

(2009) 08 BOM CK 0154

In the Bombay High Court

Case No : Writ Petition No. 1587 of 2009

Dr. Dadasaheb Tarte

APPELLANT

Vs

The State of Maharashtra, The State Appropriate Authority
and Additional Director of Health Services, State Family
Welfare Department and The District Counselling Authority
and District Civil Surgeon District Civil Hospital

RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection)
(Amendment) Act, 2003 — Section 23(1), 25, 29(1), 5
Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection)
Rules, 1996 — Rule 12, 17(2), 6(2)(5), 8(2)
Pre-conception and Prenatal Diagnostic Techniques (Regulation of Prohibition of
Misuse) Act, 1994 — Section 19, 20, 20(1), 20(2), 20(3)

Citation : (2009) 111 BOMLR 3650 : (2010) 2 MhLj 110

Hon'ble Judges : P.V. Hardas, J; A.V. Potdar, J

Bench : Division Bench

Advocate : V.D. Salunkhe, holding for, B.A. Shinde, for the Appellant; K.B.
Chaudhary, Learned AGP, for the Respondent

Judgement

A.V. Potdar, J.—Rule.

2. Rule made returnable forthwith. By consent of the parties, the writ petition is finally heard at the stage of admission.

3. By the present writ petition under Article 14, 226 and 227 of the Constitution of India, initially the petitioner has prayed for issuance of a writ of mandamus for direction to the first respondent to decide the appeal challenging the order passed by the 2nd respondent dated 30th August 2008, with further prayers for issuance of writ of mandamus directing the respondents to release the sonography machine in the light of directions issued by this Court in Writ Petition No. 7973/2008 dated 17th December 2008. During pendency of the writ petition,

the prayers were added to quash and set aside the order dated 30/08/2008 passed by the 2nd respondent suspending the registration of Genetic Clinic of the petitioner at (Exh.I, paper book page No. 39) and to quash and set aside the order dated 24/03/2009 (Exh.L at paper book page No. 52) passed by the respondent No. 1A dismissing the appeal filed by the present petitioner.

4. Before dealing with the submissions across the bar, it is necessary to consider the facts which gave rise to file the writ petition, which can be summarized as.

a) The petitioner is registered medical practitioner, holder of requisite certificate of registration under the Maharashtra Medical Practitioner's Act, 1961. He is also holding Certificate of Registration under Preconception and prenatal Diagnostic Techniques. (Prohibition of Sex Selection) Rules (In short the P.C.P.N.D.T. Act, under rules there under) (Hereinafter referred as the Act and the rules there under) (At Exh.A) in form "B" Rule 6(2)(5) and 8(2) and u/s 19 of the Act of 1994 issued by the competent designated authority. This certificate is in the name of Padmavati Hospital, Amalner, Tal.Patoda, Dist. Beed. The certificate is issued on 30/03/2003 and is valid upto 02/07/2008. The petitioner also claimed that he is holding valid license to run the Genetic Centre. The petitioner is using Ultra Sonography Machine of Toshbro S.D.U 350A in Genetic Centre which is noted in the certificate. Initially services of one Dr. Deshpande, who is holding requisite qualification of M.B.B.S. D.N.R.E. were engaged as the authorized radiologist to operate the equipment. After his demise, services of one Dr. Bhagyashree Hambire were engaged. This radiologist has executed necessary agreement (Exh.B) with the petitioner. The petitioner claimed that he has maintained requisite registers in his Genetic Centre run by him and is following all the procedures under the Act and Rules framed thereunder.

b) It is further alleged that on 06/12/2007 at about 2.00 p.m. Taluka Counselling Authority, Incharge Medical Superintendent, Rural Hospital, Patoda, Dist. Beed alongwith his squad has visited the centre run by the petitioner under the allegations that the petitioner is illegally running the centre without maintaining the requisite record. The said squad seized the sonography machine and the record maintained at the centre. Accordingly complaint was lodged with J.M.F.C. Patoda against the petitioner and the two radiologists u/s 3(2), 4(3), 29(1) of the Act of 1994. The learned J.M.F.C. took cognizance of the said complaint u/s 23(1), 25 of The P.C. P.N.D.T. Act (Exh. C collectively). Accordingly the complaint was registered as R.C.C. No. 165/2007. The petitioner claimed that the time of visit of the said squad he was not present in the centre.

