

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH.

CRM-M No.21764 of 2015 (O&M)

Date of Decision: 03.06.2016

Dr. Ritu Prabhakar and another.

..... Petitioners

Vs.

State of Haryana and another.

..... Respondents.

CORAM: HON'BLE MR. JUSTICE JASWANT SINGH

Present: Mr. Sartej Singh Narula, Advocate for the petitioners.

Mr. Gaurav Dhir, Deputy Advocate General, Haryana
for the respondents/State.

JASWANT SINGH, J.

1. The two accused petitioners, namely, Dr. Ritu Prabhakar and Dr. Sandeep Prabhakar have invoked the jurisdiction of this Court under Section 482 Cr.P.C. for quashing of a Complaint No.6 dated 05.03.2015 titled as “**State Versus Dr. Ritu Prabhakar etc.**” (**Annexure P-1**) for the stated offences under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, as amended in 2002 (for short “PC & PNDT Act”); the summoning order dated 09.04.2015 and the order of framing charge and charge-sheet dated 04.06.2015 (**Annexure P-2**) and the revisional order dated 04.07.2015 (**Annexure P-3**), whereby the revision against the order of framing charge has been dismissed, and all other subsequent proceedings.

2. Dr. Sandeep Prabhakar-petitioner No.2, a General Surgeon, is the Proprietor of Prabhakar Hospital, Assandh Road, Panipat, which is a registered

Clinic for a Ultrasound Centre, and Dr. Ritu Prabhakar-petitioner No.1, a Gynecologist, is/was the authorized person for conducting ultrasound in the said hospital. The hospital premises were registered under Section 19 of the PC & PNDT Act under Registration No.33 since 13.02.2002 for conducting ultrasound on patients and the registration stood extended up to 26.07.2017, which now stands cancelled, vide order dated 27.01.2015 (**Annexure P-13**) and an appeal there against is pending before the Appellate Authority.

3. The petitioners for treatment of couples, who could not conceive naturally started conducting In Vitro Fertilization (for short 'IVF') in layman term referred as “Test Tube Baby Centres” at the said hospital for the last about a decade. In January, 2013, the authorities started insisting upon such Centres to be registered under the PC & PNDT Act and in compliance of the memo dated 06.02.2013 (**Annexure P-9**) issued by the Civil Surgeon, Panipat, the petitioners deposited a fee of Rs.35,000/- along with the required documents for registration of the IVF Centre vide letter dated 18.02.2013 (**Annexure P-10**).

4. It is an admitted position that registration of IVF Centre remained pending with the respondents despite reminders dated 27.08.2013 and 15.10.2013. It is necessary to mention here that a letter/memo dated 09.10.2014 (**Annexure P-11**) was circulated by the Govt. of India Ministry of Health and Family Welfare laying down the guidelines for registration of IVF/ART Centres/Clinics under the PC & PNDT Act, 1994. It was specified under these guidelines that such IVF/ART Centres mandatorily required to be registered either as Genetic Counselling Centres or Genetic Clinics or Genetic Laboratories as defined under the PC & PNDT Act. The procedures of that Centres were to be recorded either in the Form F (revised) or Form E, whichever was relevant under the PC & PNDT Act read with Rules, 1996.

It is a matter of fact that such Centres are being recorded in the State as “Genetic Clinics” (ultrasound registration).

5. The record of the case transpires that a raid was conducted by a team comprising of Deputy Civil Surgeon, Lady Medical Officer, Tehsildar and Drugs Control Officer at the Hospital/Centre run by the petitioners on 19.12.2014 and allegedly discrepancies, regarding non registration, maintenance and producing of records relating to IVF procedures records for the last two years required under the PC & PNDT Act, were recorded and the Centre was sealed. However, with regard to maintenance of records for the ultrasound procedures, nothing was found to be remiss.

Based on the aforesaid inspection, a Show Cause Notice dated 02.01.2015 (**Annexure P-12**) for cancellation of registration was issued, whereby on the basis of the material examined in the inspection, it was presumed that the petitioners were running “sex selection centre” instead of Infertility Clinic by using IVF technique on the patients.

6. A detailed reply refuting the allegations was filed on behalf of the petitioners and which was duly received by the respondents on 12.01.2015 but without properly considering the same, vide order dated 27.01.2015 (**Annexure P-13**) passed by the Chairman (Civil Surgeon), District Appropriate Authority, Panipat the registration No.33 of the Prabhakar Hospital was cancelled under the PC & PNDT Act for operating as a Ultrasound Centre. Undisputedly an appeal under the PC & PNDT Act against the cancellation of the registration for the Ultrasound Centre is stated to be pending decision before the Appellate Authority.

