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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.4249 of 2009

Dr. Sudhir Kumar Brahma

....

Petitioner

Mr. B.P. Tripathy, Advocate

-Versus-

State of Odisha

....

Opposite Party

Mrs. S. Patnaik, AGA

CRLMC No.3251 of 2012

Dr. Sindhu Charan Mohanty

....

Petitioner

Mr. D.P. Dhal, Advocate

-Versus-

State of Odisha and another

....

Opposite Parties

Mrs. S. Patnaik, AGA

CRLMC No.3729 of 2012

Dr. Ajay Kumar Mishra and another

....

Petitioners

Mr. A. Patnaik, Advocate

-Versus-

Dr. Nilamadhab Mishra and another

....

Opposite Parties

Mrs. S. Patnaik, AGA

CRLMC No.172 of 2017

Dr. Bipin Bihari Panigrahi

....

Petitioner

Mr. D.P. Nanda, Advocate

-Versus-

State of Odisha

....

Opposite Party

Mrs. S. Patnaik, AGA

CRLMC No.1733 of 2015

Dr. Gopal Krishna Parida and another **Petitioners**
Mr. B.S. Das, Advocate

-Versus-

State of Odisha **Opposite Party**
Mrs. S. Patnaik, AGA

CRLMC No.1548 of 2017

Dr. Sandhyarani Panigrahi **Petitioner**
Mr. P.K. Panda, Advocate

-Versus-

State of Odisha and another **Opposite Parties**
Mrs. S. Patnaik, AGA

CRLMC No.682 of 2017

Dr. Bhubaneswar Sukla and others **Petitioners**
Mr. Basudev Mishra, Advocate

-Versus-

State of Odisha **Opposite Party**
Mrs. S. Patnaik, AGA

CRLMC No.1547 of 2017

Dr. J. Anuradha **Petitioner**
Mr. P.K. Panda, Advocate

-Versus-

State of Odisha and another **Opposite Parties**
Mrs. S. Patnaik, AGA

CRLMC No.904 of 2013

Dr. Sanjukta Pattnaik		Petitioner
		Mr. D.P. Dhal, Advocate

-Versus-

State of Odisha and another		Opposite Parties
		Mrs. S. Patnaik, AGA

CRLMC No.1546 of 2017

Smt. Sonali Panigrahi		Petitioner
		Mr. P.K. Panda, Advocate

-Versus-

State of Odisha and another		Opposite Parties
		Mrs. S. Patnaik, AGA

CRLMC No.2086 of 2012

Dr. Surendra Mohanta		Petitioner
		Mr. D.P.Dhal Sr. Advocate

-Versus-

State of Odisha and another		Opposite Parties
		Mrs. S. Patnaik, AGA

CORAM:

JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT: 19.09.2022

1. In the present batch of cases, a common question of law is involved which is as to the following:

(i) Whether the criminal prosecutions vis-à-vis the petitioners under Sections 23 and 25 of the Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994 (hereinafter referred to as 'the PC&PNDT Act') are legally tenable?

(ii) Whether such individual prosecution is by the designated authority and if consistent with Sections 17 and 28 of the PC&PNDT Act?

2. The impugned proceedings are challenged on the grounds *inter alia* that the prosecutions ought to have been launched by the respective District Magistrate (DM) as per and in accordance with the Government's Office Memorandum (in short 'OM') dated 27th July, 2007 and not by other officials like the Chief District Medical Officer (CDMO)/Additional District Medical Officer (ADMO)/Executive Magistrate (EM). It is pleaded that the learned courts below should not have entertained the complaints which were filed not by the 'Appropriate Authority' (AA) in accordance with the provisions of the PC&PNDT Act and the OM and therefore, the proceedings should be quashed in exercise of the Court's inherent jurisdiction.

