

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO .3428 OF 2020

Ranukai Critical Care Center &

Multispecialty Hospital,

Through its Director,

Nilesh S/o Jairam Bastewad,

Age : 32 years, Occu: Medical Practitioner,

R/o. Bafna Road, Nanded

...Petitioner

Versus

1. The State of Maharashtra

Through Secretary, Public Health Department,

Mantralaya, Mumbai.

2. The District Appropriate Authority – cum-

Medical Officer, Nanded Waghala Municipal

Corporation, Nanded.

...Respondents

...

Mr. V.S. Kadam, Advocate for the Petitioner.

Mr. S.R. Yadav, AGP for Respondent No.1.

Mr. R.K. Ingole, Advocate for Respondent No.2.

...

CORAM : RAVINDRA V. GHUGE &

S.G. MEHARE, JJ.

RESERVED ON : 29th SEPTEMBER, 2021

PRONOUNCED ON : 23rd NOVEMBER, 2021

JUDGMENT (PER S.G. MEHARE, J) :

1. Rule. Rule made returnable forthwith. By the consent of the learned counsels for the parties, the petition is heard finally.

2. The petitioner, a partnership firm, running a Genetic Clinic/ Ultrasound Clinic (Non- Invasive) Centre at Nanded, has impugned the orders, suspending the Registration Certificate and sealing the Sonography machine of the petitioner by the District Appropriate Authority/ respondent no.2 dated 20.09.2019 and dismissing the appeal by the state Appropriate Authority dated 07.12.2019.

3. The petitioner is a partnership firm running Renukai Critical Care Centre and Multispeciality Hospital. The petitioner's Hospital is registered as Genetic Clinic/ Ultrasound Clinic (referred to as 'Clinic' for short) with the Appropriate Authority under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994 and Rules made thereunder (the 'Act and Rules' for short). It was registered on 19.05.2018 and is valid till 18.05.2023. Respondent no. 2 is the District Appropriate Authority.

4. Respondent no.2 had issued a show-cause notice dated 28.06.2019 to Dr. Nilesh Bastewad, the partner of the Clinic, calling upon him to submit the

explanation. It is alleged in the show cause notice that in the visit of an officer authorised on 26.06.2019 to the Hospital, column no. 12 of Form-F is not filled by Dr. Chanda Bastewad. There were discrepancies in her signatures on declaration forms and consent forms of the patients. The signatures of the patients were not noticed on the consent forms. The dates were not mentioned on the declaration and consent forms of the patients. The name and registration of the doctor in column no. 11 of Form-F is not filled. Column no. 17 pertaining to the result of the pre-natal diagnostic procedure to be conveyed is left blank. The sonography registration register was not available. There was an irregularity in the monthly Sonography report submitted to the Appropriate Authority and on the website. One register was not paginated and was not certified for what purpose the petitioner used it. Respondent no.2 mentioned discrepancies of various dates in 20 items.

5. The petitioner/ Clinic had submitted its explanation to the show cause on 06.07.2019, contending that none of the provisions of the Act and Rules are violated. Sonography tests are done in the Hospital only by authorised and qualified doctors. The necessary records of such tests conducted in the Hospital are preserved and maintained in the complete sense. The record is also maintained in electronic Form and uploaded on the website as per the instructions issued from time to time.

6. Respondent no.2 passed the impugned order on 20.09.2019 and then drew a spot panchanama on 21.09.2019 in the Clinic in the presence of two witnesses and

sealed and seized the sonography machine bearing registration no. USG/NWCMC, of Aeroscan make Digital colour model no. CD25. Immediately after sealing and seizing the machine, he handed it over to Dr. Nilesh Bastewad, the partner of the Hospital, and obtained his signature and acknowledgment on the same panchanama. Respondent no.2 also prepared a possession receipt on the same day.

7. Respondent no.2 filed an affidavit in reply contending that the discrepancies found in the visit to the Clinic are a violation of the various provisions of the Act and Rules. The Hospital has submitted a vague reply to the show cause. The impugned orders are legal and correct. The acts of the Clinic are deliberate. The Clinic has not made legal compliances. That amounts to an offence. Already a regular criminal case is filed in the Court of Judicial Magistrate. The petitioner/ Clinic does not deserve leniency or mercy. The petition is liable to be dismissed

8. Heard the learned Counsel Shri V .S. Kadam for the petitioner and learned AGP Shri Yawalkar for the State and the learned Counsel Shri R. K. Ingole for respondent no.2 at length.

