

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.330 OF 2018

Dr. Bhagyashri w/o Milind Dunakhe,
Age : 40 years, Occu. Medical Practitioner,
R/o Plot No.9, Dunakhe Hospital,
In front of District and Sessions Court,
Aurangabad, Taluka and District
Aurangabad

PETITIONER

VERSUS

The State of Maharashtra,
through the Medical Superintendent,
Sub-District Hospital, Gangapur,
Taluka Gangapur, Dist. Aurangabad

RESPONDENT

AND

CRIMINAL WRIT PETITION NO.496 OF 2018

Dr. Mrs. Madhuri w/o Ashish Kothari,
Age : 39 years, Occu. Medical Practitioner,
R/o Kothari Hospital, Vedantnagar,
Aurangabad

PETITIONER

VERSUS

The State of Maharashtra

RESPONDENT

Mr. Rajendra S. Deshmukh, Advocate for the petitioner
in Cri. Writ Petition No. 330/2018
Mr. S.G. Ladda, Advocate for the petitioner in
Cri. Writ Petition No.496/2018
Ms. R.P. Gaur, A.P.P. for the respondent/State
in both Writ Petitions

CORAM : SANGITRAO S. PATIL, J.

JUDGMENT RESERVED ON : 28th AUGUST, 2018

JUDGMENT PRONOUNCED ON : 11th SEPTEMBER, 2018

COMMON JUDGMENT :

Rule, made returnable forthwith. With the consent of the learned counsel for the petitioners and the learned A.P.P., heard finally.

2. Both of the above numbered Criminal Writ Petitions have arisen out of the common judgment and order dated 15th January, 2018, passed by the learned Additional Sessions Judge, Vaijapur in Criminal Revision Petition Nos.9 of 2015 and 21 of 2015, confirming the common order dated 17th January, 2015, passed by the learned Judicial Magistrate, First Class (Court No.2), Gangapur below applications (Exh.3-A, 3-B and 6) in Regular Criminal Case (RCC) No.395 of 2013, by which the applications filed by the petitioners for their discharge of the offences punishable under Sections 5 (2) (3) and (4) of the Medical Termination of Pregnancy Act, 1971 ("MTP Act", for short), under Section 6 of the Maharashtra Nursing Homes Registration Act, 1949 ("MNHR Act", for short) and under Sections 109, 111 and 113 of the Indian Penal Code ("IPC", for

short) were rejected.

3. It is alleged that accused No.1 Dr. Mahendra Jain started Pooja Nursing Home at Ranjangaon (Shenpunji), Taluka Gangapur, District Aurangabad and did not renew the registration thereof. He further started the Centre for Medical Termination of Pregnancy ("MTP", for short) in the names of the present petitioner Dr. Bhagyashri Dunakhe (accused No.6) and accused No.5 namely Dr. Sandhya Pantoji and carried out MTPs with the help of the petitioner Dr. Madhuri Kothari (accused No.7). According to the prosecution, the petitioners abetted accused No.1 Dr. Mahendra Jain in running MTP Centre unauthorizedly.

4. Initially, the chargesheet was filed against Dr. Mahendra Jain (accused No.1) and three others for the above mentioned offences on 27th July, 2013. After conducting further investigation, supplementary chargesheet came to be filed against Dr. Sandhya Pantoji and the present petitioners on 2nd October, 2014 for the same offences.

5. The learned counsel for the petitioners submit that both the petitioners are qualified registered

Medical Practitioners, as defined under Section 2 (d) of the MTP Act. The MTP Centre was duly registered by Dr. Sandhya Pantoji, who was M.D. (Gynecology) and as such a Registered Medical Practitioner. They submit that though the petitioners, in fact, did not conduct MTPs in the MTP Centre of Dr. Sandhya Pantoji, but even if it is accepted for a while that they conducted MTPs, they being the qualified Registered Medical Practitioners and the MTPs being conducted at the MTP Centre duly approved by the Government, they cannot be connected with the offences punishable under Sections 5 (2) and (3) of the MTP Act.

