

Zaheda and Others Vs. the State of Maharashtra and Others

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Court : Mumbai

Decided On : May-09-2014

Judge : A.I.S. Cheema

Appeal No. : Criminal Writ Petition Nos. 5 of 2013, 21 of 2013, 26 of 2013, 255 of 2013, 627 of 2013, 840 of 2013 & 3966 of 2013

Appellant : Zaheda and Others

Respondent : The State of Maharashtra and Others

Judgement :

1. The present Petition has been filed to quash complaint filed by Appropriate Authority (hereafter referred as "complainant") under the provisions of Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereafter referred as "Act") and the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereafter referred as "Rules").

2. The Petition is **Admitted** and has been heard finally. Learned counsel for the Petitioner as well as learned Public Prosecutor for the Respondents submitted elaborate arguments. With this matter some other similar matters were also argued and Counsel for Petitioners adopted arguments of each other on law points to request for quashment of Criminal Trials against Accused.

3. The case of Petitioner is that Mundadatai Charitable Trust runs Faijan Multi Speciality Hospital, Kaij, Dist-Beed and Petitioner is President of the Trust. Under necessary certificate and permission from Appropriate Authority, sonography centre was being run in the hospital by the Trust. The Petitioner claims that although she is President of the Trust, she is 10th failed house wife and non medico person. Competent and expert medical staff for providing treatment to the patients and radiologist, for operating and conducting sonography, was appointed in the hospital. On 20th June, 2011 Appropriate Authority conducted raid on the hospital. At that time sonography centre was locked and key was with radiologist Dr. Pradip P. Dama. Appropriate Authority fixed seal on the lock of the door and seized records and conducted Panchnama as well as issued notice to the Petitioner, informing the Petitioner that F Forms filled in were incomplete and her explanation was sought. Copy of the Panchnama and show cause notice is filed at Exhibit B. The Petitioner gave explanation. The Appropriate Authority filed private complaint against the Petitioner and also the radiologist Dr. Dama, for violation of Rule 9(4), 10(1) and (1A) as well as Section 29 read with 23(1) and 25 of the Act, before the Judicial Magistrate, First Class, Kaij. The complaint has been registered as R.C.C. No.145 of 2011. According to the Petitioner, she is not concerned with the sonography tests which were being conducted and without considering this, process was issued against the Petitioner. The Petitioner is non medico and not competent to herself operate the machine and to maintain the records. The sonography centre is now closed. Against the order of issue of process, Criminal Revision No.26 of 2012 was filed before the Sessions Court at Ambajogai, but the same was dismissed. Thus, this Petition. According to the Petitioner, she is only President of the Trust which runs the hospital and she is not liable to maintain the record, as qualified radiologist had been appointed. She could not be proceeded against under Section 23 of the Act. Even under Section 26 of the Act, there is no liability if offence is committed without the knowledge of the person or inspite of due diligence by the person. She claims, she exercised due diligence. The Petitioner cannot be held responsible for non filling of columns of Form F. The Petitioner wants the criminal case to be quashed and set aside.

4. The learned counsel for the Petitioner submitted that the Petitioner is President of the Trust which runs the hospital, but she is non medical person and Accused

No.2 arrayed in the complaint, Dr. Dama was appointed as radiologist for conducting the sonography tests. Thus, according to the counsel, the Petitioner was not responsible for the acts of the doctor appointed, who did not keep the appropriate records. The submission was that the revisional Court, on the basis of definition of word "company" under Section 26 of the Act, did not quash the process but the same deserves to be quashed as against the Petitioner.

