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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1 **CRM-M-36456-2017 (O&M)**
Date of Decision:- November 20, 2017

Anuj Petitioner

Versus

State of Haryana Respondent

2 **CRM-M-30759-2017 (O&M)**

Anuj Petitioner

Versus

State of Haryana Respondent

CORAM: HON'BLE MR. JUSTICE SHEKHER DHAWAN

Present: Mr. Sanjay Vashisth, Advocate,
for the petitioner.

Mr. Neelam Kashyap, DAG, Haryana.

SHEKHER DHAWAN, J.

1. By this common order, the above titled two CRM-M-36456-2017 and CRM-M-30759-2017 are being disposed of as both these petitions pertain to FIR No. 423 dated 27.07.2017, under Sections 4, 5, 6, 23, 25, 28, 29 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for

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short “**the Act**”) and Sections 420, 120-B IPC (subsequently converted under Sections 23, 29 of the Act and Sections 420, 120-B IPC), registered at Police Station Mahendergarh, District Mahendergarh (Haryana).

2. By filing CRM-M-36456-2017, the petitioner seeks quashing of aforesaid the FIR alongwith consequential proceedings including challan/final report under Section 173 of Code of Criminal Procedure (for short, “the Code) and by filing CRM-M-30759-2017, petitioner, Anuj seeks anticipatory bail in the aforesaid case.

3. Relevant facts for the purpose of decision of these petitions; present FIR (Annexure P-1) was registered against Satya Narayan, Neelam wife of Satya Narayan and Anuj, who is professionally a doctor. The petitioner has alleged that he has no concern with the medical line as his qualification is 10+2 only and involvement of the petitioner is on the basis of suspicion only. There was no occasion or reason with the raiding party to get into possession of photographs of the petitioner there and then.

4. As per the FIR (Annexure P-1), on 27.07.2017 Civil Surgeon, Narnaul received a secret information against accused persons that Satya Narayan used to get the sex in foetus determination in his house and his wife, Neelam used to act as an agent. At the first instance, Anuj Yadav used to examine the sex

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resident of Nanagwas by calling at his home and if the girl is found in the foetus then he used to get done its MTP also and for both the works, he used to charge Rs.20 to Rs.5,000/-. On this basis, Civil Surgeon, Narnaul constituted a team consisting of Dr. Arun Kalra, Dy. (PNDT) Dr. Surender, Medical Officer, Civil Hospital, Narnaul SIO Nisha Yadav LMO, SDH Mahendergarh and Dharmender Lamba, Assistant PNDT. Smt. Maya, from the Health Department was to act as decoy patient and Smt. Suman Bala was made as her care taker by the team. A sum of Rs.20,000/- was paid to the decoy patient after noting the number of currency and raid was conducted. Neelam took the decoy patient in a room constructed on the first floor of the house where one doctor was already present who was having laptop portable ultrasound machine. The doctor conducted ultrasound by applying 'sailly' on the stomach of decoy patient and the decoy patient was told that she is developing a female child in her foetus and a demand of Rs.15,000/- was raised separately. During that time one couple came there and Neelam agent made them to sit there, who were present for the same purpose. On signal, the raiding party conducted the raid and during that time the doctor whose name was told as Anuj by the agent ran away with his machine. One bottle of 'sailly' was recovered from the house and Rs.20,000/-were recovered from the kitchen which were handed

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over by the Health Department. Two mobile SIM of Neelam were also recovered and from the call record it was found that other members of the gang were also involved.

5. Learned counsel for the petitioner raised a contention that the petitioner has been falsely implicated in this case though he was not apprehended on the spot. No offence under the Act is made out against the petitioner. No real victim has complained about these activities. More so, the police agency had swung into action on the basis of information given by one Dr. Arun Kalra, Deputy Civil Surgeon, Narnaul. That way, the Civil Surgeon had constituted a team solely and the same is contrary to Section 30 of the Act. As per Section 30 of the Act, the power of search and seizure is with the Appropriate Authority and Section 30 of the Act and Rule 12 of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996 are extracted below :-

“30. Power to search and seize records, etc. -

(1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, such Authority or any officer authorised thereof in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and

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seize the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.