7. Apart above, a Criminal Complaint dated **06.03.2015** (**Annexure P-1**) was filed by the District Appropriate Authority (PNDT)-cum-Civil Surgeon,

Panipat for the alleged offences under Sections 3(A), 4, 5, 6 18, 19, 22, 23, 25, 28 & 29 of the PC & PNDT Act read with Section 200 Cr.P.C alleging therein that the IVF Centre was being run since last many years without registration under the PC & PNDT Act and without its proper display at the conspicuous place. It was also alleged that the Centre was being advertised for “sex selection” as is clear from an advertisement displayed by the hospital. There was failure to properly maintain and produce records since last two years of the IVF procedures conducted at the Centre. The consent of the couples was not obtained and the IVF procedure was conducted not only on childless couples but also on couples having only girl child. Thus, the stated Sections of the PC & PNDT Act were being violated and the petitioners were accordingly summoned vide order dated 09.04.2015.

8. Based on the statements of the prosecution witnesses recorded during the pre-charge evidence i.e. CW-1 Dr. Sudhir Batra, Deputy Civil Surgeon; CW-2 Gurcharan Singh, Drugs Control Officer and CW-3 Dr. Inderjit Dhankhar, Civil Surgeon (**Annexures P-4 to P-6** respectively) and order dated 04.06.2015 regarding framing of the charges as well as charge-sheet of the same date passed/framed by the learned JMIC, Panipat (**Annexure P-2** (collectively).

9. A perusal of the charge-sheet dated 04.06.2015 reveals that both the petitioners have been charged on four counts:-

- 1) *Advertisement regarding facility of selection of sex before conception by running the IVF Centre and thus committing the offence under Section 22 of the PC & PNDT Act;*
- 2) *Non-registration & approval of the IVF Centre from the competent authority and thus committing the offence under Section 23 of the PC & PNDT Act;*
- 3) *Non-submission of reports regarding the IVF*

procedures and the required forms etc., and thus committing the offence under Section 25 of the PC & PNDT Act;

- 4) *Operating a IVF Centre in a company under the name of Prabhakar Hospital without registration and thus committing the offence under Section 26 of the PC & PNDT Act.*

10. Aggrieved against the order of framing of charges and the charge-sheet dated 04.06.2015, the petitioners filed a revision and the same was also dismissed vide order dated 04.07.2015 (**Annexure P-3**), passed by learned Additional Sessions Judge, Panipat. Hence, the present petition under Section 482 Cr.P.C. for quashing of the Complaint No.6 dated 05.03.2015 (**P-1**) for the stated offences under the PC & PNDT Act; the summoning order dated 09.04.2015 and the order of framing charge as well as charge-sheet dated 04.06.2015 (**P-2**) and the revisional order dated 04.07.2015 (**P-3**), whereby the revision against the order of framing charge has been dismissed, and all subsequent proceedings.

11. This Court on 08.07.2015 passed the following order:-

“ Notice of motion to the respondents be issued for 18.09.2015.

Trial Court not to pass final judgment in the matter till further orders. ”

12. It is apposite to mention here that pursuant to the order of framing of charges and while exercising powers under Section 23(2) of PC & PNDT Act, the registration of both the petitioners as Medical Practitioners was suspended vide order dated 06.07.2015, passed by the Registrar, Haryana Medical Council, Chandigarh. Consequently, an application bearing **CRM No.22144 of 2015** was filed on 15.07.2015 in the present petition seeking stay of operation of the

charge-sheet dated 04.06.2015 (**P-2**).

Upon notice of the application, it transpires that no orders were passed and the same remained pending.

13. Another application bearing **CRM No.36296 of 2015** was filed on 31.10.2015 for placing on record **Annexure P-20** (collectively) regarding information sought under the RTI Act, whereby it is established that the IVF Centres are given the same registration numbers as their ultrasound registrations and also the same are registered as “Genetic Clinics” under the PC & PNDT Act.

14. Upon notice, the respondents have filed a reply dated 13.11.2015 to the main petition.

In the reply, a preliminary objection has been taken that the prosecution evidence has been concluded and the case is at the stage of recording of defence evidence after recording the statements of the petitioners/accused under Section 313 Cr.P.C.

