

(2013) 05 BOM CK 0095
In the Bombay High Court
Case No : Writ Petition (Lodg) No. 636 of 2013

Dr. Bela Hitesh Bhatt

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 06-05-2013

Acts Referred:

Citation : (2014) 2 ABR 109 : (2013) 3 ALLMR 822 : (2013) 5 BomCR 130 :
(2013) 4 MhLj 620

Hon'ble Judges : S.J. Vazifdar, J;R.Y. Ganoo, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Rule. Rule is made returnable forthwith and heard finally. By an order dated 21st March, 2013, the parties were put to notice that the matter may be disposed of finally at the admission stage itself. We, accordingly, heard the petition finally. The petitioner, who has presented the petition and appeared in person, seeks an order to quash and set aside the action of respondent No. 4, the Appropriate Authority and Medical Officer under the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, sealing her sonography machine on 6th February, 2013.

2. As the petitioner appears in person, we requested Mr. Amit K. Desai, a senior counsel to appear as amicus curiae. We must, at the outset, express our appreciation for the valuable assistance rendered by him so willingly.

3. The petitioner finds herself in a most unfortunate situation for no fault of her own. The only allegation against the petitioner is that the application for renewal of her registration certificate was delayed by a day. Consequently, the respondents did not process the application and now contend that her registration certificate of 23rd January, 2008, which was valid till 23rd January, 2013, expired on that day and her continued use of the machine permitted thereunder was illegal.

We have held that there was no delay in the filing of the application and that the impugned action was illegal in any event.

Further, assuming that there was any lapse on her part, it was indeed innocent, unintended and purely unintentional. There were no mala fides or even impropriety on her part. Her actions are without, any doubt, bona fide and innocent.

4. The facts are as follows:

The petitioner was granted a certificate of registration by the Appropriate Authority for a period of five years from 23rd January, 2008 to 23rd January, 2013. The certificate furnished the particulars of the petitioner and the clinic, the nature of the procedures to be carried out therein and the details of the model and make of the equipment used.

5. The petitioner, accordingly, carried on her profession pursuant, inter-alia, to the said certificate of registration. There has never been any complaint of any nature whatsoever against the petitioner, much less of any malpractices under the said Act. Even before us, it has not even been suggested that the petitioner has ever violated the provisions of the said Act or has acted contrary to the terms and conditions of the said certificate of registration.

6. The petitioner has expressly averred in paragraph 4.5 of the petition that on 24th December, 2012, she approached the Health Department with her application for the renewal of the certificate of registration. The concerned Medical Officer Dr. Kawale scrutinized the application and informed the petitioner that there were a few deficiencies viz. the affidavit was not notarized, the MTP registration certificate was not attached, the xerox copies were not attested by a Gazetted Officer and that Form A was to be submitted in duplicate by filling the same in by hand and not by attaching a xerox copy. The said Dr. Kawale asked the petitioner to submit the application again. The next day, 25th December, was a holiday for Christmas. The petitioner, therefore, on 26th December, 2012, completed the formalities, and resubmitted the application on 27th December, 2012 for the renewal of the registration certificate. It is important to note that the application was accepted and duly acknowledged by the authorities on 27th December, 2012.

The above facts, especially that the application was submitted on 24th December, 2012, and was scrutinized by the concerned officer Dr. Kawale on that day, are admitted. The respondents have not, in any event, filed an affidavit in reply denying the same. We find no reason to disbelieve the petitioner.

7. The petitioner has further expressly averred that she contacted the Special Officer under the said Act on 22nd January, 2013, i.e. the date before her certificate of registration was due to lapse and enquired whether she could continue working with the said sonography machine after 23rd January, 2013. The officer, one Dr. Asha Advani advised her to continue working in view of the

fact that her application for renewal of the certificate of registration was pending.

The petitioner had informed the authorities about the manner in which the clinic was being conducted as required by the Act. No action was taken against her till 6th February, 2013.

8. On 6th February, 2013, the Appropriate Authority and the said Dr. Kawale, without any notice, entered the clinic and sealed the sonography machine. The panchnama stated as under:-

Inspection findings are as follows:

(1) Centre is run without valid registration. The owner has failed to apply 30 days prior to the expiry of registration.

USG machine was sealed in the presence of Dr. Hitesh Bhatt.

9. The impugned action was taken on account of the petitioner's alleged delay of one day in applying for the renewal of the registration. The respondents contended that under Rule 8(1) of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1996, the application ought to have been made 30 days before the date of expiry of the certificate of registration. In view thereof, it was contended that the application cannot be processed. The continued user of the machine after 23rd January, 2013, was, therefore, according to them, illegal.

