

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 69 OF 2014

Mohankumar Bandopant Nagane
Age: 52 years, Occ. :- Medical Officer,
R/o D-1, Raviraj Apartment,
Pimpalenilakh, Vishal Nagar,
Pune - 27

.. Applicant

v/s.

1. The State of Maharashtra
Through its Wakad Police Station,
Pune
2. Dr. Rajshekhar Iyer,
Medical Officer,
Pimpri Chinchwad Municipal
Corporation and Officer Pre-Conception
and Pre-Natal Diagnostic Techniques
(Prohibition of Sex Selection) Act, 1994
(Revised 2003)

.. Respondents

Mr. Abhijeet A. Desai a/w Ms. Vrushali Maindad, for the applicant
Ms. S.V. Sonawane, APP for respondent no.1- State
Mr. Deepak More a/w Aishwarya D. More for respondent no. 2.

CORAM : PRITHVIRAJ K. CHAVAN, J.

**RESERVED ON : 28th OCTOBER, 2020.
PRONOUNCED ON : 27th NOVEMBER, 2020.**

(Through Video Conferencing)

**UDAY
SHIVAJI
JAGTAP**

Digitally signed
by UDAY SHIVAJI
JAGTAP
Date: 2020.12.01
11:30:08 +0530

P C : -

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the applicant and the respondents.
2. The revisional powers of this Court have been invoked by the applicant/accused under Section 401 of the Criminal Procedure Code challenging the concurrent findings of the trial Court as well as the lower Appellate Court convicting and sentencing him under the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as “PCPNDT” Act for short).
3. Shorn of unnecessary details, a few facts germane for disposal of this application can be summarized as follows.
4. The applicant has been convicted and sentenced by the learned Judicial Magistrate, First Class, Court No.7, Pune by order dated 15th December 2011 in Regular Criminal Case No. 139 of 2006, which reads as under :-

“ORDER

(1) Accused is hereby convicted for the offence punishable under Section 23 for contravention of Sec. 5(1)(b) and (c) of the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. vide Sec. 248(1) of Cr.P.C. and sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.1,000/- i/d to suffer R.I. for one month.

(2) Accused is also convicted for the offence punishable under section 23 for contravention of Sec. 5(2) and Sec. 6 of the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.5,000/- i/d to suffer R.I. for three months.

(3) Accused is further convicted for the offence punishable under section 23 for contravention of Rules, 9(1), (4), (8) and Rule 10 (1-A) of the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.1,000/- i/d to suffer R.I. for one month.

(4) Accused shall surrender his bail bonds.

(5) The substantive sentences to run concurrently.

(6) The muddemal i.e. documentary evidence be preserved till the conclusion of appeals. Further the cash amount of Rs.3,000/- be returned to Smt. Kiran Moghe (PW. 2), after the appeal period is over and if appeal is preferred, then subject to its decision.

(7) Copy of judgment be given to the accused free of costs.”

5. An appeal preferred by the applicant before the learned Additional Sessions Judge, Pune being Criminal Appeal No. 23 of 2012 also came to be dismissed by judgment and order dated 7th December, 2013.

6. The complainant is a Medical Director of Pimpri Chinchwad Municipal Corporation, Pimpri, Pune and is also a competent Authority under Section 17 of the PCPNDT Act. The applicant is qualified as a M.B.B.S, M.D. (Radiologist) who was then working as an Administrative Medical Officer at Chest Hospital, Aundh, Pune. He was also practicing at Shop No.10 situated in the building namely Mira Classic, Santosh Nagar, Thergaon, Pune 33. The applicant was also appointed as a member of Advisory Committee under the PCPNDT Act.

7. It is the case of the complainant that the member of the Advisory Committee, Pune District and an Activist of “*Tathapi*” Trust namely; Smt. Audry Fernandes came to know that the applicant conducts Sonography and discloses sex of the foetus by charging some amount in contravention of the provisions of the PCPNDT Act. Accordingly, on 4th January, 2006 at about 2.30 p.m., Audry Fernandes called the complainant - Dr. Rajshekhar Iyer at Kalewadi Phata, Aundh. The complainant along with the members of the Advisory Committee namely; Dr. Kamal Yadav and Dr. Dilip Kamat went to the Sonography Centre of the applicant. They were

accompanied by the police officials of Wakad Police Station. A decoy patient namely, PW-4 Devika Gaikwad, PW-3 Smt. Saraswati Bhandirge, who is also an Activist of *Akhil Bhartiya Janwadi Mahila Sanghatna*, PW-2 Kiran Moghe, a Social Worker, Smt. Kalindi Deshpande and Advocate Milind Sahastrabuddhe along with one Advocate Sunil Naik were present at the Sonograph Centre of the applicant. Smt. Audry Fernandes also called some journalists and reporters of some news channel.

