found to be female. The Supreme Court was equally concerned with the apathy on the part of Government in implementation of the law which aims at preventing such a social evil. As per Supreme Court, "it was unfortunate that for implementation of the law, which was the urgent need of the hour, NGOs had to approach the Court." The significance given by the Supreme Court to this issue is bound to have positive effect for advancing the cause.

As the Judgments and Orders of Supreme Court are binding on all in view of Article 141 of the Constitution of India and as the non-obedience and non-compliance with the directions issued by the Supreme Court amounts to contempt of court, it appears that only with a view to avoid facing the action of contempt of the Supreme Court, the Government and Authorities have at least made some efforts towards implementation of this Act. This decision is in that respect epoch making.

It must be stated that but for the initiative taken by the NGOs and the constant monitoring by the Apex Court, virtually laying down the entire frame work for implementation, this Act would have remained on paper only.

All the six Orders passed in this Writ Petition are worth reading in entirety, especially the opening paras of the Supreme Court's first order dated 04.05.2001 and last order dated 10.09.2003, highlighting the plight of female child and the in human practice of sex selection. The six Orders of the Supreme Court passed in Writ Petition (Civil) No. 301/2000 are given below.

ORDER

1. It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has a soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby the female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advanced medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance.
2. For controlling the situation, Parliament in its wisdom enacted the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as “the PNDT Act”). The Preamble, inter alia, provides that the object of the Act is to prevent the misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide and for matters connected therewith or incidental thereto. The Act came into force from 1-1-1996.
3. It is apparent that to a large extent, the PNDT Act is not implemented by the Central Government or by the State Governments. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India. One of the petitioners is the Centre for Enquiry into Health and Allied Themes (CEHAT) which is a research centre of Anusandhan Trust based in Pune and Mumbai. The second petitioner is Mahila Sarvangeen Utkarsh Mandal (MASUM) based in Pune in Maharashtra and the third petitioner is Dr Sabu M. Georges who is having experience and technical knowledge in the field. After filing of this petition, this Court issued notices to the parties concerned on 9-5-2000. It took nearly one year for the various States to file their affidavits in reply/written submissions. Prima facie it appears that despite the PNDT Act being enacted by Parliament five years back, neither the State Governments nor the Central Government has taken appropriate action for its implementation. Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney-General for India, Mr Soli J. Sorabjee, the following directions are issued on the basis of various provisions for the proper implementation of the PNDT Act:

I. Directions to the Central Government

1. The Central Government is directed to create public awareness against the practice of prenatal determination of sex and female foeticide through appropriate releases/programmes in the electronic media. This shall also be done by the Central Supervisory Board (“CSB” for short) as provided under Section 16(iii) of the PNDT Act.
2. The Central Government is directed to implement with all vigour and zeal the PNDT Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under sub-section (5) of Section 17 of the PNDT Act to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

II. Directions to the Central Supervisory Board (CSB)

1. Meetings of CSB will be held at least once in six months [re proviso to Section 9(1)]. The constitution of CSB is provided under Section 7. It empowers the Central Government to appoint ten members under Section 7(2) (e) which includes eminent medical practitioners, including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.

2. CSB shall review and monitor the implementation of the Act [re Section 16(ii)].
3. CSB shall issue directions to all State/UT appropriate authorities to furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:
 - (i) survey of bodies specified in Section 3 of the Act;
 - (ii) registration of bodies specified in Section 3 of the Act;
 - (iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;
 - (iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;
 - (v) number and nature of awareness campaigns conducted and results flowing therefrom.
4. CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government (re Section 16).
5. CSB shall lay down a code of conduct under Section 16(iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that the public at large can know about it.
6. CSB will require medical professional bodies/associations to create awareness against the practice of prenatal determination of sex and female foeticide and to ensure implementation of the Act.

III. Directions to State Governments/UT Administrations

1. All State Governments/UT Administrations are directed to appoint by notification, fully empowered appropriate authorities at district and sub-district levels and also Advisory Committees to aid and advise the appropriate authorities in discharge of their functions [re Section 17(5)]. For the Advisory Committee also, it is hoped that members of the said Committee as provided under Section 17(6)(d) should be such persons who can devote some time to the work assigned to them.
2. All State Governments/UT Administrations are directed to publish a list of the appropriate authorities in print and electronic media in their respective States/UTs.
3. All State Governments/UT Administrations are directed to create public awareness against the practice of prenatal determination of sex and female foeticide through advertisement in print and electronic media by hoardings and other appropriate means.
4. All State Governments/UT Administrations are directed to ensure that all State/UT appropriate authorities furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:
 - (i) survey of bodies specified in Section 3 of the Act;
 - (ii) registration of bodies specified in Section 3 of the Act;
 - (iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;
 - (iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;
 - (v) number and nature of awareness campaigns conducted and results flowing therefrom.

IV. Directions to appropriate authorities

1. Appropriate authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of Section 22 of the Act.
2. Appropriate authorities are directed to take prompt action against all bodies specified in Section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.
3. All State/UT appropriate authorities are directed to furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:
 - (i) survey of bodies specified in Section 3 of the Act;
 - (ii) registration of bodies specified in Section 3 of the Act including bodies using ultrasound machines;
 - (iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;
 - (iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;
 - (v) number and nature of awareness campaigns conducted and results flowing therefrom.
4. CSB and the State Governments/Union Territories are directed to report to this Court on or before 30-7-2001. List the matter on 6-8-2001 for further directions at the bottom of the list.

EQUIVALENT CITATION : (2003) 8 Supreme Court Cases 406

1 (2)

**WP (C) No. 301 of 2000,
Decided on September 19, 2001**

CEHAT AND OTHERS

Versus

UNION OF INDIA

Hon'ble Judges : M.B. Shah and R.P. Sethi, JJ.

(Record of Proceedings)

Acts/Rules/Orders : Dowry Prohibition Act; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Sections 2, 3, 7, 7(2), 9(1), 16, 16A, 17, 17(5), 17(6), 22, 23, 28 and 30; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act – Section 3B, Constitution of India – Article 32; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996 – Rules 15 and 17(3)

ORDER

1. Heard the learned counsel for the parties and considered the affidavits filed on behalf of various States. From the said affidavits, it appears that the directions issued by this Court are not complied with.
2. At the outset, we may state that there is total slackness by the administration in implementing the Act. Some learned counsel pointed out that even though the genetic counselling centres, genetic laboratories or genetic clinics are not registered, no action is taken as provided under Section 23 of the Act, but only a warning is issued. In our view, those centres which are not registered are required to be prosecuted by the authorities under the provisions of the Act and there is no question of issue of warning and to permit them to continue their illegal activities.
3. It is to be stated that the appropriate authorities or any officer of the Central or the State Government authorised in this behalf is required to file complaint under Section 28 of the Act for prosecuting the offenders.
4. Further, wherever at district level, appropriate authorities are appointed, they must carry out the necessary survey of clinics and take appropriate action in case of non-registration or non-compliance with the statutory provisions including the Rules. Appropriate authorities are not only empowered to take criminal action, but to search and seize documents, records, objects etc. of unregistered bodies under Section 30 of the Act.
5. It has been pointed out that the States/Union Territories have not submitted quarterly returns to the Central Supervisory Board on implementation of the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as “the Act”). Hence, it is directed that the quarterly returns to the Central Supervisory Board should be submitted giving the following information:
 - (a) Survey of centres, laboratories/clinics,
 - (b) registration of these bodies,
 - (c) action taken against unregistered bodies,
 - (d) search and seizure,
 - (e) number of awareness campaigns, and
 - (f) results of campaigns.
6. From the record, it is apparent that the State of Chhattisgarh and on behalf of the Union Territory of Chandigarh, affidavits are not filed.
7. For the State of Jammu and Kashmir, learned counsel appearing on behalf of the State submits that at present, the Act is not applicable to the State of Jammu and Kashmir. However, till there is similar enactment, the State authorities would take appropriate action on the basis of the directions which may be issued by the Court.
8. As per various affidavits, learned counsel for the petitioners and Respondent 1 pointed out that some States have complied with the directions issued by this Court on 4-5-2001[†], but the following directions are not complied with by the States mentioned hereinbelow:
 - (a) For the direction of issuing notification of appropriate authorities at district levels, the following States/UTs have not complied with:

States

Goa, Jammu and Kashmir, Nagaland and Tripura

UTs

Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman & Diu, Lakshadweep, Pondicherry and NCT of Delhi.

- (b) For the direction regarding issue of notification for appointing appropriate authorities at sub-district level, the following States/UTs have not complied with:

States

Arunachal Pradesh, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Karnataka, Kerala, Maharashtra, Mizoram, Nagaland, Orissa, Sikkim, Tamil Nadu, Tripura, Uttar Pradesh and West Bengal.

UTs

Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep, Pondicherry and NCT of Delhi.

- (c) With regard to the direction issued for the Advisory Committees to aid and advise the appropriate authorities, the following States/UTs have not complied with:

States

Arunachal Pradesh, Goa, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Maharashtra, Meghalaya, Mizoram, Nagaland, Rajasthan, Sikkim, Tripura and West Bengal.

UTs

Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep, Pondicherry and NCT of Delhi.

- (d) For constitution of the Sub-District-Level Advisory Committees, the following States/UTs have not done the needful:

States

Andhra Pradesh, Arunachal Pradesh, Goa, Gujarat, Haryana, Himachal Pradesh, Jharkhand, Karnataka, Kerala, Maharashtra, Meghalaya, Mizoram, Nagaland, Orissa, Rajasthan, Sikkim, Tamil Nadu, Tripura, Uttar Pradesh and West Bengal.

UTs

Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep, Pondicherry and NCT of Delhi.

- (e) For the direction to publish a list of appropriate authorities in the print media, electronic media, hoardings and other means, the following States/UTs have not done the needful:

(i) Re print media: no action is taken by the following:

States

Assam, Goa, Himachal Pradesh, Jammu and Kashmir, Kerala, Maharashtra, Meghalaya, Manipur, Nagaland, Orissa, Sikkim, Uttaranchal and Uttar Pradesh.

UTs

Dadra and Nagar Haveli, Lakshadweep and NCT of Delhi.

- (ii) Re electronic media: no action is taken by the following:

States

Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Kerala, Maharashtra, Meghalaya, Manipur, Nagaland, Orissa, Punjab, Sikkim, Tamil Nadu, Tripura, Uttaranchal, Uttar Pradesh and West Bengal.

UTs

Dadra and Nagar Haveli, Daman and Diu, Lakshadweep and NCT of Delhi.

- (iii) Re hoardings: no action is taken by the following:

States

Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Kerala, Madhya Pradesh, Maharashtra, Meghalaya, Mizoram, Manipur, Nagaland, Orissa, Punjab, Sikkim, Tamil Nadu, Tripura, Uttaranchal, Uttar Pradesh and West Bengal.

UTs

Andaman and Nicobar Islands, Dadra and Nagar Haveli, Lakshadweep and NCT of Delhi.

9. In this view of the matter, we direct all the State Governments/Union Territories to implement the Act and submit the compliance report as directed by our order dated 4-5-2001[†] as well as this order within six weeks from today.

10. List this matter after six weeks.

EQUIVALENT CITATION : (2003) 8 Supreme Court Cases 409

1 (3)

WP (C) No. 301 of 2000
Decided on November 7, 2001

CEHAT AND OTHERS

Versus

UNION OF INDIA AND OTHERS

Hon'ble Judges : M.B. Shah and B.N. Agrawal, JJ.

(Record of Proceedings)

Acts/Rules/Orders : Dowry Prohibition Act; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Sections 2, 3, 7, 7(2), 9(1), 16, 16A, 17, 17(5), 17(6), 22, 23, 28 and 30; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act – Section 3B, Constitution of India – Article 32; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996 – Rules 15 and 17(3).

ORDER

1. Heard the learned counsel for the parties.
2. Learned counsel appearing for some of the States submit that necessary affidavit along with compliance report would be filed within a period of three weeks from today.
3. Mr Mahajan, the learned counsel appearing for the Union of India states that the Central Government has also decided to take concrete steps for the implementation of the Act and suggested to set National Inspection and Monitoring Committee for the implementation of the Act.
4. Stand over to 11-12-2001.

EQUIVALENT CITATION : (2003) 8 Supreme Court Cases 410

1 (4)

WP (C) No. 301 of 2000
Decided on December 11, 2001

CEHAT AND OTHERS

Versus

UNION OF INDIA AND OTHERS

Hon'ble Judges : M.B. Shah, B.N. Agrawal and Arijit Pasayat, JJ.

(Record of Proceedings)

Acts/Rules/Orders : Dowry Prohibition Act; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Sections 2, 3, 7, 7(2), 9(1), 16, 16A, 17, 17(5), 17(6), 22, 23, 28 and 30; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act – Section 3B, Constitution of India – Article 32; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996 – Rules 15 and 17(3)

ORDER

1. Learned counsel for the petitioners has pointed out that in the affidavits tendered on behalf of the State Governments names of the members of the Advisory Committee are not disclosed and in any case are not published at the relevant places. In this view of the matter, the State Governments concerned are directed to publish the names of the members of the Advisory Committee in various districts so that if there is any complaint any citizen can approach them. Further, the statistics and information which are to be given in the affidavit should be given districtwise.
2. Mr Krishan Mahajan, the learned counsel appearing on behalf of the Union of India states that despite the necessary warning by the Secretary, Health Department (Family Welfare), Health Secretaries of various States

are not responding and are not interested in implementing the Act as well as the various directions issued by this Court. Today, the learned counsel appearing on behalf of the petitioners has produced the chart based on the affidavits filed by the various States which indicates that there is no desire on the part of the administrators concerned to implement seriously the law and orders passed by this Court. For non-compliance with the orders passed by this Court, Secretary (Health Department) of the following States are directed to remain present before this Court on 29-1-2002:

“(1) Punjab, (2) Delhi, (3) Bihar, (4) Rajasthan, (5) Gujarat, (6) Haryana, (7) Uttar Pradesh, (8) Maharashtra, and (9) West Bengal.”

3. It is alleged by the learned counsel for the petitioners that Dr Dahiya is transferred from Faridabad to Chandigarh only because he was taking appropriate action against defaulting clinics. For this purpose, learned counsel has placed reliance on the newspaper reports. In our view, if an efficient officer is transferred only because he was taking action against the defaulting clinics then certainly the action of the State Government is an unjustified one. In addition, the State of Haryana through its Health Secretary is directed to file necessary affidavit stating reasons for transfer of Dr Dahiya.
4. Learned counsel for the petitioners further submitted that the officers of various State Governments are wasting a lot of time in verifying where ultrasound machines are kept. She pointed out that the data of ultrasound machines supplied to the clinics is available from the manufacturing companies as well as from the service contracts entered into by these clinics with those companies. It is also pointed out that in some cases these machines are also imported. For that also, names of the importers are easily available from the Customs Department. We, therefore, direct the following companies to supply the information as to how many machines they have sold to various clinics within the last five years including their names and addresses and also service contract to those clinics or individuals, as the case may be:
 1. Uma Parameshwaran, CEO, Wipro GE Medical Systems Ltd., A-1, Corporate Towers, Golden Enclave, Airport Road, Bangalore 560 017.
 2. Toshbro Shimandzu Ltd., Khetan Bhawan, 2nd Floor, Mumbai 400 020.
 3. Erbis Engineering Co. Ltd., 2E/12, 4th Jhandewalan Extn., New Delhi 110 005.
 4. V. Prabhakar, CEO, ATL India Ltd., 79 and 94, Developed Plots, Perungadi, Chennai 600 096.
 5. Larsen & Toubro Ltd. (Medical Equipment Divn.), L&T House, 10, Club House Road, Anna Salai, Post Bag No. 55247, Chennai 600 002.
 6. International Medical Services Pvt. Ltd., 17, Industrial Estate, Maruti Complex, Gurgaon 122 015.
 7. A.K. Khosla, Chairman, General Electric Co. Of India Ltd., E-16, Greater Kailash, Part I, New Delhi 110 048.
 8. Rajeev Dayal, President & CEO, HCL Picker Ltd., D-3, Community Centre, Poorvi Marg, Vasant Vihar, New Delhi 110 057.
 9. Siemens Ltd., Mahape Workshop, Shilphata Road, behind MIDC Area, off Thane-Belapur Road, Village Mahape, Thane 400 601.
5. For implementation of the Act and the rules it appears that it would be desirable if the Central Government frames appropriate rules with regard to sale of ultrasound machines to various clinics and issues directions not to sell machines to unregistered clinics. Learned counsel Mr Mahajan appearing for the Union of India submitted that appropriate action would be taken in this direction as early as possible.
6. Adjourned to 29-1-2002.

WP (C) No. 301 of 2000
Decided on March 31, 2003

CEHAT AND OTHERS

Versus

UNION OF INDIA

Hon'ble Judges : M.B. Shah and Arun Kumar, JJ.

(Record of Proceedings)

Acts/Rules/Orders : Dowry Prohibition Act; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Sections 2, 3, 7, 7(2), 9(1), 16, 16A, 17, 17(5), 17(6), 22, 23, 28 and 30; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act – Section 3B, Constitution of India – Article 32; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996 – Rules 15 and 17(3)

WP (C) No. 344 of 2002

1. The learned counsel for the petitioners seeks leave to withdraw this petition. Permission granted. The writ petition stands disposed of as withdrawn.

WP (C) No. 301 of 2000

2. Heard the learned counsel for the parties. The learned counsel for the petitioners points out that on 14-2-2003, the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 was amended and it is now named as the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act. She submits that very few persons are aware of the new amendment. According to her submission the said amendment is in conformity with the various directions issued by this Court and, therefore, the amended Act also requires to be properly implemented. For this purpose, the learned counsel for the petitioners seeks the following reliefs:

- “(i) direct the Union of India, State Governments/UTs and the authorities constituted under the PNDT Act to prohibit sex-selection techniques and its advertisement throughout the country;
- (ii) direct that the appropriate authorities shall also include ‘vehicles’ in their quarterly reports hereinafter as defined under Section 2(d);
- (iii) any person or institution selling ultrasound machine should provide information to the appropriate State authority in furtherance of Section 3-B of the amended Act;
- (iv) direct that the State Supervisory Boards be constituted in accordance with the amended Section 16-A in order to carry out the functions enumerated therein;
- (v) direct appropriate authorities to initiate suo motu legal action under the amended Section 17(4)(e);
- (vi) direct that the Central Supervisory Board shall publish half-yearly consolidated reports based on the quarterly reports obtained from the State bodies. These reports should specifically contain information on:

- (1) Survey of bodies and the number of bodies registered.
 - (2) Functioning of the regulatory bodies providing the number and dates of meetings held.
 - (3) Action taken against non-registered bodies inclusive of search and seizure of records.
 - (4) Complaints received and action taken pursuant thereto.
 - (5) Nature and number of awareness programmes.
 - (vii) direct that the Central Supervisory Board shall carry out all the additional functions as given under the amended Section 16 of the Act, in particular, to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation.”
3. As against this, Mr Mahajan, learned counsel appearing for the Union of India submits that on the basis of the aforesaid amendment, appropriate action has already been taken by the Union of India for its implementation and almost all the State Governments/UTs are informed to implement the said Act and the rules and the State Governments/UTs are directed to submit their quarterly reports to the Central Supervisory Board.
 4. Considering the amendment in the Act, in our view, it is the duty of the Union Government as well as of the State Governments/UTs to implement the same as early as possible. Hence, the State Governments/UTs are directed to file necessary affidavits within a period of ten weeks from today.
 5. List after ten weeks.
WP (C) No. 339 of 2002
 6. To be listed along with WP (C) No. 301 of 2000.

EQUIVALENT CITATION : (2003) 8 Supreme Court Cases 398

1 (6)

CASE NO.: Writ Petition (civil) 301 of 2000
Decided on September 10, 2003.

CEHAT AND OTHERS

Versus

UNION OF INDIA

Hon'ble Judges : M.B. Shan & Ashok Bhan.

Acts/Rules/Orders : Dowry Prohibition Act; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Sections 2, 3, 7, 7(2), 9(1), 16, 16A, 17, 17(5), 17(6), 22, 23, 28 and 30; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act – Section 3B, Constitution of India – Article 32; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996 – Rules 15 and 17(3)

JUDGMENT

Shah, J.

It is an admitted fact that in Indian Society, discrimination against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind-set or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that number of persons condemn discrimination against women in all its forms, and agree to pursue, by appropriate means, a policy of eliminating discrimination against women, still however, we are not in a position to change mental set-up which favours a male child against a female. Advance technology is increasingly used for removal of foetus (may or may not be seen as commission of murder) but it certainly affects the sex ratio. The misuse of modern science and technology by preventing the birth of girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off. Despite this, it is unfortunate that law which aims at preventing such practice is not implemented and, therefore, Non-Governmental Organisations are required to approach this Court for implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 renamed after amendment

as “The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act” (hereinafter referred to as ‘the PNDT Act’) which is the normal function of the Executive. In this petition, it was inter alia prayed that as the Pre-natal Diagnostic Techniques contravene the provisions of the PNDT Act, the Central Government and the State Governments be directed to implement the provisions

of the PNDT Act (a) by appointing appropriate authorities at State and District levels and the Advisory Committees; (b) the Central Government be directed to ensure that Central Supervisory Board meets every 6 months as provided under the PNDT Act; and (c) for banning of all advertisements of pre-natal sex selection including all other sex determination techniques which can be abused to selectively produce only boys either before or during pregnancy. After filing of this petition, notices were issued and thereafter various orders from time to time were passed to see that the Act is effectively implemented.

A] On 4th May 2001, following order was passed: “It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance. For controlling the situation, the Parliament in its wisdom enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as “the PNDT Act”). The Preamble, inter alia, provides that the object of the Act is to prevent the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide and for matters connected therewith or incidental there to. The Act came into force from 1st January, 1996. It is apparent that to a large extent, the PNDT Act is not implemented by the Central Government or by the State Governments. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India. One of the petitioners is the Centre for Enquiry Into Health and Allied Themes (CEHAT) which is a research center of Anusandhan Trust based in Pune and Mumbai. Second petitioner is Mahila Sarvangeen Utkarsh Mandal (MASUM) based in Pune and Maharashtra and the third petitioner is Dr. Sabu M. Georges who is having experience and technical knowledge in the field. After filing of this petition, this Court issued notices to the concerned parties on 9.5.2000. It took nearly one year for the various States to file their affidavits in reply/written submissions. Prima facie it appears that despite the PNDT Act

being enacted by the Parliament five years back, neither the State Governments nor the Central Government has taken appropriate actions for its implementation. Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney General for India, Mr. Soli J. Sorabjee following directions are issued on the basis of various provisions for the proper implementation of the PNDT

Act: -I. Directions to the Central Government

1. The Central Government is directed to create public awareness against the practice of pre- natal determination of sex and female foeticide through appropriate releases programmes in the electronic media. This shall also be done by Central Supervisory Board (“CSB” for short) as provided under Section 16(iii) of the PNDT Act.
2. The Central Government is directed to implement with all vigor and zeal the PNDT Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under sub-section (5) of Section 17 of the PNDT Act to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

II. Directions to the Central Supervisory Board (CSB)

1. Meetings of the CSB will be held at least once in six months. [Re. Proviso to Section 9(1)] The constitution of the CSB is provided under Section 7. It empowers the Central Government to appoint ten members under Section 7(2)(e) which includes eminent medical practitioners including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.
2. The CSB shall review and monitor the implementation of the Act. [Re. Section 16(ii)].
3. The CSB shall issue directions to all State/UT. Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about: -
 - (i) Survey of bodies specified in section 3 of the Act.
 - (ii) Registration of bodies specified in section 3 of the Act.
 - (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.
 - (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
 - (v) Number and nature of awareness campaigns conducted and results flowing therefrom.
4. The CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government. [Re. Section 16]
5. The CSB shall lay down a code of conduct under section 16(iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that public at large can know about it.
6. The CSB will require medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and female foeticide and to ensure implementation of the Act.

III. Directions to State Governments/UT Administrations

1. All State Governments/UT Administrations are directed to appoint by notification, fully empowered Appropriate Authorities at district and sub-district levels and also Advisory Committees to aid and advise the

Appropriate Authority in discharge of its functions [Re. Section 17(5)]. For the Advisory Committee also, it is hoped that members of the said Committee as provided under section 17(6)(d) should be such persons who can devote some time for the work assigned to them.

2. All State Governments/UT Administrations are directed to publish a list of the Appropriate Authorities in the print and electronic media in its respective State/UT.
3. All State Governments/UT Administrations are directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisement in the print and electronic media by hoarding and other appropriate means.
4. All State Governments/UT Administrations are directed to ensure that all State/UT appropriate Authorities furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about: -
 - (i) Survey of bodies specified in section 3 of the Act.
 - (ii) Registration of bodies specified in section 3 of the Act.
 - (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.
 - (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
 - (v) Number and nature of awareness campaigns conducted and results flowing therefrom.

IV. Directions to Appropriate Authorities

1. Appropriate Authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of section 22 of the Act.
2. Appropriate Authorities are directed to take prompt action against all bodies specified in section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.
3. All State/UT Appropriate Authorities are directed to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:
 - (i) Survey of bodies specified in section 3 of the Act.
 - (ii) Registration of bodies specified in section 3 of the Act including bodies using ultrasound machines.
 - (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.
 - (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
 - (v) Number and nature of awareness campaigns conducted and results flowing therefrom.

The CSB and the State Governments/Union Territories are directed to report to this Court on or before 30th July 2001. List the matter on 6.8.2001 for further directions at the bottom of the list.”

B] In spite of the above order, certain States/UTs did not file their affidavits. Matter was adjourned from time to time and on 19th September, 2001, following order was passed: “Heard the learned counsel for the parties and considered the affidavits filed on behalf of various States. From the said affidavits, it appears that the directions issued by this Court are not complied with.

1. At the outset, we may state that there is total slackness by the Administration in implementing the Act. Some learned counsel pointed out that even though the Genetic Counselling Centre, Genetic Laboratories or Genetic Clinics are not registered, no action is taken as provided under Section 23 of

the Act, but only a warning is issued. In our view, those Centres which are not registered are required to be prosecuted by the Authorities under the provisions of the Act and there is no question of issue of warning and to permit them to continue their illegal activities.

It is to be stated that the Appropriate Authorities or any officer of the Central or the State Government authorised in this behalf is required to file complaint under Section 28 of the Act for prosecuting the offenders.

Further wherever at District Level, appropriate authorities are appointed, they must carry out the necessary survey of Clinics and take appropriate action in case of non-registration or non-compliance of the statutory provisions including the Rules. Appropriate authorities are not only empowered to take criminal action, but to search and seize documents, records, objects etc. of unregistered bodies under Section 30 of the Act.

2. It has been pointed out that the States/Union Territories have not submitted quarterly returns to the Central Supervisory Board on implementation of the Pre- Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as “the Act”). Hence it is directed that the quarterly returns to Central Supervisory Board should be submitted giving the following information:-

- (a) Survey of Centres, Laboratories/Clinics, (b) Registration of these bodies,
- (c) Action taken against unregistered bodies, (d) Search and Seizure,
- (e) Number of awareness campaigns, and (f) Results of campaigns”

C] On 7th November, 2001, learned counsel for the Union of India stated that the Central Government has decided to take concrete steps for the implementation of the Act and suggested to set up National Inspection and Monitoring Committee for the implementation of the Act. It was ordered accordingly.

D] On 11th December, 2001, it was pointed out that certain State Governments have not disclosed the names of the members of the Advisory Committee. Consequently, the State Governments were directed to publish the names of advisory committee in various districts so that if there is any complaint, any citizen can approach them. The Court further observed thus: “For implementation of the Act and the rules, it appears that it would be desirable if the Central Government frames appropriate rules with regard to sale of ultrasound machines to various clinics and issue directions not to sell machines to unregistered clinics. Learned counsel Mr. Mahajan appearing for Union of India submitted that appropriate action would be taken in this direction as early as possible.”” E] On March 31, 2003, it was pointed out that in conformity with the various directions issued by this Court, the Act has been amended and titled as “The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act”. It was submitted that people are not aware of the new amendment and, therefore, following reliefs were sought:

- a) direct the Union of India, State Governments / UTs and the authorities constituted under the PNDT Act to prohibit sex selection techniques and its advertisement throughout the country;
- b) direct that the appropriate authorities shall also include “vehicles” with ultra sound machines etc., in their quarterly reports hereinafter as defined under Section 2(d);
- c) any person or institution selling Ultra Sound machine should provide information to the appropriate State Authority in furtherance of Section 3-B of the Amended Act;
- d) direct that State Supervisory Boards be constituted in accordance with the amended Section 16A in order to carry out the functions enumerated therein;
- e) direct appropriate authorities to initiate suo motu legal action under the amended Section 17(iv)(e);
- f) direct that the Central Supervisory Board shall publish half yearly consolidated reports based on the quarterly reports obtained from the State bodies. These reports should specifically contain information on:

- 1) Survey of bodies and the number of bodies registered.
- 2) Functioning of the regulatory bodies providing the number and dates of meetings held.
- 3) Action taken against non-registered bodies inclusive of search and seizure of records.
- 4) Complaints received and action taken pursuant thereto.
- 5) Nature and number of awareness programmes.
- 6) Direct that the Central Supervisory Board shall carry out all the additional functions as given under the amended Section 16 of the Act, in particular, to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation. As against this, Mr. Mahjan learned counsel appearing for the Union of India submits that on the basis of the aforesaid amendment, appropriate action has already been taken by Union of India for implementation and almost all State Governments/UTs are informed to implement the said Act and the Rules and the State Governments/UTs are directed to submit their quarterly report to the Central Supervisory Board. Considering the amendment in the Act, in our view, it is the duty of the Union Government as well as the State Governments/UTs to implement the same as early as possible.”

F] At the time of hearing, learned counsel for the petitioners submitted that appropriate directions including the steps which are required to be taken on the basis of PNDT Act and the suggestion as given in the written submission be issued. On this aspect, learned counsel for the parties were heard. In view of the various directions issued by this Court, as quoted above, no further directions are required except that the directions issued by this Court on 4th May, 2001, 7th November, 2001, 11th December, 2001 and 31st March, 2003 should be complied with. The Central Government / State Governments / UTs are further directed that:

- a) For effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in public that there should not be any discrimination between male and female child. b) Quarterly reports by the appropriate authority, which are submitted to the Supervisory Board should be consolidated and published annually for information of the public at large.
- c) Appropriate authorities shall maintain the records of all the meetings of the Advisory Committees.
- d) The National Monitoring and Inspection Committee constituted by the Central Government for conducting periodic inspection shall continue to function till the Act is effectively implemented. The reports of this Committee be placed before the Central Supervisory Board and State Supervisory Board for any further action.
- e) As provided under Rule 17(3), public would have access to the records maintained by different bodies constituted under the Act.
- f) Central Supervisory Board would ensure that the following States appoint the State Supervisory Board as per the requirement of Section 16A.
 1. Delhi 2. Himachal Pradesh 3. Tamil Nadu
 4. Tripura 5. Uttar Pradesh.
- g) As per requirement of Section 17(3)(a), the Central Supervisory Board would ensure that the following States appoint the multi-member appropriate authorities:
 1. Jharkhand 2. Maharashtra 3. Tripura 4. Tamil Nadu 5. Uttar Pradesh

It will be open to the parties to approach this Court in case of any difficulty in implementing the aforesaid directions.

The Writ Petition is disposed of accordingly.

In view of the aforesaid order, pending IAs have become infructuous and are disposed of accordingly.

IN THE HIGH COURT OF ORISSA
Writ Petition (Civil) No. 9596 of 2007

Decided on 14/02/2008

HEMANTA RATH

-VS-

UNION OF INDIA (UOI) AND ORS.

Hon'ble Judges : A. Ganguly And B. Mahapatra J.J.

Appearance : Miss Suratanaya Misra, for Petitioner

J.K. Misra, Asst. Solicitor General (For No. 1) Govt. Advocate (For Nos. 2 to 6) for Respondents.

CASE SUMMARY

Despite detailed directions issued by the Supreme Court since 2001, in the landmark decision of CEHAT v. Union of India reproduced above, several States did not take any step for effective implementation of the Act. Hence, PILs were filed in the High Courts to that effect. In the State of Orissa, for example, hundreds of skeletons, skulls and body parts of infants were recovered, which shocked the common man. As these were found in an area close to various Nursing Homes and Clinics, there was strong allegation that the practice of sex selection and pre-natal sex determination was still rampant. After coming across a series of news items in the print and electronic media to this effect, one Mr. Hemanta Rath, a social activist filed a Public Interest Litigation under Article 226 of the Constitution of India in the High Court of Orissa seeking directions for effective implementation of the PNDT Act in the State. The contention raised in the petition was that there was total inaction both on part of the Central and State Government in implementing the provisions of the Act. The appointment of Appropriate Authorities as contemplated u/s 17 (1) of the Act had not been made and the State Advisory Committee as per Section 17 (5) of the Act had not been constituted and without constitution of such Appropriate Authority and Advisory Committee, provisions of Section 28 became nugatory as under Section 28, a court can take cognizance of the offence only on a complaint made by the Appropriate Authority.

In reply, Central Government tried to justify its stand by stating that it was for the State of Orissa to take steps for appointment of Appropriate Authority and for constitution of Advisory Committee as per Section 17 (1) and 17 (5) of the Act.

The State of Orissa in its reply enlisted various measures taken by it for awareness generation and sensitization about provisions of the Act and further stated that in the State of Orissa the sex ratio is better than in any other part of the Country. However the High Court rightly rejected the said submission by observing that this can not be the reason why the provisions of the Act were not implemented. (Para 9)

After referring to the Object of the Act and Constitutional principles, the High Court stressed, on both the statutory and Constitutional obligation of the State, to implement the provisions of the

Act. The High Court also took note of the delayed response of the State for formation of the State Advisory Committee which was constituted only in 2007. This also was not in accordance with the provisions of the Act. The High Court gave explicit directions to the State Government to appoint Appropriate Authority and Advisory Committee within 6 weeks and further directed the Committee to take strict measures to implement the provisions of the Act. (Para 13)

This judgment is very positive in nature, giving impetus to strict implementation of the provisions of the Act and compelling the State to comply with its duty/obligation of implementing the Act, which was not properly implemented even after 13 years from enactment of the legislation. This judgment clearly depicts that when executive lacks a will to implement the provisions of beneficial legislation, judiciary has to play a pro- active role and it does play it well..

JUDGMENT

Per Hon'ble Mr. Justice A.K. Ganguly, C.J.

1. This writ petition has been filed in public interest by one Hemanta Rath, who describes himself to be a Social Activist and also claims to function as the President of Deaf and Dumb Society in the district of Khurda.
2. In this petition a complaint is made that the State of Orissa is not implementing the provisions of Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter called 'PNDT Act') even though the said Act was brought into existence in 1996 and was amended in order to make its provisions more effective by the Amendment Act 14 of 2003. The said amendment has come into existence with effect from 14-2-2003.
3. The said Public Interest Litigation was filed noticing series of news items in the newspapers and in the electronic media to the effect that there have been recovery of hundreds of skeletons, skulls, body parts of children from different parts of the State. The petitioner asserts that recovery of such huge body parts has shocked the common man and from the news item, it also transpires that these things were found from an area which is close to various Nursing Homes and Clinics. It is also alleged that in India, there is notorious practices of female foeticide and infanticide.
4. This has been made possible in view of the development of scientific techniques for determination of sex. Since it is determined that it is a female foetus, there is a tendency of terminating such pregnancy. Normally such medical technology has been developed in order to guard against the genetic and other disorder of the child in the mother's womb and for detecting diseases, such as, HIV and VD. But such techniques are misused by Medical Practitioners as a device for determination of the sex of the foetus and if it is a female one, the same is aborted to prevent the birth of a female child.
5. In order to prevent such malpractices, the said Act was enacted and under Section 7 of the said Act, the Central Government has to constitute a Board to be known as The Central Supervisory Board.
6. The State Government has also the statutory obligation to constitute such a Board under Section 16A of the said Act. Section 17 of the said Act casts an obligation both on the Central Government and the State Government to appoint one or more Appropriate Authorities for the whole or part of the State for the purposes of implementation of the said Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide. Under Section 17(5) of the said Act, the Central Government or the State Government shall constitute an Advisory Committee for each Appropriate Authority for advising the Appropriate Authority in the discharge of its functions and shall appoint one of the members of the Advisory Committee to be its Chairman. Under Section 28 of the said Act, a Court can take cognizance of the offence under the said Act only on a complaint made by the Appropriate Authority.

7. It has been complained in the petition that without constitution of appropriate Authority, the provisions of Section 28 become nugatory. Therefore, the complaint in the petition is that there is total inaction both on the part of State Government and the Central Government in the matter of implementing the provisions of the said Act which was enacted for preventing infanticide and foeticide. The said Act has come into existence in order to protect the appropriate male and female ratio in the society so that there will be no social imbalance. Apart from that this Court feels that the said Act has a broader human right perspective inasmuch as it has been enacted to prevent the killing of a foetus on a gender bias. This is against the essence of our Constitutional principles.
8. In this matter, affidavits have been filed by both the State Government and Central Government. On behalf of the State Government affidavit has been filed by the Principal Secretary to Government, Health and Family Welfare Department, Bhubaneswar in which it has been stated that in view of the report in the newspapers, immediate steps were taken by lodging cases and the cases have been handed over to the State Crime Branch as a result of which there has been arrest of doctors and some of the members of the staff of Nursing Homes and Ultrasound Clinics. In support of the statement, Annexure A/1 has been enclosed. It is also stated that the human body parts recovered from Forest Park area of Bhubaneswar were sent to Forensic Medicine and Toxicology (FM & T) Department, SCB Medical College and Hospital, Cuttack for necessary examination. On such examination it appeared that the specimens recovered are formalin preserved specimens of surgically removed human body parts. They were not cases of foeticide. In support of the same, report of Professor and Head of the Department of F.M. & T which was received from Chief Medical Officer, Bhubaneswar has been disclosed. It is also stated that the Government have formed a State Task Force Committee under the Chairmanship of Chief Secretary, Orissa with Principal Secretary, Home, Principal Secretary, Family & F. W., Secretary, Women & Child Development Department as members to monitor the implementation of Ultrasound Clinics and Nursing Homes. The said Committee has been formed to see that the rules on Preconception & Pre-natal Diagnostic Technique (PNDT) Act, 1994 and Medical Termination of Pregnancy (MTP) Act, 1971 are scrupulously followed. It has been stated that Task Force has been formed at the district level with the Collector, Superintendent of Police and C.D. M.O. to inspect all such centers. It is also averred that the State Level Advisory Committee was held on 18-8-2007 and newly constituted State Level Supervisory Board chaired by Minister of Health & Family Welfare was held on 29-9-2007 in order to review and monitor the progress and implementation of the said Act. The District Advisory Committee have also met in different districts to take stock of the situation.
9. However, it has not been stated in the said affidavit whether the bodies have been created by the State Government under Section 17 of the said Act nor it has been stated whether any steps have been taken under Section 28 of the said Act for filing of complaint. Such complaint can only be filed by the Appropriate Authority. So the petitioner's grievance is that if appropriate authority has not been created, no complaint can be filed under Section 28 of the said Act appears to be well founded. It has been stated that in Orissa, the male-female ratio is better than in other parts of the State. But this Court is of the view that this cannot be the reason why the provisions of the said Act shall not be implemented.
10. In the counter affidavit which has been filed on behalf of the Central Government by the Director in the Ministry of Health and Family Welfare, Government of India, it has been stated that it is for the State of Orissa to take steps as per Sections 17 and 17A of the said Act. It has been stated in the affidavit filed by the Central Government that the said Act was created to prevent the Preconception and Pre-Natal Diagnostic Tests for determination of sex. The object of the said Act is as follows:

An act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.

11. It has been stated that sensitization steps have been taken under the said Act and awareness generation programme has also been held against sex selection. It has been stated that Government of India has launched 'Save the Girl Child Campaign' and the said Campaign was part of the Republic Day Parade, 2004-2005. So far as the State of Orissa is concerned, the following steps appeared to have been taken as has been stated in the said affidavit. "State Supervisory Board reconstituted under the Chairmanship of Hon'ble Minister, Health & Family Welfare. Meeting was held on 29-9-2007. State Advisory Committee has also been reconstituted and meeting has been held on 18-8-2007. Multi Member State Appropriate Authority has been formed. District Level Advisory Committee reconstituted. State Task Force formed under Chairmanship of Chief Secretary to monitor the checking of Nursing Homes and other diagnostic centers where sex determination can be done and the MTP Centres. District Task Force has been formed under the Chairmanship of Collector and includes S.P., C.D.M.O., District Social Welfare Officer as members. A1. the clinical establishments of the district irrespective of their involvement with the Ultra Sound activity/MTP have been inspected. Total No. of Nursing Homes inspected 495, out of which 345 are registered, 150 are unregistered, 127 were sealed. Total No. of Ultra Sound Clinics inspected 388, out of which 368 are registered, 20 are unregistered, 65. Ultra Sound Clinics were sealed. Out of which FIR lodged against 5 at Nayagarh and 1 at Ganjam District. Total No. of MTP Centres inspected 167, out of which 159 are registered, 8 are unregistered, 27 sealed. FIR lodged against 1 MTP Center in Ganjam District. Instructions have been issued to the district authorities implementing the PCPNDT Act to be more vigilant in monitoring and inspection of the clinical establishment cum ultra sound clinics regularly. Again instructions have been issued to call for the meeting of District Advisory Committee bi-monthly to monitor the clinical activities individually in the district. It is also instructed to initiate legal action against the clinical establishment of ultra sound clinic and MTP Centers violating the Act. Awareness campaigns for the public, service taker and service provider on legal issues relating to the PCPNDT Act, at District level. ASHA and AWW will be involved for creating awareness among the rural people and in this context they will be oriented during their induction training about PCPNDT Act and its punishment for its violation. Again SHGs functioning at village level will be involved in the said Programme. Legal services provider to create legal awareness of the service for propagation of the message against the pre-natal sex determination.
 1. Display of hoardings in different public places, hospitals, Private Institutions regarding PCPNDT Act and punishment prescribed under different sections for both service provider and service taker. Wide publication of the Act by which the non-government organizations or any public person can file complaint against the law violator.
 2. Every month in the District level monthly meeting PCPNDT will be discussed as the pivot point.
 3. Awareness will be created by WCD Department at district level about the rights of the female child as equal with the male child by which son preference can be eliminated.
12. On perusal of the said affidavit, it appears that the State Advisory Committee if at all has been reconstituted in the month of August, 2007 and the meeting of such Committee was held on 29-9-2007, the Government Notification showing constitution of such a Committee, however has not been disclosed.
13. This Court therefore, directs that if Appropriate Authorities as contemplated under Section-17 of the said Act and as defined under Section 2(a) of the said Act has been constituted, such Authority must act strictly in terms of the provisions of the said Act. If, however, such Committee has not been constituted, such Committee must be constituted within a period of six weeks from the date of service of the order upon the Chief Secretary of the State. After constitution of the said Committee, it must take strict measures to implement the provisions of the said Act. The said Act has been enacted to serve public purpose and the Constitutional end as is clear from the object of the Act quoted hereinabove. Therefore, the State is under both a statutory and Constitutional obligation to implement the provisions of the said Act.
14. This writ petition is therefore disposed of with the direction upon the State Government to strictly implement the provisions of the said Act. which has been enacted in 1994. It appears that the response of the State

Government is very delayed and it appears that only in 2007, some kind of Committees have been formed. Whether such Committees are in accordance with the provisions of the said Act cannot be examined by the Court, since the Gazette Notification constituting such Committee has not been disclosed.

15. However, this Court reiterates that if such Committee in compliance with the said Act has not been constituted, such Committee must be constituted within the period mentioned hereinabove and after constitution of such Committee, the said Committee must act for strict implementation of the provisions of the said Act. No costs.
16. I agree.

B.N. Mahapatra, J.

1 (8)

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Writ Petition No. 15152 of 2007

Decided on 07/07/2009

Gaurav Goyal

-Vs-

State of Haryana

Hon'ble Judges : T. S. Thakur and Kanwaljit Singh Ahluwalia J.J

Present: Mr. Ashwinie Kumar Bansal, Advocate for the petitioner.

Mr. Onkar Singh Batalvi, Advocate for Dr. Anmol Rattan Sidhu, Assistant Solicitor General of India.

Mr. Randhir Singh, Additional Advocate General Haryana.

Acts/Rules/Orders : Pre-conception and Pre-natal Diagnostic Techniques Act, 1994.

CASE SUMMARY

This is one more Public Interest Litigation instituted under Article 226 of Constitution of India, again by a social activist Mr. Gaurav Goyal, in circumstances similar to those mentioned in the previous case, when large numbers of female foetuses were recovered from the 20 feet deep septic tank at Buala Nursing Home, Pataudi, district Gurgaon in Haryana. On the directions of High Court, administrative inquiry was initiated in 250 illegal eliminations of female foetuses. In the said inquiry four Medical officers were found guilty. The State Government however dragged its feet in taking appropriate action against those officers. Hence the Court directed the State to expedite the proceeding, to complete the same within 6 months and to take appropriate action against all those found to be guilty. -

What was found to be more shocking by the High Court in this case was that, though a statutory notification appointing Civil Surgeon of the district as Appropriate Authority under the Act

was issued on 24/10/1997, it was not published in Official Gazette on account of official apathy till this Writ Petition came for hearing in the year 2009, i.e. after the lapse of 12 years, which, as observed by the High Court, “adversely reflected upon the official machinery of the State Government charged with the responsibility of implementing an important legislation like PCPNDT Act.” The High Court found it regrettable that for a period of over 12 years non publication of the Notification never came to the notice of the concerned authorities.(see second last para)

To say the least, it is a classic example of total apathy and inaction on the part of State Government in implementation of this significant piece of social legislation. What is sad is that even in 2007 that is 60 years after independence, the illegal, inhuman and immoral practice of eliminating female foetuses is continuing unabated on such a large scale despite this Act being in existence since 1994.

JUDGMENT

Per Hon’ble Mr. Justice T. S. Thakur C.J.

In this petition filed in public interest, petitioner prays for a mandamus directing the respondents to conduct an inquiry into the 250 illegal abortions of female foetuses leading to recovery of large quantity of foetal remains from a 20 feet deep Well underground septic tank at Buala Nursing Home, Pataudi, District Gurgaon, as reported in a section of the press. Petitioner also prays for mandamus directing the respondents to take appropriate action against those guilty of negligence in discharge of their official functions leading to uninterrupted abortions of female foetuses.

Civil Writ Petition No. 15152 of 2007 2 When this petition came up before us for orders on 24th October, 2008, it was pointed out by Mr. Ashwinie Bansal, counsel appearing for the petitioner that while an inquiry had been conducted by the Divisional Commissioner, Patiala in a somewhat similar incident involving abortion of female foetus in the district of Patiala and while action against those found involved in the said incident has been initiated, but no inquiry, administrative or otherwise, has been conducted in a similar incident involving recovery of foetal material from the place mentioned earlier. It was submitted that conducting of an appropriate administrative inquiry by the Divisional Commissioner into the said episode would not only bring to light the true facts but would also be a basis for taking action against those found negligent in discharge of their duties.

This Court, finding merit with that submission, had directed the Divisional Commissioner, Gurgaon to hold an administrative inquiry into the recovery of female foetuses from the septic tank Buala Nursing Home, Pataudi, District Gurgaon and also identify those who prima facie seem to be guilty of any lapses in the discharge of their official duties, leading to the said incident. The role of officers responsible for the implementation of PNDT Act, 1994, as amended in year 2002, was also directed to be examined by the Divisional Commissioner and to suggest remedial measures to prevent such incident in future. Report of the Divisional Commissioner was directed to reach this Court not later than three months from the date a copy of that order was made available to Mr.Rameshwar Malik, counsel for the respondent.

In compliance with the above direction, an inquiry has been conducted by the Divisional Commissioner, Gurgaon and report thereof place on record before us. The Divisional Commissioner, Gurgaon has inter alia dealt with the lapses on the part of medical authorities in the Civil Writ Petition No. 15152 of 2007 3 implementation and enforcement of the provisions of the Act aforementioned and identified following four doctors as persons, who had neglected in performance of their duties:

1. Dr. D.V. Saharan, Civil Surgeon, Gurgaon;
2. Dr. S.S. Dalal, Civil Surgeon, Gurgaon;
3. Dr. M.D. Sharma, DFWO, Gurgaon; and
4. Dr. Jai Narain, SMO, CHC Pataudi.

The report deals with individual roles of these doctors and the manner in which they are said to have committed dereliction in discharge of their duties. The report also makes certain other suggestions and remedial measures that are required to be taken to prevent episodes like the ones under scrutiny, taking place in future. This includes proper information system at village level to be run through multi-purpose health workers network and regular and timely inflow of inputs to prevent distortions and to spread awareness and guidance among such cases.

The report also recommends proactive approach in the matter of spreading awareness among the people regarding the provisions of the Act and submission of prompt forensic reports, software in ultrasound machines, authorization, legal advisory support and video recording of raids etc. Mr. Bansal submits that while respondents have, pursuant to the report of the Divisional Commissioner, initiated action against two of the doctors indicted in the report, no action has been taken against the remaining two. He urges that there is no justification for the authorities to sit over against the remaining two doctors, who have been prima facie found to be blameworthy and therefore, not to be proceeded against. Civil Writ Petition No. 15152 of 2007 4 Mr. Randhir Singh, however submits that action has already been initiated against three out of four doctors, as per the report submitted by the Divisional Commissioner and chargesheets have already been served upon the two doctors, namely Dr. M.D. Sharma and Dr. Jai Narain. So far as Dr. D.V. Saharan is concerned, the same, according to Mr. Randhir Singh, is being served upon him within a fortnight. Similarly, the respondents, according to Mr. Randhir Singh, are ready to examine the case of Dr.S.S. Dalal also and take whatever action may be called for against the said officer for any dereliction of duty.

These submissions, in our opinion, should allay the apprehension of Mr. Ashwinie Bansal that the respondents are dragging their feet in the matter of taking appropriate action against the doctors found negligent in the discharge of their duties. All the same, we see no difficulty in directing the respondents to expedite the proceedings against the doctors mentioned above, on the basis of the report and to take the same to its logical conclusion, expeditiously, but not later than six months from the date chargesheets are served. Mr. Bansal next submitted that the notifications under the Pre- conception and Pre-natal Diagnostic Techniques (Prohibition of sex selection) Act, 1994 had not been published by the Government in the official gazette, which has led to many doctors escaping action against them.

He refers to a notification dated 24th October, 1997 appointing Civil Surgeon of Districts as appropriate authorities for the PNDT Act which notification was not, on account of official apathy, published in the Government gazette. Counsel further submits that the said notification has not been published in the official gazette, even till date. Civil Writ Petition No. 15152 of 2007 5 This position was not disputed by Mr. Randhir Singh, who has filed a brief note, in which it is inter alia stated that the non-publication of the notification in question, in the official gazette, had come to the notice of the State Government recently and that non-publication was on account of some error committed by the printing press. The government is, according to Mr. Singh, examining the feasibility of either issuing a fresh notification with retrospective effect or an ordinance that would validate the notification already issued.

We do not consider it necessary at this stage to examine whether the remedial steps, which the Government is contemplating, would meet the requirements of law, for that question does not immediately arise for our consideration. All that we need say is that non- publication of an important statutory notification in the official gazette adversely reflects upon the official machinery of the State Government charged with implementing an important legislation like the PNDT ACT. It is regrettable that for a period of over 12 years non publication of the notification in question never came to the notice of the authorities concerned. Mr. Randhir Singh, however points out that most of the steps needed to be taken in terms of the provisions of the Act, have already been taken and a notification nominating a multi-member State appropriate authority has been duly issued and published in the official gazette. He further stats that a State Supervisory Board has also been constituted apart from the State and District Advisory Committees. In the circumstances, therefore, nothing further remains to be done or survives for consideration, in this petition, which can be disposed of in the light of observations made above.

We, accordingly dispose of this petition with the direction that proceedings already initiated, or to be initiated, shall be expedited by the concerned authorities and appropriate action taken against all those found to be violating provisions of the Act, or derelicting the discharge of their duties for the same.

No costs.

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

1 (9)

Civil Writ Petition No. 17964 of 2007

Decided on 31/07/2009

Court on its own motion

-Vs-

State of Punjab and others

Hon'ble Judges : T. S. Thakur and Kanwaljit Singh Ahluwalia J.J

Present: Mr. Onkar Singh Batalvi, Advocate for Union of India. Mr. Randhir Singh, Additional Advocate General Haryana. Mr. Rupinder Khosla, Additional Advocate General Punjab.

Acts/Rules/Orders : Pre-conception and Pre-natal Diagnostic Techniques Act, 1994.

CASE SUMMARY

The latest decision in a series of Public Interest Litigations is one, where the High Court of Punjab and Haryana at Chandigarh, took suo-moto cognizance of a newspaper report about Sex Determination kits entering in the State. According to the High Court these kits were a huge blow to the efforts by the State to improve sex ratio. Being alarmed by the declining child sex ratio in the State and to curb the social menace of pre-natal sex selection and sex determination, the High Court on its own motion, issued notices to Central and State Government.

Perusal of the affidavits filled by the Governments in response thereto revealed that PNDD wing of the Ministry of Health and Family Welfare was fully conscious about availability of such Sex Determination kits in the grey market. What was found to the satisfaction of the High Court was that Government itself was also worried and concerned about the same and had taken effective and adequate steps to block them and to create general awareness and sensitization on the subject so that the laudable Object and mission of the Government, as Stated in its affidavit, to curb pre-natal sex selection and sex determination is realized.(Last Para)

This decision illustrates that human ingenuity in evolving new techniques knows no bounds when it comes to gender discrimination and elimination of female foetuses. Concerted efforts on the part of all the three wings of the Government - legislative, executive and judiciary alone can check such unpardonable crimes. Their acting together and in harmony is of importance.

JUDGMENT

Per Hon'ble Mr. Justice Kanwaljit Singh Ahluwalia J.

Alarmed by declining girl child sex ratio in this part of the country and to curb social menace of female foeticide, this Court had taken cognizance of a newspaper report published in Hindustan Times, Chandigarh on November 17, 2007 under the caption "Efforts to improve sex ratio in for a huge blow" "Sex-determination kits enter state" and had issued suo-motu notice to States of Punjab, Haryana and Union of India. In response thereto, Director, Health Service, Family Welfare, Punjab filed his affidavit and appended affidavits of the Civil Surgeons

posted at all Districts falling within the State of Punjab to say that various Civil Writ Petition No. 17964 of 2007 2 teams were constituted and surprise inspections/raids were undertaken and that no sex determination kits (hereinafter referred to as 'the kits') were available in the State of Punjab.

The Chairperson of the State Appropriate Authority constituted under Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as 'PNDT Act') cum Director General, Health Services, Haryana submitted a status-report by way of an affidavit and stated therein that strict instructions were issued to concerned officers to keep a strict vigil on use of baby gender determination kits in all the districts. It was further submitted that all Civil Surgeons posted in the districts of State of Haryana reported that kits are neither used nor available in the local market in the respective districts. It was further stated that import of such kits is not permitted in India by Drug Controller General, India. A detailed affidavit was filed by the Director (PNDT), Ministry of Health and Family Welfare, Govt. of India. In the affidavit so filed, it was stated that the department of the deponent is concerned with the falling girl child sex ratio and have noticed the following figures which have emerged in the census 2001:

“Child sex ratio for the age group of 0-6 years in 2001 is 927 girls per thousand boys against 945 recorded in 1991 Census. The encouraging trend in the sex ratio during 1991- 2000 was marred by the decline of 18 points in the sex ratio of children aged 6 years or below.” Having spelt its concern, various effective steps taken by the Ministry of Health and Family Welfare, Govt. of India have also been conveyed in the affidavit. It has been stated that PNDT Act and its rules have been amended and the Act has been made more comprehensive Civil Writ Petition No. 17964 of 2007 3 and the enforcement authorities have been empowered with the necessary teeth. It was further stated that a Central Supervisory Board has been constituted to monitor falling child sex ratio and periodical meetings are being held under the chairpersonship of Minister of Health and Family Welfare.

It was averred that necessary programme to educate, generate awareness and sensitize public opinion makers is being carried and necessary expenses for the same are being provided and incurred. It has been further mentioned that State Governments have been funded through Rural Child Health Programme for implementation plan 2007-08 drawn for implementation of various activities under the PNDT Act and to give incentive to birth of girl child. The affidavit also provides information that sensitization on sex ratio issue has been made part of the curriculum for ANM (Auxiliary Nurse Midwife) under National Rural Health Mission scheme. Furthermore, a National Inspection and Monitoring Committee has been constituted. The affidavit further states that National Support and Monitoring Cell consisting of social scientists to evolve mechanism that the actual wrong doers are apprehended, is active. Furthermore, an annual report on the implementation of PNDT Act is published and a web- site to inform the public about the information and activities undertaken by the Ministry of Health and Family Welfare regarding PNDT Act is going to be launched separately. But till now, this information is available on the web-site of Ministry of Health and Family Welfare. A toll-free telephone under the PNDT Division of the Ministry, to lodge complaints and assess information, is being installed and awareness programme under the scheme “Save the Girl Child Campaign” is being propagated. Regarding gender testing kits, it has been stated that Reliance India Mobile was carrying a programme “Plan a Baby”, under which tips were given to enhance the probability of bearing a mail child. On the issue taken up by Civil Writ Petition No. 17964 of 2007 4 the Ministry, such programme has been discontinued by the mobile service provider. A perusal of the affidavit reveals that PNDT Wing of the Ministry of Health and Family Welfare is fully conscious regarding availability of Sex Determination Kits in the grey market and through website channels and has drawn a comprehensive plan to block all the sources, from which such kits can be available. The affidavit notices that popular internet search engine ‘Google’ was providing link to sources of websites like ‘www. GenSelect.com, www.4-gender-selection.com’, which offer Sex Determination Kits for small fee. The affidavit states that all the websites offering the facilities were hosted by private organizations from overseas countries and in order to block the offending websites, Union Secretary, Health and Family Welfare has requested the Secretary Home to prevail upon the Computer Emergency Response Team (CERT In). The Cabinet Secretariat was also approached to convene a meeting of all the concerned Secretaries. Union Department of Health and Family Welfare is also contemplating to approach Ministry of Postal and Customs to intercept Sex Determination Kits imported from abroad. The affidavit further expresses Government’s worry that availability of Gender Testing Kits/ Sex Determination Kits through www.pregnancystore.com advertisements has assumed alarming proportion in the

country, especially in the elite states of the country like, Delhi and Punjab. It states that this is likely to effect the Government's efforts in curbing female foeticide, containing the declining child sex ratio and ushering in a healthy gender ratio in the country. Therefore, to curb availability of such kits, the department had sought the cooperation of the Customs Department and had approached Central Board of Excise and Customs, Department of Revenue not to allow import of Gender Testing Civil Writ Petition No. 17964 of 2007 5 Kits/ Sex Determination Kits from abroad and if any such article, through any mode, is received, same be intercepted and confiscated. After filing of the affidavit, this court had called upon the Chairman, Central Board of Excise and Customs to file an affidavit. An affidavit was filed on behalf of the Chairman, Central Board of Excise and Customs, Department of Revenue, New Delhi. In the affidavit, it was stated that the Director General of Revenue Intelligence has been asked to collect data and identify the import of such kits to enable the Department to take action against them. It was further revealed in the affidavit that the data regarding import of Gender Testing Kits/ Sex Determination Kits for the last three years was gathered and the same does not show import of such kits. To effectively control availability of such kits, inter-ministerial committee has also held two meetings. After perusal of the affidavits submitted before us by the concerned officials, we are satisfied that the officers of the Union and the two State Governments are conscious that availability of Gender Testing Kits/ Sex Determination Kits will cause harm to the efforts of the Governments to propagate, educate, sensitize and cause awareness among the various walks of the society regarding ills of female foeticide and therefore, effective adequate steps are being taken to make availability of Gender Testing Kits/ Sex Determination Kits scarce. Not only a mandate has been issued against the imports but the various functionaries of the Governments are vigilant and making efforts in right earnest to quell import of such kits in the grey market and through regulated means. Having expressed our satisfaction, we dispose of present writ petition with the hope that all the concerned officials of the State Governments shall act in harmony and continue with their strenuous Civil Writ Petition No. 17964 of 2007 6 efforts to eliminate availability of Gender Testing Kits/ Sex Determination Kits, so that the laudable object and mission of the Governments stated in their affidavits to curb female foeticide is realized. We propose no order as to costs.

Petitions Challenging Constitutional Validity of the Act

The noble Object behind enactment of PCPNDT Act was to implement in letter and spirit, a legislation to ban the use of pre-conception sex selection techniques and misuse of pre-natal Diagnostic Techniques for sex selective abortions. It was found necessary by the State to intervene in the matter by restricting the individual right of the couple to have a child of the sex of their choice in order to prevent a severe imbalance in male-female ratio which is against the order of nature. This law was therefore enacted by the State in discharge of its duty of upholding the human dignity and the welfare of the society, especially of women and children, in accordance with the principles enshrined in Article 15 (3) of the Constitution of India. However when it comes to deep rooted preference for sons over daughters entrenched in the mindset of Indian Society, new ways were sought to challenge the Constitutional validity of the Act itself, either on the ground that it violates Article 14, as being discriminatory against male child or on the ground that it violates Article 21 of the Constitution as it restricts couple's right to have family of their choice.

As on today there are two decisions, both of the Bombay High Court, in which Constitutional validity of the Act was challenged but upheld. Both the decisions are landmark in the way they deal with this most sensitive and socially relevant issue.

IN THE HIGH COURT OF BOMBAY

Criminal Writ Petition No. 945 of 2005 and Criminal Application No. 3647 of 2005

Decided on 13/06/2005

Vinod Soni and Anr.

-Vs-

Union of India (UOI)

Hon'ble Judges : V. G. Palshikar and V. C. Daga J.J

A. V. Anturkar i/b Mrs. Vinita V. Bakre Shastry, for Petitioner.

D. M. Salvi for Union of India;

Uday P. Warunjikar with Ms. Varsha Deshpande and Shaila Jadhav for Intervenor.

Ms. P. H. Kantharia – A.P.P. For the State.

Acts/Rules/Orders : Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – Section 4 and 4(2); Constitution of India – Articles 14 and 21.

CASE SUMMARY

In this case of Vinod Soni -Vs. - Union of India decided on 13/06/2005 the validity of the Act was challenged on the ground that the provisions of the Act are violative of Article 21 of the Constitution of India. A very interesting argument was advanced in this case by the Petitioner that the right to life guaranteed under Article 21 of the Constitution includes right to personal liberty which in turns includes the liberty of choosing the sex of the offspring and to determine the nature of the family. Therefore, it was contended that the couple is entitled to undertake any such medical procedure which provides for determination or selection of sex.

The High Court however exposed the fallacy of this argument by observing that, "right to personal liberty can not be expanded by any stretch of imagination to liberty to prohibit to coming into existence of a female or male foetus which shall be for the nature to decide." After making reference to the decisions of the Supreme Court, which explain that Article 21 includes the right to food, clothing, decent environment and even protection of cultural heritage, the High Court held that "these rights, even if, further expanded to the extremes of the possible elasticity of the provisions of Article 21, cannot include right to selection of sex, whether preconception or post-conception." It was observed by the High Court that "this Act is factually enacted to further the right of the child to full development as given under Article 21. A child conceived is, therefore, entitled under Article 21 to full development, whatever be the sex of that child." Accordingly High Court dismissed the Petition by holding that it does not even make a prima facie case for violation of Article 21 of the Constitution. (Para 8)

The case leaves one wondering how right to life of a person can be expanded to include selection of sex of the child.

JUDGMENT**Per Hon'ble Mr. Justice V. G. Palshikar J.**

1. By this petition, the petitioners who are married couple, seek to challenge the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter referred to Sex Selection Act of 1994). The petition contains basically two challenges to the enactment. First, it violates Article 14 of the Constitution and second, that it violates Article 21 of the Constitution of India. At the time of argument, the learned counsel appearing for the petitioners submitted that he does not press his petition in so far as the challenge via Article 14 of the Constitution of India is concerned.

The case leaves one wondering how right to life of a person can be expanded to include (in original - The case leaves one just to wonder how a right to life of a person can expand to put an end to the right of another-in this matter -of a female foetus- to be born at all.)

2. We are, therefore, required to consider the challenge that the provisions of Sex Selection Act of 1994 are violative of Article 21 of the Constitution of India. Article 21 reads thus: "Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law."
3. This provision of Article 21, according to the learned counsel has been gradually expanded to cover several facets of life pertaining to life itself and personal liberties which an individual has, as a matter of his fundamental right. Reliance was placed on several judgments of the Supreme Court of India to elaborate the submission regarding expansion of right to live and personal liberty embodied under Article 21. In our opinion, firstly we deal with protection of life and protection of personal liberty. In so far as protection of life is concerned, it must of necessity include the question of terminating a life. This enactment basically prohibits termination of life which has come into existence. It also prohibits sex selection at pre conception stage. The challenge put in nutshell is that the personal liberty of a citizen of India includes the liberty of choosing the sex of the offspring. Therefore he, or she is entitled to undertake any such medicinal procedure which provides for determination or selection of sex, which may come into existence after conception. The submission is that the right to personal liberty extends to such selection being made in order to determine the nature of family which an individual can have in exercise of liberty guaranteed by Article 21. It in turn includes nature of sex of that family which he or she may eventually decided to have and/or develop.
4. Reliance was placed, as already stated, on several judgments of the Supreme Court of India on the enlargement of the right embodied under article 21. The right basically deals with protection of life and protection of personal liberty. Personal Liberties have been or personal life has been expanded during the passage of 55 years of the Constitution. It now includes right to pollution free water and air as held in AIR 1991 S.C. page 420 It includes right to a reasonable residence for which reliance is placed on a judgment in *Shantistar Builders v. Narayan Khmalal Totame* reported in AIR 1990 S.C. page 630 This right to a reasonable residence always postulates right to a reasonable residence on reasonable restrictions and for reasonable price. This right cannot be and the Supreme Court's judgment in 1990 S.C. page 630 does not create a right to a reasonable residence in any citizen, free of any cost.
5. Then reliance is placed on a Supreme Court Judgment in AIR 1989 S.C. page 677 and two earlier decisions whereby the Supreme Court has explained Article 21 and the rights bestowed thereby include right to Food, clothing, decent environment, and even protection of cultural heritage. These rights even if further expanded to the extremes of the possible elasticity of the provisions of Article 21 cannot include right to selection of sex whether preconception or post conception.
6. The Article 21 is now said to govern and hold that it is a right of every child to full development. The enactment namely Sex Selection Act of 1994 is factually enacted to further this right under article 21, which gives to every child right to full development. A child conceived is therefore entitled to under Article 21, as held by the Supreme Court, to full development whatever be the sex of that child. The determination whether at pre conception stage or otherwise is the denial of a child, the right to expansion, or if it can be so expanded right

to come into existence. Apart from that the present legislation is confined only to prohibit selection of sex of the child before or after conception. The tests which are available as of today and which can incidentally result in determination of the sex of the child are prohibited. The statement of objects and reasons makes this clear. The statement reads as under. “The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders.”

Then para 4 reads thus:

“Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.”

7. It will thus be observed that the enactment proposes to control and ban the use of this selection technique both prior to conception as well as its misuse after conception and it does not totally ban these procedures or tests. If we notice provisions of section 4 of the Act it gives permission in when any of these tests can be administered. Sub section 2 says that no prenatal diagnostic techniques can be conducted except for the purposes of detection of any of the (1) chromosomal abnormalities, (2) genetic metabolic diseases, (3) hemoglobinopathies, (4) sex-linked genetic diseases, (5) congenital anomalies and (6) any other abnormalities or diseases as may be specified by the Central Supervisory Board. Thus, the enactment permits such tests if they are necessary to avoid abnormal child coming into existence.
8. Apart from that such cases are permitted as mentioned in sub clause 3 of section 4 where certain dangers to the pregnant woman are noticed. A perusal of those conditions which are five and which can be added to the four, existence on which is provided by the Act. It will therefore be seen that the enactment does not bring about total prohibition of any such tests. It intends to thus prohibit user and indiscriminate user of such tests to determine the sex at preconception stage or post conception stage. The right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. The conception is a physical phenomena. It need not take place on copulation of every capable male and female. Even if both are competent and healthy to give birth to a child, conception need not necessarily follow. That being a factual medical position, claiming right to choose the sex of a child which is come into existence as a right to do or not to do something which cannot be called a right. The right to personal liberty cannot expand by any stretch of imagination, to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide. To claim a right to determine the existence of such foetus or possibility of such foetus come into existence, is a claim of right which may never exist. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right. In our opinion, therefore, the petition does not make even a prima facie case for violation of Article 21 of the Constitution of India. Hence it is dismissed. In view of the fact that the petition itself is rejected, the application for intervention is also rejected.

EQUIVALENT CITATIONS: 2007 (9) LJSOFT (URC) 2, AIR 2008 Bom 29

2 (2)

IN THE HIGH COURT OF BOMBAY**Writ Petition No. 2777 of 2005****Decided on 06/09/2007***Mr. Vijay Sharma and others**-Vs-**Union of India (UOI)**Hon'ble Judges : Swatanter Kumar C.J. & Hon'ble Smt. Ranjana Desai J.**Appearances :**Ms. Ratna Bhargavan for the petitioners.**Ms. Jyostna Pandhi with Mr. Mandar Goswami for respondents 1 and 2.**Mr. Uday Warunjikar for the Intervenor.*

Acts/Rules/Orders: Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 _ Section 2, 3-A, 4(5), 6(c) (As amended by Amendment Act, 2002) _ Constitutional validity of _ Medical Termination of Pregnancy Act, 1997 _ Section 3(2) _ Constitution of India, 1950 _ Article 14, 226 _ Prohibition of sex selection _ Regulation of pre-natal diagnostic techniques _ Principle of equality of law.

CASE SUMMARY

In another Writ Petition filed under Article 226 of the Constitution of India, by one Mr. Vijay Sharma and others, validity of the Act was challenged on the ground that it violates principle of 'equality of law' enshrined in Article 14 of the Constitution of India. Petitioners were a married couple having two female children and were desirous of having a male child. According to them, by doing so, they could then enjoy the love and affection of both, son and daughter and their daughters can enjoy the company of their own brother while growing up. According to them, couples who are already having children of one sex should be allowed to make use of the pre-natal diagnostic techniques at pre-conception stage to have the child of opposite sex. It was further argued that under the provisions of the Medical Termination of Pregnancy Act, 1972 (MTP Act), termination of pregnancy is allowed under certain circumstances hence there is no reason to impose a blanket ban on determination of sex at preconception stage. An innovative plea was raised to the effect that, if anguish caused by unwanted pregnancy is recognized as ground for termination of the pregnancy under MTP Act, why under PCPNDT Act anguish caused to a mother who conceives a female or male child for the second or third time is not considered and thus there is discrimination between two women situated in similar position and hence Act violates Article 14 of the Constitution.

The Hon'ble Judges of the High Court, after elaborately dealing with the Object, Reasons and Provisions of the Act, held that there can be no comparison between the two legislations – viz., MTP Act and PCPNDT Act. The object of both the Acts differ. MTP Act does not deal with sex selection before or after conception. Anguish of a mother who does not want to bear a child of a particular sex can not be equated with a mother who wants to terminate the pregnancy not because of the sex of child but for other circumstances. Thus by process of comparative study, the High Court held that provisions of the Act can not be called as discriminatory and hence violative of Article 14 of the Constitution. (Para 17)

The High Court had in this case taken note of the frightening figure showing imbalance in sex ratio in various parts of India and expressed its concern for the same. The High Court was also aghast at the shocking arguments in the Petition proclaiming that if the country is economically and socially backward, it is better that female children are not born. The court has, in its strong and harsh words held that, “such tendency affects the dignity of women. It undermines their importance. It insults and humiliates womanhood. It violates woman's right to life. Sex selection is therefore against the spirit of the law and Constitution.” Thus rejecting all the challenges raised to the Constitutional validity of the Act, the court dismissed the Petition and directed the State to take all expeditious steps to prevent misuse of the diagnostic techniques .(Para 19 & 20)

The entire judgment the High Court must be read from start to finish. It makes out a strong case for upholding the validity the Act.

Case Law Referred :

1. Vinod Soni & Anr. v. Union of India & Ors. 2005 (7) LJSOFT 19 : 2005 (3) MLJ 1131 (Para 2).
2. Centre for Enquiry Into Health & Allied Themes (Cehat) and Ors. v. Union of India & Ors. 2003 (8) SCC 398 (Para 27).
3. State of Tamil Nadu and Ors. v. Ananthi Ammal & Ors. AIR 1995 SC 2114 (Para 5).

JUDGMENT

Smt. Ranjana Desai, J.

1. In this petition filed under Article 226 of the Constitution of India, the petitioners have challenged the constitutional validity of sections 2, 3-A, 4(5) and 6(c) of the Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, “the said Act”) as amended by The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (for short, “the Amendment Act, 2002”).
2. Before dealing with the contentions raised in the petition, it must be stated that challenge to the constitutional validity of the said Act on the ground of violation of Article 21 of the Constitution of India has been rejected by this Court in Vinod Soni & Anr. v. Union of India & Ors., 2005 (7) LJSOFT 19 : 2005 (3) MLJ 1131. It is not open to the petitioners to raise the same challenge again. We shall, therefore, only deal with the petitioners' contention that the said Act violates the principle of equality of law enshrined in Article 14 of the Constitution of India.
3. The petitioners are a married couple having two female children. It is their case as disclosed in the petition that they are desirous of expanding their family provided they are in a position to select the sex of the child. It is obvious from the petition that the petitioners are desirous of having a male child. According to them, they can then enjoy the love and affection of both, son and daughter simultaneously and their existing children can enjoy the company of their own brother while growing up if they are allowed to select sex of their child and have a son. The petitioners have approached various clinics for treatment for the selection of the sex of the

foetus by pre-natal diagnostic techniques. However, all clinics have denied treatment to them on the ground that it is prohibited under the said Act.

4. According to the petitioners, they have no intention to misuse the pre-natal diagnostic techniques. They contend that they are financially sound and capable of looking after and bringing up one more child. They cannot be treated on par with other couples, who in order to have a male child, indulge in sex selective abortion. The provisions of the said Act cannot be made applicable without distinction. According to the petitioners, they only want to balance their family. They contend that a married couple, who is already having child belonging to one sex should be permitted to make use of the pre-natal diagnostic techniques to have a child of the sex which is opposite to the sex of their existing child. In fact, ideal ratio of females to males can be maintained if the pre-natal diagnostic techniques are allowed to be used. Burden of the song is that couples who are already having children of one sex should be allowed to have a child of the sex opposite to the sex of their existing children by use of the pre-natal diagnostic techniques at pre-conception stage.
5. We have heard Ms. Ratna Bargavan, the learned counsel appearing for the petitioners. The contentions raised in the petition and in the affidavit in reply of petitioner 1 and the contentions raised in the court by the learned counsel for the petitioners can be summed up as under :
 - (a) The provisions of the said Act cannot be made applicable without any distinction. Couples who have a male or a female child should be allowed to make use of the pre-natal diagnostic techniques to have a child of the sex opposite to the sex of their existing child to balance their family. Such couples cannot be treated on par with couples who choose the sex of foetus in order to have a male child leading to imbalance in male to female ratio. The unconstitutionality of the said Act is visible to the class of couples who are already having child/children of one sex.
 - (b) The Objects and Reasons of the Medical Termination of Pregnancy Act, 1997 (for short, "MTP Act") read with section 3(2)(I) thereof permit termination of pregnancy of a woman by a registered medical practitioner if the pregnancy would involve risk to the life of the pregnant woman or grave injury to her physical or mental health. Explanation II to section 3 states that where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. However, under the said Act, a woman having children of the same sex is not allowed to use the pre-natal diagnostic techniques to have children of the opposite sex. The legislature has not taken into consideration the fact that having a child of the same sex as that of the existing child/children also causes grave mental injury to a woman. Whereas MTP Act allows abortion in case a child is conceived on account of any failure of device used by the couple for the purpose of limiting the number of children on the ground that anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman, while enacting the said Act the legislature has not considered what anguish would be caused to a prospective mother who conceives a female child or a male child for the second or third time. The legislature has not appreciated that such anguish must also be termed as grave injury to the mental health of the prospective mother. Thus, there is discrimination between women situated in similar position. The said Act, therefore, violates Article 14 of the Constitution of India. The MTP Act and the said Act are Central Acts. If by one statute certain rights are conferred upon a prospective mother, the same cannot be denied to a prospective mother by another statute originating from the same source. For this proposition, reliance is placed on the judgment of the Supreme Court in *State of Tamil Nadu and Ors. v. Ananthi Ammal & Ors.*, AIR 1995 SC 2114.
 - (c) Under the MTP Act, termination of pregnancy is allowed under certain circumstances. Foeticide is sanctioned under certain circumstances. However, by sex selection before conception with the help of the pre-natal diagnostic techniques, sex of the child is determined by choosing the male/female chromosome before fertilization and the fertilized egg is inserted in the womb of the mother. This does not lead to foeticide. There is, therefore, no reason to impose a blanket ban on the use of the prenatal

diagnostic techniques.

- (d) Under the said Act, the use of the pre-natal diagnostic techniques is permitted under certain conditions by registered institutions. The words ‘certain conditions’ should be interpreted in such a manner that inherent uncertainty existing in section 2 of the Amendment Act, 2002 and sections 3A, 4(5) and 6(c) of the said Act as inserted by the Amendment Act, 2002 is removed and the possible hardship of the couples who are already having one child can be avoided by permitting them to have child of the sex opposite to the sex of their existing child.
 - (e) The intention of the legislature to regulate and prevent misuse of the pre-natal diagnostic techniques is evident from the fact that the title of the Amendment Act, 2002 contains the words “Regulation and Prevention of Misuse”. These words replace the words “Prohibition of Sex Selection” used in the said Act. The intention of the legislature was to regulate and prevent misuse of the pre-natal diagnostic techniques and not a blanket prohibition thereof.
 - (f) The pre-natal diagnostic techniques can be used to achieve positive result I.e. To attain an ideal male to female ratio. Due to the stringent provisions of the said Act, the pre-natal diagnostic techniques are used by doctors and couples in hasty and hush hush manner which is likely to affect the mindset of prospective mothers. Fertility clinics have spawned all over where couples who do not have children are taking treatment to get the child of their choice. Such misuse needs to be prevented by providing for an exception whereby only couples who have a child can be allowed to choose the sex of the second child provided the child they propose to have is of the sex opposite to the sex of their existing child.
 - (g) Section 31-A of the said Act provides that the Central Government may publish an order in the Official Gazette within 3 years from the commencement of the said Act for removal of difficulties if any, in giving effect to the provisions of the said Act. The difficulties of the couples having one child need to be taken into account. It is, therefore, necessary for the Central Government to publish the necessary order in the Official Gazette and bring about necessary amendment in the said Act.
6. Strong exception is taken to the submissions of the petitioners’ counsel and the contentions raised by the petitioners, by the learned counsel for the respondents. Affidavit in reply is filed by Ms. Sushma Rath, Under Secretary, Ministry of Health & Family Welfare and by Versha Deshpande, a Social Worker, whose intervention is allowed by this court considering the importance of the issues involved in this petition.
7. It is necessary to quote section 2 of the Amendment Act, 2002 and sections 3-A, 4(5) and 6(c) of the said Act as inserted by the Amendment Act since the constitutional validity of the said provisions is under challenge. Section 2 of the Amendment Act, 2002 reads thus:

“2. Substitution of long title. - In the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as the principal Act), for the long title, the following long title shall be substituted, namely :-

An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital mal-formations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.”

Sections 3-A, 4(5) and 6(c) of the said Act read thus:

“3. Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics. - On and from the commencement of this Act,

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(3A). Prohibition of sex selection. No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them).

(4) Regulation of pre-natal diagnostic techniques. - On and from the commencement of this Act,

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both.

(6) Determination of sex prohibited. On and from the commencement of this Act,

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.”

8. It is necessary to first deal with the submission that the use of the words “Regulation & Prevention of Misuse” in the Amendment Act, 2002 is indicative of the legislative intent only to regulate and prevent misuse because these words substitute the words “Prohibition of Sex Selection” in the said Act. This, in our opinion, is a totally fallacious argument. The title of the earlier Act was the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (for short, “the 1994 Act”). It’s long title prior to its amendment by the Amendment Act, 2002 was as under :

“1. Substituted by the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (14 of 2003), S.2, for long title (w.e.f. 1422003). Prior to its substitution, long title read as under:-

An Act to provide for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto.”

By the Amendment Act, 2002, it was substituted by the following long title :

“An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.”

9. By the Amendment Act, 2002, the 1994 Act I.e. The Pre-natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act was renamed as the said Act I.e. The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The Statement of Objects and Reasons of the Amendment Act, 2002 must be quoted. It reads thus:

“Amendment Act 14 of 2003 – Statement of Objects and Reasons. - The Pre-natal Diagnostic Techniques

(Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit prenatal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.