10. Rule 8 reads as under:-

8. Renewal of registration.-(1) An application for renewal of certificate of registration shall be made in duplicate in Form A, to the Appropriate Authority thirty days before the date of expiry of the certificate of registration. Acknowledgement of receipt of such application shall be issued by the Appropriate Authority in the manner specified in sub-rule (2) rule 4.

(2) The Appropriate Authority shall, after holding an enquiry and after satisfying itself that the applicant has complied with all the requirements of the Act and these rules and having regard to the advice of the advisory Committee in this behalf, renew the certificate of registration, as specified in Form B, for a further period of five years from the date of expiry of the certificate of registration earlier granted.

(3) If, after enquiry and after giving an opportunity of being heard to the applicant and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that the applicant has not complied with the requirements of the Act and these rules, it shall, for reasons to be recorded in writing, reject the application for renewal of certificate of registration and communicate such rejection to the applicant as specified in Form C.

(4) The fees payable for renewal of certificate of registration shall be one half of the fees provided in sub-rule (1) of rule 5.

(5) On receipt of the renewed certificate of registration in duplicate or on receipt of communication or rejection of application for renewal, both copies of the earlier certificate of registration shall be surrendered immediately to the Appropriate Authority by the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic.

(6) 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.

11. Mr. Desai, the learned amicus curiae analyzed the provisions of the Act and the Rules. He submitted that Rule 8(1) is not a rule of limitation. It is a procedural provision to facilitate the consideration of the renewal to ensure continuity in operating the centre, including the use of the machine in accordance with the certificate of registration. Thus, even if the application is made on the last date of the validity of the existing certificate of registration, the application cannot be rejected on that ground alone. This was all the more so as an existing applicant would have invested heavily in the machine, premises and the staff. Neither the Act nor the Rules indicate that a person holding a valid certificate of registration would be prejudiced on account of a period of limitation which has no relevance to the legitimacy of the operations carried out pursuant thereto or the reliability of the applicant.

12. Mr. Desai further contrasted the provisions of Rule 8(6) with Rule 6(5) which deals with an application for the grant of a certificate of registration for the first time. Rule 6(5) reads as under:-

6. Certificate of registration.- (1).....

(5) Grant of certificate of registration shall be non-transferable. In the event of change of ownership or change of management or on easing to function as a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, the new owner or manager of such Centre, Laboratory or Clinic shall apply afresh for grant of certificate of registration.

Rule 6(5), unlike Rule 8(6) does not contain a deeming provision as is contained in Rule 8(6). In other words, it does not provide that the certificate of registration would be deemed to be granted if there was no response thereto within a period of ninety days from the date of receipt of the application for registration.

13. It is not necessary for us to deal with the above submission to the effect that Rule 8(1) does not prescribe a period of limitation although, prima facie, the submission appears to be well founded. We are inclined to allow the petition on another basis also submitted by Mr. Desai.

14. An application for renewal of the certificate of registration may be rejected

under Rule 8(3). Rule 8(3) however, prescribes the following conditions for the rejection of an application for renewal of a certificate of registration. The Appropriate Authority must make an enquiry in respect of the application; give the applicant an opportunity of being heard; satisfy himself that the applicant has not complied with the requirements of the Act and Rules, having regard to the advice of the Advisory Committee; furnish reasons in writing for rejection of the application and communicate such rejection to the applicant in Form "C". The rejection of an application for renewal of a certificate of registration has serious civil consequences. It is necessary therefore, for the Appropriate Authority to adhere to the requirements of Rule 8 strictly.

15. In the present case, none of the requirements of Rule 8(3) have been complied with. It is not the respondents' case that the Appropriate Authority gave the petitioner an opportunity of being heard. Even assuming that the panchanama furnished the reasons in writing for rejection by stating that the application had not been made thirty days prior to the expiry of the registration and that the same amounts to a communication of the rejection of the petitioner's application, it would make no difference, for admittedly, the other requirements of Rule 8(3) have not been complied with. An important infirmity in the impugned action is that the petitioner had not been given an opportunity of being heard. At such a hearing, the petitioner would have had an opportunity of establishing her case on any basis. The failure to give the petitioner an opportunity of being heard was a serious breach of the rules of natural justice expressly provided for in Rule 8(3). The impugned action is therefore, liable to be quashed on this ground alone.

16. Rule 8(3) specifically provides that the Appropriate Authority shall reject the application if he is satisfied that the applicant has not complied with the requirements of the Act and the Rules. The compliance referred to in Rule 8(3) is not limited to any particular requirement or requirements of the Act and the Rules. It refers to all the requirements of the Act and the Rules relevant to an application for the renewal of a certificate of registration. One such requirement, to be found in Rule 8(3), is that the application for renewal must be made thirty days before the expiry of the certificate of registration. Thus in the present case, the Appropriate Authority ought to have first made an enquiry and satisfied himself that the applicant had not submitted the application thirty days before the expiry of the certificate of registration. In the facts of this case, this was an extremely important aspect. If the Appropriate Authority had come to the conclusion against the petitioner in this regard, he ought to have then given the petitioner an opportunity of being heard.