(2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act.”

Rule 12 of the Rules, 1996 :-

“12. Procedure for search and seizure.-

(1) The Appropriate Authority or any officer authorized in this behalf may enter and search at all reasonable times any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Imaging Centre or Ultrasound Clinic in the presence of two or more independent witnesses for the purposes of search and examination of any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seal and seize the same if there is reason to believe that it may furnish evidence of commission of an offence punishable under the Act.

Explanation - In these Rules -

- (1). 'Genetic Laboratory/Genetic Clinic/Genetic Counselling Centre' would include an ultrasound centre/imaging centre/nursing home/hospital/institute or any other place, by whatever name called, where any of the machines or equipments capable of selection of sex before or after conception or performing any procedure, technique or test for pre-natal detection of sex of foetus, is used;
- (2). 'material object' would include records, machines and equipments; and
- (3). 'seize' and 'seizure' would include 'seal' and

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'sealing' respectively.

(2) A list of any document, record, register, book, pamphlet, advertisement or any other material object found in the Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic or Imaging Centre and seized shall be prepared in duplicate at the place of effecting the seizure. Both copies of such list shall be signed on every page by the Appropriate Authority or the officer authorized in this behalf and by the witnesses to the seizure:

Provided that the list may be prepared, in the presence of the witnesses, at a place other than the place of seizure if, for reasons to be recorded in writing, it is not practicable to make the list at the place of effecting the seizure.

(3) One copy of the list referred to in sub-rule (2) shall be handed over, under acknowledgment, to the person from whose custody the document, record, register, book, pamphlet, advertisement or any other material object have been seized:

Provided that a copy of the list of such document, record, register, book, pamphlet, advertisement or other material object seized may be delivered under acknowledgment, or sent by registered post to the owner or manager of the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, Ultrasound Clinic or Imaging Centre, if no person acknowledging custody of the document, record, register, book, pamphlet, advertisement or other material object seized is available at the place of effecting the seizure.

(4) If any material object seized is perishable in nature, the Appropriate Authority, or the officer authorized in this behalf shall make arrangements promptly for sealing, identification

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and preservation of the material object and also convey it to a facility for analysis or test, if analysis or test be required:

Provided that the refrigerator or other equipment used by the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic Ultrasound Clinic or Imaging Centre, for preserving such perishable material object may be sealed until such time as arrangements can be made for safe removal of such perishable material object and in such eventuality, mention of keeping the material object seized, on the premises of the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall be made in the list of seizure.

(5) In the case of non-completion of search and seizure operation, the Appropriate Authority or the officer authorized in this behalf may make arrangement, by way of mounting a guard or sealing of the premises of the Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic or Imaging Centre for safe keeping, listing and removal of documents, records, book or any other material object to be seized, and to prevent any tampering with such documents, records, books or any other material object.”

6. Contention was further raised by learned counsel for the petitioner that all the powers under the Act vest with the Appropriate Authority described under Chapter V and Section 17 deals with constitution of Appropriate Authority and Advisory Committee and provisions of Section 17 of the Act are reproduced here below :-

“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.

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(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.

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(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.”

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(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 gynaecologists, obstericians, 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 organisations.

(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:

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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.”

7. The appointment of members of the Committee solely by the Civil Surgeon is improper/illegal.

8. While arguing further, learned counsel for the petitioner contended that as per the provisions of the Act, the procedure has been prescribed for initiation of action in the Court of law under Sections 27 and 28 of the Act and relevant provisions of Sections 27 and 28 are extracted below:-

“27. Offence to be cognizable, non-bailable and non-compoundable.-

Every offence under this Act shall be cognizable, non-bailable and non-compoundable.

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 authorized in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or
- (b) a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the court.

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Explanation – For the purpose of this clause, “person” includes a social organization.

