COMPILATION AND ANALYSIS OF CASE LAW ON

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTICS TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994

United Nations Population Fund – India

This book is an outcome of UNFPA's efforts for improving the implementation of the law to address the declining Child Sex Ratio: the Pre-conception and Pre-natal Diagnostic Techniques Act. Between 2009 and 2011, UNFPA in collaboration with the Bombay High Court, State Health Systems Resource Centre, Maharashtra State Legal Services Authority and Public Health Department-Government of Maharashtra, supported the organization of Judicial Colloquia for capacity building of Judicial Officers and Prosecutors on the causes and implications of the declining Child Sex Ratio and the PCPNDT Act for speedy redressal of cases and also integrated the issue as part of all training programmes conducted at the Maharashtra Judicial Academy. The case laws in this book have been compiled and analyzed by the Maharashtra Judicial Academy, at the recommendation of the colloquia and training programmes, to serve as a good reference for dealing more effectively with cases under the PCPNDT Act.

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COMPILATION AND ANALYSIS OF CASE LAW ON

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTICS TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994

Dr. Shalini Phansalkar Joshi,
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2013

United Nations Population Fund – India

Mohit S. Shah
CHIEF JUSTICE
HIGH COURT OF BOMBAY

Chief Justice House
14, Narayan Dabholkar Road
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MESSAGE

Gender inequalities have persisted in India since centuries. Women and girls continue to be discriminated against at every stage of their life cycles. This manifests itself in the form of sex selection; infanticide; neglect; lack of access to education, health care, and nutrition; early marriages; repeated and frequent pregnancies at a very young age; violence; etc.

Sex selection, which is now assuming alarming proportions, is not a new phenomenon in India – it has existed for decades. The Child Sex Ratio (number of girls per 1000 boys in the 0-6 years age group) in the country declined from 976 in 1961 to 914 in 2011. This is a matter of grave concern and needs to be addressed using a multi-prolonged approach involving different sections of the society. The Judiciary also has a very important role to play in impacting the issue of sex selection. While different cases could be viewed from different angles, legislative intent should be on promoting equality and protection of the girl child.

The State of Maharashtra was a pioneer in the country in enacting the Maharashtra Regulation of Use of Pre-Natal Diagnostic Techniques Act in 1988, which paved the way for the enactment of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act in 1994 and the amended Pre-conception and Pre-Natal Diagnostic Techniques Act (PCPNDT Act) in 2003. Maharashtra has also been a pioneer in the training of Judicial Officers on the issue of sex selection and the PCPNDT Act so as to seek their involvement in the effective implementation of the Act. This activity was jointly undertaken by the Bombay High Court, the Maharashtra State Legal Services Authority, the Maharashtra Judicial Academy, the Public Health Department - Government of Maharashtra and the United Nations Population Fund (UNPFA). These trainings have enabled Judicial Officers to interpret the law in the broader context of how this issue impacts the social and cultural fabric of the country. In the recent past there have been a series of sensitive and precedent setting judgments in the state. These have helped to draw the attention of the Judiciary, media, medical community and the society at large to the gravity of the problem.

I feel that the PCPNDT Act should be viewed in the larger context of gender equality and in that an attempt should be made to draw a connect with the implementation of the Hindu Succession Act, the Protection of Women from Domestic Violence Act and the Dowry Prohibition Act. At the same time, while working on sex selection, utmost precaution should be taken to ensure that women's access to safe and legal abortion does not get compromised.

Mohit S. Shah
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I am glad that the Maharashtra Judicial Academy and UNFPA had taken an initiative in 2011 of undertaking a compilation and analysis of Judgments under the PCPNDT Act from across the country and publishing it in the form of a book, which has served as a good reference document for all those working in the field. I am told that the said book has been widely circulated and used by various stakeholders. Since then, several new Judgments have come out from the Supreme Court and various High Courts highlighting the problem of sex selection and the need for the effective implementation of the PCPNDT Act.

I, therefore, congratulate Dr. Mrs. Shalini Phansalkar-Joshi, Maharashtra Judicial Academy and UNFPA for publishing the second edition of the book in a new form, giving concise information and analysis of up-to-date case laws under the PCPNDT Act. I am sure the book would also receive a similar positive response.

18th June 2013

(Mohit S. Shah).

FOREWORD

Principles of gender equity are an integral part of our Constitution. The Constitution confers equal rights and opportunities on women; bars discrimination on the basis of sex and denounces practices derogatory to the dignity of women. In spite of this, discrimination against women and girls is almost universal. Forced abortions of female foetuses and prenatal sex determination results in millions of girls not being allowed to be born just because they are girls.

The 2011 census revealed that the child sex ratio in the country (the number of girls per 1000 boys in the 0-6 years' age group) has shown a sharp decline from 976 girls per 1000 boys in 1961 to 914 in 2011. In certain parts of the country there are less than 800 girls for every 1000 boys born.

Taking cognizance of this issue the Government of India has put in place a law, the PCPNDT Act that prohibits the use of pre conception and prenatal diagnostic techniques to determine the sex of the unborn child. It also imposes a fine and imprisonment on doctors indulging in this practice. It has however been difficult to implement the Act because sex selection happens within the confines of the doctor client relationship and there have been few convictions under the Act. The Maharashtra Judicial Academy, with support from the United Nations Population Fund, had published a book on Compilation and Analysis of case law under the Act in 2011. The said book received unprecedented response and achieved its purpose of serving as a guide and reference book on the issue of sex selection.

During these last two years there has been far more awareness about the issue and emphasis on effectively implementation of the PCPNDT Act. Several new decisions have also been pronounced throwing more light on the provisions of the Act. Hence, there was a need to update the book for analyzing latest case laws. This need will be fulfilled by the present book.

I congratulate and appreciate the efforts of Dr. Mrs. Shalini Phansalkar Joshi, Joint Director of the Academy in compiling this volume and presenting it in a different form. The Academy is doing this work as part of its endeavour towards building capacities of Judicial Officers on issues of social relevance.

I would also like to congratulate UNFPA for partnering with the Maharashtra Judicial Academy in this endeavour.

Hon'ble Dr. Justice D. Y. Chandrachud
Judge Bombay High Court &
Officiating Director
Maharashtra Judicial Academy

PREFACE

The preference for a son and discrimination against the girl child is almost universal in India and manifests itself in many ways, including sex selection, that is, the pre-birth elimination of female foetuses. This practice has led to a decline in the Child Sex Ratio in most parts of India. The Child Sex Ratio, which is the number of girls per 1000 boys in the 0-6 years age group, has declined from 976 in 1961 to 914 in 2011. The Child Sex Ratio in the State of Maharashtra declined from 940 in 1991 to 913 in 2001 to 883 in 2011 (Provisional Census Data).

The decline in sex ratio can severely impact the delicate equilibrium of nature and destroy our moral and social fabric. Sex selection is a reflection of the low status of women in society and a patriarchal mindset steeped in son preference. Sex selection also occurs because of the perceived financial cost of having a girl child, which includes paying for her education, community customs that put a burden on the family, the increasing commercialization of the institution of marriage because of which large sums have to be spent on the marriage ceremony and given away as dowry. In general this perception, conjoined with the attitude that the girl is *paraya dhan*, creates a mindset that girls are indeed a liability and boys are assets because of reasons of lineage and the perception that they would provide support in old age.

The consequences of the declining sex ratio are serious, all pervasive and far reaching. Fewer girls in society has resulted in increased violence against women and denial of basic rights to them. It has also led to an increase in sex related crimes (rape, abduction, forced polyandry). Further, sex selection impacts health, especially the reproductive health, of women who are forced to go in for repeated pregnancies followed by abortions in the desire to have a male child.

Ironically the major reason for the declining sex ratio is the proliferation of modern technology and easy and affordable access to such technology with its rapidly expanding use for the purpose of pre- and post-conception sex selection followed by the elimination of the foetus, if found to be female.

Taking cognizance of this issue, the Government of India responded to the need of the hour by passing The Pre-natal Diagnostic Techniques Act (PNDT Act), 1994 to stop this practice and the misuse of technology for pre-natal sex determination.

Maharashtra was the first state in the country to enact the Maharashtra Regulation of Use of Pre-natal Diagnostic Techniques Act in 1988, prohibiting the use of new scientific techniques for sex determination and sex selection treating it as totally insulting to the dignity of womanhood and against the spirit of the Constitution in which the right to equality is embedded. Thereafter, the Central Government took the initiative and passed the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (PNDT Act). Though this Act was passed on September 20, 1994, it came into force from January 1, 1996. During the course of the years thereafter, several deficiencies, inadequacies and practical difficulties in the implementation of the Act came to notice of the Government, which necessitated amendments in the Act. Moreover new technology was also being developed to select the sex of the child before conception. Therefore to bring these pre-conception sex selection techniques within the ambit of the law and also in conformity with the directions of the Apex Court, certain amendments were carried out in the Act, making its provisions more comprehensive and the Act was titled "The Pre-conception and Pre-natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 1994" (PCPNDT Act).

The amended Act came into effect on February 14, 2003. However, as observed by the Apex Court, there was total inaction on the part of the Government in implementing the provisions of the Act. It was only after several directions were issued by the Supreme Court and the various High Courts, that the government took upon itself the task of creating general awareness, sensitization and also prosecuting doctors and clinics which were found violating the provisions of the Act. Even then, the Act was not being implemented with the zeal and vigour which was expected for this important piece of social welfare legislation. This was reflected in the fact that there were very few prosecutions and hence not many case laws were available. The majority of rulings dealt with challenges raised about the Constitutional validity of the Act and to the directions issued by the Higher Courts for the effective implementation of the Act. There are very few cases which are registered, prosecuted and finally decided after full-fledged trials. Hence a vast body of decisional law of the District and the Trial Courts, where the bulk of the cases are ordinarily filed, fought and decided, are not available under this Act.

Moreover most of the cases booked under the Act are still pending for trial and are also concerned with ultrasonography centres which do not have licenses and are not registered. Very few of them deal with the problem of sex selection. Very few provisions of the Act have come for judicial interpretation as the unfolding of the Act is yet to take place in the manner that was expected. There are several other social causes for the same. The Act aims and attempts to address technology and medical issues but not social issues. Sex selection is the result of an unholy alliance between assumed traditional values and modern technology. The Act regulates the use of technology. However, concerns remain as the mindset of the people who adopt and practice sex selection cannot be addressed by the law. The girl child still remains unwanted in several households. These harsh realities of life cannot be ignored and are required to be addressed by the implementation of the Act. Hence it becomes the duty of society to eliminate this social evil through the effective implementation of the provisions of the Act with the sensitivity it deserves.

The burden on the legal community including the bench and the bar in such a situation becomes onerous. The mindset of society cannot be changed by law and it lags behind in legislation; it has to be the job of the Judiciary to fill this gap by adopting a realistic and sensitive approach for the proper implementation of the legislation. The need of the hour is to mould and evolve the law so as to meet its objective through effective implementation.

With this intention in mind UNFPA Maharashtra has, in association with the Bombay High Court, Maharashtra State Legal Services Authorities, State Health Systems Resource Centre and Public Health Department - Government of Maharashtra conducted various Judicial Colloquia at the state level and in all districts for Judicial Officers on the issue of sex selection and the PCPNDT Act. Sensitization workshops for newly inducted trainee Judicial Officers are also being conducted regularly at the Maharashtra Judicial Academy on the same issue. As on date, 28 Judicial Colloquia have been conducted covering all the districts of Maharashtra. As part of these colloquia, 1192 Judicial Officers including District Judges, Chief Judicial Magistrates, and Civil Judges at the senior and junior level have been trained. In addition, nearly 400 newly recruited Civil Judges, junior division and Judicial Magistrates, first class have been trained at the Maharashtra Judicial Academy. The issue has also been integrated as a part of gender and law training programmes being conducted at the Academy.

The district colloquia and the training programmes recommended the need for compilation of Judgements under the PCPNDT Act. It was decided that the Maharashtra Judicial Academy could undertake such a compilation. Hence the idea for such a book was born. The book is not just a

compilation of cases, it also provides an analysis of each case with a view to sharing the best practices and positive rulings which can be used by all stakeholders involved in the implementation of the Act. This book is designed to give exposure to the latest position in the interpretation of the provisions of the Act and is expected to serve as ready reference for judges, public prosecutors, legal practitioners and other stakeholders. Although each of the Judgements passed by the Court aids and has aided in clarifying, expanding and throwing light on some aspect of the provisions while interpreting them, the Judgements which are included in this book are those which touch upon some fundamental aspects, like directions of the Supreme Court and High Court for implementation of the Act, Constitutional validity of the Act and factual or procedural issues which are frequently raised and cases which provide clarity on the spirit, object and reasons of the Act. The case laws compiled in this book are selective and representative in nature. An attempt has been made to cover most of the issues involved in the interpretation and implementation of the Act by the Judiciary. The comments prefixing the case law are only illustrative and explanatory in nature. They are not to be read in any other way.

After the release of the first book on December 10, 2011 in association with UNFPA, several new Judgements are being pronounced every day, spelling out the need for the effective implementation of the Act, exploring its various facets and explaining by way of interpretation the grey areas in the statutory provisions. Moreover, a book which deals with a subject of this nature always needs updating. Hence, to keep up with the times and create an understanding of the subject a need was felt for a book that would create legal awareness on this issue. The present compilation has been prepared in a new format to cover the maximum number of Judgements which have been pronounced till date.

This book, like the earlier one, is a joint venture between the Bombay High Court, UNFPA, and the Maharashtra Judicial Academy.

I hope and pray this book also serves its purpose and the cause.

Dr. Shalini Phansalkar Joshi
Joint Director, Maharashtra Judicial Academy,
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ACKNOWLEDGMENTS

While working as a Judicial Officer one rarely gets the time and opportunity to write or publish a book, but my tenure in the Maharashtra Judicial Academy as Joint Director bestowed me with this opportunity. At the Academy our pillar of support is the Patron-in-Chief, the Hon'ble Shri Justice Mohit S. Shah, Chief Justice of Bombay High Court and our source of inspiration is our Director, the Hon'ble Dr. Justice D.Y. Chandrachud, Judge Bombay High Court. It was their vision, inspiration, constant support and guidance that instilled in me the idea of writing a book compiling and analyzing Judgements under The Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of sex selection) Act. I would like to express my heartfelt thanks to the Hon'ble Chief Justice and the Hon'ble Dr. Justice D.Y. Chandrachud for having permitted me to undertake this assignment, which I feel would be a lasting contribution by the Academy on the issue of sex selection. I am also grateful to them for their kind and gracious gesture of writing the Message and Foreword for the book.

The credit for the idea of publishing such a book also goes to Ms. Anuja Gulati, the State Programme Officer, UNFPA, Maharashtra, whom I first met at one of the workshops on this subject in Pune. Then we met regularly at the sensitization courses, which she conducts for every batch of our Trainee Judges at the Maharashtra Judicial Academy. Her total commitment to the cause impressed me and impelled me to undertake this venture. She is the motivating force and also an active partner in this collaborative effort. Whenever any new Judgement was pronounced in any part of the country, she was the first one to inform me and send me a copy. Naturally, I owe a great deal to her in the publication of this book. I am also grateful to Dr. Daya Krishan Mangal, State Programme Coordinator, UNFPA for his support.

I would like to express my sincere gratitude to the entire staff of the Maharashtra Judicial Academy, who have made valuable contributions to making this book as perfect as possible. I know nothing can be perfect and there are bound to be some deficiencies. If they are there, they are my sole responsibility.

I hope that this book will contribute towards the cause for which it is being published; to make the girl child a *'Laadli '* of everyone.

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Joint Director, Maharashtra Judicial Academy,
Indian Mediation Center and Training Institute, Uttan

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Chapter 1

LANDMARK DECISIONS FOR IMPLEMENTATION OF THE ACT

Directions Issued by the Supreme Court and High Courts

It is normally the function of the Government to implement laws enacted by the legislature. But when the government fails to do so, resort is taken to Judiciary. The primary credit for implementation of the Pre-Natal Diagnostic Techniques (Prevention of Misuse) Act goes to the Judiciary. The PNDT Act was enacted by Parliament in 1994. However, it came into operation two years later, on January 1996 and even after a lapse of five years, neither the Central nor the State Governments took any action to ensure its implementation. Hence, the Judiciary had to take upon itself the task of giving effect to the said Act. There are a series of decisions in the petitions filed either *suo motu* or those moved by NGOs, in which the Supreme Court and the High Courts have issued various directions and pronounced Orders to the Central and the State Governments for creating public awareness and for the effective implementation of this Act.

