

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

CRIMINAL WRIT PETITION NO.1363 OF 2017

Dr. Ramesh s/o Mahadu Bole
Age: 37 years, Occu.: Medical Practitioner,
R/o: Bhole Hospital, Tamasa Road
Ardhapur, Taluka: Ardhapur
Dist. Nanded.

**...PETITIONER
(Orig. Accused / Revision Applicant)**

Versus

1. The State of Maharashtra
2. The Appropriate Authority-cum-
Medical Superintendent,
Rural Hospital, Barad,
Taluka: Mudkhed, District: Nanded.

**... RESPONDENTS
(No.2- Original Complainant)**

Mr. Rajendra S. Deshmukh, Advocate for the Petitioner.
Mr. B.V. Virdhe, AGP for Respondents/State.

**CORAM : MANGESH S. PATIL, J.
RESERVED ON: 31.07.2018
PRONOUNCED ON :26.09.2018**

JUDGMENT:

Heard. Rule. The Rule is made returnable forthwith. Learned
A.P.P. waives service for the respondents. With the consent of both the sides
the matter is heard finally at the stage of admission.

2. The petitioner is impugning the order dated 09.06.2016 passed by the learned Judicial Magistrate First Class, Ardhapur in R.C.C. No.16 of 2016, directing the process to be issued under Section 204 of the Code of Criminal Procedure against the petitioner for the offence punishable under Section 23 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short PCPNDT Act) and the Rules framed thereunder, for violation of Section 4 (3), 5, 6 and 29 and the Rules 9, 8 (5) and 18 (9) and the judgment and order dated 21.08.2017 passed by the learned Additional Sessions Judge- 3, Nanded in Criminal Revision No.82 of 2016 dismissing the revision preferred by him against the order of issuance of process.

3. Shorn of verbiage, the allegations in the complaint filed by the respondent no.2 is an officer authorized by the Appropriate Authority i.e. Civil Surgeon, Nanded is to the effect that on an anonymous complaint received at the PCPNDT helpline, he inspected the Sonography Center being run by the petitioner at Ardhapur on 17.03.2016 at 3.30 p.m. and inspected the record in presence of panchas for the period between 01.06.2016 and 17.03.2016. The petitioner only produced 'F' Form register and no other record was made available. It was noticed that in respect of seven cases, signatures and

declarations of the pregnant women were not obtained on Form 'F' and in respect of nine cases even the signature of the petitioner / doctor who had performed sonography was absent. In some cases thumb impression of women were not attested. It was also noticed that in respect of one patient the date of the procedure having been carried out was recorded in Form 'F' as 09.12.2016 when in fact, it was carried out on 08.02.2016. Such irregularities were noticed and duly recorded.

4. A notice was issued to the petitioner on the same day under Section 20 (1) of the PCPNDT Act calling upon him to offer explanation. The District Appropriate Authority and Civil Surgeon issued him letter dated 18.03.2016 and asked him to appear in person before the Advisory Committee on 22.03.2016. Accordingly, he appeared before the Appropriate Authority and tendered his explanation *inter alia* contending that employees in his hospital were under taking the task of recording the information furnished by the patient and due to rush of work in some cases the irregularities could be noticed in the form of absence of signatures of the patient or his signature. It was only a minor irregularity and had no nexus with determination of sex.

5. Pursuant to such opportunity that was extended to the petitioner the Advisory Committee refuted the explanation and by the minutes dated

22.03.2016 concluded that there was *prima facie* material to launch the prosecution against the petitioner and the Appropriate Authority was further directed to take appropriate steps. Pursuant to such directions the Appropriate Authority i.e. Civil Surgeon, Nanded authorized respondent no.2 to launch the prosecution. Accordingly, the complaint was filed and the process was issued.

6. The learned advocate for the petitioner submitted that Dr. Pawde was not authorized to lodge the prosecution. He was not an Appropriate Authority within the meaning of Section 2(a) appointed under Section 17 of the PCPNDT Act. Consequently, the Magistrate could not have taken cognizance of the offence in view of the bar contained under Section 28 of the PCPNDT Act. According to the learned advocate, the learned Magistrate was not empowered to take cognizance and still has issued the process overlooking this lapse. Even the learned Additional Sessions Judge has not correctly appreciated the fact and the law and has over-looked this infirmity which goes to the root of the jurisdiction of the Magistrate.

7. The learned advocate for the petitioner would then submit that the alleged lapses in maintaining the record in respect of the Form 'F' were clearly technical lapses and an inadvertent irregularity. There was no

intention much less to determine sex. Allowing the petitioner who is a medical practitioner to face prosecution for such trifle mistake in maintaining the record would be hazardous and the process issued may be recalled.

