

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CRIMINAL APPLICATION NO. 8286 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE SANDEEP N. BHATT Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

PAPPUKUMARSINH
 Versus
 DHARMESH BHARATBHAI PATEL

Appearance:

MS RV ACHARYA(1124) for the Applicant(s) No. 1
 for the Respondent(s) No. 1 – Original Accused No.2
 MR SOAHAM JOSHI, APP for the Respondent(s) No. 2 - State

CORAM: HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 26/07/2023

CAV JUDGMENT

1. The present petition is filed by the petitioner – original complainant under Article 226/227 of the Constitution

of India, being aggrieved by and dissatisfied with the impugned order dated 08.04.2019 passed by the learned appellate Court below – 5th Additional Sessions Judge, Rajkot in Criminal Revision Application No.31 of 2018, whereby the discharge application of the present respondent No.1 is allowed and the order passed by the learned trial Court – 5th Additional Chief Judicial Magistrate, Rajkot dated 15.12.2017 in Criminal Case No.7184 of 2014, rejecting the discharge application of present respondent No.1, is reversed.

2. The brief facts of the case are as under :

2.1 Initially, upon complaint given by the petitioner before the learned trial Court on 21.02.2014, the learned trial Court has passed an order on 21.02.2014, directing the Police Authority of the Malviyanagar Police Station to carry out the inquiry under Section 202(1) of the Code of Criminal Procedure, 1973 ('the Code' for short) and submit the report on or before 04.04.2014 and accordingly, it was registered as Criminal Inquiry Case No.68 of 2014.

2.2 Pursuant to the said order, the police authority has carried out the inquiry and submitted its report before the learned trial Court. The learned trial Court, after taking into consideration the complaint, police report and other

papers, had issued summons upon the accused for the offences punishable under Sections 4(3), 5(1-b), 19(4) and 29 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act ('the Act' for short) and Rules 6(2), 9(1), 10 and 17(2) of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules ('the Rules' for short).

2.3 Aggrieved by the said order of issuing summons, respondent No.1 – accused No.2 had preferred revision application before the learned Sessions Court being Criminal Revision Application No.32 of 2015 under Section 397 read with Section 401 of the Code.

2.4 The learned Sessions Court has rejected the said revision application vide order dated 30.10.2015.

2.5 Accordingly, the said inquiry proceeding is culminated into Criminal Case No.7182 of 2014 before the learned trial Court.

2.6 In the said Criminal Case No.7182 of 2014, respondent No.1 herein has preferred discharge application at the stage of framing of charge by an application - Exh.114 before the learned trial Court.

2.7 The learned trial Court has rejected the said discharge application Exh.114 of respondent No.2 vide order dated 15.12.2017.

2.8 Being aggrieved by and dissatisfied with the said order dated 15.12.2017 passed by the learned trial Court, respondent No.2 has preferred Criminal Revision Application No.31 of 2018 before the learned appellate Court below – Sessions Court, Rajkot.

2.9 The learned appellate Court below has allowed the said application vide order dated 08.04.2019, by reversing the order passed by the learned trial Court, which is impugned in this petition.

2.10 Hence, the present petition by the Authority before this Court.

3. The matter is of the year 2019 and the issue is of the year 2014. Till date, neither notice nor any effective order is passed by this Court. Since no notice is issued, respondent No.2 may be unaware about this petition. However, looking to the pendency, this Court has heard this petition on merits.

4. Heard learned advocate Ms.R.V. Acharya for the petitioner – Authority and learned APP Mr. Soaham Joshi for the State at length on earlier date of hearing i.e. 04.07.2023. Thereafter, the matter was adjourned to 12.07.2023 for limited purpose to produce the relevant decisions qua the issue involved in this petition. On 12.07.2023, the arguments are concluded and the matter is kept for orders.

