

**(2012) 09 BOM CK 0065**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 6557 of 2012**

Dr. Mrs. Sukhada Mulay

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

**Date of Decision :** 11-09-2012

**Acts Referred:**

Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 — Section 17, 20, 21, 30

**Citation :** (2012) 6 ALLMR 778 : (2013) 2 BomCR 316 : (2013) 1 MhLj 638

**Hon'ble Judges :** S.V. Gangapurwala, J

**Bench :** Single Bench

**Advocate :** V.D. Hon and Mr. S.V. Dankh, for the Appellant; T.S. Lodhe, A.G.P. for the Respondent No. 1 and Shri N.B. Khandare, Advocate for Respondent Nos. 2 and 3, for the Respondent

## Judgement

S.V. Gangapurwala, J.—Rule. Rule returnable forthwith. With the consent of parties taken up for final hearing. The petitioner before this Court is a Medical Practitioner possessing certificate of registration issued by the Appropriate Authority under the provisions of the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994 (hereinafter referred as to the "Said Act" for the sake of brevity) for the purpose of carrying out Genetic Counseling Centre/Genetic Laboratory/Genetic Clinic, Pre-Natal Diagnostic Test, ultrasound as laid down under said certificate. The said certificate of registration is for a period of five years ending on 11th December, 2012. It appears that, the petitioner is engaged in the said profession.

2. The petitioner received a show cause notice dated 14.06.2012 from the Appropriate Authority seeking explanation from the petitioner about the irregularities in the maintenance of the record as is enumerated in the said show cause notice. The petitioner replied the said show cause notice saying that the discrepancies mentioned in the notice are due to use of old F Form and old consent forms. The Appropriate Authority thereafter vide notice dated 29.06.2012 asked the petitioner to remain present for hearing. The petitioner

remained present for hearing and in writing put forth the submissions. Thereafter, on 04.07.2012, the Appropriate Authority who is the Health Officer of the Municipal Corporation, Aurangabad directed the petitioner to give the said explanation on a bond of Rs. 100/- on or before 07th July, 2012.

3. On or about 05th July, 2012 the Medical Officers of the Municipal Corporation, Aurangabad referring themselves as Assistant Appropriate Authorities passed an order suspending the registration of the petitioner, so also sealing the sonography machines. The sonography machines were sealed pursuant to the panchanama of the even date.

4. The petitioner has prayed for quashing and setting aside the impugned order dated 05.07.2012 by virtue of which the registration of the petitioner has been suspended and the sonography machines have been sealed.

5. Shri Hon, the Learned Counsel for the petitioner submits that, the term Assistant Appropriate Authority is alien to the provisions of the Said Act. Sec. 20 only empowers the Appropriate Authority to take action regarding cancellation and suspension of the registration. According to the Learned Counsel, the Appropriate Authority is defined under the statute. The Appropriate Authorities are appointed pursuant to Sec. 17 of the said Act. The Government has issued notification detailing the Appropriate Authorities. The Medical Officers of the Municipal Corporation are not notified as Appropriate Authorities and action taken by them is without jurisdiction and authority. The Learned Counsel further submits that, as the said action is without authority and jurisdiction the same deserves to be set aside.

6. Shri Khandare, the Learned Counsel for respondent Nos. 2 and 3 supports the order and the action. The Learned Counsel relied on the notification dated 09th December, 1997 to submit that the Health Officer is an Appropriate Authority. According to the Learned Counsel the proper procedure has been followed. The principles of natural justice have been adhered and thereafter action has been taken. The same cannot be faulted.

7. The Learned Counsel submits that, the order of suspension was issued based on the unsatisfactory explanation given and after the hearing the petitioner. So far as the sealing of the machine is concerned, the Learned Counsel submits that, in view of Sec. 30 of the said Act, the appropriate authority is empowered to appoint the authorized officer for the purpose of seizure and sealing. The provision is clear and explicit. According to the Learned Counsel, the Commissioner who is also an Appropriate Authority under the statute has appointed the Medical Officers and authorized them to seal the said machines and precisely that has been done by them. The Learned Counsel further contends that, there is remedy of appeal provided under Rule 19 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996 as far as sealing is concerned and the petitioner can be asked to approach the said appellate forum. The Learned Counsel also submits that in view of Sec. 21 of the

said Act the remedy of appeal is also provided against the order of suspension of certificate of registration. The Learned Counsel relies on the decision of the Division Bench of this Court in Writ Petition No. 6433/2012 dated 14.08.2012 to buttress his submissions that as far as sealing is concerned, the petitioner has remedy of appeal under Rule 19.

8. Before advertising to the arguments canvassed by Learned Counsel for the respective parties, it would be appropriate to refer to the relevant provisions of the Said Act and Rules.

The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994

2. Definitions :

(a) Appropriate Authority means the Appropriate Authority appointed u/s 17;

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 sub-section (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 that 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 Counseling Centre, Genetic Laboratory or Genetic Clinic;
- (b) to enforce standards prescribed for the Genetic Counseling Centre, Genetic Laboratory and 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 sub-section (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 investigations 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 CSB 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.