3. It would be appropriate to reflect upon and discuss the relevant provisions of the PC&PNDT Act before adverting to the rival claims of the parties. In fact, the term AA is defined in Section 2(a) of the said Act which means an authority appointed under Section 17 thereof. The pre-natal diagnostic procedures have been prescribed in Section 4 with certain restrictions imposed. Section 5 specifies that no person referred to in Section 3(2) of the PC&PNDT Act shall conduct the pre-natal diagnostic procedure without the consent of the pregnant woman. The determination of sex is fully prohibited in view of Section 6. An elaborate procedure has been specified in the PC&PNDT Act for regulation on pre-natal diagnostic techniques and the manner in which, they shall have to be conducted, the intent and purpose being to prevent its misuse in the sex determination. Section 17 deals with the AA and functions an AA is required to discharge stands clearly mentioned in sub-section (4) thereof. The powers of the AA in certain matters have been indicated in Section 17(A) which is with regard to summoning of persons in possession of any information relating to violation of the provisions of the PC&PNDT Act; production of documents or material objects; issuance of search warrant for any place suspected to be indulged in sex

selection techniques or pre-natal sex determination etc. Chapter VII of the PC&PNDT Act deals with the offences and penalties. A reverse presumption is attached in view of Section 24 of the PC&PNDT Act as to absence of consent of the pregnant woman unless contrary is proved while following the pre-natal diagnostic techniques for the purposes of the said Act. The offences under the PC&PNDT Act are cognizable in nature as per Section 27. In fact, Section 28 specifies that no court shall take cognizance of any offence except on a complaint filed by the AA or such other officer duly authorized by the AA or the appropriate Government. As already indicated herein before, the ground of challenge is that the prosecutions have been initiated at the instance of the CDMO/ADMO/EM other than the AA which needs a threadbare discussion with reference to the provisions of the PC&PNDT Act.

4. It is contended on behalf of the petitioners that the actions taken under the PC&PNDT Act is not by the AA but instead by the CDMO/ADMO/EM are not as per and in accordance with Section 28 which mandates that a criminal prosecution shall have to be through a complaint filed by the AA. In some cases, it is made to suggest that CDMOs have filed the complaints being authorized by the respective DMs, who have been appointed as the AAs for each district within the State by the OM superseding earlier notification No.3058 dated 24th January, 2002 of the Health and Family Welfare Department of the Government of Orissa, whereby, CDMO of a district was the AA under the PC&PNDT Act. For better appreciation, the aforesaid OM is reproduced herein below.

“Government of Orissa
Health and Family Welfare Department
No.19077/H. Dt.27/7/07

OFFICE MEMORANDUM

In pursuance of the Office Memorandum vide
No.24026/iii/06-PNDT dtd.12th Feb. 2007 of Ministry of
Health and Family Welfare, Government of India the District

Magistrate had been declared as District Appropriate Authority under Section 17(2) of the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 amended in 2002. Accordingly, the State Government do hereby appoint the Appropriate Authority for the District and Sub-District (Sub-Division) as follows for smooth enforcement of the provision under the said Act.

1. District Appropriate Authority

The District Magistrate of each district is hereby appointed as District Appropriate Authority for the District under the above Act.

He may nominate an Executive Magistrate of the District as his/her nominee to assist him/her in monitoring the implementation of the PC&PNDT Act as deemed necessary.

2. Sub-District Appropriate Authority

The Sub-Divisional Magistrate (Sub-Collector) of each Sub-Division is hereby appointed as Appropriate Authority for the Sub-District (Sub-Division) for smooth implementation of the provision under this Act.

The Notification of this Department vide No.3058 dtd.24.1.02 appointing the CDMO of each district as the Appropriate Authority under the above Act is hereby superseded.

Principal Secretary to Government”

5. From the provisions of the PC&PNDT Act, it is made to appear that the offences under the said Act are triable by a court upon a complaint being filed by the AA or any such official authorized by the Government or the AA in that behalf. The primary and common ground of challenge is that the petitioners have been prosecuted without valid complaints for the fact that they have not been filed by the AAs. It is urged that the complaints were filed by the CDMO/ADMO/EM instead of the DMs and

hence, the learned courts below committed a fundamental error in entertaining the same being oblivious of Sections 17 read 28 of the PC&PNDT Act.