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

9. The sentence provided under the Act is three years.

Reliance has been placed upon the judgment of this Court in **Dr. Tejinder Pal Singh Multani Vs. State of Punjab and another, 2015(2) R.C.R. (Crl.) 399**, wherein it was laid down that FIR is not maintainable in such like cases. In identical matter, where the ambit and scope of Sections 27 and 28 of the Act were under consideration before this Court was referred to the Larger Bench of this Court vide orders dated 5.8.2014, passed in CRM-M-4211 of 2014, **Dr. Hardeep Singh and another Vs. State of Haryana and another.**

10. Contention was also raised by learned counsel for the petitioner that the entire scheme of the Act envisages that the Appropriate Authority is to conduct the search and seizure in case any complaint is made and the procedure to be followed is as in a Complaint case and FIR is not to be registered. To sum-up, learned counsel for the petitioner contended that as per provisions of

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Section 27 of the Act, offences are non-bailable and non-compoundable and as per provisions of Section 28 of the Act, no Court is to take cognizance except on a complaint by the Appropriate Authority. That way, the police agency is to be kept away in the entire process and procedure of complaint is to be followed. On this point, reliance was also placed on a Division Bench judgment of Hon`ble Bombay High Court in **Dr. Sai Vs. The State of Maharashtra**, CrI. Writ Petition No. 1381 of 2015, decided on 27.09.2016, and it has been contended that the present FIR is misuse of process of law and is liable to be quashed.

11. While arguing on these points, learned State Counsel contended that in this case, raid was conducted at the house of accused Neelam where accused persons were conducting pre-natal determination test on the fetus in the womb and recoveries were effected. On that basis, present FIR was registered. Mobile phone of accused Neelam and Rs.20,000/- charged from the decoy patient were recovered apart from others. A CD of conversation which was held between the petitioner and accused Neelam was also taken into possession. Accused Santosh, who is a Nurse in Dhanvantry Hospital was also found involved in the case. Accused Neelam was arrested in this case and she was interrogated by the Plice upon which she disclosed the names of her co-accused, i.e. Santosh,

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Nurse, Satnayaran, Anuj and Satta. However, the petitioner and co-accused Satta are absconding despite conduct of raids to their houses. The investigation is being carried out fairly, impartially and expeditiously.

12. Learned State counsel also contended that local police is competent to lodge FIR in case of information about cognizable offence. More so, law and legislative has also issued clarification in the matter vide Annexure R/2 and the action taken by the Police is legal, valid and sustainable. The raid was conducted on the basis of authorities of Appropriate Authority. The search and seizure was also conducted as per law. The offences alleged against the petitioner are serious in nature and there are absolutely no ground for quashing of FIR or release of petitioner on pre-arrest bail in this case.

13. The facts of the case in **Dr. Sai's case (supra)** are somewhat different from the facts of the present case and the scope and ambit of Sections 27 and 28 of the Act as well as other provisions regarding search and seizure were under consideration before Hon`ble Division Bench of this Court in **Hardeep Singh's case (supra)**. Hon`ble Division Bench, dealt with the reference on identical following law points having been raised by learned Single Judge of this Court in **Dr. Hardeep Singh's case (supra):-**

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- (1). Whether FIR for the offences committed under this Act can be registered on the complaint of Appropriate Authority and can be investigated by the Police?
- (2). Whether the report under Section 173 Cr.P.C. along with the complaint of an Appropriate Authority can be filed to the Court?
- (3). Whether no FIR can be lodged nor the offences can be investigated by the Police and only complaint by the Appropriate Authority directly to the court lies?"

14. Hon`ble Division Bench of this Court while dealing with the ambit and scope of Section 28 of the Act and the concept of taking cognizance of the offence by the Court which is barred except on a complaint filed by any of the persons as mentioned in the said Section, was of the view that the Court is normally said to have taken cognizance of the offence, when it applies its judicious mind to proceed further against an accused in a criminal case. On this point, while relying upon the judgment of Hon`ble Supreme Court in **Narayandas Bhagwandas Madhavdas Vs. State of West Bengal, AIR 1959 SC 1118**, it was observed that it is only when a Magistrate applies his mind for proceeding under Section 200 of the Code and the subsequent Sections of Chapter XVI of the Code or under Section 204 of Chapter XVII of the Code.

