

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
AURANGABAD BENCH, AT AURANGABAD

CRIMINAL WRIT PETITION NO. 200 OF 2014

Dr. Rajesh S/o. Kamalkishor Agrawal.

Age: 47, Occ: Medical Practitioner,

R/o Lifeline Diagnostic Center,

Suryamohan Hospital Building,

Doctor Lane, Nanded.

... Petitioner.

Versus

The Appropriate Authority/

Medical Officer,

Nanded-Waghala Municipal Corporation,

Nanded, Tq. & Dist. Nanded.

... Respondent.

Shri. R.N. Dhorde, Sr. Counsel i/b. Shri P.G. Patil, advocate for petitioner.

Shri M.V. Deshpande, advocate for Respondent.

Shri U.S. Mote, APP for respondent/State.

CORAM : SMT. SADHANA S. JADHAV,J

DATE : APRIL 6, 2015

P.C.:

1 Heard the learned Senior Counsel for the Petitioner,
learned Counsel for the respondent and learned APP for State.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The Petitioner herein is challenging the order of issuance of process against him under Section 3(A), 4, 5(2), 6, 23 and Rule 9 and 18 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, it is referred as “PCPNDT Act”) by the Chief Judicial Magistrate, Nanded in R.C.C. No. 752 of 2013 vide order dated 7/1/2014.

4 The Petitioner herein is a medical practitioner. The Petitioner is a partner in the partnership firm, which he runs alongwith his partner in the name and style of “Life Line Diagnostic Centre and Hospital at Nanded”. The said hospital renders multiple services in medical aid. The diagnostic center also undertakes sonographic diagnostic, for which the Petitioner is accorded with necessary licence for running the sonographic center, as contemplated under the PCPNDT Act. The licence is renewed from time to time.

The sonographic center has two ultra sound sonographic machines, which are being operated by three qualified doctors i.e. (1) Dr. Battalwar, (2) Dr. Bolnewar and the Petitioner himself.

5 That on 23/7/2013 Dr. Uttam Ingale, the appropriate authority under the PCPNDT Act lodged a report at Vimantal Police Station, Nanded alleging therein that the authority had received secret information on 22/7/2013 that one Shaikh Arifabee was posing as a midwife and was carrying out abortions at her residential premises. The residential premises of Arifabee was raided by the police authority. It was noticed that one Mrs. Savita (patient) was present in the residential house and was being administered with saline. Upon enquiry, Mrs. Savita disclosed that she had visited the house of Arifabee for undergoing abortion and that she was already administered two injections.

6 In the course of investigation, Savita Ashture had disclosed to the police that she had undergone diagnostic test at

Lifeline Diagnostic Centre. On the basis of the said information, the appropriate authority and others raided premises of Lifeline Diagnostic Centre. They examined the cabin where the sonographic machine was installed. They also examined the records for the period 12/5/2013 to 19/6/2013. They noticed the entry in the computer in respect of examination of Mrs. Savita Ashture on 22/6/2013. They saw the screen shot. The fee receipt in the name of Mrs. Savita Ashture for undergoing the diagnostic test dated 11/6/2013. The panchanama was recorded to that effect. The copy of the panchanama was given to the accused.

7 On the basis of the seized records, according to the complainant it was revealed that form No. F in respect of Mrs. Savita Ashture was filled in on 11/6/2013 and in all probabilities, she had undergone diagnostic test on the same day. No on-line report was given about the said test. The fee receipt was allegedly signed by the present Petitioner. It was clear that the form-F was not filled on 22/6/2013. In the report sent to the appropriate authority, the

hospital had shown that Form-F was not filled in on 22/6/2013 i.e. the day on which she had undergone the diagnostic test. From the records, it was revealed that there was no compliance with the provisions of PCPNDT Act in as much as Forms-F were not filled on the day on which the procedure was carried out.

