

(2014) 05 RAJ CK 0050

In the Rajasthan High Court

Case No : Civil Writ Petition No. 10286/2012, Civil Writ Petition No. 10086/2011, Civil Writ Petition No. 16035/2011, Civil Writ Petition No. 16086/2011, Civil Writ Petition No. 13192/2012, Civil Writ Petition No. 13428/2012, Civi

Vijay Gupta and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 22-05-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 05 RAJ CK 0050

Hon'ble Judges : M.N. Bhandari, J.

Bench : Single Bench

Advocate : Prahlad Singh, A.K. Sharma, Sr. Advocate and V.K. Sharma, R.K. Mathur, Sr. Advocate and Aditya Mathur, R.D. Rastogi, Rinesh Gupta for A.K. Gupta, S.S. Hora, Rajeev Surana, Parinitoo Jain, A.C. Goyal and Anurag Shukla, for the Appellant; G.S. Gill, Additional Advocate General and Akshat Choudhary, for the Respondent

Final Decision : Disposed off

Judgement

M.N. Bhandari, J. This bunch of writ petitions challenges the order dated 13th June, 2012, by which, the sonography machines were seized apart from cancellation of registration. The sonologists/doctors were also debarred to operate the sonography machines. The challenge to the impugned order has been made on many grounds. The respondents raised preliminary objections regarding maintainability of writ petitions as the petitioners are having efficacious remedy of appeal under Section 21 of The Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short "Act of 1994"). Few petitioners preferred appeal/s prior to filing of writ petition/s, thus two remedies have been taken simultaneously. In few other cases, the appeals so preferred were dismissed and in other cases, no appeal was preferred.

2. It would be necessary to first deal with the preliminary objections to which

reply has been given by the petitioners stating that impugned order has been passed by the incompetent authority, thus preliminary objections regarding maintainability of writ petition/s should not come in their way. If the impugned order has been passed by an incompetent authority then one should not be relegated to the alternative remedy. It is also stated that remedy of appeal is not available in view of the fact that Section 21 of the Act of 1994 provides for appeal "in the prescribed manner". The provision of Pre-conception & Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (for short "Rules of 1996") does not prescribe the manner of appeal. Rule 19 of the Rules of 1996 does not provide an appeal to the State Government from the order of State Appropriate Authority, though Section 21 of the Act of 1994 provides for it. In absence of the prescribed manner, petitioners were unable to file an appeal.

3. In view of the arguments raised above, it is to be determined as to whether remedy of appeal lies to the petitioners even if manner is not prescribed and further, the petitioners can be non-suited despite of the allegation that the impugned impugned order has been passed by an incompetent authority.

4. I would first deal with the issue as to whether the impugned order has been passed by the competent authority. The aforesaid is otherwise a legal issue, thus can be raised directly by maintaining a writ petition.

5. It is stated that Section 17 of the Act of 1994 provides for appropriate authority, which can be at different levels. The appropriate authority shall be appointed by the State Government by a Notification in the official gazette. The allegations of the petitioners is that appropriate authority was no appointed by a Notification in the official gazette, thus the impugned order passed by the State Appropriate Authority cannot be said to be competent. It is further stated that one of the member of appropriate authority should be an eminent woman representing the women's organization. As against the aforesaid provisions, Dr. Param Navdeep Singh, MLA was appointed as a member of appropriate authority, though she is not representing any women's organization. The allegations have also been made against appointment of Special Secretary of Health and Family Welfare Department to be Chairperson of the appropriate authority. It is in the light of Section 17(3)(a) of the Act of 1994. It provides for an officer of or above the rank of Joint Director of Health and Family Welfare Department to be Chairperson. The Special Secretary of Health and Family Welfare Department is not a member of Health and Family Welfare Department being an IAS Officer, thus challenge to the constitution of appropriate authority has been also made on the aforesaid ground.

6. Learned counsel for the petitioners made a reference of inspection caused on 07.12.2009 on the instructions of appropriate authority whereas gazette notification for appointment of Special Secretary, Health and Family Welfare Department was issued on 27th January, 2010 and no gazette notification was issued for members of the appropriate authority. The inspection at the instance of appropriate authority was itself illegal, as gazette notification for Chairperson

of the appropriate authority was issued subsequent to it.

7. Learned counsel appearing for the respondents submitted that constitution of appropriate authority was in accordance to the provisions of law. A gazette notification was issued on 04.07.2003 to notify as to who would be the appropriate authority. Initially, the Director (Family Welfare), Medical and Health Department was nominated as Chairperson but it was substituted by the subsequent notification dated 11th September, 2008 followed by gazette notification dated 27th January, 2010. The Notifications were also issued for appointment of Dr. Param Navdeep Singh so as for Mr. Brij Kishore Gupta, DLR of Law Department, State of Rajasthan. In view of above, not only that inspection was made on the instructions of the appropriate authority but even impugned order has been passed in lawful manner. Dr. Param Navdeep Singh is an eminent woman representing the legislative constituency, thus was rightly appointed as a member of appropriate authority.

8. To appreciate the arguments, it would be relevant to refer Section 17 of the Act of 1994, thus it is quoted for ready reference:

"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 multimember 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 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.

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;
- (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 prenatal determination of sex;
- (g) to supervise the implementation of the provisions of the Act and rules;
- (h) to recommend to the Board 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, obstericians, paediatricians 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."