8. It is the contention of the complainant that Smt. Saraswati Bhandirge informed him that applicant had conducted a sonography test of PW-4 Devika Gaikwad. He detected and disclosed the sex of the foetus as a male and in lieu of the same, accepted Rs.3,000/- towards fees without issuing any receipt. The complainant took search of the person of the applicant and his clinic but he did not find the money. When the car of the applicant bearing Registration No. MH-14-P-5203 was searched, the said amount of Rs.3,000/- alleged to have been obtained by the applicant for determining the sex of the foetus, was found concealed in the pouch of the rear seat of the driver of the car, in an envelope. The serial numbers of the currency notes tallied with the numbers which were already

mentioned in a letter dated 3rd January, 2006 addressed to the Assistant Health Officer Shri. Chandakkar. It is further alleged that the complainant had seized the sonography report and thermal print in respect of PW-4 Devika Gaikwad from the drawer of a table in the clinic of the applicant. The complainant had seized the currency notes, sonography report and thermal print. The complainant had also seized the sonography machine, sonography register, consent letters, refer chits and registration certificate in the presence of panch witnesses. All the seized articles were duly sealed. The copies of the seizure panchanama were made available to the applicant by taking his acknowledgment. The complainant had also recorded statement of Receptionist of the applicant namely Sarika Uttam More. A spot panchanama was also drawn.

9. On 3rd January, 2006 in the evening PW-4 Devika Gaikwad and PW-3 Saraswati Bhadinrge went to the clinic of the applicant at the instance of Smt. Audry Fernandes and Smt. Kiran Moghe. They asked the applicant to conduct the sonography of Devika Gaikwad since she already has a daughter and, therefore, wanted to ascertain the sex of the foetus in her womb. The applicant, therefore, asked for Rs.3,000/- for conducting the Sonography test. Since PW-4

Devika Gaikwad did not have that much amount, the applicant asked her to come on the following day. However, he conducted her sonography test for about 20-25 minutes. On the following day, PW-4 Devika Gaikwad and PW-3 Saraswati Bhandirge reached the clinic of the applicant. The applicant disclosed that the foetus in her womb was a male. PW-3 Saraswati Bhandirge then gave Rs.3,000/- to the applicant. PW-3 Saraswati Bhandirge informed Advocate Milind Sahastrabuddhe by a sign language, who, in turn, informed Smt. Kiran Moghe and Smt. Audry Fernandes. Audry Fernandes, thereafter gave a call to the complainant.

10. It is the case of the complainant that on 5th January, 2006, he recorded the statements of PW-4 Devika Gaikwad, PW-3 Saraswati, Audry Fernandes, Kiran Moghe, Adv. Sahastrabuddhe and Adv. Sunil Naik.

11. After recording the verification of the complainant and after going through the material on record, the learned J.M.F.C. issued process against the applicant. The applicant appeared before the learned J.M.F.C. After framing a charge under Section 23 for contravention of Sec. 5(1)(b) and (c) vide Sec. 248 (1) of Cr.P.C.,

5(2) and Sec. 6, Rules 9(1), (4), (8) and Rule 10(1-A) of the PCPNDT Act, it was read over and explained to the applicant. The applicant pleaded not guilty and claimed to be tried.

12. The learned Magistrate recorded the evidence of complainant PW-1 Dr. Rajshekhar Iyer, PW-2 Kiran Moghe, a Social Worker and President of *Akhil Bhartiya Mahila Janwadi Sanghatana*, PW-3 - Smt. Saraswati Bhandirge, PW-4 Devika Gaikwad, a decoy and PW-5 Audry Fernandes, a Social Worker. The complainant also examined PW-7 Dr. Nagkumar Kunchagi. After considering the evidence of the witnesses and after hearing the Counsel for the respective parties, the learned Magistrate by the impugned order convicted and sentenced the applicant.

13. An appeal preferred by the applicant also came to be dismissed by the Additional Sessions Judge on 7th December, 2013.