9. We have perused the paper book.

10. The Clinic has assailed both the impugned orders on the ground that on 26.06.2019, the Authorised officer had entered the Clinic illegally and with mala fide intention and inspected the record. However, no illegality/ irregularity was noticed. They took the entire record without preparing its list and not handed it over to it. To

show that some action is taken, the registration is suspended and the Sonography machine is sealed on concocted and false grounds. A detailed reply to the show cause was filed, but respondent no.2 and other Officers were bent upon closing the Clinic. The doctors working in the Clinic are diligently following the provisions of the Act and the Rules. The Clinic is maintaining the record as provided under the Act and Rules. The Clinic was not indulging in any illegal activities as provided under the Act and the Rules. It is maintaining and filing the Form-F online scrupulously. From time to time, the authorised officers from the Office of respondent no. 2 visited and inspected the record to be maintained under the provisions of the Act and Rules. However, they found no irregularities. The Authorities did not consider that the Clinic has not indulged in any act of sex selection or sex determination. The Sonography machine was never used for the selection and determination of sex. While concluding, respondent no.2 had no reason to believe that the Sonography machine was used for committing any offence under the Act and the Rules. Rule 12 has not been strictly complied with. No reasons are recorded by respondent no.2 to it's satisfaction that the Sonography machine had furnished the evidence of the commission of an offence punishable under the Act. The order passed by the State Appropriate Authority has also not considered the legal requirement to complete the offence and passed the impugned order illegally and arbitrarily. The learned Counsel for the petitioner, to support his arguments, has relied on case law.

11. The learned counsels for respondents argued that there was no *mala fide*; they have acted under the powers and duties conferred on them by the law. Nothing was explained as pleaded and argued before this Hon'ble Court. The explanation was vague. The deficiencies and irregularities noticed amount to a breach of the mandatory provisions of the Act and the Rules. The case law relied on by the petitioner would not assist him in any way. A criminal case is also pending before the learned Magistrate. There is no force at all in the petition. Hence, the petition is liable to be dismissed.

12. Section 17 of the Act states the functions of the appropriate Authority. It has to grant, suspend, or cancel the registration and enforce standards prescribed for and of the Genetic Clinic, laboratory, and Genetic counseling Centres ('Centres' for short). It is also its function to investigate complaints of breach of the provisions of the Act or the Rules made thereunder. To take appropriate legal action against the use of any sex selection technique by any person at any place, either suo motu or brought to its notice, independent investigations can be initiated in such matter, to supervise the implementation of the provisions and the Act and the Rules, to take actions on the recommendations of the Advisory committee made after investigation of complaints about suspension or cancellation of registration, etc.

13. Under section 20 of the Act, the Appropriate Authority has powers, either suo motu or on a complaint, to issue a show-cause notice with reasons to the Centres

why its registration should not be canceled or suspended. Section 20(2) of the Act empowers the appropriate Authority on the satisfaction of the breach of the provisions of the Act or the Rules, without prejudice to any criminal action, to cancel or suspend the registration of such Centres for such period as it thinks fit. It has to consider the advice of the Advisory Committee and give the Clinics or Centres a hearing. Sub-rule (3) of section 20 further empowers the Appropriate Authority to suspend the registration of such Centre without giving show cause notice as contemplated in sub-rule (1) in the public interest. While doing so, it has to record the reasons in writing.

14. Section 30 of the Act provides that If the Appropriate Authority has reason to believe that offence under this Act has been committed at the Centre, such Authority or any officer authorised in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable time with such assistance, if any, as such Authority or officer considers necessary, such Centre or any other place examine any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seize and seal the same if it has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.

15. Rule 12 of the Rules prescribes the procedure for search and seizure. The Appropriate Authority or any officer authorised on his behalf may enter the Centre. It

may seize and seal the pamphlet, advertisement, or any other material object in the presence of two or more independent witnesses If there is a reason to believe that it may furnish evidence of the commission of an offence punishable under the Act. A list of any such document, book, register, or any other material object seized and sealed shall be prepared in duplicate at the place effecting the seizer. Its every page shall be signed by the Appropriate Authority and by the witnesses. Such a list may be prepared, in the presence of the witnesses, at any other place than the place where it is seized but has to record the reasons therefor. One copy of a list mentioned above shall be handed over, under an acknowledgment, to the person from whose custody such material has been seized. If no responsible person or manager of the Centre is available, such list shall be sent by registered post. It is further provided that if the material object is perishable in nature, Appropriate Authority or officer authorised on his behalf shall promptly make arrangements for sealing, identification, and preservation of the material object and also convey it to a facility for analysis or test if it is required. In case the search or seizer could not be completed, the Authority may make arrangements by way of mounting a guard or sealing the premises of the Centre for safe keeping of the record, books, documents, or objects to be seized, and to prevent any tampering with such documents or any other material object.

