
(2014) 05 BOM CK 0023
In the Bombay High Court
Case No : Criminal Writ Petition No. 5 of 2013

Vinayak	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 09-05-2014

Acts Referred:

Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 — Section 2(d), 20, 23, 26, 3(3)

Citation : (2014) ALLMR(Cri) 3393 : (2014) 3 BomCR(Cri) 683

Hon'ble Judges : A.I.S. Cheema, J

Bench : Single Bench

Advocate : V.D. Hon, Advocate for the Appellant; S.V. Kurundkar, Public Prosecutor, V.D. Godbharle, S.G. Chincholkar, A.P.P. and A.M. Karad, Advocate for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema, J.—The present Petition has been filed to quash complaint filed by Appropriate Authority (hereafter referred as "complainant") under the provisions of Pre conception and Pre natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereafter referred as "Act") and the Pre conception and Pre natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereafter referred as "Rules").

2. The Petition is Admitted and has been heard finally. Learned counsel for the Petitioner as well as learned Public Prosecutor for the Respondents submitted elaborate arguments. With this matter some other similar matters were also argued and Counsel for Petitioners adopted arguments of each other on law points to request for quashment of Criminal Trials against accused.

3. The Petitioners claim that the Petitioner No.1 has got registered sonography centre at Jyoti Maternity Home and Sonography Clinic in Surananagar, Aurangabad. Both the Petitioners are doctors. Petitioner No.1 is running the clinic since 1996. Municipal Corporation granted registration to Petitioner No.1 to run

sonography centre in 2002. Respondent No.2 Appropriate Authority, on 4th June, 2012 carried out inspection and only on the ground that Form F has not been properly filled, sealed sonography machines and suspended the registration. The Petitioner No.1 carried appeal to the State Authorities and when the same failed, Petitioner No.1 filed Writ Petition No.10191 of 2012 and got relief in the same. During the pendency of the Writ Petition, Criminal Case No.1635 of 2012 was filed by Respondent No.2 in the Court of Chief Judicial Magistrate, Aurangabad and in the complaint both the Petitioners were made accused. The Petitioner No.2 has no concern with the sonography centre, still she has been made accused. Petition claims that in the complaint no offence has been made out against the Petitioners and the proceedings need to be quashed and set aside.

4. On behalf of the Respondents, affidavit in reply has been filed by Medical Officer of Health, Aurangabad Municipal Corporation denying the contentions raised in the Petition. According to the Respondents, the complaint concerned clearly makes out case under the Act and Rules.

5. The Petitioners have filed additional affidavit of Petitioner No.1 referring to the deficiencies pointed out in the complaint and it is claimed that there was no substance in the deficiencies pointed out and there was no intention to conceal information. Explanations are given as to the defects pointed out, with reference to Form F, in the additional affidavit filed by the Petitioners.

6. Counsel for Petitioners submitted that at the hospital concerned, the certificate of registration is in the name of Petitioner No.1 only and Petitioner No.2 has nothing to do with the offence. Counsel referred to the defects pointed out in the complaint which has been filed before Chief Judicial Magistrate.

The defects alleged in Complaint, in brief, are :

Records have not been kept as required by the Act and Rules. In filling of various form F, there were many deficiencies and irregularities. In form F, in column 10 no where there were indications filled in. Even where sonography report was "abnormal", in form F there were false entries of being "normal". In form F as on 29th May, 2012 the name of last patient was Jijabai Dhakne but thereafter in 42 F forms even before examination of the patients and filling of name of patients, entries have been made that sonography report is "normal". 33 pages are blank and thereafter on 22 pages except name of patients rest of the informations were found to have been already filled in. In form F register of 18 points, on blank pages signatures of sonologists were found to have already been taken. Complaint further points out defects that affidavit of pregnant women have not been taken in Marathi. Similarly on some affidavits signatures of pregnant lady are not there, while on some affidavits signatures of sonologists are not there. In Monthly Report, on 23rd November, 2011 entry regarding M.T.P.s done after 12 weeks, was not mentioned. Even where referral slips are there, on form F self referral is mentioned. On sonography machine, photographs of Gods and Goddess have been pasted.