6. They further submit that Pooja Nursing Home seems to have been registered in the name of accused No.1 Dr. Mahendra Jain. The petitioners had no concern whatsoever with Pooja Nursing Home. Therefore, if the registration certificate of the said Nursing Home was not renewed by accused No.1, the petitioners cannot be connected with the offence punishable under Section 6 of the MNHR Act.

7. The learned counsel for the petitioners further submit that there is no provision in the MTP Act for renewal of the registration certificate for MTP

Centre. As per Rule 6 of the Maharashtra Termination of Pregnancy Rules, 2003 ("MTP Rules", for short), the place approved under Rule 5 has to be inspected by the Chief Medical Officer of the District as often as may be necessary with a view to verify whether termination of pregnancies is being done therein under safe and hygienic conditions. As per Rule 7, if, after inspection of any place approved under Rule 5, the Chief Medical Officer of the District is satisfied that the facilities specified in Rule 5 are not being properly maintained therein and the termination of pregnancy at such place cannot be made under safe and hygienic conditions, he shall make a report of the fact to the committee giving the detail of the deficiencies or defects found at the place and the committee might, if it is satisfied, suspend or cancel the approval provided that the committee should give an opportunity of making representation to the owner of the place before the certificate issued under Rule 5 is cancelled.

8. The learned counsel for the petitioners submit that the MTP Centre in question has been started under the certificate of approval dated 9th March, 2006. It

was inspected by the Chief Medical Officer of the district from time to time. It is only on 13th June, 2012 that the informant namely Dr. Dilip Dange, Medical Superintendent, Sub-District Hospital, Gangapur found the deficiencies in the MTP Centre. Instead of Dr. Sandhya Pantoji and the petitioner Dr. Bhagyashri Dunakhe, the petitioner Dr. Madhuri Kothari was found to have conducted the MTPs in the said Centre. According to them, if any unauthorised Medical Practitioner conducts MTP, he/she would be liable to be punished under the provisions of the MTP Act. Since Dr. Madhuri Kothari was a Registered Medical Practitioner, it cannot be said that she committed any offence under the said Act.

9. According to the learned counsel, the petitioners cannot be said to have abetted Dr. Mahendra Jain (accused No.1) in running MTP Centre unauthorizedly and conducting MTPs therein. These petitioners have been falsely implicated in this case. No prima facie case is made out against them. If they are asked to face the trial, it would be nothing but an abuse of process of law. The learned Magistrate as well as the learned Additional Sessions Judge did not

consider the facts of the case properly and wrongly rejected the applications of the petitioners for their discharge of the above mentioned offences. The learned counsel, therefore, pray that the petitioners may be discharged of the said offences.

10. The learned A.P.P. strongly resisted the petitions. She submits that Pooja Nursing Home is registered in the name of accused No.1 Dr. Mahendra Jain as its owner, while in the MTP Centre approval certificate, accused No.5 Dr. Sandhya Pantoji is shown as the owner of Pooja Nursing Home. In the certificate of approval of MTP Centre, the name of the petitioner Dr. Bhagyashri Dunakhe is shown as the Surgeon. The name of the petitioner Dr. Madhuri Kothari is not mentioned in the certificate. However, from the papers of investigation and the statements of the witnesses, it would be clear that instead of Dr. Sandhya Pantoji (accused No.5) and the petitioner Dr. Bhagyashri Dunakhe, the petitioner Dr. Madhuri Kothari was conducting MTPs in the said Centre. Since the name of Dr. Madhuri Kothari was not mentioned in the certificate, she was not authorized to conduct MTPs in that Centre. The learned A.P.P. submits that Dr.

Bhagyashri Dunakhe got the certificate registered by showing her to be the Surgeon, who was going to conduct MTPs, but did not actually conduct MTPs. She facilitated accused No.1 Dr. Mahendra Jain and Dr. Madhuri Kothari to conduct MTPs unauthorizedly. Therefore, Dr. Bhagyashri Dunakhe has been rightly connected with the offence of abetting accused No.1 Dr. Mahendra Jain and Dr. Madhuri Kothari in committing the offence under Section 5 (2), (3) and (4) of the MTP Act. There is strong prima facie case made out against the petitioner Dr. Bhagyashri Dunakhe for the said offence.