It is stated that in the procedure of IVF, the chromosomes of sperms can be separated into X and Y chromosome and Y chromosome be used for birth of a male child and as such used for selection for given birth to a male child. The use of such technique is presumed on examination of the record which indicates that most of the IVF procedures were conducted upon pregnant ladies already having girl child and thereafter giving birth to a male child. It is submitted that the IVF technique is meant for infertile women and by resorting to such methods, it is suggested that the petitioners are indulging in sex selection and thus attracting the offences punishable under the PC & PNDT Act. It is also submitted that even the Govt. of India, vide letter dated 09.10.2014 (**Annexure P-11**) has declared that registration of IVF Centres under the PC & PNDT Act is mandatory and the petitioners were running their IVF Centre without getting

registered from the competent authority.

15. Learned Counsel for the petitioners has argued that the petition deserves to be allowed on the grounds that there is no material available on record even to *prima facie* prove that petitioners have committed any offence under the provisions of the PC & PNDT Act. It is further argued that prosecution has been launched against the petitioners with malafide intention just to harass and humiliate them, as the clinic run by them was duly registered by the competent authority and they were running the same as per the provisions of the Act. It has further been argued that in view of the settled proposition of law that when *prima facie* there is no material available on record against an accused person then continuation of criminal proceedings amounts to abuse of the process of the Court and violative of Article 21 of the Constitution and more particularly in view of the grave consequences of the automatic suspension of registration of the medical practitioner(s) as contemplated in Section 23(2) of the PC & PNDT Act. It has also been argued that the complaint is not validly instituted and the same is contravention of the provisions of Section 28 of the PNDT Act.

16. Per Contra, learned State Counsel submitted that in view of the stage of the trial no interference is warranted by this Court as the prosecution evidence has already been concluded and after recording the statement of the accused-petitioners under Section 313 Cr.PC the case is fixed for defence evidence. It is further argued that the discrepancies pointed out by the inspection team against the petitioners are squarely falling within the preview of the PC & PNDT Act as well as rules framed thereunder. It is further argued that the petitioners have violated the provisions of PC & PNDT Act by running IVF Centre without obtaining any registration from the competent authority and as such the registration of the Ultrasound Centre has rightly been cancelled and the

complaint filed against them is perfectly legal and valid in view of their involvement in “sex selection techniques” while separating the chromosomes of sperms into 'X' & 'Y'. Lastly it is argued that in view of the letter dated 09.10.2014 (P-11) issued by Central Government, the registration of IVF Centre is mandatory but the petitioners have not complied with the same rather running their IVF Centre without any registration by the competent authority.

17. I have heard learned Counsel for the parties and have perused the paper book with their assistance and find force in the contentions raised on behalf of the petitioners and as such petition deserves to be allowed.

18. Before proceeding with the matter, it is appropriate to have a brief look at the relevant provisions of PC & PNDT Act as well as circumstances necessitating for the enactment, which are as under:-

Perusal of statements of objects and reasons reveal that PC & PNDT Act was enacted with a view to prohibit Pre-Natal Diagnostic Technique for determination of the sex of the foetus leading to female feticide being abusive of techniques against the female sex and which inter alia provided for prohibition of misuse of Pre-Natal Diagnostic Technique for determination of sex of foetus leading to female feticide, prohibition of advertisement of Pre-Natal Diagnostic Technique for detection or determination of sex, permission and regulation of the use of Pre-Natal Diagnostic Technique for the purpose of detection of specific genetic abnormalities or disorders, permitting the use of such techniques only under certain conditions by the registered institutions and punishment for violation of the provisions of the Act.

In the year 2001, Section 7 of the PC & PNDT Act was amended regarding the deemed termination of membership of the Central Supervisory Board but that is not relevant for the adjudication of the matter in controversy.

Thereafter by way of Act No.14 of 2003 (w.e.f. 14.02.2003) many changes were incorporated in the Act and the long title of the Amendment Act reads as under:-

“ An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of prenatal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto. ”

Emphasis supplied

19. Some of the definitions contained under Section 2 of the PC & PNDT Act (after amendment w.e.f. 14.02.2003) and which are relevant for deciding the matter in controversy are also reproduced here as under:-

2. Definitions.- *In this Act, unless the context otherwise requires,—*

(ba) "conceptus" means any product of conception at any stage of development from fertilization;

(bb) "embryo" means a developing human organism after fertilization till the end of eight weeks (fifty-six days);

(bc) “foetus” means a human organism during the period of its development beginning on the fifty seventh day following fertilization or creation (excluding any time in which its development has been suspended) and ending at the birth;

(d) “Genetic Clinic” means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedures.

