
(2014) 11 BOM CK 0015

In the Bombay High Court

Case No : Criminal Writ Petition No. 680 of 2012 and Criminal Application No. 2541 of 2013

Prabhakar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 05-11-2014

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 482

Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 — Section 18, 19, 2(d), 20, 20

Citation : (2014) 4 BomCR(Cri) 700

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : S.B. Talekar and S.S. Rathi, Advocate for the Appellant; A.S. Shinde, Additional Public Prosecutor, Advocate for the Respondent

Judgement

T.V. Nalawade, J.—The first proceeding is filed under Section 482 of the Code of Criminal Procedure and under Article 227 of the Constitution of India. Relief to set aside the order of issue process made in Regular Criminal Case No. 73/2011 is claimed and the relief of quashing of the proceeding filed as a complaint by the public servant, authority under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as "the Act") is claimed. The proceeding is pending before the Judicial Magistrate, First Class, Omerga, District Osmanabad and it is filed under sections 23, 25, 29 of the Act and under Rule 9(4), (6) and (8) of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereinafter referred to as "the Rules"). Criminal Revision Application No. 9/2011 was filed against the order of issue process by the petitioners in Sessions Court but the revision is dismissed by the Sessions Court and so that decision is also challenged. Relief of getting custody of sonography machine seized by the authority is also claimed as a consequential relief. No interim custody was

claimed before the Judicial Magistrate by the petitioners. Both the sides are heard.

2. Petitioner No. 1 owns and runs one hospital at Omerga and the petitioner No. 2 works as a Radiologist in the hospital. The hospital has a registered sonography centre. On 19-6-2011 the authority created under the Act visited the hospital for inspection and the sonography center was also visited and inspection was done. After finding discrepancies and irregularities in the record which is required to be prepared and maintained in Sonography Centre, the sonography machine came to be seized. Complaint then came to be filed for the aforesaid offences.

3. It is the case of the complainant that Forms "F" which are required to be prepared and maintained by the Sonography Centre were not complete. It is contended that consent forms which are required to be obtained from the pregnant women were also not complete. It is contended that even when no pregnant woman was subjected to diagnosis by the hospital, when there was no record of reference, sonography of many pregnant women was done at this centre. It is contended that Dr. Prabhakar Tawshikar who was in-charge of the hospital had not referred the patient and he denied that patients were referred by him to the centre. On many forms his name was mentioned as the doctor who had referred the patient. Some forms were found blank and they were not having paging number. More particulars of the irregularities and discrepancies are given in the affidavit filed by the complainant in reply to the present proceeding.

4. In reply it is contended by the authority that in Forms "F" which are at Sr. Nos. 1 to 74, the name of the doctor who referred the patient to the centre was subsequently added as the record collected was virtually filled subsequently and different ink was used. It is contended that column 13 of Form "F" was not complete and the centre ought to have mentioned that this column was not applicable if it was not applicable. It is contended that column Nos. 5 and 6 were not filled. It is contended that in the forms at Sr. Nos. 1 to 75 column Nos. 14 and 19 were not filled. Model form dully filled, is attached with the affidavit by the complainant. It is specifically contended that the form Nos. 75 to 408 were filled without examining the patients in the hospital. It is contended that in respect of Form Nos. 75 to 408 there were no referral slips. It is contended that computerized record of the patients shown in Form "F" at Sr. Nos. 1 to 75 were not authenticated by the doctor when such authentication needs to be done as per the rules. It is contended that consent form No. 153 which is in respect of the period 17-1-2011 to 30-1-2011 is blank. It is contended that consent form at Sr. Nos. 154 bears thumb impression but the thumb impression is not attested. This Court has seen the copy of form which needs to be supplied to the patient which is at Sr. No. 154 in respect of Usha Pahune. It is still present in the form book and it was not supplied to the patient as required by law. It is contended that thumb impression of Mangal Pujari, patient from Form No. 194 is also not attested. It is contended that similarly thumb impressions appearing on Form "F"

at Sr. No. 11 and 71 which are for the period from 1-4-2011 to 18-6-2011 are not attested. Similar contentions are made in respect of forms at Sr. Nos. 8, 16, 18, 21, 22, 25, 28, 33, 38 and 45 and they are in respect of the period from 2-1-2011 to 17-1-2011.