1(1)

Equivalent Citations:
(2003) 8 Supreme Court Cases 398, AIR 2003 SC 3309, 2003(7) SCALE 345, (2003) Supp 3 SCR 593

IN THE SUPREME COURT OF INDIA
Writ Petition (Civil) 301 of 2000
Decided on September 10, 2003

CEHAT and Others

vs.

Union of India

Hon'ble Judges: M.B. Shah and Ashok Bhan, JJ

Case Summary

This was the first path-breaking Judgement of the Apex Court, which paved the way for the implementation of the Act. It was a Public Interest Litigation (PIL) filed, under Article 32 of the Constitution of India, by the Centre for Enquiry into Health and Allied Themes (CEHAT), a research organization; Mahila Sarvangin Utkarsh Mandal (MASUM), a non-governmental organization and Dr. Sabu M. George, a civil society member, bringing to the notice of the Court that although the Act prohibiting sex determination had been passed by the Central Government in 1994 and Rules were also framed in 1996, no steps for its implementation were taken either by the Central Government or by the State Governments. It was further pointed out that in Indian society discrimination against the girl child was universal. There had been no change in the mindset that favoured a male child as compared to a female child. The use of modern science and technology prevent the birth of a girl child by sex determination before conception and by sex selection after conception, was evident from the 2001 Census figures revealing a greater decline in Child Sex Ratio in the 0-6 years age group in states like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off. The Supreme Court took note of the fact that the law, which aims at preventing the practice of sex selection and sex determination, is not being implemented at all. Hence, after calling for data and compliance reports from the Central and State Governments regarding the implementation of the Act, the Supreme Court passed various Orders from time to time on 4.5.2001, 19.9.2001, 7.11.2001, and 11.12.2001 and finally disposed of the Petition on 31.3.2003, giving various directions. These are as follows.

Directions to the Central Government

- To create public awareness against the practice of sex selection and sex determination.
- To implement the Act with all vigour and zeal.

Directions to the Central Supervisory Board

- To call for meetings at least once in six months.
- To review and monitor implementation of the Act.

- To call for quarterly updates from State and Union Territory (UT) Appropriate Authorities regarding the implementation and working of the Act.
- To examine the necessity of amending the Act keeping in mind emerging technologies and difficulties in implementation of the Act.
- To lay down a code of conduct to be observed by persons working under the Act and to ensure its due publication.
- To require Medical Professional Bodies/Associations to create awareness and to ensure implementation of the Act.

Directions to State Governments and UT Administrations

- To appoint by Notification fully empowered Appropriate Authorities at the district and sub district levels.
- To appoint Advisory Committees to aid and advise Appropriate Authorities.
- To furnish a list of Appropriate Authorities in the print and electronic media.
- To create public awareness against the practice of sex selection and sex determination.
- To ensure that Appropriate Authorities furnish quarterly returns to the Central Supervisory Board, giving information on the implementation and working of the Act.

Directions to Appropriate Authorities

- To take prompt action against any person or body that issues or causes to be issued any advertisement in violation of Section 22 of the Act.
- To take prompt action against all bodies and persons who are operating without valid Certificate of Registration under the Act.
- To furnish quarterly returns to the Central Supervisory Board about the implementation of the Act.

The perusal of these directions in the form of six Orders reflects that the Supreme Court has in this matter legislated on how the Act should be implemented. It also exhibits the deep concern and the anguish felt by the Apex Court towards the social evil of sex selection. The Supreme Court was equally concerned about the apathy on the part of Government in the implementation of the law which aims at preventing such a social evil. As per the Supreme Court, "it was unfortunate that for implementation of the law, which was the urgent need of the hour, NGOs had to approach the Court." All the six Orders passed in this Writ Petition are worth reading in entirety, especially the opening paragraphs of the first Order dated May 4, 2001 and the last Order dated September 10, 2003 highlighting the plight of the girl child and the inhuman practice of sex selection.

It must be noted that as a result of the Order passed in this Petition, in the year 2003, the Act was amended to bring within its purview the misuse of pre-conception techniques and was titled the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act.

Moreover it was only because of continuous monitoring by the Supreme Court and initiatives taken by the NGOs that the Central and the State Supervisory Board, Appropriate Authorities, Advisory Committees and the National Inspection and Monitoring Committee were appointed and awareness was created. If these steps had not been taken the Act would have remained merely legislation on paper.

1(2)

Equivalent Citation:
AIR 2008 Orissa HC 71, MANU/OR/0093/2008, 2008(I)OLR916

IN THE HIGH COURT OF ORISSA
Writ Petition (Civil) No. 9596 of 2007
Decided on February 14, 2008

Hemanta Rath

vs.

Union of India and Others

Hon'ble Judges: A. Ganguly, CJ and B. Mahapatra, J

Case Summary

Despite detailed directions issued by the Supreme Court in 2001, in the landmark decision of *CEHAT vs. Union of India*, several states did not take any steps for effective implementation of the Act. Hence, a PIL was filed once again in various High Courts to that effect. In the State of Orissa for example, hundreds of skeletons, skulls and body parts of infants were recovered, which shocked the nation. As these body parts were found in an area close to various nursing homes and clinics, there were strong allegations that the practice of sex selection and pre-natal sex determination was still rampant. After coming across a series of news items in the print and electronic media about this incident, one Mr. Hemanta Rath, a social activist filed this PIL under Article 226 of the Constitution of India in the High Court of Orissa seeking directions for the effective implementation of the PCPNDT Act in the state.

The contention raised in this petition was that there was total inaction both on the part of the Central and State Government in implementing the provisions of the Act. Neither the appointment of Appropriate Authorities as contemplated u/s 17(1) of the Act had been done nor had the State Advisory Committee as per Section 17(5) of the Act been constituted. It was urged that without the constitution of such Appropriate Authority and Advisory Committee, provisions of Section 28 became nugatory as under Section 28, a court can take cognizance of the offence only on a complaint made by the Appropriate Authority.

In reply, the Central Government tried to justify its stand by stating that it was for the State of Orissa to take steps for the appointment of Appropriate Authorities and for the constitution of Advisory Committees as per Section 17 (1) and 17 (5) of the Act.

The State of Orissa in its reply stated that it had already taken immediate steps by lodging criminal cases against the guilty and the investigation of the cases had been handed over to the State Crime Branch, as a result of which the doctors and some of the staff members of nursing homes and ultrasound clinics were arrested. It was also informed that the government had formed a State Task Force Committee to monitor the working of ultrasound clinics and nursing homes. The State Government also enlisted

various other measures taken by it for awareness generation and sensitization regarding the provisions of the Act and further stated that in the State of Orissa the sex ratio was better than in various other parts of the country. The High Court was, however, not convinced and emphasized the implementation of the provisions of the Act.

After referring to the object of the Act and Constitutional principles, the High Court stressed both the Statutory and Constitutional obligation of the state, to implement the provisions of the Act. The High Court also took note of the delayed response of the state in the formation of the State Advisory Committee which was constituted only in 2007. This also was not in accordance with the provisions of the Act.

The High Court gave explicit directions to the State Government to appoint Appropriate Authorities and Advisory Committees within six weeks and further directed the Committees to take strict measures to implement the provisions of the Act. The Court observed that the Act had come into existence in order to protect an appropriate male and female ratio in society so that there would be no social imbalance. In the words of High Court, "the Act has been enacted to serve public purpose and the Constitutional end as is clear from the Object of the Act. Therefore, the state is under both a Statutory and Constitutional obligation to implement the provisions of the Act." This Judgement is very positive as it gives an impetus for the strict implementation of the provisions of the Act and compels the state to comply with its duty/ obligation of implementing the Act which had not been properly implemented even 13 years after the enactment of the legislation. The Judgement clearly shows that when the executive lacks the will to implement provisions of a beneficial legislation, the Judiciary has to play a proactive role.

1(3)

Equivalent Citation:
http://judis.nic.in, http://indiankanoon.org/doc/584431/

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH
Civil Writ Petition No. 15152 of 2007
Decided on July 7, 2009

Gaurav Goyal

vs.

State of Haryana

Hon'ble Judges: T.S. Thakur and Kanwaljit Singh Ahluwalia, JJ

Case Summary

This was a PIL filed by a social activist, Mr. Gaurav Goyal, with a prayer for a mandamus directing the State Government to conduct an inquiry into the illegal elimination of 250 female foetuses leading to the recovery of a large quantity of foetal remains from a 20 feet deep septic tank at Buala Nursing Home, Pataudi, District Gurgaon in Haryana. The Petitioner had also prayed for mandamus directing the government to take action against those guilty of negligence in the discharge of their official functions.

Finding merit in the Petition, the Court directed the Divisional Commissioner, Gurgaon, to hold an administrative inquiry into the illegal elimination of 250 female foetuses and also directed him to examine the role of the officers responsible for implementation of the PCPNDT Act and to suggest remedial measures to prevent such incidents in the future.

In compliance with the directions of the Court, an inquiry was held in which four Medical Officers were found guilty. The State Government however dragged its feet in taking appropriate action against the officers. Hence, the Court directed the state to expedite the proceedings, complete the same within six months and to take appropriate action against all those found to be guilty.

It was also pointed out to the High Court that, though a statuary notification appointing the Civil Surgeon of the district as the Appropriate Authority under the Act was issued on October 24, 1997 it was not published in the Official Gazette, which led to many doctors escaping action against them. Therefore, the High Court had to observe that the non-publication of an important Statutory Notification in the Official Gazette, adversely reflected upon the official machinery of the State Government charged with the responsibility of implementing an important legislation like the PCPNDT Act. The High Court found it regrettable that for a period of over 12 years the non-publication of the Notification had never come to the notice of the concerned authorities. As it was pointed out on behalf of the state that most steps that needed to be taken in terms of the provisions of the Act had already been taken and a Notification nominating a multi-member State Appropriate Authority had been duly issued and published in the Official Gazette and a State Supervisory Board had already been constituted apart from the State and District Advisory Committees, the High Court disposed of the Petition holding that in the circumstances, nothing further remained to be done.

1(4)

Equivalent Citation:
http://judis.nic.in

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH
Civil Writ Petition No. 17964 of 2007
Decided on July 31, 2009

Court on Its Own Motion

vs.

State of Punjab and Others

Hon'ble Judges: T.S. Thakur and Kanwaljit Singh Ahluwalia, JJ

Case Summary

In this Petition the High Court of Punjab and Haryana at Chandigarh, has taken *suo moto* cognizance of a newspaper report published in Hindustan Times Chandigarh on November 17, 2007, under the caption "Efforts to improve sex ratio in for a huge blow". In the said report, it was mentioned that sex determination kits were entering the state. Becoming alarmed by the declining Child Sex Ratio in the state and to curb the social menace of pre-natal sex selection and sex determination, the High Court took cognizance of the newspaper report on its own motion and issued notices to the Union of India and State Governments.

In response thereto, the Directors of Health Services of different states filed affidavits elaborating various steps taken by the State Governments for effective implementation of the Act. Perusal of the affidavits filled by them revealed that, the PCPNDT wing of the Ministry of Health and Family Welfare was aware of the availability of such sex determination kits in the grey market. They had in fact constituted teams which had conducted surprise inspections/raids and found no sex determination kits. The High Court was, therefore, satisfied that the State Governments were also worried and concerned about the same and had taken effective and adequate steps to ensure that sex determination kits were not made available. They had further taken steps to create awareness on the issue. The Ministry of Health and Family Welfare also informed the Hon'ble Court that a toll free helpline under the PCPNDT Division of the Ministry to lodge complaints and access information was being installed and an awareness programme under the scheme, "Save the Girl Child Campaign" were being undertaken. It was further stated that sensitization on the issue of sex selection had been made part of the curriculum for the Midwifery Course under the National Rural Health Mission. Furthermore, an annual report on the implementation of the Act was being published and a website was to be launched separately to inform the public about the information and activities undertaken by the Ministry of Health and Family Welfare regarding the PCPNDT Act. The High Court, therefore, disposed of the Petition after being satisfied with the measures taken by the government.

1(5)

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN, JAIPUR BENCH, JAIPUR
Public Interest Litigation Petition No. 3270/12
Decided on March 30, 2012 and May 23, 2012

S.K. Gupta

vs.

Union of India and Others

Hon'ble Judges: Arun Mishra, CJ and Narendra Kumar, J

Case Summary

The Petitioner, who is an advocate, had filed this PIL to direct the Respondents to take appropriate steps to ensure that the Child Sex Ratio in the state should not decline further on account of prevalent dowry system or the practice of elimination of female foetuses due to sex selection/sex determination. Direction was also sought that the State Government should provide financial assistance and initiate schemes for the improvement of the condition of female children. Prayer was also been made to direct the government to have a separate cadre of officers under the PCPNDT Act to prevent the practice of sex selection and to use the latest technology so that sonography centres are mandated to have a complete record of each sonography conducted and are required to fill in and transmit online Form 'F' to the Appropriate Authority within 24 hours of conducting a sonography.

After concurring with the above said decision of the Bombay High Court in *Radiological and Imaging Association vs. The Union of India* dated August 26, 2011, the Division Bench of the Court upheld the decision taken by the State Government of Rajasthan of filling of Form 'F' online on the government website hamaribeti.nic.in, and gave further directions for effective compliance of these decisions within the time prescribed. It was ordered that these directions of the Government of Rajasthan be made a part of the Order of the Court and any violation of the same would amount to violation of the Order of the High Court under Article 215 of the Constitution as well as under the Contempt of Courts Act, 1971.

Subsequent to the passing of this Order on March 30, 2012 on the submission of the Petitioners that a large number of cases under the PCPNDT Act were pending at the trial stage without charges being framed by the Trial Court for no good reason, the High Court observed that violation of the Act had to be dealt with a firm hand since it had become very difficult to check the rampant practice of sex determination. The Court, therefore, directed the Trial Court to frame charges in the pending cases within a period of two months, even by preponing the date, wherever necessary. It was further directed that, no laxity in this regard would be tolerated and if any Trial Court delayed the framing of charges, extension of time had to be obtained from the High Court giving reasons for the charges not being framed within the stipulated timeframe.

As it was pointed out that in some cases framing of charges have been questioned before the Sessions Judge, it was directed that Sessions Judges of various districts should ensure that in case a Revision is

pending relating to framing of charge, it be decided on priority basis within a period of three months of the receipt of this Order. The Court also directed the Deputy Registrar Judicial of the High Court of Rajasthan, Jodhpur as well as Jaipur to submit the list of such cases pending before the High Court for quashing the framing of charges so as to obtain administrative orders before the Chief Justice for listing them on priority basis.

Assurance was given by the government that they were going to take action against erring doctors/ centres in accordance with the law and complete the investigation in pending cases as expeditiously as possible. It was directed that the list of cases pending in the State of Rajasthan against various doctors at the stage of investigation be furnished to the Court with details as to how long they have been pending, along with the list of cases in which chargesheets have also been filed.

The Court further directed that the copy of this Order be sent to all CJMs, all Sessions Judges, Deputy Registrar – Judicial as well as to the Chief Secretary, Director General of Police and Principal Secretary, Home.

The matter was kept pending for further directions, if necessary.

1(6)

Equivalent Citations:
AIR 2013 SC 1571, (2013) 4SCC 1

IN THE SUPREME COURT OF INDIA
Extraordinary Civil Writ Jurisdiction
Writ Petition (Civil) No. 349 of 2006
Decided on March 4, 2013

Voluntary Health Association of Punjab
vs.
Union of India and Others

Hon'ble Judges: K.S. Radhakrishnan and Dipak Mishra, JJ

Case Summary

Despite the fact that as early as in 2001 and 2003 the Supreme Court had in the case of *CEHAT vs. Union of India* issued several directions for proper implementation of the Act, as those directions were not complied with by the various states, this Writ Petition was filed in the year 2006, which came up for hearing before the Apex Court on March 4, 2013.