16. As per sub-rule 8 of rule 18-A, the appropriate Authority shall conduct regular inspections of all the registered facilities once in every ninety days. It has to preserve

the inspection report as documentary evidence, and a copy of the same be handed over to the owner of the facility inspected and obtain acknowledgment in respect of the inspection.

17. The learned Counsel for the petitioner/ Clinic has vehemently argued that the Appropriate Authority has no reason to believe that the material seized may furnish evidence of the commission of any offence under the Act. It had no such reason, that may prima facie prove any offence is committed. The action taken by the Appropriate Authority is without material. It is *mala fide*. To bolster his arguments, he relied on the cases of Dr. Ramesh Mahadu Bole v The State of Maharashtra and others Writ Petition No. 2349 of 2017 decided on 13th February 2018 by the Hon'ble Division Bench of this Court, and ***Janki Ultra Sound Centre V Appropriate Authority and others. 2015 (6) Mh. L J. 886.***

18. Before adverting to the grounds raised by the petitioner, we feel it advantageous to go through the relevant provisions of the Act and Rules.

19. The Act and the rules impose various obligations and duties on the centres, and if any of the obligations and duties are not strictly followed, it is an offence under the Act. Let's see the obligations and duties of the Centres. Those are as follows:-

- a) The Registration of the Centres is mandatory. Conducting the activities relating to pre-natal diagnostic techniques without registration is an offence. (section 3 (1) of the Act)
- b) No person, who does not possess the qualification as may be prescribed, shall be employed or caused to be employed (3(2))
- c) No pre-natal diagnostic techniques shall be conducted or aided to be conducted at any other place than a place registered under the Act. (3(3))
- d) No sex selection shall be conducted or caused to be conducted on a woman or man or both or any tissue, embryo, conceptus, fluid, or gametes from either or both of them. (sec 3-A)
- e) No registered place shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purpose specified in clause (2) and after satisfying any of the conditions specified in clause (3) of section 4 of the Act. (4(1))
- f) The person employed as per subsection 2 of section (3) of the Act, shall not conduct the pre-natal procedures unless he has explained all known side and after-effects of such procedures to the pregnant women. He has to obtain in prescribed Form her written consent to undergo such procedures in the language he understands. A copy of her such consent shall be given to such woman. (sec 5(1))

g) The person, including the person conducting pre-natal diagnostic procedure, shall not communicate to the pregnant woman or her relatives or any other person the sex of foetus by words, signs, or in any other manner. (Section 5(2))

h) No Centre shall conduct pre-natal diagnostic techniques including ultrasonography for the purposes of the sex of foetus or for determining the sex of foetus (Sec 6 (a) and (b))

i) No person shall, by whatever means, cause, or allow to be caused the selection of sex before or after conception. (Sec 6 (c))

j) Publishing by advertisement in any mode including internet, that determination of sex or sex selection before conception is available at such Centre, and publishing by any other means of pre-natal determination or preconception selection of sex, is an offence punishable under section 22 of the Act.

k) The Centre shall maintain a register showing, in serial order, the names and addresses of the men and women given genetic counselling, subjected to pre-natal diagnostic procedures or pre-natal diagnostic tests, the names of their spouse or father, and the date on which they first reported for such counseling, procedure, or test. (Rule 9 (1))

l) Every Laboratory shall maintain in respect of each man or woman subjected to any pre-natal diagnostic procedure/ technique/test, in Form E.

- m) Every Centre shall maintain the record in Form F.
- n) The Centre shall preserve the record to be maintained under the Act and rules for two years from the date of completion of counselling, pre-natal diagnostic procedure or pre-natal diagnostic test. In the event of any legal proceedings, the record as such shall be preserved till the final disposal of the proceedings, or till the expiry of the said period of two year, whichever is later. (Rule 9 (6))
- o) If such record is maintained on a computer or other electronic equipment, a printed copy of the record shall be taken and preserved after authentication by a person responsible for such record. (Rule 9(7))
- p) Every Centre shall send a complete report in respect of all preconception or pregnancy-related procedures/techniques/tests conducted by them in respect of each month, by the 5th day of the following month, to the concerned Appropriate Authority. (Rule 9 (8))
- q) Before conducting preimplantation genetic diagnosis, or any pre-natal diagnostic technique/test/procedure such as amniocentesis, chorionic villi biopsy, foetoscopy, foetal skin or organ biopsy or cordocentesis, a written consent, as specified in Form G, in the language the person undergoing such procedure understands, shall be obtained from her/him. (Rule 10 (1))
- r) Any person conducting ultrasonography/ image scanning on a pregnant woman shall give a declaration on each report on ultrasonography/image scanning that

