
(2011) 11 BOM CK 0014

In the Bombay High Court

Case No : Writ Petition (L) No. 1939 of 2011

Radiological and Imaging Association (State Chapter)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-11-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21

Citation : (2012) 2 BomCR 115 : (2012) 114 BOMLR 150 : (2012) 1 MhLj 935 : (2012) 1 RCR(Civil) 795 : (2012) 1 RCR(Civil) 795 : (2012) 1 RCR(Criminal) 22 : (2012) 1 RCR(Criminal) 22

Hon'ble Judges : P.B. Majmudar, J;Mridula Bhatkar, J

Bench : Division Bench

Advocate : Anita Bhaktwani, for the Appellant; A.M.Sethna for U.O.I., Mr. N.P. Pandit, AGP for Res. 2 and 5, Ms. Gharpure for BMC and Mr. Uday P. Warunjikar for Intervener, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Majmudar, J.—Rule.

2. Rule returnable forthwith. With the consent of the parties the petition is heard finally at the stage of admission.

3. This petition is filed by Radiological & Imaging Association (State Chapter) challenging the decision dated 28/7/2011 taken by the Appropriate Authority i.e. the Medical Health Officer of Dahisar Ward. The petitioner has also prayed that Respondent nos.2 to 5 may be directed to frame appropriate guidelines as regards the circumstances and manner of sealing the machinery and the modus operandi for removal of the seal by way of clarification of the provisions of Section 30 of the Pre-Conception and Pre-Natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 2003 (Act 14 of 2003)(for short PC-PNDT Act). According to the petitioner, when the portable ultra sound Sonography machine is permissible for treating the patients, direction given by the Officer restraining the members of the Petitioner-Association from taking the machine out of the

premises of the institution is arbitrary, illegal, and in violation of Articles 14 and 21 of the Constitution of India.

4. On behalf of the petitioner, learned counsel Ms. Bhaktwani vehemently argued that portable sonography machine is available in view of the modern technology. A patient whose physical condition is serious and if he is unable to travel immediately to the hospital, he can get the medical benefit immediately, if he is subjected to sonography in a given case at his residence. It is submitted that it is not open for the Authority to restrict the portable sonography machine as according to her sonography machine is meant for taking it from one place to another like a laptop. Learned counsel further vehemently submitted that such type of restriction is de-hors the provisions of PC-PNDT Act, 1994. It is submitted that in a given case there may be a patient who may not be pregnant lady and in such case also it is necessary to do sonography of such patient and if there is restriction on the movement of a portable sonography machine such patient will be deprived of getting the benefit of sonography immediately. It is submitted that the restriction is based on an apprehension of misuse of such portable machine, however, such misuse is possible in the clinic itself. It is submitted that the impugned communication is not consistent with the provisions of law. The restrictions imposed are without any authority of law and in view of the same the impugned communication is required to be set aside and this Court may ask the concerned authority to frame the guidelines in this behalf. Union of India as well as the State of Maharashtra should frame the guidelines in this behalf and they should frame appropriate policy decision regarding the sealing of all sonography machines.

5. Mr. Sethna, learned counsel appearing for Union of India submitted that the concerned officer of the Corporation has taken correct decision by restricting the transportation of such ultra sound sonography machine out side the said Institute as according to him if such transportation is permitted, there is every chance of such machines being misused with a view to find out the sex of the child in the womb. It is submitted by Mr. Sethna that so far as the sonography is concerned, it cannot be said that the patient cannot go to a particular hospital or clinic for getting done the sonography and it is not such an urgent thing that the patient cannot wait. It is submitted that there is likelihood of misuse if sonography machine is required to be taken out side the Institute or the Hospital as in a given case it will not be possible for the authority to monitor this aspect and such machine if taken to the residence of a patient or a pregnant lady for determination of sex of a fetus, and it comes to the knowledge of such lady, there is every possibility that it may result in removal of female fetus by termination of pregnancy. It is submitted that considering the provisions of the Act such prevention is justified to prevent such abuse. The submissions are on the basis of the instructions received by him from the Ministry of Health and Family Welfare.

6. Mr. Pandit, learned AGP, vehemently opposed the petition. It is submitted that

there are all chances of misuse if the portable sonography machine is allowed to be taken out of the Institute and if there is some apprehension that the machine is likely to be misused, there is nothing wrong on the part of the concerned officer who issued such communication.

7. Mr. Warunjikar appearing for newly added respondent no.5 who is social worker and member of National Level Monitoring Committee established under the Act, argued that, if such portable sonography machine is allowed to be taken out of the Institute there is great danger of it being misused. He states that in the city of Mumbai sex ratio of male and female has come down by 30% in last 10 years and now the actual ratio is 1000 boys and 880 girls. It is submitted that it is in the interest of the society that this portable sonography machine should not be allowed to be misused as some may take disadvantage of such a machine only with a view to identify the sex of the child in womb.

8. We have heard the learned counsel at length. The principal question which is required to be considered is "whether the direction issued by the concerned officer at Page -74 is required to be interfered with by this Court and as to whether such direction is justified or it will infringe the fundamental rights of the Petitioner-Association ?"

9. At this stage reference of provisions of PC PNDT Act, 1994 is required to be made. At the time of amending the Act the relevant provisions of the Act are amended as follows.