c) The petitioner has filed an application for return of the Ultra Sonography Machine before J.M.F.C. Patoda, which application was rejected on 31/01/2008. Within meantime the petitioner has also filed a Criminal Application numbered as 219/2008 before this Court to challenge the legality of RCC No. 165/2007. On 16/06/2008, this Court granted "Rule" and stayed the further proceedings in the said RCC No. 165/2007 during the pendency of the Criminal Application. It is further contended that the order passed by the J.M.F.C. Patoda about the return

of the property was challenged before the Court of Session by filing Criminal Revision application No. 30/2008, but the Court of Revision was not inclined to grant any relief in the said revision application on the ground "further proceedings in the criminal complaint are stayed by this Court."

d) It is further contended that as the Ultra Sonography Machine was seized, the clinical diagnosis at the centre are stand still. It is further contended that in the identical situation, order of return of sonography machine was passed in writ petition No. 7973/2008 by the Principal Bench at Bombay. The Centre of the petitioner is situated in rural area, hence to provide better medical services to the patients, the petitioner has prayed for the similar reliefs about the return of the Ultra Sonography Machine.

e) It is also contended by the petitioner that the registration of the Genetic Clinic of the petitioner is cancelled by the authorities on 10/12/2007 (Exh.G) which order is challenged by way of appeal before the Director of Family Welfare Bureau, Pune. The State Advisory Committee have heard the appeal and by its decision set aside the order of cancellation of registration, but suspended the registration vide order dated 12/08/2008 (Exh.H) In view of this order, respondent authority suspended the registration of the Genetic Centre of the petitioner by order dated 30/08/2008 (Exh.I). This order is challenged before the first respondent by appeal on 01/10/2008. It is further alleged and contended by the petitioner that before passing the suspension order of the registration of certificate of petitioner, no show cause notice was issued upon him. It is also alleged that while taking action u/s 20(3) of the Act, the competent authority to record the reasoned order about the suspension of the registration certificate in the public interest as the authority has not recorded the reasoned finding about the suspension of the registration certificate of the petitioner. Hence the present writ petition for the prayers as stated in para No. 3 of this judgment and as stated in para No. 23(B), (C), (BB), (BBB) of the writ petition on the grounds stated in para No. 17(A) and 17(B) of the writ petition.

5. In response to the notice issued by this Court, the respondents appeared in the writ petition and filed an affidavit in reply of one Dr. Sudhakar Sudkoji Ambekar, the Assistant Director, State Family Welfare, Pune to oppose the admission of the writ petition inter alia contending that

a) In most of the Indian family, female child is not welcomed resulting in tremendous growth of Genetic Counseling Centre for female foeticide. Such abuse of technique is crying against the female sex diminishing the dignity and honour of women. The P.N.D.T. (Regulation of Prohibition of Misuse) Act of 1994 and P.C.P.N.D.T. (Prohibition of Sex Selection) Act 2003 was enacted to control and misuse of such tests and techniques. Accordingly the Government has set up the forum and various authorities for the purpose to implement the Act at various levels for their respective jurisdiction. In addition to this forum, Additional Director of Health Services (F.W.N.C.H. And S.H.) Pune has been declared as State Appropriate Authority. These forums and authorities are

functioning as per the provisions for the implementation of P.C. And P.N.D.T. Act in the entire State.

b) It is alleged that in the present case during the visit of team of Taluka Appropriate Authority to the Genetic Clinic of the petitioner, they noticed (i) booklet of P.C.P.N.D.T. Act and rules as per Rule 17(2) was not found kept, (ii) authorised radiologist was not found present in the sonography room, (iii) consent of some of the patients was not obtained as required u/s 5 of The P.C.P.N.D.T. Act, (iv) demise of authorized radiologist Mr. Deshpande was not informed to the appropriate authority, (v) appointment of new radiologist Dr. Hambire was not informed to the appropriate authority, (vi) timetable about the visit of radiologist was not displayed in the clinic, (vii) monthly report about the sonography centre was incomplete, (viii) FormF and FormG are not update as required u/s 29(1) of The P.C.P.N.D.T. Act of 2003. According to the deponent, these acts of the petitioner amount to be violation of the provisions of The P.C.P.N.D.T. Act and rules thereunder. Hence the sonography machine and the record of the clinic of the petitioner was sealed and seized. Thereafter complaint was lodged with a J.M.F.C. Patoda. Initially, the District Appropriate Authority and Civil Surgeon, Beed cancelled the registration vide its letter dated 10/12/2007.