5. Learned advocate Ms.R.V. Acharya for the petitioner – Authority has submitted that the impugned order passed by the learned appellate Court below is without appreciating the factual aspects of the matter. She has submitted that respondent No.1 was working as Gynecologist and carrying out sonography in the hospital of accused No.1, who was owner of the hospital and therefore, respondent No.1 has violated the provisions of the Act as well as Rules. She has further submitted that respondent No.1, being a Doctor, was required to maintain the records under the Act. She has submitted that respondent No.1 has not properly filled up the Form 'F' and thereby committed breach of the Rules. She has submitted that the said Form 'F' is required to be filled up by the Doctor performing the sonography. She has submitted that the appellate Court below has committed an error of law in the impugned order. She has submitted

that the learned appellate Court below has not properly appreciated the deposition of Somavatiben Arvindbhai at Exh.113. She has submitted that the learned trial Court has rightly come to the conclusion and rejected the discharge application of respondent No.1. She has relied upon the decision of this Court in the case of *Suo Motu versus State of Gujarat* reported in *2009 Cri.L.J. 721* in support of her submissions. She has submitted that this petition may be allowed by exercising the powers under Article 226/227 of the Constitution of India.

6. Learned APP Mr. Joshi for the State has submitted that the petitioner is an Appropriate Authority under the Act. He has submitted that he has carried out the inspection and found some clerical irregularities and therefore, the complaint is lodged by the Authority against the erring persons. He has submitted that the trial Court has rejected the discharge application of respondent No.1, however the learned appellate Court below has allowed the discharge application of respondent No.1. He has submitted that appropriate order may be passed.

7. I have heard rival contentions raised by the learned advocates for the respective parties. I have perused the documents available on record. I have also perused the

orders passed by both the Courts below. Considering the facts of the case, the following points are emerged for consideration of this Court :

- The complaint is lodged by the Authority under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act as well as under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules.
- There are total three accused in the said complaint.
- The petitioner being the Authority has visited the hospital of accused No.1, who is the sole owner of that hospital.
- The respondent No.2 is the visiting Doctor at that hospital.
- The main allegations in the complaint are about the clerical things i.e. registers, forms, notice board, etc., which are maintained by the hospital but not in accordance with law/rules.
- On bare perusal of the entire complaint, no serious allegation is made by the petitioner – Authority against respondent No.2, except not maintaining the record in proper manner, which is a clerical thing.

- The said clerical error is committed by the hospital staff and not by the doctor/s, more particularly not by the visiting doctor/s.
- There is no role of respondent No.1 – accused No.2 as the sole owner of the hospital is accused No.1.

8.1 Keeping the above points in mind, it would be fruitful to refer to the provisions of the Act, as alleged in the complaint i.e. Section 4(3), 5(1B), 19(4) and 29 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, which are as under :

“4. Regulation of pre-natal diagnostic techniques.- On and from the commencement of this Act,—

(3) no pre-natal 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) age of the pregnant woman is above thirty-five years; (ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss; (iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals; (iv) the pregnant woman or her spouse has a family history of mental

retardation or physical deformities such as, spasticity or any other genetic disease; (v) any other condition as may be specified by the Central Supervisory Board; Provided that the person conducting ultrasonography 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 ultrasonography;

5. Written consent of pregnant woman and prohibition of communicating the sex of foetus. 1. No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless—

(b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands;

19. Certificate of registration.-

(4) The certificate of registration shall be displayed by the registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in a conspicuous place at its place of business.

29. Maintenance of records.

(1) All records, charts, forms, reports, consent letters and all other documents required to be

maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed: Provided that, if any criminal or other proceedings are instituted against any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings.

(2) All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf.”

8.2 At this stage, it would be necessary to throw light on the object of the Act, which is to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereof. The effective implementation of The Act has painted a grim picture of the Act. The Act was enacted with an intent to prohibit prenatal diagnostic techniques for determination of

the sex of the fetus leading to female foeticide. The preliminary object of this Act was to put a check on female foeticide. The Act is legislated in a manner that it should be a deterrent for those indulging in sex determination. The unfortunate decline in the male-female sex ratio has brought in stringent measures.

8.3 At this stage, it would be relevant to refer to the provisions of Section 2(a), 17 and 28 of the Act, which are as under :

“2. Definitions.- In this Act, unless the context otherwise requires,—

(a) “Appropriate Authority” means the Appropriate Authority appointed under section 17;

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 sub-section (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 women's 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 pre-natal 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.