he/she has neither detected nor disclosed the sex of foetus of the pregnant woman to anybody. The pregnant woman shall before undergoing ultrasonography/image scanning declare that she does not to know the sex of her foetus.

20. The object behind enacting the Act is well known that the technique is primarily invented to be used to detect the prenatal genetic and metabolic disorders, chromosomal abnormalities, certain congenital malformations of sex-linked disorders. However, amniocentesis and sonography were being used on a large scale to detect the sex of the foetus and to terminate the pregnancy if the unborn child is found to be female. The techniques are also being developed to select the sex of the child before conception. This led to a large number of termination of pregnancies. Such technologies took society towards sex discrimination and made the future dark of severe imbalance in the male-female ratio. Therefore, to uphold society, the present Act is enacted. The provisions of the Act and the Rules provide for strict action against the violators, and the concerned have to follow it strictly. Even non maintaining the records as prescribed is also an offence under the Act.

21. In the Act, a Code of Conduct is also prescribed to be observed by the persons working in the Centres and the Appropriate Authorities. The Code of conduct to be observed by the Appropriate Authorities has been prescribed in Rule 18-A of the Rules. Subrule 1(ii) provides that the Appropriate Authority shall observe and implement the provisions of the Act and Rules in a balanced and standardised

manner in the course of their work, clause (iii) provides to conduct their work in a just manner without any bias or perceived presumption of guilt.

22. The registration of the Clinic is suspended by the impugned order of Appropriate Authority for breach of sections 5, 6, 25, and 29 of the Act and rule 9 of the Rules.

23. The learned Counsel for respondent no.2 argued that any deficiency or inaccuracy is an offence under sections 5 and 6 of the Act. To bolster his argument, he relied on the case of Federation of Obstetric and Gynecological Societies of India V Union of India 2019 AIR 2214. The constitutional validity of Sections 23(1) and 23(2) of the Act was challenged in the said case. The relevant paragraphs are extracted hereunder;

"92. Non maintenance of records 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 a violation of provisions of Section 5 and 6 of the Act, by virtue of proviso to Section 4(3) of 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 under Section 20 of the Act".

24. Subparagraph of paragraph 74 from the above case is relevant, thus extracted hereinunder;

"No sustenance can be drawn from the aforesaid decision as keeping the information blank is definitely a violation of the Act and very basic fundamental requisite for undertaking the test. Thus, when Form has not been filled up, obviously the Act is dishonest, fraudulent and can be termed intentional also. Such case cannot be classified into clerical error".

25. In paragraph 93, it is further observed that, by virtue of proviso to Section 4(3), a person conducting ultrasonography on a pregnant woman is required to keep complete record of the same in the prescribed manner and any deficiency or inaccuracy in the same amounts to contravention of section 5 and 6 of the Act, unless the contrary is proved by the person conducting the said ultrasonography.

26. The Honb'ble Apex Court in the above case has pronounced that non maintaining the record as prescribed under the Act and Rules is not a clerical job but mandatory. Complete contents of Form F are mandatory. Non maintaining the record is very foundation of offence. There need not have graded offence on the basis of actual determination of sex and non-maintenance of record as undertaking the test without the pre-requisites is prohibited under the Act.

27. It would be profitable to reproduce proviso to section 4(3) of the Act, which reads thus;

"Provided that the person conducting the ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribe, an 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".

28. In the case of ***Suo Motu v State of Gujrat (2009) 1 Gujrat Law Reporter 64***, which is reproduced in the case of Federation of Obstetrics cited supra, (para 68), the Hon'ble Gujrat High Court has observed in para 7, that the deeming provision is restricted to the cases of ultrasonography on the pregnant women and person conducting ultrasonography is, during the course of trial or other proceeding, entitled to prove that the provisions of Section 5 and 6 were, in fact, not violated.

