

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1406 OF 2015

THE STATE OF MAHARASHTRA
VERSUS
DR. RAJENDRA S/O EKNATH JAWLEKAR

...
APP for Petitioner : Mr. M.B. Bharaswadkar
Advocate for Respondents: Mr. N.B. Khandare

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CORAM : V. K. JADHAV, J.
DATED : 2nd DECEMBER, 2016

PER COURT:-

1. Heard finally with consent of the parties at admission stage.
2. Being aggrieved by the judgment and order passed by the Additional Sessions Judge, Basmath, dated 8.4.2015 in Criminal Revision No. 5 of 2015, the original complainant has preferred this criminal writ petition.
3. Brief facts giving rise to the present criminal writ petition are as follows:-

The Superintendent of Sub District Hospital, Basmath has filed a private complaint bearing R.C.C. No. 290 of 2012 before the J.M.F.C. Basmath, for the offences punishable under sections 29(2), 3(2), 3(3), 1(B), 2(2), 6(2) Rule 17(1) (2), Rule 9(4) of the Pre-

conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, referred to as “the PCPNDT Act”). The present respondent original accused appeared before the J.M.F.C., Court No.2, Basmath and moved an application Exh.137 for discharge under Section 245 of Cr.P.C. The learned J.M.F.C. by common order below Exh.1 and Exh.137 in R.C.C. No. 290 of 2012 rejected the application for discharge Exh.137 and framed charge against the respondent accused for the offence punishable under Sections, as aforesaid. Being aggrieved by the same, the respondent accused has preferred criminal revision No. 5 of 2015 before the Additional Sessions Judge, Basmath and the learned Additional Sessions Judge, Basmath by impugned order dated 8.4.2015, allowed the criminal revision and thereby set aside the order passed by the J.M.F.C. Basmath dated 17.2.2015 below Exh.1 and Exh.137 in R.C.C. No. 290 of 2012, as aforesaid. Thus, the applicant original complainant has approached this Court by filing present criminal writ petition.

4. Learned A.P.P. for the petitioner submits that by notification dated 6.11.2001, the State Government has appointed the Medical Superintendent of Rural Hospital at every Taluka level as an appropriate authority, as contemplated under Section 17 of the PCPNDT Act. The said notification specifically refers Medical

Superintendent, Rural Hospital at every Taluka level and where Rural Hospital is not established at Taluka level, then the Sub District Hospital or General Hospital in a particular Taluka are established. Thus, the Medical Superintendent of Sub District or General Hospital is an appropriate authority within the meaning of aforesaid notification in terms of provisions of Section 17 of PCPNDT Act. The learned A.P.P. submits that in one case, wherein issue of appropriate authority of General Hospital, Khamgaon was under discussion and accordingly the Additional Director of Health Services, has opined that the Medical Superintendent of General Hospital is appropriate authority for Khamgaon Taluka. The aforesaid opinion was based on the communication from Joint Director (Hospitals) State Level, Mumbai, dated 21.3.2013. The learned A.P.P. submits that in Basmath Taluka, there is no General Hospital or Rural Hospital since the Government Hospital at Basmath is upgraded to Sub District Hospital way back in the year 2004. In the year 2015, when the Government has noticed the disparity, by notification dated 15.5.2015 declared the Medical Superintendent of Rural Hospital/ Sub District Hospital/General Hospital/ Cottage Hospital as an appropriate authority. In such circumstances, the Medical Superintendent of existing Hospital is an appropriate authority and as such, the action taken by the Medical Superintendent, Sub District Hospital, Basmath, in the present case, is in accordance with the

provisions of Section 17 of the PCPNDT Act. The learned A.P.P. submits that that learned Additional Sessions Judge, Basmath has not considered this aspect and erroneously quashed and set aside the well-reasoned order passed by the learned Magistrate, Basmath below Exh.1 and Exh.137 in R.C.C. No. 290 of 2012.

5. Learned A.P.P., in order to substantiate his contentions, placed reliance on the judgments in following cases:-

- i) Dr. Kailas s/o Hiranman Dudhal vs. Dr. Sarswati Sudam Munde and others, reported in 2013 ALL MR (Cri.) 2174,
- ii) Om Prakash and Anr vs. Union of India and Anr, reported in 2012 ALL MR (Cri.) 324 (SC)

6. Learned counsel for the respondent original accused submits that in terms of provisions of Section 17(2) of PCPNDT Act, it is the State Government, who by notification, can appoint one or more appropriate authorities for any part of the State or whole of the State. By notification dated 6.11.2001, the Government of Maharashtra has appointed Medical Superintendent of Rural Hospital at every Taluka level in the State of Maharashtra to be an appropriate authorities for respective area under the jurisdiction for the purposes of PCPNDT Act. Learned counsel submits that the instant complaint is filed by the Medical Superintendent of Sub District Hospital, Basmath.