11. The learned A.P.P. further submits that since the name of Dr. Madhuri Kothari was not mentioned in the certificate of approval, she cannot be said to be an authorized Medical Practitioner to conduct MTPs in the MTP Centre standing in the name of Dr. Sandhya Pantoji. As such, a strong prima facie case is made out against Dr. Madhuri Kothari under Section 5 (2) of the MTP Act.

12. The learned A.P.P. submits that there are sufficient grounds to proceed against the petitioners for the above mentioned offences. The learned

Magistrate and the learned Additional Sessions Judge have rightly rejected the claim of the petitioners for their discharge of the above mentioned offences. She supports the impugned orders and prays that the Writ Petitions may be dismissed.

13. As per Section 3 (1) of the MTP Act, notwithstanding anything contained in the Indian Penal Code, a Registered Medical Practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

14. As per Section 4 of the MTP Act, no termination of pregnancy shall be made in accordance with the Act at any place other than -

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government.....

15. Sub-section (2) of Section 5 of the MTP Act prescribes punishment for termination of pregnancy by a person who is not a Registered Medical Practitioner, while sub-section (3) provides that whoever terminates

any pregnancy in a place other than that mentioned in section 4 shall be punishable.

16. From the above provisions, it is crystal clear that if a Registered Medical Practitioner terminates pregnancy in accordance with the provisions of the MTP Act at any place for the time being approved for the purpose of this Act by the Government or the competent authority, it would not be any offence.

17. Registered Medical Practitioner is defined in Section 2(d) of the MTP As under :-

“Registered Medical Practitioner” means a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.

18. There is no dispute that the petitioners Dr. Bhagyashri Dunakhe and Dr. Madhuri Kothari, each, are having qualification M.B.B.S., D.G.O. Their names have been registered in the State Medical Register. There is no dispute that they have requisite experience as well as training in gynecology and obstetrics as prescribed under Rule 4 of the MTP Rules. As such,

they are Registered Medical Practitioners as defined in Section 2(d) of the MTP Act.

19. The MTP Centre has been registered in the name of Dr. Sandhya Pantoji, who is M.D. (Gynecology), as the owner thereof as seen from the certificate of approval dated 9th March, 2006 issued by the Joint Secretary, Public Health Department, Government of Maharashtra. The papers of investigation show that Dr. Sandhya Pantoji had filed an application in the prescribed form for seeking approval to the proposed MTP Centre. In Clause No. (8) of that application, she had given the names of the petitioners Dr. Bhagyashri Dunakhe and Dr. Madhuri Kothari as the registered Medical Practitioners employed in the MTP Centre, who were having the requisite qualifications and experience in Gynecology and Obstetrics. In Clause No. (10), again the names of both of these petitioners were mentioned as the full-time trained Doctors working at the Centre. The inspection report of the Civil Surgeon shows that Dr. Bhagyashri Dunakhe was named against Clause No. (4) as the Registered Medical Practitioner having experience in Gynecology and Obstetrics, while in Clause No. (6), the petitioner Dr. Madhuri Kothari was

shown as the Assistant having the requisite qualification and experience. In Clause No.(8) also, there is reference of the petitioner Dr. Madhuri Kothari as the person assisting the MTP with minimum three years experience. It is, thus, clear that Dr. Sandhya Pantoji had mentioned the names of both of these petitioners in her application as the persons who were going to conduct MTPs in the proposed MTP Centre.

20. As per Rule 5 (2) of the MTP Rules, every application for the approval of a place shall be in Form "A" and shall be addressed to the Chief Medical Officer of the District. Form "A" does not contain any clause asking for the names of the Registered Medical Practitioners who would conduct MTPs therein.

21. In the present case, as stated above, both the petitioners are Registered Medical Practitioners. They were authorized to conduct MTP in any approved MTP Centre. Even if it is accepted that Dr. Madhuri Kothari conducted MTPs in the MTP Centre standing in the name of Dr. Sandhya Pantoji, the said Centre being approved one, she cannot be said to have committed any offence either under sub-section (2) or sub-section (3) of Section 5 of the MTP Act.