8. The learned advocate also submitted that all these Forms 'F' were duly uploaded on the concerned website of the State Government and therefore there was no intention on the part of the petitioner to hide anything. Lastly, the learned advocate placed reliance on the decision of this Court in Writ Petition No.250 of 2015 in the case of **Dr. Payal W/o Shreekant Chobe V/s. The State of Maharashtra and others**, dated 16.10.2015 and the decision in Writ Petition No. 1381 of 2015 in case of **Dr. Sai W/o Santosh Shiradkar V/s. The State of Maharashtra and Anr.** dated 27.09.2016.

9. The learned A.P.P. strongly opposed the petition. He submitted that the Civil Surgeon, Nanded was an Appropriate Authority duly appointed under Section 17 of the PCPNDT Act and in turn he had authorized Dr. Pawde, who was then Medical Superintendent, to inspect the Sonography Center of the petitioner and to lodge the prosecution. He would submit that pursuant to the powers under Sub-section 2 of Section 17 of the PCPNDT Act, the State Government has appointed Medical Superintendents at Rural Hospitals and Sub District Hospitals as Appropriate Authorities by the Government

notification issued by the Public Health Department on 06.11.2001 and therefore Dr. Pawde was having statutory authority to lodge the prosecution.

10. The learned A.P.P. would then submit that during inspection of the petitioner's Sonography Center in respect of the record for period between 01.01.2016 and 17.03.2016 several discrepancies were noticed. In seven cases patients' signatures in the declaration of the pregnant women were not forthcoming, whereas in nine cases even signature of the petitioner was absent. In couple of cases thumb impression of women patient were not attested. In respect of Rajshree Madhav Londhe though the sonography was carried out on 08.02.2016, it was shown as 09.02.2016. Even there was discrepancy in recording the number of issues she had. Since such mandatory record was not maintained correctly as is required under Section 4, it is an offence of which cognizance was rightly taken by the Magistrate. The learned A.P.P. would then submit that an opportunity of being heard was also extended to the petitioner by the Advisory Committee and even in his explanation before the committee he had admitted the discrepancies. There is a presumption running against the petitioner. There was sufficient material before the Magistrate to enable him to take cognizance. The lapses cannot be brushed aside by branding it to be a trifle irregularity. Not maintaining the actual record is a deficiency which is punishable in view of Section 5 or 6 of

the PCPNDT Act. The objective of the legislation is to be borne in mind in coming out with such a legislation as is noticed by the Supreme Court in the case of **Voluntary Health Association of Punjab V/s. Union of India and Others** Writ Petition (Civil) No.349 of 2006 dated 08.11.2016. The learned A.P.P. also placed reliance on the Full Bench judgment of the Gujarat High Court in Criminal Reference No.04 of 2008 dated 30.09.2008. Thus he would submit that there was no apparent error or illegality committed by the learned Magistrate in taking cognizance of the crime and directing the process to be issued. Similarly, there was no error in the order passed by the learned Additional Sessions Judge in dismissing the revision. The writ petition may be dismissed.

11. As can be noticed the basic objection raised on behalf of the petitioner as to the maintainability of the complaint is regarding authority of the respondent no.2 to launch the prosecution, obviously in the light of the provisions of Section 28 of the PCPNDT Act. It is therefore appropriate to proceed with this objection. Section 28 and particularly clause (a) of Sub-section 1 of Section 28 reads thus:

“28. Cognizance of offences-

(1) No Court shall take cognizance of an offence under

this Act except on a complaint made by

(a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or”

A careful reading of this clause makes it abundantly clear that a Court is debarred from taking cognizance of an offence except on a complaint made by (i) An Appropriate Authority concerned (ii) Any officer authorized in this behalf by the Central Government or State Government (iii) Any officer authorized in this behalf by the Appropriate Authority. Therefore, it is not only the Appropriate Authority as defined under Clause (a) of Section 2 appointed under Section 17 but even an officer authorized by such Appropriate Authority is entitled to launch the prosecution by filing a complaint. This is the interpretation deduced by this Court in the case of **Kalpna Pundlik Jamdade (Dr.) V/s. State of Maharashtra and Another; 2015 All M.R. (Cri.) 17.**

12. The notification of the State Government produced on the record by the respondents (Exhibit-R-13) dated 15.05.2015 reveals that by superseding all the earlier notifications issued under Section 17 (2) and (3), the Appropriate Authorities have been notified. As can be seen, at district

level excluding the areas covered by Municipal Corporations or Municipal Councils, District Civil Surgeon is the Appropriate Authority, apart from the Collector and Additional Collectors. As far as Taluka level is concerned Tahsildar, Naib-Tahsildar, Medical Superintendent of Rural Hospital, Sub-District Hospital, Civil Hospital and Cottage Hospital have been appointed as the Appropriate Authorities. It is thus quite clear that Civil Surgeon, Nanded is the Appropriate Authority duly constituted under Section 17 of the PCPNDT Act for the entire district of Nanded.