Learned counsel submits that when the statute laid down that a particular thing to be done in particular manner, it has to be done in that manner only. The opinion expressed by the Additional Director of Health Services, cannot replace the notification wherein the Medical Superintendent of Rural Hospital at every Taluka level in the State of Maharashtra is declared as an appropriate authority, as provided under Section 17(2) r.w. sub-section (3) of PCPNDT Act. Learned Magistrate has observed that the Sub District Hospital is established at Taluka level according to the population and in terms of administration of the Civil Hospital and as such the Sub District hospital is at upper level to Rural Hospital in District Civil Hospital administration. In the backdrop of these observations, learned Magistrate has erroneously observed that for want of specific word, it cannot be said that the complainant in the instant case is not appropriate authority to file the complaint. The learned Counsel for the respondent accused submits that realizing the said mistake, by notification dated 15.5.2015, in suppression of earlier notification, the Government of Maharashtra has appointed Tahsildar, Naib Tahsildar, Medical Superintendent of Rural Hospital/Sub District Hospital/ General Hospital/ Cottage Hospital as an appropriate authority for the purpose of PCPNDT Act and further by notification dated 16.3.2016 by deleting the Tahsildar and Naib Tahsildar appointed the Medical Superintendent of Rural Hospital/Sub District

Hospital/General Hospital/ Cottage Hospital as an appropriate authority in terms of provisions of Section 17(2) and (3) of the PCPNDT Act.

7. Learned counsel for the respondent accused in order to substantiate his contentions placed reliance on the judgments in following cases:-

- i) The order of the Supreme Court in Special Leave to Appeal (Civil) No (s). 18033 of 2013, dated 9.12.2013 (the Assistant Municipal Commissioner, Nanded Waghala City vs. Kalpana and others),
- ii) Judgment dated 11.9.2012 passed by this Court in Writ Petition No. 6557 of 2012 (Dr. Mrs. Sukhada Dilip Mulay vs. The State of Maharashtra and others),
- iii) A.K. Roy and another vs. State of Punjab and others, reported in (1986) 4 SCC 326,
- iv) Hari Chand Aggarwal vs. Batala Engineering Co. Ltd. and others, reported in AIR 1969 SC 483 and
- v) Jeewan Kumar Rut and another vs. Central Bureau of Investigation, reported in (2009) 7 SCC 526.

8. Before advertng to the submissions canvassed by the counsel for the respective parties, it would be appropriate to refer to

the provisions of Section 17 of the PCPNDT Act, which is reproduced as follows:-

“17. Appropriate Authority and Advisory Committee.- (1) *The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purposes of this Act.*

(2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.

(3) The officers appointed as Appropriate Authorities under sub-section (1) or sub-section (2) shall be,--

[(a) when appointed for the whole of the State or the Union territory, consisting of the following three members--

- (i) an officer of or above the rank of the Joint Director of Health and Family Welfare — Chairperson;*
- (ii) an eminent woman representing women's organization; and*
- (iii) an officer of Law Department of the State or the Union territory concerned:*

Provided that it shall be the duty of the State or the Union territory concerned to constitute multi-member State or Union territory level Appropriate Authority within three months of the coming into force of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002:

Provided further that any vacancy occurring therein shall be filled within three months of the occurrence,]

(b) when appointed for any part of the State or the Union territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.

(4) The Appropriate Authority shall have the following functions namely:-

(a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;

(b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic;

(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action; and

(d) to seek and consider the advice of the Advisory Committee, constituted under sub-section (5), on application for registration and on complaints for suspension or cancellation of registration;

(e) to take appropriate legal action against the use of any sex selection technique by any person at any place, suo motu or brought to its notice and also to initiate independent investigations in such matter;

(f) to create public awareness against the practice of sex selection or pre-natal determination of sex;

(g) to supervise the implementation of the provisions of the Act and Rules;

(h) to recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions;

(i) to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration.

(5) The Central Government or the State Government, as the case may be, shall constitute an Advisory committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions, and shall appoint one of the members of the Advisory Committee to be its Chairman.