14. I heard Mr. Desai, learned Counsel for the applicant, Mr. More, learned Counsel for respondent no.2 and Smt. Sonawane, learned APP.

15. At the outset, Mr. Desai, learned Counsel for the applicant restricted his arguments to Section 17 and Section 28 of the PCPNDT Act. It is submitted that he will pitch his case *qua* these two sections only and would not like to go to the merits of the matter. The sum and substance of the arguments of the learned Counsel is that it is a false and frivolous case foisted upon the applicant at the instance of Smt. Audry Fernandes, who was a social worker and a member of the Advisory Committee.

16. It is contended by Mr. Desai that the learned trial Judge as well as the Additional Sessions Judge failed to appreciate that the present decoy case is being carried out at the instance of PW-5 Audry Fernandes, who admittedly had a personal enmity with the applicant in respect of the action against one Dr. Hendre of Saswad under the PCPNDT Act. There was a difference of opinion between the applicant and Audry Fernandes. Admittedly, the action against the applicant involves an element of bias which ought to have been taken note of by the Courts below. It is contended that the impugned conviction on this count itself, needs to be set aside. It is further contended by Mr. Desai, that the alleged acceptance of Rs.3,000/- by the applicant towards the charges for determining the sex of the

foetus in the womb of PW-4 Devika Gaikwad is tainted with malice for the simple reason that the alleged amount was not found in the clinic of the applicant where the sonography report and thermal print was lying. It suggests that sonography was not complete and thus, form "F" was found missing as the patient ran away from the clinic and, therefore, panchanama was required to be drawn on the next date i.e. on 5th May, 2006. It is also contended that the car owner was different, in which the amount was alleged to have been found.

17. The main thrust of the arguments of Mr. Desai is that the complainant had failed to establish that he is the appropriate Authority to initiate a complaint against the applicant under the PCPNDT Act, as at the relevant time the complainant was not appointed by the State Government as mandated under Section 17 of the PCPNDT Act. He drew my attention to the fact that the alleged offence took place on 3rd January, 2006 and 4th January, 2006 whereas the Notification on record which came to be issued under Section 17(2) of the PCPNDT Act is dated 15th May, 2006. Thus, it is clear that on the date of commission of alleged offence, the complainant was not the appropriate Authority. There was no Notification on the date of the alleged offence, which has also been

admitted by the complainant in his evidence. However, the Courts below have ignored this material lacuna in the complainant's case and based its finding and judgment on the basis of mis- appreciation of the evidence on record. It is contended that there are enormous anomalies which are apparent in the purported decoy case, which has been carried out by the *Akhil Bhartiya Mahila Janwadi Sanghatana* as well as *Tathapi* Women Organization, whose credentials were not verified as to whether such organizations were competent to initiate a decoy case against the applicant and whether, at all those institutions were registered organizations.

18. Mr. Desai has also pointed out a glaring anomaly in the sense that the mandatory 15 days statutory notice has not been given by the said organizations to the Appropriate Authority to plan such a decoy case against the applicant under Section 28(1)(b) of the PCPNDT Act.

19. With the assistance of the learned Counsel for the applicant, I have meticulously gone through the evidence of all the complainant's witnesses, the statement of the applicant under Section 313 of the Cr.P.C. as well as the impugned judgment and order of

conviction passed by the learned J.M.F.C. and confirmed by the learned Additional Sessions Judge, Pune.

20. Mr. Desai has placed a useful reliance on the judgments of this Court in the case of *Dr. Rajender Amirchand Sujanyal & Anr. Vs. State of Maharashtra & Ors.* in Writ Petition No.4310 of 2015 delivered on 21st December, 2016 (Coram : Smt. Anuja Prabhudessai, J.), Criminal Writ Petition No. 250 of 2015 by Aurangabad Bench in case of *Dr. Paayal, w/o Dr. Shreekant Chobe Vs. State of Maharashtra & Ors.*, dated 16th October, 2015 (Coram : S.S. Shinde & A.M. Badar, J.J.) as well as the judgment in Criminal Writ Petition No.3065 of 2012 dated 4th September, 2013 in case of *State of Maharashtra Vs. Dr. Ganesh Krishnaji Gadgil and Anr.* (Coram : Smt. Sadhana S. Jadhav, J.).