9. Sub-section 2 of Section 17 of Act of 1994 requires appointment by notification in the official gazette. Sub-section 3 of Section 17 of the Act of 1994 refers about composition of appropriate authority. If the reply submitted by the respondents along with documents are looked into, gazette notification for appointment of Chairperson was issued on 27th January, 2010 but no gazette notification has been filed for appointment of the members of State Appropriate Authority, though the notifications have been enclosed along with reply to show their appointment but there is nothing on record to show its publication in the gazette, if it was made.

10. In view of the above, it cannot be said to be appointment of appropriate authority in accordance to the provisions of law. Sub-section 2 of Section 17 of the Act of 1994 does not make a reference of appointment of Chairperson of appropriate authority by a notification in official gazette, rather it talks about appointment of appropriate authorities by notification in official gazette, thus not only the Chairperson but the members can be appointed by notification in the official gazette. The reasoning aforesaid is supported by Sub-section 3 of Section 17 of the Act of 1994, which gives composition of officers, who can be appointed as appropriate authorities. In view of the above, appropriate authority has to be appointed by notification in official gazette. It can be by separate gazette notification for each or by composite gazette notification. In view of the above, appointment of appropriate authority and action as a consequence thereupon cannot be said to be proper and legal other than for the Chairperson for whom gazette notification was issued and has been submitted along with reply whereas for others, it is only the notification which has been placed along with reply and not the notification in Gazette.

11. In view of finding recorded above, I am not required to deal with the issue as to whether the Special Secretary of Health and Family Welfare Department could be appointed as Chairperson of the appropriate authority or not but it is a fact that Dr. Param Navdeep Singh cannot be considered to be eminent woman representing women's organization merely being MLA. The issue aforesaid could have been dealt with elaborately but in absence of gazette notification for her appointment as a member of appropriate authority, I am not touching the issue further.

12. The petitioners have even raised the issue about delegation of powers by the appropriate authority. The issue aforesaid is not required to be dealt with at this stage when appointment of appropriate authority itself is not as per Section 17 of the Act of 1994.

13. In view of the finding recorded above, preliminary objections regarding maintainability of writ petitions in view of availability of remedy of appeal cannot be accepted. An incompetent order has been challenged by invoking the jurisdiction under Article 226 of Constitution of India. It would further be necessary to refer Section 21 of the Act of 1994. It provides about remedy of appeal, thus is quoted:

"21. Appeal. The Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic may, within thirty days from the date of receipt of the order of suspension or cancellation of registration passed by the Appropriate Authority under section 20, prefer an appeal against such order to--

(i) The Central Government, where the appeal is against the order of the Central Appropriate Authority; and

(ii) the State Government, where the appeal is against the order of the State Appropriate Authority, in the prescribed manner."

14. The perusal of the provisions quoted above reveals that an appeal would lie to the State Government from the order of State Appropriate Authority but it would be in the prescribed manner. The Act and Rules do not prescribe the manner in view of the fact that Rule 19 of the Rules of 1996 only deals with the hierarchy of appeal and not the manner. Therein, even the provision for appeal to the State Government from the order of State Appropriate Authority is not provided. Rule 19 of the Rules of 1996 is also quoted thus for ready reference:

"19. Appeals.--(1) Anybody aggrieved by the decision of the Appropriate Authority at sub district level may appeal to the Appropriate Authority at district level within 30 days of the order of the sub-district level Appropriate Authority.

(2) Anybody aggrieved by the decision of the Appropriate Authority at district level may appeal to the Appropriate Authority at State/UT level within 30 days of the order of the District level Appropriate Authority.

(3) Each appeal shall be disposed of by the District Appropriate Authority or by the State/Union Territory Appropriate Authority, as the case may be, within 60 days of its receipt

(4) If an appeal is not made with the time as prescribed under sub-rule (1), (2) or (3), the Appropriate Authority under that sub-rule may condone the delay in case he/she is satisfied that appellant was prevented for sufficient cause from making such appeal."

15. The Rules quoted above does not reveal an appeal to the State Government from the order of State Appropriate Authority, though the rule cannot dilute or

nullify the provisions of Act. The Rule 19 of the Rule of 1996 has been referred to show that no manner has been prescribed for appeal. The forms attached to the Rules of 1996 are also not for appeal under Section 21 or Rule 19. In view of the above, non-filing of appeal cannot be fatal. The aforesaid issue is relevant and Central Government should take cognizance of it and prescribe the manner of appeal. In view of the finding recorded above, the other issues, which are more less on fact, are not required to be dealt with by this Court.

16. In view of the discussion made above, I am of the opinion that impugned order cannot be allowed to sustain in the eye of law, thus it is set aside so as the orders passed on appeal in those cases where few petitioners preferred appeal against the order.

17. Before parting with the judgment, it would be relevant to direct the respondent - State Government to see compliance of Section 17 of the Act of 1994 while making appointment of appropriate authority so that any action at the instance of appropriate authority may not result with the same treatment as exists herein. The State Government would be expected to make appointment of appropriate authority in strict compliance to Section 17 of the Act of 1994. The Central Government would also be expected to prescribe the manner for appeal as required under Section 21 of the Act of 1994.

18. With the aforesaid, all the writ petitions are disposed of so as the stay applications.