(6) The Advisory Committee shall consist of--

- (a) three medical experts from amongst gynecologists, obstetricians, paediatricians and medical geneticists;*
- (b) one legal expert;*
- (c) one officer to represent the department dealing with information and publicity of the State Government or the Union territory, as the case may be;*
- (d) three eminent social workers of whom not less than one shall be from amongst representatives of women's organizations.*

(7) No person who has been associated with the use or promotion of pre-natal diagnostic techniques for determination of sex or sex selection shall be appointed as a member of the Advisory committee.

(8) The Advisory committee may meet as and when it thinks fit or on the request of the Appropriate Authority for consideration of any application for registration or any complaint for suspension or cancellation of registration and to give advice thereon:

Provided that the period intervening between any two meetings shall not exceed the prescribed period.

(9) The terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee in the discharge of its functions shall be such as may be prescribed."

9. As defined under Section 2(a) of the PCPNDT Act "appropriate authority" means, the appropriate authority appointed under Section 17. In terms of sub-section (2) of Section 17 of the PCPNDT Act, the State Government is empowered to appoint, by notification in the official gazette, one or more appropriate authority,

for the whole or part of the State for the purpose of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.

10. Section 28 of the PCPNDT Act prescribes the cognizance of offence and the said Section reads as under:-

“28. Cognizance of offences.-- (1) No Court shall take cognizance of an offence under this Act except on a complaint made by--

(a) The Appropriate Authority concerned, or any officer authorised 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 organisation.

(2) No Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the 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.”

11. In terms of provisions of Section 28 of the Act, as aforesaid, no court shall take cognizance of the offence under this Act except

on a complaint made by the appropriate authority or any Officer authorized in this behalf, by the Central Government or the State Government, as the case may be, or appropriate authority or by person, who has given notice of not less than 15 days in the manner prescribed, to the appropriate authority, of the alleged offence and on his intention to make the complaint to the Court and for the purpose of this clause "person" includes the social organization.

12. By notification dated 6.11.2001, the Government of Maharashtra has appointed Medical Superintendent of Rural Hospital at every Taluka level in the State of Maharashtra to be an appropriate authority, for the respective area under the jurisdiction for the purpose of the PCPNDT Act. The said notification reads as under:-

" In exercise of the powers conferred by sub-section (2) read with sub-section (3) of section 17 of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act. 1994 and of all other powers enabling it in that behalf, the Government of Maharashtra is hereby please to appoint the Medical Superintendent of Rural Hospital at every Taluka level in the State of Maharashtra, to be the Appropriate Authority for the respective area under jurisdiction for the purpose of the said ACT."

13. It is clear from the above notification that the Medical Superintendent of Sub District Hospital at Taluka level in the State of

Maharashtra is not appointed as an appropriate authority. However, the Medical Superintendent, Sub District Hospital, Basmath has filed complaint before the J.M.F.C. Basmath.

14. In the case of Nanded Waghala Municipal Corporation vs Kalpana and others, the petition before the Supreme Court was directed against the orders dated 13.3.2013 and 20.3.2013 passed by this Court whereby the writ petition filed by the respondents were allowed by following order:-

"It is State Government who by notification in the official Gazette can appoint one or more Appropriate Authority for any part of the State or whole of State. The notification is produced on record and the persons designated as Appropriate Authorities are spelt out in the said notification. The Assistant Municipal Commissioner is not designated as Appropriate Authority under the said notification. No other notification is placed on record showing that the Assistant Municipal Commissioner is designated as an Appropriate Authority. The reliance is placed on the order dated 17.06.2011 issued by the Commissioner of Nanded Waghala Municipal Corporation, wherein it is said that the Assistant Commissioners as Ward Officers would be entitled to take action under the P.C.P.N.D.T. Act. Sec. 17 of the P.C.P.N.D.T. Act does not authorize the Commissioner of Municipal Corporation to appoint Appropriate Authorities. It is only the Appropriate Authorities designated under the Statute or appointed by the State Government in particular state would be entitled to act as Appropriate Authorities. When a statute lays down a particular thing to be done in particular manner, it has to be done in that

manner only. The Assistant Municipal Commissioners are nowhere shown as Ward Officers. The order is also passed in the capacity of Assistant Municipal Commissioner, Nanded. In absence of any notification in that behalf by the State Government, the said Assistant Municipal Commissioner cannot be an Appropriate Authority. The action taken by him of suspending the registration would be without authority and deserves to be set aside. Even otherwise, the registration of petitioner's centre is suspended since 19.07.2011 i.e. for more than one and half year. As far as sealing of the machine is concerned, the same is contemplated U/Sec. 30 of the P.C.P.N.D.T. Act read with Rules 11 and 12 of the P.C.P.N.D.T. Rules. The Appropriate Authority or any person authorized in that behalf can resort to action of sealing sonography machine, if the said authority has reason to believe that the said machine may furnish evidence of commission of offence under the P.C.P.N.D.T. Act. In the present case, the order sealing the machine does not spell out this fact. The authority has to arrive at a conclusion upon subjective satisfaction based on objective assessment of the facts. Perusal of the order sealing the machine it is manifest that the said machine has been sealed as the record has not been properly maintained".