In this Writ Petition again the Apex Court had to express its concern about Indian society's discrimination towards the girl child because of various reasons which have their roots in social behaviour and the prejudices against the female child, and due to the evil practice of dowry that is still prevalent in India. The Apex Court took note of the decline in the female Child Sex Ratio across the country which was a result of the misuse of pre-natal diagnostic techniques and the improper implementation of the Act meant to prevent such misuse. In this Petition, therefore, the personal attendance of the Health Secretaries of the States of Punjab, Haryana, NCT Delhi, Rajasthan, Uttar Pradesh, Bihar and Maharashtra was secured to examine what steps had been taken for the proper and effective implementation of the provisions of the Act as well as of the various directions issued by the Supreme Court in its earlier decisions. It was noticed by the Court on the basis of the data furnished by them that though the Union of India has constituted the Central Advisory Board and most of the states and Union Territories have constituted State Supervisory Boards, Appropriate Authorities, Advisory Committees, etc., their functioning is far from satisfactory as is evident from the Census figure of 2011 showing a decline in the female Child Sex Ratio. The Court took notice that the provisions of the Act were not being implemented properly and effectively by all the states except for the State of Maharashtra. The reasons for the same were found to be the lack of proper supervision and monitoring of the mushrooming growth of sonography centres. It was also found that the ultrasonography machines used for sex determination were seldom seized and even if seized, they were being released to the violators of the law, only to repeat the crimes. Moreover, very few cases had resulted in convictions and were pending disposal for several years in many courts. The records required

to be maintained as per the Rules in respect of pregnant women were also not being maintained. Many of the clinics were also totally unaware of amendments in the Act and Rules. The Supreme Court, therefore, in this Petition again issued various directions as follows:

- The Central and State Supervisory Boards should meet at least once in six months to supervise the effective implementation of the Act.
- The State and District Advisory Committees to gather information relating to the breach of provisions of the Act and the Rules and to take steps to seize records, seal machines and institute legal proceedings in case they notice violations of the provisions of the Act.
- The said Committees to report the details of the charges framed and the conviction of the persons under the Act to the State Medical Council for taking proper action, including suspension of registration and cancellation of licence to practice.
- They should ensure that all the records and forms in accordance with Rule 9(8) are maintained.
- They should further ensure that all the manufacturers and sellers of ultrasonography machines do not sell any machine to any unregistered centre and disclose on a quarterly basis a list of persons to whom machines have been sold.
- Steps should be taken for mapping of all registered and unregistered clinics in three months time.
- Special Cell to be constituted by the State Governments and Union Territories to monitor the progress of various cases pending in the court and take steps for their early disposal.
- To seize and if necessary to confiscate and to sell the machines which are used illegally and contrary to the provisions of the Act.
- Various courts in the country to take steps to dispose of all pending cases within six months.
- To communicate this Order to the Registrars of various courts to take follow-up action with due intimation to the concerned courts.

The most important direction given in the decision is to take steps to educate the people about the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the state and district levels. It was felt by the Apex Court that the reason for non-implementation of the provisions of the Act was the failure on the part of the authorities to change mindsets that discriminated against women and girls. According to the Court, in addition to awareness of the legal provisions, what is also necessary is awareness in other spheres, like focus on the prowess of women and the need for women's empowerment, for that a change in mindset is required so that practices like dowry are abhorred. In the words of the Court, women play a seminal role in the society and it is a requisite need of the present day that people are made aware that it is obligatory to treat women with respect and dignity. Hence the Court directed that a cosmetic awareness campaign would never sub-serve the purpose. The people involved in the camps must take it up as a service, a crusade. They have to equip themselves with Constitutional concepts, culture, philosophy, religion, scriptural commands and injunctions, and the mandate of the law as engrafted under the Act. They should have boldness and courage to change the mindset of the people. They should clearly spell out that the elimination of female foetuses is the worse type of dehumanization of the human race. Only then, as per the Apex Court, the object of conducting workshops and awareness camps can be achieved to realize the ultimate aim of having gender equality as mandated by the Constitution.

Chapter 2

PETITIONS CHALLENGING THE CONSTITUTIONAL VALIDITY OF THE ACT

The noble object behind the enactment of the PCPNDT Act was to ban the use of pre-conception sex selection techniques and the misuse of pre-natal diagnostic techniques for sex selection. The State found it necessary to intervene in the matter, by restricting the couple's individual right to have a child of the sex of their choice, in order to prevent a catastrophe in the form of a severe imbalance in male-female ratio, which was against the order of nature. This law was therefore enacted by the State in discharge of its duty of upholding the human dignity and the welfare of society, especially of women and children, in accordance with the principles enshrined in Article 15(3) of the Constitution of India. However when it comes to the deep rooted preference for sons over daughters entrenched in the mindset of Indian society, new ways are sought to challenge the Constitutional validity of the Act itself, either on the ground that it violates Article 14 as being discriminatory against the male child or on the ground that it violates Article 21 of the Constitution as is restricts a couple's right to have a family of their choice.

As of today there are two decisions, both by the Bombay High Court, in which the Constitutional validity of some provisions of the Act were challenged but upheld. Both the decisions are landmarks in the way they deal with this sensitive and socially relevant issue.

2(1)

Equivalent Citations:
2005 Cri LJ 3408, 2005 (3) MhLJ 1131, MANU/MH/0293/2005
2005 All M.R.(Cri.)2504, 2005(2) BOM.C.R.(Cri.)417

IN THE HIGH COURT OF BOMBAY
Criminal Writ Petition No. 945 of 2005 and
Criminal Application No. 3647 of 2005
Decided on June 13, 2005

Vinod Soni and Anr

vs.

Union of India (UOI)

Hon'ble Judges: V.G. Palshikar and V.C. Daga, JJ

Case Summary

The Petitioners in this case were a married couple. They had challenged the Constitutional validity of the Act basically on two grounds: first, that it violates Article 14 and second that it violates Article 21 of the Constitution of India. At the time of argument, challenge via Article 14 was, however, not pressed into submission.

A very interesting argument was advanced in this case by the Petitioners by submitting that the right to life guaranteed under Article 21 of the Constitution has been gradually expanded to cover several facets of human life and personal liberties, which an individual has as a matter of his fundamental rights. Reliance was placed on several Judgements of the Supreme Court to submit that the right to life includes right to personal liberty which in turns includes the liberty of choosing the sex of the offspring and to determine the nature of the family. Thus it was contended that the couple is entitled to undertake any such medical procedure which provides for determination or selection of sex, so that they can exercise the right of deciding the nature of their family.

The High Court however exposed the fallacy of this argument by observing that, "right to personal liberty cannot be expanded by any stretch of imagination to liberty to choose the sex of the child and prohibit to coming into existence of a female or male foetus which shall be for nature to decide." After making a reference to the decisions of the Supreme Court, which explain that Article 21 includes the right to food, clothing, decent environment and even protection of cultural heritage, the High Court held that "these rights, even if, further expanded to the extremes of the possible elasticity of the provisions of Article 21, cannot include right to selection of sex, whether pre-conception or post-conception, which shall be for the nature to decide. As per the High Court, right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself be a right." Accordingly, the High Court dismissed the Petition holding that it does not even make a *prima facie* case for violation of Article 21 of the Constitution.

2(2)

Equivalent Citations:
AIR 2008 Bom 29, 2007(5) Bom CR 710, 2007(6) ALL MR 336, MANU/MH/0668/2007

IN THE HIGH COURT OF BOMBAY
Writ Petition No. 2777 of 2005
Decided on September 6, 2005

Mr. Vijay Sharma and Others

vs.

Union of India

Hon'ble Judges: Swatanter Kumar, CJ and Smt. Ranjana Desai, J

Case Summary

In this Writ Petition filed under Article 226 of the Constitution of India, the Petitioners had challenged the Constitutional validity of Sections 2, 3-A, 4(5) and 6(c) of the Act on the ground that they violate the principles of 'equality before law', enshrined in Article 14 of the Constitution of India. The Petitioners were a married couple with two female children and were desirous of having a male child, so that they could enjoy the love and affection of both sons and daughters and their daughters could enjoy the company of their own brother while growing up. It was contended by them that provisions of the Act should not be made applicable without distinction. According to them, couples who already have children of one sex should be allowed to make use of the diagnostic techniques at pre-conception stage to have a child of the opposite sex. It would help to balance their family and in fact lead to the ideal ratio of females to males. It was further argued that under the provisions of the Medical Termination of Pregnancy Act, 1972 (MTP Act) the termination of pregnancy is allowed under certain circumstances hence there was no reason to impose a blanket ban on determination of sex at the pre-conception stage. An innovative plea was raised to the effect that, if the anguish caused to a mother by an unwanted pregnancy is recognized as grounds for termination of the pregnancy under the MTP Act, why is anguish caused to a mother who conceives a female or male child for the second or third time is not considered under the PCPNDT Act? Thus there is discrimination between two women in a similar position and hence the Act violates Article 14 of the Constitution.

The Hon'ble Judges of the High Court, after elaborately dealing with the Object, Reasons and Provisions of the Act, held that there can be no comparison between the MTP Act and the PCPNDT Act as the object of both the Acts is different and both the Acts operate in different fields. Hence, acceptance of the submissions of the Petitioners would frustrate the object of the PCPNDT Act. It was held that the MTP Act does not deal with sex selection before or after conception. Moreover, it must be remembered that termination of pregnancy under the MTP Act is also not prompted because of the unwanted sex of the foetus. It was held that anguish of a mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the sex of child but

for other reasons. Thus by the process of comparative study, the High Court held that provisions of the PCPNDT Act cannot be called discriminatory and hence violative of Article 14 of the Constitution.

The High Court then took note of the frightening figures showing the imbalance in the sex ratio in various parts of India and expressed its concern about the same. The High Court was also aghast at the shocking arguments in the Petition proclaiming that if the country is economically and socially backward, it is better if female children are not born. The High Court was at pains to observe that, "in India there is strong bias in favour of the male child. Various causes have led to this preference. It is felt that a son carries the name of the family forward and only he can perform the religious rites at the time of cremation of the parent. Sons are said to provide support in old age. Several socio-economic and cultural factors are responsible for this craving for a son. It is unfortunate that people should still be under the influence of such outdated notions. As long as such notions exist, the girl child will always be unwanted, because it is felt that she brings with her the burden of dowry. These hard realities have to be kept in mind while dealing with the challenge raised about the Constitutional validity of a statute which tries to ban sex selection before or after conception".

The High Court held that no one can be allowed to use the said techniques for sex selection. The justification offered by the Petitioners in this respect was totally unacceptable. It was further observed by the High Court that if the patriarchal system or economic and social backwardness are responsible for sex selection, then efforts should be made to rectify the system and improve the socio-economic status of society. But the Court cannot accept it as a *fait accompli*, permit an abject surrender to it and allow sex selection or misuse of techniques to eliminate the female sex. As per the High Court, if the use of sex selection techniques is not banned, there will be unprecedented imbalance in male to female sex ratio and that will have a disastrous effect on society. The Act must, therefore, be allowed to achieve its avowed object of preventing sex selection. The provisions of the Act are neither unconstitutional nor arbitrary nor unreasonable and hence not violative of Article 14. According to the High Court the whole idea of sex selection before conception is to go against the nature and secure conception of a child of one's choice, thereby to prevent birth of the female child. Hence the argument that sex selection at the pre-conception stage is an innocent act has to be rejected.

The High Court has, in strong and harsh words rejected outright the argument that society does not want a girl child and, therefore, efforts should be made to prevent the birth of the girl child. It was held that, "such tendency offends the dignity of women. It undermines their importance. It insults and humiliates womanhood. It violates woman's right to life. It violates Article 39(e) of the Constitution and also ignores Article 51A(e) of the Constitution. Sex selection is therefore against the spirit of the law and Constitution." Thus, rejecting all the challenges raised about the Constitutional validity of the Act, the High Court dismissed the Petition and directed the State to take all expeditious steps to prevent misuse of diagnostic techniques.

The entire Judgement the High Court must be read from start to finish. It makes out a strong case for preventing sex selection and upholding the validity of the PCPNDT Act.

Chapter 3

CASES INVOLVING PROCEDURAL ISSUES UNDER THE ACT

Cases involving procedural issues under the Act are few and far between. The majority of them pertain to the cancellation of registrations of sonography clinics or of the sealing and seizure of ultrasound machines on account of their misuse. The challenges to this action of the State, in the cases covered in this chapter, are mainly on the ground that the State Authority had not complied with procedural formalities in taking such drastic action which had the effect of preventing the Petitioners from carrying on their professional activities and thereby affecting their Constitutional right of earning livelihood. Some cases also pertain to the requisite qualifications for conducting sonography clinics, whereas in some cases the issue of statutory compliance before taking any action under the Act is raised.

PART - I

Qualification of the persons conducting ultrasonography test Section 3 and Rule 3

As the very object of the PCPNDT Act is to prohibit the misuse of the pre-natal test for sex determination, Section 3 of the Act lays down the provisions for the regulation of genetic counselling centres, genetic laboratories and genetic clinics and also for the registration of such clinics under the Act. It provides that no genetic counselling centre, genetic laboratory or genetic clinic registered under the Act shall employ or cause to be employed or use the services of any person whether on honorary basis or on payment, who does not possess the qualifications as may be prescribed.

Rule 3 of the PNDT Rules, 1996 prescribe minimum requirements and qualifications for setting up a genetic counselling centre, genetic laboratory, genetic clinic, ultrasound clinic and imaging centre. Sub-Rule (3)(1) lays down that any person being or employing

(a) A gynaecologist having experience of performing at least 20 procedures in chorionic villi aspirations per vagina or per abdomen, chorionic villi biopsy, amniocentesis, cordocentesis foetoscopy, foetal skin or organ biopsy or foetal blood sampling, etc., under supervision of an experienced gynaecologists in these fields, or

(b) A sonologist, imaging specialist, radiologist or registered medical practitioner having a post graduate degree or diploma or six months training or one year experience in sonography or image scanning, or

(c) A medical geneticist may set up a genetic clinic/ultrasound clinic/imaging centre.

Section 2 of the Act gives the definition of gynaecologist, medical geneticist, paediatrician and sonologist or imaging specialist. The issue always raised before the Courts, after the Appropriate Authority has taken action against certain medical practitioners or radiologists is whether he/she has the requisite qualifications to set up such a clinic for conducting ultrasound tests. This section of the book examines these contentions and summarizes the verdicts of various High Courts under the following categories,

(i) Whether a medical practitioner with a BAMS Degree is qualified as per Section 2(g) of the Act to use an ultrasonography machine and conduct the test

(ii) Whether all ultrasonography scanning centres are required to be registered under the Act irrespective of whether they carry such pre-natal diagnostic procedures or not

(iii) Whether a person holding a BHMS Degree and registered with the Homeopathic Medicine Board can be said to be qualified to conduct ultrasonography tests

(iv) What the minimum criteria regarding training should be, where the training should be provided and whether there are any institutes recognized for providing training as required under Rule 1(3)(1)(b) for qualifying as a sonologist, imaging specialist, radiologist or registered medical practitioner

3-I(1)

Equivalent Citations:
2006 (4) Ker LJ 81, MANU/KE/0330/2006

IN THE HIGH COURT OF KERALA
O.P. No. 39084 of 2001 and Connected Cases
Decided on August 1, 2006

Qualified Private Medical Practitioners and Hospitals Association

vs.

State of Kerala

Hon'ble Judges: V.K. Bali, CJ and P.R. Raman, J

Case Summary

In this case seven hospitals situated in different parts of Kerala had sought a declaration that laboratories and clinics which do not conduct pre-natal diagnostic tests using ultrasonography will not come within the purview of the Act. It also sought for a direction that the Authorities under the Act should not insist on the registration of all ultrasound scanning centres irrespective of the fact as to whether they are conducting ultrasonography or not. The Court accepted their submission that registration under the Act would be compulsory only for genetic counselling centres, genetic clinics and genetic laboratories which were used for conducting any pre-natal diagnostic procedure or pre-diagnostic steps. The Court however rejected the contention that such clinics do not come within the purview of the provisions of the Act.

The Court dealt at length with the Provisions of Section 3, 4 and 18 of the Act and held that, as the object of the Act is to prevent misuse of any pre-natal diagnostic techniques, the authorities would be free to conduct inquiries or to hold inspections at any places where such a device was available and to take action under the Act in case any person or institution is indulging in activities contrary to the provisions of the Act. This would apply equally to non-registered institutes as well. While the registration only permits pre-natal diagnostic techniques being used for restricted purposes mentioned in Clause (2) of Section 4, it cannot be said that merely because Institutions are not registered they can indulge in the use of such techniques especially for the purposes clearly prohibited under the Act.

Thus it was categorically held that the Authorities were fully competent to ensure due compliance of the Act from all persons, at all places and in all institutions, whether registered or unregistered, thereby empowering Appropriate Authorities to take action even against unregistered institutes.

3-I(2)

Equivalent Citations:
MANU/PH/0364/2010, (2010)159 PLR 446

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
Civil Writ Petition No. 14759 of 2009
Decided on April 27, 2010

Dr. Devender Bohra

vs.