Amendment Act 14 of 2003-Statement of Objects and Reasons

1. The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the fetus leading to female feticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.

2. The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc.. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the fetus and to terminate the pregnancy of the unborn child if found to be female. Techniques are also being developed to select the sex of child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of the woman.

The impugned order is pertaining to the institute is covered under the definition of "Genetic Clinic", which reads as follows.

"Genetic Clinic" means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedure. 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 fetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, is used;

10. It is required to be noted that it is a very sorry state of affairs that even today in our country people are trying to undertake the determination of sex of the child in womb. Unfortunate tendency is going on in various parts of the country to discourage the birth of female child. No society can exist without a woman and for the growth of the human race and nation men and women both are equally important. It may be true as argued by the counsel for the petitioner that even if few bad elements in the society who are indulged in such activity of sex determination and removing fetus from the womb, the axe should not fall on all. However, it is required to be noted that the only scientific way which will be available to cut the possible abuse is by enacting proper law, rules and guidelines in that behalf. Possibility cannot be ruled out of misuse of such machine if it is taken out of the Institute for the sole purpose of sex determination in the womb. It is required to be noted that ultra sonography is a diagnostic technique which utilizes sound waves and reflections. It is not a medicine and the said machine does not provide any treatment to the patient. Considering the same, in our view in a case where a patient cannot wait till he is taken to the particular clinic for sonography and the portable machine has been taken to this residence, the possibility of evil and misuse cannot be ruled out. In our view, if the society is fully made conscious and change in attitude takes place to forget the distinction between male and female, till then all remedial measures are required to be taken to curb the misuse of modern technology which is likely to be misused to achieve the dishonest and illegal purpose. It may be true as argued by the counsel for the petitioner that even in an Institute also there are possibility of such misuse of sonography machine. So far as the hospitals are concerned, even if a particular doctor is doing illegal activities, it is at his own risk and appropriate data is available in such a case which cannot be possible if the machine is taken out of the principal place.

11. Considering such aspect, in our view the direction issued by the Authority is in consonance with the provisions of the Act and only with a view to prevent possible misuse of such machine. It cannot be disputed that such a machine can be utilized for prenatal diagnosis even at the place where the machine is taken outside the clinic. It is required to be noted that ultra sonography is one of the prenatal diagnosis technique as prescribed under the Act. As pointed out earlier, unfortunately there are cases where such techniques are being misused to detect sex of the fetus and termination of pregnancy of unwanted female child. In our view even if there is only one case out of millions this Court may not interfere with such a policy decision which in our view is the most scientific and in the interest of the society. Considering the said aspect, it cannot be said that any fundamental right either under Article 14 or 19 is violated as the Petitioner-Association can carry out its activity within the Institute itself and at the

recognized place. The restriction imposed by the concerned officer is the most reasonable and in public interest and does not violate the fundamental right of the petitioner in any manner. Ultimately the public interest at large is required to be taken into account and the decision taken by the concerned officer is in consonance with the provisions of the Act.

12. The MHO, an appropriate, authority under the Act has issued these directions under sections 17 and 17-A of the Act in respect of implementation of the Act. Thus, the directions are issued by the MHO on the basis of his experience and the collection of data of the instances he had come across of the mis use of the ultra sound sonography machine. In the notice, MHO has mentioned that the movement or shifting of the said machine is not permissible. For the purpose of understanding the word " institute" we have to refer the definition of Genetic Clinic u/s 2(d) (supra). Thus, the movement of the machine is prohibited qua Act. It is to be noted that the State and the Appropriate Authority are taking various steps to prevent the misuse of the machine used by the radiologist. We gainfully refer to the judgment delivered by the Division Bench of this Court dated 26/8/2011 in W.P. No.797/2011 filed by Radiological and Imaging Association (State Chapter-Jalna) Vs. Union of India and Ors.. A circular was issued by the Collector and the District Magistrate of Kolhapur on 10/3/2010 whereby all the radiologists and sonologists were called upon to install a device "silent observer" in their ultra sound sonography machine to identify and prevent the illegal use of the said machine for sex determination. Said instructions were challenged in the Writ Petition. The Division Bench upheld the instructions and dismissed the petition. Thus, the directions given by the MHO in the notice under challenge in the present case are consistent with the provisions and the object of the Act. It is made clear that this notice and our decision are applicable to the machines in the institutes and genetic clinics as mentioned under the Act. The direction given by the concerned officer is, therefore, in public interest and in consonance with the provisions of the Act.

13. Learned AGP states that the direction is applicable to the entire State of Maharashtra though such restrictive order is passed by the Ward Officer, Dahisar. Mr. Sethna states that as per the stand taken by the Ministry of Health, the decision taken by the concerned officer is in accordance with law and for the rest of the part of the Country, appropriate directions may be issued in this behalf which will not restrict only a particular State but it will be applicable uniformly to the whole country. Since this stand is taken by the Government of India, it is for the concerned Ministry to act as it deems fit and we are not required to say anything in this behalf.

14. At this stage Mr. Warunjikar placed on record copy of Chart declaring the sex ratio as per the Census-2011 report.

For what is stated above, the petition is dismissed.

Rule discharged.