- 2) The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. Techniques are also being developed to select the sex of child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of the women.
 - 3) The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe, in the form of severe imbalance in male-female ratio. The State is also duty bound to intervene in such matters to uphold the welfare of the society, especially of the women and children. It is, therefore, necessary to enact and implement in letter and spirit a legislation to ban the pre-conception sex selection techniques and the misuse of pre-natal diagnostic techniques for sex-selective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of the society.
 - 4) Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.
 - 5) The Bill seeks to achieve the aforesaid objects.”
10. The Statement of Objects and Reasons of the Amendment Act, 2002 therefore clearly indicates that the legislature was alarmed at the severe imbalance created in the male to female ratio on account of rampant use of the pre-natal diagnostic techniques made to detect sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. The legislature took note of the fact that certain techniques are being developed whereby even at pre-conception stage, sex of the child can be selected and, therefore, the title of the 1994 Act was amended to include the words “Pre-conception” and “(Prohibition of Sex Selection)” in it. The legislature categorically stated that there was a need to ban pre-conception sex selective techniques and made it clear that the 1994 Act was sought to be amended with a view to banning the use of sex selection techniques prior to conception as well as misuse of pre-natal diagnostic techniques for sex selective abortions.
 11. A look at certain important provisions of the said Act persuade us to reject the submission of the petitioners that the legislative intent is to only regulate the use of the said pre-natal diagnostic techniques. “Pre-natal diagnostic procedures” are defined under section 2(1) of the said Act as all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo blood or any other tissue or fluid of a man or of a woman before or after conception, for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception.
 12. “Pre-natal diagnostic test” is defined under section 2(k) of the said Act as ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases.
 13. Section 2(j) defines pre-natal diagnostic techniques. It states that pre-natal diagnostic techniques include all pre-natal diagnostic procedures and pre-natal diagnostic tests. Pre-natal diagnostic techniques (for convenience, hereinafter referred to as “the said techniques”) can detect the sex of the foetus. Section 3-A prohibits sex selection on a woman or a man or on both of them or on any tissue embryo, conceptus, fluid or

gametes derived from either or both of them and section 4 regulates use of the said techniques. Section 4(2) states that the said techniques shall not be conducted except for the purpose of detection of (I) chromosomal abnormalities; (ii) genetic metabolic diseases; (iii) haemoglobinopathies; (iv) sex linked genetic diseases; (v) congenital anomalies or any other abnormalities or diseases as may be specified by the Central Supervisory Board that too on fulfillment of any of the conditions laid down in sub-section 3. Thus the said techniques are to be used only to detect abnormalities in the foetus and not for sex-selection or sex-selective abortions. Section 5(2) states that no person including the person conducting pre-natal procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner. Section 6(c) prohibits determination of sex by stating that no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

14. Under the said Act machinery is created to ensure that there is no sex selection at pre-conception stage or thereafter and there is no pre-natal determination of sex of foetus leading to female foeticide. Therefore, the submission that the use of the said techniques is only intended to be regulated, must be rejected.
15. The challenge on the ground of violation of Article 14 rests on the comparison between the said Act and the MTP Act which are Central Acts. In our opinion, the object of both the Acts and the mischief they seek to prevent differ. They cannot be compared to canvass violation of Article 14. We have already quoted the Statement of Objects and Reasons of the Amendment Act, 2002. What it seeks to ban is pre-conception sex selection techniques and use of pre-natal diagnostic techniques for sex-selective abortions. Having taken note of the alarming imbalance created in male to female ratio and steep rise in female foeticide legislature has amended the Act of 1994. It, inter alia, prohibits sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, foetus or gametes derived from either or both of them. It prohibits any person to cause or allowed to be caused selection of sex before or after conception.
16. The MTP Act is an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. Statement of Objects and Reasons of the MTP Act indicates that it concerns itself with the avoidable wastage of the mother's health, strength and sometimes life. It seeks to liberalize certain existing provisions relating to termination of pregnancy as a health measure – when there is danger to the life or risk to physical or mental health of the woman, on humanitarian grounds – such as when pregnancy arises from a sex crime like rape or intercourse with a mentally ill woman, etc. and eugenic grounds – where there is substantial risk that the child, if born, would suffer from deformities and diseases. It does not deal with sex selective abortion after conception or sex selection before or after conception.
17. It is true that under section 3(2) of the MTP Act, when two registered medical practitioners form an opinion that continuance of the pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health, pregnancy can be terminated and, under Explanation II thereof, where any pregnancy occurs as a result of a failure of a device used by the couple for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy is presumed to constitute a grave injury to the mental health of the woman. It must be remembered that termination of pregnancy under the MTP Act is not prompted because of the unwanted sex of the foetus. It could be a male or a female foetus. The MTP Act does not deal with sex selection. The petitioners want to equate the situation of a prospective mother under the MTP Act with the prospective mother under the said Act. They contend that anguish caused to a woman who is carrying a second or third child of the same sex as that of her existing children and who is desirous of having a child of the opposite sex also constitutes a grave injury to her mental health. According to the petitioners, this aspect has been overlooked by the legislature. They contend that an exception ought to have been carved out for such women.

It is their contention that inasmuch as both these Acts are Central Acts and deal with prospective mothers if by MTP Act certain rights are conferred on a prospective mother, the same cannot be denied to the prospective mother by the said Act. We are unable to accept this submission. Apart from the fact that both the Acts operate in different fields and have different objects acceptance of the submissions of the learned counsel would

frustrate the object of the said Act. A prospective mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the foetus of the child but because of other circumstances laid down under the MTP Act. To treat her anguish as injury to mental health is to encourage sex selection which is not permissible. Therefore, by process of comparative study, the provisions of the said Act cannot be called discriminatory and, hence, violative of Article 14.

18. It is well settled that when a law is challenged as offending against the guarantee enshrined in Article 14, the first duty of the court is to examine the purpose and the policy of the Act and then to discover whether the classification made by the law has a reasonable relation to the object which the legislature seeks to obtain. The purpose or object of the Act is to be ascertained from an examination of its title, preamble and provisions. We have done that exercise in the preceding paragraphs and we are of the considered opinion that the said Act does not violate the equality clause of the Constitution.

19. Our attention is drawn to the frightening figures which show the imbalance in male to female ratio in various parts of India. Ms. Sushma Rath, Under Secretary, Ministry of Health & Family Welfare has in her affidavit in reply stated that there is a considerable decline in the number of female children and the financially sound areas of Punjab, Haryana and Delhi are worst affected. Ms. Versha Deshpande has in her affidavit stated that the percentage of female children is on the decline in Maharashtra. The booklet titled “missing” published by the Ministry of Health & Family Welfare on which reliance is placed by respondent 1 makes an interesting reading. It captures the decline in the number of girls as compared to boys in India. It is necessary to quote two paragraphs from the same, which have caused great distress to us.

“The sex ratio at birth is slightly favourable to boys. This means that more boys are born as compared to girls. This is a natural phenomenon. The sex ratio at birth is usually between 940-950 girls per 1000 boys. The child sex ratio is calculated as number of girls per 1000 boys in the 0-6 years age group. In India, however, the 1991 Census reported a child sex ratio of 945 girls per 1000 boys which further declined to 927 during 2001 Census. Over the years, this ratio has fallen from 976 in 1961 to 964 in 1971, and 962 in 1981. A stage may soon come when it would become extremely difficult, if not impossible, to make up for the missing girls. Society needs to recognise this discrimination : girls have a right to live just as boys do. Moreover, missing numbers of either sex, and the resulting imbalance, can destroy the social and human fabric as we know it.”

“In States such as Haryana, Punjab, Delhi and Gujarat, this ratio has declined to less than 900 girls per 1000 boys. 70 districts in 16 States and Union Territories have recorded a more than 50 point decline in the child sex ratio during the decade 1991-2001. The ratio stands at a mere 770 in Kurukshetra district of Haryana, 814 in Ahmedabad, and 845 in the South West district of Delhi – even though these regions are amongst the most prosperous in the country.”

20. That there is decline in the number of girls is not seriously disputed by the petitioners. According to them, the imbalance is caused by the couples who have no children and who by using the said techniques choose male child. In our opinion, no such distinction is permissible. It cannot be denied that in India there is strong bias in favour of a male child. Various causes have led to this preference. It is felt that son carries the name of the family forward and only he can perform religious rites at the time of cremation of the parents. Sons are said to provide support in the old age. Several socio-economic and cultural factors are responsible for this craving for a son. It is unfortunate that people should still be under the influence of such outdated notions. As long as such notions exist, the girl child will always be unwanted because it is felt that she brings with her the burden of dowry. These hard realities will have to be kept in mind while dealing with the challenge raised to the constitutional validity of a statute which tries to ban sex selection before or after pre-conception and misuse of the said techniques leading to sex selective abortions. None can be allowed to use the said techniques for sex selection. The justification offered by the petitioners is totally unacceptable to us.

21. Certain averments made in the petition are shocking and they reinforce our conclusion that the challenge to the said Act must be thrown overboard. Ground (g) reads as under :

“(g) If the country is not advanced socially and economically to accept a female child, it is better such children are not born. The highly advanced treatment should be accepted and utilized for achieving positive mindset.”

Ground (m) reads as under :

“(m)As long as the patriarchal system exists the craving for a male child is likely to be there and one cannot erase the said issue from the mindset of the people. Hence, it is necessary to balance the family with a male and female child if financial social and other circumstance permits.”

22. The petitioners have boldly proclaimed that if the country is not economically and socially advanced, it is better that female children are not born. Patriarchal system is the answer for the craving for a male child. If patriarchal system or economic and social backwardness is responsible for female foeticide, efforts should be made to rectify the system and improve the socioeconomic status of the society. But this court cannot accept it as a fate accompli, permit an abject surrender to it and allow sex selection or misuse of the said techniques leading to female foeticide. The petitioners’ case that the use of the said techniques can result in obtaining equal male to female ratio is nullified by their own averments. We have no doubt that if the use of the said techniques for sex selection is not banned, there will be unprecedented imbalance in male to female ratio and that will have disastrous effect on the society. The said Act must, therefore, be allowed to achieve its avowed object of preventing sex selection. In our opinion, the provisions of the said Act which are sought to be declared unconstitutional are neither arbitrary nor unreasonable and are not violative of Article 14.
23. It is then submitted that by sex selection before conception with the help of the said techniques, sex of the child is determined by using male/female chromosome before fertilization and the fertilized egg is inserted in the womb of the mother. There is, therefore, no foeticide and, hence, it is not necessary to impose any ban on the said techniques.
24. It is not possible to accept this submission. Techniques like sonography which are useful for the detection of genetic or chromosomal disorders or congenital malformations are being used to detect the sex of the foetus and to terminate the pregnancy in case the foetus is female. Similarly, pre-conception sex selection techniques which have now been developed make sex selection before conception possible. If prior to conception by choosing male or female chromosome sex of the child is allowed to be determined and fertilized egg is allowed to be inserted in the mother’s womb that would again give scope to choose male child over female child. In such cases, even if it is assumed that there is no female foeticide, indirectly the same result is achieved. The whole idea behind sex selection before pre-conception is to go against the nature and secure conception of a child of one’s choice. It can prevent birth of a female child. It is as bad as foeticide. It will also result in imbalance in male to female ratio. The argument that sex selection at pre-conception is an innocent act must, therefore, be rejected.
25. We have so far laid stress on the possibility of severe imbalance in male to female ratio on account of artificial reduction in the number of female children caused by the use of the said techniques. But there is yet another and more important fact of this problem. That society should not want a girl child; that efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance. It violates woman’s right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A(e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection.
26. We are of the considered opinion that the provisions of the said Act as amended by the Amendment Act, 2002 are clear, unambiguous and in tune with their avowed object. There is no uncertainty in any of the provisions as alleged in the petition. Therefore, it is not necessary for the Central Government to issue any order in the

Official Gazette under section 31-A of the said Act for removal of difficulties on the grounds stated in the petition. This submission of the petitioners is, therefore rejected.

27. The petitioners have made a grievance that in fertility clinics which have spawned all over, there is a misuse of the said techniques. It is contended that in the said clinics, the couples who do not have children are taking treatment to get a child of their choice. In *Centre for Enquiry Into Health & Allied Themes (Cehat) and Ors. v. Union of India & Ors.* 2003 (8) SCC 398, a grievance was made by a Non Governmental organization that the provisions of the said Act are not properly implemented. After considering this grievance, the Supreme Court has noted that it has already issued directions to secure compliance of the provisions of the said Act. The Supreme Court has issued further directions to the Central Government, State Government and Union Territories to ensure compliance of its earlier directions. If the said directions are followed, proper implementation of the said Act would be secured. Though the petitioners have alleged misuse of the said techniques, no particulars of the misuse have been given. In any case, it is the duty of the respondents to ensure that the provisions of the said Act are properly implemented. The respondents will have to abide by the directions of the Supreme Court. We, therefore, direct the respondents to abide by the directions issued by the Supreme Court and take all expeditious steps to prevent the misuse of the said techniques.
28. In the view that we have taken, the petition will have to be dismissed and is accordingly dismissed.

Cases involving procedural issues under the Act

Cases involving procedural issues under the Act are few and far in between. Majority of them pertain to cancellation of registration of the Sonography clinic or of seal and seizure of the sonography machines on account of their misuse. The challenge to this action of the State, in below mentioned cases, is mainly on the ground that procedural formalities are not complied with by the State Authority in taking such drastic action which has the effect of preventing the Petitioners from carrying on their professional activities and there by affecting their Constitutional right of earning their livelihood.

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 5295 of 2003

Decided on 17/09/2004

M/s Malpani Infertility Clinic Pvt. Ltd. & Others

-Vs-

Appropriate Authority, PNDT Act & Others

Hon'ble Judges : H. L. Gokhale & Smt. Justice Nishita Mahtre, J.J

Anil V. Anturkar, for Petitioners.

A. Y. Sakhare with M.D. Patil for Respondent No.1,

J. S. Pawar, A.G.P. For Respondent NO.2.

Acts/Rules/Orders : Constitution of India - Article 226; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – Section 20(3).

CASE SUMMARY

In the Writ Petition filed by M/s Malpani Infertility Clinic Pvt. Ltd. in the High Court of Bombay, the order passed by Appropriate Authority suspending the registration of Petitioner's Diagnostic Centre under the PNDT Act was challenged. Main contention raised was that show cause notice, as contemplated u/s 20 (1), an opportunity of hearing as contemplated u/s 20 (2) and sufficient reasons as required u/s 20 (3) of the Act, were not given to Petitioners before taking the action of suspending registration; hence the order was bad as per law.

However, considering peculiar facts of the case, High Court rejected this contention. It was pointed out that Petitioners had joined as Respondent No. 38 in Writ Petition (Civil) No. 301/2001 filed by CEHAT (Cente for Enquiry into Health and Allied Themes) before Apex Court and also filed an affidavit therein defending the sex determination tests on the ground of 'family balancing'. Though subsequently the Petitioners had filed another affidavit tendering apology, they knew that they were prosecuted for criminal offence under the provisions of the Act. It was held that, as Appropriate Authority has, after referring to that criminal prosecution issued the order of suspension, there was sufficient notice to Petitioners and there was also sufficient mention of the reasons by the Appropriate Authority in suspension order. It was further held that, "when the reasons are required to be given in writing it is not necessary that there ought to be a detailed discussion." As regards the contention that Section 20 (3) provides only for cancellation and not for suspension of the registration, it was pointed out that such power has to be read in to the Section, otherwise the provisions of a welfare enactment will be rendered nugatory. In the words of High Court, "where there is a conflict of private interest, to carry on a particular activity which the Public Authority considered as damaging to the social interest, surely the power under the Statute has to be read as an enabling power." (Para 7 - 8)

JUDGMENT

Per Hon'ble Mr. Justice H. L. Gokhale, J.

1. Heard Mr. Anturkar for the petitioners. Mr. Sakhare Senior Advocate with Mr. Patil appears for respondent No. 1 and Mrs. Pawar, Additional Government Pleader for respondent No. 2.
2. This petition seeks to challenge the order dated 7th August, 2003 issued by respondent No. 1 under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short "the PNDT Act") which suspends the registration of the 1st petitioner's Diagnostic Centre under the PNDT Act. This is an Act which has been passed by the Parliament to deal with the problem of pre-natal sex determination leading to female foeticide. A Public Interest Petition bearing Writ Petition (Civil) No. 301 of 2001 was filed in the Apex Court by an N.G.O. CEHAT (Centre for Enquiry into Health and Allied Themes) wherein a grievance was made that in spite of passing the said Act, the activities, which are prohibited under this Act, are going on. The petitioners herein intervened in that matter inasmuch as they were carrying on a Centre, called as a Diagnostic Centre, whose activities could be said to be prohibited under the said Act. They joined as respondent No. 38 in the proceedings before the Apex Court. In the Apex Court, in fact, the petitioners filed an affidavit and defended the sex determination test on the ground of "family balancing" by filing an affidavit, though subsequently another affidavit was filed wherein an apology was tendered and it was stated that only wrong committed by them was to continue the advertisement of such an activity on web site. The Apex Court gave appropriate directions for the implementation of the Act and thereby the petition was disposed of.
3. It is material to note that above-referred affidavit containing apology was filed in the Apex Court in July, 2003. As a part of the implementation of the directions of the Supreme Court, the respondents started the prosecution of the petitioner under Section 22(3) of the said Act on 22nd July, 2003 and then came the impugned order, which is issued by the Appropriate Authority on 7th August, 2003. This order in the reference column refers to two items viz. (i) Case No. 34/S/ of 2003 filed against the petitioners in the Court of Metropolitan Magistrate, 37th Court, Esplanade, Mumbai and (ii) letter from the Additional Director, Health Services. Thereafter, the order states in second paragraph as follows :-

"As per the reference given above you are hereby informed that said Registration is suspended/cancelled with effect from 7-8-2003 in the public interest till further orders from the Court, which please note." The registration mentioned therein is the registration of the petitioners to carry on certain activities as permitted under the said Act for a period of five years and which is issued to the petitioners sometimes in January, 2002.
4. Mr. Anturkar, learned Counsel appearing for the petitioners, submitted that this order was uncalled for. He further submitted that the only Section to which this order can be related, is Section 20 of the said Act. Sub-section (1) of Section 20 of the said Act requires a show cause notice to be given to the person concerned or to the Centre concerned on a complaint being received or on a suo motu basis by the appropriate Authority. Thereafter, under Sub-Section (2) of Section 20 of the said Act, a hearing is contemplated and thereafter if the Authority is satisfied that there is a breach of the provisions of this Act or the rules that it may, without prejudice to any criminal action, suspend the registration. Mr. Anturkar submitted that, in the present case, no notice has been given to the petitioners nor has there been any hearing and, therefore, the impugned order is bad in law! He further submitted that, according to the petitioners, they are no longer carrying on the disputed activities and the only mistake committed by them was not to update the web site, which, according to him, has now been done.
5. Mr. Sakhare, learned senior Counsel appearing for respondent No. 1 and Mrs. Pawar, learned Additional Government Pleader appearing for respondent No. 2, submitted that the petition ought not to be entertained for the reason that an Appeal is available under Section 21 of the said Act to the Appellate Authority. As far as this submission is concerned, Mr. Anturkar submitted that against the order of the appropriate Authority, an Appeal is available to the Additional Director of Health Services and since it is that officer, who has

written a letter leading to the suspension, the Appeal will be meaningless. It was suggested to Mr. Anturkar that an Appeal may be preferred to the Principal Secretary of the Health Department since under Section 21 of the said Act, the Appeal lies to the State Government. Mr. Anturkar, however, submitted that the then Principal Secretary one Mr. Manmohan Singh had written a letter in July, 2003 taking certain position on this controversy. He, therefore, submitted that it will be difficult to expect a fair hearing from this Secretary. Ms. Pawar, learned Additional Government Pleader appearing for respondent No. 2, pointed out that Mr. Manmohan Singh is now no longer the Principal Secretary in the Health Department and the concerned Principal Secretary is one Mr. Navin Kumar. However, in spite of this, Mr. Anturkar submitted that it would be better that this Court itself may go into the aspect of this matter.

6. Mr. Sakhare, learned senior Counsel appearing for respondent No. 1, submitted that an Appeal having been provided, it ought to be first exhausted. As far as this submission is concerned, undoubtedly there is some merit therein. However, the principle of exhaustion of internal remedies is a rule of self restriction as far as the powers of the High Court are concerned. That being so, if a party feels that there is no use in resorting to the remedy inasmuch as it is like going from Caesar to Caesar and if the party wants the grievance to be redressed in the High Court, the High Court cannot prevent the party from doing so.
7. In view of this position; we have heard Mr. Anturkar. As stated above, he has referred to the provisions of Sub-sections (1) and (2) of Section 20. As against this, it is material to note that Sub-section (3) of Section 20, provides for a suspension of the registration and that power can be exercised notwithstanding anything contained in Sub-sections (1) and (2) for the reasons to be recorded in writing. Mr. Anturkar submitted that even if this Sub-section (3) is pressed into service, that Sub-section requires reasons to be given in writing. In our view, there is a clear reference to the prosecution lodged against the petitioners in the reference clause. The petitioners, very much knew that a Public Interest Petition was filed in the Apex Court. They have filed an affidavit in that proceedings. Thereafter, they had tendered an apology as stated above in July, 2003. Thereafter on 22nd July, 2003, they knew that they were prosecuted. This being the position, if the appropriate Authority refers to that prosecution and issues an order of suspension, in our view, there is a sufficient mention of the reasons for the Authority which have led it to take the action.
8. Mr. Anturkar submitted that in the affidavit filed by the Authority, they have stated that this is an action of cancellation. Inasmuch as Sub-section (3) of Section 20 does not provide for a cancellation, this order cannot be considered as an order of cancellation. It can only be treated as an order of suspension which will mean suspension till the hearing and disposal of the prosecution which has been mentioned in the order. In our view, such an action has to be permitted to the Authority concerned. If the Authority has some material before it, which, prima facie, it had, at the relevant time, it ought to have such a power to suspend the activities of such a nature. If such power is not read into the Section, the provisions of a welfare enactment will be rendered nugatory. It is only a particular kind of activity that has been stopped and the Authority concerned has seized two machines. The 2nd and 3rd petitioners are Gynaecologists and their practice as Gynaecologists is not prevented in any manner whatsoever. In a situation like this, where there is a conflict of private interest to carry on a particular activity which the public Authority considers as damaging to the social interest, surely, the power under the Statute has to be read as an enabling power. In the instant case, in our view, Sub-section (3) of Section 20 provides an adequate power to the Authority concerned to suspend the licence.
9. Mr. Sakhare appearing for respondent No. 1 and Ms. Pawar, Additional Government Pleader for respondent No. 2, have referred to two affidavits filed by the respondents' officers, which mention violation of various rules including Rule 6(2) 4(i)(ii) and 9(i) of the Rules framed under the said Act as well as Section 23(i) which empowers the prosecution. They drew our attention to a statement of one of the patients attending the Clinic pointing out the purpose for which she went there and the assurance given to her. Inasmuch as such prosecution has been lodged, if the Public Authority forms an opinion that pending that prosecution, a particular activity should be suspended, we do not think that there is any error on its part and it is not necessary that when the reasons are required to be given in writing, there ought to be a detailed discussion. A reference to the prosecution is sufficient as the reason for the action and the same is provided in the order.

10. In the circumstances, there is no substance in the petition and the same is dismissed. The interim order passed earlier is vacated. Mr. Anturkar applies for extension of the stay for a period of four weeks. However, in view of the circumstances leading to the impugned order, we are not inclined to extend the stay.
11. Authenticated copy of this order be made available to the parties.

3 (2)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No. 18365 of 2009

Decided on 03/02/2010

Dr. Mrs. Sudha Samir

-Vs-

State of Haryana and others

Civil Writ Petition No. 19740 of 2009

Dr. Mrs. Maninder Ahuja

-Vs-

State of Haryana and others

Civil Writ petition No. 19794 of 2009

Dr. R.D. Negi

-Vs-

Stae of Haryana and others

Hon'ble Judges : K. Kannan J.

Present: Mr. Hemen Aggarwal, Advocate, for the petitioners. Mr. Ravi Dutt Sharma, Deputy Advocate General, Haryana. Ms. Deepali Puri, Advocate, for respondent No.3.

Acts/Rules/Orders : Constitution of India - Article 226; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – Section 20(3).

CASE SUMMARY

This batch of Writ Petitions filed by one Dr. Mrs. Sudha Samir and others in the High Court of Punjab and Haryana at Chandigarh again reflects the carelessness on part of the State Government in issuing Notification in the Official Gazette about the appointment of Appropriate Authority, before taking any penal action warranted under the Act. These Petitions challenged the order of suspension of registration under the Act on the ground that, when the show cause notices were issued u/s 20 and the action of suspension had been taken, the Gazette Notification had not been made; therefore the entire action u/s 20 of the Act ought to fail. The response of the State to this contention was that the Government had issued an Ordinance to validate certain acts done by Appropriate Authority prior to the Gazette Notification. The said Ordinance was subsequently introduced as a Bill in the State Assembly and was also brought as an enactment subsequently. The High Court therefore held that when subsequent enactment is not challenged which validates the acts done by the Appropriate Authority prior to the Gazette publication, the Petitioners' challenge to the show cause notices and the suspension orders issued by the Competent Authority can not survive for adjudication. The High Court however observed that Petitioners can avail of independent remedy to challenge the validity of the Act itself.

It must be noted that though these Petitions were dismissed on technical ground, these are enough to reflect adversely on the inaction and lackadaisical manner in which the State Government – whether it is of Maharashtra or of Punjab and Haryana - functions in implementation of this important piece of social legislation. (Para - 2)

JUDGMENT

1. The batch of writ petitions challenges the impugned order of suspension of registration under the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter called 'the PNDT Act'). The suspension had been done after a show cause notice was issued under Section 20, when on an inspection, the authorities had come to a provisional conclusion that the petitioners were indulging in acts that were prohibited under the Act. It appears that an appeal had been filed by all the petitioners under Section 21 of the Act and it confirmed the decision of the appropriate authority and hence, they challenge the decisions by means of the batch of writ petitions.
2. The contention of the counsel appearing on behalf of the petitioners is that the appropriate authority constituted under the Act shall be notified in the official gazette and admittedly the gazette publication was made only on 21.07.2009. At the time when the impugned show cause notices were issued and the action for suspension had been taken, the gazette notification had not been made and therefore, the entire action under Section 20 of the Act ought to fail. The response to this contention by the counsel for the respondent is that the Government had issued an ordinance to validate certain acts done by various authorities prior to the gazette notification through the Pre- conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Haryana Validation Ordinance, 2009 issued on 21st July, 2009. The ordinance purports to validate of the acts and proceedings done by appropriate authorities on the ground that the notification of the Act had Civil Writ Petition No.18365 of 2009 -3- been made on 24.10.1997 and the ordinance is intended to save certain acts taken by the appropriate authority, which under Section 17(2), he is competent to do. It is seen that the ordinance was subsequently introduced as a Bill on 30th July, 2009 in the State Assembly and also brought as an enactment subsequently. The learned counsel sought to contend that the ordinance itself has been repealed and that the 2009 ordinance will not have any effect. It must be noticed that the ordinance was repealed in order to substitute it by an enactment passed in an Assembly through a Bill. When the substituted enactment itself is not in challenge which validates the acts done by the appropriate authority even prior to

the gazette publication on 21.07.2009, the petitioners' challenge to the show cause notices and the substantial orders of the competent authority cannot survive for adjudication before this Court. The petitioners may have independent remedy to challenge the validity of the Act, itself but so long as the Act is in its place, the action initiated by the appropriate authority cannot be assailed on the ground that when it was done, the gazette notification had not been issued.

3. The writ petitions are, accordingly, dismissed.

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

3 (3)

Civil Writ Petition No. 20635 of 2008.

Decided on 10/02/2010

Dr. Preetinder Kaur and others

-Vs-

The State of Punjab and others

Hon'ble Judge : K. Kannan J.

Present: Mr. R.N. Raina, Advocate, with Mr. Ravi Sharma, Advocate and Mr. Daman Dhir, Advocate, for the petitioners. Mr. Anil Kumar Sharma, Additional Advocate General, Punjab, for respondents 1 to 3.

Mr. Vikas Chatrath, Advocate, and Mr. Sunny Singla, Advocate, for respondent No.5.

Mr. Anil Kshetarpal, Advocate, for respondent No.6.

CASE SUMMARY

In the recently decided Civil Writ Petition No. 20635 of the 2008 again the competency of the authority which initiated criminal prosecution against the Petitioner for violation of Section 3 (a) punishable u/s 23 of the Act was challenged. It was contended that the Act contemplated the proceeding to be initiated in particular fashion on a complaint by the Appropriate Authority, but the said procedure had not been followed. The person who had filed the complaint had never been authorized by the Appropriate Authority for taking any action; therefore the entire trial which was in progress before the Magistrate was vitiated.

High Court rightly rejected this contention by giving broader interpretation to Section 28 of the Act. It was held that Section 28 does not narrow down the class of persons who can initiate action. On the other hand, as any legislation intending to prevent a social evil, it allows for fairly large body of persons to set the law in motion. Apart from the Appropriate Authority, an Officer authorized by the Central or State Government can also file a complaint. He can also be a person authorized by

the Appropriate Authority itself. As per the Explanation contained u/s 28, the expression 'person' includes even a social organization. The various categories of persons which are set out u/s 28 give authority to a wide range of persons who can initiate the action under the Act. It was further held that Section 28 must not be read as constituting a narrow class of persons who could initiate the action. It must be given an extensive meaning to pave the way for any socially conscious person to initiate action. It was accordingly held that the complaint filed by the Project Officer was not illegal but it was only irregular and the subsequent discussion and recording of minutes by Appropriate Authority constituted valid ratification. The High Court therefore, having regard also to fact that the case before the trial court has progressed for sufficient length of time, dismissed the Petition. (Para 9)

Thus this case, taking into consideration the Object of the Act, which was to put an end to the social menace of sex selection, adopts a different and broader approach in favour of upholding the validity of the action taken under the Act.

JUDGMENT

Per Hon'ble Mr. Justice K. Kannan J.

1. The petitioners, two of whom are medical practitioners and the 3rd petitioner that supports the cause of the petitioners, namely the Indian Medical Association, have filed this writ petition under Article 226, 227 of the Constitution of India read with Section 482 Cr.P.C. to quash the order dated 06.11.2003 issued by the Deputy Commissioner, Bathinda Civil Writ Petition No.20635 of 2008 -2- authorizing the Assistant, Project Officer, DRDA, and PNDT Cell, Bathinda to file complaints in the Court of Chief Judicial Magistrate for alleged offences under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (called 'the PNDT Act').

II. The principal grounds of challenge

2. The intervention through this writ petition was at the time when the trial was in progress after the charge-sheet had been framed for violation of Section 3(a) of the Act rendering themselves as punishable under Section 23. The grounds of challenge principally are that the Act contemplates the proceedings to be initiated in a particular fashion on a complaint by the appropriate authority but the procedure had not been followed. The jurisdictional magistrate, who had taken the complaint on file, had no authority to initiate the legal action by issue of process when the procedure had not been followed. As a shot in the arm for the petitioners, the Director, Health and Family Welfare, Punjab had himself reported to have issued a memo dated 04.10.2007 to the Principal Secretary to the Government of Punjab directing withdrawal of complaints lodged under PNDT Act against the doctors of Bathinda on the ground that the person, who had filed the complaint namely, Shri Sadhu Ram Kusla, had never been authorized by the appropriate authority for taking any action and therefore, the action could not be pursued by the magistrate.
3. At the time of argument, the learned counsel Shri Raina appearing for the petitioners also referred to the contentions as to how in one case Civil Writ Petition No.20635 of 2008 -3- the sonogram had been taken when the foetus was just around 10 weeks when determination of sex itself was not possible and how in yet another case it was seen to be a blighted ovum and there was no means that it could have gone for gestation for a fully developed foetus to determine the sex of the child. According to him, the Act does not prohibit the use of sonogram itself, for, it was still an essential medical investigation technique and the offence under the Act could be said to have been committed only if it was meant for detection of sex of the child that could result in a misuse leading to female foeticide. III. Contention in defence
4. The latter part of the argument relating to the merits of the contentions raised by the petitioners, I shall not dwell for, in my view, the case has to either stand or fall by whether the act complained of is so fundamentally

an egregious error that a further pursuit in the proceedings before the magistrate would be unjustified. The contention on behalf of the respondents was also that even apart from the offence under the Act, there were other offences to which the petitioners had been charge- sheeted under Section 312 read with Section 120-B of the Indian Penal Code as well as under Section 5 of the Medical Termination of Pregnancy Act. The contention in defence therefore was that the case has to go on, for the offence complained of is not merely for violations of the provisions of the PNDT Act but also other offences for which the permission as set out under Section 28 of the Act, was not applicable. It was the further contention of the learned counsel appearing on behalf of the respondents that the very same objection has been taken in some Civil Writ Petition No.20635 of 2008 -4- other cases complaining of want of jurisdiction on the ground that the person, who had filed a complaint was not competent to initiate the proceedings under the Act and this Court had rejected the challenge made under Section 482 Cr.P.C. on the ground that the issue would be decided only at the time of trial and cannot be prejudged at this time. IV. Issues for consideration

a) Basis of complaint examined

5. The basis for the action against the petitioners 1 and 2 have been the letter authorizing the 5th respondent to file criminal cases under PNDT Act by the Deputy Commissioner, Bathinda and it would, therefore, require to be reproduced:-

“District administration, Bathinda has launched a pilot project to combat the menace of female foeticide. In this project data of the pregnant ladies who undergo sonography is picked up from Form ‘F’ of the PNDT Act and with the help of the software, suspected cases of female foeticide are short listed. These suspected case are visited by various government functionaries to check whether pregnancy is continuous or not and in case the lady has undergone abortion the detailed investigations are done to see if it is a case of female foeticide.

I authorize Shri Sadhu Ram Kusla, Assistant Project Officer, DRDA and Project Officer, PNDT Cell, Bathinda to file complaints in the Court of Chief Judicial Magistrate, Bathinda or any other appropriate Court where there is a prima facie case of female foeticide. For this purpose he can engage private advocate to assist him. Besides this District Attorney, Bathinda will also pursue these cases. All expenses will be met out from PNDT Cell/Red Cross, Bathinda.”

Civil Writ Petition No.20635 of 2008 -5- b) Relevant section for lodging the complaint

The learned counsel for the petitioners attacks this letter as wholly without any authority. The relevant provision relating to taking of cognizance of offences under the Act is set out under Section 28 of the PNDT Act:- “28. Cognizance of offences

- (1) No court shall take cognizance of an offence under this Act except on a complaint made by--
- (a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or
 - (b) a person who has given notice of not less than thirty days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the court.

Explanation.--For the purpose of this clause, “person” includes a social organisation.

- (2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.
- (3) Where a complaint has been made under clause (b) of sub- section (1), the Court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.”

6. The contention is that the Court could take cognizance of an offence under the Act (i) only on a complaint made by the appropriate authority or any officer authorized on behalf of the Central Government or the State

Government, as the case may be, or the appropriate authority; (ii) it could also be taken at the instance of a complaint made Civil Writ Petition No.20635 of 2008 -6- by a person, who had given a notice of less than 15 days in the manner prescribed to the appropriate authority of the commission of alleged offence and of his intention to make a complaint to the Court. The latter situation would arise in a case whether the appropriate authority himself had failed to initiate action on a notice and when even a private individual could lodge a complaint. In the latter situation again sub-section (3) empowers the Court to direct the appropriate authority to make available copies of the relevant records in its possession to such a person if he makes such a demand before the Court. c) Civil surgeon of the district is the Appropriate Authority under the Act

7. The learned counsel for the petitioners points out that the notification issued by the Government of Punjab dated 8th December, 1999 appointed the Civil Surgeon of all districts as district appropriate authority of their respective districts for effective implementation of the Act and also constituted a District Advisory Committee in all district to aid and advice the District Appropriate Authority in the discharge of the functions. According to the petitioners, admittedly the Civil Surgeon, Bathinda was very much available but he had not either lodged a complaint against himself or he had not authorized the 5th respondent to lodge the complaint. If the Act requires the appropriate authority or the authorized person or the private individual, who had issued a notice to file a complaint any other person authorized by Deputy Commissioner is wholly without authority and cognizance could not be taken on such an unauthorized complaint.

Civil Writ Petition No.20635 of 2008 -7 - d) Decision to pursue cases was taken in the presence and with knowledge of Authorised Authority Minutes of meeting affords proof

8. As the petitioners makes it appear, it almost seems like an open shut case where the complaint is lodged only by a person other than the appropriate authority and therefore the continuance of the proceedings before the magistrate would be unjustified. The learned counsel appearing for the respondent would urge that the complaint by the 5th respondent was not merely at the instance of the letter of authority issued by the Deputy Commissioner, which is impugned in the writ petition but it was the result of a decision taken in the presence of the Deputy Commissioner by the appropriate authority himself namely of the Civil Surgeon, sitting in a meeting along with other persons in PNDT Cell, Bathinda for taking action against persons, who they suspected to be guilty of violation of the provisions of the Act. At a meeting on 18.11.2003 at 5 P.M. under the Chairmanship of the Deputy Commissioner, at appears the fact of institution of 7 cases before the judicial magistrate and 5 new cases were discussed. The minutes of meeting which had been produced contains inter alia the following details:-

“All the above cases was discussed in detail and it was found that there is strong evidence of female foeticide and criminal proceedings are required to be launched. It was suggested by the Civil Surgeon, (District Appropriate Authority) Bathinda that previously in seven cases complaints in different Courts have been launched by the Project Officer, PNDT Cell, Bathinda and it will be better if these complaints will also be filed by him. After Civil Writ Petition No.20635 of 2008 -8- discussion it was decided that Project Officer PNDT Cell will file all the complaints in different Courts on behalf of the District Appropriate Authority/ PNDT Cell, Bathinda “

e) Initiation of proceeding on a complaint by a person authorized by DC but later ratified by Authorized Authority is irregular but not illegal

9. I have no doubt in my mind that going by the expression used under Section 28 strictly, the person, who lodged the complaint did the same only on a letter of authority issued on 06.11.2003. The reading of the resolution clearly shows that after the complaint had been filed, the Civil Surgeon, who is the appropriate authority, knew about the same and he had not merely approved of the same but had also suggested that some more complaints have to be filed against some other individuals. If the taking of a complaint on file is an illegality, there shall be no further continuance of the same. On the other hand, if it is seen to be irregular, judging by the importance of the legislation and the despicable social evil that it seeks to abate, an interpretation shall be so made that a criminal process began in right earnest on a complaint by a person whose authority was initially

suspect but whose authority came to be ratified by subsequent conduct is not thwarted. The Act was intended to eradicate the social menace of female foeticide and if in a process, it is evidenced that the appropriate authority being the Civil Surgeon had participated in a discussion where he had discussed with the Deputy Commissioner, the fact that the complaints had been taken at the instance of the Project Officer, PNDT Cell (5th respondent herein) purportedly under the Civil Writ Petition No.20635 of 2008 -9- authorization of the Deputy Commissioner makes it an irregular exercise and still not an illegal exercise.

f) Persons authorized to file a complaint fairly a large body of persons

In my view, the Section detailing the procedure for taking cognizance of an offence does not make the presence or the actual filing by the appropriate authority itself as sacrosanct. Apart from the appropriate authority, an officer authorized by the Central Government or the State Government could also file a complaint. It can also be a person authorized by the appropriate authority himself. Still more, even any person, who has given a notice to the appropriate authority and who had expressed his intention to make a complaint to a Court could lodge a complaint. This person need not be even in any way personally connected with the incident. The explanation contained under Section 28 for the expression 'person' includes a social organization. The various categories of persons, which are set out under Section 28 more than it restricts the person, who can give a complaint, as made to appear by the petitioners, gives a wide class of persons, who can initiate the action. In other words, Section 28 does not narrow down the class of persons, who can initiate action; on the other hand, as any legislation intending to prevent a social evil, it allows for fairly large body of persons to set the law in motion. In this case, the 5th respondent, the Project Officer, PNDT Cell, was definitely a person, who is not a stranger to the action; he was a Nodal Officer for the PNDT Cell. He was intimately connected with the enforcement of the Act. If he did not secure the sanction from the appropriate authority at the time when he Civil Writ Petition No.20635 of 2008 - 10 - lodged the complaint, the matter was surely ratified by the appropriate authority in a meeting held subsequently when the issue of lodging of complaints had been discussed and the appropriate authority had also directed fresh complaints to be filed against certain other individuals. g) Issue of ratification itself arises only when the initial act was without authority

10. The learned counsel appearing for the petitioners would say even this ratification was not valid. The ratification must be with reference to an Act, which is in excess of the authority granted to the agent and when the competent person ultimately approves or ratifies the same. If, on the other hand, the person, who acted initially was not merely acting in excess of the authority but was acting without authority then the ratification does not simply arise. The learned counsel relies on the judgment of the Bombay High Court headed by Chief Justice Chagla in *East and West Insurance Company Limited Versus Mrs. Kamala Jayantilal Mehta-AIR 1956 Bombay 537*, which was a decision with reference to the provisions of the Companies Act where the Court held in the context of the application of the principle of ratification as provided under the Contract Act, "Where a valid resolution has been passed by some one lacking the necessary authority the persons with the requisite authority may adopt the resolution validly passed and thereby ratify it. But where the objection to the resolution is not the wanting of authority but illegality in the very making of it, in the very passing of it, then it is impossible to accept the contention that the doctrine of ratification can validate a resolution which when it was passed was invalid." In my view, the above decision must be understood only in the context of the Civil Writ Petition No.20635 of 2008 - 11 - particular facts. I have already explained that Section 28 must not be read as constituting a narrow class of persons, who could initiate the action. It must be given an extensive meaning to pave way for an easy access to set the law in motion by any socially conscious person. In this case, the fact that the Project Officer of the PNDT Cell did not hold a direct sanction from the appropriate authority at the time of lodging a complaint was immaterial, so long as the appropriate authority approved of the same immediately thereafter. The learned counsel appearing for the petitioners also relied on the decision of the Hon'ble Supreme Court in *State of U.P. Versus Singhara Singh and others-AIR 1964 Supreme Court 358*, which held that if under the provisions of the Criminal Procedure Code if a confession was recorded by a magistrate not empowered by the State Government, even oral evidence to prove such a confession shall not be admissible. Yet another decision that on which the learned counsel placed reliance

was *Narbada Prasad Versus Chhaganlal and others-AIR 1969 Supreme Court 395*, that dealt with the situation of the requirement of a valid nomination paper under the Representation of the People Act when the Hon'ble Supreme Court held that if an Act required a particular procedure for acceptance of a nomination paper and if there was no compliance of the provisions of the Act, the Court shall not dispense with such a requirement. The Hon'ble Supreme Court underscored that if a thing is required to be done in a particular manner, it must be done in that manner or not at all; other modes of compliance are excluded. A pithy expression of what procedural safeguard in criminal legislation would mean was graphically *Civil Writ Petition No.20635 of 2008 - 12 - set out in McMABB et al. Versus United States-318 U.S.332(1943)* when Hon'ble U.S. Supreme Court spoke: "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." All the above judgments relied on by the learned counsel for the petitioners are to emphasize that there could be no deviance from the manner in which a complaint could be filed and the person who could lodge such a complaint. h) Consideration of why the trial shall not be stalled now

11. In this case, by the view that I have taken that the complaint filed by the Project Officer, PNDT, was not illegal but it was only irregular and that the subsequent discussion and recording of minutes by the appropriate authority constituted valid ratification, I do not, for one moment mean to approve of the action of the Project Officer unexceptionally. If the Act requires that the complaint could be instituted only by certain classes of persons, it ought to be done in the same manner. However, in this case, we have at our hand a situation where the case has progressed for sufficiently a length of time and the person at whose instance the complaint progressed was not an utter stranger but he was a Project Officer of the enforcement Cell and the appropriate authority had also participated in the deliberations and approved of the actions taken already. The legislation has an important social mission and a restrictive understanding to the person, who could initiate action or the application of provisions that could stall further progress in trial is simply incongruous. I have already stated that there other offences also *Civil Writ Petition No.20635 of 2008 - 13 -* that the petitioners remain charged with. The stage at which an intervention is sought is also, in my view, not appropriate. To the same type of the complaint by the same officer, this Court had already directed the continuance of the trial. The witnesses appear to have been examined in this case. The intervention is sought at the eleventh hour. V. Contentions: Mere charge-sheet for commission of offence, if unjustified, is harassment
12. The learned counsel Shri Raina would persist on an argument that the registration of complaint and the cognizance of the same by the magistrate were so fundamental that it would be unfair to let the trial go. The petitioners were already put to sufficient harassment by their names being paraded in several public places that had a serious consequence of not merely tarnishing their names but also having portents of causing suspension of the licence to practice by the operation of Section 23 of the Act. If the Act contains serious consequences of a complaint by an appropriate authority to suspend registration of any genetic counseling centre, the provisions themselves provide for sufficient safeguards that no such suspension of registration could be done without putting on notice the person who may be affected by the decision to show cause against such action.
13. There is however, a certain merit in the contention of the learned counsel for the petitioner that the very framing of charge-sheet can result in disastrous consequences, for Section 23(2) provides that the name of a medical practitioner reported by the appropriate authority to the State Medical Council for taking action might include even an action for suspension of the registration even at the stage when the charges are *Civil Writ Petition No.20635 of 2008 - 14 -* framed by the Court and till the case is disposed of. A conviction may result in removal of his name but mere framing of a charge could result in suspension. It is to be noted that so far no such precipitate action has been taken and having regard to the fact that I have observed that there was an irregular exercise of authority, I am of the view that the protection that the petitioners shall have during the pendency of the case is that no action for suspension shall be recommended by the appropriate authority during the pendency of the case and the authorities shall not also notify the petitioners to any

adverse publicity till the case is completed. These observations are to off-set the apprehension expressed by the petitioners that the prolonged criminal action and trial will cause immense hardship and embarrassment for medical professionals, who are held in high esteem of the Society.

VI. Conclusion

14. The trial shall now continue and the magistrate before whom the cases are pending shall endeavour to conclude the same as expeditiously as possible. The petitioners will have a protection against any adverse publicity or any possible action in the manner referred to in the previous paragraph.
15. The writ petition is dismissed but subject to the protection referred to above.

EQUIVALENT CITATION : MANU/UP/0857/2006

3 (4)

IN THE HIGH COURT OF ALLAHABAD AT ALLAHABAD
Criminal Misc. Writ Petition No. 5086 of 2006
Decided on 26/05/2006

Dr. Varsha Guatam

-Vs-

State of U.P. And others

Hon'ble Judges : Imtiyaz Murtaza and Amar Saran J

*For Appellant/Petitioner/Plaintiff : V. C. Mishra, Vivek Mishra, A. N. Mishra and Kamal Krishna
Advocates.*

For Respondents/Defendant : A. G. A.

Acts/Rules/Orders : Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – Sections, 2, 3A, 3(1), 6, 23, 27 and 28; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) (Amendment) Act, 2002; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994; Prevention of Corruption Act; Indian Penal Code; Criminal Procedure Code (Cr.P.C.) - Sections 5, 190(1), 195(1), 340 and 341; Constitution of India – Article 226..

CASE SUMMARY

The other major category of Petitions filed before the High Court are the Petitions under Section 482 of Cr. P. C. for quashing of process issued under the provisions of the Act by the Trial Court. In this Writ Petition filed by Dr. Varsha Gautam a prayer was made for quashing of the FIR lodged against her u/s 312 & 511 IPC read with the provisions of PCPNDT Act. The allegation in FIR was to the effect that in a sting operation shown on television it was revealed that Petitioner was engaged in performing abortions in her hospital in collusion with other doctors who determined the sex of the foetus by conducting ultra sound tests. Her clinic was also not registered under the Act and as per the case, she was not entitled to conduct the pre-natal Diagnostic procedures there in.

The first contention raised by her was that there is bar on investigation in view of Section 28 of the Act, which prohibits cognizance of an offence except on a complaint made by the concerned Appropriate Authority. This contention was outrightly rejected by the High Court holding that the said prohibition does not apply at the stage of investigation and only relates to the stage when cognizance is sought to be taken by the concerned court. (Para 5)

Second contention raised was that no offence u/s 312 r/w 511 IPC is made out as mere consent to perform the abortion is only an expression of an 'intention' to commit the offence and does not amount to an 'attempt' to commit the offence. The Court rejected this contention also holding that there is no clear dividing line between the stage of preparation and the stage of attempt and whether a certain act would amount to an attempt is a question of fact which can be determined by the court at appropriate stage. (Para 7)

The next contention raised was that no offence under the Act was disclosed as the FIR itself mentioned that sex determination of the woman had already been conducted elsewhere when she approached the Petitioner who agreed to perform the operation to terminate the pregnancy. The Court considered in detail the Object, Reasons and all provisions of the Act and held that sex selection prohibited under the Act can not be confined only to the determination of the sex of foetus but includes all the steps taken by the person or by the specialist either himself or by any other person in facilitating sex selection leading to elimination of female foetuses. (Para 16)

An attempt was also made to contend that as the offence of engaging or aiding in any sex selection is punishable with imprisonment for 3 years u/s 23 of the Act and as the offence alleged against the Petitioner was an attempt to commit the said offence, the maximum punishment would be of one and half years and hence said offence would become non cognizable in view of the last clause of Schedule I of Cr.P.C. dealing with "Classification of Offences against other laws." This contention was held by the High Court to be devoid of merits in view of the direct provision contained in Section 27 of the Act making every offence under the Act cognizable. (Para 22)

The High Court also rejected the last submission raised in supplementary affidavit filed by the Petitioner that while preparing a certain Parcha of the case diary the investigating officer had exonerated the Petitioner from an offence under the Act. It was held that this contention can not be considered at this stage in a Writ Petition under Article 226 of Constitution. (Para 23)

In the concluding paragraphs the High Court had expressed concern with respect to the increased misuse of modern scientific technology leading to decline in sex ratio, spelling out very grave social consequences. The Court has observed that "we are sitting on a virtual time bomb, which can spell social disaster." (Para 26)

JUDGMENT**Per Hon'ble Mr. Justice Amar Saran J.**

1. This writ petition has been filed with a prayer for quashing of the first information report dated 11.4.2006 lodged at case crime No. 192 of 2006, under Sections 312 and 511 IPC read with the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, hereinafter called 'the Act.'
2. The allegations in the FIR lodged by the C.M.O., Agra on 11.4.06 at P.S. Hari Parvat, Agra was that a sting operation shown on television by the Rastriya Sahara Channel revealed that a pregnant woman wanted to get her abortion done because there was a girl child in her womb. She approached the petitioner Dr. Varsha Gautam at her hospital, who agreed to perform the abortion although it was an offence to perform such an operation and even determination of the sex by doctors using ultrasound technique was illegal. The petitioner is said to have engaged in getting abortions done in her hospital in collusion with doctors, who determined the sex of the foetus by conducting ultrasound tests. Her clinic was not even registered under the Act and she was not entitled to conduct pre-natal diagnostic procedures therein.
3. We have heard Shri V.C. Mishra and Sri Kamal Krishna, learned Counsel for the petitioner and learned Additional Government Advocate.
4. Firstly, it was contended that there is a bar on investigation in view of Section 28 of the Act, which prohibits cognizance by any court of an offence except on a complaint made by the concerned appropriate authority.
5. In our view the said prohibition does not apply at the stage of investigation and only relates to the stage when cognizance is sought to be taken by the concerned court. In this regard when dealing with the question of a bar under Section 195(1)(b)(ii), it has been held in *M. Narayan Das v. State of Karnataka AIR 2004 SC 768*, that the said bar only applies at the time when the court takes cognizance of an offence, and not at the stage of investigation. The material Paragraph 8 reads as follows:

We are unable to accept the submissions made on behalf of the Respondents. Firstly it is to be seen that the High Court does not quash the complaint on the ground that Section 195 applied and that the procedure under Chapter XXVI had not been followed. Thus such a ground could not be used to sustain the impugned judgment. Even otherwise there is no substance in the submission. The question whether Sections 195 and 340 of the Criminal Procedure Code affect the power of the police to investigate into a cognizable offence has already been considered by this Court in the case of *State of Punjab v. Raj Singh*. In this case it has been that as follows :

2. We are unable to sustain the impugned order of the High Court quashing the FIR lodged against the respondents alleging commission of offences under Sections 419, 420, 467 and 468, I.P.C. by them in course of the proceeding of a civil suit, on the ground that Section 195(1)(b)(ii), Cr. P. C. prohibited entertainment of and investigation into the same by the police. From a plain reading of Section 195, Cr. P.C. it is manifest that it comes into operation at the stage when the Court intends to take cognizance of an offence under Section 190(1), Cr. P. C; and it has nothing to do with the statutory power of the police to investigate into an FIR which discloses a cognizable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceedings in Court. In other words, the statutory power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195, Cr. P. C. It is of course true that upon the charge-sheet (challan), if any, filed on completion of the investigation into such an offence the Court would not be competent to take cognizance thereof in view of the embargo of Section 195(1)(b), Cr. P. C., but nothing therein deters the Court from filing a complaint for the offence on the basis of the FIR (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in Section 340, Cr. P. C. The judgment of this Court in *Gopala-krishna Menon v. Raja Ready* on which the High Court relied, has no manner of application to the facts of the instant case for there cognizance was taken on a private complaint even though the offence of forgery was committed in respect of a money receipt produced in the civil Court

and hence it was held that the Court could not take cognizance on such a complaint in view of Section 195, Cr. P.C.

Not only are we bound by this judgment but we are also in complete agreement with the same. Sections 195 and 340 do not control or circumscribe the power of the police to investigate, under the Criminal Procedure Code. Once investigation is completed then the embargo in Section 195 would come into play and the Court would not be competent to take cognizance. However that Court could then file a complaint for the offence on the basis of the FIR and the material collected during investigation provided the procedure laid down in Section 340, Criminal Procedure Code is followed. Thus no right of the Respondents, much less the right to file an appeal under Section 341, is affected.

6. Secondly, it was urged that no offence under Section 312 read with Section 511 IPC is made out as mere consent to commit the offence of performing the abortion on the woman is only an expression of an intention to commit an offence and it could at the highest only be considered as preparation to commit an offence and would not amount to any attempt to commit offence, which is punishable under the Penal Code.
7. There is no clear dividing line between the stage of preparation and the stage of attempt and these questions of fact can properly be determined by the Court at the appropriate stage. In *Abhyanand Mishra v. State of Bihar*, it has been held that obtaining forged mark sheets for the purpose of appearing in the M.A. examinations was not regarded as only a preparation to commit an offence, but was considered an attempt to cheat, even though the accused in that case had already been acquitted of committing forgery. Paragraphs 11 and 12 may be quoted here with advantage:

11. Another contention for the appellant is that the facts proved do not go beyond the stage of preparation for the commission of the offence of 'cheating', and do not make out the offence of attempting to cheat. There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is clear from the general expression 'attempt to commit an offence' and is exactly what the provisions of Section 511, I.P.C. require. The relevant portion of Section 511. I.P. C., is:

Whoever attempts to commit an offence punishable by this Code...or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt be punished....

These provisions require that it is only when one, firstly, attempts to commit an offence and, secondly, in such attempt, does any act towards the commission of the offence, that he is punishable for that attempt to commit the offence. It follows, therefore, that the act which would make the culprit's attempt to commit an offence punishable, must be an act which, by itself or in combination with other acts, leads to the commission of the offence. The first step in the commission of the offence of cheating, therefore, must be an act which would lead to the deception of the person sought to be cheated. The moment a person takes some step to deceive the person sought to be cheated, he has embarked on a course of conduct which is nothing less than an attempt to commit the offence, as contemplated by Section 511. He does the act with the intention to commit the offence and the act is a step towards the commission of the offence.

12. It is to be borne in mind that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary

to take in order to commit it. No exhaustive precise definition of what would amount to an attempt to commit an offence is possible. The cases referred to make this clear.

8. Again the observations in paragraph 16 of the said law reports further clarifies that attempt does not only relate to the penultimate stage of the offence:

16. In the matter of the petition of R. Mac Crea ILR 15 All 173 it was held that whether any given act or series of acts amounted to an attempt which the law would take notice of or merely to preparation, was a question of fact in each case and that Section 511 was not meant to cover only the penultimate act towards the completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, and were done with the intent to commit it and done towards its commission. Knox J., said at page 179: “Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon her mind may be several in point of number, and yet the first act after preparations completed will, if criminal in itself, be beyond all doubt, equally an attempt with the ninety and ninth act in the series. Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repeal before the attempt is completed”. Blair, J., said at page 181:

It seems to me that the section (Section 511) uses the word ‘attempt’ in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, and c., shall be punishable. The term ‘any act’ excludes the notion that the final act short of actual commission is alone punishable.

We fully approve of the decision and the reasons therefor.

9. It was also argued by learned Counsel for the petitioner that no offence under the Act was disclosed, and that the FIR itself mentioned that sex determination of the woman had already been conducted elsewhere, when she approached the petitioner who agreed to perform the operation. Now according to learned Counsel the offence would only arise at the stage when an illegal abortion was performed on the woman, which would constitute an offence under Section 312 IPC and not under the Act.
10. In this connection the definition of sex selection in Section 2(o) of the Act may usefully be perused:
Section 2(o) “Sex selection includes any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex.
11. Section 3A prohibits sex selection by providing that no person including a specialist in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man. Section 3A of the Act reads as under:
3-A. Prohibition of sex selection: No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.

12. It is thus clear from a reading of Section 3A of the Act that prohibition of sex selection (i.e. an act for increasing the probability that an embryo will of a particular sex) has been given a wide meaning under the said provisions and the restriction is on every person including a specialist on conducting or even causing to be conducted or aiding in conducting by himself or by any other person sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either of both of them. Therefore, both conducting sex selection oneself or by aiding another person to engage in sex selection, has been brought within the purview of this section.
13. The contention of the learned Counsel for the petitioner that sex selection only amounts to determination of the sex of the embryo, which was conducted by an outside agency and thereafter determination of the pregnancy would constitute only an offence under Section 312 IPC, which, for the reasons mentioned by the learned Counsel had not reached the stage of attempt, cannot therefore be accepted.
14. Sex determination includes not only determination of the sex, but also includes anything done from fertilization until birth, which increases the probability that the embryo will be of a particular sex. Therefore, sex selection cannot only be confined to the determination of the sex of the foetus.
15. That such a comprehensive and extended meaning of sex selection has been given is also clear from an examination of Sections 6(b) and Section 6(c) of the Act, which read as under:
 - 6(b) “No person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus;
 - 6(c) No person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.
16. It is noteworthy that Section 6(c) as also the other provisions relating to the aspect of sex selection have been introduced by the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (14 of 2003) with effect from 14.2.2004. Prior to that date only determination of sex by ultrasonography etc was prohibited, but after the said amendment, any step taken by a specialist or any other person to cause or even to allow to be caused selection of sex before or after conception was made punishable.
17. It appears that this amendment was introduced also for ensuring that all aspects of sex selection, starting from the initial activity of determination of the sex by pre-natal diagnostic procedures and thereafter all the steps taken by any person or specialist for facilitating sex selection before or after conception would be brought under the ambit of this amendment.
18. Even the title of the Act was amended and whereas in the earlier title the long title was for “An Act to provide for the Regulation of the use of Pre-natal Diagnostic Techniques for.... after the amendment Act No. 14 of 2003 the initial line reads as “An Act to provide for the prohibition of sex selection, before or after conception and for regulation of prenatal diagnostic techniques...the purpose of pre-natal sex determination leading to female foeticide...
19. The statement of objects and reasons of the amendment Act No. 14 of 2003 also indicated the inadequacy of the 1994 Act and the need for expanding the scope of the Act so as to include a ban on sex selection techniques and procedures. The statement of Objects and Reasons of Act No. 14 of 2003 reads as under:
 1. Amendment Act 14 of 2003-Statement of Objects and Reasons- The pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.
 2. The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus

and to terminate the pregnancy of the unborn child if found to be female. Techniques are also being developed to select the sex of child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of the women.

3. The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe, in the form of severe imbalance in male-female ratio. The State is also duty bound to intervene in such matters to uphold the welfare of the society, especially of the women and children. It is, therefore, necessary to enact and implement in letter and spirit a legislation to ban the pre-conception sex selection techniques and the misuse of prenatal diagnostic techniques for sex-selective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of the society.
 4. Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to Conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.
20. We also observed that admittedly there was no registration of the petitioner's clinic under the Act, which amounts to an offence under Section 3(1) of the Act. The said provisions reads as under: Section 3(1) "No Genetic Counseling Centre, Genetic laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to prenatal diagnostic techniques.
 21. The said provisions also clarifies that no Genetic Counseling Centre, Laboratory or clinic unless it is registered under the Act can conduct or even associate with or help in conducting the activities relating to pre-natal diagnostic techniques. Therefore, even association or helping with activities for sex selection would be prohibited under the Act.
 22. In this background, we also find no force in another contention raised by the learned Counsel for the petitioner that as the offence of engaging or aiding any sex selection is punishable for three years under Section 23 of the Act, and as the present offence would only be a case of attempt to commit, whose maximum punishment would be half or 1 1/2 years, hence an offence of sex selection, would become non-cognizable in view of the last clause of Schedule 1, of the Code of Criminal Procedure dealing with 'Classification of Offences against other laws'. Here it may be pointed that there is a direct provision under the Act, viz. Section 27 which clearly provides that every offence under this Act shall be cognizable, non-bailable and non-compoundable. Therefore this special provision in the Act would prevail over the general provision in view of Section 5 of the Code of Criminal Procedure.
 23. The last submission raised by the learned Counsel for the petitioner by means of a supplementary affidavit that while preparing a certain Pancha of the case diary on 20.4.2006, the investigating officer had exonerated the petitioner from an offence under the Act.
 24. We cannot consider or appreciate the value of such an entry in the case diary at this stage in the present petition under Article 226, and it is for the court to apply its mind and consider whether an offence under a particular provision is made out or not at the appropriate stage. In this connection it has been held in *Supdt. of Police, CBI v. Tapan Kumar Singh*, that the FIR need not even mention all the ingredients of an offence, and the same may be brought out on the conclusion of the investigation:
22. The High Court has also quashed the GD entry and the investigation on the ground that the information did not disclose all the ingredients of the offence, as if the informant is obliged to reproduce the language of the section, which defines "criminal misconduct" in the Prevention of Corruption Act, In our view the law does not require the mentioning of all the ingredients of the offence in the first information report. It is only after a complete investigation that it may be possible to say whether any offence is made out on the basis of evidence collected by the investigating agency.

25. It has further been mentioned in paragraph 22 of the aforesaid law report that the mere mention or non-mention of a particular section in the FIR is not conclusive, and it is for the Court to determine at the appropriate stage as to the offence for which the charge may be framed. The relevant lines read as under:

Similarly, the mentioning of a particular section in the FIR is not by itself conclusive as it is for the court to frame charges having regard, to the material on record. Even if a wrong section is mentioned in the FIR, that does not prevent the court from framing appropriate charges.

26. As any activity for sex selection as pointed out above has very grave social consequences as it can disturb the balance in the male-female ratio. With the female-male ratio having already declined to 933 per 1000 males, we are sitting on a virtual time bomb, which can spell social disaster. Instances of villages where there are no eligible females for marriages are being reported, or where girls are being purchased from backward areas for servicing several brothers as brides. Whilst the earlier primitive methods of female foeticide were still relatively confined to a limited section of the population, however by using the modern scientific and relatively covert methods which the Act seeks to bring under its purview, sex selection has become a rampant phenomena which has affected every strata of society.
27. In view of the laxity in implementing the provision of the Act, and the continuing sex-selection and discriminatory practices against the female child compared to the male child, the apex Court has issued directions in Centre for Enquiry Into Health And allied Themes (CEHAT) and Ors. v. Union of India and Ors. calling for the effective implementation of the Act and for complying with its earlier order. The Center/State Govts. and Union Territories were further directed to issue advertisements to create awareness in public that there should not be any discrimination between male and female child. The reports of appropriate authorities were to be published annually for information of public. The National Monitoring and Inspection Committee was to continue to function till the Act was effectively implemented. Certain States were directed to appoint State Supervisory Boards and multi-membered appropriate authorities.
28. In view of what has been indicated hereinabove, we find no ground to quash the FIR or to stay the arrest of the petitioner. The petition has no force. It is accordingly dismissed.

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

3 (5)

Civil Writ Petition No. 14759 of 2009

Decided on 27/04/2010

*Dr. Devender Bohra**-Vs-**State of Haryana and other Respondent**Hon'ble Judge : K. Kannan J**Counsels:**For Appellant/Petitioner/Plaintiff: Anil Ghanghas, Adv.**For Respondents/Defendant: Ravi Dutt Sharma, Deputy Adv. General*

Acts/Rules/Orders : Sections 2, 3-A, 3-B, 4, 17(2), 21 Pre-conception and Pre-natal Diagnostic Techniques Act, 1994; Rule 3 of Pre-conception and Pre-natal Diagnostic Techniques Act, 1994; Indian Medical Council Act of 1956 and Act of 1970.

CASE SUMMARY

Under the provisions of the Act, to prevent the misuse of Ultrasound /Sonography machines for the purpose of sex determination, wide powers are conferred on the Appropriate Authority to seal and if necessary, seize the machine, record, register and any other material object if Appropriate Authority has reason to believe that it may furnish evidence of the commission of the offence punishable under the Act. Section 30 of the Act lays down that, Power to search and seize records, etc. (1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place, such Authority or any officer authorized in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such Authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize and seal the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act. (2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act.

Rule 12 of the Act lays down the procedure for such search and seizure. However the moment Appropriate Authority takes such action, it is challenged in the Court. The bulk of the Petitions filed before the High Courts are for challenging the seal and seizure of Ultrasound machines and for their return.

In the Petition filed by Dr. Devendra Bohra, the order of suspension of registration of a sonography machine installed in the hospital run by the Petitioner and sealing of the equipment was

challenged. The Appropriate Authority had taken the said action on the ground that as the Petitioner was a Medical Practitioner with B.A.M.S. degree, he was not qualified as per Section 2 (g) of the Act to possess the said machine. The contention of the Petitioner was that under the Indian Medical Council Act, 1956, he was a Medical Practitioner and hence entitled to the use of an ultra sound machine.

After considering various provisions and the Object of the Act, the High Court rejected the said contention by holding that “a Practitioner under Indian Medicine System may have a requirement of Sonography machine for determination of foetal abnormalities for appropriate treatment, but if he doesn’t possess the particular qualification required under the PCPNDT Act to operate the sonography machine, his challenge to the suspension order is futile without a challenge to the provisions of the PCPNDT Act or the Rules themselves. It was further held that the Notification issued by the State allowing the use of Ultrasound machine by medical practitioner with B.A.M.S. degree cannot expand the legislative intent or the Rules which have been framed under the Act. It was further held that the Notification issued by the Government can not displace the requirement of Rule 3 of the Act. The court held the Petition to be frivolous, wholly misconceived and dismissed it with fine of Rs. 10,000/- (Para 5)

This judgment needs to be appreciated for taking a very positive and affirmative view in upholding the action taken under the Act and for interpreting the provisions strictly.

JUDGMENT

Per Hon’ble Mr. Justice K. Kannan J.

I. The subject of challenge - suspension of registration

1. The petitioner challenges the order of suspension of registration of a sonogram installed in the hospital run by the petitioner and sealing of the equipment. By the impugned notice issued on 27.11.2008, the petitioner had been directed to make an arrangement of qualified Sonologist as per the provisions of the Pre-conception and Pre- Natal Diagnostic Techniques (Prohibition of Sex Selection) Act (hereinafter called the ‘PNDT Act’). The suspension notice was subject of a challenge in appeal to a Government under Section 21 before the appropriate authority and it was dismissed by order dated 13.03.2009. The suspension notice and the order passed in the appeal are the matters in challenge through this writ petition. By an ordinance issued in 2009 called the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Haryana Validation Ordinance, 2009, the appropriate authority had been notified and it validated all acts done in the name of appropriate authority even prior to the date of the notification. The ordinance is also the subject of challenge but no arguments were advanced and I proceed to dispose of the writ petition only in so far as it contains the challenge to the order of suspension of the registration under the PNDT Act.

II. The basis of challenge- MBBS degree is no different from BAMS for the purpose of registration

2. It is an admitted fact that at the time when the registration of the equipment was made in the hands of the petitioner, there had been a medical practitioner, who had held a medical qualification recognized under the Indian Medical Council Act but subsequently he had resigned from the petitioner’s hospital and there had been no Sonologist or imaging specialist resulting in the suspension of the licence. The petitioner’s challenge is on the basis that he had a medical qualification recognized by the Central Council of Indian Medicines and according to the petitioner, as a person, who has a BAMS (Bachelor in Ayurvedic Medicine & Surgery) qualification, he shall be permitted to have the registration in the same manner as the person, who has a MBBS (Bachelor of Medicine and Bachelor of Surgery) degree. The petitioner complains that the suspension

of licence amounted to gross breach fundamental right to equality and operated as discriminatory. According to the petitioner, the equipment is necessary for the very same reason as an allopath practicing medicine and the petitioner could not be denied the right of registration and the use of the equipment.

III. The scheme of PNDT Act relating to registration

3. Significantly the writ petition does not challenge the vires of the Act or the rules which have been framed thereunder. The challenge, however, is to a notification issued under Section 17(2) with retrospective effect which also was not pressed at the time of arguments. The Act imposes a system of registration of persons having the equipment to prevent the prevalent misuse by securing the data that could be collected by the user of the equipment for foeticide. The declared object of the Act is to provide for the prohibition of sex selection, before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto. It is not denied that the petitioner has installed an elector sonogram in his hospital which is capable in carrying out “pre-natal diagnostic procedure”. The Act seeks to regulate the functioning of genetic counselling centres, genetic laboratories or genetic clinics by imposing restrictions of the user of a sonogram for conducting activities relating to certain pre-natal diagnostic techniques. The regulation includes the necessity of having to employ a person, who shall possess the qualifications, as may be prescribed and restricts also the place where any pre-natal diagnostic technique is conducted. Section 3-A specifically prohibits a person including a specialist in the field of infertility from conducting the sex selection of a woman or a man or of both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them. Section 3-B contains the prohibition on sale of ultrasound machine, etc., to persons, who are not registered under the Act. The need for registration of a person, who possesses an ultrasound machine is obviously to ensure that the sex identification which is possible through the ultrasound machine is done in a controlled area of persons, who use it for appropriate diagnostic purposes, for detecting certain abnormalities which are specified under Section 4(2) of the PNDT Act. The said provision states:

No pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:

- (i) chromosomal abnormalities;
- (ii) genetic metabolic diseases;
- (iii) haemoglobinopathies;
- (iv) sex-linked genetic diseases;
- (v) congenital anomalies;
- (vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board.

IV. The relevant Rules relating to registration - Persons who shall be appointed

4. The pre-natal diagnostic technique itself could be carried out only, if a person who is qualified, undertakes such an examination, records in writing certain conditions which are spelt out under Clause (3) of Section 4. Section 5 prohibits the communication of the sex of the foetus, which is again intended to prevent the misuse of such information. Section 6 prohibits the determination of sex by any genetic counselling centre or genetic laboratory or genetic clinic. The provisions of the Act are carried through the rules of the year 1996 and Rule 3 specifies the qualification of employees for 3 classes namely, (i) genetic counselling centre; (ii) genetic laboratory and (iii) genetic clinic/ ultrasound clinic/imaging centre. For each one of these classes, the Rules specify the respective qualifications of persons, who shall be employed. A genetic counselling

centre could not be established without a gynaecologist or a paediatrician or a medical geneticist. A genetic laboratory shall have a person, who is either a medical geneticist or a lab technician having certain degrees. A genetic clinic/ultrasound clinic/ imaging centre shall have a gynaecologist having experience of performing at least 20 procedures and a Sonologist, Imaging specialist, Radiologist or Registered Medical Practitioner having Post-Graduate degree or diploma or six months training or one year experience in sonography or image scanning or there shall be a medical geneticist. The expressions “medical geneticist”, “Gynaecologist”, “Sonologist”, “Medical Practitioner” have all been defined. A “medical geneticist” is defined under Section 2(g) as follows:

“medical geneticist” includes a person who possesses a degree or diploma in genetic science in the fields of sex selection and pre-natal diagnostic techniques or has experience of not less than two years in any of these fields after obtaining

- (i) any one of the medical qualifications recognised under the Indian Medical Council Act, 1956 (102 of 1956); or
- (ii) a post-graduate degree in biological sciences;

A “Sonologist” or a “Imaging specialist” is defined under Section 2(p), which reads as follows:

“sonologist or imaging specialist” means a person who possesses any one of the medical qualifications recognised under the Indian Medical Council Act, 1956 (102 of 1956) or who possesses a post-graduate qualification in ultrasonography or imaging techniques or radiology;

Appendix to the Rules sets out the forms under which the certificate of registration shall be issued. Form-A which is a form of application for registration of an ultrasound clinic/imaging centre requires a declaration that the organization that installs the equipments has understood the provisions of the Act and all the employees have also been explained under the Act and the Rules. Form-B is the certificate of registration issued for a particular period of time and Form-C is for rejection of application for grant/renewal of registration; Form-D specifies the form of maintenance of records by genetic counselling centre; Form-E by the genetic laboratory and Form-F for genetic clinic/ultrasound clinic/imaging centre.

V. Government notification permitting use of the machine by a BAMS degree holder is irrelevant for testing the competence for obtaining registration under the relevant rules

5. The attempt of the petitioner’s counsel was to show that the Indian Medical Council Act and the Indian Medicine Central Council Act of 1970 fulfill the same object and, therefore, even a person registered as a practitioner under Indian Medicine Central Council Act shall also be competent to install a sonogram. The entire submissions of the counsel appearing for the petitioner are misdirected in assuming that since two enactments contained a same objective namely of constituting a medical council and for maintenance of certain registration of practitioners, there cannot be a discrimination between the practitioners of Indian Medicine and practitioners of Allopathic system. If the Act requires the possession of certain degrees and if the petitioner does not possess the same, there ends the issue and the question of allowing the petitioner to continue the registration does not arise. It is a simple open and shut case of a petitioner, who is not a ‘medical practitioner’ and who is not therefore registered under the Indian Medical Council Act of 1956. If the admitted position is that his name has not been registered in the State Medical register and the Act read with the rules specifically require that the person, who possesses the equipment to have such a certain qualification, then the petitioner could have no further argument to advance. I have already outlined three classes of organizations mentioned under Rule 3 and the prohibition of sale of ultrasound machine to any such organization which is not registered under the Act. It may be that a practitioner under the Indian medicine system may have a requirement for detection of foetus abnormalities for appropriate treatment, but if the Act requires the person to have a particular qualification to possess the sonogram, it will be futile to question the legislative wisdom in a reply to a notice for suspension of registration that he should be treated as competent to make use of the equipment for the purpose of registration. Without a challenge to the provisions of the Act or the Rules

themselves, the petitioner has no legs to stand. The petition is wholly misconceived, for, even at the time of arguments, the learned Counsel made a dogged insistence in pressing for a parity in treatment of a medical practitioner registered under the Indian Medical Council Act and a practitioner registered under the Indian Medicine Central Act. The right to use an ultrasound machine by a BAMS degree holder through a notification issued by the Deputy Secretary, Health on behalf of the Secretary to Government, Haryana, on 12.04.2004, is used by the petitioner to justify that if he had been permitted to use the ultrasound machine by the notification, the respondents would be estopped from passing impugned order. A notification by the State allowing the user cannot expand the legislative intent or the Rules which have been framed under the Act. The notification must be understood in the strictest sense of making possible a practitioner of Indian medicine having a BAMS degree to assess the values or interpreting the imaging secured through the ultrasound machines. It cannot be used for legitimizing even the possession of the equipment without a registration under the relevant rules or claim that registration must be made de hors the rules. The notification issued by the Government in the year 2004 is no more than a certification of competence to use the modern technological innovations and it cannot displace the requirement of Rule 3 of the PNDT Act.

6. The writ petition is frivolous and it is dismissed with cost assessed at Rs. 10,000/-.

EQUIVALENT CITATION: 2006 (4) KarLJ 81

3 (6)

IN THE HIGH COURT OF KERALA
O.P. No. 39084 of 2001 and connected cases
Decided On: 01.08.2006

Qualified Private Medical Practitioners and Hospitals Association

Versus

State of Kerala

Hon'ble Judges: V.K. Bali, C.J. and P.R. Raman, J.

Counsels:

For Appellant/Petitioner/Plaintiff: P.B. Sahasranaman, K. Jagadeesh and T.S. Harikumar, Advs.

For Respondents/Defendant: Noorji Noushad, Government Pleader

Acts/Rules/Orders:

Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 - Sections 2, 3(1), 3(2), 3(3), 4(1), 4(2), 4(3), 6, 18, 18(1), 19, 20, 22, 22(1), 22(2), 22(3) and 30(1)

CASE SUMMARY

In this case seven hospitals situated in different parts of Kerala had sought declaration that laboratories and clinics which do not conduct pre-natal diagnostic tests using ultra sonography will not come within the purview of the Act and the Authorities under the Act should not insist for registration of all ultra sound scanning centres irrespective of the fact as to whether they are conducting ultra sonography or not. The Court accepted their submission that registration under the Act will be compulsory only for genetic counseling centres, genetic clinics and genetic laboratories which are used for conducting any pre-natal diagnostic procedure or pre-diagnostic steps. The Court however rejected the contention that such clinics do not come within the purview of the provisions of the Act. Considering the Provisions of Section 4 (1) and Section 22 of the Act and keeping in mind the object of the Act to prevent misuse of any pre-natal diagnostic techniques it was held that, authorities will be free to conduct inquiries or inspection at any place where such device is available and to take action under the Act in case any person or institution is indulging in activities contrary to the provisions of the Act, irrespective of the fact that such an institute is registered or not under the Act. (Para 14)

This judgment thus takes a positive view, by holding that Authorities are fully competent to ensure due compliance of the Act from all persons, at all places and in all Institutions, whether registered or unregistered, and thereby empowering Appropriate Authorities to take action even against any unregistered institute.

Cases Referred:

Cehat v. Union of India AIR 2002 SC 3689

JUDGMENT

P.R. Raman, J.

1. In all the above Original Petitions there is a common prayer for a declaration that laboratories and clinics which do not conduct pre-natal diagnostic, test using ultrasonography will not come within the purview of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as 'the Act') and for a direction to the respondents not to insist for registration of all ultrasound scanning centres irrespective of the fact as to whether they are conducting ultrasonography, under the Act, 1994.
2. First petitioner in O.P. 10193/2002 is the Lourdes Matha Hospital and the second petitioner is the P.V.S. Memorial Hospital, Kaloor. O.P. 39084/2001 is filed by the Qualified Private Medical Practitioners and Hospitals Association, represented by its President. O.P. 3446/2002 is also filed by hospitals. In O.P. 2704/2002, there are seven petitioners who are also hospitals situated in different places of State of Kerala. O.P. 2194/2002 is filed by persons representing various hospitals. O.P. 563/2002 is also filed by a Hospital situated in Ernakulam.
3. It is averred in the Original Petitions that the petitioners hospitals are engaged in treatment of all ailments except genetic counselling and are not conducting any prenatal diagnosis using ultrasonography. They also undertake that they will not undertake any pre-natal diagnostic procedures as contemplated under the Act. This Court, while admitting the Original Petitions, after taking notice of the specific averments made by the petitioners that they are not conducting any pre-natal diagnosis using ultrasonography in their hospitals, passed an interim direction that Registration under Section 18 of the Prenatal Diagnosis (Regulation and Prevention of Misuse) Act, 1994 shall not be insisted in their case. However, it was made clear that the said order shall not prevent the authorities concerned to inspect the hospitals as to whether the petitioners are conducting any such pre-natal test.

4. It is the case of the petitioners that only institutions which are using ultrasonography for the purpose of pre-natal Diagnosis will come within the purview of the Act and only such institutions are required to register with the authority. In other words, institutions having ultrasonography used for the purposes other than for conducting prenatal diagnostic test cannot be said to be a genetic laboratory or clinic for the purpose of the Act.
5. Ext.P3 in O.P. 39084/2001 is a press release dated 20.8.2001 issued by the District Medical Officer, Ernakulam, who is the second respondent therein, directing all ultrasound clinics and genetic counselling centres in the city to register before the date specified therein. There is a further direction that scanning clinics associated with private hospitals also should register. Though, in reply thereto, petitioner had sent a letter to the second respondent that it is not at all necessary to obtain registration for all the institutions by Ext. P5 dated 28.11.2001, the second respondent issued another press release reiterating that ultrasound scanning centres will have to obtain licence.
6. The short question that arises for consideration is as to whether hospitals which are equipped with ultra sound scanning equipment for purpose other than conducting any Pre-natal Diagnostic test requires registration and whether such hospitals will come within the purview of the said Act.
7. The respondent would contend that based on the order of the Supreme Court reported in *Cehat v. Union of India* AIR 2002 SC 3689, all clinics with ultrasound machines require registration. It is also their case that irrespective of the fact as to whether the said ultrasound scanning machines are used for any pre-natal detection or not such institution must be registered.
8. At the outset, we may say that the order of the apex court as referred to supra is only an interim order and the respondents have no case that any final judgment is rendered by the apex court and as a matter of fact, no such final judgment is placed on record. We have gone through the order of the apex court and we find that there was no occasion for the apex court to consider the applicability of the Act to institutions which are using ultrasound scanning for any purposes other than pre-natal detection. In the circumstances, we shall proceed to dispose of these Original Petitions with reference to the provisions contained in the Act.
9. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 is an Act provided for regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital mal-formations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide, and for matters connected there with or incidental thereto. Section 2(c) of the said act defines “Genetic Counselling Centre” as an institute, hospital, nursing home or any place, by whatever name called, which provides for genetic counselling to patients. As per Section 2(d) “Genetic Clinic” means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedures. Section 2(e) defines “Genetic Laboratory” as a laboratory and includes a place where facilities are provided for conducting analysis or tests of samples received from Genetic Clinic for pre-natal diagnostic test. Section 2(i) defines “pre-natal diagnostic procedures” as gynecological or obstetrical or medical procedures such as ultrasonography foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic test. As per Section 2(j) “pre-natal diagnostic techniques” includes all pre-natal diagnostic procedures and pre-natal diagnostic tests. As per Section 2(k) “prenatal diagnostic test” means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases.
10. Chapter II of the said Act deals with Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics, As per Section 3(1) no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques. As per Sub-section (2) of Section 3, no Genetic Counselling Centre,

Genetic Laboratory or Genetic Clinic shall employ or cause to be employed any person who does not possess the prescribed qualifications. Likewise, Sub-section (3) of Section 3 bars medical geneticist, gynecologist paediatrician, registered medical practitioner or any other person from conducting or causing to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic techniques at a place other than a place registered under this Act.