State of Haryana and Others

Hon'ble Judge: K. Kannan, J

Case Summary

In this Petition filed by Dr. Devendra Bohra, the Order of suspension of registration of a sonography machine installed in the hospital run by the Petitioner and sealing of the equipment was challenged. The Appropriate Authority had taken the said action on the ground that, as the Petitioner was a medical practitioner with a BAMS degree, he was not qualified as per Section 2(g) of the Act to use the said machine. The contention of the Petitioner was that under the Indian Medicine Central Council Act, 1970, he was a medical practitioner and hence entitled to the use of an ultrasound machine.

After considering various provisions and the Object of the Act, the High Court rejected the said contention holding that "a Practitioner under Indian Medicine Central Council Act, 1970, may have a requirement of sonography machine for determination of foetal abnormalities for appropriate treatment, but if he doesn't possess the particular qualification required under the PCPNDT Act to operate the sonography machine, his challenge to the suspension order is futile without a challenge to the provisions of the PCPNDT Act or the Rules themselves." It was further held that the Notification issued by the State allowing the use of the ultrasound machine by a medical practitioner with a BAMS degree cannot expand the legislative intent or the Rules which have been framed under the Act. It was further held that if the PCPNDT Act requires possession of a certain degree and qualification and if the Petitioner does not possess the same, it ends the matter and the question of allowing the Petitioner to continue the registration. It was held that it was a simple, open and shut case of a Petitioner who was not a 'medical practitioner' and who is not, therefore, registered under the Indian Medical Council Act, 1956. If the admitted position is that his name has not been registered in the State Medical Register and the Act r/w the Rules specifically requires that the person, who possesses the equipment to have such a certain qualification, then Petitioner could have no argument to advance. It was further held that the Notification issued by the government cannot displace the requirement of Rule 3 of the Act. The Court held the Petition to be frivolous, wholly misconceived and dismissed it with fine of Rs. 10,000.

3-I(3)

Equivalent Citations:
AIR 2011 Delhi. 48 (NOC), MANU/DE/1688/2010

IN THE HIGH COURT OF DELHI
W.P. (C) 6654 and 6826/2007
Decided on July 5, 2010

Dr. K.L. Sehgal

vs.

Office of District Appropriate Authority and

Dr. Sonal Randhawa

vs.

Union of India (UOI) and Others

Hon'ble Judge: S. Muralidhar, J

Case Summary

The question raised for consideration in these two Writ Petitions filed before the Delhi High Court is what meaning should be given to the expression 'sonologist' as defined u/s. 2(p) of the PCPNDT Act. As per the said Section, 'sonologist or imaging specialist' means a person who possesses any one of the medical qualifications recognized under the Indian Medical Council Act, 1956 or who possesses a post graduate qualification in ultrasonography or imaging techniques or radiology.

The cause for filing these Writ Petitions was the rejection of the application filed for the renewal of a Registration Certificate. The application of the Petitioner, Dr. Sehgal, was rejected on the ground of non-submission of documents about his qualification from a qualified radiologist. The Petitioner challenged it stating that in terms of Section 3(1)(b) of the PCPNDT Act any person who was registered as a medical practitioner and had one year's experience in sonography was eligible to run an ultrasound clinic and according to him as he fulfilled this requirement, he was eligible to set up such a clinic.

A similar issue was also raised by another Petitioner Dr. Sonal Randhawa. She had worked as a registered sonologist under the PCPNDT Act for three years and had undergone training. She had worked under Dr. J.S. Randhawa, M.D., a qualified and experienced radiologist and ultrasonologist. Her application was rejected on the ground that training in ultrasound needs to be examined and recognized by the Competent Authority.

The common issue raised by both the Petitioners was that the PCPNDT Act and Rules do not provide the procedure for undergoing training/experience or identify persons eligible to provide such training. Hence there was no justification in rejecting the request for registration.

The High Court after careful scrutiny of the entire material on record and after hearing at length the Authorities under the Medical Council of India and the PCPNDT Act, held that none of these authorities were clear as to what should be the minimum criteria regarding training, where the training should be provided, and which are the institutes recognized for providing training. Even the Rules framed under the PCPNDT Act did not provide that the training has to be in a recognized institute. It was also unclear where such recognized institutes existed. It was found that even the PCPNDT Act and Rules did not provide any guidelines on this point. It was, therefore, held that unless such criteria are fixed and made known in advance, it would be unfair to reject the application. Hence, it was held that the rejection of both the Petitioners' applications for registration as sonologist was unsustainable in law and set aside as such.

The High Court could not restrain itself from expressing its concern about this disconcerting state of affairs reflected in these two Petitions. In the words of the High Court, "as a result of weak definition of the term 'sonologist' under the PCPNDT Act, the mushrooming growth of diagnostic clinics is unable to be effectively regulated. The absence of clear rules and guidelines spelling out unambiguously the qualification, training and experience required for operating a diagnostic clinic offering ultrasound tests has resulted in unethical practices being adopted in many such clinics in violation of the PCPNDT Act going unchecked." As per the High Court, these cases underscore the need to amend the PCPNDT Act to plug the loopholes. The High Court held that, in order to avoid any confusion, the requirements in terms of qualification, training and experience to be recognized and registered as a 'sonologist', should be incorporated in the PCPNDT Act and further explicated under the PCPNDT Rules.

The High Court was of the opinion that in determining the criteria the best available international practices should be adapted to suit Indian conditions. Secondly, the names of the institutions state-wise which are recognized for that purpose will have to be notified. Thirdly, the changed criteria must be made not only prospective but sufficient time must be given to enable those seeking registration or renewal to fulfil the changed criteria. According to the High Court, fresh registrations can be postponed to enable the arrangements envisaged by the new criteria to be put in place. These steps will require a comprehensive survey to be undertaken by the Respondents followed by consultations with experts in the medical fraternity and education. The resultant amendment to the definition of 'sonologist' under Section 2(p) of the PCPNDT Act and the corresponding amendment to the PCPNDT Rules must be given wide publicity so that there is increased public awareness about the minimum standards one should expect in diagnostic clinics.

Now as per the expectations of the High Court necessary amendments have been made in the Act and the Rules framed thereunder.

3-I(4)

Equivalent Citations:
MANU/UP/0514/2011,(4)ADJ 672

IN THE HIGH COURT OF ALLAHABAD
Civil Misc. Writ Petition No. 57791 of 2008
Along with Civil Misc. Writ Petition Nos. 57794 and 57795 of 2008
Decided on April 1, 2011

Anil Kumar Mishra

vs.

State of UP and Others

Hon'ble Judges: Sunil Ambwani and Dilip Gupta, JJ

Case Summary

The Petitioners in this case held BHMS degrees and were registered with the Homeopathic Medicine Board. They had also registered themselves for running an ultrasound clinic under Rule 6 of the Rules framed under the Act. By the Order dated September 22, 2008, they were informed that they were not qualified to run an ultrasound clinic. They were also directed to show cause why their registration should not be cancelled. The Petitioners challenged the said notice by submitting that they were given registration certificates after their qualifications had been verified. They also held medical qualifications in Homeopathic and Unani medicine. Therefore, the action initiated for cancellation of their registration under PCPNDT Act was not legal.

After perusing and dealing with the provisions of Section 3 of the Act and Rule 3 of the PCPNDT Rules, prescribing the qualifications for running a sonography clinic, it was held by the High Court that Petitioners were neither gynaecologists nor paediatricians. They did not have any qualification in genetic counselling. They were also not medical geneticists or radiologists nor medical practitioners registered under the Indian Medical Council Act and therefore, they were not qualified or eligible in any way to run an ultrasound clinic. Therefore, they could not be registered under the Act for carrying out ultrasound tests. The plea of estoppel, which was raised by them, could not be applicable against a clear statutory prohibition.

The Court then discussed at length the object of enacting the PNDT Act and the social conditions prevailing in India, which have resulted in the decline in the Child Sex Ratio/female sex ratio and also the fact that the PCPNDT Act is an important social welfare legislation to avoid gender discrimination and to ensure gender justice at conception and birth.

The Court ultimately held that the registration of a medical practitioner under the Indian Medical Council Act, 1956 and induction of his name in the State Medical Register is an essential qualification

for the registration of ultrasound clinics. In view of Section 3 of the Act and Rule 3(3) of the PCPNDT Rules, no other medical practitioner can conduct such an ultrasound test. Even for a registered medical practitioner, the additional qualification of possessing a post-graduate degree or diploma or six months' training or one year's experience in sonography or image scanning is a must for registration under the Act. In this case as the Petitioners did not have the qualifications, it was held that they were not qualified and eligible to run an ultrasound clinic. Their Writ Petitions were dismissed accordingly.

PART - II

Maintenance of Records and Form 'F'
Sections 4, 5 and 6 Rule 9

Section 4 of the Act regulates the use of pre-natal diagnostic techniques for particular purposes only as laid down in sub-clause (3) with a proviso that the person conducting ultrasonography on a pregnant woman shall keep complete records 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 the contrary is proved by the person conducting such ultrasonography.

Rule 9 lays down the details of various records to be maintained and preserved by the person conducting ultrasonography on a pregnant woman in prescribed forms which are given in the Schedule. The Form 'F' as given in the Schedule in this respect is of special relevance as it pertains to pregnant women subjected to any pre-natal diagnostic techniques procedure or test. The significance of maintaining such record, especially Form 'F', is to check the misuse of diagnostic techniques.

Appropriate Authorities appointed under the Act to supervise the implementation of the provisions of the Act and Rules, are authorized under Section 17 to inspect any clinic performing ultrasonography to see whether records are properly maintained or not. Rule 11 mandates that such clinic shall afford all reasonable facilities to Appropriate Authority for inspection of the place, equipment and record. However, whenever such action is taken by the Appropriate Authority against the person or the clinic for non-maintenance of records, especially Form 'F', the breach of which invites penal consequences and punishment up to three years with fine extending to Rs. 10,000 for the first conviction, the argument generally advanced in the Court is that, non-maintenance of records is merely a procedural lapse, it is not a serious issue. The usual ploy of the lawyers appearing for the medical practitioners is to plead that it is the job of the staff to maintain the records or to fill up forms and for lapse on their part, doctors should not be held penally liable especially for such a severe punishment. The following rulings of various High Courts negate these arguments and emphasize the significance of maintenance of such records for checking the misuse of diagnostic techniques.

3-II(1)

Equivalent Citations:
MANU/GJ/1040/2008, 2009 GLH(1)584

IN THE HIGH COURT OF GUJARAT
Criminal Misc. Application Nos. 10158 and 10160 of 2007
Decided on September 19, 2008

Amita R. Patel

vs.

State of Gujarat and Anr

Hon'ble Judge: M.R. Shah, J

Case Summary

Both these Petitions were filed under Section 482 of CrPC to quash the criminal proceedings initiated against the Petitioners for contravention of the provisions of the PCPNDT Act. As per the case put up by the Appropriate Authority, the Petitioners had failed to observe and comply with the provisions of the Act. The Form 'F' which was required to be filled in completely and sent before the 5th of the following month to the Appropriate Authority was not sent. The signature of the doctor and the date were also found missing on the Form, which clearly indicated that the provisions of the Act were circumvented to resort to the illegal practice of sex determination or to suppress activities which were not in consonance with the provisions of the Act.

As per the Petitioners all the Rules under the Act were complied with. There were no breaches whatsoever and hence prosecutions launched against them were required to be quashed.

After considering the provisions of the PCPNDT Act, the Rules framed thereunder and the objects and reasons of the Act, the Court came to the conclusion that the averments in the complaint sufficiently spell out non-compliance and breach of the provisions of the Act and the Rules framed thereunder. It was further held that though the alleged breaches may be seen as technical, the provisions of the Act and Rules which are mandatory are required to be complied with strictly so as to achieve the ultimate goal of the Act. Hence, it was held that as the allegations made in the complaint make out a *prima facie* case for further trial, the powers under Section 482 of CrPC of quashing the proceedings at the threshold itself cannot be exercised.

Before parting with the Judgement, the Court was tempted to observe that the motto of the Government and everybody is "Save the Girl". However, it shall not be only "Save the Girl" but it should be "Welcome Girl" and if this goal is achieved and every man and woman starts welcoming girls (daughters) from the bottom of their hearts, then and only then it can be said that the purpose and object for which the PCPNDT Act was enacted has been achieved.

3-II(2)

Equivalent Citations:
2009 CRI. L. J. 721, (2009)1 GLR 64, MANU/GJ/0717/2008

IN THE HIGH COURT OF GUJARAT (FULL BENCH)
Cri. Reference Nos. 4 and 3 of 2008
Decided on September 30, 2008

Suo Motu

vs.

State of Gujarat

Hon'ble Judges: M.S. Shah, D.H. Waghela and Akil Kureshi, JJJ

Case Summary

This Full Bench decision of the Gujarat High Court is a path-breaking decision, wherein the Court has taken a progressive view in tune with the Objects and Provisions of the PCPNDT Act. In this case, the Full Bench of the Gujarat High Court was deciding the reference made by a single Judge in the case of *Hitesh D. Shaha vs. State of Gujarat* on several important legal issues namely,

(i) Whether under the provisions of Section 28 of the Act, a Court can take cognizance of an offence under the Act on a complaint made by any officer authorized in this behalf by the Appropriate Authority

(ii) Whether the provisions of the proviso to sub-section (3) of Section 4 of the Act require that the complaint should contain specific allegations regarding the contravention of the provisions of Section 5 and 6 of the Act

(iii) Whether the burden lies on the Authorities to prove that there was contravention of the Provisions of Section 5 or 6 of the Act and

(iv) Whether any deficiency or inaccuracy in filling Form 'F', as required under the statuary provisions, is merely a procedural lapse

The genesis of the reference was the decision of a single bench in the case of *Dr. Manish C. Dave vs. State of Gujarat, (2008) 1 GLR 239*. By this decision a bunch of petitions for quashing criminal complaints filed against Petitioners for the offence punishable u/s 4 and 5 of the Act were allowed. The Petitioners were radiologists using sonography machines for the purpose of diagnosis. The only allegation made against them was that they had failed to fill up Form 'F' as required u/s 4(3) of the Act, which according to the prosecution, amounted to contravention of the provisions of Section 5 and 6 of the Act. However in the absence of any specific allegation in the complaint that petitioners had conducted the tests for sex determination or communicated the sex of the foetus to any one, it was held by the single bench that deficiency in filling up Form 'F' does not amount to contravention of the provisions of Section 5 and 6 of the Act. Accordingly it was further held that the complaints themselves were not maintainable.

The observation made by the High Court in the case of *Manish C. Dave* that "Deficiency or inaccuracy in filling up of Form 'F' is merely a procedural lapse which does not in any manner amount to contravention of the provisions of Section 5 and 6 of the Act" was bound to prove fatal to the prosecution, leading to the setting aside of several such criminal cases.

Fortunately for the prosecution, the same High Court had in the case of *Jagruti R. Sanghvi vs. State of Gujarat, Misc. Application No. 4996/2008* expressed disagreement with the view taken by the single Judge in the case of *Manish C. Dave*. Hence, faced with these two conflicting views, in the case of *Hitesh D. Shaha vs. State of Gujarat* it was felt necessary by another single bench to refer it to a larger bench.

Accordingly, in this Reference, while answering these legal issues, it was held by the full bench that the Act and the Rules framed thereunder provide for an elaborate scheme to ensure proper implementation of the relevant legal provisions and the possible loopholes in strict and full compliance are sought to be plugged by detailed provisions for maintenance and preservation of records. In order to fully operationalize the restrictions and injunctions contained in the Act in general and in Section 4, 5 and 6 in particular, to regulate the use of pre-natal diagnostic techniques, to make the pregnant woman and the person conducting the pre-natal diagnostic test and procedure aware of the legal and other consequences and to prohibit determination of the sex, the Rules framed under the Act prescribe the detailed forms in which records have to be maintained. Thus the Rules are made and the Forms are prescribed in aid of the Act and they are so important for implementation of the Act and for prosecution of the offender that any improper maintenance of such record is itself made by the Act is equivalent to a violation of the proviso of Section 5 and 6 by virtue of the proviso to sub-section (3) of Section 4 of the Act.

