

(2018) 12 P&H CK 0026

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 977, 1311, 36185, 26068 Of 2016, 21014 Of 2017

Dr. Zoni Jain & Others

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision : 07-12-2018

Acts Referred:

Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 — Section 17, 17(1), 17(2), 17(3), 17(5), 17(3)(a), 17(1)(2)(5)

Citation : (2018) 12 P&H CK 0026

Hon'ble Judges : A.B. Chaudhari, J;H.S. Madaan, J

Bench : Division Bench

Advocate : B.B.S.Sobti, Ajaivir Singh, Yogesh Goel, Anurag Jain, Supriya Garg, Atul Nanda

Judgement

1) In the present petition the petitioners have put to challenge the action of the respondents in the matter of filing of the complaint for violation of the provisions of Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (57 of 1994) (in short 'the PNDT Act'), filed before the criminal Court on various grounds and against the order taking cognizance thereof.

2) The present petition along with other petitions were heard from time to time as the principal ground of challenge raised has been that the criminal complaint was filed before the criminal Court by the complainant Appropriate Authority consisting of only one member and not three members contemplated by Clause (b) of sub-Section (3) of Section 17 of the PNDT Act. According to the petitioners filing of the complaint by the Appropriate Authority itself was illegal and therefore, the complaint is liable to be quashed by this Court in these Criminal Writ Petitions.

3) There are several other grounds which have been taken in the present petition as well as other petitions to challenge the criminal complaint filed against the

petitioners. However, it is not necessary at this stage to go into those grounds for the reasons appearing hereinafter.

4) The principal ground, on which the aforesaid contention has been raised, is the Division Bench judgment of this Court in the case of Help Welfare Group Society versus The State of Haryana and others in CWP No. 21565 of 2011 decided on 18.09.2013. According to the learned counsel for the petitioners, the Government of Haryana has implemented the said judgment of this court by issuing appropriate notification. Similarly the Government of Punjab has recently issued a notification though during the pendency of the present petitions on 04.05.2018, constituting a multi-member Appropriate Authority for the other part of the State. The counsel for the petitioners, therefore, submitted that now there is no occasion for the State of Punjab to ask for review of the said judgment of the Division Bench of this Court.

5) On this proposition we do not agree with the learned counsel for the petitioners because this Court vide orders dated 30.09.2016, 18.11.2016 and had sought compliance of the said judgment by the Government of Punjab. Hence, the issuance of notification would not come in our way. Apart from that, the question of law that has been raised by learned Advocate General for the State of Punjab, is being considered by this Court and therefore, by mere issuance of notification, the plea of estoppel can not be pressed into service.

6) The counsel for the petitioners also argued that on similar type of grounds the learned Single Judges of this Court had quashed the complaint in similar type of matters and the judgment rendered by the Single Judges of this Court in those matters were put to challenge before the Apex Court and the Apex Court dismissed the special leave petitions. Again we are unable to agree with these submissions as perusal of the judgments of Single Judges does not show any consideration of the question that is being raised before us by the learned Advocate General for the State of Punjab.

7) It is in this context we are required to consider the contention raised by the learned Advocate General, Punjab as to whether the Division Bench judgment rendered by this court in Help Welfare (supra) requires reconsideration.

8) Mr. Atul Nanda learned Advocate General for the State of Punjab with his usual vehemence submitted that the Division Bench judgment in the case of Help Welfare (supra) decided on September 18, 2013, is based on interpretation of the provisions of Section 17 (1) to (3) & (5) of the PNDT Act. He submitted that the interpretation put by the Division Bench, by pressing into service the doctrine of purposive construction, is inappropriate. The principal argument raised by him is that un-amended Section 17 of PNDT Act and in particular sub-Section

(3) Clause (a) & (b) provided for a single member Appropriate Authority for the State or any part of the State. The authority for the State was to be of the rank of Joint Director of Health and Family Welfare. He then submitted that the provisions of Section 17(3) of the PNDT Act underwent amendment to the

Central Act w.e.f. 17.01.2003. As per the amendment Clause (a) of sub-Section (3) of Section 17 providing for appointment of the officer of or above the rank of Joint Director of Health and Family Welfare, was replaced by a multi-member Appropriate Authority of three members, to be constituted within three months for the whole of the State. In other words, one member Appropriate Authority for whole of the State was substituted by three members. But Clause (b) to sub-Section (3) of Section 17 of the PNDT Act, was retained as it was prior to the amendment, namely, that for "any part" of the State, officer of such other rank as deemed fit would be appointed. In other words, according to him though after amendment clause (a) underwent change, Clause (b) did not. It is in the above scenario, he contended that the doctrine of 'purposive construction' could not have been pressed into service. The learned Advocate General also relied on Handbook on Pre-Conception & Pre-Natal Diagnostic Techniques Act and Rules with Amendments published by Ministry of Health and Family Welfare, Government of India, 2006 and the interpretation made therein and in particular under the head "Implementing Authorities" on page 33 of the said handbook. The relevant portion of which reads thus:

"The State Government is required to appoint one or more Appropriate Authorities for the whole or part of the States having regard to the intensity of the problem of pre-natal determination of sex leading to female foeticide;

Under the amendments, a multi-member body has been provided as the State Appropriate Authority (or when appointed for the whole of the Union Territory) consisting of:

- 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.