11. Section 4(1) under Chapter III provides that on and from the commencement of the said Act, no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in Clause (2) and after satisfying any of the conditions specified in Clause (3). As per Section 4(2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of (i) chromosomal abnormalities (ii) genetic metabolic diseases, (iii) haemoglobinopathies, (iv) sex-linked genetic diseases (v) congenital anomalies & (vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board. As per Sub-section (3) of Section 4 no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied that any of the conditions prescribed thereunder are fulfilled. The conditions prescribed are (i) the age of the pregnant woman is above thirty-five years, (ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss; (iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals, (iv) the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease and (v) any other condition as may be specified by the Central Supervisory Board. Section 6 prohibits determination of sex. As per this Section on and from the commencement of the Act, no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus and no person shall conduct or cause to be conducted any prenatal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.
12. Next chapter, which is relevant is Chapter VI which deals with registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics. As per Section 18(1) no person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic after the commencement of this Act unless such Centre, Laboratory or Clinic is duly registered separately or jointly under the Act. Section 19 deals with grant of certificate of registration. Section 20 deals with cancellation or suspension of registration. Chapter VII deals with offence and penalties. Section 22 thereunder deals with prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention. As per Sub-section (1) of Section 22 no person, organisation, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue or cause to be issued any advertisement in any manner regarding facilities or pre-natal determination of sex available at such Centre, Laboratory, Clinic or any other place. As per Sub-section (2) of Section 22 no person or organisation shall publish or distribute or cause to be published or distributed any advertisement in any manner regarding facilities of pre-natal determination of sex available at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place. In case any person contravenes any provision as aforesaid, he shall be punished with imprisonment as provided under Sub-section (3) of Section 22.
13. As per Sub-section (1) of Section 30 if the appropriate authority has reason to believe that an offence under this Act has been or is, being committed by any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, such authority or any officer authorised thereof in this behalf may, subject to such rule as may be prescribed, enter and search at all reasonable times, with such assistance, if any, as such authority or Officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and examine any record, register, document book, pamphlet, advertisement or any other material object found therein and seize the same if such authority or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.
14. On a reading of the above provisions, it can thus be seen that Section 18 of the Act compels registration of Genetic Counselling Centres, Genetic Laboratory or Genetic Clinics without which no person shall open

any such centres, laboratory or clinic, after the commencement of the Act. But the expression “Genetic Counselling Centre” as defined under Section 2(c) makes it clear that any institute, hospital, nursing home or any place by whatever name called, which provides for genetic counselling to patients come within the ambit of the expression “Genetic Counselling Centre”. In other words, such of those institutions must provide for Genetic Counselling to patients. Likewise; a Genetic clinic as defined under Section 2(d) will take in only clinic/institute/hospital or nursing home which is used for conducting Pre-natal diagnosis. The specific contention of the petitioners is that they are not conducting any Pre-natal diagnostic procedures. If so, going by the definition, it cannot be treated as a diagnostic clinic or diagnostic counselling centre as defined under the Act. But, at the same time, even the registered genetic counselling centre, genetic laboratory or genetic clinic as the case may be, can Use of cause to use for conducting any pre-natal diagnostic techniques except for the purpose specified in Clause 2 of Section 4, if they are satisfied that the conditions specified in Clause (3) thereunder are fulfilled. Further, as per Section 4(1) of the Act, it prohibits use of conducting any Pre-natal diagnostic technics in any place including a registered counselling centre or genetic centre or clinic as the case may be. By use of the expression “including a registered Genetic Counselling Centre...” the legislature has intended to extend the prohibition contained in Section 4 even to unregistered counselling centre or diagnostic centre or Genetic clinic, as the case may be. In other words, even institutions which may not require registration will still be governed by the restrictive provision and cannot indulge in any activities contrary to the legislative mandate imposed under Section 4 and the prohibitions contained therein equally apply to all such institutions Further, as per Section 22 there is a ban for issuance of any advertisement in any manner . regarding the facilities of pre-natal determination of sex, available at such centre, laboratory, clinic, including any person or organisation, genetic counselling centre etc. Further, powers have been vested in the authorities to conduct inspection or to hold such enquiries for the purpose of satisfying themselves that the institutions to whom certificate of registration is granted is strictly complied with the requirements of the Act and rules thereunder. Therefore, with a view to prevent misuse of any pre-natal diagnostic techniques except for the purpose of genetic or metabolic diseases etc. as the case may be, the authorities will be free to conduct inquiries or to hold inspections at places where such device is available and to take action in case any person or institution is indulged in activities contrary to the provisions of the Act. This will equally apply to non-registered institutions as well. While the registration only permits prenatal diagnostic techniques being used for restricted purposes mentioned in Clause (2) of Section 4, it cannot be said that merely because the institutions are not registered they can indulge in the use of such techniques even for the purposes clearly prohibited under the Act. Therefore, the authorities will be fully competent to ensure due compliance of the provisions of the Act whether it be registered or unregistered institution. However, petitioners, so long as they don’t act in violation of the undertaking given and so long as they are not conducting any such pre-natal diagnostic tests using any techniques including ultrasonography, cannot be insisted to be registered under Section 18 of the Act. So however, it will be open to the authorities concerned to inspect the hospitals and to ensure that petitioners are not conducting any such pre-natal test as undertaken by them. As a matter of fact, even the letter of the Director of Health Services, addressed to all District Medical Officers of health, only directs the District Medical Officers of Health to identify the units which are yet to be registered under the Act which direction as such does not affect any of the petitioners so long as they are not conducting any pre-natal diagnostic test and there is no room for any apprehension that such institutions will be compelled to be registered under Section 18 of the Act.

15. As we have already indicated, registration will be compulsory only in case of Genetic Counselling Centres, Genetic Clinic, Genetic Laboratory, etc. which are used for conducting any pre-natal diagnostic procedures or pre-diagnostic test. However, if any of the hospitals are found using such pre-diagnostic techniques and/or does any act in violation of the provisions contained in the Act, necessarily the authorities will have the power to proceed in accordance with law.

The Original Petitions are accordingly disposed of with the above observations.

IN THE HIGH COURT OF GUJARAT (FULL BENCH)

Cri. Reference Nos. 4 and 3 of 2008

Decided on 30/09/2008

Suo Motu

-Vs-

State of Gujarat

Hon'ble Judges :. M. S. Shah, D. H. Waghela and Akil Kureshi, J.J

Suo Motu, for Applicant :

Sunit S. Shah, Public Prosecutor for Opposite party.

Acts/Rules/Orders: Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – Sections 3, 4, 4(2), 4(3), 5, 6, 17, 20, 28, 28(1) and 32; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act (Amendment), 2003; Pre-conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002; Gujarat High Court Rules, 1993 – Rule 5; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996- Rules 9, 9(4) and 10(1A).

CASE SUMMARY :

This Full Bench decision of Gujarat High Court is a path breaking decision, wherein the Court has taken a progressive view in tune with the provisions of the Act. In this case the Full-Bench of the Gujarat High Court was deciding the Reference made by single Judge in the case of Hitesh D. Shaha -Vs- State of Gujarat on several important legal issues namely, whether the provisions of the Proviso to subsection (3) of Section 4 of the Act require that the complaint should contain specific allegation regarding the contravention of the provisions of Section 5 and 6 of the Act ; whether the burden lies on the Authorities to prove that there was contravention of the Provisions of Section 5 or 6 of the Act and whether any deficiency or inaccuracy in filing Form - 'F' as required under the statutory provisions is merely a procedural lapse?

The genesis of the reference was the decision of single bench in the case of Dr. Manish C. Dave -Vs- State of Gujarat, (2008) 1 GLR 239. By this decision a bunch of petitions for quashing criminal complaints filed against petitioners for the offence punishable u/s 4 and 5 of the Act were allowed. The petitioners were radiologists using sonography machine for the purpose of diagnosis. The only allegation made against them was that they have failed to fill up the Form- 'F' as required u/s 4(3) of the Act, which according to prosecution, amounted to contravention of the provisions of

Section 5 and 6 of the Act. However in the absence of any specific allegation in the complaint that petitioners had conducted the tests for sex determination or communicated the sex of the foetus to any one, it was held by the single Bench that deficiency in filling up Form -'F' does not amount to contravention of the provisions of Section 5 and 6 of the Act. Accordingly it was further held that complaints themselves were not maintainable.

This observation made by High Court in the case of Manish C. Dave that "Deficiency or inaccuracy in filling up of Form – 'F' is merely a procedural lapse which does not in any manner amount to contravention of the provisions of Section 5 and 6 of the Act" was bound to prove fatal to prosecution, leading to setting aside of several such criminal cases.

Fortunately for the prosecution, the same High Court had in the case of Jagruti R. Sanghvi -Vs- State of Gujarat, Misc. Application No. 4996/2008 expressed disagreement with the view taken by the single Judge in the case of Manish C. Dave. Hence faced with these conflicting views, in the case of Hitesh D. Shaha – Vs- State of Gujarat it was felt necessary by another single bench to make Reference to Larger Bench.

Accordingly, in this Reference, while answering these legal issues it was held by the Full Bench that the Rules are made and the Forms are prescribed in aid of implementation of the Act to plug the possible loop holes in strict compliance of the Act and hence they are very important for implementation of the Act and for the prosecution of the offender that any improper maintenance of such record is itself made by the Act equivalent to violation of the Proviso of Section 5 and 6 by virtue of the Proviso to subsection (3) of Section 4 of the Act . It was further held that improper maintenance of records also has consequences other than prosecution for the deemed violation of Section 5 or 6 because Section 20 provides for cancellation or suspension of registration of genetic counseling centre, genetic laboratory or genetic clinic in case of breach of the provisions of the Act or the Rules framed there under. It was held that by virtue of the deeming provision of the Proviso to subsection (3) of Section 4, contravention of the provisions of Section 5 or 6 is legally to be presumed. Hence Proviso to sub-section (3) of Section 4 of the Act does not require that the complaint alleging the inaccuracy or deficiency in maintaining record in the prescribed manner should also contain allegation of contravention of the provisions of Section 5 or 6 of the Act. It was further held that the burden to prove that there was contravention of these provisions does not lie upon the prosecution. It was accordingly held that, deficiency or inaccuracy in filling Form-'F' prescribed under Rule 9 of the Rules made under the PNDT Act, being a deficiency or inaccuracy in keeping record in the prescribed manner, is not a procedural lapse but an independent offence amounting to contravention of the provisions of Section 5 or 6 of the PNDT Act and has to be treated and tried accordingly. (Para 7,8,9)

This judgement of Full Bench is really welcome because of the progressive interpretation given to these provisions., Otherwise the provisions of Section 4 (3) of the Act would have been illusory or nugatory. This judgment is important in more than one area as it has held that not only the Appropriate Authority but any officer on whom the powers are conferred by the Central Government, the State Government or the Appropriate Authority itself can institute a complaint under the provisions of the Act and court can take cognizance on a complaint made by any officer authorized in that behalf. Thus in this case the Court has widened the scope of the term 'Appropriate Authority' and recognized the locus standi of any officer authorized by such Appropriate Authority to file complaint and set the law in motion in case of violation of the provisions of the Act. (para 6)

JUDGMENT

Per Hon'ble Justice Mr. D. H. Waghela J.

By these References, learned single Judge has referred the following issues for consideration and opinion:

“(i) Whether under the provisions of section 28 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in this behalf by the Appropriate Authority?”

- (ii) Whether the provisions of the proviso to sub-section (3) of section 4 of the PNDT Act require that the complaint should contain specific allegations regarding the contravention of the provisions of sections 5 and 6 of the Act?
- (iii) Whether the burden lies on the authority to prove that there was contravention of the provisions of section 5 or 6 of the PNDT Act?
- (iv) Whether any deficiency of inaccuracy in filing Form-F as required under the statutory provisions is merely a procedural lapse?”

2. Above issues have come to be referred on account of the learned single Judge not agreeing with the following observations and conclusions expressed by another learned single Judge in *Dr. Manish C. Dave v. State of Gujarat* [2008 (1) GLH 475] :

“10 Therefore, the complaint should be filed by Appropriate Authority or any officer authorised in this behalf by the Central Government or State Government and the person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority of the alleged offence and of his intention to make a complaint to the Court. Admittedly, the complaints were not filed by Appropriate Authority or any officer authorised in this behalf. There is nothing on record to show that the persons who have filed the complaints have given notice as per Section 28 (b) of the Act. In view of these facts, I am of the view that the complaints become bad in law.

“15. From a bare perusal of the complaints, it is apparent that it is not the case of the authority that provisions of Section 5 or 6 are applicable inasmuch as the authority has not been able to show or even alleged that (i) any pregnant woman or her relative or any other person has been communicated the sex of foetus by the petitioners or (ii) at any place and by any person, including the person conducting ultrasonography, there has been either sex determination or sex selection. In absence of such specific allegations in the complaint, it cannot be said that provisions of sections 5 and 6 of the Act would be attracted.

“16. Reading the proviso to section 3, it is to be presumed that the deficiency or inaccuracy in the record would amount to contraventions of the provisions of section 5 or section 6 of the Act. As a natural consequence, in view of such deficiency or inaccuracy, there should be allegation of contravention of provisions of sections 5 and 6 of the Act. In the present case, there are no specific allegations in the complaint pertaining to the provisions of sections 5 and 6. Apart from that, the language of sections 5 and 6 is prohibitory in nature and therefore the burden of proof will be on the authority to prove that there was contravention and thereupon to rely on the provisions of Statutory Form-F for filing criminal complaint.

“18. As far as section 4 (3) is concerned, it is the case of the petitioners that the register is maintained with all the columns which fall within the four corners of the duties and functions of the petitioners. Apart from that, no opportunity is afforded to the petitioners to prove contrary and put up their case. Further, such deficiency or inaccuracy, at least so far as the present proceedings are concerned, is merely a procedural lapse, which do not in any manner contravene the provisions of sections 5 and 6 of the Act.

“19. In view of the above, when it is not established that there is contravention of the provisions of Sections 5 or 6, the contention regarding any Inaccuracy or deficiency in Form-F will not be applicable and therefore the complaints themselves are not maintainable. I am, therefore, of the view that the complaints do not prima facie establish any alleged offence against the petitioners.”

The questions referred in Reference No.4 of 2008 include the issue referred in Reference No.3 of 2008 and they are heard and disposed as references under Rule 5 of the Gujarat High Court Rules, 1993.

3. The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short “the Act”) is enacted for the avowed purpose of prohibiting sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto. Relevant statutory provisions of the Act, as amended by the Act 14 of 2003, read as under :

“2 Definitions-

In this Act, unless the context otherwise requires -

- (a) “Appropriate Authority” means the Appropriate Authority appointed under section 17;
- (i) “pre-natal diagnostic procedures” means all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo, blood or any other tissue or fluid of a man, or of a woman before or after conception, for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception;
- (j) “Pre-natal diagnostic techniques” includes all pre-natal diagnostic procedures and pre-natal diagnostic tests;
- (k) “pre-natal diagnostic test” means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases;
- (l) “prescribed” means prescribed by rules made under this Act.

CHAPTER III : REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES

4. Regulation of pre-natal diagnostic techniques -

On and from the commencement of this Act -

- (1) no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3);
- (2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely -
- (i) chromosomal abnormalities;
- (ii) genetic metabolic diseases;
- (iii) haemoglobinopathies;

- (iv) sex-linked genetic diseases;
 - (v) congenital anomalies;
 - (vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;
- (3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely -
- (i) age of the pregnant woman is above thirty-five years;
 - (ii) the pregnant woman has undergone two or more spontaneous abortions or foetal loss;
 - (iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
 - (iv) the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;
 - (v) any other conditions as may be specified by the Board :
- Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultrasonography;
- (4) no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purposes specified in clause (2);
- (5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both.

5. Written consent of pregnant woman and prohibition of communicating the sex of foetus-

- (1) No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless -
- (a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;
 - (b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and
 - (c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.
- (2) No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs, or in any other manner.

6. Determination of sex prohibited-

On and from the commencement of this Act-

- (a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;
- (b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.

- (c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

CHAPTER V : APPROPRIATE-AUTHORITY AND ADVISORY COMMITTEE

17. Appropriate Authority and Advisory Committee-

- (1) The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union Territories for the purposes of this Act.
- (2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.
- (3) The officers appointed as Appropriate Authorities under sub-section (1) or subsection (2) shall be,-
 - (a) when appointed for the whole of the State or the Union Territory, consisting of the following three members :-
 - (i) an officer of or above the rank of the Joint Director of Health and Family Welfare-Chairperson;
 - (ii) an eminent woman representing women's organization and
 - (iii) an officer of Law Department of the State or the Union Territory concerned;

Provided that it shall be the duty of the State or the Union Territory concerned to constitute multi-member State or Union Territory level Appropriate Authority within three months of the coming into force of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002:

Provided further that any vacancy occurring therein shall be filled within three months of the occurrence;
 - (b) when appointed for any part of the State or the Union Territory, of such other rank as the State Government or the Central Government, as the case may be may deem fit.
- (4) the Appropriate Authority shall have the following functions, namely-
 - (a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;
 - (b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;
 - (c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;
 - (d) to seek and consider the advice of the Advisory Committee, constituted under subsection (5), on application for registration and on complaints for suspension or cancellation of registration;
 - (e) to take appropriate legal action against the use of any sex selection technique by any person at any place, suo motu or brought to its notice and also to initiate independent investigation in such matter;
 - (f) to create public awareness against the practice of sex selection or pre-natal determination of sex;
 - (g) to supervise the implementation of the provisions of the Act and Rules;

- (h) to recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions;
- (i) to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration.

CHAPTER VII : OFFENCES AND PENALTIES

23. Offences and penalties:-

- (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.
- (2) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.
- (3) Any person who seeks the aid of any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant woman for the purposes other than those specified in sub-section (2) of section 4, he shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.
- (4) For the removal of doubts, it is hereby provided, that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.

28. Cognizance of offences-

- (1) No court shall take cognizance of an offence under this Act except on a complaint made by-
 - (a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or
 - (b) a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and for his intention to make a complaint to the court.

Explanation.- For the purpose of this clause, “person” includes a social organisation.

CHAPTER VIII : MISCELLANEOUS

29. Maintenance of records-

- (1) All records, charts, forms, reports, consent letters and all the documents required to be maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed :

Provided that, if any criminal or other proceedings are instituted against any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings.

- (2) All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf.”

- 3.1 In exercise of the powers conferred by section 32 of the Act, the Central Government has made the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (for short, “the Rules”) of which following provisions, as amended by notification [G.S.R.109 (E)] dated 14.02.2003, may be relevant :

“9. Maintenance and preservation of records-

- (1) Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall maintain a register showing, in serial order, the names and addresses of the men or women given counselling, subjected to pre-natal diagnostic procedures or pre-natal diagnostic tests, the names of their spouses or fathers and the date on which they first reported for such counselling, procedure or test.
- (2) The record to be maintained by every Genetic Counselling Centre, in respect of each woman counselled shall be as specified in Form D.
- (3) The record to be maintained by every Genetic Laboratory, in respect of each man or woman subjected to any pre-natal diagnostic procedure/technique/test, shall be as specified in Form E.
- (4) The record to be maintained by every Genetic Clinic, in respect of each man or woman subjected to any pre-natal diagnostic procedure/technique/test, shall be as specified in Form F.
- (5) The Appropriate Authority shall maintain a permanent record of applications for grant or renewal of certificate of registration as specified in Form H. Letters of intimation of every change of employee, place, address and equipment installed shall also be preserved as permanent records.
- (6) All case related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved by the Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic or Imaging Centre for a period of two years from the date of completion of counselling, pre-natal diagnostic procedure or pre-natal diagnostic test, as the case may be. In the event of any legal proceedings, the record shall be preserved till final disposal of legal proceedings, or till the expiry of the said period of two years, whichever is later.
- (7) In case the Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic or Ultrasound Clinic or Imaging Centre maintains records on computer or other electronic equipment, a printed copy of the record shall be taken and preserved after authentication by a person responsible for such record.
- (8) Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall send a complete report in respect of all pre-conception or pregnancy related procedures/ techniques/tests conducted by them in respect of each month by 5th day of the following month to the concerned Appropriate Authority.

10. Conditions for conducting pre-natal diagnostic procedures-

- (1) Before conducting preimplantation genetic diagnosis, or any pre-natal diagnostic technique/test/procedure, such as amniocentesis, chorionic villi biopsy, foetus-copy, foetal skin or organ biopsy or cordo centesis, a written consent, as specified in Form G, in a language the person undergoing such procedure understands, shall be obtained from her/him :

Provided that where a Genetic Clinic has taken a sample of any body tissue or body fluid and sent it to a Genetic Laboratory for analysis or test, it shall not be necessary for the Genetic Laboratory to obtain a fresh consent in Form G.

- (1A) Any person conducting ultrasonog-raphy/image scanning on a pregnant woman shall give a declaration on each report on ultrasonography/image scanning that he/she has neither detected nor disclosed the sex of foetus of the pregnant woman to any body. The pregnant woman shall before undergoing ultrasonography/image scanning declare that she does not want to know the sex of her foetus.
- (2) All the State Governments and Union territories may issue translation of Form G in languages used in the State or Union Territory and where no official translation in a language understood by the pregnant woman is available, the Genetic Clinic may translate Form G into a language she understands.”

“14. Conditions for analysis or test and pre-natal diagnostic procedures-

- (1) No Genetic Laboratory shall accept for analysis or test any sample, unless referred to it by a Genetic Clinic.
- (2) Every pre-natal diagnostic procedure shall invariably be immediately preceded by locating the foetus and placenta through ultrasonography, and the pre-natal diagnostic procedure shall be done under direct ultrasonographic monitoring so as to prevent any damage to the foetus and placenta.”

“18. Code of conduct to be observed by persons working at Genetic Counselling Centres. Genetic Laboratories. Genetic Clinics. Ultrasound Clinics. Imaging Centre, etc.

All persons including the owners, employee or any other persons associated with Genetic Counselling Centres, Genetic Laboratories, Genetic Clinics, Ultrasound Clinics, Imaging Centres registered under the Act/these Rules shall-

- (i) not conduct or associate with, or help in carrying out detection or disclosure of sex of foetus in any manner;
- (ii) not employ or cause to be employed any person not possessing qualifications necessary for carrying out pre-natal diagnostic techniques/procedures and tests including ultrasonography;
- (iii) not conduct or cause to be conducted or aid in conducting by himself or through any other person any techniques or procedure for selection of sex before or after conception or for detection of sex of foetus except for the purposes specified in sub-section (2) of section 4 of the Act;
- (iv) not conduct or cause to be conducted or aid in conducting by himself or through any other person any techniques or test or procedure under the Act at a place other than a place registered under the Act/these Rules;
- (v) ensure that no provision of the Act and these rules are violated in any manner;
- (vi) ensure that the person, conducting any techniques, test or procedure leading to detection of sex of foetus for purposes not covered under section 4 (2) of the Act or selection of sex before or after conception, is informed that such procedures lead to violation of the Act and these rules which are punishable offences;

- (vii) help the law enforcing agencies in bringing to book the violators of the provisions of the Act and these Rules;
 - (viii) display his/her name and designation prominently on the dress worn by him/ her;
 - (ix) write his/her name and designation in full under his/her signature;
 - (x) on no account conduct or allow/cause to be conducted female foeticide;
 - (xi) not commit any other act of professional misconduct.”
- 3.2 Form-F prescribed for maintaining the records under Rule 9 (4) and Rule 10 (1A) is as under :

“FORM F

(See proviso to Section 4 (3), Rule 9(4) and Rule 10 (1A)

FORM FOR MAINTENANCE OF RECORD IN RESPECT OF PREGNANT WOMAN BY GENETIC CLINIC/ULTRASOUND CLINIC/IMAGING CENTRE.

1. Name and address of the Genetic Clinic/Ultrasound Clinic/Imaging Centre.
2. Registration No.
3. Patient’s name and her age
4. Number of children with sex of each child
5. Husband’s/Father’s name
6. Full address with Tel. No., if any.
7. Referred by (full name and address of Doctors/Genetic Counseling Centre (referral note to be preserved carefully with the case papers)/self referral.
8. Last menstrual period/weeks of pregnancy
9. History of genetic/medical disease in themselves family (specify)
Basis of diagnosis :
 - (a) Clinical
 - (b) Bio-chemical
 - (c) Cytogenetic
 - (d) Other (e.g. radiological, ultrasonography etc., specify)
10. Indication for pre-natal diagnosis
 - A. Previous child/children with :
 - (i) Chromosomal disorders
 - (ii) Metabolic disorders
 - (iii) Congenital anomaly
 - (iv) Mental retardation

- (v) Haemoglobinopathy
 - (vi) Sex linked disorders
 - (vii) Single gene disorder
 - (viii) Any other (specify)
- B. Advanced maternal age (35 years)
- C. Mother/father/sibling has genetic disease (specify)
- D. Other (specify)
11. Procedures carried out (with name and registration No. of Gynaecologist/Radiologist/Registered Medical Practitioner who performed it).
- Non-Invasive
- (i) Ultrasound (specify purpose for which ultrasound is to be done during pregnancy) (list of indications for ultrasonography of pregnant women are given in the note below).
- Invasive
- (ii) Amniocentesis
 - (iii) Chorionic Villi aspiration
 - (iv) Foetal biopsy
 - (v) Cordocentesis
 - (vi) Any other (specify)
12. Any complication of procedure-please specify
13. Laboratory tests recommended
- (i) Chromosomal studies
 - (ii) Biochemical studies
 - (iii) Molecular studies
 - (iv) Preimplantation genetic diagnosis
14. Result of
- (a) pre-natal diagnostic procedure (give details)
 - (b) Ultrasonography Normal/Abnormal (specify abnormality detected, if any)
15. Dates on which procedures carried out.
16. Date of which consent obtained (In case of invasive)
17. The result of pre-natal diagnostic procedure were conveyed to.....on.....
18. Was MTP advised/conducted?
19. Date on which MTP carried out.

Name, Signature and Registration number of the Gynaecologist/Radiologist/Director of the Clinic.

Date.....

Place.....

DECLARATION OF PREGNANT WOMAN

I, Ms.....(name of the pregnant woman), declare that by undergoing ultrasonography/image scanning etc. I do not want to know the sex of my foetus.

Signature/Thumb impression of pregnant woman

DECLARATION OF DOCTOR/PERSON CONDUCTING ULTRASONOGRAPHY/IMAGE SCANNING

I.....(name of the person conducting ultrasonography/image scanning) declare that while conducting ultrasonography/image scanning on Ms.....(name of the pregnant woman), I have neither detected nor disclosed the sex of her foetus to anybody in any manner.

Name and signature of the person conducting the sonography/image scanning/ Director or owner of genetic clinic/ultrasound clinic/imaging centre.

Important Notes :-

- (i) Ultrasound is not indicated/advised/performed to determine the sex of foetus except for diagnosis of sex-linked diseases such as Duchenne Muscular Dystrophy, Haemophilia A and B etc.
- (ii) During pregnancy Ultrasonography should only be performed when indicated. The following is the representative list of indications for ultrasound during pregnancy :-

(1) to (23).....”

4. It was argued by learned Public Prosecutor Mr. Sunit Shah that the Appropriate Authority for the State being a multi-member body, delegation of authority for filing a complaint was essential and explicit in the provisions of section 28 of the Act. He also submitted that in view of increasing incidence of female foeticide and adverse sexratio in the society, the legislature has advisedly made stringent provisions for preventing misuse of the pre-natal diagnostic techniques. The maintenance and preservation of records particularly in case of pregnant women undergoing ultrasonography, under the pain of heavy penalties, was part of a strategy to curb the misuse of diagnostic techniques and without such compulsion to keep the records in the prescribed manner, it would be well nigh impossible to trace and prove the offences under the Act. The requirement of maintaining the records was itself an effective check against commission of other offences, according to the submission. Per contra, it was submitted that the provisions of sub-section (3) of section 4 were procedural and any lapse in maintaining the record could not be equated with substantive offences of contravention of the provisions of section 5 or 6. It was submitted that even a minor, formal, technical or accidental slip in filling the forms or keeping the record cannot be the basis of allegation of inaccuracy or deficiency and should not be allowed to expose the person conducting ultrasonography on a pregnant woman to prosecution for serious offences and cast upon him an impossible burden of proving all the ingredients of sections 5 and 6 of the Act.
5. A conjoint reading of the above provisions would clearly indicate a well-knit legislative scheme for ensuring a strict and vigilant enforcement of the provisions of the Act directed against female foeticide and misuse of pre-natal diagnostic techniques. In fact, the use of those techniques are restricted to the purpose of detection of any of the abnormalities or diseases enumerated in sub-section (2) of section 4 of the Act. The provisions are stricter in case of conduct of pre-natal diagnostic techniques on a pregnant woman, requiring her written consent and determination of sex of a foetus is prohibited by the provisions of sections 5 and 6. Constitution of ‘Appropriate Authority’ under section 17 is clearly meant to ensure proper and vigorous implementation of the Act; and it is expressly prescribed as one of its functions to take legal action against the use of any sex-selection technique. That authority, where appointed for the whole of a State or Union Territory, has to consist of three members. And when it is appointed for a part of the State or a Union Territory, it could consist of an officer of such rank as the Government concerned may deem fit.

6. The provisions of section 28 clearly provide for taking cognizance of an offence under the Act only upon a complaint being made by any of the four categories of complainants, viz:
 - (1) the Appropriate Authority concerned;
 - (2) any officer authorised in that behalf by the Central Government or State Government;
 - (3) any officer authorised in that behalf by the Appropriate Authority; and
 - (4) a person, which includes a social organisation, who has given notice as prescribed in section 28 (1) (b).

Use of the words “Appropriate Authority” twice, at the beginning and end of clause (a) of sub-section (1) of section 28, clearly conveys that complaint could be made by an officer who is authorised in that behalf by the Central Government, the State Government or the Appropriate Authority, besides the Appropriate Authority itself. The power to delegate and authorise an officer to make a complaint is clearly conferred upon all the three authorities under the provisions of section 28, and, therefore, a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in that behalf by the Appropriate Authority. The first issue is answered accordingly.

7. As seen earlier, the Act and the Rules made thereunder provide for an elaborate scheme to ensure proper implementation of the relevant legal provisions and the possible loop-holes in strict and full compliance are sought to be plugged by detailed provisions for maintenance and preservation of records. In order to fully operationalise the restrictions and injunctions contained in the Act in general and in sections 4, 5 and 6 in particular, to regulate the use of pre-natal diagnostic technique, to make the pregnant woman and the person conducting the prenatal diagnostic tests and procedures aware of the legal and other consequences and to prohibit determination of sex, the Rules prescribe the detailed forms in which records have to be maintained. Thus the Rules are made and forms are prescribed in aid of the Act and they are so important for implementation of the Act and for prosecution of the offenders, that any improper maintenance of such record is itself made equivalent to violation of the provisions of sections 5 and 6, by virtue of the proviso to sub-section (3) of section 4 of the Act. It must, however, be noted that the proviso would apply only in cases of ultrasonography conducted on a pregnant woman. And any deficiency or inaccuracy in the prescribed record would amount to contravention of the provisions of sections 5 and 6 unless and until contrary is proved by the person conducting such ultrasonography. The deeming provision is restricted to the cases of ultrasonography on pregnant women and the person conducting ultrasonography is, during the course of trial or other proceeding, entitled to prove that the provisions of sections 5 and 6 were, in fact, not violated.
8. It needs to be noted that improper maintenance of the record has also consequences other than prosecution for deemed violation of section 5 or 6. Section 20 of the Act provides for cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in case of breach of the provisions of the Act or the Rules. Therefore, inaccuracy or deficiency in maintaining the prescribed record shall also amount to violation of the prohibition imposed by section 6 against the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and expose such clinic to proceedings under section 20 of the Act. Where, by virtue of the deeming provisions of the proviso to sub-section (3) of section 4, contravention of the provisions of section 5 or 6 is legally presumed and actions are proposed to be taken under section 20, the person conducting ultrasonography on a pregnant woman shall also have to be given an opportunity to prove that the provisions of section 5 or 6 were not violated by him in conducting the procedure. Thus the burden shifts on to the person accused of not maintaining the prescribed record, after any inaccuracy or deficiency is established, and he gets the opportunity to prove that the provisions of sections 5 and 6 were not contravened in any respect. Although it is apparently a heavy burden, it is legal, proper and justified in view of the importance of the Rules regarding maintenance of record in the prescribed forms and the likely failure of the Act and its purpose if procedural requirements were flouted. The proviso to sub-section (3) of section 4 is crystal clear about the maintenance of the record in prescribed manner being an independent offence amounting to violation of section 5 or 6 and, therefore, the complaint need not necessarily also allege

violation of the provisions of section 5 or 6 of the Act. A rebuttable presumption of violation of the provisions of section 5 or 6 will arise on proof of deficiency or inaccuracy in maintaining the record in the prescribed manner and equivalence with those provisions would arise for punishment as well as for disproving their violation by the accused person. That being the scheme of these provisions, it would be wholly inappropriate to quash the complaint alleging inaccuracy or deficiency in maintenance of the prescribed record only on the ground that violation of section 5 or 6 of the Act was not alleged or made out in the complaint. It would also be improper and premature to expect or allow the person accused of inaccuracy or deficiency in maintenance of the relevant record to show or prove that provisions of section 5 or 6 were not violated by him, before the deficiency or inaccuracy were established in court by the prosecuting agency or before the authority concerned in other proceedings.

9. Upon above analysis and appreciation of the scheme and provisions of the Act and Rules made thereunder, opinion on issues referred to the larger bench is as under :

- (i) Under the provisions of section 28 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (“the PNDT Act”), a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in that behalf by the Appropriate Authority.
- (ii) The proviso to sub-section (3) of section 4 of the PNDT Act does not require that the complaint alleging inaccuracy or deficiency in maintaining record in the prescribed manner should also contain allegation of contravention of the provisions of section 5 or 6 of the PNDT Act.
- (iii) In a case based upon allegation of deficiency or inaccuracy in maintenance of record in the prescribed manner as required under sub-section (3) of section 4 of the PNDT Act, the burden to prove that there was contravention of the provisions of section 5 or 6 does not lie upon the prosecution.
- (iv) Deficiency or inaccuracy in filling Form F prescribed under Rule 9 of the Rules made under the PNDT Act, being a deficiency or inaccuracy in keeping record in the prescribed manner, it is not a procedural lapse but an independent offence amounting to contravention of the provisions of section 5 or 6 of the PNDT Act and has to be treated and tried accordingly. It does not, however, mean that each inaccuracy or deficiency in maintaining the requisite record may be as serious as violation of the provisions of section 5 or 6 of the Act and the Court would be justified, while imposing punishment upon conviction, in taking a lenient view in cases of only technical, formal or insignificant lapses in filling up the forms. For example, not maintaining the record of conducting ultrasonography on a pregnant woman at all or filling up incorrect particulars may be taken in all seriousness as if the provisions of section 5 or 6 were violated, but incomplete details of the full name and address of the pregnant woman may be treated leniently if her identity and address were otherwise mentioned in a manner sufficient to identify and trace her.
- (v) The judgment in *Dr. Manish C. Dave v. State of Gujarat* reported in 2008 (1) GLH 475 stands overruled to the extent it is inconsistent with the above opinion. The references stand disposed accordingly.

Order accordingly.

EQUIVALENT CITATIONS : 2011 (7) LJSOFT 6 , MANU/MH/0694/2011, 2011(4) AIR Bom R 326, 2011(4) Mh.LJ 21, 2011(4) Bom.C.R. 293.

3 (8)

Writ Petition No.7896 Of 2010
Alongwith
Civil Application No. 512 Of 2011
Decided On June 6th 2011

DR. (MRS.) SUHASINI UMESH KARANJKAR

VS.

KOLHAPUR MUNICIPAL CORPORATION & ORS.

Hon'ble Judges : Mohit S. Shah, C.J., Dr. D.Y. Chandrachud, D.G. Karnik, JJ.

Mr. Sagar A. Mane i/by N.V.Bandiwadekar for the Petitioner.

Mr. S.R.Nargolkar, Additional Government Pleader for Respondent No.2.

Mr. Uday Warunjikar for intervenors in C.A.No.512 of 2011.

Acts/Rules/Orders : Maharashtra Medical Practitioner's Act, 1961; Preconception and Prenatal Diagnostic Techniques(Prohibition of Sex Selection) Rules - Rules 6(2)(5), 8(2), 12 and 17(2); Preconception and Prenatal Diagnostic Techniques (Regulation of Prohibition of Misuse) Act, 1994 - Sections 3(2), 4(3), 19, 20, 20(1) to 20(3), 21, 21(1), 29(1) and 30; Preconception and Prenatal Diagnostic Techniques

(Prohibition of Sex Selection) Act, 2003 - Sections 5, 23(1), 25 and 29(1); Constitution of India -Articles 14, 226 and 227.

CASE SUMMARY

This decision is landmark in more than one sense and similarly a long and much awaited decision. It overrules the earlier decision delivered by the two judge Aurangabad Bench of the same High Court in Writ Petition No. 1587 of 2009 filed by Dr. Dadasheb Popatrao Tarte against State of Maharashtra through the minister for Health & Family Welfare and decided on 14/08/2009. In that writ petition, seizure of Ultra sonography machine was challenged on the ground that Section 30 of the Act does not empower Appropriate authority to seize such machine used in Genetic Clinic. High Court had accepted the said contention holding that reading of Section 30 and Rule 12 of the Act do not empower the Appropriate Authority to seize the sonography machine used in the genetic clinic. The High Court had therefore set aside the seizure of ultra-sonography machine and directed its return to the petitioner. However it was clear that while arriving at this conclusion, Explanation(2) of Rule 12 which defines material object to include machines and Explanation(3) which states that "seize" and "seizure" would include "seal" and "sealing" respectively, were not brought to the notice of High Court.

The result of the said decision was however to the effect that Appropriate Authority could not seize sonography machines and because of this decision, already seized machines had to be released and returned.

Fortunately for the Prosecution, when this anomalous position was brought to the notice of the High Court in Writ Petition No.7896 of 2010 filed by Dr. Mrs. Suhasini Umesh Karanjkar against Kolhapur Municipal Corporation and others, dated 23.12.2010, it was held that this part of the decision requires reconsideration and the matter deserves to be heard by a larger Bench.

Accordingly, the matter was considered in detail by the Full Bench, which in its decision dated 12.6.2011 positively and conclusively held that, the analysis of the provisions of the Act is sufficient to hold that the expression "material object" in respect of which the power to seize and seal is conferred upon the Appropriate Authority/ authorised officer, includes ultra sound machines, other machines and equipment which are used for pre-natal diagnostic techniques or sex selection techniques" and hence now it can be held as settled law that Appropriate Authority has power to seize the ultra sound machine used in genetic clinics. (Para 27, 33)

In this case, before parting with the matter, the High Court also made a reference to the disturbing figures of the declining National child sex ratio over the last five decades, to which its attention was sought by the learned Additional Government Pleader, reflecting that in the census of 2011 the national female child sex ratio has fallen to 914 whereas in Maharashtra it has gone down from 913 in 2001 to 883 in 2011. It has gone down to as low as 801 in Beed District. In Kolhapur District, where the offence in question was registered, it is 839.

The High Court also felt distressed by the fact that a number of cases for trial of offences registered under the Act are pending in Courts of the Judicial Magistrate First Class for a long period, sometimes upto 6 years and in a few cases as long as 6 to 8 years. The High Court has, therefore, directed that all cases under the Act shall be taken up on top priority basis and the Metropolitan Magistrates, Mumbai and the J.M.F.Cs. in other Districts shall try and decide such cases with utmost priority and preferably within one year. Criminal Cases instituted in the year 2010 and prior thereto shall be tried and decided by 31 December 2011.(Para 41)

The High Court further gave direction to circulate the copy of the judgement to all the courts in Maharashtra for timely compliance of the above direction.(Para 42)

This judgement therefore goes a long way not only in clarifying the anomalous legal position but also paves the way for expeditious disposal of the cases filed under this Act so that the Act will achieve the object of curbing the misuse of sex determination and sex selection techniques. The results of this judgment are also visible in expeditious disposal of cases and recent decisions coming from trial courts.

JUDGMENT

P. C. : Mohit S. Shah, C. J.

This reference made by an order dated 23 December, 2010 of a Division Bench of this Court raises the following questions :-

- 1) Whether the power to search, seize and seal "any other material object" conferred by Section 30 of the Preconception and pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 includes the power to search, seize and seal an ultrasound machine or any other machine or equipment, if the Appropriate Authority or Authorized Officer has reason to believe that it may furnish evidence of the commission of an offence punishable under the Act?

2) Whether the decision of a Division Bench of this Court at Aurangabad Bench in Dadasaheb (Dr.) s/o Popatrao Tarte Vs. State of Maharashtra and others, 2009 (12) LJSOFT 95 = 2010 (2) Mah.L.J. 110 taking the view that Section 30 does not confer such power in respect of an ultrasound machine lays down the correct law?

2. The brief facts leading to filing of this writ petition are not in dispute. The petitioner is a Gynecologist running a Maternity and Surgical Hospital at Kolhapur with an ultrasound machine. The hospital has been registered as a Genetic clinic/Ultrasound Clinic under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques Act, 1994 “(the Act)” and the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 “(the Rules)”. Registration was granted by the competent authority on 3 September 2003 and has been extended from time to time till 31 March 2013. On 22 January 2009, the Appropriate Authority at Kolhapur along with his officers went to the petitioner’s clinic in view of a complaint that the petitioner was using the ultra sound machine for conducting sonography on pregnant women for determination of sex of foetus. The Appropriate Authority seized the record of the hospital and the ultrasound machine and put his seal on the record and the ultrasound machine after drawing a panchanama in presence of the petitioner’s husband, who is also a Gynecologist.

On 17 February 2009, the Appropriate Authority issued a notice to the petitioner to show cause why the registration granted in her favour should not be suspended. The petitioner sent a reply dated 5 March 2009. The Appropriate Authority passed order on 7 March 2009 suspending the registration granted to the petitioner under the provisions of the Act and the rules. Aggrieved by the order the petitioner preferred an appeal before the District Collector, Kolhapur under Section 27 of the Act, on 31 August 2009.

3. In the present petition filed on 14 September 2010, the petitioner has challenged the action of the Appropriate Authority seizing and sealing the ultrasound machine on the ground that the Appropriate Authority and the Authorized Officer does not have any power to seize and seal an ultrasound machine. At the time of the preliminary hearing of this petition, counsel for the petitioner placed reliance on the decision of a Division Bench of this Court in Dadasaheb Vs. State of Maharashtra, 2009 (12) LJSOFT 95 = 2010 (2) Mah.L.J. 110, in support of the contention that the Appropriate Authority has no power to seize or seal an ultrasound sonography machine. The following observations are contained in paragraph 12 of the judgment:-

“On clear reading of the provisions under Section 30 of the Act of 1994 as well as the provisions under Rules of 1996 make it clear that the Appropriate Authority is empowered to seize the documents, record, register, book, pamphlet, advertisement or any other material object found in the Genetic Clinic, Genetic Centre, or the General Laboratory. But on clear and bare reading of the provision under the Act as well as the rules it nowhere provides that the authority is empowered to seize the machinery/the machine used in the Genetic Clinic. If it is so, the authority is not empowered to seize the Ultra Sonography Machine under the provisions of Law. In the premise, the case of the petitioner is covered under the EQUIVALENT CITATION as the Rule given by the Principal Bench of this Court in Writ Petition No. 7973/2008 is applicable to the present case. In the premises, we set aside the order of the seizure of the ultra sonography machine and direct to return the seized ultra sonography machine to the petitioner.” (emphasis supplied)

4. While prima facie disagreeing with the above view, the Division Bench making the reference has expressed a tentative opinion that the provisions of Section 30 of the Act and Rule 12 of the Rules are widely worded in order to provide for the power to seize and seal not only registers and documents but also “any other material object” found in a Genetic Counselling Centre, Genetic Laboratory/Genetic clinic or any other place where an offence under the Act has been or is being committed. Hence, the present reference which involves determination of the questions set out in the opening paragraph of this judgment.

While making this reference, the Division Bench had also directed the District Collector i.e. Appellate Authority to hear and decide the petitioner’s appeal expeditiously.

5. The learned counsel for the petitioner placed reliance upon the aforesaid decision of this Court and submitted that Section-30 of the Act does not define “any other material object” and therefore, the definition of “material

object” in Explanation (2) to Rule 12 laying down the procedure for search and seizure as “including machines and equipments” cannot empower the Appropriate Authority under Section 30 to seize and seal an ultrasound machine. It was submitted that the substantive power conferred by Section 30 of the Act cannot be enlarged by a definition in the Rules made under the Act.

6. On the other hand, Mr. Nargolkar, learned Additional Government Pleader has submitted that Explanation (2) to Rule 12 expressly defines “material object” as including “machines and equipments” and therefore, there is no scope whatsoever for any controversy. It is further submitted that the Rules of 1996 were framed by the Central Government under the provisions of Section 32 read with Section 30 and were laid before each House of Parliament under Section 34. In absence of any modification made by Parliament in Rule 12, the definition of “material object” as including machines and equipments must be treated as having received legislative acceptance by Parliament. It is further submitted that even otherwise, on an examination of the scheme of the Act and the Rules, the Appropriate Authority and the Authorized Officer do have the power or authority to search, seize and seal ultrasound machines or other equipments used in criminal acts of sex determination for sex selection in contravention of the Act.
7. Before dealing with the rival submissions, it is necessary to refer to the relevant provisions of the Act and the Rules and also to the Statement of Objects & Reasons particularly, for Amendment Act 14 of 2003.
8. The Act and the Rules framed there under came into force on 1 January 1996. The Preamble to the Act provides that it is an Act to provide for the prohibition of sex selection, before or after conception and regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital mal-formations or sex linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and, for matters connected herewith or incidental thereto. (emphasis supplied)
9. Section 3 of the Act provides for regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic clinics through the requirement of registration under the Act. Section 4 provides that no such place shall be used for conducting pre-natal diagnostic techniques except for the purposes specified in Clause (2) of the said section and requires a person conducting such techniques such as ultrasound sonography on pregnant women to keep a complete record in the manner prescribed in the Rules..
Section 6 provides that no pre-natal diagnostic techniques including sonography can be conducted for the purpose of determining the sex of a foetus and that no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultra sonography for the purpose of determining the sex of a foetus.
10. The Act came to be amended by Amendment Act 14 of 2003. The Statement of Objects and Reasons to the Amendment Act, inter alia, read as under:-
 - 1) **“Amendment Act 14 of 2003 - Statement of Objects and Reasons.-** The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act. (emphasis supplied)
 - 2) The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child, if found to be female. Techniques are also being developed to select the sex or child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of women. (emphasis supplied)
 - 3) The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe in the form of severe imbalance in male female ratio. The State is also duty bound to intervene in such matters to uphold the welfare of the society, especially of the women and children. It is, therefore, necessary to

enact and implement in letter and spirit a legislation to ban the pre conception sex selection techniques and the misuse of pre-natal diagnostic techniques for sex selective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of the society. (emphasis supplied)

- 4) Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of prenatal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.” (emphasis supplied)
11. Some important amendments made by the said Amendment Act 14 of 2003, have a bearing on the questions under consideration. Having realized that ultra sonography on a pregnant woman with an ultrasound machine is an very important part of the sex determination test and procedure, which is being misused, Parliament has made a specific reference to sonography and ultrasound machine and other machines in some of the newly inserted sections and also by amendments to existing provisions.
12. The term “genetic clinic” is defined in Section 2(d) as “any clinic or place by whatsoever may be called which is used for conducting pre natal diagnostic procedures”. The Explanation thereto provides that genetic clinic even includes a vehicle, where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus is used. Genetic laboratory is defined by Section 2(e) as including a place where facilities are provided for conducting analysis or test samples received from a genetic clinic or pre natal diagnostic tests. Explanation thereto provides that “genetic laboratory” includes a place where an ultrasound machine capable of determining sex of foetus, is used. Both these explanations provide that the definitions would even include a portable equipment with a potential for detection of sex during pregnancy or selection of sex before conception. (emphasis supplied)

A pre natal diagnostic test is defined in Section 2(k) as “ultrasonography or any test or analysis of amniotic fluid..... or fluid of pregnant woman or conception or analysis....blood or any other tissue or blood of the pregnant woman or conceptus conducted to detect genetic or sex linked disease”.

Section 2(i) defines “pre-natal diagnostic procedures as “all gynaecological or obstetrical or medical procedures such as ultra sonography,..... of a woman before or after conception for being sent to genetic laboratory or genetic clinic for conducting any type of analysis or pre natal diagnostic tests for selection of sex before or after conception.

Section-2) (j) defines “pre-natal diagnostic techniques” as including all pre natal diagnostic procedures and pre natal diagnostic tests. (emphasis supplied)

13. Section 3B provides as follows :
- “3-B- Prohibition on sale of ultrasound machine, etc., to persons, laboratories, clinics, etc., not registered under the Act- No person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of foetus to any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other person not registered under the Act.”** (emphasis supplied)

14. Amended section 4 now specifically provides that the person conducting ultra sonography on a pregnant woman has to maintain the complete record thereof in the manner prescribed in the Rules and any deficiency or inaccuracy found therein amounts to contravention of Section 5 and 6, unless contrary is proved by the person conducting such ultra sonography.

Section 6 also specifically prohibits ‘any genetic clinic.... or any person’ from conducting any pre natal diagnostic techniques including ultra sonography for the purpose of detecting sex of foetus. 15. Sub Section (1) of Section 18 prior to amendment by Act 14 of 2003 read as under:-

“(1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic after the commencement of this Act unless such Centre, Laboratory of Clinic is duly registered separately or jointly under this Act.”

After amendment in 2003, the provision reads as under :

“No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection, or render services to any of them, after the commencement of the Prenatal Diagnostic Techniques [Regulation and Prevention of Misuse) Amendment Act, 2002 unless such centre, laboratory or clinic is duly registered under the Act.” (emphasis supplied)

16. Section 22 provides for prohibition of advertisement relating pre conception and pre natal determination of sex and punishment for contravention and Section 23 provides that any medical geneticist, gynaecologist, registered medical practitioner or any person who owning a Genetic Centre, etc., or is employed to render his professional or technical services to or at such a centre, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a period upto three years and with fine which may extend to ten thousand rupees, which may extend to five years and with fine which may extend to fifty thousand rupees, in case of subsequent conviction.

Sub section (2) of Section 23 even provides that the name of the errant registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action.

17. Section 17(4) of the Act, even prior to the Amendment Act of 2003, provided that the Appropriate Authority shall perform various functions including the following :-

“(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action.” and (emphasis supplied)

(d) any other matter which may be prescribed.

Section 17-A inserted by the Amendment Act, 2003 confers additional powers on the Appropriate Authority including the power in respect of :

(c) issuing search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination ; and

(d) any other matter which may be prescribed.”

18. Section 29 provides for maintenance of records and preservation of such record for a period of two years till the final disposal of proceeding under the Act. Section 30 of the Act confers power to search and seize records. Prior to its amendment in 2003, Section 30 did not provide for any power to seal, though explanation (3) to Rule 12 of the Rules provides that “seize” would include “seal”, Section 30 as amended by Act 14 of 2003 with effect from 14 February 2003 specifically confers power not only to seize but also “to seal” any record, register documents, books, pamphlet, advertisement or “any other material object” found therein at any Genetic Centre etc., in the following words:-

“30. Power to search and seize records, etc. -

- (1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place, such Authority or any officer authorised thereof in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize and seal the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act. (emphasis supplied)

Section 32 confers upon the Central Government powers to make rules for carrying out the provisions of the Act, including; (xiii) the manner in which the seizure of documents, records, objects, etc., shall be made and the manner in which seized list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under sub section (1) of Section 30.

19. Section 34 provides that every rule and every regulation made under the Act shall be laid as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days and if both houses agree in making any modification in the rule or regulation or both Houses agree that the rule and regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be.
20. In exercise of the aforesaid powers under Section 32 read with Section 30 the Central Government has made the Pre conception and Pre- natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996.
21. Rule 9 provides for maintenance and preservation of records and sub-rule (6) provides for particulars of the manner in which the records are to be maintained and also provides that all case related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved by Genetic Centre etc., for a period of two years from the date of completion of counseling, pre- natal diagnostic procedure or pre-natal diagnostic test, as the case may be. In the event of any legal proceedings, the records etc., shall be preserved till final disposal of the legal proceedings. (emphasis supplied)
- Rule 9(7) further provides that in case the Genetic Clinic etc. maintains records on computer or other electronic equipment, a printed copy of the record shall be taken and preserved after authentication by a person responsible for such record and further that such centre is required to send a complete report in respect of all pre conception or pregnancy related procedures/techniques /tests conducted by them in respect of each month by fifth day of the following month to the concerned Appropriate Authority.
22. Sub rule (1) of Rule 11 provides that Every Genetic Centre, Ultrasound Clinic etc., or any other place where any of the machines or equipments capable or performing any procedure, techniques or test capable of pre-natal determination of sex or selection of sex before or after conception is used, shall afford all reasonable facilities for inspection of the place, equipment and records to the Appropriate Authority or to any other person authorized by the Appropriate Authority. Sub rule (2) of Section 11 reads as under: (emphasis supplied)
- “(2) The Appropriate Authority or the officer authorized by it may seal and seize any ultrasound machine, scanner or any other equipment, capable of detecting sex of foetus, used by any organization if the organization has not got itself registered under the Act.” (emphasis supplied)
- These machines of the organizations may be released if such organization pays penalty equal to five times of the registration fee to the Appropriate Authority concerned and gives an understanding that it shall not undertake detection of sex of foetus or selection of sex before or after conception.
23. Rule 12 lays down the procedure for search and seizure as under :
- “12. The Appropriate Authority or any officer authorized in this behalf may enter and search at all reasonable times any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Imaging Centre or Ultrasound Clinic in the presence of two or more independent witnesses, for the purposes of search and examination of any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seal and seize the same if there is reason to believe that it may furnish evidence of commission of an offence punishable under the Act.”
- Explanation-In these rules-
- “(1) Genetic Laboratory/Genetic Clinic/Genetic Counselling Centre” would include an ultrasound centre/imaging centre/nursing home/hospital/institute or any other place, by whatever name called, where any of the machines or equipments capable of selection of sex before or after conception or performing any procedure technique or test for pre-natal detection of sex of foetus, is used;
- (2) “material object” would include records, machines and equipments; and
- (3) “seize” and “seizure” would include “seal” and “sealing” respectively.” (emphasis supplied)
24. A bare perusal of the aforesaid statutory provisions, both in the Act and in the Rules framed thereunder, makes it abundantly clear that an ultra sonography test on a pregnant woman is considered to be an important

part of a pre-natal diagnostic test or pre-natal diagnostic procedure, which cannot be conducted except for the purpose of section 4(2). The person conducting ultra sonography on a pregnant woman has to maintain a complete record thereof in the manner prescribed in the Rules and a deficiency or inaccuracy in maintaining such records would amount to an offence, unless the person conducting such sonography is able to show that there was no deficiency or inaccuracy. The fact that section 3-B inserted by Amendment Act 14 of 2003 specifically prohibits even sale of an ultra sound machine or other machines capable of detecting sex of foetus to any genetic clinic or any other place or to any person not registered under the Act, itself should be sufficient to hold that in the scheme of the Act, Parliament has considered an ultrasound machine as a “material object” because it is capable of detecting sex of a foetus.

25. While section 17-A(c) empowers the appropriate authority to issue search warrant for any place suspected to be indulging in pre-natal sex determination with an ultra sonography test on a pregnant woman, apart from section 30, there is no other section in the Act which confers powers upon the appropriate authority or authorised officer to seize or seal a “material object” like an ultrasound machine at any place suspected to be indulging in pre-natal diagnostic techniques such as an ultra sonography test on a pregnant woman for determination of sex.
26. Now, if the petitioner’s contentions were to be accepted, the appropriate authority or the authorised officer will not have any power to seize or seal such an ultra sound machine sold by a person to an unregistered clinic. The Legislature which has condemned misuse of pre-natal diagnostic technique (such as ultra sonography on a pregnant woman) for sex determination of foetus leading to female foeticide, and made it a criminal offence punishable with imprisonment upto three years, could not have intended that while a seller of an ultra sound machine to an unregistered clinic should be prosecuted under section 23 for contravention of section 3-B of the Act, the ultra sound machine should be allowed to be continued to be used by or on behalf of an unregistered purchaser. But for section 30 of the Act, no action can be taken by the appropriate authority or authorised officer in respect of the ultra sound machine being used for sonography on a pregnant woman for the purpose of determination of sex of the foetus, which may ultimately result into termination of pregnancy of unborn child, if found to be female- as stated in so many words in the Statement of Objects and Reasons to the Amendment Act 14 of 2003. That is why Parliament, which had already conferred on the appropriate authority/ authorised officer the power to “search and seize” any material object, also conferred the further power to “seal” such a material object.
27. In our opinion, the above analysis of the provisions of the Act is sufficient to hold that the expression “material object” for which the power to seize and seal is conferred upon the appropriate authority/ authorised officer, includes ultra sound machines, other machines and equipment which are used for pre-natal diagnostic techniques or sex selection techniques.
28. Further, the provisions of Rule 11, particularly sub-rule (2) thereof, conferring power to seal and seize ultra sound machines or other machines or equipments capable of detecting sex of foetus, sold to unregistered purchasers and explanation (2) to Rule 12 (material object would include records, machines and equipments) make it more than clear that the expression “any other material object” in section 30 includes ultrasound machines, other machines and equipment capable of detecting sex of foetus or capable of use for sex selection.
29. It is necessary to note that the Rules made under Section 32 of the Act are required by Section 34 to be laid before each House of Parliament and if no modification is made within a period of 30 days while Parliament is in session, the rules continue to have effect as made. If any modification is made, then the Rules continue to have effect subject to the modification . If both the Houses agree that a rule should not be made, the rule shall be of no effect from the date of annulment. It is nobody’s case that the Rules have not been laid before Parliament or after having been laid before Parliament, Parliament resolved to delete or modify explanation (2) to Rule 12. It must therefore, be held that the Rules have been accepted by Parliament without any modification of explanation (2) to Rule 12.

30. In a catena of decisions (*Tata Engineering and Locomotive Company Ltd Vs. Gram Panchayat, Pimpri Waghere*, AIR 1976 SC 2463 = (1976)4 SCC 177, *P. Kasilingam Vs. P.S.G. College of Technology*, AIR 1995 SC 1395 = 1995 Supp (2) SCC 348, *Pali Devi Vs. Chairman, Managing Committee*, AIR 1996 SC 1589 = 1996 (3) SCC 296 (para 8), *Gujrat Pradesh Panchayat Parishad Vs. State of Gujarat*, 2007 (7) SCC 718 (para 39) the Supreme Court has held that “rules made under a statute are a legitimate aid to construction of the statute as contemporanea expositio.”. This is particularly so when Section 34 of the Act requires Rules made under Section 32 of the Act to be laid before each House of Parliament within a period of 30 days while Parliament is in session.
31. We may also refer to the rule of “ejusdem generis” invoked by the learned counsel for the petitioner in support of the contention that “any other material object” in Section 30 must take colour from the preceding words. It is submitted that since all the preceding words pertain to paper such as record, register, document, books, pamphlet and advertisement the words “any other material object” must be construed in light of the preceding words.
32. In *Smt. Leelavati Bai Vs. State of Bombay*, 1957 SCR 721 : AIR 1957 SC 521 (Para 11), the Apex Court laid down the following principle:-
“The rule of *ejusdem generis* is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the legislature presumed to use the general words in a restricted sense; that is to say, as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the courts to give those words their plain and ordinary meaning”. (emphasis supplied)
33. As already discussed, on analysis of the scheme of the Act, and having regard to the legislative object and the mischief sought to be avoided, as referred to in the preamble to the Act and also in the Statement of Objects and Reasons to the Amendment Act 14 of 2003, we have no manner of doubt in holding that the power under Section 30 to seize and seal “any material object” includes power to seize and seal ultrasound machines and other machines and equipments, capable of selection of sex or capable of performing any procedure, technique or test for pre natal detection of sex of foetus.
34. As regards the decision in *Dadasaheb Vs. State of Maharashtra (supra)*, we note that the Division Bench did not refer to explanation (2) to Rule 12 of the PC and PNDT Rules, 1996, much less to the legislative object and scheme of the Act discussed above . Otherwise also, independently of reference to the said Rules, we are of the view that on an analysis of the provisions of the Act, if any ultrasound machine is used for conducting sonography on a pregnant woman for a sex determination test or sex selection procedure in contravention of the provisions of the Act, the power to seize and seal any other material object, besides the record and documents, would include the power to seize and seal ultrasound machines and other machinery and equipment.
35. We may also refer to the interim order in Writ Petition No. 7973 of 2008 referred to in Paragraph 12 of the judgment in Dadasaheb’s case. (*Lata Mangeshkar Medical Foundation Vs. The Dy. Medical Officer of Health Pune Municipal Corporation and others*). That interim order was passed in an all together different set of facts and circumstances. In that case, 8 ultrasound machines were seized from a charitable hospital with 650 beds and 70 ICU beds and it was in that background that a Division Bench of this Court (without holding that the authority does not have the power to seize or seal ultra sound machines) by an interim order, directed the authorities to return ultrasound machines seized by the authorities on an allegation that “certain formalities were not fulfilled whilst sonography on patients was conducted which raises the suspicion that sonography might have been performed for detecting sex of the foetus.”

An interim order cannot be treated as a precedent while interpreting the provisions of a statute, and that too when the Division Bench did not refer to Section 30 of the Act.

36. In view of the above discussion, our answers to the questions framed for determination are as under:-
- (i) The expression “any other material object” in Section 30 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 includes ultrasound machines, other machines and equipment capable of aiding or assisting in selection of sex, or capable of performing any procedure, technique or test for pre natal detection of sex of foetus.
 - (ii) The decision of the Division Bench of this Court in *Dadasaheb Vs. State of Maharashtra* 2009 (12) LJSOFT 95 = 2010 (2) Mah.L.J. 110, taking the contrary view does not lay down the correct law and is hereby overruled.
37. Since the only controversy raised in this petition was about interpretation of the expression “any other material object” in Section 30 of the Act, we may not be treated to have expressed any opinion on the question as regards the circumstances in which the power under Section 30 is to be exercised.
38. As the seizure and sealing of the petitioner’s ultrasound machine was challenged only on the ground that the Appropriate Authority or Authorized Officer does not have power or authority to take such action under Section 30 of the Act read with Rule 12 and the petitioner’s contention has been repelled, we see no merit in this petition. The petition is accordingly dismissed. (emphasis supplied)
39. We place on record our appreciation for the valuable assistance rendered by Mr. Sagar A. Mane, learned counsel for the petitioner, Mr. S.R.Nargolkar, learned Additional Government Pleader for respondent No.2 and Mr.Uday Warunjkar, learned counsel for the intervenors.
40. Before parting with the matter, we may refer to the disturbing figures of the declining National child sex ratio over the last five decades, to which our attention has been invited by the learned Additional Government Pleader :-

Year	No.of girls per 1000 boys (in the age group 0-6 years)
1961	976
1971	965
1981	962
1991	945
2001	927
2011	914

In the State of Maharashtra also, the child sex ratio has gone down from 913 in 2001 to 883 in 2011. It has gone down to as low as 801 in Beed District. In Kolhapur District, where the offence in question is registered, it is 839.

41. We are also distressed by the fact that a number of cases for trial of offences registered under the Act are pending in Courts of the Judicial Magistrate First Class for a long period, sometimes upto 6 years and in a few cases as long as 6 to 8 years. It is, therefore, directed that all cases under the Act shall be taken up on top priority basis and the Metropolitan Magistrates, Mumbai and the J.M.F.Cs. in other Districts shall try and decide such cases with utmost priority and preferably within one year. Criminal Cases instituted in the year 2010 and prior thereto shall be tried and decided by 31 December 2011.
42. A copy of this judgment shall be circulated to the Principal District Judges in all the districts of State of Maharashtra and State of Goa and to the Chief Metropolitan Magistrate, Mumbai, who shall in turn circulate a copy of this judgment to the Metropolitan Magistrates, Mumbai and all the Judicial Magistrates First Class in their respective districts for timely compliance with the above direction.

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 797 of 2011

Decided On: 26/08/2011

Radiological and Imaging Association (State Chapter- Jalna), through Dr. Jignesh Gokuldas Thakker, its PC-PNDT Coordinator for the Indian Radiological and Imaging

Association

Vs.

Union of India (UOI) Through its Secretary, Ministry of Health and Family Welfare, State of Maharashtra Through its Secretary, Ministry of Health and Family Welfare and Mr. Laxmikant Deshmukh, Collector and District Magistrate

Hon'ble Judges: Mohit S. Shah, C.J. and R.P. Sondurbaldota, J.

For Appellant/Petitioner/Plaintiff: Jignesh Thakker, Adv.

For Respondents/Defendant: Anurag Gokhale, Adv. for Respondent No. 1, V.D. Patil, Government Pleader for Respondent No. 2, A.A. Kumbhakoni and Amit Borkar, Adv. for Respondent No. 3

Acts/Rules/Orders: Societies Registration Act, 1860; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and Rules, 1996 - Sections 4, 4(1), 4(2), 4(3), 5, 6, 17,17 A, 17(4), 23, 23(2), 29, 30, 30(1) and 32, Rules 9, 12; Information Technology Act, 2000 - Sections 72 and 72A; Amendment Act, 2003 - Section 14; Indian Evidence Act - Section 45; Constitution of India - Articles 19, 21 and 226; European Convention on Human Rights – Article

CASE SUMMARY

In a series of landmark decisions delivered by the Bombay High Court towards effective and meaningful implementation of the provisions of the Act, one must say this Judgment constitutes a major milestone. It once again proves that Judiciary is one step ahead of legislature and executive in acting as catalyst for social change.

This Writ Petition under Article 226 of the Constitution was filed by Radiological and Imaging Association challenging two actions initiated by the Collector of Kolhapur District. One was the Circular dated 14th January 2011 issued by him, requiring the Radiologists and Sonologists in the District to transmit Form – F online within 24 hours of conducting Sonography. The challenge was

on the ground that the said Circular is without authority of law because under the PC & PNDT Rules the Form F is required to be submitted up to 5th day of the next month and not immediately within 24 hours and not on line. The Collector and Civil Surgeon strongly supported the Circular on the ground that Kolhapur District is having the worst sex ratio of 838 females per 1000 males and one of the causes for the same was found to be illegal use of sonography centres for sex selection tests resulting in sex determination. It was found that there were two blatant violations of the Act, viz., under-reporting and false reporting of sonography tests. Moreover, as Kolhapur alone had 250 sonography centres and each month more than 12000 sonography tests are being conducted on pregnant women, considering the magnitude of the work and lot of man power required to monitor the submission of Form – F and its analysis for necessary action under the Act and Rules, it was submitted that with online submission of Form – F, the said task has become easy and less time consuming and effective for taking prompt action. Moreover, it was in consonance with the spirit and object of Rule 9(4), which already require the sonography centres to submit Form – F every month.

The High Court found considerable substance in these submissions as it noticed 4 distinct advantages in the online submission of Form – F when such large number of sonographies – 15000 per month are performed. Firstly, that entire information in the Form – F has to be filled up in its online submission, otherwise Form was not accepted by Computer. Secondly, the work of submitting information in Form-F has to be complete on day to day basis, which results into third advantage to District administration to make its meaningful scrutiny and analysis to zero in on cases where sex selection was resorted to after sex determination. Fourthly, it would enable the Appropriate Authority to take immediate action in case of breach of provisions of the Act and Rules. The High Court, therefore, found that the Circular to submit Form-F online within 24 hours is in keeping with the letter and spirit of Section 17(4).

JUDGMENT

Mohit S. Shah, C.J.

1. In this petition under Article 226 of the Constitution, the Petitioner-Radiological & Imaging Association (State Chapter-Jalna) (hereafter referred to as "the Petitioner" or "the Association") has challenged the circular dated 14 January 2011 of Collector and District Magistrate, Kolhapur (exhibit 'F') requiring the Radiologists and Sonologists to submit on-line form F under the Pre-conception and Pre-natal Diagnostic Techniques Rules, 2003. The Association has also challenged the circular dated 10 March 2010 (exhibit 'A') issued by the Collector in which reference is made to the workshop of doctors, sonologists and radiologists of Kolhapur held on 8 March 2010 and to the discussion at the said workshop for installation of SIOB (silent observer) for all the sonography machines, as a part of 'save the baby' campaign for improving sex ratio in the district.
2. The Petitioner-association is a society registered under the Societies Registration Act, 1860, formed for promoting, inter alia, the study and practice of Radio-diagnosis, ultra-sound, CT, MRI and other imaging modalities.

Members of the Association are medical practitioners who are imaging specialists engaged, inter alia, in foetal imaging, generally known as Sonologists/Radiologists and are governed by the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and Rules, 1996 (for brevity, PC&PNDT Act of 1994 and Rules, 1996).
3. According to the Petitioner, ultra-sonography is a diagnostic technique which utilizes sound waves and reflections leading to imaging of diverse muscular or soft tissue organs/ parts of human body for detection of disorders, abnormalities or malfunctioning. It is a non-invasive technique which does not have any side effects or after effects and is, therefore, widely used in India and abroad for diagnostic examination of diverse

organs and parts of the human body, including heart, liver, bladder, abdomen, kidneys, intestines, pancreas, prostate etc. Since it is non-invasive and has No. radiation hazard, ultra-sonography has proved to be a boon in evaluating the foetus during pregnancy.

Primary challenge

4. In this petition, the Petitioner has challenged the action of Collector and District Magistrate, Kolhapur in issuing Circular dated 10 March 2010 whereby all doctors, sonologists and radiologists practicing in Kolhapur District are called upon to install device 'Silent Observer' in their sonography/ultra-sound machines. According to the Petitioner, this machine and its software enables the Collector to directly review at district headquarters at Kolhapur to scan images of the patient which is illegal, against the provisions of the Act and invades privacy of the patients. It is contended that under the Rules, the ultra-sound clinics and other bodies governed by Act and the Rules are given time upto 5th day of the next month for submitting information in the format which is to be signed by the doctor and the patient. However, public notice dated 14 January 2011 (exhibit 'F') issued by the Collector and District Magistrate requiring the doctors/sonologists/radiologists to transmit form "F on-line within 24 hours is without authority of law.

Defence of Collector and District Magistrate

5. Collector and District Magistrate, Kolhapur has filed affidavit-in-reply dated 28 February 2011 submitting, interalia, as under:
 - 5.1 Vide notifications issued under Section 17 of the Act, the Collectors and District Magistrates as well as Civil Surgeons or Deans of Medical Colleges (where Civil surgeons are not available) at every district level, are appointed as appropriate authorities. Reference is made to the power conferred by the Act and the Rules on the appropriate authority for enforcement of the provisions of the Act and the Rules.
 - 5.2 (a) The Collector and Civil Surgeon found that Kolhapur district is having the worst sex ratio 839 females per 1000 males. After understanding the magnitude of the problem and illegal use of sonography centres for sex selection test resulting in female foeticide, the Collector organized the workshop of doctors/radiologists/sonologists.
 - (b) Kolhapur has 250 sonography centres as on 1 January, 2011 and each month more than 12000 sonography tests are being conducted on pregnant women in the district i.e. 1,50,000 tests per annum in the district. Sonography centre has to maintain, as per Section 4 and Rule 9, record of each test on the pregnant woman in form 'F'. It is mandatory for the sonography centres to submit form 'F' to the office of the Civil Surgeon (District Appropriate Authority) by fifth of next month. The district and sub-district appropriate authorities are required to inspect each centre once in three months to check whether the sonography centre has maintained the record properly or not. It requires a lot of manpower to monitor the submission of 'F' form from all centres and its analysis for necessary action under the Act and the Rules. The overburdened district and sub-district authorities also entrusted with other public duties, find it almost impossible to carry out 100% inspection and to study and scrutinize 'F' forms being received in such large numbers every month.
 - 5.3. The district administration came across two blatant violations of the Act viz. under-reporting and false reporting of sonography tests.
 - (a) Under-reporting is not filling 'F' form even though sonography test is conducted on a pregnant woman, for the sole purpose of sex determination resulting in female foeticide.
 - (b) False reporting is wrong mentioning of age of the foetus and incorrect and wrong particulars in the other relevant columns. It was noticed that even when the health, growth and other indicators of foetus is normal, many doctors/radiologists submit incorrect report of pre-natal diagnostic

procedure and recommend Medical Termination of Pregnancy. Checking of 'F' form after considerable long time lag was not yielding desirable result as the appropriate authority was unable to detect the sex selection abortion being carried out.

- (c) Study on doctors perspective on PC&PNDT Act shows that 55.9% of the doctors stated that the information submitted was absolutely false and 41.2% stated that they were not sure. Almost all, 97% of the doctors confirmed that there is demand for gender determination of foetus by patients (exhibit 'M').

Several studies have shown that almost 70% of form 'F' are incomplete whether deliberate or not.

6. In order to overcome these problems, the District administration evolved the impugned methods:
- 6.1 The on-line 'F' form facilitates to fill in all 19 columns of form correctly and upload on daily basis. It also helps the district authority, namely, Civil Surgeon to analyse the monthly data expeditiously because on-line record in form 'F' is readily available on computers for the analysis and, action if needed, and for corrective course for proper enforcement of the Act. This new scientific innovation of on-line 'F' form is an added tool in the hands of district appropriate authorities for analysis of huge data (more than 12000 'F' forms on average per month) to take needful action.
- 6.2 Otherwise also, the information submitted in 'F' form in hard copy was required to be scrutinized and analysed by the District administration and as indicated above, the number of 'F' forms being received every year in Kolhapur district alone being 1.5 lakh, it was not possible for the administration to analyse the information submitted in 'F' forms in such a large number. With on-line submission of 'F' forms, it is possible for the appropriate authority to analyse the data by referring to a few parameters like age of the foetus, number of children the pregnant woman already has etc.
- 6.3 On-line submission of 'F' form is in consonance with the spirit and object of Section 4 and Rule 9.. which already require the sonography centre to submit submission of forms 'F' every month. All sonography centres, in addition to on-line submission, still keep 'form 'F' manually in printed form where they sign and obtain signature of the patient undergoing sonography test.
- 6.4. After installation of silent observer on the ultra-sound machines in the sonography centres in Kolhapur district, reporting of sonography tests of pregnant women has increased to 34%. At the hearing also, Mr. Kumbhakoni, learned Counsel for the Collector and District Magistrate, Kolhapur has placed before us the statement giving details of the number of 'F' forms submitted in October 2009 and in May 2011 as under:

Month	Kolhapur Rural	Kolhapur City	Kolhapur District
October 2009	4932	4970	9902
June 2010	6618	5290	11908
May 2011	8909	6688	15597

7. It is the specific case in the reply affidavit that the information contained in 'F' form submitted on-line is not accessible to anyone except the Collector and District Magistrate.
8. The second solution found out by the District Collector and District Magistrate, Kolhapur and Civil Surgeon is installation of silent observer (SIOB). Together with on-line submission of 'F' forms, the silent observer addresses both the problems of under-reporting or false-reporting. As soon as doctor/radiologist opens the sonography machine, the silent observer captures and stores the video output of each sonography test which

shows the age of foetus and abnormality if any. Thus, each sonography test is counted and can be cross-checked with the 'F' form submitted on-line. In case of suspected medical termination of pregnancy, the district administration can check the 'F' form and verify the truthfulness by comparing video of sonography test. For instance, in order to show that the MTP is for medical purpose and not as a result of sex selection, the age of aborted foetus is normally shown as below 12 weeks, in which case the sex is not necessary to be mentioned in the report. In order to escape from the provisions of the Act, many doctors/radiologists indulge in false reporting in form 'F' in this fashion. By cross-checking, the information submitted in 'F' form on-line with the data stored in the silent observer, it is possible for the appropriate authority to detect false reporting in form 'F' and then to track down MTP for the purpose other than the medical purpose.

9. Rule 9(6) of the PC&PNDT Rules provides that all case-related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved for two years. With few exceptions, No. sonography centres preserve such records except 'F' form. What the silent observer or SIOB does is, facilitate storage of video record of each sonography test. The silent observer is embedded on the ultra-sound machine which remains in the concerned sonography centre. The information stored in the said silent observer is not transmitted on-line to any authority but it remains stored in the device installed on the ultra-sound machine. It is accessed by the appropriate authority only when required in case of suspected MTP after sex selection.
10. In paras 10 and 31 of the affidavit-in-reply, the Collector and District Magistrate, Kolhapur (Respondent No. 3) has specifically stated as under:

...Respondent No. 3 submits that Petitioner has stated without ascertaining the facts and functions of SIOB that it enables the Respondent No. 3 to directly review at his district level (Kolhapur District) the scanned images of a patient is not correct. The device SIOB stores the video of sonography tests of pregnant women carried out at the sonography centre and not transmitted to district server for viewing by the Collector. The SIOB is sealed in presence of the concerned doctor/Radiologist with his signature. The Appropriate Authority, whenever it deems fit, request the concerned doctor/Radiologist and his authorized person go to the centre and access the selected data on pen drive and it is being viewed by a member of Radiologist Association of Kolhapur and they offer us their observation.

Hereto annexed and marked as Exh. 'C' is the protocol made for use of "silent Observer".

31... Silent Observer is not connected to any district server, No. internet is connected to Silent Observer. The appropriate authority with the help of silent observer can check for suspected centres and suspected cases like pregnant females with one or more previous girls, pregnant females with age of 35 and above. The solution also provides various medical data of the entire district that can be used for various decision making.

11. It is further stated in the affidavit-in-reply that the Collector and District Magistrate, Kolhapur alongwith Civil Surgeon, Chairperson of Federation of Obstetric and Gynecological Societies of India and Chairperson of Radiologist Association organized a one day workshop at Kolhapur on 8 March 2010 and demonstrated the new device i.e. SIOB or popularly called the "silent observer"-to all the doctors/radiologists and sonologists present at the workshop and the object of installation of silent observer. It was also explained that this device will help the administration in solving the problem of under reporting and false-reporting. It will protect the practitioners doing ethical and legal practice and will act as a deterrent against sex selection practice resulting in female foeticide. All the doctors/radiologists present at the workshop agreed and resolved unanimously to install the silent observer (SIOB) at their own cost as concerned citizen of India to curb the illegal practice female foeticide and improving the sex ratio and it was, thereafter that the Collector and District Magistrate, Kolhapur issued letter dated 10 March 2010 (exhibit 'A') appealing to all the doctors and radiologists in the district to install the silent observer at the earliest. All 250 sonography centres in Kolhapur district have installed the silent observer at their own cost and there is not a single complaint to any higher authority.

Central Government stand

12. At the hearing of this writ petition, Mr. Anurag Gokhale, learned Counsel for Union of India has placed on record office memorandum dated 16 June 2011 issued by the Director, Ministry of Health & Family Welfare (PNDT Division) to the learned Additional Government Advocate on the subject matter of the present petition, which reads as under:
1. The undersigned is directed to refer to your letter dated 4961/LIT/2011 dated 24.5.2011 on the subject cited above and to convey that the declining child sex ratio and the reducing number of girl children in many states as per 2011 Census is a matter of great concern.
 2. Tracking of pregnancy tests and detection of unreported termination of pregnancies have been a challenge for Appropriate Authorities in monitoring the activities of clinics offering diagnostic services. Clearly, it is the mandate of the Appropriate Authorities to effectively implement the PC & PNDT Act, 1994, as provided under Sub-Section 4 of Section 17 of the Act. District Appropriate Authorities thus have the discretion to facilitate the mechanisms to check illegal sex determination tests, including innovative strategies like the 'Silent Observer' among others.
 3. This issues with the approval of competent authority.?

Sd/

Director

(PNDT Division)

Rival Submissions

13. At the hearing of the petition, the learned advocate as well as the learned Counsel for the Petitioner sought discharge, as the Coordinator of the Petitioner-association himself desired to argue the case. Accordingly, Dr. Jignesh G. Thakker, Coordinator of the Petitioner-association made the following submissions:
- (i) The impugned letter/circular of the Collector and District Magistrate, Kolhapur requiring the doctors/radiologists /sonologists to submit form 'F' is without authority of law and not supported by any provision of the Act or the Rules.
 - (ii) The patient gives consent for sonography test to be conducted by the concerned doctor/radiologist/sonologist and gives No. consent for giving access to the information contained in the sonography test to any other person. Hence, there is invasion into the patient's right to privacy.
 - (iii) The sonography test is undertaken by a pregnant woman in view of faith and trust on the radiologist/sonologist/doctor that all the information relating to the test will remain confidential and private. However, the impugned actions of the Collector and District Magistrate, Kolhapur result into breach of confidentiality and privacy and therefore, constitute an offence punishable under Section 72 of the Information Technology Act, 2000.
14. On the other hand, Mr. Kumbhakoni, learned Counsel for the Collector and District Magistrate, Kolhapur, Mr. V.D. Patil, learned Government Pleader for the State of Maharashtra and Mr. Anurag Gokhale, learned Counsel for Respondent No. 1 Union of India have opposed the petition and made the following submissions:
- (i) The appropriate authorities under the Act are required to supervise and implement the provisions of the Act and the Rules and to take appropriate legal action against the use of any sex selection technique

by any person at any place suo motu or otherwise and also to undertake independent investigation. The appropriate authorities also have the powers to summon any person who is in possession of any information relating to violation of possession of any Act or the Rules and to produce any document or material object relating thereto. The appropriate authorities have also power to issue search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination.