7. Learned counsel for the Petitioners, with reference to deficiencies in Form F, submitted that the forms used were old forms of 18 columns and new form of 19 columns came later on. It was submitted that the Petitioners had got the earlier forms printed and the same were used but there was no intention of criminality in the same. New form of 19 columns came into force on 20th May, 2011. Regarding not taking signatures of pregnant women on affidavit, it was submitted that ink fades but that the signatures were taken. Regarding pasting of photographs of Gods and Goddess, the counsel referred to the case of "Dr.Prakash s/o Shamrao Chaudhari vs. The State of Maharashtra and others", Criminal Writ Petition No.558 of 2012, Judgment dated January 28, 2013, passed by learned Single Judge of this Court. It was held that merely putting photograph of deity Ganpati was no violation of Rules. It is argued that it is not the case of the complainant that Petitioners have disclosed sex of foetus to anybody.

Counsel for the Petitioners argued that the Form F are being changed from time to time and wrongly include parts of "Non invasive" and "invasive" techniques in the same form. According to the counsel, the Petitioner No.1 was approved only for doing ultra sound sonography, which is "Non invasive" and thus for non applicable parts the Petitioner No.1 had mentioned as N.A. i.e. non applicable. Regarding not giving indication against column 10 of F forms, the counsel submitted that it related to invasive procedures and did not apply to Petitioner No.1. Regarding mentioning of normal even in case of abnormal sonography report and forms pre signed by sonologists, it was submitted that there was no criminal intention in it. Referring to the additional affidavit of the Petitioner No.1, counsel submitted that the Petitioner has explained the defects regarding which the complaint has been filed. Regarding partially filling up of forms in advance, additional affidavit of Petitioner No.1, in Para 7, claims that the Petitioners were out of station and to save time Sister of Petitioner No.1 who was having no work in hospital, filled in F forms which is general in nature, for example, name of the hospital, registration number of doctor, registration date of the centre, address of the hospital etc. Argument is that in this, there was no criminal intention. Relying on the explanations mentioned in the additional affidavit of the Petitioners, the counsel for Petitioners submitted that no case is made out against the Petitioners and the complaint deserves to be quashed.

8. After referring to the various provisions of the Act, reference was made to the case of Dr. Pratidnya Jayesh Shinde and Dr. Rahul Sudhirchandra Shinde Vs. Appropriate Authority, Dr. Rameshchandra Kisan Savkare and The State of Maharashtra, In that matter, proceeding was quashed as the complaint was silent as to how responsibility of maintaining records was cast upon the concerned Applicants as were before the Court. Reliance is also placed on the Judgment in the case of Dr. Alka w/o Anant Gite and another vs. The State of Maharashtra in Criminal Application No.3500 of 2011 decided on 11th May, 2012. Referring to that Judgment, submission is that inadvertently if a column is blank, it cannot attract offence. Relying on the case of "Dr. Mrs. Uma Shankar Rachewad vs. Appropriate Authority" Criminal Writ Petition No. 407 of 2011, decided on 19th

April, 2012, it is submitted that writing of "N.A." i.e. Non Applicable does not amount to incomplete filling of Form. Judgment in the case of Dr. Ravindra s/o Shivappa Karmudi vs. The State of Maharashtra in Criminal Application No.757 of 2012 decided on 3rd May, 2012, was referred to submit that F Form was incomplete does not mean criminal offence is there. Reliance was also placed on the Judgment in the matter of Dr. Tushar Rangrao Patil vs. Appropriate Authority in Criminal Writ Petition No.406 of 2011 decided on 2nd May, 2012. These are matters decided by learned Single Judge of this Court. The submission is that in those matters also although there were defects in maintaining of Form F, the Petitioners therein were given benefit and the concerned cases against those Petitioners were quashed. Thus it is argued that the Petition needs to be allowed.

9. The learned Public Prosecutor submitted that the complaint filed, gives various details regarding deficiencies and inaccuracies in maintenance of the records and F Form. The complaint mentions that the inspection carried out was also videographed. According to the Public Prosecutor the trial will show the manner in which the records were maintained and the violation of the provisions of the Acts and Rules. The complaint is supported by documents, copies of which are before this Court and referring to the documents, the Public Prosecutor submitted that there are various irregularities in maintenance of the records. Wrong form was being used although new form F had been introduced. Reference has been made to Panchnama, copy of which is also available on record, and the complaint. Averments of the complaint show that the inspection carried out was of the hospital of both the Petitioners and that inspection showed that both of them had not kept the records as per the Act and Rules. According to the Public Prosecutor, both the Petitioners are liable to be proceeded against under the Act and Rules. If sonography is not normal, writing in the form that the same was "normal", is violation of the provisions of the Act and Rules. Taking signatures of sonologists in advance in F forms, is also not permissible. According to the Public Prosecutor, the explanations given in the additional affidavit of the Petitioner No.1 are matters of defences and at the present stage even before trial takes place, on the basis of such explanations the trial cannot be quashed or thrown out. According to him, Complaint discloses serious defects and illegalities in maintaining of records.

