
(2013) 08 GUJ CK 0044

In the Gujarat High Court

Case No : Special Civil Application No. 6215 of 2011

Jashmina Dilip Devda

APPELLANT

Vs

State Appropriate Authority under P.N.D.T. Act and Another

RESPONDENT

Date of Decision : 05-08-2013

Acts Referred:

Citation : AIR 2014 Guj 28 : (2014) 1 GLH 265 : (2014) 1 GLR 99

Hon'ble Judges : Rajesh H Shukla, J

Bench : Single Bench

Advocate : Bharat T. Rao, for the Appellant; Bharat Vyas, A.G.P. for Respondent No. 1 and Nikhilesh J. Shah, for the Respondent

Judgement

Rajesh H Shukla, J.—The present petition has been filed by the petitioner under Arts. 226 and 227 of the Constitution of India as well as under the provisions of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and Rules made thereunder challenging the order passed by the State Appropriate Authority in Appeal No. 2 of 2011 dated 17-3-2011 on the grounds stated in the memo of petition. The facts of the case briefly summarised are that the petitioner is having hospital at Ahmedabad known as Dev Hospital, which is one type of Polyclinic having other doctors from other branches like Gynaecology, Physician and General Surgeon, who are also treating patient in the said hospital. The hospital of the petitioner has been granted registration under the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as the "P.N.D.T. Act") for carrying out such genetic counseling, pre-natal diagnostic procedure and pre-natal diagnostic test, which is valid upto 23-5-2015. One Dr. Ruchita Sharda, Gynaecology is also attending the hospital and the husband of the petitioner is also a doctor. It is the case of the petitioner that one Smt. Shilpa Punani of Wadhwan, District: Surendranagar had been admitted in the hospital of the petitioner on 10-9-2010 and she was advised to undergo ultra-sonography test, which was carried out and Form No. F was filled in by Dr. Ruchita Sharda. Sonography test revealed that foetus, which

is developing, was likely to be a mentally retarded child if it is allowed to grow. Therefore, as per the medical science and jurisprudence, advice has been given to the patient that foetus is not properly developed and there are chances of complication if it is allowed to give a birth to a child. Therefore, husband and family members of the patient agreed for termination of pregnancy and the operation was performed on 11-9-2010 after obtaining necessary consent and other formalities were completed.

However, one relative of Smt. Shilpaben serving in the office of the Hon''ble Chief Minister has misused the office and pressurised the office of the Health & Family Welfare Department to initiate action against the petitioner, which led to complaint by the official and they have visited the hospital and in violation of Rule 12, prepared the panchnama and seized the sonography machine and certain files of the hospital of the petitioner. Thereafter, same has been confiscated and seal has been applied and custody has been given to the petitioner. Therefore, the petitioner approached the authority, who after following procedure, passed impugned order. It is also contended that the Appropriate Authority without following procedure as prescribed under Secs. 20(1) and 20(2) of the Act passed an order of suspension of the registration of the petitioner dated 25-10-2010 produced at Annexure-D.

2. Heard learned Counsel, Shri B.T. Rao for the petitioner, learned A.G.P. Shri Bharat Vyas for the respondent No. 1 and learned Counsel, Shri N.J. Shah for the respondent No. 2.

3. Learned Counsel, Shri Rao referred to the provisions of Sec. 20 of the P.N.D.T. Act and submitted that provision of Secs. 20(1) and 20(2) of the P.N.D.T. Act clearly provide for the issuance of the notice and reasonable opportunity of being heard before passing order regarding suspension of the registration. Learned Counsel, Shri Rao submitted that as it has a consequence both civil as well as economic consequence and also it may affect the very profession of the petitioner, such an order could not have been passed in violation of principles of natural justice. Learned Counsel, Shri Rao submitted that though Sec. 20(3) of the P.N.D.T. Act provides in public interest to take action for the reasons to be recorded in writing, the present case would not be covered by such provision. He therefore submitted that having regard to the background of the facts that it was in the interest of the patient as well as foetus, which has not properly developed and if it was allowed to continue, it would have led to birth of retarded child. Learned Counsel, Shri Rao, therefore, submitted that as a member of medical profession, the petitioner and others are expected to guide the patient, and therefore, with the consent of patient and her family members and that too, after completing the formalities and the procedure, the operation was performed for termination of the pregnancy on 11-9-2010. Learned Counsel, Shri Rao referred to Annexure-B and also referring to patient history record-sheet and submitted that it is dated 10-9-2010 and it refers to Hydrocephalus. He has also referred to Annexure-C as well as Annexure-D dated 25-10-2010 and submitted that the