29. Further in paragraph no. 8 of the above case in the middle, it is observed that, "Where, by virtue of the deeming provisions of the proviso to sub-sec. (3) of Sec. 4, contravention of the provisions of Sec. 5 or 6 is legally presumed and actions are proposed to be taken under section 20, the person conducting Ultra-sonography on a pregnant woman shall also have to be given an opportunity to prove that the provisions of Sec. 5 or 6 were not violated by him in conducting the procedure. Thus, the burden shifts on the person accused of not maintaining the prescribed record, after any inaccuracy or deficiency is established, and gets the opportunity to prove that the provisions of Sec. 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”.

30. It is clear from the above observations that unless the contrary is proved, it is presumed that non maintaining the record as prescribed shall amount to a contravention of 5 or 6 of the Act. In other words, there is a presumption of offence if no record is maintained as prescribed. The legal presumptions are rebuttable.

31. A rebuttable presumption can be rebutted either by leading contrary, independent evidence or by bringing the material from the cross-examination of the opponent or his witness as the case may be. It can be overturned only if the evidence contradicting it is true and if a reasonable person of average intelligence could logically conclude from the evidence that the presumption is no longer valid.

32. In the case at hand, to attract the presumption, the primary burden to establish inaccuracy and deficiency in maintaining the record was on respondent no.2. To establish the inaccuracy and deficiency in maintaining the record, respondent no.2, an appropriate authority, has powers to enter the Clinic at any reasonable time and inspect the record. Respondent no.2, in the impugned order, has made a reference about such inspection of the record by an officer appointed by it. It is also observed in the impugned order that the record from the Clinic was

seized. Such seized record may furnish evidence of the commission of an offence punishable under the Act. The record further reveals that 55 copies of Form F have been placed on record by respondent no.2. On the basis of such Forms, it is claimed that the Clinic has committed the offence under the Act.

33. It is the specific contention of the petitioner/ Clinic that no seizer panchanama of the record taken by the Authority was prepared. We have observed above that drawing such seizer panchanama in the presence of two panchas is mandatory under rule 12 of the Rules. One of its copies shall be handed over to the person from whose custody any such record is recovered. However, respondent no.2 has no explanation whether such seizer panchanama was drawn. However, in a complaint filed before the learned Chief Judicial Magistrate, which is available in the paper book, it is pleaded that such seizer panchanama was drawn and the list of such record was prepared in the presence of the accused, and its copy was handed over to the accused. At the foot of the complaint it is mentioned that as per the list, documents are submitted with the complaint, but no documents are placed in the paper book. Under such circumstances, we draw the adverse inference against respondent no.2. Unless any material adverse to the accused is placed on record or supplied to the accused, no burden to rebut the presumption can be shifted on the accused.

34. In ***Mousam Singha Roy v State of West Bengal (2003) 12 SCC 377***, the Hon'ble Apex Court held in para no.28 as below :-

“It is also settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since higher degree of assurance is required to convict the accused.”

35. Since the offences under the Act are more serious, we are of the view that seizer panchanama was the backbone to prove the prima facie case against the petitioner/Clinic. However, such a material piece of evidence is not produced by respondent no.2, nor the contention of the petitioner/ Clinic that no such panchanama was drawn and its copy was handed over to it is not specifically denied by it in the affidavit in reply. Thus it is a strong circumstance in favour of the petitioner.

36. It is indirectly tried to argue by respondent no.2 that this petition shall not be entertained since the criminal complaint is pending against the petitioner. After having gone through the entire provisions of the Act and the Rules, it is clear that the proceeding before the Appropriate Authority for cancellation or suspension of the Registration of the Clinic and criminal trial on the same allegation are two distinct and independent proceedings. Hence we do not find force in the arguments that this

petition will not be entertained as the criminal complaint is pending before the learned Judicial Magistrate.

37. For the above reasons, we conclude that the impugned orders warrant interference by this Court. Accordingly, we pass the following order:-

ORDER

- 1) The petition is allowed.
- 2) The impugned orders dated 20.09.2019 and 07.12.2019 passed by respondents are quashed and set aside.
- 3) Respondent no.2 is directed to un-seal the Sonography machine of AEROSCAN CD 25 make and hand it over to the petitioner/Clinic forthwith.
- 4) The Registration of the petitioner/Clinic bearing no. USG/177 dated 19.05.2018 is restored.
- 5) We make it clear that the learned Chief Judicial Magistrate, Nanded shall not be influenced by the findings or observations recorded by us while deciding the case.
- 6) Rule is made absolute in above terms.

(S.G. MEHARE, J.)

(RAVINDRA V. GHUGE, J.)

amj