15. The Hon'ble Supreme court has observed that this court had not committed error by quashing the order passed by the petitioner because he had not been appointed as an appropriate authority under Section 17 of the PCPNDT Act. The Supreme court has upheld the order passed by this Court to the effect that it is only the appropriate authority, designated under the statute or appointed by the State Government, in particular State, would be entitled to act as

an appropriate authority and when the statute laid down that a particular thing to be done in a particular manner, it has to be done in that manner only.

16. The learned Magistrate by his opinion replaced the above mentioned notification and held that the complainant, though attached to Sub District Hospital, as a Medical Superintendent, is an appropriate authority or authorized Officer to make the complaint. The learned Additional Sessions Judge has therefore, rightly interfered and thus quashed and set aside the order passed by the Magistrate.

17. Even the Government of Maharashtra, by realizing the said mistake, by subsequent notifications dated 15.5.2015 and 16.3.2016 appointed the Medical Superintendent, Rural Hospital/Sub District Hospital/General Hospital/Cottage Hospital as an appropriate authority in the respective area under the jurisdiction for the purpose of the PCPNDT Act. The Joint Director (Hospitals), State Level, Mumbai though expressed opinion that the Medical Superintendent of Rural Hospital, who is an appropriate authority under the provisions of PCPNDT Act, is equivalent post to the Medical Superintendent of General Hospital, the Additional Director of Health Services is not empowered to express that the Medical

Superintendent attached to Sub District Hospital is also an appropriate authority, contrary to the notification dated 6.11.2001.

18. In the case of ***A.K. Roy and another vs. State of Punjab and others (supra)***, relied upon by learned counsel for the accused, the Supreme Court while dealing with the question whether the Food (Health) Authority could, by notification dated 7.9.1972 sub-delegate his powers to the Food Inspector, Faridkot, observed that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden. The Supreme Court further observed that where liberal construction of a rule may lead to a consequence not envisaged by the Act under which the Rule made, the Rule must be construed restrictively.

19. The learned A.P.P. has vehemently submitted that the purpose of appointing the appropriate authority, as contemplated under Section 17 of the PCPNDT Act, is to deal with the problem of pre-natal sex determination leading to female foeticide and therefore, even though the provisions are liberally construed, the complaint filed by the Medical Superintendent, though attached to the Sub District Hospital is within the meaning of said provision and notification issued by the State Government to carry out the purpose as

envisaged in the Act. I do not agree with this submission for the reason that when the power is given to do certain things in certain way, it must be done in that way and not at all. By notification in the official gazette, as contemplated under Section 17 of the PCPNDT Act, if the State Government has appointed the Medical Superintendent, Rural Hospital, as an appropriate authority, the other modes of compliance are necessarily forbidden. The Medical Superintendent are appointed in different capacity in the Hospitals at various levels and though the Medical Superintendent of Rural Hospital is equivalent post to the Medical Superintendent, Sub District and General Hospital, in absence of specific notification to that effect or authorization, the complaint would suffer from basic defect, if it is filed by the person, who is not appointed as an appropriate authority. If it is permitted by liberal construction of the provisions, the same may lead to the consequences, not envisaged by the Act.

20. In the case of ***Dr. Kailas Hiranman Dudhal vs. Dr. Saraswati Sudam Munde (supra)***, relied upon by learned A.P.P. for the petitioner, this court has dealt with the point whether the petitioner in that case had authorization, and if he has, whether it was imperative for him to place copy of the complaint filed in terms of provisions of the PCPNDT Act. In that context of the matter, by relying upon the

judgment of the Supreme Court in the case of ***Dinesh Kumar vs. Chairman, Airport Authority of India & Anr, reported in AIR 2012 SC 858***, this Court has observed that since the cognizance has already been taken by the learned Judge of the Trial Court, the said question can be raised during trial and by granting such liberty, disposed of the case. In the instant case, question raised is altogether different, which goes to the root of the matter. Thus, the case cited above cannot be made applicable to the facts of the instant case.

21. In view of above discussion, I find no fault in the impugned judgment and order passed by the learned Additional Sessions Judge, Basmath. There is no substance in the writ petition. Hence, the writ petition is hereby dismissed.

(V. K. JADHAV, J.)

rlj/