13. Admittedly, the Sonography Center of the petitioner situate within Nanded district. As can be seen from the minutes of the Advisory Committee (Exhibit-R-10), it had specifically noted about a notice having been issued to the petitioner under Sub-section 1 of Section 20 of the PCPNDT Act and an opportunity was extended to him to make oral and written submissions and accordingly he had availed of the opportunity. After considering the facts and circumstances, the Advisory Committee refuted the explanation tendered by him and advised the Civil Surgeon to proceed against him under the relevant provisions of the PCPNDT Act.

14. The letter addressed by the Appropriate Authority cum Civil Surgeon, Nanded to the petitioner dated 23.03.2016 (Exhibit-R-12) clearly

reads and brings to his notice various short-comings in maintaining the record in "F" form. Many of which did not bear his signature and in some of which even the signatures or thumb impressions of the patients were absent. He was specifically intimated that his explanation, oral as well as written tendered to the Advisory Committee pursuant to a notice issued to him under Section 20 (2) of the PCPNDT Act was duly considered and the committee had advised the Appropriate Authority to proceed against him for violation of different provisions of the PCPNDT Act. Conspicuously, a copy of this letter is also marked to the respondent no.2 specifically directing him to launch the prosecution in the Court. It is also apparent that the copy of this letter was duly received by the petitioner under his signature on 23.03.2016. It is pertinent to note that the provision of Section 28 does not require the Appropriate Authority to authorize an officer to launch prosecution in any prescribed form. Therefore having addressed the petitioner a letter and marking its copy to the respondent no.2 containing specific direction to launch prosecution, *prima facie* the Appropriate Authority cum Civil Surgeon, Nanded has duly authorized the respondent no.2 to launch the prosecution and there is no apparent infirmity going to the root of the jurisdiction of the Magistrate in taking cognizance of the complaint. Therefore, the submission of the learned advocate for the petitioner questioning the validity of the prosecution

on this ground is not tenable and is liable to be discarded.

15. The second limb of the argument of the learned advocate for the petitioner is more on facts when he submitted that the alleged violations in maintaining the record are trifles in nature and more a human error and does not carry any intention to flout the provisions of the PCPNDT Act. Reliance is also placed on the Division Bench judgment of this Court in the case of **Dr. Sai W/o Santosh Shiradkar V/s. The State of Maharashtra and Another** in Criminal Writ Petition No.1381 of 2015 (Aurangabad Bench) dated 27.09.2016.

16. I have carefully gone through the judgment of the Division Bench (supra), the facts pertaining to the matter before the Division Bench and the facts in the matter in hand. As is mentioned at the beginning in the matter in hand it was noticed by the respondent no.2 during the course of inspection that the lapses in maintaining the record were to the effect that in respect of seven cases the "F" Forms were found without signature of the patients, in eight cases the "F" Forms were found without signature of the patients and doctor. Obviously, since the sonography did not involve invasive procedure, the consent of the patient was not necessary. However, when Form "F" specifically requires signature of the patient, the requirement was clearly

mandatory. It is to be borne in mind that the very object and purpose of legislating such a legislation makes it imperative that the record is maintained meticulously to obviate any loophole which would result in determination of sex. Certainly the requirement of maintaining the record upto date and laying down the presumption for not maintaining the record, of commission of the offences as defined under Section 5 and 6 makes it abundantly clear that the legislature had intended that irrespective of the intention on the part of the person performing the sonography, the record should be upto date and as prescribed by the PCPNDT Act and the rules framed thereunder. The proviso to Sub-section 3 of Section 4 reads thus:

“(3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely:-

- (i) age of the pregnant woman is above thirty-five years;*
- (ii) the pregnant woman has undergone two or more spontaneous abortions or foetal loss;*
- (iii) the pregnant woman had been exposed to potentially teratogenic agents such as, drugs, radiation, infection or chemicals;*
- (iv) the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;*
- (v) any other condition as may be specified by the Board:*

Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultrasonography;”

17. Suffice for the purpose to refer to and rely upon the following observations from paragraph nos. 7 and 8 of the Full Bench judgment of the Gujarat High Court (supra):