It was further held that improper maintenance of records also has consequences other than prosecution for the deemed violation of Section 5 or 6 because Section 20 of the Act provides for cancellation or suspension of the registration of genetic counselling centres, genetic laboratories or genetic clinics in case of breach of the provisions of the Act or the Rules framed thereunder. It was held that by virtue of the deeming provision of the proviso to sub-section (3) of Section 4, contravention of the provisions of Section 5 or 6 is legally to be presumed. Hence, proviso to sub-section (3) of Section 4 of the Act does not require that the complaint alleging the inaccuracy or deficiency in maintaining record in the prescribed manner should also contain allegations of contravention of the provisions of Section 5 or 6 of the Act. It was further held that the burden to prove that there was contravention of these provisions does not lie upon the prosecution. It was accordingly held that, deficiency or inaccuracy in filling Form 'F' prescribed under Rule 9 of the Rules made under the PCPNDT Act, being deficiency or inaccuracy in keeping records in the prescribed manner, 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. The Court thus overruled the Judgement in *Dr. Manish C. Dave vs. State of Gujarat* to the extent that it was inconsistent with the above findings.

To this end of giving progressive interpretation to these provisions, this Judgement by the full bench is really welcome. Otherwise the provisions of Section 4 (3) of the Act would have been illusory or nugatory.

This Judgement is important in more than one area as it has held that not only the Appropriate Authority but any officer on whom the powers are conferred by the Central Government, the State Government or the Appropriate Authority itself can institute a complaint under the provisions of the Act and the court can take cognizance on a compliant made by any officer authorized in that behalf. Thus, in this case the Court has widened the scope of the term 'Appropriate Authority' and recognized the *locus standi* of any officer authorized by such Appropriate Authority to file a complaint and set the law in motion in case of violation of the provisions of the Act.

3-II(3)

Equivalent Citations:
MANU/MH/1050/2011, AIR 2011 BOM 171, 2012(1) Mh L J 935, 2011(113) BOM LR 3107

IN THE HIGH COURT OF BOMBAY
Writ Petition No. 797 of 2011
Decided on August 26, 2011

Radiological and Imaging Association (State Chapter-Jalna), through
Dr. Jignesh Gokuldas Thakker, Its PCPNDT Coordinator for the
Indian Radiological and Imaging Association
vs.
Union of India (UOI) through Its Secretary,
Ministry of Health and Family Welfare, State of Maharashtra through
Its Secretary, Ministry of Health and Family Welfare and
Mr. Laxmikant Deshmukh, Collector and District Magistrate

Hon'ble Judges: Mohit S. Shah, CJ and R.P. Sondurbaldota, J

Case Summary

In a series of landmark decisions delivered by the Bombay High Court towards the effective and meaningful implementation of the provisions of the Act, one must say that this Judgement constitutes a major milestone. It once again proves that the Judiciary is one step ahead of the Legislature and Executive in acting as a catalyst for social change.

This Writ Petition under Article 226 of the Constitution was filed by the Radiological and Imaging Association challenging an action initiated by the Collector of Kolhapur District. This included a circular dated January 14, 2011 issued by the collector, requiring radiologists and sonologists in the district to transmit Form 'F' online within 24 hours of conducting a sonography. The challenge was on the grounds that the said circular was without authority of law because under the PCPNDT Rules, Form 'F' is required to be submitted up to the fifth day of the following month and not immediately within 24 hours and not online. The Collector and Civil Surgeon strongly supported the circular by submitting that Kolhapur District has the worst sex ratio of 838 females per 1000 males and one of the causes for the same was found to be the illegal use of sonography centres for sex determination tests resulting in sex selection. It was found that there were two blatant violations of the Act, viz., under reporting and false reporting of sonography tests. Moreover, as Kolhapur alone had 250 sonography centres and each month more than 12000 sonography tests were being conducted on pregnant women, considering the magnitude of the work and the amount of manpower required to monitor the submission of Form 'F' and its analysis for necessary action under the Act and Rules, it was submitted that, with online submission of Form 'F', the said task would become easy, less time consuming and effective for taking prompt action. Moreover,

it was in consonance with the spirit and object of Rule 9(4), which already required the sonography centres to submit Form 'F' every month.

The High Court found considerable substance in these submissions as it noticed four distinct advantages in the online submission of Form 'F' when such large numbers of sonographies are performed every month. Firstly, that entire information in Form 'F' had to be filled up for its online submission; otherwise the form was not accepted by the computer. Hence it would reduce the danger of under-reporting. Secondly, the work of submitting information in Form 'F' has to be complete on a day-to-day basis, which results in the third advantage to the district administration to enable meaningful scrutiny and analysis so as to zero in on cases where sex selection was resorted to after sex determination. Fourthly, it would enable the Appropriate Authority to take immediate action in case of breach of provisions of the Act and Rules. The High Court, therefore, found that the circular to submit Form 'F' online within 24 hours was in keeping with the letter and spirit of Section 17(4) of the Act.

PART - III

Suspension of Registration
Section 20

Section 20 of the Act lays down a procedural safeguard for the Appropriate Authority before taking any action of cancellation or suspension of registration of any centre or clinic conducting diagnostic techniques, *suo motu* or when it is brought to its notice regarding the misuse of any pre-natal diagnostic techniques for sex selection or sex determination. Sub-clause (1) of Section 20 requires that the Appropriate Authority should issue a show cause notice and sub-clause (2) provides for giving a reasonable opportunity of hearing to such a genetic clinic before taking any action of cancellation or suspension of registration. Sub-clause (3) of Section 20 is an exception to sub-sections (1) and (2) laying down that 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 such clinic without issuing any such notice referred to in sub-section (1).

Thus the provisions of Section 20 categorically confer power on the Appropriate Authority to suspend or cancel the registration even without notice or giving an opportunity of hearing provided it was done in public interest and reasons recorded for taking such action. Even then whenever such action is taken, it is challenged before the High Court either on the ground that there was no cause for exercising this power or suspension of registration can only be for a limited period, etc., as can be seen from the following rulings of the High Courts.

3-III(1)

Equivalent Citations:
AIR 2005 Bom. 26, 2005(1) Bom CR 595, 2004(4) ALL M.R.836, 2004(4) Mh.L.J.1058

IN THE HIGH COURT OF BOMBAY
Writ Petition No. 5295 of 2003
Decided on September 17, 2004

M/s Malpani Infertility Clinic Pvt. Ltd. & Others

vs.

Appropriate Authority, PNDT Act and Others

Hon'ble Judges: H.L. Gokhale and Smt. Justice Nishita Mahtre, JJ

Case Summary

In this Writ Petition the Order passed by the Appropriate Authority suspending the registration of the Petitioner's diagnostic centre under the PNDT Act was challenged. The main contention raised was that show cause notice, as contemplated u/s 20(1) and an opportunity of hearing, as contemplated u/s 20(2) of the Act was not extended to the Petitioner and his registration was suspended straightaway. Moreover, the Order suspending the registration did not disclose sufficient reasons, as required u/s 20(3) of the Act; hence it was urged that the impugned order was bad in law.

However, considering the peculiar facts of the case, the High Court rejected all these three contentions. It was pointed out that the Petitioners had joined as Respondent No. 38 in Writ Petition (Civil) No. 301/2001 filed by CEHAT (Centre for Enquiry into Health and Allied Themes) before the Apex Court and also filed an affidavit therein defending the sex determination tests on the ground of 'family balancing'. Though, subsequently the Petitioners had filed another affidavit tendering an apology, they knew that they were being prosecuted for criminal offence under the provisions of the Act. It was held that, as the Appropriate Authority had, after referring to that criminal prosecution, issued the Order of suspension, there was sufficient notice and opportunity of hearing to the Petitioners and there was also sufficient mention of the reasons by the Appropriate Authority in its suspension order. It was further held that, "when the reasons are required to be given in writing, it is not necessary that there ought to be a detailed discussion."

As regards the contention that Section 20(3) provides only for cancellation and not for suspension of the registration, it was pointed out that such power has to be read into the Section; otherwise the provisions of a welfare enactment will be rendered nugatory. In the words of the High Court, "where there is a conflict of private interest, to carry on a particular activity which the Public Authority considered as damaging to the social interest, surely the power under the Statute has to be read as an enabling power." Accordingly it was held that sub-section (3) of Section 20 provides adequate power to the Authority concerned to suspend the licence. In the circumstances, the Petition came to be dismissed finding no substance therein.

3-III(2)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
Special Civil Application No. 17994 of 2006
Decided on August 30, 2006

Suresh Manjibhai Prajapati

vs.

State of Gujarat and Anr

Hon'ble Judge: Ravi R. Tripathi, J

Case Summary

By this Petition, the Order passed by Respondent Authorities suspending the registration of the genetic clinic and sealing the sonography machine of the Petitioner was sought to be quashed and set aside.

It was the case of the Petitioner that on April 9, 2006 he was served with a show cause notice after his clinic was inspected by the Appropriate Authority. In the notice various irregularities and breaches of the provisions of the PCPNDT Act were mentioned, including the change of address without permission of the Authority, change of sonography machine without intimation to the Appropriate Authority, etc. By the notice, the Petitioner was also called upon to intimate the Authorities as to where the earlier sonography machine was in respect of which registration was granted in the year 2002. The petitioner was granted three days time to file his explanation. However, on the same day the Appropriate Authority passed the Order and suspended his registration and sealed the machine by resorting to provisions of sub-section (3) of Section 20 of the Act. Hence he challenged the said Order on the ground that it violated the principles of natural justice.

After perusing the provisions of Section 20, subsections (1), (2) & (3) of the Act, the Court came to the conclusion that sub-section (3) is not a proviso to sub-sections (1) & (2) of Section 20, but it had an overriding effect with a "non obstente clause". It gives wide powers along with discretion to the Appropriate Authority. The moment the Appropriate Authority is of the opinion that it is necessary or expedient in the public interest, after recording reasons in writing, it can suspend the registration without issuing any notice, as is referred to in sub-section (1) of Section 20.

In this case, it was found by the High Court that, the Appropriate Authority had, in its nine-page Order recorded in detail the reasons for taking the action of suspending the registration of the Petitioner's genetic clinic. It was also done in public interest and hence it was held that there was substance in the grievance of the Petitioner that the said Order was in violation of the principles of natural justice.

It was further pointed that, as the Petitioner had already replied to the show cause notice and also preferred an appeal before the Appellate Authority and that the Appellate Authority had, also after hearing the appeals, not found any reasons to change the Order, the High Court found that there was no substance in the Petition and hence the Petition was dismissed.

3-III(3)

Equivalent Citations:
http://judis.nic.in, http://indiankanoon.org/doc/256476/

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
Civil Writ Petition No. 18365 of 2009
Decided on February 3, 2010

Dr. Mrs. Sudha Samir

vs.

State of Haryana and Others

Civil Writ Petition No. 19740 of 2009

Dr. Mrs. Maninder Ahuja

vs.

State of Haryana and Others

Civil Writ Petition No. 19794 of 2009

Dr. R.D. Negi

vs.

State of Haryana and Others

Hon'ble Judge: K. Kannan, J

Case Summary

This batch of Writ Petitions challenges the Order of suspension of registration under the PCPNDT Act. The contention of the Petitioners was that when the show cause notices were issued to them and the action for suspension of registration was taken, the Gazette Notification of the Appropriate Authority had not been made and therefore, the entire action under Section 20 of the Act ought to fail.

The response of the state to this contention was that the government had issued an Ordinance to validate certain acts done by the Appropriate Authority prior to the issuance of the Gazette Notification. The said Ordinance was subsequently introduced as a Bill in the State Assembly and was subsequently brought as an enactment. The High Court therefore held that when subsequent enactment is not challenged, which validates the acts done by the Appropriate Authority prior to the Gazette Notification, the Petitioners' challenge to the show cause notices and the suspension orders issued by the Competent Authority cannot survive for adjudication. The High Court however observed that the Petitioners can avail of independent remedy to challenge the validity of the Act itself.

3-III(4)

Equivalent Citations:
2012 (10) LJSOFT 22

IN THE HIGH COURT OF BOMBAY
Writ Petition No. 11059 of 2011
Decided on August 16, 2012

Dr. Sujit Govind Dange

vs.

State of Maharashtra and Others

Hon'ble Judges: D.D. Sinha and Smt. V.K. Tahilramani, JJ

Case Summary

In this case the Petitioner had challenged the legality and authority of the Order passed by the Appropriate Authority of suspension of the registration of his clinic on the ground that no show cause notice or an opportunity of hearing was given to the Petitioner before taking such action. Hence there was violation of the principles of natural justice. It was urged that, before drawing a presumption of contravention of Section 5 or 6 of the Act, opportunity must be given to the doctor to disprove the said presumption. He is required to be given a chance to put forth his defence regarding maintenance of the records. If the Appropriate Authority is satisfied with his explanation, it may not be necessary to proceed against such doctor by initiating criminal proceedings or suspending his licence. It was submitted that the provisions of Section 20(1)(2) expressly provide for issuing a Notice and of giving reasonable opportunity for being heard. Though Section 20(3) is an exception to this Rule, it is made so as to vest the Appropriate Authority with emergency powers, but it is subject to the condition that it is necessary or expedient to do so in public interest and the Appropriate Authority has to record reasons in writing for the same. It was contended that in the instant case the Appropriate Authority had not given or recorded any reason before suspending the licence, nor obtained the advice of the Advisory Committee.

Further, it was submitted that the suspension of registration as expected under Section 20 of the Act can be only for a specific period and not for an indefinite period. If the period of suspension is not specified, it amounts to cancellation of the same, which is not permissible in law. It was further argued that since the licence can be suspended only for a limited period, the ultrasonography machine can be seized for a specific period only. Moreover, when the machine was sealed and seized, no indication was given to the Petitioner that a criminal case was likely to be filed against him, therefore, seizure of machine cannot be considered as a part of Muddemal property and is required to be released.

The last submission advanced was that, there is no nexus between the provisions of the Act and the object to be achieved by the Act. The object is to see that no professional should conduct sex determination tests and therefore, harsh punishments like suspension, cancellation of licence and/or

conviction are provided. Whereas in the case of minor violations or mistakes in filling the form and maintaining of records, which is generally done by the subordinate staff, awarding of such punishment is unreasonable, arbitrary and therefore, violative of Article 14 of the Constitution.

After perusing and taking review of the relevant provisions of the Act and earlier decisions of the Full Bench in the case of Dr. (Mrs.) Suhasini Umesh Karanjkar vs. Kolhapur Municipal Corporation and Anr and of the Division Bench in the case of Radiological and Imaging Association (State Chapter-Jalna), through Dr. Jignesh Gokuldas Thakker vs. Union of India (UOI) through its Secretary, Ministry of Health and Family Welfare, State of Maharashtra and Mr. Laxmikant Deshmukh, Collector and District Magistrate, the Court held that in order to prohibit the abuse of 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 in maintaining and preserving complete records shall amount to contravention of the provisions of Section 5 or 6, unless the contrary is proved. This provision is thus completely consistent with the objective of the Act. The Court refused to accept the argument that non-maintenance of the record was a minor violation. It was held that neither the provisions of the Act nor that of Rules framed thereunder provide for or define minor or major deficiencies or inaccuracies. On the other hand, the Act requires strict compliance of every provision and provides strict punishment for breach of the same. Hence having regard to the object of the Act, it cannot be said that there is any arbitrariness so as to violate Article 14 of the Constitution.

As regards the issuance of show cause notice and opportunity of hearing it was held that Section 20(3) gives an extraordinary power to the Appropriate Authority in the larger public interest, to be used in exceptional circumstances when the Appropriate Authority is of the opinion that it is necessary or expedient to do so, that too after recording reasons. Hence exercise of such power cannot be called arbitrary.

It was also not accepted that suspension of the licence was for indefinite period as it was held that suspension has effect till the criminal prosecution launched against the Petitioner comes to an end.

Thus all the contentions raised by the Petitioner were rejected, holding that it will be now for the Petitioner to prove before the Criminal Court that there was no deficiency or inaccuracy in maintaining or preserving complete records of the clinic. The Petition was thus dismissed.

PART - IV

Prohibition on Advertisement
Section 22

Section 22(2) of the Act prescribes that no person or organization, including genetic counselling centres, genetic laboratories or genetic clinics shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or pre-conception selection of sex by any means whatsoever, scientific or otherwise. Sub-section (3) of Section 22 provides punishment with imprisonment for a term which may extend up to three years or a fine which may extend to Rs. 10,000 to any person who contravenes the said provision. Explanation to this Section lays down that 'advertisement' includes any notice, circular, label, wrapper or other document including advertisement through the internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall painting, signal, light, sound, smoke or gas.

Thus the intention of the Legislature is very clear about prohibiting any sort of advertisement either direct or disguised propagating the use of pre-conception or pre-natal diagnostic techniques for sex selection. However, human ingenuity knows no bounds when it comes to contravening statutory provisions and justifying such contraventions. The following case is a classic example.