5. It is the case of the complainant that attestation is compulsory as form needs to be complete in every respect. There is allegation in respect of Form No. 60 which is for the period from 1-4-2011 to 18-6-2011 that it does not bear date. It is the contention of the complainant that column Nos. 12, 14, 15, 17 to 19 need to be filled as they involve future outcome, the result of diagnosis.

6. It is the case of the petitioners that no show cause notice was issued under section 20 of the Act and as no opportunity was given to explain the things, the complaint could not have been filed. It is contended that the order of issue process is not reasoned order and on that ground also it is liable to be set aside. It is contended that the petitioners have complied with the provisions of the Act and the Rules and no form was incomplete. It is contended that the centre was used as sonography centre only and no invasive procedure was involved and so other columns of the relevant forms were not filled. It is contended that there was no specific direction from the authority to attest the thumb impressions. It is contended that as the record was computerized there was no signature of the doctor and so on some forms there was no such signature. It is contended that the sonography centre was under the roof of one hospital and both these institutions were being run by the members of the same family and so referral slips were not maintained. It is denied that Dr. Tawshikar had denied that he had referred the patients to the sonography centre. It is contended that due to oversight there were some blank pages of consent forms and that does not amount to commission of offence.

7. It is the case of the petitioners that as the registration of the centre cannot be cancelled without giving notice under section 20 of the Act, the prosecution could not have been launched without giving such notice and without seeking explanation. It is the contention that the complainant himself was trapped subsequently in a corruption case and his action was mala fide and there is professional rivalry behind the complaint. It is also contended that subsequent to the inspection, new Form "F" was created with effect from 1-1-2014 and separate portion like portion C is created for invasive procedure and that shows that other columns of Form "F" need not be filled by the Sonography Centre, Ultra Sound Clinic.

8. This Court has gone through the original record of the forms and register. The contentions made in the complaint and the reply given by the complainant in this proceeding are apparently correct and there are such discrepancies in the record.

9. The second proceeding is filed under provision of Section 482 of the Code of Criminal Procedure for quashing of the proceeding bearing Regular Criminal Case No. 573/2012 filed by the authority under the Act for offences punishable under

section 23, 25 and 29 of the Act and the relief of setting aside the order of issue process made by the learned Judicial Magistrate First Class is also claimed. Criminal Revision No. 8/2013 was filed by the applicant to challenge the order of issue process in Sessions Court Latur and the revision is dismissed. Said decision is also challenged in the present proceeding.

10. In Regular Criminal Case No. 573/2012 it is contended by the authority that accused - Dr. Smt. Kamla owns Toshniwal Hospital at Latur and there she has the sonography centre. Information was received by the authority that some record was burnt by the hospital and then the authority paid visit to the centre on 14-6-2012. The authority found discrepancies in the record like Form "F". Form dated 7-6-2012 was not signed by the doctor. There was over writing on the dates mentioned in the Form "F" at Sr. Nos. 42, 45, 110, 113, 114 and 117 and the consent forms and declarations were not complete and many columns were kept blank. The declarations were also not bearing signatures of the doctor. In the affidavit filed by the complainant, particulars regarding contraventions of the provisions of the Act are given. It is contended that, information was received that one illegal abortion was caused as the lady who was having three daughters had again conceived and she was having female foetus. The case of termination of pregnancy is also registered against this accused/applicant. In this case submissions were made which were similar to the submissions made in the first proceeding and it was also submitted that on consent forms, declarations, the doctor had signed but those forms were handed over to the pregnant women and only on the forms which remained with the centre the doctor did not sign due to oversight. The argument was advanced that till 5th day of next month report needs to be sent to the authority and so there was some time with the accused but before that, action was taken. This Court has perused copies of aforesaid forms and record. The record shows that there is substance in the contentions made by the authority. There is one more additional circumstance like detection of case of illegal abortion against this accused.

11. The submissions made by the learned counsel for the petitioners that in such case prosecution cannot be launched without issuing notice under section 20 of the Act is not at all acceptable.

12. This Court has carefully gone through the scheme of the Act. The provisions of Sections 18 to 20 are for different purpose and they relate to exercise of the powers by the authority to issue registration certificate or to cancel registration certificate. The power to inspect Ultra Sound Clinic is given under section 30 to the Appropriate Authority and it is a separate power. Action like the present action is taken by exercising the power under section 30 of the Act and under Rule 12 of the Rules. These provisions do not show necessity of issuing notice under section 20 of the Act. This Court holds that there was no need of issuing notice under section 20 of the Act before launching of the prosecution for the aforesaid offences.