8 According to the complainant in the course of investigation in Crime No. 83 of 2013, it was revealed that Savita Ashture had undergone the diagnostic test in the Lifeline Diagnostic Centre, wherein the accused No. 1 i.e. Dr. Gopal Battalwar had conducted diagnostic test with the help of nurse Noorjahabegam Shaikh Makdum. The accused were therefore, liable for the non-compliance of section 4, 5 and 6 of the PCPNDT Act, which is punishable under Section 23 of the said Act. It is stated in the complaint that notice was issued to Lifeline Diagnostic Centre wherein present petitioner had accepted the said notice. Notice was issued to the Petitioner on 30/7/2013. The Petitioner had replied said notice on 1/8/2013. An explanation was given in reply to the

said notice. The matter was kept before the advisory committee on 7/8/2013. The Petitioner had put up his case. However, the explanation was not acceptable and hence, a complaint was lodged on 30th October, 2013.

9 It appears from the record that the Lifeline Diagnostic Centre had filed Writ Petition No. 520 of 2014 in the Hon'ble High Court challenging the order passed by the appropriate authority confirming the order dated 9/8/2013 thereby sealing the sonography machine as well as directing the suspension of registration and licence for sonography center run by Lifeline Diagnostic Centre. By a judgment and order dated 12th March, 2014, the said Writ Petition was allowed by the High Court and the order passed by the appropriate authority was quashed and set aside.

10 In the said Writ Petition, it was specifically observed that Mrs. Ashture had visited Lifeline Diagnostic Centre on 11/6/2013 and had filled the form on that day. However, the test was not carried out

on that day but it was carried out on 22/6/2013. Mrs. Ashture had paid fees on 11/6/2013. She was referred to the Sonography by Dr. Chidrawar. Dr. Santosh Katte had referred her to Dr. Pokalwar and thereafter, she had been to Arifa begam for the purpose of aborting foetus. Dr. Pokalwar has been exonerated on the basis of an undertaking and affidavit furnished by him. The Court had rightly observed that Mrs. Ashture had visited several diagnostic centre and there was no cogent material to suggest that only on the basis of the diagnostic test conducted by Dr. Pokalwar, she had decided to abort foetus.

11 The learned Senior Counsel for the Petitioner submits that the learned Magistrate has issued process without application of judicial mind. That the continuation of the said proceedings would be an abuse of process of law and that the professional like the present Petitioner would not only be exposed to social obloquy, but would have to go through the ordeal of the said proceedings which are initiated without there being a proper foundation.

12 The learned Counsel appearing for the appropriate authority submits that the records would clearly show that on 22/6/2013 Mrs. Ashture had undergone test without filling in the form on that day. It is submitted that the form-F contemplated was not filled in as per the pro-forma given in the rules contemplated under the said Act. Sub-clause 15 of Form-F contemplates that the date on which the procedure is carried out should be stated. Clause 16 of Form-F contemplates the date on which consent obtained (in case of invasive). Signature/Thumb impression must be mentioned .. accompanied with the declaration of the pregnant woman. In the present case, Lifeline Diagnostic Centre had violated provisions and therefore, they are punishable under Section 23 of the said Act.

13 It is the case of the Petitioner that the service of Dr. Battalwar were hired by Lifeline Diagnostic Centre and fees were paid to him at the rate of Rs. 300/- per patient. That Dr. Battalwar was an employee of the Lifeline Diagnostic Centre. He was handling and

operating sonographic machine. That it was for him to maintain records. The acts alleged against Lifeline Centre is in fact, the acts of Dr. Battalwar in his individual capacity and he alone is liable for any action under the PCPNDT Rules. That the statement of Mrs. Savita Ashture would also show that the diagnosis was done by Dr. Battalwar. The offence is committed in the individual capacity. The report submitted by him on 22/6/2013 does not in any way indicate that Mrs. Ashture had undergone sex determination test.

14 The learned Senior Counsel for the Petitioner submits that it is true that Mrs. Ashture had visited Lifeline Diagnostic Centre on 11/6/2013. That there were more than 55 patients. She did not wait for her turn. Hence, she did not undergo sonography test on 11/6/2013. It is in these premises that on line submission of the report did not indicate her name in the record dated 11/6/2013. She revisited the hospital on 22/6/2013. She had brought alongwith her fee receipt showing that she had paid fees for the test on 11/6/2013. The records of the hospital showed that the form was filled up on

11/6/2013 itself and therefore, she was directed to undergo the test on 22/6/2013. The on-line record would clearly show that on 22/6/2013 she had undergone sonography test. Her name was shown at Sr. No. 490. The results were normal. It is only on the basis of this anomaly that the Petitioner is being prosecuted under the provisions of PCPNDT Act 1994. The learned Senior Counsel therefore, reiterates that the continuance of the proceedings would be an abuse of process of law.