17. Had he given the petitioner an opportunity of being heard, the petitioner would have been able to establish that her application was within the prescribed time. She has been denied this important right. Especially, in this case, the failure to comply with the rules of natural justice is not a mere technicality, but a matter of substance.

18. Further the Appropriate Authority is bound to record his reasons for the rejection in writing and to communicate the same to the applicant i.e. the petitioner in this case.

The Appropriate Authority neither recorded his reasons for coming to the conclusion that the applicant had not made the application thirty days before the date of expiry of the certificate of registration nor did he communicate the same to the petitioner at any stage. The impugned action is liable to be quashed for this reason also.

19. At the highest, it could be contended that the above endorsement in the panchnama constituted the Appropriate Authority's satisfaction that the applicant had not complied with the requirements of the Act, the reasons for the same and the communication thereof to the petitioner. It is a moot point whether the mere endorsement in the panchnama constitutes compliance of the provisions of Rule 8(1). Even assuming that it does, it would make no difference whatsoever in the present case.

20. In the present case, the Appropriate Authority and the said Dr. Kawale visited the petitioner's premises and sealed the said machine. They made the said endorsement in the panchnama. Prior thereto, admittedly, the petitioner had received no communication from them. It is not even the respondent's case that prior to 6th February, 2013, the authorities had even taken any decision. Under Rule 8(5), it is only upon the receipt of the communication of the rejection of the application for renewal that an applicant is bound to surrender immediately to the Appropriate Authority, the certificate of registration. Thus, even assuming that the panchnama constituted a communication of the rejection as required by Rule 8(1), upto 6th February, 2013, the petitioner could not even be held/considered to have committed any offence at all. After that date, 6th February, 2013, the petitioner has admittedly not used the machine.

21. Even assuming that the panchnama constituted compliance with Rule 8(1) and that the same was a valid rejection of the petitioner's application for renewal of the certificate of registration, the petitioner clearly had not committed any offence under the said Act or the Rules by continuing to operate the machine under the said certificate of registration dated 23rd January, 2008. A practical and harmonious construction of the provisions of the Act and the Rules substantiates Mr. Desai's contention that during this twilight period viz. from the date of an application for renewal of the registration certificate upto the date of the communication of the rejection, if any, the holder of the certificate of registration sought to be renewed is entitled to continue to operate on the basis of the existing certificate of registration. This is clear from the fact that the authorities are granted ninety days under Rule 8(6) to consider the application and it can hardly be suggested that their not deciding the same earlier disentitles the holder of a certificate of registration to operate under the certificate of registration sought to be renewed. The law abhors a vacuum. The respondents did not deny Mr. Desai's submission that in the case of an application for renewal

of the registration under Rule 8, an applicant is entitled to continue to use the machine till an order of rejection under Rule 8(3) is communicated to him.

22. The question of the petitioner having committed any offence, even if she had not filed an application within the period prescribed by Rule 8(1) therefore, cannot and does not arise. She has committed no offence whatsoever under the Act.

23. This brings us to the question whether the petitioner's application for the renewal of the certificate of registration was, in fact, delayed by a day. We have come to the conclusion that the question must be answered in the negative, in favour of the petitioner.

24. The petitioner had, in fact, submitted the application on 24th December, 2012. She has expressly stated the same in the petition. She has also mentioned the name of the officer to whom it was submitted. There is no denial of the same. The respondents have fairly not even denied that the said Dr. Kawale was not authorized to receive the application. This is not a case of word against word. The application was, therefore, as a matter of fact, submitted in time. The petitioner cannot be penalized on account of her having been directed to re-submit the same alongwith certain other documents. The concerned authorities ought to have accepted the application and either granted the petitioner an opportunity of rectifying any deficiencies or rejected the same in accordance with law. They did neither. It would be a hyper-technical argument to state that the petitioner ought to have insisted upon leaving the application with the authorities and then returning the next day and rectifying the deficiencies. The petitioner's application was, therefore, filed in time.

25. There is no other ground for rejecting the application for renewal of the certificate of registration. In any event, no other ground has been communicated to the petitioner. The certificate of registration must, therefore, be deemed to have been renewed in view of the provision of Rule 8(6). In the circumstances, Rule is made absolute in terms of prayer (a), which reads as under:-

(a) this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction thereby quash and set aside the action taken by The Appropriate Authority of sealing sonography machine on dated 6th February 2013 and release the same.

The order shall be complied with forthwith. The seal shall be removed latest by Wednesday, 8th May, 2013. The application for stay is rejected.

There shall, however, be no order as to costs.