13. For ascertaining as to which record needs to be created and maintained and

which columns of the form need to be filled by the owner of the Ultra Sound Clinic and by the persons conducting the procedure, the relevant provisions of the Act and the Rules need to be seen. The relevant provisions of the Act are Section 2(d), (i), (k), Sections 4 and 5, they are as under:-

"2. Definitions.-- In this Act, unless the context otherwise requires,-

(d) "Genetic Clinic" means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedures.

Explanation.-- For the purposes of this clause, "Genetic Clinic" includes a vehicle, where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, is used."

"(i) "pre-natal diagnostic procedures" means all gynecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo blood or any other tissue or fluid of a man, or of a woman before or after conception, for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception."

"(k) "pre-natal diagnostic test" means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases."

"4. Regulation of pre-natal diagnostic techniques.-- On and from the commencement of this Act--

(1) no place including a registered Genetic Counseling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3);

(2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:-

(i) chromosomal abnormalities;

(ii) genetic metabolic diseases;

(iii) haemoglobinopathies;

(iv) sex-linked genetic diseases;

(v) congenital anomalies;

(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

(3) no pre-natal diagnostic technique shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely:-

(i) age of the pregnant woman is above thirty-five years;

(ii) the pregnant woman has undergone two or more spontaneous abortions or foetal loss;

(iii) the pregnant woman had been exposed to potentially teratogenic agents such as, drugs, radiation, infection or chemicals;

(iv) the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;

(v) any other condition as may be specified by the Board:

Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultrasonography;

(4) no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purposes specified in clause (2);

(5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both."

"5. Written consent of pregnant woman and prohibition of communicating the sex of foetus.--(1) No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless--

(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;

(b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and

(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.

(2) No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs, or in any other manner."

14. The learned counsel for petitioner No. 2 of first proceeding submitted that as he is not the owner of the ultrasound clinic, the provisions with regard to creation

and maintenance of the aforesaid record cannot be used against him. For considering this defence, the aforesaid provisions [viz. section 5(1)(a)] and some more rules need to be considered. In rule 2(b) of the Rules, definition of "employee" is given as under:-

"(b) "employee" means a person working in or employed by a Genetic Counseling Centre, a Genetic Laboratory or a Genetic Clinic or an Ultra Sound Clinic or Imaging Centre, and includes those working on part-time, contractual, consultancy, honorary or on any other basis."

In rule 4 nature of undertaking required to be given by the person applying for registration is given. Reading of this rule shows that such certificate is to be used only as per the contents of the certificate. Rule 9 provides for maintenance and preservation of record in respect of persons who come for diagnosis and this record is to be created to enable to identify the person who had come to the centre for sonography. Rule 9(4) shows that Form "F" need to be filled and it runs as under:-

"9. Maintenance and preservation of records.--

(4) The record to be maintained by every Genetic Clinic including a Mobile Genetic Clinic, in respect of each man or woman subjected to any pre-natal diagnostic procedure/technique/test, shall be as specified in Form F."

Rule 9(6) runs as under:--

"(6) All case-related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved by the Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic, Ultra Sound Clinic or Imaging Centre for a period of two years from the date of completion of counseling, pre-natal diagnostic procedure or prenatal diagnostic test, as the case may be. In the event of any legal proceedings, the records shall be preserved till the final disposal of legal proceedings, or till the expiry of the said period of two years, whichever is later."

Rule 9(8) runs as under:-

"(8) Every Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centres shall send a complete report in respect of all pre-conception or pregnancy related procedures/techniques/tests conducted by them in respect of each month by 5th day of the following month to the concerned Appropriate Authority."

15. Submission was made that record can be created before 5th of next month as report needs to be sent during this period and so there was time to correct the things. In view of the aforesaid sections and rules the record needs to be created immediately at Ultra Sound Clinic and it needs to be completed before leaving of the patient with the report regarding diagnosis though report to authority needs to be sent before 5th of next month. Thus, the provision of Rule

9(8) of the Rules cannot be used as the defence in such a case.

16. Another submission is made that as computerized record was maintained, rule 9(7) needs to be used. This rule shows that when there is computerized record, printed copy is to be taken and preserved after authentication by the person responsible for such record. Such authentication and signature are missing.