17A. Powers of Appropriate Authorities.- The Appropriate Authority shall have the powers in respect of the following matters, namely:-

- a) summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the rules made thereunder;*
- b) production of any document or material object relating to clause (a);*
- c) issuing search warrant for any place suspected to be indulging in sex pre-natal sex determination; and selection techniques or*
- d) any other matter which may be prescribed.*

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.”

8.4 Further, it would be fruitful to refer to the provisions of the Rules, as alleged in the complaint i.e. Rule 6(2), 9(1), 9(4), 10 and 17(2) of the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Rules, which are as under :

“6. Certificate of registration.-

(2) *Having regard to the advice of the Advisory Committee the Appropriate Authority shall grant a certificate of registration, in duplicate, in Form B to the applicant. One copy of the certificate of registration shall be displayed by the registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic at a conspicuous place at its place of business: Provided that the Appropriate Authority may grant a certificate of registration to a Genetic Laboratory or a Genetic Clinic to conduct one or more specified pre-natal diagnostic tests or procedures, depending on the availability of place, equipment and qualified employees, and standards maintained by such laboratory or clinic.*

9. *Maintenance and preservation of records.-*

(1) *Every Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic shall maintain a register showing, in serial order, the names and addresses of the women given genetic counseling, subjected to pre-natal diagnostic procedures or pre-natal diagnostic tests, the names of their husbands or fathers and the date on which they first reported for such counseling, procedure or test.*

(4) *The record to be maintained by every Genetic Clinic, in respect of each woman subjected to any pre-natal diagnostic procedure,*

shall be as specified in Form F.

10. *Conditions for conducting pre-natal diagnostic procedures.- (1) Before conducting any prenatal diagnostic procedure, a written consent, as specified in Form G, in a language the pregnant woman understands, shall be taken from her: Provided that where a Genetic Clinic has taken a sample of any body tissue or body fluid and sent it to a Genetic Laboratory for analysis or test, it shall not be necessary for the Genetic Laboratory to obtain a fresh consent in Form G. (2) All the State Governments and Union Territories may issue translation of Form G in languages used in the State or Union Territory and where no official translation in a language understood by the pregnant woman is available, the Genetic Clinic may translate Form G into a language she understands.*

17. *Public Information.-*

(2) At least one copy each of the Act and these rules shall be available on the premises of every Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic, and shall be made available to the clientele on demand for perusal."

8.5 As we know that, when any Act is introduced and passed, it is not mandatory that it is a complete code in

itself. So, there is a requirement for the enactment of rules for defining the procedures of performing and implementation of the Act. Rules are necessary because it is very complex for the legislation to include each and every detail in a single Act making it lengthy. Hence, a separate set of rules are made, in compliance with the provisions of the Act. However, the rules provide procedural laws. Rules are secondary in nature to their parent Act. Therefore, the rules cannot go beyond the parent Act.

9. The learned trial Court has rejected the discharge application filed by all the accused persons. There were total three accused. Respondent No.1, who is a visiting doctor, is shown as accused No.2. The owner of the hospital is accused No.1 and another visiting doctor is shown as accused No.3. The trial Court has observed that there is a prima facie case against the accused and therefore, discharge application at the stage of framing the charge under Section 245 of the Code of Criminal Procedure, 1973 is rejected.

10. The learned appellate Court below has observed that there is no prima facie evidence as to breach of Rule 10 by the accused has come out on record. Further, Form 'F' is to be maintained by the authority and/or staff of the clinic and it should be filled up by anybody among the gynecologist

/ owner / radiologist and it is not the duty of the visiting gynecologist to maintain such records and Form 'F'. Further, it was only under the new Act of 2014 that the person performing the procedure was required to be signed the Form 'F'. As the offence alleged against the accused for breach of Rule 9(4) of the Rules is said to have been occurred before the amendment in the Act of 2014, respondent No.1 cannot be made liable for non-signing of Form 'F'. Further, respondent No.1 being a visiting gynecologist and a registered medical practitioner, cannot be held liable for breach of Section 4(3) of the Act. Further, respondent No.1 can also not be liable for breach of Section 19(4) of the Act and Rule 6(2) of the Rules for not displaying of certificate of registration under the Act in the hospital. Further, to maintain register showing in serial order as prescribed in Rule 9(1) of the Rules and to keep copy of the Act and Rules in the hospital are the duty of the owner and staff of the concerned nursing clinic and not of the visiting gynecologist and therefore, respondent No.1 cannot be held liable for breach of Section 19(4) and 29 of the Act as well as Rules 6(2), 9(1), 9(4) and 17(2) of the Rules. Thus, on perusal of the impugned order passed by the learned appellate Court below, this Court finds that no error is committed by the learned appellate Court below in allowing the discharge application of respondent No.1.

