

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 3751 of 2017

Ashadullah Biswas @ Asadulla Biswas

Versus

The State of West Bengal and Another

For the Petitioner : Mr. Sobhendu Sekhar Roy, Adv.
Mr. Amarendra Chakraborty, Adv.
Mr. Dipayan Kundu, Adv.

For the State : Mr. Debasish Roy, Ld. P.P.
Mr. Ananda Keshari, Adv.

Heard on : 06.11.2024

Judgment on : 13.12.2024

Ajay Kumar Gupta, J:

1. Petitioner/accused has filed this Criminal Revisional application seeking quashing of the proceedings being G.R. Case No. 4103 of 2016 arising out of Kaliachak Police Station Case No. 641 of 2016 dated 24.09.2016 under Sections 23/25 of the Pre Conception and Pre Natal Diagnostic Techniques Act, 1994 as well as all Orders passed therein, including Order dated 13.09.2017 passed by the Learned Chief Judicial Magistrate, Malda, thereby, *inter alia*, rejected the prayer for discharge of the petitioner and fixed a date for framing charges.

2. The factual matrix of the instant case leading to filing of this Criminal Revisional application by the petitioner is as under:

2a. The petitioner is a businessman, who established a nursing home named as “Kaliachak Nursing Home” and operates an x-ray and pathological clinic named and styled as “Kaliachak X-Ray and Pathology Clinic” which was founded in the year 1992. The said clinic is duly registered, licensed and authorised under the relevant statutes to conduct medical investigations

and pathology services. The clinic is also registered with the Kaliachak Gram Panchayat.

2b. The clinic was duly registered under the West Bengal Clinical Establishments Act, 1950 and a licence was issued being Licence No. 4A dated 11.12.2014 by the Chief Medical Officer of Health, Malda. The licence has been renewed periodically. The petitioner had applied for registration and a licence for conducting ultrasound testing in the said clinic as a specific statutory registration and licence are required in terms of the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994 (hereinafter referred to as the 'PC and PNDT Act') before the Appropriate Authority.

2c. The registration for the Clinic was duly issued by the Appropriate Authority for conducting ultrasound pre-natal diagnostic procedures. Accordingly, petitioner's clinic had all the necessary licences. The Clinic had applied to Philips India for purchase of a state-of-the-art Ultra Sonography machine. However, until the new machine was supplied and paperwork was completed, the clinic had temporarily obtained an old and

used USG machine, model EMP 2000, to conduct pre-natal diagnostic test in the form of ultra sound examination, as soon as the registration certificate was granted. Unfortunately, the machine did not function properly and was never used.

2d. A machine was supplied to the petitioner's clinic being a USB system with model number HD5 and serial number CI56150487 under invoice number 932223568 dated 11.01.2016. All communications regarding this matter were also made to the Chief Medical Officer, Health, Malda and procedures were carried out in accordance with the statutory norms.

2e. After completing all the appropriate formalities, the Clinic began using the ultrasound system for diagnostic procedures ensuring that all actions were in full compliance with the prevailing rules and regulations and maintaining necessary records. But, with intention to harass the petitioner as earlier, the State authorities had targeted the petitioner's clinic with an intention to put pressure on the petitioner for their illegal gain.

2f. Once the new Philips machine had been installed and was ready for commission, an inspection was scheduled to be done for the purpose of verifying the machine, the licence and the certification by the competent authorities. But, unfortunately, a G.R. Case No. 4103 of 2016 arising out of Kaliachak Police Station Case No. 641 of 2016 dated 24.09.2016 under Sections 23/25 of the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994 was registered for investigation on the basis of written complaint by one Dr. Jyoti Biswas, District Maternity & Child Health Officer and District Nodal Officer, Malda under the PC & PNDT Act, 1994 alleging, *inter alia*, therein that:

“That an unauthorised portable Ultra Sonography Machine (USG) (Model No. EMP S/N No. 27181773) was found in the USG room of the Kaliachak X-Ray and Pathological Clinic at Kaliachak Malda by the District Inspection and Monitoring Team consisting of Dr. Nilanjan Paty, Deputy Chief Medical of Health, Malda and Sri Indronil Biswas, District Coordinator, CINI on 24.09.2016 at 2 pm, in gross violation of the PC & PNDT Act, 1994”

2g. The contention of the petitioner is that the case is entirely false and fabricated for the simple reason that law does not regulate a particular machine but rather the right of a particular clinic to conduct tests. Whether the clinic has existence of one machine exists or two machines at the clinic are not distinguished under the applicable laws and rules. Therefore, the question raised by the Inspection Team regarding alleged presence of old machine lying at the clinic cannot have any significance in terms of law as it is admitted position that the clinic was properly licensed under the PC and PNDT Act, 1994 and was entitled to carry on ultrasound testing with an USG machine. There is no restriction therein as to the make, model and/or type of the machine to be used. Although, the prosecution case against the petitioner is based solely upon allegation that the machine in question was kept at the clinic and was unauthorised. Without considering these facts, the Investigating Officer purportedly submitted Charge Sheet No. 227 of 2017 dated 31.03.2017 under Sections 23/25 of the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994 against the petitioner. The charge sheet fails to disclose the sufficient ingredients of all the allegations against the present

petitioner. As such, no case has been made out against the alleged offences.

