

(2012) 09 RAJ CK 0016

In the Rajasthan High Court

Case No : Civil Writ Petition No. 18347 of 2011 with Civil Writ Petition No. 162 of 2012

Dr. Brijendra Singh

APPELLANT

Vs

The State of Rajasthan and Others
 Shriprakash Jangid
Vs State Appellate Authority and Chief Administrative
Secretary, Medical and Health Department, Rajasthan, Jaipur
and Others

RESPONDENT

Date of Decision : 20-09-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act,
1994 — Section 20, 20(3), 21

Citation : AIR 2013 Raj 25 : (2013) 1 CDR 517 : (2013) 2 RLW 1378

Hon'ble Judges : Alok Sharma, J

Bench : Single Bench

Advocate : B.L. Avasthi, Dr. Brijendra Singh and Mr. Rajat Ranjan, for the Appellant; Shriprakash Jangid, R.P. Sing, Additional Advocate General with Mr. Shashikant Saini, for the Respondent

Final Decision : Allowed

Judgement

Alok Sharma

1. Both the petitions are being disposed of by this common order, as legal the issue involved is identical. The question is as to whether subsequent to the order passed by the State Level Appropriate Authority in favour of the petitioners under Rule 19 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 ("the Rules of 1996" for brevity) suo moto cognizance by the Appellate Authority thereafter could be taken u/s 21 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter to be referred in short as "the Act of 1994") to upset the order of the State Level Appropriate Authority ("SLAA" in short) without as much as an opportunity of hearing to the successful party before the

SLAA. The facts of the case are that the petitioner is a practicing Doctor in Medicine and runs his own private Hospital, where he inter alia conducts ultra sonography. One Rajan Choudhary, Secretary, N.G.O. Shikshit Rozgar Kendra Prabandhak Samiti, Jhunjhunu furnished information to the Authorities under the Act of 1994 that the petitioner was conducting ultra sonography contrary to the provisions of the Act of 1994. On the information received, the District Collector, Jhunjhunu constituted a district inspection party consisting of five members under his order dated 17th November, 2009 to carry out a surprise inspection at the Hospital of the petitioner. The inspection of the Hospital of the petitioner took place on 13th December, 2009 and appears to have caught the petitioner in an act of conducting ultra sonography of decoy pregnant woman sent by it and charging a fee for disclosing the sex of foetus. The employees of the petitioner also appears to have made statements about the petitioner being engaged in unauthorized pre-conceptional sex determination contrary to the Act of 1994.

2. In these circumstances, the Deputy Chief Medical and Health Officer (Family Welfare) Jhunjhunu passed an order on 14th January, 2010 by which the registration of the genetic clinic of the petitioner with regard to carrying out ultra sonography test was cancelled. An appeal by the petitioner against the order dated 14th January, 2010 passed by the Sub-Divisional Appropriate Authority was filed. Vide order dated 5th April, 2010, the District Collector and District Appropriate Authority (PCPNDT), Jhunjhunu rejected the appeal filed by the petitioner. A further second appeal was laid by the petitioner before the SLAA. Oddly the SLAA vide its order dated 25th June, 2010 allowed the appeal of the petitioner for alleged contravention of Section 20(3) of the Act of 1994 and the specious ground that reasons of the cancellation of registration of the petitioner were not recorded as mandated by law. The SLAA overlooked the fact that the petitioner was caught red handed conducting ultra sonography on a decoy pregnant woman and disclosing sex of foetus. Consequent to the order dated 25th June, 2010, the petitioner stood exonerated of wrong doings and contravention of the Act of 1994 as found in the course of inspection conducted on 13th December, 2009 and the order dated 14th January, 2010 in the first instance.

3. Rule 19 of the Rules of 1996 provides for only two levels of appeal one from the order of Sub-Divisional Appropriate Authority to the District Level Appropriate Authority and thereafter to the State Level Appropriate Authority. In the event of a person other than those detailed in Section 21 of the Act of 1994 or the State being aggrieved by the order passed by the SLAA, the only remedy is to approach this Court, if so warranted, under Article 227 of the Constitution of India.

4. However, apparently shaken by the order of the SLAA passed on 25th June, 2010 exonerating the petitioner in what appeared to be an open and shut case of the petitioner conducting ultra sonography on a decoy pregnant woman and disclosing the sex of foetus and his employees admitting wrong doings and

contravention of the Act of 1994, the Principal Secretary, Medical and Health Department, Rajasthan, Jaipur, the Appellate Authority u/s 21 of the Act of 1994 proceeded to take suo moto cognizance of the matter and vide order dated 25th October, 2011 set aside the order dated 25th June, 2010 remanding the matter to the SLAA directing it to decide the specific legal question as to whether failure to record reasons in passing an order under the Act of 1994 as warranted by Section 20(3) of the said Act would override and prevail over the public purpose of the Act of 1994. However, the Appellate Authority overlooked the limitations of jurisdiction and the fact that the order exonerating the petitioner of wrong doings was passed on 25th June, 2010 about a year and a half prior to the suo moto appellate jurisdiction sought to be exercised and no opportunity of hearing was being given to the petitioner.