[Explanation.-For the purpose of this clause, “Genetic Clinic” includes a vehicle, where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, is use;]

(i) “pre-natal diagnostic procedures” means all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any other tissue or fluid of a man, or of a woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception; name called, which is used for conducting pre-natal diagnostic procedures.

(o) “sex selection” includes any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex;

20. Section 3-A of the PC & PNDT Act contains the prohibitory Clause for “sex selection” which reads as under:-

“ ***Prohibition of sex-selection-*** *No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.* ”

Further, Section 6 of the PC & PNDT Act talks about prohibition for determination of “sex” of a foetus before or after conception which reads as under:-

“ ***Determination of sex prohibited.-*** *On and from the commencement of this Act,—(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;*
(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus;
(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception. ”

21. Admittedly and undisputedly by the parties, the term IVF i.e. In Vitro Fertilization is nowhere defined under the PC & PNDT Act except that it finds mention only under the guidelines issued by the Central Government vide letter dated 09.10.2014 (**Annexure P-11**). In addition to above, it transpires that

an effort was made by the Central Government while bringing the draft of The Assisted Reproductive Technologies (Regulation) Bill-2010 (**Annexure P-8**) for short “ART Bill 2010” but the same has not culminated into an enactment but for the sake of guidance to decide the matter in controversy it is appropriate to reproduce the preamble of the draft bill which reads as under:-

PREAMBLE

It is estimated that 15 percent of couples around the world are infertile. This implies that infertility is one of the most highly prevalent medical problems. The magnitude of the infertility problem also has enormous social implications. Besides the fact that every couple has the right to have a child, in India infertility widely carries with it a social stigma. In the Indian social context specially, children are also a kind of old-age insurance.

*With the enormous advances in medicine and medical technologies, today 85 percent of the cases of infertility can be taken care of through medicines, surgery and/or the new medical technologies such as **in vitro fertilization** (IVF) or intracytoplasmic sperm injection (ICSI). It may be recalled that the birth of the first child, Louise Brown in 1978, through the technique of in vitro fertilization by Robert G Edwards and Patrick Steptoe, was a path-breaking step in control of infertility; it is, in retrospect, considered as one of the most important medical advances of the last century.*

Most of the new technologies aimed at taking care of infertility, involve handling of the gamete – spermatozoa or

the oocyte – outside the body; they also often involve the donation of spermatozoa or oocyte, or the use of a surrogate mother who would be carrying a child with whom she has no biological relationship. These technologies not only require expertise but also open up many avenues for unethical practices which can affect adversely the recipient of the treatment, medically, socially and legally.

*The last nearly 20 years have seen an exponential growth of infertility clinics that use techniques requiring handling of spermatozoa or the oocyte outside the body, or the use of a surrogate mother. **As of today, anyone can open infertility or assisted reproductive technology (ART) clinic; no permission is required to do so.** There has been, consequently a mushrooming of such clinics around the country.*

In view of the above, in public interest, it has become important to regulate the functioning of such clinics to ensure that the services provided are ethical and that the medical, social and legal rights of all those concerned are protected.

The bill details procedures for accreditation and supervision of infertility clinics (and related organizations such as semen banks) handling spermatozoa or oocytes outside of the body, or dealing with gamete donors and surrogacy, ensuring that the legitimate rights of all concerned are protected, with maximum benefit to the infertile couples/individuals within a recognized framework of ethics and good medical practice.

Emphasis Supplied

22. The present case falls within the category of cases instituted otherwise than on a police report i.e. a complaint case. The alleged offences for which the cognizance has been taken by the learned trial Court are punishable under Sections 22, 23, 25 and 26 of the PC & PNDT Act, 1994. The charges have been framed after recording the pre-charge evidence, wherein the accused (petitioners) have participated and the witnesses were cross-examined also.

The two modes of prosecution as provided in the Code of Criminal Procedure reach differently at the stage of framing of charges. Unlike in a police case, the charges are framed in a complaint case after recording the pre-charge evidence, whereas in the police case, the charges are framed on the basis of the final report submitted under Section 173(2) Cr.P.C. which contains statements under Section 161 Cr.P.C. (not even signed by the witnesses) and other material. Therefore, the caveat of the State for non-interference at this stage is that the statement under Section 313 Cr.P.C. stands recorded is of no significance as the entire evidence before the learned trial Court stood recorded at pre-charge stage. Therefore, the issues raised to the legality and validity of the orders passed by the Courts below on the subject needs to be analyzed on merits.