Such authorities are to be constituted within three months of coming into force of the Amended Act and any vacancy occurring therein is required to be filled within three months of the occurrence.

Under the directions of the Supreme Court, Appropriate Authorities are to be appointed at District and sub-district levels as well. At the District level, the Chief Medical Officers or the Civil Surgeons have been designated as the Appropriate Authorities while at the sub-district level, the practice varies from State to State."

9) He also relied on a Single Bench decision by the High Court of Rajasthan, in the case of Dr. Ravi Mohan Mahawar versus State of Rajasthan & another, 2015 SCC OnLine Raj 8386. Finally, he submitted that the Division Bench decision in Help Welfare (supra) may be held per incuriam and/or if this Court finds it expedient, the issue may be referred to larger Bench.

10) Per contra, learned counsel for the petitioners in these various writ petitions

submitted that the said Division Bench decision, following rule of interpretation of the purposive construction, cannot be faltered. The reason given in the judgment itself is that multi-members or multi-member Authority would far better serve the ends rather than the Civil Surgeon alone being the Appropriate Authority. They also relied on a Single Bench judgment of the Madras High Court. Learned counsel for the petitioners contended that the larger public interest has been considered by the Division Bench in the *Help Welfare* (supra) and, therefore, the view taken by the Division Bench subserves the public interest and there is no need to make a reference as sought by the learned Advocate General. The learned counsel for the petitioners also argued on merits of the petitions but we are not inclined to consider those submissions, except the present question posed before us.

CONSIDERATION

11) We have heard learned counsel for the parties at length. We have seen the relevant provisions of the PNDT Act and the Rules. Section 17(1)(2)(5) reads thus:

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, of or above the rank of the Joint Director of Health and Family Welfare; and

(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 and Genetic Clinic;

(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action; and

(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.

(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.

12) The Division Bench of this Court in the case of *Help Welfare* (supra) recorded the following reasons:

"The question which arises for consideration is whether even where the appointment is for a part of the State or the Union Territory, it should be multi-member three member body or only single member body consisting of officer of such rank as the State Government may deem fit.

In our view, the purposive construction must be given to the said provisions and the intent to have a multi member body is not eschewed in Sub-Section

(b) when the appointment is for a part of the State or the Union Territory. We find it difficult to accept that if the appointment is for the whole of the State, it will be three member committee, while it is for part of State, it will be single member committee. The only change is that the Chairperson need not be of the rank of Joint Director of the Health and Family Welfare, but of such other rank as the State Government may deem fit. It will still continue to be a multi-member committee having an eminent woman representing women's organization and officer of the Law department of the State as a member.

xxx.... xxx.... xxx....

We are of the view that once we have come to the conclusion that the Appropriate Authority has to be a three member body, to ensure compliance of Section 17(5) of the said Act, it is the State Government which would have to constitute the Advisory Committee to aid and advise each Appropriate Authority and in turn if only names have to be filled in by the Appropriate Authority of the designated persons who have to act as Members of the Advisory Committee, the same can be done."

13) We have carefully seen the aforesaid reasoning given by the Division Bench of this Court. We also really understand the need for constitution of multi-member Appropriate Authority, like the one provided for by amended Clause (a) of Section (3) of Section 17 of the PNDT Act even qua Clause (b). The Division Bench pressed into service the doctrine of purposive construction for interpretation. We however note the following features:

i) The Apex Court in the case of *Shri Ram Krishna Dalmia & others versus Shri Justice S. R. Tendolkar and others*, AIR 1958 S.C. 538 (V 45 C 80), the relevant portion is reproduced as follows:

"(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate

grounds."

ii) It is a well settled legal position that the Parliament is supreme and as settled in the judgment of the Apex Court in the case of *Swedish Match Ab and another versus Securities & Exchange Board of India & another*, (2004) 11 Supreme Court cases 641, the relevant portion reads thus:

"52. It is a well-settled principle of law that where wordings of a statute are absolutely clear and unambiguous, recourse to different principles of interpretation may not be resorted to but where the words of a statute are not so clear and unambiguous, the other principles of interpretation should be resorted to."

It is significant to note the following chart showing amended and un-amended relevant provisions:

UN-AMENDED

AMENDED

CHAPTER V

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Appropriate Authority and

Appropriate Authority and

Advisory Committee

Advisory Committee

17.