5. In the factual context detailed hereinabove, the argument of the learned counsel for the petitioner is two fold. One, that there is no provision for exercising appellate power u/s 21 of the Act of 1994 suo moto. Second, it is submitted that even otherwise, an appeal u/s 21 could be filed only by a Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic, which was not the case at hand and thus the Appellate Authority had no jurisdiction. Counsel submits that in the facts of the case, resort to Section 21 of the Act of 1994 was wholly ultra vires the Act of 1994. Counsel further submits that in any event, the power u/s 21 of the Act of 1994 could not have been exercised without due notice to the petitioner which admittedly was not done. It is prayed that for these reasons the impugned order dated 25th October, 2011 passed by the respondent Appellate Authority is liable to be set aside.

6. Mr. R.P. Singh AAG with Mr. Shashikant Saini appearing for the State would submit that even if the power u/s 21 of the Act of 1994 has been exercised by the Appellate Authority in an irregular manner, it has been exercised for public good. He submits that the case of the petitioner before this Court is a stark case of a Doctor acting in gross contravention to the Act of 1994 conducting unauthorizedly ultra sonography on pregnant woman (in this case, decoy) and even disclosing the sex of foetus to her and was caught red handed. He submits that the employees at the Hospital run by the petitioner had in their statement admitted to the factum of such unlawful practices being rampant at the Hospital. Counsel submits that the exercise of writ jurisdiction by this Court is not a matter of course and is to be invoked only for setting right injustice. He submits that this Court should not invoke its jurisdiction under Article 226 of the Constitution of India for quashing an order which would entail the whole object and purpose of the Act of 1994 being compromised. It is further submitted that in any event of the matter, no grave prejudice is caused to the petitioner inasmuch as the matter has only been remanded to the State Level Appropriate Authority for reconsideration on the question framed by the Appellate Authority.

7. I have heard the learned counsel for the petitioner as also Learned Additional Advocate General and perused the impugned orders.

8. The moot question before this Court is as to whether illegal exercise of power palpably without jurisdiction by the Appellate Authority should be sustained for public good or whether such exercise of power should be set aside upholding the rule of law entailing benefit to the petitioner, who has been caught red handed conducting ultra sonography on a decoy pregnant woman and disclosing to her the sex of foetus. After consideration of the matter, in my view the letter of law should prevail even if the petitioner were to be allowed temporary relief as upholding law even in difficult and hard cases is the utmost public good. There cannot be a short term gain of persons being held guilty in a particular case to the larger detriment of the majesty of law being compromised. In a democratic republic rule of men has been replaced by the rule of law. In the case of Kartar Singh Vs. State of Punjab, albeit in a different context, the Hon"ble Supreme Court has held that the history of personal liberty is largely the history of procedural safeguards. A reading of the Act of 1994 more particularly Section 21 thereof indicates that an appeal can only be filed by a Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic within 30 days from the receipt of the order either of suspension or cancellation of the registration by the State Level Appropriate Authority u/s 20 of the Act of 1994. There are two limitations inherent in Section 21 of the Act of 1994 i.e. with regard to institutions/Hospital which can file an appeal and the period within which such appeal can be filed. Section 21 of the Act of 1994 does not appear to authorize filing of an appeal by any other person including the State. It is trite that appeal is a creature of statute and absent statutory condition in which an appeal can be laid, appellate jurisdiction in law is absent. In the instant case, the Appellate Authority has taken suo moto cognizance of the order dated 25th June, 2010 after a period of over 18 months. Further no notice has also been issued to the petitioner before upsetting an order passed by the SLAA in his favour. In my considered view, the mischief of letting off the petitioner apparently engaged in pre-natal and pre-conceptional diagnostic tests contrary to the provisions of the Act of 1994, for a short while is a lesser evil than allowing of exercise of non-existent suo moto appellate power contrary to the provisions of the Act of 1994. If the impugned order 25th October, 2011 passed by the Appellate Authority without jurisdiction contrary to the Section 21 of the Act of 1994 and in breach of principles of natural justice were to be sustained it would be grossest violation of provisions of the Act of 1994 itself, nay-of the rule of law itself which has been recognized by the Apex Court to be a basic and inalienable feature of the Constitution. Contrarily, if the order 25th October, 2011 were to be set aside-as I intend to-the State can still take steps to remedy the order dated 25th June, 2010 passed by the State Level Appellate Authority by laying a writ petition before this Court and ensuring that justice is done in the facts of the case. Consequently, both the writ petitions are allowed and the order dated 25th October, 2011 passed by the State Level Appellate Authority as also the consequential notices/orders are set aside. It is however made clear that State will be free to challenge the order dated 25th June, 2010 passed by the SLAA exonerating the petitioner by laying a writ petition. The writ petition, if filed even belatedly, the State Government can

always detail the reasons for the belated filing of the writ petition challenging the order dated 25th June, 2010 and the public interest of the matter.