6. This Court is fully conscious of the law vis-a-vis exercise of inherent jurisdiction under Section 482 Cr.P.C. If there is a wrong or illegality apparent on the face of record, or there appears a legal or jurisdictional error, or to prevent abuse of process of law, or to secure the ends of justice, the Court may exercise such power to set things right which however depends on the facts and circumstances of a particular case. The celebrated judgment of the Supreme Court in **State of Haryana and others Vrs. Ch. Bhajan Lal and others** reported in AIR 1992 SC 604 is a legal classicus on the point which outlined the broad parameters for exercising the inherent jurisdiction under Section 482 Cr.P.C. and writ powers under Article 226 of the Constitution of India. In other words, the Apex Court in the decision (supra) laid down the principles for the purpose of exercising such jurisdiction while dealing with quashing of criminal proceedings. In the aforesaid case, apart from other situations described, it has been held and observed that where if there is an express legal bar engrafted in any of the provisions of the Cr.P.C. or the Special Act to the institution and continuance of the proceedings, jurisdiction by the High Court could be exercised.

7. Turning to the PC&PNDT Act and its provisions, Section 28 begins with a non-obstante clause and goes on to say that cognizance of the offences has to be based on a complaint by the AA or authorized officer. On a conjoint reading of Section 17(3)(a)(b) and Section 28(1)(a) of the PC&PNDT Act makes it is profoundly clear that a complaint is to be filed by the AA or any such officer, who has been so authorized. It is submitted at the Bar that in view of the above provisions, it has to be the AA to file the complaint in view of the OM dated 27th July, 2007 which allows him to do so besides to nominate an EM for monitoring the implementation of the provisions of the PC&PNDT Act. It is contended on behalf of the petitioners that a procedure is prescribed under the PC&PNDT Act which is to be scrupulously followed without any

departure. In this regard, a judgment of the Supreme Court in the case of **Dipak Babaria and another Vrs. State of Gujarat and another** reported in (2014) 3 SCC 502 is relied upon to contend that when a statute provides for a thing to be done in a particular manner, it has to be accomplished in that manner only. The contention is that if a statute confers a power and lays down a procedure for exercise of such power, it has to be exercised in the manner so prescribed and in the present case, since the complaints have been filed not by the AAs but by other officials, the learned courts below should not have entertained it. In support of such contention, a judgment of the Bombay High Court in the case of **Dr. Paayal Vrs. State of Maharashtra and others** (Criminal Writ Petition No.250 of 2015) disposed of on 16th October, 2015 is cited, wherein, it is held that when the complaint has not been filed by the AA as per the PC&PNDT Act, the court cannot take cognizance of the offence in view of Section 28 of the Act and in such eventuality, the proceeding shall have to be terminated while making a reference to Article 21 of the Constitution of India which mandates that a person shall not be deprived of his life or liberty except according to the procedure established by law. A decision of the M.P. High Court in the case of **Mukesh Rathore Vrs. State of M.P. and another** decided in MCC No.3154 of 2020 and disposed of on 26th June, 2020 is also placed reliance, wherein, it is held that AA as defined under the PC&PNDT Act shall have to initiate the action and no one else or by any such officer duly authorized by the Government or the AA. As to the exercise of authority by the AA and maintainability of the prosecution under the PC&PNDT Act, a decision of the Supreme Court in the case of **M.P. Vrs. Manvinder Singh Gill** decided in SLP (Criminal No.2226 of 2014) dated 3rd August, 2015 is also referred to while contending that the Court shall have to take cognizance according to the provisions of the PC&PNDT Act and in the manner prescribed and not otherwise. In the said case, the challenge was to the notification of the State Government to delegate powers to initiate prosecution for offences under the Prevention of Food Adulteration Act, 1954. Herein essentially the contention is that the prosecutions have not

been set in motion through complaints filed by the AAs and therefore, they are to be terminated since it touches upon and hits the jurisdiction to entertain the same. The argument is that only if the complaint is a valid one and as per the PC&PNDT Act, only then, it can be maintained by a court and not otherwise.