21. On the other hand, Mr. More, the learned Counsel appearing for respondent no.2 complainant supported the impugned judgment of conviction. According to Mr. More, it is a genuine case in which the applicant was found contravening the provisions of PCPNDT Act by accepting an amount of Rs.3,000/- and consequently disclosing the sex of the foetus in the womb of PW-4 Devika Gaikwad- a decoy,

who had been to the hospital along with PW-3 Saraswati Bhandirge who acted as her mother-in-law. Mr. More has also taken me through the evidence of the witnesses and also through the Notification by maintaining that the complainant was competent to initiate action against the applicant, as in view of the Notification, he has been authorized to act as per Section 17(2) of the PCPNDT Act. According to Mr. More, the Medical Director is the only competent Authority as per the Notification dated 15th May, 2006. Even if there is no 15 days notice as per Section 28(1)(b) of the PCPNDT Act, it is submitted that the judgment in case of *Paayal w/o Shreekant Chobe* (supra) takes care of this exigency.

22. Ms. Sonawane, the learned APP in her brief submissions contended that 'cognizance' has not been challenged by the applicant in the trial Court as well as in the lower Appellate Court. Now, for the first time, the applicant is barred from raising the issue at the revisional stage under Section 401 of the Cr.P.C. The learned APP has drawn my attention to the judgment of the learned Magistrate, wherein he has observed as to how the defect has been cured.

23. PW-5 Audry Fernandes is a social worker and Co-ordinator of

“*Tathapi*” Trust. The work of the said trust is to provide Health Education to women. She also is a member of Advisory Committee under the PCPNDT Act. The complaint under the Act came to be lodged by PW-1 Dr. Rajshekhar Iyer, who is admittedly a Medical Director of Pimpri Chinchwad Municipal Corporation. He claims to be an appropriate Authority under the PCPNDT Act. Admittedly, he had acted at the behest of PW-5 Audry Fernandes.

24. The applicant is a Radiologist. Apart from serving as a Medical Officer at General Hospital, Aundh, Pune, he has been practicing privately at Santosh Nagar/Thergaon, Pune in a building known as ‘Mira Classic’ where he runs his clinic by name “Nagane Sonography Centre”. The raid was conducted by the complainant and his team at Nagane Sonography Centre.

25. The moot and debatable points are; whether PW-1 Dr. Rajshekhar Iyer was an appropriate Authority appointed under Section 17(2) of the PCPNDT Act to lodge a complaint against the applicant before the learned JMFC and secondly whether the learned JMFC had lawfully taken cognizance of an offence as provided under Section 28(1)(b) of the PCPNDT Act?

26. Section 17 of the PCPNDT Act reads thus :-

“17. Appropriate Authority and Advisory Committee.—

(1) The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purposes of this Act.

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

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

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

(i) an officer of or above the rank of the Joint Director of Health and Family Welfare—Chairperson;

(ii) an eminent woman representing women’s organisation; and

(iii) an officer of Law Department of the State or the Union territory concerned:

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

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

(4) the Appropriate Authority shall have the following functions, namely:—

- (a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;*
- (b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic;*
- (c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;*
- (d) to seek and consider the advice of the Advisory Committee, constituted under sub-section (5), on application for registration and on complaints for suspension or cancellation of registration;*
- [(e) to take appropriate legal action against the use of any sex selection technique by any person at any place, suo motu or brought to its notice and also to initiate independent investigations in such matter;*
- (f) to create public awareness against the practice of sex selection or pre-natal determination of sex;*
- (g) to supervise the implementation of the provisions of the Act and rules;*
- (h) to recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions;*
- (i) to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration.]*

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

- (6) The Advisory Committee shall consist of—*
- (a) three medical experts from amongst 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: 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."

[17-A. Powers of Appropriate Authorities – The Appropriate Authority shall have the powers in respect of the following matters, namely :–

(a) summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the rules made thereunder;

(b) production of any document or material object relating to clause (a);

(c) issuing search warrant for any place suspected to the indulging in sex selection techniques or pre-natal sex determination; and

(d) any other matter which may be prescribed.]"

27. It is quite surprising that the offence in question alleged to have been occurred on 3rd January, 2006 and 4th January, 2006

whereas a Notification under Section 17(2) of the PCPNDT Act came to be issued on 15th May, 2006 i.e. more than 4½ months after the alleged offence.