15. In **R.R.Chari Vs. State of Uttar Pradesh, AIR 1951 SC 207**, while discussing the concept of taking cognizance, the Hon`ble Apex Court held that the Magistrate applies his mind not for

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the purpose of proceeding under the subsequent sections of Chapter XIV, but for taking action of some other kind, i.e., ordering investigation under Section 156 (3) of the Code or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of the offence. The Division Bench in **Hardeep Singh's case (supra)** while elaborating the concept of filing of complaint and taking cognizance observed as under:-

“ To put it differently, upon completion of the investigation, an authorized officer could only file a complaint and not a Police report, as a specific bar has been created by the Parliament. In that view of the matter, the police report being not a complaint and vice-versa, it was obligatory on the part of the respondent to choose the said method invoking the jurisdiction of the Magistrate concerned for taking cognizance of the offence only in the manner laid down therein and not by any other method...”

16. Identical matter was before Hon`ble Division Bench of this Court in **Jai Singh Vs. State of Punjab and others**, **2010(1) R.C.R. (Criminal) 350**, wherein the Hon`ble Division Bench of this Court considered the question – whether learned trial Magistrate was competent to take cognizance of an offence under Section 188 IPC without a written complaint of a public servant directly submitted to the court in view of the bar contained in Section 195(1)(a)(i) of the Code and it was held that

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investigation could be carried out by the police on a First Information Report in respect of a cognizable offence. The police could investigate into the offence under Section 188 IPC being a cognizable offence, but the Court could not take cognizance except on a complaint of a public servant. Hon`ble Division Bench in **Hardeep Singh's case (supra)** while interpreting the scope and ambit of Section 27 of the Act observed that the offences under the Act being cognizable, non-bailable and non-compoundable in terms of Section 27 of the Act, the investigation of the same by the police would not *per se* be barred.

17. As regards to the plea taken by learned counsel for the petitioner that under the Act, power of search and seizure has been vested with the Appropriate Authority, the police would not have the power to investigate the case, Hon`ble Division Bench of this Court in **Hardeep Singh's case (supra)** while discussing scope of Sections 4 and 5 of the Code held that in terms of sub-Section (1) of Section 4, all offences under the Indian Penal Code are to be investigated and inquired into, tried and otherwise dealt with according to the provisions of the Code. As per view taken by the Division Bench of this Court in **Hardeep Singh's case (supra)**, the FIR for the offences committed under the Act can be registered on the complaint of the Appropriate Authority and can be investigated by the Police, but cognizance of the offence is to be taken by the Court only on the complaint that has been filed in accordance with the provisions of Section 28 of the Act.

18. With the progress of science and technology, it is quite easy

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to find out the gender of the fetus. Some unscrupulous medical practitioners are also found to be increasingly involved in the illegal trade of carrying out sex-determination tests. It is really very unfortunate that the technology is often used in detecting the sex of the fetus and if it is a girl, then parents have no qualms in getting it aborted. Unfortunately, there is vast malpractice prevalent in the Society of using this technique for finding out the sex of the unborn child resulting in female foeticide and disturbing the very balance of male-female ratio.

19. There is no ground for quashing the FIR (Annexure P/1) and subsequent proceedings in this case. The present petition bearing **CRM-M-36456-17** is without any merit and the same stands dismissed.

CRM-M-30759-17

20. In view of the above discussion, the investigation is being carried out and the entire matter requires intensive investigation and the petitioner is warranted by the Police. No ground is made out to release the petitioner on pre-arrest bail.

21. In view of the above, there is no merit in the petition, and the present petition seeking anticipatory also bail stands dismissed.

22. Resultantly, both the petitions bearing **CRM-M-36456-2017** and **CRM-M-30759-2017** stand dismissed.

November 20, 2017
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(SHEKHER DHAWAN)
JUDGE

Speaking/Reasoned
Reportable

Yes
Yes