8. On the other hand, the learned AGA strenuously urged that the complaints have been filed at the behest of the AAs and therefore, instead of adhering to the technicality rather considering the spirit of the law and its legislative intent, the proceedings should not be quashed. In that regard, a decision of the Supreme Court in the case of **Federation of Obstetrics and Gynaecological Societies of India (FOGSI) Vrs. Union of India** reported in (2019) 6 SCC 283 is relied upon. In the aforesaid case, the Apex Court was seized of a matter where some of the provisions of the PC&PNDT Act were challenged as *ultra vires* which was repelled and rejected with a conclusion that they have been incorporated to give effect to the aim and objective of the statute. One more judgment in the matter of **State of Orissa Vrs. Mamata Sahoo and others** reported in (2019) 7 SCC 486 is cited by the learned AGA, wherein, the Apex Court declined to interfere with a proceeding which was challenged on the ground that the inspection under the PC&PNDT Act was conducted by an EM and not the AA. The sum and substance of the argument by the learned AGA is that even though, in the cases at hand, the complaints have not been filed by the AAs but having regard to the intent and purport of the PC&PNDT Act and its legislative design, the proceedings vis-à-vis the petitioners should not be terminated on such ground rather the effort must be to ensure to penalize the perpetrators of the crime. In the decision of **FOGSI** (supra), the Supreme Court examined validity of some provisions of the PC&PNDT Act and finally dismissed it with a conclusion that they are indeed *intra vires*. The learned AGA contended that the PC&PNDT Act has been incorporated with a purpose and the same was analyzed by the Apex Court in the aforesaid case, wherein, it has been concluded that the real aim and objective of the statute is to prevent the menace of female foeticide.

9. The relevant excerpt of the decision in **FOGSI** is reproduced herein below:

“26. Before we dilate upon various aspects, we take note of provisions of the Act. The Act was introduced by Parliament with the following Statement of Objects and Reasons:

“STATEMENT OF OBJECTS AND REASONS It is proposed to prohibit prenatal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. A legislation is required to regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act.

The Bill, inter alia, provides for:—

- (i) prohibition of the misuse of prenatal diagnostic techniques for determination of sex of foetus, leading to female foeticide;
- (ii) prohibition of advertisement of prenatal diagnostic techniques for detection or determination of sex;
- (iii) permission and regulation of the use of prenatal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders;
- (iv) permitting the use of such techniques only under certain conditions by the registered institutions; and
- (v) punishment for violation of the provisions of the proposed legislation.

2. The Bills seeks to achieve the above objectives.” The concern of the Legislature was that the female child is not welcomed with open arms in most of Indian families and the diagnostic technique is being used to commit female foeticide.”

The Apex Court in the aforesaid decision examined the constitutional validity of the provisions of the PC&PNDT Act with reference to Part III of the Constitution of India and observed as under:

“71. The Act intends to prevent mischief of female foeticide and the declining sex ratio in India. When such is the objective of the Act and the Rules and mischief which it seeks to prevent, violation of the rights under Part III of the Constitution is not found. This Court in *Hamdard Dawakhana v. The Union of India* AIR 1960 SC 554 has laid down the following principles:

“8. Therefore, when the constitutionality of an enactment is challenged on the ground of violation

of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy; *Bengal Immunity Co. Ltd. v. State of Bihar*, 1955 2 SCR 603 at pp. 632, 633 (S) AIR 1955 SC 661 at p.674); *R.M.D. Chamarbaughwala Union of India*, 1957 SCR 930 at p. 936: (S) AIR 1957 SC 628 at p.631); *Mahant Moti Das v. S.P. Sahi*, AIR 1959 SC 942 at p. 948.