5. After referring to the various provisions of the Act, reference was made to the case of **Dr. Pratidnya Jayesh Shinde and another vs. Dr. Rameshchandra Kisan Savkare and another, reported in 2014 ALL M.R.(Cri) 681**. In that matter, proceeding was quashed as the complaint was silent as to how responsibility of maintaining records was cast upon the concerned Applicants as were before the Court. Reliance is also placed on the Judgment in the case of **Dr. Alka w/o Anant Gite and another vs. The State of Maharashtra in Criminal Application No.3500 of 2011 decided on 11th May, 2012**. Referring to that Judgment, submission is that inadvertently if a column is blank, it cannot attract offence. Relying on the case of **"Dr. Mrs. Uma Shankar Rachewad vs. Appropriate Authority" Criminal Writ Petition No. 407 of 2011, decided on 19th April, 2012**, it is submitted that writing of "N.A." i.e. Non-Applicable does not amount to incomplete filling of Form. **Judgment in the case of Dr. Ravindra s/o Shivappa Karmudi vs. The State of Maharashtra in Criminal Application No.757 of 2012 decided on 3rd May, 2012**, was referred to submit that F Form was incomplete does not mean criminal offence is there. Reliance was also placed on the **Judgment in the matter of Dr. Tushar Rangrao Patil vs. Appropriate Authority in Criminal Writ Petition No.406 of 2011 decided on 2nd May, 2012**. These are matters decided by learned Single Judge of this Court. The submission is that in those matters also although there were defects in maintaining of Form F, the Petitioners therein were given benefit and the concerned cases against those Petitioners were quashed. Thus it is argued that the Petition needs to be allowed.

6. The Public Prosecutor submitted that perusal of the complaint, filed before the trial Court, shows clear averments that Petitioner is the President of the Trust running the hospital and Accused No.2 Dr. Dama was the radiologist, working in the sonography centre. Para 5 of the complaint mentions that Accused (Petitioner)

herself was examining pregnant ladies by the sonography machine. According to the complaint, F Forms had not been completely filled and the records were seized on 20th June, 2011. The submission of the Public Prosecutor is that notice dated 20th June, 2011 as available in the Petition, was served on the present Petitioner and she had given reply on 22nd June, 2011 where she clearly admitted that in F Forms dash had been put but henceforth the columns will be properly filled in. Thus, according to the Public Prosecutor, there is admission of deficiencies and clear case is made out of non compliance of the Act and Rules and there is no reason to quash the complaint against present Petitioner.

7. As per provisions of Section 4(1) of the Act, no place shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3). Proviso below clause (3) of Section 4 requires maintaining of complete records. If any person uses or causes to be used the place for the purposes mentioned, liability under the Act would get attracted. Under Section 23 of the Act, any person who owns the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and who contravenes any of the provisions of the Act or Rules made thereunder, is liable for punishment. According to the Public Prosecutor, a body corporate or association of individuals are included in the definition of the "company" and when offence punishable under this Act has been committed by the company, every person who at the time the offence was committed was in-charge of and was responsible to the company for the conduct of the business, shall be liable to be proceeded against. According to Public Prosecutor, the Petitioner was President of the Trust which was running the hospital and her liability is clearly on record. Excuse of being non medico person cannot be taken. Stand of offence being committed without knowledge or exercise of due diligence is matter of defence in trial, the Public Prosecutor submitted.

8. After this matter was closed for Judgment, the same was taken up by way of mentioning in between and the learned A.P.P., for information, pointed out order dated 28th January, 2014 passed in Criminal Application No.2065 of 2012 which had been filed by Accused No.2 in the matter, Dr. Dama, vide said Judgment the proceedings as regards the said Accused, have been quashed. The learned

A.P.P. referred to Para 7 of that order, where the observations of the learned Single Judge are that the responsibility of maintaining the requisite record has been put under the Act and Rules on the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic.

The counsel for the Petitioner argued that the proceedings against the radiologist who was Accused No.2, have been quashed and so the same should be quashed against the present Petitioner also who is non medico person.

9. I find that irrespective of the order which has been passed with reference to Accused No.2, the paramount consideration for considering present Petition is, whether under the Act and Rules applicable, liability of present Petitioner is spelt out.

10. To appreciate the controversy, it would be appropriate to keep in view certain provisions of the Act.

Portions relevant from Section 4 of the Act are as under:-

"4. Regulation of prenatal diagnostic techniques. “ On and from the commencement of this Act, -

(1) no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting prenatal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3);

(2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:-

(i) (iv).....

(ii)..... (v).....

(iii)..... (vi).....

(3) no prenatal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely:-

(i) (ii).....

(iii) (iv).....

(v)

Provided that the person conducting ultra sonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and 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 ultra sonography;

(4).....

(5)....."

With reference to the above proviso as regards keeping of records, relevant portions of Rule 9 are as under:-

"9. Maintenance and preservation of records.-

(1) Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic including a Mobile Genetic Clinic, Ultrasound Clinic and Imaging Centres shall maintain a register showing, in serial order, the names and addresses of the men or 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 counselling, procedure or test.