- (ii) Section 4 and Rule 9 also require the ultra-sound clinic to preserve the records and documents for a period of two years and to afford all reasonable facilities for inspection of the place, equipment and records to the appropriate authority or to any other person authorized by the appropriate authority. Rule 9(8) also requires the ultra-sound clinic to submit the information in form 'F' by fifth day of the next month. Hence, requiring the ultra-sound clinics to submit 'F' forms on-line is only requiring the ultra-sound clinics to submit information in electronic form which is otherwise also required to be submitted by the ultra-sound clinics in physical form. Referring to the averments made in the affidavit-in-reply as to how on-line submission of 'F' forms will help the authorities in making proper analysis of the data submitted in large numbers (almost more than 1,50,000 forms of ultra-sound test done on pregnant women in one district alone in a year, it would not be possible to make proper analysis and to enforce the Act and the Rules, if such information is not received by the appropriate authority in electronic form.
- (iii) Only the appropriate authority has access to this information and only the appropriate authority can assign the work of analysis to the officer authorized by the appropriate authority. Since the existing provisions of the Act and the Rules themselves require the ultra-sound clinics to give access to the information to the appropriate authorities and to the officers authorized by the appropriate authority, and the on-line information is not available on public domain, there is No. question of breach of privacy right of the patient
- (iv) It is only on account of introduction of on-line submission of 'F' form that the authorities have been able to overcome the problem of under-reporting of 'F' forms as per the data given. The statement placed on record by the Collector and District Magistrate shows the number of 'F' forms in 250 ultra-sound centres in Kolhapur district has gone up from 9,902 in October 2009 to 15,597 in May 2011.
- (v) As regards the silent observer, it is submitted after referring to the relevant averments in the reply affidavit that silent observer does not transmit the information stored in the device embedded on the ultra-sound machine to the office of the Collector through any district server or any other server but it very much remains within the premises of the registered ultra-sound centre. Otherwise also, the registered ultra-sound centre is required to store all its records, registers, sonography slides etc. for a period of two years. The silent observer stores images generated during the ultra sonography test, so that when the appropriate authority desires, or the officer authorized by the appropriate authority is required, to cross-check the information supplied in the 'F' form on-line, the appropriate authority or authorized officer will go to the ultra-sound centre and obtain the information stored in the silent observer in the presence of the concerned radiologist/sonologist and in the presence of another radiologist/sonologist of the District.
- (vi) It is submitted that there are sufficient safeguards for ensuring that there is No. breach of privacy rights of the patient and that the Collector and District Magistrate welcomes any further suggestions or any other safeguards which may be made or suggested by the Petitioner-Association or others.
- (vii) Mr. Kumbhakoni has lastly submitted that the impact of innovative measures introduced by the Collector and District Magistrate, Kolhapur is so significant that the sex ratio, which was 839 girls as to 1000 boys in the district in May 2010, has gone upto 876 girls as to 1000 boys in January 2011. It is submitted that the innovative initiatives taken by the Collector and District Magistrate, Kolhapur may not be interfered with.

15. Having heard the coordinator of the Petitioner-Association and the learned Counsel for the Respondents, we have given our anxious consideration to the rival submissions.

Statutory Provisions

16. Before dealing with the submissions, we may refer to the relevant provisions of the Act and the Rules. The scheme of the PC&PNDT Act and Rules thereunder has very recently been examined by a Full Bench of this Court in judgment dated 6 June 2011 in Writ Petition No. 7869 of 2010.
17. The preamble to the Act which was initially enacted in 1994 and which underwent substantial amendments in 2003 indicates that it is an Act to provide for the prohibition of sex selection, before or after conception, and for Regulations of pre-natal diagnostic techniques and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.
18. The Act came to be amended by Amendment Act 14 of 2003. The Statement of Objects and Reasons to the Amendment Act, inter alia, read as under:
1. Amendment Act 14 of 2003 - Statement of Objects and Reasons.-The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.
 2. The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child, if found to be female. Techniques are also being developed to select the sex or child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of women.
 3. The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe in the form of severe imbalance in male female ratio. The State is also duty bound to intervene in such matters to uphold the welfare of the society, especially of the women and children. It is, therefore, necessary to enact and implement in letter and spirit a legislation to ban the pre conception sex selection techniques and the misuse of pre-natal diagnostic techniques for sex selective abortions and to provide for the Regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of Regulation of medical technology in the larger interests of the society.
 4. Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.
19. Having realized that ultra sonography on a pregnant woman with an ultrasound machine is an very important part of the sex determination test and procedure, which is being misused, Parliament has made a specific reference to sonography and ultrasound machine and other machines in some of the newly inserted sections and also by amendments to existing provisions.

Sub-section (1) of amended Section 4 now specifically provides that the person conducting ultra sonography on a pregnant woman has to maintain the complete record thereof in the manner prescribed in the Rules and any deficiency or inaccuracy found therein amounts to contravention of Section 5 and 6, unless contrary is proved by the person conducting such ultra sonography.

Sub-section (2) of amended Section 4 mentions the purpose/s for which, and for which alone, the pre-natal diagnostic test or procedure can be conducted.

Section 6 also specifically prohibits 'any genetic clinic.... or any person' from conducting any pre natal diagnostic techniques including ultra sonography for the purpose of detecting sex of foetus.

20. Section 23 provides that any medical geneticist, gynecologist, registered medical practitioner or any person who owning a Genetic Centre, etc., or is employed to render his professional or technical services to or at such a centre, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a period upto three years and with fine which may extend to ten thousand rupees, which may extend to five years and with fine which may extend to fifty thousand rupees, in case of subsequent conviction.

Sub-section (2) of Section 23 even provides that the name of the errant registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action.

21. Section 17(4) of the Act, even prior to the Amendment Act of 2003, provided that the Appropriate Authority shall perform various functions including the following:

- (c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;" and
- (d) any other matter which may be prescribed.

Section 17-A inserted by the Amendment Act, 2003 confers additional powers on the Appropriate Authority including the power in respect of:

- (c) issuing search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination; and
- (d) any other matter which may be prescribed.

22. Section 29 provides for maintenance of records and preservation of such record for a period of two years till the final disposal of proceeding under the Act. Section 30 of the Act read with Rule 12 confers power to search, seize and seal records and ultra-sound machine.

23. Section 32 confers upon the Central Government powers to make rules for carrying out the provisions of the Act,;

- (xiii) the manner in which the seizure of documents, records, objects, etc., shall be made and the manner in which seized list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under Sub-section (1) of Section 30.

In exercise of the aforesaid powers under Section 32 read with Section 30 the Central Government has made the Pre conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996.

24. Rule 9 provides for maintenance and preservation of records and Sub-rule (6) provides for particulars of the manner in which the records are to be maintained and also provides that all case related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved by Genetic Centre etc., for a period of two years from the date of completion of counseling, pre-natal diagnostic procedure or pre-natal diagnostic test, as the case may be. In the event of any legal proceedings, the records etc., shall be preserved till final disposal of the legal proceedings.

Rule 9 (7) further provides that in case the Genetic Clinic etc. maintains records on computer or other electronic equipment, a printed copy of the record shall be taken and preserved after authentication by a person responsible for such record and further that such centre is required to send a complete report in respect of all pre conception or pregnancy related procedures/techniques /tests conducted by them in respect of each

month by fifth day of the following month to the concerned Appropriate Authority.

Sub rule (1) of Rule 11 provides that Every Genetic Centre, Ultrasound Clinic etc., or any other place where any of the machines or equipments capable or performing any procedure, techniques or test capable of pre-natal determination of sex or selection of sex before or after conception is used, shall afford all reasonable facilities for inspection of the place, equipment and records to the Appropriate Authority or to any other person authorized by the Appropriate Authority.

Rule 12 lays down the procedure for search and seizure as under:

12. The Appropriate Authority or any officer authorized in this behalf may enter and search at all reasonable times any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Imaging Centre or Ultrasound Clinic in the presence of two or more independent witnesses, for the purposes of search and examination of any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seal and seize the same if there is reason to believe that it may furnish evidence of commission of an offence punishable under the Act.

Explanation-In these rules

- "(1) Genetic Laboratory/Genetic Clinic/ Genetic Counselling Centre" would include an ultrasound centre/imaging centre/nursing home/hospital/institute or any other place, by whatever name called, where any of the machines or equipments capable of selection of sex before or after conception or performing any procedure technique or test for pre-natal detection of sex of foetus, is used;
- (2) "material object" would include records, machines and equipments; and
- (3) "seize" and "seizure" would include "seal" and "sealing" respectively.

Discussion

25. A bare perusal of the aforesaid statutory provisions, both in the Act and in the Rules framed thereunder, makes it abundantly clear that an ultra sonography test on a pregnant woman is considered to be an important part of a pre-natal diagnostic test or pre-natal diagnostic procedure, which cannot be conducted except for the purpose of Section 4(2). The person conducting ultra sonography on a pregnant woman has to maintain a complete record thereof in the manner prescribed in the Rules and a deficiency or inaccuracy in maintaining such records would amount to an offence, unless the person conducting such sonography is able to show that there was No. deficiency or inaccuracy.
26. In our opinion, the aforesaid provisions of the Act and the Rules make it amply clear that the persons running the sonography clinic/sonography centre etc. are required to store, maintain and preserve the complete records including the sonography plates or slides for a period of two years from the date of pre-natal diagnostic techniques procedure/test and that in the event of legal proceedings, such records, letter etc. have to be preserved in light of the legal proceedings. The sonography clinic is also required to send a complete report in respect of a pre-conception of pregnancy related procedure for technical procedure or test conducted by them in respect of each month for the perusal of the concerned appropriate authority. As per Rule 11(1) the Clinic is also duty bound to afford all reasonable facilities for inspection of equipments and records to the appropriate authority or any other person authorized by the appropriate authority and such authority/authorized officer has also been vested with the power to search, seal and seize such equipments/records. All these provisions are required to be read with the express power conferred by Section 17(4) of the Act which empowers the appropriate authority to take immediate action in case of breach of the provisions of the Act or the Rules.
27. We find considerable substance in the submission of Mr. Kumbhakoni, learned Counsel for the Collector and District Magistrate, Kolhapur that if the number of 'F' forms giving particulars about sonography test conducted on pregnant women in Kolhapur district alone runs into almost 1,50,000 'F' forms per year or

15,000 forms per month, and if they are not submitted on-line, it will be impossible for any appropriate authority or officer authorized by the appropriate authority to make any meaningful scrutiny and analysis of 'F' forms being received in such large numbers. The on-line submission of 'F' forms in such large numbers has four distinct advantages.

In the first place, the sonography centres sending such forms in physical form very often take the plea in the prosecution under the Act that some columns in the form were not filled in inadvertently, but there was *No. mens rea* and, therefore, the appropriate authority should not take a harsh view by prosecuting the radiologist/sonologist merely for incomplete information submitted in 'F' form. The advantage of the on-line submission of 'F' form will be that if any column in the form is left blank, the form will not be accepted on-line. Hence, the person filling in the form is immediately alerted that some column/s in the form/s is/are incomplete. Hence, all the columns in form 'F' will have to be filled in.

The second advantage will be that since 'F' form is to be submitted on-line within 24 hours, the concerned persons required to submit the information in 'F' form will have to complete their work on day-to-day basis and, therefore, will have *No. excuse* to plead that the information cannot be submitted after lapse of one month. In fact, having gone through the contents of 'F' form, we find that it would be possible for the person assisting the radiologist/sonologist to fill in the form immediately after the sonography test is undertaken.

The third advantage is to the district administration. On account of a large number of such 'F' forms being received on-line (15,000 per month in one district), it will be possible for the appropriate authority and the officer authorized by it to make a meaningful scrutiny and analysis of the 'F' forms by searching the relevant data such as age of the foetus, the number of children of the pregnant woman as on the date of the sonography test, etc. This will help the Appropriate Authority to zero in on cases where MTP was resorted to after sex selection.

The fourth advantage will be that Section 17(4) requires the Appropriate Authority to "take immediate action" in case of complaints of breach of provisions of the Act and the Rules, but it would not be possible to take immediate action if the authority had to wait for submission, hard copy of the "F" form till the 5th day of the next month. In every field electronic filing is to be followed by submitting paper documents. Hence the instructions to submit "F" form on-line within 24 hours are in keeping with the letter and spirit of Section 17(4).

28. Coming to the "silent observer", the entire petition is based on the premise that the information stored in the silent observer which contains the images of ultra sonography on all patients will be transmitted on-line and will be available in public domain and thereby would violate the privacy rights of the patients undergoing ultrasonography. The entire premise and the apprehension based thereon is without any basis. The affidavit of the Collector and District Magistrate, Kolhapur states in terms that the silent observer is embedded on the ultra-sound machine, that the images stored therein are not at all transmitted on-line to any server, and that it is only for the purpose of cross-checking the information supplied in the 'F' forms submitted on-line, that as and when any violation of the Act and the Rules is suspected, the appropriate authority will obtain the images stored in the silent observer for the purpose of cross-checking the information submitted in the 'F' form on-line. Since the appropriate authorities have been invested specifically with the power to take appropriate legal action against the use of any sex selection or sex determination technique by any person at any place even *suo motu* as provided in Section 17(4)(e), and Section 17-A also specifically empowers the appropriate authority to summon any person who is in possession of the information relating to violation of the provisions of any Act or the Rules and to obtain production of any document or any material object relating to violation of the provisions of the Act and also to issue search warrant for any place suspected to the indulging in sex selection techniques or pre-natal sex determination and proviso to Section 4(3) specifically provides that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic and Rule 9 also provides that all case-related records, microscopic pictures, sonographic plates or slides etc. are required to be preserved in the sonography centre for a period of two years and Rule 9(8) also requires the Ultra-sound Clinic to send a complete report in respect of all pre-conception or pregnancy

related procedures/techniques/tests conducted by them to the concerned appropriate authority, in our view, the instructions sent by the Collector and District Magistrate, Kolhapur requiring the sonologists/persons incharge of ultra-sound machines to install SIOB (popularly known as silent observer) are within the letter and spirit of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act and Rules made thereunder.

29. In *State of Maharashtra v. Praful B. Desai*,¹ and in *Sakshi v. Union of India and Ors.* 2 the Supreme Court has held that the principles of interpreting an ongoing statute have been specifically set out by the leading jurist Francis Bennion in his commentaries titled *Statutory Interpretation*:

It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters....

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.

30. The Supreme Court then noted that the above principle of updating construction has been approved in a number of decisions. "Handwriting" in Section 45 of the Evidence Act is construed to include "typewriting"; "notice in writing" construed to include a notice by fax"; "telegraph" to include "telephone"; "banker's books" to include "microfilm"; "to take note" to include the "use of tape recorder", and "documents" to include "computer databases".
31. In *Sakshi v. Union of India and other (supra)*, the Court has also held that there is a major difference between the substantive provisions defining the crimes and providing punishment for the same on the one hand and procedural enactments on the other hand. Rules of procedure are handmaiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meanings of such provisions to elicit the truth and do justice to the parties.
32. The Parliament has taken notice of the socio-cultural mindset of the people as regards the circumstances in which they resort to female foeticide after ascertaining sex of the foetus. When the number of 'F' forms being received by the appropriate authority in a district runs into a large number like 15,000 forms of pregnant women undergoing ultra-sonography test in a single district in a month and more than 1,50,000 sonography tests on pregnant women in a single district in a year, the object of the Act requiring the ultra-sound clinics to submit information in 'F' form and giving the Appropriate Authority power to inspect the place, equipments and records for the purpose of investigating violations of the PC&PNDT Act and the Rules can be fulfilled if, and only if, the 'F' forms are submitted on-line and such information can be cross-checked with the sonography slides in the silent observer.
33. Hence the requirement of Sub-section (1) of Section 4 of the Act to maintain the complete record of ultra sonography on pregnant women and the mandate of Section 17(4) of the Act requiring the Appropriate Authority to take immediate action on investigation of complaints of breach of provisions of the Act and the Rules would include the power to require the ultrasound clinic to submit the on-line information in form 'F' within 24 hours, and to keep the ultra sonography slides stored in the silent observer embedded on the ultrasound machine.

34. As regards reliance placed by the Petitioner on the provisions of Section 72 and 72A of the Information Technology Act, 2000, we find No. merit in this contention. Section 72 refers to a person having got access to the electronic record in pursuance to any powers conferred by Information Technology Act, 2000 or the Rules and Regulations made thereunder. Obviously, the information received by the appropriate authority through 'F' forms on-line are not received in exercise of any powers under the Information Technology Act, 2000 nor under the Rules and Regulations thereunder. Moreover, Section 72 as well as 72-A both specifically provide that those provisions are subject to any other law for the time being in force. The provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and the Rules thereunder, therefore, definitely prevail over the provisions of Sections 72 and 72-A of the Information Technology Act, 2000.
35. As regards the allegation of invasion of privacy rights, it is amply clear from the affidavit of the Collector and District Magistrate, that the images stored in the silent observer are not transmitted on-line to any server and thus they remain very much part of the ultra-sound machine on which the silent observer is embedded and that the silent observer is to be opened only in the presence of the concerned radiologist/sonologist/doctor incharge of the Ultra-sound Clinic. Silent observer is an electronic device which is attached to Sonography machine. In the event of the appropriate authority needing to check the sonographies which have taken place through a particular machine, the appropriate authority i.e. the Collector/the civil surgeon may himself or his authorized officer will have to actually go to the site of the ultra-sound machine and it is only on the authorization of Collector that the silent observer can be removed from a particular ultra-sound machine and only on putting the user name and password under the control of Collector that the officer can actually see the sonographies done with the ultra-sound machine on a Computer. Moreover, mere seeing of these sonographies by lay person would be of No. help and hence as per the protocol made by appropriate authority under the Act, whenever the silent observer is to be opened, presence of the concerned doctor at the sonography center as well as a third expert doctor would be necessary. The protocol made by the appropriate authority for seeing the results of the silent observer is annexed to the reply affidavit at exhibit 'C'.
36. In view of the above factual backdrop, the submission that there will be violation of privacy rights is without any substance. Even so, we may refer to the decisions of the Apex Court having some bearing on the subject.
37. In *R. Rajagopal alias R.R.Gopal and Anr. v. State of T.N. and others*¹ the Supreme Court considered the right of privacy vis-a-vis a right of the press laid down under Article 19 of the Constitution and laid down, inter alia, the following principles:
- (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent -whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.
38. In *Sharda v. Dharmpal* MANU/SC/0260/2003 : (2003) 4 SCC 493 a three Judge Bench of the Supreme Court explained the interplay between the right to privacy on the one hand and public interest on the other hand in the following terms:
56. With the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21 of the Indian Constitution. (See *R. Rajagopal v. State of T.N.* MANU/SC/0056/1995 : (1994) 6 SCC 632 *People's Union for Civil Liberties v. Union of India* MANU/SC/0149/1997 : (1997) 1 SCC 301. In some cases the right has been held to be amalgam of various rights.
 57. But the right to privacy in terms of Article 21 of the Constitution is not an absolute right.

58. In *Gobind v. State of M.P.* (1975) 2 SCC 157, para 31 it was held:

Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest.

59. If there were a conflict between fundamental rights of two parties, that right which advances public morality would prevail. (See '*X*' v. Hospital '*Z*' MANU/SC/0733/1998 : (1998) 8 SCC 296, and '*X*' v. Hospital '*Z*' MANU/SC/1121/2002 : (2003) 1 SCC 500. In *R. Rajagopal v. State of T.N.*, this Court upon formulating six principles, however, hastened to add that they are only broad principles and neither exhaustive nor all-comprehending and indeed No. such enunciation is possible or advisable.

60. In *Gobind v. State of M.P.* (1975) 2 SCC 157, para 31 it was held:

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

39. In *Mr. 'X' v. Hospital 'Z'* MANU/SC/0733/1998 : (1998) 8 SCC 296 after referring to the principles laid down in *R. Rajagopal v. State of T.N.* (Supra), the Apex Court referred to Article 8 of the European Convention on Human Rights and then laid down the following principle:

26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action 3 MANU/SC/0149/1997 : (1997) 1 SCC 301, 4 (1975) 2 SCC 157, para 31 5 MANU/SC/0733/1998 : (1998) 8 SCC 296, 6 MANU/SC/1121/2002 : (2003) 1 SCC 500 as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

In that case, the Appellant was suffering from HIV positive. The doctor in the Respondent-hospital disclosed this fact to the persons related to the girl to whom the Appellant intended to marry. The Court held that the girl had a right to know about the HIV positive status of the Appellant.

40. Having regard to the aforesaid principles and considering the matter in the factual backdrop already highlighted hereinabove that the information contained in 'F' form submitted on-line is submitted only to the Collector and District Magistrate and that except the authorized officer No. third party can have access to it and that the information contained in the silent observer remains embedded on the ultrasound machine and that after analysis of the information contained in 'F' form submitted on-line, the appropriate authority or the officer authorised by the authority has to access the information contained in the silent observer including the visual images, we are of the considered opinion that there is No. violation of the doctor's duty of confidentiality or the patient's right to privacy. The contours of the right to privacy must be circumscribed by the compelling public interest flowing through each and every provision of the PC&PNDT Act, when read in the background of the following figures of declining sex ratio in the last five decades:

Number of girls per 1000 boys (in the age group 0-6 years)

Year	National Average	Maharashtra
1961	976	
1991	927	946
2001	933	913
2011	914	883

While the Court cannot close its eyes to these depressing figures, the assertion of Collector and District Magistrate, Kolhapur that after introduction of the impugned innovative measures, the sex ratio in the district has gone up from 839 in May 2010 to 876 in January 2011-is certainly a heart warming eye opener.

41. In the above view of the matter, it is not necessary to consider the further submission on behalf of the Respondents that the right of the unborn child to be born would also be a fundamental right, and therefore, when there is a conflict of fundamental rights of two parties, that right which advances public morality will prevail.
42. Accordingly, we find No. merit in the challenge to the instructions of the Collector and District Magistrate, Kolhapur requiring the ultra sound clinics to submit the information in 'F' form on-line within 24 hours and to instal the "silent observer" on the ultrasound machine.
43. Before parting with the matter, in order to allay any apprehension that any person, other than the appropriate authority or a medical person may have access to such information, we make it clear that the appropriate authority shall not allow access to such data stored in a silent observer to a non-medical officer except himself and senior officers not below the rank of Deputy Collector and that No. access shall be given to such images in silent observer to any lower officer of the Revenue Department or to any officer in the Police Department below the rank of Deputy Superintendent of Police, except when such information is required in connection with or, for the purpose of registration of an offence. As regards medical personnel, only medical officers of the rank of Civil Surgeon or Deans of medical college or officers-incharge of the Primary Health Centre shall be given access to the images in the silent observer.

In our view, it will be open to the radiologist/sonologist/doctor incharge of ultra-sound clinic to require that such images in a silent observer may be accessed by such a medical officer in the presence of the appropriate authority or an officer authorised by the appropriate authority.

44. Subject to the above observations, we find No. merit in this petition. The petition is accordingly, dismissed.

EQUIVALENT CITATION: AIR 2006 Utr 78

3 (10)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

W.P. No. 873 of 2005 (M/B)

Decided on 16/08/2005

Chitra Agrwal

-Vs-

*State of Uttaranchal And Ors**Hon'ble Judges : Cyriac Joseph and B Kandpal , JJ.**B. P. Nautiyal, for Petitioner.**K. P. Upadhyaya, Standing Counsel for the State of Uttaranchal.*

Acts/Rules/Orders: Pre-conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Sections 22(2), 23, 25, 27; Pre-natal Diagnostic Technique (Regulation and Prevention of Misuse) Rules - Rule 19(1) 19(2) 19(3).

CASE SUMMARY

The facts of this Petition are to the effect that the registration of the Petitioner's Ultrasound/ Sonography Centre was first suspended and then cancelled. The Petitioner filed an appeal before State Appellate Authority challenging the cancellation of the registration. However the Appellate Authority informed the Petitioner that the appeal cannot be entertained as the criminal proceedings initiated against the Petitioner were pending before the High Court. The Petitioner therefore approached the High Court under Article 226 of the Constitution challenging the cancellation of registration. The High Court found that the State Appellate Authority was not right in not entertaining the Appeal of the Petitioner simply on the ground that criminal proceedings in respect of the same incident were pending against the Petitioner. The High Court explained in detail the difference between the two. It was held that the action of cancellation of registration is directed against the Ultrasound Centre and not against the owner of the Centre; where as criminal action is directed against the person who has committed the offence under the Act. Both the actions are independent and they can be dealt with simultaneously. The pendency of criminal proceedings need not and should not deter the Appellate Authority from deciding the Appeal filed against the cancellation of registration. Accordingly the High Court directed the State Appellate Authority to take appropriate decision in accordance with law, as early as possible and at any date within a period of 3 weeks.(Para 5)

This Judgment thus provides guidance to State Appropriate Authorities when to entertain or not to entertain the Appeal, when simultaneously several actions are being initiated. The Judgment also explains the difference between the penal action and the action of suspension and cancellation of registration.

JUDGMENT

Per Hon'ble Justice Cyriac Joseph, C.J.

1. The petitioner claims to be a practising Doctor who is having an Ultrasound Centre and X-ray Clinic known as Chitra Ultrasound Centre at 5 New Road, Dehradun. The said Ultrasound Centre has been registered under the Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short PNDDT Act). According to the petitioner, the registration certificate bears No. A/CMO/16 dated 10-12-2001.

The grievance of the petitioner in this writ petition is that the registration of the petitioner's Ultrasound Centre was first suspended and then cancelled illegally. As per Annexure 1 order dated 23-2-2005, the registration was suspended under Section 20(3) of the PNDDT Act by the Chief Medical Officer, Dehradun who is the Appropriate Authority at the district level. The petitioner was also asked to show cause why the registration should not be cancelled. In reply to Annexure 1 notice/suspension order, the petitioner submitted Annexure 2 explanation. However, as per Annexure 3 order dated 14-3-2005, the Chief Medical Officer, Dehradun cancelled the registration of the Ultrasound Centre under Section 20(2) of the PNDDT Act. Against Annexure 3 order, the petitioner filed Annexure 4 appeal before the Appropriate Authority at State Level. But the appellate authority, as per Annexure 5 communication dated 27-6-2005, informed the petitioner that his appeal cannot be entertained in view of the criminal proceedings pending before Court. Aggrieved by Annexures 1, 3 and 5, the petitioner has filed this writ petition praying for quashing Annexures 1 and 3.

2. We have heard Mr. B. P. Nautiyal, learned Counsel for the petitioner and Mr. K. P. Upadhyaya, learned Standing Counsel for the State of Uttaranchal who accepted notice for the respondents.
3. The challenge against Annexure 1 order dated 23-2-2005 has become infructuous, as the registration has subsequently been cancelled as per Annexure 3 order dated 14-3-2005. Once the registration has been cancelled, there is no need for considering whether the suspension of registration was legal or not. Hence, we are not inclined to consider the legality or correctness of Annexure 1 order which has merged with Annexure 3 order cancelling the registration.
4. We also do not find it necessary to consider the legality or correctness of Annexure 3 order, as the petitioner has already resorted to the statutory remedy of filing an appeal against the said order and the appeal filed by the petitioner is still pending. As per Rule 19(2) of the PNDDT Rules 1996, anybody aggrieved by the decision of the Appropriate Authority at district level may appeal to the Appropriate Authority at State/UT level within 30 days of the order of the district level Appropriate Authority. As per Rule 19(3) of the said Rules, each appeal shall be disposed of by the State/Union Territory Level Appropriate Authority within 60 days of its receipt. Annexure 3 order was passed by the Appropriate Authority at the district level. Hence, the appeal against Annexure 3 order lies to the Appropriate Authority at the State level. The petitioner rightly submitted the appeal to the Appropriate Authority at the State level (second respondent in the writ petition).

Instead of considering the appeal on merits, the second respondent has declined to consider the appeal on the ground that some criminal proceedings are pending against the petitioner in respect of the same incident on the basis of which, the registration was cancelled.

5. In our view, the stand taken by the second respondent in Annexure 5 communication is not correct or justified. Chapter VII of the PNDDT Act deals with the Offences and Penalties. Section 22 in Chapter VII deals with the prohibition of advertisement relating to pre-conception and pre-natal determination of sex and punishment for contravention of such prohibition. Section 23 lays down that any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of the Act or the Rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees. According to Section 25, whoever contravenes any of the provisions of the Act or

any Rules made thereunder, for which no penalty has been elsewhere provided in the Act, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention. According to Section 27, every offence under the Act shall be cognizable, non-bailable and non-compoundable. From Annexure 5, it would appear that on the basis of the incident which lead to the cancellation of the registration of the Ultrasound Centre of the petitioner, criminal proceedings also have been initiated against the petitioner under the Act and the Rules.

But the initiation of such criminal proceedings against the petitioner or the pendency of such criminal proceedings before Court is not a bar for deciding the appeal against cancellation of registration and it cannot be a ground for refusing to entertain and decide the appeal filed by the petitioner under Rule 19 of the PNDT Rules. There is no provision in the PNDT Act or the PNDT Rules which prevents the appellate authority from entertaining and considering the appeal filed under Section 21 of the PNDT Act or Rule 19 of the PNDT Rules on the ground that criminal proceedings have been initiated or are pending in respect of the same incident on the basis of which, the registration was cancelled. Cancellation of registration is for violation of the provisions of the PNDT Act and the Rules. The action is directed against the registration of the Ultrasound Centre and not against the owner of the Centre. But criminal action is initiated for committing an offence under the PNDT Act and the action is directed against the person who committed the offence. Both actions are independent and they can be proceeded with simultaneously. The pendency of criminal proceedings need not and should not deter the appellate authority from deciding the appeal filed against the cancellation of registration.

6. Under Rule 19(3) of the PNDT Rules, an appeal filed under Rule 19(1) or 19(2) shall be disposed of within 60 days of its receipt. Annexure 5 shows that Annexure 4 appeal was received by the second respondent on 16-4-2005. Hence, the second respondent was bound to dispose of the appeal before 16-6-2005. Since the second respondent failed to discharge its statutory function, the said respondent is liable to be directed by this Court to consider and pass appropriate orders on Annexure 4 appeal without any further delay. Considering that the statutory period for deciding the appeal expired on 16-6-2005, we are of the view that the second respondent should be directed to decide the appeal within a time limit stipulated by the Court.
7. Hence, the writ petition is disposed of with a direction to the second respondent to consider Annexure 4 appeal filed by the petitioner and to take an appropriate decision in accordance with law as early as possible and at any rate, within a period of three weeks from the date of receipt of a copy of this judgment. Before taking a decision on Annexure 4, the second respondent shall give a personal hearing to the petitioner.

The petitioner may produce a copy of this judgment before the second respondent for information and compliance.

IN THE HIGH COURT OF BOMBAY (GOA BENCH)

CRIMINAL WRIT PETITION NO.6 OF 2009

Decided on 15-4-2009

J. Sunderrajan

Vs.

Dr. S.G. Dalvi & anr.

Hon'ble Judge : N.A. Britto, J.

Appearances :

Shri S.M. Singbal, Advocate for the Petitioner.

Ms. Winnie Coutinho, Public Prosecutor for the Respondents.

Acts/Rules/Orders: Pre-conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Section 3B, Negotiable Instruments Act 1881- Section 141.

CASE SUMMARY

This Petition is filed U/S 482 of Cr. P.C. for quashing the process issued against the Petitioner under Section 3-B of the Act. The allegation against the Petitioner, who was accused No. 2 in the complaint case filed by Respondent in the trial court, was that Petitioner being one of the directors of Accused No. 1 Company - Philips Medical System India Pvt. Ltd., has violated the provisions of Section 3 B of the Act by selling Ultrasound machine to Apollo Victor Hospital which at the time of sale was a non registered hospital under the Act.

It was not disputed that the sale in question took place after Section 3 B was introduced. It was also not disputed that Apollo Victor Hospital was a non registered hospital at the time of the sale. The only contention raised was that there were no averments in the complaint as well as in the statement on oath that Petitioner was in charge of and responsible to the Company for the conduct of the business of the Company. The High Court accepted the said contention and quashed the process issued against the Petitioner. (Para 6)

It is pertinent to note that the Apex Court has in several of its decisions like S.M.S. Pharmaceutical Ltd. -Vs- Neeta Bhalla 2005 (8) SCC 89 categorically held that necessary averments ought to be in the complaint before a person can be subjected to criminal process by way of fastening vicarious liability on him in his capacity as director of the company. What are those necessary averments is also spelt out by the unanimous judicial decisions. Even then in this case the only averment made in the complaint was that Petitioner is a director of the Company. There was no necessary

avertment made that Petitioner was in charge of and responsible for the conduct of the business of the company. Hence for this technical lacuna in the complaint the process issued against Petitioner came to be set aside though factually all the necessary conditions of the offence were met.

This case is therefore important for the prosecution to act as a guideline while drafting the complaint against the company and its directors.

ORAL JUDGMENT

Heard.

2. Challenge in this petition, filed under Section 482 of the Code of Criminal Procedure, 1973 is to the Order dated 31-7-2007, issuing process against the accused under Section 3B of the Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (Act, for short). The Petitioner herein, who is accused No.2, in a complaint case filed by Dr. Sanjeev G. Dalvi, is one of the Directors of Philips Medical Systems India Pvt. Ltd. Which is accused No.1. The Company and the Petitioner, as one of the Directors, have been prosecuted for violation of Section 3B of the said Act which reads as follows:-

“Prohibition on sale of ultrasound machine, etc., to persons, laboratories, clinics, etc., not registered under the Act.- No person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of foetus to any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other person not registered under the Act”.
3. There is no dispute that the sale in question took place after Section 3B was introduced in the Act w.e.f. 14-2-2003. There is also no dispute that the sale of (I) Philip HPT 3 probe Ultra Sound Machine, (ii) Philip Doppler 2 probe sonos 4500, and (iii) Portable Ultra Sound Machine sonosite 180 plus philips were sold to Apollo Victor Hospital which at the time of sale was a non registered hospital under the Act. However, the contention raised on behalf of the Petitioner who is accused No.2 in the said complaint case is that no process could have been issued against him for want of any averments in the complaint as well as in the statement on oath recorded by way of an affidavit that he was in charge of, and responsible to the Company for the conduct of the business of the Company, as contemplated by Section 26 of the said Act.
4. Shri S.M. Singbal, learned Counsel appearing on behalf of the Petitioner/ Accused has submitted that Section 26 of the Act is in para materia, the same, as Section 141 of the Negotiable Instruments Act, 1881, and therefore the law laid down by the Apex Court with reference to the Section 141 needs to be followed in this case as well. Learned Counsel has placed reliance on the decisions of the Apex Court in a cases of S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another reported in (2005 (12) LJSOFT (SC) 185 = 2005 (8) SCC 89) as well as (2007 (4) LJSOFT (SC) 29 = 2007 (4) SCC 70).
5. The only averments which can be seen from the complaint are: “the accused No.2 is the Director of accused No.1” and “accused No.1 and accused No.2 have contravened the provisions of Rule 3A of the Pre-natal Diagnostic Techniques (Regulations and Prevention of Misuse) Rules, 2003, and is therefore liable for penalty under Section 25 of the said Act”.
6. Admittedly, the Petitioner/Accused No.2 is only one of the Directors of the said Company and it is nobody’s case that he is the Managing Director of the said Company. Presumably, it is the Company/Accused No.1 which has sold the said ultra sound machines to the said Apollo Victor Hospital, and thus prima facie, it has committed the offence punishable under Section 3B of the said Act. It is not the case of the Complainant that the Petitioner/Accused No.2 was in charge of, and was responsible to, the said Company for the conduct of the business of the said Company at the time the sale was made and as such was also liable for punishment.
7. The Apex Court in the first case of S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another (supra) has categorically stated that there is almost unanimous judicial opinion that necessary averments ought to be

contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act (Negotiable Instruments Act, 1881) is said to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial. The Apex Court thereafter proceeded to lay down the law as thus:-

“It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.”

8. The same view has been reiterated in the second case of *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another* (2007 (4) LJSOFT (SC) 29 = 2007 (4) SCC 70) which reads thus:-

“The learned counsel brought to our notice the well-settled principle of law that for the purpose of attracting the provisions of Section 141 of the Act, it is not necessary to reproduce the exact wordings of the statute and submitted that the involvement of an accused as a Director of a company being in charge of or responsible for the conduct of the Company must be gathered from the other averments made in the complaint petition as also the documents appended thereto.”

9. In the absence of necessary averments being made against the Petitioner/Accused No.2 that he was a person who was in charge of for the conduct of the business of the Company, no process could have been issued as against him.
10. Consequently, the petition, which has already been admitted, deserves to succeed. The impugned Order to the extent the Petitioner/Accused No.2 has been summoned to answer the charge under Section 3B of the said Act is hereby quashed and set aside.

IN THE HIGH COURT OF DELHI**W.P. (C) 6654 and 6826/2007****Decided On: 05.07.2010***Dr. K.L. Sehgal**Vs.**Office of District Appropriate Authority**AND**Dr. Sonal Randhawa**Vs.**Union of India (UOI) and Ors.***Hon'ble Judges:***S. Muralidhar, J.***Counsels:**

For Appellant/Petitioner/Plaintiff: Praveen Khattar, Adv. in W.P.(C) 6654/2007, Ravi P. Mehrotra, M.L. Mehra and Vibhu Tiwari, Advs. in W.P.(C) 6826/2007

For Respondents/Defendant: Zubeda Begum, Addl. Standing Counsel and Sana Ansari, Advs. in W.P.(C) 6654/2007, Amiet Andlay, Adv. for R-2, Maninder Singh, Sr. Adv., Gaurav Sharma and J.P. Karunakaran, Advs. for MCI in W.P.(C) 6826/2007

Acts Rules Orders:---Pre-natal Diagnostic Techniques Act, 1994 - Sections 2 and 3(1); Right to Information Act, 2005; Medical Council Act, 1956 - Sections 2, 19(2), 20 and 33; U.P. District Boards Act - Sections 71 and 90; Pre-natal Diagnostic Techniques Rules - Rules 3, 3(1) and 8(6); Medical Education Regulations, 2000 - Regulation 10; Constitution of India - Article 226

CASE SUMMARY

The question raised for consideration in these two Writ Petitions filed before the Delhi High Court is about the meaning that should be given to the expression 'sonologist' as defined u/s. 2(p) of the PNDT Act. As per the said Section 'Sonologist or Imaging Specialist' means a person who possesses any one of the medical qualifications recognized under the Indian Medical Council Act, 1956 or who possesses a Post Graduate Qualification in Ultrasonography or Imaging Techniques or Radiology. The cause for filing these Writ Petitions was the rejection of the application filed for renewal of Registration Certificate. The application of Petitioner Dr. Sehgal was rejected on the

ground of non-submission of documents about his qualifications, from a qualified Radiologist. The petitioner challenged it stating that in terms of Section 3(1)(b) of the PNDT Act any person who was registered as Medical Practitioner and had one year experience in sonography was eligible to run an Ultra sound Clinic and according to him since he fulfilled this requirement, he was eligible to set up an Ultrasonography Clinic.

Similar issue was raised by the Petitioner Dr.Sonal Randhawa also. She had worked as a registered Sonologist under PNDT Act for three years and has undergone training. She had worked under Dr. J. S. Randhawa, M. D. a qualified and experienced Radiologist and Ultra Sonologist. Her application was rejected on the ground that training in Ultrasound needs to be examined and recognized by the Competent Authority.

The common issue raised by both the Petitioners was that the PNDT Act and Rules do not provide the procedure for undergoing training/experience or identify persons eligible to provide such training. Hence there was no justification in rejecting the request for registration.

The High Court after careful scrutiny of the entire material on record and after hearing at length the authorities under Medical Council of India and PNDT Act, held that none of these authorities were clear as to what should be the minimum criteria regarding training, where the training should be provided, and which are the Institutes recognized for providing training. Even the Rules framed under PNDT Act did not provide that the training has to be in a recognized Institute. It was also unclear where such recognized Institutes exist. It was found that even the PCPNDT Act and Rules did not provide any guidelines on this point. It was, therefore, held that unless such criteria are fixed and made known in advance, it would be unfair to reject the application. Hence it was held that rejection of both the Petitioners' applications for registration as sonologist was unsustainable in law and set aside as such. (Para 36)

The High Court could not restrain itself from expressing its concern about this disconcerting state of affairs reflected in these two Petitions. In the words of High Court, "as a result of weak definition of the term 'sonologist' under the PNDT Act, the mushrooming growth of diagnostic clinics is unable to be effectively regulated. The absence of clear rules and guidelines spelling out unambiguously the qualification, training and experience required for operating a diagnostic clinic offering ultrasound tests has resulted in unethical practices being adopted in many such clinics in violation of the PNDT Act going unchecked." As per the High Court, these cases underscore the need to amend the PNDT Act to plug the loopholes. The High Court held that, in order to avoid any confusion, the requirements in terms of qualification, training and experience to be recognized and registered as a "sonologist", should be incorporated in the PNDT Act and further explicated under the PNDT Rules. The High Court opined that, in determining the criteria the best available international practices should be adapted to suit Indian conditions. Secondly, the names of the institutions state-wise which are recognized for that purpose will have to be notified. Thirdly, the changed criteria must be made not only prospective but sufficient time should be given to enable those seeking registration or renewal to fulfill the changed criteria. According to the High Court fresh registrations can be postponed to enable the arrangements envisaged by the new criteria to be put in place. These steps will require a comprehensive survey to be undertaken by the respondents followed by consultations with experts in the medical fraternity and education. The resultant amendment to the definition of "sonologist" under Section 2(p) of the PNDT Act and the corresponding amendment to the PNDT Rules must be given wide publicity so that there is increased public awareness about the minimum standards one should expect in diagnostic clinics. (Para 37)

However, there is nothing on record to show that these expectations of High Court are fulfilled.

JUDGMENT
S. Muralidhar, J.

1. These two writ petitions raise important questions of law concerning interpretation of Section 2(p) of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 [hereafter “the PNDT Act”] which defines “sonologist or imaging specialist”.
2. First, the brief facts in each of the writ petitions may be noticed.

W.P. (C) 6654 of 2007 - Dr. K.L. Sehgal

3. The Petitioner in Writ Petition (C) No. 6654 of 2007 is Dr. K.L. Sehgal who runs the Dr. Sehgal’s Polyclinic & Diagnostics Imaging Clinic in New Delhi. He obtained an MBBS degree from the Ranchi University in 1977. He got registered from the Delhi Medical Council (DMC) in 2001. The registration has been renewed from time to time and is currently valid till 4th December 2011. Dr. Sehgal states that he is a registered medical practitioner within the meaning of Section 2(m) of the PNDT Act. Dr. Sehgal claims that he is also a sonologist within the meaning of Section 2(p) of the PNDT Act. He claims that he has undergone a six months training course in Sonography between 14th February 2002 to 2nd September 2002 at the Institute of Ultrasound Training which is a training centre for ultrasound training recognised by the Indian Medical Association-Academy of Medical Specialties (IMA-AMS) and the Federation of Obstetric & Gynaecological Societies of India (FOGSI). He states that during the course of training he had gained experience of handling more than 100 cases of Ultrasonography under the supervision of Dr. J.S. Randhawa, M.D. (Radiology). The certificate issued by the said Institute has been annexed to the petition.
4. In April 2002, Dr. Sehgal applied for grant of PNDT registration for setting up an ultrasound clinic under the name of ‘Dr. Sehgal’s Clinic’. He was granted a certificate on 1st May 2002 with registration No. 348. The certificate was valid for a period of five years up to 30th April 2007. By a letter dated 21st February 2007 from Respondent No. 1, i.e., the Office of District Appropriate Authority (hereafter ‘the Authority’) under the PNDT Act, Dr. Sehgal was asked to submit the necessary documents for renewal of the PNDT registration. In response to the said notice on 28th February 2007 Dr. Sehgal submitted an application for renewal enclosing the certificate of his six months training. He stated that he had been regularly performing sonography tests for the last five years.
5. Dr. Sehgal states that he did not receive any response till the expiry of 90 days thereafter i.e. 29th May 2007. According to him, in terms of Rule 8 (6) of the PNDT Rules, the registration should be deemed to have been renewed on the expiry of 90 days. Rule 8 (6) of the PNDT Rules reads as under:

In the event of failure of the Appropriate Authority to renew the certificate of registration or to communicate rejection of application for renewal of registration within a period of ninety days from the date of receipt of application for renewal of registration, the certificate of registration shall be deemed to have been renewed.
6. It is submitted that on 22nd June 2007, Dr. Sehgal received a letter dated 25th May 2007, which according to him was posted on 21st June 2007, by which he was informed that his application for renewal of registration had been rejected on the ground of “non-submission of documents from a qualified Radiologist.” Dr. Sehgal protested stating that in terms of Section 3(1)(b) of the PNDT Act, any person who was registered as a medical practitioner and had one year’s experience in sonography, was eligible to run an ultrasound clinic.
7. Dr. Sehgal claims to have submitted an application dated 11th July 2007 under the Right to Information Act, 2005 (“RTI Act”) seeking the precise reasons for the rejection of his application. By a letter dated 3rd August 2007, the Authority provided the following information to him:
 2. Now, in Feb. 2007, you had submitted application for renewal of PNDT registration. The file had been sent to higher authorities for guidelines (copy of file noting is attached as Annexure I-3). Guidelines

were received from the Directorate of Family Welfare in minutes of meeting (attached as Annexure-4). On the above mentioned basis your application for renewal has been rejected.

3. You have also stated that you have been regularly doing ultrasonography from last 5 years (again ref. your letter No. nil dated 28.02.2007). It will be counted towards “Self Experience” & in the PNMT Act & Rules there are no guidelines regarding the registration of registered medical practitioner on the basis of Self Experience: as because any experience without the supervision of any competent authority is not counted, i.e. treats only as “Self Experience”.
8. The rejection of Dr. Sehgal’s application is assailed on the following grounds:
 - (a) that with the rejection not having been communicated to Dr. Sehgal within a period of 90 days from the date of his application, i.e., 28th February 2007, there was a deemed renewal under Rule 8 (6) of the PNMT Rules.
 - (b) that under Rule 3(1) (b) an ultrasound clinic can be run by a registered medical practitioner having six months training or one year experience in sonography. Since Dr. Sehgal satisfies this requirement, he was eligible to set up an ultrasound clinic. In any event, Dr. Sehgal submitted a certificate from a qualified radiologist that he had undergone training in sonography and therefore, the ground for non-renewal was contrary to the record.
 - (c) The rejection of the application on the ground that five years’ experience by Dr. Sehgal’s ultrasound would be a “self-experience” and therefore would not be counted towards the experience under the PNMT Act, was clearly arbitrary. The guidelines of the Directorate of Family Welfare do not indicate that in a similar situation the certificate of registration should not be renewed. It only indicated that the issue was still under consideration and till such time the PNMT Act was to be strictly followed.
9. The response of the Authority under the PNMT Act is that the Institute, in which Dr. Shekel claims to have undergone training, is not recognised by the Government of India or any competent authority. The Institute was recognised only by private institutions which could be termed as ‘NGOs’ and the experience gained was no experience because anybody could approach private institutes and get certificates without satisfying the basic criteria of being trained to use the ultrasound apparatus. A radiologist has to be one from an institute recognised by the Government of India. It is submitted that since the PNMT Act and Rules framed thereunder do not specify the institutes and individuals from where the training/experience had to be undergone, the application was placed before an Advisory Committee comprising of technical experts. It is submitted that the grant of registration as sonologist under the PNMT Act is a matter of policy. The absence of clear-cut guidelines is acknowledged. It is stated that a response is awaited to the letter written to the Government of India in this regard on 20th November 2007. It is pointed out that Dr. Sehgal not being a Sonologist or an Imaging Specialist/Radiologist could not be qualified to run an ultrasound clinic. On behalf of Dr. Sehgal, it is pointed out that unless there is a requirement in the PNMT Act or the Rules that the training should be obtained from a recognised institute, the rejection of Dr. Sehgal’s application was ultra vires the PNMT Act and Rules.

W.P. (Civil) 6826/2007 - Dr. Sonal Randhawa

10. The facts in Writ Petition (C) No. 6826 of 2007 are that the Petitioner, Dr. Sonal Randhawa, holds an MBBS degree from the University of Agra and has been registered under the DMC since 18th September 2006. It is stated that in 2007 she completed American Registry for Diagnostic Medical Sonography (ARDMS) certifying examinations as Specialist in Obstetrics and Gynecology. As far her experience in Sonography is concerned, it is stated that she has worked as a registered Sonologist under PNMT in Rohini (North-West Dist.) for three years. She has training and worked under Dr. J.S. Randhawa MD (Radio diagnosis) who is a qualified and experienced Radiologist and Ultrasonologist from 1998-2001. She claims to have completed a Visiting Fellowship in Diagnostic Ultrasound and Echocardiography from 26th March 2007 in the Department of Radiology, Thomas Jefferson University Hospital and Jefferson Medical College, Philadelphia in USA. It is

stated that in February 2003 Dr. Randhawa completed the two year course on ultrasound training under the IMA (AMS) from 4th January 2001 to 10th February 2003. She also worked as a Consultant Ultrasonologist at the government approved Gupta Hospital in Delhi from 16th July 2001 to 31st March 2005.

11. On 5th April 2006 Dr. Randhawa applied for registration as a sonologist under the PNDDT Act in the West District of the National Capital Territory of Delhi. Dr. Randhawa had already been recognized and registered as a Sonologist with the Rohini (North-West Zone) and Dwarka (South-West Zone) under the PNDDT Act since the last seven years. On 10th July 2006 Dr. Randhawa submitted all necessary documents as directed by the Appropriate Authority in support of her application. Since no reply was forthcoming, Dr. Randhawa filed an application on 14th July 2006 under the RTI Act. On 2nd August 2006 the District Appropriate Authority under the PNDDT Act (West District) sent a communication to the Director, Directorate of Family Welfare, GNCTD stating that Dr. Randhawa did not submit documents in support of her application to be registered as an ultrasonologist and therefore her application could not be considered. Dr. Randhawa preferred an appeal on 21st August 2006 with the Director, PNDDT, Ministry of Health and Family Welfare with reference to her application dated 14th July 2006 under the RTI Act. In response to this, a letter was written by the Ministry of Health and Family Welfare, PNDDT Division on 15th September 2006 stating that the PNDDT Act or Rules do not categorically specify the institutions/individuals from where the training or experience has to be acquired. At the meeting of the State Level Multi-Member Appropriate Authority under the PNDDT Act held on 6th December 2006 Dr. Randhawa's case was discussed and her request for registration was not acceded to. Dr. Randhawa applied to the Ministry of Health and Family Welfare on 19th December 2006. However, she did not hear any response to the said letter. In the meanwhile she kept pursuing her request for information under the RTI Act. By an order dated 19th June 2007 the Central Information Commission (CIC) directed the Directorate of Family Welfare to provide information to Dr. Randhawa within ten days. The Directorate of Family Welfare sent a letter dated 5th July 2007 to the Petitioner stating that her request for registration as a sonologist could not be acceded by the State Advisory Committee under the PNDDT Act and that "training in Ultrasound needs to be examined and recognized by the competent authority."
12. Dr. Randhawa has assailed the refusal of registration on the ground that the reasons therefore were arbitrary and unreasonable. The observation that training in ultrasound needed to be examined and recognized by the competent authority, was a bald one. Even though the PNDDT Act and Rules do not provide the procedure for undergoing training/experience or identify persons eligible to provide such registration, there was no justification in simply rejecting the request for registration.

Stand of the Medical Council of India

13. In the present cases, the counter affidavit filed by the Respondent is more or less similar. However, in addition to the reply of the Respondent Appropriate Authority, an affidavit has been filed on behalf of Respondent No. 6 Medical Council of India (MCI). Referring to the decisions in *Dr. Preeti Srivastava v. State of MP* MANU/SC/1021/1999 : (1999) 7 SCC 120, *State of Punjab v. Dayanand Medical College* MANU/SC/0635/2001 : (2001) 8 SCC 664 and *State of Madhya Pradesh v. Gopal D. Tirthani* MANU/SC/0507/2003 : (2003) 7 SCC 83, it is submitted that the MCI Regulations made under the Indian Medical Council Act, 1956 ('IMC Act') are binding and mandatory. It is stated that a 'recognized medical qualification' as defined under Section 2(h) of the IMC Act means any of those medical qualifications included in the Schedules to the IMC Act.
14. Under Section 33 read with Section 20 of the IMC Act after obtaining prior approval from the Central Government, the MCI framed the Postgraduate Medical Education Regulations, 2000. As per Regulation 10, the period of training for the award of a degree of Doctor of Medicine (M.D.)/Master of Surgery (M.S.) shall consist of three completed years including the period of examination. For the award of a postgraduate diploma there shall be two completed years of training including the period of examination. The specialties in which postgraduate degrees/diplomas can be awarded are prescribed in the schedule to the said Regulations. At serial No. 24 under A i.e., qualification for M.D. specializations of the Schedule is Radio Diagnosis and under F i.e., for diplomas at serial Nos. 21 to 23 are Radio Diagnosis, Radio Therapy and Radiological Physics.

It is submitted that Dr. Randhawa Diagnostics where Dr. Sonal Randhawa is purported to have conducted ultrasounds regularly under the supervision of Dr. J.S. Randhawa is not a recognized medical institute under the IMC Act, and is not included in the Schedule to the IMC Act. The said Institute of ultrasound training is also not included in the list of institutes recognized/permitted by the MCI to conduct any postgraduate courses in Radio-Diagnosis or Ultrasound. The course offered on ultrasound by the said Institute is not a recognized medical qualification for the purposes of the IMC Act.

Subsequent Developments

15. After the filing of this petition a meeting was held in the Directorate of Family Welfare on 9th January 2008 in which the following decisions were taken:
 - i) Now onwards registration should be allowed to only the persons qualified in Radiology (ii) Specialists may be allowed Ultrasound in their own speciality. For example a Gynecologist with Post Graduate qualification can do level 1 scan for gross anomalies and monitoring of pregnancy. (iii) Registration of existing clinics registered on basis of training/experience from private place should not be cancelled. At the same time they should be given show cause notice regarding non MCI qualification/experience and a stricture should be written on their registration certificate. (iv) Renewal of such clinics should be allowed till court judgment regarding qualification/experience or any other clarification in this regard from Govt. of India. (v) No new registration should be given on basis of non MCI recognized qualification. (vi) practice of giving training/experience by one Doctor to other fellow Doctor should be stopped. (vii) Directions issued by Hon'ble Court should be followed further in this regard. (viii) A file may be sent to the legal department and legal opinion on this matter be obtained.
16. It is submitted that once the above decisions came to be published, it met with a stiff opposition and an agitation among the fraternity of doctors. The State Advisory Committee which thereafter met on 22nd July 2008 decided to discard the earlier changes. This happened while it considered an appeal of Dr. Rahul Kumar in which it passed the following order:

Instant appeal has been filed by Dr. Rahul under Section 19(2) of the act against rejection of application for registration vide order dated 13.06.08 passed by the CDMO, North West District. The sole reason for rejection of application is consequent upon the issuance of certain instructions from State Advisory Committee, according to which the kind of training as was being given by private Post Graduate Doctors was termed as not valid as per Medical Council of India norms and it was considered that practice of giving training/experience by one Doctor to other fellow Doctor should be stopped. Considering the above said the case of the Appellant was rejected for the reason that he had obtained the Post Graduate Diploma in Sonography from the Global Open University which was not listed as recognized Institute for awarding Medical qualification as required. However, it is informed that in the subsequent meeting of the Advisory Committee dated 22.07.08 it was considered that registration of new Centers under PC & PNDT Act may be resumed on the basis of qualification as prescribed under the provision of Act on the basis of Experience/Training as laid down in the Act as per practice prior to 9.1.08. Since now the previous restrictions as imposed have been done away, as stated above, in the meeting of State Advisory Committee. It is agreed by both the parties that the case of the Appellant may be reconsidered if his case is otherwise found fit on the basis of merits. The matter is accordingly remanded back to the District Authority for reconsideration in terms of the above.” (emphasis supplied)
17. It is pointed out by Dr. Randhawa that pursuant to the above decision Dr. Rahul Kumar was granted registration as was evident in the reply given under the RTI Act on 24th October 2008. Accordingly, it is submitted that Dr. Randhawa has been meted out a differential treatment which is unwarranted.
18. Learned Counsel appearing for Dr. Randhawa pointed out to the stand of the MCI in a reply dated 3rd March 2008 to an application made under the RTI Act by one Sagar Saxena that “courses like IVF, Laparoscopy, Lasik Surgery, Ultrasound, Bariatric surgery, do not come within the purview of MCI.” In a reply given to

one Dr. Diwan Singh on 14th August 2008 in response to a query as to “who is a sonologist as defined in the PNDT Act as per the MCI guidelines,” it was stated that the matter is “outside the purview of Medical Council of India.”

Submissions of counsel

19. This Court has heard the submissions of Mr. Ravi P. Mehrotra, the learned Counsel for Dr. Sonal Randhawa and Mr. Praveen Khattar learned Counsel appearing for Dr. K.L. Sehgal, Ms. Zubeda Begum and Mr. Amiet Andley learned Counsel appearing for Respondent No. 2 Appropriate Authority, GNCTD and Mr. Maninder Singh, learned Senior counsel appearing for the MCI.
20. While counsel for Appropriate Authority GNCTD reiterated the submissions noticed hereinbefore, Mr. Maninder Singh learned Senior counsel for the MCI urged that the provisions of the PNDT Act have to be interpreted in such a manner that the word ‘or’ appearing in Section 2(p) has to be read as ‘and’. He relied upon the judgment of the Supreme Court in Prof. Yashpal v. State of Chhattisgarh MANU/SC/0093/2005 : AIR 2005 SC 2026, and in particular para 40 thereof. He pointed out to the growing menace of female foeticide and the apparent failure of the PNDT Act to check the alarming sex ratio which is directly traceable to the indiscriminate use of the pre-natal diagnostic tests and unethical practices of the registered medical practitioners. He submitted that unless the PNDT Act is interpreted to require a sonologist to be a qualified specialist with experience in a recognized institute, the unchecked unethical practices adopted by diagnostic clinics cannot possibly be stopped. He urged this Court to take a proactive approach in the matter and adopt an interpretation that would advance the purpose of the legislation. Reliance is also placed on the decisions in Dr. A.K. Sabhapathy v. State of Kerala MANU/SC/0240/1992 : AIR 1992 SC 1310; Gopinder Singh v. Forest Department of Himachal Pradesh MANU/SC/0113/1991 : 1990 (Supp) SCC 272; and Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd. MANU/SC/2179/2008 : JT 2008 (7) SC 11.

Meaning of ‘sonologist’ under Section 2(p) PNDT Act

21. The question that arises for consideration is the meaning that should be given to the expression ‘sonologist’ as defined under Section 2(p) PNDT Act of the PNDT Act.

Section 2(p) PNDT Act reads as under:

2(p) “Sonologist or Imaging Specialist” means a person who possesses any one of the medical qualifications recognized under the Indian Medical Council Act, 1956 or who possesses a post-graduate qualification in ultrasonography or imaging techniques or radiology.

22. The definition of the word ‘sonologist’ does support the submission of the learned Counsel for the Petitioners that as long as the person concerned possesses “one of the medical qualifications recognized under the Indian Medical Council”, he could be a sonologist. The word ‘or’ only makes the possessing of “a post-graduate qualification in ultrasonography or imaging techniques or radiology” an alternative qualification. It appears that prior to the insertion of Section 2(p) PNDT Act in the PNDT Act certain amendments were proposed. The suggested definition of ‘sonologist’ as proposed reads as under:

“Sonologist/Imaging Specialist” means a person who possesses any one of the medical qualifications recognized under the Indian Medical Council Act 1956, and/or a post graduate qualification in ultrasonography/ imaging technique/radiology and who is certified for performing sonography

23. Despite the above suggestion, when the amendment was ultimately enacted the word ‘and’ appears to have been dropped. The present definition requires a post-graduate qualification only in the alternative.
24. How the definition under Section 2(p) PNDT Act has been understood is reflected in Rule 3 of the PNDT Rules which reads as under:

The qualifications of the employees, the requirement of equipment etc. for a Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall be as under:

XXXXX

(3)(1): Any person having adequate space and being or employing

XXXXX

(b) a Sonologist, Imaging Specialist, Radiologist or Registered Medical Practitioner having Post Graduate degree or diploma or six months training or one year experience in sonography or image scanning,

XXXXX

may set up a genetic clinic/ultrasound clinic/imaging centre.

25. In *Prof. Yashpal v. State of Chhattisgarh*, the Supreme Court, in the context of recognition of institutions for the purposes of affiliation to a university, observed that the word ‘or’ can sometimes be read as ‘and’ when the literal meaning of the word would produce “unintelligible or absurd” results. However, the same cannot be said of the present definition. This is because if one were to read the word ‘or’ as ‘and’, then the following words which indicate that the person should be possessing any one of the medical qualifications recognized under the IMC Act are rendered redundant. If the submission of the MCI is to be accepted, the definition ought to mean that a sonologist or an imaging specialist could be a person who is

(a) an MBBS or possessing any one of the “other” medical qualifications, for e.g. an Ophthalmologist, an ENT specialist or a Cardiologist who possess qualifications recognized by the IMC Act, together with

(b) a post-graduate qualification in “ultrasonography or imaging techniques or radiology”.

The post-graduate qualification in “ultrasonography or imaging techniques or radiology” would also have to be a qualification recognized by the IMC Act. However, that is not how Section 2(p) PNDDT Act reads. To accept the argument of the MCI would be reading too many words into Section 2(p) PNDDT Act, which is simply not permissible for this Court to do. In this connection a reference may be made to the decision in *Hiradevi v. District Court at Shahjahanpur* MANU/SC/0021/1952 : AIR 1952 SC 362, where Justice Bhagwati speaking for the Court in the context of the old Section 71 vis-à-vis Section 90 of the U.P. District Boards Act, observed (AIR @ p. 365):

it was unfortunate that when the Legislature came to amend the old Section 71 of the Act it forgot to amend Section 90 in conformity with the amendment of Section 71. But this lacuna cannot be supplied by any such liberal construction as the High Court sought to put upon the expression ‘orders of any authority whose sanction is necessary’. No doubt, it is the duty of the Court to try and harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the word used by the Legislature to fill in gaps or omissions in the provisions of an Act.

26. There are other difficulties in reading the definition in Section 2(p) PNDDT Act as suggested by the MCI. The MCI itself has, in a letter dated 4th May 2009 written to the Petitioner in Writ Petition (Civil) No. 6654 of 2007, clarified as under:

Sir, With reference to your letter dated nil received on 1.09.2008, I am directed to state that the above mentioned matter was considered by the Executive Committee at its meeting held on 27.04.2009 and it was decided as under:

The Executive Committee of the Council perused the report of the Sub-Committee and the decision of the Ethics Committee and decided as under:

The Ultrasonography can be undertaken by a specialist who possesses postgraduate qualification in the specialty of Radio-Diagnosis. However, specialist doctor in their specialty can also undertake Ultrasonography for the purpose of certification subject to the condition that he/she has undergone orientation training in the

Ultrasonography in the department of Radio-Diagnosis in a recognized medical institution under recognized medical teacher for a minimum period of 6 months wherein he has not only observed the procedure of Ultrasonography but also has undergone hands on training to enable him to practice in the field of ultrasonography for the diagnostic purposes pertaining to his/her specialty.

27. The above reply would indicate that a person who is a specialist who either has an MBBS degree or a further specialization qualification would be able to run an ultrasound clinic provided he or she undergoes six months' training in ultrasonography. The MCI is therefore, unclear as to what will satisfy the definition of 'sonologist' under Section 2(p) PNDT Act of the PNDT Act. It is inconceivable how a request for registration can be refused on the ground of non-compliance with the above requirement when the decision in that regard appears to have been taken only on 27th April 2009 by the MCI.

28. On 11th May 2009 Dr. Sonal Randhawa asked the MCI to provide her with:

1. List of recognized Medical Colleges which are providing six months training in Diagnostic Ultrasound including hands-on to specialist doctors of subjects other than radio diagnosis in the department of radio diagnosis.
2. Application procedure, eligibility criteria, course curriculum and fee for the same.

29. In reply thereto, on 6th June 2009 the MCI informed her as under:

With reference to your application dated 11.5.2009, on the subject noted above, the point-wise reply is as under:

1. No such list of Medical Colleges providing training in Ultrasound is available with Medical Council of India.
2. This is not related to Medical Council of India, you may contact to individual Medical Institutions for the same.

Therefore, it is plain that MCI itself is not aware of medical colleges which provide training in ultrasonography and diagnostic ultrasound.

Uncertainty in applying the PNDT Act and Rules

30. At this stage a reference should also be made to the deliberations of State Advisory Committee which considered Dr. Sehgal's application for renewal of registration. The recording of the minutes of the meeting of the Committee held on 27th April 2007 under Agenda Item No. 2 read as under:

Agenda 2

Qualifications/experience required by Registered Medical Practitioners who are employed by/in a Genetic Clinic. Details: Grant of Registration/renewal of registration of genetic clinic on the basis of (a) Training with Doctor J.S. Randhawa, Institute of USG Training, D-364, Tagore Garden Extn., N. Delhi-27; and (b) Many centres in 2002 were registered based on (a) above, now requesting renewal on the basis of Self Experience.

In this context, a letter from Govt. of India, dated 15-9-06 was quoted. It was brought to the notice of all present that the issue is under consideration of Central Supervisory Board and there is proposal to accredit only larger Govt. Hospitals and Medical Council of India recognized, post-graduate Institutes, teaching & Radiology for the purpose of training, to be recognized ultrasonologist as per PC & PNDT Act.

The issue was discussed at large by all members of Advisory Committee and it was concluded that we may seek guidance from Govt. of India on above agenda. Till such time PC & PNDT Act should be followed, strictly. (emphasis supplied)

31. The above minutes were enclosed with the reply dated 3rd August 2007 given by the District Appropriate Authority to Dr. K.L. Sehgal stating that his application had been rejected on the above basis. What is not clear is the basis for rejection when the Committee was still seeking "guidance" from the Government of

India and the matter was still under the consideration of the Central Supervisory Board. The other reason given in the rejection order dated 25th May 2007 in respect of Dr. Sehgal's application is "non-submission of documents of qualified radiologist". No such criterion was earlier prescribed and it is not understood how such a requirement could suddenly be insisted upon.

32. Even in the reply filed by the GNCTD it is stated in para 8 as under:

That the list of the Hospitals/Institutes recognized by the Govt. of India for the purpose of training/experience in Ultrasonologist under the PC & PNDT Act is received from the Govt. of India, no private institute or Ultrasound Diagnostic Centre can be accredited by the Govt. of Delhi for the purpose of training/experience in Ultrasonologist under the PC & PNDT Act. The question of the grant of registration as sonologist to the Petitioner under the PC & PNDT Act is policy matter which can be decided after clear-cut guidelines of Govt. of India. A letter dated 20/11/2007 has been written in this regard by the answering respondent and response thereto is awaited.

33. The above letter dated 20th November 2007 by the Director, Family Welfare suggested that a committee of technical experts be constituted to examine the following issues:

1. What shall Appropriate Authorities do with the Doctors who were provided registration on the basis of 100 cases experience and now applying for renewal?
2. Is the training/experience provided by private Radiologist to MBBS Doctors valid for purpose of registration of under PNDT Act?
3. What is the kind of training/experience valid for registration under PNDT Act?
4. Ultrasounds are used in other specialties also. Can the other Doctors of different specialties use Under Section for respective specialties? Do Doctors from different specialties not doing Pre-conception or Pre-natal work require registration under PNDT Act?
5. Are Gynecologist/others specialist/registered Medical Practitioner allowed to perform Under Section on their patients?

34. The above documents reflect an uncertain state of affairs. None of the authorities were clear what should be the minimum criteria regarding training, where the training should be provided, whether the criteria should be made prospective and so on. Also, it is plain that neither the PNDT Act nor the PNDT Rules provided any guidance on these aspects. It is in this background that the plea of the learned Senior counsel for the MCI that the court has to read the requirements of training and special qualification into the definition of 'sonologist' in Section 2(p) PNDT Act of the PNDT Act has to be examined.

35. In cases such as the present ones, the issues raised involve consideration of technical aspects on which the views of the experts rather than courts are relevant. In determining who should be recognized as being qualified to undertake ultrasound tests, what should be the minimum qualification and experience, the inputs of experienced medical fraternity become critical for. This Court, exercising jurisdiction under Article 226 of the Constitution, lacks the competence to determine such technical issues.

Rejection of Petitioners' applications unsustainable in law

36. Nevertheless, it appears to this Court that the reasons for rejection of the Petitioners' applications were not based on rational grounds and on the basis of reasonable criteria made known to each of them in advance. The Petitioners appear to have satisfied the requirements of the PNDT Act and the extant PNDT Rules which do not specify that the training to be undergone has to be in a recognized institute. As already noticed, even the MCI is unclear where such 'recognised' institutes that offer such training and qualification exist. Also, without such criterion being made known in advance, it would be unfair to reject an application for renewal on that basis as was done in the case of Dr. Sehgal and for registration as in the case of Dr. Randhawa. Further, in the case of Dr. Sonal Randhawa there is no convincing explanation forthcoming for the apparent inconsistency in

dealing with her applications for registration in the different districts in Delhi. It is not disputed that she has been granted registration under the PNDT Act in two districts but has been refused in the third. Also, if in Dr. Rahul's case, the Advisory Committee on 22nd July 2008 resumed the registering of new centres under the PNDT Act "as per practice prior to 9.1.08" there is no valid explanation for meting out a different treatment to these two petitioners. It was not denied by counsel for the GNCTD that others similarly placed as the Petitioners were not being denied renewal of their registrations/licences to run clinics under the PNDT Act. It was explained that the GNCTD is waiting the decision in these cases before deciding on the future course of action. Clearly therefore, there is no consistency in the GNCTD applying the PNDT Act and the PNDT Rules for the purpose of grant of or renewal of registration. A selective application of an undisclosed criterion is a sure recipe for the decision being rendered arbitrary. Consequently, this Court holds that the rejection of Dr. K.L. Sehgal's application for renewal of registration by the impugned order dated 25th May 2007 and the rejection of Dr. Sonal Randhawa's application for registration as sonologist by the communication dated 5th July 2007 are unsustainable in law.

Need to plug the loopholes in the PNDT Act

37. These two petitions reflect a disconcerting state of affairs. As a result of the weak definition of the term 'sonologist' under the PNDT Act, the mushrooming growth of diagnostic clinics is unable to be effectively regulated. The absence of clear rules and guidelines spelling out unambiguously the qualification, training and experience required for operating a diagnostic clinic offering ultrasound tests has resulted in unethical practices being adopted in many such clinics in violation of the PNDT Act going unchecked. These cases underscore the need to amend the PNDT Act to plug the loopholes and reflect the view of the MCI as indicated in its reply dated 4th May 2009 to one of the Petitioners where it suggested that person seeking to run a diagnostic clinic should either possess a post-graduate degree in Radio Diagnosis or should be a specialist who has undergone orientation training in ultrasonography in a recognized medical institution for a minimum period of six months. To avoid any confusion, the requirements in terms of qualification, training and experience to recognised and registered as a 'sonologist' should be incorporated in the PNDT Act and further explicated under the PNDT Rules. In determining the criteria the best available international practices should be adapted to suit Indian conditions. Secondly, the names of the institutions state-wise which are recognized for that purpose will have to be notified. Thirdly, the changed criteria must be made not only prospective but sufficient time given to enable those seeking registration or renewal to fulfill the changed criteria. Fresh registrations can be postponed to enable the arrangements envisaged by the new criteria to be put in place. These steps will require a comprehensive survey to be undertaken by the Respondents followed by consultations with experts in the medical fraternity and education. The resultant amendment to the definition of 'sonologist' under Section 2(p) PNDT Act of the PNDT Act and the corresponding amendment to the PNDT Rules must be given wide publicity so that there is increased public awareness about the minimum standards one should expect in diagnostic clinics.

Conclusion

38. For the aforementioned reasons, the rejection of Dr. K.L. Sehgal's application for renewal of registration by the impugned order dated 25th May 2007 and the rejection of Dr. Sonal Randhawa's application for registration as sonologist by the communication dated 5th July 2007 are held unsustainable in law and are set aside as such. The two writ petitions are allowed in the above terms. The respective applications of both the Petitioners will again be placed before the Appropriate Authority for consideration in accordance with law within a period of two weeks from today. It would be open to the Appropriate Authority to require any further clarification from the Petitioners and if any or both the Petitioners so request, they should be given a personal hearing. The decision on the two applications should be taken by the Appropriate Authority within a period of four weeks thereafter and communicated to each of the Petitioners within a further period of two weeks thereafter.
39. The two writ petitions are disposed of with the above directions.

Appeal against Acquittal

As this Act is yet in the stage of infancy, there are very few cases which are tried and decided at the trial court stage. Therefore the appeals against the decisions of trial Courts after full fledged hearing of the case are very few. Even if some decisions of the trial courts have reached in Appeal to the High Court, the Appeals are yet to be heard and decided. Therefore, as of today, we could get only one appeal against the acquittal of the accused by the trial court. This decision pertains to the High Court of Punjab and Haryana at Chandigarh. This decision is of great significance as it exposes the lacunae in implementation of the provisions of the Act. It is pertinent that though the Act protects the pregnant woman from prosecution, the Appropriate Authority prosecutes her which results not only in harassment being caused to her but also in damaging the prosecution case. Hence this decision has been included in this book.

Criminal Misc. No. 337-MA of 2007**Decided on 23/03/2009***Sadhu Ram Kusla**-Vs-**Ranjit Kaur and others**Hon'ble Judge :. K. C. Puri, J.*

Acts/Rules/Orders: Pre-conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Sections 22(2), 23, 25, 27; Pre-natal Diagnostic Technique (Regulation and Prevention of Misuse) Rules - Rule 19(1) 19(2) 19(3).

CASE SUMMARY

In this case the acquittal of the respondents by the trial court for the offences punishable u/s 120 B, 312, 315 IPC & Section 23 of the Act was challenged. The allegations against the respondents were to the effect that respondent No.3 Dr. Kamlesh Jindal who was running her Nursing Home at Rampura had conducted Sonography test on respondent No. 1 who was 14 weeks pregnant. The test was allegedly conducted to determine "foetus well being" and the result was found to be normal. However on the same night respondent 1 had a miscarriage. Hence it was contended by the Petitioner that in fact Sonography test was conducted to determine sex of the foetus and the pregnancy was terminated on finding the foetus to be female. It was argued that if the foetus was found to be normal in the sonography test, a miscarriage could not have occurred on the same night by alleged excessive bleeding as contended by the respondents. Respondent No. 2 was the husband of Respondent No. 1 and respondent No. 4 was Dr. Laxmi who has terminated the pregnancy of respondent No. 1.

During trial evidence was laid both by the prosecution and defence. As per respondent No. 1 she had continuous bleeding and pain for 2 days and therefore she had gone for Ultrasound scan to respondent No. 3 to know the condition of foetus. She was told by respondent No. 3 that there was risk of threatened abortion and she should get herself admitted. However as no male member was accompanying her, she refused to get admitted and on that night she had miscarriage. The trial court accepted the defence case and acquitted all the four accused.

In Appeal the High Court also concurred with the decision of the trial court by holding that there was practically no case made out. It was opined by the High Court that the mere fact that there was miscarriage on the same night on which sonography test was conducted, ipso-facto does not establish that sex of the foetus was detected and disclosed. It was further held that there is no legal presumption that as there was abortion, the foetus was female. There was also no evidence to prove that the foetus was of a female (Para last but one).

This case to some extent exposes the lacuna in the provisions of the Act. The tell-tale circumstances of the case created strong ground to hold that abortion, alleged to be a miscarriage,

was only because the foetus was found to be female. Otherwise there is no explanation how the alleged miscarriage took place on the very night when the condition of the foetus was found to be normal in the afternoon. It appears that as respondent No. 1 - the pregnant lady was also made an accused, there was no likelihood of her supporting the prosecution case. Hence there was no evidence for prosecution to prove its case against the doctor who conducted sex determination test and terminated the pregnancy. Some thinking is, therefore, required in this direction for amendment in the provisions of the Act so that the evidence of the pregnant lady will be available for prosecution to prove the case against the doctors and clinics which misuse prenatal diagnostic techniques. Making the pregnant lady an accused in the case was counterproductive. The attention of the Appropriate Authorities is also required to be drawn to provision of Section 24 of the Act, which lays down a presumption that unless the contrary is proved, the Court shall presume that the pregnant woman was compelled by her husband or any other relative as the case may be, to undergo prenatal diagnostic technique for the purposes other than those specified in sub-section (2) of Section 4 and such person shall be liable for abatement of offence under subsection (3) of Section 23 and shall be punishable for the offence specified under that section. This presumption is to be drawn notwithstanding anything contained in the Indian Evidence Act. It is to deal exactly with situations similar to those faced in this case, although the presumption was laid down by the Legislature it was not adhered to by the Appropriate Authorities, while making respondent No.1 as accused.

JUDGMENT

Per Hon'ble Justice Mr. K. C. Puri J.

Present: Mr. Anil Kshetarpal Advocate for the appellant. Mr. Harinder Singh, Advocate for respondent Nos.1 and 2.

Mr. Gauttam Dutt, Advocate for respondent No.3. ...

JUDGMENT.

K. C. Puri, J

Through the present application, the appellant/applicant seeks grant of leave to appeal against the judgment passed by the Additional Sessions Judge, Bathinda dated 12.4.2007 whereby the accused have been acquitted of the charges under Sections 120-B, 312, 315, 120-B IPC and Section 23 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (in short the Act).

The complainant has alleged in his complaint that Dr. Kamlesh Jindal had been running her Clinical/Nursing Home at Rampura where she was also providing Ultrasound (Pre-natal Diagnostic) facilities. On 30.8.2003, Ranjit Kaur wife of Kulwant Singh, accused, got herself subjected to Pre-natal Diagnostic test from Dr. Kamlesh Jindal, accused No.3. Dr. Kamlesh Jindal has recorded the relevant entries in form F and conducted Ultra-sound test of Ranjit Kaur, accused No.1. Thereafter, Ranjit Kaur has got the pregnancy terminated and this fact was established from the report of S.D.M, Rampura Phul, because at the time of inquiry PW-4, Ranjit Kaur was not pregnant. After Ultra-sound test, accused No.3, Dr. Kamlesh Jindal has described the result of PNDT process as 14 weeks normal pregnancy which was revealed during inquiry conducted by the S.D.M and was found to be a case of female foeticide and termination of pregnancy. However, sex of foetus was not specified in form-F of Dr. Kamlesh Jindal. According to the complainant, pregnancy was normal and neither any complication nor abnormalities have developed in the abdomen of accused Ranjit Kaur but the pregnancy has been terminated by Dr. Lakshmi, accused No.4. It was also alleged in the complaint that it has come to the knowledge of the complainant that menace of female foeticide was flourishing due to the nexus of couples who have no male child or who were not interested of having female

child and in connivance with the doctors/ Ultra-Sonologists//RMP and other agents. In this case, the termination of pregnancy of Ranjit Kaur is governed by common psyche of bearing a male child and, therefore, accused Nos.1 and 2 got the female foetus aborted after report from accused No.3 regarding the determination of sex of the foetus.

On the receipt of complaint, the learned Magistrate treated it as a warrant case. He initiated preliminary inquiry wherein complainant Sadhu Ram Kusla appeared as CW-1, Avniash Kaur as CW-2 and Ravi Kumar, CW-3 a Clerk from the office of SDM.

The learned Magistrate vide order dated 26.2.2005 has observed that there were sufficient grounds to proceed against all the accused for the commission of offences punishable under Sections 120-B, 312, 315 IPC and Section 23 of the Act. Charge was accordingly framed against the accused to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined PW-1 Mohinder Kaur, PW-2 Taro Bai, PW-3 Sadhu Ram Kusla and PW-4 Avinash Kaur.

After the close of prosecution evidence, all the accused were examined under Section 313 Cr.P.C in order to afford them an opportunity to explain the circumstances appearing against them in the prosecution evidence. All the incriminating circumstances were put to them. They have denied the same. Accused Dr. Kamlesh Jindal has taken the following stand:-

“I am innocent and case has been planted upon us falsely. I have not committed any illegality while conducting the Ultrasonography of Ranjit Kaur.” Accused Dr. Lakshmi Garg has taken plea the following plea:-

“I am innocent and case has been planted upon us falsely. Ranjit Kaur never came to me nor PW Avinash Kaur had ever visited my clinic. PW Avinash Kaur was not known to me. She had conducted no inquiry and she had sent wrong report on imagination.” Accused Ranjit Kaur has taken the following stand:- “I am innocent and case has been planted upon me and my husband falsely. I was pregnant and I had gone to the clinic of Dr. Kamlesh Jindal along with my mother-in-law on 30.8.03 as I had continuous bleeding and pain for two days. Dr. Kamlesh Jindal after examining me advised for Ultra-sound and on giving consent by me, Ultra-sound scan was conducted by Dr. Kamlesh Jindal which was necessary to know the condition of foetus. Dr. Kamlesh Jindal told us that the sex of foetus will not be disclosed to which we agreed and got signed from me declaration regarding above facts. Dr. Kamlesh Jindal after examining me clinically told that there is risk of threatened abortion and also told to get myself admitted to which I and my mother-in-law refused as we were not accompanying any male person at that time. However, doctor did not disclose about the sex of foetus to us. Dr. Kamlesh Jindal also issued prescription slip to me. We returned to our village in a bus. During the night intervening 30-31 August, 2003 after mid night, I had lot of pain in lower abdomen and my mother-in-law also woke up and she called old lady from neighbouring house i.e. Jasbir Kaur. My husband went from house to arrange some vehicle for taking me to some hospital but by that time there was heavy bleeding and all contents of pregnancy spontaneously came out of its own there and then. Avinash Kaur never visited our village nor conducted any inquiry in our village. I and my husband have been falsely named as accused”.

Accused Kulwant Singh also took the plea that he and his wife Ranjit Kaur were innocent and he had adopted the plea of his co-accused Ranjit Kaur.

In their defence, the accused examined DW-1 Tirath Ram, a Steno of Civil Surgeon, Bathinda, DW-2 Dr. Baldev Raj and DW-3 Basant Kaur.

After the conclusion of trial, vide impugned judgment, trial Court acquitted the accused.

At the time of issuing notice of motion, this Court observed as under:-

“This is application under Section 378(4) of the Code of Criminal Procedure for leave to appeal against judgment of acquittal dated 12.04.2007 of learned Additional Sessions Judge, Bathinda, whereby in criminal complaint instituted by petitioner Sadhu Ram Kusla, Assistant Project Officer and Member of P.N.D.T.Cell, Bathinda, respondents No.1 to 4 have been acquitted of the charge under Sections 120-B, 312 and 315 of the Indian Penal Code and Section 23 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (in short ‘the Act’).