10. To appreciate the controversy, it would be appropriate to keep in view certain provisions of the Act.

Portions relevant from Section 4 of the Act are as under:

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

(1) no place including a registered Genetic Counselling 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) (iv).....

(ii)..... (v).....

(iii)..... (vi).....

(3) no prenatal diagnostic techniques 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) (ii).....

(iii) (iv).....

(v)

Provided that the person conducting ultra sonography 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 ultra sonography;

(4).....

(5).....

With reference to the above proviso as regards keeping of records, relevant portions of Rule 9 are as under:

"9. Maintenance and preservation of records. (1) Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic including a Mobile Genetic Clinic, Ultrasound Clinic and Imaging Centres shall maintain a register showing, in serial order, the names and addresses of the men or women given genetic counselling, subjected to pre natal diagnostic procedures or pre natal diagnostic tests, the names of their spouse or father and the date on which they first reported for such counselling, procedure or test.

(2) The record to be maintained by every Genetic Counselling Centre, in respect of each woman counselled shall be as specified in Form D.

(3) The record to be maintained by every Genetic Laboratory, in respect of each man or woman subjected to any pre natal diagnostic procedure/technique/test shall be as specified in Form E,

(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.

(5).....

(6).....

(7).....

(8)....."

In Rule 10 conditions for conducting pre natal diagnostic procedures are prescribed, which includes obtaining written consent as prescribed in Form G in a language the person undergoing the procedure understands.

Section 20 of the Act deals with cancellation or suspension of the registration. Sub section (1) and (2) deal with giving of notice and reasonable opportunity before suspending or cancelling registration of the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic. Sub section (3) of Section 20 reads as under:

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

11. The learned Public Prosecutor submitted that the cases under the Act are treated as warrant cases instituted otherwise than on police report. It has been argued that major or minor violation in the keeping of records is immaterial.

12. Scheme of the Act and Rules need to be appreciated:

(A). Proviso below Section 4(3) of the Act shows that persons conducting ultra sonography on a pregnant woman are required to 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 of the Act unless contrary is proved by the person conducting such ultra sonography. Section 5 of the Act relates to taking written consent of pregnant woman and prohibition of communicating the sex of foetus. Section 6 of the Act prohibits determination of sex by Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic or any person. Rule 9 relates to maintenance and preservation of records and this inter alia includes keeping record in respect of each man or woman subjected to any pre natal diagnostic procedure/technique/test in specified Form F. Although sub rule (4) of Rule 9 refers to Genetic Clinic, definition of "Genetic Clinic" as in Section 2(d) of the Act specifies that 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. Thus, all such places are covered where pre natal diagnostic procedures are being conducted and all persons doing the same are also covered, and as per the statute, maintaining of proper records and Form F as prescribed, is mandatory.

(B). Section 5 requires taking written consent of the pregnant woman and

prohibits communication of sex of foetus. In this regard Form G is prescribed in Rule 10. (According to the Public Prosecutor Section 5(2) of the Act prohibits communicating of sex of the foetus by words, signs, or in any other manner and thus according to him displaying of even photographs of Gods and Goddess where pre natal diagnostic procedures are conducted, is not permissible, as the same gives opportunity to convey sex of foetus by signs or in other manners.)

(C). Section 23 of the Act shows that medical geneticist, gynecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of the Act or rules made thereunder is also liable for punishment. u/s 23 of the Act, the owner of Centre, Laboratory, Clinic who takes professional services to run the Centre where pre natal diagnostic techniques are conducted, is also liable, if any provisions of the Act or Rules are contravened.

(D). u/s 26 of the Act, with reference to companies, the word "company" means any body corporate and includes a firm and other association of individuals and such persons are also liable, when offences by Companies are there.

(E). In view of Section 3(3) of the Act, pre natal diagnostic techniques can be conducted only at place registered and any change has to be reported. Under Rule 13 every change of employee, place, address and equipment installed has to be informed to the Appropriate Authority.