28. The Notification dated 15th May, 2006 is by and under the Governor of Maharashtra and had been issued by the Under Secretary to the Government of Maharashtra. The Notification reads as under :-

“NOTIFICATION

*Public Health Department,
Mantralaya, Mumbai – 400 032
Dated :- 15th May, 2006*

*The Pre Conception and Pre-natal Diagnostic Techniques
(Prohibition of Sex Selection) Act, 2003*

No. PRACHINI-2006/197/CR-19/FW-II :

In exercise of the powers conferred by sub-section (2) of Section 17 of the Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003 (14 OF 2003) and of all other powers enabling it in that behalf, the Government of Maharashtra hereby appoints the Medical Director, Pimpri-Chinchwad, Municipal Corporation to be the Appropriate Authority for the city of Pimpri Chinchwad, for the purpose of the said Act.

*By order and in the name of the
Governor of Maharashtra*

Sd/-

(U.M. Tembhare)

*Under Secretary to Government of
Maharashtra”*

29. Even while recording the evidence before charge of PW-1 Dr. Rajshekhar Iyer, there is no shred of evidence *qua* his appointment under Section 17(2) of the PCPNDT Act as an appropriate Authority specifying the details of the Notification. *Sans* the details, no charge could have been framed against the applicant as the absence of Notification in the Official Gazette as contemplated under Section 17(2) of the PCPNDT Act goes to the root of the complaint.

30. The second glaring discrepancy is that the learned Magistrate, without examining the decoy PW-4 Devika Gaikwad had taken cognizance of the offence. Only on the basis of the evidence of PW-1 Dr. Rajshekhar Iyer, it was not correct to issue process against the applicant. Even at the time of recording the evidence before charge, the decoy was not examined and, therefore, there was no evidence before the learned Magistrate that the applicant had indulged into activities which were in contravention of the PCPNDT Act.

31. What had been simply testified by PW-1 Dr. Rajshekhar Iyer is that apart from the Medical Director of Pimpri Chinchwad Municipal Corporation, he is also a competent Authority under the PCPNDT Act

and not an appropriate Authority.

32. In his cross-examination, PW-1 Dr. Rajshekhar Iyer had unequivocally admitted that at the time of filing of the complaint, the Government had not made his appointment as an appropriate Authority for Pimpri Chinchwad Municipal Corporation. The complainant himself had hammered a last nail in the coffin of its case by this admission. The entire edifice of the complainant's case collapses on this important aspect itself.

33. The reasons assigned by the learned JMFC in paragraph 27 of the impugned judgment and ratified by the learned Additional Sessions Judge, Pune exhibit non-application of judicial mind and are based on misinterpretation of the legal provisions of the PCPNDT Act. It has been observed by the learned JMFC that though the Notification is dated 15th May, 2006, in view of delegation of his powers by PW-7 Dr. Nagkumar Kunchagi, who was then working as a Medical Officer in Health Department of Pimpri Chinchwad Municipal Corporation as well as appropriate Authority, PW-1 Dr. Rajshekhar Iyer was empowered to initiate an action against the applicant under the said Act. Such observation merits to be laughed

at and wept over at one and the same time, for, the Act does not provide for any such exigency, nor there is any authorization by PW-7 Dr. Nagkumar Kunchagi to delegate his powers.

34. At this stage, it would be apposite to refer a judgment of this Court in the case of the *State of Maharashtra Vs. Dr. Ganesh Krishnaji Gadgil and Anr.* (Coram: Smt. Sadhana S. Jadhav,J). In the said case, the respondents were discharged by the Additional Sessions Judge of the offence punishable under Sections 23(1), 29, Rule 9(1)(4), 10(1)(1a), 18(1) and 18(2) of the PCPNDT Act against which the State has invoked writ jurisdiction of this Court. The Revisional Court under Section 17 of the PCPNDT Act noticed that the copy of the Gazette of the Government of Maharashtra was published on 3rd February, 2007 wherein it was shown that the Notification was dated 9th January, 2002. Under the said Notification, the Assistant Director, Health (Medical) of Pune Circle, was notified as a competent Authority. Though the Notification was dated 9th January, 2002, it was published on 2nd March, 2006 in the Official Gazette. The Additional Sessions Judge thus observed that the date of publication is relevant and not the date on which the Public Health Department has prepared the draft of Notification.

It is observed by this Court that a Notification cannot be given retrospective effect unless it is so specifically mentioned. On the date when the complaint was filed, the complainant was not the Appropriate Authority nor he was an authorized Officer. It is also observed by this Court that the decoy witness was not examined at the stage of recording of evidence before charge and therefore, there was no evidence to show that the accused were indulging into activities which are in contravention of the PCPNDT Act. The situation herein is similar.