Learned counsel for the petitioner pointed out that vide Form-F (Annexure P-1), respondent No.3 conducted sonography test of respondent No.1, who had pregnancy of 14 weeks. The test was conducted on 30.08.2003 to determine 'Foetus Well Being' as mentioned in Annexure P-1 and the result was found to be normal. However, on the same night between 30/31.08.2003, there was alleged miscarriage of the pregnancy of respondent No.1. It is contended that in fact, sonography test was conducted to determine sex of the foetus and thereupon, the pregnancy was got aborted on finding the foetus to be female. Respondent No.2 is husband of respondent No.1. It is contended that if the foetus was found normal on sonography test conducted on 30.08.2003, as contained in Annexure P-1, there could not be miscarriage on the same night by alleged excessive bleeding as contended by the defence. However, there is practically no evidence against respondent No.4.

In view of the aforesaid, the instant petition as against respondent No.4 is dismissed. Notice of motion to respondents No.1 to 3 only for 07.07.2008."

The counsel for the petitioner, during the course of arguments, has again raised similar contentions. His main stress is on the fact that since foetus of Ranjit Kaur was normal on 30.8.2003 on the same night, how the foetus was aborted. Presumption be drawn that the foetus was of a female child and had been aborted.

I have considered the said submission. It is a settled law that a case cannot be decided on mere presumptions unless the Statute states so. If there is legal presumption, the same can be drawn but the counsel for the petitioner is fair enough to concede that under the Statute, there is no legal presumption that foetus was of female and was aborted. Moreover, according to the case of the prosecution, abortion was done by respondent No.4 but no notice of motion has been issued by this Court qua respondent No.4 vide order dated 26.3.2008. It is not out of place to mention here that the complainant while reporting the matter to the authorities under the Act has not stated that it was a female foetus. The case of the prosecution, from the very beginning, was that Dr. Kamlesh Jindal has conducted Ultra- sound (Sonography). Admittedly, she has reported to the authorities and it has been mentioned in her report that she has not disclosed the factum of sex or foetus to Ranjit Kaur or any other family member. There is no legal evidence on the file to prove the fact that foetus was that of female. In para No.40 of the judgment, the trial Court has discussed the report of PW-4 Avinash Kaur. She found the following deficiencies:-

- a) She did not mention in Ex.P4, the date, time and place the inquiry.
- b) She did not record the statement of any person.
- c) She did not record the statement of her subordinates i.e. Anganwari workers.
- d) It is not mentioned in Ex.P4 that on which date, she visited village Mehraj and at which time or on which date.
- e) She did not try to approach the pregnant woman Ranjit Kaur her family members or to Dr. Kamlesh Jindal or Dr.Lakshmi Garg
- f). Her inquiry report Ex.P4 is silent with regard to sex of foetus, the date of abortion."

So, on the basis of above observations, the trial Court held that the alleged inquiry, Exhibit P4 is ambiguous, unbelievable and does not provide any help to the case of the complainant. The trial Court has rightly held that mere fact that Ultra-sonography was conducted by Dr. Kamlesh Jinda, ipso-facto, does not establish that she had detected and disclosed the sex of the foetus. The trial Court has dealt with each and every aspect of the case elaborately.

In the light of above discussion, I do not find any fault in the judgment of the learned trial Court. The petitioner has failed to make out a case for grant of leave to appeal. Consequently, this application for grant of leave to appeal and the appeal stand dismissed.

Cases of Conviction

Recently the Trial Courts are coming up with some decisions after full fledged hearing of the case, which indicates a promising trend. It appears that as a result of the various public awareness campaigns led by media and implementing machinery under the Act and as an outcome of the systematic and professional training of Judicial Officers and Public Prosecutors undertaken on sensitization and orientation about the object and the reasons of the Act, at the time of going to the press several Judgments of conviction by the Trial Court were brought to notice, out of which three Judgments from the State of Maharashtra, and one from the State of Haryana have been included in this compilation.

Magistrates are the key to the interpretation of the provisions of the Act as the Act vests jurisdiction in the Courts of Judicial Magistrate to punish those found guilty for violating its provisions. The Judgments which are now coming from the Trial Courts reveal that the spirit of the Act is being well understood and given effect to by the Magistrates by passing appropriate orders of punishment and sentence. These Judgments reflect the maturity of the Magistrates. When in doubt, they are referring to and quoting elaborately the object and reasons of the Act. We are aware that these Judgments are not yet tested in the

Appeal and the view taken therein is yet to be endorsed by the Superior Courts, but in our opinion, that does not diminish their value or importance in any way. Moreover, at times the view taken by the Trial Court Judges, who are closer to ground reality, is a far more acceptable view, because it is believed that this is in tune with perception of public and expectations of the Society.

Moreover at the Academy it is our endeavour to encourage the best practices and to highlight the best Judgments given by Trial Courts to motivate others and also to act as a guiding force or as beacon lights.

Another promising trend is that some of these Judgments are written in Marathi, the local language, which is bound to have effect in creating public awareness about this piece of social legal legislation. Although these Judgments cannot be equated with case laws as they do not have any binding force, they are included in this book for reasons mentioned above.

EQUIVALENT CITATION: AIR 2008 P H 108

5 (1)

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**C. W. P. No. 19018 of 2006****Decided on 20/12/2007***Dr. Pradeep Ohri**-Vs-**State of Punjab and Anr.**Hon'ble Judges: Satish Kumar Mittal and K. C. Puri J.J.*

Acts/Rules/Orders: Pre-conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – Sections 22(2), 23, 25, 27; Pre-natal Diagnostic Technique (Regulation and Prevention of Misuse) Rules - Rule 19(1) 19(2) 19(3).

CASE SUMMARY

Petitioner in this case was convicted u/s 23 (1) of the Act and was released on probation by the trial court. Initially he was legally advised that it was not necessary for him to file appeal against the conviction. However subsequently as per legal advice, he preferred an appeal alongwith application for condonation of delay. Meanwhile after more than one year of his conviction by the trial court, the Petitioner's name was removed from the State Medical Register by the Medical Council u/s 23 (2) of the Act. By this Writ Petition, he has challenged this order of removal of his name.

The first contention raised was that his name was removed from the State Medical Register for a period of 5 years for an offence committed on 09/07/2002 when as per Section 23 of the old PNDDT Act, 1994, his name could have been removed only for a period 2 years. It was submitted that only after the amendment of PNDDT Act with effect from 14/02/2003, the period of 2 years for the first offence had been enhanced to 5 years. Therefore it was argued that the order of removal of his name for 5 years in respect of the act committed prior to the new amended Act came into effect was squarely hit by the Constitutional prohibition as imposed by Article 20 (1) of the Constitution against retrospective effect to any penal law. The High Court accepted and upheld the said contention and reduced the period to 2 years from 5 years.(Para 18)

The second contention raised was that as the Petitioner was not sentenced to any punishment but was released on probation, no disqualification was attached to his conviction. Hence Medical Council had acted illegally and without jurisdiction while ordering the removal of his name. It was submitted that this order was grossly in violation of Section 12 of the Probation of Offenders Act. The High Court however rejected the said contention and confirmed the removal of his name for two years.(Para 20)

JUDGMENT

Per Hon'ble Justice Mr. Satish Kumar Mittal J.

1. The petitioner, who had obtained the M.B.B.S. degree in the year 1990 and got himself registered as medical practitioner by the Punjab Medical Council (hereinafter referred to as 'the Medical Council') in the year 1991 and subsequently also obtained the MD degree from Guru Nanak Dev University in the year 1996, has filed this petition challenging the order dated 7-11-2005 (Annexure P-4) passed by the Medical Council removing his name from the State Medical Register for a period of five years under Section 23(2) of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as 'the PNDT Act, 1994') in view of his conviction under Section 23(1) of the said Act. He has also challenged the subsequent order dated 21-8-2006 (Annexure P-5) whereby the Medical Council re-affirmed its earlier decision to remove the name of the petitioner from the State Medical Register.
2. In the present case, the petitioner was running Satyam Diagnostic Centre inside Ohri Nursing Home. On July 9, 2002, an inspection of the said ultrasound centre viz. Satyam Diagnostic Centre was made by the District Medical Authorities. During the inspection, it was found that the petitioner had violated Section 5(a)(b)(c) of the PNDT Act, 1994 and Rules 9(1)(4) and 10 of the Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereinafter referred to as 'the Rules'). On a complaint under the aforesaid provisions, he was prosecuted and convicted under Section 23(1) for the offence committed under Section 5(a)(b)(c) of the PNDT Act, 1994 and Rules 9(1)(4) and 10 made there under. But, he was released on probation for a period of one year under Section 4(1) of the Probation of Offenders Act, 1958 vide judgment dated September 24, 2004 delivered by the Chief Judicial Magistrate, Amritsar. Since the petitioner was released on probation and not sentenced to any imprisonment, he was legally advised that it was not necessary for him to file an appeal against the conviction. Subsequently he was advised that he should contest the conviction by way of an appeal and accordingly he filed an appeal before the Sessions Court, Amritsar along with an application under Section 5 of the Limitation Act for condonation of delay in filing the appeal.
3. It is pertinent to mention here that against the order of release of the petitioner on probation, the State filed a revision petition in the High Court seeking enhancement of punishment by way of imposition of a sentence of imprisonment. We have also been informed that the appeal filed by the petitioner before the Sessions Court has now been transferred to this Court and the said appeal as well as the revision are still pending in this Court.
4. After more than a year of his conviction by the trial Court vide the above-said judgment, the petitioner's name was removed from the State Medical Register by the Medical Council under Section 23(2) of the PNDT Act vide order dated 7-11-2005. The petitioner has challenged this order in this petition.
5. Before dealing with the controversy, it will be necessary at this stage to set out the provisions of Section 23 of the PNDT Act, 1994 where under the action has been taken by the Medical Council against the petitioner, which are reproduced below:
 23. Offences and penalties.--(1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made there under shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.
 - (2) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the Court and till the case is disposed of and on conviction for removal of

his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.

- (3) Any person who seeks the aid of any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or Ultrasound Clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant woman for the purposes other than those specified in Sub-section (2) of Section 4 he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.
- (4) For the removal of doubts, it is hereby provided that the provisions of Sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.

6. The petitioner has challenged the aforesaid orders of the Medical Council on the following grounds:

- (a) that, completely without prejudice to the grounds (b) to (d) below, the removal of the name of the petitioner from the State Medical Register for a period of five years following his conviction for an offence or offences allegedly committed on 9-7-2002 is squarely hit by the inviolable constitutional prohibition against retrospective or ex post facto action imposed by Article 20(1) of the Constitution. It is submitted that while removing the petitioner's name from the State Medical Register for a period of five years, the Medical Council has purported to act under Section 23(2) of the PNDT Act, 1994 as amended by the PNDT Amendment Act, 2002 (Act No. 14 of 2003) notified w.e.f. 14-2-2003. Prior to such amendment, Section 23(2) reads as under:

The name of the registered medical practitioner who has been convicted by the Court under Sub-section (1) shall be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence.

Following the PNDT Amendment Act, 2002 notified w.e.f. 14-2-2003, the period of two years for the first offence has been enhanced to five years. It is submitted that even if for the sake of arguments it is presumed that all other conditions for the applicability of Section 23(2) of the PNDT Act, 1994 to the petitioner are satisfied, the infliction of the enhanced penalty of removal for five years instead of two on the petitioner by purporting to apply the amended provisions of Section 23(2) of the PNDT Act (notified w.e.f. 14-2-2003) in respect of an offence or offences allegedly committed on 9-7-2002 is clearly illegal and directly hit by the prohibition under Article 20(1) of the Constitution.

- (b) Though the petitioner has been convicted for violation of certain provisions of the PNDT Act, 1994 and the Rules made there under and he could have been punished with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees, but the Chief Judicial Magistrate instead of awarding the sentence, released the petitioner on probation under Section 12 of the Probation of Offenders Act. It is argued that it is settled law (ever since the judgment of the Apex Court in Divisional Personnel Officer, Southern Railway v. T.R. Challappan, which continues to hold the field on this point despite being overruled on another point in Tulsi Ram Patel's case), that release on probation in lieu of sentence does not erase the stigma of conviction, or does not absolve a Government servant/employee of his liability to departmental punishment for misconduct, but such punishment shall not suffer a disqualification, if any, attaching to a conviction of an offence under such law in view of Section 12 of the Probation of Offenders Act. Equally, it is settled law that Section 12 does apply to a disqualification automatically attaching to a conviction and provided by that very law which prescribes the offence and punishment there for. It is argued that this is precisely the situation in the case of the petitioner. The removal of his name from the State Medical Register on his conviction under Section 23(2) of the PNDT Act, 1994 is directly and automatically flowing from his conviction

under the same provisions i.e. Section 23(1) of the PNDDT Act, 1994. Therefore, it is argued that the respondent-Medical Council has acted illegally and without jurisdiction while ordering removal of the petitioner's name from the State Medical Register on the ground of his conviction under the PNDDT Act which is grossly in violation of Section 12 of the Probation of Offenders Act, which reads as under:

12. Removal of disqualification attaching to

conviction.--Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law:

Provided that nothing in this section shall apply to a person who, after his release under Section, is subsequently sentenced for the original offence.

In this context, it is further argued that while both the Probation of Offenders Act and the PNDDT Act, 1994 are Central laws, there is no provision in the PNDDT Act which ousts or excludes the applicability of the Probation of Offenders Act or any provision thereof; and secondly no general non obstante clause under the PNDDT Act with reference to any other law. On the other hand, not only Section 12 of the Probation of Offenders Act but both Sections 3 and 4 thereof as well (both of which are referred to in Section 12) contain a general non obstante clause with reference to any other law. In support of his contention, learned Counsel for the petitioner has relied upon the decision of the Supreme Court in *Hart Chander v. Director of School Education*, , whereby

while upholding the dismissal from service of the appellant, convicted under Section 408 of the I.P.C. but released on probation, the Supreme Court has held as under:

7. In our view, Section 12 of the Probation of Offenders Act would apply only in respect of a disqualification that goes with a conviction under the law which provides for the offence and its punishment. That is the plain meaning of the words

“disqualification, if any, attaching to a conviction of an offence under such law” therein. Where the law that provides for an offence and its punishment also stipulates a disqualification, a person convicted of the offence but released on probation does not, by reason of Section 12, suffer the disqualification.

Thus, it is argued that the disqualification contemplated by Section 12 of the Probation of Offenders Act is something attached to the conviction which is flowing automatically from the conviction or which is a consequence or result of the conviction. In that situation, if a person is released on probation under Sections 3 and 4 of the Probation of offenders Act in lieu of the sentence for the said conviction, then he shall not suffer disqualification notwithstanding anything contained in any other law attaching to a conviction for the said offence. Learned Counsel for the petitioner argued that the removal of the doctor's name from the State Medical Register is a necessary and automatic consequence of his conviction under the PNDDT Act as is apparent from a bare perusal of Section 23(2) of the said Act. The removal of the petitioner's name from the Medical Register is solely based upon his conviction under Section 23(1), and not on any conduct or misconduct of the petitioner. In view of the law so clearly and comprehensively laid down by the Apex Court as cited hereinabove, the removal of the name of the petitioner from the Medical Register is nothing but a disqualification hit by Section 12 of the Probation of Offenders Act.

(c) Thirdly, it is argued that entirely without prejudice to ground (b) above, the expression "conviction" in Section 23(2) of the PNDDT Act necessarily means and implies a conviction that is final and conclusive and not a conviction that is being impeached or still liable to be impeached by way of appeal or revision or other mode known to law. While referring to the decision of the Supreme Court in *Dalip Kumar Sharma and Ors. v. State of Madhya Pradesh*, learned counsel for the petitioner argued that a conviction that is defeasible or capable of being, or liable to be voided, annulled or undone by way of appeal or revision or other judicial process known to law, is clearly and wholly outside the purview of the said expression. Thus, the Medical Council acquires no jurisdiction to remove the name of the

medical practitioner from the Medical Register of the State Medical Council under Section 23(2) of the PNDT Act, 1994 until the conviction under the PNDT Act becomes final and conclusive whose judgment has already been impeached by the petitioner by filing an appeal which is still pending for consideration in the Court. Hence, the removal of the name of the petitioner from the Medical Register is illegal and void.

- (d) That the State Medical Council acquires jurisdiction to act under Section 23(2) of the PNDT Act only if and when a medical practitioner registered with the Medical Council is convicted by a criminal Court under Section 23(1) of the Act or, alternatively under Sub-section (3) of Section 22 or Section 25 thereof. Unless and until the medical practitioner concerned is convicted under Sub-sections (1) of Section 23, Sub-section (3) of Section 22 or Section 25, no question of the Council acquiring jurisdiction to act against the medical practitioner under Sub-section (2) of Section 23 arises. Chapter VII of the Act comprising Sections 22 to 28 and titled "Offences and Penalties" deals exclusively with offences, conviction and punishment there for under the Act. No other part or provision of the Act provides for offences and conviction or punishment there for. The only offences under the Act are those prescribed in Sub-section (3) of Section 22, Sub-section (1) and (3) of Section 23 and Section 25. Conviction for any or more of such offences is an indispensable sine qua non for action by the State Medical Council under Sub-section (2) of Section 23. In absence of such conviction, any action by the State Medical Council purporting to act under Section 23(2) would be wholly and indubitably *coram non iudice*, without jurisdiction and a nullity for that reason.

Since the petitioner was neither prosecuted nor charged nor convicted for any of the aforesaid offences under the Act, there being no other offence created or prescribed under the PNDT Act, the order dated 7-11-2005 passed by the Medical Council is a complete nullity in law. The provisions of Section 5 and Rules 9 and 10 (under which alone the petitioner was convicted by the trial Court) do not constitute offences in themselves, apart from and independently of Section 23(1) of the PNDT Act.

7. Learned Counsel for the petitioner submitted that in case the contention of the petitioner raised in ground (a) is accepted and it is held that the name of the petitioner cannot be removed from the State Medical Register for a period of more than two years, as the date of occurrence was 9-7-2002, in view of the provisions of Section 23(2) of the PNDT Act, 1994 existing prior to the amendment made by Act No. 14 of 2003, i.e. w.e.f. 14-2-2003, then this Court need not (o con sider and decide the contentions raised in grounds (b) to (d), referred to above, as the petitioner has already undergone two years penalty.
8. On the other hand, Shri B.S. Walia, learned Counsel for the Medical Council argued that the protection provided under Article 20(1) of the Constitution of India would not be available to the petitioner. According to him, the said protection is available only in respect of the criminal offences punishable under Section 23(1) of the PNDT Act, 1994 which provides for punishment by way of imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees etc. Learned Counsel further argued that by the Amending Act no change has been made in Sub-section 23(1) of the PNDT Act nor the petitioner has been imprisoned for his conviction as he was released on probation. He submits that the penalty provided under Sub-section (2) of Section 23 of the said Act is not the punishment for conviction as contemplated under Article 20(1) of the Constitution of India. Therefore, he submits that the amended provisions of Section 23(2) of the PNDT Act which provide for enhancement of period of removal of the name of a medical practitioner from the Medical Register for a period of five years for the first offence and permanently for the subsequent offence is the ensuing civil consequences in distinction to the penal consequences for the conviction under Section 23(1) of the said Act. Therefore, if by the amendment the period of removal has been extended from two years to five years, it makes no difference and the name of the petitioner has been rightly removed from the Medical Register for a period of five years on the basis of the provisions which were existing on the date of decision. In support of his contention, learned Counsel for respondent Council has relied upon the decision of the Supreme Court in *Hathising Manufacturing Co. Ltd. Ahmedabad and Anr. v. Union of India and Anr.*

Besides this contention, learned Counsel for the respondent has also controverted the other arguments raised by the learned Counsel for the petitioner.

9. After considering the arguments raised by the learned Counsel for the parties and going through the relevant provisions of the PNDT Act and the Rules made there under, and Article 20(1) of the Constitution of India as also considering the judgments referred during the course of arguments and other relevant judgments, we are of the opinion that the removal of the name of the petitioner from the State Medical Register for a period of five years following his conviction for the offences under the PNDT Act allegedly committed by him on 9-7-2002, is illegal and unconstitutional and the same is squarely hit by the inviolable constitutional prohibition against retrospective or ex post facto action imposed by Article 20(1) of the Constitution of India.
10. Undisputedly, the alleged offence under the PNDT Act and Rules made thereunder was committed on 9-7-2002 for which the petitioner has been convicted under Section 23(1) and released on probation vide judgment dated September 24, 2004, and subsequently a penalty for removal of his name for a period of five years from the Medical Register has been imposed under Section 23(2) of the PNDT Act vide order dated 7-11-2005. It is also not disputed that at the time of commission of the alleged offence, the unamended Section 23(2) of the PNDT Act provides that the name of the registered medical practitioner who has been convicted by the Court under Sub-section (1), could be removed by the State Medical Council for a period of two years for the first offence and permanently for the subsequent offence. The said provision was amended by PNDT Amendment Act, 2002 (Act No. 14 of 2003) notified w.e.f. 14-2-2003. The amended provisions have enhanced the period of penalty for removal of the name of a medical practitioner from two years to five years w.e.f. 14-2-2003. Undisputedly, the said amendment was prospective and not retrospective.
11. In view of these facts, it is to be determined whether removal of the name of the petitioner from the State Medical Register for a period of five years by the Medical Council is in violation of Article 20(1) of the Constitution of India which provides as under:
 20. Protection In respect of conviction for offences,--(1) No person shall be convicted of any offence except for violation of a law In force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
12. The argument of the learned Counsel for the petitioner is that Section 23 of the PNDT Act, 1994 provides for the offences and the penalties under the said Act, This Section imposes two types of penalties for the contravention of any provisions of the PNDT Act and the Rules made thereunder, Sub-section (1) of Section 21 of the said Act provides that If a registered medical practitioner contravenes any provisions of the Act or Rules made thereunder, he shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees, and Sub-section (2) further provides that the name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council on conviction for removal of his name from the Medical Register of the Council for a period of five years for the first offence and permanently for the subsequent offence. Learned Counsel submitted that the removal of the name of the medical practitioner from the Register of the Medical Council on his conviction under the PNDT Act is also a penalty which attracts the rigour of Article 20 of the Constitution of India.
13. On the other hand, it is the contention of the learned Counsel for the respondent-Council that the removal of the name of the medical practitioner on his conviction under Section 23(2) of the PNDT Act and the Rules made thereunder is not a punishment or penalty but it is a civil consequence which a medical practitioner would suffer on his conviction under the Act. Therefore, the protection of Article 20(1) of the Constitution of India will not be available to the petitioner and removal of his name for a period of five years on his conviction under the Act on the basis of the amended provisions is absolutely legal and valid.
14. The aforesaid contention of the learned Counsel for the respondent-Council cannot be accepted. In our opinion, the removal of the name of the medical practitioner under Section 23 (2) of PNDT Act following his conviction for the offences under the said Act and the Rules made thereunder for a particular period is also

a penalty provided under the said Act, If various provisions of the PNDT Act are examined, it appears that Chapter VII of the Act deals with offences and penalties under the PNDT Act. The whole of Section 23 is a penal provision, attracting the rigour of Article 20 of the Constitution as is apparent from the title of Section 23 itself i.e. Offences and Penalties.

15. It is well settled that the law which imposes additional punishment to that prescribed when a criminal act was committed is *ex post facto* and a change in law that alters a substantial right can be *ex post facto* even if the statute takes a seemingly procedural form. It is the duty of the Court to interpret the penal laws in a manner that they do not have *ex-post-facto* operation. The provision contained in Article 20 of the Constitution also recognises principles laid down under Article 11(2) of the Declaration of Human Rights of the United Nations and Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which lay down as under:
 - 11 (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be Imposed than the one that was applicable at the time the penal offence was committed.
 - 7(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
 - (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.
16. The Supreme Court in *People's Union for Civil Liberties v. Union of India* has recognised the principle that in view of the fact that India is a member of the United Nations Organisation and is also a signatory to the aforesaid conventions, it is almost an accepted proposition of law that rules of customary international law shall be deemed to be incorporated in the domestic law. It is also well settled that Article 20 of the Constitution is the most precious fundamental right which relates to the personal liberty of a person which should be given liberal interpretation. Under Clause (1) of Article 20 of the Constitution, the protection available is not only against conviction for an act or omission which was not an offence under the law in force when the same was committed, it is also against infliction of a greater penalty than what was provided under the law in force when the offence was committed. Recently a question came up for consideration before the Supreme Court in *Transmission Corporation of A.P. v. Ch. Prabhakar and Ors.*, whether the constitutional guarantee enshrined in Article 20(1) was confined only to prohibition against conviction for any offence except for violation of law in force at the time of the commission of the act charged as an offence and subjection to a penalty greater than that which might have been inflicted under the law in force at the time of commission of offence or it also prohibited legislation which aggravated the degree of crime or made it possible for the accused to receive greater punishment even though It was also possible for him to receive the same punishment under the new law as could have been Imposed under the prior law or deprived the accused of any substantial right or Immunity possessed at the time of the commission of the offence charged, is a moot point to be debated. The said question of law has been referred to the larger Bench for consideration.
17. As far as it is undisputed that there is no conflict to the proposition that Clause (1) of Article 20 of the Constitution prohibits Imposition of greater penalty for a prohibited act which might have been inflicted under the law in force at the time of commission of offence. In the present case, Section 23 of the PNDT Act provides for the penalties and offences committed under the Act. Sub-section (1) of Section 23 of the said Act provides that whosoever contravenes any of the provisions of this Act and the Rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees. Sub-section (2) of the said Section provides that the name of the registered

medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for removal of his name from the Register of the Council for a period of five years for the first offence and permanently for the subsequent offence. In our opinion, the removal of the name of a medical practitioner from the Register of the Medical Council for a period of five years (before the amendment of two years) on his first conviction is in the nature of penalty imposed on him, due to his conviction under the Act. Sub-section (2) of Section 23 does not give any discretion to the medical authorities. Once the factum regarding his conviction is reported to the Medical Council, the removal of the name of the medical practitioner from the Register of the Medical Council for five years (or for two years before Amendment) is mandatory. There is no discretion with the authorities to impose the penalty for a lesser period. Therefore, the removal of his name from the State Medical Register on his conviction under the PNDT Act, 1994 is directly and automatically flowing from his conviction under the same provisions i.e. Section 23(2) of the PNDT Act, because under the said Sub-section the word “shall” has been used and not the word “may”. In our opinion, it can be said that the provisions of Sub-sections (2) and (3) of Section 23 are not penal provisions, but are provisions which provide for civil consequences. Since both the sub-sections are part and parcel which provide penalty for the alleged offence, in our opinion, the whole of Section 23 of the PNDT Act is a penal provision which attracts the rigour of Article 20 of the Constitution of India.

18. From the reading of Article 20(1) of the Constitution of India, it is clear that in the said Article the word “penalty” has been used and not the “sentence/imprisonment”. Merely because Sub-section (1) of Section 23 of the PNDT Act deals with sentence/imprisonment to be imposed and Sub-section (2) of the said Section deals with the removal of the name of a medical practitioner from the State Medical Register on his conviction, does not make any difference. In both the situations, a penalty is provided which is to be imposed upon a person who has been convicted for the offences under the said Act. For an offence, there can be two penalties, one in the shape of imprisonment and the other in a different shape which in the present case is the removal of the name of a medical practitioner from the State Medical Register on his conviction. In our opinion, both the penalties are subjected to rigour of Article 20 of the Constitution. Therefore, the name of the petitioner could not have been removed from the State Medical Register as a penalty on his conviction under Section 23(2) of the PNDT Act for more than the period which was prescribed in the statute at the time of the alleged commission of the offence.
19. In our opinion, the judgment cited by the learned Counsel for the respondent-Council in Hathising Manufacturing Co. Ltd. Ahmedabad’s case AIR 1960 SC 923 (supra) in support of his contention that the removal of the name of a medical practitioner from the State Medical Register on his conviction under the PNDT Act is not a punishment or a penalty, but is only a civil consequence which has flown from his conviction, is not applicable in the facts and circumstances of the present case. In that judgment, the insertion of Section 25-FFF of the Industrial Disputes Act by an amendment was challenged on the ground that it also violates Article 20(1) of the Constitution of India. In that case, it was held that the law which creates a civil liability in respect of a transaction which has taken place before the date on which the Act was enacted, does not violate the mandate of the said Article. The Supreme Court came to the conclusion that the said Section imposes civil liability to pay compensation for closure prior to the Act and non-compliance was not made an offence, therefore, the same does not attract Article 20(1) of the Constitution. In this regard, following observation has been made:

It is true that the Amending Act which has introduced Section 25-FFF was passed in June 1957, and liability to pay compensation arises in respect of all undertakings closed on or after November 28, 1956. But, if liability to pay compensation is not a condition precedent to closure, by failing to discharge the liability to pay compensation and wages in lieu of notice, the employer does not contravene Section 25-FFF (1). If the statute fixes criminal liability for contravention of the prohibition or the command which is made applicable to transactions which have taken place before the date of its enactment the protection of Article 20(1) may be attracted. But Section 25-FFF (1) imposes neither a prohibition nor a command. Undoubtedly for failure to discharge liability to pay compensation, a person may be imprisoned, under the statute providing for recovery of the amount e.g. the Bombay Land Revenue Code, but failure to discharge a civil liability is not, unless

the statute expressly so provides, an offence. The protection of Article 20(1) avails only against punishment for an act which is treated as an offence, which when done was not an offence. It is therefore not attracted to Section 25FFF.

20. In our opinion, the aforesaid observations are not applicable in the present case. It has been clearly observed that If the statute fixes criminal liability for contravention of the prohibition or the command which is made applicable to transactions which have taken place before the date of Its enactment, the protection of Article 20(1) of the Constitution may be attracted, but Section 25-FFF (1) neither Imposes a prohibition nor a command. In the instant ease Sub-section (2) of Section 23 of the PNDT Act clearly Imposes a penalty of removal of the name of a medical practitioner from the State Medical Register in case he is convicted for violating the provisions of the PNDT Act. Therefore, it attracts the rigour of Article 20(1) of the Constitution of India. Since we have decided the ground (a) in favour of the petitioner, therefore, in view of the stand taken by the learned Counsel for the petitioner, we are not deciding the other contentions raised by him.
21. In view of the aforesaid discussion, this petition is partly allowed and the impugned order dated 7-11-2005 and the subsequent order passed by the Medical Council is modified and penalty of removal of the name of the petitioner from the State Medical Registrar is reduced to two years from five years.

5 (2)

**IN THE COURT OF SHRI JAGJIT SINGH, HCS,
SUB DIVISIONAL JUDICIAL MAGISTRATE: PALWAL:
DISTRICT – FARIDABAD, HARYANA.
CASE NO. RBT – 298/2 OF 2001
DATE OF INSTT: 5.11.2001/20.7.2004
DATE OF DECISION: 28.3.2006**

State through District Appropriate Authority cum Civil Surgeon, Faridabad.

Versus

- 1. DDr. Anil Sabhani, Prop. M/s. Dr. Anil's Ultra Sound Opp G.H. Palwal, Faridabad,*
- 2. Sh. Kartar Singh Son of Sh. Lakhi Singh, Technician M/s. Dr. Anil Ultrasound, Opp G.H. Palwal, Faridabad, Resident of V.P.O. Maheshpur, District Faridabad.*
- 3. M/s. Dr. Anil Ultrasound, Opp. G.H. Palwal, Faridabad (H) through Dr. Anil Sabhani*

**COMPLAINT UNDER PRE NATAL DIAGNOSTIC
TECHNIQUE (REGULATION AND PREVENTION OF
MISUSE) ACT. 1994 AND RULES, 1996.**

Present : A.P.P. for the State / Complaint.

Both accused on bail with Sh. R.A. Gupta, Advocate.

CASE SUMMARY

The PCPNDT Act is a recent piece of legislation. Further, as observed by the Apex Court and various High Courts, there has been total in-action, apathy and lack of interest on the part of the Government in implementing the provisions of the Act. Hence, there are very few cases registered for violating the provisions of the Act. Out of these also, very few have reached a logical conclusion, even at the trial stage.

The below mentioned case is one of the first of its kind of cases in which conviction for violation of various provisions and the rules under the Act was recorded and it was followed by a deterrent punishment.

This case was registered on the complaint of the District Appropriate Authority cum Civil Surgeon Faridabad as on the basis of three decoy patients sent to the ultrasound centre of the accused, it was established that accused No. 1 and 2 were indulging in the illegal act of sex determination and violating the provisions of the Act and the Rules framed thereunder. Hence with the help of the Task Force and three pregnant women acting as decoy patients by name, Mrs. Santosh, Mrs. Raveeta and Mrs. Madhu, a sting operation was conducted at the ultrasound centre and accused No. 1 and 2 were nabbed red handed while performing ultrasonography on a pregnant women and disclosing the sex of the foetus. The marked currency notes and the record of ultrasonography test were seized from their possession. Both the accused had admitted in their handwriting that they had charged Rs. 300/- plus Rs. 1200/- for sex determination of Mrs. Madhu and had only made entry of Rs. 300/-. They had further admitted in writing about not issuance of any receipt of cash to the patient - Mrs. Madhu and of accepting the money for conveying sex of the foetus to her. Both the accused were therefore taken into custody and charged for contravening provisions of Section 6 (a) and 6 (b) of the Act. When a sting operation was conducted at their clinic it was found that the accused were conducting PNDT procedures in violation of Section 5 (1) and 5 (2) of the Act and using ultrasound for revealing sex of the unborn foetus in violation of Section 4 (1) (2) (3) of the Act and also failing to maintain proper records of the ultrasound centre and contravening the provisions of Section 29 r/w Rule 9 and Form-F under PNDT Act Rules and all the offences punishable u/s 23 of the Act.

As both the accused pleaded not guilty, prosecution examined 9 witnesses and proved the incident of sending decoy patients for examination and of conducting the raid by the Task Force. Prosecution also relied upon various documentary evidences. In defense, accused examined 3 witnesses namely, decoy patients Mrs. Madhu, Mrs. Santosh and Santosh's husband Mr. Sohan Pal. All of them disowned the statements recorded by the Appropriate Authority and denied the occurrence of any such incident. Several contentions were raised by the accused to challenge the prosecution case, which were dealt with by the court one by one and with sound reasoning they were rejected. The Court found both the accused guilty for commission of all the offences alleged against them and sentenced them to undergo S. I. for 2 years and to pay fine of Rs. 5000/- each, in default to suffer further S. I. for 3 months.

There are several plus points of the judgment which must be acknowledged and appreciated.

In the entire judgment the Court has consciously placed emphasis upon the Object and Reasons of the Act, the circumstances under which it was brought into existence and expressed concern for the continuously declining sex ratio due to the rampant misuse of scientific diagnostic techniques. What was more important was that the Court did not stop merely at expressing its concern but also handled the case in a very pragmatic and sensitive manner while appreciating evidence. In the end the Court by condemning the acts of the accused imposed deterrent punishment on the accused so that no one indulges in such a heinous crime.

While appreciating the evidence on record the Court has, being aware of the different and typical nature of the case ignored minor contradictions pointed out by defence counsel in the statements of witnesses. The defence tried to cash in on the fact that there were inconsistencies in the evidence of prosecution witnesses with respect to the presence of Appropriate Authority along with the team conducting the sting operation. The Court held that the said fact was not of much importance as Appropriate Authority was not the sole witness on which the case is based and hence it does not affect the merits of the case.

The court also rejected the defence argument about absence of any written complaint against accused, by observing that when there were several oral complaints against the accused of violating the provisions of the Act, Appropriate Authority was not required to wait for written complaint and then to take action; on the contrary Appropriate Authority was bound, competent and was correct in investigating the oral complaints also. (Para 24-b)

The Court then placed reliance on the statements of the accused recorded by Appropriate Authority at the time of the sting operation. As per defence counsel, Appropriate Authority had no right to obtain such statements and the said statements being confessional in nature, cannot be used against the accused. However observing that these statements are in the handwriting of accused and were contemporaneous and corroborative piece of circumstantial evidence, the Court relied upon them to prove the guilt of accused.

The Court rejected defence argument about non joining of independent witnesses from the place at which the sting operation was conducted, by holding that it was not very material in the present case as the team had earlier taken precaution of including in its team Dr. Mini Vora who was not a doctor working for Government, but in fact a private doctor and was the Secretary of the Indian Medical Association, Faridabad. (Para 24-b)

The Court also appreciated the efforts taken by the prosecution team in bringing the accused to the book although the case was first of its kind, registered way back in 2001, and the Appropriate Authority had never played the role of an investigating agency like police. Even then they had completed the investigation to the best of their knowledge and capability.

At the same time the court has also brought to notice that, Appropriate Authority and his team, who had done a lot of hard work in preparation and subsequent sting at the clinic of the accused, did not show the same zeal at the time of conducting the trial. One of the reasons for the court to make such an observation was that no necessary steps were taken by the prosecution to prove the evidence of conversation between the accused, Mrs. Madhu, the witness and doctor Keval kumar inside the clinic which was recorded on a tape though it was an important piece of evidence and would have added weightage to the prosecution case. Secondly, though the witness list of prosecution was of 18 witnesses, prosecution was able to examine only 9 witnesses despite sufficient opportunity being granted by the court and despite the fact that the presence of some more witnesses would have further helped the prosecution. (Para 24-C)

The best part of the judgment is the appreciation of the evidence of 3 defence witnesses, who were initially the witnesses for prosecution but at the time of trial, were examined by the accused as their witnesses. This appreciation of evidence was done in a proper and sensitive manner.. The Court understood and put on record the circumstances under which these three witnesses came to depose in favour of the defence instead of prosecution. The evidence of the two defence witnesses namely, Mrs. Santosh and Mrs. Madhu was very vital for prosecution as they were decoy patients and were also present at the time of the sting operation, however in evidence they denied everything and stated that they were induced by the task force members to accompany them and to raise false alarm. Their becoming hostile was fatal to the prosecution case. However only because of proper

appreciation of their evidence, prosecution could get over this obstacle in reaching to conviction of the accused who had made every effort to escape from the clutches of law, even to the extent of winning over crucial prosecution witnesses. (Para 24-C)

The Court has in this respect brought to the notice of the prosecution the need to take care of such witnesses who by going against all odds tried to help prosecution with its case but then they were not cared for by the prosecution and hence became easy prey for the accused to use them as their witnesses instead of the witnesses of the task force members.

In a nutshell, this judgment excels in all respects and is a major victory for prosecution. It shows that if there is genuine interest and hard work, accompanied with sincere efforts, the laudable Object of the Act can be achieved with success.

JUDGMENT

1. The present case was initially filed as a complaint by the District Appropriate Authority cum- Civil Surgeon, Faridabad against accused on the grounds that the complainant has been appointed as the 'Appropriate Authority' under 17 (2) of the Pre Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred as 'PNDT Act') vide Haryana Govt. Gazette Notification No:1/19/88 2 HB II 97 dated 18.09.1997 for the district and is presently posted as Civil Surgeon District Faridabad, that M/s. Dr. Anil Ultrasound Centre, situated Opp. G.H. Palwal, Faridabad is a registered genetic clinic under Section 3 of the Pre Natal Diagnostic Techniques Act 1994 and Rule 1996 having registration No. 12 granted on 9.8.2001.
2. It was further submitted that on 11.10.01 the complainant directed Dr. C.Paul, SMO, Incharge G.H. Ballabgrah cum Team Incharge PNDT to conduct raid along with PNDT team members Dr. Rekha Mishra and Dr. Kewal Kumar visited Palwal on 2.10.2001 with decoy patient Mrs. Santosh and her husband Sohal Pal and Dr. Anil conveyed to her about female foetus after performing ultrasonography and charged Rs.1350/-. Again the team visited him on 5.10.2001 with a new patient Raveeta wife of Shiv Kumar, who was told about breach foetus by Dr. Anil. Again Dr. C. Paul and Dr. Rekha visited Palwal on 8.10.2001 along with patient Raveeta for her foetus's sex determination and Dr. Anil Sabhani after performing ultrasound told her about male foetus and charged Rs. 1200/-. On 1.10.2001 Hemwati wife of Narender also visited Dr. Anil Sabhani and got ultrasound of her foetus without any referral slip and consent letter of the patient. The three pregnant women were identified by Dr. C. Paul, who got ready voluntarily to pose as decoy patients and extend all possible help to the complainant's team and agreed to work on humanitarian grounds keeping in view the decreasing sex ratio in the country particularly in Haryana.
3. Since from the visits of the above persons, it was established that Dr. Anil Sabhani had indulged in illegal unethical and unsocial act of determination of sex of foetus of pregnant women with ulterior motive and was violating the provisions of PNDT Act. It was decided that a Task force be prepared to nab the accused while doing ultrasonography on pregnant woman and catch him red handed. In pursuance to this on 11.10.2001 the complainant visited Palwal along with three decoy volunteer patients and their attendants along with the team members and Dr. Mini Vohra, Sh. Bijender Ahlawat and Sh. Sanjay with Video Camera. Dr. C. Paul sent one of his team MEMBER Dr. Kewal Kumar with decoy patient Mrs. Madhu and Dr. Kewal Kumar posed as her attendant and they went to Dr. Anil Ultrasound Centre for getting her foetus's sex determination. Dr. C. Paul put his signatures on three currency notes of five hundred denomination each and three currency notes of one hundred denomination each in the presence of the members of the inspection team and these currency notes were given to Dr. Kewal Kumar for use at the Ultrasound center. Dr. Kewal Kumar with a hidden tape recorder visited Dr. Anil's ultrasound center with Mrs. Madhu while other members stayed out side waiting for signal from Dr. Kewal Kumar. Dr. Kewal Kumar paid Rs.300/- to accused Kartar Singh as charges for

routine normal ultrasound and in the presence of Dr. Kewal Kumar while Dr. Anil Sabhani performing routine ultrasound on Mrs. Madhu he asked her about her children and suggested her that he could also tell the sex of her foetus, if she makes an additional payment of Rs. 1200/- to him for this purpose. The decoy patient Mrs. Madhu accepted the suggestion of Dr. Anil stating that she already had two daughters. Rs.1200/- was paid by Dr. Kewal Kumar to accused Kartar Singh, who returned Rs.300/- to Dr. Kewal. Dr. Anil Sabhani performed ultrasonography on Mrs. Madhu without any referral slip and without any written consent of the patient and conveyed to her the sex of foetus as female orally. No. receipt for payment or any written report of sex determination was issued by the accused. However, a routine ultrasound report card was prepared.

4. After this on receiving information from Dr. Kewal Kumar, the entire team consisting of Dr. C.Paul, Dr. Mini Vohra, Dr. Rekha Mishra, Dr. Sneha Lata, Sh.G.L. Singhal, Sh. Praveen Arora, Biologist, Dr. Sanjeev Bhagat, M.D. and Dr. B.S. Sharma, MO reached ultrasound center accompanied by video camera of Sanjay and Bijender Ahlawat press correspondent. The team gave its introduction and directed Dr. Anil Sabhani to produce the record of ultrasonography and he produced some files and registers, which were taken into custody. Dr. Anil Sabhani admitted having conducted ultrasonography on Mrs. Madhu on 11.10.2001. On Hemwati on 1.10.2001, and on Raveeta on 5.10.2001, but the name of none of these patients were found in his ultrasound register. Their names were however entered in a note book maintained by accused Kartar Singh meant for recording of miscellaneous ultrasound. Both accused admitted in writing before the team that they had charged Rs.300/- plus Rs.1200/- for sex determination of Mrs. Madhu and had only made an entry for Rs.300/-. Accused Dr. Anil Sabhani also could not produce any referral slip and consent letter for performing ultrasonography on these patients. Statement of Mrs. Madhu who was conveyed sex of here foetus as female by the accused was also recorded who deposed about giving signed currency notes of Rs.500/- and of Rs. 100/- to accused No. 2 and in the presence of the inspection team these currency notes were recovered from accused Kartar Singh, who also admitted in writing about having received this amount. Both the accused also admitted in writing about not issuing any written receipt of cash to the patient and Dr. Anil Sabhani agreed to have accepted the money from the patient and having conveyed sex of foetus to her. Seized currency notes were put in an envelop and were sealed and were signed and were signed by the members of the inspection team and by the accused. The entire process of raid was recorded and the inspection report was prepared and the SMO, Incharge Ballabgarh cum Team Incharge of PNDT task force submitted his report dated 11.10.2001 to the complainant informing him about nabbing of Dr. Anil Sabhani red handed while performing ultrasonography on pregnant women disclosing the sex of the foetus.
5. Vide letter of the complainant dated 12.10.2001 the registration granted to Dr. Anil Sabhani ultrasound center was suspended and Dr. Anil Sabhani vide letter dated 12.10.2001 was asked to produced record of ultrasonography prior to 1.10.2001 for purpose of inspection which were not produced by him. Complainant vide letter dated 15.10.2001 issued show cause notice to both the accused, but no reply was received from any of the accused till filing of the complaint and no records were produced by the accused. On perusal of the records seized, it was observed that accused had performed ultrasonography on the basis of referral slips issued by persons who are not qualified doctors under the PNDT Act and therefore, not authorized to issue or advise ultrasonography to the patients and it seemed that a nexus was operating between the accused and other unqualified doctors and persons who referred patients for ultrasonography to his clinic for some ulterior motive. It was further submitted that accused were engaged in sex determination of foetus at their ultrasound center and were not maintaining any record and records maintained was incomplete and by not maintaining the record the ulterior motive of the accused became clear and thus when female ratio was decreasing in the country, the accused were indulging in serious crime despite being in the knowledge that it is immoral, unethical and amounts to an offence and thus the accused contravened the various provisions of the PNDT Act and Rules 1996 and therefore, the present complaint was filed for summoning the accused and punishing them.
6. On filing of the complaint, vide order dated 12.02.2002, the court ordered the summoning of the accused as the present complaint was made by a public servant in the discharge of his duty and there was no necessity of recording evidence in terms of section 200 Cr. P.C. The accused were summoned for offence punishable

under section 23 of the PNDT Act.

7. Accused in pursuance of the summons and warrants appeared before the court and the complainant was asked to lead its pre charge evidence.
8. In pre charge evidence, the complainants led their evidence and on the basis of the same charge against the accused for the commission of offence, punishable under Section 23 of the PNDT Act was framed vide order dated 23.3.2005, to which they pleaded not guilty and claimed trial.
9. In its entire oral evidence, prosecution examined PW 1 Dr. B.S. Dahiya, Director General Health, PW 2 Dr. G. Paul, Deputy CMO, Faridabad, PW 3 Dr. Rekha, PW 4 Dr. Snehalata, PW 5 Dr. Kewal Kumar, PW 6 Dr. Parveen Kumar Arora, Biologist, PW 7 Dr. B.S. Sharma, PW 8 Dr. Mini Vohra, Pw 9 Girdhari Lal Singhal and in documentary evidence, the prosecution placed reliance upon the following documents :-
 - Ex. PW 1/A: Complaint
 - Ex. PW 2/A: Inspection note;
 - Ex. PW 2/B: Form of inspection;
 - Ex. PW 2/C: Ultrasound report card;
 - Ex. PW 2/D: Register
 - Ex. PW 2/E: Sealed envelop; containing currency notes;
 - Ex. PW 2/F: Statement of Mrs. Santosh;
 - Ex. PW 2/G: Statement of Mrs. Madhu
 - Ex. PW 2/H: Spot memo dated 8.10.2001
 - Ex. PW 2/I: Receipt of documents taken into custody;
 - Ex. PW 3/A: Spot Memo
 - Ex. PW 3/B: Written admission of sonography;
 - Ex. PW 2/A: Statement of Sohan Pal
 - Mark A: envelope containing video cassette
 - Mark B: envelope containing tape recorder cassette
 - Mark A: Photocopy of list of patients;
 - Ex. PW 9/A: Receipt of documents taken into custody;
10. The point of determination in this case was whether the prosecution has successfully proved that the accused in a raid conducted at their ultrasound center were found conducting sex determination of foetus and were found not explaining the side effect by not obtaining written consent and was communicating to the patients the sex of foetus by words and signs and used ultrasound center for conducting sex determination and conducted the same in violation of the provisions of the Act and also failed to maintain proper record of the ultrasound center and contravening the various provisions of the Act.
11. To prove the point of determination PW1 complainant I stepped into the witness box and deposed about being posted as Civil Surgeon and Appropriate Authority, Faridabad in October, 2001 and having filed the complaint Ex. PW. 1/A. He also deposed that on 11.10.2001 he had authorized Dr. C. Paul along with other members to conduct a raid at the Sabhani Clinic Ultrasound Centre of accused Anil Sabhani, who is also a radiologist. He further deposed that this center was registered under the PNDT Act without any office. He further deposed that after the raid was conducted the matter was reported to him on the basis of which, he filed the present complaint.

It was further deposed by the witness that during the investigation by the team, it was found that accused Dr. Anil Sabhani had conducted sex determination upon one Madhu and had also disclosed the sex of the foetus being female in the womb and this was in utter violation of the PNDT Act and Rules and there was neither any consent nor receipt given by the accused. It was further deposed that prior to this raid earlier also accused Dr. Anil Sabhani conducted ultrasonography on one Santosh on 2.10.2001 and already there is fall of the male/female sex ratio due to illegal sex determination and followed by illegal abortions when the foetus is disclosed as female by the accused like persons.

PW 2 deposed that on 11.10.2001 he was directed by the then Civil Surgeon, Faridabad to inspect and check the ultrasound center of the accused and he along with his team members and three decoy patients Mrs. Madhu, Mrs. Santosh and Mrs. Raveeta came to Palwal. The witness sent Dr. Kewal Kumar along with decoy patients as attendant of Madhu to ultrasound center for ultrasonography and he was also directed to give a signal to the witness, if the accused Dr. Anil Sabhani does the sex determination of foetus of Madhu. On getting the hint the witness with his team went inside the center and came to know that the accused had done sex determination of foetus of Madhu.

On the request of witness the accused Dr. Anil Sabhani showed the relevant record and when asked as to whether he had done sex determination, he refused, but on cross questioning of the decoy customer and his technician in presence of the team members and on hearing his voice from the tape recorder and on seeing the currency notes recovered from his technician which he had accepted as money for doing the sex determination, accused Dr. Anil Sabhani accepted his offence. A spot memo was prepared at the spot and also an inspection note. The records relating to the patients coming for ultrasound which contained names of the patients were also taken into custody. The video and Audio cassettes were prepared at the spot and the currency notes which were given to the technician co accused were put in an envelope, which is Ex.PW.2/E. On the same day the witness recorded the statements of both the accused with Dr. Kewal Kumar under the guidance of the District Appropriate Authority along with decoy patient went to Palwal and to the ultrasound center of accused Dr. Anil Sabhani for a routine ultrasound. Accused Dr. Anil Sabhani prompted the patient to know the sex of foetus and demanded Rs. 1200/- without giving any receipt or report he declared the foetus as female. Again on 5.10.2001 the witness and Dr. C. Paul came with decoy patient Raveeta to get her ultrasound done and were asked to come on 8.10.2001. On 8.10.2001 the witness along with Dr. Kewal Kumar and patients Raveeta and Santosh came to Palwal and the patient went to Sabhani ultrasound center and Dr. Anil Sabhani detected Raveeta foetus as male. On 11.10.2001 the whole team along with District Appropriate Authority came to Palwal to nab the accused red handed. Dr. Kewal Kumar along with patients Madhu and currency notes signed by Dr. C. Paul entered in the clinic of the accused and asked Dr. Anil Sabhani to do the ultrasound of patient Madhu. Dr. Anil prompted patient Madhu to know the sex of the foetus and asked for extra amount of Rs.1200/- to disclose the foetus and she was told that it was a female foetus. The team members along with the District Appropriate Authority and Dr. C. Paul reached the clinic in the presence of the Indian Medical Association, Zonal Secretary and correspondent of the Press and accused had confessed about conducting the sex determination of foetus and the proceedings were recorded on a video. Later on statements of Mrs. Santosh, Mrs. Madhu and Mrs. Raveeta were recorded, which is Ex. PW 2/F, Ex. PW 2/G. Both the accused also made their statements Ex. PW. 3/B regarding conducting sex determination of foetus and Ex. PW 2/E is the envelope which contained currency notes recovered from accused Kartar Singh, which were accepted by him as fees for sex determination.

PW 4 deposed that she was a member of the raiding party on 11.10.2001 and visited Palwal along with team members. Dr. Kewal Kumar along with decoy patient Mrs. Madhu visited the hospital of the accused while witness and others stood outside the clinic. Dr. Kewal Kumar gave a signal to them and they reached inside and Mrs. Madhu told them that Dr. Anil Sabhani had told her with respect to the foetus of her as female. In the presence of the witness the currency notes were recovered from accused Kartar Singh and confessional statements of the accused Ex. PW.3/ B was recorded in her presence and bears her signatures.

PW 5 deposed that on 2.10.2001 he along with Dr. Rekha and patient Mrs. Santosh wife of Sohan Pal went to clinic of Dr. Anil Sabhani to get her ultrasound done. The patient was disclosed about her foetus as female and Rs.1350/- were charged from her. On 5.10.2001 he along with Dr. Rekha and patient Raveeta wife of Shiv Kumar went to Palwal and got her ultrasound conducted at Dr. Anil ultrasound Centre and she was disclosed as breech foetus. On 11.10.2001 he along with the District Appropriate Authority and the whole team reached Palwal where Patient Machu and two other patients were also present. He was given Rs.1800/- signed by Dr. C.Paul and they he along with patient Madhu went to Dr. Anil Ultrasound Centre posing himself as her attendant and he got ultrasound of Mrs. Madhu done in normal routine for which paid Rs.300/-. After that Dr. Anil Sabhani asked about the children of Madhu, who told about having two daughters. Dr. Anil Sabhani then instigated her whether she wanted to know the sex of her child and Mrs. Madhu asked the witness to deposit the amount, who deposited the same with accused Kartar Singh in the form of three 500/- notes and accused Kartar Singh returned Rs. 300/- to the witness. After that Dr. Anil accused told that Madhu is having a female foetus and this conversation between the witness, patient Madhu and Dr. Anil was recorded by the witness in a hidden tape recorder. After this a signal was given to the team standing outside and the team members entered ultrasound center of accused Dr. Anil and recorded the statement and checked the record. Dr. Anil confessed in presence of all the team members that he had done sex determination of foetus of patient Madhu. Video film prepared at the spot and spot memo was also prepared and three currency notes of Rs. 500/- each were also recovered from accused Kartar Singh, which are in envelop Ex. PW.2/E.

PW6 deposed that on 11.10.2001 he was a member of the raiding team which included Dr. Rekha, Dr. C. Paul, Dr. Kewal Kumar and Dr. C. Paul went inside and he was told that on receiving a signal he should come inside. When the ultrasonography was done inside the witness along with other team members went inside and the record of ultrasound center was taken into custody and a spot memo was prepared and three currency notes of Rs.500/- each were recovered from accused Kartar Singh. Some registers and books of the accused were also taken into custody.

PW 7 deposed that on 11.10.2001 at about 11:00 A.M. as per the orders of Dr. B.S. Dahiya Civil Surgeon, Faridabad, he was a members of Team of Dr. C. Paul made under the PNDT Act for raiding the ultrasound center. As per their programme Dr. Kewal Kumar, Dr. Rekha and patient Mrs. Madhu, who was pregnant went to the ultrasound center of the accused Dr. Anil Sabhani and if accused prompted them for sex determination, a signal was to be given to other team members by Dr. Kewal Kumar. After the sex determination by the accused. Dr. Kewal Kumar gave a signal by coming outside the ultrasound center and on this teammmembers went inside along with Dr. Mini Vohra of the Indian Medical Association and other members. Dr. C. Paul gave his introduction and checked the clinic of the accused. Initially Dr. Anil Sabhani admitted conducting sex determination. Three currency notes of Rs. 500/- each given as fees for sex determination were also recovered from accused Kartar Singh, which were sealed in an envelop which is Ex.PW.2/E. Spot memo was prepared and the records were taken into custody. The inspection note was also prepatated and accused are present in the court and identified by him.

PW 8 deposed that on 11.10.2001 she was present along with Dr.B.S. Dahiya, Dr. C. Paul, Dr. C. Paul was the in-charge of raiding team along with Dr. Rekha Mishra, Dr. Snehlata, Dr. Kewal Kumar and Shri Bijender and they went to raid the ultrasound center as complaints had been received about the accused conducting sex determination of pregnant women. Dr. Kewal Kumar took along with him one decoy patient Mrs. Madhu to get her ultrasonography done. Dr. Kewal Krmar accompanied Mrs. Madhu be attendant and he was charged Rs. 300/- for routine ultrasound. During routine ultrasound Dr. Anil Sabhani prompted them to know the sex of the foetus for which he would only charge Rs.1200/-. On this fees was paid and the accused disclosed them about the female foetus. After this the team members went inside and checked the documents and record maintained by the accused. At serial number 15 on 11.10.2001 the name of patient was mentioned with only Rs.300/- paid whereas Rs.1500/- had been charged by the accused. From the pocket of accused Kartar Singh attendant of accused Dr. Anil Sabhani Rs.1500/- signed currency notes were recovered which he disclosed had been taken for special checkup. Accused Dr. Anil Sabhani in the presence of all the team

members admitted having taken the money for special checkup and to determine the sex of the patient. The admission of the accused is Ex. PW. 3/B and bear the signatures of the witness.

PW 9 deposed that on 11.10.2001 he was posted as ASDC at Faridabad and on the same day along with Dr.C. Paul and his team went to Palwal at Anil Ultrasound Centre where a raid was conducted. Dr. C. Paul was the in-charge of the raiding team consisting of Dr. Rekha Mishra, Dr. Snehlata, Dr. Bhagat, Dr. Praveen Kumar, Dr. Mini Vohra and Bijender Alhawat and others along with a video camera. This raiding team had been prepared on the directions of the Chief Medical Officer Dr. Dahiya. The raid team was prepared as there were complaints about the accused conducting sex determination on pregnant women. Dr.C.Paul gave Rs.1800/- to Dr. Kewal Kumar with his signatures and sent him with decoy patient to the clinic of Dr. Anil Sabhani. After the sex determination conducted by the accused, the team members went inside and introduced themselves and asked accused Dr. Anil Sabhani as to whether he conducted sex determination of patient Madhu and previously of patient Mrs. Raveeta and Mrs. Santosh. The record at the spot was taken into custody and only Rs. 300/- had been mentioned against the name of Madhu whereas Rs.1500/- had been charged from her. Statement of accused was recorded at the spot, wherein he admitted conducting the sex determination. The currency notes given to accused Kartar Singh were also recovered and sealed in an envelop Ex.PW 8/ A. Dr. Anil Sabhani admitting in writing about conducting the sex determination, which is statement Ex. PW. 3/B at point 'A'.

12. On the basis of the statement of these witness, who have clearly deposed about the initial visit of patient with the team members to the ultrasound center of the accused, where he disclosed the foetus of their sex to them and later on the raid conducted by the entire team at the ultrasound center of accused where he was found having conducted sex determination of patient Mrs. Madhu and also on the basis of the record taken into custody, which was not prepared by the accused as per the requirement of the Act, it was argued by the learned APP for the State that the prosecution has been able to prove the point of determination beyond shadows of reasonable doubt and accused accordingly deserve to be convicted.
13. The learned defence counsel cross examined the witnesses of the prosecution and argued that the accused have been falsely implicated in this case due to some personal motive of the raiding team and the accused have never conducted any sex determination upon any patient. It was argued by the learned defence counsel that the Act provides for complaint to be received on which the ultrasound center could have been checked, but there is no written complaint produced by the prosecution to show about any complaint against the accused for the alleged offence. The learned defence counsel further cross examined the witnesses of the prosecution and pointed out to the discrepant statements by them, as PW 1 has stated in his cross examination that he was not a member of the raiding team and did not visit the clinic of the accused on 11.10.2001 whereas the other team members and witnesses have deposed about PW1 Dr. B.S. Dahiya also being a member of the team. This witness has further admitted in his cross-examination that there was no written complaint of any person against accused and that the decoy patients were arranged by the Task force members, which argued by the learned defence counsel shows that they were not volunteers for the alleged raid.
14. It was further pointed out that PW 2 in his examination in chief has deposed about recording statement of decoy patient at the spot itself whereas PW 1 has deposed that the same were recorded in his office. PW 2 admits that PW 1 was a member of the raiding team, which was denied by PW 1, PW 2 also deposed that decoy patients were only known to him 8-10 days prior to the raid and it was argued that his shows the arrangement made by the team to fabricate a false case against the accused. PW 2 further admits that he was not aware about the conversation between the accused and patient Madhu prior to his entering the room. PW 3 has meanwhile deposed that on 11.10.2001 they had come to nab the culprits red handed, which shows that the intension of the raiding team was not good and they were trying to fabricate a false case against the accused. The witness PW 3 further deposed that the decoy patients were known to her for a year prior to the date of raid and this shows that the planning for fabricating a case against the accused was being carried out for a long time. This witness has further deposed that there is not list team members on the me and the Chief Medical Officer was a member of the team, which was denied by PW 1, CMO himself. The witness further

deposed that patient Mrs. Madhu was introduced to on 11.10.2001 whereas earlier he has deposed about having known the patient for more than one year. She further deposed that the Chief Medical Officer gave approximately Rs.1400/- to Mrs. Santos whereas PW 2 has deposed otherwise. This witness further deposed that there was no written complaint about the accused.

15. The learned defence counsel further pointed out to the cross examination of PW 4 and argued that PW 4 is merely deposing about hear say evidence as proceedings allegedly having taken place inside the clinic were not in her presence. This witness deposed about Dr. B.S. Dahiya being with the Task Force, which is denied by PW1 Dr. B.S. Dahiya. IT was further deposed by this witness that Dr. Dahiys gave currency notes to Dr. C. Paul, which were signed by Dr. C. Paul, but PW 3 deposed otherwise. She further deposed that she never visited ultrasound center of the accused and in her presence the statements of decoy patients were also not recorded and statement of Mrs. Madhu was recorded at Palwal, whereas PW 1 deposed otherwise. PW 5 in his examination in chief has deposed about having recorded the conversation between him, patient Madhu and accused in a hidden tape recorder, but the same was not played or produced in the court. This witness further deposed about confessional statement made by Dr. Anil Sabhani in presence of team members, but such statement was not admissible in evidence. This witness further deposed that no police member was present at that time, which is denied by PW 3. This witness further deposed that the currency notes were given to him by Dr. C. Paul, but PW 1 deposed that he had given the currency notes. It was further deposed by this witness that even he got conducted X ray in the clinic of the accused and paid Rs.100/- but the same were never recovered by the raiding team. PW 6 denied the presence of Dr. Dahiya in the raiding team and also deposed that in his presence the accused had not disclosed the sex of the foetus. PW 7 has deposed that many persons had gathered at the spot on the day of the alleged raid, but no other independent witness was joined by them from the other citizens present there. PW 8 is also deposing about hear say evidence and deposed that the alleged disclosing of the foetus of sex, had taken place prior to her entry in the clinic of the accused. She further deposed that she was told by Mrs. Madhu about accused having disclosed about female foetus to her, but this was only a hear say evidence.
16. Apart from this the leaned defence counsel has also placed reliance upon the defence witnesses examined by the accused which included the decoy patients Madhu as DW 1, DW 2 Santosh, DW 3 Sohal Pal and by way of documentary evidence reliance was placed upon an affidavit of Mrs. Madhu Ex. D 1, affidavit of Mrs. Santosh Ex. D 2 and that of Sohal Pal Ex. D 3.
17. In the defence DW 1 deposed that she had come to the court to depose as a witness about 10-11 months back, but on that day her statement was not recorded and she had given one affidavit Ex.D 1. She further deposed that about 3-4 years back the doctors of Government Hospital had brought her from her house and told her to get her free ultrasound done and free treatment. They took her to several Hospital including Siri Ram Hospital and her ultrasound was done in B.K. Hospital and she was told that one more ultrasound would be done at Palwal. On that day she got her ultrasound done at the clinic of the accused and she had enquired of well being of the foetus. She never got the ultrasound done to ascertain the sex of the foetus and she did not enquire about this and nor the same was disclosed by the accused. No currency notes were recovered in her presence and her signatures were obtained on the some documents and she had merely been told to tell at Palwal, that accused had told to her about a female foetus. The accused have been falsely implicated in this case.

DW 2 meanwhile deposed that about 11 months back she had given one affidavit Ex D 2 and she never got her ultrasound done from the ultrasound center of the accused and never enquired about sex of foetus and statement was not recorded before the Chief Medical Officer although her signatures were obtained on blank papers. She had never come to Palwal. She was told about her foetus by the doctor of B.K. Hospital and she had been brought to Palwal to create a scene at the ultrasound center of accused and on the asking of the doctor of B.K. Hospital, she created a scene at the ultrasound center of the accused by telling that the accused had disclosed to her about her foetus.

DW 3 was the husband of DW 2 and deposed that he had given one affidavit Ex. D in this court. He along with his wife and been brought by Government doctors of B.K. Hospital on the pretext of getting them treated free and getting ultrasound done and they were asked to say that the ultrasound had been done by the accused whereas ultrasound of his wife was done in B.K. Hospital. They never got recorded any statement in the office of the Chief Medical Officer and their signatures were obtained on blank papers.

18. Pointing out to the discrepant statements made by the witness examined and the fact that the recorded version was never put to the accused and the fact that the decoy patients Mrs. Madhu and Mrs. Santosh along with Sohal Pal were not supporting the alleged prosecution case and they had also deposed that they were never a part of the raiding team and were only joined to fabricate a false case against the accused, it was argued by the learned defence counsel that the circumstances clearly show that accused have never indulged in any determination of sex and for their personal benefits and to destroy the career of the accused, the witness have deposed falsely and no reliance can be placed upon their testimony, more so, in view of the statement of the decoy patient accused, deserve to be acquitted in this case.
19. Statements of the accused were record under section 313 Cr.P.C. wherein they have submitted that a false case has been fabricated upon them and they deserve to be acquitted. In their defence evidence the accused have examined D W 1 Madhu, DW 2 Santosh and DW 3 Sohan Pal and in documentary evidence, the accused placed reliance upon affidavit of the aforesaid witness Ex. D 1 to Ex. D 3.
20. It is pertinent to note here that the present case registered on the basis of a complaint was one of the earlier cases registered under the Pre conception and Pre Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (here in after to be referred as the Act). In the past Pre Natal diagnostic centers sprang up in the urban areas of the country using pre natal diagnostic techniques for determination of sex of the foetus. Such centers became very popular and their growth was tremendous as the female child is not welcomed with open arms in most of the Indian families. The result was that such centers become centers of female foeticide. Such abuse of the technique is against the female sex and affects the dignity and status of women. Various organization working for the welfare and uplift to the women raised their heads against such an abuse. It was considered necessary to bring out a legislation to regulate the use of, and to provide deterrent punishment to stop the misuse of, such techniques. The matter was discussed in Parliament and the Pre natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill, 1991 was introduced in the Lok Sabha. The Lok Sabha after discussions adopted a motion for reference of the said Bill to a Joint Committee of both the Houses of Parliament in September, 1991. The Joint Committee presented its report in December, 1992 and on the basis of the recommendations of the Committee, the Bill was reintroduced in the Parliament.
22. The object and reasons for which the present Act was formulated were as follows:-

To prohibit pre natal diagnostic techniques for determination of sex of the foetus leading to female foeticide . Such abuse of Techniques is discriminatory against the female sex and affects the dignity and status of women. A legislation is required to regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act.

- i. prohibition of the misuse of pre natal diagnostic techniques for determination of sex foetus, leading to female foeticide;
- ii. prohibition of advertisement of prenatal diagnostic techniques for detection or determination of sex;
- iii. permission and regulation of the use of prenatal diagnostic techniques for the purpose of detection of specific genetic abnormalities disorders;
- iv. permitting the use of such techniques only under certain conditions by the registered institutions; and
- v. punishment for violation of the provisions of the proposed legislation.

23. It is also pertinent to note that being the first of its kind cases under the Act and having been registered on the basis of the complaint filed by the District Appropriate Authority there never was the role of any prosecuting agency as such like police or some other organizations related to the prosecution agency to investigate the case and conduct investigation or record statements of witnesses or visit the site. All this work was done by the complainants, which was a team of doctors under the District Appropriate Authority and they have done the investigation part to the best of their knowledge and capability.
24. The present Act came into force in view of the declining sex ratio between the male and female child in India and the sex ratio in Northern India is getting worse day by day. The child sex ratio in Punjab has fallen from 793 in 2001 to 776 in 2003 and in Haryana from 820 to 807 during this period. Himachal Pradesh, Uttar Pradesh, Rajasthan, Gujarat and Bihar are the other states where the child sex ratio is worse and declining further.
- (a) The learned defence counsel in the present case has cross examined the witnesses of the prosecution at length and tried to bring to notice the discrepancies in the statements of the witnesses and some minor contradictions here and there. It is to be noted that the present case although triable as a criminal case, but still the handling of the case under this Act can not be replica of what is seen or looked for in other criminal cases such as cases relating to hurt or injury. In cases relating to hurt or injury where an occurrence is alleged with eye witnesses to the occurrence, the contradictory statements made by the witnesses relating to the occurrence, the number of injuries suffered and kind of medical reports brought by the doctor, are very material, but in the case in hand the minor contradictions pointed out would not be very material due to the different and typical nature of the case.
- (b) From the perusal of the evidence on the file and cross examination conducted by the learned defence counsel on the witnesses of the prosecution some things became very clear and the same are as follows:-
1. There was a team of doctors and other members which had raided the clinic of the accused;
 2. There was the presence of the decoy patients along with the said team;
 3. The team raided the clinic of the accused and questioned him;
 4. There were some admissions made by the accused in writing and in secretly recorded audio tape before the team. With the above points in mind, the arguments of the learned defence counsel can not to be looked into. The major thrust of the arguments of the learned defence counsel was with regard to contradiction in the statements of the witnesses. It was argued that some witnesses have deposed about the presence of Civil Surgeon cum Appropriate Authority, Faridabad in the raiding team while he himself has denied being a member of the Team. Whether the appropriate authority was always present along with the raiding team or he was not present in the raid along with the team does not affect the merits of this case, as PW 1, the appropriate authority was not the sole witness on which the prosecution has based its case. The absence of this witness, even if his evidence is taken into consideration, from the raiding team does not show or prove that the raid was not conducted, when in the cross examination of the witnesses the fact of raid having been conducted is admitted by the learned defence counsel.

The learned defence counsel had also argued that about the handing over the currency notes being stated differently by the different witnesses. It was argued that as per PW 1 he paid Rs.1800/- for decoy patient Madhu whereas the other witnesses have deposed that the money was given by PW 1 to Dr. C.Paul. Here it is pertinent to note that PW 1 has only deposed about having given Rs.1800/- 'for' decoy patients Madhu and it was never deposed by him that he had given any money 'to' patient Madhu. It was always the case of the prosecution that PW 1 had given the money for patient Madhu because on the day the raid was conducted i.e. 11.10.2001, there currency notes of Rs.500/- each and three currency notes of Rs.100/- each were given to be used as money for transaction in the clinic by

PW 1 to Dr. C. Paul and he signed that same and he gave them to Dr. Kewal Kumar, who was acting as the attendant of patient Madhu and who used the said currency notes in the clinic when demand was made by the accused of sum of Rs. 1200/- to report about the sex of the foetus of patient Madhu.

It was further the argument of the learned defence counsel that there was never any written complaint against the accused and this has also been deposed by the witnesses and thus there was no ground to raid the clinic of the accused and he was never done any illegal act. Hence a perusal of the statements of the witnesses recorded shows that it has been deposed by PW 1 himself that there were several oral complaints with regard to the accused indulging in sex determination in his clinic and as provided under Section 17 of the Act, the appropriate authority had full right to investigate the complaint of breach of the provisions of this Act or the Rules made there under and he also competent to take immediate action. When it had come to the notice of the Appropriate Authority about the accused violating the provisions of the act, he was not required to wait for written complainants and then take the action.

It was further argued by the learned defence counsel that some witnesses who deposed, have only deposed on the basis of hearsay evidence and the actual alleged occurrence had not taken place in their presence. This was in context to the case of prosecution and that on the exact date of raid Dr. Kewal Kumar along with patient Madhu and her husband had gone to the conversation that took place inside the clinic could not, has been known first hand to the persons waiting outside. This contention and arguments of the learned defence counsel does not hold much the defence of the accused as the corroborating circumstances and the evidence of the witness would show that even Dr. Kewal Kumar has appeared in the witness box as PW 5 and moreover, the witnesses have also deposed about the later admissions and confessions made by the accused in their presence.

It was further argued by the learned defence counsel that witness PW 3 has deposed about presence of police along with the team while others have denied this and this is a major contradiction, but the same can only be said to be a minor contradiction and expect for PW 3 no other witness deposed about presence of police with the raiding team and neither was this question asked to other witnesses.

It was further argued by the learned defence counsel that the witnesses have laid a great thrust on a tape recorded conversation between the accused and Dr. Kewal Kumar and patient Madhu inside the clinic since the same has not been proved as per law. The learned defence counsel although argued about this tape recorder conversation, but even the prosecution could prove this tape recorded conversation as per procedure laid down by the law. To prove this conversation which was the material evidence with the prosecution, it was required that first the transcript of the conversation be placed on file and then on the application of the prosecution and with the consent of the accused, their sample voice was to be recorded and then to be sent for verification along with the original conversation in the alleged audio tape. This procedure was never followed by the prosecution for the reasons best known to them.

Here it is important to say that the prosecution which was mainly consisting of the appropriate authority and his team members has not shown except for some members the same zeal that was shown when they formed a task force to check the violations of the Act and raided the clinic of the accused. Till the filing of the complaint, a lot of hard work went in the preparation and subsequent raid at the clinic of the accused but a perusal of the case file shows that somehow the sting went missing after the filing of the complaint. The witnesses mentioned in the list attached with the complaint somehow did not seem very keen to appear in the court and depose in the witness box and despite having been granted sufficient opportunities some of the witnesses were still not examined in the witness box as the list included 18 witnesses of which the prosecution was able to examine only nine witnesses. The presence of some more witnesses could have further helped the case of prosecution.

The learned defence counsel has also argued that the witnesses are laying great importance to confessional statement Ex. PW 3/B where as per prosecution both the accused have admitted about having violated the provisions of the Act and having conducted sex determination on the foetus of

patient Madhu and where accused Dr. Anil admitted having accepted money for sex determination. It was argued that this so called confessional statement cannot be taken into consideration at all the Appropriate Authority had no right to obtain this statement and the same cannot be used as evidence against the accused. As earlier discussed, there was no opportunity in this case for any agency to conduct the investigation and what ever was best thought at the relevant time was done by the members of the raiding party and when they confronted the accused with the signed currency notes recovered from accused Karter and with the alleged audio tape having recorded conversation of the accused, the accused admitted their guilt and gave the entire admission in writing in their own hand.

It is important to note that Ex. PW 3/B is in the hand of the accused themselves and this fact is also not denied by the accused and this document cannot be simply brushed aside by saying that the same is not admissible in evidence, when it is in the hand of the accused and accused have also failed miserably in showing any witness motive on the part of the members of the raiding team for raiding the clinic of the accused. The present documents is a circumstantial and corroborative evidence of the prosecution and it helped to the prosecution to a large extent in view of the fact that he prosecution had always state about using the signed currency notes at the time of the raid on the clinic of the accused and these currency notes on the asking of the accused Anil were given to accused Kartar Singh and also recovered from him and on the recovery of these currency notes, the same were put in an enveloped were sealed and this envelope bore the signatures of the members of the task force as well as the accused and which is Ex. PW 2/E. The learned defence counsel has not felt the need to confront the accused with these currency notes by requesting the court for opening of the envelope and thus it amounted to admission on the part of the accused about the recovery of these signed currency notes from accused Kartar Singh which were with him at the demand made by accused Anil

Another argument put forward by the learned defence counsel was with regard to the place of raid being a busy place and non joining of any independent witness from the public at large. The joining of any witness from the public who were present at the spot was not very material in the present case as the raiding team had taken a pre caution of joining Dr. Mini Vohra in its team, who was not a doctor working for the government, but in fact was private doctor was the secretary of the Indian Medical Association Faridabad.

- (c) The learned defence counsel also had with him three witnesses examined as defence witnesses i.e. Mrs. Madhu, Mrs. Santosh and Sohan Pal who were initially the witnesses of the prosecution and were not examined by them as their witnesses, but were examined by the accused as their defence witnesses. It is pertinent to mention that Mrs. Madhu and Mrs. Santosh were two of the alleged decoy patients whith the taks force and Sohan Pal was the husband of Mrs. Madhu, who accompanied the task force on the alleged date of raid i.e. 11.10.2001. From the testimony of these witnesses, the learned defence counsel tried to bring forward the story, of the task force members of the ream and to raise false alarm against accused in their clinic, by saying that Dr. Anil by conducting sex determination of Mrs. Madhu had told about a female foetus in her womb. On these lines is the testimony of these witnesses and DW 1 deposed that some Govt. doctors came to their house from B.K. Hospital, Faridabad and told her that they would get her atreated for free and asked her to accompany them to the clinic of the accused and to raise false alarm as discussed above. The witnesses deposed that she did accordingly and no money was ever recovered from the accused in her presence. On the same lines DW 2 Santosh also deposed that she was first taken by some Govt. doctors to B.K. Hospital, Faridabad and her signatures were obtained on blank papers and she was also asked to create a scene and raise a false alarm in the clinic of the accused. DW 3, the husband of patient Madhu has also deposed that he was induced by the Govt. doctors on the pretext of free treatment to him and taken to the clinic of the accused with a prior planning of raiding team. A perusal of the testimony of these witnesses bring to mind the recent Jessica Lal's case where there was a huge list of prosecution witnesses going hostile and not supporting statements made by them earlier. The three witnesses of the defence as earlier discussed never got any chance to get their statements recorded before any prosecuting agency like the police and there was no statement

of these witnesses recorded on oath at any stage on the basis of which they could be termed turning hostile, but there are some similar circumstances in the present case also. As per prosecution, after they had conducted the raid at the clinic of the accused, the raiding team had recorded the statements of these witnesses, which is Ex. PW. 2/F and Ex. PW.2/G being statement of Santosh and Madhu and in these statements, these witnesses had supported the case of prosecution. However, as earlier stated their statements not being on oath, these witnesses could not be termed as hostile witnesses when examined as defence witnesses and as such proceedings against them for perjury could not be initiated. However, a perusal of their cross examination by the learned APP goes to show the circumstances under which these witnesses may have deposed for the accused. All the three witnesses deposed that some doctors from the Government hospital came to them on the pretext that they would give them free treatment. A perusal of the testimony shows that no prudent person even if he is considered to be an illiterate person would simply got up and joined a group of persons, who come to him and identified themselves as Govt. Doctor. This observation has been made as the defence witnesses have stated that they accepted the persons as Govt. doctors because it was said so by them. These witnesses further deposed that the said group of persons took them and made them sign some blank papers which also cannot be believed even with closed eyes, as no one would sign blank papers on the asking of the persons, the identity of whom he or she is not ware of DW 1 has stated in her cross examination that although she is illiterate, but can put her signatures. The learned defence counsel along with the testimony of these three defence witnesses also placed reliance upon their alleged affidavits Ex. D 1 to Ex. D3. In these affidavits, the witnesses examined by the accused have stated the same fact as stated by them in the witness box i.e. denying being a part of the raiding team and only having been used by them against the accused. These three affidavits were alleged to have been signed by Mrs. Madhu and Mrs. Santosh and Sohan Pal, but a perusal of the affidavits shows that these were not properly drafted and in the verification there was no mention as to which part of the affidavit was true to the knowledge of the deponent and which part to his or her belief. Further these so called affidavits were said to have been attested by some oath commissioner, but again the attestation was also not proper as neither does the seal of the oath commissioner contained his name and neither does the seal of attestation mentions the name of oath commissioner and neither these affidavits had been entered at any serial number in the register of the said oath commissioner, whose identity cannot be ascertained from the signatures allegedly present on these affidavits. Thus no reliance can be placed on these affidavits and on the same lines is the testimony of the defence witnesses and it is stated by DW 1 that she is not aware about the contents of Ex. D 1 has also deposed that the members of the raiding team had asked her to co operate with them for the benefit of the public and thus she had joined them and this statement of the witness shows that there was never any ulterior motive on the part of the raiding team when they joined this witness as decoy patient with them.

A perusal of cross examination of DW 2 shows that she denied her presence on 11.10.2001 at the clinic of the accused where as in her examination in chief says that she was made to create a scene on 11.10.2001 by the team members and on the same lines was her affidavit Ex. D 2 on which she was placing reliance. It is also pertinent to note that these witnesses have stated in their cross examination that they were brought to depose in the witness box by the accused and this shows that why these witnesses were deposing in favour of the accused. DW 3 also made it clear in his cross examination that he was brought to deposed by Dr. Anil Sabhani.

A perusal of the testimony of these defence witnesses shows that although initially these witnesses had joined the task force members for a very noble cause and the circumstances also required the presence of such witnesses to expose the violation and practice of the accused there was the necessity of pregnant woman on whom the accused could conduct the sex determination and he could be caught. A perusal of the statements of the witnesses shows that PW 3 had arranged for these decoy patients, but perusing the entire evidence it comes to notice that when the prosecution agency needed these witnesses they must have cared for them, but as earlier discussed, after the filing of the complaint these witnesses

seem to have been left in the lurch and thus they became easy prey for the accused to use them as his witnesses instead of being the witnesses of the task force members. Here the need arises to take care of such witnesses who by going against all odds tried to help the prosecution with its case which was for noble cause and then none cared to look back at these witnesses and the circumstances in which they were maintaining themselves. The above observation would show that the testimony of these defence witnesses in favour of the accused is not trust worthy and cannot be relied upon at all for the benefit of the accused, more so, because of the other evidence of the prosecution to support its case.

- (d) Having a look at the case of prosecution in its entirety some thing that come forward and are to be looked at is that the sex ratio in India and more so in the states of Punjab and Haryana has always been a matter of concern but this concern sounded a red alert when the state entered the 21st century with a sex ratio of 776 per 1000 and 807 per 1000 respectively. A question that can be asked is as to where the missing girls are? The obvious answer is that they have either been eliminated even before they were born or had died a slow death as a result of neglect. The perpetrator of the crime goes scot free. Here it is also important to mention that the determination of sex of the unborn child has also led to the large scale killing of the girl child because as soon as one comes to know about the sex of foetus being female the next step is to get terminated the pregnancy and kill the girl child and thus the sex determination tests followed by sex selection even though its stringent implementation may bring down the number of sex selective abortions. The nexus seems to be too strong and weighs heavily in favour of the medical fraternity. It is important to note that the entire blame for determination of sex of the unborn child cannot be put entirely on presence like the accused, but said blame should be shared jointly by the society.