(2) The record to be maintained by every Genetic Counselling Centre, in respect of each woman counseled shall be as specified in Form D.

(3) The record to be maintained by every Genetic Laboratory, in respect of each man or woman subjected to any pre-natal diagnostic procedure/technique/test

shall be as specified in Form E,

(4) The record to be maintained by every Genetic Clinic including a Mobile Genetic Clinic, in respect of each man or woman subjected to any pre-natal diagnostic procedure/technique/test, shall be as specified in Form F.

(5).....

(6).....

(7).....

(8)....."

In Rule 10 conditions for conducting pre-natal diagnostic procedures are prescribed, which includes obtaining written consent as prescribed in Form G in a language the person undergoing the procedure understands.

Section 20 of the Act deals with cancellation or suspension of the registration. Sub-section (1) and (2) deal with giving of notice and reasonable opportunity before suspending or cancelling registration of the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic. Subsection (3) of Section 20 reads as under:-

"(3) Notwithstanding anything contained in sub-sections (1) and (2), if the Appropriate Authority is of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1).?"

11. The learned Public Prosecutor submitted that the cases under the Act are treated as warrant cases instituted otherwise than on police report. It has been argued that major or minor violation in the keeping of records is immaterial.

12. Scheme of the Act and Rules need to be appreciated:

(A). Proviso below Section 4(3) of the Act shows that persons conducting ultra sonography on a pregnant woman are required to keep complete record thereof in the clinic in such manner as may be prescribed and any deficiency or inaccuracy found therein shall amount to contravention of provisions of Section 5 or Section 6 of the Act unless contrary is proved by the person conducting such ultra sonography. Section 5 of the Act relates to taking written consent of pregnant woman and prohibition of communicating the sex of foetus. Section 6 of the Act prohibits determination of sex by Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic or any person. Rule 9 relates to maintenance and preservation of records and this inter-alia includes keeping record in respect of each man or woman subjected to any pre-natal diagnostic procedure/technique/test in specified Form F. Although sub-rule (4) of Rule 9 refers to Genetic Clinic, definition of "Genetic Clinic" as in Section 2(d) of the Act specifies that Genetic Clinic means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedures. Thus, all such places are covered where prenatal diagnostic procedures are being conducted and all persons doing the same are also covered, and as per the statute, maintaining of proper records and Form F as prescribed, is mandatory.

(B). Section 5 requires taking written consent of the pregnant woman and prohibits communication of sex of foetus. In this regard Form G is prescribed in Rule 10. (According to the Public Prosecutor Section 5(2) of the Act prohibits communicating of sex of the foetus by words, signs, or in any other manner and thus according to him displaying of even photographs of Gods and Goddess where pre-natal diagnostic procedures are conducted, is not permissible, as the same gives opportunity to convey sex of foetus by signs or in other manners.)

(C). Section 23 of the Act shows that medical geneticist, gynecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of the Act or rules made thereunder is

also liable for punishment. Under Section 23 of the Act, the owner of Centre, Laboratory, Clinic who takes professional services to run the Centre where pre-natal diagnostic techniques are conducted, is also liable, if any provisions of the Act or Rules are contravened.

(D). Under Section 26 of the Act, with reference to companies, the word "company" means any body corporate and includes a firm and other association of individuals and such persons are also liable, when offences by Companies are there.

(E). In view of Section 3(3) of the Act, pre-natal diagnostic techniques can be conducted only at place registered and any change has to be reported. Under Rule 13 every change of employee, place, address and equipment installed has to be informed to the Appropriate Authority.

13. I have heard learned counsel for the Petitioner as well as learned Public Prosecutor. Record has been perused. The criminal case filed by the Appropriate Authority in the lower Court supported by documents shows the deficiencies and inaccuracies found and necessary particulars are there. Counsel for Petitioner has strenuously tried to demonstrate that either the defects alleged are not there or even if they are there, they are insignificant. The Petitioner is trying to give reasons as to how the Form was maintained and if there are lacunae, what is the explanation.