registration has been suspended in purported exercise of power under Secs. 20(1) and 20(2) of the P.N.D.T. Act. Learned Counsel, Shri Rao submitted that no notice has been given as required under law, which is mandatory requirement for compliance of the rules of natural justice. He submitted that admittedly no such notice or opportunity of hearing has been given, and therefore, such action is bad and illegal. He also referred to the order passed by the Appellate Authority dated 21-12-2010 produced at Annexure-F. He submitted that though the Appellate Authority has in terms accepted that no notice was issued as required under law, which was legally required to record the reasons before passing order and also the fact that licence has been suspended, the operative portion of the Appellate Authority does not satisfy the order and has merely directed to pass suitable order suggesting to fill in lacuna including the provisions of the law. He, therefore, submitted that the Appellate Authority has also adopted and has to perform its statutory duty as an authority and it has led to the present petition when the authority on the basis of such order of remand passed fresh order dated 29-12-2010 produced at Annexure-G, against which, Appeal was preferred, wherein the order came to be passed by the Appellate Authority rejecting Appeal, which has led to filing of the present petition. Learned Counsel, Shri Rao pointedly referred to the memo of Appeal as well as the order where the submissions are recorded. Again he emphasized that there is breach of the mandatory provision of law, which has not been followed. However, to fill in lacuna and justify the action, the order is passed in purported exercise of power under Sec. 20(3) of the P.N.D.T. Act. Further, the deficiency are mentioned, however, it may be a procedural lapse but it would not amount to violation of law, by which, harsh action of suspension of the registration and seal of the machine could be taken by the respondents. Learned Counsel, Shri Rao, therefore, submitted that it was incumbent upon the authority as well as appellate authority to first consider as to whether there is any violation of provisions of the Act, which would justify such action. Learned Counsel, Rao referred to the papers including the communication produced at Annexure-R-1 with affidavit-in-reply on behalf of the respondent No. 1 addressed by the patient. He also referred to the affidavit of the patient and also statement dated 27-10-2010 and submitted that affidavit is required to be considered closely as stamp paper is of Wadhwan and the name of the purchaser is of the patient herself, who is said to have purchased on 20th October, 2010. He submitted that though it has been denied, she has not consented for the operation nor does the paper bear signature, fact remains that it was on the basis of the medical exigency, she has been advised with full understanding, and therefore, the provisions of law would not be attracted. Learned Counsel, Shri Rao also referred to the provisions of Sec. 30 of the Act, which provides for "power of search and seizure, the record read with Rule 12 of the Rules. He submitted that Rule 12 provides for procedure for search and seizure. Learned Counsel, Shri Rao has referred to Rule 12 in detail and submitted that the procedure has to be followed and two independent witnesses are required to be kept present. Therefore, learned Counsel, Shri Rao submitted that how search is made unilaterally is not

mentioned.

4. Learned Counsel, Shri N.J. Shah for the respondent authority referred to the papers in detail including Page No. 33. He also referred to the facts as to how the hospital was visited and pointedly referred to the facts that the complaint was made, which was scrutinised and as there was a female foetus, termination was made resulting in this complaint for the alleged breach of the violation of provisions of law. He submitted that though, it has been stated that it could be a technical lapse in the maintainability of record and fill the form, it may not be accepted. He submitted referring to Sec. 5(2) of the Act that it was examination of the sex of a child, and therefore, underlying object of the Act is required to be considered. Learned Counsel, Shri Shah referred to the provision of Sec. 20(3) of the Act and submitted that it starts with Non-obstante clause and in the public interest, such order could be passed. Similarly, he referred to Sec. 30 read with Rule 12 and submitted that it empowers seizure and seal on such machine, and therefore, when it has been seized after following procedure including the witnesses, it cannot be said that the procedure has not been followed. He submitted that it may not be necessary to take technician. He therefore submitted that in view of underlying object of the Act, no lenient view could be taken. He has also referred to and relied upon the judgment of the Hon'ble Apex Court in case of P.K. Palanisamy Vs. N. Arumugham and Another, and pointedly emphasised the observations made in Para Nos. 28 and 29 and submitted that if the authority is empowered by the statute merely because there is no specific mention of a particular Section like Sec. 20(3) of the Act, the order may not be rendered illegal. He also referred to affidavit-in-reply at length and submitted that if the foetus was not developing well, it was life threatening, and therefore, the provisions of law could not have been contravened.