When ever a person goes to the ultrasonologist for determination of the sex of the foetus, the act is not alone of the persons like the accused, but equal role is also played by the patient and his family members. On the mere instigation of the person like the accused no same person would agree to abort their child until time they have an interest in the termination of the pregnancy. The persons like the the accused cannot force any person to know the sex of the child till the said person is also interested in knowing the same. This, however, does not mean that persons like the accused are not to be blamed at all and rather such persons like the accused should deter the patient from making enquires about the sex of the foetus and should refrain from disclosing the same as provided under the act.

- (e) A perusal of the complaint of the prosecution shows that to nab the accused a great effort was put in by the task force members as a result of which they initially visited the clinic of the accused with decoy patient Santosh and were conveyed a female foetus by the accused. To further certify the act of the accused, the team members visited the clinic on 5.10.2001 with patient Raveeta and she was disclosed having male foetus on 8.10.01 and charged the fees amounting to Rs. 1200/- By verifying the act of the accused finally the raid was conducted on 11.10.2001 along with decoy patients and independent witness Dr. Mini Vohra and there, as earlier discussed, signed currency notes were given by Dr. C. Paul to Dr. Kewal Kumar, which were three currency notes of Rs. 500/-each and three currency notes of Rs. 100/- each and Dr. Kewal Kumar posed as the attendant of patient Madhu and got her normal ultrasonography done, but accused Dr. Anil asked about the children of Madhu and suggested her that he could also tell the sex of her present foetus, if she makes additional payment of Rs.1200/- to him. This demand was most with the help of the signed three currency notes of Rs. 500/- and after this a female foetus was disclosed by accused in the womb of Mrs. Madhu. The team members on signal of Dr. Kewal Kumar joined them in the clinic and confronted the accused with the recovered currency notes from accused Kartar Singh and then both accused admitted their guilt as earlier discussed to their crime and admitted their act by way of admission Ex. PW.3/B The team members also took the records of the accused was not maintaining the records as per the rules of the Act. It is provided under the Rules and the Act under section 6 that the Genetic Centre would not conduct ultrasonography for the purpose of determining the sex of foetus and it has been further provided under section 5 of the Act as follows:-

- “5. Written consent of pregnant woman and prohibition of communicating the sex of foetus:-
- (1) No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless:
 2. He has explained all known side and after effects of such procedures to the pregnant woman concerned;
 3. He has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and
 4. A copy of her written consent obtained under clause (b) is given to the pregnant woman”

A perusal of the records taken into custody from the accused, however, shows the violations of this section as some ultrasound report cards taken into custody from the spot show that the requirement of Act has not been met at all by the accused and during their entire defence, the accused have also failed to prove or show that there was no violation of this section by them. There was also violations of section 4(1), 4(2) and 4(3) of the Act to maintain proper record by the ultrasound center and the patient examined and this was provided under section 29 of the Act, which read as follows:-

“29 Maintenance of Record:

- (1) All records, charts, forms” reports, consent letters and all the documents required to be maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed.

Provided that, if any criminal or other proceedings are instituted against any genetic clinic, the records and all other documents of such center, laboratory or clinic shall be preserved till the final disposal of such proceedings.

- (2) All such records shall, at all reasonable times, be made available for inspection to the appropriate authority or to any other persons authorized by the appropriate authority in this behalf.

Rule 9 of the Act was also violated by the accused along with section 29 with regard to non-maintenance of proper records and the accused also did not maintain proper records as required under Form-F. The entire records of the accused taken into custody show that Form-F has not at all been maintained by the accused, which contains a declaration of the pregnant woman and declaration of the person conducting ultrasonography which mentions in the declaration that the woman did not want to know the sex of her foetus and the person conducting ultrasonography neither detected nor disclosed the sex of her foetus to any body in any manner. This there has been gross flouting of the Rules by the accused and a very serious offence has been committed by both the accused, while the accused are required not to attend to any patient without reference they were doing so openly which is clear from the records taken into custody.

- (f) A perusal of the testimony of the witnesses also shows that there have been admissions of the act of the accused at several places. What PW-2Dr.C.Paul deposed in his examination-in-chief about the raid at the clinic of the accused and disclosing of sex of foetus by the accused and also the recovery of currency notes has not at all been denied in the cross-examination of the witnesses which would amount to its admission. The accused also admitted to the document Ex.PW.3/B being in their own hand during cross-examination of PW-2 where it was suggested to the witness that the statement of accused was taken under some threat but such threat has not been proved or made clear by the accused. Similar suggestion was also made to PW-3 and even she denied the suggestion made to her and which amounted to the statement of accused having been recorded by them in their own hand. The learned defence counsel has also tried to make the defence witness Madhu say that no ultrasonography was conducted upon her in the clinic of the accused, but in the cross-examination of PW-5, it was suggested

to him that only a sum of Rs. 300/- was paid for patient Madhu and only a normal ultrasound was conducted by the accused upon patient Madhu, which she was trying to deny in her testimony in the witness box. All the witnesses who were the members of the task force have deposed in one breath about the admissions made by the accused in their presence as also the recovery of currency notes and for the sake of repetition accused have failed miserably to show any ulterior motive of the part of any of the witness of the prosecution to depose against them.

25. The above detailed observations and the circumstantial and corroborative piece of evidence and the records taken into custody from the accused clearly proves the point of determination of the prosecution about the accused having been found contravening the provision of Section 6 (a) and 6 (b) of the Act when a raid was conducted at their clinic and further the accused having been found conducting PNDT procedure in violation of section 5 (1) and 5 (2) of the Act and using ultrasound center for conducting PNDT in violation of section 4 (1) 4 (2) and 4 (3) of the Act and also failing to maintain proper records of the ultrasound center and contravening the provisions of Section 29 read with Rule 9 and Form-F under the PNDT Act Rules and all the offences are punishable under Section 23 of the Act. Both the accused are accordingly held guilty and convicted for the above offences. Let the convicts be heard on the point of quantum of sentence on 28.3.2006.

Sd/-

Announced:

Sub Divisional Judicial Magistrate

Dt: 25.3.2006

Palwal. 25.3.2006

JUDGEMENT CONTINUED:

Present :

APP for the State/Complainant

Both convicts in person with Sh. R.A. Gupta, Advocate

ORDER OF SENTENCE

1. Arguments on the point of quantum of sentence heard. Convict Dr. Anil Sabhani has stated that he is the sole bread earner of the family with an old mother and small children to look after. He is doctor by profession and not a previous convict and a lenient view to taken against him. Convict Kartar Singh has meanwhile stated that he is not a previous convict and has old parents and small children to look after. He is the sole bread earner of the family and a lenient view taken against him. The learned counsel for the convicts argued that the convicts are not previous offenders and they did not indulge in any criminal act and as much leniency be shown to tem. The learned APP meanwhile argued that stringent punishment be awarded to the convicts, who have indulged in very serious offence.
2. I have heard the convict, their counsel as also the learned APP for the State. The convicts have prayed for a lenient view against them, but in my considered view they could not deserve the leniency prayed for. As earlier discussed due to the illegal acts of the persons like the convicts the sex ratio is declining day by day in the country and in the State and because of the persons like the convicts the day is not far when there would be no girl child around. In the present case, the convicts orally conveyed the sex of foetus to the patients, but due to the check of such illegal acts the persons like the convicts have worked out their own sex determination code. It was reported in the news paper recently as follows:

“If the doctor tell us to come and get the report on Monday, we know it’s a boy. Friday means a girl,” says Sarla, proud mother of three strapping boys in Karnal’s Chonchda village. Her neighbour’s doctor adopted a slightly different *modus operandi* signature in red ink to indicate a girl child and blue for a boy. “No words are exchanged. It’s an unspoken thing and one doesn’t even have to ask,” she says. If the doctor doesn’t oblige, some tout does.”

3. It is further to be seen that Haryana’s infamously skewed sex ratio is not just about numbers though they are quite horrific 861 per 1000 males as per the 2001 census it’s also about attitudes. Combined with ultrasound technology that motorable roads, electricity and extensive urbanization have brought only closer home, this has translated into a dearth of brides. The statistics speak for themselves: 36.24% of men between 15 and 44 years of age (the so-called reproductive or marriageable age) were tabulated as being unmarried in the 1991 census. In some districts like Rohtak, the percentage was a high as 44. Since then the number has only gone up. Though the state government has claimed success in its efforts to correct the skewed sex ratio through awareness drives and incentives for the girl child, activists who work in the area are skeptical.
4. The convicts together have indulging in a very serious crime. To kill a person who may have the opportunity to defend himself is a very serious offence, but even more serious is the offence where a person kills someone who is not even in a stage to defend himself. The determination of sex by persons like the convicts lead to the above reality where on determining the sex of the foetus as female the same is killed in a cruel manner. The act of the convicts is to be condemned and in my considered view the punishment to be awarded to the convict should act as a deterrent to other persons, so that no one indulges in such a heinous crime. Accordingly, I order both the convicts to undergo a simple imprisonment for a period of two years and to pay fine of Rs. 5000/- each for the offences mentioned in section 6(a), 6(b), Section 5(1), 5(2) Section 4(1), 4(2), 4(3) and Section 29 read with Rule 9 of the Act and all the offences punishable under section 23 of the Act. In default of payment of fine, the convicts shall further undergo simple imprisonment for a period of three months. Fine paid.

Announced in open court: Sub Divisional Judicial Magistrate

Dated 28th March 2006

Palwal 28.3.2006

NOTE: This judgment contains forty-nine pages and each page has been signed by me.

Sub Divisional Judicial Magistrate

Palwal 28.3.2006

IN THE COURT OF THE METROPOLITAN MAGISTRATE,
41ST COURT, SHINDEWADI (DADAR), MUMBAI

5 (3)

C. C. No. 10169/MS/2004

Decided on 14/08/2009

Mumbai Municipal Corporation
(Through Legal Assistant of G/N - Ward)

-Vs-

1. *Chhaya Rajesh Tated, Aged 42 yrs.*
 2. *Shubhangi Suresh Adkar, Age 62 yrs.*
- Hon'ble Judge :R. V. Jambkar.*

Appearance : Ld. Adv. Mr. Engineer for Complainant,
Ld. Adv. Ghate for accused No.1.
Ld. Adv. Vedak for accused No.2.

CASE SUMMARY

This is the first case of conviction recorded under the Act in the State of Maharashtra and was given wide publicity by the media, which it deserved, for the purpose of creating awareness and sensitization among the general public and the doctor community.

The facts of this case are peculiar and they pertain to the publication of an advertisement in the weekly magazine in connection with selection of the sex of foetus. In the weekly magazine, the Lokprabha dated 19/11/2004 and 03/12/2004 one advertisement was released by accused No. 1 to the effect that,

‘मुलगा हवा’
गर्भधारणेपूर्वीच
विशेष उपचार ! दर २ रा, ४ था रविवार
(वेळ १२ ते ६) डॉ. छाया तातेड (फॉरेन रिटर्न)
श्री. नर्सिंग होम, सेना भवनसमोर, दादर प. मुंबई
२४४६४९८५ सोम. मंगळ - पीरबाजार,
औरंगाबाद २३४११८०.

On 27/11/2004 P.W. No. 1 Dr. Kanchan after coming to know about the said advertisement, carried out an inspection of Shri Maternity and Nursing Home and found that no board was displayed there stating that sex of the foetus will not be determined. Further, the registration certificate was not displayed and register of cases was also not maintained. Hence both, accused No. 1 Dr. Chhaya Tated who has issued the advertisement and accused No. 2 Dr. Adkar who was owner of the said

Nursing Home were prosecuted for the contravention of the provisions u/s 22 (3) and Rules 6 (2), 4 (1), (2), 9 (1) of the Act.

Taking into consideration seriousness of the matter, the Court adopted the procedure laid down for warrant triable cases. Both the accused pleaded not guilty. Prosecution examined 4 witnesses in support of its case; whereas accused No. 1 examined herself in support of her defence that she has actually communicated to issue the advertisement “want a child?” and not “want a son?” (मुल हवयं? and not मुलगा हवाय?) However there was mis-communication between her and her witness Sunil Patni. Moreover when she came to know that the advertisement was published in the magazine, she immediately informed the said publisher to issue a corrigendum which was accordingly published in Lokprabha magazine dated 31/12/2004.

The Court considered in detail the entire evidence on record, appreciated it in proper perspective and held that the defence raised by accused No. 1 was clearly an after thought. Both the accused were therefore held guilty for all the offences alleged against them and convicted and sentenced separately on each count to suffer R.I. for 3 years and to pay fine of Rs. 10,000/- each in default R.I. for further 3 months. (Para 20 & 32)

The Judgment is positive in several aspects, like appreciation of evidence, adopting deterrent approach while imposing punishment considering the serious nature of the offence and also having regard to the object of the Act, the status of the accused in society as doctors and therefore expected to follow the law and not to commit the breach there of.

JUDGMENT

Per Hon’ble Mr. R. V. Jambkar.

Charge : For the Offence Punishable u/s. 22(3) and Sec.23 for contravening provisions of Rules 4(1) (2), 6(2) 9(1) of Pre Natal Diagnostic Techniques Act, 1994 (Amended as The Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Section) Act, 2003.

(Here-in-after referred as “P.N.D.T. Act”.)

JUDGMENT

(Delivered on 14/8/2009)

1. Accused – above named – are facing trial for the offence Punishable u/s. 22(3) and Sec.23 for contravening provisions of Rules 4(1) (2), 6(2), 9(1) of Pre Natal Diagnostic Techniques Act, 1994 (Amended as The Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Section) Act, 2003.
2. The scenario of prosecution’s case unfurled during trial as;
 - (a) On 27/11/2004 P.W.N0.1 Dr. Kanchan Shrikant Banavalkiar was serving as Medical Officer, Health Department, G/N – Ward, M.M.C., Mumbai. On that day, she received one letter from Deputy Director, Health Service, Bombay Circle in which Deputy Officer, Health asked her to take action against advertisement published by accused No.1 in weekly magazine “Lokprabha”, November 2004 in connection of selection of sex of baby. So, immediately, she carried out inspection of “Shree Maternity and Nursing Home, Dadar along with her Assistant Rathod, Sanitary Inspector Mr. Kadam and other staff. During the course of her inspection, she noticed that no board was displayed at “Shree Maternity and Nursing Home” Dadar, projecting “there will be no detection of the sex of the child”. Registration certificate was also not displayed and register of cases was also not maintained by “Shree Maternity

and Nursing Home” which belongs to accused No.2 Dr. Adkar.

- (b) At the time of inspection, accused No.2 Dr. Adkar was present in the Nursing Home in the capacity of owner of said Nursing Home. Complainant made inquiry with her. During the course of inquiry, accused No.2 disclosed that accused No.1 Tated used to visit the Nursing Home on every second and fourth Sunday from Aurangabad. To that extent, accused No.1 gave written statement to complainant which is placed on record vide (Exh.P-5). Thereafter, P.W.N0.1 prepared panchnama in presence of two panchas, recorded statement of accused No.1 Chhaya Tated, carried out inquiry with the publisher and thereafter, came to conclusion that both the accused contravened the provisions u/s. 22 and Rules 6(2), 4(1) (2), 9(1) of Pre Natal Diagnostic Techniques Act, 1994 (Amended as The Pre Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Section) Act, 2003. Hence, she filed present complaint .
- (c) My Ld. Predecessor Mrs. Karnik issued process against both the accused for the offence punishable u/s. 22(3), Rules 6(2), 4(1) (2), 9(1) of Pre Natal Diagnostic Techniques Act, 1994 (Amended as The Pre Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Section) Act, 2003. In sequel, both the accused appeared before the court and were released on bail. It appears from record that, looking into seriousness of matter, it came to be disposed off by way of adopting procedure laid down for warrant triable cases. Hence, evidence before charge of P.W.No.1 Dr. Banavalkiar came to be recorded, vide (Exh.P-4). At the initial stage both the accused partly exercised their right of cross examination and reserved their remaining cross. So, my Ld. Predecessor framed charge against both the accused for the offence punishable u/s. 22(3), Rules 6(2), 4(1) (2), 9(1) of Pre Natal Diagnostic Techniques Act, 1994 (Amended as The Pre Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Section) Act, 2003. On perusal of charge, it is to be seen that my Ld. Predecessor readover and explained the substance of charge to both the accused for which they pleaded not guilty and claimed to be tried.
- (d) Complainant / Prosecution examined P.W.N0.1 Dr. K.S. Banavalkiar (Exh.P-4) in the capacity of complainant, P.W.N0.2 Dr. D.G. Rathod (Exh.P-9) in the capacity of Medical Assistant, P.W.N0.3 Ramakrishnan T.K. Kunhappan Kunnath (Exh.P-15) on the point of proving of advertisement, P.W.N0.4 Vijay B. Padhey (Exh.P-22) in the capacity of Managing Director of P.Y. Padhey Publicity Private Ltd. Apart from these oral evidence, prosecution relied upon documentary evidence i.e. statement of accused No.1 recorded by complainant (Exh.P-5), panchnama (Exh.P-6), authority of P.W.N0.1 (Exh.P-7), Government Gazette (Exh.P-8), registration certificate of accused (Article D and E), advertisements dt. 19/11/2004 and 3/12/2004 are (Exh.P-17 and 18 respectively), corrigendum (Exh.P-19), payment receipt (Exh.P-23).
- (e) Statement of accused U/Sec. 313 of Cr. P. C. came to be recorded individually vide (Exh.P-26 and 27 respectively). In defiance, accused No.1 took the defence of miscommunication and relied upon the explanation given by her to Vijay Padhey dt.19/11/2004 (Exh.P-24) and corrigendum (Exh.P-19). To the buttress, she got examined herself u/s. 315 of Cr.P.C. and relied upon the oral evidence of D.W.N0.2 Vijay Patni on the point of proving of her defence of miscommunication.
- (f) Perused oral and documentary evidence. Read memorandum of argument filed on record. Heard Ld. Adv. Mr.Engineer for complainant and and Ld. Defence counsel Mr.Ghate for accused No.1 and Mr.Vedak for accused No.2. Thereon following points arises for my determination to which I have recorded my findings thereon for the reasons discussed thereunder -

Points Findings

- 1) Does prosecution proved that in the month of November 2000, at Weekly Magazine “Lokprabha” accused No.1 published advertisement about selection of sex of baby before conception at Shree Maternity and Nursing Home, Dadar and thereby committed an offence punishable u/s.22(3) of Pre Natal Diagnostic Techniques Act, 1994 (Amended as The Pre Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Section) Act, 2003?

- ...Proved.
- 2) Does the prosecution further proved that in the aforesaid period and place, both accused did not get registered the Nursing Home in Form -A and thereby committed an offence punishable u/s. 23 for contravening the provisions of Rule 4(1)(2) of the P.N.D.T. Act ?
-Proved.
- 3) Does the prosecution further proved that in the aforesaid period and place accused failed to display the duplicate certificate of registration in Form-B to conduct pre-natal diagnostic tests or procedure, depending on the availability of place, equipments and qualified employees (no and standard maintained by such laboratory separate sentence and thereby committed an offence punishable passed) u/s.23 for contravening the provisions of Rule 6(2) of P.N.D.T. Act ?
- ..Proved.
4. Does the prosecution further proved that in the aforesaid period and place accused failed to maintain a register showing serial order, names and address of patients given genetic counseling, subjected to pre-natal diagnostic procedure or tests, the name of their spouse or father and the date on which they reported for counseling and thereby committed an offence punishable u/s. 23 for contravening the provision of Rule 9(1) of the P.N.D.T. Act ?
- ...Proved.
- 5) What order ? As per final order.

REASONS

As to point No. 1 :

3. At the out set, before marshaling of evidence, I would like to reproduce the provisions of Sec.22 of P.N.D.T Act, which reads thus;

Sec.22 : Prohibition of advertisement relating to preconception and prenatal determination of sex and publication for contravention.

- (1) No person, organization, Genetic Conselling Centre, Genetic Laboratory or Genetic Clinic including clinic, laboratory or centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of the foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form, including internet, regarding facilities of pre-natal determination of sex or sex selection before conception available at such Centre, Laboratory, Clinic or at any other place.
- (2) No person or organization including Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or pre-conception selection of sex by any means whatsoever, scientific or otherwise.
- (3) Any person who contravenes the provisions of sub section(1) or sub section(2) shall be punishable with Imprisonment for a term which may extent to three years and with fine which may extent to ten thousand rupees.

EXPLANATION:For the purpose of this section, 'advertisement' includes any notice, circular, lable, wrapper or any other document including advertisement through internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall painting, signal, light, sound, smoke or gas.

4. In order to prove the advertisement, alleged to have been published by accused No.1 in Lokprabha Weekly Magazine dt. 19/11/2004 and 3/12/2004, which are at (Exh.P-17 and P-18 respectively), prosecution got

examined P.W.N0..1 Dr. K.S. Banavalikar (Exh.P-4). According to her evidence that upon receiving the letter from Public Health Department, dt. 6/12/2004 (Article-F), she carried out inspection of Shree Nursing Home, Dadar and verified the said fact from accused No.2 Dr. Adkar, who is the owner of Shree Nursing Home. According to the statement of accused No.2 (Exh.P-5), that accused No.1 Tated used to join Shree Nursing Home on every second and fourth Sunday from Aurangabad. This fact is also duly proved by the mouth of accused No.1, during the course of recording of her statement u/s. 313 of Cr.P.C.

5. Prosecution examined P.W.N0.2 Dr. Mr. D.G. Rathod (Exh.P-9) who on 27/11/2004 was accompanied with P.W.N0.1. P.W.N0.2 deposed before the court that during the course of their inspection, they prepared panchnama. Panchnama is placed before court vide (Exh.P-6).
6. Further, prosecution examined P.W.N0.3 Ramakrishnan T.K. Kunhappan Kunnath (Exh.P-15) in the capacity of publisher of Lokprabha Magazine. According to his evidence that prior to 19/11/2004 he received D.T.P. Material by accused No.1 through P.Y. Padhye, Publicity Pvt. Ltd. Accordingly, he released the advertisement in Lokprabha magazine on 19/11/2004 and 3/12/2004. Thereafter, he also published corrigendum given by accused on 31/12/2004.
7. Further, prosecution examined P.W.N0.4 V.B.Padhye (Exh.P-22). According to his evidence that he is in well acquaintance with accused No.1 since 15 years and in the month of October first week accused No.1 Chhaya Tated requested him to release the advertisement in weekly magazine Lokprabha for the month of November, December and January and provided ready D.T.P.(Dest Top Printing) material. Accordingly, he send it to the publisher of Lokprabha magazine, pursuant to which, Lokprabha magazine released advertisement on 19/11/2004 and 3/12/2004.
8. Now, let us see the advertisement which were released by accused on 19/11/2004 and 3/12/2004, which reads thus;

Advertisement dt.19/11/2004:

‘मुलगा हवा?’
गर्भधारणेपूर्वीच
विशेष उपचार ! दर २ रा, ४ था रविवार
वेळ १२ ते ६. डॉ. छाया तातेड; फॉरेन रिटर्न,
श्री. नर्सिंग होम, सेना भवनसमोर, दादर प. मुंबई २४४६४९८५
सोम मंगळ - पीरबाजार, औरंगबाद २३४११८०

Advertisement dt.3/12/2004:

‘मुलगा हवा?’
गर्भधारणेपूर्वीच
विशेष उपचार ! दर २ रा, ४ था रविवार
वेळ १२ ते ६, डॉ. छाया तातेड ;फॉरेन रिटर्न,
श्री. नर्सिंग होम, सेना भवनसमोर, दादर प. मुंबई २४४६४९८५
सोम मंगळ - पीरबाजार, औरंगबाद २३४११८०

9. In the light of aforesaid advertisements, accused No.1 got examined herself, as defence evidence vide (Exh.P-29) and took the defence of miscommunication. According to her, that she completed her graduation in Homeopathic branch and in order to carry out her practice, she use to release advertisements in Lokprabha magazine as well as in other newspapers. For that purpose, she use to supply information of advertisement on

telephonic message to one Sunil Patani. Thereafter, Sunil Patani i.e. D.W.N0.2 use to provide that information to D.T.P. operator and thereafter it goes to P.W.N0.4 Padhye for its advertisement.

10. She further deposed that never she supplied the information in order to release the advertisement dt. 19/11/2004 and 3/12/2004. On the contrary, when she was giving telephonic information to Sunil Patani that time, he listen “want a son”, instead of “want a child” and got prepared the D.T.P. material from concern and supplied it to Shri. Padhye. So, it is telephonic miscommunication in between accused No.1 and D.W.N0.2 Sunil Patani.
11. Further she deposed that on 17/11/2004 somebody informed her in respect of advertisements dt. 19/11/2004 published in Lokprabha Magazine which issue was came into market for sale, immediately, she informed the said fact to P.W.N0.4 Padhye on telephonic message and wrote one letter to him and send it by hand delivery with someone. Similarly, she also communicated this fact to Additional Director, Health Department, Pune in written form on 7/12/2004.
12. In order to prove the defence of miscommunication, accused No.1 Tated relied upon the testimony of D.W.N0.2 Sunil Patani (Exh.P-35). According to his evidence, that since 10 years he is acquainted with accused No.1 on account of his business relations with accused No.1. At some occasion, when he used to come at Mumbai for his business purpose, that time accused No.1 used to supply the material of D.T.P. for advertisement thereafter he used to supply that material to Padhye Publicity Pvt. Ltd. He further deposed that, so far as advertisements dt. 19/11/2004 and 3/12/2004 are concerned, he listened “want a son”, instead of “want a child”. Accordingly, he got prepared D.T.P. material and supplied it to P.W.N0.4 Padhye. Pursuant to which, Lokprabha Magazine projected those advertisements. In order to substantiate the contention of D.W.N0.2, he relied upon his affidavit, which is placed before court vide (Exh.P-36).
13. The sum and substance of the defence taken by accused No.1 is concern, I would like to point out that in order to substantiate the defence of miscommunication, apart from these oral evidence accused No.1 relied upon the letter given by her to P.W.N0.4 Padhye, which is placed before court vide (Exh.P-24). Now, let us see the contents of letter, which reads thus;

Letter (Exh.P-24): 19@11@2004

श्रीयुत विजय पाध्ये,

सन्नेह नमस्ते / वि. वि. मागील वेळी मी D.T.P. बनवून घेणा-याला ‘मूल हवे?’ असे शिर्षक घ्यावयास फोनवर सांगितले होत. परंतु फोनवर ऐकण्यात त्याच्याकडून चूक झाली आणि त्याने ‘मूल हवं?’ ऐवजी चुकून मुलगा हवा? असे शिर्षक D.T.P. बनविणा-याकडून करवून घेतलं आणि परस्पर ती D.T.P. तुमच्याकडे मुंबई ऑफिसात आणून दिली. ही D.T.P. मी स्वतः पाहिलीही नाही आणि शिवाय असे चुकीचे काही घडेल हे मला अगदीच अनपेक्षित होतं. कारण यापूर्वीही त्याने D.T.P. बनवून घेतल्या होत्या आणि परस्पर तुम्हांला मुंबईच्या ऑफिसात मला न दाखवता आणूनही दिल्या होत्या. पण यापूर्वी असे त्याच्याकडून शिर्षक चुकीचे ऐकले जाणे आणि तशी चुकीची D.T.P. होणे असे आजपर्यंत कधीच झाले नाही. यावेळचा अंक हा दिवाळी अंक होता. त्यामुळे तो बाजारात लवकर आला असावा. काल कुणाचा तरी मला फोन आल्यावर आपल्या जाहिरातीमध्ये काहीतरी चुकीचे छापले गेल्याचे मला लक्षात आले. माझी नुकतीच फोन डायरी कुठेतरी हरवली असल्याने मला तुम्हांला लगेच फोन करता आला नाही. म्हणून आज औरंगाबादहून मुंबईला येणारच्या व्यक्तीकडे हे पत्र मी एकदम गडबडीत लिहून पाठवित आहे. खरे म्हणजे या लोकप्रभा मासिकाच्या proof reader ने ‘मुलगा हवा?’ असे शिर्षक दिसताच ही जाहिरात बाजूला काढून ठेवावयास हवी होती. कादाचित त्यांच्याकडूनही ती चुकीने नजरेआड झाली असावी. असो. मात्र यापूढे ही चुकीच जाहिरात अजिबात होउ नये असे लोकप्रभाला ताबडतोब कळविणे.

आपली विश्वासू

डॉ छाया जैन

14. On close scrutiny of the contents of letter and oral evidence adduced by accused No.1, I found major inconsistency between them because, as per the letter (Exh.P-24), it is to be seen that at the relevant time accused No.1 misplaced her telephone diary so, she could not communicate this fact to P.W.N0.4 Padhye by telephonic message. Thereby, she wrote this letter (Exh.P-24) and send it to P.W.N0.4 Padhye by hand delivery with the help of one person. The said episode appears to be false simply for the reason that accused No.1 exposed in her chief examination by admitting that immediately when she came to know about the advertisements, she informed said fact to P.W.N0.4 Padhye on telephonic message and wrote one letter. This admission given by accused No.1 in her evidence itself appears to be contrary with the contents of letter, because as per the contents of letter that at the relevant time her telephone diary was misplaced, so she could not communicate this fact to P.W.N0.4 Padhye, on telephonic message, thereby she handed over this letter to one person who was coming towards Mumbai. If it was so, then question arises as to why accused No.1 deposed in her evidence that she informed this fact to P.W.N0.4 on telephonic message. This appears to be a major inconsistency in oral and documentary evidence adduced by accused No.1.
15. Furthermore, I would like to point out that as per the evidence of P.W.N0.4 Padhye that, he is in acquaintance with accused No.1 since 15 years and he is having commercial relations with her. In this scenario, it is necessary for the court to scrutinize the oral and documentary evidence placed on record by defence witness and P.W.N0.4 Padhye with great care and caution. In sequel, while assessing the evidentiary value of this letter, I would like to point out that, as per the evidence of accused No.1, it was delivered by her to P.W.N0.4 Padhye by hand delivery. In order to prove this fact, it was necessary for her to examine that person who delivered it to P.W.N0.4 Padhye. On this point, the evidence adduced by accused No.1 and P.W.N0.4 Padhye remained silent as to who handed over this letter to P.W.N0.4 Padhye. In this background, had it been said that it is a genuine document, particularly when it was placed on record by P.W.N0.4 during the course of his cross examination when it was not called by accused or prosecution, from which only it could be gathered that it is a fabricated document prepared by accused No.1 with the help of P.W.N0.4 with intent to save her from this proceeding. So, there is a need to discard this evidence in toto.
16. Furthermore, I would like to point out that as per the evidence of D.W.N0.2 Patani that while receiving information of advertisement, he listened “want a son”, instead of “want a child”. So, he got prepared D.T.P. material and supplied it to P.W.N0.4 Padhye. Similarly, D.W.N0.2 also placed his affidavit before the court vide (Exh.P-36), which is prepared by him before notary in which he retreated the same contentions. On this point, assuming for a moment, that this defence adopted by accused No.1 is true, then question arises as to why she failed to check out the contents of D.T.P. material prior to its advertisement. Is it not a duty of accused No.1, to check it? But to that extent, there is no explanation given by accused. Moreover, during the course of cross examination of D.W.N0.2, he exposed by admitting that at the time of preparation of affidavit (Exh.P-36), he did not narrate the contents of affidavit to the typist. On the contrary, it came to be typed upon the instructions given by accused No.1 Dr. Tated and she paid the fees of notary. Similarly, at the time of preparation of affidavit notary did not administer oath to him. It means it is not a affidavit in true sense.
17. Furthermore, on perusal of (Exh.P-36), it is to be seen that at the time of preparation of affidavit, D.W.N0.2 stated before notary that he saved the contents of advertisement given by accused No.1 Chhaya Tated to him and as per the requirements of accused No.1, he used to supply that ready material to P.W.N0.4 Padhye. From this recitals, it is to be seen that already those advertisements were saved by D.W.N0.2 and upon the instructions from accused No.1 and as per her requirements, he used to supply that material to P.W.N0.4 Padhye. This admission given by D.W.N0.2 before notary is also goes against the accused No.1 and it expressly helps to the story of prosecution.
18. On this point, Ld. Defence Counsel vehemently argued that it is only part of miscommunication between accused No.1 and D.W.N0.2 Patani. When accused No.1 came to know about the fact of advertisement, immediately she published one corrigendum in Lokprabha magazine dt. 31/12/2004 (Exh.P-19). Now, let us see the contents of corrigendum (Exh.P-19) and its comparison with disputed advertisement (Exh.P-17), which reads thus;

Corrigendum (Exh.P-19) Advertisement (Exh.P-17)**dt. 31/12/2009 dt.19/11/2004.**

शुध्दीपत्रक
मुलगा हवा?
गर्भधारणेपुर्वीच विशेष उपचार!
दर २रा, ४था रविवार वेळ १२ ते ६
डॉ.छाया तातेड (फॉरेन रिटर्न)
श्री.नर्सिंग होम, सेना भवनसमोर, दादर प.मुंबई २४४६४९८५
सोम. मंगळ - पीरबाजार, औरंगाबाद २३४११८०
**‘मूल हवं?’ ऐवजी मागील अंकात ‘मुलगा हवा’ असे चुकीने छापले गेले.
तरी गर्भधारणा न होणा-यांना अथवा गर्भधारणा होउन नऊ महिने पूर्ण न होणा-या केसेससाठी
गर्भधारणेपूर्वी विशेष होमिओपॅथिक उपचार .
डॉ. छाया तातेड होमिओपॅथिक तज्ञ
मुंबई दर दुसरा / चौथा रविवार
औरंगाबाद दर सोम / मंगळ २३४११८०**

19. On going through the contents of corrigendum and while comparing it with advertisement dt.19/11/2004 (Exh.P-17), it is to be seen that accused No.1 made three major changes in corrigendum dt.31/12/2004. She changed the heading of advertisement i.e. “want a child”, instead of “want a son”, similarly, in corrigendum she failed to mention her degree and address of Shree Nursing Home along with its phone number. On this point, I would like to point out that in earlier advertisement dt.19/11/2004 (Exh.P-17) and dt.3/12/2004 (Exh.P-18). accused personated herself as foreign returned doctor. But in corrigendum she mentioned Homeopathic expert and failed to give her contact address at Mumbai. Considering these major changes made by accused in corrigendum, it is to be seen that, if it was a part of miscommunication between accused No.1 and D.W.No.2 in connection with the “heading of advertisement”, then question arises as to why she failed to mention her degree as “foreign returned” Doctor and address of “Shree Nursing Home” along with “telephone number” in corrigendum. It means, she tried to cope up this lacuna.
20. On this point, I hold that accused No.1 is not skilled person of Allopathy side because according to her evidence that she has completed graduation in Homeopathic side. If it was so, then question arises as to whether Homeopathy degree provides any such type of treatment. To that extent, the burden is shifted upon accused No.1 but, she could not rebut it. On the contrary, the advertisement dt. 19/11/2004 (Exh.P-17) and 3/12/2004 (Exh.P-18), it is to be seen that she tried to personate herself as a foreign returned doctor and suppressed the fact of her original qualification. But in corrigendum, she mentioned her qualification as Homeopathic Expert. It means, at the time of releasing corrigendum she became more cautious and took all precautionary measures with intent to save her from the proceeding, because as per her oral evidence that immediately when she came to know about the advertisements dt. 19/11/2004 and 3/12/2004, she published corrigendum, but it appears to be false. Because in present case on 27/11/2004 P.W.No.1 carried out inspection of Shree Nursing Home and recorded statement of accused No.2 on 29/11/2004. It means prior to releasing of advertisement of corrigendum, she was well aware about the initiation of this proceeding. So, the entire defence evidence brought on record by the mouth of accused, D.W.No.2 and letter dt.19/11/2004 (Exh.P-24) and letter (Exh.P-30) which are written by accused to Additional Director, Health Department, Pune on 7/12/2004, is appears to be a brought-up and fabricated evidence placed on record with intent to save accused No.1 from this proceeding. So, it is liable to be straight way rejected.

21. Furthermore, Ld. Defence Counsel for accused No.1 also raised objection in his memorandum of argument by submitting therein that at the time of inspection P.W.No.1, was not having any valid authority to carry out inspection under the P.N.D.T act. Despite this she acted and prepared panchnama. So, her act is an ultra virus. In order to ascertain the answer of this question, I have taken the assistance of oral evidence adduced by P.W.N0.1 (Exh.P-4), in which she categorically deposed that the then D.M.C. Mr. Doctor deputed her at G/N-Ward as a Medical Officer Health Department. Similarly, Government Gazette (Exh.P-8) placed before the court authorized every medical officer as a competent authority to the extent of their respective territorial jurisdiction. In the present case it is not disputed that at the time of inspection P.W.N0.1 was authorized by D.M.C. to act as medical officer for G/N-Ward. The said authority is not seriously challenged in cross examination. Similarly, Gazette itself is having presumptive value as contemplated under Sec.81 of the Evidence Act.Under these circumstances, I hold that P.W.N0.1 is authorized to exercise the powers given under this Act
22. So far as involvement of accused No.2 Dr. Adkar is concerned, Ld. Defence Counsel Mr.Vedak for accused No.2 submitted that whatever the practice carried out by accused No.1 at Shree Nursing Home was not having any concern with accused No.2, because accused No.2 allowed her to carry out her practice as Homeopathic Expert. So, she does not covered under the provision of Sec.22 of the P.N.D.T. Act. On this aspect, I failed to understand the argument advanced by Ld. Defence Counsel simply for the reason that, when accused No.2 allowed accused No.1 to carry out her practice prior to two years, then it will be treated that accused No.2 is also having commercial terms with accused No.1, under these circumstances, there is also necessity to scrutinize the evidence of both the accused with great care and caution. While scrutinizing it, firstly, I would like to reproduce the definition of Genetic Counseling Centre, which is provided u/s.2(c) of the P.N.D.T. Act which reads thus;

“Genetic Counseling Centre” means an institute, hospital, nursing home or any place, by whatever name called, which provides for genetic counseling to patients;

“Genetic Clinic” means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedures;

EXPLANATION:

For the purposes of this clause, “Genetic Clinic”includes a vehicle, where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, is used;

23. On going through the definition of Genetic Counseling Centre, it is to be seen that any nursing home or any place by whatever name called, came to be used for counseling to the patients is called, ‘Genetic Counseling Centre’ and as per Sec.4 of the P.N.D.T. Act it is necessary for every Genetic Counseling Centre to get it registered under the P.N.D.T. Act.

Sec.4 reads thus;

4. Regulation of pre-natal diagnostic techniques: On and from the commencement of this Act-
- (1) no place including a registered Genetic Counseling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specific in Cl.(2) and after satisfying any of the conditions specified in Cl.(3);
 - (2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely;
 - (i) chromosomal abnormalities.
 - (ii) genetic metabolic diseases;
 - (iii) haemoglobinopathies;

- (iv) sex-linked genetic diseases;
 - (v) congenital anomalies;
 - (vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;
- (3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing.
- (i) age of the pregnant woman is above thirty five years;
 - (ii) the pregnant woman has undergone two or more spontaneous abortions or foetal loss;
 - (iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals.
 - (iv) the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic diseases.
 - (v) any other condition as may be specified by the Board.

24. In present case, while assessing evidence against accused No.2, I hold that accused No.1 and accused No.2 are having cordial relations with each other, accused No.1 was practicing in Shree Nursing Home, which belongs to accused No.2. Under these circumstances, whether is it possible to place reliance upon the defence taken by accused No.2 in connection with her non involvement in the said crime? The rational answer of this question goes into negative simply for the reason that in present case accused No.1 and 2 are having cordial relations. Both are qualified doctors. For a moment if court assumes that accused No.2 came to know about the act of accused No.1 after the date of inspection i.e. 27/11/2004 then question arises as to why immediately she failed to inform the said fact to the appropriate authority i.e. Maharashtra Council of Homeopathy Board in connection with professional misconduct of accused No.1 for taking serious action against her. When she remained silent on this point, then only inference could be drawn that accused No.2 impliedly consented accused No.1 to carry out her practice at her nursing home by way of providing aid to her at her nursing home, which is not registered under P.N.D.T. Act. Hence, I hold that in present case both the accused contravened the provisions of Sec.22 of P.N.D.T. Act. Therefore, I have no hitch to record my findings on Point No.1 in the affirmative.

25. As to Point No.2 and 3:

Both the points are interlinked so discussed with each other. To that extent, let us see the provisions of Rule 4(1)(2) of the P.N.D.T. Act which reads thus;

4. Registration of Genetic Counseling Centre, Gentic Laboratory and Genetic Clinic – (1) An application for registration shall be made to the Appropriate Authority, in duplicate, in Form A, duly accompanied by an Affidavit containing-
- (i) an undertaking to the effect that the Genetic Centre / Laboratory/ Clinic/ Ultrasound Clinic/ Imaging Centre / Combination thereof, as the case may be, shall not conduct any test or procedure, by whatever name called, for selection of 'sex' before or after conception or for detection of sex of foetus except for diseases specified in Section 4(2) nor shall the sex of foetus be disclosed to any body; and
 - (ii) an undertaking to the effect that the genetic centre / Laboratory /clinic combination thereof as the case may be shall display prominently a notice that they do not conduct any technique test or procedure etc. by whatever name called for detection of sex of foetus or for selection of sex before or after conception.
- (2) The Appropriate Authority, or any person in his office authorized in this behalf, shall acknowledge receipt of the application for registration, in the acknowledgment slip provided at the bottom of Form A, immediately if delivered at the office of the Appropriate Authority, or not later than the next working day if received by post.

26. After going through the provision of Rule 4 of the said Act, it is to be seen that it is necessary for every Genetic Counseling Centre to get it registered before the appropriate authority because Genetic Counseling Centre is a process, where qualified Genetic Counselor will conduct genetic test, evaluate family history to know where the patients are passing some diseases from one generation to another. In present case, without having any qualification to run genetic counseling center, both the accused run it at the nursing home, belongs to accused No.2 Dr. Adkar. So, I am of the opinion that, it is not only contravention of Rule 4 but it is a false impersonation of both the accused to the public who is innocent and not having sufficient knowledge about the medical field and acts upon their advices. Hence, I hold that, prosecution duly succeed to prove that both accused contravened Rule 4(1)(2) and Rule 6 of the P.N.D.T. Act. So far as, Point NO.3 is concerned, I hold that the said point is already covered while deciding point No.2 hence, no need to pass separate sentence for contravention of Rule 6(2) of the P.N.D.T. Act. Therefore, I have recorded my findings to point No.2 and 3 accordingly.
27. As to point No.4:
It has come in the evidence of P.W.NO.1 and P.W.NO.2 that at the time of inspection both the accused failed to produce the registers showing names and addresses of men and women to whom they tendered the services of counseling. To that extent, first of all, I would like to point out that, it is unauthorized genetic counseling centre, established by both the accused. Under this circumstance, it is not expected from them to maintain the register with intend to create evidence against them. So, there might be a chance that accused did not maintain the register. Whatever-so-may-be, but the provisions of Rule 9(1) provides condition to maintain record at Genetic Counseling Centre and in present case accused failed to maintain it, though it was not registered. So, I hold that accused also contravened Rule 9(1) of the P.N.D.T. Act.
28. As to point No.5:
Cumulative effect of the aforesaid discussion and the findings thereon goes to suggest that in present case prosecution duly succeed to prove the guilt against accused for the offence punishable u/s.22(3) and 23 for contravening Rules 6(2),4(1)(2),9(1) of P.N.D.T. said Act. So, I have recorded my findings on Point No.4 in the affirmative. My findings constrained me to pause here to hear the accused on the quantum of sentence.

Date: 14/8/2009.

Mumbai .

(R. V. Jambkar)
Metropolitan Magistrate,
41st Court, Shindewadi,
Dadar, Mumbai.

JUDGMENT RESUMED

29. On the quantum of sentence, accused No.1 submitted that she belongs to middle class family and bread and butter of her children is depend upon her earning. So, she prayed for imposing minimum fine. Accused No.2 submitted that she is senior citizen and aged around 62 years. So, she prayed for imposing minimum fine.
30. Heard Ld. Defence counsel Mr. Ghate for accused No.1 and and Mr.Vedak for accused No.2. They also retreated the same contention.
31. While considering the quantum of sentence, court has to consider the mitigating and aggravating circumstance. Accused in the case at hand are doctors. Admittedly, they are reputed persons from the society. Society looks towards them as their ideal persons and when such persons have committed the offence which is coming within ambit of not only heinous but also against the existence of the society. Because, by their act they have encouraged to the society for determination of sex of female with a view to prevent pregnancy of

female foetus. So, definitely, it come within the ambit of aggravating form of circumstance. Under such circumstances, they are not entitled for leniency.

32. Similarly, P.N.D.T Act views the offence committed under this act very seriously which makes every offence under this act is cognizable, non-bailable and non-compoundable. The Legislature want to protect the dignity and status of women. In this context Parliament introduced this act which never permit for showing leniency while passing sentence thereon. Therefore, I proceed to pass following order.

ORDER

1. Accused 1. Chhaya Rajesh Tated and 2. Shubhangi Suresh Adkar are hereby convicted u/s. 248(2) of Cr.P.C. of the offence punishable U/Sec. 22(3) for contravening the provisions of Sec.22(1)(2) and for the offence punishable u/s.23 for contravening the provisions of Rules 6(2), 4(1) (2), 9(1) of Pre Natal Diagnostic Techniques Act, 1994 (Amended as The Pre Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003).
2. Both the accused are hereby sentenced to suffer R.I. for three years for the offence punishable u/s. 22(3) for contravening the provisions of Sec.22 of P.N.D.T Act and do pay fine amount of Rs.10,000/- (Ten Thousand only) each. In default of payment of fine, they shall suffer R.I. for three months.
3. Both the accused are hereby sentenced to suffer R.I. for three years for the offence punishable u/s. 23 for contravening the provisions of Rule 4(1)(2) of P.N.D.T Act and do pay fine amount of Rs.10,000/- (Ten Thousand only) each. In default of payment of fine they shall suffer R.I. for three months.
4. Both the accused are convicted for the offence punishable u/s. 23 for contravening the provisions of Rule 6(2), but no separate sentence passed for the same.
5. Both the accused are hereby sentenced to suffer R.I. for three years for the offence punishable u/s. 23 for contravening the provisions of Rule 9(1) of P.N.D.T Act and do pay fine amount of Rs.10,000/- (Ten Thousand only) each. In default of payment of fine they shall suffer R.I. for three months.
6. Accused shall surrender their bail bonds, if any for undergoing the sentence.
7. All sentences shall run concurrently.
8. Copy of Judgment be delivered to both the accused, free of costs, forthwith.

Date: 14/8/2009.

Mumbai.

(R. V. Jambkar)

Metropolitan Magistrate,

41st Court, Shindewadi,

Dadar, Mumbai. Rgz.

**IN THE COURT OF JUDICIAL MAGISTRATE (F.C.)
AT - PAROLA, DISTRICT JALGAON**

5 (4)

**(Presided over by S. P. Naik- Nimbalkar,
Judicial Magistrate (F. C.), Parola)
Regular Criminal Case No. 5/2006
Decided on 27.07.2010**

The Appropriate Authority,

Dr. Sambhaji Patil

-Vs.-

Dr. Prashant Navnitlal Gujrathi

The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996 - Rule 9 (4) punishable under Section 23 and 25 of The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003

CASE SUMMARY

This judgment comes after a full fledged trial conducted in the Court of Judicial Magistrate First Class at Parola, Dist. Jalgaon. It is one of those early decisions which are an encouragement for the prosecution. In this case the accused was prosecuted u/s 23 and 25 of the Act for contravention of Rule 9 (4) of the Act, for non maintenance of record and for failure to submit the record which was to be maintained as per Form-F, of his sonographic clinic, before Appropriate Authority at the time of inspection.

The court considered in detail the relevant provisions, like Section 4 (3) Section 29 (2) Rule 10 (1A), Rule 11 in their proper perspective, casting the bounden legal duty on the accused to produce and show the record to inspecting Authorities. The court elaborately dealt with the various pleas taken by the defence including the challenge to competence of Appropriate Authority to file a complaint for non compliance with procedure of seizure, the conduct of accused and held accused guilty for offence u/s 23 and 25 of the Act for contravention of Rule 9 for non maintenance of records.

While awarding the sentence, the Court dealt with the object of the Act and as to how non maintenance of form-F amounts to contravention of provisions of Section 5 and 6 within the meaning of Section 4 (3) of the Act, making the offence more serious and grave. The court has considered the need for imposing deterrent punishment in view of declining sex ratio particularly in the said Taluka and status of the accused as Doctor by profession, casting further responsibility upon him to obey the law. The Court accordingly sentenced him to suffer rigorous imprisonment of 1 year and to pay fine of Rs. 5000/- in default to suffer further simple imprisonment of two months.

In this case for the first time the Proviso to Section 4(3) of the Act and its effect was discussed. Failure of the Accused in discharging the burden shifted upon him by this Proviso was one of the factors resulting in his conviction.

The Court also took note of Section 28(1)(a) of the Act while rejecting the contentions of the defence that complaint was not filed by the Police or before the Police. The Court also rightly rejected the various contentions about improper procedure of search, seizure and sealing, which are routinely raised in various proceedings. (Para 52)

The most important part of the judgment is that the court has directed the copy of judgment to be given to the Appropriate Authority through Civil Surgeon, Jalgaon for reporting the name of accused to the State Medical Council for taking necessary action against him as per Section 23 (2) of the Act. (Para 75) It is reported that now the Civil Surgeon has already taken necessary action

The Credit for the success of the case to some extent also goes to Assistant Public Prosecutor for bringing sufficient oral and documentary evidence on record by examining the complainant, panch and Medical Officer and by proving Panchnama and Authority Letter.

This Judgment is thus, on all fronts a step forward.

JUDGMENT

**Per Shri S. P. Naik- Nimbalkar,
Judicial Magistrate (F. C.), Parola**

(Delivered on 27th July 2010)

Mr. Sambhaji . R. Jadhav, Ld. A. P. P. for complainant.

Mr. U. B. Misar, Ld. Advocate for accused.

- 1) Accused Dr. Prashant Navnitlal Gujrathi, resident of Parola is charged for the contravention of Rule 9 (4) under The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996 (Hereinafter 'Rules 1996' for short) punishable under Section 23 and 25 of The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003 (Hereinafter P. C. P. N. D. T. Act 2003 for short).
- 2) The summation and summarization of the complainant's case may be stated as under:
Complainant Dr. Sambhaji Patil, Medical Officer, Rural Hospital, Parola was appointed as the appropriate authority under Section 17 of the P. C. P. N. D. T. Act 2003, by the Maharashtra Government.
- 3) Accused Dr. Prashant Gujrathi runs Shriji Hospital at Parola, which is a sonography clinic. Civil Surgeon, Jalgaon has sanctioned this sonography centre as an ultra sonography centre. Dr. Minal D. Khalane, radiologist, Dhule operates the sonography machine at the aforesaid Shriji Hospital, Parola.
- 4) On 11-12-2005, complainant Dr. Sambhaji Patil along with Dr. Mrs. Kavita Sontakke, Medical Officer, Civil Hospital, Jalgaon has inspected the sonography centre of the accused. They demanded the requisite record to be maintained under the P. C. P. N. D. T. Act, 2003 to the accused. Accordingly, accused had handed over one register and registration certificate to the complainant. It was revealed during this inspection that the Form F register, consent forms of pregnant women willing to undergo sonography and copy of the P. C. P. N. D. T. Act 2003 was not found at the sonography centre. Accordingly, the complainant had inferred that the accused had contravened the provisions under 'Rules 1996'. Subsequently, the complainant had seized and sealed the ultra sonography machine and a printer by doing a panchanama.
- 5) Thereafter, the present complaint was filed on 3-1-2006 for contravention of Rule 9 (4) constituting for an offence punishable under Section 23 and 25 of the P. C. P. N. D. T. Act, 2003. As per order on Exh. 1 dated 3-1-2006 of my Hon'ble learned pre-decessor the then Judicial Magistrate (F. C.), Parola, process was issued in the form of summons against the accused for contravention of Rule 9 Punishable under Sections 23 and 25 of the P. C. P. N. D. T. Act 2003.

- 6) The accused has appeared on 10-1-2006 and was released on bail vide order dated 10-1-2006 on Exh.6 i. e. the bail application.
- 7) As the case is filed as private complaint otherwise than on police report, the evidence before charge came to be recorded. Prosecution has examined as many as three witnesses as follows.
 - 1) The Appropriate Authority, complainant P. W. No.1 Dr. Sambhaji Rawan Patil at Exh. 22.
 - 2) Panch witness P. W. No. 2 Baliram Mahadu Walunj Wani at Exh. 25.
 - 3) Medical Officer, Civil Hospital, Jalgaon, P.W.No.3 Dr. Mrs. Kavita Satish Sontakke at Exh. 26 in capacity of member of the inspecting party.

The accused has cross-examined P. W. No. 2 Baliram and P. W. No. 3 Dr. Mrs. Kavita Sontakke wholly. Whereas, cross-examination of P. W. No. 1 Dr. Sambhaji Patil was partly taken before charge and in lieu of order below Exh. 38 dated 22-1-2010, P. W. No. 1 Dr. Sambhaji Patil was again cross-examined by the accused.
- 8) Along with the above mentioned oral evidence, the prosecution has filed the following documentary evidence.
 - 1) Panchanama dated 11-12-2005 at Exh. 23.
 - 2) Letter of Additional Director, Family Welfare, Health Services, Mother and Child Development and School Health Department, Pune at Exh. 24.
 - 3) Learned Additional Public Prosecutor, Jalgaon has filed evidence close pursis vide Exh. 36.

Prosecution has also placed seized register Article A and copy of registration certificate Article B, on record.
- 9) Considering the oral and documentary evidence on record, as per order below Exh. 1 dated 15-12-2009, the charge for the contravention of Rule 9 (4) of 'Rules 1996' punishable as an offence under Sections 23 and 25 of the P. C. P. N. D. T. Act, 2003 was framed by me against the accused on 15-12-2009 vide Exh. 33. I have explained the contents of the charge i. e. the particulars of the offence in Marathi, to the accused. The accused understood the same. He has pleaded not guilty to the offence. Hence, the trial ensue.
- 10) The statement of accused under Section 313 of Code of Criminal Procedure, 1973. (Hereinafter for short Cr. P. C.) was recorded vide Exh. 42 on 23-2-2010. He has denied the entire incriminating evidence against him. The accused has filed the following documents during his statement vide Exh. 42, as follows.
 - 1) Letter dated 31-12-2005 given by the accused to Civil Surgeon, Jalgaon at Exh. 32A.
 - 2) The monthly reports filed at Cottage Hospital, Parola of December 2005, November 2005, October 2005, September 2005, August 2005, July 2005, June 2005, May 2005, April 2005 from Exh. 45 to 53 respectively.

Along with these documents, the accused has also filed the F form registers from Articles 1 to 7 and registers in Format F from Articles 8 to 14.
- 11) In view of the above rival facts and evidence filed on record by the prosecution as well as the accused, the following points arise for my determination and I have given my findings against each of them for the reasons recorded below.

Points

Findings

- 1) Whether the prosecution proves that accused Dr. Prashant Navnitlal Gujrathi failed to submit the record which was necessary to be maintained by his sonography clinic in respect of each man or woman subjected to any Prenatal Diagnostic Procedure/Techniques/Test, as specified in Form F,

annexed to the P. C. P. N. D. T. Act, 2003, before the complainant Dr. Sambhaji Patil on 11-12-2005 at Shriji Hospital, Parola, Taluka Parola, District Jalgaon and has contravened the Rule 9 (4), framed under 'Rules 1996' and thereby committed an offence punishable under Sections 23 and 25 of the P. C. P. N. D. T. Act, 2003 ?.

... Yes

2) What order ?.

... As per final order

REASONS

12) **As to point No. 1 :**

Submissions of both Ld. Counsels :

I have heard the arguments advanced by learned A. P. P. Mr. S. R. Jadhav and learned advocate Mr. U. B. Misar for the accused. Learned A. P. P. Mr. S. R. Jadhav has submitted that P. W. No. 1 Dr. Sambhaji Patil is the appropriate authority with reference to Section 2 (A) and Section 17 of the P. C. P. N. D. T. Act, 2003. The letter in this context of Additional Director, State Government is duly proved. P. W. No. 2 Baliram Walunj Wani has proved the panchanama and seizure of register from the clinic of accused. He has further submitted that the application dated 31-12-2005 vide Exh. 32A of the accused suggest the apprehension in the mind of the accused. The accused has kept mum from the date of inspection i. e. 11-12-2005 till 31-12-2005. This shows that he has manipulated the record, which is filed at Article 1 to 14 at the time of his statement recorded under Section 313, Cr. P. C. The defence of the accused is after thought and is against preponderance of probabilities. Therefore, it can not be accepted. The prosecution has proved the case beyond all reasonable doubts. Finally, he has submitted that the accused be dealt with as per provisions of law.

13) On the contrary, learned advocate Mr. U.B. Misar for the accused has heavily attacked all submissions of prosecution and has argued at length. He has submitted that the delay of filing the complaint from 11-12-2005 till 3-1-2006 suggests the concoction of this complaint. He has further submitted that P. W. No. 1 Dr. Sambhaji Patil is not an appropriate authority within the meaning of Section 17 of the P. C. P. N. D. T. Act, 2003. The letter of Additional Director, State Government filed at Exh. 24 is not proved and the same can not be read in evidence. He has also submitted that police can take cognizance of this complaint. But the complainant has not filed any complaint nor has given information to the police station. He has come down strenuously on the seizure panchanama with the aid of Rule 12 of 'Rules 1996'. As per him, the search and seizure of the documents is not proved. The visit form is not filled by the inspecting party. He further submits that the accused has maintained all the record as contemplated under the P. C. P. N. D. T. Act, 2003 and the same is filed on record vide Articles 1 to 14.

14) Learned advocate Mr. U. B. Misar for the accused has also placed his reliance on:

- 1) Vijay Bhagwan Shetty Vs. State of Maharashtra and another, 2009 (2) Mh. L. J. (Cri.) 143.
- 2) Bhalchandra Namdeo Shinde Vs. State of Maharashtra, 2003 Bom. C. R. (Cri.) 133.
- 3) Naba Kumar Das Vs. State of West Bengal, 1974 Cri. L. J. 512.

I have gone through the above mentioned case laws. It would be proper to elaborate the aforementioned arguments along with the produced authority case laws at the relevant part hereinafter.

15) **Non-disputed facts :**

At the outset, before proceeding further, it would be proper to lay down the facts which are not disputed by accused on record. This 'non disputed' facts which are gathered from the evidence on record as well as the statement of accused recorded under Section 313, Cr. P. C. vide Exh. 42 may be listed as follows.

- 1) Accused Dr. Prashant Gujrathi is a registered medical practitioner and runs 'Shriji' Hospital at Parola which is a sonography clinic.
- 2) P. W. No. 1 Dr. Sambhaji Patil along with other members has inspected 'Shriji' Hospital, Parola on 11-12-2005.
- 3) Accused Dr. Prashant Gujrathi was present at the time of this inspection.
Except aforementioned facts, all other facts are disputed by the accused.

16) Nature of the offence and burden on prosecution :

At this juncture, it would be proper to lay down the burden which the prosecution is facing in this trial. As mentioned earlier, the offence is filed for the contravention of Rule 9 (4) of the 'Rules 1996' which constitutes for an offence punishable under Sections 23 and 25 of the P. C. P. N. D. T. Act, 2003. Rule 9 (4) of 'Rules 1996' lay down that every genetic clinic to maintain record in respect of each man or woman subjected to any prenatal diagnostic procedure/techniques/test, and shall be maintained as specified in Form F. Form F is annexed along with 'Rules 1996'. Form F starts with reference to proviso to Section 4 (3), Rule 9 (4) and Rule 10 (1A). So, before discussing the contents of Form F, it would be proper to discuss this legal provisions.

- 17) Proviso to Section 4 (3) of the P. C. P. N. D. T. Act, 2003 mentions that the person conducting ultra sonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of Section 5 or Section 6 unless contrary is proved by the person conducting such ultra sonography.
- 18) Section 5 of the P. C. P. N. D. T. Act, 2003 lays down that written consent of pregnant woman has to be obtained before conducting the prenatal diagnostic procedure and no person including the person conducting prenatal diagnostic procedure shall communicate the sex of the foetus by words, signs or in any other manner. Section 6 prohibits the determination of the sex of the foetus. So, by virtue of proviso to Section 4 (3) any deficiency or inaccuracy found in the record of genetic clinic would amount to contravention of aforementioned Section 5 and 6. By virtue of Section 5 and 6, maintaining complete record is not a mere formality. But amounts to contravention of Section 5 and 6 of the P. C. P. N. D. T. Act, 2003. Also, it casts legal duty and burden on the concerned genetic clinic.
- 19) Further Rule 10 (1A) of the 'Rules 1996' creates an obligation on any person conducting ultra sonography/image scanning on a pregnant woman of giving a declaration on each report that she does not want to know the sex of the foetus. Neither it is detected or disclosed to anybody.
- 20) Form F contains detail 19 entries specifying the details about the genetic clinic, patient, patient's history, duly signed by the Gynaecologist/Radiologist/Director of the clinic. Form F also provides for declaration of pregnant woman with her signature or thumb impression, that she does not want to know the sex of her foetus. It also contains the declaration of Doctor/person conducting ultra sonography/image scanning that he/she have neither detected nor disclosed the sex of foetus to anybody in any manner. Considering the above entries and declaration, Form F appears to be an important part of the prenatal diagnostic transaction.
- 21) Considering the aforesaid legal provisions, the complaint Exh. 1 and the charge at Exh. 33, the prosecution is burdened in this case to prove that accused Dr. Prashant Gujrathi has failed to submit the complete record of any man/woman subjected to prenatal diagnostic techniques/procedure/test which was obligatory on him to be maintained as specified in Form F, Annexed to 'Rules 1996'. Prosecution has to prove the above fact beyond all reasonable doubts by leading cogent, convincing and clinching evidence. If the prosecution fails to bring home the guilt of accused, as per cardinal principles of criminal trial, the accused is entitled for an acquittal.
- 22) Prosecution's evidence :

At the cost of repetition, it is necessary to state that in the complaint Exh. 1, Para No. 3, it is particularly mentioned that, P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke have demanded

the record from the accused. At that time, accused has handed over one register and registration certificate of sonography centre to the complainant. The Form F register, declaration of pregnant woman undergoing ultra sonography were not found at the sonography clinic.

- 23) P. W. No. 1 Dr. Sambhaji Patil has categorically stated in his chief examination Exh. 22 that accused Dr. Prashant Gujrathi was not having the consent form of patients, declarative form of doctor in F format. Instead of F Form, he was having a simple notebook. P. W. No. 3 Dr. Mrs. Kavita Sontakke has also categorically deposed that the Form F Register at the clinic of Dr. Prashant Gujrathi was not as per the prescribed format. The addresses of pregnant mothers were incompletely written. The entry regarding existing child was not made in the Form F Register. The sonography report was not properly written. The doctors who have done sonography have not signed the sonography report. The declaration of doctor as well as pregnant women was not found.
- 24) Therefore, the evidence of P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke is in tune with the contents of complaint Exh. 1. The fact in the complaint that the Form F Register as prescribed under Rule 9 (4) and Form F were not found at the genetic clinic of the accused, is supported through the evidence of P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke.
- 25) In the searching cross-examinations of both the above witnesses, there is no suggestion given by the accused that he has maintained the Form F Register in the prescribed format as per Form F and was possessing the same at the time of inspection and he was ready and willing to show the same to the inspecting party. A mere suggestion appears in the cross-examination of P. W. No. 1 Dr. Sambhaji Patil (page No. 5, para No. 4, Exh. 22) that 'accused had maintained all the documents as per Rules'. It is denied by P. W. No. 1 Dr. Sambhaji Patil. It is settled position of law that bare denial would not yield anything in favour of accused.
- 26) No suggestion in the above context is given either to P. W. No. 3 Dr. Mrs. Kavita Sontakke. A mere suggestion appears on page No. 3, para No. 4, Exh. 26 in the cross-examination of P. W. No. 3 Dr. Kavita Sontakke that she has deposed falsely that Form F Register was not maintained in the prescribed format by the accused. This is also denied by the said witness. So, except this evasive denial, there is nothing in the cross-examination of both these witnesses which would shake their testimony on this aspect. But, before accepting this evidence at its face value, as per rules of prudence, evidence and caution, it would be proper to verify these facts with the defence of accused. It is necessary to ascertain whether these facts stands to the test of reliability and admissibility against the defence of accused and objections raised therein.
- 27) Defence of accused :
- Against the above fact, the accused has replied in his statement recorded under Section 313, Cr. P. C. vide Exh. 42 to question Nos. 2 and 3 that P. W. No. 1 Dr. Sambhaji Patil has not introduced him with anybody. The accused had asked about his identity. But P. W. No. 1 Dr. Sambhaji Patil has not shown his identity card to him. In answer to question No. 17, the accused has further replied that he is ready to file all registers with consent form. Accordingly, he has filed Article 1 to 14 on record. So, in the statement of accused also, he has not stated that he had maintained the complete record as per Rule 9 (4) and Form F at his genetic clinic and he was possessing the same on the date of inspection and that he was ready to show it to the inspecting party.
- 28) On this point, learned advocate Mr. U. B. Misar has argued that P. W. No. 1 Dr. Sambhaji Patil was not having any identity card with him to show that he was the appropriate authority. Further, he has submitted that there was no document regarding the appointment of P. W. No. 1 Dr. Sambhaji Patil as an appropriate authority under the Act. Therefore, it was natural conduct of accused Dr. Prashant Gujrathi of not showing his record. Learned advocate Mr. U. B. Misar has submitted that why should the accused show his record to the person who is a stranger to him. In this connection, he has also pointed out that in the cross-examination P. W. No. 1 Dr. Sambhaji Patil has admitted at para 3, page 3, Exh. 22 that he was not having the identity card being a competent authority.

- 29) While dealing with this defence, it is necessary to see the complaint Exh. 1 which specifically states that P. W. No. 1 Dr. Sambhaji Patil has visited the clinic of accused on 11-12-2005. P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke have also stated that they have visited 'Shriji' hospital and Prashant Nursing Home on 11-12-2005 at or about 5.00 to 5.30 P. M. This fact is not shattered in the cross-examinations of both these witnesses. So, the view is proved.
- 30) It has further come in the cross-examination at para 4, page 5, Exh. 22, that wife of P. W. No. 1 Dr. Sambhaji Patil has dispensary by name Shri. Sai Hospital at Parola. Shri. Sai Hospital was started in the year 2003-2004. As the medical practice of P. W. No. 1 Dr. Sambhaji Patil was not procuring, he has shifted his clinic in Gajanan Colony. There are several suggestions in Para No. 4, Exh. 22 which suggest the previous acquaintance of P. W. No. 1 Dr. Sambhaji Patil and accused Dr. Prashant Gujrathi. When the accused himself has suggested his acquaintance with P. W. No. 1 Dr. Sambhaji Patil then, whether he would be at liberty to take the defence that P. W. No. 1 Dr. Sambhaji Patil was a stranger to him. The answer is obviously in the negative. Because it has come in the cross-examination of P. W. No. 1 Dr. Sambhaji Patil that accused is practicing from last 30 years at Parola. P. W. No. 1 Dr. Sambhaji Patil has started his clinic from the year 2003-2004. Accused and complainant (as per Exh. 1), both reside at Parola. So, it is not probable that in a small town like Parola the members of medical fraternity are unknown to each other.
- 31) In the cross-examination, at para 4, the accused has suggested to P. W. No. 1 Sambhaji Patil that he was appointed as a Medical Officer to Cottage Hospital, Parola on temporary basis. This would go to show that accused had knowledge that P. W. No. 1 Dr. Sambhaji Patil was attached to Cottage Hospital, Parola, was known to the accused. Therefore, despite this knowledge, it is difficult to gather why the accused has not shown the record of his genetic clinic to him.
- 32) Secondly, accused Dr. Prashant Gujrathi was legally bound under Section 29 (2) to show all such record to P. W. No. 1 Dr. Sambhaji Patil. In this connection, it would be proper to lay down Section 29 (2) of the P. C. P. N. D. T. Act, 2003 as follows:
- “All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf”. (emphasis supplied).
- 33) Accused Dr. Prashant Gujrathi was also legally bound to show his record to the inspecting party by virtue of Rule 11 framed under the 'Rules 1996'. It would be proper to lay down Rule 11 as follows.
- “Facilities for inspection.- (1) Every Genetic Counselling centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic, Imaging Centre, nursing home, hospital, institute or any other place where any of the machines or equipments capable of performing any procedure, technique or test capable of pre-natal determination of sex or selection of sex before or after conception is used, shall afford all reasonable facilities for inspection of the place, equipment and records to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf for registration of such institutions, by whatever name called under the Act, or for detection of misuse of such facilities or advertisement therefore or for selection of sex before or after conception or for detection/disclosure of sex of foetus or for detection of cases of violation of the provisions of the Act in any other manner”.
- (emphasis supplied).
- 34) So, on facts as well as law, the defence of accused that he has not shown the record to P. W. No. 1 Dr. Sambhaji Patil as he was stranger do not gather any force. On the contrary, it suggests that P. W. No. 1 Dr. Sambhaji Patil had inspected the clinic of accused on 11-12-2005 and at that time, the accused has not made available to him the record which was necessary to be maintained by him as specified in Rule 9 (4) and Form F.
- 35) So, the subsequent question which emerges from the above defence is that whether accused had maintained and possessed the record from Articles 1 to 14 on the date of inspection or not. So, let us consider Articles 1 to

7 first. Articles 1 to 7 is the record in respect of pregnant women. It consist of two parts. First declaration given by pregnant woman and secondly, declaration of Doctor/person conducting ultra sonography/ image scanning. Article 1 starts from 7-9-2003 and Article 7 ends on 4-12-2005. The dates on Article 1 are overwritten and scribbled for first 19 forms. There is no counter signature for this overwriting and scribbling. The name of Radiologist/ Gynaecologist along with the stamp (necessary as per form) is not appearing on any of the forms from Articles 1 to 7. Articles 8 to 14 are Form F registers as specified in Form F Annexed to 'Rules 1996'. Article 8 starts with the form on 1-9-2003 and Article 14 ends with the form filled on 4-12-2005.

- 36) None of the Form F in Articles 8 to 14 contains the name of Radiologist or Gynaecologist/Director of the Clinic who has conducted the ultra sonography on the pregnant woman. There is no reason assigned by the accused as to why the name of Gynaecologist/Radiologist/Director of Clinic and registration number is left blank on all these forms. Through this record, the name of the persons conducting ultra sonography, image scanning or director or owner of the genetic clinic/ultra sound clinic/imaging centre can not be revealed. The name of the person is necessary in view of the specified Form F with reference to Rule 10 (1A) of the 'Rules 1996'. Because Rule 10 (1A) lays down as under-
- “ Any person conducting Ultrasonography image scanning on a pregnant woman shall give a declaration on each report on ultrasonography/ image scanning that he/she has neither detected nor disclosed the sex of foetus of the pregnant woman to any body. The pregnant woman shall before undergoing ultrasonography/ image scanning declare that she does not want to know the sex of her foetus”.
- 37) With reference to the above Rule 10 (1A), the documents at Articles 1 to 14 do not reveal the name of the person giving such declaration and therefore, they are incomplete within the meaning of Rule 10 (1A) read with Form F Annexed with 'Rules 1996'.
- 38) The accused has adduced these documents in his statement vide Exh. 42. It is needless to say that they were not shown to any of the prosecution witnesses during their cross-examinations. It is not suggested during the lengthy cross-examinations of P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke that accused had maintained Articles 1 to 14 at the time of inspection and he has possessed the same at the relevant date, time and place. On the contrary, P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke have categorically deposed that they have not found any such documents at the time of search of the sonography clinic of the accused. So, it was for the accused to raise a probable defence that he was having such documents Articles 1 to 14 at the time of inspection. But, the accused has failed to suggest so.
- 39) The accused has not examined himself to show that Article 1 to 14 were maintained by him or that it is the complete record maintained as per Rule 9 (4) and he has possessed it on the date of inspection. Neither the accused has examined the concerned persons whose signatures are appearing on the forms from Articles 1 to 14. It was necessary because accused has not stated anywhere (in the cross or in his statement Exh. 42) that he has signed the forms in Articles 1 to 14. Accused has not examined any pregnant woman whose consent was obtained on Form F, Articles 1 to 7. It is also pertinent to note that one carbon copy of this form from Articles 1 to 7 is detached from the original form. It is to be given to the pregnant woman. So, if accused had given any such evidence then, it would have shown that the record was genuinely maintained.
- 40) Let us also view this situation from the point of view of a prudent man. It is difficult to infer as to what had restrained or prohibited the accused from showing Articles 1 to 14 to the inspecting party, if he had maintained them at his sonography clinic. What prejudice at the most would have been caused to the accused if he had shown such important documents to the inspecting party?. But answers to these questions are not given by the accused. So, the fact of not showing the record to the inspecting party goes against the accused.
- 41) Accused has filed one letter at Exh. 32A. This letter is written to Civil Surgeon, Jalgaon stating that some persons have inspected his sonography clinic. But they have not given any written orders. Therefore, he has not produced any record before them. But he is ready to produce the record to Civil Surgeon. This letter is of 31-12-2005. The inspection is of 11-12-2005. What prevented the accused from filing such record to the Civil Surgeon for 20 days is also not explained by him.

- 42) Accused has filed the monthly reports sent to Cottage Hospital, Parola from Exh. 45 to 53. But this case is filed for non maintenance of Form F Registers and not for non filing of monthly reports. Therefore, filing of monthly reports and non maintenance of Form F Register are two different facts which can not be misled with each other.
- 43) Therefore, considering the entire above discussion summarily, it may be stated that the defence of accused is not probable. Firstly, because it has come on record that P. W. No. 1 Dr. Sambhaji Patil was not a stranger to the accused. Secondly, there is no cross-examination of any of the prosecution witnesses that accused possessed Articles 1 to 14 on the date of inspection. Thirdly, by virtue of Section 29 (2) and Rule 11 accused was legally bound to show this record (if he was having so) to the inspecting party. Fourthly, by the defence taken, accused himself admits that he has not shown the record to the inspecting party. Fifthly, there is no other evidence put forth by him to show that the record was maintained and possessed by him. Sixthly, the name of concerned Gynaecologist, Radiologist, owner of the sonography clinic is not appearing on any of the forms in Articles 1 to 14. Seventhly, in absence of such names, the record produced itself is incomplete by virtue of Rule 10 (1A) and Form F, Annexed to 'Rules 1996'.
- 44) Other objections of accused :
- a) Complainant is not an appropriate authority :
- Learned advocate Mr. U. B. Misar has objected that P. W. No. 1 Dr. Sambhaji Patil is not an appropriate authority under the P. C. P. N. D. T. Act 2003. He has no authority to file this complaint. He has attacked the letter Exh. 24. As per him, Section 17 of the P. C. P. N. D. T. Act 2003 lays down the procedure for appointment of the appropriate authority. As per Section 17 (3) of the P. C. P. N. D. T. Act 2003, the persons who may act as an appropriate authority have been enlisted. P. W. No. 1 Dr. Sambhaji Patil does not fall in such category. Learned A. P. P. Mr. Jadhav has counter submitted that P. W. No. 1 Dr. Sambhaji Patil is the appropriate authority in this context.
- 45) In view of the above rival contentions, we need to analyse Section 17 (3) of the P. C. P. N. D. T. Act 2003. It states that the officers appointed as appropriate authorities for whole of the State shall be the persons as enlisted in Section 17 (3) (a) of the P. C. P. N. D. T. Act, 2003. But, it is specified in Section 17 (3) (b) that-
“When appointed for any part of the State or the Union Territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit”.
- 46) On bare perusal of above provision, it can be ascertained that for any part of the State, officer of such other rank can be appointed. Therefore, Section 17 (3) (b) of the P. C. P. N. D. T. Act, 2003 itself is an answer to the objection raised by the accused that Dr. Sambhaji Patil is not the person of the rank as enlisted in Section 17 (3) (a) of the P. C. P. N. D. T. Act, 2003. In view of Section 17 (3) (b) of the P. C. P. N. D. T. Act, 2003, it is for the State Government to determine any other officer of other rank who would be an appropriate authority for any part of the State.
- 47) Accordingly, letter Exh. 24 is issued by Additional Director Health Services and Family Welfare, Mother and Child Development and School Health Department, Pune. The letter is issued on 21/26th July 2001 to all Civil Surgeons in Maharashtra. This letter is issued for the enforcement of the Prenatal Diagnostic Techniques Act, 1994. The second paragraph of this letter mentions that the Public Health Department, Mantralaya, Mumbai have issued notifications dated 11-9-1997 and 9-12-1997 declaring all the Civil Surgeons to act as an appropriate authority under the P. C. P. N. D. T. Act 2003. On the basis of these notifications, it is further declared that on the Taluka level the Medical Superintendent of Rural Hospital would be the appropriate authority to act under the P. C. P. N. D. T. Act, 2003. In this context, separate orders are issued.
- 48) Therefore, on the basis of this letter Ex. 24, it can be ascertained that the appointment of appropriate authority is done on the basis of the notifications dated 11-9-1997 and 9-12-1997 of the State Government. It has remained intact in the evidence of P. W. No. 1 Dr. Sambhaji Patil that he was working as Medical Officer at Parola from 2003 to 31-1-2006. He has admitted in the cross-examination, page No. 5, para No. 4, Exh. 22 that he was appointed on temporary basis. But the letter at Exh. 24 nowhere mentions that the medical officer

on temporary basis shall not act in capacity of an appropriate authority at the Taluka level. Therefore, in view of Section 17 (3) (b) of the P. C. P. N. D. T. Act 2003 and letter at Exh. 24, it is ample clear that P. W. No. 1 Dr. Sambhaji Patil can act as an appropriate authority as he was a Medical Officer at Parola at that time.

49) Learned advocate Mr. U. B. Misar for the accused has also attacked on the letter at Exh. 24 on the grounds that the same is not duly proved. Learned A. P. P. has resorted to Sections 78 and 79 of the Evidence Act and has counter submitted that the letter is proved.

50) The letter Exh. 24 is directed to all Civil Surgeons to do the needful in context of program to be initiated under the Prenatal Diagnostic Techniques Act, 1994. In this context, it has been directed to form a Vigilance Committee at Taluka level and the appropriate authority for this Vigilance Committee would be the Medical Officer at Taluka level. Therefore, the recitals of these documents itself bring out that these are certain orders which are given by department of a State Government to its employees working under their superintendence and control. Therefore, Section 78 (1) of the Evidence Act would be certainly attracted in this case. Exh. 24 is proved to be filed from custody of P. W. No. 1 Dr. Sambhaji Patil. P. W. No. 1 Dr. Sambhaji Patil has deposed in capacity of medical officer i. e. employee of the State Government to whom there were directions issued by the Department of the State vide Exh. 24.

51) Hence, the objection of accused that it is a secondary evidence can not gain ground as the original of this letter i. e. Exh. 24 is filed on record by P. W. No. 1 Dr. Sambhaji Patil. So, this objection of accused is negated with reference to the above discussion.

52) b) Complaint not filed to police or by police :

Learned advocate Mr. U. B. Misar for accused has also objected the complaint on the ground that it was not filed to police. During the arguments, Section 28 of the P. C. P. N. D. T. Act, 2003 was pointed out to him by me. Section 28 of the P. C. P. N. D. T. Act, 2003 lays down that other than an appropriate authority, a person or a social organization, nobody is entitled to file such complaint. Therefore, police have no role to play for enforcing the provisions of P. C. P. N. D. T. Act, 2003. In view of Section 28 of the P. C. P. N. D. T. Act, 2003, the complaint has to be filed to the Court of Metropolitan Magistrate or a Judicial Magistrate First Class having jurisdiction to try such offence.

53) In this context, learned advocate Mr. U. B. Misar for accused has placed his reliance on Vijay Bhagwan Shetty (cited supra). In the said case, Hon'ble Bombay High Court has set aside the order of learned Sessions Judge of approving the order of committal of a case under Electricity Act, 2005 by learned Judicial Magistrate First Class. The reasons for setting aside this order were registration of F. I. R. was illegal, further action taken on the basis of said F. I. R. was erroneous. The Deputy Executive Engineer of the M. S. E. B. was not the authorized officer under Section 151 (a) of the Electricity Act, 2005. (Para 10, Page 147 of the Mh. L. J.).

54) In the present case, it is held earlier that the State Government can appoint officer of any other rank as an appropriate authority. Accordingly, letter Exh. 24 was issued. Also, in view of Section 28 (1) (a) of the P. C. P. N. D. T. Act, 2003 the present complaint may be filed. Hence, due to major variance of facts and above reasons the ratio and reasons recorded by Hon'ble Bombay High Court in Vijay Bhagwan Shetty (cited supra), with great respect and regards, are not applicable to this case. Accordingly, the objection of accused also goes with.

55) c) Non followance of search, seizure and sealing procedure as contemplated in the Act.

The accused has objected the seizure panchanama Exh. 23 on the grounds that the inspecting party has not followed the procedure for seizure as contemplated under Rule 12 of the 'Rules 1996'. It is admitted that panch witness P. W. No. 2 Baliram Walunj Wani and other witness S. D. Chopade were both employees of Cottage Hospital, Parola. It is further admitted that the list of seized documents prepared in duplicate is not placed on record. It has come in the cross-examination of P. W. No. 1 Dr. Sambhaji Patil that one copy of the list was not handed over to the accused or that there is no acknowledgment of the accused on the panchanama Exh. 23 in that regard. There is no signature of panchas on seized document Article A.