c) It is further contended that the petitioner submitted an appeal u/s 21 of the Act before the State Appropriate Authority, Pune which appeal was received on 25/02/2008, and was placed before the State Advisory Committee meeting held on 24/06/2008 wherein the order of cancellation was revised and the registration was suspended vide communication dated 12th August 2008 to the District Appropriate Authority and the same was communicated to the petitioner vide letter dated 30th August 2008.

d) It is further contended by the respondent that the petitioner has further submitted an appeal before the Minister of Health and Family Welfare, State of Maharashtra dated 29/09/2008 which was kept before the Advisory Committee of which meeting was held on 23/03/2009. This appeal was not considered by the Committee as the case against the petitioner is subjudiced before the competent criminal court and this decision was communicated to the petitioner vide letter dated 27/04/2009. It is further alleged that earlier on 24/01/2004, and on 06/02/2004, the District Appropriate Authority have warned the petitioner in writing for not properly maintaining the record, still the petitioner has ignored these warnings. It is also urged that the acts of the petitioner indicates that he has approached this Court with a malafied intention just to delay the proceeding pending before the Trial Court, hence the petitioner is not eligible for any reliefs as claimed for.

6. In the further affidavit in reply, it is contended by the respondent that the petitioner has not intimated about the demise of authorized radiologist Shri.Deshpande and appointment of Dr. Hambire to the appropriate authority. According to the respondent, considering the gravity of the case and the lapses committed by the petitioner, he is not entitled for any relief. According to the

respondents that the facts on which the rule was given in W.P. No. 7973/2008, can not be compared with the case that of the petitioner, hence that citation is not applicable in the present case. The respondents support the decision taken by the State Advisory Committee about the suspension of the organization of the petitioner vide order impugned in a writ petition dated 23rd March 2009 communicated to the petitioner vide letter dated 27/04/2009, and lastly prayed for dismissal of the writ petition with costs.

7. Heard respective counsels for the parties in the background of these pleadings.

8. Chapter (vi) of The P.N.D.T. Act of 1994 deals with the registration of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics. Section 20 of the said chapter deals with the cancellation or suspension of the registration while Section 21 of the Act deals with the appeals provided under the Act.

Section 20 : Cancellation or suspension of registration:

1. The Appropriate Authority may suo motu, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.

2. If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, and Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the Rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.

3. Notwithstanding anything contained in Sub-sections (1) and (2), if the Appropriate Authority is, of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in Sub-section (1).

Section 21 : Appeal : The Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic may, within thirty days from the date of receipt of the order of suspension or cancellation of registration passed by the Appropriate Authority u/s 20, prefer an appeal against such Order to

(i) the Central Government, where the appeal is against the order of the Central Appropriate Authority; and

(ii) the State Government, where the appeal is against the order of the State Appropriate Authority; in the prescribed manner.

On plain reading of Sub-section (1) and (2), it is clear that the Appropriate Authority is required to issue show cause notice before suspension or cancellation of the registration as the case may be, disclosing the reasons

mentioned in the said notice. It is further clear that the reasonable opportunity of hearing be given to the concerned before taking the action of suspension or cancellation of the registration as the case may be. At the same time, the plain reading of Sub-section (3), it is clear that in case it is expedient in the public interest, the competent authority may pass the reasoned order of suspension or cancellation of the registration as the case may be even without notice of such action to the concerned.