17. Rule 10(1) and 10(1-A) are as under:-

"10. Conditions for conducting pre-natal diagnostic procedure.-- (1) Before conducting preimplantation genetic diagnosis, or any prenatal diagnostic technique/test/procedure such as amniocentesis, chorionic villi biopsy, foetoscopy, foetal skin or organ biopsy or cordocentesis, a written consent, as specified in Form G, in a language the person undergoing such procedure understands, shall be obtained from her/him.

"(10-A) Any person conducting ultrasonography/image scanning on a pregnant woman shall give a declaration on each report on ultrasonography/image scanning that he/she has neither detected nor disclosed the sex of foetus of the pregnant woman to any body. The pregnant woman shall before undergoing ultrasonography/image scanning declare that she does not want to know the sex of her foetus."

18. These two rules show that declaration form needs to be obtained if pre-natal diagnostic technique, procedure is to be conducted. The taking of such declaration is necessary when there is no invasive procedure. In the present case Form "F" is shown to be prepared by accused as per section 4(3) and rule 9(4) and Rule 10(1-A). In this form there is no printed declaration of pregnant woman as required by Rule 10(1-A). It appears that separate declaration and consent form which is also titled as Form "F" is maintained. A book of the form is seen by this Court. Even if this record is considered and accepted as annexure to the Form "F" maintained in the register, they need to be complete in every respect including for the purpose of declaration. Under the law, such declaration needs to be made in Form "F" itself.

19. The wording of section 5 shows the procedure that needs to be followed for conducting of pre-natal diagnosis. However in section 5(1)(b) the term "prescribed" is used in respect of consent form of pregnant woman. In rule 10 and in Form "G" prepared under rule 10 it is made clear that this form is applicable to invasive techniques. In view of clause (c) of section 5 it needs to be presumed that written consent of pregnant woman is necessary when invasive procedure needs to be used. When no invasive procedure is to be used and when it is to be done without invasive procedure by using ultra sound machine, only declaration as required in rule 10(1-A) as mentioned in Form "F" of section 4(3) needs to be obtained from the pregnant woman. Submissions made in this regard by the learned counsel need to be accepted. However, the record needs to be seen to ascertain as to whether at least the declaration was complete as per

the requirement. These provisions also show that person using the procedure needs to give declaration and so he is also involved in creation and maintenance of record.

20. For interpretation of the provisions of the Act and the Rules, learned counsel for the petitioners has placed reliance on following four cases decided by this Court (Aurangabad Bench):--

- (1) Criminal Writ Petition No. 232/2012 (Satyaprem v. the State of Maharashtra), decided on 11th September 2014;
- (2) Criminal Application No. 3500/2011 (Dr. Alka Gite v. The State of Maharashtra), decided on 11th May 2012;
- (3) Criminal Application No. 3044/2012 (Dr. Pratidnya Jayesh Shinde v. Appropriate Authority), decided on 4th December 2013; and,
- (4) Criminal Application No. 2065/2012 (Dr. Pradip Prabhuappa Dama v. The State of Maharashtra), decided on 28th January 2014.

21. In the first case, the Court considered Form "F" which needs to be used from 31st January 2014 and observed that there are separate requirements in respect of maintenance of record for Ultrasound Clinic not using invasive technique and genetic test using invasive procedure. The Court further found that the allegations were very vague in nature and gave relief to the accused. In the second case there were referral letters. This Court held that flimsy mistakes can be ignored and relief was given to the accused in the second case also. In the third case there was allegation that the record was not properly maintained. As the allegations were found baseless, relief was given to the accused. In the last case, this Court held that there was no allegation against the applicant and the shortcoming or deficiency in maintaining the record could not be attributed to him.

This Court is avoiding to discuss more the reasons given. The relevant provisions which are quoted above, were not considered and discussed.

22. For the State, the learned Additional Public Prosecutor has placed reliance on the following cases:--

- (1) Dr. Sujit Govind Dange Vs. State of Maharashtra and Others, ;
- (2) Suo Motu Vs. State of Gujarat, ;
- (3) Criminal Application No. 4513/2012 (Dr. Harsha Patil v. The State of Maharashtra) decided by this Court (Aurangabad Bench) on 4th December 2013;
- (4) Dr. (Mrs.) Suhasini Umesh Karanjkar, through her Constituted Attorney Dr. Umesh Murlidhar Karanjkar Vs. Kolhapur Municipal Corporation and The District Collector, ;
- (5) Criminal Application No. 3966/2013 (Dr. Nirmala Bajaj v. The State of

Maharashtra), decided by this Court (Aurangabad Bench) on 9th May 2014; and, (6) Criminal Writ Petition No. 5 of 2013 (Dr. Vinayak Khedkar v. The State of Maharashtra), decided by this Court (Aurangabad Bench) on 9th May 2014.