- 56) It is also necessary to state that P. W. No. 1 Dr. Sambhaji Patil has stated in his chief examination that Articles A and B were left at sonography clinic of the accused. Then, he called accused Dr. Prashant Gujrathi in this context and then, the brother of accused Dr. Gujrathi has produced Article A and B before Dr. Sambhaji Patil at Cottage Hospital on the same day at 11.30 P. M. This part is not appearing in the complaint Exh. 1. So, we have to assess the impact of this non followance of procedure on the case of prosecution.
- 57) It is necessary to state that in the deposition of P. W. No. 1 Dr. Sambhaji Patil, it has come on record that the seized documents were left at the clinic of accused. Therefore, the documents which were produced by brother of accused at 11.30 P. M. were not verified that they were the same seized and left documents or not. Neither there is a separate seizure list of the documents nor the same is done after production of documents by brother of the accused. So, this act of P. W. No. 1 Dr. Sambhaji Patil would not come within the purview of seizure at all. As this would amount to production of the documents Articles A and B by the brother of accused to P. W. No. 1 Dr. Sambhaji Patil.
- 58) Therefore, as there is no seizure in this case, the document at Article A can not be looked into. The objections of accused in this regard sustains.
- 59) But, the case of prosecution is not based on the seized documents Articles A and B. At the cost of repetition, it is necessary to mention again that complaint Exh. 1, para No. 3 mentions that the complete record necessary to be maintained by the accused was not found at the sonography centre. Which means that the accused has failed to submit the complete record as specified in Form F. Therefore, the charge under Exh. 33 is also framed accordingly that the accused has failed to submit the Form F Register and consent forms of pregnant women. Therefore, the fact of seizure or production of Article A and Article B can not be intermingled with the fact of failure to produce the Form F and consent forms registers of pregnant women by accused Dr. Prashant Gujrathi.
- 60) Learned advocate for the accused has built his argument on this preconceived notion that non followance of of seizure procedure of Articles A and B would amount to inadmissibility of Articles A and B in evidence which would in the alternative prove that no such seizure has taken place. But the case of prosecution right from the complaint is not that Article A is an incomplete register (Para 3, Exh. 1, complaint). But the case is for the non submission or non production of the record by the accused. Therefore, non production of record and defect in seizure are two entirely different things. The seizure is defective. Its corollary is inadmissibility of seized documents. But what about the act of accused of failure to submit documents at the time of inspection, which is otherwise proved by the prosecution evidence. It would also not show that accused Dr. Prashant Gujrathi has maintained the record at the relevant time and place. The case is for such non maintenance.
- 61) Therefore, the case laws in this context-
- Bhalchandra Namdeo Shinde Vs. State of Maharashtra, 2003 Bom. C. R. (Cri.) 133 and Naba Kumar Das Vs. State of West Bengal, 1974 Cri. L. J. 512 would not be attracted in this case. Because this case is not based only upon the seized documents. Hence, merely by attacking the seizure procedure and by showing that the seizure was faulty, accused would not be entitled for its benefit.
- 62) d) Delay in filing complaint :
- The raid is conducted on 11-12-2005. The complaint is filed on 3-1-2006. There is no explanation for delay appearing on record. We have to see the possibility of concoction or deliberation behind this delay. All such suggestions are otherwise denied by P. W. No. 1 Dr. Sambhaji Patil. There are no concomitant circumstances on record which would raise doubt that the complaint is filed with an ulterior motive to harass the accused deliberately. The complaint is filed by P. W. No. 1 Dr. Sambhaji Patil in capacity of an appropriate authority under the P. C. P. N. D. T. Act, 2003. Therefore, no personal reason for concoction or deliberation is attached with it, neither it has sprang up from his cross-examination. The interest of an appropriate authority to robe an innocent person is not appearing on record. So, the delay would not be fatal to the prosecution in this case.

63) e) Non recording of statements :

As stated earlier, this is a private complaint filed otherwise than on police report. It has to be dealt with the procedure from Section 244 to 247 as contemplated in the Code of Criminal Procedure. Therefore, the private complainant has not recorded the statements can not be a major lacuna to doubt with his case.

64) Summary :

The gist of entire above discussion, in the form of summary may be stated as follows:

- 65) P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke have deposed in tune with the complaint Exh. 1. The fact of failure on the part of accused to produce Form F Register and consent forms of pregnant women is established on record by their evidence.
- 66) The defence of accused was twofold. First, he came with a defence that complainant was a stranger to him. Therefore, he has not produced his record before him. But these defence could not withstand the test of actuality. As from the cross-examination, the previous acquaintance of the accused and complainant was revealed. The legal obligations on the accused casted by Section 29 (2) of the P. C. P. N. D. T. Act 2003 and Rule 11 of the 'Rules 1996' bisected his defence. Then, by filing Articles 1 to 14, accused attempted to show that he has maintained complete record. But due to the irregularities and infirmities as listed (in para 43 above), this defence was also negated. The other objections of accused regarding the appointment of appropriate authority, proof of Exh. 24, non followance of seizure procedure, delay in filing complaint, non recording of statements have not gathered any force to sublimate the crystallized evidence of prosecution.
- 67) In the result, the evidence of prosecution is inspiring and can be acted upon. The prosecution is successful in proving that the accused has contravened Rule 9 (4) framed under 'Rules 1996' and thereby has committed an offence punishable under Sections 23 and 25 of The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003. Therefore, I answer point No. 1 in the affirmative.
- 68) As point No. 1 has got its finding in the affirmative, before sentencing the accused to any punishment, I pause here to hear him on the point of sentence.

Date: 27/7/2010

(S. P. Naik-Nimbalkar)

Judicial Magistrate (F. C.) Parola

- 69) Heard the accused on the point of sentence. He has submitted that he do not accept this punishment. He has submitted to hear advocate Mr. T. K. Patil on his behalf. Learned advocate Mr. T. K. Patil has submitted that accused is not a habitual offender. The theory of reformation be applied while imposing punishment. Chance of reformation be given to the accused. Learned A. P. P. Mr. S. R. Jadhav is absent when called for repeatedly.
- 70) While fixing the quantum of sentence, the nature of offence is necessary to be looked into. As stated earlier, this case is for non maintenance of Form F Register and consent forms leading to the contravention of Rule 9 (4) of the 'Rules 1996'. At the cost of repetition, it is necessary to mention again that proviso to Section 4 (3) of the P. C. P. N. D. T. Act, 2003 lays down that any such deficiency or inaccuracy would lead to a further contravention of provisions of Section 5 and 6. Sections 5 and 6 is the prohibition of determination of sex of foetus and communicating it to the pregnant woman or her relatives or any other person in any manner. By virtue of above provisions and the offence proved, the accused has thus contravened Section 5 and 6 of the P. C. P. N. D. T. Act, 2003. The contrary is also not proved by the accused within the meaning of proviso to Section 4 (3) of the P. C. P. N. D. T. Act, 2003. So, the above scenario makes the offence more serious and grave. The case not only remains for non maintenance of record in specified form but also is for contravention of prohibition on determination of sex of foetus.
- 71) Secondly, the legislative intent behind the enactment of P. C. P. N. D. T. Act, 2003 can be gathered from the statement of object and reasons as follows: " It is proposed to prohibit prenatal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory

against the female sex and affects the dignity and status of woman. A legislation is required to regulate the use of such techniques and to provide deterrent punishment to stop such any inhuman act”.

- 72) So, the legislature itself has emphasized the need for imposing deterrent punishment while dealing with such offenders.
- 73) Thirdly, the social circumstances relating to such offences are also necessary to be considered. The declining child sex ratio particularly in this taluka is the indicator of such misuse of technological progress.
- 74) Fourthly, the accused is a doctor by profession. The faith and health of society rest with him. He is educated and a professional. Therefore, more responsibility casts upon him to obey and abide with law.
- 75) Therefore, considering the nature of offence, the legislative intent, social circumstances and educational qualifications of accused, I am not inclined to prefer a lenient view in this case. Hence, the operative order as under-

ORDER

- 1) Accused Dr. Mr. Prashant Navnitlal Gujrathi, Age- Adult, R/o. Parola, Tal. Parola, Dist. Jalgaon is hereby convicted for the offence under Section 23 and 25 of The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003 for the contravention of Rule 9 (4) framed under The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 and in view of Section 23 (1) of the The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003 read with Section 248 (2) of the Code of Criminal Procedure, 1973, he is sentenced to suffer rigorous imprisonment of one (1) year and to pay a fine of Rs. 5,000/-, in default to pay such fine to suffer further simple imprisonment of two months, in view of Section 30 (1) of the Code of Criminal Procedure, 1973.
- 2) The existing bail bond of accused stands surrendered.
- 3) The documents at Articles 1 to 14 as well as muddemal property Article A and B be given to the accused, after the appeal period.
- 4) Right of appeal is vested with the accused against this Judgment and Order and the same is explained to him in his Mother tongue i. e. Marathi.
- 5) Copy of this Judgment and Order be given free of cost to the accused forthwith as per Section 363 (1) of the Code of Criminal Procedure, 1973.
- 6) Copy of this Judgment be given to the Appropriate Authority through Civil Surgeon, Jalgaon for reporting the name of accused to the State Medical Council for taking necessary action against him as per Section 23 (2) of The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003.

Dictated and pronounced in open Court.

(S. P. Naik-Nimbalkar)

Judicial Magistrate (F. C.) Parola

Date: 27/7/2010

दिवाणी न्यायाधीश (क.स्तर) तथा न्यायदंडाधिकारी,
प्रथम श्रेणी, कराड, जिल्हा सातारा.
(पिठासीन अधिकारी राजेश म. कपाटे)

नियमित फौजदारी खटला क्रमांक २८६/२००५
निकाल दिनांक: ०६/०९/२०१०

महाराष्ट्र शासनातर्फे
डॉ. व्ही. बी. यादव,
जिल्हा समुचित प्राधिकारी
तथा सिव्हील सर्जन, सातारा
. //विरुद्ध//
डॉ. प्रभाकर कृष्णराव पवार,
जीवन ज्योती हॉस्पिटल, गोंदी/
जुळेवाडी, ता. कराड, जि. सातारा.

श्री. आर.एन.मडके, तज्ञ सरकारी वकील साहेब फिर्यादी पक्षातर्फे.

श्री. एम.टी.यादव, तज्ञ वकील साहेब आरोपीतर्फे.

“प्रसुतीपुर्व निदान तंत्र (विनिमय व दुरुपयोगावरील प्रतिबंध) कायदा १९९४” व सुधारीत ”गर्भधारणापुर्व आणि प्रसवपुर्व निदान तंत्रे (लिंग निवडीवर प्रतिबंध) कायदा २००३” चे कलम ३(१), ५, ६, २९(१)(२) तसेच “प्रसुतीपुर्व निदान तंत्र (विनिमय व दुरुपयोगावरील प्रतिबंध)नियम १९९६” व सुधारीत ”गर्भधारणापुर्व आणि प्रसवपुर्व निदानतंत्रे (लिंग निवडीवर प्रतिबंध) नियम १९९६” चे कलम ३(१), ९, १०(१-ए), १७(१)(२), १८ या तरतुदींचे उल्लंघन करून पी.एन.डी.टी. कायद्याचे कलम २३ व २५ अंतर्गत शिक्षेसपात्र गुन्हा.

CASE SUMMARY

This Judgment is unique because in the first place it is written in the local language "Marathi" which is a very difficult task considering the fact that the Act and the Rules framed there under are in English and they contain several technical words and medical terms. Secondly, the Judgment elaborately explains in the language of the locals the object and reasons of the Act, the importance of the Act and why the strict implementation of the provisions of the Act, including im,plemnetation of technical and procedural aspects is significant. Thirdly, punishment imposed on the accused in this case is not only exemplary but the Court has also invoked the power of confiscating to the State the sonography machine used for diagnosis.

This Judgment is equally of importance because sensitivity and awareness to the ground reality, which is the hallmark of good judicial decision making process, are found reflected in this Judgment. The Judgment is detailed in analysis of the facts, evidence, application of law, the reasoning and imposition of punishment. It is for the first time in this case that Accused is convicted

and punished for violating the code of conduct laid down in Rule 18 which is to be observed by the persons working in Genetic Clinics, Genetic Laboratories, etc.

It is a case of a sting operation. The facts of the case are to the effect that on the reliable information that Accused is conducting activities relating to the pre-natal diagnosis techniques in his clinic, which was not registered under the Act and was disclosing the sex of the foetus to pregnant women, complainant - Appropriate Authority with the support of Advocate Varsha Deshpande, sent to the clinic of the Accused a six months pregnant lady by name Kavita Lokhande as decoy client with marked currency notes of Rs.2,500/- for conducting diagnostic test. Accused conducted the test with the sonography machine and informed her that foetus in her womb was of a male child and accordingly issued sonography report to her accepting the amount of Rs.2,500/-. On receipt of this information from Advocate Varsha Deshpande and Advocate Shaila Jadhav, Dr. Jayant Deshpande went to the spot, verified the information, recorded statements of Kavita Lokhande, Advocate Shaila Jadhav, etc., seized the marked currency notes and sonography report under Panchnama alongwith other articles. After due investigation, case was filed in the Court against the Accused for the offence punishable u/s. 23 of the Act for contravention of various provisions and rules.

On the basis of evidence of various witnesses referred above, the Court found that the Clinic of Accused was not registered under the Act. He had also not obtained requisite training or experience of running such Clinic and yet he was conducting therein activities relating to pre-natal diagnostic techniques of sex detection and communicating the same to the pregnant lady. It was also proved that Accused had not maintained record, nor obtained consent from the pregnant woman – Kavita Lokhande and further he had also not displayed a board in his premises that disclosure of sex of foetus is prohibited under the Act. Thus for the breach of various provisions of Sections 3, 5 and 29 read with Rules 3, 10, 17 and 18 of the Act, Accused was held liable for conviction u/s. 23.

All the defences taken by Accused from even denying ownership of the Clinic, use of sonography machine, conducting of such activities and even factual details to the extent possible were rejected by the Court with sound reasoning. The case law cited before it was also distinguished on factual aspects. The plea of Accused for leniency was rejected considering that though Accused belonged to the noble profession of medicine, he was indulging into abhorrent practice of sex selection only to satisfy his greed for money. The Court imposed on him deterrent punishment of 3 years Rigorous Imprisonment and fine of Rs.10,000/- on each of the counts and further confiscated to the State his sonography machine, firstly because it was used for commission of offence and secondly on the ground that Accused may misuse it again. (Para 29)

It is the first case in which the accused was held guilty for as many as nine offences and he was punished with full sentence, i.e., to undergo three years imprisonment and fine of RS.10,000/- on each count. This is for the first time that the Court has rightly invoked and applied all the provisions under the Act in proper spirit keeping in mind the object and reasons of the Act, explaining them in the Judgment in the language which public at large can understand. The Judgment is really an eye opener to the entire medical profession and everyone must read it as it is in Marathi language.

न्यायनिर्णय

(पारित दिनांक ०६ सप्टेबर २०१०)

१. उपरोक्त नमुद आरोपीवर आरोप करण्यात आले आहे की, त्यांनी दिनांक ०९/०९/२००५ रोजी दुपारी ३.०० वाजताचे दरम्यान मौजा गोंदी/जुळेवाडी तह.-कराड, जिल्हा-सातारा येथील स्वतःचे जिवन-ज्योती हॉस्पिटलमध्ये "प्रसुतीपुर्व निदान तंत्र (विनिमय व दुरुपोयोगावरील प्रतिबंध) कायदा १९९४" व सुधारीत "गर्भधारणापुर्व आणि प्रसवपुर्व निदान तंत्रे (लिंग निवडीवर प्रतिबंध) कायदा २००३" (येथुन पुढे थोडक्यात पी.एन.डी.टी. कायदा) चे कलम ३(१), ५, ६, २९(१) (२) तसेच "प्रसुतीपुर्व निदान तंत्र (विनिमय व दुरुपोयोगावरील प्रतिबंध) नियम १९९६" व सुधारीत "गर्भधारणापुर्व आणि प्रसवपुर्व निदानतंत्रे (लिंग निवडीवर प्रतिबंध) नियम १९९६" (येथुन पुढे थोडक्यात पी.एन.डी.टी.नियम) चे कलम ३(१), ९, १०(१-ए), १७(१)(२), १८ या तरतुदींचे उल्लंघन करुन पी.एन.डी.टी. कायद्याचे कलम २३ अंतर्गत शिक्षेस पात्र असा गुन्हा केला आहे.
२. फिर्यादी पक्षाची थोडक्यात हकीकत खालीलप्रमाणे आहे. घटना उपरोक्त नमुद दिवशी, वेळी व ठिकाणी घडली होती. घटणेचे वेळी फिर्यादी डॉ. विलासराव बाबुराव यादव हे जिल्हा सामान्य रुग्णालय, सातारा येथे जिल्हा शल्य चिकित्सक म्हणून कार्यरत होते. त्यावेळी फिर्यादीची पी.एन.डी.टी. कायद्याअंतर्गत जिल्हा स्तरावरील समुचित प्राधिकारी म्हणून नियुक्ती करण्यात आली होती. फिर्यादीला माहिती मिळाली होती की, आरोपी प्रभाकर पवार हे त्यांचे नोंदणी न झालेल्या जेनेटीक क्लिनिकमध्ये बेकायदेशीररीत्या गर्भवती महिलांची सोनोग्राफी मशिनचे आधारे गर्भलिंग निदानाची चाचणी करुन गर्भामध्ये मुलगा आहे किंवा मुलगी आहे या बाबींचा खुलासा करतात. पी.एन.डी.टी. कायद्या अंतर्गत सातारा येथील जिल्हा सल्लागार समितीमध्ये अॅड. वर्षा देशपांडे ही सदस्य असुन अॅड. शैला जाधव ही समाज सेविका आहे. म्हणून फिर्यादीनी अॅड. वर्षा देशपांडे व अॅड. शैला जाधवच्या मदतीने कविता लोखंडे या गर्भवती महिलेला डेकाॅय केसकरीता आरोपीच्या दवाखान्यामध्ये गर्भलिंग निदानाची चाचणी करण्याकरता पाठविण्याचे ठरविले होते. त्याप्रमाणे दिनांक ०९/०९/२००५ रोजी दुपारी ३.०० वाजताचे दरम्यान अॅड. वर्षा देशपांडे, अॅड. शैला जाधव, कविता लोखंडे, कैलास जाधव इत्यादींना आरोपीच्या दवाखान्यामध्ये डेकाॅय केसकरता पाठविले होते. त्यावेळी फिर्यादीनी अॅड. वर्षा देशपांडे व अॅड. शैला जाधवजवळ कविता लोखंडेच्या गर्भलिंग निदानाचे चाचणीकरीता नोटांच्या क्रमांकाची नोंद घेवून रुपये २५००/- दिले होते. घटणेचे वेळी कविता लोखंडे ही सहा महिन्याची गरोदर होती. त्यावेळी आरोपीच्या मागणीप्रमाणे अॅड. शैला जाधवने कम्पाउंडर नामे संजय भोसलेजवळ गर्भलिंग निदानाच्या चाचणीचे रु.२५००/- जमा केले होते. त्यानंतर आरोपीनी कविता लोखंडेला सोनोग्राफी मशिन असलेल्या कमरऱ्यामध्ये नेवून त्यांची सोनोग्राफी मशिनव्दारे गर्भलिंग निदानाची चाचणी केली होती. सदर चाचणी घेतल्यानंतर आरोपीनी कविता लोखंडे व अॅड. शैला जाधवला सांगितले होते की, कविता लोखंडेच्या गर्भामध्ये मुलगा असून सदर गर्भ सहा महिन्याचा आहे. त्यावेळी आरोपीनी गर्भलिंग निदानाची चाचणी केल्याबाबत लेखी स्वरूपात लिहून देण्याचे नाकारले होते. परंतु आरोपीनी कविता लोखंडेची सोनोग्राफी मशिनव्दारे चाचणी केल्याबाबत सोनोग्राफीचा अहवाल दिला होता. त्यानंतर अॅड. शैला जाधव व अॅड. वर्षा देशपांडेनी फोनव्दारे उपरोक्त नमुद घटणेची माहिती फिर्यादीला दिली होती. त्यानंतर फिर्यादी हे मिटींगमध्ये व्यस्त असल्यामुळे त्यांनी वैद्यकीय अधिकारी डॉ. जयंत दत्तात्रय देशपांडेला घटनास्थळी जावून सखोल तपास करण्याचे अधिकार व निर्देश दिले होते. त्याप्रमाणे डॉ. जयंत देशपांडेनी घटणेचे दिवशी सायंकाळी ६.०० वाजताचे दरम्यान घटनास्थळी जावून आरोपीनी कविता लोखंडेची सोनोग्राफी मशिनव्दारे गर्भलिंग निदानाची चाचणी करुन कविता लोखंडेच्या गर्भामध्ये मुलगा असल्याचे सांगितल्याबाबत खात्री करुन घेतली होती. त्यानंतर डॉ. जयंत देशपांडेनी अॅड. शैला जाधव, कविता लोखंडे, कैलास जाधव व संजय भोसलेचे बयाण नोंदवून पंच साक्षदारासमक्ष गर्भलिंग निदानाच्या चाचणीकरीता दिलेले रु.२५००/- जप्त करुन त्याचा पंचनामा तयार केला होता. त्यानंतर डॉ. जयंत देशपांडेनी आरोपीची उपरोक्त नमुद सोनोग्राफी मशीन पंच साक्षदारासमक्ष सिल व जप्त करुन त्याचा पंचनामा तयार केला होता. त्यानंतर डॉ. जयंत

देशपांडेनी आरोपीच्या उपरोक्त नमूद हॉस्पिटलच्या मिळकतीचा गाव नमुना-आठ उतारा व कविता लोखंडेला दिलेला सोनोग्राफी अहवाल जप्त करून जप्त केलेल्या साहित्याची यादी तयार केली होती. त्यानंतर डॉ. जयंत देशपांडेनी फिर्यादीला उपरोक्त नमूद कार्यवाहीबाबतचा अहवाल सादर केला होता. त्यानंतर फिर्यादीनी राज्यस्तरीय समुचित प्राधिकारी व सरकारी वकिल साहेबांसोबत विचारविमर्श करून आरोपीविरुद्ध सदर तक्रार न्यायालयामध्ये दाखल केली होती.

३. त्यानंतर माझ्या तज्ञ पुर्वाधिकार्यांनी फिर्यादीचे व्हेरीफिकेशन घेतल्यानंतर सदर गुन्ह्याची दखल घेवून आरोपीविरुद्ध पी.एन.डी.टी. कायद्याचे कलम ३(१), ५, ६, २९(१)(२) तसेच पी. एन.डी.टी. नियमांचे कलम ३(१), ९, १०(१-ए), १७(१)(२), १८ अंतर्गत गुन्ह्याकरीता प्रोसेस पाठविला होता. त्याप्रमाणे आरोपीने न्यायालयामध्ये हजार राहिल्यानंतर त्यांना जामिनावर सोडण्यात आले आहे. त्यानंतर आरोपीविरुद्ध दोषारोप तयार करण्यापुर्वी फिर्यादीमार्फत पुरावा(इ.बी. सी) नोंदविण्यात आला. त्यानंतर माझे तज्ञ पुर्वाधिकार्यांनी दोषारोप (चार्ज) निशाणी ३९ प्रमाणे तयार करून आरोपीला त्यांच्या मातृभाषेमध्ये वाचून व समजावून सांगितला असता त्यांनी गुन्हा कबुल नसून खटला चालविण्याची विनंती केली होती. त्याप्रमाणे आरोपीविरुद्ध सदर खटला पुढे चालविण्यात आला आहे. फिर्यादीच्या अर्जावरील (निशाणी क.५७) आदेशाप्रमाणे दोषारोपामध्ये दुरुस्ती करून पुन्हा सुधारीत दोषारोप निशाणी ६० प्रमाणे तयार करून आरोपींना त्यांच्या मातृभाषेमध्ये वाचून व समजावून सांगितले असता त्यांनी गुन्हा नाकबूल करून खटला चालविण्याची विनंती केली होती. त्यानंतर फिर्यादीच्या उर्वरित साक्षदारांची साक्ष नोंदवून फिर्यादीचा पुरावा बंद करण्यात आला होता. त्यानंतर फौजदारी प्रक्रिया संहितेचे कलम ३१३ अंतर्गत आरोपीचे बयाण (स्टेटमेंट) निशाणी ५३ प्रमाणे नोंदविण्यात आले होते. आरोपीच्या बचावाप्रमाणे घटणेचे वेळी अॅड. वर्षा देशपांडेनी त्यांना पैशाची मागणी केली होती परंतु आरोपीनी सदर पैशाची मागणी पूर्ण न केल्यामुळे त्यांना अॅड. वर्षा देशपांडे व इतरांनी सदर खोट्या केसमध्ये फसविले आहे.
४. फिर्यादी पक्षाचे वरील कथन व दस्ताऐवजांवरील उपलब्ध साक्ष पुराव्यावरून मी खालील मुद्दे तयार करून त्यांचे कारणासहित निष्कर्ष खालीलप्रमाणे देत आहे.

मुद्दे निष्कर्ष

१. फिर्यादी पक्षाने सिध्द केले आहे काय की, आरोपीनी दिनांक ०९/०९/२००५ रोजी दुपारी ३.०० वाजताचे दरम्यान मौजा गोंदी/जुळेवाडी, तह. कराड, जिल्हा सातारा येथिल स्वतःचे जिवन-ज्योती हॉस्पिटलमध्ये (जेनेटीक क्लिनीक) पी. एन.डी.टी. कायद्या अंतर्गत नोंदणी न करता प्रसवपुर्व निदान तंत्र सोनोग्राफी मशिनचा वापर करून पी.एन.डी.टी. कायद्याचे कलम ३(१) चे उल्लंघन करून कलम २३ अंतर्गत शिक्षेसपात्र गुन्हा केला आहे ?
.....होकारार्थी.
२. फिर्यादी पक्षाने सिध्द केले आहे काय की, आरोपीनी उपरोक्त नमूद दिवशी, वेळी व ठिकाणी कविता नंदकुमार लोखंडेची (डेकॉय विटनेस) नमुना-जी मध्ये लेखी संमती न घेता सोनोग्राफी मशिन या प्रसवपुर्व निदान तंत्राचा वापर करून कविता लोखंडेच्या गर्भामध्ये मुलगा असल्याचे त्यांना व त्यांच्या नातेवाईकांना सांगून पी.एन.डी. टी. कायद्याचे कलम ५ (१)(२) व ६ तसेच पी.एन.डी.टी. नियमांचे कलम १०(१-ए) चे उल्लंघन करून पी.एन.डी. टी. कायद्याचे कलम २३ अंतर्गत शिक्षेसपात्र गुन्हा केला आहे ?
:होकारार्थी.
३. फिर्यादी पक्षाने सिध्द केले आहे काय की, आरोपीनी उपरोक्त नमूद दिवशी, वेळी व ठिकाणी पी.एन.डी.टी. कायद्याचे कलम २९(१)(२) व पी.एन. डी.टी. नियमांचे कलम ९ व १७(१)(२) अंतर्गत आवश्यक असलेले दस्ताऐवज

चार्ट, नमुने (फॉर्म्स), अहवाल, संमतीपत्र, रजिस्टर्स, कायद्याची पुस्तिका उपलब्ध ठेवले नाही तसेच पी.एन.डी. टी कायद्यांतर्गत गर्भलिंग निदान करणे प्रतिबंधीत असल्याबाबतचे मराठी व इंग्रजीमध्ये फलक लावलेले नव्हते व त्याद्वारे पी.एन.डी.टी. कायद्याचे कलम २९(१)(२) व पी.एन.डी.टी. नियमांचे कलम ९ व १७(१)(२) या तरतुदींचे उल्लंघन करून पी.एन.डी.टी. कायद्याचे कलम २३ अंतर्गत शिक्षेसपात्र गुन्हा केला आहे ?

:होकारार्थी.

४. फिर्यादी पक्षाने सिध्द केले आहे काय की, आरोपीनी उपरोक्त नमुद दिवशी, वेळी व ठिकाणी जेनेटीक क्लिनीक चालविण्याकरीता पी.एन.डी.टी नियमांचे कलम ३(१) अंतर्गत आवश्यक असलेले शिक्षण न घेता जेनेटीक क्लिनीक चालवून पी.एन.डी.टी नियमांचे कलम ३(१) या तरतुदीचे उल्लंघन करून पी.एन.डी.टी. कायद्याचे कलम २३ अंतर्गत शिक्षेसपात्र गुन्हा केला आहे ?

:होकारार्थी.

५. फिर्यादी पक्षाने सिध्द केले आहे काय की, आरोपीनी उपरोक्त नमुद दिवशी, वेळी व ठिकाणी, पी.एन.डी.टी नियमांचे कलम १८ मधील नमुद वागणूकीबाबतची नितिमुल्ये न जोपासता सदर तरतुदीचे उल्लंघन करून पी.एन.डी.टी. कायद्याचे कलम २३ अंतर्गत शिक्षेसपात्र गुन्हा केला आहे ?

:होकारार्थी.

६. कोणता आदेश ?

.....अंतिम आदेशाप्रमाणे

निष्कर्षाची कारणमिमांसा

५. फिर्यादी पक्षाने आरोपीविरुद्ध गुन्हा सिध्द करण्याकरीता खालीलप्रमाणे एकुण ५ साक्षदारांना शपथेवर तपासले आहे. फिर्यादी व पी.एन.डी.टी. कायद्यांतर्गत जिल्हा समुचित प्राधिकारी डॉ. विलासराव बाबुराव यादव (स.सा.क्र.२) यांची साक्ष निशाणी क्र. ३१, वैद्यकीय अधिकारी डॉ. जयंत दत्तात्रय देशपांडे (स.सा.क्र.३) यांची साक्ष नि.क्र. ३३, अॅड. शैला दत्ताजीराव जाधव (स.सा.क्र.१) यांची साक्ष नि.क्र. १८, डेकॉय विटनेस कविता नंदकिशोर लोखंडे (स.सा.क्र.४) यांची साक्ष नि.क्र.४८ व पंच साक्षदार प्रशांत रंगराव पवार (स.सा.क्र.५) यांची साक्ष नि.क्र.५१ प्रमाणे नोंदविण्यात आली आहे. फिर्यादी पक्षाने उपरोक्त मौखिक साक्षेशिवाय खालीलप्रमाणे कागदोपत्री पुरावा न्यायालयामध्ये सादर केला आहे. शैला जाधवचे बयाण (नि.क्र.१९), कविता लोखंडेचे बयाण (नि.क्र.३४), कैलास जाधवचे बयाण (नि.क्र.३५), संजय भोसलेचे बयाण (नि.क्र.३६), कविता लोखंडेनी लिहून दिलेले प्रतिज्ञापत्र (नि.क्र. ३२), आरोपीकडून पंचविसशे रुपये जप्त केल्याचा जप्ती पंचनामा (नि.क्र. ३७), आरोपीची सोनोग्राफी मशिन सिल करून जप्त केल्याचा जप्ती पंचनामा (नि.क्र.५२), आरोपीनी कविता लोखंडेचा दिलेला सोनोग्राफी अहवाल (आर्टिकल-अ), आरोपीकडून जप्त केलेल्या साहित्याची यादी (आर्टिकल-ड), आरोपीच्या हॉस्पिटलचा गाव नमुना आठ (आर्टिकल-ब). याउलट, आरोपीनी स्वतःचे बचावाकरीता कोणताही मौखिक व कागदोपत्री पुरावा न्यायालयामध्ये सादर केला नाही.
६. फिर्यादी पक्षाचे तज्ञ सरकारी वकील साहेब, श्री. आर. एन.मडके व आरोपीचे तज्ञ वकील साहेब, श्री. एम.टी.यादव यांना मी विस्तृतपणे ऐकून घेतले तसेच संपुर्ण दस्तऐवजांचे सुक्ष्मपणे अवलोकन केले आहे.

मुद्दा क्रमांक १ ते ५ बाबत:-

७. उपरोक्त नमुद सर्व मुद्दे एकमेकांशी निगडीत असल्यामुळे त्यांच्या निष्कर्षाच्या कारणमिमांसेची पुनरावृत्ती टाळण्याकरीता मी सदर सर्व मुद्द्यांच्या निष्कर्षाची कारणमिमांसा एकत्रितरित्या देत आहे. पी.एन.डी.टी. हा कायदा गर्भनिवड करणे आणि

नको असलेल्या लिंगाच्या गर्भाचा गर्भपात करण्याच्या घृणास्पद प्रकाराला आळा घालण्यासाठी करण्यात आला आहे. भारतीय समाजमनात मुलगाच हवा ही धारणा खूप पूर्वीपासून घट्ट रूजली आहे. या हव्यासामुळे मुलींबाबत भेदभाव होऊ लागले. यामुळे नवजात मुलींना मारणे, हुंडाबळी आणि सती सारख्या कुप्रथा वाढत गेल्या. मुलींना मारून टाकणे हे भारतीय सामाजिक व सांस्कृतिक व्यवस्थेत नवीन गोष्ट नाही. साहजिकच त्यामुळे स्त्रियांची संख्या कमी होत गेली. सध्या भारतात ० ते ६ या वयोगटातील दर १००० मुलांमागे ९२७ मुली असे प्रमाण आहे. ही परिस्थिती अधिक बिकट झाली असती पण, अनेक समाज सुधारकांनी अशा घातक प्रथांविरुद्ध चळवळी उभारल्या यामुळे देशातील स्त्री पुरुषांचे प्रमाण काही मर्यादेपर्यंत नियंत्रणाखाली ठेवले गेले. तरीही देशाच्या निरनिराळ्या प्रांतांमध्ये याबाबत तफावत आढळते. देशाच्या उत्तर आणि पश्चिम भागात पुरुषांच्या तुलनेत स्त्रियांची संख्या खूपच कमी झालेली दिसते. गेल्या काही दशकांत जरी देशाने इतर क्षेत्रात विकास केला असला तरी बाल लिंग गुणोत्तर अधिक घसरलेले आढळून येते. अलिकडच्या काळात घसरत्या बाल लिंग गुणोत्तराच्या मुद्याला एक नविन पैलू निर्माण झाला आहे. गर्भधारणेपूर्व व गर्भधारणानंतर ज्याने गर्भलिंग ओळख व निवड करता येते असे तंत्रज्ञान याला कारणीभूत आहे.

८. सन १९८० नंतर आधुनिक वैद्यकीय तंत्रज्ञानात मोठे बदल घडले. या नंतरच्या काळात आधुनिक वैद्यक तंत्रज्ञानाचा गर्भावस्थेत गर्भलिंग चिकीत्सा करणे आणि स्त्री गर्भ ओळखून गर्भपात करणे यासाठी मोठया प्रमाणात दुरुपयोग सुरू झाला. अॅम्नियोसेंटिसिस आणि अल्ट्रासोनोग्राफी यासारखी प्रसूतीपूर्व निदान तंत्रे ही वास्तविक गर्भातील अनुवंशिक दोष (विकृती) शोधण्यासाठी जगभरात वापरली जातात. मात्र भारतात गेली तीस वर्षे गर्भावस्थेतील बाळाचे लिंग शोधण्यासाठी आणि त्यानंतर लिंग निदान करण्यासाठी या तंत्रांचा दुरुपयोग करण्यात येत आहे. सन १९९१ च्या जनगणनेमधून देशातील लोकसंख्येतील स्त्रियांचे प्रमाण आणि मुलींची संख्या कमी झाल्याचे सिद्ध झाले. याच काळात देशभरातील स्त्रियांच्या संघटनांनी वैद्यकीय तंत्रज्ञानाच्या दुरुपयोगाविरुद्ध मोठया प्रमाणात आवाज उठवला. या चळवळींमुळे सरकारने राष्ट्रीय पातळीवर एक कायदा करून वैद्यकीय तंत्रज्ञानाचा गर्भलिंग चिकीत्सा करण्यासाठी दुरुपयोग करण्यावर बंदी घातली. परंतु यासाठी सन १९९४ साली केलेल्या पी.एन.डी.टी. कायद्याची परिणामकारक अंमलबजावणी झाली नाही. 'छोटे कुटुंब' ही कल्पना सरकारी पातळीवरून आणि सामाजिक पातळीवरही जोरकसपणे पुरस्कृत केली जात होती. या कल्पनेला समाजमान्यता मिळत होती. या सर्वातून दोनच मुलं असतील तर त्यात एक तरी मुलगा हवाच या इच्छेने गर्भलिंग निवड आणि स्त्री गर्भाचा गर्भपात यासाठी गरोदरपणात आधुनिक वैद्यकीय तंत्रांचा गैरवापर मोठया प्रमाणात वाढला. ज्यामुळे मुलींना मारणे हे जास्त (छुप्या पद्धतीने) होऊ लागले आणि समाजातही त्याची मान्यता वाढली.
९. सन २००१ च्या जनगणनेच्या निष्कर्षांनी लहान मुले आणि मुलींमधील घसरलेल्या लिंग गुणोत्तरामुळे धोक्याचा इशारा राष्ट्रीय पातळीवर आणखीनच गंभीरपणे जाणवू लागला. या घसरलेल्या लिंग गुणोत्तराचा अर्थ लिंग-निवड पद्धतींचा वापर मुलींना नष्ट करण्यासाठीच केला जात आहे हे अधिक स्पष्टपणे पुढे आले. भारतात सामाजिक कुप्रथा बंद करण्यासाठी आणि आधुनिक सुधारणा घडवून आणण्यासाठी कायदे करण्याचा एक इतिहास आहे. आमच्या देशात हुंडा बंदी, बालविवाह प्रतिबंध आणि सती प्रतिबंध कायदे करण्यात आले आहेत. असे कायदे केल्याने या कुप्रथा पुर्णपणे बंद झाल्या असे नाही. परंतु या कायद्यांमुळे अशा प्रथांना आळा घालण्यास निश्चितपणे मदत झाली आहे. अशाच तऱ्हेने आधुनिक वैद्यकीय तंत्रज्ञानाचा, गर्भलिंग निवड करण्यासाठी आणि स्त्रीगर्भ तयारच होऊ नये म्हणून गर्भधारणापूर्व उपाय करण्यासाठी होणारा दुरुपयोग थांबविण्यासाठी पी.एन.डी.टी. कायदा करणे भाग पडले. पी.एन.डी.टी. कायदा हा एक वेगळया प्रकारचा सामाजिक कायदा आहे. या कायद्यामुळे केवळ स्त्री-विरोधी सामाजिक व्यवहाराला आळा घातला जात नाही तर या कायद्याच्या माध्यमातून वैद्यकीय तंत्रज्ञानाचा वापर नैतिकतेच्या आधारेच झाला पाहिजे असा आग्रह, यासाठी वैद्यकीय तंत्रज्ञानावर नियंत्रण ठेवण्याचे काम हा कायदा करतो. किंबहुना हा कायदा स्त्री-विरोधी, स्त्रियांचे अस्तित्वच नाकारणाऱ्या या प्रथांना आळा घालण्यासाठी वैद्यकीय तंत्रज्ञानावर नियंत्रण आणण्यास प्राधान्य देतो.

१०. प्रसुतीपूर्व निदान तंत्राद्वारे प्रसुतीपूर्व जनुकिय विकृती किंवा मेटाबॉलीक विकृती किंवा गुणसुत्रातील विकृती जन्मतः व्यंग किंवा लिंग संबंधित विकृतीचे निदान व त्याचा गर्भाच्या लिंग निदानासाठी व तदंतर स्त्री गर्भाचा गर्भपात अशा दुरुपयोगास प्रतिबंध करण्याची तरतूद या कायद्यात करण्यात आली आहे. काही विशिष्ट परिस्थिती सोडल्यास, कुठलीही व्यक्ती किंवा जेनेटिक समुपदेशन केंद्र किंवा जेनेटिक लेबोरेटरी किंवा जेनेटिक दवाखाना यांनी प्रसुतीपूर्व निदान तंत्र आणि अल्ट्रासोनोग्राफी या तंत्राचा वापर लिंगनिदान करण्यास करू शकत नाही. तसेच गर्भवती महिलेला किंवा तिच्या नातेवाईकांना किंवा अन्य कोणाही व्यक्तीला जिच्या गर्भाचे लिंग तोंडी सांगणे, थेट किंवा अप्रत्यक्षपणे कळवणे, अन्य मार्गाने सांगणे हा या कायद्याखालील दंडनीय अपराध ठरविण्यात आला आहे. अल्ट्रासोनोग्राफीसारख्या निदान तंत्राचा वापर करून गर्भलिंग ओळख केली जाऊ शकते. म्हणजेच जन्माला येणारे बाळ मुलगा आहे की मुलगी हे कळू शकते. यालाच लिंग निदान म्हणतात. कोणतेही कुटुंब जेव्हा आपल्याला हव्या असलेल्या लिंगाच्या बाळाची निवड करतं व नको असलेल्या लिंगाच्या बाळाचा गर्भपात करवतं, तेव्हा या प्रक्रियेला गर्भलिंग निवड म्हटलं जातं. बहुतेक सर्वांनाच मुलगेच हवे असतात म्हणून स्त्रीगर्भाचा गर्भपात केला जातो. अल्ट्रासोनोग्राफी केली जात असलेल्या प्रत्येक ठिकाणी - 'गर्भाचे लिंग शोधण्यावर बंदी आहे आणि ते बेकायदेशीर आहे.' हे इंग्रजी व स्थानिक भाषेत ठळकपणे लिहीले गेले पाहिजे असा फलक लावणे अनिवार्य केले गेले. यापुढेही प्रत्येक अल्ट्रासाउंड मशिनची नोंदणी आणि मशीन बनवणाऱ्या आस्थापनांना त्यांनी कुठल्या दवाखाने व डॉक्टरांना मशिन विकले याची माहिती देणे बंधनकारक केले.
११. गर्भधरणापूर्व आणि प्रसवपूर्व निदान तंत्रांचा कायदेशीर वापर कोणत्याही तऱ्हेची अनुवंशिकतेतून उद्भवलेली स्थिती जशी हिमोफोलिया, डाऊन्स सिन्ड्रोम, जन्मतः किंवा जन्मजात दोष उदाहरणार्थ आरएच गट न जुळणे, यासारख्या अनुवंशिक किंवा गर्भाच्या लिंगामुळे घातक ठरणाऱ्या त्रुटी, दोष किंवा अन्य शारीरिक किंवा मानसिक त्रुटी ज्यांचा उल्लेख, या कायद्याच्या मार्गदर्शक तत्वात केलेला आहे, यासाठी करता येऊ शकेल. दुसऱ्या शब्दांत सांगायचं तर, गर्भातील शारीरिक किंवा मानसिक विकृतींचा शोधघेण्यासाठी या तंत्रांचा वापर करता येईल. अशा गर्भातील विकृती (दोष) या अनुवंशिक असू शकतात किंवा कौटुंबिक इतिहासाशी जोडलेल्या असू शकतात किंवा गर्भलिंगाशी संबंधित असू शकतात. मात्र या तंत्राचा वापर गर्भलिंग निवडीसाठी करता येणार नाही. तसेच गर्भवती महिला ३५ वर्षांपेक्षा अधिक वयाची असेल, तीचे त्यापूर्वी २ किंवा ३ तत्काळ नैसर्गिक गर्भपात झाले असतील, किंवा ती संभाव्य धोकादायक अशा रसायनांच्या, औषधांच्या, किरणोत्सर्जनच्या किंवा संसर्गाच्या संपर्कात आली असेल, किंवा त्या महिलेच्या कुटुंबात शारीरिक विकृती आणि/किंवा स्पास्टीसिटी किंवा अन्य अनुवंशिक आजारांचा इतिहास असेल तर अशा विशिष्ट परिस्थितीत या कायदानुसार या तंत्रांचा वापर करता येऊ शकेल. वेगळ्या शब्दात सांगायचे तर वरीलपैकी कोणती अशी परिस्थिती उद्भवली, की त्यामुळे गर्भवती महिला किंवा गर्भ यांना धोका पोहचण्याची शक्यता आहे, तर अशा स्थितीत प्रसवपूर्व निदान चाचण्या करता येतात. तर सोनोग्राफी सारख्या चाचण्या या गर्भाची वाढ तपासण्यासाठी आणि प्रसवपूर्व तपासणीसाठी व्यापक प्रमाणावर वापरल्या जातात. मात्र त्यांचा वापर गर्भलिंग निवडीसाठी करता येणार नाही.
१२. प्रसवपूर्व निदान चाचण्या करणाऱ्या वैद्यकीय व्यावसायिकास संबंधित गर्भवती महिलेची लेखी संमती घेणे आवश्यक आहे. या चाचणीचे साईड इफेक्ट काय आहेत हे तिला सांगून अशी संमती घेण्यात आली पाहिजे. तिने दिलेल्या संमतीपत्राची प्रत त्या महिलेला देणे आवश्यक आहे. सगळ्यात महत्वाचे म्हणजे तिची संमती आणि तिला सांगण्यात आलेली माहिती तिला समजेल त्याच भाषेत देणे आवश्यक आहे. एखाद्या वैद्यकीय व्यावसायिकाने अशा चाचण्या करताना संबंधित महिलेची लेखी संमती घेतली नाही किंवा ते क्लिनिक नोंदणीकृत नसेल तर चाचणी बेकायदेशीर ठरते. तसेच अशा चाचणीदरम्यान त्या वैद्यकीय व्यावसायिकाला गर्भाचे लिंग समजले तरी त्याने ते कोणाला सांगता कामा नये. उपरोक्त नमूद केलेल्या रास्त कारणांसाठी या चाचण्या नोंदणीकृत वैद्यकीय व्यावसायिकाला करता येतात. असा वैद्यकीय व्यावसायिक मेडिसिनमधील पदवीधर (एमडी) असावा, तसेच या कायद्यात सांगितलेले विशेष प्रकारचे कौशल्य उदाहरणार्थ स्त्रीरोगशास्त्र किंवा बालरोगशास्त्र

हे या वैद्यकीय व्यावसायिकाकडे असणे आवश्यक आहे. याशिवाय सोनॉलॉजिस्ट किंवा रेडिओलॉजिस्ट व्यावसायिकांना केवळ अल्ट्रासोनोग्राफी करण्याची परवानगी देण्यात आली आहे. अशी जागा नोंदणीकृत असेल तर अशा चाचण्या खालील ठिकाणी करता येतात ज्यांची कायद्यांतर्गत नोंदणी झाली आहे. रूग्णांना जेनेटिक कॉन्सिलिंग सेवा पुरविण्यात येणाऱ्या जेनेटिक कॉन्सिलिंग सेंटर्स म्हणजेच संस्था, रूग्णालये, शुश्रूषागृहे किंवा अन्य असे कोणतेही ठिकाण. जेनेटिक क्लिनिक म्हणजे असे कोणतेही क्लिनिक, रूग्णालय, सुश्रूषागृह किंवा अन्य कोणतीही जागा कोणत्याही नावाने ओळखली जाणारी, ज्या ठिकाणी प्रसवपूर्व निदान प्रक्रिया, उपचार केले जातात. जेनेटिक लॅबोरेटरी म्हणजे अशी प्रयोगशाळा किंवा अशी जागा, जिथे जेनेटिक क्लिनिक तर्फे पाठविण्यात येणारे प्रसवपूर्व निदान चाचण्या करण्यासाठीचे नमूने स्वीकारले जातात. जेनेटिक क्लिनिक आणि प्रयोगशाळा यामध्ये अल्ट्रासाउंड यंत्रे किंवा इमेजिंग यंत्रे किंवा स्कॅनर किंवा अन्य कोणतेही गर्भलिंग निश्चितीकरण करण्यासाठी वापरणे शक्य असेल असे उपकरण किंवा गर्भावस्थेतील गर्भाचे लिंग ओळखण्यासाठी किंवा गर्भधारणापूर्व निदान करणारी उपयोगात आणता येऊ शकेल असे हातवाही (पोर्टेबल) उपकरण असणाऱ्या सोनोग्राफी आणि इमेजिंग सेंटर्सचा यात समावेश आहे.

१३. डेकॉय वितनेस कविता लोखंडे ही घटणेची प्रत्यक्षदर्शी साक्षदार असल्यामुळे त्यांच्या साक्षेचे सुक्ष्मपणे अवलोकन करणे आवश्यक आहे. कविता लोखंडेच्या साक्षेप्रमाणे दिनांक ०९/०९/२००५ रोजी दुपारी २.३० वाजताचे दरम्यान ती व शैला जाधव आरोपीच्या जिवन-ज्योती हॉस्पिटलमध्ये सोनोग्राफीद्वारे गर्भलिंग निदान करण्याकरीता गेली होती. त्यावेळी कविता लोखंडे ही पाच महिन्यांची गरोदर होती. त्यावेळी आरोपीच्या हॉस्पिटलमध्ये आरोपी हजर नसल्यामुळे कम्पाउंडरने कविता लोखंडेच्या नावाची रजिस्टरमध्ये नोंद करून घेतली होती. त्यानंतर दुपारी ३.१५ वाजताचे दरम्यान आरोपीनी हॉस्पिटलमध्ये येवून गर्भलिंग निदानाकरीता पंचविसशे रुपये घेण्यास कम्पाउंडरला सांगितले होते. त्याप्रमाणे शैला जाधवने कम्पाउंडरजवळ पंचविसशे रुपये दिले होते. त्यानंतर आरोपीनी कविता लोखंडेला आतमध्ये बोलावून त्यांची सोनोग्राफी चाचणी केली होती. त्यावेळी आरोपीनी कविता लोखंडेला सहा महिन्याचा गर्भ असून सदर गर्भ मुलगा असल्याचे सांगितले होते. त्यावेळी आरोपीनी कविता लोखंडेला सांगितले होते की, त्यांनी गर्भलिंग निदानाबाबत बाहेर कुणालाही सांगु नये. त्यावेळी आरोपीनी कविता लोखंडेला सोनोग्राफी केल्याबाबत केसपेपर लिहून दिला होता. कविता लोखंडेच्या उपरोक्त नमुद मौखिक साक्षेशी सुसंगत साक्ष शैला जाधवनी दिली आहे. शैला जाधवच्या साक्षेप्रमाणे ती दलित महिला विकास मंडळ, सातारा या संस्थेची अध्यक्ष असून सदर संस्था महिलांचे सशक्तीकरण करण्याचे विविध उपक्रम राबवीते. उपरोक्त नमुद संस्था सन २००३ पासून पी.एन.डी.टी कायद्यांतर्गत प्रबोधन करण्याचे काम करीत असून त्यामध्ये अॅड. वर्षा देशपांडे, कविता लोखंडे, कैलास जाधव, बबलु फरास इत्यादी व्यक्तींचा समावेश आहे. दिनांक ०९/०९/२००५ रोजी पी.एन.डी. टी कायद्यांतर्गत समुचित प्राधिकारी तथा सिव्हील सर्जन सातारा डॉ. विलासराव यादव व डॉ. जयंत देशपांडेच्या विनंतीवरून मौजा गोंदी गावामध्ये कविता लोखंडे या गर्भवती महिलेच्या गर्भलिंग निदानाकरीता डेकॉय केस म्हणून पाठविण्याचे ठरले होते. आरोपीचे मौजा गोंदी येथे जिवन-ज्योती नावाचे हॉस्पिटल आहे. शैला जाधव व कविता लोखंडे दिनांक ०९/०९/२००५ रोजी दुपारी ३.०० ते ४.०० वाजताचे दरम्यान आरोपीचे उपरोक्त नमुद हॉस्पिटलमध्ये गेली असता आरोपी त्यांच्या हॉस्पिटलमध्ये हजर नव्हते म्हणून कम्पाउंडरने त्यांना थांबवून घेतले होते. त्यानंतर १५ ते २० मिनीटांनी आरोपी हॉस्पिटलमध्ये आले असता शैला जाधवनी त्यांना कविता लोखंडेच्या गर्भामध्ये मुलगा आहे किंवा मुलगी आहे याबाबत चाचणी करायची असल्याचे सांगितले होते. त्यावेळी आरोपीनी गर्भलिंग निदानाकरीता पंचविसशे रुपये खर्च येत असल्यामुळे सदर रक्कम कम्पाउंडरजवळ जमा करण्यास सांगितले होते. त्याप्रमाणे डॉ. यादव समुचित प्राधिकारी सातारा यांनी स्टींग-ऑपरेशन करीता दिलेले पंचविसशे रुपये शैला जाधवने आरोपीचे कम्पाउंडरजवळ जमा केले होते. त्यानंतर शैला जाधव व कविता लोखंडे ही आरोपीच्या हॉस्पिटलमधील ओपीडीच्या डाव्या बाजूला असलेल्या सोनोग्राफीच्या कम-यामध्ये गेले होते. सदर कम-यामध्ये सोनोग्राफी मशिन ठेवलेली होती. तेथे आरोपीनी गर्भवती कविता लोखंडेची सोनोग्राफी मशिनद्वारे सोनोग्राफी चाचणी केली होती.

त्यानंतर आरोपीनी कविता लोखंडे व शैला जाधवला सांगितले होते की, कविता लोखंडेच्या गर्भामध्ये सहा महिन्याचा गर्भ असून सदर गर्भ मुलगा आहे. त्यावेळी आरोपीनी कविता लोखंडेचा प्रिंटेड व स्वहस्ताक्षरामधील सोनोग्राफीचा रिपोर्ट तयार करून दिला होता.

१४. फिर्यादी विलासराव यादवच्या साक्षेप्रमाणे ते दिनांक २६/०६/२००४ रोजीपासून दिनांक ०८/०६/२००६ रोजीपर्यंत सातारा येथे जिल्हा शल्य चिकित्सक पदावर कार्यरत असून पी.एन. डी.टी. कायद्या अंतर्गत त्यांची जिल्हा समुचित प्राधिकारी म्हणून नियुक्ति केली होती. समुचित प्राधिकाऱ्यांनी कोणकोणते विविध कार्ये करावयाचे असल्याचे फिर्यादीनी सांगितले आहे. समुचित प्राधिकाऱ्यांनी कोणकोणती कार्ये करावयाची आहेत याबाबत पी.एन. डी.टी. कायदा व नियमामध्ये विस्तृत वर्णन दिलेले आहे. दिनांक ०९.०९.२००५ रोजी सकाळी पी.एन.डी.टी. कायद्या अंतर्गत दक्षता समितीमधील सदस्य अॅड. वर्षा देशपांडे व सामाजिक कार्यकर्ती शैला जाधवनी फिर्यादी विलासराव यादवसोबत चर्चा केली होती की, सातारा जिल्हयामधील विविध ठिकाणी तसेच जुळेवाडी येथिल आरोपीच्या दवाखाण्यामध्ये गर्भलिंग निदानाची चाचणी केल्या जाते. त्यावेळी अॅड. वर्षा देशपांडे व शैला जाधवनी आरोपीच्या दवाखाण्यामध्ये तपासणी करता बोगस ग्राहक म्हणून कविता लोखंडे येण्यास तयार असल्याची माहिती देवून त्याकरीता परवाणगी मागितली होती. त्यावेळी वर्षा देशपांडे व शैला जाधवने फिर्यादी विलासराव यादवला त्यांचे निधीमधून बोगस केसची तपासणी-फी भरण्याकरता पंचविसशे रूपयाची मागणी केली होती. त्याप्रमाणे फिर्यादी विलासराव यादवनी बोगस ग्राहकाची तपासणी-फी भरण्याकरीता पंचविसशे रूपये व जाण्या-येण्याकरीता पाचशे रूपये असे एकूण तीन हजार रूपये अॅड. वर्षा देशपांडे व शैला जाधव यांना दिले होते. सदर तपासणी-फीच्या पंचविसशे रूपयामध्ये शंभर रूपयाच्या १५ व पन्नास रूपयाच्या २० नोटा असून सदर नोटांचे नंबर फिर्यादीने नोंद करून घेतले होते. त्यानंतर दिनांक ०९.०९. २००५ रोजी दुपारी २.३० ते ०३.०० वाजताचे दरम्यान अॅड. वर्षा देशपांडे, शैला जाधव, बोगस ग्राहक कविता लोखंडे व त्यांचे दोन सहकारी मौजे जुळेवाडी येथिल आरोपीच्या हॉस्पिटलमध्ये गेले होते. त्यानंतर शैला जाधवचा फिर्यादीला फोन आला होता की, आरोपी हॉस्पिटलमध्ये हजर नाहीत व आरोपी आल्यानंतर ती पुन्हा फोन करेल. त्यानंतर सायंकाळी ५.०० वाजताचे दरम्यान शैला जाधवनी फिर्यादी विलासराव यादवला फोन करून सांगितले होते की, आरोपीच्या कंपाऊडरने तपासणी-फी स्विकारून आरोपीनी गर्भवती कविता लोखंडेची सोनोग्राफी चाचणी करून त्यांच्या गर्भामध्ये मुलगा असल्याचे सांगितले होते. त्यावेळी फिर्यादी विलासराव यादवला फोनद्वारे सांगण्यात आले होते की, आरोपीची गर्भलिंग निदान करण्याची बाब गोपनीय ठेवण्याचे सांगून सोनोग्राफीचा अहवाल लिहून दिला होता. त्यावेळी फिर्यादी विलासराव यादवला फोनद्वारे सांगण्यात आले होते की, आरोपीनी पंचविसशे रूपये स्विकारून त्याबाबत पावती दिली नव्हती. त्यानंतर फिर्यादी विलासराव यादवनी घटनास्थळी जावून तपासणी व जप्ती करण्याकरीता स्वतःच्या वतीने डॉ. जयंत देशपांडेला अधिकार दिले होते. त्याप्रमाणे डॉ. जयंत देशपांडेनी मौजे जुळेवाडी येथे घटनास्थळी जावून आरोपीनी दिलेला सोनोग्राफीचा अहवाल जप्त करून सोनोग्राफी मशीन सिल केली होती तसेच साक्षदारांचे बयाण नोंदविले होते. त्यावेळी डॉ. जयंत देशपांडेने आरोपीकडून गर्भलिंग निदानाकरीता दिलेल्या पंचविसशे रूपयांच्या नोटा जप्त केल्या होत्या. त्यानंतर डॉ. जयंत देशपांडे यांनी केलेल्या कार्यवाहीचा अहवाल फिर्यादी विलासराव यादवकडे सादर केला होता. फिर्यादी विलासराव यादवनी सदर कार्यवाहीच्या अहवालाची नियमाप्रमाणे पडताळणी केली होती. सदर कार्यवाहीच्या अहवालाप्रमाणे आरोपीजवळ सोनोग्राफी मशीनची नोंदणी केलेली नव्हती, गर्भलिंग निदान केल्या जात नसल्याबाबतचा फलक हॉस्पिटलचे बाहेरील बाजूस व सोनोग्राफी मशीजवळ लावलेला नव्हता, आरोपीजवळ “सोनोग्राफीस्ट” असे शिक्षण नव्हते, आरोपीजवळ शासनविहित ट्रेनिंगचे प्रमाणपत्र नव्हते, आरोपीजवळ “एफ” रजिस्टर नव्हते, शासनाला पाठविलेल्या मासिक अहवालाची फाईल नव्हती, आरोपीजवळ पी.एन.डी.टी. कायद्याची पुस्तिका नव्हती. अशाप्रकारे उपरोक्त नमूद त्रुट्या असताना सुध्दा आरोपीनी कविता लोखंडेचे सोनोग्राफी मशीनद्वारे गर्भलिंग निदान केले होते.

१५. शैला जाधवच्या साक्षेप्रमाणे सुध्दा त्यांनी कविता लोखंडेच्या गर्भलिंग निदानाच्या चाचणीनंतर बाहेर येवून सदर घटनेबाबत समुचित प्राधिकार्यांना फोनद्वारे माहिती दिली होती. त्यानंतर डॉ. जयंत देशपांडेने घटनास्थळी येवून वस्तुस्थितीची पडताळणी केली होती. त्यावेळी डॉ. जयंत देशपांडेने आरोपीला घटनेबाबत विचारणा केली असता आरोपीनी कविता लोखंडेची गर्भलिंग निदानाची चाचणी करून त्यांच्या गर्भामध्ये मुलगा असल्याचे सांगून त्याबाबत पंचविसशे रुपये घेतल्याचे कबूल केले होते. त्यावेळी जयंत देशपांडेनी आरोपीच्या ड्रॉव्हरमधून उपरोक्त नमूद पंचविसशे रूपयाच्या नोटा आरोपीनी काढून दिल्यावरून जप्त केल्या होत्या. त्यावेळी डॉ. जयंत देशपांडेनी आरोपीची सोनोग्राफी मशीन व घटनास्थळावरील रेकॉर्ड जप्त करून त्याबाबत पंचनामा तयार केला होता. त्यानंतर डॉ. जयंत देशपांडेनी पुढील कार्यवाही केली होती. कविता लोखंडेच्या साक्षेप्रमाणे सुध्दा आरोपीनी त्यांची गर्भलिंग चाचणी केल्यानंतर त्यांनी बाहेर येवून डॉ. जयंत देशपांडेला उपरोक्त नमूद घटनेबाबत सांगितले होते. त्यावेळी डॉ. जयंत देशपांडेनी आरोपीकडून गर्भलिंग निदानाच्या चाचणीकरीता दिलेल्या सर्व नोटा व रजिस्टर जप्त केले होते. आरोपीच्या हॉस्पिटलमध्ये गर्भलिंग निदानाची चाचणी होत असल्याचे अॅड. वर्षा देशपांडेनी सांगितल्यावरून सदर केसमध्ये डेकॉय केसकरीता आल्याचे कविता लोखंडेनी सांगितले आहे. डॉ. जयंत देशपांडेच्या साक्षेप्रमाणे सुध्दा सन १९९६ पासून जूलै २००६ पर्यंत ते जिल्हा रूग्णालय, सातारा येथे वैद्यकीय अधिकारी पदावर कार्यरत होते. फिर्यादी विलासराव यादव सुध्दा सन २००५ पासून जिल्हा शल्य चिकित्सक, सातारा या पदावर कार्यरत होते. घटना दिनांक ०९.०९.२००५ रोजी घडली असून त्यादिवशी दुपारी ०४.३० वाजताचे दरम्यान फिर्यादी विलासराव यादवनी डॉ. जयंत देशपांडेला बोलावून जुळेवाडी येथिल आरोपीचे जिवन-ज्योती हॉस्पिटलमध्ये जावून पी.एन.डी.टी. कायद्यातर्गत सदर हॉस्पिटलची तपासणी करून कार्यवाही करण्याचा आदेश दिला होता. त्याप्रमाणे डॉ. जयंत देशपांडे हे आरोपीच्या उपरोक्त नमूद हॉस्पिटलमध्ये गेले असता तेथे अॅड. वर्षा देशपांडे, शैला जाधव, कविता लोखंडे व कैलास जाधव हजर होते. त्यावेळी कविता लोखंडेनी डॉ. जयंत देशपांडेला सांगितले होते की, त्यांच्या विनंतीवरून आरोपीनी पंचविसशे रूपये घेवून सोनोग्राफी मशीनने त्यांच्या गर्भाची चाचणी करून त्यांच्या गर्भामध्ये मुलगा असल्याचे सांगितले होते. त्यानंतर डॉ. जयंत देशपांडेनी कविता लोखंडे, कैलास जाधव, शैला जाधव, कंपाऊंडर संजय भोसले व आरोपीच्या सांगण्यावरून त्यांचे बयान नोंदविले होते. शैला जाधव व कविता लोखंडेनी सुध्दा डॉ. जयंत देशपांडेनी त्यांचे बयान नोंदविल्याचे सांगितले आहे. डॉ. जयंत देशपांडेनी शैला जाधवचे बयान (नि.क्रं. १९), कविता लोखंडेचे बयान (नि.क्रं. ३४), कैलास जाधवचे बयान (नि.क्रं. ३५) व संजय भोसलेचे बयाना (नि.क्रं. ३६) वरील स्वतःची व सदर साक्षदारांची सही ओळखून त्यामधील मजकूर बरोबर असल्याचे सांगितले आहे. त्याचप्रमाणे शैला जाधव व कविता लोखंडेनी सुध्दा त्यांच्या उपरोक्त नमूद बयानावरील स्वतःची सही ओळखून त्यामधील मजकूर बरोबर असल्याचे सांगितले आहे.
१६. डॉ. जयंत देशपांडेच्या साक्षेप्रमाणे त्यांनी आरोपीच्या कॅश बॉक्समधून बोगस ग्राहकाच्या गर्भलिंग निदानाकरीता दिलेल्या नोटा जप्त करून त्याचा पंचनामा तयार केला होता. त्यानंतर डॉ. जयंत देशपांडेनी कविता लोखंडेकडून आरोपीनी दिलेला सोनोग्राफीचा अहवाल जप्त केला होता. त्यानंतर डॉ. जयंत देशपांडेनी आरोपीच्या हॉस्पिटलची तपासणी केली होती त्यावेळी डॉ. जयंत देशपांडेना दिसून आले होते की, आरोपीनी 'एफ' नमुन्यामध्ये रेकॉर्ड ठेवले नव्हते तसेच पी.एन.डी.टी. कायद्यातर्गत सोनोग्राफी करण्याकरीता पात्र असल्याबाबतची कागदपत्रे व नोंदणी प्रमाणपत्र आरोपीजवळ नव्हते. आरोपीनी त्यांच्या हॉस्पिटलमध्ये गर्भलिंग निदान केल्या जात नाही असा फलक लावला नव्हता तसेच पी.एन.डी.टी. कायद्याची पुस्तिका ठेवली नव्हती त्यानंतर डॉ. जयंत देशपांडेनी आरोपीच्या सोनोग्राफी मशीनचा पंचनामा तयार केला होता. त्यानंतर डॉ. जयंत देशपांडेनी जप्त केलेल्या वस्तुची यादी तयार करून त्याची एक प्रत आरोपीला देवून त्यावर प्रत मिळालेबाबत आरोपीची सही घेतली होती. त्यानंतर डॉ. जयंत देशपांडेनी आरोपीच्या हॉस्पिटलस्थित असलेल्या मिळकतीचा गाव नमुना आठ प्राप्त करून घेतला होता. त्यानंतर डॉ. देशपांडेनी जप्त केलेली मशीन व सर्व अहवाल फिर्यादी विलासराव यादवला दिला होता. त्यानंतर फिर्यादी विलासराव यादवनी पुढील कार्यवाही केली होती. पंच साक्षदार प्रशांत पवारच्या साक्षेप्रमाणे सुध्दा

डॉ. जयंत देशपांडेनी त्यांना दिनांक ०९.०९.२००५ रोजी जुळेवाडी येथील आरोपीच्या हॉस्पिटलमध्ये पंच म्हणून बोलावीले होते. आरोपीनी त्यांच्या हॉस्पिटलमध्ये सोनोग्राफी मशीनद्वारे कविता लोखंडेची तपासणी करून त्यांच्या गर्भामध्ये मुलगा आहे किंवा मुलगी आहे हे सांगितल्याबाबत डॉ. जयंत देशपांडेनी आरोपीच्या हॉस्पिटलमध्ये धाड टाकली होती. त्यावेळी डॉ. जयंत देशपांडेनी प्रशांत पवार व दुसरे पंच साक्षदार बबलू फरासचे समक्ष आरोपींना दिलेल्या पंचविसशे रूपयाच्या नोटा जप्त करून त्याचा जप्ती पंचनामा तयार केला होता. त्यावेळी जप्त केलेल्या नोटांच्या क्रमांकाची नोंद करून घेण्यात आली होती. सदर जप्त केलेल्या पंचविसशे रूपयामध्ये शंभर रूपयाच्या १५ व पन्नास रूपयाच्या ५० नोटा होत्या. त्यानंतर डॉ. जयंत देशपांडेनी आरोपीच्या हॉस्पिटलमधील सोनोग्राफी मशीन सिल व जप्त करून त्याचा पंचनामा तयार केला होता. डॉ. जयंत देशपांडे व पंच साक्षदार प्रशांत पवारनी नोटाचा जप्ती पंचनामा (नि.क्रं.३७) व सोनोग्राफी मशीनचा जप्ती पंचनाम्यावरील (नि.क्रं.५२) स्वतःच्या सहया ओळखून त्यामधील मजकूर बरोबर असल्याचे सांगितले आहे. फिर्यादी विलासराव यादव व कविता लोखंडेनी प्रतिज्ञापत्रा (नि.क्रं.३२) वरील स्वतःच्या सहया ओळखून त्यामधील मजकूर बरोबर असल्याचे सांगितले आहे. आरोपीनी कविता लोखंडेच्या सोनोग्राफीचा दिलेला अहवाल (आर्टिकल-अ) डॉ. जयंत देशपांडे व शैला जाधवनी न्यायालयामध्ये ओळखला. फिर्यादी विलासराव यादव, डॉ. जयंत देशपांडे व शैला जाधव, कविता लोखंडे व पंच साक्षदार प्रशांत पवारनी आरोपींना न्यायालयामध्ये साक्ष देताना ओळखले की, घटनेवेळी त्यांनीच सोनोग्राफी मशीनद्वारे कविता लोखंडेची चाचणी करून त्यांच्या गर्भामध्ये मुलगा असल्याचे सांगितले होते.

१७. अशाप्रकारे, उपरोक्त नमूद सर्व साक्षदारांनी स्पष्टपणे सांगितले आहे की, घटना दिनांक ०९/०९/२००५ रोजी दुपारचेवेळी मौजे जुळेवाडी/गोंदी येथील आरोपीच्या जिवन-ज्योती हॉस्पिटलमध्ये घडली असून त्यावेळी आरोपीनी कविता लोखंडे या गर्भवती डेकाॅय विटनेसची सोनोग्राफी मशीनद्वारे चाचणी करून त्यांच्या गर्भामध्ये मुलगा असल्याचे सांगितले होते. म्हणून उपरोक्त नमूद सर्व साक्षदारांची मौखिक साक्ष ठोस, स्पष्ट व विश्वासहर्तेस पात्र असल्याचे दिसून येते काय हे पाहणे आवश्यक आहे. आरोपीच्या तज्ञवकील साहेबानी उपरोक्त नमूद पाचही साक्षदारांची दिर्घ उलट तपासणी घेतली आहे. उपरोक्त नमूद घटनास्थळ हे मौजे जुळेवाडी येथे आहे किंवा गोंदी येथे आहे याबाबत तफावत आली आहे. याबाबत आरोपीचे तज्ञ वकिल साहेबानी युक्तीवाद केला आहे की, जुळेवाडी व गोंदी हे दोन्ही गावे वेगवेगळी असल्यामुळे घटनास्थळाची निश्चिती होत नाही. वास्तविकतेमध्ये आरोपीचे हॉस्पिटल अस्तीत्वामध्येच नसल्यामुळे उपरोक्त नमूद केल्याप्रमाणे आरोपीचे हॉस्पिटल हे जुळेवाडी येथे आहे किंवा गोंदी येथे आहे याबाबत फिर्यादीच्या साक्षदारांच्या साक्षेमध्ये विसंगती आली आहे. याउलट, फिर्यादीच्या तज्ञ सरकारी वकिल साहेबानी सांगितले आहे की, जुळेवाडी व गोंदी ह्या दोन्ही गावच्या हद्दीवर आरोपीचे उपरोक्त नमूद हॉस्पिटल आहे. म्हणून फिर्यादीच्या उपरोक्त नमूद साक्षदारांच्या साक्षेमध्ये घटनास्थळाबाबत विसंगती असली तरी केवळ त्याकारणावरून मुळातच आरोपीचे हॉस्पिटल अस्तीत्वामध्ये नसल्याचा निष्कर्ष काढता येणार नाही. आरोपीच्या तज्ञ वकिल साहेबांनी वरील प्रमाणे केलेल्या युक्तीवादाबाबत मी येथे नमूद करू इच्छितो की, आरोपीचे हॉस्पिटल असलेल्या मिळकतीचा गाव नमुना आठ अर्टिकल-ब वर आहे. सदर ग्रामपंचायत मिळकत क्रं.५६० च्या गाव नमुना आठ वरून स्पष्ट होते की, मौजे गोंदी येथे उपरोक्त नमूद मिळकतीवर आरोपीची दुमजली इमारत आहे. आरोपीनी सुध्दा गोंदी येथे त्यांची उपरोक्त नमूद ग्रामपंचायत मिळकत क्रं.५६० असल्याचे कबुल केले आहे. परंतु आरोपीच्या बचावाप्रमाणे मौजे गोंदी येथील त्यांच्या उपरोक्त नमूद मिळकतीवरील इमारतीमध्ये त्यांचे हॉस्पिटल नसून त्यांचे राहते घर आहे. आरोपीच्या तज्ञ वकिल साहेबांनी पुढे युक्तीवाद केला आहे की, उपरोक्त नमूद इमारतीमध्ये आरोपीचे हॉस्पिटल असल्याचे दर्शविण्याकरीता डॉ. जयंत यादव व फिर्यादी विलासराव यादवनी सदर इमारतीच्या शेजाऱ्यांचे बयाण नोंदविलेले नाही. म्हणून उपरोक्त नमूद मिळकतीवरील इमारतीमध्ये आरोपीचे हॉस्पिटल असल्याचे सिध्द होत नसल्याचा युक्तिवाद आरोपीचे तज्ञ वकिल साहेबांनी केला आहे. दस्ताऐवजाचे अवलोकनावरून स्पष्ट होते की, सदर केसमध्ये आरोपीचे हॉस्पिटल असलेल्या मिळकतीचे शेजारील एकाही व्यक्तीचे बयाण नोंदविण्यात आले नाही. परंतु घटनेचे प्रत्यक्षदर्शी साक्षदार कविता लोखंडे, शैला जाधव,

डॉ.जयंत देशपांडे व पंच साक्षदार प्रशांत पवारनी स्पष्टपणे सांगितले आहे की, घटनास्थळी आरोपीचे जिवन-ज्योती हॉस्पिटल आहे. उपरोक्त नमूद सर्व साक्षदार आरोपीच्या हॉस्पिटलमध्ये गेल्यामुळे त्यांना आरोपीचे जिवन-ज्योती हॉस्पिटल अस्तीत्वामध्ये असल्याबाबत प्रत्यक्ष माहिती असल्याचे म्हणता येईल. फिर्यादीच्या उपरोक्त नमूद साक्षदारांच्या उलट तपाणीदरम्यान असा कोणताही मजकूर दस्ताऐवजावर आला नाही की, ज्यावरून मौजे गोंदी येथील ग्रामपंचायत मिळकत क्रं.५६० वर आरोपीचे जिवण-ज्योती हॉस्पिटल नसल्याचे दिसून येईल. फिर्यादीच्या उपरोक्त नमूद साक्षदारांनी स्पष्टपणे सांगितले आहे की, आरोपी हे डॉक्टर असून ते वैद्यकीय व्यवसाय करतात. आरोपीच्या तज्ञ वकिल साहेबांनी फिर्यादीच्या साक्षदारांच्या घेतलेल्या उलट तपासावरून स्पष्ट होते की, आरोपी हे डॉक्टर असल्याचे त्यांना कबुल आहे. परंतु आरोपीच्या बचावाप्रमाणे ते सरकारी दवाखान्यामध्ये वैद्यकीय अधिकारी असल्यामुळे त्यांचे खाजगी हॉस्पिटल अस्तीत्वामध्ये असणे शक्य नाही. परंतु मी येथे नमूद करू इच्छितो की, सरकारी दवाखान्यामधील वैद्यकीय अधिका-यांना खाजगी वैद्यकीय व्यवसाय करता येतो. म्हणून फिर्यादीच्या उपरोक्त नमूद साक्षदारांनी सांगितल्याप्रमाणे मौजे गोंदी/जुळेवाडी येथील हद्दीमध्ये आरोपीचे खाजगी जिवण-ज्योती नावाचे हॉस्पिटल असल्याचे म्हणता येईल. आरोपीचे हॉस्पिटल गोंदी व जुळेवाडीचे हद्दीमध्ये असल्यामुळे फिर्यादींनी त्यांच्या तक्रारीमध्ये (नि.क्रं.१) सुध्दा आरोपीचे हॉस्पिटल केवळ गोंदी किंवा जुळेवाडी येथे असल्याचे नमूद केलेले नसून सदर हॉस्पिटल हे जुळेवाडी/गोंदी येथे असल्याचे नमूद केले आहे. म्हणून आरोपीचे हॉस्पिटल गोंदी येथे आहे किंवा जुळेवाडी येथे आहे या बाबींचा जास्तीचा उहापोह न करता जुळेवाडी व गोंदीच्या हद्दीमध्ये आरोपीचे हॉस्पिटल अस्तीत्वामध्ये असल्याचे म्हणता येईल. गोंदी व जुळेवाडी हया दोन्ही ग्रामपंचायती वेगवेगळ्या असल्या तरी आरोपीचे हॉस्पिटल उपरोक्त नमूद दोन्ही गावच्या हद्दीवर असल्यामुळे उपरोक्त नमूद किरकोळ विसंगतीचा फिर्यादीचे कथनावर कोणताही विपरीत परिणाम होणार नाही. सदर किरकोळ विसंगतीमुळे मुळातच आरोपीचे हॉस्पिटल अस्तीत्वामध्ये नसल्याचा निष्कर्ष काढता येणार नाही. मौजे गोंदी येथील ग्रामपंचायत मिळकत क्रं. ५६० मध्ये आरोपीचे जिवन-ज्योती हॉस्पिटल असून तेथे उपरोक्त नमूद घटना घडल्याचे फिर्यादींनी सादर केलेल्या साक्षपुराव्यावरून स्पष्ट होते. आरोपींनी कबुल केले आहे की, घटनेवेळी डॉ.जयंत देशपांडेनी जप्त केलेली सोनोग्राफी मशिन त्यांच्या स्वतःचे मालकीची आहे. त्याप्रमाणे आरोपींना सुप्तनाम्यावर सोनोग्राफी मशिन देण्यात आलेली आहे. म्हणून घटनेचेवेळी आरोपीच्या हॉस्पिटलमध्ये उपरोक्त नमूद सोनोग्राफी मशिन उपलब्ध असल्याचे म्हणता येईल. आरोपीच्या तज्ञ वकिल साहेबांनी युक्तीवाद केला आहे की, आरोपींनी वैद्यकीय अधिकारी या नोकरीमधून स्वेच्छानिवृत्ती घेवून खाजगी वैद्यकीय व्यवसाय करण्याचा निर्णय घेतल्यामुळे त्यांनी सोनोग्राफी मशिन खरेदी करून ठेवली होती. आरोपींनी सोनोग्राफी मशीन सुप्तनाम्यावर मिळण्याकरीता न्यायालयामध्ये सादर केलेल्या सोनोग्राफी मशिनच्या बिलावरून स्पष्ट होते की, आरोपींनी सदर सोनोग्राफी मशिन सन १९९९ मध्ये खरेदी केली होती. परंतु सन १९९९ मध्ये किंवा त्यानंतर आरोपींनी वैद्यकीय अधिकारी या नोकरीमधून स्वेच्छानिवृत्ती घेतल्याचे किंवा सदर स्वच्छानिवृत्ती घेणार असल्याचे दर्शविणारा कोणताही मौखिक व कागदोपत्री पूरावा न्यायालयामध्ये सादर केला नाही. म्हणून आरोपींनी सन १९९९ पासून उपरोक्त नमूद सोनोग्राफी मशिनचा वापर केला नसून सदर मशिन केवळ वैद्यकीय अधिकारी या नोकरीमधून स्वेच्छानिवृत्ती घेतल्यानंतर खाजगी वैद्यकीय व्यवसाय करण्याकरीता खरेदी करून ठेवल्याचे म्हणता येणार नाही. आरोपीच्या तज्ञ सरकारी वकिल साहेबांचे युक्तीवादाप्रमाणे आरोपींनी सोनोग्राफी मशिन सन १९९९ मध्ये खरेदी केली त्यावेळी सदर सोनोग्राफी मशिनची नोंदणी करणे कायद्याने बंधनकारक नव्हते. आरोपीचे तज्ञ वकिल साहेबांनी वरीलप्रमाणे केलेल्या युक्तीवादाबाबत मी येथे नमूद करू इच्छितो की, पी.एन.डी.टी. कायद्याचे कलम १८(३) अंतर्गत सदर पी.एन. डी.टी. कायदा अंमलामध्ये आल्यापासून ६० दिवसाचे आत, पूर्वीपासून सोनोग्राफी मशिन असलेल्या जेनेटीक क्लिनिकची नोंदणी करण्याकरीता समुचित प्राधीकाऱ्याकडे अर्ज करणे बंधनकारक आहे. त्याचप्रमाणे पी.एन.डी.टी. कायद्याचे कलम १८(४) अंतर्गत जेनेटीक क्लिनिकने सदर पी.एन.डी.टी. कायदा अमलामध्ये आल्यानंतर जेनेटीक क्लिनिकची नोंदणी केली नसल्यास सदर जेनेटिक क्लिनिकला प्रसुतीपूर्व निदान तंत्राचा (सोनोग्राफी मशीन) वापर करता येणार नाही. आरोपींनी बचाव घेतला नाही की, त्यांनी सन १९९९ मध्ये सोनोग्राफी मशिन खरेदी केल्यानंतर

पी.एन.डी.टी. कायदा अमलामध्ये आल्यानंतर जेनेटीक क्लिनिकची समुचित प्राधिकाऱ्याकडे नोंदणी करीता अर्ज केला होता. म्हणून आरोपीनी पी.एन.डी.टी. कायदा अमलामध्ये आल्यानंतर त्यांच्या जेनेटीक क्लिनिकची नोंदणी करण्याकरीता समुचित प्राधिकाऱ्याकडे अर्ज केला नसल्याचे म्हणता येईल. समुचित प्राधिकारी फिर्यादी विलासराव यादवनी सुध्दा स्पष्टपणे सांगितले आहे की, आरोपीनी त्यांच्या जेनेटिक क्लिनिकची नोंदणी केलेली नाही. आरोपीनी सुध्दा त्यांचे जेनेटिक क्लिनिकची नोंदणी झाल्याचे कथन केले नाही. वास्तविकतेमध्ये आरोपीनी त्यांच्या जेनेटिक क्लिनिकची नोंदणी केली असती तर त्यांनी सदर नोंदणी प्रमाणपत्र न्यायालयामध्ये सादर केले असते. परंतु आरोपीनी त्यांच्या जेनेटिक क्लिनिकचे नोंदणीपत्र न्यायालयामध्ये सादर केले नाही. म्हणून आरोपीनी त्यांच्या जेनेटिक क्लिनिकची समुचित प्राधिकाऱ्याकडे नोंदणी केली नसल्याचे म्हणता येईल. आरोपीनी त्यांच्या जेनेटिक क्लिनिकची नोंदणी केली नसताना सुध्दा सोनोग्राफी मशिनद्वारे कविता लोखंडेची गर्भलिंग निदानाची चाचणी करून त्यांच्या गर्भामध्ये मुलगा असल्याचे सांगितले होते. तसेही पी.एन.डी.टी. कायद्याअंतर्गत जेनेटिक क्लिनिक नोंदणी केलेले असले तरीही प्रसुतीपूर्व निदान तंत्राचा वापर करून गर्भवती महिलेच्या गर्भामध्ये मुलगा आहे किंवा मुलगी आहे ह्या बाबीचा खुलासा करणे प्रतिबंधित आहे. परंतु आरोपीनी पी.एन.डी.टी. कायद्याअंतर्गत त्यांच्या जेनेटिक क्लिनिकची नोंदणी तर केलीच नाही याउलट, नोंदणी न केलेल्या जेनेटिक क्लिनिकमध्ये सोनोग्राफी मशिनचे आधारे कविता लोखंडेच्या गर्भामधील लिंगांचे निदान केले होते. आरोपीने त्यांच्या जेनेटिक क्लिनिकची पी.एन.डी.टी.कायद्याअंतर्गत नोंदणी केल्याशिवाय त्यांना प्रसुतीपूर्व निदान तंत्राचा (सोनोग्राफी मशिन) कोणतीही चाचणी करण्याकरीता उपयोग करता येणार नाही. म्हणून आरोपीनी पी.एन.डी.टी. कायद्याचे कलम ३(१) चे उल्लंघन करून कलम २३ अंतर्गत गुन्हा केल्याचे म्हणता येईल.