15 Upon perusal of records, it appears that Mrs. Savita Ashture had got herself examined by Dr. Pokalwar prior to visiting Lifeline Diagnostic Centre i.e. on 13/5/2013. After she was examined at Lifeline Diagnostic Centre on 22/6/2013, she had again visited Dr. Pokalwar, who had examined her on 24/6/2013. It therefore, cannot be said that there was determination of sex on 22/6/2013, on the basis of which she had decided to abort the foetus. It can be safely inferred that Mrs. Ashture was bent upon determination of sex of the

foetus and that Lifeline Diagnostic Centre as a firm cannot be prosecuted for violation of the provisions of the PCPNDT Act.

16 The learned Counsel for the respondent submits that Dr. Battalwar was admittedly working with Lifeline Diagnostic Centre. That it is the defence of the accused that he was an employee of the Centre. That it is an offence by the firm, which can be termed as a company under Section 26 of the PCPNDT Act, which reads as follows:

“26. Offences by companies.- (1) Where any offence punishable under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

17 According to the learned Counsel for the respondent, the documents/records were signed by Dr. Rajesh Agarwal i.e. the present

Petitioner. That he being the partner of Lifeline Diagnostic Centre is liable to be punished under Section 26 of the said Act. It is submitted that the company means any body corporate and includes a firm or other association of individuals.

18 As against this, the learned Senior Counsel has drawn attention of this Court to the proviso to Section 26 which contemplates thus :

“Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.”

Hence, according to the learned Senior Counsel, the Petitioner herein cannot be held liable by virtue of Section 26 of the said Act.

19 In the present case, it is a matter of record that even according to Mrs. Savita Ashture, she was never examined by the present Petitioner. There is nothing on record to arrive at a concrete conclusion that Dr. Battalwar who was the employee of Lifeline

Diagnostic Centre had determined the sex of the foetus and had disclosed the same to Mrs. Savita Ashture. It is a matter of record that she had visited the hospital of Dr. Pokalwar on 24/6/2013 and thereafter had decided to abort the foetus. In these circumstances, it would be difficult to hold the present Petitioner liable under the provisions of PCPNDT Act.

20 The learned Counsel for the respondent/appropriate authority submits that form-F bears the name of the present petitioner in column No. 11 and there is no reference to Dr. Battalwar and therefore, according to him, it would be premature to quash the proceedings at this stage.

21 It is further submitted by the learned Counsel for the respondent that Rule 9 sub-rule 8 contemplates that -

“(8) Every Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centres shall send a complete report in respect of all preconception or pregnancy related procedures/ techniques/tests conducted by

them in respect of each month by 5th day of the following month to the concerned Appropriate Authority.”.

It is submitted that there is non-compliance of the said provisions.

22 Upon perusal of the record, it is clear that the test was conducted on 22/6/2013 and the report was sent on line within the stipulated period and therefore, it was revealed that she was examined on 22/6/2013. The defence of the accused given in the form of reply has not been taken into consideration and the said act of filling in the form on 11/6/2013 and not conducting the test on the same day or that the form was not filled up on 22/6/2013 i.e. the day on which she was examined, has been considered a serious offence and the Petitioner is being prosecuted for the same.

23 In the present case, the prosecution has not made a specific averment in the complaint that the sex of the foetus was determined and disclosed to the patient on 22/6/2013. The statement of Mrs. Savita Ashture would also show that she had

undergone ultra sonography test which was done by Dr. Battalwar. If she had known the sex of foetus on 22/6/2013, there was no reason for her to visit Dr. Pokalwar on 24/6/2013. In the absence of primary allegations, the prosecution cannot take recourse to Section 26 of the said Act and proceed against the director/partner of Lifeline Diagnostic Centre. It is pertinent to note that an incorrect allegation is levelled in paragraph-6 of the complaint that since Form-F is filled on 11/6/2013 it is inferred that the test was also conducted on the same day and on-line entry is not made on 11/6/2013.