9. On reading the order under challenge at Exh.I (at page No. 39) and Exh.L (page No. 55) as well as the contents of the affidavit in reply filed by the respondent, it is further clear that before passing these orders, no show cause notice was served on the petitioner or any opportunity was given to the petitioner before the action of cancellation or suspension of the registration of the clinic of the petitioner was taken. At the same time, order impugned is not a reasoned order as contemplated under Sub-section 3 of Section 20 of the Act of 1994. From these facts, it is apparent on the face of it that the order impugned is not in conformity with the compliance of Sub-section 1 to Sub-section 3 of Section 20 of the Act of 1994. The second point required for consideration is about the authority who has passed the impugned order dated 24/03/1990. The contents of the order clearly disclose that the decision of the order under challenge was taken in the meeting of the State Advisory Committee whereas Sub-section (3) of Section 20 contemplates the appellate authority is a State Government against the order passed by the State Appropriate Authority. The copy of the appeal memo filed by the petitioner is at Exh.7 (at page No. 40) which is addressed to the Hon'ble Minister of the State for Health and Family Welfare State of Maharashtra. This fact is also clear from the unnumbered para No. 1 of the impugned order at Exh.L (page No. 55), but in this appeal, the decision was taken by the State Advisory Committee, which is not in accordance with the provisions under Sub-section (ii) of Section 21 of the Act of 1994.

10. The prayers in terms of prayer clause "C" of the writ petition is about the return of property seized by the Appropriate Authority during their alleged visit dated 06/12/2007 to the Genetic Clinic of the petitioner. The attack of the learned advocate for the petitioner about this statement is two fold. First that the Ultra Sonography Machine which was seized by the visiting squad to the Genetic Clinic of the petitioner is otherwise also used for the clinical diagnosis of the patients coming in the dispensary i.e. Padmavati Hospital and hence it is necessary to release the Ultra Sonography Machine and second considering the provisions under the Act of 1994 and the rules made there under, the authority is not empowered to seize the Ultra Sonography Machine.

11. Section 30 in Chapter (viii) of the Act of 1994 deals with powers to search and seize records, which read as follows:

Section 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 it being committed at any Genetic Counselling Centre, Genetic Laboratory of

Genetic Clinic, such Authority or any Officer authorized 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 and examine any record, register, document book, pamphlet, advertisement or any other material object found therein and seize the same if such Authority or Officers has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.

(2) The provisions of Code of Criminal Procedure, 1973 relating to searches and seizures shall, so far as may be apply to every search or seizure made under this Act. At the same time, Rule 12 of the Rules of 1996 deals with the procedure for search and seizure by the Appropriate Authority which read as follows.

Rule 12 : Procedure for search and seizure : (1) The Appropriate Authority or any Officer authorized in this behalf may enter and search at all reasonable times any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, in the presence of two or more independent and respectable persons, for the purposes of Section 30.

(2) A list of any document, record, register, book, pamphlet, advertisement or any other material object found in the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and seized shall be prepared in duplicate at the place of effecting the seizure. Both copies of such list shall be signed on every page by the Appropriate Authority or the Officer authorised in this behalf and by the witnesses to the seizure :

Provided that the list may be prepared, in the presence of the witnesses, at a place other than the place of seizure if, for reasons to be recorded in writing, it is not practicable to make the list at the place of effecting the seizure....

12. On clear reading of the provisions u/s 30 of the Act of 1994 as well as the provisions under Rules of 1966 made 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 Genetic 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 citation as the rule given by the Principle Bench of this Court in Writ Petition No. 7973/2008 is applicable to the present case. In the premise, 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.

13. For the discussion made in the above foregoing paragraphs, it is apparent that the order under challenge was not passed by the authority empowered under the law or otherwise the order was passed without any authority as

contemplated u/s 21(ii) and also in contravention of the provisions u/s 20(1) to (3) of the Act of 1994. If it is so, then these orders impugned under the writ petition liable to be quashed and set aside. Accordingly we quash and set aside the impugned orders dated 30/08/2008 and 24/03/2009 and remit the matter back for hearing afresh in accordance with Law within the period of 4 weeks from the date of communication of this order before the authority where the appeal is filed by the present petitioner. The Appellate Authority to dispose of the appeal within the period of 3 months thereafter in accordance with Law after giving proper opportunity to all the concerned. The Appellate Authority to decide the pending appeal without influencing the fact that the criminal case is pending before the J.M.F.C.Patoda, Dist. Beed.

14. Rule thus made absolute as indicated above and the writ petition stands disposed of accordingly with no order as to costs.