“7. As seen earlier, the Act and the Rules made thereunder provide for an elaborate scheme to ensure proper implementation of the relevant legal provisions and the possible loop-holes in strict and full compliance are sought to be plugged by detailed provisions for maintenance and preservation of records. In order to fully operationalise the restrictions and injunctions contained in the Act in general and in sections 4, 5 and 6 in particular, to regulate the use of pre-natal diagnostic technique, to make the pregnant woman and the person conducting the pre-natal diagnostic tests and procedures aware of the legal and other consequences and to prohibit determination of sex, the Rules prescribe the detailed forms in which records have to be maintained. Thus the Rules are made and forms are prescribed in aid of the Act and they are so important for implementation of the Act and for prosecution of

the offenders, that any improper maintenance of such record is itself made equivalent to violation of the provisions of sections 5 and 6, by virtue of the proviso to sub-section (3) of section 4 of the Act. It must, however, be noted that the proviso would apply only in cases of ultrasonography conducted on a pregnant woman. And any deficiency or inaccuracy in the prescribed record would amount to contravention of the provisions of section 5 and 6 unless and until contrary is proved by the person conducting such ultrasonography. The deeming provision is restricted to the cases of ultrasonography on pregnant women and the person conducting ultrasonography is, during the course of trial or other proceeding, entitled to prove that the provisions of sections 5 and 6 were, in fact, not violated.

8. *It needs to be noted that improper maintenance of the record has also consequences other than prosecution for deemed violation of section 5 or 6. Section 20 of the Act provides for cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in case of breach of the provisions of the Act or the Rules. Therefore, inaccuracy or deficiency in maintaining the prescribed record shall also amount to violation of the prohibition imposed by section 6 against the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and expose such clinic to proceedings under section 20 of the Act. Where, by virtue of the deeming provisions of the proviso to sub-section (3) of section 4, contravention of the provisions of section 5 or 6 is legally presumed and actions are proposed to be taken under section 20, the person conducting*

ultrasonography on a pregnant woman shall also have to be given an opportunity to prove that the provisions of section 5 or 6 were not violated by him in conducting the procedure. Thus the burden shifts on to the person accused of not maintaining the prescribed record, after any inaccuracy or deficiency is established, and he gets the opportunity to prove that the provisions of section 5 and 6 were not contravened in any respect. Although it is apparently a heavy burden, it is legal, proper and justified in view of the importance of the Rules regarding maintenance of record in the prescribed forms and the likely failure of the Act and its purpose if procedural requirements were flouted. The proviso to sub-section (3) of section 4 is crystal clear about the maintenance of the record in prescribed manner being an independent offence amounting to violation of section 5 or 6 and, therefore, the complaint need not necessarily also allege violation of the provisions of section 5 or 6 of the Act. A rebuttable presumption of violation of the provisions of section 5 or 6 will arise on proof of deficiency or inaccuracy in maintaining the record in the prescribed manner and equivalence with those provisions would arise for punishment as well as for disproving their violation by the accused person. That being the scheme of these provisions, it would be wholly inappropriate to quash the complaint alleging inaccuracy or deficiency in maintenance of the prescribed record only on the ground that violation of section 5 or 6 of the Act was not alleged or made out in the complaint. It would also be improper and premature to expect or allow the person accused of inaccuracy or deficiency in maintenance of the relevant record to

show or prove that provisions of section 5 or 6 were not violated by him, before the deficiency or inaccuracy were established in court by the prosecuting agency or before the authority concerned in other proceedings.”

18. In nutshell, a careful perusal of the object behind such a legislation coupled with the presumption deducible under the proviso to Sub-section 3 of Section 4 leaves no room for doubt that any error or mistake in maintaining the record comes with a presumption of an offence as defined under Section 5 and 6 which would be punishable under Chapter VII. Precisely for this reason, the stand of the petitioner before the Advisory Committee and the submission of the learned advocate for the petitioner that it was primarily the responsibility of the clerical staff appointed by the petitioner in his hospital to maintain the record is nothing but a lame attempt to derive an excuse for saving the skin. In my considered view, the facts before the Division Bench of this Court in the case of **Dr. Sai W/o Santosh Shiradkar** (supra) are clearly distinguishable and with respect would not govern the fact situation in the matter in hand.

19. Whether and in what manner the violations in maintaining the record was found during the course of inspection carried out by the respondent no.2 is indeed a pure question of fact which can be gone into at a

fullfledged trial. Suffice for the purpose to observe that *prima facie* there has been a blatant violation of the provisions of the PCPNDT Act and the rules framed thereunder while maintaining the record and there is a presumption deducible regarding commission of the offences under Section 5 and 6. This was sufficient for the Magistrate to take initiative in directing the process to be issued. There was no apparent illegality committed by the learned Magistrate in taking cognizance. Similarly there is no apparent illegality committed by the learned Additional Sessions Judge in dismissing the revision preferred by the petitioner.

20. The Writ Petition does not hold merits and is liable to be dismissed.

21. The Writ Petition is dismissed. The Rule is discharged.

[MANGESH S. PATIL, J.]