5. In rejoinder, learned Counsel, Shri Rao referred to the reference book of Ultrasonography in Obstetrics and Gynaecology by Peter W. Callen, M.D. produced at Annexure-R-4 along with the reply filed on behalf of the respondent No. 2. Learned Counsel, Shri Rao submitted that such provision has civil consequence and in case of such penal provision has to be considered directly and it has to be subject to the satisfaction of the authority. He submitted that before coming to any conclusion about the breach or provisions of law, it requires to be seen whether there is any justification. He again referred to the papers and submitted that when hydrocephalus is diagnosed and it is allowed to give birth to said foetus, there is chances and possibilities of retarded child, therefore, such termination of pregnancy cannot be a ground for punishing doctor, who has performed his duty as required in the medical provision. He further submitted that had he not advised or had he not accepted the decision of the patient for termination, he could not have been blamed in future. He submitted that there is no dispute that sonography reports are of the same patient in which it has been recorded specifically about hydrocephalus. Therefore, he submitted that the present petition may be allowed.

6. In view of these rival submissions, it is required to be considered whether the present petition can be entertained or not.

7. First aspect which is required to be considered is regarding the background of the facts. It transpires that the patient had travelled from Surendranagar (Wadhwan). Admittedly, the fact is that as required under the law and procedure, necessary form/writing for consent of patient for undergoing operation/surgery has been filled in. If the patient and/or her relatives were not willing, the pregnancy could not have been terminated, meaning thereby, the complainant and his family members of the patient have not accepted the medical advice and shown willingness for the surgery and thereafter cannot be heard to say that there is violation of provisions of the P.N.D.T. Act. This issue is also required to be considered in background of the medical science. The diagnosis of the foetus having Hydrocephalus at the time of sonography may have led to such a decision. Therefore, considering underlying object of Act that termination of pregnancy of the female foetus is required to be curbed and to achieve object in public interest, such Act has been made. However it cannot be stretched that even after medical opinion or medical diagnosis when there is possibility of either risk to the life or whether child to be born may have abnormality, such termination of pregnancy is not allowed or permitted. In fact on the basis of the right of privacy as well as human rights, patient, who is expected mother would be a best Judge or a person to have such decision guided by the medical science or opinion. Reference is made to the book of Ultrasonography in Obstetrics and Gynaecology by Peter W. Callen, M.D., which clearly provides that "Congenital hydrocephalus has generic implications". It is observed that "When hydrocephalus is diagnosed before viability, many parents may request termination of pregnancy. When this option is not accepted, and in those cases recognized later on in pregnancy, a thorough discussion of the possible choices with the couple is recommended. Many authors believe that delivery when foetal maturity is achieved and prompt neurologic treatment will maximise the chances of survival and normal development for the affected infants." Therefore, where there are possibilities of any abnormality of foetus which is allowed to develop may result in a child with low intellect causing major stress to the couple or mother, which one has to suffer could be avoided. Therefore, may be the object of the Act is laudable, but it has to be considered with background of the facts given in a case.