Appropriate Authority

17.

Appropriate Authority

and Advisory

Committee.-

and Advisory Committee.-

(1) The Central Government

(1) xxx.... xxx.... xxx....

shall appoint, by notification

(2) xxx.... xxx.... xxx....

in the Official Gazette, one

or

more

Appropriate

(3) The officers appointed as

Authorities for each of the

Appropriate

Authorities

Union Territories for each of

under sub-Section (1) or sub-

the Union Territories for the

section (2) shall be,-

purposes of this Act.

(2)

The State

Government

(a)

when

appointed for the

whole of the State or the

shall appoint, by notification

Union Territory, consisting of

in the Official Gazette, one

the

following

three

or

more

Appropriate

members-

Authorities for the whole or

part of the State for the
(i)
an officer of or above
purposes of this Act having
the rank of the Joint
regard to the intensity of the
Director of
Health and
problem of pre-natal sex
Family
Welfare-
determination
leading to
Chairperson;
female foeticide.

(ii)
an
eminent
woman
(3) The officers appointed as
representing
women's
Appropriate
Authorities
organization; and
under sub-section (1) or sub-

(iii) an
officer
of
Law

section (2) shall be, -
Department of the State
(a) when appointed for the
or
the
Union Territory
whole of the State or the
concerned;
Union Territory, of or above
Provided that it shall be the
the rank of the Joint Director
of
Health
and Family
duty of the State of the
Welfare:
Union Territory concerned to
constitute multimember State
and
or
Union
Territory
level
(b) when appointed for any
Appropriate Authority within
three months of the coming
part of the State or the Union
into force of the Pre-natal
Territory, of such other rank
Diagnostic

Techniques
as the State Government or
(Regulation
and
Prevention
the
Central
Government, as
of Misuse) Amendment Act,
the case may be, may deem
2002: Provided
further
that
fit.
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."

iii) A bare perusal of the above chart shows and as rightly argued by learned Advocate General, that sub-Section (2) of Section 17 states that the appropriate authorities for the State and part of the State should be constituted having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide. Clause (a) of sub-Section (3) in the un-amended provision indicate that the officer to be appointed as Appropriate Authority under sub-Clause (a) for the whole of the State should be of or above the rank of Joint Director of Health and Family Welfare. Now a look at the amended provision and in particular Clause (a) will clearly reveal that amendment was made for replacing one member Appropriate Authority contemplated by three member Appropriate Authority; thus making the said Authority a multi-member Authority. The three members have also been stipulated therein.

iv) However a look at Clause (b) of un-amended provision shows that for "any part" of the State, the State could appoint officer of such other rank as it deemed fit. Had it been the will of the Parliament to have a three member Appropriate Authority, also for "part of the State", the same also would have been provided by way of amendment to Clause (b) as was done in Clause (a). This is clear and unambiguous and the Legislature was aware about it. Hence 'purposive construction' rule of interpretation could not have been adopted.

14) We thus find that what has not been provided by the legislature in Clause (b), cannot be inserted by the Court nay it is not the function of the Court to do so. We, therefore, respectfully differ with the view taken by the Division Bench in Help Welfare (supra) that even for the purpose of Clause (b) of sub-Section (3) of Section 17 of PNDA Act, there shall be multi-member Appropriate Authority consisting of three members.

15) The submission made by learned Advocate General that the decision in the case of Help Welfare (supra) is per incuriam, will have to be rejected outright. We are unable to agree with the said submission as the Division Bench in Help Welfare (supra) had noticed all the provisions and applied the interpretation as it deemed fit which does not mean that the said decision can be said to be per incuriam. In this connection we are inclined to follow the following ratio of Apex Court Judgment in the case of State of Bihar versus Kalika Kuer alias Kalika Singh & others, (2003) 5 SCC 448. The relevant portion reads thus : "10. Looking at the matter, in view of what has been held to mean by per incuriam, we find that such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature, is not the reason indicated by the Full Bench in the impugned judgment, while saying that decision in the case of Ramkrit Singh and Others versus State of Bihar and Ors, AIR 1979 Patna 250 was rendered per incuriam. On the other hand, it was observed that in the

case of Ramkrit Singh (supra) the Court did not consider the question as to whether the consolidation authorities are courts of limited jurisdiction or not. In connection with this observation, we would like to say that an earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the Court or more aspects should have been gone into by the Court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the latter bench of coordinate jurisdiction. Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits.

16) In view of the disagreement which we have indicated above, the Registry is directed to place the matter before Hon'ble the Chief Justice of this Court for making reference to the larger Bench.

17) It is made clear that since in all these petitions several other questions have been raised, we are not inclined to decide these petitions until the decision by the larger Bench, if any.