23. In the first case, the Division Bench of this Court has discussed the provisions of sections 4, 5, 6 and 20 of the Act and it is laid down that if there is deficiency or inaccuracy in the record, that amounts to contravention of sections 5 and 6 unless contrary is proved by the doctor/person conducting ultrasonography. Thus the defence of the accused in such case can be considered during trial. The Court has made it clear that the Act does not distinguish discrepancy as minor or major and in view of the object behind the provisions they need to be strictly complied with. In the second case, the Full Bench of Gujarat High Court has made similar observations and has laid down that such defence can be considered only during trial. In the fourth case the Full Bench of the Bombay High Court at paragraphs 14 and 24 has made similar observations. It is made clear by the Full Bench that if there is contravention in respect of maintenance of record and the persons conducting the process do not maintain necessary record complete in every respect that contravention amounts to offence. Though different point was involved in the matter pending before the Full Bench, the relevant provisions are discussed by the Full Bench even from the angle of commission of offence. In the last two proceedings, this Court refused to quash the proceeding by relying on the observations made by the Division Bench of this Court and the Full Bench of the Gujarat High Court, cited *supra*.

24. While interpreting the provisions and considering the prayers made in the proceedings like present one, the object behind the special legislature needs to be kept in mind. The object is to prohibit use of pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Pre-natal diagnostics techniques like sonography are useful for detection of sex. They can be used also for detecting disorders in the foetus. In view of the possibility of use of this technique for determination of sex and then for termination of pregnancy of unborn child, the aforesaid provisions are made. Sale of ultrasound machines to persons not registered under the Act (rule 3-A of the Rules) is prohibited. The study made by Population Research Centre Pune (PRC) shows that most of the bodies like Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic, Imaging Centre are registered in Maharashtra and there are maximum number of sonography Centers in Maharashtra. More than 60% of such bodies are ultrasound clinics. The studies have revealed that the pre-natal diagnostic techniques are easily available in sonography centres for sex determination. The cases registered in Maharashtra show that these centers are being misused. Due to misuse of the centres the sex ratio has come down alarmingly in Marathwada region and by the end of year 2012 the ratio of female child birth had got down below 800 in most of the Districts of Marathwada. Only when the authority started making inspection and the cases were registered for causing illegal abortion, the female birth ratio improved and it has now crossed

900 in this region.

25. When there is object like the object behind the present Act, the provisions need to be strictly implemented. It can be said that no sufficient powers are with the authority and powers need to be given to the authority to do sample checking of such cases to ascertain as to whether pregnant woman opted to undergo abortion and then, the Act will become more effective.

26. In view of the discussion made above, this Court has no hesitation to observe that for ensuring effective implementation of the aforesaid provisions strict compliance of the aforesaid provisions needs to be made. Thumb impressions need to be attested as it involves identification of pregnant women. The declaration form needs to be signed by the doctor conducting procedure also as the things are required to be explained to pregnant woman by the doctor. Referral slips need to be maintained and preserved and unless it is self referred case the person conducting processes and the persons who own the Centre need to insist for production of referral slip and if it not done it needs to be presumed that there is contravention of the provisions. Blank pages of forms cannot be kept in the book as it gives opportunity for creation of record subsequently. If record is not created and maintained as per aforesaid provisions, the Court has to go with the presumption that there is contravention of the provisions and the offence is committed unless the accused rebuts the presumption. In view of the facts of both the cases this Court has no hesitation to hold that the Magistrate has not committed error in ordering issuance of process. Thus there is no possibility of quashing of the proceedings filed against the applicants. As the offence is committed, there is no question of release of sonography machine in the first case. It is up to the authority to take decision on the permission given for the use of the machine and unless there is permission, the accused cannot be allowed to get the custody of the machine. It is open to the authority to make appropriate order in that regard.

27. In the result, both the proceedings stand dismissed.