23. At the stage of framing of the charges, it is necessary for the Court to follow the procedure as enshrined under Sections 245, 246 Cr.P.C. At this stage, the Court has to examine the entire evidence as collected and to find out if the accused is to be either discharged or charged. The relevant material has to be referred to in order to build up a *prima-facie* opinion before framing the charges. The grievance of the petitioners pertains to the orders impugned, whereby the trial Court has framed the charges in a mechanical manner without appreciating the material on record, as there is nothing to suggest that the alleged commission of offence and the petitioners were entitled to be discharged. The learned

Revisional Court instead of correcting the illegality committed by the trial Court proceeded to affirm the order.

24. There is no dispute that the petitioners are running an In Vitro Fertilization (IVF) Centre for the last more than a decade and for that purposes, the Ultra Sonography Centre stands registered in terms of Rule 7 of the PNDT **Rules**. As discussed above, it is not in dispute that there is no requirement of registration of the IVF Centre under the PC & PNDT Act except because of the letter dated 09.10.2014 (**Annexure P-11**) and this fact is specifically admitted by CW-3 to the effect that IVF is a procedure, which facilitates conceiving the infertile females and this medical technique is adopted for pregnancy to the females who are unable to conceive naturally. It is also admitted by this witness that the PC & PNDT Act and the Rules framed thereunder do not contain the term IVF. However, to strengthen its case, the respondents have stressed that Assisted Reproductive Technologies (Regulation) Bill, 2010 is being proposed to cover the IVF Centres, but the same is yet to be enacted and as such the same is of no help to the case of the respondent-State.

25. Section 22 of the PNDT Act which deals with prohibition of advertisement relating to pre-natal of determination of sex and provide for punishment for its violation reads as under:-

22. Prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention.- (1) No person, organisation, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue or cause to be issued any advertisement in any manner regarding facilities of pre-natal determination of sex available at such Centre, Laboratory, Clinic or any other place.

(2) No person or organisation shall publish or distribute or cause to be published or distributed any advertisement in any manner regarding facilities of pre-natal determination of sex available at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place.

(3) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

Explanation.--For the purposes of this section, "advertisement" includes any notice, circular, label wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas."

26. The contents of para 4 of the complaint if examined in the context of Section 22 of the PC & PNDT Act the same do not at all suggest that there was any advertisement allegedly made by the accused/petitioners proclaiming the facility of "selection of sex before conception" merely by running IVF Centre. The complaint only highlights that for want of registration as IVF Centre the facility of IVF is being provided, thereby attracting penal provisions under Section 22 of the PC & PNDT Act; but a perusal of Section 22 nowhere reveals that the registration of IVF Centre is mandatory or obligatory and in case of non registration the same attracts the penal consequences. It is clear that the ingredients to constitute the offence punishable under Section 22 of the PC & PNDT Act are not available and, therefore, the learned trial Court has apparently gone wrong in framing the charge in this regard.

27. Secondly, the learned trial Court has framed the charge under Section

23 of the PC & PNDT Act on the ground that the petitioners were running IVF Centre without getting it registered from the District appropriate authority and were running an Ultrasound Centre in the Clinic.

Section 18 of the PC & PNDT Act provides for registration of Genetic Counseling Centres, Genetic Laboratories and Genetic Clinics which reads as under:-

“18. Registration of Genetic Counselling Centres, Genetic

Laboratories or Genetic Clinics. (1) No person shall open any

Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic after the commencement of this Act unless such Centre, Laboratory or Clinic is duly registered separately or jointly under this Act.

(2) Every application for registration under sub-section (1), shall be made to the Appropriate Authority in such form and in such manner and shall be accompanied by such fees as may be prescribed.

(3) Every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged, either partly or exclusively, in counselling or conducting pre-natal diagnostic techniques for any of the purposes mentioned in section 4, immediately before the commencement of this Act, shall apply for registration within sixty days from the date of such commencement.

(4) Subject to the provisions of section 6, every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged in counselling or conducting pre-natal diagnostic techniques shall cease to conduct any such counselling or

technique on the expiry of six months from the date of commencement of this Act unless such Centre, Laboratory or Clinic has applied for registration and is so registered separately or jointly or till such application is disposed of, whichever is earlier.