3-IV(1)

Equivalent Citation:
2012 (6) LJSOFT 389

IN THE HIGH COURT OF BOMBAY (NAGPUR BENCH)
Criminal Application (APL) No. 178 of 2011
Decided on February 14, 2012

Satya Trilok Kesari @ Satyanarayan
s/o Trilokchand Lohia
vs.
State of Maharashtra and Anr

Hon'ble Judge: M.L. Tahaliyani, J

Case Summary

The Applicant had published an article in the daily local newspaper *Hindustan of Amravati* on how to conceive a male child through naturopathy. The submission made was that, it was a research paper of the Applicant and that in no way offends the provisions of Section 22 of the PCPNDT Act. As against it, the submission of the Additional Public Prosecutor was that the title of the so called research paper indicates that the applicant had published the article or issued an advertisement in the garb of an article, to invite people to teach them how to conceive a male child. Therefore, it clearly falls within the purview of the definition of mischief as defined u/s 22 of the Act. Hence, the prosecution initiated against the Applicant was proper.

After going through the whole text of the Article, the Court opined that the Article was written very skillfully with the intention of evading the provisions of Section 22 of the Act. However, the intention of the Applicant could be read between the lines. Some of the paragraphs were very explicit. The Article was purposefully written in small letters and some paragraphs were also studded with selected words to evade Section 22(1) (2) of the Act. In the last paragraph of the so called article it was also stated that one could conceive a male child by naturopathy. The High Court held that it *prima facie* amounted to violation of sub-section (1) & (2) of the Section 22 of the Act. Hence the Application for quashing the prosecution was dismissed by the High Court.

PART - V

Removal of the Name of Medical Practitioner from the State Medical Council Section 23(2)

In order to achieve the object of the Act of prohibiting and preventing the misuse of diagnostic techniques for sex selection, along with stringent punishment an attempt has been made to create a deterrent effect by providing for suspension of the registration on framing of charges and for removal of a medical practitioner's name from the Register on conviction of concerned medical practitioner. Section 23(2) casts a duty on the Appropriate Authority to report the name of the registered medical practitioner to the State Medical Council for taking necessary action including suspension of registration pending trial and on conviction the removal of his name from the Register of the Council for a period of five years for the first offence and permanently for a subsequent offence. This consequence is to follow automatically on framing of charges or on conviction as the case may be. The provision does not warrant that on receipt of such information the State Medical Council is expected to hold any sort of inquiry again before taking such action. However, as the said impression was prevailing, the Bombay High Court had to clarify that this impression is not correct in the following case.

3-V(1)

Equivalent Citation:
2012(11) LJSOFT 1

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
Civil Appellate Jurisdiction
Writ Petition No. 6495 of 2012
Decided on October 22, 2012

Dr. Pradipchandra Mohanlal Gandhi and Anr

vs.

Maharashtra Medical Council, through Its Registrar and Anr

Hon'ble Judge: S.C. Dharmadhikari, J

Case Summary

The issue raised before the High Court in this Writ Petition was whether the Maharashtra Medical Council is required to hold an inquiry before suspension or removal of the name of the concerned registered medical practitioner is effected, as laid down under Section 23(2) of the Act.

It was held that the Section is very clear inasmuch as there is a mandate to the Appropriate Authority to inform the State Medical Council concerned, the name of the registered medical practitioner against whom the charges are framed by the Court and who had been convicted. In the first case when the charges are framed, the State Medical Council must take action including suspension of registration till the case is decided but where there is conviction the name of the concerned medical practitioner should be removed from the Register of the Council for a period of five years. As per the High Court, there is absolutely no warrant for holding any inquiry so as to de-link the taking of action in terms of sub-section (2) of Section 23 of the Act. The Maharashtra Medical Council was directed accordingly to take immediate action against the Petitioner under the said Section.

PART - VI

Cognizance of the Case
Section 28

This being a special legislation requiring technical expertise for investigation and prosecution of the offences punishable under this Act, a special post of Appropriate Authority has been created for carrying out various functions as laid down in Section 17 of the Act for proper implementation of the provisions. Such Appropriate Authority is to be a Medical Superintendent, who has knowledge of techniques. Hence, under the Act it is not the Police like in other criminal cases, but only the Appropriate Authority that is competent to take action and lodge a complaint in the Court. Section 28 of the Act creates a bar for the Court to take cognizance of the offence, except on a complaint made by certain persons including Appropriate Authority. It reads as follows:

28. Cognizance of offences. -

(1) No Court shall take cognizance of any offence under this Act except on a complaint made by-

(a) the Appropriate Authority concerned, or any officer authorized in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or

(b) a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court.

Explanation. - For the purpose of this clause, "person" includes a social organization.

(2) No Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of First Class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1), the Court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.

Bare perusal of Section 28, therefore, makes it clear that it does not narrow down the class of persons who can initiate the action but it allows for a fairly large body of persons to set the law in motion, having regard to the object of the Act, which is to prevent a social evil and that is what is laid down in the following cases.

3-VI(1)

Equivalent Citation:
MANU/UP/0857/2006

IN THE HIGH COURT OF ALLAHABAD AT ALLAHABAD
Criminal Misc. Writ Petition No. 5086 of 2006
Decided on May 26, 2006

Dr. Varsha Guatam

vs.

State of UP and Others

Hon'ble Judges: Imtiyaz Murtaza and Amar Saran, JJ

Case Summary

This Petition was filed under Section 482 of CrPC for quashing of process issued against the Petitioner u/s 312 & 511 IPC read with the provisions of the PCPNDT Act. The allegation in the FIR was to the effect that in a sting operation shown on television it was revealed that the Petitioner was engaged in her hospital in collusion with other doctors who determined the sex of the foetus by conducting ultrasound tests. Her clinic was also not registered under the Act and as per the case she was not entitled to conduct pre-natal diagnostic procedures therein.

The first contention raised by the Petitioner was that there is a bar on investigation in view of Section 28 of the Act, which prohibits cognizance of an offence except on a complaint made by the concerned Appropriate Authority. This contention was rejected outright by the High Court holding that the said prohibition does not apply at the stage of investigation and only relates to the stage when cognizance is sought to be taken by the concerned court.

The second contention raised was that no offence u/s 312 r/w 511 IPC is made out as mere consent to perform the abortion is only an expression of an 'intention' to commit the offence and does not amount to an 'attempt' to commit the offence. The Court rejected this contention also holding that there is no clear dividing line between the stage of preparation and the stage of attempt and whether a certain act would amount to an attempt is a question of fact which can be determined by the court at the appropriate stage.

The next contention raised was that no offence under the Act was disclosed as the FIR itself mentioned that sex determination of the woman had already been conducted elsewhere when she approached the Petitioner who agreed to perform the operation to terminate the pregnancy. The Court considered in detail the Object, Reasons and all provisions of the Act and held that sex selection prohibited under the Act cannot be confined only to the determination of the sex of the foetus but includes all the steps taken by the person or by the specialist, either himself or by any other person, in facilitating sex selection leading to the elimination of female foetuses.

An attempt was also made to contend that as the offence of engaging or aiding in any sex selection is punishable with imprisonment for three years u/s 23 of the Act and as the offence alleged against the Petitioner was an attempt to commit the said offence, the maximum punishment would be of one and half years and hence said offence would become non-cognizable in view of the last clause of Schedule I of the CrPC dealing with "Classification of Offences against Other Laws." This contention was held by the High Court to be devoid of merits in view of the direct provision contained in Section 27 of the Act making every offence under the Act cognizable.

The High Court also rejected the last submission raised in the supplementary affidavit filed by the Petitioner that while preparing a certain *Parcha* of the case diary the investigating officer had exonerated the Petitioner from any offence under the Act. It was held that this contention cannot be considered at this stage in a Writ Petition under Article 226 of the Constitution.

As a result, the High Court expressed serious concern with respect to the increased misuse of modern scientific technology leading to a decline in the sex ratio, spelling out very grave social consequences. The Court observed that "With the female-male ratio having already declined to 933 per 1000 males, we are sitting on a virtual time bomb, which can spell social disaster. Instances of villages where there are no eligible females for marriages, or where girls are being purchased from backward areas for servicing several brothers as brides, are being reported. While the earlier primitive methods of sex selection were still relatively confined to a limited section of the population, however, by using the modern scientific and relatively covert methods, which the Act seeks to bring under its purview, sex selection has become a rampant phenomenon, which has affected every strata of society".

In the end the High Court refused to quash the FIR or to stay the arrest of the Petitioner, finding that there was no substance in the Petition.

3-VI(2)

Equivalent Citation:
2010(8) LJSOFT (URC) 152

IN THE HIGH COURT OF BOMBAY (NAGPUR BENCH)
Criminal Application No. 2281 of 2008
Decided on February 3, 2010

Dr. Mrs. Kakoly Borthakuar

vs.

Dr. Pramodkumar s/o G. Babar and Others

Hon'ble Judge: A.B. Choudhari, J

Case Summary

The only issue involved in this Petition filed under Section 482 of the CrPC was related to the territorial jurisdiction of the Court which can entertain a complaint filed for the offences punishable under the PCPNDT Act. In this case as per allegations, a sonography test to find out the sex of the child in the womb was admittedly done at Vashi, Navi Mumbai whereas the complaint was lodged by the Appropriate Authority at Nagpur on the ground that the girl child was born at Nagpur. As per the Applicant, the Court at Nagpur did not have territorial jurisdiction to entertain the complaint as the alleged offence had taken place at Vashi and not at Nagpur.

It was held by the High Court that, perusal of Section 28(1) is clear that the Appropriate Authority concerned is required to file a complaint. The word 'concerned' has been deliberately used and the territorial jurisdiction will be decided in accordance with the provisions of Section 177 CrPC. In this case it was held that as the sonography test to find out the sex of the child in the womb was admittedly done at Vashi, Navi Mumbai, therefore, the local place for commission of offence under the Act is Vashi and hence the Appropriate Authority concerned as per Section 28(1)(b), shall be at Vashi. Merely because the girl child was born in Nagpur, the territorial jurisdiction for the trial of the case cannot be changed to Nagpur. It was necessary for the Appropriate Authority at Nagpur to forward the said complaint to the Appropriate Authority at Vashi for filing it before the proper Court. The direction was given accordingly.

3-VI(3)

Equivalent Citations:
2011 CriLJ 876, (2010)158 PLR63, MANU/PH/0449/2010

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
Civil Writ Petition No. 20635 of 2008
Decided on February 10, 2010

Dr. Preetinder Kaur and Others

vs.

The State of Punjab and Others

Hon'ble Judge: K. Kannan, J

Case Summary

In this Civil Writ Petition the competency of the authority which had initiated criminal prosecution against the Petitioner for violation of Section 3(a) punishable u/s 23 of the Act was challenged. It was contended that the Act contemplated the proceedings to be initiated in a particular fashion only on a complaint made by the Appropriate Authority but the said procedure had not been followed. It was submitted that the person who had filed the complaint had never been authorized by the Appropriate Authority for taking any action; therefore the entire trial which was in progress before the Magistrate was vitiated.

The High Court, however, rejected this contention by giving a broader interpretation to Section 28 of the Act. It was held that Section 28 does not narrow down the class of persons who can initiate action. On the other hand, just as any legislation intending to prevent a social evil, it allows for a fairly large body of persons to set the law in motion. Apart from the Appropriate Authority, an Officer authorized by the Central or State Government could also file a complaint. He can also be a person authorized by the Appropriate Authority itself. As per the explanation contained u/s 28, the expression 'person' includes even a social organization. It was held that various categories of persons which have been set out u/s 28 give authority to a wide range of persons who can initiate action under the Act. In the words of the High Court, Section 28 must not be read as constituting a narrow class of persons who could initiate action. It must be given an extensive meaning to pave the way for easy access to set the law in motion by any socially conscious person. Hence the Section detailing the procedure for taking cognizance of an offence does not make the presence or the actual filing of the complaint by the Appropriate Authority itself sacrosanct.

In this case as the complainant was the Project Officer of the PCPNDT Cell, it was held that he was definitely a person who was not a stranger to the action but being a nodal officer for the PCPNDT Cell he was intimately connected with the enforcement of the Act. Even if he had not secured a sanction from the Appropriate Authority at the time of lodging the complaint, the matter was surely ratified by the Appropriate Authority in the meeting held subsequently. Hence it was held that there was nothing illegal but it was only irregular and the subsequent discussion and recording of minutes by the Appropriate Authority constituted valid ratification. The High Court, therefore, considering the fact that the case before the Trial Court had progressed for a sufficient length of time, dismissed the Petition.

3-VI(4)

Equivalent Citation:
http://bombayhighcourt.nic.in

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
Writ Petition No. 3509 of 2011
Decided on June 11, 2013

Dr. Kavita Pramod Kamble (Londhe)

vs.

State of Maharashtra and Anr

Hon'ble Judge: Smt. Roshan Dalvi, J

Case Summary

This Petition was filed under Section 482 of the CrPC against the Order passed by the Judicial Magistrate First Class, Karmala, for framing of charges against the Petitioner, a practicing doctor, for offences punishable under Sections 23 and 25 of the PCPNDT Act. It was a decoy case. On the request of the social worker, a pregnant lady named Prerna Bhilare, offered to act as a decoy. She had given an undertaking that she would not cause any harm to her foetus even after becoming aware of its sex. The Petitioner charged her an examination fee of Rs. 4000 and on examination, disclosed the sex of her foetus as a male child. The Petitioner also gave her the report of the sonography and confirmed the sex of the foetus when asked by the companions of the pregnant lady. On receipt of this information, the complaint came to be filed by the Medical Superintendent, Sub District Hospital, Karmala.

Upon the issue of process, the Trial Court recorded the evidence of three witnesses, including the complainant and the pregnant lady and proceeded to pass the Order of framing charges against the Petitioner, mainly for the offence of conducting a sex determination test and disclosing the sex of the foetus. Other minor offences were in respect of the breach of various other provisions of the PCPNDT Act.

Against this Order, the Petitioner first preferred revision before the Sessions Court, which came to be dismissed and hence this Writ Petition.

The first contention raised by the Petitioner was that the Complainant was not the Appropriate Authority and hence had no *locus standi* to file the Complaint. This contention was, however, rejected by both the Courts, by holding that u/s. 17(ii) of the Act the State Government is authorized to appoint an Appropriate Authority for any part of the State as per the intensity of the problem of sex determination and as per Section 3(b) of the Act, such Appropriate Authority would be any officer of any other rank as the State Government may deem fit. In the instant case, it was held that, vide Notification dated October 16, 2007, published in the Official Gazette, the Additional Collector or Sub-Divisional Officer

had been appointed as the Appropriate Authority in view of Section 17(3)(b) of the Act. He was further authorized to appoint any other officer to initiate the complaint. The Complainant in this case was the Medical Superintendent of the Sub-District Hospital. The Appropriate Authority, i.e., the Sub-Divisional Officer, District Solapur had authorized him to lodge the complaint vide authorization letter dated August 31, 2010. Hence it was held that the Complaint filed by the Complainant was correct as having been filed by the Appropriate Authority.

The second contention raised by the Petitioner was that the evidence produced by the Complainant before the Trial Court was not sufficient for framing of charges. This contention was also rejected by both the Courts holding that there was direct oral evidence of the decoy patient, supported by documentary evidence like a prescription, the receipt of payment of examination fee of Rs. 4000, the sonography report and the undertaking of the decoy patient. It was held that the decoy patient was not cross-examined on these aspects of her evidence and therefore, for the purpose of framing of charges this evidence of the decoy patient, coupled with the evidence of the Appropriate Authority and the other medical officer was sufficient. Accordingly the High Court dismissed the Writ Petition, directing the Trial Court to proceed with the framing of charges.

(In the authority of Suo Motu v/s. State of Gujarat a similar issue was also referred to the Full Bench and it was held that not only the Appropriate Authority but any officer on whom the powers are conferred by the Central Government, State Government or Appropriate Authority itself can institute a complaint and the Court can take cognizance on a complaint made by any officer authorized on their behalf.)

PART - VII

Search, Seal and Seizure of Sonography Machine
Section 30 and Rule 12

Under the provisions of the Act, to prevent the misuse of ultrasound/sonography machines for the purpose of sex determination, wide powers have been conferred on the Appropriate Authority to seal and if necessary, seize the machine, record, register and any other material object, if the Appropriate Authority has reason to believe that it may furnish evidence of the commission of the offence punishable under the Act.