35. Section 28 of the PCPNDT Act reads thus :-

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

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

(b) a person who has given notice of not less than (fifteen days) in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court.

(2) No Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1), the Court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.”

36. A bare look at Section 28 provides that the Court is debarred from taking cognizance of the offence under the PCPNDT Act except on a complaint made by the concerned Appropriate Authority or by an officer authorized for making complaint by the Central or State Government, as the case may be. Even any officer authorized by the Appropriate Authority for instituting the criminal proceedings can lodge the complaint. In the case at hand, PW-1 Dr. Rajshekhar Iyer himself was not an appropriate Authority and, therefore, there is no question of taking cognizance of the offence by the learned Magistrate.

37. Once it is held that PW-1 Dr. Rajshekhar Iyer was not an appropriate Authority under Section 17(2) of the PCPNDT Act, there is no question of even 15 days notice by PW-5 Audry Fernandes to PW-1 Dr. Rajshekhar Iyer in the prescribed manner as provided in clause (b) of Section 28(1) of the Act. Even otherwise, there are some vital admissions surfaced during the cross-examination of PW-5 Audry Fernandes which create a reasonable doubt as regards the genuineness of the case. Rather, it probabalizes the defence that the applicant has been falsely implicated in this case as there was disagreement with PW-5 Audry Fernandes when a raid was

conducted in the past under the said Act at the hospital of one Dr. Hendre at Saswad, Pune. The applicant was admittedly an appropriate Authority under the said Act and PW-5 Audry Fernandes was a member of the Advisory Committee. There are several admissions in the cross-examination of the complainant's witnesses to that effect, however, it is needless to delve deep into the aspect as the learned Counsel for the applicant has restricted his arguments on these two legal issues.

38. It is worthwhile to note that PW-1 Dr. Rajshekhar Iyer in his cross-examination admits that he did not receive any written complaint from any one against the applicant that he determines the sex of the foetus of his patients. Except the applicant, there was not a single complaint received against any one within the jurisdiction of Pimpri Chinchwad Municipal Corporation. PW-1 Dr. Rajshekhar Iyer does not know whether the two women organizations namely; *Akhil Bhartiya Mahila Janwadi Sanghatna* and "*Tathapi* Trust" were registered non Governmental organizations. He admits that on an oral request of these organizations, a decoy case was planned by him within two hours. This demonstrates the hasty action by PW-1 Dr. Rajshekhar Iyer at the instance of PW-5 Audry Fernandes. PW-1 Dr.

Rajshekhhar Iyer in his complaint categorically states that the applicant is also a member of an Advisory Committee but in cross-examination he exhibits his unawareness about the same. Thus, this aspect also strengthens the defence of the applicant.

39. In case of ***A.K. Roy and Ors. Vs. State of Punjab & Ors. Reported in AIR 1986 SC 2160***, the Hon'ble Supreme Court while considering the provisions of Section 20(1) of the Food Adulteration Act, 1954, dealing with cognizance and trial of offences under the said Act held thus :-

“A careful analysis of the language of S.20(1) of the Act clearly shows that it inhibits institution of prosecutions for an offence under the Act except on fulfillment of one or the other or the two conditions. Either the prosecutions must be instituted by the Central Government or the State Government or a person authorised in that behalf by the Central Government or the State Government, or the prosecutions should be instituted with the written consent of any of the four specified categories of authorities or persons. If either of these two conditions is satisfied, there would be sufficient authority for the institution of such a prosecution for an offence under the Act. The provision contained in S.20(1) of the Act does not contemplate the institution of a prosecution by any person other than those designated. The terms of S.20(1) (1) do not envisage further delegation of powers by the person authorised, except that such prosecution may be instituted with the written consent of the Central Government or the State Government or the person authorised. The use of the negative words in S.20(1) "No prosecution for an offence under this Act.. shall be instituted except by or with the written consent of" plainly make the requirements of the section imperative. That

conclusion of ours must necessarily follow from the well-known rule of construction of inference to be drawn from the negative language used in a statute stated by Craies on Statute Law, 6th edn., p. 263 in his own terse language:

"If the requirements of a statute which prescribe the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding."

Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden. The intention of the Legislature in enacting S.20(1) was to confer a power on the authorities specified therein which power had to be exercised in the manner provided and not otherwise."