14. The Full Bench of High Court of Gujarat in **SuoMotu vs. State of Gujarat, reported in 2009 CRI.L.J. 721**, considered effects of non maintaining records properly under this Act. It was held that criminal consequences are attracted and there can also be suspension of the registration. Para 8 of the Judgment reads as under:-

"8. It needs to be noted that improper maintenance of the record has also consequences other than prosecution for deemed violation of section 5 or 6. Section 20 of the Act provides for cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in case of breach of the provisions of the Act or the Rules. Therefore, inaccuracy or

deficiency in maintaining the prescribed record shall also amount to violation of the prohibition imposed by section 6 against the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and expose such clinic to proceedings under section 20 of the Act. Where, by virtue of the deeming provisions of the proviso to sub-section (3) of section 4, contravention of the provisions of section 5 or 6 is legally presumed and actions are proposed to be taken under section 20, the person conducting ultrasonography on a pregnant woman shall also have to be given an opportunity to prove that the provisions of section 5 or 6 were not violated by him in conducting the procedure"

.....

"It would also be improper and premature to expect or allow the person accused of inaccuracy or deficiency in maintenance of the relevant record to show or prove that provisions of section 5 or 6 were not violated by him, before the deficiency or inaccuracy were established in court by the prosecuting agency or before the authority concerned in other proceedings.?"

In that Judgment of Full Bench, mentioned above, opinion (iv) recorded in Para 9, is as under:-

"(iv). Deficiency or inaccuracy in filling Form F prescribed under Rule 9 of the Rules made under the PNDDT Act, being a deficiency or inaccuracy in keeping record in the prescribed manner, it is not a procedural lapse but an independent offence amounting to contravention of the provisions of section 5 or 6 of the PNDDT Act and has to be treated and tried accordingly. It does not, however, mean that each inaccuracy or deficiency in maintaining the requisite record may be as serious as violation of the provisions of section 5 or 6 of the Act and the Court would be justified, while imposing punishment upon conviction, in taking a lenient view in cases of only technical, formal or insignificant lapses in filling up the forms. For example, not maintaining the record of conducting ultrasonography on a pregnant woman at all or filling up incorrect particulars may be taken in all seriousness as if the provisions of section 5 or 6 were violated, but incomplete details of the full name and address of the pregnant woman may be treated leniently if her identity and address were otherwise mentioned in a manner

sufficient to identify and trace her.?

15. It is clear that it would be premature to accept explanations regarding inaccuracies or deficiencies before trial takes place. It is further apparent that if the lapse is insignificant, the benefit would go to the accused at the time of sentence, but claiming that deficiencies in Form F and keeping Records are insignificant, cannot be reason to claim that no offence is there and to discharge the accused.

16 (A). Reference needs to be made to the case of **SujitGovind Dange (Dr.) and another vs. State of Maharashtra and others, reported in 2013(2) Bom.C.R. 351**. In that matter Division Bench of this Court held that any deficiencies noticed in maintaining the record, in specially Form F, attracts the provisions of the Act.

(B). The Division Bench of this Court considered the objects and reasons of the Act and as to how the Act was necessary to control menace of female foeticide. In Para 29, while considering Section 4 of the Act, it was observed with reference to Rule 9, as under:-

"29. Considering the object of the Act, the maintenance and preservation of records as per rule 9 is an important statutory duty cast upon the person (Doctor) conducting ultra sonography on a pregnant woman and, therefore, any deficiency or inaccuracy found in this regard amounts to contravention of the provisions of section 5 or 6 of the Act unless contrary is proved by the person (Doctor) conducting such ultra sonography".

(C). In that matter also arguments were raised that the discrepancies were minor in nature or that they were only inaccuracies. The Hon'ble Division Bench in Para 30 held as under:.

"30. It is important to note that in order to prohibit abuse of these prenatal diagnostic techniques, the Legislature has incorporated a proviso to sub-section (3) of section 4 of the Act which stipulates that any deficiency or inaccuracy found in maintaining and preserving complete record in a manner prescribed by the person conducting ultrasonography on a pregnant woman shall amount to contravention of the provisions of section 5 or section 6 unless contrary is proved

by the person conducting such ultrasonography. This provision, in our view, is completely consistent with the objectives of the Act and has been introduced to prohibit abuse of the pre-natal diagnostic techniques by the person conducting ultra sonography on a pregnant woman".

.....