Section 30 of the Act lays down that, "Power to search and seize records, etc. (1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place, such Authority or any officer authorized in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such Authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize and seal the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act. (2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act."

Rule 12 of the Act lays down the procedure for such search and seizure. However, the moment the Appropriate Authority takes such action, it is challenged in the Court. The bulk of the Petitions filed before the High Courts are for challenging the sealing and seizure of ultrasound machines and for their return.

However, whenever the Appropriate Authority exercises such power of seal and seizure of the machine, several challenges are raised to the exercise of that power like,

(i) Whether the Appropriate Authority really has the power to seal or seize a sonography machine as Section 30 does not expressly mention the words 'sonography machine'

(ii) Whether the direction issued by the District Magistrate calling upon the installation of a device popularly called 'silent observer' (SIOB) in sonography machines was consistent with the provisions of the Act and whether it was affecting the right to privacy guaranteed by Article 19 of the Constitution

(iii) Whether the sonography machine seized by the Appropriate Authority should be released like any other Muddemal Property on bond during pendency of the trial

(iv) Whether show cause notice and opportunity of hearing is required to be given before seal and seizure of sonography machine

(v) Whether the restriction imposed on the movement or shifting of a portable ultrasonography machine out of the registered premises is just and legal

A summary of the cases in which the High Courts have discussed and answered these issues is given on the next page.

3-VII(1)

Equivalent Citation:
MANU/PH/1267/2011

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
Civil Writ Petition No. 23327 of 2010
Decided on May 5, 2011

Dr. Manoj Lamba

vs.

State of Haryana and Others

Hon'ble Judge: Ranjit Singh, J

Case Summary

This Petition was filed challenging the Order passed by the Appropriate Authority for sealing of the mobile ultrasonography machine of the Petitioner. As per the Petitioner he had been granted the licence for using a mobile ultrasonography machine, hence from the mere fact that the machine was moved or shifted to another place, there was no ground to seal it. Hence, the Order of sealing it as passed by the Appropriate Authority was illegal.

As per the Appropriate Authority, in the raid conducted at the Petitioner's clinic, the machine was not found in the clinic, where it was initially installed. A sign board showed an X-ray and ultrasound room. On inquiry it was said that the machine was kept in a cupboard in another room. Thus as the Petitioner had changed the place of the ultrasonography machine without intimation to the Appropriate Authority, it was violation of Rule 13 of the PCPNDT Act and hence it was urged that the sealing of the machine was justified.

As per the Petitioner, the definition of a genetic clinic given in Section 2(d) is an inclusive definition and is wide enough to include not only a clinic, institution, hospital and nursing home but any place by whatever name it is called which is used for conducting pre-natal diagnostic procedures. Hence, keeping the machine locked in a room in the same hospital/clinic would not mean that the same was shifted from the genetic clinic. It was his further contention that a genetic clinic could include even a vehicle, where the ultrasonography machine is used. The definition thus, cannot be confined to a hospital or nursing home as such.

The Court, however, held the Petition to be premature as the Petitioner had filed it only against the show cause notice and no Order was passed on the said show cause notice. It was held that the Petitioner would have to file an appeal against the Order of suspending his licence and only then the question of removal of the seal would arise. Accordingly, the Court dismissed the Petition as being premature.

3-VII(2)

Equivalent Citations:
2011(7)LJSOFT6, MANU/MH/0694/2011, 2011(3) Mah. L.R. 535, 2011(4) All M.R.804
2011(4)Mh.LJ 21, 2011(4)Bom. C.R. 293.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
Writ Petition No. 7896 of 2010
Along with
Civil Application No. 512 of 2011
Decided on June 6, 2011

Dr. (Mrs.) Suhasini Umesh Karanjkar

vs.

Kolhapur Municipal Corporation and Others

Hon'ble Judges: Mohit S. Shah, CJ, Dr. D.Y. Chandrachud and D.G. Karnik, JJ

Case Summary

This decision is a landmark one in more than one sense and also a long and much awaited one. It deals with the power of the Appropriate Authority to seal and seize the sonography machine used for conducting pre-natal diagnostic tests on a pregnant woman against the provisions of the PCPNDT Act and also gives directions for effective expeditious disposal of the cases filed under the Act.

It overrules the earlier decision taken by the Division Bench of Aurangabad Bench of the Bombay High Court in Writ Petition No. 1587 of 2009 filed by *Dr. Dadasheb Popatrao Tarte against the State of Maharashtra through the Minister for Health & Family* Welfare and decided on August 14, 2009. In the said Writ Petition, the seizure of the ultrasonography machine was challenged on the ground that Section 30 of the Act does not empower the Appropriate Authority to seize such a machine used in a genetic clinic. The Division Bench accepted the said contention holding that, Section 30 and Rule 12 of the Act do not empower the Appropriate Authority to seize the sonography machine used in the genetic clinic. The Division Bench, therefore, set aside the seizure of the ultrasonography machine and directed its return to the Petitioner. However, it appears that while arriving at this conclusion, Explanation (2) of Rule 12 which defines material object to include machines and Explanation (3) which states that "seize" and "seizure" would include "seal" and "sealing" respectively, were not brought to the notice of the High Court.

The result of the said decision was that the Appropriate Authority could not seize sonography machines and because of this decision, the already seized machines had to be released and returned.

Fortunately for the Prosecution, when this anomalous position was brought to the notice of the High Court in this Writ Petition, it was held that this part of the decision requires reconsideration and the matter deserves to be heard by a larger bench.

Accordingly, the matter was considered in detail by the Full Bench, which in its decision dated June 12, 2011 positively and conclusively held that, the analysis of the provisions of the Act is sufficient to hold that the expression "any other material object" used in Section 30 of the Act, the power to seize and seal which is conferred upon the Appropriate Authority/authorized officer, includes ultrasound machines, other machines and equipment which are used for pre-natal diagnostic techniques or sex selection techniques. Thus, now it can be held as a settled law that the Appropriate Authority has the power to seal and seize the ultrasound machine used in genetic clinics.

In this case, before parting with the matter, the High Court also made a reference to the disturbing figures of the declining National Child Sex Ratio over the last five decades, to which its attention was drawn by the learned Additional Government Pleader, reflecting that in the Census of 2011 the National Child Sex Ratio has fallen to 914 whereas in Maharashtra it has gone down from 913 in 2001 to 883 in 2011. It has gone down to as low as 801 in Beed District. In Kolhapur District, where the offence in question was registered, it was 839.

The High Court also felt distressed by the fact that a number of cases for trial of offences registered under the Act are pending in courts of the Judicial Magistrate First Class for a long period, sometimes up to six years and in a few cases, as long as six to eight years. The High Court has, therefore, directed that all cases under the Act shall be taken up on top priority basis and the Metropolitan Magistrates, Mumbai and the Judicial Magistrates First Class in other Districts shall try and decide such cases with utmost priority and preferably within one year. Criminal cases instituted in the year 2010 and prior thereto shall be tried and decided by December 31, 2011.

The High Court further gave direction that the copy of the Judgement be circulated to all the Courts in Maharashtra for timely compliance of the above direction.

This Judgement therefore, goes a long way not only in clarifying the anomalous legal position but also paves the way for expeditious disposal of the cases filed under this Act so that the Act will achieve the object of curbing the misuse of sex determination and sex selection techniques.

3-VII(3)

Equivalent Citation:
MANU/GJ/0994/2011

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
Special Civil Application Nos. 6625 and 7234 of 2011
Decided on September 19, 2011

Dr. Kalpesh J. Patel

vs.

State of Gujarat and Others

Hon'ble Judge: Abhilasha Kumari, J

Case Summary

The Petitioner in this case was a radiologist. On February 13, 2010, the Appropriate Authority visited his clinic and found that Form 'F' was not being filled by the Petitioner. Hence, notice was issued to him to show cause. He offered the explanation and the undertaking that he would take care in future. His explanation was accepted and intimated to him. However, in the second inspection also, five contraventions of the Act and Rules were found in respect of the filling of Form 'F'. Again notice was issued to him. In his reply he undertook to rectify the lapses. However, during the third inspection similar lapses were noticed. Therefore, his explanation was rejected and the two sonography machines in his clinic were sealed and the registration of his clinic was suspended. Being aggrieved by this action, he approached the High Court with a Writ Petition.

The first contention raised by him was that there was a breach of principles of natural justice as no prior notice was given to him before sealing the machines. He had been deprived of the opportunity of a hearing and of offering an explanation. It was urged that though there was no specific provision in the Act for issuance of notice before sealing the machine, it affects his fundamental rights as he has been deprived of carrying on his profession. The action of sealing the machine without following the principles of natural justice is bad in law. Moreover, no specific Order was passed for sealing the machines and no reasons were recorded. The action of sealing also had no reasonable basis. Therefore, it was required to be set aside.

Further it was also urged that even before suspending his registration no show cause notice or opportunity of hearing was given. The Order of suspending the registration also did not disclose the reasons and it was passed without any recommendation of the Advisory Committee to that effect.

After examining the entire scheme of the Act, including its Preamble, Objects and Reasons and other provisions, the Court came to the conclusion that the Appropriate Authority has power under Section 30 of the Act and Rule 12 to seize and seal the machine if it has reason to believe that it may furnish evidence of the commission of an offence under the Act. As the purpose behind seizure of the

machine is to furnish evidence of the commission of an offence, there is no specific provision in the Act or in the Rules framed thereunder contemplating the issuance of the show cause notice before seal or seizure of the machine. Hence the applicability of principles of natural justice cannot be stretched too far. It was held that when the sealing of the machines has been carried out with a view to collect evidence in a criminal trial, the submission that an opportunity to show cause should have been accorded to the Petitioner before the seizure cannot be accepted.

It was further held that the provisions of Section 30(2) of the Act made it clear that, though there is an express provision of issuance of show cause notice before suspension or cancellation of the registration of the clinic, there is no such provision regarding sealing of the machine. The omission appears to be a conscious legislative intention, thereby making it clear that the applicability of principles of natural justice have been barred by necessary implication.

About the violation of his fundamental right to carry on the profession, it was held that the Petitioner was bound to conduct his profession in accordance with the provisions of the Act and not otherwise. As regards submission that no reasoned order had been passed before sealing the machine, it was held that, the action had been resorted to in order to furnish evidence of commission of an offence in the criminal case filed against the Petitioner and there was no requirement of passing a reasoned order before taking such action. It was further held that the prior issuance of a show cause notice would defeat the very purpose for which the power is to be exercised and may result in prejudice in the criminal proceedings. In the end, therefore, the prayer of the Petitioner to remove the seals on the sonography machines was rejected, finding no substance therein.

As regards the lacuna in the show cause notice issued under Section 20(1)(2) it was held that though it was not happily worded, technicalities and irregularities, which do not occasion a failure of justice should not be allowed to defeat the ends of justice. The Petitioner had been afforded a reasonable opportunity of hearing and therefore he is estopped from saying that there was violation of the principles of natural justice. The Petition, therefore, came to be dismissed on all counts.

3-VII(4)

Equivalent Citations:
2011(12) LJSOFT 12, 2011(6) All.M.R.370, 2012(2)BOM.C.R.115
2012(1) Mah. L.J.935 2011(5) All.(BOM R) 731

IN THE HIGH COURT OF BOMBAY
Ordinary Original Civil Jurisdiction
Writ Petition (L) No. 1939 of 2011
Decided on November 17, 2011

Radiological and Imaging Association (State Chapter)

vs.

Union of India and Others

Hon'ble Judges: P.B. Majmudar and Mrs. Mridula Bhatkar, JJ

Case Summary

This Petition was filed challenging the decision taken by the Appropriate Authority, Dahisar, of restricting the movement or shifting of ultrasonography machines outside the hospitals or clinics and seeking further directions about the search or seizure of such machines. It was urged that when a portable sonography machine is available in view of modern technology, and when the patient's physical condition is serious and he is unable to travel immediately to the hospital, it is not open for the Authority to restrict the portable sonography machine from being taken outside the clinic; especially when its very purpose is meant for taking it from one place to another, like a laptop. It was argued that the restriction is based on an apprehension of misuse of such a portable machine; also such misuse is possible in the clinic itself. Hence, such restriction is not consistent with the provisions of the Act. It is without any authority of law and hence, liable to be set aside.

The Petition was opposed by the Union of India and the State by submitting that if such movement or shifting of the machine is permitted, there is every likelihood of such a machine being misused for sex selection and it will not be possible for the Authority to monitor the use of the machine if taken outside the clinic. It was argued that in the city of Mumbai the sex ratio of females to males has come down in the last ten years by 30 per cent and hence it is in the interest of society that the sonography machine should not be allowed to be misused by taking it out of the clinic. The direction therefore issued by the Appropriate Authority was perfectly legal.

After making reference to the various provisions of the Act, the Court also took note of the sorry state of affairs that even today people in our country are trying to determine the sex of the unborn child. The High Court expressed the view that no society can exist without a woman and for the growth of the human race and the nation, both men and women are equally important. The only scientific way to cut the possible misuse of modern diagnostic techniques used for the determination of sex, is by enacting

a law, rules and guidelines in that behalf. It was observed that the possibility of misuse cannot be ruled out if such a machine is taken out of the institute. Till society is made fully conscious and a change in attitude takes place to forget the distinction between males and females, all the remedial measures are required to be taken to curb the misuse of modern technology.

It was held that as the sonography machine does not provide any treatment to the patient, it is not required to be taken out for any emergency relief to a serious patient. As regards the argument that even in a hospital or clinic the misuse of sonography machines takes place, it was held that even if in the hospital or clinic a particular doctor is misusing the same, appropriate data is available in such a case which would not be possible if the machine is taken out of the hospital. Considering these aspects it was held that the direction issued by the Appropriate Authority restricting its movement or shifting is in consonance with the provisions of the Act and only with a view to prevent the possible misuse of such machine. It also cannot be said that any fundamental right of a person 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 Appropriate Authority, therefore, was held to be most reasonable and in public interest and issued on the basis of the experience and collection of data showing the misuse of the machines if taken outside.

As it was further pointed out that as the direction is applicable to the entire State of Maharashtra and the Ministry of Health had also taken a similar stand of putting restrictions on taking machine out of the clinic, the Court did not pass any further directions to that effect.

3-VII(5)

Equivalent Citation:
http://www.radbazar.com/content/images/stories//04032013.pdf

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
Criminal Appellate Jurisdiction
Writ Petition No. 4399 of 2012
Decided on January 23, 2013

Dr. Vandana Ramchandra Patil

vs.

The State of Maharashtra and Anr

Hon'ble Judge: Mrs. Roshan Dalvi, J

Case Summary

The Petitioner herein was an Appropriate Authority. A case was filed by the Petitioner against Respondent No. 2, the Doctor, for the offences punishable under the provisions of the Act. Pending the criminal trial the sonography machine used by Respondent No. 2 in his clinic had been sealed and his licence for medical practice was also suspended. Respondent No. 2 applied before the Trial Court for opening the seal so that the ultrasonography machine could be used. The Trial Court allowed the said application. This Order of the Trial Court was challenged in this Writ Petition by the Appropriate Authority.

After hearing both the parties, the Court held that, as the offence under the PCPNDT Act was committed essentially with the use of the ultrasonography machine and as the sonography machine is the most important component in the crime which is repetitive in nature, the prevention of the crime is best achieved by sealing the machine. If the seal is opened, the accused in the case is facilitated to repeat the crime. Once a case is made out, repetition of such a crime has to be prevented. It cannot be allowed to proliferate. The Court compared the provision of sealing machines under the Act with the provisions of sealing the premises of a brothel in an offence committed under Section 18 of the Immoral Trafficking Prevention Act, 1986 and held that this power of the Magistrate is the most potent weapon in the case of prevention and further recurrence of the offence. This power, therefore, has to be used in the interest of the general public whom the State is bound to protect under the Law. The Court, therefore, held that the order of opening of the seal and release of the machine cannot be made mechanically, like the release of any other property. The Court must consider the effect and impact of such an Order. The Court further held that a machine sealed in any case registered under the Act cannot be directed to be opened. In fact it is the duty of the Investigating Officer as also the Magistrate to seal the machine and to see that it has been sealed properly.