5. The Central Government or the State Government, as the case may be, shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions, and shall appoint one of the members of the Advisory Committee to be its Chairman.

6. The Advisory Committee shall consist of--

- (a) three medical experts from amongst Gynaecologists, obstetricians, pediatricians and medical geneticists;
- (b) one legal expert;
- (c) one officer to represent the department dealing with information and publicity of the State Government or the Union territory, as the case may be;
- (d) three eminent social workers of whom not less than one shall be from amongst representatives of women's organisations.

7. No person who has been associated with the use or promotion of pre-natal diagnostic technique for determination of sex or sex selection shall be appointed as a member of the Advisory Committee.

8. The Advisory Committee may meet as and when it thinks fit or on the request

of the Appropriate Authority for consideration of any application for registration or any complaint for suspension or cancellation of registration and to give advice thereon:

Provided that the period intervening between any two meetings shall not exceed the prescribed period.

9. The terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee in the discharge of its functions shall be such as may be prescribed.

## 20. Cancellation or suspension of registration.-

1. The Appropriate Authority may suo moto, or on complaint, issue a notice to the Genetic Counseling 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 Counseling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the 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 Counseling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1).

## 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 Counseling 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 Counseling 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.

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.

## The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996

### 11. Facilities for inspection.-

1. Every Genetic Counseling Centre, Genetic Laboratory and 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 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 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.

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. 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 undertaking that it shall not undertake detection of sex of foetus or selection of sex before or after conception.

### 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 Counseling 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 Counseling 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.

2. A list of any document, record, register, book, pamphlet, advertisement or any other material object found in the Genetic Counseling Centre, Genetic

Laboratory, Genetic Clinic, Ultrasound Clinic or Imaging Centre 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 authorized 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.

3. One copy of the list referred to in sub-rule (2) shall be handed over, under acknowledgement, to the person from whose custody the document, record, register, book, pamphlet, advertisement or any other material object have been seized:

Provided that a copy of the list of such document, record, register, book, pamphlet, advertisement or other material object seized may be delivered under acknowledgement, or sent by registered post to the owner or manager of the Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic or Imaging Centre, if no person acknowledging custody of the document, record, register, book, pamphlet, advertisement or other material object seized is available at the place of effecting the seizure.

4. If any material object seized is perishable in nature, the Appropriate Authority, or the officer authorized in this behalf shall make arrangements promptly for sealing, identification and preservation of the material object and also convey it to a facility for analysis or test, if analysis or test be required:

Provided that the refrigerator or other equipment used by the Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre for preserving such perishable material object may be sealed until such time as arrangements can be made for safe removal of such perishable material object and in such eventuality, mention of keeping the material object seized, on the premises of the Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic or Imaging Centre shall be made in the list of seizure.

5. In the case of non-completion of search and seizure operation, the Appropriate Authority or the officer authorized in this behalf may make arrangement, by way of mounting a guard or sealing of the premises of the Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic Ultrasound Clinic or Imaging Centre, for safe keeping, listing and removal of documents, records, book or any other material object to be seized, and to prevent any tampering with such documents, records, books or any other material object.

9. The Appropriate Authority as defined under the statute is the one appointed U/ Sec. 17 of the Said Act. Sec. 17 empowers the Central Government or the State Government to appoint the Appropriate Authorities for the State or in respect of a particular area. In the present case, the appropriate authorities are appointed vide notification dated 11th September, 1997, 09th December 1997 and 16th

October, 2007. The notification dated 16th October, 2007 is in addition to the notifications of the year 1997. The notification dated 16th October, 2007 does not say that it is in supersession of the earlier notifications. Be that as it may, the appropriate authorities are notified by the State Government pursuant to the said notifications.

10. The moot question in the present petition is as to whether the order of suspension of registration and sealing is passed by the Appropriate Authority appointed under the statute. Perusal of the order, it is manifest that, the said order has been issued by the Medical Officer of the Municipal Corporation. Reading the notifications relied by the respondents it nowhere transpires that Medical Officers of the Municipal Corporation are notified and appointed as Appropriate Authorities within the meaning of Sec. 17 of the said Act. In the affidavit in reply filed by the respondent it is tried to be suggested that, though the Medical Officers issuing the said order of suspension of registration and sealing have signed same as Assistant Appropriate Authority, the same is misnomer. Actually they are validly appointed by the Government under the empowering section of the Act. Para 5 of the said affidavit in reply reads as under :

5. I say that the reference as Assistant appropriate authority mentioned in the order is inadvertent and does not render the order illegal or without authority. The order is issued by the appropriate authority, validly appointed by the government under the empowering section of the act. The order issued is perfectly legal and valid ad no exception can be taken. It is submitted that, the grounds raised in the petition do not deserve consideration.