8. Moreover, as contended by the petitioner referring to the statutory provisions of Sec. 20 read with Rule 12, it is evident that before taking any such issue which involves Civil consequence, opportunity of hearing is required to be considered. However admittedly no opportunity has been given and no notice as required has been given, which would amount to denial of rules of natural justice. Though, in the reply, it has been contended that such a contention is vague, the fact remains that the provision of Secs. 20(1) and 20(2) of the Act has not been complied with which has led to earlier round of litigation and the order passed by the appellate authority in Appeal No. 5 of 2010 produced at

Annexure-F would clearly suggest that it has been observed that "Looking to the procedure adopted by the District Appropriate Authority, it would appear that the District Appropriate Authority has passed order under Sec. 20(1)(2) of the Act. The Appropriate Authority was required to issue a notice to the Genetic Clinic to show-cause as to why its registration should not be suspended for the reasons mentioned in the notice under Secs. 20(1) and 20(2) of the Act. No such notice was issued to the Genetic Clinic. The District Appropriate Authority was legally required to record the reasons and then to pass the appropriate order and that the District Appropriate Authority had to specify the period of suspension of the registration." This would clearly suggest that the procedure as required under Secs. 20(1) and 20(2) of the Act have not followed with regard to the issuance of the notice or the show-cause notice and the order of the District Authority could have been set aside in Appeal. The Appellate Authority while remanding and deciding this matter seeks to have suggested the District Authority to resort to Sec. 20(3), which provides as under:

Notwithstanding anything contained in sub-sees. (1) and (2), if the Appropriate Authority is of the opinion that it is necessary or expedient so to do in the public interest, if 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-sec. (1).

9. Thus, in order to have an explanation or way out for non-compliance, sub-sec. (3) is resorted that if for the reasons to be recorded in writing, it may suspend such cancellation without issuance of notice. Again before such power could be exercised, it has to be:

(i) in public interest;

(ii) reasons have to be recorded in writing justifying that it is necessary in public interest to suspend the licence without notice.

10. Therefore, merely by stating or suggesting that power is provided in sub-sec. (3) of Sec. 20, the case does not automatically fall under Sec. 20(3) nor it could be covered in such a manner. Admittedly, no reasons are stated and there is no public interest. If the underlying objects are to be seen in public interest then every case would be falling under that category of public interest and provision of Secs. 20(1) and (2) would be rendered redundant. Therefore, the Legislature has in a given circumstances kept the discretion open for the authority that such power could be exercised even without notice in a given case in a public interest subject to the reasons to be recorded in writing that is not the case herein, and therefore, the contentions raised by learned Counsel Shri Rao are required to be accepted on that count also.

11. The submission made by learned Counsel Shri Shah referring to the observations made by the Hon''ble Apex Court in case of P.K. Palanisamy (supra), more particularly, Paragraph Nos. 28 and 29 are misconceived. The submission that it is not the case of the petitioner that there is no power, and therefore,

patient has the power is there and the order cannot be set aside merely because the Section is wrongly mentioned or there was some lapse. In fact, this judgment would not have any application to the facts of the case and for issue involved in this, it has been given with reference to the interpretation of the provisions of the Code of Civil Procedure, 1908 and the issue is not that Section or the provision of the Act is wrongly quoted but the issue is that the procedure prescribed by the statute has not been complied with, and therefore, the reliance placed on the observation quoted in the aforesaid judgment, P.K. Palanisamy Vs. N. Arumugham and Another, in Paragraph No. 28 is misconceived. The issue is not with regard to the lack of power but the issue is with regard to the exercise of power in a given case subject to the compliance with the procedure like notice as contemplated under Secs. 20(1) and (2) of the Act.

12. Another facet of argument that in exercise of discretion under Arts. 226 and 227 of the Constitution of India, the High Court may not interfere with the order and the scope is limited is also misconceived. In fact when there is a breach or violation of the provisions of the statute requiring compliance with the rules of natural justice, it is rather obligatory for the High Court to set aside such order and it cannot be sustained. A useful reference can be made to the judgment of the Hon"ble Apex Court in case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, . Therefore, the present petition deserves to be allowed. In the circumstances, the present petition stands allowed in terms of Para Nos. 21(A) and 21(AA). The impugned order passed by the respondent No. 1 in Appeal No. 2 of 2011 dated 17-3-2011 confirming the order passed by the District Authority dated 29-12-2000 is hereby quashed and set aside. Rule is made absolute. No cost.