The argument advanced on behalf of Respondent No. 2 – the accused – that the machine is an electronic instrument and has to be constantly maintained by use, was rejected outright by the Court, holding that citizens have no legal right to claim use of their machines, if they are seen to have abused such equipment. It was further held that as the Licence of Respondent No. 2 was under suspension, so he could not carry on his business anyway. Hence, there was no question of permitting him to use the machine. At the most the machine could be used by the Mira Bhayandar Municipal Corporation, who are the Complainants in the case, for proper and legitimate use, if it has to be maintained by continuous use. Accordingly, the Court ordered the machine to be shifted to the hospital of the Corporation and the seal to be retained till it was shifted or until the trial was over. The Court thus not only set aside the order passed by the Magistrate of desealing and releasing the machine, but also directed the Registrar of the High Court to send the copies of this Order to all the Courts of Magistrates and Sessions Judges in the State of Maharashtra.

PART - VIII

Miscellaneous Issues

In addition to the issues already discussed, there are certain other aspects of the Act which have also come before the Court like whether the benefit of anticipatory bail can be extended in such offences, the procedure to be followed for trial of such cases, whether the two proceedings – one for cancellation of registration of the clinic and the other for criminal prosecution – can be taken simultaneously, etc. These issues are raised either in Writ Petitions or in the Applications under Section 482 of the CrPC. Since it is a new Statute which has not yet been implemented fully, there are several technical and procedural issues which needed to be clarified and streamlined. The Courts have, while furthering the laudable object of the Act, always tried to protect the right of the accused and strike a just balance which is evident in the decisions mentioned on the following page.

3-VIII(1)

Equivalent Citations:
AIR 2006 Utr 78, 2005(2) U.D. 280, MANU/UC/0138/2005, 2006(1) UC 485

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
W.P. No. 873 of 2005 (M/B)
Decided on August 16, 2005

Chitra Agrwal

vs.

State of Uttaranchal and Others

Hon'ble Judges: Cyriac Joseph and B. Kandpal, JJ

Case Summary

The facts of this Petition are to the effect that the registration of the Petitioner's ultrasound/sonography centre was first suspended and then cancelled. The Petitioner filed an appeal before the State Appellate Authority challenging the cancellation of the registration. However, the Appellate Authority informed the Petitioner that the appeal cannot be entertained as the criminal proceedings initiated against the Petitioner were pending before the High Court. The Petitioner therefore approached the High Court under Article 226 of the Constitution challenging the cancellation of registration. The High Court found that the State Appellate Authority was not right in not entertaining the Appeal of the Petitioner simply on the ground that criminal proceedings in respect of the same incident were pending against the Petitioner. The High Court explained in detail the difference between the two. It was held that the action of cancellation of registration is directed against the ultrasound centre and not against the owner of the centre; where as criminal action is directed against the person who has committed the offence under the Act. Both the actions are independent and they can be dealt with simultaneously. The pendency of criminal proceedings need not and should not deter the Appellate Authority from deciding the Appeal filed against the cancellation of registration. Accordingly the High Court directed the State Appellate Authority to take appropriate decision in accordance with the law, as early as possible and at any rate within a period of three weeks.

This Judgement thus provides guidance to the State Appropriate Authorities when to entertain or not to entertain the Appeal, when several actions are being initiated simultaneously. The Judgement also explains the difference between penal action and the action of suspension and cancellation of registration.

3-VIII(2)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
Special Criminal Application No. 122 of 2008
Decided on March 27, 2008

Dr. Suresh Goswami (Gosai)

vs.

State of Gujarat and Anr

Hon'ble Judge: H.N. Devani, J

Case Summary

Often the powers of the High Court are resorted to under Section 482 of the CrPC for quashing the prosecution initiated by the Appropriate Authority for violations of the provisions of the Act. In this case also the same power of the High Court was invoked by the Petitioner submitting that the perusal of the complaint filed by the Appropriate Authority in the Trial Court does not indicate the breach of any of the provisions of the Act or the Rules and hence the proceedings are required to be quashed at the threshold itself.

The Court, however, on perusal of the complaint, came to hold that there are specific allegations in the complaint as regards the breach of provisions of Rule 9(1) and Rule 9(5) of the PCPNDT Rules. It was held that Section 25 of the PCPNDT Act provides for penalty for contravention of the provisions of the Act or Rules for which more specific punishment is provided. Hence as no specific penalty is provided for the contravention of provisions of Rule 9(1) and Rule 9(5), provisions of Section 25 of the Act would squarely be attracted. In the circumstances, the High Court refused to intervene in exercising its power under Section 482 of CrPC as the complaint itself disclosed the ingredients of the offences alleged. The High Court rejected the Petition *in limine.*

3-VIII(3)

Equivalent Citation:
2009(6) LJSOFT 9 (URC)9

IN THE HIGH COURT OF BOMBAY (GOA BENCH)
Criminal Writ Petition No. 6 of 2009
Decided on April 15, 2009

J. Sunderrajan

vs.

Dr. S.G. Dalvi and Anr

Hon'ble Judge: N.A. Britto, J

Case Summary

This Petition was filed u/s 482 of CrPC for quashing the process issued against the Petitioner under Section 3B of the Act. The allegation against the Petitioner, who was accused No. 2 in the complaint case filed by Respondent in the Trial Court, was that the Petitioner being one of the directors of the Accused No. 1 Company, Philips Medical System India Pvt. Ltd., had violated the provisions of Section 3B of the Act by selling an ultrasound machine to Apollo Victor Hospital which at the time of sale was a non-registered hospital under the Act.

It was not disputed that the sale of sonography machine in question took place after Section 3B was introduced. It was also not disputed that Apollo Victor Hospital was a non-registered hospital at the time of the sale. The only contention raised was that there were no averment in the complaint as well as in the statement on oath that the Petitioner was in charge of and responsible to the company for the conduct of the business of the company. The High Court accepted the said contention and quashed the process issued against the Petitioner.

It is pertinent to note that the Apex Court has in several of its decisions like *S.M.S. Pharmaceutical Ltd. vs. Neeta Bhalla 2005 (8) SCC 89* categorically held that necessary averments ought to be in the complaint before a person can be subjected to criminal process by way of fastening vicarious liability on him in his capacity as director of the company. What those necessary averments are is also spelt out by the unanimous judicial decisions. Even then in this case the only averment made in the complaint was that the Petitioner is a director of the company. There was no necessary averment made that the Petitioner was in charge of and responsible for the conduct of the business of the company. Hence for this technical lacuna in the complaint, the process issued against the Petitioner came to be set aside though factually all the necessary conditions of the offence were met.

This case is therefore, important for the prosecution to act as a guideline while drafting the complaint against a company and its directors.

3-VIII(4)

Equivalent Citation:
http://www,indiankanoon.org/doc/1496227/

IN THE HIGH COURT OF DELHI AT NEW DELHI
Bail Application 1556/2010
Decided on September 27, 2010

Subhash Gupta

vs.

State

Hon'ble Judge: Sanjiv Khanna, J

Case Summary

In all these applications for Anticipatory Bail serious allegations were made against the applicants of conducting sex detection and sex determination tests on pregnant women against her will, at the instance of her husband and in-laws. Having regard to the probity of the allegations and the serious nature of the offence, it was held that the Applicants were not entitled for the relief of Anticipatory Bail. Their applications were dismissed accordingly.

3-VIII(5)

Equivalent Citation:
2012(10) LJSOFT 138

IN THE HIGH COURT OF BOMBAY (AURANGABAD BENCH)
Criminal Application No. 757 of 2012
Decided on May 3, 2012

Dr. Ravindra s/o Shivappa Karmudi

vs.

State of Maharashtra

Hon'ble Judge: A.V. Nirgude, J

Case Summary

Section 28 of the Act makes it clear that the Court can take cognizance of the offence punishable under the Act only on the complaint lodged by the Appropriate Authority or the persons or organization fulfilling the criteria laid down therein. Therefore, this is a case instituted not on the Police Report but otherwise than on Police Report. As the punishment provided for the offences under Sections 22 and 23 of the Act is of imprisonment for a term which may extend to three years and fine which may extend to Rs. 10,000, the procedure for trial of these offences is of warrant trial as laid down in Chapter XIX of the CrPC specifically provided in Part B of the Chapter for cases instituted otherwise than on Police Report. As per the said procedure as laid down in this part of the Chapter in Section 244, when the accused appears or is brought before the Court, the Magistrate has to proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. As per Sections 245 and 246 of the CrPC, the Magistrate thereafter may discharge the accused or frame the charge against him, as the case may be. Therefore, in trial of the offences under this Act the Court has to record evidence before the charge and cannot frame the charge directly like in cases instituted on Police Report.

In this authority this legal position was clarified by holding that the proceedings of a criminal case for the offence punishable under Section 4(3) proviso r/w Sections 5 & 6 and r/w Sections 23 & 25 are required to be conducted as warrant case registered on a complaint otherwise than on Police Report and therefore, evidence before framing of the charge has to be recorded. The Court cannot directly proceed with the framing of the charge without recording evidence.

3-VIII(6)

Equivalent Citation:
http://bombayhighcourt.nic.in

IN THE HIGH COURT OF JUDICATURE AT BOMBAY NAGPUR BENCH, NAGPUR
Criminal Application (APL) No. 697 of 2012
Decided on April 5, 2013

Dr. Dadarao Sitaram Parwe

vs.

State of Maharashtra and Others

Hon'ble Judge: M.L. Tahaliyani, J

Case Summary

This was an Application u/s 482 CrPC for quashing the prosecution launched against the Applicant for the offence punishable u/s 23 and 25 of the Act for violation of various provisions. The contention advanced was that the breach alleged against the Applicant is that he had disclosed the sex of foetus to one of the pregnant women. However, there was no further material in this regard. Therefore, the order of framing charges passed by the Trial Court in this respect is required to be set aside. Further argument was advanced to the effect that the Appropriate Authority cannot file any complaint without the advice of the Advisory Committee.

After going through the provisions of the Act and the Rules framed thereunder, the Court came to the conclusion that it was not the intent of the law that the Appropriate Authority cannot file any complaint or take any action without the advice of the Advisory Committee. According to the High Court, the only provision made in the Act is that the Appropriate Authority may take into consideration the recommendations of the Advisory Committee and nothing more than that. The High Court, therefore, refused to quash the proceedings lodged against the Applicant. The further prayer made by the Applicant for permitting the use of the sonography machine pending the trial was also rejected and the trial was directed to be expeditiously decided within a period of 15 days from the framing of charges.

Chapter 4

APPEAL AGAINST ACQUITTAL/ CONVICTION

As this Act is still in its infancy, there are very few cases which are tried and decided at the Trial Court stage. Therefore, the Appeals against the decisions of Trial Courts after a full-fledged hearing of the cases are very few. Even if some decisions of the trial courts have reached the Appeal stage to the High Court, the Appeals are yet to be heard and decided. Therefore, as on date, we could get only one appeal against the acquittal of the accused by the Trial Court. This decision pertains to the High Court of Punjab and Haryana at Chandigarh and is of great significance as it exposes the lacunae in the implementation of the provisions of the Act. It is pertinent that though the Act protects the pregnant woman from prosecution, the Appropriate Authority prosecutes her, which results not only in harassment being caused to her, but also in damaging the prosecution's case. Hence, this decision has been included in this book.

4(1)

Equivalent Citation:
AIR 2008 P H 108, MANU/PH/1213/2007

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
C.W.P. No. 19018 of 2006
Decided on December 20, 2007

Dr. Pradeep Ohri

vs.

State of Punjab and Anr

Hon'ble Judges: Satish Kumar Mittal and K.C. Puri, JJ

Case Summary

The Petitioner in this case was convicted u/s 23(1) of the Act and was released on probation by the Trial Court. Initially he was legally advised that it was not necessary for him to file an appeal against the conviction. However, subsequently as per the advice, he preferred an appeal along with an application for condoning the delay. Meanwhile more than one year after his conviction by the Trial Court, the Petitioner's name was removed from the State Medical Register by the Medical Council u/s 23(2) of the Act. By this Writ Petition, he challenged this Order of removing his name.

The first contention raised was that his name was removed from the State Medical Register for a period of five years for an offence committed on July 9, 2002 when as per Section 23 of the old PNDT Act, 1994, his name should have been removed only for a period two years. It was submitted that only after the amendment of the PNDT Act with effect from February 14, 2003, the period of two years for the first offence had been enhanced to five years. Therefore, it was argued that the order of removal of his name for five years in respect of the act committed prior to the new amended Act came into effect was squarely hit by the prohibition as imposed by Article 20(1) of the Constitution against giving retrospective effect to any penal law. The High Court accepted and upheld the said contention and reduced the period to two years from five years.

The second contention raised was that as the Petitioner was not sentenced to any punishment but was released on probation, no disqualification was attached to his conviction. Hence, the Medical Council had acted illegally and without jurisdiction while ordering the removal of his name. It was submitted that this Order was in gross violation of Section 12 of the Probation of Offenders Act. The High Court, however, rejected the said contention and confirmed the removal of his name for two years.

4(2)

Equivalent Citation:
http://judis.nic.in, http://www.indiankanoon.org/doc/686274/

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
Criminal Misc. No. 337-MA of 2007
Decided on March 23, 2009

SADHU RAM KUSLA

VS.

RANJIT KAUR AND OTHERS

Hon'ble Judge: K.C. Puri, J

Case Summary

This was an application for leave to prefer an appeal challenging the acquittal of the respondents recorded by the Trial Court for the offences punishable u/s 120B, 312, 315 IPC & Section 23 of the Act was challenged. The allegations against the respondents were to the effect that Respondent No. 3, Dr. Kamlesh Jindal, who was running her Nursing Home at Rampura had conducted a sonography test on Respondent No. 1 who was 14 weeks pregnant. The test was allegedly conducted to determine "foetus well-being" and the result was found to be normal. However, on the same night Respondent No. 1 had a miscarriage. Hence, it was contended by the Petitioner that in fact the sonography test was conducted to determine the sex of the foetus and the pregnancy was terminated on finding the foetus to be that of a female child. It was argued that if the foetus was found to be normal in the sonography test, a miscarriage could not have occurred on the same night by alleged excessive bleeding as contended by the Respondents. Respondent No. 2 was the husband of Respondent No. 1 and Respondent No. 4 was Dr. Laxmi who had terminated the pregnancy of Respondent No. 1.

During trial, evidence was led both by the prosecution and the defence. As per Respondent No. 1 she had continuous bleeding and pain for two days and therefore, she had gone for an ultrasound scan to Respondent No. 3 to know the condition of foetus. She was told by Respondent No. 3 that there was risk of threatened abortion and she should get herself admitted. However, as no male member was accompanying her, she refused to get admitted and on that night she had a miscarriage. The Trial Court accepted the defence case and acquitted all the four accused.

In Appeal the High Court also concurred with the decision of the Trial Court by holding that there was practically no case that could be made. It was opined by the High Court that the mere fact that there was miscarriage on the same night on which the sonography test was conducted, *ipso-facto* does not establish that the sex of the foetus was detected and disclosed. As there was also no evidence to prove that the foetus was of a female, it was further held that there was no legal presumption that as there was an abortion, the foetus was female. As a result leave to prefer appeal came to be refused.

This case to some extent exposes the lacuna in the provisions of the Act. The tell-tale circumstances of the case created strong ground to hold that abortion, alleged to be a miscarriage, was only because the foetus was found to be female. Otherwise there is no explanation as to how the alleged miscarriage took place on the very night that the condition of the foetus was found to be normal in the afternoon. It appears that as Respondent No. 1 – the pregnant woman – was also made an accused, there was no likelihood of her supporting the prosecution case. Hence, there was no evidence for the prosecution to prove its case against the doctor who conducted the sex determination test and terminated the pregnancy. Some thinking is, therefore, required in this direction for an amendment in the provisions of the Act so that the evidence of the pregnant woman would be available for the prosecution to prove the case against the doctors and clinics which misuse pre-natal diagnostic techniques. Making the pregnant woman an accused in the case was counterproductive. The attention of the Appropriate Authorities is also required to be drawn to the provision of Section 24 of the Act, which lays down a presumption that unless the contrary is proved, the Court shall presume that the pregnant woman was compelled by her husband or any other relative as the case may be, to undergo pre-natal diagnostic techniques for purposes other than those specified in sub-section (2) of Section 4 and such person shall be liable for abatement of offence under sub-section (3) of Section 23 and shall be punishable for the offence specified under that Section. This presumption is to be drawn notwithstanding anything contained in the Indian Evidence Act. It is to deal exactly with situations similar to those faced in this case, although the presumption was laid down by the Legislature it was not adhered to by the Appropriate Authority, while making Respondent No.1 as the accused.

That society should not want a girl child; that efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance...It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A(e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection.

Hon'ble Smt. Ranjana Desai, J.

(Vijay Sharma vs. Union of India AIR 2008 Bom. 29)