2h. The petitioner was arrested and remanded into custody and subsequently, petitioner obtained bail and filed a discharge petition presenting the true state of affairs before the Learned Magistrate but the Learned Magistrate dismissed the petitioner's prayer for discharge mechanically and without applying statutory provision as stipulated in the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994. Hence, the present Criminal Revisional application.

SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Learned counsel appearing on behalf of the Petitioner filed written notes of argument and submitted that after due inspection and inquiry conducted prior to issuance of certificate on 12.01.2015, the petitioner was running the clinic in full compliance with law. There was no question of any violation, as such issuance of certificate itself demonstrates that all were in order at the clinic. The subsequent purported discovery of another machine at the clinic which gave rise to this case cannot

have any relevance to an offence as the certificate had already been issued. As such, the petitioner gravely prejudiced with the continuation of the instant proceedings which is sheer travesty and miscarriage of justice. The rejection of discharge petition was not in accordance with law. Due to such rejection, the petitioner is suffering irreparable loss, prejudice and injury.

3a. It was further submitted that even though alleged offences are cognizable but no Court can take cognizance of such offences under the Act except upon written complaint made by the Appropriate Authority concerned or any officer authorised in this behalf by the Central Government or the State Government, as the case may be, in terms of Section 28(1)(a) of the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994. So, the cognizance of offence, taken by the Learned Magistrate vide order dated 11.04.2017 only on the basis of charge sheet filed by the Investigation Officer, is incomplete, breach of mandatory and statutory provisions contained in Section 28(1)(a) of the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994. Therefore, all further proceedings pursuant thereto are bad, illegal and without jurisdiction and

abuse of process of Court and, accordingly, the same is liable to be quashed for the ends of justice.

3b. It was further submitted that the police officer has not been authorised by the Government to file a complaint before any Court in connection with the offences under the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994 and even if police officer files such complaint, without any authorisation, the Court cannot take cognizance of such offence in view of the statutory restriction as contained in Section 28(1)(a) of the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994. To support of his contention, the learned counsel appearing on behalf of the petitioner has placed reliance of judgments as under: -

i. Ranjit Kumar Bag Vs. State of West Bengal¹;

ii. Jeewan Kumar Raut & Anr. Vs. Central Bureau of Investigation².

¹ (2006) 1 C.G. L.R. (Cal) 334;

² (2009) 7 SCC 526;

3c. It was further submitted that the cognizance was illegally taken by the Learned Court below only on the basis of charge sheet and not on the basis of complaint in terms of Section 28(1)(a) of the Act. So, the legal maxim “Specialia derogant generalibus” meaning thereby “Special Provisions derogate from general Provision” squarely applies in the present case. The provisions of the Special Act have been observed in complete breach thereof resulting thereby in causing a great prejudice to the petitioner. To bolster his submission, the learned counsel has placed reliance of a judgment of Hon’ble Kerala High Court passed in the case ***Moosakoya Vs. State of Kerala***³.

4. None represented the Opposite Party No. 2 in spite of proper service of notice and no accommodation was sought for at the time of call. Accordingly, arguments were closed in her absence.

³ 2008 CLJ (2388).

SUBMISSION ON BEHALF OF THE STATE:-

5. Learned counsel appearing on behalf of the State submitted that the complainant being District Maternity & Child Health Officer was authorised person as such, there is no need to comply Section 28(1)(a) of the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994. The cognizance was taken by the Learned Court below after filing charge sheet, as all cases fall under the said Act is cognizable offence under Section 27 of the Act. During investigation, sufficient materials were collected against the present petitioner. Some relevant documents were also collected during the investigation to establish prima facie case against the petitioner. Therefore, the instant Criminal Revisional application is liable to be dismissed.

DISCUSSIONS AND CONCLUSION OF THIS COURT:

6. Heard arguments advanced by the parties and upon perusal of the record and legal provisions as stipulated in the Pre-Conception and Pre Natal-Diagnostic Techniques Act, 1994 (the said Act), this Court is of the view that as per Section 28 of the said Act, a Magistrate is prohibited from taking cognizance of an offence punishable under this Act except on a complaint

made by “Any Officer Authorised” or “Appropriate Authority concerned” in this regard by the Central Government or State Government, as the case may be or by “the Appropriate Authority”. Such complaint must be before the Magistrate of the First Class and not before the Police authority.