9. Another principle which has to borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. *Charanjit Lal v. Union of India*, 1950 SCR 869: (AIR 1951 SC 41); *State of Bombay v. F.N. Bulsara*, 1951 SCR 682 at p. 708: (AIR 1951 SC 318 at p. 326); AIR 1959 SC 942.”

72. The mischief sought to be remedied is grave and the effort is being made to meet the challenge to prevent the birth of the girl child. Whether Society should give preference to male child is a matter of grave concern. The same is violative of Article 39A and ignores the mandate of Article 51A(e) which casts a duty on citizens to renounce practices derogatory to the dignity of women. When sex selection is prohibited by virtue of provisions of Section 6, the other interwoven provisions in the Acts to prevent the mischief obviously their constitutionality is to be upheld.”

10. According to the Apex Court in the **FOGSI** case, the PC&PNDT Act is a comprehensive social legislation having been conceived to avoid the consequences of skewed sex ratio in India which could propel to serious incidents of violence against women. The Court is well aware of the

significance of such a statute which is enacted to obviate illegal acts of pre-natal diagnostic procedures being adopted for the purpose of ascertaining the sex of an unborn child. Against the above backdrop, the Court is to appreciate whether the plea of the petitioners challenging the prosecutions on the ground of invalid complaints should be accepted. At the same time, the ratio of the judgment in **Dipak Babaria**(supra) is to be borne in mind since if a statute has conferred a procedure to do an act, it necessarily bars the doing of such act in any other manner than the one specified. Thus, the pertinent question is, whether, the CDMO/ADMO/EM could have filed the complaints and the courts concerned should have entertained the same for having not been filed by the DMs?

11. As per Section 17(4)(e) of the PC&PNDT Act, the AA shall have the authority to take appropriate legal action against the use of any sex selection technique by any person at any place either *suo motu* or being brought to notice and also to initiate independent investigation in such matters. So it is the AA who is to initiate the prosecution after taking up investigation. In other words, the AA is to file the complaint only upon which the court shall take cognizance of the offences. Section 28 (1) of the PC&PNDT Act clearly mandates that a court shall not take cognizance of any offence except on a complaint being filed by the AA or by any officer authorized by him or the appropriate Government. Whether the AA can delegate the power to any other officer for filing of a complaint? The reply to the above question is not in the affirmative. The PC&PNDT Act does not provide any such authority for the AA to delegate the responsibility. However, the AA can authorize an officer for the aforesaid purpose which is evident from Section 28(1)(a) of the Act. In so far as the OM of the State Government dated 27th July, 2007 is concerned, the AA may nominate an EM of the district as his nominee to assist him in monitoring implementation of the PC&PNDT Act. The petitioners contend that for a limited purpose, an EM is nominated so as to render assistance to the AA, who is primarily responsible for the execution and overall implementation of the provisions of the PC&PNDT Act. In other words, according to the petitioners, an EM if nominated by the AA shall

be responsible for offering his assistance and therefore, cannot and shall not be eligible to register a complaint which has to be done by the AA only. In the decision of **Mamata Sahoo** (supra), the Apex Court held that when an EM inspected a clinic, the proceeding has not been vitiated as he was authorized for the said purpose. The above decision has been relied upon by the learned AGA while contending that the filing of the complaints by the CDMO/ADMO/EM since a part of the implementation process notwithstanding the fact that the DMs have not filed such complaints, in view of the said authority of the Apex Court, the proceedings cannot be held as bad in law. But the PC&PNDT Act is very clear which speaks of the manner in which the complaints are to be filed and it must have to be by the AA which is conspicuously evident from Section 28(1) of the said Act. If the CDMO of a district files a complaint, he cannot file it not being the authority under the PC&PNDT Act. In some of the cases, it has been found that instead of a complaint being filed, FIR has been registered. For taking of cognizance of offences punishable under the PC&PNDT Act, no doubt an investigation may be undertaken by the police but for initiating a criminal prosecution, it shall have to be through a complaint filed by the AA. From the aforesaid discussion, the conclusion which is drawn by the Court stands summarized herein below:

(i) AA is the authority who is to file the complaint as per Section 17(4)(e) read with Section 28 of the PC&PNDT Act read with the OM of the State Government dated 27th July, 2007 and no other official;

(ii) In view of the OM, DM is the AA in respect of a district and SDM (Sub-Collector) shall be the authority vis-à-vis Sub-District (Sub-Division) who shall file the complaint under the PC&PNDT Act;

(iii) For the purpose of rendering assistance, an EM may be nominated by the DM for monitoring the implementation of the PC&PNDT Act which is by virtue of the OM of 2007;

(iv)The authority to file the complaint cannot be shifted by the AA, inasmuch as, there is no such provision in the PC&PNDT Act for delegation of power for the said purpose;

(v)A complaint cannot be filed by any other official as a substitute of the AA or in the guise of or on behalf of the AA in derogation to the OM;

(vi)For the purpose of inspection, investigation etc. any other officer may be engaged by the orders of the DM in accordance with the OM which is for assisting the authority in due implementation of the PC&PNDT Act and not beyond;

(vii)Any such complaint filed other than by the AA cannot be held as a valid prosecution in accordance with law;

(viii) The OM is issued by the State Government whereby the DM/SDM is to file the complaint and not the CDMO anymore after supersession of the notification of 2002 and if at all, he is treated as an EM, he can only be said to render help and assistance to the DM and not to usurp the jurisdiction of the AA.

12. With the above conclusion, the Court proceeds to decide the fate of the cases which is described herein below:

(i) CRLMC No.4249 of 2009, CRLMC No.682 of 2017: In both the cases, chargesheets have been filed under Sections 312,315,316,109 and 34 IPC and Sections 23 and 25 of the PC&PNDT Act, Section 5(3)(4) of Medical Termination of Pregnancy Act, 1971 and Section 16(1) of the Orissa Clinical Establishment Act, 1990. In so far as offences under the PC&PNDT Act are concerned, though investigation is permitted being cognizable in nature, however, the complaints were needed to be filed by the DMs which is the statutory mandate and therefore, the courts below could not have taken cognizance of the offences under Sections 23 and 25 thereof on the strength of the chargesheets, whereas, taking cognizance of

offences under the IPC and other Special Acts is tenable in law and hence, it calls for no interference;

(ii) CRLMC No.172 of 2017, CRLMC No.3729 of 2012, CRLMC No.3251 of 2012 and CRLMC No.2086 of 2012: In all the above cases, since the complaints have been filed by the CDMOs and consequential orders passed, the proceedings for offences under Sections 23 and 25 of the PC&PNDT Act cannot be sustained for not being filed by the DMs;

(iii) CRLMC No.1548 of 2017, CRLMC No.1547 of 2017, CRLMC No.1733 of 2015 and CRLMC No.1546 of 2017: In the aforesaid cases, the ADMOs have filed the complaints and not the concerned DMs and therefore, the proceedings for the offences under Sections 23 and 25 of the PC&PNDT Act are to be held as not maintainable in law;

(iv) CRLMC No.904 of 2013: In the present case, the EM has initiated the prosecution under Sections 23 and 25 of the PC&PNDT Act by filling the complaint and therefore, the same is legally untenable.

13. The conclusion in respect of CRLMC No.4249 of 2009 and CRLMC No.682 of 2017 is in agreement with an earlier decision of this Court in CRLMC No.2082 of 2010 in case of **Ramesh Chandra Naik and others Vrs. State of Odisha** decided and disposed of on 3rd April, 2018, wherein, it has been concluded that Section 27 of the PC&PNDT Act stipulates that every offence under the said Act being cognizable and Section 154 Cr.P.C. since provides that every information relating to the commission of cognizable offence has to be registered as an FIR and as per Section 156 Cr.P.C. when an OIC of the P.S. can investigate any cognizable case committed within its local jurisdiction even without the orders of a Magistrate, however, in view of the special provision in the PC&PNDT Act, lodging of an FIR and submission of chargesheet for such offences is impermissible as any such cognizance shall have to be based on a complaint moved by the authority empowered to do so. Hence, therefore, in both the cases since the cognizance of the offences under Sections 23 and 25 of the PC&PNDT Act has been taken on the basis of chargesheets and not on the strength of complaints as envisaged in Section