13. I have heard learned counsel for the Petitioner as well as learned Public Prosecutor. Record has been perused. The criminal case filed by the Appropriate Authority in the lower Court supported by documents shows the deficiencies and inaccuracies found and necessary particulars are there. Counsel for Petitioner has strenuously tried to demonstrate that either the defects alleged are not there or even if they are there, they are insignificant. The Petitioner is trying to give reasons as to how the Form was maintained and if there are lacunae, what is the explanation.

14. The Full Bench of High Court of Gujarat in *Suo Motu Vs. State of Gujarat*, considered effects of non maintaining records properly under this Act. It was held that criminal consequences are attracted and there can also be suspension of the registration. Para 8 of the Judgment reads as under:

"8.It needs to be noted that improper maintenance of the record has also consequences other than prosecution for deemed violation of section 5 or 6. Section 20 of the Act provides for cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in case of breach of the provisions of the Act or the Rules. Therefore, inaccuracy or deficiency in maintaining the prescribed record shall also amount to violation of the prohibition imposed by section 6 against the Genetic Counseling Centre,

Genetic Laboratory or Genetic Clinic and expose such clinic to proceedings u/s 20 of the Act. Where, by virtue of the deeming provisions of the proviso to sub section (3) of section 4, contravention of the provisions of section 5 or 6 is legally presumed and actions are proposed to be taken u/s 20, the person conducting ultra sonography on a pregnant woman shall also have to be given an opportunity to prove that the provisions of section 5 or 6 were not violated by him in conducting the procedure"

.....

"It would also be improper and premature to expect or allow the person accused of inaccuracy or deficiency in maintenance of the relevant record to show or prove that provisions of section 5 or 6 were not violated by him, before the deficiency or inaccuracy were established in court by the prosecuting agency or before the authority concerned in other proceedings."

In that Judgment of Full Bench, mentioned above, opinion (iv) recorded in Para 9, is as under:

"(iv). Deficiency or inaccuracy in filling Form F prescribed under Rule 9 of the Rules made under the PNDT Act, being a deficiency or inaccuracy in keeping record in the prescribed manner, it is not a procedural lapse but an independent offence amounting to contravention of the provisions of section 5 or 6 of the PNDT Act and has to be treated and tried accordingly. It does not, however, mean that each inaccuracy or deficiency in maintaining the requisite record may be as serious as violation of the provisions of section 5 or 6 of the Act and the Court would be justified, while imposing punishment upon conviction, in taking a lenient view in cases of only technical, formal or insignificant lapses in filling up the forms. For example, not maintaining the record of conducting ultra sonography on a pregnant woman at all or filling up incorrect particulars may be taken in all seriousness as if the provisions of section 5 or 6 were violated, but incomplete details of the full name and address of the pregnant woman may be treated leniently if her identity and address were otherwise mentioned in a manner sufficient to identify and trace her."

15. It is clear that it would be premature to accept explanations regarding inaccuracies or deficiencies before trial takes place. It is further apparent that if the lapse is insignificant, the benefit would go to the accused at the time of sentence, but claiming that deficiencies in Form F and keeping Records are insignificant, cannot be reason to claim that no offence is there and to discharge the accused.

16 (A). Reference needs to be made to the case of Dr. Sujit Govind Dange Vs. State of Maharashtra and Others, In that matter Division Bench of this Court held that any deficiencies noticed in maintaining the record, in specially Form F, attracts the provisions of the Act.

(B). The Division Bench of this Court considered the objects and reasons of the

Act and as to how the Act was necessary to control menace of female foeticide. In Para 29, while considering Section 4 of the Act, it was observed with reference to Rule 9, as under:

"29. Considering the object of the Act, the maintenance and preservation of records as per rule 9 is an important statutory duty cast upon the person (Doctor) conducting ultra sonography on a pregnant woman and, therefore, any deficiency or inaccuracy found in this regard amounts to contravention of the provisions of section 5 or 6 of the Act unless contrary is proved by the person (Doctor) conducting such ultra sonography".

(C). In that matter also arguments were raised that the discrepancies were minor in nature or that they were only inaccuracies. The Hon'ble Division Bench in Para 30 held as under: .

"30. It is important to note that in order to prohibit abuse of these prenatal diagnostic techniques, the Legislature has incorporated a proviso to sub section (3) of section 4 of the Act which stipulates that any deficiency or inaccuracy found in maintaining and preserving complete record in a manner prescribed by the person conducting ultra sonography on a pregnant woman shall amount to contravention of the provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultra sonography. This provision, in our view, is completely consistent with the objectives of the Act and has been introduced to prohibit abuse of the pre natal diagnostic techniques by the person conducting ultra sonography on a pregnant woman".