22. It is alleged that the petitioner Dr. Bhagyashri Dunakhe and Dr. Sandhya Pantoji got the MTP Centre approved, but they did not actually conduct MTPs. They abetted accused No.1 Dr. Mahendra Jain to conduct MTPs unauthorizedly. I do not find any substance in these allegations. As per Rule 6 of the MTP Rules, a place approved under rule 5 may be inspected by the Chief Medical Officer of the District, as often as may be necessary with a view to verify whether termination of pregnancies is being done therein under safe and hygienic conditions.

23. As per Rule 7, if, after inspection of any place approved under rule 5, the Chief Medical Officer of the District is satisfied that the facilities specified in rule 5 are not being properly maintained therein and the termination of pregnancy at such place cannot be made under safe and hygienic conditions, he shall make a report of the fact to the committee giving the detail of the deficiencies or defects found at the place and the committee may, if it is satisfied, suspend or cancel the approval provided that the committee shall give an opportunity of making representation to the owner of the place before the

certificate issued under rule 5 is cancelled.

24. It is stated that the MTP Centre in question was registered on 9th March, 2006. As per Rule 6 of the MTP Rules, it must have been inspected by the Chief Medical Officer of the district periodically. He must have inspected the registers maintained in the said Centre. However, it is strange to note that the Chief Medical Officer of the district never found any deficiencies or defects in the said Centre. It is only on 13th June, 2012 that the said Centre was inspected by Dr. Dilip Dange, the Medical Superintendent and it was alleged that the petitioner Dr. Bhagyashri Dunakhe did not conduct MTPs herself but abetted Dr. Mahendra Jain (accused No.1) in conducting MTPs unauthorizedly though the said Centre was approved on her giving undertaking that she would conduct MTPs therein. It seems that Dr. Sandhya Pantoji had given the name of the petitioner Dr. Bhagyashri Dunakhe in her application for approval of the Centre and her name accordingly was mentioned in the approval certificate. There is nothing on record to show that Dr. Bhagyashri Dunakhe was gaining anything wrongfully from Dr. Mahendra Jain for facilitating him to conduct MTPs in the said Centre. No patient has

made any allegation against Dr. Bhagyashri Dunakhe. Prima facie, Dr. Bhagyashri Dunakhe cannot be said to have abetted Dr. Mahendra Jain to do so. On the contrary, the concerned Medical Officer, who was supposed to periodically inspect the said Centre, seems to be responsible in allowing Dr. Mahendra Jain to conduct MTPs therein because even after inspecting the said Centre, no deficiency or defect was brought by him to the notice of the Committee as required under Rule 7 (1) of the MTP Rules.

25. So far as the offence under Section 6 of the MNHR Act is concerned, it will be against Dr. Mahendra Jain only since he is shown to be the owner of Pooja Nursing Home. In case he fails to renew registration thereof every year as required under sub-section (1) of Section 4 of the MNHR Act, the present petitioners cannot be connected with the offence under Section 6 of the said Act.

26. In the above facts and circumstances of the case, prima facie, no offences are disclosed against the petitioners. They have been wrongly connected with the above mentioned offences. The learned Magistrate as well as the learned Additional Sessions Judge did

not consider the facts of the case in their proper perspective and wrongly held that there are sufficient grounds to frame charges against the petitioners for the above mentioned offences. In the circumstance, asking the petitioners to face the ordeal of trial would be nothing but an abuse of process of law. For the reasons mentioned hereinabove, the impugned orders cannot be said to be legal, proper and correct. They are liable to be quashed and set aside. In the result, I pass the following order:-

ORDER

- (i) The Writ Petitions are allowed.
- (ii) The impugned orders are quashed and set aside.
- (iii) The petitioners are discharged of the offences alleged against them.
- (iv) The bail bonds of the petitioners are cancelled. They are set at liberty.
- (v) Rule is made absolute in the above terms.
- (vi) The Writ Petitions are disposed of.

[**SANGITRAO S. PATIL**]
JUDGE