28 of the PC&PNDT Act, the Court has therefore held that the impugned proceedings cannot stand and shall have to be terminated. In the said decision, the concerned authority was granted the liberty to file complaint before the appropriate court. However, in the present case, the Court does not wish and is not inclined since no real and worthy purpose would be served by granting such liberty after so long. With regard to the challenge as to the constitution of the AA by the State Government as per the OM not to be consistent with Section 17(3) of the PC&PNDT Act, it has remained so and survived till now and though raised by the learned counsel appearing for some of the parties but the Court is of the view that said question should be left open for determination in such other proceedings at appropriate point of time.

14. Assimilating the points, the Court observes that the State Government declared the AAs for the district and sub-division under the OM dated 27th July, 2007 for exercising jurisdiction under Section 17(2) of the PC&PNDT Act amended in 2002. If a CDMO/ADMO is treated as an EM, then also in the considered view of the Court, they shall have a limited role to play so as only to assist the DM but not to substitute the latter as the AA for the purpose of filing complaint under the PC&PNDT Act. The DM/SDM is only to initiate legal action by filling complaint against persons who are directly or indirectly involved in sex determination. Though the OM authorizes the EM to have the role of assisting the DM, however, by no stretch of imagination, he can be permitted to file the complaint which shall have to be by the DM at the district level and SDM/Sub-Collector at the level of Sub-Division. So, at the cost of repetition, it has to be held that in all the above cases, the procedure which has been laid down and the mechanism in place as stipulated in the PC&PNDT Act read with the OM was not followed, rather, the officials who did not have the authority to file complaints for the offences punishable under Sections 23 and 25 of the said Act initiated the prosecutions which cannot be sustained in law. To reiterate and while referring to the decision of the Apex Court in the case of **Dipak Babaria** (supra) and applying its ratio, the Court reaches at a logical conclusion that a complaint shall have to be

filed by the DM and the procedure so prescribed in the PC&PNDT Act must be followed in view of the rule of interpretation '*expressio unius est exclusio alterius*' which stipulates that when something is mentioned expressly in a statute, it leads to the presumption that the things not mentioned are excluded. Thus, the Court is of the final opinion that even assuming that the CDMOs/ADMOs have been nominated as the EMs, they could not have filed the complaints. Any such authorization in favour of the CDMOs/ADMOs by the DMs shall have to be read in terms of the OM which only nominates them as the EMs to assist the respective DMs in the monitoring and implementation of the PC&PNDT Act and not to cross the line especially when the OM replaced the earlier notification of 2002 which had appointed the CDMOs as the AA.

15. The end result is restated:

(i)CRLMC No.4249 of 2009 and CRLMC No.682 of 2017: Both the petitions stand allowed to the extent indicated above. As a logical sequitur, the orders of cognizance vis-à-vis offences under Sections 23 and 25 of the PC&PNDT Act are hereby set aside. But, in so far as other offences under the IPC and Special Acts are concerned, the proceedings are to continue wherein the petitioners shall have the opportunity to defend during the enquiry and trial since it would require examination of the materials to find out existence of a prima facie case; and

(ii)CRLMC No.172 of 2017, CRLMC No.3729 of 2012, CRLMC No.3251 of 2012, CRLMC No.1548 of 2017, CRLMC No.1547 of 2017, CRLMC No.1733 of 2015, CRLMC No.2086 of 2012, CRLMC No.904 of 2013 and CRLMC No.1546 of 2017: The aforesaid petitions stand allowed. As a necessary corollary, the orders of cognizance, framing of charge as well as the criminal proceedings in the whole pending before the respective courts are hereby quashed.

16. Accordingly, it is ordered.

(R.K. Pattanaik)
Judge