.....

"The contention of the petitioner that the discrepancy was of a minor nature is wholly misconceived. Neither the provisions of the Act nor that of the Rules provide or define minor or major deficiencies or inaccuracies. On the other hand, it requires strict compliance of every provision of the Act and the Rules. Considering the objectives to be achieved, strict punishment is provided for violating the conditions prescribed under the Act. The contentions canvassed by the petitioner, in this regard, therefore, are devoid of substance and are rejected".

(D). With reference to Sub section (3) of Section 20 of the Act, the Hon'ble Division Bench recorded in Para 39, as under:

"The observations made by the Division Bench in Malpani Infertility Clinic Pvt. Ltd. and Others Vs. Appropriate Authority, PNDT Act and Others, clearly show that the Division Bench in view of the fact that prosecution was launched against the petitioner in the said case, it was held to be sufficient reason for the authorities to take recourse to sub section (3) of Section 20 of the Act. In the instant case, the Petitioner having admitted the existence of deficiency and inaccuracy in keeping and maintaining the record including form "F" has resulted in contravention of the provisions contained in section 5 or 6 and,

therefore, would amount to an offence and can be treated to be sufficient reason for the Appropriate Authority to invoke the provisions of sub section (3) of section 20 of the Act, in the larger public interest and, therefore, the action of suspension of registration of the Genetic Centre of the petitioner is sustainable in law till such time contrary is proved by the petitioner."

(E). Para 38 of the Judgment of the Division Bench recorded that:

"38. Rule 9(1) requires that every Genetic Counselling Centre, Genetic laboratory, Genetic Clinic, etc., shall maintain a register showing, in serial order, the names and addresses of the men or women given genetic counselling, subjected to pre-natal diagnostic procedure or pre natal diagnostic tests, the names of their spouse or father and the date on which they first reported for such counselling, procedure or test. Sub rule (4) of rule 9 stipulates the record to be maintained by every 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". In the instant case, the petitioner has admitted existence of discrepancies, irregularities in maintenance of Form "F" which has undoubtedly resulted in causing deficiency or inaccuracy in maintaining and preserving the record and, therefore, as per proviso to sub section (3) of section 4 of the Act, resulted in contravention the provisions of section 5 or 6 of the Act and would amount to an offence, unless contrary is proved by the petitioner who has conducted such ultra sonography test."

17. Keeping in view the observations of the Hon"ble Division Bench in the case of "Sujit Govind Dange", mentioned above, there remains no doubt that deficiencies or inaccuracies in the maintaining of record and Form F attract the provisions of Section 5 or 6 of the Act. I am bound by the Judgment of the Division Bench of this Court.

18. When the complaint has been filed under this Act showing the inaccuracies and deficiencies in the keeping of record, and complainant has documents to support disclosing sufficient grounds to proceed in the light of provisions of this Act and Rules, this Court cannot, before holding of the trial, sit in Judgment whether or not the Record has been kept properly; or Form F concerned has been properly filled or improperly filled; or whether or not the deficiencies pointed out are serious or insignificant. When complaint has been filed pointing out deficiencies or inaccuracies, before trial it would not be proper for this Court to consider the arguments that what is pointed out is no deficiency or no inaccuracy. It would be prejudging the matter. As per Proviso of Section 4(3) "any" deficiency or inaccuracy in keeping of complete record "shall amount to contravention" of Section 5 or 6 "unless contrary is proved." Naturally, the contrary can be "proved" only at the trial. Appropriate Authority under the Act is Public Servant acting in discharge of official duty and has to act with responsibility. Keeping in view the Judgments discussed above, in such serious matters, it would be inappropriate to interfere when prima facie case is made out.

19. It cannot be said, at present, that there is no sufficient ground for proceeding. Keeping in view Aims and Objects of the Act and Scheme of the Act and Rules referred above and stringent and specific provisions not tolerating any (means any) deficiency or inaccuracy in keeping complete records, I am unable to accept the explanatory arguments in defence or to invoke writ jurisdiction, inherent power or revisional jurisdiction to quash the proceedings at the threshold when sufficient grounds to proceed are made out in the complaint.

For reasons mentioned, arguments in favour of State have substance, and submissions for Petitioner to quash process or Complaint need to be discarded. Defences being raised, can be considered at the time of trial. The Petition stands rejected.