24 It is the specific defence of the Petitioner that due to rush of patients Mrs. Savita Ashture did not wait for her turn on 11/6/2013, but on the basis of the same fee receipt had subjected herself to USG test on 22/6/2013 at the hands of Dr. Battalwar. It is true that as contemplated under Section 26 of the PCPNDT Act, firm/company or the associate of persons can be prosecuted for procedural lapses. However, in the interest of justice and to uphold the dignity of the medical profession, it would also be necessary to

ascertain at the initial stage as to whether the person had the knowledge of procedural lapses or that he had deliberately committed any act. In the present case, there is no procedural lapse attributed to the present petitioner and therefore, this Court finds substance that the provisions of subsection 3 of Section 4 of the Act were procedural and any lapse in maintaining record could not be equated with substantive offence of contravention of the provisions of Section 5 or 6 of the Act. At the same time, the contentions of the learned Counsel for the respondents also needs to be taken into consideration, by and large, that conjoint reading of the above provisions, would clearly indicate the well-known legislative scheme for ensuring a strict and vigilant enforcement of the provisions of the act directed against female foeticide and misuse of prenatal diagnostic technique. However, the said submission needs to be applied to the facts of the present case. The Courts are duty bound to see that the prosecution of any individual does not amount to abuse of process of law. In the present case, even prima facie, at the time of filing of the complaint, there is no material to indicate that there is contravention of the

provisions of Section 5 or 6, the contentions regarding inaccuracy or deficiency in Form-F will not be applicable and therefore, the prosecution against individual doctor who had no knowledge that the form was filled up on 11/6/2013 and the test was conducted on 22/6/2013 cannot be held liable. There is no evidence of any irregularities in maintaining the records except the discrepancy in the dates and therefore, this Court is of the view that prima facie no case is made out against the present applicant. Hence, Petition seeking quashing of proceedings deserves to be allowed.

25 The learned Senior Counsel has placed reliance upon the Judgment of this Court dated 19/4/2012 in the case of **Dr. Mrs. Uma Shankarrao Rachewad**, wherein the Petitioner was also being prosecuted under the provisions of PCPNDT Act. The said Writ Petition was allowed. The learned Senior Counsel has drawn the attention to the observations of this Court (Coram : A.V. Nirkude, J), wherein the Hon'ble Court has held that -

“When the Competent Authority visits a clinic for inspection, after inspection he should record statement of the person against whom he intends to file the case. In such statement, such person would get ample opportunity to put-forward his or her explanation. The Competent Authority under this Act, in my view, should consider each case on its merits, examine it meticulously, preferably with the help of a Legal Advisor and then file complaint in the Court.”

26 The learned Senior Counsel has also placed reliance upon the Judgment in the case of **Dr. Tushar Rangrao Patil**, wherein this Hon'ble Court (Coram : A.V. Nirgude, J) by a Judgment and Order dated 2nd May, 2012 was pleased to quash the proceedings under the PCPNDT Act. Being aggrieved by the said Judgment and Order, the Appropriate Authority had filed a SLP before the Hon'ble Apex Court. By an order dated 10th May, 2013, the Hon'ble Apex Court had declined to interfere with the order passed by this Court.

27 In the case of **Inder Mohan Goswami & anr. v/s. State of Uttaranchal & ors. reported in AIR 2008 SC 251**. The Hon'ble Apex Court has observed as follows :

“It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.”

28 In the above mentioned premises, this Court has perused the complaint, compilation of the charge-sheet in Crime No. 83/2013 and the records of this case and this Court is of the opinion that prima facie, no case is made out for continuing the proceedings against the present Petitioner under the provisions of PCPNDT Act. That in the absence of any foundation for prosecuting the accused and where

prima facie an offence is not disclosed, it would be expedient in the interest of justice to quash the said proceedings and avoid abuse of process of law. Hence, the Writ Petition deserves to be allowed :

29 Hence, following order is passed

ORDER

(i) Writ Petition is allowed in terms of prayer clause (B) which reads as under :

“B) Quash and set aside R.C.C. No. 752/2013 registered under section 3-A, 4, 5(2), 6, 23 and Rule 9 and 18 of PCPNDT Act and Rules alongwith the impugned order dated 07.01.2014 passed below Exhibit -1 by the learned Chief Judicial Magistrate, Nanded in R.C.C. No. 752/2013 and for that purpose issue necessary orders.”

(ii) The Rule is made absolute in the above terms. Writ Petition is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)