

Avinash Kumar Vs. The State of Jharkhand

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Court : Jharkhand

Decided On : Nov-06-2017

Appellant : Avinash Kumar

Respondent : The State of Jharkhand

Judgement :

IN THE HIGH COURT OF JHARKHAND AT RANCHI Cr. M.P. No. 1421 of 2014
---- Avinash Kumar, Son of late Birendra Kumar, Resident of Gumla-Jaspur Road,
P.O. & P.S. Gumla, District-Gumla.Petitioner Versus The State of Jharkhand.
....Opposite Party ---- Coram: HON'BLE MR JUSTICE RONGON
MUKHOPADHYAY ----- For the Petitioner : Mr. Mohit Prakash, Advocate For
the State : Mrs. Laxmi Murmu, APP ----- 12/6/11/2017 Heard the parties. In this
application, petitioner has prayed for quashing the entire criminal proceedings in
connection with Gumla P.S. Case No. 281 of 2013 including the order dated
19.2.2014, passed by the learned Chief Judicial Magistrate, Gumla, whereby and
whereunder cognizance has been taken for the offence under sections 5
(2)6/23/25/29, 18(VIII) Preconception and Pre natal Diagnostic Techniques
Prohibition of Sex Selection Act (Hereinafter referred to as the Act). A complaint
case was instituted wherein it was alleged that Vidyavasini Ultrasound Clinic was
inspected and several irregularities and violation of Diagnostic Technique
(Regulation and Prevention of Misuse Act, 1994) were detected. It has been
alleged that names and designation were not mentioned in the dress worn by the
doctors and technicians, which is in violation of Rule 18 (VIII). It has been alleged

that besides bed of the patient, there was photo of Lord Ganesha and Sai Baba, which is in violation of Section 5(2) of the Act. The register was also not found strictly in accordance with the norms and Form-F was found incomplete and in place of signature of the doctors, proprietor had signed. It has also been alleged that the provision of Section 29 of the Act has been violated. It has been alleged that from Form-F, it could not be detected as also to for what purpose, test was done and it was presumed that some sex determination test was done. Allegation has also been levelled that Dr. Gorakh Prasad had confessed that due to Cataract Problems he takes help of technicians and technician had also confessed that she starts ultra sound machine and does report before arrival of the doctor. The complaint case was sent to the police under section 156(iii) of Cr.P.C. leading to institution of Gumla P.S. Case No. 281 of 2013. Investigation resulted in submission of chargesheet, pursuant to -2- which, by order dated 19.2.2014, cognizance was taken by the learned Chief Judicial Magistrate, Gumla for the offence punishable under sections 5 (2)6/23/25/29, 18(VIII) Preconception and Pre natal Diagnostic Techniques Prohibition of Sex Selection Act. It has been submitted by the learned counsel for the petitioner that the petitioner is the owner of Vidyavasini Ultrasound Clinic, which is run by the Dr. Gorakh Prasad with the help of qualified technicians. Learned counsel further submits that the complainant is not the appropriate authority as he neither has the power to search and seize in terms of Section 30 of the Act nor he is a person authorized to file a complaint. Learned counsel therefore submits that in absence of any notification designating the complainant as an appropriate authority and the same being fundamental defect in institution of the case itself, entire criminal proceeding as against the petitioner deserves to be quashed and set aside. Learned A.P.P. has opposed the prayer made by the learned counsel for the petitioner. When the matter was heard at the initial stage, this Court by order dated 31.7.2017 on consideration of the arguments advanced by the learned counsel for the petitioner had directed the Law Secretary to bring on record the notification, which has been made in terms of Section 17 of the Act. Pursuant to the said order, a notification was sent to this Court by the Law Secretary which is dated 22.8.2017 and from which it appears that the appropriate authority has been constituted in terms of Section 17 (ii) of the Act and it was directed to be published in the official gazette. Since the notification,

which was produced was much after the date on which the incident is alleged to have taken place, learned A.P.P. was directed to bring on record the notification, which would show that the complainant was empowered to institute a complaint under section 28 of the Act. The counter affidavit, which has been filed by the State, reveals merely a letter issued by the Principal Secretary, Department of Health Medical Education & Family Welfare Department dated 6.6.2012 and same cannot be construed to mean a notification as it is merely a communication to the Deputy Commissioner of the districts regarding constitution of the appropriate authority. The letter dated 6.6.2012 was never published in the official gazette and therefore the same is contrary to the -3- provisions as depicted in Section 17 of the Act. An appropriate authority has been defined in Section 2(a) of the Act, which means an appropriate authority appointed under section 17 of the Act. Section 17 of the Act deals with the power of the Central Government and the State Government to appoint one or more appropriate authorities and the same reads as follows:-

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 subsection (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 womens organization; 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 that 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 prenatal determination of sex; (g) To supervise the implementation of the provisions of the Act and rules; (h) To recommend to the CSB 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, obstetricians, 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 technique 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. -4- Sub section (2) of Section 17 clearly envisages that the State Government shall appoint by notification in the official gazette one or more authorities for the whole or part of the State for the purposes of the Act and the members who would constitute an appropriate authority has been depicted therein. One of the functions of the appropriate authority is to investigate the complaints of the breach of the provisions of the Act or the rules made therein and take immediate action. Section 30 of the Act deals with the power to search and seize the records and the same power vests with the appropriate authority. Section 28 of the Act deals with the cognizance of the offences and it 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 subsection (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. Therefore, as per Section 28 of the Act, a complaint can only be made by an appropriate authority or any officer authorized in its behalf by the Central Government, or the State Government or the appropriate authority. Sub Section (b) of Section 28 deals with a person who on giving a notice of not less than 15 days to the appropriate authority of an alleged offence making his intention to file a complaint to the Court. Relevancy of Section 28 and Section 30 of the Act is dependent upon the State Government constituting an appropriate authority. If an appropriate authority is constituted, it can institute a complaint or

direct a person to be authorized to file a complaint and also can search and seizure, if any offence under this Act has been or is being committed. Entire case of the State rests upon the communication dated 6.6.2012, which is not a notification in terms of Section 17(ii) of the Act. The subsequent notification dated 23.8.2017 cannot be given a retrospective effect so as to include within its domain the case of the petitioner. In absence of any appropriate authority having been constituted by the State Government at the time when the complaint was instituted i.e. on 29.6.2013 and since the communication of the -5- Principal, Health Secretary is not a notification, the conclusion which could be arrived at by this Court is that there was no appropriate authority in existence at the time when the complaint case was instituted and therefore the complainant being a person not authorized in terms of the Act could have neither conducted search and seizure nor filed the complaint case. Therefore, in view of what has been stated above, continuation of criminal proceeding as against the petitioner would be an abuse of the process of court and would lead to a miscarriage of justice. Accordingly, this application is allowed and the entire criminal proceedings in connection with Gumla P.S. Case No. 281 of 2013 including the order dated 19.2.2014, passed by the learned Chief Judicial Magistrate, Gumla, whereby and whereunder cognizance has been taken for the offence under sections 5 (2)6/23/25/29, 18(VIII) Preconception and Pre natal Diagnostic Techniques Prohibition of Sex Selection Act, is hereby quashed and set aside. (Rongon Mukhopadhyay, J) Rakesh/

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