(5) No Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall be registered under this Act unless the Appropriate Authority is satisfied that such Centre, Laboratory or Clinic is in a position to provide such facilities, maintain such equipment and standards as may be prescribed.

Admittedly, for ultra-**sonography** the Clinic is registered with the appropriate authority and the same stands renewed also. As per the testimony of CW-2, Gurcharan Singh, during the raid on 19.12.2014 only two Ultrasound Machines were found installed in the Centre which were seized by Dr. Sudheer Batra, Nodal Officer (CW-3), besides five original registers of Form 'F' and six files of consent form of IVF cases. There is no other machinery or other equipment recovered from the premises, which are used for analysis or pre-natal diagnostic test for selection of sex before or after conception. Even otherwise, there is no evidence of any particular instance relating to the particular beneficiary suggesting the alleged commission of offence. The trial Court has proceeded to frame the charges apparently without their being any material available on record and despite the clear admission suffered by the complainant.

Section 23 of the PC & PNDT Act being material and which lays down offences and penalties reads as under:-

“ Offences and penalties.- (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person

who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with Act, 1994 & Amendments imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

2. *The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.*

3. *Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre- natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4, he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.*

4. *For the removal of doubts, it is hereby provided, that*

the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection. ”

Perusal of the Section 23(1) reveals that in case of any contravention of the provisions of PC &PNDT Act or Rules framed thereunder, an imprisonment upto a period of three years and fine upto Rs.10,000/- can be imposed and on subsequent conviction imprisonment may extend to five years and the fine can be imposed upto Rs.50,000/-. Section 23(2) *inter alia* envisages that consequent upon framing of charge(s) by the competent Court, the registration of a medical practitioner can be suspended till the decision of the case and in case in hand as discussed above, the power under Section 23(2) has been exercised by the competent authority in the present case and registration of the petitioners as medical practitioners have been suspended vide order dated 06.07.2015.

28. Thirdly, the Court proceeded to frame charge under Section 25 of the PC & PNDT Act on the ground that the required report and forms were not submitted. Before dealing with the allegations under this count it is appropriate to reproduce the Section 25 of the PC & PNDT Act which reads as under:-

“ **25. Penalty for contravention of the provisions of the Act or rules for which no specific punishment is provided.** - Whoever contravenes any of the provisions of this Act or any rules made thereunder, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention. ”

A reading of the charge itself would show the vagueness in respect of the particulars, period etc. of the reports whereas it stands admitted in para 6 of the complaint itself that the hospital having been registered for Ultrasound Centre only, submitted reports of USG (regarding pregnant females) regularly in the Form "F" which is mandatory for a Centre before 5th of every month. The complainant further alleged that reports regarding IVF were not submitted and also during inspection, certain discrepancies were noticed. The discrepancies, which are suggested in the complaint are contained in para 8 which reflects that the records of number of patients were analyzed and discrepancies highlighted are of different natures such as: patients are having female child and underwent IVF at their Centres and the accused has failed to explain what was indication of IVF. Failure to conceive can be for variety of reasons and at any age and it can occur even after the patient had earlier naturally conceived and delivered. No presumption in law can be drawn to infer that there was a determination of sex which constitutes the offence punishable under the PC & PNDT Act. Once the technology of IVF is not covered under the Act, it will not be safe to prosecute the accused for the offences for which they have been charged. The charge framed under Section 25 of the Act itself highlights the uncertainty of the prosecution case as there is no mentioning of any specific report or forms required to be submitted.

29. The last charge is for violation of Section 26 of the PC & PNDT Act and to examine the issue in this context the Section 26 is reproduced hereunder:-

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: 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.

(2) Notwithstanding anything contained in sub-section (1), where any offence punishable under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purpose of this section, -

(a) “company” means any body corporate and includes a firm or other association of individuals, and

(b) “director,” in relation to a firm means a partner in the firm.”

A perusal of the complaint itself gives the description of the hospital as a “proprietorship firm” and not a “company”. Thus it is not conceivable as to how the provisions of Section 26 of the PC & PNDT Act has been attracted in the present case. Consequently, on this count also there is no basis to proceed

against the petitioners. As a result, charges framed by the learned trial Court are not sustainable and the learned trial Court has not at all discussed the relevant material and proceeded to frame the charges in a routine and mechanical manner.