(emphasis supplied)

40. The PCPNDT Act prescribes a specific way and manner as to how an appropriate Authority and Advisory Committee shall be appointed by the State or Central Government by a Notification in the official gazette and, therefore, it has to be done in the way as provided by the statute in expressed terms and not otherwise. Similarly, Section 28 of the PCPNDT Act begins with negative words so as to say "*No Court shall take cognizance of an offence under this Act except on a complaint made by – (a) Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the*

Appropriate Authority; or (b) a person who has given notice of not less than (fifteen days) in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court.” It clearly contemplates that the requirement of the section is imperative. Therefore, it has been observed in the aforesaid judgment that the conclusion of ours must necessarily follow from the well known rule of construction of inference to be drawn from the negative language used in a statute stated by the Craies on Statute Law, 6th Edn. p.263.

41. Thus, where powers have been given to do certain things in a certain way, the things must be done in that way or not at all. The Courts below have deviated from the said path by stating that the powers have been delegated to the complainant PW-1 Dr. Rajshekhar Iyer by PW-7 Dr. Nagkumar Kunchagi. The ratio is, therefore, squarely applicable to the case at hand. Section 17 does not envisage further delegation of the powers by the appropriate Authority.

42. On the other hand, Mr. More the learned Counsel for respondent no.2 has pressed into service a latest judgment of the Supreme Court in the case of ***Federation of Obstetrics &***

Gynaecological Societies of India (FOGSI) Vs. Union of India & Ors.

(2019) 6 SCC 283. The petitioners have moved the Hon'ble Supreme Court for striking down proviso to Section 4(3), provisions of Section 23(1) and 23(2) or to read down Section 20 or 30 of the PCPNDT Act. The writ petition came to be dismissed by an elaborate judgment wherein the Hon'ble Supreme Court has emphasized the statutory requirements of keeping the record as well as the mandatory natures of every entry required to be made in terms of form "F" of 1996 Rules. The Hon'ble Supreme Court has also held presumption of the guilt against the person conducting Ultra-Sonography under Section 4(3) proviso for offence under Sections 5 and 6 and penalty under Sections 23(1) and 23(2), in case of deficiency and inaccuracy in keeping the record. According to the Hon'ble Supreme Court, the plea of the petitioners that the Medical Practitioners should not be penalized for clerical errors in record keeping, is not tenable. The judgment further elaborates the scheme of the PCPNDT Act as well as the seriousness of the female foeticide and infanticide in a very large scale across the world. The learned Counsel for respondent no.2 has drawn my attention to paragraph 98 of the judgment, which reads thus : -

“98. Non-maintenance of record is springboard for commission of offence of foeticide, not just a clerical error. In order to effectively implement the various provisions of the Act, the detailed forms in which records have to be maintained have been provided for by the Rules. These Rules are necessary for the implementation of the Act and improper maintenance of such record amounts to violation of provisions of Sections 5 and 6 of the Act, by virtue of proviso to Section 4(3) of the Act. In addition, any breach of the provisions of the Act or its Rules would attract cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, by the appropriate authority as provided under Section 20 of the Act.”

43. No doubt, a record has to be maintained very scrupulously as discussed in the judgment as provided by the various Rules, which are quite important for implementation of the Act. Nevertheless, as stated hereinabove, the complainant itself is found to be defective as there is a clear violation of Section 17 and Section 28 of the PCPNDT Act. Thus, the judgment would not be of any assistance to the complainant.

44. Corollary of the aforesaid discussion is that the impugned judgment and order of conviction dated 15th December, 2011 rendered by the learned Judicial Magistrate First Class, Court No.7 Pune in Regular Criminal Case No. 139 of 2006 and confirmed by the Additional Sessions Judge, Pune in Criminal Appeal No. 23 of 2013

dated 7th January, 2014 needs to be quashed and set aside.

45. In view of the aforesaid discussion, following order is expedient :-

ORDER

- (i) The Criminal Revision Application is allowed.
- (ii) The impugned order of conviction dated 15th December, 2011 passed by the learned Judicial Magistrate First Class, Court No.7 Pune in Regular Criminal Case No. 139 of 2006 and confirmed by the Additional Sessions Judge, Pune in Criminal Appeal No. 23 of 2013 dated 7th January, 2014 is quashed and set aside.
- (ii) The applicant is acquitted of the offences with which he had been charged.
- (iv) His bail bonds stand cancelled.

(PRITHVIRAJ K. CHAVAN, J.)