11. Time and again, the Co-ordinate Bench of this Court as well as the Hon'ble Apex Court has observed that if there is a no breach qua the object of the Act, the accused cannot be held liable for the offence under the Act.

12. In view of above facts and circumstances of the case as well as keeping in mind the provisions of the Act and the Rules, this Court finds that there is no error committed by the learned appellate Revisional Court below in passing the impugned order. The appellate Court below has rightly allowed the application filed by respondent No.1 under Section 397 of the Code. Further, prima facie, there is no evidence to against respondent No.1 revealing that any process or technique was carried out by the respondent No.1 in breach of Section 4(3) of the Act. Further, at this stage, keeping in mind the object vis-a-vis there is no evidence that respondent No.1 had ever communicated any pregnant woman or her relatives or any other person about the sex of foetus by words, signs or in any other manner. Further, from record it transpires that, inaccuracy or deficiency in maintaining records by the hospital cannot be taken seriously as breach of Section 5 and Section 6 of the Act by respondent No.1, especially when there is no prima facie evidence to the effect that the respondent No.1 has carried out ultra sonography

without consent of any pregnant woman. Further, it is relevant to note that the learned appellate Court below has observed qua the deposition of Somvatiben Arvindbhai (Exh.113), whose previous statement was recorded by the Appropriate Authority during the pre-inquiry stage and on perusal of her statement, nowhere she has stated that the concerned gynecologist has communicated the sex of her foetus while examining her. The allegations made in the complaint are with regard to the non-fulfillment of provisions of the Act and Rules regarding maintenance of record and non-filling up of the forms only and there is no allegations or averments in the complaint that the doctors of the hospital i.e. accused persons were carrying out sex determination during pre-natal diagnosis. It is the duty of the hospital staff to maintain notice board, registers, records and to keep up the Form 'F' signed by the accused No.1 and respondent No.1 (accused No.2) cannot be made liable for non-signing of Form 'F' in view of the then prevailing Act, 2013. The Act, 2013 did not enjoin duty on doctors performing procedure to sign Form 'F' himself. It was only under the new Act of 2014 that the person performing the procedure was required to sign the Form 'F'. In the present case, respondent No.1 was the visiting doctor. The offence is registered under some Rules also. The Rules provide procedural laws. Rules are secondary in nature to their

parent Act. Therefore, the rules cannot go beyond the parent Act.

13. Under the circumstances, this Court is of the opinion that, the learned appellate Court below has not committed any error in allowing the discharge application of respondent No.1, by rejecting the order passed by the learned trial Court. There is no need to interfere in the impugned order passed by the learned appellate Court below by this Court. Therefore, the present petition is required to be rejected by confirming the order passed by the learned appellate Court below by exercising the powers under Article 226/227 of the Constitution of India.

14. This Court fails to understand the manner and method of the officers / authority with regard to register the complaint under the Act / Rules. Many a time, the Authorities are very eager to act promptly and without application of mind and therefore, their prompt action results into vitiation of the whole proceedings. Sometime, they may be right in taking action against erring doctors, but many a time, their action proves their non-application of mind and the genuine doctors are the sufferers. We know that the remedial measures available in such cases are time-consuming and bring the career of an individual to a standstill. This

Court hopes that wisdom may prevail to the appropriate authorities in future.

15. For the reasons recorded above, the following order is passed.

15.1 The present petition is dismissed in *limine*.

15.2 The impugned order 08.04.2019 passed by the 5th Additional Sessions Judge, Rajkot in Criminal Revision Application No.31 of 2018 is hereby confirmed.

15.3 Consequently, the order passed by the 5th Additional Chief Judicial Magistrate, Rajkot dated 15.12.2017 in Criminal Case No.7184 of 2014 is hereby rejected.

Direct service is permitted.

M.H. DAVE

Sd/-
(SANDEEP N. BHATT,J)