१८. आरोपीचे तज्ञ वकिल साहेबांनी युक्तीवाद केला आहे की, आरोपीचे हॉस्पिटल नसल्यामुळे व त्यांनी कोणतेही गर्भलिंग निदान केले नसल्यामुळे जेनेटिक क्लिनिकच्या संज्ञेमध्ये ते समाविष्ट होत नाहीत. पी.एन.डी.टी. कायद्याअंतर्गत केवळ जेनेटिक क्लिनिकला नोंदणी करणे बंधनकारक असल्यामुळे आरोपीनी केवळ सोनोग्राफी मशीन ताब्यामध्ये ठेवण्याकरीता नोंदणी करणे आवश्यक नाही. म्हणून आरोपीविरुद्ध पी.एन.डी.टी. कायद्याअंतर्गत कोणताही गुन्हा सिध्द होवू शकत नसल्याचा युक्तीवाद आरोपीचे तज्ञ वकिल साहेबांनी केला आहे. याउलट, तज्ञ सरकारी वकिल साहेबांच्या युक्तीवादप्रमाणे आरोपीचे हॉस्पिटल जेनेटिक क्लिनिकच्या संज्ञेमध्ये समाविष्ट होत असल्यामुळे त्यांनी पी.एन.डी.टी. कायद्याअंतर्गत नोंदणी करणे आवश्यक होते. आरोपीचे तज्ञ वकिल साहेबांनी वरीलप्रमाणे केलेल्या युक्तीवादाबाबत मी येथे नमुद करू इच्छितो की, घटनेचेवेळी आरोपीचे ताब्यामध्ये सोनोग्राफी मशिन असल्याचे दस्ताऐवजावरील उपलब्ध साक्ष पुराव्यावरून स्पष्ट होते. मी यापूर्वीच नमुद केले आहे की, आरोपीनी सोनोग्राफी मशिनद्वारे कविता लोखंडेच्या गर्भाची चाचणी करून त्यांच्या गर्भामध्ये मुलगा असल्याचे त्यांना सांगितले होते. सोनोग्राफी मशिन हे प्रसुतीपूर्व निदान तंत्र असून त्याद्वारे गर्भलिंग निदान करता येत असल्याबाबत आरोपीचा वाद नाही. पी.एन.डी.टी. कायदा व नियमामध्ये स्पष्टपणे नमुद केले आहे की, सोनोग्राफी मशिनद्वारे गर्भलिंग निदान करता येत नाही. सोनोग्राफी मशिनचा प्रसुतीपूर्व निदान तंत्रांमध्ये समावेश होतो. म्हणून आरोपीनी सोनोग्राफी मशिनचा गर्भलिंग निदानाकरीता वापर केल्यास त्यांचा जेनेटिक क्लिनिक या संज्ञेमध्ये समावेश होतो किंवा नाही हे पाहणे आवश्यक आहे. जेनेटिक क्लिनिकची संज्ञा पी.एन.डी.टी. कायद्याचे कलम २ (डी) मध्ये दिली आहे. सदर संज्ञेप्रमाणे जेनेटिक क्लिनिक म्हणजेच कोणतेही क्लिनिक, हॉस्पिटल किंवा कोणतेही ठिकाण की, जेथे प्रसुतीपूर्व निदान प्रक्रिया (प्री-नाटल डॉयग्नॉस्टिक प्रोसिजर) केली जाते. म्हणून आरोपीचे क्लिनिक किंवा हॉस्पिटल अस्तित्वामध्ये नसल्याचे गृहित धरले तरीही त्यांनी प्रसुतीपूर्व निदान प्रक्रिया केल्यास ते कोणतेही ठिकाण असो त्या ठिकाणाला जेनेटिक क्लिनिक असल्याचे म्हणता येईल. परंतु मी यापूर्वीच नमुद केले आहे की, आरोपीचे जिवन-ज्योती नावाचे हॉस्पिटल अस्तित्वामध्ये असून आरोपीनी सदर हॉस्पिटलमध्ये कविता लोखंडेचे गर्भलिंग निदान केले होते. प्रसुतीपूर्व निदान प्रक्रियेची संज्ञा पी.एन.डी.टी. कायद्याचे कलम २ (आय) मध्ये दिलेली आहे. सदर संज्ञेप्रमाणे प्रसुतीपूर्व निदान प्रक्रिया म्हणजेच गर्भधारणेपूर्वी किंवा नंतर गर्भलिंग निदान

करण्याकरीता केलेली चाचणी की ज्यामध्ये सोनोग्राफी मशिनचा सुध्दा समावेश होतो. आरोपीनी कविता लोखंडेचे गर्भलिंग निदान करण्याकरीता सोनोग्राफी मशिनचा वापर केल्यामुळे सदर गर्भलिंग निदानाकरीता वापरलेले हॉस्पिटल हे आरोपीचे जेनेटिक क्लिनिक असल्याचे म्हणता येईल. म्हणून आरोपीनी त्यांच्या जेनेटिकक्लिनिकची पी.एन.डी.टी. कायद्याअंतर्गत समुचित प्राधिका-याकडे नोंदणी करणे आवश्यक होते. पी.एन.डी.टी. कायद्याचे कलम ३(१) अंतर्गत आरोपीना त्याचे जेनेटिक क्लिनिकची नोंदणी केल्याशिवाय प्रसुतीपूर्व निदान तत्रांचा वापर करता येणार नाही. प्रसुतीपूर्व निदान तत्रांमध्ये पी.एन.डी.टी. कायद्याचे कलम २(जे) अंतर्गत प्रसुतीपूर्व निदान प्रक्रिया व प्रसुतीपूर्व निदान चाचणीचा समावेश होतो. प्रसुतीपूर्व निदान चाचणीची संज्ञा पी.एन. डी.टी. कायद्याचे कलम २ (के) मध्ये दिलेली आहे. सदर संज्ञेप्रमाणे प्रसुतीपूर्व निदान चाचणीमध्ये सोनोग्राफीद्वारे करण्यात येणाऱ्या सर्व चाचण्याचा समावेश होतो. म्हणून सोनोग्राफी मशिनद्वारे गर्भलिंग निदान न करता उपरोक्त नमुद व्याख्येमध्ये नमुद केल्याप्रमाणे इतर चाचण्या केल्या तरीही सदर चाचण्याचा समावेश प्रसुतीपूर्व निदान चाचणीमध्ये होईल. त्याप्रमाणे आरोपीनी सोनोग्राफी मशिनचा उपयोग गर्भलिंग निदानाकरीता न करता उपरोक्त नमुद केल्याप्रमाणे इतर चाचण्या करण्याकरीता केल्याचे गृहित धरले तरीही आरोपीनी पी.एन.डी.टी. कायद्याचे कलम ३ (१) चे उल्लंघन केल्याचे म्हणता येईल. परंतु मी यापुर्वीच नमूद केले आहे की, आरोपीनी घटनेचेवेळी सोनोग्राफी मशिनद्वारे कविता लोखंडेचे गर्भलिंग निदान करून त्यांच्या गर्भामध्ये मुलगा असल्याचे त्यांना सांगितले होते. म्हणून आरोपीनी पी.एन.डी.टी. कायद्याचे कलम ५ व ६ चे उल्लंघन करून कलम २३ अंतर्गत शिक्षेसपात्र गुन्हा केल्याचे म्हणता येईल.

१९. आरोपीचे तज्ञ वकिल साहेबांनी युक्तीवाद केला आहे की, डेकॉय विटनेस कविता लोखंडेचे प्रतिज्ञापत्रावरील स्टॅम्पपेपरवर दि.१५/०९/२००५ या तारखेचा शिक्का मारलेला असून सदर प्रतिज्ञापत्र दिनांक ०९/०९/२००५ रोजी तयार केल्याचे खोटे दर्शविले आहे. प्रतिज्ञापत्राचे (नि.३२) अवलोकनावरून स्पष्ट होते की, सदर प्रतिज्ञापत्रावरील स्टॅम्पपेपरवर दिनांक १५ सप्टेंबर २००५ चा शिक्का मारलेला आहे. फिर्यादी विलासराव यादवनी त्यांच्या उलट तपासणी दरम्यान सांगितले आहे की, त्यांनी दिनांक १५/०९/२००५ रोजी कविता लोखंडेचे प्रतिज्ञापत्र (नि.क्रं.३२) लिहून घेवून दिनांक १६/०९/२००५ रोजी शैला जाधवला पैसे दिले होते. फिर्यादी विलासराव यादवनी त्यांच्या उलट तपासणीदरम्यान पुढे सांगितले आहे की, शैला जाधवने त्यांना ट्रॅपपुर्वी पेशाची मागणी केली नसून सदर पेशाची मागणी ट्रॅपनंतर केली होती. फिर्यादी विलासराव यादवनी त्यांच्या उलट तपासणीदरम्यान पुढे सांगितले आहे की, दिनांक १६/०९/२००५ रोजी कविता लोखंडेचे प्रतिज्ञापत्र (नि.क्रं.३२) तयार करण्यात आल्याचे त्यांना माहिती नाही. फिर्यादी विलासराव यादवनी त्यांच्या उलट तपासणीदरम्यान पुढे सांगितले आहे की, डेकॉय विटनेसचे प्रतिज्ञापत्र कायद्याअंतर्गत आवश्यक असल्यामुळे त्यांनी रेड केल्यानंतर कविता लोखंडेचे प्रतिज्ञापत्र तयार करून घेतले होते. परंतु फिर्यादी विलासराव यादवनी त्यांच्या सरतपासणीदरम्यान स्पष्टपणे सांगितले आहे की, त्यांनी दिनांक ०९/०९/२००५ रोजी रेडपूर्वी म्हणजेच घटनेचे पूर्वीच डेकॉय विटनेस कविता लोखंडेचे प्रतिज्ञापत्र लिहून घेवून रेडकरीता तपासणी-फी म्हणून पंचवीसशे रुपये व जाण्या-येण्याचे खर्चाकरीता पाचशे रुपये असे एकूण तीन हजार रुपये दिले होते. उपरोक्त नमूद केल्याप्रमाणे फिर्यादी विलासराव यादव हे सरतपासणीचेवेळी स्पष्टपणे सांगतात की, घटनेचे दिवशी कविता लोखंडेचे प्रतिज्ञापत्र तयार करून घेवून त्यांना पैसे दिले होते परंतु त्यानंतर उलट तपासणीदरम्यान घटनेचेनंतर दिनांक १५/०९/२००५ रोजी कविता लोखंडेचे प्रतिज्ञापत्र तयार करून दिनांक १६/०९/२००५ रोजी रेडकरिता पैसे दिल्याचे सांगतात.फिर्यादी विलासराव यादव हे जिल्हा शल्य चिकित्सक तथा समुचित प्राधिकारी म्हणजेच वरिष्ठ वैद्यकीय अधिकारी आहेत. म्हणून आरोपीनी कविता लोखंडेचे गर्भलिंग निदान करण्याची घटना दिनांक ०९/०९/२००५ रोजी घडली असताना फिर्यादी विलासराव यादवनी शैला जाधवला दिनांक १६/०९/२००५ रोजी ट्रॅपकरीता पैसे दिल्याची बाब मनाला पटणारी नाही. आरोपीच्या हॉस्पिटलमध्ये कविता लोखंडेला दिनांक ०९/०९/२००५ रोजी डेकॉय विटनेस म्हणून ट्रॅपकरीता पाठविले असताना व सदर ट्रॅप पूर्ण झाल्यानंतर दिनांक १५/०९/२००५ रोजी किंवा १६/०९/२००५ रोजी फिर्यादी शैला जाधवला आरोपीचे हॉस्पिटलमध्ये ट्रॅपकरीता पैसे देण्याचे कोणतेही ग्राह्य कारण नाही. तसेही फिर्यादी विलासराव यादव प्रथम सांगतात

की, दिनांक १६/०९/२००५ रोजी कविता लोखंडेचे प्रतिज्ञापत्र तयार केल्याचे त्यांना माहिती नाही परंतु त्यानंतर सदर बाब सत्य असल्याचे सांगतात. यावरून फिर्यादी विलासराव यादवनी आरोपीला सदर केसमधून वाचविण्याकरीता व त्रुट्या निर्माण करण्याकरीता जाणिवपूर्वक खोटी साक्ष देण्याचा प्रयत्न केल्याचे म्हणता येईल. फिर्यादी विलासराव यादवसारखी उच्च शिक्षित व उच्च पदावरील कोणतीही व्यक्ती आरोपीच्या हॉस्पिटलमध्ये ट्रॅप केल्यानंतर सदर ट्रॅपकरीता लागणारे पैसे न देता ट्रॅप होण्यापूर्वी पैसे देईल. परंतु फिर्यादी विलासराव यादवनी केवळ आरोपीला सदर केसमधून निर्दोष सुटण्याकरीता आपल्या पहिल्या साक्षेशी विसंगत व खोटी साक्ष देण्याचा प्रयत्न केला आहे. आरोपीचे तज्ञ वकिल साहेबांनी फिर्यादी विलासराव यादवला त्यांच्या उलट तपासणीदरम्यान दिलेल्या सुचविण्यावरून वर्षा देशपांडे व शैला जाधनी फिर्यादीविरुद्ध पी.एन.डी.टी. कायद्याअंतर्गत कार्यवाही करित नसल्याबाबत तक्रारी दाखल केल्यावरून त्यांच्याविरुद्ध गुन्हा दाखल झाल्यामुळे द्वेषभावनेमधुन शैला जाधवणी ट्रॅप केलेली केस खोटी ठरविण्याकरीता फिर्यादीने उपरोक्त नमूद केल्याप्रमाणे स्वतःच्या साक्षेशी विसंगत व खोटी साक्ष देवून आरोपीला निर्दोष सुटण्याकरीता मदत करण्याचा प्रयत्न केल्याचे म्हणता येईल. त्याच कारणावरून फिर्यादी विलासराव यादवनी जाणिवपूर्वक आरोपीला सदर केसमधून निर्दोष सुटण्याकरीता फायदा व्हावा म्हणून कविता लोखंडेच्या प्रतिज्ञापत्रावरील स्टॅम्पेपरवर दिनांक १५ सप्टेंबर २००५ चा शिक्का मारून सदर प्रतिज्ञापत्र त्याचदिवशी तयार केल्याबाबत खोटी साक्ष दिली असल्याची शक्यता नाकारता येत नाही. म्हणून केवळ फिर्यादीच्या साक्षेमधील उपरोक्त नमूद विसंगतीमुळे फिर्यादी पक्षाची संपूर्ण केस खोटी व बनावटी असल्याचा निष्कर्ष काढता येणार नाही. तसेही कविता लोखंडेच्या प्रतिज्ञापत्रामधील नमूद क्रमांकाच्याच नोटा दिनांक ०९.०९.२००५ रोजी आरोपीकडून जप्त केल्याचे शैला जाधव, कविता लोखंडे, डॉ. जयंत देशपांडे व पंच साक्षदार प्रशांत पवारानी स्पष्टपणे सांगितले आहे. वास्तविकतेमध्ये फिर्यादी विलासराव यादवनी दिनांक ०९.०९.२००५ रोजी घटणेचेपूर्वी प्रतिज्ञापत्रामधील नमूद क्रमांकाच्या पंचविसशे रूपयाच्या नोटा शैला जाधवला ट्रॅपकरीता दिल्या नसत्या तर सदर सर्व नोटा आरोपीकडून घटना घडल्याबरोबर जप्त करण्यात आल्या नसत्या. परंतु मी यापूर्वीच नमूद केले आहे की, घटना घडल्याबरोबर डॉ. जयंत देशपांडेनी आरोपीला कविता लोखंडेच्या गर्भलिंग निदानाकरीता दिलेल्या पंचविसशे रूपयाच्या सर्व नोटा जप्त करून त्यांचा पंचनामा तयार केला होता. म्हणून फिर्यादी विलासराव यादवनी जाणिवपूर्वक आरोपीला सदर केसमधून निर्दोष सुटण्याकरीता मदत व्हावी व शैला जाधवनी केलेल्या तक्रारीच्या रागामुळे उपरोक्त नमूद केल्याप्रमाणे घटनेनंतर कविता लोखंडेचे प्रतिज्ञापत्र तयार करून शैला जाधवला ट्रॅपकरीता पैसे दिल्याबाबत खोटी व विसंगत साक्ष दिल्याचे म्हणता येईल. तसेही डेकॉय विटनेसनी गर्भलिंग निदानाच्या चाचणीचेपूर्वी प्रतिज्ञापत्र लिहून देणे बंधनकारक असल्याचे पी.एन.डी.टी. कायदा व नियमामध्ये कुठेही नमूद केलेले नाही. म्हणून कविता लोखंडेचे प्रतिज्ञापत्र घटनेनंतर तयार केल्याचे गृहीत धरले तरीही फिर्यादी पक्षाच्या एकंदरीत कथनाच्या सत्यतेवर कोणताही विपरीत परिणाम होणार नाही. पी.एन.डी.टी. कायद्यातर्गत जिल्हा शल्य चिकीत्सकांची समुचीत प्राधिकारी म्हणून नियुक्ती केली असताना सुध्दा ते स्वतःहून सदर पी.एन.डी.टी. कायद्याअंतर्गत वैद्यकीय व्यवसायीकाविरुद्ध कार्यवाही करताना दिसून येत नाही. परंतु स्वयंसेवी संस्थांच्या पुढाकारामुळे समुचित प्राधिकार्यांना आपल्या व्यवसायीक बांधवाविरुद्ध कार्यवाही करावी लागत आहे. म्हणून समुचित प्राधिकार्यांद्वारे त्यांच्या वैद्यकीय व्यवसाय असलेल्या बांधवांना वाचविण्याकरीता पी.एन.डी.टी. कायद्याअंतर्गत मजबुरीमध्ये केलेल्या कार्यवाहीमध्ये त्रुट्या ठेवून त्यांना संशयाचा फायदा देवून निर्दोष सोडण्यास बाध्य करण्याचे कृत्य करणे साहजिक आहे. म्हणून समुचित प्राधिकार्यांनी ठेवलेल्या किरकोळ त्रुट्यांचा फायदा देवून आरोपीना पूर्णतः निर्दोष करार देणे योग्य होणार नाही. अशा परिस्थितीमध्ये दस्ताऐवजावरील उपलब्ध सर्व साक्ष पुराव्याचा विचार करून आरोपीनी गुन्हा केला किंवा नाही याबाबतचा निष्कर्ष काढणे योग्य होईल. कविता लोखंडे, शैला जाधव, डॉ. जयंत देशपांडे व प्रशांत पवारानी घटनेबाबत तंतोतंत साक्ष दिली असून त्यांची साक्ष ठोस, स्पष्ट व विश्वासाहर्तस पात्र आहे. म्हणून फिर्यादी पक्षाच्या उपरोक्त नमूद सर्व साक्षदारांनी सांगितल्याप्रमाणे वास्तविकतेमध्ये आरोपीनी कविता लोखंडेची सोनोग्राफी मशीनद्वारे गर्भलिंग निदान करण्याची घटना घडल्याचे म्हणता येईल.

२०. आरोपीचे तज्ञ वकील साहेबांनी युक्तीवाद केला आहे की, दिनांक १९.१०.२००५ रोजीच्या परीपत्रकाप्रमाणे शासनाने स्वयंसेवी संस्थाना पी.एन.डी.टी. कायद्याअंतर्गत तपासणी व जप्ती करण्याचे अधिकार दिले असून त्यापूर्वी सदर अधिकार स्वयंसेवी संस्थाना नव्हते. सदर केसमधील घटना दिनांक ०९.०९.२००५ रोजी म्हणजेच उपरोक्त नमूद शासन-निर्णय अस्तित्वामध्ये येण्यापूर्वी घडल्यामुळे सदर केसमध्ये स्वयंसेवी संस्थेनी केलेली कार्यवाही बेकायदेशीर असल्याचा युक्तीवाद आरोपीचे तज्ञ वकील साहेबांनी केला आहे. आरोपीचे तज्ञ वकील साहेबांनी वरीलप्रमाणे केलेल्या युक्तीवादाबाबत मी येथे नमूद करू इच्छितो की, सदर केसमध्ये शैला जाधव व कविता लोखंडेनी त्यांच्या स्वयंसेवी संस्थेद्वारे आरोपीच्या जेनेटिक क्लिनीकची तपासणी व जप्ती (सर्च व सिझर) केली असून त्यांनी केवळ गर्भलिंग निदानाची बनावट केस करून आरोपीविरुद्ध “स्टिंग ऑपरेशन” केले आहे. म्हणून वर्षा देशपांडे किंवा शैला जाधवला समुचित प्राधिकाऱ्यांनी परवानगी दिली नसताना सुध्दा त्यांनी आरोपीच्या जेनेटिक क्लिनीकमध्ये धाड टाकून तपासणी व जप्ती केल्याचे म्हणता येणार नाही. सदर केसमध्ये आरोपीच्या जेनेटिक क्लिनीकमध्ये धाड टाकून जेनेटिक क्लिनीकची तपासणी व जप्ती करण्याची कार्यवाही डॉ. जयंत देशपांडेनी समुचित प्राधिकारी फिर्यादी विलासराव यादवच्या आदेश व परवानगीने केली आहे. पी. एन.डी.टी. नियाचे कलम १२ अंतर्गत समुचित प्राधिकारी इतर अधिकाऱ्याला जेनेटिक क्लिनीकमध्ये धाड टाकून जेनेटिक क्लिनीकची तपासणी व जप्ती करण्याचे अधिकार देवू शकते. समुचित प्राधिकाऱ्यांनी उपरोक्त नमुद तपासणी व जप्तीचे अधिकार कोणत्याही अधिकाऱ्याला लेखी स्वरूपामध्ये देणे बंधनकारक असल्याचे पी.एन.डी.टी. कायदा व नियमामध्ये नमुद केलेले नाही. दिनांक ०४/०१/२००७ रोजी महाराष्ट्र शासनाने पारित केलेले परिपत्रक क्रं.प्रचिती २००६/प्र.क्र.३७५/क.क.२ (सार्वजनिक आरोग्य विभाग) प्रमाणे समुचित प्राधिकाऱ्यांनी केवळ स्वयंसेवी संस्थाना जेनेटिक क्लिनीकची तपासणी करण्याकरीता लेखी स्वरूपामध्ये अधिकार द्यावयाचे आहेत. परंतु सदर केसमध्ये समुचित प्राधिकाऱ्यांनी तपासणीचे अधिकार वैद्यकिय अधिकारी डॉ. जयंत देशपांडेला दिले होते. म्हणून समुचित प्राधिकाऱ्यांनी डॉ. जयंत देशपांडेला आरोपीच्या जेनेटिक क्लिनीकमध्ये धाड टाकून तपासणी व जप्ती करण्याचे लेखी अधिकार न देता तोंडी अधिकार दिल्याचे गृहित धरले तरीही त्यामध्ये काहीही चुकीचे व बेकायदेशीर नाही. सदर केसमध्ये शैला जाधव, अॅड. वर्षा देशपांडे व त्यांच्या स्वयंसेवी संस्थेला आरोपीचे जेनेटिक क्लिनीकमध्ये धाड टाकून सदर जेनेटिक क्लिनीकची तपासणी करण्याचे अधिकार समुचित प्राधिकाऱ्यांनी दिलेले नाही व तसे कोणतेही कृत्य उपरोक्त नमूद व्यक्ती स्वयंसेवी संस्थेनी केलेले नाही. त्यामुळे शैला जाधवला आरोपीचे जेनेटिक क्लिनीकमध्ये डेकॉय केस तयार करून गर्भलिंग निदानाचे स्टिंग ऑपरेशन करण्याकरीता समुचित प्राधिकाऱ्याची लेखी किंवा तोंडी अधिकाराची आवश्यकता नाही. दिनांक १९/१०/२००५ रोजीच्या परिपत्रकाद्वारे पी.एन.डी.टी. कायद्याअंतर्गत बनावट केस (डेकॉय केस) स्वयंसेवी संस्थेनी करण्यास कुठेही प्रतिबंधित नाही. परंतु शासनाने दिनांक १९/१०/२००५ रोजीच्या परिपत्रकान्वये पी.एन.डी.टी. कायद्याची योग्य व पुर्णपणे अंमलबजावणी होण्याकरीता स्वयंसेवी संस्थेला बनावट केस करण्याकरीता समाविष्ट करून घेण्यास संमती दिली होती. पी.एन.डी.टी. कायद्याच्या अंमलबजावणीमध्ये जास्तीत-जास्त स्वयंसेवी संस्थेला समाविष्ट करून घेवून बनावट केस करण्याकरीता सामावून घेण्याकरता शासनाने दिनांक १९/१०/२००५ रोजी परिपत्रक काढल्यामुळे त्यापूर्वी स्वयंसेवी संस्थेला बनावट केस करण्याचा अधिकार नसल्याचे म्हणता येणार नाही. तसेही पी.एन.डी.टी. कायद्याअंतर्गत कोणत्याही तरतुदीचे उल्लंघन झाल्यानंतर समुचित प्राधिकारी स्वतः किंवा त्याबाबत तक्रार प्राप्त झाल्यानंतर तपास करून न्यायालयामध्ये तक्रार दाखल करू शकतात. म्हणून सदर केसमध्ये सुध्दा कविता लोखंडेची आरोपीने गर्भलिंग निदानाची सोनोग्राफी मशिनद्वारे चाचणी केल्याची खात्री झाल्यानंतर समुचित प्राधिकारी फिर्यादी विलासराव यादवनी सदर केस अधिकृतारित्या न्यायालयामध्ये दाखल केल्याचे म्हणता येईल. समुचित प्राधिकारी फिर्यादीनी अधिकृत केलेल्या डॉ. जयंत देशपांडेनी आरोपीच्या जेनेटिक क्लिनीकमध्ये तपासणी व जप्ती करून साक्षदारांचे बयाण नोंदविले आहे. म्हणून सदर केसमध्ये योग्य व अधिकृत अधिकाऱ्यांनी आरोपीच्या जेनेटिक क्लिनीकची तपासणी व जप्ती करून समुचित प्राधिकारऱ्यांनी न्यायालयामध्ये आरोपीविरुद्ध पी.एन. डी.टी. कायद्याअंतर्गत तक्रार दाखल केल्याचे म्हणता येईल.

२१. आरोपीच्या तज्ञ वकील साहेबांनी युक्तीवाद केला आहे की, डॉ.जयंत देशपांडेनी साक्षदारांचे बयाण नोंदविले नसून सदर बयाण शैला जाधवनी नोंदविले आहे. परंतु मी येथे नमुद करू इच्छितो की, तपास अधिकाऱ्यांनी स्वतःचे हस्ताक्षरामध्ये साक्षदारांचे बयाण नोंदविण्याचे बंधन नाही. तपास अधिकारी त्यांच्या सांगण्याप्रमाणे (डिक्टेसन) इतराकडून सुध्दा साक्षदारांचे बयाण लिहून घेवू शकतात. वरिष्ठ पोलीस अधिकारी त्यांच्या रायटर कडून साक्षदारांचे बयाण लिहून घेत असतात. डॉ. जयंत देशपांडेनी स्पष्टपणे सांगितले आहे की, त्यांचेसमक्ष व त्यांच्या सांगण्याप्रमाणे (डिक्टेसन) शैला जाधवनी साक्षदारांचे बयाण नोंदविले होते. म्हणून डॉ. जयंत देशपांडेनी शैला जाधवचा साक्षदारांचे बयाण नोंदविण्याकरीता रायटर म्हणून उपयोग केल्यास त्यामध्ये कोणतेही चुकीचे किंवा बेकायदेशीर कृत्य नाही. शैला जाधव व कविता लोखंडेनी त्यांच्या बयाणामधील मजकूर बरोबर असल्याचे सांगून त्याप्रमाणे न्यायालयामध्ये तंतोतंत साक्ष दिली आहे. त्याचप्रमाणे डॉ. जयंत देशपांडेच्या सांगण्याप्रमाणे (डिक्टेसन) शैला जाधवनी पंचनामे व इतर दस्तावेज लिहिला असल्यास त्यामुळे आरोपीचे कोणतेही नुकसान होणार नाही. आरोपीच्या तज्ञ वकील साहेबांनी युक्तीवाद केला आहे की, फिर्यादीनी तक्रार दाखल करण्यापूर्वी डॉ. जयंत देशपांडेनी साक्षदारांचे बयाण नोंदविले असले तरी सदर साक्षदारांचे सर्व बयाण फौजदारी प्रक्रिया संहितेचे कलम १६१ अंतर्गत असल्यामुळे सदर बयाणाचा उपयोग कलम १६२ अंतर्गत पुरावा म्हणून करता येणार नाही. आरोपीच्या तज्ञ वकील साहेबांनी त्यांचे वरील युक्तीवादासोबतच आदरणीय सर्वोच्च न्यायालयानी “१९९४ रोजी सुप्रीम कोर्ट केसेस (क्रिमिनल) ८५, डायरेक्टोरेट ऑफ एनफोर्समेंट -विरुद्ध- दिपक महाजन” या केसमध्ये नमुद केलेला कायदा (सायटेशन) दाखल केला आहे. उपरोक्त नमुद केसमध्ये आदरणीय सर्वोच्च न्यायालयानी नमुद केले आहे की, “कोणत्याही विशिष्ट कायद्यामध्ये तपास करण्याचे अधिकार विशिष्ट अधिकाऱ्याला दिले असल्यास तो अधिकारी सुध्दा पोलीस अधिकाऱ्याच्या” संज्ञेमध्ये येतो. त्याचप्रमाणे विशिष्ट कायद्यामध्ये तपास अधिकाऱ्यांनी गुन्हा दाखल होण्यापूर्वी पुरावा गोळा करून न्यायालयामध्ये तक्रार दाखल केली असल्यास सदर पुरावा गोळा करण्याकरीता केलेली कार्यवाही सुध्दा “तपास” या संज्ञेमध्ये समाविष्ट होते. उपरोक्त नमुद कायद्याप्रमाणे डॉ. जयंत देशपांडेनी केलेली सर्व कार्यवाही समुचित प्राधिकाऱ्यांनी न्यायालयामध्ये तक्रार दाखल करण्यापूर्वीची असली तरी सदर कार्यवाहीला “तपास” म्हणता येईल. म्हणून डॉ. जयंत देशपांडेनी नोंदविलेल्या कविता लोखंडे, शैला जाधव, कैलास जाधव व संजय भोसलेच्या बयाणाला आरोपीविरुद्ध गुन्हा सिध्द करण्याकरीता पुरावा म्हणून ग्राह्य धरता येत नसले तरीही कविता लोखंडे व शैला जाधवनी त्यांच्या बयाणाप्रमाणे न्यायालयामध्ये तंतोतंत साक्ष दिली आहे. म्हणून कविता लोखंडे, शैला जाधव, डॉ. जयंत देशपांडे व फिर्यादी विलासराव यादवनी न्यायालयामध्ये दिलेली मौखिक साक्ष आरोपीविरुद्ध गुन्हा सिध्द करण्याकरीता पुरावा म्हणून ग्राह्य धरता येईल.
२२. आरोपीच्या तज्ञ वकील साहेबांच्या युक्तीवादाप्रमाणे कविता लोखंडेशिवाय इतर कुणीही घटनेचे प्रत्यक्षदर्शी साक्षदार नसून त्यांची साक्ष ऐकीव स्वरूपाची आहे. परंतु मी येथे नमुद करू इच्छितो की, शैला जाधवचे साक्षेप्रमाणे कविता लोखंडेची आरोपीनी सोनोग्राफी मशिनद्वारे गर्भलिंग चाचणी केली होती त्यावेळी ती सुध्दा कविता लोखंडेसोबत सोनोग्राफीच्या कमऱ्यामध्ये गेली होती व त्यावेळी आरोपीनी त्यांना व कविता लोखंडेला सांगितलेले होते की, कविता लोखंडेच्या गर्भामध्ये मुलगा आहे. म्हणून कविता लोखंडेसोबत शैला जाधव ही सुध्दा घटनेची प्रत्यक्षदर्शी साक्षदार असल्याचे म्हणता येईल. आरोपीचे तज्ञ वकील साहेबांनी युक्तीवाद केला आहे की, शैला जाधवने ती दलित महिला विकास मंडळ, सातारा या स्वयंसेवी संस्थेची अध्यक्ष असल्याचा कागदोपत्री पुरावा अस्तीत्वामध्ये असताना सुध्दा त्यांनी सदर कागदोपत्री पुरावा न्यायालया मध्ये सादर न केल्यामुळे “भारतीय पुरावा अधिनियमाचे कलम ११४, उदाहरण-जी” अन्वये सदर कागदोपत्री पुरावा त्यांचेविरुद्ध असल्याचे गृहित धरण्याची विनंती केली आहे. परंतु मी येथे नमुद करू इच्छितो की, शैला जाधव, कविता लोखंडे, फिर्यादी विलासराव यादव व इतर साक्षदारांच्या साक्ष पूराव्यावरून स्पष्ट होते की, वर्षा देशपांडे व शैला जाधव ही दलित महिला स्वयंसेवी संस्थेमध्ये कार्यरत असून वर्षा देशपांडे ही पी.एन.डी.टी. कायद्याअंतर्गत स्थापित जिल्हास्तरीय सल्लागार समिती सातारा मध्ये सदस्य आहे. त्याचप्रमाणे घटनेचेवेळी फिर्यादी विलासराव यादव हे सातारा येथे

जिल्हा शल्य चिकित्सक तथा पी.एन्.डी.टी. कायद्या अंतर्गत जिल्हा समुचित प्राधिकारी व डॉ. जयंत देशपांडे हे सातारा येथील जिल्हा सामान्य रुग्णालयामध्ये वैद्यकिय अधिकारी म्हणून कार्यरत असल्याचे आरोपीनी कबुल केले आहे. म्हणून घटनेचेवेळी फिर्यादी विलासराव यादव हे सातारा जिल्हायाकरीता समुचित प्राधिकारी असून त्यांनी अधिकृतरीत्या सदर तक्रार न्यायालयामध्ये दाखल केल्याचे म्हणता येईल. आरोपीनी कविता लोखंडेची सोनोग्राफी केल्यानंतर दिलेला केसपेपर दस्तावेजावर उपलब्ध नसल्याचा युक्तीवाद आरोपीचे तज्ञ वकिल साहेबांनी केला आहे. परंतु मी येथे नमुद करू इच्छितो की, आरोपीनी कविता लोखंडेची सोनोग्राफी करून त्यांच्या गर्भामध्ये मुलगा असल्याचे सांगितल्यानंतर दिलेला केसपेपर अर्टिकल-अ वर आहे. सदर केसपेपरवरून स्पष्ट होते की, आरोपीनी घटनेवेळी कविता लोखंडेची सोनोग्राफी केली असून त्यावेळी त्यांचे जेनेटीक क्लिनिक अस्तीत्वामध्ये होते. आरोपीचे तज्ञ वकिल साहेबांनी “ २०१० सी.आर.एल.जे. ३२४७, शातांराम राईकर/गांवकर -विरुध्द- स्टेट ऑफ गोवा” या केसमध्ये आदरणीय मुंबई उच्च न्यायालयानी नमुद केलेला कायदा दाखल करून युक्तीवाद केला की, भारतीय पुरावा अधिनियमचे कलम २५ व २६ अंतर्गत आरोपीचा कबुली-जबाब (कन्फेशन) पूरावा म्हणून त्यांचेविरुध्द वापरता येणार नाही. उपरोक्त नमुद केसमधील कायद्याचा आदर करून मी येथे नमुद करू इच्छितो की, उपरोक्त नमुद केसमधील कथन व सदर खटल्यामधील कथनामध्ये ठोस तफावत असल्यामुळे उपरोक्त नमुद केसमधील कायदा सदर खटल्यामधील विसंगत व वेगळ्या कथनाला लागू करता येणार नाही. आरोपीनी गुन्हा कबुल केल्याबाबतचा कोणताही कबुली-जबाब सदर केसमध्ये दाखल करण्यात आलेला नाही. त्याचप्रमाणे डॉ. जयंत देशपांडे हे “भारतीय पूरावा अधिनियमांचे कलम २४ ते २६” अंतर्गत पोलिस अधिकारी असल्याचे म्हणता येणार नाही. डॉ. जयंत देशपांडेला केवळ जेनेटिक क्लिनिकची तपासणी करून जप्ती करण्याचे अधिकार समुचित प्राधिकाऱ्यांनी दिले असून त्यांना आरोपीना अटक करण्याचे अधिकार नाहीत. त्याचप्रमाणे समुचित प्राधिकारी व डॉ. जयंत देशपांडेला सक्ती करण्याचे किंवा आरोपीला कोठडीमध्ये ठेवण्याचे कोणतेही अधिकार नसून ते वैद्यकिय अधिकारी आहेत. म्हणून समुचित प्राधिकारी व डॉ. जयंत देशपांडेनी बळजबरी करून आरोपीकडून सोनोग्राफीचा पेपर लिहून घेतल्याचे म्हणता येणार नाही. तसेच डॉ. जयंत देशपांडेनी बळजबरीने सोनोग्राफीचा पेपर लिहून घेतल्याबाबत आरोपीनी तक्रार सुध्दा केलेली नाही. अशाप्रकारे, आरोपीनी घटनेचेवेळी कविता लोखंडेची सोनोग्राफी करून त्याबाबत लिहून दिलेला केसपेपर (अर्टिकल-अ) आरोपीविरुध्द पूरावा म्हणून वापरता येईल. “ए.आय.आर. २००७ बॉम्बे २९ बॉंद्रे -विरुध्द- विलफ्रेड फर्नांडिस” या केसमध्ये आदरणीय मुंबई उच्च न्यायालयाने भारतीय पूरावा अधिनियमाचे कलम ६७ अंतर्गत कागदोपत्री पूरावा सिध्द कधी व कशाप्रकारे करता येतो याबाबत सांगितले आहे. आरोपीनी कविता लोखंडेच्या दिलेल्या सोनोग्राफी पेपर (अर्टिकल-अ) वर आरोपीची सही असून त्यांनी स्वतः सदर सोनोग्राफीचा पेपर लिहून दिल्याचे फिर्यादीच्या साक्षदारांनी सांगितले आहे. आरोपीनी कविता लोखंडेची सोनोग्राफी केल्यानंतर सदर सोनोग्राफीचा केसपेपर कविता लोखंडे व शैला जाधवचे समक्ष दिलेला होता. म्हणून सोनोग्राफीचा केसपेपर आरोपीनी लिहून दिल्याबाबत शैला जाधव व कविता लोखंडेनी दिलेली साक्ष सत्य असल्याचे ग्राह्य धरता येईल. त्याचप्रमाणे सदर सोनोग्राफीचा केसपेपर आरोपीकडून जप्त केल्याचे जप्ती साहित्याचे यादीवरून (अर्टिकल-ड) दिसून येते. सदर जप्त केलेल्या साहित्याच्या यादीची प्रत मिळाल्याबाबत आरोपीनी त्यावर सही केली आहे. वास्तविकतेमध्ये आरोपीकडून सदर सोनोग्राफीचा केसपेपर/रिपोर्ट जप्त करण्यात आला नसता तर त्यांनी त्याबाबत सुरुवातीलाच तक्रार केली असती किंवा जप्तीच्या साहित्याचे यादीवर सोनोग्राफीचा केसपेपर जप्त केला नसल्याचा शंका लिहून त्यावर सही केली असती.

२३. आरोपीच्या तज्ञ वकिल साहेबांच्या युक्तीवादाप्रमाणे एकाही पंचनाम्यावर समुचित प्राधिकारी व त्यांच्याद्वारे अधिकृत केलेल्या अधिकाऱ्याची सही नाही. पंचवीसशे रुपये जप्त केल्याचे पंचनाम्यावर (नि.क्रं.३७) व जप्त केलेल्या साहित्याचे यादीवर (अर्टिकल-डी) समुचित प्राधिकाऱ्यांनी अधिकृत केलेले अधिकारी डॉ. जयंत देशपांडे व दोन पंच साक्षदारांची सही आहे. त्याचप्रमाणे कविता लोखंडेच्या प्रतिज्ञापत्रावर (नि.क्रं.३२) कविता लोखंडे व समुचित प्राधिकाऱ्याची सही आहे. केवळ

सोनोग्राफी मशिनच्या जप्ती पंचनाम्यावर समुचित प्राधीकारी व त्यांच्याद्वारे अधिकृत केलेल्या अधिकाऱ्याची सही नाही. परंतु सदर सोनोग्राफी मशिन जप्तीच्या पंचनाम्यावर (नि.क्रं.५२) दोन पंच साक्षदारांची सही आहे. आरोपीनी बचाव घेतला नाही की, डॉ. जयंत देशपांडेनी त्यांच्या हॉस्पिटलमधून सोनोग्राफी मशिन जप्त केली नव्हती. डॉ. जयंत देशपांडे, फिर्यादी विलासराव यादव व पंच साक्षदार प्रशांत पवारनी सोनोग्राफी मशिन जप्तीचा पंचनामा व आरोपीकडून पंचविसशे रुपये जप्त केल्याचा पंचनामा सिध्द केला आहे. म्हणुन जप्ती पंचनाम्यामध्ये नमुद केल्याप्रमाणे दिनांक ०९/०९/२००५ रोजी घटनेनंतर डॉ. जयंत देशपांडेनी आरोपीकडून कविता लोखंडेच्या गर्भलिंग निदानाकरीता दिलेले पंचविसशे रुपये, सोनोग्राफीचा केसपेपर/रिपोर्ट व सोनोग्राफी मशिन इत्यादी साहित्य जप्त केल्याचे म्हणता येईल. आरोपीकडून जप्त केलेल्या साहित्याची यादी डॉ. जयंत देशपांडेनी सिध्द केली आहे. त्याचप्रमाणे कविता लोखंडेचे प्रतिज्ञापत्र फिर्यादी विलासराव यादव व कविता लोखंडेनी सिध्द केले आहे. आरोपीच्या तज्ञ वकिल साहेबांनी युक्तीवाद केला आहे की, प्रशांत पवार हे स्वतंत्र साक्षदार नाहीत कारण ते गोंदी/ जुळेवाडी येथील रहिवाशी नाहीत. प्रशांत पवार हे केवळ आरोपीचे जेनेटिक क्लिनिक स्थित असलेल्या गावामधिल रहिवाशी नसल्यामुळे ते स्वतंत्र साक्षदार नसल्याचे म्हणता येणार नाही. आरोपीचे तज्ञ वकिल साहेबांनी पंच साक्षदार प्रशांत पवारची दिर्घ उलट तपासणी घेवून सुध्दा त्यांचे उलट तपासणीदरम्यान असा कोणताही मजकुर दस्तावेजावर आला नाही की, ज्यावरून त्यांचेसमक्ष पंचनामे तयार केल्याबाबत त्यांनी खोटी साक्ष दिल्याचे दिसले. म्हणुन प्रशांत पवारनी उपरोक्त नमुद केल्याप्रमाणे सत्य साक्ष दिल्याचे म्हणता येईल. पंच साक्षदार प्रशांत पवारच्या मौखिक साक्षेला डॉ. जयंत देशपांडेच्या मौखिक साक्षेचा आधार आहे. डॉ. जयंत देशपांडेनी सुद्धा स्पष्टपणे सांगितले आहे की, त्यांनी आरोपीकडून पंचविसशे रुपये, सोनोग्राफीचा अहवाल, रजिस्टर व सोनोग्राफी मशीन जप्त करून त्याचा जप्ती पंचनामा व जप्त केलेल्या साहित्याची यादी तयार केली होती. उपरोक्त नमुद जप्तीबाबत शैला जाधव व फिर्यादी विलासराव यादवनी सुद्धा सांगितले आहे. उपरोक्त नमुद सर्व साक्षदारांच्या उलट तपासणी दरम्यान असा कोणताही मजकुर दस्तावेजावर आला नाही की, ज्यावरून त्यांनी खोटी साक्ष दिल्याचे दिसून येईल. म्हणुन उपरोक्त नमुद सर्व पंचनामे सिध्द झाले असून त्यामधील मजकुर बरोबर असल्याचे म्हणता येईल. आरोपीचे तज्ञ वकिल साहेबांनी “२०१०(२) एम.एच.एल.जे. ११०, दादासाहेब -विरुध्द- स्टेट ऑफ महाराष्ट्र” या केसमध्ये आदरणीय मुंबई उच्च न्यायालयानी नमुद केलेला कायदा (सायटेशन) दाखल करून युक्तीवाद केला आहे की, समुचित प्राधीकारी व त्यांच्यावतीने अधिकृत केलेल्या कोणत्याही अधिकाऱ्याला पी.एन्.डी.टी. कायद्याअंतर्गत सोनोग्राफीची मशिन जप्त करता येत नाही. उपरोक्त नमुद केसमध्ये आदरणीय मुंबई उच्च न्यायालयानी नमुद केलेल्या कायद्याचा आदर करून मी येथे नमुद करू इच्छितो की, उपरोक्त नमुद केलेल्या कायद्याचे केसमधील कथन व सदर खटल्यामधील कथनामध्ये ठोस तफावत असल्यामुळे उपरोक्त नमुद केसमधील कायदा सदर केसमधील वेगळ्या कथनाला लागू करता येणार नाही. उपरोक्त नमुद केसमध्ये नमुद केले आहे की, समुचित प्राधिकार्याला जेनेटिक क्लिनिकमधील सोनोग्राफी मशिन जप्त करता येणार नाही. उपरोक्त नमुद कायद्याचा आदर करून मी येथे नमुद करू इच्छितो की, सदर खटल्यामध्ये डॉ. जयंत देशपांडेनी आरोपीचे जेनेटिक क्लिनिकमध्ये कविता लोखंडेचे गर्भलिंग निदान करण्याकरीता वापरलेली सोनोग्राफी मशिन जप्त केली आहे. डॉ. जयंत देशपांडेला आरोपीची सोनोग्राफी मशिन जप्त करण्याचे अधिकार समुचित प्राधिकारी फिर्यादी विलासराव यादवनी पी.एन्.डी.टी. कायद्याचे कलम ३० व पी.एन्. डी.टी. नियमाचे कलम १२ अंतर्गत दिले आहेत. पी.एन्.डी.टी. नियमाचे कलम १२, स्पष्टीकरण क्रं.(पपद्ध मध्ये स्पष्टपणे नमुद केले आहे की, ‘मशिन’ म्हणजेच सोनोग्राफी मशिन जप्त करण्याचे अधिकार समुचित प्राधिकारी व त्यांच्याद्वारे अधिकृत केलेल्या अधिका-याला आहे. म्हणुन आरोपीनी पी.एन्.डी.टी. कायद्याअंतर्गत गुन्हा करण्याकरीता वापरलेली सोनोग्राफी मशिन डॉ. जयंत देशपांडेनी अधिकृत व कायदेशीर पध्दतीने जप्त केल्याचे म्हणता येईल. तसेही आरोपीनी गुन्हा करण्याकरीता वापरलेली सोनोग्राफी मशिन जप्त न केल्यास आरोपीनी सोनोग्राफी चाचणी केल्याचा पुरावाच जमा करता येणार नाही.

२४. आरोपीच्या तज्ञ वकिल साहेबांनी “२००२ सुप्रिम कोर्ट केसेस (क्रिमिनल) १७१८, आशिष बाथम -विरुद्ध- स्टेट ऑफ मध्यप्रदेश” मध्ये आदरणीय सर्वोच्च न्यायालयानी नमुद केलेला कायदा (सायटेशन) दाखल करून युक्तीवाद केला आहे की, आरोपीनी केलेला गुन्हा कितीही गंभिर व निर्धून स्वरुपाचा असला तरीही केवळ सबळ संशयाचे आधारे आरोपीला दोषी धरता येत नसून सयुक्तीक संशयापुढे जावून आरोपीविरुद्ध गुन्हा सिध्द करणे आवश्यक आहे. उपरोक्त नमुद केसमध्ये आदरणीय सर्वोच्च न्यायालयानी नमुद केलेल्या कायद्याचा आदर करून मी येथे नमुद करू इच्छितो की, सदर खटल्यामध्ये फिर्यादी विलासराव यादव, डॉ. जयंत देशपांडे, शैला जाधव, कविता लोखंडे व प्रशांत पवारची मौखिक साक्ष ठोस, स्पष्ट व विश्वासाहर्तेस पात्र असून त्यांच्या मौखिक साक्षेवरून आरोपीनी पी.एन्.डी.टी. कायदा व नियमाच्या तरतुदीचे उल्लंघन केल्याचे दिसून येते. उपरोक्त नमुद फिर्यादी पक्षाच्या साक्षदारांच्या मौखिक साक्षेमध्ये किरकोळ स्वरुपाची विसंगती आली आहे. परंतु उपरोक्त नमुद सर्व साक्षदारांनी घटनेच्या पाच वर्षांनंतर न्यायालयामध्ये साक्ष दिली आहे. म्हणून घटनेच्या पाच वर्षांचे प्रदीर्घ कालावधीनंतर कोणतीही सर्व-सामान्य व्यक्ती घटना घडली त्याप्रमाणे तंतोतंत साक्ष देवू शकणार नाही. घटनेनंतर पाच वर्षांचे दिर्घ कालावधीनंतर फिर्यादी पक्षाच्या साक्षदारांच्या मौखिक साक्षेमध्ये किरकोळ विसंगती येणे साहजिक आहे. म्हणून फिर्यादी पक्षाच्या साक्षदारांच्या मौखिक साक्षेमधील किरकोळ विसंगतीमुळे त्यांची साक्ष खोटी असल्याचे गृहित धरून सदर साक्ष दुर्लक्षित करता येणार नाही. फिर्यादीनी दाखल केलेल्या तक्रारीमध्ये नमुद केल्याप्रमाणे वास्तविकतेमध्ये घटना घडल्याबाबत फिर्यादी पक्षाच्या सर्व साक्षदारांनी एकमेकांच्या साक्षेशी सुसंगत साक्ष दिली आहे. आरोपीच्या तज्ञ वकिल साहेबांनी फिर्यादी पक्षाच्या उपरोक्त नमुद सर्व साक्षदारांची दिर्घ उलट तपासणी घेवून सुध्दा त्यांच्या उलट तपासणीदरम्यान असा कोणताही मजकूर दस्तावेजावर आला नाही की, ज्यावरून त्यांनी आरोपीना खोटया केसमध्ये फसविण्याकरिता खोटी साक्ष दिल्याचे दिसून येईल. म्हणून फिर्यादी पक्षाच्या सर्व साक्षदारांची मौखिक साक्ष ठोस, स्पष्ट व विश्वासाहर्तेस पात्र असल्याचे म्हणता येईल. शैला जाधव व कविता लोखंडेच्या उलट तपासणीदरम्यान दस्तावेजावर आले आहे की, त्यांनी बीड व इतर ठिकाणी सुध्दा पी.एन्.डी.टी. कायद्याअंतर्गत बनावटी केस (डेकॉय केस) करण्याबाबत कार्यवाही केली असून त्या केसमध्ये त्यांनी साक्ष दिली आहे. परंतु मी येथे नमुद करू इच्छितो की, शैला जाधव व कविता लोखंडे हया स्वयंसेवी संस्थेद्वारे पी.एन्.डी.टी. कायद्याच्या योग्य अंमलबजावणीकरीता बनावटी केसेस करून शासनाला मदत करित आहेत. बनावटी केसेस करण्याबाबत शासनाने स्वयंसेवी संस्थाना मंजुरी सुध्दा दिली आहे. म्हणून शैला जाधव व कविता लोखंडेनी इतर डॉक्टराविरुद्ध पी.एन्.डी.टी. कायद्याअंतर्गत केसेस केल्याचे गृहित धरले तरीही केवळ त्या कारणावरून शैला जाधव व कविता लोखंडेनी आरोपीविरुद्ध सदर खोटी केस केल्याचा निष्कर्ष काढता येणार नाही. शैला जाधव, वर्षा देशपांडे, कविता लोखंडे, फिर्यादी विलासराव यादव व डॉ. जयंत देशपांडेची आरोपीसोबत घटनेचे पुर्वीपासून कोणतीही दुश्मनी नसल्यामुळे त्यांनी आरोपीविरुद्ध खोटी केस करून खोटी साक्ष देण्याचे कोणतेही ग्राह्य कारण नाही. आरोपीच्या बचावाप्रमाणे वर्षा देशपांडेनी घटनेनंतर आरोपीला पैशाची मागणी केली होती. परंतु आरोपीनी पैसे न दिल्यामुळे वर्षा देशपांडेनी सदर खोटी केस केली आहे. परंतु मी येथे नमुद करू इच्छितो की, फिर्यादी पक्षाच्या सर्व साक्षदारांच्या उलट तपासणीदरम्यान असा कोणताही मजकूर दस्तावेजावर आला नाही की, ज्यावरून वर्षा देशपांडेनी आरोपीला पैशाची मागणी केल्याचे दिसून येईल. वर्षा देशपांडे व शैला जाधवविरुद्ध केवळ इतर काही स्टिंग-ऑपरेशन केलेल्या डॉक्टरानी फौजदारी केसेस दाखल केल्याचे कारणावरून वर्षा देशपांडे व शैला जाधवनी आरोपीला पैशाची मागणी केल्याचा निष्कर्ष काढता येणार नाही. याउलट, वर्षा देशपांडे व शैला जाधवनी गर्भलिंग निदान करणा-या डॉक्टरांविरुद्ध स्टिंग-ऑपरेशन केल्यास निश्चितच सदर स्टिंग-ऑपरेशन झालेले डॉक्टर्स वर्षा देशपांडे व शैला जाधव यांचेविरुद्ध खोटया फौजदारी केसेस दाखल करण्याचा प्रयत्न करतील. आरोपीनी त्यांच्या कम्पाउंडरला शपथेवर तपासून त्यांना वर्षा देशपांडे व शैला जाधवनी पैशाची मागणी केल्याची बाब सिध्द केली नाही. त्याचप्रमाणे आरोपीनी त्यांचा उपरोक्त नमुद बचाव सत्य असल्याचे सिध्द करण्या करता कोणताही मौखिक व कागदोपत्री पुरावा न्यायालयामध्ये सादर केला नाही. म्हणून आरोपीनी घेतलेला उपरोक्त नमुद बचाव खोटा व बनावटी असल्याचे म्हणता येईल.

२५. घटनेचेवेळी कविता लोखंडे ही मुळातच गर्भवती नसल्याचा बचाव आरोपीनी घेतला नाही. याउलट, कविता लोखंडे व इतर सर्व साक्षदारांनी स्पष्टपणे सांगितले आहे की, घटनेचेवेळी आरोपीनी त्यांच्या जेनेटिक क्लिनिकमध्ये सोनोग्राफी मशिनद्वारे गर्भवती कविता लोखंडेचे गर्भलिंग निदान करून त्यांच्या गर्भामध्ये मुलगा असल्याचे त्यांना व शैला जाधवला सांगितले होते. आरोपीनी सोनोग्राफी रिपोर्ट दिला असला तरीही ते सदर सोनोग्राफी रिपोर्टमध्ये कविता लोखंडेच्या गर्भामध्ये मुलगा असल्याची बाब निश्चितच लिहून देणार नाही. आरोपीनी बचाव घेतला आहे की, त्यांचे जेनेटिक क्लिनिक अस्तीत्वामध्ये नसून त्यांनी कधीही सोनोग्राफी मशिनचा उपयोग केला नाही. म्हणून आरोपीनी त्यांच्या जेनेटिक क्लिनिकमध्ये पी.एन्.डी.टी. कायदा व नियमांतर्गत ठेवावयाचे सर्व रेकॉर्डची जपवणुक केलेली नसल्याचे म्हणता येईल. डॉ. जयंत देशपांडे व फिर्यादी विलासराव यादवनी स्पष्टपणे सांगितले आहे की, घटनेचेवेळी आरोपीजवळ जेनेटिक क्लिनिकमध्ये सोनोग्राफी करण्याकरीता पात्र असल्याबाबतचे शिक्षण नव्हते, 'एफ' फॉर्ममध्ये रेकॉर्ड ठेवले नव्हते, गर्भलिंग निदान केले जात नसलेबाबतचा फलक लावला नव्हता, पी.एन्.डी.टी. कायद्याची पुस्तिका नव्हती, सोनोग्राफी मशिनची नोंदणी केलेली नव्हती, शासनविहीत ट्रेनिंगचे प्रमाणपत्र नव्हते, शासनास पाठविलेल्या मासिक अहवालाची फाईल नव्हती. फिर्यादी विलासराव यादव व डॉ. जयंत देशपांडेची उपरोक्त नमुद मौखिक साक्ष खोटी असल्याचे दस्तावेजावरून दिसून येत नाही. आरोपीनी सुध्दा घटनेचेवेळी उपरोक्त नमुद त्रुट्यांची पुर्तता केली असल्याचे कथन केले नाही किंवा त्याबाबत बचाव घेतला नाही. म्हणून घटनेचेवेळी आरोपीचे जेनेटिक क्लिनिकमध्ये उपरोक्त नमुद त्रुट्या असल्याचे म्हणता येईल. पी.एन्.डी.टी. नियमाचे कलम ३ अंतर्गत जेनेटिक क्लिनिकमध्ये सोनोग्राफी मशिनचा उपयोग करण्याकरीता आवश्यक असलेले शिक्षण व ट्रेनिंग आरोपीनी घेतले असल्याचे दस्तावेजावरून दिसून येत नाही. म्हणून आरोपीनी पी.एन्. डी.टी. नियमाचे कलम ३(१) चे उल्लंघन केल्याचे म्हणता येईल. उपरोक्त नमुद केल्याप्रमाणे आरोपीनी त्यांच्या जेनेटिक क्लिनिकमध्ये पी.एन्.डी.टी. कायद्याचे कलम २९(१)(२) व पी.एन्.डी.टी. नियमांचे कलम ९ अंतर्गत कोणतेही रेकॉर्ड जोपासले नव्हते तसेच डॉ. जयंत देशपांडे यांचे निरीक्षणाकरीता सदर रेकॉर्ड सादर केला नव्हता. म्हणून आरोपीनी पी.एन्.डी.टी. कायद्याचे कलम २९(१)(२) व पी.एन्. डी.टी. नियमांचे कलम ९ चे उल्लंघन केल्याचे म्हणता येईल. पी.एन्.डी.टी. नियमाचे कलम १०(१-ए) अंतर्गत आवश्यक असलेली कविता लोखंडेची जी-फॉममध्ये लेखी संमती घेतली नव्हती. तसेच आरोपीनी कविता लोखंडेच्या सोनोग्राफी रिपोर्टवर गर्भामध्ये मुलगा आहे किंवा मुलगी आहे हे पाहिले नाही व त्याबाबत कुणालाही सांगितले नसल्याबाबत जाहिरनामा लिहून दिला नाही. म्हणून आरोपीनी पी.एन्.डी.टी. कायद्याचे कलम ५ व पी.एन्.डी.टी. नियमांचे कलम १०(१-ए) चे उल्लंघन केल्याचे म्हणता येईल. आरोपीनी त्यांच्या जेनेटिक क्लिनिकमध्ये गर्भलिंग निदान करणे प्रतिबंधित असल्याचे फलक लावले नव्हते व पी.एन्.डी.टी. कायद्याची पुस्तिका ठेवली नव्हती. म्हणून आरोपीनी पी.एन्.डी.टी. नियमांचे कलम १८(१) (२) चे उल्लंघन केल्याचे म्हणता येईल. त्याचप्रमाणे आरोपीनी कविता लोखंडेची सोनोग्राफी मशिनद्वारे गर्भलिंग निदान करून त्यांच्या गर्भामध्ये मुलगा असल्याचे त्यांना सांगितले होते. सोनोग्राफी मशिनद्वारे गर्भ निदानाची चाचणी करण्याकरीता आवश्यक असलेल्या शिक्षणाशिवाय सदर चाचणी केली होती. तसेच आरोपीनी पी.एन्.डी.टी. कायदा व नियमांच्या इतर तरतुदीचे उल्लंघन करून पी. एन्.डी.टी. नियमांचे कलम १८ अंतर्गत नेमुन दिलेल्या नितीमुल्याचे जतन कले नव्हते. म्हणून आरोपीनी पी.एन्.डी.टी. नियमांचे कलम १८ चे उल्लंघन केल्याचे म्हणता येईल. अशाप्रकारे, अभियोजन पक्षाने संयुक्तीक संशयापुढे जावून आरोपीनी पी.एन्.डी.टी. कायद्याचे कलम ३(१), ५, ६, २९(१)(२) व पी.एन्.डी.टी. निमाचे कलम ३(१), ९, १०(१-ए), १७(१)(२), १८ चे उल्लंघन करून पी.एन्. डी.टी. कायद्याचे कलम २३ अंतर्गत गुन्हा केल्याचे सिध्द केल्यामुळे मी मुददा क्रं.१ ते ५ चे उत्तर होकारार्थी देत आहे.
२६. उपरोक्त नमुद केल्याप्रमाणे आरोपीविरुध्द गुन्हा सिध्द होत असल्यामुळे मी आरोपी व फिर्यादी पक्षाला शिक्षेबाबत विस्तृतपणे ऐकून घेतले तसेच संपुर्ण दस्तावेजाचे सुक्ष्मपणे अवलोकन केले आहे. आरोपी व त्यांच्या तज्ञ वकिल साहेबांनी शिक्षेबाबत सांगितले आहे की, आरोपीचा सदर केसमधिल पहिलाच गुन्हा असून ते सन्मानित कुटुंबामधील सदस्य आहेत. त्याचप्रमाणे

आरोपी हे त्यांच्या कुटुंबामधील एकमेव कमावते व्यक्ती आहेत. म्हणून आरोपीना कमीत-कमी शिक्षा करण्याची विनंती आरोपीचे तज्ञ वकील साहेबांनी केली आहे. याउलट, फिर्यादी पक्षातर्फे तज्ञ सरकारी वकिल साहेबांनी शिक्षेबाबत सांगितले की, पी.एन्.डी.टी. कायद्याचा उद्देश लक्षात घेवून गर्भलिंग निदानाच्या गुन्ह्याची पुनरावृत्ती टाळण्याकरीता आरोपीना दया न दाखविता कायद्याने नेमुन दिलेली पुर्ण शिक्षा करावी. आरोपी व फिर्यादी पक्षाचे शिक्षेबाबत वरिल म्हणणे मी लक्षात घेतले तसेच सदर गुन्ह्याशी संबंधित सर्व पैलूंचा सखोल विचार केला आहे. पी.एन्.डी.टी. कायद्याच्या प्रस्तावनेमध्ये स्पष्टपणे नमुद केले आहे की, सदर कायदा गर्भलिंग निदान प्रतिबंधित करून सदर कायद्याच्या तरतुदीचे उल्लंघन करून गर्भलिंग निदान करणाऱ्या व्यक्तीला कठोरात -कठोर शिक्षा करण्यात यावी कारण देशामध्ये मुलामागे मुलीचे प्रमाण कमी होण्याचे प्रमुख कारण प्रसूतीपूर्व गर्भलिंग निदान असे आहे. प्रसूतीपूर्व निदान तत्रांचा वापर गर्भलिंग निदान करण्याकरीता कोणत्याही परिस्थितीमध्ये स्विकृत नाही. परंतु गर्भामध्ये मुलगी असल्यास मुलाच्या हव्यासापोटी मुलीच्या गर्भाचा सर्रासपणे गर्भपात केला जात आहे. आरोपीसारख्या निर्दयी व पैशाच्या लालचेपोटी वैद्यकीय व्यवसायाची नितीमुल्ये बाजुला सारून गर्भलिंग निदान करणाऱ्या वैद्यकीय व्यवसायिकांमुळे मुलींचा जननदर कमी होत आहे. वैद्यकीय व्यवसायीकाला माहिती असते की, त्यांनी गर्भवती महिलांचे गर्भलिंग निदान केल्यानंतर सदर महिलेच्या गर्भामध्ये मुलगी असल्यास सदर गर्भाचा गर्भपात केला जातो. म्हणून मुलगी गर्भ असलेल्या महिलेचा गर्भपात करण्याकरीता गर्भलिंग निदान करणारे डॉक्टर सर्वस्वी जबाबदार असल्याचे म्हणता येईल. डॉक्टरानी गर्भवती महिलेची प्रसूतीपूर्व निदान तत्रांचा वापर करून गर्भलिंग निदान केलेच नाही तर मुलगी-गर्भाचा गर्भपात करण्याचा प्रश्नच उद्भवनाही. म्हणून गर्भलिंग निदान करणाऱ्या लालची डॉक्टरांवर कडक शासन करून त्यांना व इतर डॉक्टरांना भविष्यात पुढे होणाऱ्या गर्भलिंग निदानापासून रोकता येईल. आरोपीनी गर्भलिंग निदानाचे केलेले कृत्य निर्दय तर आहेच परंतु त्याहीपेक्षा जास्त घृणास्पद आहे. गरज भागविण्याकरीता गुन्हा करणाऱ्या आरोपीला दया दाखवून कमी व सौम्य स्वरूपाची शिक्षा करता येईल. परंतु सदर केसमधील आरोपीनी केलेल्या गुन्ह्यामध्ये आरोपीला किंचितही दया दाखविता येणार नाही कारण त्यांनी सदर गुन्हा त्यांची गरज भागविण्याकरता केला नसून त्यांनी सदर गुन्हा पैशाची लालच पुर्ण करण्याकरता केला आहे. आरोपीला गर्भलिंग निदान करण्यापासून प्रतिबंध न लावल्यास ते भविष्यामध्ये कितीतरी गर्भवती महिलांचे गर्भलिंग निदान करून मुलगी-गर्भाच्या गर्भपातास म्हणजेच त्यांच्या हत्येला कारणीभूत ठरतील. आरोपीना दया दाखवून सौम्य स्वरूपाची शिक्षा केल्यास इतर डॉक्टरांची सुध्दा गर्भलिंग निदान करण्याची प्रवृत्ती जागृत होवून त्यांना सदर गुन्हा करण्यास प्रवृत्त केल्यासारखे होईल. आरोपीला कठोरात कठोर शिक्षा करून त्यांच्यासोबतच इतरही गर्भलिंग निदान करणाऱ्या समाजकंटकांना धडा शिकविणे आवश्यक आहे की, काही पैशाच्या लालचेपोटी गर्भलिंग निदान करून समाजाचा नैसर्गिक समतोल ढासळण्यास कारणीभूत ठरणाऱ्या कोणत्याही व्यक्तीला क्षमा न मिळता कठोरात कठोर शिक्षाच केल्या जाते.

२७. आरोपी हे डॉक्टर असून ते वैद्यकीय अधिकारी आहेत. आरोपीनी आपल्या वैद्यकीय ज्ञानाचा दुरुपयोग करून भ्रूण हत्या करणाऱ्या समाजकंटकांना मदत करणे सुरु केल्यामुळे त्यांना कोणत्याही परिस्थितीमध्ये दया दाखविता येणार नाही. आरोपीनी त्यांची मुलभूत गरज भागविण्याकरीता मजबुरीमध्ये गुन्हा केला नसून केवळ पैशाच्या लालचेकरीता सदर गुन्हा केल्यामुळे त्यांना दया दाखविल्यास त्यांच्यामध्ये सुधारणा होण्याची किंचितही शक्यता नाही. आरोपीला कठोर शिक्षा केल्यास सदर कठोर शिक्षेमुळे गर्भलिंग निदान करणाऱ्या इतर वैद्यकीय व्यवसायिकांच्या मनामध्ये भिती व धास्ती निर्माण होईल व त्यामुळे गर्भलिंग निदानाचे चाचणीवर थोड्या प्रमाणत का होईना परंतु प्रतिबंध लावता येईल. पी.एन्.डी.टी. कायद्याचा उद्देश सुध्दा गुन्हेगारांच्या मनामध्ये भिती निर्माण करणारी कठोर शिक्षा करण्याचा आहे. आरोपी हे वैद्यकीय व्यावसायिक असल्यामुळे त्यांची आर्थिक परिस्थिती सुध्दा सदृढ असल्याचे म्हणता येईल. म्हणून आरोपीला पी.एन्.डी.टी. कायद्याने नेमुन दिलेला पुर्ण दंड केल्यास ते संपुर्ण दंड न्यायालयामध्ये जमा करू शकतील व त्यांच्यावर अन्याय केल्या सारखे सुध्दा होणार नाही. आरोपीविरुध्द पी.एन्.डी.टी. कायद्यांतर्गत सदर खटल्याप्रमाणे दुसरा खटला क्रं. ३८६/२००७

सुध्दा अंतिम युक्तीवादाकरीता प्रलंबित आहे. म्हणून आरोपीच्या मनामध्ये कायद्याची भिती व आदर नसून ते कुणालाही न घाबरता पी.एन्.डी.टी. कायद्याच्या तरतुदीचे सर्रासपणे उल्लंघन करित असल्याचे म्हणता येईल. आरोपी विरुद्ध पी.एन्.डी.टी. कायद्याअंतर्गत फौजदारी खटला दाखल केल्यानंतर त्याच्या मनामध्ये कायद्याची भिती व आदर असता तर त्यांनी पी.एन्.डी.टी. कायद्याअंतर्गत दुसरी केस दाखलच होवू दिली नसती. म्हणून आरोपी हे पी.एन्.डी.टी. कायद्याअंतर्गत गुन्हे करणारे अट्टल गुन्हेगार असल्याचे म्हणता येईल. कोणत्याही मार्गाने विचार केल्यास आरोपीनां कारावास व दंडाच्या शिक्षेमध्ये दया दाखविणे योग्य व न्यायोचित होणार नाही. पी.एन्.डी.टी. कायद्याअंतर्गत समुचित प्राधिकारी हे सुध्दा वैद्यकीय अधिकारी असल्यामुळे ते आपल्या व्यावसायिक बांधवाविरुद्ध कार्यवाही करण्यास कुचरतात. परंतु सदर केससारख्या सवयंसेवी संस्थेने पुढाकार घेतल्यामुळे पी.एन्.डी.टी. कायद्याअंतर्गत गुन्हेगारविरुद्ध केसेस दाखल होवून त्यांना शास्ती होत आहे. अन्यथा केवळ समुचित प्राधिकाऱ्यावर विसंबून राहल्यास पी.एन्.डी.टी. कायद्याची योग्य व चांगल्या पध्दतीने अंमलबजावणी करताच आली नसती. म्हणून आरोपीना पी.एन्.डी.टी. कायद्याने नेमुण दिलेली संपूर्ण कारावास व दंडाची शिक्षा करणे योग्य व न्यायोचित होईल.

२८. पी.एन्.डी.टी. कायद्यांतर्गत कोणत्याही व्यक्तीने सदर कायदा व नियमाच्या तरतुदीची पूर्तता केल्यानंतरच त्यांना सोनोग्राफी मशीनचा ताबा कायम ठेवून त्याचा उपयोग करता येईल. आरोपीनी त्यांच्या जेनेटीक क्लिनीकची नोंदणी केली नसल्यामुळे त्यांना जप्त केलेल्या सोनोग्राफी मशीनचा ताबा स्वतःजवळ कायम ठेवण्याचा कोणताही अधिकार नाही. आरोपीनी सोनोग्राफी मशीन ठेवण्याकरीता पी.एन्.डी.टी. कायदा व नियमांतर्गत आवश्यक असलेल्या कोणत्याही तरतुदीची पूर्तता केलेली नाही. त्याचप्रमाणे आरोपीला सोनोग्राफी मशीनचा ताबा दिल्यास त्यांना पी.एन्.डी.टी. कायद्यांतर्गत गुन्हा करण्याची पुन्हा परवानगी दिल्यासारखे होईल. आरोपीला सोनोग्राफी मशीनचा ताबा दिल्यास त्यांच्याद्वारे पुन्हा गर्भलिंग निदानाचा गुन्हा करण्याची शक्यता नाकारता येत नाही. तसेही आरोपीला पी.एन्.डी.टी. कायदा व नियमाच्या सर्व तरतुदींची पूर्तता केल्याशिवाय स्वतःचे ताब्यामध्ये सोनोग्राफी मशीन ठेवता येणार नाही. सोनोग्राफी मशीन विक्रेत्यांना सदर मशीनची विक्री करताना पी.एन्.डी.टी. कायदा व नियमाच्या तरतुदीचे प्रतिबंध असून सदर मशीन खरेदी करणाऱ्यावर सदर प्रतिबंध नसल्याचा युक्तीवाद ग्राह्य धरता येणार नाही. पी.एन्.डी.टी. कायदा अस्तित्वामध्ये येण्याचे उद्देश व हेतू लक्षात घेतल्यास कोणत्याही व्यक्तीने सोनोग्राफी मशीन खरेदी केल्यानंतर त्यांनी सदर कायदा व नियमांमधील तरतुदींची पूर्तता करणे बंधनकारक असल्याचे दिसून येते. आरोपी हे पी.एन्.डी.टी. कायदा व नियमांमधील तरतुदीचे वारंवार उल्लंघन करून सोनोग्राफी मशीनचा गर्भलिंग निदानाकरीता उपयोग करित असून त्यांना सदर सोनोग्राफी मशीनचा ताबा कायम ठेवण्याचा कोणताही अधिकार नाही. आरोपीनी गुन्हा करण्याकरीता सोनोग्राफी मशीनचा वापर केल्यामुळे सदर सोनोग्राफी मशीन गुन्हा करण्याकरीता वापरलेले उपकरण/मशीन असल्याचे म्हणता येईल. म्हणून गुन्हा करण्याकरीता आरोपीनी वापरलेली सोनोग्राफी मशीन समुचित प्राधिकारी, सातारा यांच्या ताब्यामध्ये नोंदणी असलेल्या अधिकृत व्यक्तीला विक्री करण्याकरीता देणे योग्य व न्यायोचित होईल. समुचित प्राधिकारी सातारा यांनी जप्त मुद्देमाल सोनोग्राफी मशीनचा अधिकृत व नोंदणी झालेल्या व्यक्तीला सार्वजनिक लिलावाद्वारे पी. एन्.डी.टी. कायदा व नियमांच्या सर्व तरतुदीचे पालन करून विक्री करावी. त्यानंतर समुचित प्राधिकारी, सातारा यांनी सोनोग्राफी मशीनच्या विक्रीची रक्कम सरकारजमा करावी. त्याचप्रमाणे सदर गुन्ह्यामध्ये वापरलेले नगदी पंचवीसशे रुपये सरकार जमा करून उर्वरीत मुद्देमाल मुल्यहीन असल्यामुळे तो नष्ट करणे योग्य होईल.

मुद्दा क्रमांक ६ बाबत: -

२९. वरील कारणमिमांसा लक्षात घेवून न्यायोचित होईल असा मी खालील प्रमाणे आदेश पारीत करित आहे.

- ७) आरोपी डॉ.प्रभाकर कृष्णराव पवार यांना “फौजदारी प्रक्रिया संहितेचे कलम २४८(२)” अंतर्गत “प्रसुतीपूर्व निदान तंत्र (विनीमय व दुरुपयोगावरील प्रतिबंध) नियम १९९६” व सुधारीत “गर्भधारणापूर्व आणि प्रसवपूर्व निदान तंत्रे (लिंग निवडीवर प्रतिबंध) नियम १९९६ चे कलम १०(१) व १०(१-ए)”/“प्रसुतीपूर्व निदान तंत्र (विनीमय व दुरुपयोगावरील प्रतिबंध) कायदा १९९४” व सुधारीत “गर्भधारणापूर्व आणि प्रसवपूर्व निदान तंत्रे (लिंग निवडीवर प्रतिबंध) कायदा २००३ चे कलम २३”च्या गुन्ह्यामध्ये दोषी धरून ३ वर्षे सश्रम कारावास व रूपये १०,०००/- (रू.दहा हजार फक्त) दंडाची शिक्षा ठोठावण्यात येत आहे. आरोपीनी उपरोक्त नमूद दंडाची रक्कम न भरल्यास त्यांना एक महिना साधा कारावासाची शिक्षा देण्यात यावी.
- ८) आरोपी डॉ.प्रभाकर कृष्णराव पवार यांना “फौजदारी प्रक्रिया संहितेचे कलम २४८(२)” अंतर्गत “प्रसुतीपूर्व निदान तंत्र (विनीमय व दुरुपयोगावरील प्रतिबंध) नियम १९९६” व सुधारीत “गर्भधारणापूर्व आणि प्रसवपूर्व निदान तंत्रे (लिंग निवडीवर प्रतिबंध) नियम १९९६ चे कलम १७(१)(२)”/“प्रसुतीपूर्व निदान तंत्र (विनीमय व दुरुपयोगावरील प्रतिबंध) कायदा १९९४” व सुधारीत “गर्भधारणापूर्व आणि प्रसवपूर्व निदान तंत्रे (लिंग निवडीवर प्रतिबंध) कायदा २००३ चे कलम २३” च्या गुन्ह्यामध्ये दोषी धरून ३ वर्षे सश्रम कारावास व रूपये १०,०००/- (रू.दहा हजार फक्त) दंडाची शिक्षा ठोठावण्यात येत आहे. आरोपीनी उपरोक्त नमूद दंडाची रक्कम न भरल्यास त्यांना एक महिना साधा कारावासाची शिक्षा देण्यात यावी.
- ९) आरोपी डॉ.प्रभाकर कृष्णराव पवार यांना “फौजदारी प्रक्रिया संहितेचे कलम २४८(२)” अंतर्गत “प्रसुतीपूर्व निदान तंत्र (विनीमय व दुरुपयोगावरील प्रतिबंध) नियम १९९६” व सुधारीत “गर्भधारणापूर्व आणि प्रसवपूर्व निदान तंत्रे (लिंग निवडीवर प्रतिबंध) नियम १९९६ चे कलम १८”/“प्रसुतीपूर्व निदान तंत्र (विनीमय व दुरुपयोगावरील प्रतिबंध) कायदा १९९४” व सुधारीत “गर्भधारणापूर्व आणि प्रसवपूर्व निदान तंत्रे (लिंग निवडीवर प्रतिबंध) कायदा २००३ चे कलम २३” च्या गुन्ह्यामध्ये दोषी धरून ३ वर्षे सश्रम कारावास व रूपये १०,०००/- (रू.दहा हजार फक्त) दंडाची शिक्षा ठोठावण्यात येत आहे. आरोपीनी उपरोक्त नमूद दंडाची रक्कम न भरल्यास त्यांना एक महिना साधा कारावासाची शिक्षा देण्यात यावी.
- १०) आरोपीनी उपरोक्त नमूद सर्व शिक्षा एकाच वेळी (कंकरंटली) भोगाव्यात.
- ११) आरोपीनी उपरोक्त नमूद शिक्षा भोगण्याकरीता त्याचे जामीनपत्र (स्युएरिटी बॉन्ड) न्यायालयाचे स्वाधीन करावे.
- १२) सदर खटला प्रलंबित असताना आरोपी कारागृह किंवा पोलीस ठाण्यामध्ये बंदीस्त राहिले असल्यास त्यांना “फौजदारी प्रक्रिया संहितेचे कलम ४२८” अंतर्गत “सेट-ऑफ” चा फायदा देण्यात यावा.
- १३) अपिलाचा कालावधी संपल्यानंतर सदर खटल्यामधील जप्त मुद्देमाल नगदी रक्कम रू.२,५००/- (रूपये दोन हजार पाचशे फक्त) सरकार जमा करून मुद्देमाल सोनाग्राफी मशिन यापूर्वीच आरोपीना सुपूर्तनाम्यावर दिल्यामुळे सदर सुपूर्तनामा बॉन्ड रद्द करून आरोपीनी सदर सोनाग्राफी मशिन न्यायालयाचे स्वाधीन करावी. त्यानंतर सदर सोनाग्राफी मशिन फिर्यादीचे ताब्यामध्ये कायदेशीररित्या विल्हेवाट लावण्याकरीता देवून इतर मुद्देमाल मुल्यहिन असल्यामुळे तो नष्ट करण्यात यावा.
- १४) सदर न्यायनिर्णय आज रोजी खुल्या न्यायालयामध्ये घोषित करण्यात आला आहे.
- १५) सदर न्यायनिर्णयाची एक प्रत आरोपीना विनामूल्य प्रदान करण्यात यावी.

ठिकाण:—कराड (राजेश म. कपाटे)

दिनांक:—०६/०९/२०१० दिवाणी न्यायाधीश (क.स्तर) तथा

न्यायदंडाधिकारी प्रथमश्रेणी, कराड(कोर्ट क्र.४).

(गुरव एच.एस., लघुलेखक)

Notes

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That society should not want a girl child; that efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A(e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection.

Hon'ble Smt. Ranjana Desai, J.
(Vijay Sharma vs. Union of India AIR 2008 Bom. 29)

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