30. The Court of revision has specifically noticed in para 20 of the judgment that no doubt a person cannot be held guilty for committing a crime on the basis of assumptions and presumptions but at the stage of the charges only *prima-facie* cases are to be seen. It needs to be reminded that the *prima-facie* case has to be made out from the material and evidence available on record. To form an opinion that a *prima-facie* case is made out cannot be based on mere assumptions and presumptions at all unless the statute provides for drawing such an inference. Once the material discrepancies in the complaint as well as the pre-charge evidence have been noticed by the Additional Sessions Judge, it was a fit case which warranted interference in the revisional jurisdiction against the order of charge. The Hon'ble Supreme Court has laid down the guidelines in case titled as **“CBI Versus K. Narayan Rao”**, reported as **2012(9) SCC, 512** while dealing with the prosecution case at the stage of charge. It is specifically held that where there are two views possible, the Court should not frame the charge and discharge the accused.

31. Another important aspect of the matter is that the complaint filed against the petitioners has not been validly instituted. The paragraph 1 of the complaint gives the constitution of an appropriate authority for the district consisting of three officials i.e. Chairman and two other members; but a perusal of the complaint clearly reveals that the same has been signed only by the Chairperson and there is nothing on record to prove that rest of the two members of the appropriate authority have either signed or authorized the chairperson for filing the complaint against the petitioners. The provisions of Section 28 of the

PC & PNDT Act contemplates that **no Court shall take cognizance of an offence under this Act except on the complaint made by the appropriate authority concerned, or any Officer authorized in this behalf by the Central Government or State Government** and the relevant part of Section 28 of the Act reads as under:-

- (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 authorized in this behalf by 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.”*

Admittedly in the present case, the State Government while issuing notification dated 7th November 2013, Annexure **P-15** has constituted the Appropriate Authority for the district consisting of the following officers namely:-

- “ i) Civil Surgeon Chairperson
- ii) District Programme Officer Women and Child Development Department. Member
- iii) District Attorney Member

In the case in hand, the complaint was signed only by the Civil Surgeon claiming to be the chairperson of the Appropriate Authority and in this regard a

Specific ground is taken under para 6(L) of the petition as well as during the course of arguments also a plea was raised on behalf of the petitioners before this Court to the effect that the complaint is not maintainable in view of the fact that the same is not validly instituted due to the lack of authorization and signatures by other two members of the Appropriate Authority.

Even in the reply filed on behalf of the respondents also, the averment made in para 6(L) of the petition are not denied, rather the same are admitted in following terms:-

“ In reply to part L of para 6 of the petition, it is further submitted that the civil surgeon is part and parcel of D.A.A. And has acted upon the opinion as advise of the DAA which makes him competent as well as authorized person to file the complaint and for proceedings thereof.”

Thus, neither in the complaint nor in the reply filed by the respondents or during the course of arguments it has been brought to the notice of this Court that there is any authorization to file the present complaint against the petitioners in consonance with the provisions of Section 28 of the PC & PNDT Act. Consequently, on the point whether the complaint against the petitioners is validly instituted or not, this Court comes to the firm conclusion that the complaint is signed and filed only by Dr. Inderjit Dhankar, Chairperson claiming himself to be District Appropriate Authority (PNDT)-cum-Civil Surgeon, Panipat and other two members have not signed the same and thus the same is not validly instituted in consonance with the Section 28 of the PC & PNDT Act. As a result, it is held that the complaint is not instituted in the manner provided under Section 28 of the PC & PNDT Act and consequently the entire proceedings are vitiated being illegal in law. However, this issue has not been examined by both the learned Courts below in its true prospect and, as such the same has resulted into a

grave miscarriage of justice.

32. The arguments on behalf of the respondents that the prosecution of the petitioners is squarely covered within the parameters of the PC & PNDT Act in view of the Central Government letter dated 09.10.2014 (Annexure P-11) is not sustainable in view of the fact that counsel for the respondents has miserably failed to point out as to under which provision of the PC & PNDT Act it has been provided that it was obligatory upon the petitioners to get their clinic separately registered for the purpose of IVF facilities merely on issuance of the guidelines by the Central Government dated 9th October, 2014 (**Anneuxre P-11**). Even otherwise, if the matter is to be examined from the angle whether these guidelines have any force of law or can be construed as part of the PC & PNDT Act or not, then the provisions of Section 31-A of the PC & PNDT Act being relevant can be pressed into service and the same reads as under:-

“ 31-A. **Removal of difficulties.** (1) *If any difficulty arises in giving effect to the provisions of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of the said Act as appear to it to be necessary or expedient for removing the difficulty.*

Provided that no order shall be made under this section after the expiry of a period of three years from the date of commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.”