7. In the present case, a FIR was registered being Kaliachak P.S. Case No. 641/2016 dated 24.09.2016 under Sections 23/25 of the said Act and an investigation was initiated against the Petitioner based on a complaint lodged by one Dr. Jyoti Biswas, District Maternity & Child Health Officer and District Nodal Officer, Malda under the PC & PNDT Act, 1994 alleging, inter alia, that an unauthorised portable Ultra Sonography Machine (USG) (Model No. EMP S/N No. 27181773) was found in the USG room of the Kaliachak X-Ray and Pathological Clinic at Kaliachak, Malda by the District Inspection and Monitoring Team consisting of Dr. Nilanjan Paty, Deputy Chief Medical of Health, Malda and Sri Indronil Biswas, District Coordinator, CINI on 24.09.2016 at 2 pm, in gross violation of the PC & PNDT Act, 1994.

8. After culmination of the investigation, a charge sheet has been filed being Charge Sheet No. 227/17 dated 31.03.2017 under Sections 23/25 of the said Act against the Petitioner herein.

9. Cognizance has been taken by the Learned Magistrate after perusal of the Charge sheet against the Petitioner though it was entirely contrary to the law since there is a specific bar on taking cognizance under Section 28 of the said Act. As per this provision, the cognizance cannot be taken on the basis of a charge sheet submitted by the police.

10. Specific provision as laid down in the Section 28 of the said Act reads as follows:

“28. Cognizance of offences.—

(1) No court shall take cognizance of an offence under this Act except on a complaint made by—

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

(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.

Explanation.—For the purpose of this clause, “person” includes a social organisation.

(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.”

11. Upon careful perusal of the aforesaid provision as stipulated in the said Act, it is clear that cognizance of an offence may be taken by the Court under the Provision of the said Act on a complaint made by “any Officer Authorised” or “Appropriate Authority concerned” in this behalf by the Central Government or State Government, as the case may be or by “the Appropriate Authority”.

Secondly, it is also made clear that a person (includes a social organisation), who has given notice not less than fifteen days in the manner prescribed, to the Appropriate Authority, about the alleged offence and their intention to make a complaint to the court, may proceed with filling the complaint and,

Thirdly, where a complaint has been made under clause (b) of the 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 that person.

12. Section 28 of the Act begins with non-obstante clause putting check on the Court while taking cognizance of the offence under the said Act until the complaint is made by the “Appropriate Authority concerned” or “any Officer Authorised” or “Appropriate Authority”.

13. In the present case, a written complaint was lodged before the Officer-in-charge, Kaliachak Police Station, Kaliachak, Malda. However, as per the provisions of the Act, it is

responsibility of any Officer Authorised or the Appropriate Authority or Appropriate Authority concerned and should have approached the Court of First Class Magistrate by making a petition of complaint or by the mode of a complaint case as prescribed under Section 200 of the CrPC, then only the Court could take cognizance after being fully satisfied.

14. As per the procedure of the complaint case prescribed under the Criminal Procedure Code, first of all, the Court of law will record the evidence of the complainant and other supporting witnesses and if the Court is satisfied that a prima facie offence is made out, then the summons may be issued against the accused persons for the appearance i.e. the complainant has to satisfy the Court that a prima facie offence is made out under the PC-PNDT Act against the accused persons.

15. During the deposition of the pre-summoning evidence, the proposed accused has no locus standi or the accused is not expected to attend the Court proceedings before the issue of process or summons against him.

16. After the appearance of the accused, the complainant and supporting witnesses have to adduce their evidence or testimony in front of the accused person and the accused person may exercise his right to cross-examine the complainant and all such witnesses who are deposing against him.

17. Therefore, cognizance, taken by the Learned Magistrate on the basis of a Charge Sheet, submitted by the Police, is contrary to the Section 28 of the said Act.

18. In addition, the State failed to produce any relevant document to show Dr. Jyoti Biswas, District Maternity & Child Health Officer and District Nodal Officer, Malda was an authorised person under the PC & PNDT Act, 1994.

19. Registration of crime and investigation by the police are illegal since they are not competent and they have no role to play in the investigation. There is specific bar to lodge FIR as per provisions of Section 28 of the said Act.

20. Consequently, **CRR No. 3751 of 2017** is **allowed**.

Connected applications, if any, are also, thus, disposed of.

21. Consequently, the proceedings being G.R. Case No. 4103 of 2016 arising out of Kaliachak Police Station Case No. 641 of 2016 dated 24.09.2016 under Sections 23/25 of the Pre Conception and Pre Natal Diagnostic Techniques Act, 1994 including Charge Sheet No. 227 of 2017 dated 31.03.2017 is hereby quashed insofar as the Petitioner is concerned and all Orders passed therein, including Order dated 13.09.2017 passed by the Learned Chief Judicial Magistrate, Malda, thereby, *inter alia*, rejected the prayer for discharge of the petitioner and fixed a date for framing charges are also, thus, set aside. However, it is open to the appropriate authority to take action as permissible under the law.

22. Let a copy of this Judgment be sent to the Learned Trial Court for information.

23. Interim order, if any, stands vacated.

24. Case Diary, if any, is to be returned to the learned counsel for the State.

25. All parties will act on the server copies of this Judgment uploaded from the official website of this Court.

26. Urgent photostat certified copy of this Judgment, if applied for, is to be given as expeditiously to the parties on compliance of all formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)