"The contention of the petitioner that the discrepancy was of a minor nature is wholly misconceived. Neither the provisions of the Act nor that of the Rules provide or define minor or major deficiencies or inaccuracies. On the other hand, it requires strict compliance of every provision of the Act and the Rules. Considering the objectives to be achieved, strict punishment is provided for violating the conditions prescribed under the Act. The contentions canvassed by the petitioner, in this regard, therefore, are devoid of substance and are rejected".

(D). With reference to Sub-section (3) of Section 20 of the Act, the Honble Division Bench recorded in Para 39, as under:-

œThe observations made by the Division Bench in (Malpani Infertility Clinic Pvt. Ltd. and others Vs. Appropriate Authority PNDDT Act and others), reported in 2005(1) Bom.C.R. 595 (supra) clearly show that the Division Bench in view of the fact that prosecution was launched against the petitioner in the said case, it was held to be sufficient reason for the authorities to take recourse to sub-section (3) of Section 20 of the Act. In the instant case, the Petitioner having admitted the existence of deficiency and inaccuracy in keeping and maintaining the record including form F has resulted in contravention of the provisions contained in section 5 or 6 and, therefore, would amount to an offence and can be treated to be sufficient reason for the Appropriate Authority to invoke the provisions of sub-section (3) of section 20 of the Act, in the larger public interest and, therefore, the action of suspension of registration of the Genetic Centre of the petitioner is sustainable in law till such time contrary is proved by the petitioner.?

(E). Para 38 of the Judgment of the Division Bench recorded that:-

"38. Rule 9(1) requires that every Genetic Counselling Centre, Genetic laboratory, Genetic Clinic, etc., shall maintain a register showing, in serial order, the names and addresses of the men or women given genetic counselling, subjected to pre-natal diagnostic procedure or pre-natal diagnostic tests, the names of their spouse or father and the date on which they first reported for such counselling, procedure or test. Sub-rule (4) of rule 9 stipulates the record to be maintained by every Genetic Clinic, in respect of each man or woman subjected to any prenatal diagnostic procedure/technique/test, shall be as specified in Form 'F'. In the instant case, the petitioner has admitted existence of discrepancies, irregularities in maintenance of Form 'F' which has undoubtedly resulted in causing deficiency or inaccuracy in maintaining and preserving the record and, therefore, as per proviso to sub-section (3) of section 4 of the Act, resulted in contravention the provisions of section 5 or 6 of the Act and would amount to an offence, unless contrary is proved by the petitioner who has conducted such ultrasonography test."

17. Keeping in view the observations of the Hon'ble Division Bench in the case of "**SujitGovind Dange**", mentioned above, there remains no doubt that deficiencies or inaccuracies in the maintaining of record and Form F attract the provisions of Section 5 or 6 of the Act. I am bound by the Judgment of the Division Bench of this Court.

18. When the complaint has been filed under this Act showing the inaccuracies and deficiencies in the keeping of record, and complainant has documents to support disclosing sufficient grounds to proceed in the light of provisions of this Act and Rules, this Court cannot, before holding of the trial, sit in Judgment whether or not the Record has been kept properly; or Form F concerned has been properly filled or improperly filled; or whether or not the deficiencies pointed out are serious or insignificant. When complaint has been filed pointing out deficiencies or inaccuracies, before trial it would not be proper for this Court to consider the arguments that what is pointed out is no deficiency or no inaccuracy. It would be prejudging the matter. As per Proviso of Section 4(3) "any" deficiency or inaccuracy in keeping of complete record "shall amount to contravention" of Section 5 or 6 "unless contrary is proved." Naturally, the contrary can be "proved" only at the trial. Appropriate Authority under the Act is Public Servant acting in

discharge of official duty and has to act with responsibility. Keeping in view the Judgments discussed above, in such serious matters, it would be inappropriate to interfere when prima facie case is made out.

19. It cannot be said, at present, that there is no sufficient ground for proceeding. Keeping in view Aims and Objects of the Act and Scheme of the Act and Rules referred above and stringent and specific provisions not tolerating any (means-any) deficiency or inaccuracy in keeping complete records, I am unable to accept the explanatory arguments in defence or to invoke writ jurisdiction, inherent power or revisional jurisdiction to quash the proceedings at the threshold when sufficient grounds to proceed are made out in the complaint.

For reasons mentioned, arguments in favour of State have substance, and submissions for Petitioner to quash process or Complaint need to be discarded. Defences being raised, can be considered at the time of trial. The Petition stands rejected.

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