A perusal of Section 31-A reproduced hereinabove, clearly reveals that no order shall be made under this Section by the Central Government after

expiry of the period of three years from the date of commencement of amendment Act, of 2002 (14 of 2003) i.e. 14.02.2003. Undisputedly the guidelines dated 9th October 2014 (**P-11**) are issued beyond the period of three years of the Amendment Act 2002 and consequently the same cannot be construed to be issued while exercising the powers by the Central Government under the provisions of Section 31-A and thus cannot form the part and parcel of the PC & PNDT Act for the purposes of prosecution of the petitioners.

33. That even otherwise as per the provisions of Article 20(1) of the Constitution of India, (which finds place under Part-III, Fundamental Rights), no person shall be convicted of any offence except for violation of law in force at the time of the commission of the Act charged as an offence but in the present case the respondents have miserably failed to substantiate that the petitioners have violated any provisions of the PC & PNDT Act merely by running their clinic which was duly registered by the competent authority.

34. Consequently, this Court is of the opinion that the guidelines dated 9th October 2014 (Annexure P-11) issued by the Central Government is of no consequence to fasten the liability of the petitioners to face prosecution under provision of the PC & PNDT Act as the law is well settled by the Hon'ble Supreme Court that while applying and interpreting the provisions of a statute resulting into the penal consequences, then the same are to be construed strictly and not liberally.

35. In view of the discussions made herein above, there is no material available on record to substantiate the allegations of the respondents that petitioners have violated any provisions of PC & PNDT Act merely by running Ultra Sound Centre, which was duly registered at the relevant time and imparting the IVF facilities. Consequently, the allegation of the respondents that inspection

team has pointed out discrepancies against the petitioners and they have violated the provisions of PC & PNDT Act by running their IVF Centre is fallacious and liable to be rejected and the same deserves to be quashed and set aside and there is no reason to go ahead with the prosecution of the present petitioners.

36. The contention on behalf of the respondents that this Court should not entertain the present petition while exercising power under Section 482 Cr.PC in view of the advanced stage of the criminal proceedings is not acceptable as the law is well settled by Hon'ble Supreme Court in a catena of judgments that power under Section 482 Cr.PC can be exercised by a High Court at any stage to prevent the abuse of the process of the Court and/or to otherwise secure the ends of justice and reference in this regard can be made to a recent judgment of Hon'ble Supreme Court rendered in **Satish Mehra Vs. State of N.C.T. Of Delhi & Anr.**

2013(2) RCR Criminal 883, wherein it is held as under:-

“15. The power to interdict a proceeding either at the threshold or at an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to be interdicted in the interest of justice as continuance thereof will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent in every High Court. The power, though available, being extra ordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfies the narrow test indicated above, namely, that even accepting all the allegations levelled by

the prosecution, no offence is disclosed. However, if so warranted, such power would be available for exercise not only at the threshold of a criminal proceeding but also at a relatively advanced stage thereof, namely, after framing of the charge against the accused. In fact the power to quash a proceeding after framing of charge would appear to be somewhat wider as, at that stage, the materials revealed by the investigation carried out usually comes on record and such materials can be looked into, not for the purpose of determining the guilt or innocence of the accused but for the purpose of drawing satisfaction that such materials, even if accepted in its entirety, do not, in any manner, disclose the commission of the offence alleged against the accused. ”

Still further reference can be made to law laid down by a Bench of three judges of Hon'ble Supreme Court in **State of Karnataka Vs. L. Munishwamy** AIR 1977 (SC) 1489 wherein it was held as under:-

“ In the, exercise of this whole some power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the; ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the, ends of mere law though justice has got to be administered according to laws made by the, legislature. The compelling necessity for making these observations is

that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction. ”

37. In view of the above, Complaint No.6 dated 05.03.2015 titled as **“State Versus Dr. Ritu Prabhakar etc.”** (Annexure P-1) under Sections 3(A), 4, 5, 6, 18, 19, 22, 23, 25, 28 and 29 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, as amended in 2002 (for short “PC & PNDT Act”); the summoning order dated 09.04.2015 and the order of framing charge and charge-sheet dated 04.06.2015 (Annexure P-2) and the revisional order dated 04.07.2015 (Annexure P-3), whereby the revision against the order of framing charge has been dismissed are hereby quashed and set aside.

(JASWANT SINGH)
JUDGE

June 03, 2016
Vinay