11. The notifications relied by the respondents does not show that Medical Officers of the Municipal Corporation are the Appropriate Authorities. It is the Health Officer of the Municipal corporation who is the Appropriate Authority. The show cause notice dated 14.06.2012 is issued by the Health Officer of the Municipal Corporation who is an Appropriate Authority. It appears that, the hearing was conducted by the Appropriate Authority. However, the order appears to have been passed by the Medical Officers presuming that they are the Assistant Appropriate Authorities. There is no concept of Assistant Appropriate Authority under the statute. Medical Officers are not designated, nor notified or appointed as Appropriate Authorities in any of the notifications relied by the respondents. The Medical Officers have arrogated unto themselves the powers which are not vested in them. When a statute prescribes the Appropriate Authority, then the said Act has to be done by the Appropriate Authority only and by no other. In the present case, though earlier show cause notice is issued by the Appropriate Authority, the order is passed by the Medical Officers, who certainly are not the Appropriate Authority. The said order as such would be by a person who did possess any authority or jurisdiction under the statute to pass such order of suspension of the registration.

12. It is explicitly clear, the show cause notice was issued by the Appropriate

Authority. The explanation was tendered to the Appropriate Authority. The Appropriate Authority vide order dated 04.07.2012 directed the petitioner to submit upto 07.07.2012 an undertaking on bond of Rs. 100/- with regard to the clarification given by the petitioner and abruptly on 05.07.2012 the impugned orders are passed by the Medical Officers. It is a salutary principle that the person who conducts the hearing should decide. In the present case, the hearing has taken place before Health Officer i.e. an Appropriate Authority and the order is passed by the Medical Officers, who are not Appropriate Authorities under the statute. It would show that the hearing was only farcical. In the present matter, I need not go into those aspects, as the order is passed by the Medical Officer who is not an Appropriate Authority. Therefore, the said order deserves to be quashed on that count itself.

13. It has been submitted that, these Medical Officers are authorized under Sec. 30 of the said Act and Rule 11 and 12 of the Rules 1996 by the Appropriate Authority i.e. the Commissioner for the purpose of search, inspection and sealing. They are authorized for the purpose of sealing as contemplated U/Sec. 30 of the Said Act and Rules 11 and 12 of the Rules of 1996. It would appear that the order of suspension and sealing is issued by these Medical Officers on the premise that they are Assistant Appropriate Authorities. In the affidavit in reply it is suggested that they are Appropriate Authorities. In fact, by none of the notification as discussed above, they are designated or notified as Appropriate Authorities. It has been suggested that in the meeting dated 05.07.2012, the Commissioner has authorized them to be the authorized officers. The said office order dated 05.07.2012 states that in the meeting held on 05.07.2012 the Commissioner has appointed the squad under the Medical Officers to seal the sonography machines of the persons/medical practitioners named in the said order.

14. The said order is said to have been issued on 05.07.2012. The order suspending the registration and sealing is passed by the Medical Officer on the same day i.e. on 05.07.2012. It is contended that the Commissioner is also an Appropriate Authority and on his directions the said Medical Officers have sealed the sonography machines. The order passed by the Medical Officer sealing the machines does not depict that they have suspended the registration and sealed the machines on the orders of the Appropriate Authority. On the contrary the order of suspension of registration and sealing is issued by the Medical Officers in the capacity of the Assistant Appropriate Authority.

15. Even Sec. 30 of the said Act lays down that, if the Appropriate Authority has reason to believe that an offence under this Act has been or is been committed, then he may personally or authorize any officer in that behalf to examine the record, register, documents and seize and seal the same. Rule 12 of the Rules of 1996 also authorizes an Appropriate Authority or the Officer authorized in this behalf to enter and search at all reasonable time the said genetic counseling centre, ultra sound clinic, etc. and may seal and seize the record, register and

evidence or any other material therein, if there is "reasonable belief" that it may furnish evidence of commission of offence punishable under the Act.

16. "Reason to believe" or "reasonable belief" means coming to factual conclusion on the basis of information that a thing, condition, statement or a fact exists. Reason to believe contemplates an objective determination based on intelligent care and deliberation as distinguished from purely subjective consideration. The said expression is not synonymous to subjective satisfaction of the authority. It postulates belief and existence of reason for that belief. The belief has to be held in good faith. It cannot be a mere pretence. The reason for the belief must have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant for the purpose of the section.

17. In the present case, no such reasons are given. It does not transpire that sonography machines have been sealed upon the Appropriate Authority satisfying itself or having reason to believe that the said object i.e. sonography machines would furnish evidence of commission of offence punishable under the Act.

18. In normal course, I would not have entertained the petition and would have relegated the petitioner to avail the alternate remedy, however, as the impugned order is passed without authority and jurisdiction, I have entertained the petition in writ jurisdiction. In view of the above, the impugned order cannot be sustained and deserves to be quashed and set aside. The order dated 05.07.2012 (Exhibit - H) as such is quashed and set aside.

Rule is accordingly made absolute in above terms, however, with no order as to costs.